



THE EAFIP TOOLKIT

MODULE 3

The **EAFIP Toolkit** aims to provide support to policy makers in designing PCP and PPI strategies, and to procurers and their legal departments in implementing such procurements.

The Toolkit consists of three modules:

- **Module 1:** A strategic module addressed to policy makers, providing economic and case evidence about the impacts and benefits of PCP and PPI, together with concrete guidance on how to embed PCP and PPI into innovation strategies;
- **Module 2:** An operational module addressed to public procurers aimed at clarifying the prerequisites and key steps to design and implement an innovation procurement process (PCP and PPI); and
- **Module 3:** A legal/operational module addressed to legal services aimed at clarifying legal issues and provide practical 'how-to' guidelines, supported by templates.

For further information regarding the Toolkit, such as the overall context, the disclaimers and authors thereof, please visit the EAFIP website at www.eafip.eu.

MODULE 3

2024

Section 1: Introduction

Section 2: A step-by-step approach to innovation
procurement

Section 3: Joint procurement

Section 4: Templates and annexes – PCP procurement
documents

NEW 2024 ADDITIONS/CHANGES IN MODULE 3 :

SECTION 4 TEMPLATES AND ANNEXES - PCP PROCUREMENT DOCUMENTS

- **Update of the PCP Procurement Documents template**
Updated with the Horizon Europe guidance document
“How to set up and manage HE PCP and PPI grants” – including the PCP and PPI
template annexes (Version 1.0 – 15 October 2023)

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1 Introduction

1.1 Objectives

The objectives of Module 3 are to:

- assist legal experts with the implementation of innovation procurements;
- clarify the main legal provisions, illustrated by case law, applicable to a PCP or a PPI;
- explain the legal specificities of PCP and PPI;
- provide examples on how to formulate procurement documents in compliance with the applicable legal provisions.

1.2 Important issues

The most important issues in Module 3 are detailing and explaining:

- the legal pre-requisites for a successful implementation of Pre-Commercial Procurement (PCP) and of Public Procurement of Innovative Solutions (PPI);
- how to prepare and implement a PCP and/or PPI procurement, covering the activities before and during the procurement up to the award of the procurement contract(s) in full compliance with EU legal provisions governing public procurement; and
- how to manage and monitor an ongoing PCP and/or PPI procurement, covering the activities to be undertaken after the award of the procurement contract(s) and during the implementation of the PCP / PPI contract, according to EU legal rules and principles.

1.3 Links

There is a particularly strong link between Module 3 and, respectively, Modules 1 and 2. Module 3 explains the *how* to draft the legal documentation for PCP/PPI and complements Modules 1 and 2 that focus mainly on the *what* and the *why* to implement PCP/PPI for the policy makers and, respectively, decision makers and procurement officers within public purchasers (e.g., the persons responsible for the coordinating, planning, implementing and executing public procurement strategies and procedures).

1.4 Relevance

Module 3 addresses the legal expert(s) of the public procurer, the person(s) responsible for ensuring compliance of the procurement process with applicable legal provisions. It will be of particular help to legal experts in the drafting of the procurement documents (e.g. the market consultation document, the tender documentation, the drafting of the procurement contract(s) etc.).

The information in Module 3 is based on the EU legal framework applicable to public procurement, as well as on lessons learned from PCP and PPI implemented across Europe. Compliance with TFEU

principles, the EU competition rules and the EU and international public procurement legal framework are *sine-qua-non* requirements that apply throughout the entire procurement process. Failure to comply with these sine-qua-non requirements could jeopardize the entire procurement process.

2 A step-by-step approach to innovation procurement

2.1 Introduction

Pre-Commercial Procurement (PCP)

Public procurements of R&D services are exempted from the EU Public Procurement Directives¹, provided that at least one of the below two conditions defined in articles 14 and 32 of the Public Sector Directive and of the Utilities Directive, respectively, are fulfilled:

- the procurer does not reserve the benefits of the R&D exclusively for himself;
- the procurer does not wholly remunerate the provided Module 3 outlines the EU legal framework at each stage during the preparation and implementation of a PCP and/or of a PPI procurement.

R&D service

PCP is exempted from the EU public procurement directives because the first condition applies (the procurer leaves ownership of IPR generated by R&D providers during the PCP contract with the R&D service providers). The R&D providers that are selected according to best value for money criteria to provide the R&D services are paid the full price they quoted in their offer for delivering the R&D services under the pre-defined IPR conditions.

PCP is exempted from the application of the EU Public Procurement Directives, but remains subject to:

- the TFEU principles and derived principles (e.g. transparency, non-discrimination, equal treatment);
- the EU competition rules including specific provisions to exclude State aid.
- any applicable national public procurement provisions that apply to PCP specifically or to public procurements exempted from the EU public procurement directives.

In addition, policy documents emanating from the European Commission provide guidance on PCP²:

- the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Region, “Pre-commercial procurement: driving innovation to ensure sustainable high quality public services in Europe”, COM(2007) 799 final, 14.12.2007 (**PCP Communication**);
- the Commission Staff Working Document, Example of a possible approach for procuring R&D services applying risk-benefit sharing at market conditions, i.e. pre-commercial procurement, SEC(2007) 1668, 14 December 2007 (**PCP Staff Working Document**).

¹ However, the Treaty for the Functioning of the European Union remains applicable.

² A comprehensive list of policy documents regarding implementation of PCP procurements is available here: <https://ec.europa.eu/digital-single-market/en/news/eu-policy-initiatives-pcp-and-ppi>.

PPI is, in principle, fully covered by the European Public Procurement Directives:

- [Directive 2014/24/EU](#) on public procurement and repealing Directive 2004/18/EC (Public Sector Directive)
- [Directive 2014/25/EU](#) on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (New Utilities Directive)
- Directive [2009/81/EC on defence and sensitive security procurement](#).

Two other directives apply to complaints and review of the procurement procedures³:

- [Directive 89/665/EC](#) on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (Remedies Directive for the Public Sector); and
- [Directive 92/13/EC](#) coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (Remedies Directive for the Utilities Sector).

Additional legal deeds complementing the ones above include:

- [Directive 2001/78/EC](#) on the use of standard forms in the publication of public contract notices
- [Regulation 2151/2003](#) amending Regulation 2195/2002 on the Common Procurement Vocabulary (CPV); updated CPV codes were adopted under Regulation 213/2008
- [Regulation 1564/2005](#) establishing standard forms for the publication of notices in the framework of public procurement directives; however, the applicability of this Regulation is questionable, given the fact that the new public procurement directives establish, by means of their annexes, the information that needs to be included in contract / award notices.

Module 3 provides an in-depth analysis of the practical implications of the applicable EU legal framework at each of the following steps in the preparation and implementation an innovation procurement:

- Section 2.2 Needs identification and assessment;
- Section 2.3 Prior art analysis and IPR search;
- Section 2.4 The link to regulation, policy, standardization, labelling and certification;
- Section 2.5 Drafting the business-case;
- Section 2.6 Open market consultation;
- Section 2.7 IPR and confidentiality strategies;
- Section 2.8 Drafting the tender documentation;
- Section 2.9 Conducting the procurement;

³These so-called 'remedies directives' coordinate national review systems by imposing some common standards intended to ensure that rapid and effective means of redress are available in all EU countries in cases where tenderers consider that contracts have been awarded unfairly. Both remedies directives have been significantly modified by the Directive 2007/66/EC amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts.

- Section 2.10 Monitoring and evaluating the contract performance;
- Section 2.11 Managing after contract issues.

2.2 Needs identification and assessment

The main “*how to*” issues pertaining to the conduct of needs identification and assessment have already been addressed in Module 2 dedicated to public procurers (see section 2.1 of Module 2).

There are no express legal requirements regarding the conduct of the needs identification and assessment.

The public procurement legal framework does not prescribe what a public procurer should purchase or how a public procurer should identify its needs. It prescribes the rules and principles to follow when conducting a market consultation and conducting the procurement for a specific need identified by the procurer. The public procurer possesses large discretion in formulating its need.

In certain sectors though, there may be EU or national legislation that prescribes certain characteristics of the purchased products, services or works. The legal expert needs to be aware of any applicable legislation and set the boundaries for defining the public need accordingly.

EXAMPLE

The EU Energy Performance of Buildings Directive requires the EU countries to set minimum energy performance requirements for all new buildings and to ensure they are nearly zero-energy by 31 December 2020. In the Netherlands, for example, legislation (Bouwbesluit) sets minimum energy performance requirements and provides a calculation method (energy performance coefficient (EPC)) to check compliance.

Source: <https://www.rijksoverheid.nl/onderwerpen/bouwregelgeving/inhoud/bouwbesluit-2012>

Generally, such legislation does not constitute an obstacle to innovation procurement. Most of the times, such legislation sets minimum performance criteria, that do not prevent the public procurer from formulating advanced needs that may only be met by innovative solutions or that are still unmet by existing solutions. In other cases, legislation may require the procurer to take into account in the procurement specific impacts (e.g. environmental impacts) linked to the operation of a product (see example below).

EXAMPLE

The EU Clean Vehicles Directive requires public purchasers and private companies operating public transport services to take into account environmental impacts linked to the operation over the lifetime of vehicles in procurement procedures. The Directive defines common rules on how to monetize impacts and calculate the operational lifetime costs for energy consumption, CO2 emissions and pollutant emissions (NOx, NMHC and PM) of vehicles. By applying the formula that calculates the environmental impacts, public procurers will be able to purchase vehicles with improved environmental performance.

Source: <http://www.clean-fleets.eu/about-clean-fleets/clean-vehicles-directive/>

Identifying and assessing needs is the basis (together with the prior art analysis, IPR search and market consultation) for justifying whether to use a PCP or a PPI to address the need (see next section):

2.3 Prior Art analysis and IPR search

The EU public procurement directives do not prescribe how a public procurer should proceed when initiating and conducting initiate, conduct or interpret the results of a prior art analysis / IPR search and how to interpret the results of such a research. Practical guidance in this respect is available under sections 2.2 and 2.3 of Module 2.

For the legal adviser, the prior art analysis and IPR search, together with the needs assessment will:

- a) provide the justification for deciding whether to start a PCP from the Procurement Directives or a PPI. A PCP may be started when the prior art analysis and IPR search reveal that no available solution can meet the need of the procurer, and R&D is still required, and there are several potential customers for the solutions on the market (so it makes sense to leave IPR ownership with suppliers). A PPI may be started when the prior art analysis and IPR search reveal that there are solutions close to the market and/or no real R&D is needed (possibly still some product adaptations or scaling up of production).
- b) signal that a PCP or PPI may not be viable, when there are already parties on the market who own 'key IPR' (IPR that cannot be avoided to address the identified need(s) which they refuse to license out under fair and reasonable market conditions).
- c) signal legal risks related to third-party IP infringement, when market parties own IPR that is partially or fully relevant to addressing the identified need. This is relevant to both PCP and PPI. The contractors may face IPR barriers when trying to deploy their solutions.

The market consultation can help further understand the technological trajectories and IPR strategies of relevant market players. In case the developed solutions are vulnerable to third party IPR infringement claims (see also section 2.7.2.3 below), the public procurer may choose to check if

relevant IPR holders are willing to license out their IPR and/or participate themselves in the procurement.

In cases where the IPR-holder refuses to license its relevant IPR, the public procurer may choose to investigate (and discuss at the open market consultation) if it is possible to design around existing blocking IPR and then design the functional specification for the PCP or PPI around this blocking IPR. In cases where this might not be possible, then the public procurer may consider that the risks of third party IPR infringement are too great for the procurement to viably proceed, and may choose to call an end to the procurement. However, this is to be decided on a case-by-case basis and no general rule can be established to this end.

The public procurer may also become that certain providers hold background IPR that is relevant to the planned PCP or PPI. In this case, the public procurer may request bidders to grant to the procurer a license to use his background IPR and to grant licenses to other suppliers.

In case of PPI, the needs identification and assessment together with the prior art analysis can also form the basis for justifying reliance on article 32(3)(a) of the Public Sector Directive and using the negotiated procedure without prior publication for buying a limited set of prototypes or test products that were developed in a preceding PCP. As the limited set of prototypes or test products were manufactured (during the preceding PCP) purely for the purpose of research, experimentation, study or development (as PCP is an R&D services contract) and nor the PCP nor the procurement to buy the limited set of prototypes and test products includes quantity production to establish commercial viability or to recover R&D costs, the conditions to use the negotiated procedure without prior publication are fulfilled. However, this should not affect competition at the subsequent stage in later procurements when the procurer is purchasing commercial volumes of the solution for wide implementation.

2.4 Legislation, policy, standardization, labelling and certification

As mentioned in section 2.4 of Module 2, both existing and new-to-be-created legislation, policy targets, standards, labels or certifications applicable in the sector of the innovation procurement play an important role in the shaping of both the innovation procurement process and of the procurement documents.

The procurer may need guidance from the legal expert on how to best:

- translate requirements that innovative solutions should comply with "existing" policy targets, legislation, standards, labels or certifications into the functional specifications, evaluation criteria, clauses for testing / validation of solutions and contract performance monitoring for the PCP or PPI.
- trigger the creation of "new" legislation, policy targets, standards, labels or certification to facilitate the market uptake of the new innovative solutions addressed by the PCP or PPI. The legal expert may be called upon to foresee contractual obligations in the tender documents (functional

requirements and monitoring mechanisms) that require vendors that participate in the PCPs or PPIs to contribute to standardization, certification or labelling and/or he may be asked for legal arguments to convince the legislator or policy makers to set "new" legislative requirements or policy targets for innovative solutions.

Preamble 95 of the EU public procurement directive 2014/24/EU refers to the possibility to set mandatory sector-specific legislative requirements (e.g. in the energy/transport sector) that would be applicable in innovation procurement.

For more information regarding how to use legislation, standards, labels and certification in the drafting of the procurement documents, see section 2.8.3 (B) hereunder.

EXAMPLE Shockwave Jam PCP

Example of contractual obligation requiring vendors to comply with existing standards

The solution developed by the supplier should comply with all relevant EU and national legislation and any relevant standards deriving from this legislation.

Example of contractual obligation to make solutions from different PCP lots interoperable

In the Shockwave PCP, the Brabant province chose to develop parts of the needed innovative solution (in this case innovative software) in several PCP lots. In each lot several suppliers would compete in developing the best software. The procurer required the suppliers to create connecting software that would ensure interoperability between the solutions developed in different lots.

To this end, the following contractual clauses were included:

“Both Parties [the procurer and the supplier] will designate a contact person. The task of the contact persons is to represent the Parties, to make and coordinate appointments and to take decisions regarding any aspect that may be relevant to the completion of the contract. The contact persons will periodically consult each other with respect to the execution of the contract.”

“Upon request, the supplier will transfer the procurer the IP ownership of the Connecting Software. The Parties are aware and explicitly agree that the Procurer will subsequently make the Connecting Software available to the market under EUPL license.”

Source: Framework Agreement and Phase I Agreement, Shockwave PCP. For more information regarding the Shockwave PCP, see http://www.spookfiles.nl/sites/www.spookfiles.nl/files/documenten/shockwave_traffic_jams_a58_-_background_information.pdf

2.5 Building a business case

Practical guidance on “how to” build a business case is available in section 2.5 of Module 2.

The public procurement legal framework does not prescribe how a public procurer should build a business case for a planned procurement. For the legal expert, the business case will provide a relevant overview of the risks and the expected benefits of the PCP or PPI as well as of the underlying assumptions for the business case to end up positive.

Based on the business-case, the legal expert should draft provisions:

- **To effectively mitigate the risks** identified in the risk analysis that is part of the business case (e.g. when successful uptake and use of the solution depends heavily on how user friendly the deployed solutions are, the legal expert should define tender specifications that require testing of user friendliness by end-users ; when there is a big risk that the solution won't be relevant any more if it's not ready before a certain time, a strict time schedule for monitoring of contract performance can be set in the contract with penalties for late delivery of solutions; to ensure that the procurement does not run out of budget, strict penalty/payment/termination clauses could be foreseen.
- **To ensure that vendors meet the expected benefits** that are needed for a positive business case (the desired quality and/or efficiency improvements in public services that the innovative solutions need to deliver to make the investment in the innovation procurement worthwhile), the expected benefits from the business case analysis should be translated into minimum functionality and/or price requirements, a monitoring framework and possibly also value engineering clauses in the tender documents.

EXAMPLE

1. Termination clause: “The Public Procurer shall terminate the contract when the Supplier/Service Provider is unable to deliver or perform any or all of the goods/Outputs/Deliverables within the periods(s) specified in the contract.”

2. Review clause: “The Public Procurer may decrease the budget available for the next PCP Phase when the business case is recalculated and the procurement becomes less profitable than initially estimated.

Source: Corvers Procurement Services BV

2.6 Open market consultation

2.6.1 Introduction – legal relevance of the market consultation

For preparing an innovation procurement, organizing an open market consultation is preferable compared to hiring one private adviser to help prepare tender specifications. By consulting all interested economic operators, the risk of favoring certain suppliers or certain technologies can be effectively mitigated. Also, the open market consultation helps cross-check the procurer's analysis of the prior art/IPR and standardization/regulatory environment.

For info on different ways of conducting an open market consultation, see section 2.6 in Module 2.

For the legal expert, it is particularly important that the open market consultation confirms the legal justification for the choice of a PCP or a PPI procurement. It should clearly reveal whether the procurement need still requires R&D and thus a PCP may be conducted⁴; or whether there are solutions that have already moved beyond the R&D stage but are not yet widely commercially proven, in which case a PPI in compliance with the EU public procurement directives may be conducted.

The legal adviser can take the following actions:

- Clarify the aim of the market consultation in the call for participation and explicitly request participants to provide information regarding the stage of development of the needed solutions;
- Stress the importance of obtaining relevant information from the market, during internal discussion with the technical personnel/expert in charge of conducting the consultation.

It is thus important that the legal adviser contributes to the drafting of the open market consultation documents and to the conducting of the open market consultation itself. The legal expert should thus be aware of the legal rules governing open market consultations and how to avoid breaching procurement and competition rules when "consulting the market".

2.6.2 Legal basis

The legal basis for the conduct of an open market consultation is:

- The TFEU principles and derived principles (equal treatment, non-discrimination, transparency);
- The EU public procurement directives and their transposition into national legislation;
- EU competition rules (e.g. related to distortion of competition and information exchange between competitors).

2.6.2.1 The public procurement rules

The 2014 EU Public Procurement Directives contain specific provisions about consulting the market:

- Article 40 of the Public Sector Directive and article 58 of the Utilities Directive provide that *“Before launching a procurement procedure, contracting authorities may conduct market consultations with a view to preparing the procurement and informing economic operators of their procurement plans and requirements. For this purpose, contracting authorities may, for example, seek or accept advice from independent experts or authorities or from market participants. That advice may be used in the planning and conduct of the procurement procedure, provided that such advice does not have the effect of distorting competition and does not result in a violation of the principles of non-discrimination and transparency.”*;
- Furthermore, article 41 of the Public Sector Directive and, respectively, article 59 of the Utilities Directive complete the general provisions aforementioned and provide the rules for the prior involvement of candidates and tenderers: *“Where a candidate or tenderer or an undertaking related to a candidate or tenderer has advised the contracting authority, whether in the context of Article*

⁴ In line with article 14 of the new Public Sector Directive and article 32 of the new Utilities Directive.

40 / 58 (market consultation) or not, or has otherwise been involved in the preparation of the procurement procedure, the contracting authority shall take appropriate measures⁵ to ensure that competition is not distorted by the participation of that candidate or tenderer.”

Note that these provisions apply irrespective of the subsequent decision of the public procurer to conduct a PCP procurement outside the scope of the EU Public Procurement Directives, or a PPI procurement subject to the EU Public procurement Directives. Also note that according to these provisions, a market consultation can broach the views of the market not only on the tender specifications, but any aspect that may be relevant for the planning and conduct of the procurement (e.g. technological possibilities, suitable procurement procedure, suitable exclusion and selection criteria, suitable IPR conditions, feasibility of budget and time limitations on the procurement etc.).

Stadt Halle case (C-26/03)

The Court of Justice of the EU decided that “every decision of a contracting authority falling under the Community rules in the field of public procurement and liable to infringe them is subject to [...] judicial review [...]”. However, “acts which constitute a mere preliminary study of the market or which are purely preparatory and form part of the internal reflections of the contracting authority with a view to a public award procedure” are not amenable to review.

The legal expert needs to make sure therefore that the market consultation:

(i) does not violate the principle of non-discrimination

Thus the market consultation must be open to all potentially interested bidders on the entire market (so that it is truly an "open" market consultation); According to the derived Treaty principle of non-discrimination, the market consultation may not restrict participation to the market consultation to national economic operators or operators of a certain type (e.g. SMEs), in the detriment of economic operators from other EU countries or other company sizes. This obligation applies also to PCPs that are exempted from the EU public procurement directives.

Question: Can I promote the Open Market Consultation to specific vendors/industry sectors?

Answer: Yes, as long as you provide the same info about the OMC to all potentially interested vendors and don't inform certain vendors earlier than others.



Good practice:

- publish first the info about the OMC and then send dedicated e-mails/promo messages to specific vendors that you want to encourage to participate in the OMC;
- publish any replies that you give to questions from any vendor via a published FAQ list.

⁵ All the measures taken during the conduct of the market consultation need to be duly documented in the tender procedure report that public procurers need to draft, in accordance with the provisions of article 84 of the Public Sector Directive and, respectively, article 100 of the Utilities Directive.

Question: Can I have one-to-one meetings with individual vendors when doing an open market consultation, can vendors provide commercial/confidential info about their solution in confidential way only to me as procurer, or does the whole OMC have to be done *en pleine public*?

Answer: Yes, the OMC can consist of a combination of one part that takes place *en pleine public* and another part that is done as one-to-one meetings with individual vendors. It is up to each vendor himself to decide which info he shares *en plein public* (with other vendors as well) and which info he provides on confidential basis only to the procurer (e.g. via one-to-one meetings). But the procurer has to ensure that he gives exactly the same information to all vendors about the planned procurement/his procurement need (the procurer cannot limit certain info to only some preferred vendors). For example, if the procurer answers a question that other vendors did not ask to a specific vendor in his one-to-one meeting, then he must publish the answer that he gave to this vendor also in a FAQ so other vendors can also check the reply to this question.

(ii) does not distort competition

The market consultation will not distort competition when:

- all relevant information that the procurer provides to economic operators in the market consultation is also communicated to the other economic operators in a transparent, non-discriminatory manner.
- all interested economic operators receive equal chances to formulate an offer in the subsequent procurement and all requirements imposed in the subsequent procurement are not biased towards a specific economic operator or towards a specific proprietary technology;

Question: Can I allow vendors to present their solution approach during an OMC meeting?

Answer: Yes, as long as you give all vendors that are potentially interested in doing this the same chances to do this.

When conducting the open market consultation, the legal expert needs to make sure there is a clear distinction between the open market consultation and the subsequent public procurement.

EXAMPLE of provision in the market consultation document

Any company may participate in this market consultation. Participating in this market consultation is free of any engagement and will never lead to any obligation between the procurer and your company. (Non) participation by a company will neither exclude this company from future tenders nor will it have any influence on its opportunities.

Source: CHARM PCP project, Market consultation document



Encouraging competition does not mean that the public procurer may not formulate ambitious requirements that may not be fulfilled by all economic operators.

Question: What can I present as procurer to vendors at an OMC?

Answer:

- Any information about the upcoming procurement that you want vendors to be aware about (e.g. the planned scope of the procurement, the planned conditions (e.g. IPR) for the procurement)
- Any questions you have as procurer on which you want to broach the views of the market (e.g. is this time frame, budget, scope of the procurement that I have in mind realistic? Am I correct that there are no solutions existing yet for this procurement need that I want to address?)

In addition, article 41 of the new Public Sector Directive and article 59 of the new Utilities Directive detail measures that a public procurer should adopt in order to ensure that competition is not distorted when an economic operator who participated in the market consultation or provided advice on the planning and conduct of the procurement, submits an offer for the subsequent procurement: *"Such measures shall include the communication to the other candidates and tenderers of relevant information exchanged in the context of or resulting from the involvement of the candidate or tenderer in the preparation of the procurement procedure and the fixing of adequate time limits for the receipt of tenders. The candidate or tenderer concerned shall only be excluded from the procedure where there are no other means to ensure compliance with the duty to observe the principle of equal treatment. Prior to any such exclusion, candidates or tenderers shall be given the opportunity to prove that their involvement in preparing the procurement procedure is not capable of distorting competition. The measures taken shall be documented in the individual report required by Article 84."*

To ensure that information is shared with all the market players who are interested in bidding in the subsequent procurement (whether they participated in the market consultation or not), while protecting commercially sensitive information, the market consultation document could specifically mention that:

"All ideas submitted by industry will be treated as Commercial in Confidence. No part of these will be made public. However, relevant insights (shared openly by industry during the open market consultation meeting) are subject to publication and may be used by procuring entities to shape future strategies".

Source: CHARM PCP project, Market consultation document; <http://www.projectcharm.info/>

Question: Can I reveal commercial information or technical information obtained in confidence during the OMC from one vendor to other vendors?

Answer: No, the procurer may not disclose commercial info or confidential info from one vendor to another vendor. See Module 2 section 2.6.3 regarding the use of the Planning Poker technique in the Smart@Fire PCP, to ask the opinion of vendors on certain issues related to the procurement without making them reveal commercial/confidential information to each other.

(iii) does not violate the principle of transparency

The principle of transparency is essentially intended to preclude any risk of favoritism or arbitrariness on the part of the public procurer.

Succhi di Frutta case

In *Succhi di Frutta* case,⁶ the European Court of Justice stated that the transparency principle requires that all the conditions and detailed rules of the procurement procedure must be drawn up in a clear, precise and unequivocal manner in the notice or contract documents so that:

1. all reasonably informed tenderers exercising ordinary care can understand their exact significance and interpret them in the same way; AND
2. the public procurer is able to ascertain whether the tenders submitted satisfy the criteria applying to the relevant contract.

In the case of a market consultation, the principle of transparency implies the following:

- to announce in advance the intention to organise a market consultation to all possibly interested vendors (e.g. by publishing a PIN) (see the market consultation PIN template attached to this Toolkit);
- to allow sufficient time to interested economic operators to express their interest in participating;
- to publicize in advance the rules for participation;
- after the market consultation, to publish the information provided by the procurer to economic operators (e.g. by means of a FAQ list, by videotaping the entire Open Market Consultation etc.);
- to allow economic operators to submit comments.

The Public Procurement Directives do not mandate a specific form for publishing Open Market Consultations notices. However, in order to ensure compliance with the transparency principle, it is advisable to conduct the market consultation in English and announce it via a PIN in the Official Journal of the European Union. This allows a large number of economic operators to participate.

⁶ Case C-496/99 *Commission of the European Communities v CAS Succhi di Frutta SpA* [2004] ECR I-3801 paras 110-1.

The market consultation may also reveal information needed to justify compliance with national procurement legislation. The legal expert should design the market consultation such as to produce the needed information.

EXAMPLE

In the Netherlands, the Public Procurement Law prohibits unnecessary clustering of contracts. A procurer who wants to cluster contracts, should consider, among others, the composition of the relevant market and the impact clustering would have on small and medium size suppliers. The market consultation has the potential to reveal the composition of the market and to substantiate the procurer's decision to cluster contracts or not.

Source: Aanbestedingswet 2012 <http://wetten.overheid.nl/BWBR0032203/2016-07-01>

2.6.2.2 The EU competition rules

In order to prevent the exchange of information which eliminates uncertainties about the actions and strategies of competitors within the context of a market consultation, the public procurer should not share commercially sensitive information with other competitors. Specifically:

- information should be anonymized;
- reference to specific economic operators should be left out of market consultation reports, etc.

But the procurer may publish the names of the companies that participated in the OMC. However, for privacy reasons, the names of the individual persons that attended should not be published without their explicit permission.

The procurer is not responsible if companies engage in collusive practices during the Open Market Consultation, at least if he did not encourage those companies to do so.

To sum up...

If competitors who together make up a significant market share engage in the frequent exchange of recent / future, detailed, individual, private information (to have an effect on inter-MS trade), either directly or by means of an intermediary, this is classified under competition law as an infringement by object, which is, based on the provisions of the 2011 Commission Communication⁷, presumed to cause competitive harm. Nonetheless, due to the specificities of each case, the competition authority investigates such a potential exchange of information between competing firms on a case-by-case basis, also taking into consideration the characteristics of the industry concerned.

⁷ The Commission Communication establishing the Guidelines on the applicability of article 101 of the Treaty on the Functioning of the European Union ("TFEU") to horizontal co-operation agreements (2011/C 11/01).


2.6.3 Legal considerations related to the organization of a market consultation

In this section we focus on guidance to the legal expert of the public procurer, regarding the rules applicable at each stage in the market consultation process:

(i) Announce an open market consultation widely and well in advance:

- ❖ Publish a Prior Information Notices (PIN) in the Official Journal of the European Union (OJEU) to ensure legal compliance with the transparency principle in terms of announcing an upcoming open market consultation widely (see the market consultation PIN template attached to this Toolkit); In case of multiple open market consultation meetings, announce all of them via a PIN or multiple PINs.

Publication of the PIN 'well in advance' (e.g. 2 months instead of 1 week) before the actual market consultation starts is important to give all potentially interested bidders enough time to make the necessary practical preparations (e.g. preparing responses, travel arrangements) to participate in the open market consultation.

 Keep in mind that additional promotion of the market consultation (e.g. at sector specific industry events, online communities etc.) should be done 'after' publication of the PIN, to ensure that all vendors are being treated equally (no vendors receive preferential treatment / earlier information access than others).

- ❖ Ensure that the PIN calls for an 'open' market consultation. All potentially interested bidders should be allowed to participate from all the countries with which the EU has public procurement agreements. Don't limit open market consultations to companies from only your country, to only specific types of companies (e.g. SMEs), or to companies only from EU Member States (even for PCP there can be no discrimination of potential bidders from countries with which the EU has an association or stabilization agreement in the context of the EU neighborhood policy).

(ii) Define the market consultation documentation:

The market consultation document should clearly describe the procurement and public procurers, the goals of the market consultation, the form and planning of the consultation etc. A potential indicative structure of a market consultation document is outlined below:

- reasons for holding a market consultation and procurement background
- goals of the market consultation
- approach
 - an explicit assurance by the public procurer that no economic operator involved in the market consultation phase will be excluded from the tender procedure, based on the mere fact that it participated in the closed brainstorming sessions and/or open market dialogue;
 - express warning that it is the responsibility of all participating parties to respect relevant legislation in the field of public procurement, competition, intellectual property, etc.

- criteria to allow/select participants (e.g. particularly in security sensitive projects).
- planning/timetables.



The market consultation document should reserve the right of the public procurer to amend the timetable of the market consultation.

EXAMPLE of market consultation timetable (CHARM project)	
Industry Event – PIN Notice	9 March 2012
Publication of Market consultation round 1	29 March 2012
Industry Event	29 March 2012
Deadline for questions about the market consultation	10 April 2012
Publication of answers of the CHARM consortium to the questions about the market consultation	17 April 2012
Deadline for return of questionnaire	1 May 2012
Insights of round 1 to be communicated widely	June 2012
Market consultation round 2	June – October 2012
Insights of round 2 to be communicated widely	December 2012

- expected input (including specific questions):
 - a mutual explicit expectation for an ambitious and innovative outcome is advisable.
- procedural steps during the market consultation:
 - explain the different stages in the market consultation (e.g. written questionnaire followed by oral consultations, public and/or individual closed door meetings);
 - explain how confidentiality will be safeguarded (e.g. in case of security sensitive procurements);

Example of a confidentiality clause

“All data provided by the Applicant will be handled confidentially, unless statutory obligations demand the publication of this data and/or the Applicant agrees with the publication of the provided data.”

Source: Corvers Procurement Services BV

- legal framework for the market consultation:
 - outline the applicable rules deriving from the Public Procurement Directives for PPI;
 - outline the relevant EU competition rules;
 explain what outcomes will be published (at least all Q&A) and where they will be published.

(iii) Conduct the consultation:

At this stage the legal expert should safeguard compliance with the equal treatment, non-discrimination and transparency principles. The legal expert may remind participating companies what exchanges of information are prohibited by the competition rules (as detailed in section 2.6.2 above).

(iv) Publish a report of the consultation:

- ❖ the report of the market consultation should outline the broad topics of discussion and all answers that were given by the procurer to questions from potential tenderers in an anonymous form;
- ❖ the open market consultation can be filmed and put online (see e.g. www.imaile.eu)
- ❖ the draft report could be offered to the participants for verification;
- ❖ as the open market consultation is a public event, names of companies that attended the open market consultation could be published to encourage further networking also between vendors that were not able to attend;
- ❖ in order to ensure compliance with the transparency principle, the report should be available to all other potentially interested bidders. It is normally published openly (e.g. on the website of the envisaged procurement).

The public procurer may need to obtain from the economic operators sensitive commercial information, in order to formulate a suitable procurement documentation. In this case, the public procurer will not be able to make this information public through the market consultation report. One suitable approach is for the public procurer to keep sufficient documentation (individual report on the preparation and conduct of the procurement) to demonstrate that the sensitive information was not used in the procurement to distort competition.⁸

(v) process into the procurement decisions the intelligence gathered during the market consultation:

- ❖ interpret results to decide whether the solution to the identified need already exists or it needs to be developed;
- ❖ interpret results to see if there is a need to go back to the market for further input;
- ❖ interpret results to define outcome based specifications; etc.

⁸ Article 84(2) of the new Public Sector Directive.

At this stage the legal expert will safeguard compliance with the procurement principles (in case of PCP) and with the provisions of the Public Procurement Directives (in case of PPI). This is discussed in detail in section 2.8 below.

2.7 IPR and confidentiality strategies

2.7.1 Introduction and legal basis

Section 2.7 of Module 2 discussed the general IPR-related issues that procurers face when they engage in PCP and PPI.

It is important to clarify that for all procurements of R&D, including but not only limited to PCPs, several competition considerations must be taken into account in the definition of the tender documents preceding the generation of IPRs.

Section 2.3 article 33 of the State Aid Framework for R&D&I provides that:

“In all other cases, including pre-commercial procurement, the Commission 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 Member State concerned, 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 standardization 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 nonexclusive licenses, under market conditions.

In exclusive development type R&D procurements all IPRs are kept by the procurer and the first bullet under d) applies. As discussed in section 2.7 of Module 2, in PCPs this is not the case and the second bullet under d) applies. In PCPs there is:

- allocation of the IPR ownership of the PCP results to the R&D service provider;
- a free license to use the PCP results for internal use for the procurer;
- the right for the procurer to grant licenses (or to require the R&D service provider to grant licenses) to third parties to the PCP results on fair and reasonable market conditions;
- an IPR 'call back' provision which enables the procurer to assume ownership of the generated IPR in the situation where the R&D service provider fails to commercialise the results within an agreed time-frame.

The legal expert should ensure that the contract requires vendors to transfer the IPR obligations (e.g. under the call back clause) also to other vendors in case they get taken over, merge with other vendors.

Before deciding on how to formulate the legal clauses for the IPR distribution, the legal expert should check whether and how national legislation,⁹ transposing Directive 2004/48/EC on the enforcement of intellectual property rights, is governing the division of IPR in public procurement.¹⁰

In some EU countries the default situation in public procurement law (if no clauses are foreseen in the procurement contracts that change this) is that all IPR rights are allocated to the vendors (e.g. Sweden), in other countries that all IPR rights are allocated to the public procurers (e.g. Netherlands, Greece).

Question: Can the procurer choose him/(her)self how to distribute the IPR rights/obligations? Can the procurer, for example, give all IPR rights to the vendors and not keep anything for himself?

Answer: There are countries with mandatory rules about how to deal with IPR in public procurement or default rules about how to deal with IPR in public procurement. The legal expert should verify whether and under which conditions the procurer may deviate from the rules (e.g. the procurer may have to justify the need to deviate from the rules). From a practical point of view, there are some minimum IPR related rights that a procurer should keep himself to not lock himself knowingly into certain vendors, thus to avoid State aid (such as royalty free rights to use and right to require to give license to third parties).

In R&D procurements that do not comply with the above conditions in article 33 of the R&D&I State aid rules and are implemented as State aid, the procurer will be limited to the percentages for the R&D&I aid intensities that are defined for the different categories of R&D in the State aid rules.¹¹

⁹ In Greece, for example, L. 2121/1993 on Intellectual Property Rights governing the division of IPR in public procurement.

¹⁰ The survey on the status of implementation of PCP, performed by the EC in 2010 confirmed that all standard IPR conditions foreseen in national public procurement legislations across Europe allow the specific IPR arrangement that is used in PCP. See <http://cordis.europa.eu/fp7/ict/pcp/pcp-survey.pdf>.

¹¹ See Framework for state aid for research and development and innovation C(2014) 3282.

Question: Why should all IPR rights/obligations be clarified up front in the contract? Can I not just agree on IPR issues during or after the procurement if and when IPR is eventually created/needs to be exploited?


Answer: As IPR allocation determines to a significant extent the price setting of vendors for their procurement offer, the procurer needs to publish up front in the tender documents the distribution of IPR rights/obligations that it wants to apply in this particular procurer in order to get comparable offers and determine correctly the market price. When the IPR distribution is not made available upfront, the procurer does not benefit of the 'market price' presumption offered by para.33 of the Framework for state aid for R&D&I.

Having now dealt with the IPR-related issues that arise *before* the initiation of the PCP, it is important to look at some of the issues that arise *during and after* the PCP. The following discussion will highlight which aspects are relevant to PPIs as well.

In case of PPIs, the importance of clearly identifying IPR related obligations is recognized by the Public Procurement Directives. Accordingly:

- recital 107 of the Public Sector Directive provides that a new procurement procedure is required in case of material changes to the initial contract, in particular to the scope and content of the mutual rights and obligations of the parties, including the distribution of intellectual property rights. Consequently, clear provisions regarding the IPR arrangements prior to the conduct of the PPI significantly reduces the risk of having to initiate a new procedure due to the need to change the initial distribution of IPRs;
- article 42 of the Public Sector Directive regulating technical specifications also specifically provides that "*the technical specifications may also specify whether the transfer of intellectual property rights will be required.*";
- last but not least, violation of intellectual property rights could be a cause for exclusion or barring economic operators from participating in public procurement procedures, as specifically stated under recital 101 of the Public Sector Directive.

Section 2.7.2.1 in Module 2 explains that the procurer may choose to retain ownership of foreground ownership, usually over solutions that incorporate highly sensitive information or may have national security consequences if it was disseminated or if the provider is not able to commercialize the solution, for example due to the high customer specificity of the solution (e.g. critical ICT infrastructure or Defense-related procurements). In such cases, the legal expert may advise the procurer not to apply for registered IPR (such as patents), but to maintain all knowledge internally as trade secrets and confidential information, regulated by contract (such as Non-Disclosure Agreements, see Section 2.7.3).



The legal expert should define in the tender documentation any IPR and obligations that the procurer wants to allocate to preferred partners, if any (preferred partners meaning other procurers who decide to follow up the progress of the ongoing procurement without investing in it) .

2.7.2 Managing IPR-related risks

2.7.2.1 Vendor Lock-in

The risk of ‘supplier lock-in’ usually occurs when suppliers of essential products, components or intellectual property maintain their exclusive proprietary rights over the latter, significantly raising costs of switching suppliers. Lock-in situations are common in relation to ICT-systems, where for example, proprietary data formats prevent users from switching to other systems due to lack of interoperability. The downsides of being locked in to a single supplier are essentially those associated with utilizing products produced by a monopoly: significantly higher costs, poorer quality, and less innovation – all due to lack of competition. The risk of lock-in is muted in the case of PCPs because of the approach to work with multiple vendors in all stages. Provided the solutions generated in the PCP meet criteria of interoperability (see ‘open standards’ below and ‘Standardization’ section of Module 2), then lock-in issues can be adequately managed. However, the risk of lock-in in the case of PPI (when it was not preceded by a PCP) may be higher. This is due to the fact that given the pioneering nature of the technology, the private PPI partner may well be the only supplier on the market.

A well-known approach to avoid vendor lock-in is for procurers to insist that suppliers make use of so-called ‘open interoperability standards’ in their supplied technologies; make use of designs that are ‘modular’, wherever possible; and attempt to ensure dual or multi-source supply arrangements for project-critical deliverables. In cases of unavoidable supplier lock-in however, the procurer can still mitigate the risks posed to business continuity (e.g., supplier insolvency) by setting up an escrow with triggering conditions. These approaches will be briefly reviewed below.

Open standards

‘Interoperability standards’ are aspects of technology that enable devices to work together, like the wireless standards ‘Wi-Fi’ or ‘Bluetooth’, or document standards for word processing or spreadsheets. A standard is ‘open’ when there are minimal legal or financial barriers to its use. ICT systems utilizing open standards enable data to be easily migrated between different systems and enable their interoperability with ICT systems produced by other suppliers in subsequent procurement rounds. ‘Open standards’ often require that the IPR ‘reading on’ to them are licensed on either royalty-free or Fair, Reasonable, and Non-Discriminatory (‘FRAND’) conditions. The legal expert is encouraged to stipulate in the tender documents that all standards utilized in the procured solutions conform to the definition of ‘openness’ as defined in the Digital Single Market.

Modular designs

'Modular designs' enable hardware parts and software blocks ('functional units') to be easily modified, upgraded and replaced without disturbing the rest of the system. Clearly, the possibility of modular designs may be conditioned upon the availability of open standards over the interfaces between the functional units. Although modularity of design may not be possible for all aspect of the project technology, it is well-advised that project-critical deliverables are designed with forethought as to their ease of future upgradeability, maintenance and replacement, including by technology provided by other suppliers. Such requirements may be included as functional specifications in the tender documents for PCPs, and in some cases, PPIs.

Multi-sourcing arrangements

Ensuring dual or multi-source supply for project-critical technology is another strategy of avoiding lock-in by a single supplier. By maintaining commercial relationships with more than one company with respect to the provision of project-critical technology, the procurer can ensure a degree of competition and business continuity that would be absent in the case of a single supplier. The fact that PCP's include a minimum of three R&D service providers creates the potential for multi-sourcing. Furthermore, clauses which permit the procurer to grant (or to mandate that the R&D service provider grant) non-exclusive licenses to the PCP results under market conditions to third parties also creates the potential for assuring multi-sourcing.

Competitive pricing and continuous innovation by the suppliers is encouraged by the fact the companies must compete to supply the technology in the PPI. Business continuity is ensured since if one of the suppliers becomes insolvent or unable to continue supplies, the second supplier may then take over its volumes. It should be noted that sourcing substitute products from two or more suppliers may also require that the procured technologies are interoperable. To this end, dual and multi-sourcing models may only be possible in the case where an 'open standards' policy is adhered to.

Dealing with 'unavoidable' vendor lock-in

Situations may also arise where the necessary technology is so unique that there is only one supplier on the market and therefore lock-in situations occur by default. Such situations may occur in PPIs rather than PCPs, since PCPs ensure there are at least two possible suppliers, and contain clauses permitting third party licensing of PCP results. PPIs on the other hand may be likely to result in single-supplier scenarios since the technology is often of a pioneering nature with very few, if any, substitutes.

If such indispensable IP is selected despite the risk of lock-in, then public procurers should carefully weigh the following things. They should ensure to only select such IP for inclusion if the projected 'present costs' of the R&D required to reproduce its (non-infringing) functionality is greater than the expected 'future costs' incurred due to supplier lock-in, over the lifetime of the technology. Although these costs cannot be estimated with any certainty, at least a rough calculation should be performed

as the long-term nature of many procurements means that the costs associated with technological lock-in might be significant. One persistent risk of lock-in is that procurers become vulnerable to the economic fate of their suppliers. For instance, if a supplier becomes insolvent and unable to continue to invest in its technology or merely decides to stop investing or supporting the technology for some other business reason, then the continued viability of the public procurer's technology is at risk. One way to deal with this risk is for the public procurer to insist that under such 'triggering conditions', the ownership (or license under favorable and broad conditions) of the technology IP transfers to the procurer. A mutually agreed fee may also condition such a transfer. All necessary source code, technical data, documentation, blueprints and other necessary information to use the IP should be put in a third party 'escrow' and only released to the procurer under the mutually agreed triggering conditions (see 'source code escrow' discussion in section 2.7.3 below).

2.7.2.2 Open source software related risks

In addition to the various hardware deliverables that may be procured during a PPI (either following a PCP or otherwise), there may also be a number of software deliverables.

It is increasingly common for software developers to use a combination of both proprietary software and so-called 'open source software'. 'Open source software' refers to software licensed under a particular set of licenses that enable users access to the source code in exchange for certain obligations related to distributing any modified source code.

The use of open source software in conjunction with proprietary software may present risks that are best allocated to and managed by the private party in a PCP or PPI contract. These risks are detailed further below, but include the inadvertent 'opening up' of proprietary code stacks (which may also be trade secrets) by poorly-managed integration of open source and proprietary software.

Although the Open Source Initiative ('OSI' - the de facto open source license certifying body) has approved more than 70 open source licenses, there are essentially only two main license types. These are the 'permissive' and the 'hereditary' types.

Permissive open source licenses place very little burden on users in terms of compliance: source code which enters the code base under a permissive license – for example, a 'Berkeley Software Distribution' –style license ('BSD-style') can be used and re-combined with any other code (including proprietary code), provided the copyright notice remains intact.

'Hereditary' licenses on the other hand are more burdensome. For example, the GNU General Public License (GPL)- style licenses require that source code 'combined' with other code in a certain way automatically renders that other code covered by the GPL from the point of distribution on, whether it is proprietary or not.

If significant funds have been invested in developing proprietary code then it is (often, though not always) extremely undesirable that such code is mandatorily released under an open source license. For this reason, participants in a PCP or PPI who plan on producing software deliverables should be made aware of how to develop software in a manner which does not risk making any proprietary code fall under an open source license. Such code may also contain other software elements covered by trade secret law.

To this end, it is advisable that PCP/PPI participants are required to adhere to an ‘open source software policy’ or software development best practice guidelines, which can help them manage these risks. Such a policy could be formulated by the public procurer (on advice from an external expert or consultant) and included as an addendum to the PPI or PCP contract.

2.7.2.3 Third party IPR infringement risk

One of the central IP-related risks associated with using solutions from the ‘technological frontier’ concerns the matter of Third Party IPR infringement. “Third Party IPR” refers to any IPR owned by a party which is not part of the PCP or PPI but which is required in the use of the R&D results or PPI-procured solution. Third Party IP owners pose a risk to the public procurer because they have the legal right to prevent the public procurer from using the innovative solution (by applying for injunctions) or to demand extra licensing fees. Indeed, one objective of procurers engaging in an IPR search prior to initiating a PCP or PPI is to identify the ‘IPR landscape’ (see section 2.3 of Module 2 and section 2.3 above), together with identifying the main IPR holders in the technological field.

In order to deal with such risks, public procurers are advised to try to allocate the risks of such eventualities to the private party. This is normally done by including legal clauses in the contract which extract a “warranty of non-infringement” and an “indemnification duty” from the private party. Both these clauses aim to create a scenario where the private party has strong incentives to ensure that the created technology is free of Third Party IPR.

This risk can also be managed by the procurer more directly by encouraging private parties to a PCP or PPI to participate in a ‘Third Party IPR’ notification system, including a ‘register’ containing the following information:

- identify and notify any potentially blocking Third Party IPR in advance;
- identify licensing terms related to such IPR in advance;
- identify any potential design-around solutions.

In the case of PPI, such a notification system may not be of any practical utility since the R&D-cycle is in most cases already completed and thus Third Party IP rights would be difficult to avoid. Therefore, procurers should rely on the contractual provisions of warranties of non-infringement and indemnification duties.

In the case of PCP, however, such a system could be fruitfully implemented at the end of each R&D phase. This would allow the public procurer full transparency over Third Party IP risk and the ability to instruct private parties to either seek out licenses, design around patents, or alternatively, leave out infringing components from a final design.

2.7.3 Key IPR-related contractual terms

Special attention should be given to the following IPR-related clauses in any contract regulating PCP or PPI.

2.7.3.1 Indemnification

‘Indemnification’ refers to the duty of one party to a contract to reimburse the other party with respect to losses or injury experienced under the contract. In an IPR context, indemnification usually relates to losses due to third party IPR infringement claims.

A standard clause would include the IPR owner providing indemnification (for both awarded damages and legal costs) to the procurer if any third party files a suit against the procurer claiming its use of the technology infringes its IPR.

2.7.3.2 Assignment

‘Assignment’ refers to the sale or transfer of IPR from one party in a licensing contract to a third party. Assignments most often occur in the context of company buy-outs, mergers and acquisitions. The most important point for the public procurer is that the obligations attached to the procured R&D, technology or software continue to be performed by the new IPR owner in case the private partner is acquired. This can be assured contractually by inserting a suitable ‘assignment’ clause in the contract which only permits IPR assignment with consent of the public procurer, and/or, requires that any IPR acquisition by a third party includes the continuation of the private partner’s obligations.

2.7.3.3 Royalties

‘Royalties’ or licensing fees refers to the revenue the parties to a contract may expect to pay or be paid under a licensing contract for use of the technology. In lieu of the usual method for assessing market compensation discussed in section 2.7 above, the procurer and R&D service provider may instead come to an agreement whereby instead of reducing the value of exclusive development by the allocated IPR value, the parties agree on a royalty once the solution is commercialized.

It is also possible that the procurer will be entitled to royalties from the private partner’s commercialization of the technology on the market in any case, such as where the public partner contributed Background or Foreground IP to the technology, and in situations of joint ownership. It is essential that royalty rates are worked out long before the private partner brings the technology to market, although the royalty clause should provide some flexibility to respond to changing market conditions.

2.7.3.4 IPR ownership clause

According to the European Commission guidance on PCP, the IPR ownership belongs to the private partner, while the procurer obtains a free license to use the solution and the right to call-back the ownership if the private partner does not commercialise within a certain period of time after the end of the PCP. In the context of PPIs, where the private party has performed the R&D before the start of the PPI contract, all IPR would belong to the private party. However, when the parties wish to deviate from this default position and vest the IPR in the public procurer, then the IPR will need to be expressly assigned to the other partner by way of an instrument of assignment for copyright or registering the change of ownership in the patent register of the relevant patent office. A clause reflecting the obligations of the parties with respect to the latter should be included in the contract.

Furthermore, since public disclosure of inventions before their registration as patents or patent applications may make protection unavailable, it is crucial that the party filing for registered IPR takes suitable contractual precautions such as binding employees, contractors and other third parties by Non-Disclosure Agreements. This duty of maintaining confidentiality may also be included in any contract between the innovating parties (see confidentiality section below).

2.7.3.5 Confidentiality

During all phases of a PPI or PCP, parties may exchange confidential or privileged information which could be covered by trade secret law. For example, during market consultations or competitive dialogues, companies may provide the public procurer with confidential information outlining their R&D activities or capacities. If this information is labeled or otherwise indicated to constitute ‘confidential information’, then the public procurer will be bound not to disclose the information to any third party. Often this duty is formalized into a separate contract called a ‘Non Disclosure Agreement’ or NDA. This duty is also included in Section 21 of the Procurement Directive, and is also the subject of a Directive on the protection of trade secrets against their unlawful acquisition, use and disclosure.¹²

Sometimes the content covered by an NDA may constitute inventions for which patents have not yet been applied, and therefore premature disclosure would result in significant loss of investment. In other cases, the content of NDAs may include strategic information related to pricing or R&D trajectories.

For more information in this regard, please refer to the section addressing market consultations (see section 2.6 above regarding market consultations).

¹² See Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure.

Another option available to tackle the confidentiality related risks in an innovation procurement process is to establish a structured approach regarding confidentiality and business secrets. This could be done by employing the following actions:

- Developing and implementing a process for safeguarding business confidentiality and assign qualified personnel to handle any sensitive issues
- Clearly defining the concept of business secrets
- Informing potential bidders during the market consultations on what falls under the category of ‘confidential information’ and ‘trade secrets’, and how far and under which circumstances this sensitive information could be protected.

European Dynamics Luxembourg and Others v Commission, T-536/11

The Court of First Instance of the European Union has recognized the right of the procurer not to disclose confidential information and business secrets to parties who require judicial review of a procurement decision. The Court judged that “the adversarial principle does not mean that the parties are entitled to unlimited and absolute access to all of the information relating to the award procedure concerned. On the contrary, that right of access must be balanced against the right of other economic operators to the protection of their confidential information and their business secrets. The principle of the protection of confidential information and of business secrets must be observed in such a way as to reconcile it with the requirements of effective legal protection and the rights of defence of the parties to the dispute and, in the case of judicial review, in such a way as to ensure that the proceedings as a whole accord with the right to a fair trial.”

2.7.4 Advanced IPR tools

IPR management can be a complex task, with many nuances and edge-cases requiring specific approaches. Below are explained some common advanced IPR management tools which sometimes arise in joint public-private innovation activities. The legal adviser of the procurer should consider translating these approaches into contractual clauses.

2.7.4.1 Source code escrow

In the case where the technology involves software and the R&D service provider owns the IPR and is not under an obligation to grant licenses to other suppliers, the public procurer may be at risk of vendor lock-in. This risk can be mitigated by establishing a software source code *escrow* in the control of a neutral third party, whereby the software source code is released to the procurer with a right to grant sub-licenses on certain agreed ‘triggering’ circumstances. Another practical solution is to establish a source code repository, which gives the procuring entity the constant access to the current version of the code and protects against lack of access to the code in case of any disputes.

2.7.4.2 Patent pools

In the case where both the public procurer and private party (and possibly other third parties) own essential patents over the technology and the technology is intended to be widely commercialized, one strategy is for the patents to be licensed in a 'one stop shop' to third parties. How royalties are divided among the parties is decided in advance and is usually proportional to either the quantity or quality of the patents contributed by each party. Patent pools are an efficient way to deal with patent-heavy technology where ownership is fragmented. They may be administered either by the patent owners themselves or by a third party 'licensing administrator'.

2.8 Drafting the tender documentation

2.8.1 Introduction

Important aspects to be decided before drafting the tender documents are (more info in section 2.8.2):

- A) Type of procedure to be followed;
- B) Defining the subject-matter of the contract and the technical specifications;
- C) Defining exclusion criteria;
- D) Defining selection criteria;
- E) Defining award criteria;
- F) Deciding on the use of variants;
- G) Deciding on the use of value engineering
- H) Defining criteria to monitor vendor performance

The subsequent step is to draft the tender documentation. Sections 2.8.3 and 2.8.4 below outline the content of the main tender documents as applicable to a PCP and, respectively, a PPI:

1. Prior Information Notice (in case of PPI): to publish the intention to buy and the time by which vendors need to prove (e.g. via conformance testing / product labelling) that they can deliver solutions compliant with the procurers' requirements);
2. Contract Notice;
3. Request for tenders (also called Tender Regulation or Invitation to Tender);
4. Procurement Contracts;
5. Optional Tender Forms (these documents can help the provider in structuring their tender; but the procurer can also decide to let the providers structure their tenders as they wish).

Before outlining the specific legal considerations related to the tender documentation, we describe the legislative framework for PCP and PPI.

2.8.1.1 Legal framework for PCP

R&D scope of a PCP

The boundaries of what R&D may cover under PCPs (which clarifies also how PCP maps to TRLs) are set by the following two legal frameworks: the 2014 EU State aid framework for research, development and innovation (R&D&I) and the WTO Government Procurement Agreement (GPA). PCP covers the following activities: solution exploration and design, prototyping, original development and validation/testing of a limited volume of first products or services in the form of a test series. According to Article XV (1)(e) of WTO GPA 1994 and Article XIII(1)(f) of the revised WTO GPA 2014 that defines original development as the boundary of where R&D stops, original development of a first product or service may include limited production or supply in order to incorporate the results of field testing and to demonstrate that the product or service is suitable for production or supply in quantity to acceptable quality standards, but does not include quantity production or supply to establish commercial viability or to recover R&D costs.

This fits with the 2014 EU State aid framework for research, development and innovation (R&D&I), which states that in order for PCP to exclude State aid, the object of a PCP contract must fall within one or several categories of research and development defined in this framework and must be of limited duration, it may include the development of prototypes or limited volumes of first products or services in the form of a test series but the purchase of commercial volumes of products or services must not be an object of the same contract.

The R&D categories defined in the [R&D&I State aid framework](#) that may thus be covered by PCP are

- fundamental research
- industrial research
- experimental development

Where:

- **'Fundamental research'** means experimental or theoretical work undertaken primarily to acquire new knowledge of the underlying foundations of phenomena and observable facts, without any direct commercial application or use in view;
- **'Industrial research'** means the planned research or critical investigation aimed at the acquisition of new knowledge and skills for developing new products, processes or services or for bringing about a significant improvement in existing products, processes or services. It comprises the creation of components parts of complex systems, and may include the construction of prototypes in a laboratory environment or in an environment with simulated interfaces to existing systems as well as of pilot lines, when necessary for the industrial research and notably for generic technology validation;

- **'Experimental development'** means acquiring, combining, shaping and using existing scientific, technological, business and other relevant knowledge and skills with the aim of developing new or improved products, processes or services. This may also include, for example, activities aiming at the conceptual definition, planning and documentation of new products, processes or services. Experimental development may comprise prototyping, demonstrating, piloting, testing and validation of new or improved products, processes or services in environments representative of real life operating conditions where the primary objective is to make further technical improvements on products, processes or services that are not substantially set. This may include the development of a commercially usable prototype or pilot which is necessarily the final commercial product and which is too expensive to produce for it to be used only for demonstration and validation purposes. Experimental development does not include routine or periodic changes made to existing products, production lines, manufacturing processes, services and other operations in progress, even if those changes may represent improvements. The latter are considered innovation / commercial development activities (see below).

Services scope of a PCP

PCP is an R&D services contract, not an R&D supplies or R&D works contract. PCP is thus a public procurement having as its object the provision of services. Vendors participating in a PCP are thus contracted to perform research, development and testing services (activities) with the objective to investigate, develop and test for the procurer whether it is possible to bring a solution to the market that meets the procurer's requirements.

An R&D services contract may involve the use and provisioning of supplies (products). Vendors participating in a PCP may need certain pieces of equipment to perform the research, development and testing and build the solution. The procurer may also wish to become the owner of the prototypes (resulting from phase 2) and/or the limited set of products (resulting from phase 3) developed and tested during the PCP.

In this context, it is important to note that under the EU legal framework for public procurement, contracts that are providing more than only services are still considered a public service contract if the value of the services exceeds that of the products covered by the contract. This condition is fulfilled if the total value of the services over all the PCP phases in question exceeds the value of products covered by the PCP contract over all the PCP phases. It is important to note that if the services condition is not fulfilled the provisions for R&D supply contracts apply, and the R&D contract is not exempted from the EU public procurement directives or WTO GPA.

Public procurers thus have two choices to procure a limited set of prototypes or end-products that were developed during the project:

Option (1) The public procurer chooses to procure "as part of" the PCP contract products that were covered by the PCP contract if the total value of all the products covered by the PCP contract does not exceed the total value of all the R&D services covered by the PCP contract. In this scenario (option 1) the public procurer already has to request all the vendors when they make their offers for the PCP to budget their activities so that the value of the products to be delivered is included in the offer.

Option (2) The public procurer can choose to procure "after" the PCP contract products that were developed during the PCP contract. In this scenario (option 2) the public procurer can wait until the results of the PCP contract are known to decide whether or not to buy resulting prototypes or end-products and if so how many of them and from which vendors that participated in the PCP. The public procurer can then use article 32(3)(a) of the Public Sector Directive or article 50(b) of the Utilities Directives and use the negotiated procedure without prior call for competition for buying a limited set of prototypes or test products that were developed in a preceding PCP from one or more vendors that participated in the PCP. As the limited set of prototypes or test products were manufactured (during the preceding PCP) purely for the purpose of research, experimentation, study or development (as PCP is an R&D services contract) and nor the PCP nor the procurement to buy the limited set of prototypes and test products includes quantity production to establish commercial viability or to recover R&D costs, the conditions to use the negotiated procedure without prior call for competition are fulfilled.

However, please note that it is not possible to buy commercial volumes of end-products via option (1) during a PCP or via option (2) using the negotiated procedure without call for competition after a PCP. From the moment quantity production is needed to deliver more products than originally developed during the PCP and/or additional modifications are needed to products originally developed during the PCP, the procurer must launch a new procurement procedure (a PPI) to buy commercial volumes of the innovative solution developed during a PCP for wide implementation, because at this stage the EU public procurement directives, and possibly also the WTO GPA, apply.

Applicable legal framework

PCP falls outside the European Public Procurement Directives. This is an expressly stated exception from the general rule establishing the obligation of public procurers to comply with the procedural rules set out in the public procurement directives when procuring services, goods or works. This exception is based on the provisions of article 14 of the 2014 Public Sector Directive and, respectively, article 32 of the 2014 Utilities Directive which state¹³: *"this Directive shall only apply to public service contracts for research and development services [...] provided that both of the following conditions are*

¹³ Also article 13(j) of the Defence Directive states: "This Directive shall not apply to the following: j) research and development services other than those where the benefits accrue exclusively to the contracting authority/entity for its use in the conduct of its own affairs, on condition that the service provided is wholly remunerated by the contracting authority/entity."

fulfilled: (i) the benefits accrue exclusively to the public procurer for its use in the conduct of its own affairs, and (ii) the service provided is wholly remunerated by the public procurer”.

The Court of Justice of the EU has not yet ruled on matter related to PCP, but national case-law is already available about public procurements that were based on the R&D services exemption in the EU public procurement directives (see examples below).

EXAMPLE

VK Köln, Beschluss vom 26.04.2006, VK VOL 5 / 2006

The case concerned a nationwide R&D pilot project for the introduction of a mobile phone ticket system for the public transport sector. According to the draft contract, the contractor did not have to provide an end product. The procurer, a transport association whose members are transport operators and public authorities, had selected 8 companies to submit an offer. When the first offers didn't meet his need, the procurer requested a modified offer. One supplier, who was not invited to the negotiations, initiated legal action. Amongst others, the claimant argued that the contract was not a research and development services contract within the meaning of section 100(2) lit.n of the German Procurement Act (Gesetz gegen Wettbewerbsbeschränkungen - GWB), as it went beyond the conceptual nature of mere research and development.

The court determined that the service to be awarded was a R&D service within the meaning of Article 100 (2) GWB. The aim of the contract was to gain a nationwide standard for a mobile phone ticket system ticket including a technically reliable process with high customer acceptance. Moreover, the Court concluded that the procurer would only receive non-exclusive rights, the business process for mobile ticketing remained open for third parties and after the successful pilot is finished, the transport operators and public authorities would (in compliance with applicable procurement law) decide about finding a company to operate and implement the system.

EXAMPLE

VK Südbayern, Beschluss vom 27.09.2002, 36 - 08 / 02

This case concerned the detection and analysis of potential military hazardous waste sites in Bavaria. Three suppliers were invited to submit an offer. When the procurer awarded the project to supplier Y, one of the other suppliers initiated a legal action, complaining among others that the procurer was indeed obliged to follow a formal procurement procedure, as the project didn't fall under the R&D exception of Art. 100 Abs. 2 GWB (Gesetz gegen Wettbewerbsbeschränkungen - GWB).

The Court fully agreed with the supplier, and concluded that the R&D contract would not be excluded from the scope of procurement law, since (1) the service cannot be considered as R&D service, but as analysis of existing files, archives and photographic materials and (2) the service is fully remunerated by the procurer and the results will become property of the procurer, who is by law obliged to procure such services; whether the results will then also be delivered to other authorities, to scientists or the general public was irrelevant for the court.

Because of its exemption from the public procurement directives, PCP procurements are also not subject to the remedies directives. Non-applicability of the Remedies Directive means that the review procedure regime and hence inter alia the following obligations as stipulated by the Remedies Directive are not applicable:

- jurisdiction of national review bodies
- ex ante communication of contract award decision and standstill period
- interim measures by review body
- minimum time limits for review applications
- declaration of contracts ineffective that are illegally awarded without prior publication or in breach of the standstill period

However, even in absence of the Remedies Directive, the above-mentioned obligations could be established by the national law of the respective Member state. Further, EU primary law also might impose some obligations with regard to judicial protection.

Although PCP is exempted from the European Public Procurement Directives, it remains subject to the principles established under the TFEU, the EU State aid rules¹⁴ and any national legislation implementing the above. Moreover, a legally-compliant approach to PCP is described in the PCP Communication and related PCP Staff Working Document.

¹⁴ Commission, 'Framework for state aid for research and development and innovation' C(2014) 3282 (2014 State Aid Framework).

The PCP Communication and the PCP Staff Working Document

The PCP Communication defines PCP as an instrument to commission R&D services in the form of a three-stage approach process, based on:

- (i) risk-benefit sharing according to market conditions,
- (ii) competitive development in phases, and
- (iii) the clear separation of the R&D phase from deployment of commercial volumes of end-products.

Moreover, the PCP Staff Working Document provides an example on how to conduct a PCP process in line and full compliance with the EU legal framework.

The TFEU principles

The Court of Justice of the European Union ('Court') has not yet judged in matters related to PCP. The Court has though decided in a series of cases on the applicability of the Treaty provisions to the procurements of contracts that (partially) fall outside the scope of the Public Procurement Directives (e.g. contracts with a value under the threshold set by the public procurement directives). The Court applies a consistent approach to all these cases. This suggests that the Court would apply the same interpretation of the Treaty principles and the same reasoning when considering PCP contracts.¹⁵

The Court decided that the Treaty is applicable to contracts that present a certain cross-border interest (when companies from other Member States are potentially interested in bidding for the tendered contract).

A certain cross-border interest – Coname and SECAP cases

The Coname case¹⁶ concerned a non-competitive award of a service concession. The Court decided that the Treaty is applicable, unless it can be proven that undertakings from other Member States would not be interested in the contract. Only special circumstances, such as '*the very limited economic value*' of the contract could justify non-applicability of the Treaty.

In case of a certain cross-border interest, the Court decided that the non-discrimination principle and the transparency principle apply. The transparency principle entails an obligation for the procurer to allow access to an appropriate information regarding the contract before it is awarded, '*so that, if an undertaking from another Member State had so wished, it would have been able to express its interest in obtaining the contract*'.

In the SECAP cases¹⁷ which dealt with the discriminatory nature of a national legislation imposing the automatic exclusion of abnormally low tenders in contracts with a value below the threshold, without granting

¹⁵ Ramona Apostol, 'Trials and Tribulations in the implementation of pre-commercial procurement in the European Union' (Springer Verlag 2016, forthcoming).

¹⁶ Case C-231/03 *Coname* [2005] ECR I-7287.

¹⁷ Joined Cases C-147/06 and C-148/06 *SECAP SpA and Santorso Soc. Coop. Arl. Comune di Torino* [2008] ECR I-3565 (SECAP cases).

the opportunity to tenderers to prove that their offer is genuine and viable, the Court provided additional circumstances that indicate the presence of a cross-border interest: the monetary value of the contract in question, in conjunction with its place of execution and its technical complexity.

This has also been established in Belgian national case-law.

Council of State (Belgium) 23 december 2015, nr. 223.335 KINEPOLIS MEGA

In the KINEPOLIS MEGA case, the Belgian Council of State ruled that a contract concerning a land lease, although not a public procurement contract, should be awarded according to the TFEU principles, when the contract has a certain cross-border interest. In this specific case only a few articles were published in newspapers with few information regarding the contract (scope etc.). Given the fact that the value of the contract was over 6 million euros in total and the location where the land lease would be granted was in Antwerp, a Belgian city, not far from the border with the Netherlands, were sufficient indications for the Council of State to rule that the contract had a certain cross-border interest. In that respect the Council of State judged that the contract was not awarded according to the TFEU principles since the principle of transparency was insufficiently observed.

Based on the Court's case-law, one can conclude that PCP will generally present cross-border interest and will need to comply with the TFEU principles.

In several cases, the Court explained which concrete obligations derive from the application of the Treaty principles of non-discrimination, equal treatment and transparency in cases of procurements exempted from the Procurement Directives. These obligations are outlined in the box below. They equally apply to a PCP.

In the SECAP cases, the Court ruled that the equal treatment principle is breached when national legislation does not allow tenderers the possibility to prove that their bids are genuine and viable, despite offering a low price.

In the Wall case,¹⁸ which regarded the change of a subcontractor in a service concession contract, exempted from the application of the Procurement Directives, the Court judged that the equal treatment principle prohibits a change of subcontractor, even when this change was foreseen in the contract, if the use of one subcontractor rather than another was a decisive factor in concluding the contract. A change of the subcontractor under these circumstances would amount to a substantial amendment that demonstrates the intention of the parties to renegotiate the essential terms of the contract. In this case, the procurer should start a new award procedure.

¹⁸ Case C-91/08 *Wall AG v Stadt Frankfurt am Main* [2010] ECR I-0000 (Wall case).

In May 2010, the Court of First Instance validated the 2006 Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives.¹⁹ It decided that the Commission's Communication limited itself to explaining the obligations arising from the fundamental principles of the Treaty and did not create new obligations for public procurers.²⁰ The Court of First Instance thereby validated this Communication in which the Commission stated that contracts (partially) excluded from the Procurement Directives need to be awarded following a competitive procedure, whenever a cross-border interest cannot be excluded. The Commission detailed the procedural steps:

- prior publication of an advertisement of the public contract through a sufficiently wide coverage medium, including a description of the award procedure;
- non-discriminatory description of the subject-matter of the contract;
- use of non-discriminatory selection criteria;
- recognition of equivalent diplomas, certificates and other evidence of formal qualifications from other member States;
- allowing sufficient time for expressions of interest and submission of offers;
- prior announcement of the rules for award;
- avoiding de facto unjustified advantages to a specific tenderer (for example by providing the same amount of information).

The EU State aid rules

According to the 2014 State Aid Framework, the Commission will consider, a priori that, in principle, 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 procurer and the risks taken by the participating economic operators, when the following cumulative conditions are met:

- a) the conduct of R&D services procurements via open, transparent and non-discriminatory procedures, based on objective selection and award criteria provided upfront in the tender documentation;
- b) the upfront provision of contractual arrangements describing all rights and obligations of the parties, including with regard to Intellectual Property Rights (IPR);
- c) strictly avoiding giving 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 member State concerned.

Additionally, it is required that:

- (i) all results which do not give rise to IPR be widely disseminated and any IPR are fully allocated to the public procurer; OR

¹⁹ Commission, 'Interpretative Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives' 2006/C 179/02.

²⁰ Case T-258/06 *Germany v Commission* [2010] ECR II-2027.

- (ii) the service provider to whom results giving rise to IPR are allocated is required to grant the public procurer unlimited access to those results free of charge, and to grant access to this parties, for example by way of non-exclusive licenses, under market conditions.

National legislation

In addition to the above, when implementing a PCP procurement, the legal expert should check the provisions of the national legislation governing PCP. Some Member States have translated the provisions of the PCP Communication into national legislation, giving them legal force and transforming them into binding rules for public procurers conducting this type of procurements.

EXAMPLE: National PCP legislation in Lithuania

For example, in Lithuania, the Government passed a law decree in 2015 on the approval of procedures for PCP, based on the 2007 PCP Communication. This legislation mandates the following steps in the implementation of PCP:

- Procurer prepares a description of the object of PCP and the technical specification
- Procurer submits the above mentioned documents to coordinating authority (Agency for Science, Innovation and Technology)
- The coordinating authority checks compliance of the envisaged pre-commercial procurement with requirements for approval (e.g. whether R&D services are required to develop needed functionalities and there is no evidence that market players will develop such functionalities in the nearest future (less than a year))
- Upon approval, the procurer sets up a commission to implement the pre-commercial procurement
- The coordinating authority co-finances the implementation of pre-commercial procurement and supervises the use of the funds

See dr. Deividas Soloveicik, 'Pre-commercial and Innovation Procurement in Lithuania' presentation available at http://ec.europa.eu/information_society/newsroom/image/document/2015-50/lithuania_12535.pdf

International legal framework (WTO)


The Main Parties to the WTO Agreement on Government Procurement (GPA), including the EU, have excluded R&D services²¹ from the scope of the GPA, i.e. both from the national treatment²² and the non-discrimination obligation. Except for the EEA and Stabilisation and Association Agreements with partner countries of the European Neighbourhood Policy, the EU has no national treatment and non-

²¹ Annex IV of WTO GPA

²² The national treatment obligation implies that Members do not operate discriminatory measures between domestic services or service suppliers and foreign ones.

discrimination obligations vis-à-vis other parts of the world for the procurement of R&D services, but it does for supplies²³.

As pre-commercial procurement concerns R&D services, public purchasers can decide case by case on the openness to worldwide offers and on the relevant conditions, taking into account the full potential of the European Research Area. This means that the PCP procurement could be organised so as to stimulate companies to locate a relevant portion of the R&D and operational activities related to the pre-commercial development contract in the European Economic Area or a country having concluded a Stabilisation and Association Agreement. Allowing companies from anywhere in the world to make offers regardless of the geographic location of company head offices or their governance structure would be an open and effective way for Member States to promote the creation of growth and jobs in Europe without excluding non-European firms.



As the TFEU principles apply to PCPs it is NOT allowed to restrict the participation to the PCP procurement to economic operators from a specific EU country, region or city or to require economic operators to perform a specific percentage of the R&D for the PCP contract in a specific EU country, region or city (it is not allowed to discriminate economic operators from other EU countries).

As the EEA and Stabilisation and Association Agreements with partner countries of the European Neighbourhood Policy apply to PCPs, it is NOT allowed to restrict the participation to PCP procurements to economic operators from EU Member States or to require economic operators to perform a specific percentage of the R&D for the PCP contract in the EU Member States (it is not allowed to discriminate economic operators from countries in the EEA and the partner countries having signed a Stabilisation and Association Agreement in the context of the European Neighbourhood Policy).

EXAMPLE

A valid approach of formulating a place of performance requirement for a PCP procurement would be to require economic operators to perform at least 50% of all the R&D services in the European Economic Area or in a country having concluded a Stabilization or Association Agreement in the context of the EU neighbourhood policy.

2.8.1.2 Legal framework for PPI

Innovation scope of a PPI

PPIs do not procure R&D but innovative commercial end-products/services. A PPI is started when products/services are near-to-the market or already on the market in small quantities. In order to

²³ This obligation does not only concern commercial end-products. R&D supply contracts are also not exempted from the non-discrimination obligation.

deliver those innovative solutions with the required quality/price level to the procurer for the PPI, vendors may still need to do 'innovation' activities e.g. to customise existing solutions to specific client needs and/or scale up their production chain from R&D to commercial production volumes. **According to the 2014 EU State aid framework for research, development and innovation (R&D&I), non-R&D type 'innovation' activities include:**

- **'organisational innovation'**: the implementation of a new organisational method in an undertaking's business practices, workplace organisation or external relations, excluding changes that are based on organisational methods already in use in the undertaking, changes in management strategy, mergers and acquisitions, ceasing to use a process, simple capital replacement or extension, changes resulting purely from changes in factor prices, customisation, localisation, regular, seasonal and other cyclical changes and trading of new or significantly improved products;
- **'process innovation'**: the implementation of a new or significantly improved production or delivery method (including significant changes in techniques, equipment or software), excluding minor changes or improvements, increases in production or service capabilities through the addition of manufacturing or logistical systems which are very similar to those already in use, ceasing to use a process, simple capital replacement or extension, changes resulting purely from changes in factor prices, customisation, localisation, regular, seasonal and other cyclical changes and trading of new or significantly improved products.

Applicable legal framework

PPI is, in principle, fully covered by the European public procurement directives²⁴ and the remedies directives. It is thus subject to the European public procurement legal framework implementing the TFEU principles, the state aid rules and applicable national legislation.

Public procurement legal framework and TFEU principles

In designing the procurement process and the related tender documentation, the public procurer follows the provisions established under the public procurement directives in terms of choice of procedure, the drafting of exclusion, selection and award criteria, the drafting of tender specifications and the like.

The legal expert should check the tender documentation for compliance with the legal rules for the formulation and application of the procurement criteria (e.g. technical specifications, exclusion grounds, selection criteria, award criteria). The legal expert should also check compliance with any other relevant national legislation governing the industry sector in which the procurement takes place. Furthermore, the legal experts should ensure compliance of the procurement with the principles established by the TFEU. The public procurement directives include specific provisions in this respect

²⁴ Exceptions from the applicability of the European Public Procurement Directives are expressly regulated there under and are of strict interpretation.

in the very first recital thereof, which states that *“The award of public contracts by or on behalf of Member States’ authorities has to comply with the principles of the Treaty on the Functioning of the European Union (TFEU), and in particular the free movement of goods, freedom of establishment and the freedom to provide services, as well as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency.”*

EU Competition rules

Compliance with EU competition rules should also be ensured to avoid State aid in PPI.

As a general note, art. 107(1) TFEU qualifies as incompatible with the common market any aid granted by a Member State or through state resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods, as long as it affects trade between Member States. In order to qualify as state aid and thus be subject to the prohibition aforementioned, four cumulative conditions must be met: (i) the measure has to be granted out of State resources; (ii) the measure needs to confer an economic advantage to certain undertakings; (iii) the advantage needs to be selective and distort competition; and (iv) the measure has to affect the trade between Member States.²⁵ Most of the above conditions could easily be met by certain public procurement activities:²⁶ public contracts are financed from State resources, the award thereof is selective and the effect on trade between Member States could be significant. The one thing that requires additional analysis is whether the public contracts awarded pursuant to public procurement procedures confer an economic advantage to the contractor which it would not receive under normal market conditions.²⁷

The official position of the European Commission is that as long as a public contract is awarded in line with an open or restricted procedure as defined by the public procurement directives, will normally not amount to the grant of state aid.²⁸

RELEVANT CASE LAW

In the **London Underground Public-Private Partnership case**, the Commission concluded that *“when these types of infrastructure arrangements are concluded after the observance of an open, transparent and non-discriminatory procedure, it is, in principle, presumed that the level of any market sector support can be regarded as representing the market price for the execution of the project. This conclusion should lead to the assumption that, in principle, no State aid is involved”*.

See Case N 264/2002 London Underground Public Private Partnership, para 79

²⁵ Dr. Albert Sanchez Graells, ‘Public Procurement and State Aid: Reopening the Debate?’, available at <http://ssrn.com/abstract=2037768>.

²⁶ S. Arrowsmith, ‘The Law of Public and Utilities Procurement’, 2nd edition, London: Sweet and Maxwell (2005)

²⁷ A. Doern, ‘The Interaction between EC Rules on Public Procurement and State Aid’, 13 P.P.L.R. 97 (2004).

²⁸ Framework for State aid for research development and innovation (2014/C 198/01) para 32.²⁹ Joined cases T-116/01 and T-118/01, *PuO European Ferries (Vizcaya) SA and Diputación Foral de Vizcaya v Commission* [2003] ECR II-2956, para116.

ECJ's judgement in the **Altmark Case** backs the European Commission's established presumption that no State Aid incompatible with the TFEU exists where the award of the contract:

is a pure procurement transaction and the procurement procedure is compliant with the EU public procurement directives and suitable for achieving best value for money – in as much as no economic advantage which would go beyond normal market conditions will usually arise under these circumstances.

See Case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH* [2003] ECR I-7747

However, when another public procurement procedure is applied (in compliance with the 2014 Public procurement Directives), the State aid rules do not consider the public procurement procedure automatically State aid free. For example, when the procurement is not in line with the actual needs of the procurer, State aid rules may be breached.

Joined Cases T-116/01 and T-118/01 PVO European Ferries (Vizcaya) SA and Diputación Foral di Vizcaya v Commission

The European Court of First Instance ('CFI')²⁹ ruled that a purchasing decision which does not correspond to 'actual needs felt by the authorities' involves State aid even when the purchase was made on market conditions which a private investor would have accepted (regarding for example duration, and price). In this case, the public authority had bought a much larger number of transportation vouchers from the private transportation supplier than there was demand for (the end-users were in this case private citizens who availed themselves of the transportation services).

Whenever the procurer has doubts regarding compliance with the State aid rules, it should notify the envisaged procurement to the European Commission for state aid assessment and/or to national competent authorities.³⁰

²⁹ Joined cases T-116/01 and T-118/01, *PVO European Ferries (Vizcaya) SA and Diputación Foral di Vizcaya v Commission* [2003] ECR II-2956, para 116.

³⁰ In Greece for example, the Central State Aid Unit (CSAU).

RELEVANT CASE LAW – THE WELSH PUBLIC SECTOR NETWORK SCHEME³¹

In 2007, the UK authorities submitted a notification regarding a procurement of high bandwidth network services by the Welsh Assembly Government for public sector organizations in Wales.

Background:

Traditionally, public procurers in Wales had their own networks, which were procured separately by the different public service organizations. This approach resulted in higher costs, lack of sufficient connectivity and duplication of resources, the fragmentation and lack of interconnectivity, interoperability and common network standards between the Welsh public service bodies which translated into a reduced efficiency of public services and hampered their improvement. Based on these pre-requisites, the Welsh Assembly Government decided to award a service contract for the provision of consolidated network services, including: (i) a collective electronic communications network service consisting of a range of core infrastructure services; (ii) an initial connection of selected public sector organizations (around 1000 connections shared between the Health Service, local government and the Higher Education / Further Education Sectors).

Scope of the centralized procurement:

- common standards of service;
- increased interoperability;
- extended service reach throughout Wales;
- improved public sector service delivered to citizens;
- avoiding duplications;
- reaching economies of scale.

Conduct of the procurement:

Procedure: competitive dialogue procedure in compliance with the Directive 2004/18/EC;

Award criteria: MEAT, comprising several sub-criteria concerning commercial, technical and quality aspects, risk distribution and contractual compliance;

Specific mechanisms were also considered to ensure that the price paid would remain cost effective (gain sharing, benchmarking by means of independent reviews of tariffs and service performance, etc.).

The state aid assessment was conducted prior to the award of the contract and the main scope of the assessment was to check whether the procurement as described above provides an economic advantage to any undertaking within the meaning of article 107 TFEU (former article 87 EC Treaty).

³¹ Ibid. 24.

In assessing the presence of state aid, the Commission looked at the way the tender documentation was drafted and how the procurement procedure was conducted. The Commission also verified the presence of State aid concerning the users of the network and third parties. The Commission's conclusion was that the procurement of the Welsh Public Sector Network Scheme does not constitute State aid within the meaning of article 107 TFEU (former article 87 EC Treaty).

Findings of the Commission:

The award of the contract would not provide any economic advantage to the service provider which would go beyond market conditions;

the award of the contract was a pure procurement transaction, aiming to satisfy a public need (the objective was to purchase network services for UK public service organisations);

the award procedure was conducted in line with the EU procurement directives, using a competitive procurement procedure with prior publication at EU level in which any economic operator could request to participate under equal conditions;

the award criteria (MEAT) corresponds to the objective of achieving best value for money;

the contract did not give rise to extra advantages to the service provider beyond the scope of the contract (beyond the initial order fixed in the public service contract, there was no obligation for the public service organisations to use the connectivity services provided by the service provider);

the provision of the network services did not result in additional spare capacities which could have been exploited commercially;

there were appropriate mechanisms to ensure cost-effectiveness over the whole duration of the contract (e.g., benchmarking by means of independent reviews of tariffs and service performance, etc.);

The users of the network were all part of the public administration and exercised public functions (e.g., the National Health Service Wales, local authorities, fire services, police, national parks authorities, the Welsh Assembly Government and the National Assembly for Wales, higher and further education and assembly sponsored public bodies, such as the Welsh language board); these entities were not found to exercise an economic activity and hence did not qualify as 'undertakings' under the State aid rules;

the network was not considered to provide an advantage to third party operators given that the need for significant new infrastructure was unlikely and wholesale access was not envisaged beyond potentially existing regulatory requirements.

See Case N 46/2007 "Welsh Public Sector Network Scheme", United Kingdom, of 30.5.2007, available at http://ec.europa.eu/competition/state_aid/cases/218491/218491_683319_19_2.pdf

[International legal framework \(WTO\)](#)

PPIs are subject to the WTO government procurement agreement unless the type of product/service procured or the type of procurer that is implementing the PPI is specifically exempted from the WTO.

2.8.2 Legal considerations on drafting the tender documentation

A) Type of procurement approach to be followed

In case of **PCP**, it is recommendable to use an open-like procurement (similar to the open procedure described in the Procurement Directives), in order to ensure compliance with the Treaty principles and the EU State aid rules. Such a procedure entails that the market is challenged in an open and transparent way, that the procurement documentation is published in advance and that all requirements are non-discriminatory and are clearly described therein. All interested market players are invited to submit an offer. Following the deadline for submission, the offers are evaluated based on the criteria described in the published procurement documents.

In principle, it is recommendable that a minimum number of 4 (four) suppliers are awarded Framework Contracts and a PCP Phase 1 contract for conducting a feasibility study (see Module 1). Each supplier will need to pass an assessment of outputs, as a pre-condition for the advancement to the next phase. The legal adviser should ensure that clear criteria are defined for the assessment of the outputs at the end of each Phase. Separate criteria should be defined to assess whether the outputs are satisfactory (for the purpose of payments) and successful (for the purpose of bidding for the following Phase Contract).

Assessment criteria should be defined in objective and measurable terms to avoid giving too much flexibility/subjectivity to the assessors who perform the end of phase assessment, in consideration of the nature and characteristics of each phase.

In case of **PPI**, the legal adviser of the public procurer should make sure that the choice of the applicable procurement procedure complies with the Public Procurement Directives. The types of procedures that could be considered are presented in section 2.8.2 of Module 2.

The chosen procedure could be adapted to the specificities of **PPI**, for example by including conformance tests. The purpose of the conformance tests is to check whether the innovation truly performs at the levels described in the offer and requested in the tender documents, and whether it shows reliability in the medium to long-term (particularly in the case of IT systems).

The demonstration phase (conformance testing) will precede the final award. The legal adviser should ensure that the conformance testing procedure and the acceptance criteria are clearly described in advance in the procurement documents and are applied in the same manner to all the suppliers.

Examples of tested requirements

- (i) **Capacity:** minimum applications memory per processing unit, file system utility, storage management product, weigh racks before installation, meter racks and cooling infrastructure.
- (ii) **Performance:** for example, external networks connectivity and performance, archive and backup performance, system resilience, start-up and shut-down tested during availability tests.
- (iii) **Functionality:** for example, verify whether the system admin can authorize a user to become an application provider; verifies whether the system only accepts a job description written in a language that is standardized or proposed for standardization.
- (iv) **Flexibility:** upgrades to current system and future technology roadmaps, field upgradability and time to upgrade.

Source: <http://wwwis.win.tue.nl/2R690/projects/spingrid/atp.pdf>

B) Defining the subject-matter of the contract and the technical specifications

Defining the subject-matter of the procurement contract

The subject-matter of the contract is the product, service or work that is being procured.

In the case of **PCP**, the subject matter of the procurement contract is R&D services. The applicability of the procurement principles entails that the subject-matter is defined in clear and non-discriminatory terms.

In the 2006 Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives,³² it is clarified that the subject-matter of contracts (partially) excluded from the Procurement Directives should be described in a non-discriminatory manner.

Succhi di Frutta case (C-496/99)

The Court clarified that the transparency principle “implies that all the conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner in the notice or contract documents so that, first, all reasonably informed tenderers exercising ordinary care can understand their exact significance and interpret them in the same way and, secondly, the contracting authority is able to ascertain whether the tenders submitted satisfy the criteria applying to the relevant contract” (para.111).

³² Commission, ‘Interpretative Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives’ 2006/C 179/02.

In the case of **PPI**, the new Public Procurement Directives do not prescribe what the public procurer should purchase, but rather how to conduct the procurement processes.

However, the Public Procurement Directives require that tender requirements are linked and proportionate to the value and objectives of the contract.³³ This means that the public procurer should define the subject-matter by providing an accurate description of its needs, which justifies setting advanced technical requirements. In the case of innovation procurement, for example, the description of the subject-matter should underline the stringency and importance of the targeted public objectives which should be addressed in an innovative way.

EXAMPLE HOW TO DESCRIBE THE OBJECT OF THE TENDERED CONTRACT

“Erasmus University Medical Centre (Erasmus MC) is renewing its bed washing facility to provide enough clean and disinfected beds for its daily operational needs. This currently exceeds 70,000 beds per annum and is expected to increase. The existing machine is labor intensive and uses a large volume of water and energy to operate. In brief, it is expensive and out of step with the hospital’s sustainability policies and objectives”, to meet the identified need for “a sustainable and low carbon solution to deliver 70,000 clean beds and mattresses per year”.

Source: ERASMUS MC; see www.ecoquip.eu

Defining technical specifications

Technical specifications are minimum requirements that any tender should meet or possess in order to compete for winning the public contract. They are directly related to the characteristics of what is being procured, and not to the general capacities or qualities of the bidder.

In case of **PCP**, the technical specifications should be compliant with the Treaty principles. According to the Commission’s Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives,³⁴ these rules are:

- the characteristics required of the contract do not restrict participation of economic operators from other Member States.
- the characteristics required of the contract do not favour a certain solution that is being developed by one specific economic operator;
- equivalent means of proof should be accepted;
- the technical specifications are published in the call for tenders;
- the technical specifications are clearly described in order to enable all normally informed and diligent economic operators to formulate a suitable tender;
- the technical specifications are applied to all tenders in the same way;

³³ See recitals (75), (83), (97) (104) of the new Public Sector Directive. See also article 42(1) of the new Public Sector Directive.

³⁴ Commission, Interpretative Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives (2006/C 179/02) p.5.

- time-limits for submission of offers are long enough to allow undertakings from other Member States or undertaking who did not participate in the market consultation, to make a meaningful assessment and prepare their offer.

IMPORTANT!

Due to the phased approach in a PCP and the competitive development of the innovative solution in phases, technical specifications and requirements could get more detailed and complex from one phase to the next, also triggering a need to increase the allocated resources. Clear provisions should be included in the tender documents to enable this.

In the case of **PPI**, the Public Procurement Directives define extensive obligations for the definition of technical specifications,

To encourage innovation, the Public Procurement Directives³⁵ allow public procurers to formulate the technical specifications in the following ways:

1. by defining themselves the desired performance and functions, without reference to a standard as proof of compliance;
2. by reference to standards, and in order of preference to:
 - national standards transposing European standards;
 - European Technical Assessments;
 - common technical specifications;
 - international standards;
 - other technical reference systems established by the European standardization bodies;
 - national standards;
 - national technical approvals;
 - national technical specifications relating to the design, calculation and execution of the works and use of the supplies;
3. by specifying performance and functional requirements and requiring a certificate of compliance with a certain standard as proof of compliance;



According to article 42(3)(a) of the Public Sector Directive and, respectively, article 60(3)(a) of the Utilities Directive, the performance or functional requirements should include parameters that are sufficiently precise to allow tenderers to understand what is being procured and to allow the procurer to objectively determine compliance with the requirement.

³⁵ Article 42 and Annex VII of the 2014 Public Sector Directive and article 60 and Annex VIII of the 2014 Utilities Directive.

EXAMPLE of performance requirements:

“By 2012, the procurer wants all its mattresses and pillows not classified as hazardous waste to be recycled, repurposed or reused instead of going to landfill; and to reduce to 2 per cent the number of mattresses disposed of as hazardous or clinical waste”.

Source: BIS, Forward Commitment Procurement, Know How Programme Part 1
<https://www.gov.uk/.../khp1b-fcp-principles-into-practice.ppt>

4. by reference to standards for certain characteristics and by reference to performance or functional requirements for other characteristics.

Where reference is made to a European standard or, in the absence thereof, to a national standard, tenders based on equivalent arrangements should be considered by public procurers. It should be the responsibility of the economic operator to prove equivalence with the requested standard.

5. by using the appropriate underlying specifications of labels, while requesting the label as proof of compliance with those specifications.³⁶

A procurer can only require a label if all of its requirements are linked to the subject-matter of the contract and the label meets certain standards of objectivity, transparency and availability to the market;

Even where such a label is required, the procurer must still accept labels meeting equivalent criteria and, in cases where bidders cannot obtain a label within the relevant time limits for reasons not attributable to them, other appropriate forms of evidence;

All technical specification, should comply with the following general rules:³⁷

- are published upfront in the tender documentation;

Enterprise Focused Solutions v Spitalul Judetean de Urgenta Alba Iulia (C-278/14)

The Court decided that the procurer may not exclude the offer of a tenderer based on non-compliance with a technical specification that was not mentioned in the contract notice. In this case, the procurer had excluded Enterprise Focused Solutions from the award procedure, because its products allegedly processors of its offered computers had reached their ‘end of life’ and were not being produced anymore.

³⁶ In Case C-368/10 Commission v Kingdom of the Netherlands, the Court of Justice seemed to take the view that technical specifications should always refer to the criteria underlying a label instead of just the label itself, unless those criteria are set out in legislation (paras 67-70 of judgment). Note however that this judgment was delivered prior to the new, more stringent requirements for labels introduced under the 2014 directives. See Article 43 of the 2014 Public Sector Directive and article 61 of the 2014 Utilities Directive.

³⁷ Article 42 of the 2014 Public Sector Directive and article 60 of the 2014 Utilities Directive.

- lay down the characteristics required of a works, service or supply (specific process or method of production or provision of the requested works, supplies or services or to a specific process for another stage of its life cycle);
- are proportionate to the value and objectives of the procurement;
- afford equal access to the procurement to all potentially interested bidders; to this end, technical specifications shall not refer to a specific make or source, or a particular process which characterizes the products or services provided by a specific economic operator, or to trade marks, patents, types or a specific origin or production with the effect of favoring or eliminating certain undertakings or certain products.

Case C-368/10, European Commission v The Netherlands (the “Coffee Arrest case”)

This case regarded a tendering procedure for a public contract for the supply and management of drink dispensing machines and of coffee with the Max Havelaar label. The European Court of Justice found that the public procurer has laid down a technical specification incompatible with Article 23(6) of Directive 2004/18 by requiring that certain products to be supplied were to bear a specific eco-label (Max Havelaar label in this case), rather than mentioning the desired specifications of the label and allowing tenderers to prove compliance by equivalent means (e.g. another label).

- do not create any unjustified obstacles to competition; as a consequence, the requirements should not favour a specific economic operator by mirroring key characteristics of the supplies, services or works habitually offered by that economic operator; they should reflect the “diversity of technical solutions standards and technical specifications in the marketplace, including those drawn up on the basis of performance criteria linked to the life cycle and the sustainability of the production process of the works, supplies and services”,³⁸
- are described in sufficiently clear and precise terms in the tender in order to encourage economic operators to compete in the procurement procedure.
- are verifiable, such as to enable the public procurer to make an objective choice for the best offer.
- shall, when applicable and except in duly justified cases, take into account accessibility criteria for persons with disabilities or design for all users;
- may also specify whether the transfer of intellectual property rights will be required.

GUIDELINES TO KEEP IN MIND WHEN TECHNICAL SPECIFICATIONS IN PPI PROCUREMENTS ARE FORMULATED BY REFERENCE TO STANDARDS

- reference to technical standards can be included directly in the technical specifications;

³⁸ Recital 74 of the Public Sector Directive and, respectively, Recital 83 of the Utilities Directive.

- The legal expert should ensure that the standard's requirements are not replacing the advanced requirements that were identified as innovative during the IPR search and market consultation.

The Public Procurement Directives allow the use of standards and other technical specifications issued by formal standardization bodies at EU, international and national level. These standardisation bodies have non-discriminatory procedures in place, that ensure broad participation by industry.

- when reference to a standard is used, it must be accompanied by words “or equivalent”, which means that tenders based on equivalent arrangements (equivalent standards or equivalent solutions not certified according to a specific standard) must be accepted by the public procurer; This will allow suppliers to propose a new solution that has not (yet) been certified in accordance to the standard; the responsibility to prove such equivalence rests with the tenderers; means of proof include third-party verified evidence, technical dossier from the manufacturer etc.;
- existing standards that represent common practice in various sectors in Member States should be identified³⁹;
- requiring -in the case of long term contracts- the contractor to take into consideration standards that are newly released during contract implementation, approach which has the potential to stimulate the contractor to adapt during contract implementation its products/services to higher level requirements stemming from newly arriving standards; [*also see section G) on value engineering below*]
- at the evaluation phase, the public procurers should possess sufficient expertise to evaluate the equivalence of other solutions based on different standards than the specified one or based on other proof (such as a technical dossier etc.) as well as the performance of the product above the requirements of the standard.

GUIDELINES TO KEEP IN MIND WHEN TECHNICAL SPECIFICATIONS IN PPI PROCUREMENTS ARE FORMULATED BY REFERENCE TO LABELS

A procurer may refer to a specific label or eco-label as proof of compliance with the technical specifications in a PPI procurement, exclusively when the following conditions are cumulatively fulfilled:⁴⁰

³⁹ This can be done by verifying the existence of national standards with national certification bodies in each of the countries concerned. Moreover, note should be made that, in some countries, the translation of standards into national legislation has been done by way of enactment of mandatory legal provisions, which impose the employment of a specific standard in case of specific construction projects.

⁴⁰ See article 43 of the Public Sector Directive and article 61 of the Utilities Directive. See also iSeal Alliance & Corvers, 'The role of 'labels' in the new EU Procurement Directives – Guide for ISEAL members and similar schemes' (January 2015), available at [http://www.isealalliance.org/sites/default/files/ISEAL Guidance - The role of labels in the New EU Procurement Directives v1.0\[Webinar\].pdf](http://www.isealalliance.org/sites/default/files/ISEAL%20Guidance%20-%20The%20role%20of%20labels%20in%20the%20New%20EU%20Procurement%20Directives%20v1.0[Webinar].pdf)

- All the requirements laid down in the label are linked to the subject-matter of the contract (are appropriate to define the characteristics of the supplies or services that are the object of the contract, such as characteristics of the product itself, specific process of production or provision of the requested works, supplies or services or of any stage of its life cycle, requirements related to packaging or use). In case the label includes requirements which relate to the company itself or its policy in general, the label cannot be referred to by the public purchaser;
- The label requirements are based on objectively verifiable and non-discriminatory criteria.
- The label requirements are adopted through an open and transparent procedure in which stakeholders, such as government bodies, consumers, social partners, manufacturers, distributors and non-governmental organizations may participate.
- The label is accessible and available to all interested parties.
- The label requirements are set by a third party over which the economic operator applying for the label cannot exercise a decisive influence.

When the label also sets out requirements not linked to the subject-matter of the contract (thus contrary to the first condition above), the procurer shall not require the label as such but may define the technical specification by reference to the label's specifications that are linked to the subject-matter of the contract and are suitable to define the characteristics of the subject-matter.

When using a label as means of proof,, the public procurer is mandated to accept as equivalent proof:

- other labels that confirm that the works, supplies or services meet equivalent label requirements;
- any appropriate means of proof such as a technical dossier of the manufacturer, when the economic operator has no possibility to obtain the specific label indicated by the public procurer, or an equivalent label, for reasons that are not attributable to the economic operator (e.g. the time limits established under the procurement procedure are insufficient to obtain such third party certification): It remains the responsibility of the economic operator though to prove the equivalence.
- exclusively third party verification (e.g. test reports or certificates from a specific conformity assessment body and other equivalent bodies)⁴¹, when the impossibility to obtain the label or an equivalent label certification is attributable to the economic operator.

⁴¹ Art.44 Public Sector Directive clarifies that a conformity assessment body is a "body that performs conformity assessment activities including calibration, testing, certification and inspection accredited in accordance with Regulation (EC) No 765/2008 of the European Parliament and of the Council".

C) Defining exclusion criteria

For PCP, there are no European, but there may be national, legal provisions mandating the public procurer to exclude economic operators from the competition when these find themselves in certain situations related to their criminal record or related to their economic ability to perform a public contract. Moreover, the exclusion grounds that are mentioned in the Public Procurement Directives⁴² could also be used in PCP. This is common practice followed by most of the EU-funded cross-border PCPs.

EXAMPLE of exclusion criteria – Smart@Fire PCP project (http://www.smartatfire.eu)		
A1	Has your organisation or any of its directors or any other person who has powers of representation, decision or control of the organisation been convicted of any of the following offences: NOTE: Responses to these questions will be assessed as PASS / FAIL. Only those applications achieving a PASS will be put forward for further evaluation.	
NAME OF THE COMPANY:		
A1.1	Conspiracy	Yes / No
A1.2	Corruption	Yes / No
A1.3	Bribery	Yes / No
A1.4	Fraud	
(i)	The offence of cheating the Revenue	Yes / No
(ii)	The offence of conspiracy to defraud	Yes / No
(iii)	Fraud or theft	Yes / No
(iv)	Fraudulent trading	Yes / No
(v)	Defrauding HM Revenue & Customs	Yes / No
(vi)	An offence in connection with taxation in the European community	Yes / No
(vii)	Destroying defacing or concealing of documents or procuring the extension of a valuable security	Yes / No

⁴² Article 57 Public Sector Directive and article 80 Utilities Directive.

(viii)	Money laundering	Yes / No
(ix)	Any other offence	Yes / No
PART A.2 –Exclusion criteria– Discretionary Pass *(see note below)		
A.2	Do any of the following apply to your organisation, or to (any of) the director(s) / partners / proprietor(s)? NOTE: Responses to these questions will be assessed as PASS / FAIL. Only those applications achieving a PASS will be put forward for further evaluation.	
A2.1	Bankruptcy, insolvency, compulsory winding up, receivership, composition with creditors, or subject to relevant proceedings	Yes / No
A2.2	A conviction (or convictions) for a criminal offence related to business or professional conduct	Yes / No
A2.3	Legal or administrative finding of a commission of an act of grave misconduct in the course of business	Yes / No
A2.4	Failure to fulfil obligations related to payment of social security contributions	Yes / No
A2.5	Failure to fulfil obligations related to the payment of taxes	Yes / No
A2.6	Failure to provide information required or providing inaccurate / misleading information when participating in a procurement exercise	Yes / No
A2.7	Failure to obtain and maintain relevant licences or membership of an appropriate trading or professional organisation where required by law	Yes / No
A2.8	Has personal or financial connection with an elected member or senior officer of the authority	Yes / No
A2.9	If the answer to any of these is “Yes” please give brief details below, including what has been done to put things right.	

For PPI, the Public Procurement Directives explicitly provide several mandatory criteria that public procurers should always include in their tender documentation as well as several facultative exclusion grounds, that the public procurer may include, or may be required by the national legislation (transposing the new Public Procurement Directives) to include. The new Public Procurement Directives also define an exhaustive list of evidence that the public procurer is allowed to require from the economic operator as proof that the exclusion grounds are not applicable.⁴³

⁴³ See articles 59 and 60(2) of the new Public Sector Directive.

The legal expert should check how these provisions have been implemented in national legislation, e.g. regarding the length of the exclusion period. In the Netherlands, for example, the mandatory exclusion criteria may not be applied after 5 years from the final conviction.

Source: art. 2.86 (7) Aanbestedingswet 2012

<http://wetten.overheid.nl/BWBR0032203/2016-07-01>

The same provision is included in the Belgian procurement legislation.

Source: art. 67, § 2

http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&table_name=wet&cn=2016061719

As a general rule, the public procurer is mandated to accept the European Single Procurement Document (ESPD) as preliminary evidence. The ESPD is a formal electronic statement by the economic operator that the grounds for exclusion do not apply and that the relevant selection criteria are fulfilled. The economic operator shall also indicate in the ESPD which public authority or third party is responsible for providing the supporting document. Through the same declaration, the economic operator will commit to obtain and provide, upon request and without delay, those supporting documents.⁴⁴ The public procurer is only allowed to request those supporting documents from the highest scored tenderer, before adopting the final award decision.⁴⁵ National legislation (e.g. Poland) may allow public procurers to request the supporting documents from other tenderers as well, under certain circumstances.

Below, we outline the mandatory and the facultative grounds for exclusion and we mentioned the permitted proof for each ground.

MANDATORY EXCLUSION CRITERIA

According to the Public Procurement Directives,⁴⁶ public procurers are **mandated** to exclude an economic operator from participation in a tender procedure when:

the economic operator (or a member of the administrative, management or supervisory body of the economic operator) has been subject of a conviction by final judgment for one of the following reasons:

- Participation in a criminal organization;
- Corruption;
- Fraud;
- Terrorist offences or offences linked to terrorist activities;

⁴⁴ See article 59 of the Public Sector Directive.

⁴⁵ See article 60(4) and Annex XII Part II of the new Public Sector Directive. Moreover, the public procurer should request evidence only in so far as it does not have the possibility of obtaining the evidence directly by accessing a national database in any Member State that is available free of charge (e.g. a national procurement register, a virtual company dossier, an electronic document storage system or a prequalification system).

⁴⁶ Art.57 of the new Public Sector Directive.

- Money laundering or terrorist financing;
- Child labour and other forms of trafficking in human beings.

The permitted proof in this case is “an extract from the relevant register, such as judicial records or, failing that, of an equivalent document issued by a competent judicial or administrative authority in the Member State or country of origin or the country where the economic operator is established showing that those requirements have been met.”⁴⁷ When such proof is not issued in the Member State or country in question, a declaration on oath or, where this is also not available, a solemn declaration made by the person concerned before a competent judicial or administrative authority, a notary or a competent professional or trade body, in the Member State or country of origin or in the Member State or country where the economic operator is established, will suffice.

The economic operator is in breach of its obligations relating to the payment of taxes or social security contributions and this has been established by a competent administrative and/or judicial body. In this case, a certificate issued by the competent authority in the Member State or country concerned shall be requested as proof.

OPTIONAL EXCLUSION CRITERIA

The public procurer **may** exclude, but is not mandated to do so, or may be required by the national legislation transposing the Procurement Directives to exclude from participation in a procurement procedure an economic operator, where:

- the public procurer can demonstrate by any appropriate means (in the absence of a decision of a competent administrative and/or judicial body) that the economic operator is in breach of its obligations relating to the payment of taxes or social security contributions;
- the public procurer can demonstrate by any appropriate means that the economic operator failed to comply with its obligations in the fields of environmental, social and labor law established by the Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X of the new Public Sector Directive and Annex XIV of the new Utilities Directive;
- the economic operator is bankrupt or is the subject of insolvency or winding-up proceedings, where its assets are being administered by a liquidator or by the court, where it is in an arrangement with creditors, where its business activities are suspended or it is in any analogous situation arising from a similar procedure under national law and regulations; In this case, a certificate issued by the competent authority in the Member State or country concerned shall be requested as proof.

⁴⁷ Articles 60(2)(a) of the new Public Sector Directive.

- the public procurer can demonstrate by appropriate means that the economic operator is guilty of grave professional misconduct, which renders integrity questionable;
- the public procurer has sufficiently plausible indications that the economic operator has entered into agreements with other economic operators aimed at distorting competition;
- a conflict of interest cannot be effectively remedied by other less intrusive measures;
- a distortion of competition from the prior involvement of the economic operators in the preparation of the procurement procedure cannot be remedied by other, less intrusive measures;
- the economic operator has shown significant or persistent deficiencies in the performance of a substantive requirement under a prior public contracts, a prior contract which led to an early termination thereof, damages or comparable sanctions;
- the economic operator has been guilty of serious misrepresentation in supplying the information required for the verification of the absence of grounds for exclusion or the fulfilment of selection criteria, has withheld such information or is not able to submit supporting documentation;
- the economic operator has undertaken to unduly influence the decision making process of the public procurer, to obtain confidential information that may confer upon it undue advantages in the procurement procedure or to negligently provide misleading information that may have a material influence on decisions concerning exclusion, selection or award.

Whereas in case of mandatory exclusion criteria, the exclusion of economic operators meeting any of these criteria occurs automatically, the optional exclusion criteria, although mentioned in the tender documentation, might not always lead to an automatic exclusion of tenderers that find themselves in any of the situations covered by the optional exclusion criteria. This is an aspect which the legal expert should further investigate under applicable national legislation. For example, the applicable Dutch law and its interpretative guidance foresee that '*the assessment of whether a tenderer must actually be excluded, having regard to the general principles of Directive 2004/18, must always be **proportional** and be carried out in a non-discriminatory manner*'.⁴⁸

This approach is also confirmed from the perspective of EU law. The case-law of the Court (as well as case-law of national courts) on the optional grounds for exclusion, rejecting their automatic application, confirms the need for that consistent interpretation.⁴⁹ Procurers are under a general obligation of acting in a proportionate manner and, consequently, each decision they adopt needs to be proportionate under the circumstances and pro-competitive. Ultimately 'a contracting authority must retain the power to assess, on a *case-by-case basis*, the gravity of the circumstances that would

⁴⁸ See *Connexion Taxi Services* case, C-171/15, [EU:C:2016:506](#) (Opinion in C-171/15, para 10).

⁴⁹ See the judgment in *Forposta and ABC Direct Contact* Case that automatic exclusion (of a tenderer guilty of grave misconduct) could go beyond the discretion conferred on Member States by Article 45(2) of Directive 2004/18 ((Opinion in C-171/15, paras 51-52). See also Belgian Council of State, *Heyrman-De Roeck* case, nr. 233.383 of 5 January 2016.

lead to exclusion of the tenderer [...] and also balance them against the effects that such exclusion would have on competition'.⁵⁰ However, the legal expert should make the procurer aware of the fact that defining a more restrictive approach in the tender documentation will prevent the procurer from applying a proportionality assessment. This is illustrated in the *Connexion Taxi Services* case of the Court of Justice of the EU, described below.

RELEVANT CASE LAW

In the *Connexion Taxi Services* case, the public procurer engaged in such proportionality assessment and awarded the contract to the supplier that had been guilty of grave professional misconduct, despite having defined in the published tender documentation an automatic rejection. The tender documentation stated: 'A tender to which a ground for exclusion applies shall be set aside and shall not be eligible for further (substantive) assessment'. The Court of Justice of the European Union concluded that the procurer should strictly comply with the criteria which it has itself laid down in the tender documentation. Applying a proportionality assessment under the current circumstances would breach the principles of non-discrimination and transparency.

See *Connexion Taxi Services* case, C-171/15, [EU:C:2016:506](#) (para 30)



The legal expert should clearly define in the tender documentation any additional exclusion ground that derives from national case-law or administrative practice.

RELEVANT CASE LAW

The *Pizzo* case regarded the exclusion of economic operators for not paying an administrative tax, despite the fact that payment of this tax had not been defined in the tender documentation as exclusion ground. The Court of Justice of the European Union ruled that automatic exclusion breached the principles of transparency and non-discrimination. The procurer would need to provide the tenderer an opportunity to regularize its position by paying the administrative fee within a defined period of time.

See *Pizzo* Judgment (C-27/15, [EU:C:2016:404](#))

D) Defining selection criteria

For **PCP**, there are no legal provisions requiring or prohibiting the public procurer to apply certain selection criteria. However, the fundamental principles of the TFEU remain applicable. Consequently, the following general rules should be respected when formulating the selection criteria:

- The requirement is linked and proportionate to the subject matter of the contract.

⁵⁰ A Sanchez-Graells, [Public procurement and the EU competition rules](#), 2nd ed. (Oxford, Hart, 2015) 293.

- The requirement is indicated in the contract notice or contract documents.
- The requirement is sufficiently clear and precise.
- The requirements relate to the professional, financial or technical ability of the tenderer to perform the contract.

Moreover, in case of PCP, the public procurer should not impose strict selection requirements related, for example, to the financial capacity (e.g. yearly turnover) and professional qualifications (e.g. prior customer references) of the economic operator or other burdensome requirements. Indeed for a PCP procurement that concerns the development of new solutions that don't exist yet on the market it makes no sense to request prior customer references (as the new solutions are not deployed yet by anyone); The track record of a vendor in supplying existing solutions is not a good measure to evaluate whether a vendor will also be capable to develop totally different new solutions. Likewise, yearly minimum turnover (which is generated from other existing already deployed solutions) is also not a good measure to evaluate the tenderers capacity to develop new innovative solutions; having an impressive turnover from existing solutions does not make a vendor better placed to develop totally different new solutions. Very often new solutions that create the biggest breakthroughs are provided by new small companies that had no previous track record or turnover. Imposing burdensome selection criteria requirements could hamper thus in particular the participation of new and innovative SMEs to the tendering due to their lack of track record and financial turnover comparable to the one of big players in the relevant market.

It is recommended to allow all interested parties to tender in the PCP, including legal entities, start-ups, universities, associations, foundations. To be eligible, all legal entities should show a trustworthy and clear route to the market (e.g. a business-plan).

The principles of equal treatment and non-discrimination do not contain any obligation relating to the decision of the public procurer to allow or not suppliers to submit several tenders, when participating in several consortia. In the context of PCP, though, allowing multiple bidding by one supplier as part of various consortia, may enhance the variety of innovative solutions. It may enable the participation of innovative firms that are not individually able to comply with the selection criteria.

Moreover, an automatic prohibition to multiple bidding may breach the proportionality principle, when it is not justified by competition related concerns. The procurer should adopt the decision to allow or prohibit multiple bidding based on the information gathered during the market consultation on the structure of competition between technology vendors on specific technologies or parts thereof. In order to take the most suitable decision, the procurer may require the members of the consortia to present the justification for their decision to form a consortium.

The change of the consortium during the PCP process could also be necessary (e.g. in case of bankruptcy of the taking over of a specific technology vendor). From a legal perspective these

possibilities and the steps to be followed should be outlined upfront in order to avoid any subsequent legal debate.

In assessing the bidders' ability to perform the contract in a PCP procurement, public procurers could look into specific experience and competence of the former, relevant to the subject matter, such as: whether the bidders have the required capacity and equipment to conduct R&D activities; whether the bidders have access to or employ personnel with the required educational and professional background.

For **PPI**, the Public Procurement Directives⁵¹ define several categories of selection criteria that the public procurer is allowed to use. The public procurer is also limited to requesting only certain supporting documents that prove compliance with the selection criteria. As mentioned above, the public procurer is now mandated to accept the European Single Procurement Document (ESPD) as preliminary evidence.

The public procurer is only allowed to request those supporting documents from the highest scored tenderer, before adopting the final award decision.⁵²

Below we outline the selection criteria that may be imposed by the public procurer in a **PPI**:

[Suitability to pursue the professional activity;](#)

The public procurer may require the economic operator, whenever applicable:

- to be enrolled in one of the professional or trade registers kept in their Member State of establishment, as detailed in Annex XI of the new Public Sector Directive; or
- to hold a particular authorization or membership as may be required by their country of origin in order to be allowed to perform a certain service.

[Economic and financial standing;](#)

The public procurer may impose requirements related to the economic and financial capacity of the economic operator to perform the contract. Public procurers may require:⁵³

- That bidders have a certain minimum yearly turnover, including a minimum turnover in the area covered by the contract;



In order to support innovation and encourage the participation of SMEs to procurements, the new procurement directives specifically state that **the minimum yearly turnover** that economic operators are required to have **shall not exceed** two times the estimated contract value, except in duly justified cases (i.e., justified by the special nature of the contract object, which must be explained in the procurement documents)⁵⁴.

- Information on their annual accounts showing the ratios, for example, between assets and liabilities; this ratio may be taken into consideration where the public procurer specifies the

⁵¹ Article 58 Public Sector Directive and article 80 Utilities Directive.

⁵² See article 60(4) and Annex XII Part II Public Sector Directive.

⁵³ See article 58(2) Public Sector Directive and article 80(2) Utilities Directive.


⁵⁴ See, for example, article 58(3) Public Sector Directive and article 80(3) Utilities Directive.

methods and criteria for such consideration in the procurement documents. The methods and criteria need to be transparent, objective and non-discriminatory.

- An appropriate level of professional risk indemnity insurance.

In order to encourage innovative SMEs to bid in a PPI, the public procurer should consider the benefits of minimizing the economic and financial requirements. However, high risks associated with the implementation of the innovative solution may compel the public procurer to impose stricter economic and financial conditions.


In this case, the Public Procurement Directives allow the economic operator to team up with other undertakings and jointly submit a bid. The economic operator may rely on the financial standing of other entities, regardless of the legal nature of the links which it has with them. The economic operator is though required to prove to the public procurer that it will have at its disposal the invoked resources. One means of proving that is a formal commitment by those entities to that effect.⁵⁵

 The public procurer may also require that the economic operator and those entities be jointly liable for the execution of the contract.⁵⁶

Technical and professional ability

The procurer is given more discretion in the exact formulation of the requirements related to the technical and professional ability of the economic operator to perform the public contract. However, the public procurer may only impose requirements that relate to:

- The necessary human and technical resources; the bidders should, for example, demonstrate that they have access to or employ personnel with the required educational and professional background and that they have access to necessary research infrastructure.

 In a PPI, the public procurer should pay particular attention to the qualifications and experience of the personnel. This may prove crucial in the implementation of an innovative solution.

- Sufficient level of experience to perform the contract to an appropriate quality standard, demonstrated by similar contracts performed in the past.

EXAMPLE

“In the three years prior to the publication date of this Tender Regulation, the tenderer must have realized one other procurement the content of which falls within the area of competence identified in the technical specifications, for an amount of no less than 50.000 Euro.”

Source: Corvers Procurement Services BV

Article 19(2) Public Sector Directive.⁵⁷ Case C-226/09 *Commission v Ireland* [2010] ECR I-11807 (Commission v Ireland case).

⁵⁷ Case C-226/09 *Commission v Ireland* [2010] ECR I-11807 (Commission v Ireland case).



In a PPI, the supplier might not have prior experience with the implementation of the innovative solution. In this case, the selection criterion should refer though to contracts performed in the past that demonstrate certain competences that are crucial for the implementation of the current solution (e.g. the implementation of an IT systems with a similar level of complexity).

When formulating the aforementioned selection criteria, the public procurer should keep in mind the following rules:

- any requirements should be limited to those that are appropriate to ensure that a bidder has the legal and financial capacities and the technical and professional abilities to perform the contract to be awarded;
- all selection criteria related requirements must be related to the subject-matter of the contract;
- the required conditions for participation shall be indicated in the contract notice;
- the requirements may be expressed as minimum levels of ability;
- whenever the public procurer applies a 2-stage procurement procedure (e.g. restricted procedure or the negotiated procedure with prior competition), it may choose to award points to those economic operator who demonstrate above the minimum ability to perform the contracts. In these cases, only those economic operators who accumulate a certain number of points will be invited to submit a tender or to negotiate;
- appropriate means of proof shall be required;
- proof of compliance may also be required of other entities on the capacities of which the economic operator relies; the public procurer is mandated to request the economic operator to whom it has decided to award the contract, to submit up-to-date supporting documents showing compliance with the selection criteria, before the award becomes final.

The Public Procurement Directives also define an exhaustive list of supporting documents that the public procurer is allowed to require from economic operators as proof of compliance with the above mentioned technical and professional requirements. These means of proof are provided by article 60 of the 2014 Public Sector Directive and, respectively, article 62 of the 2014 Utilities Directive.

E) Defining award criteria

For **PCP**, the fundamental TFEU principles imply the following obligations:

1. the award of PCP contracts must be based on award criteria which are objective and relevant for the scope of the tendered contract;
2. the award criteria must relate to the tendered contract requirements;
3. the award criteria must be transparent. This means that all factors which would be taken into consideration by the public procurer when evaluating the received bids, as well as by the bidders in preparing their tenders should be disclosed.

Commission v Ireland case⁵⁷

This case shows that procurements falling outside the application of (several provisions of) the Procurement Directives (in particular article 53 of the Directive 2004/18/EC on contract award criteria), allow public procurers additional discretion in assigning scores to award criteria after the deadline for submission of bids (as long as it happens before the opening of the bids).

Commission v Ireland case: concerning the procurement of a contract exempted from the application of several provisions of the Procurement Directives (in casu, IIB services), the procurer allocated weights to the award criteria after the deadline for the submission of bids and subsequently amended them after the first investigation of the submitted bids. The Court of Justice of the European Union ruled that the obligation to publicize the weights of the award criteria before the deadline for the submission of bids is not applicable as long as the procured contract is excluded from the scope of article 53 of the Directive 2004/18/EC. As a consequence, assigning scores to the award sub-criteria after the deadline for submission of bids was allowed. However, this is not allowed after opening of the bids.⁵⁸

In case of **PCP**, in addition to price, the award criteria could include, for example, quality, implementation and impact⁵⁹. To be more clear:

1. **quality** could refer to:
 - the ability to address the challenge raised in the tender;
 - the novelty/innovativeness of the proposed solution approach (progress beyond-state-of-the-art);
 - the technological soundness of the solution concept;
2. **implementation** could refer to the quality and effectiveness / appropriateness of the proposed R&D work plan and resource allocation;
3. **impact** could refer to the added value for society/economy, the soundness of the commercialisation plan etc.

More examples of award criteria are included in section 2.8.2 of Module 2.



Demand a cost breakdown of the fixed price (quantity and unit price for e.g., personnel, material costs, subcontracting, equipment), in order to allow a follow-up on the costs actually spent; this will facilitate any follow-up project monitoring / processing of payments / audit / verification from the authority during and after the project (e.g. to prove that what was delivered qualifies as R&D services).

⁵⁷ Case C-226/09 *Commission v Ireland* [2010] ECR I-11807 (Commission v Ireland case).

⁵⁸ It should be stressed that in procurements falling within the scope of the article 53 of the Directive 2004/18/EC **the Court ruled that the procurer was not allowed** to attribute weightings to the award criteria or to define sub-criteria after the publication of the contract notice. See below case LIANAKIS AE E.A. v DIMOS ALEXANDROUPOLIS E.A.

⁶⁰ Article 67 of the Public Sector Directive and article 82 of the new Utilities Directive.

In the case of PPI, the Public Procurement Directives⁶⁰ define the **main applicable rules when formulating and applying the award criteria**:

- ✓ must be defined in clear and precise terms;

RELEVANT CASE LAW

In the **EVROPAÏKI DYNAMIKI v EIB case**, the Court of First Instance of the European Union ruled that “while the ‘ability to provide a pool of staff from own resources’ award criterion was intended inter alia to make it possible to determine whether the tenderer had staff with the relevant competences and experience ‘in sufficient number’ to respond to the EIB’s requirements for additional services, it was formulated in a vague and imprecise manner, since, [...] no ‘optimal number’ had been predefined with regard to that staff and the EIB failed to give the tenderers any precise figures in that regard”.

Source: CFI, C-461/08, EVROPAÏKI DYNAMIKI v EIB, para.149

- ✓ public procurers should award the contract to the most economically advantageous (“MEAT”) offer; this ensures better value for money and higher quality of the products / works / services offered;



In order to ensure that the solution does not substantially outweigh the cost of available solutions, award criteria regarding the whole life cycle of the product or service should be considered.

RELEVANT CASE LAW

In the **EVROPAÏKI DYNAMIKI v EIB case**, the Court of Justice of First Instance of the European Union decided that “*where a contract is to be awarded to the most economically advantageous tender, the contracting authority should set the weightings to be applied to the award criteria by ensuring that the ‘price effect’ is not neutralised or minimised in such a way that the tendering procedure might lead to the award of a public contract that is unreasonably costly in relation to the actual needs of the administration*”.

Source: CFI, C-461/08, EVROPAÏKI DYNAMIKI v EIB

- ✓ must be linked to the subject matter of the contract;

RELEVANT CASE LAW

In the **EVN Wienstrom case**, the Court ruled that an award criterion related to the amount of ‘green electricity the tenderers can supply to a non-defined group of customers’ was not linked to the subject

⁶⁰ Article 67 of the Public Sector Directive and article 82 of the new Utilities Directive.

matter of the contract in question. A lawful criterion would have been the amount of green electricity that the tenderers could annually supply to the contracting authority.

Source: CJEU, C-448/01 Wienstrom v Austria

- ✓ must not confer unrestricted freedom of choice to the public procurer; This means they must provide an objective basis for distinguishing between tenders, and be adequately specific. In the words of the Court, award criteria must be formulated in such a way that allows all “reasonably well-informed and normally diligent tenderers” to interpret them in the same way.⁶¹

A further element of the objectivity requirement for award criteria concerns **verifiability**. If award criteria relate to factors which cannot be verified by the public procurer, it will be difficult to demonstrate that they have been applied objectively. This means you should consider in advance what means of proof tenderers can offer under each award criterion and how you will evaluate this. In the Concordia Bus case, before evaluation of the tenders the Community of Helsinki had specified and published a system for awarding extra points for lower levels of noise and nitrogen oxide emissions⁶². This system was considered by the Court of Justice to be adequately specific and objective.

RELEVANT CASE LAW

In the **EVN Wienstrom case**, the Court ruled that *“where a contracting authority lays down an award criterion indicating that it neither intends, nor is able, to verify the accuracy of the information supplied by the tenderers, it infringes the principle of equal treatment, because such a criterion does not ensure the transparency and objectivity of the tender procedure”*.

Source: CJEU, C-448/01 Wienstrom v Austria, para.51

In the Concordia Bus case, the Court decided that *“criteria whereby additional points are awarded to tenders which meet certain specific and objectively quantifiable environmental requirements are not such as to confer an unrestricted freedom of choice on the contracting authority”*.

Source: CJEU, C, Concordia Bus Finland Oy Ab v Helsingin kaupunki and HKL para.66

⁶¹ See also Case C-19/2000 SIAC Construction Ltd v County Council of the County of Mayo, at para 42

⁶² In this case, extra points were awarded (amongst other factors), for the use of buses with nitrogen oxide emissions below 4 g/kWh (+ 2.5 points/ bus) or below 2 g/kWh (+ 3.5 points/bus) and with external noise levels below 77 dB (+1 point/bus).

- ✓ must have been advertised in the contract notice, including relative weighting of each criterion and sub-criteria.⁶³ In case weighting is not possible, the public procurer must provide objective reasons in this regard and the criteria shall be indicated in decreasing order of importance.

RELEVANT CASE LAW

In the **LIANAKIS AE E.A. v DIMOS ALEXANDROUPOLIS E.A. case**, the Court of Justice of the European Union decided that in a procurement governed by the Procurement Directives, the transparency and equal treatment principles prohibit the procurer to attribute weightings to the award criteria, or to define sub-criteria, after the publication of the contract notice.

Source: CJEU, C-532/06, LIANAKIS AE E.A. v DIMOS ALEXANDROUPOLIS E.A.

- ✓ must not be mixed with selection criteria (e.g., experience/general capacity);

RELEVANT CASE LAW

In the **Ambisig v Nersant case** however, the Court of Justice of the European Union ruled that ‘quality of the team’ may be used as award criterion, where the performance of the contract is intellectual in nature (in the present case, it concerned training and consultancy services) and the quality of performance depends “decisively on the ‘professional merit’ of the people entrusted with its performance, which is made up of their professional experience and background”.

Source: CJEU, C-601/13, Ambisig v Nersant, paras 30-33.

- ✓ must be suitable of objective and non-discriminatory evaluation. In other words, the procurer must interpret the award criteria in the same way throughout the entire procurement and must apply them objectively and uniformly to all tenderers.

RELEVANT CASE LAW

In the **EVROPAÏKI DYNAMIKI v EIB case**, the Court of First Instance of the European Union decided that, by requiring the successful tenderer to lower its price and alter the composition of its team, the procurer actually altered the weighting applied to the initial award criteria. In practice, the procurer accorded greater relative importance to the financial criterion than it accorded to the technical criteria, as defined in the tendering documents on the basis of which the bids had not only been prepared by the tenderers but also compared by the evaluation committee. This

⁶³ The Court has considered the level of disclosure required regarding sub-criteria in a number of cases including Case C-532/06 *Lianakis and Others*, Case C-331/04 *ATI EAC and Viaggi di Maio v ACTV Venezia SpA*, and Case T-70/05 *Evropaiki Dynamiki v EMSA*. It is permissible to withhold the weightings of sub-criteria only where these i) do not alter the main criteria, ii) do not contain elements which could have affected the preparation of bids and iii) do not give rise to discrimination against any tenderer (Case C-331/04 *ATI EAC*).

infringed the principles of equal treatment, non-discrimination and transparency, by unlawfully depriving the other tenderers of a real chance of being awarded the contract.

Source: CFI, C-461/08, *EVROPAÏKI DYNAMIKI v EIB*

This means that a contracting authority cannot add new award criteria in the evaluation that were not mentioned as such in the procurement documents.⁶⁴ Only the award criteria mentioned in the procurement documents can be evaluated. But it also means that all the award criteria mentioned in the procurement documents must be evaluated.⁶⁵

F) Deciding on the use of variants

In **PCP**, the use of variants is not necessary, as the PCP inherently requires the development of several alternative solutions in parallel. However, the public procurer could decide, on a case-by-case basis, if allowing variants is beneficial to encourage the (even more) innovative character of the bids or not.

In **PPI**, the use of variants could help the procurer compare tenders for standard solutions and tenders for innovative solutions (particularly on price).

According to the Public Procurement Directives,⁶⁶ the procurer should observe the following rules:

- the acceptance of variants must be clearly stated in the contract notice and tender documentation;
- the minimum requirements which variants must meet must also be clearly defined;
- specific 'administrative' requirements that tenderers submitting a variant should comply with must also be clearly communicated (e.g. submission of the variant tender in a separate envelope etc.).

RELEVANT CASE LAW

In the **Traunfellner GmbH vs Asfinag case**, the Court of Justice of the European Union decided that the obligation to set minimum requirements in order to consider variants is not satisfied “ where the contract documents refer only to a provision of national legislation requiring that alternative tender ensure the performance of work which is qualitatively equivalent to that for which tenders have been invited, without further specifying the comparative parameters on the basis of which such equivalence is to be assessed” .


Source: CJEU, C-421/01, *Traunfellner GmbH v Asfinag* para. 30

⁶⁴ See *OPPS* case of the Belgian Council of State, nr. 237.234 of 31 January 2017.

⁶⁵ See *Buccinum* of the Belgian Council of State, nr. 228.133 of 29 July 2014.

⁶⁶ Article 45 Public Sector Directive; article 64 Utilities Directive.

The legal expert should signal the need to distinguish in the tender documentation between minimum requirements, mandatory for both standard and variant bids, and additional requirements which are mandatory only for the standard bid, but do not need to be observed by the variant bid. In defining the minimum requirements for variants, the procurer should aim to allow sufficient flexibility in order to widen the competition and allow tenderers to bring forward alternative, innovative offers that may deliver better results than the standard solution envisaged by the procurer.⁶⁷ Recital (48) of Directive 2014/24/EU and recital (58) of Directive 2014/25/EU expressly encourage procurers to allow variants as often as possible, in order to allow innovative offers.

 The legal expert should define the same award criteria for the evaluation of both standard bids and variants. The contract should be awarded to the standard or variant tender that proves the most economically advantageous.

G) Deciding on the use of value engineering

Value Engineering (VE) offers the possibility to improve value for money during the execution of a contract, when it becomes more clear which elements of the project or the contract increase costs. For general information regarding the use of VE in innovation procurement and some example of approaches used in this respect, see section 2.8.2 (G) in Module 2.

A VE clause in public contracts may allow providers to propose, and public procurers to accept, new state of the art solutions during the execution of the public contracts. Thus, VE clauses may lead to amendments of an existing contract.

In case of **PCP** procurements, the employment of a VE clause is subject to the TFEU principles of transparency, equal treatment, non-discrimination and proportionality. Consequently, the public procurer needs to announce the intention to use VE upfront, in all the tender documents. Moreover, the PCP contract should clearly define the conditions for the application of the VE approach, in order to prevent unwarranted modifications to the procurement contract.

Whereas the above rules equally apply in case of **PPI**, any potential modifications to the procurement contracts need to be fully compliant with the provisions of the public procurement directives. In this respect, the 2014 Public Procurement Directives expressly include, for the first time, the specific cases in which public contracts could be modified during their term, in article 72 of the Public Sector Directive and, respectively, in article 89 of the Utilities Directive.

However, through the application of VE during the execution of a contract, the substantial or material core of the contract must not change. This means that the functional or performance "minimum" requirements to be accomplished to satisfy a specific need that was defined in the initial tender specifications must remain the same throughout contract implementation, and any improvement in satisfying the need that is created through VE during contract implementation results in "additional"

⁶⁷ Sanchez (2015) 397.

cost savings and quality improvements in the delivered solution. A VE clause could work in practice as an innovation clause.

VE clause – EXAMPLE

Voluntary approach: The Contractor is encouraged to develop, prepare, and submit value engineering change proposals (VECP's), targeting quality improvements and cost-savings, voluntarily. Any savings resulting from the implementation of approved VECPs shall be shared between the Contractor and the public procurer, in accordance with the pre-defined incentive sharing rates

Mandatory approach: The Contractor shall develop, prepare, and submit value engineering change proposals (VECP's), targeting quality improvements and cost-savings. The Contractor shall share with the public procurer in any net acquisition savings realized from accepted VECP's, in accordance with the pre-defined incentive sharing rates.

Source: Value Engineering: US Department of Defense (2011) A Guidebook of Best Practices and Tools

EXAMPLE of Value Engineering clause in a PPI contract

Definition

1. Value engineering

The sum of activities and actions, aiming to ensure that the [Contractor] fulfils its obligations such as to create added value for the [Public Procurer]; these activities and actions target innovative development, effective and/or efficient organization of the project or similar.

2. Value Engineering

- 2.1. The Contractor shall submit twice a year (before 15th of January and before 15th of July) to the [Public Procurer], a written proposal based on Value Engineering. The proposal shall contain the following information:
 - (i) a description of the activities that will increase the quality of the project;
 - (ii) the change in the parameters of the Total Cost of Ownership (TCO) calculation, as a direct consequence of the value engineering, as well as an analysis of the estimated savings for the remaining time of the contract;
 - (iii) a risk analysis related to the implementation of Value Engineering and the description of the planned prevention or mitigation measures;
 - (iv) an overview of those Contract clauses that need to be amended as a consequence of Value Engineering, and an overview of the reasons why these changes are needed;

- 2.2. The proposal mentioned in section 2.3 above, will be orally presented and explained by the Contractor to the [Public procurer] within 20 Business Days from the initial submission date. The [Public Procurer] may accept or reject the (amended) proposal, following its presentation. The rejection of the proposal by the [Public Procurer] shall not bear any consequence on the fulfilment of the contractual obligations by the Contractor.

2.3 Savings that are realized through Value Engineering, based on a proposal priority accepted by the [Public Procurer], will be equally shared between the [Public procurer] and the Contractor.

3.Contract cancellation and termination

3.1. Notwithstanding its right to cancel the Contract based on applicable legislation, the [Public Procurer] has the right to partially or entirely cancel the Contract, out-of-court, by registered letter, containing a notice of default with a remedy period of ten Business Days, provided that the Contractor does not comply with its obligation to submit a Value Engineering proposal, as described above.

3.2. The Party who cancelled the Contract has a right to compensation for the damage that may be caused by the cancellation, except in cases of *force majeure*.

Source: VZVZ, translation by Corvers Procurement Services B.V.

More information on Value Engineering and a glossary of terms used when defining VE clauses are available in Annex 4 of Module 2 on Value Engineering.

The VE clause is always related to quality improvements that generate savings. Sharing the savings between the procurer and the supplier acts as incentive for suppliers to engage in Value Engineering. Whenever the public procurer desires to stimulate the supplier to propose quality improvements that do not necessarily generate savings, he should design other (e.g. financial or reputational) incentives, such as financial bonuses, or supporting vendors in marketing the improved solution to other customers etc.

2.8.3 Drafting the tender documentation

2.8.3.1 The Prior Information Notice (PIN)

Prior Information Notices (**PIN**) serve the purpose for public procurers to make known in a transparent way to all potentially interested bidders on the market their intention / plan to start a procurement in the future, together with any information relevant to the upcoming procurement. For PCPs and PPIs, PINs are an important tool to inform all potentially interested bidders on the market well in advance about:

- the upcoming needs for innovative solutions, so that vendors have enough time to bring innovative solutions to the market with the required quality/price requirements in time for the procurement
- any preparatory activities (e.g. open market consultations, conformance testing) that the procurer plans to organize before the actual purchase

PINs are specifically regulated by article 48 under the 2014 Public Sector Directive and, respectively, by article 67 under the 2014 Utilities Directive, where they are referred to as '*Periodic Indicative Notices*'.

A template for announcing the PIN for a PCP and a PPI is attached to this Toolkit.

PINs to announce open market consultations in preparation of a PCP or PPI procurement

In addition to the typical information on the planned scope (innovative solution requirements), timeframe and budget of the PCP or PPI procurement, the PIN can also contain information about open market consultations that the procurer plans to organize before the PCP or PPI procurement.

In the case of **PPI**, the procurer may also require conformance testing to assess the readiness of solutions/technologies for commercial deployment. The procurer can require conformance testing to take place prior to starting the procurement procedure (before publishing the contract notice, to verify up to what degree vendors on the market are ready to meet the requirements), or during the procurement procedure (as part of the evaluation of tenders), but in any case prior to the final contract award.

DIFFERENT TYPES OF CONFORMANCE TESTING – EXAMPLES

A demonstration of the capabilities of a system prior to final award of a PPI contract may include:⁶⁸

- ❖ **On-site tests** - including all hardware installation and assemble, burn in of all components, installation of software and approved production environment, tests and benchmarks addressing functionality, performance, reliability and quality and run benchmarks to demonstrate performance commitments.

- ❖ **Factory Test** - running tests and verifications even on a subset of the system makes possible to anticipate possible problems before on-site delivery and therefore is desirable.

- ❖ **Availability tests** - usually run for 10-30 contiguous days in a sliding window of 20-60 days and require typically 98% availability – often running a selected system load. Failures taken into account for computing the availability may include unavailability of nodes, inability to access the file system, inability to login, unavailability of full switch bandwidth, inability to launch batch submission.

- ❖ **Functionality demonstrations** - are run on the configuration that will go into production and include remote monitoring, power control and boot capabilities, network connectivity, file-system functionality, batch system, system management software, program development environment and Operating System functionality.

Source: [R Blake, F Robin and M Sbrighi, PRACE 1IP Work Package 8: HPC Systems Procurement Best Practice](#)

⁶⁸ Description based on [R Blake, F Robin and M Sbrighi, PRACE 1IP Work Package 8: HPC Systems Procurement Best Practice](#).

In addition to information about the planned scope, timeframe and budget of the procurement, the PIN can also announce specific conformance testing/certification/labelling requirements that vendors will need to meet for the procurement.

The procurer has two options in the PIN for conformance testing/certification/labelling:

(1) The procurer can announce in the PIN that conformance testing/certification/labelling will take place by a specific target date (defined in the PIN) that takes place before the PPI will be started. In this case the conformance testing/certification/labelling is used as a way to check whether it makes sense to start procuring, by verifying whether by the target date "if" and "up to what degree" different solutions of different vendors can meet the desired quality/cost improvements.

EXAMPLE

The Swedish Energy Agency classifies/labels at which costs different vendors solutions reach which level of energy improvement via a conformance testing that takes place before the procurers (Swedish cities) launch afterwards PPIs. The advantages of this approach are:

- (i) each procurer (city) only needs to start the whole procurement procedure if and when it is proven that vendors have reached its requirements;
- (ii) each procurer (city) can better specify the quality/price requirements for its PPI (as he knows beforehand which level of quality improvement can be reached at which cost) and
- (iii) this simplifies the PPI procedure and enables different procurers (cities) to reuse a common conformance testing/certification/labelling for their own individual PPI procurements (e.g. the Swedish cities don't need to possess themselves any technical skills to organize the conformance testing, they can simply refer in their tender specs to the fact that they want to buy solution with energy level x and cost y as conformance tested already beforehand by the Swedish Energy Agency).

Source: http://www.bebostad.se/wp-content/uploads/2013/08/Heat_Recycling_Procurement_eng_invitation.pdf

(2) The procurer can announce in the PIN that conformance testing/certification/labelling will take place during the tendering procedure during the evaluation of offers. In this case there is the risk that the procurers starts the procurement procedure (i) at a time when the market is not ready yet to deliver the optimal solution (ii) while still lacking important information to set realistically achievable expected quality/price ratio requirements. Also in this case (iii) each individual procurer needs to have all the technical skills and financial resources to organize itself the conformance testing / certification / labelling.

In order to comply with the TFEU fundamental principles, the PIN should include clear and sufficient information about the conformance testing/certification/labelling to enable tenderers to understand whether they are able to participate (e.g. regarding location, price, scope of the testing etc.).

Moreover participation to the conformance testing/certification/labelling should not be unjustifiable restricted (e.g. on basis of nationality, location etc.).

2.8.3.2 The Contract Notice

A contract notice serves the purpose for public procurers to invite potential bidders to make offers for a specific type of service, good or work that is to be procured.

From a legal point of view, publication of the Contract Notice serves the purpose of ensuring compliance with the principle of transparency. To ensure wide dissemination of the upcoming procurement, the public procurer should publish the contract notice in TED (Tenders Electronic Daily), while the text of the contract notice should be written at least in English.

In case of **PCP**, according to the principle of transparency, the Contract Notice should be published in relevant media channels existing in each country (e.g., national procurement portals, procurer's websites, innovation procurement portals etc.). It is advisable to publish the Contract Notice at least in English and the local language of the public procurer. However, the legal expert should ensure that any language requirements set by national legislation are observed.

As PCP is addressing procurement needs for which there can be a multitude of potential technical solution approaches and for which there is a wide commercial market, PCPs are typically of interest to potential bidders from all over Europe. Therefore, although not mandatory by legislation, in the case of **PCP**, it is advisable to use the standard form for a Contract Notice⁶⁹ and to publish it voluntarily also in the Official Journal of the EU.⁷⁰

The PCP contract notice should describe relevant information that a supplier would need to determine whether the call is interesting enough to participate and/or whether it meets the tendered contracts requirements.

The contract notice shall include sufficiently information to enable economic operators to decide whether to submit a tender:

A template contract notice that can used for PCP is attached to this Toolkit.

In case of **PPI**, the Public Procurement Directives specifically regulate the contract notices under article 49 of the Public Sector Directive and, respectively, article 69 of the Utilities Directive. Accordingly, contract notices shall be issued as a means of calling for competition in respect of all procedures regulated under these directives.

⁶⁹ Available at http://simap.europa.eu/buyer/forms-standard/index_en.htm

⁷⁰ Available at <http://ted.europa.eu>

A template contract notice that can be used for PPIs is attached to this Toolkit.

2.8.3.3 The Request for Tender/Tender Regulation/Invitation to Tender

The Request for Tender is the main document that describes the object of the procurement and sets the terms and conditions governing the procurement process. The aspects discussed in the previous section (section 2.8.2) should be included in the Request for Tender, according to the specificities of a PCP or a PPI.

From a legal perspective, both in case of a PCP and of a PPI, the Request for Tender needs to include, upfront, all the information pertaining to the envisaged procurement, as well as the information that is needed by the bidders in order for them to draft and submit their tenders and to estimate whether their tenders could be successful.

Information regarding the specific information that should be included in the Request for Tender is presented in sections 2.2.3 (B) and 2.2.4 (B) of Module 2.

H) R&D services

The Request for Tenders should clarify the conditions for the execution of the activities under the PCP procurement (e.g. through the use of specific selection and compliance criteria):

- The economic operator needs to perform R&D services;
- The application of place of performance conditions, if any (see page 94 of Module 2 and section E page 32 in Module 3)
- The public procurer has the right to regularly inspect compliance with the above obligations.

2.8.3.4 The procurement contract

According to specific provisions in the PCP Communication and section 2 of the Staff Working Document, in a **PCP**, the public procurer will conclude a contract with several bidders whose offers have been accepted. Each successful bidder will thus be granted a **Framework Agreement**. The PCP Framework Agreement will cover all 3 PCP phases. For each phase, a separate Phase Contract will be concluded. The Phase Contracts will mainly describe the scope of the deliverables within each phase and the price per phase. The Phase Contracts are drafted within the general setting of the Framework Agreement. However, in case of conflict between the Framework Agreement and one or more of the Phase contracts, the former shall prevail. This approach will allow the public procurer to terminate the Framework Agreement with those economic operators at the end of each phase, in case they do not deliver successful results, and do not qualify for receiving an invitation to bid for the subsequent phase.

The **PPI** will result in the signing by the public procurer of a **Procurement Contract** (which could also, but not have to be, a framework contract or framework agreement) with the successful bidder. The

PPI Procurement Contract gives evidence of the rights and obligations of the parties thereto, in relation to the specific type of goods, works or services that are being procured. According to recital (104) of Directive 2014/24/EU, contract performance conditions must be published upfront, as part of the PIN, Contract Notice or tender documentation.

Both the PPI Procurement Contract and the PCP Framework Agreement contain general provisions. These are outlined below. Subsequently we provide an overview of the most important clauses that are specific to the PCP procurements and, respectively, the PPI procurements.

Common Provisions:

Parties' identification and parties' rights and obligations

The procurement contract must expressly include the parties' identification details, as well as their rights and obligations, in line and full compliance with the provisions of the tender documentation, contract notice and award notice.

Scope of the procurement contract

The procurement contract must expressly include the procurement contract's object.

Applicable law

The law governing the contract should also be specified in the contract. From a practical point of view it may be advisable to declare applicable the law of the country in which the activities are executed. In case of joint procurement, the public procurement directives contain specific provisions regarding the choice of law governing such procurement.

Accordingly, when several public procurers from different Member States, jointly award a public contract, they shall enter into an agreement expressly mentioning the law that will govern such procurement, unless the necessary elements of such procurement, including the governing law, have been regulated by an international agreement concluded between the Member States concerned (see article 39(4) of the Public Sector Directive).

In case of joint procurement taking the form of centralized purchasing activities, the provision of such activities by a central purchasing body located in another Member State shall be conducted in accordance with the national provisions of the Member State where the central purchasing body is located (see article 39(3) of the Public Sector Directive).

In case of institutionalized procurement taking the form of ERICs or EGTCs, the law governing the procurements carried out by them is established pursuant to the provisions of the EC Regulation No 1082/2006 of the European Parliament and of the Council of 5 July 2006 on a European grouping of territorial cooperation in case of EGTCs and, respectively, Council regulation (EC) No 723/2009 of 25 June 2009 concerning the Community legal framework for a European research Infrastructures Consortium (ERIC) as further amended by the Council regulation (EU) No 1261/2013 of 2 December 2013 amending Regulation (EC) No 723/2009 in case of ERICs.

It is important to consider the fact that some Member States regulate the procurement procedure under administrative law while the implementation of the procurement contract falls under private law, whereas other Member States regulate both the procurement procedure and the implementation of the procurement contract under private law. The legal expert should always check which legal system applies to the procurements conducted by its procurer.

Jurisdiction and competent court of law. Alternative dispute resolution

It is important to be aware of the legal regime applicable in the jurisdiction which the procurement contract falls under (see above paragraph) in order to include the court of law competent for the solving of any disputes arising out of or in connection with the procurement contract.

The contract may state a preference for alternative dispute settlement methods, particularly mediation and arbitration, as such dispute fora are often cheaper and more flexible than traditional courts of law. Nevertheless, the legal advisor should check this option under national legislation.

If the national law allows for such alternative dispute resolution mechanisms, (a) mediator(s) or (an) arbitrator(s) could be appointed from the beginning of the contract.

In the case of arbitration, it is advisable to appoint 3 arbitrators, one by each party to the contract and one arbitrator in agreement by both parties to the contract. The Rules of Conciliation and Arbitration of the International Chamber of Commerce or any mutually agreed alternative rules should be declared applicable. Such rules may include their own designation procedure of the arbitrators. Sometimes arbitrators with specialized expertise may be necessary, as in the case where the parties disagree over the acceptance of a deliverable and the conformance of such deliverable to specification. The latter would require specific technical expertise in order to adjudicate successfully.

The arbitration award should be declared final and binding on the parties, excluding any appeal. The enforcement of the award should be governed by the law of the country in which the contract is being executed.

Another mechanism to ensure speedy dispute settlement is to appoint dispute review boards or adjudicators.

EXAMPLE of dispute resolution clauses

Article - Dispute Settlement

- (i) Any disputes between the Parties, arising with reference to the interpretation, performance, validity, effectiveness and termination of this Agreement, shall be resolved in an amicable manner

(ii) The parties shall defer any disputes arising out of the present Agreement which remain unresolved to the exclusive competence of the *[insert chosen court of law]*.

(iii) The applicable law to this Agreement is the *[insert law]* law.

Article - Dispute Settlement (Mediation and Arbitration)

1. The parties shall solve disputes arising out of the present contract in an amicably manner.
2. The parties shall defer the disputes arising out of the present contract which remain unresolved to a mediation attempt managed by the *[insert which mediation body you select]*.
3. If the mediation attempt fails, the disputes arising out of or related to the present contract shall be settled by means of arbitration by *[insert which Court of Arbitration you select]*.
4. The language of the arbitration will be *[insert language]*.

Source: Corvers Procurement Services BV

Assignment

The contract should also provide that the winning bidder is not allowed to assign the obligations incumbent there upon under the contract to another entity or change potential sub-contractors mentioned in the tender without prior (written and explicit) authorization from the public procurer. Moreover, the winning bidder should remain liable for the proper execution of the sub-contracts by the sub-contractors.

Replacing the main contractor could trigger the need to organize a new procurement (e.g., when the contract was awarded to a certain contractor given its previous experience in the type of the tendered contract). In the case of PPI, however, according to article 72 of the Public Sector Directive and, respectively, article 89 of the Utilities Directive, the replacement of the contractor shall not trigger the need to organize a new procurement procedure in the following cases:

- A. the possibility for such replacement has been provided for upfront in the tender documents, in an unequivocal manner;
- B. universal or partial succession into the position of the initial contractor, following corporate restructuring, including takeover, merger, acquisition or insolvency, of another economic operator that fulfils the criteria for qualitative selection initially established provided that this does not entail other substantial modifications to the contract and is not aimed at circumventing the law;
- C. the public procurer itself assumes the main contractor's obligations towards its subcontractors, where this possibility is provided for under national legislation.

[Contract amendment during execution](#)

The general rule applicable in public procurement is that major amendments of the contract, that change its overall nature, breach the equal treatment principle, both in the case of a PPI Procurement Contract and a PCP Framework Agreement (and Phase contract).

As both PCPs and PPIs deal with innovative solutions, in both cases there may be a need for the vendor to modify its technical solution during contract execution to meet the procurement need. In cases where this requires contract modification, this is possible as long as the possibility for contract modification was explicitly foreseen in the PPI contract/PCP framework agreement and such modifications do not change the overall nature of the contract (no change to the object of the tender and the solution requirements defined in the technical specifications).

[Limitation of liability](#)

The public procurer should exclude any liability for infringements of laws in any country by the contractor by placing the burden of conformance to all local laws and regulations on the contractor. The contract shall also exclude liability of the public procurer for infringement of third-party IPR or for damages to third parties by the contractor, as well as indirect, consequential and special damages caused by the contractor under the procurement contract.

[Indemnification](#)

‘Indemnification’ refers to the duty of one party to a contract to reimburse the other party with respect to losses or injury experienced under the contract. In an innovation procurement context, indemnification can relate to losses due to third party IPR infringement claims.

A standard clause would include the IPR owner providing indemnification (for both awarded damages and legal costs) to the licensee if any third party files a suit against the licensee claiming its use of the technology infringes its IPR. An indemnification duty is rarely open-ended so it's important that a ‘cap’ of financial liability is defined in the contract.

[Transfer of IPR ownership](#)

Transfer refers to the sale or transfer of IPR ownership from one party in a licensing contract to a third party. Transfer most often occur in the context of company buy-outs, mergers and acquisitions, joint ventures or other collaboration agreements between companies. The most important point for the legal advisor is to ensure in the PCP/PPI contract that the obligations attached to the licensee continue to be performed by the new IPR owner in case of IPR transfers. This can be assured contractually by inserting a suitable ‘IPR transfer’ clause in the contract.

[Penalties and bonuses](#)

When the contractor fails to meet its obligations under the contract (delays in delivery or completion of works/services, or failure to meet the performance requirements that result in extra costs or loss of revenue or loss of other benefits), he may be mandated to pay a penalty. The total amount of the

penalties should be deducted from the contract price. In the case of late delivery, deduction could take place without formal notice. The contractor may be required to pay damages when the late delivery is due to its gross negligence.

In the case of technical shortcomings, the penalties should be imposed only after informing the contractor. When penalties are mentioned in percentages, they will be calculated on that part of the contract's price that corresponds to the portion of the contract that is not executed according to the contract. Good practice in international contracts shows that the amount of the penalties should not go beyond 10% of the value used as a basis for their calculation.

The contract could provide for the payment of a bonus to the contractors when works are completed before the contractual timeline and when this benefits the public procurers and the procurement overall.

Force majeure

When delays are caused by events not attributable to the fault or negligence of the contractor, the public procurers shall allow respite or modification of the contract delivery requirements. It is the obligation of the contractor to show that such force majeure events made the execution of the contract impossible within the time-limits specified therein. Penalties will not be charged in such cases. However, the contractor should also be required to maintain and abide by a mutually-agreed risk management plan (RMP), which details in advance certain procedures to deal with and minimize the disruption of certain unlikely events, e.g. earthquakes or other natural disasters.

The contractor should be mandated to inform the public procurer as soon as it becomes aware of an event that may cause delays in the procurement and should describe what the impact is on the cost and planning, as well as the action he undertakes to mitigate these problems.

Specific provisions in PCP Framework Agreements:

Relation between the PCP Framework Agreement and the Phase Contracts

The PCP Framework Agreement should detail:

- the names of the contracting parties (and possibly additional preferred partners that cooperate with them) and the nature of the contract (R&D services)
- the contractual provisions that define the rights and obligations of all the parties involved in the PCP that remaining binding during the entire duration of the PCP (across the different phases) such as IPR, confidentiality, publication, payment, monitoring, contract termination and/or modifications etc.
- the approach for implementing the different PCP phases (through specific contracts) with intermediate assessment of results at the end of the solution design and prototype development phases.

The PCP Framework Agreement should also clarify whether its provisions take precedence in case of conflicting provisions with the Phase Contract.

Value Engineering (VE)

A VE clause may be included in the PCP Framework Agreement. For more info on value engineering clauses see section 2.8.2 G).

Intellectual Property Rights (IPRs)

For PCPs, the Framework Agreement shall provide the regime of sharing of IPRs between the public procurer and each of the bidders, in accordance with the PCP Communication, section 4 of the related Staff Working Document and the State Aid Framework for R&D&I⁷¹. These clauses shall not be renegotiated/modified during the execution of the contract.

Monitoring performance clauses

See section 2.10 for information on how to set appropriate monitoring mechanisms to assess development during contract implementation and how to take progress made by the contractors into account.

Exit schemes

Several exit clauses could be included in the Framework Agreement establishing the terms and conditions for terminating a PCP Framework Agreement. These could regard:

- budgetary restrictions;
- insufficient competition at PCP Phase 2 and Phase 3 (e.g. when an insufficient number of supplier have delivered successful Phase result to qualify for bidding on the next Phase Contract).
- the activities do not represent R&D services.

In the PRACE PCP project⁷² for example, an exit clause was included that allows the public procurer to terminate the agreement in case the activities executed by the vendors do not represent R&D services.

Publication of R&D results

The public procurers shall inform tenderers of the procurers' right to publish - after consultation with each participating R&D provider - public summaries of the results of the PCP project, including

⁷¹ Section 2.3 article 33(d) of the State Aid Framework for R&D&I specifically provides, as one of the conditions that need to be met to exclude the state aid element, that “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 nonexclusive licenses, under market conditions.” An alternative to this approach is the wide dissemination of all results which do not give rise to IPR and the allocation of any IPR to the public procurer.

⁷² See <http://www.prace-ri.eu/IMG/pdf/d2.1.2-3ip.pdf>.

information about key R&D results attained and lessons learnt by the procurers during the PCP (e.g. on the feasibility of the explored solution approaches to meet the procurers' requirements and lessons learnt for potential future deployment of solutions). Details should not be disclosed that would hinder application of the law, would be contrary to the public interest, would harm the legitimate business interests of the R&D providers involved in the PCP (e.g. regarding IPR protected specificities of their individual solution approaches) or could distort fair competition between the participating R&D providers or others on the market. In addition, publication of R&D results could also be done by the R&D suppliers.

Templates for a PCP Framework Agreement and a complementary Phase Contract template are attached to this Toolkit.

Specific provisions in PPI Procurement Contracts:

Cancellation of the contract

The public procurers should reserve the right to cancel a contract either wholly or in part, at any time upon written notice within an agreed time period. The contractor should be mandated to collaborate in winding up the contract. When possible and depending on the scope of the procurement contract, the public procurers should take over all finished parts as well as other materials already purchased for the execution of the contract, at a fair and reasonable price. However, the public procurers will not take over parts or materials that the contractor chooses to retain.

The public procurers should also indemnify the contractor for foreseeable financial losses that are attributable to the cancellation of the contract. The amount of indemnification shall be fixed by these public procurers on the basis of evidence brought by the contractor and accepted by them. The total sum paid will under no circumstances exceed the total price of the contract.

When the contract is cancelled due to the fault of the contractor, the public procurers shall only pay the contractual value of the accepted deliverables. The contract may also provide that the penalties stipulated in the contract are also charged to the contractor for delivery after the delivery date stipulated in the contract. The contractor could, in principle, be at fault when:

- it fails to meet the technical requirements of the contract or the progress and/or delivery requirements jeopardize seriously the concerned procurement;
- it has breached the confidentiality clause;
- it transfer his obligations under the contract without prior authorization by the public procurers or does so against their explicit refusal;
- it uses fraudulent practices, such as deceit concerning the nature, quality or quantity if the delivered parts, offering gifts or remuneration as bribery to any person employed by a member of the public procurers or by the entities coordinating the concerned procurement or persons working on its behalf.

[IPR arrangements](#)

In order to encourage fair and wide exploitation of results, ownership rights of IPRs generated during the execution of a PPI procurement contract should be assigned to the party generating the IPRs, except in duly justified cases (e.g. when that party is not able to exploit them).

[Performance clauses](#)

Safeguarding the promotion of innovation should not be limited to the conduct of the tender procedure and must be given due consideration also during the implementation phase of the procurement contracts awarded in the concerned procurement. Specific clauses which aim at incentivizing contractors are often included in procurement contracts.

Contract performance clauses usually state how a contract must be carried out, in accordance with the requirements published in the tender documentation.

The Public Procurement Directives stipulate that contract clauses must be linked to the performance of the contract, namely to the tasks which are necessary for the provision of works / services procured and may not result in discrimination in favor of interested bidders from a specific Member State.⁷³

Performance clauses to be included under procurement contract could include:

- payments related to the achievement of key performance indicators, such as energy efficiency, minimization of waste, efficient use of resources, etc.;
- Provide for the possibility to implement contract extensions for innovative design alterations, however, conditioned upon mentioning this possibility under the tender documentation;
- Guarantees that the contractors having implemented the procurement successfully will be mentioned in the publicity done by the procurer about their new solution.

[Monitoring performance clauses](#)

See section 2.10 for information on how to set appropriate monitoring procedures to assess development during contract implementation and how to take the progress made by the contractors into account.

[Warranties \(more used in case of PPI construction procurements\)](#)

The contractor should be mandated to offer to the procurer warranties of at least one year against any defect in any parts of the construction. This entails that the contractor should remedy such defects at its own expense. The warranty period starts from the final acceptance of the construction. The warranty should not cover damage suffered by the public procurers or third parties resulting from the use of the parts after acceptance, unless the damage arises from gross negligence on the part of the contractor.

⁷³ See article 70 of Public Sector Directive, stating: “Contracting authorities may lay down special conditions relating to the performance of a contract, provided that they are linked to the subject-matter of the contract and indicated in the call for competition or in the procurement documents. Those conditions may include economic, innovation-related, environmental, social or employment-related considerations.”

The warranty does not extend to defects arising from misuse of the items. When defects are remedied, the period of warranty for these items extends with the period that was necessary to remedy them. When items are replaced with new ones, the warranty period of one year applies to these items, starting from the date of replacement.

2.9 Conducting the procurement procedure

2.9.1 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 and/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 phases⁷⁴) 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 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.

⁷⁴ Phase Contracts will be signed with the bidders declared successful to move from one phase to the other.

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

2.9.2 Conducting the PPI

The public procurement directives expressly provide how a PPI procurement should be conducted, once the procedure to be followed has been established. Specifically, Chapter III of the Public Sector Directive and of the Utilities Directive include express provisions regarding:

- A. the preparation of the procurement** – articles 40 – 47 of the Public Sector Directive and articles 58 – 66 of the Utilities Directive (e.g., the organization of market consultations, defining the technical specifications, setting the time limits or deciding on the division of contracts into lots);
- B. publication of the contract notice and the tender documentation and ensuring compliance with the transparency principles** – articles 48 - 55 of the Public Sector Directive and articles 67 - 75 of the Utilities Directive;
- C. selecting economic operators and awarding procurement contracts** – articles 56 - 69 of the Public Sector Directive and articles 76 - 86 of the Utilities Directive (e.g., what exclusion, selection and

award criteria a public procurer could use in the selection process, how to reduce the number of candidates, how to apply award criteria and how to conclude the procedure);

D. monitoring contract performance, amending contracts during their execution and subcontracting matters – articles 70 – 73 of the Public Sector Directive and articles 87 - 90 of the Utilities Directive

All this information needs to be included in the tender documentation and published upfront, to ensure all the interested bidders have access to it in an equal, transparent and non-discriminatory manner.

If the value of a contract exceeds the European thresholds, publication of the contract notice in the OJEU is mandatory. Infringement of this duty may lead to the whole procurement procedure being declared null and void.

EXAMPLE – Waterboot Amsterdam

In the **Waterboot Amsterdam** case, a Dutch contractor complained that a Belgian contract was only published national Belgian Bulletin of Tenders, but not in the OJEU, even though the European thresholds for European publication were reached. The contractor argued that he, as a Dutch contractor, was not correctly notified of the awarding of the contract and therefore missed out on the opportunity to submit an offer. The Council of State ruled that the contracting authority should have published the contract notice in the OJEU since the European thresholds were reached. By not doing so, basically, the whole tender procedure had to be declared null and void.

Source: Belgian Council of State 14 October 2004, nr. 136.022, Waterboot Amsterdam

During the assessment of the tenderer/tenders, the legal expert should ensure that the process takes place in accordance with the tender documentation, that procurement criteria are not modified (e.g. they are not discarded) and that they are applied equally to all the tenderers. The legal expert may also define guidance for evaluators, listing among others, the criteria against which tenders are evaluated and scoring sheets.

Based on the legal prescripts of the Procurement Directives, the following steps could be taken to organize the evaluation of the tenderers and their tenders:

1 Administrative evaluation

A potential system for evaluating offers is the one in which tenderers are evaluated in stages. The first administrative evaluation stage targets the checking of the bidders' compliance with **exclusion and selection criteria**. In this case, the administrative forms and related documentation are checked by the

evaluation committee. Once the administrative evaluation is completed, the technical evaluation will start. based on the application of **award criteria** to the offers received (see below).

2 Technical evaluation

The legal expert will define an evaluation approach that ensures objectivity and equal treatment:

- Experts will be required to score the tenders using the score sheet, based on the criteria and scoring model previously provided
- Each expert will be allocated a certain number of tenders, based on the number of all bids received and the number of available experts
- Evaluation of the tenders will be done individually
- Experts need to justify their scoring qualitatively;
- Once individual evaluations are completed, the scores for each tender will be added and total points per tender calculated
- Based on the results of the individual evaluations, it will be decided which tenders will be passed on to the decision panel
 - it is recommendable that a certain percentage of the maximum score (e.g., 60%) is set as threshold to be met by tenders in order to advance to the decision panel
 - Submission of a tender to the decision panel should also take place in cases when a tender received very different score from different evaluators.
- The numeric outcome from the individual experts could be overridden by the decision panel, subject to the provision of solid grounds for this approach
- Results of the decision panel meetings should be documented in the form of written meeting minutes. These minutes will be used by the procurer to provide reasons to unsuccessful bidders.

European Dynamics Luxembourg and Others v Commission, T-536/11

This case shows to which extent the procurer should provide detailed reasons for not awarding a contract to a bidder. The Court of First Instance judged that *“the contracting authority cannot be required to communicate to a tenderer who was unsuccessful in securing the first place in the cascade, in addition to the reasons for the ranking of its tender, a detailed summary of how each detail of its tender was taken into account when the tender was evaluated.”*

3 Conformance testing prior to contract award

The best scoring bidder may be invited to pass a conformance test before being awarded the contract. The conformance testing aims to test the innovative solutions at the site of the procurer or at the site of an independent party appointed by the procurer perform the conformance testing, before wide deployment. Examples are provided in section 2.9.2 Module 2.

4 Award the Agreement

- Both successful and unsuccessful bidders are informed on the outcome of the evaluation
- A formal, well-grounded decision notice will be sent to both categories aforementioned
 - For successful bidders, a deadline should be provided for acceptance (e.g., 10 days)
 - Unsuccessful bidders should be given the possibility to challenge the results of the assessment process and seek remedy (stand-still period)
- The results of the evaluation should be published:
 - In a contract award notice in TED
 - Optionally also in a press release
 - On the procurer's website etc.
- The contract is signed and cash advance, if applicable, is paid.

2.9.3 Conflicts of interests

At each stage of the procurement, conflicts of interest may become apparent. Examples of potential conflicts of interest are provided in section 2.9.3 of Module 2.

Conflicts of interest pose a risk to competition and equal treatment of the economic operators.

Therefore, article 24 of the Public Sector Directive and article 42 of the Utilities Directive allow Member States to decide which appropriate measures the public procurer should adopt, in order to effectively prevent, identify and remedy conflicts of interest. Such measures could be:

- regulating through separate national legislation which situations of conflicts of interests are not permitted in the case of public functionaries;
- requiring public procurers to complement the above mentioned national legislation with integrity codes, compliance procedures, internal point for complaints etc.;
- requiring the persons involved in the conduct of public procurement to sign a declaration on the absence of conflicts of interests.

The legal expert of the public procurer needs to be aware of any relevant national legislation, as well as of the integrity codes and procedures that might be in place within the organization of the public procurer. The legal expert should also be aware that conflicts of interest may become apparent at each stage in the procurement process.

One manner of minimizing the risks that the procurement process distorts competition due to conflicts of interest, is to obtain declarations from bidders in the procurement that they do not have conflicting interests in the respective procurement and that they will immediately inform the public procurer when such conflicts interests arise.

Whenever the public procurer identifies conflicts of interest, remedial measures should be undertaken. Available approaches, in the context of the procurement process are, for example:

- (i) excluding from further involvement in the procurement, the functionary who finds him/herself in a conflict of interests;
- (ii) excluding from further involvement in the procurement an economic operator which finds him/herself in a conflict of interest when less intrusive measures are not available.⁷⁵

These measures should be clearly specified in the Request to Tender.

RELEVANT CASE LAW

Cases C-315/99

The Court stated that 'the fact that a person who helps to evaluate and select bids for a public contract has this contract awarded to him' is pertinent, relevant and indicative of a serious malfunction of the institution or body concerned.'

Case C-538/13

The Court concluded that the evaluation of the tenders is unlawful solely on the grounds that the tenderer has had significant connections with experts appointed by the public procurer who evaluated the tenders. According to the Court, 'the public procurer is, at all events, required to determine the existence of possible conflicts of interests and to take appropriate measures in order to prevent and detect conflicts of interests and remedy them.'

In the context of the examination of an action for annulment of an award decision on the ground that the experts were biased, 'the unsuccessful tenderer may not be required to provide tangible proof of the experts' bias. It is, in principle, a matter of national law to determine whether, and if so to what extent, the competent administrative and judicial control authorities must take account of the fact that possible bias on the part of experts has had an effect on the decision to award the contract.'

2.10 Monitoring contract performance

2.10.1 Checking and assessing contractor's performance

A monitoring system enables the procurer to supervise vendor activities during contract implementation to ensure compliance with (legal) requirements, and performance targets set forth in a contract. For more information on how to set up such a monitoring system, please see section 2.10 and Annex 5 'Step-by-step monitoring methodology' of Module 2 of this Toolkit.

In particular, monitoring a contract involves checking and assessing contractors' compliance with minimum requirements, obligations, standards, key performance indicators (KPIs milestones and

⁷⁵ See article 57(4)(e) of the New Public Sector Directive and article 80(1) of the new Utilities Directive.

deliverables set forth in a contract. The clarity and soundness of the procurement (framework) contract are thus essential to carry out monitoring activities. As a result of the monitoring activity, the legal expert, in consultation with the procurer, may need to enforce the contract (namely penalties), modify it or cancel it.

In a **PCP**, regular checks and assessment of the performance delivered by the participating economic operators per R&D phase is embedded in the PCP approach (see section 2.8 above) and even more frequent monitoring during each phase is recommended. This enables the procurer to provide early feedback to the contractors. Moreover, this allows the contractors the opportunity to improve their approach and achieve the next upcoming milestones.

Section 2.8 above clarifies that the assessment of the results of a PCP phase may lead to one of the following conclusions (based on pre-defined criteria):

- The results are satisfactory, OR
- The results are partially satisfactory, OR
- The results are not satisfactory.

The consequences of concluding that the phase results are partially or fully unsatisfactory as defined in the framework agreement and/or phase contracts are either the termination for cause (or not) (& liability) or non-(partial) payment. The decision to enforce or to modify the contract according to the result of the assessment is discussed in the next section.

Within the context of **PPI**, ensuring that the economic operator fulfils its contractual obligations is crucial for ensuring compliance with the procurement directives. Any modification of the contract, whether based on a value engineering clause or not, should be carefully assessed by the legal expert (see section below). In addition, during the performance of the contract, the procurer will continue to check and assess the contractor's performance in conformity with the obligations, standards, key performance indicators (KPIs) and milestones set forth in a contract

The intention to use Value Engineering (VE) in a contract (see Annex 4 of Module 2 on Value Engineering) which should be advertised upfront in the contract notice, may open the possibility to changes in the contract as the result of alternative proposals that can improve the value for money of a solution during the execution of the contract.

2.10.2 Enforcing or modifying the public contract

The application of a monitoring system not only provides relevant information to enforce the obligations set forth in a contract and the provisions of the law, but it also helps to establish whether it may be lawful, necessary and beneficial to modify the contractual terms.

In other words, whenever the monitoring process leads to the conclusion that the contractor does not perform at the levels established in the public contract, the legal expert, in consultation with the procurer, will take one of the following decisions:

a) **enforce the contract:**

- suspend payment and allow the contractor time to improve its performance;
- release partial payment proportional to the achieved targets;
- initiate a direct dialogue with the contractor to find an amiable solution (according to the alternative dispute settlement clause). In case it is not possible to reach an agreement in an amicable manner, the parties may resort to the means of dispute settlement provided in the agreement or contract;
- terminate the contract in case of serious underperformance.

b) **modify the contract:**

- the modification of a contract should be carefully evaluated by the legal expert, to prevent material or substantial changes of the contract that are not allowed according to EU case law and the Public Procurement Directives.

The Public Procurement Directives⁷⁶ establish important rules on the modification of contracts, regarding both the conditions to modify a contract without the need to carry out a new procurement, and the definition of substantial modifications of a contract that require a new procurement procedure.

2.10.2.1 Conditions for a modification of a contract or framework agreement without a new procurement

Modifications to the contract resulting in a minor change of the contract value below the threshold are possible without the need to carry out a new procurement to ensure legal certainty.

The modifications above the thresholds are also possible without the need to carry out a new procurement to the extent they comply with the conditions set in the Procurement Directives and do not alter the overall nature of the contract.

Contracts and framework agreements may be modified without a new procurement procedure in the following cases:

- a) where the modifications, irrespective of their monetary value, have been provided for in the initial procurement documents in clear, precise and unequivocal review clauses, which may include price revision clauses, or options. Such clauses shall state the scope and nature of possible modifications or options as well as the conditions under which they may be used. They shall not

⁷⁶ Directive 2014/24/EU: Recitals 107 – 111; Articles 33, 72, and 73; and Part G (<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0024&from=EN>). Directive 2014/25/EU: Recitals 113 – 118; Articles 89, 90, and Annex XVI. (<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0025&from=EN>)

provide for modifications or options that would alter the overall nature of the contract or the framework agreement;

- b) for additional works, services or supplies by the original contractor that have become necessary and that were not included in the initial procurement where a change of contractor:
- cannot be made for economic or technical reasons such as requirements of interchangeability or interoperability with existing equipment, services or installations procured under the initial procurement; and
 - would cause significant inconvenience or substantial duplication of costs for the public procurer.

Any increase in price shall not exceed 50 % of the value of the original contract. In case of several successive modifications, that limitation applies to the value of each modification.

- c) where all of the following conditions are fulfilled:
- the need for modification has been brought about by circumstances which a diligent public procurer could not foresee;
 - the modification does not alter the overall nature of the contract;
 - any increase in price is not higher than 50 % of the value of the original contract or framework agreement (for each modification);
- d) where a new contractor replaces the one to which the public procurer had initially awarded the contract as a consequence of either:
- an unequivocal review clause or option in conformity with point (a);
 - universal or partial succession into the position of the initial contractor, following corporate restructuring, including takeover, merger, acquisition or insolvency, of another economic operator that fulfils the criteria for qualitative selection initially established provided that this does not entail other substantial modifications to the contract and is not aimed at circumventing the application of this Directive; or
 - in the event that the public procurer itself assumes the main contractor's obligations towards its subcontractors where this possibility is provided for under national legislation;
- e) where the modifications, irrespective of their value, are not substantial.

Public procurers having modified a contract in the cases set out under points (b) and (c) should publish a notice to that effect in the Official Journal of the European.

2.10.2.2 Substantial modifications that require a new procurement

A new procurement procedure is required in case of material changes to the initial contract, in particular to the scope and content of the mutual rights and obligations of the parties, including the distribution of intellectual property rights.

Such changes are understood as a demonstration of the parties' intention to renegotiate essential terms or conditions of that contract. This is the case in particular if the amended conditions would have had an influence on the outcome of the procedure, had they been part of the initial procedure.

A modification of a contract or a framework agreement during its term is considered substantial where it renders the contract or the framework agreement materially different in character from the one initially concluded.

This is the case where one or more of the following conditions is met:

- a) the modification introduces conditions which, had they been part of the initial procurement procedure, would have allowed for the admission of other candidates than those initially selected or for the acceptance of a tender other than that originally accepted or would have attracted additional participants in the procurement procedure;
- b) the modification changes the economic balance of the contract or the framework agreement in favour of the contractor in a manner which was not provided for in the initial contract or framework agreement;
- c) the modification extends the scope of the contract or framework agreement considerably;
- d) where a new contractor replaces the one to which the public procurer had initially awarded the contract in other cases than those provided for under the conditions described in the title above.

RELEVANT CASE LAW

[C-337/98 Commission v. France](#)

Amendments to the provisions of a public contract during the currency of the contract constitute a new award of a contract “when they are materially different in character from the original contract and, therefore, such as to demonstrate the intention of the parties to renegotiate the essential terms of that contract”.

[C-454/06 Presstext Nachrichtenagentur GmbH v. Republik Österreich](#)

An amendment to a public contract during its currency may be regarded as material when: (i) it introduces conditions which, had they been part of the initial award procedure, would have allowed for the admission of tenderers other than those initially admitted or would have allowed for the acceptance of a tenderer other than the one initially accepted; (ii) when it extends the scope of the contract considerably to encompass services not initially covered, and (iii) when it changes the economic balance of the contract in favor of the contractor in a manner which was not provided for in the terms of the initial contract).

[C-91/08 Wall v. Stadt Frankfurt am Main](#)

A change of subcontractor, even if the possibility of a change is provided for in the contract, may in exceptional cases constitute such an amendment to one of the essential provisions of a contract where the use of one subcontractor rather than another was, in the view of the particular characteristics of the services concerned, a decisive factor in concluding the contract.

[President of the Belgian Tribunal of First Instance of Courtrai, 7 June 2012, T. Aann. 2013, 276](#)

The President of the Belgian Tribunal of First Instance of Courtrai judged that the replacement of the initial contractor by a new contractor under the given circumstances is a substantial modification of the contract. *In casu* an entity of the contractor was taken over by another company. However, since the transferor took no part in the structure of the transferee that became the new contractor, the President of the Tribunal ruled that the contract was substantially modified which should lead to a new tender procedure.

2.11 Managing after contract issues

Section 2.11 of Module 2 lists those contractual obligations that have a longer life-span than the contract itself and may need to be monitored and managed beyond the contract period. Whenever this is the case, it should be clearly specified in the contract and the procurer should ensure monitoring of compliance.

Contractual obligations that may need to be monitored after the expiration of the **PCP** Framework Agreement include:

- the obligation for PCP suppliers to commercialise the developed solution;
- the obligation for PCP suppliers to grant FRAND licenses to other suppliers;
- the obligation for PCP suppliers to share royalties resulting from commercialization with the procurer (if the procurer opted for a royalty approach);
- the obligation of PCP suppliers to contribute to standardization processes (if requested by the procurer in the tender documents).

In the case of a **PPI** Procurement Contract, clauses that may require monitoring beyond the expiration of the contract include:

- the obligation of the PPI supplier to provide warranties on the proper functioning of the installed solution;
- the obligation of the PPI supplier to indemnify the procurer in case of third-party IPR infringement;
- the obligation of the PPI supplier to participate in standardisation processes (if, requested by the procurer in the tender documents).

Breach of some of these obligations may be signalled to the public procurer by third parties (e.g. market players who have attempted to secure a FRAND licence agreement for the use of the innovation). Other obligations may require pro-active periodic monitoring by the public procurer.

3 Joint procurement

Section 3 of Module 2 describes the main benefits of undertaking joint procurement in innovation procurements, as well as the steps that a public procurer could take in this regard. In this section, we will further provide the legal background against which joint procurement could be implemented.

3.1 Introduction and legal basis

Joint procurement benefits from express regulation under the EU public procurement directives. Accordingly, article 38 et seq. of the 2014 Public Sector Directive and, respectively, article 56 et seq. of the **2014 Utilities Directive** specifically provide that:

“Two or more contracting authorities may agree to perform certain procurements jointly.

Where the conduct of a procurement procedure in its entirety is carried out jointly in the name and on behalf of all the contracting authorities concerned, they shall be jointly responsible for fulfilling their obligations. This applies also in cases where one contracting authority manages the procedure, acting on its own behalf and on the behalf of the other contracting authorities concerned.

Where the conduct of a procurement procedure is not in its entirety carried out in the name and on behalf of the contracting authorities concerned, they shall be jointly responsible only for those parts carried out jointly. Each contracting authority shall have sole responsibility for fulfilling its obligations in respect of the parts it conducts in its own name and on its own behalf.”

The new 2014 rules on joint procurement are intended to facilitate cooperation between public procurers, which can encourage risk and benefit-sharing for innovative projects and the pooling of demand.

Joint procurement can occur between or among procurers from the same Member State or between or among public procurers originating from different Member States (cross-border joint procurement, specifically regulated by article 39 of the Public Sector Directive and, respectively, article 57 of the Utilities Directive). Furthermore, joint procurement can take two different forms: (i) occasional / ad-hoc joint procurement and (ii) institutionalized joint procurement. Both forms are described in section 3.2 of Module 2. The legal implications thereof are further addressed in section 3.2 below.

As **PPI** is, in principle, fully covered by the provisions of the public procurement directives, the provisions under the EU procurement directives regarding joint procurement are fully applicable.

PCP, when conducted in compliance with the PCP Communications and the Staff Working Document, falls outside the scope of the public procurement directives. Nevertheless, public procurers could follow the principles regarding joint procurement as provided for under the EU public procurement directives.

3.2 Forms of joint / coordinated procurement

The EU public procurement directives regulate two different forms of joint/coordinated procurement:

3.2.1 Occasional / ad-hoc procurement

In this case, the procurement is undertaken via an ad-hoc cooperation between a group of procurers that is formed solely for the purpose of one procurement and does not entail the set-up of a separate entity / permanent cooperation structure.

When several public procurers from different Member States decide on occasional/ad hoc basis to conduct a procurement and award a public contract, they need to conclude an agreement determining the responsibilities of the parties, the internal organization of the procurement and the law governing the procurement. For procurers established in different Member States, this is expressly referred to under the new public procurement legal framework (article 39(4) of the Public Sector Directive and article 57 (4) of the Utilities Directive), A template for a joint procurement agreement is attached to this Toolkit.

See section 3.2 (b) in Module 2 for an analysis of the legal aspects related to occasional/ad-hoc joint/coordinated procurement.

3.2.2 Institutionalized procurement

In the institutionalized joint or coordinated procurement set-up, the participating procurers establish or designate an external legal entity (i.e., European Groupings of Territorial Cooperation – EGTCs, European Research Infrastructure Consortia – ERICs, centralized purchasing bodies etc.) to conduct the joint procurement or the preparation of the coordinated procurement with a joint mandate of all public procurers

Pursuant to express provisions under the new public procurement legal framework (article 39(5) of the Public Sector Directive and article 57(5) of the Utilities Directive), in case several public procurers from different Member States have set up a joint/common entity, such as a EGTC or other entities established under the Union Law (for the purpose of conducting a joint cross-border procurement), the participating public procurers shall agree on the applicable national procurement rules of one of the following Member States:

- i. the national provisions of the Member State where the joint entity has its registered office;
- ii. the national provisions of the member State where the joint entity is carrying out its activities.

See section 3.2 (b) in Module 2 for an analysis of the legal aspects related to institutionalized / joint/coordinated procurement.

3.2.3 Piggy backing

Piggy-backing happens when a public procurer carries out the procurement on its own but allows other public procurers the option of utilizing the contract. It can be combined with institutionalized or occasional joint or coordinated procurement.

Piggy-backing involves very little extra work from the public procurer (essentially stating in the Contract Notice that other named public procurers may also wish to set up a contract with the winning supplier), and provides direct access to more environmentally sound products for a wider range of authorities.

However, the procurer is not allowed to foresee a piggy-backing clause that enables unspecified (number of) procurers (e.g. all other fire brigade procurers in Europe) to piggy-back on a contract. Such an approach would be contrary to the transparency principle, as interpreted by the Court of Justice of the EU in case-law.⁷⁷

4 Templates and annexes – PCP procurement documents

This section provides the templates and annexes to use as guidance when preparing a PCP project.

The guidance document on “How to set up and manage HE PCP and PPI grants” is designed to help applicants and beneficiaries design and manage PCP and PPI procurements under Horizon Europe grants.

⁷⁷ Case C-496/99 *Commission of the European Communities v CAS Succhi di Frutta SpA* [2004] ECR I-3801 paras 110-1. In this case, the Court stated that all the conditions and detailed rules of the procurement procedure must be drawn up in a clear, precise and unequivocal manner in the notice or contract documents.

Horizon Europe (HORIZON)

How to set up and manage HE PCP and PPI grants

From designing your proposal to managing your procurements

Version 1.0

15 October 2023

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[Horizon Europe funding for PCP and PPI | Shaping Europe's digital future \(europa.eu\)](https://europea.eu)

Disclaimer

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1. Introduction

PCP/PPI procurements enable public procurers to use their purchasing power to trigger the market to deliver innovative solutions for specific challenges they have.

For challenges for which there are no solutions yet close to market, both can be used sequentially. The PCP covers the R&D activities to find the best innovative solutions; the PPI brings the solution to the market. The PCP itself works in competitive phases, with a gradual reduction of the retained solutions for each R&D phase (in order to narrow down the number of competing solutions so that the most promising solutions reach the final phase). For challenges for which there are already solutions close to market or on the market in small quantities but not widely adopted yet, PPI can be used directly without a preceding PCP.

PCP/PPIs allow the public procurers to be in the driving seat for both the definition of the challenge and for monitoring the project execution to ensure that the procurement delivers the solutions that meet their needs.

PCP has proven to be an efficient means for technologically demanding challenges that require focused R&D; PPI has proven a powerful means to scale up the wide deployment of innovative solutions.

2. Background: Horizon Europe funding for PCP and PPI

PCPs address the R&D in phases (either 2 or 3 phases — depending on the case) and, if needed, the first deployment of a limited volume of the newly developed solutions; PPIs address the deployment of commercial volumes of end product(s). The PPI buyers group acts as a launching customer (early adopter) of innovative solutions that are not yet available on a large-scale commercial basis.

Figure 1 — Standard 3 phase PCP

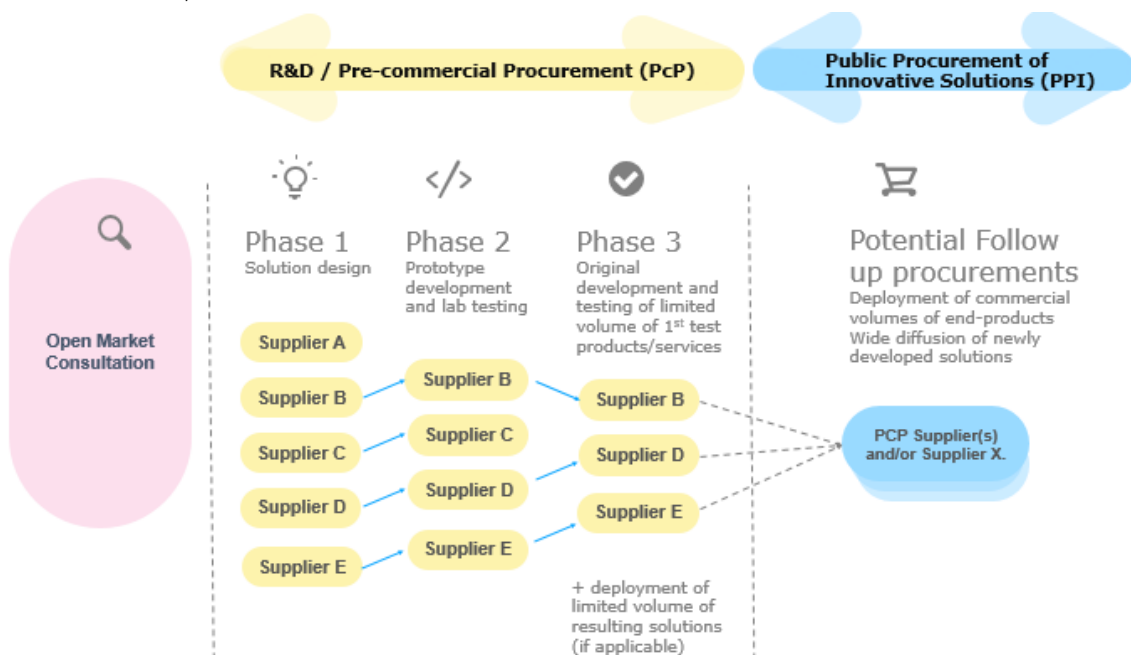
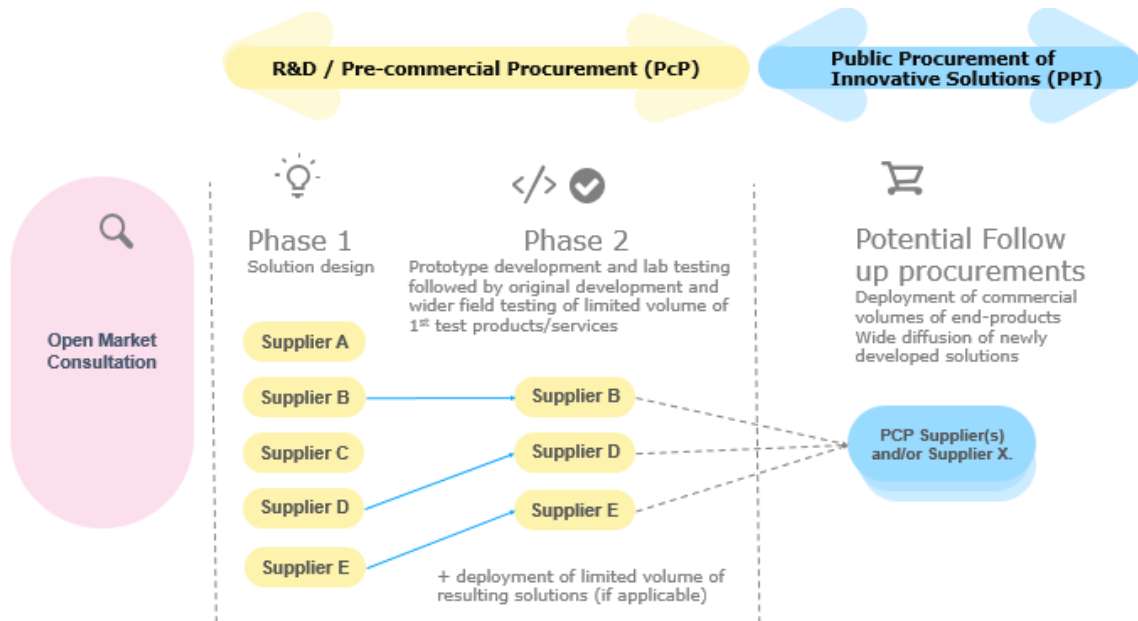


Figure 2 — 2 phase fasttrack PCP



PCPs are characterised by the following five features:

- ✗ Public procurement of R&D services
- ✗ Competitive development in phases to identify the solutions offering the best value for money
- ✗ Open, transparent, non-discriminatory approach — No large-scale deployments
- ✗ Sharing of IPR-related risks and benefits under market conditions — Contractors retain IPR ownership on results; procurers retain usage, licensing and call back rights on the results
- ✗ Exemption from EU public procurement directives, the WTO Government Procurement Agreement (GPA) and EU state aid rules.

By contrast, PPIs have:

- ✗ Public procurement of innovative goods or services
- ✗ No requirement to use phases (actions implementing PPIs cover 2 phases (deployment and operational validation), but there is no requirement to split the PPI procurement for those 2 phases in different contracts)
- ✗ Open, transparent, non-discriminatory approach — Large-scale deployments (except where procurements are restricted such as in the field or security and for PPIs that deploy a limited set of solutions resulting from a PCP)
- ✗ No mandatory sharing of IPR-related risks and benefits under market conditions — IPR ownership is recommended to be wherever possible with contractors but in may be also with procurers (if justified)
- ✗ Normally no exemption from EU public procurement directives, WTO Government Procurement Agreement (GPA) and EU state aid rules (except in specific cases, e.g. security).

PCPs are outside the standard public procurement rules (neither EU Public Procurement Directives nor WTO GPA apply; national procurement rules may or may not apply). Therefore, the HE grant imposes quite a long list of additional obligations, in order to ensure full transparency and equal treatment for the tenderers and a procurement procedure that efficiently implements the PCP design parameters. For PPIs, the situation is different since normally the EU Public Procurement Directives and WTO GPA apply and the HE grant therefore contains less additional obligations and is generally less prescriptive.

⚠️ Depending on *where* the additional obligations are set out, they apply either to ALL Horizon Europe actions involving PCP or PPI (obligations in [General Annex H of the Horizon Europe Work Programme](#)) or ONLY to calls that are specifically labelled as PCP/PPI actions (obligations set out in Article 6.2.D.5 and Annex 5 of the [HE Model Grant Agreement \(MGA\)](#)).

PCP/PPI procurements (both as separate types of action and as part of standard HE RIA and IA grants) can be funded in all Parts of the HE Programme. For more information and case examples that illustrate their relevance for the ‘Excellence science’, ‘Global challenges and European industry competitiveness’ and ‘Innovative Europe’ pillars, see the [Horizon Europe Programme Guide](#).

3. Setting-up your HE actions with PCP/PPI procurements

3.1 Minimum requirements for all HE actions involving PCP or PPI (set out in the HE General Annexes)

[General Annex H of the Horizon Europe Work Programme](#) sets out the following minimum requirements for all types of HE actions involving PCP or PPI procurements. This includes both:

- HE PCP/PPI actions that have as main objective the implementation of a PCP or PPI procurement by a transnational buyers’ group and
- all other HE actions (*e.g. Research and Innovation actions, Innovation actions, Programme Cofund actions*) that involve as one of their many activities also the implementation of a PCP or PPI procurement, either by a transnational buyers’ group or by an individual procurer.

If you want to apply for Horizon Europe support for a PCP/PPI procurement, it is thus important that you keep these requirements in mind from the moment you start designing your proposal.

Requirements for all types of actions involving PCP or PPI

The PCP/PPI must be prepared and executed by one of the following:

- by one or more public procurer(s), plus possibly one or more private and/or NGO procurer(s) that provide similar services of public interest, that is (are) responsible for the acquisition and/or regulatory strategy of the relevant innovative solutions and aim to obtain ambitious quality and efficiency improvements in the area of the PCP/PPI or
- by entities with a mandate from one or more of these procurers to act on their behalf in the procurement (*e.g. central purchasing bodies*).

Other entities (*e.g. end-users*) that do not have a conflict of interest with the PCP/PPI, and whose participation in the action is well justified, may participate in ‘additional activities’ to prepare, manage and follow-up the PCP/PPI and embed it into a wider set of demand-side activities. This includes disseminating results, removing obstacles to introducing the solutions onto the market (*e.g.*

contributing to standardisation, regulation and certification), awareness raising, experience sharing/training, and preparing further cooperation among stakeholders and procurers for future PCP or PPI.

For PCP executed by a group of procurers, the buyers' group must jointly prepare and implement the pre-commercial procurement so that there is one joint call for tender, one joint evaluation of offers, and a lead procurer⁷⁸ awarding the research and development (R&D) service contracts in the name and on behalf of the buyers' group. The PCP must address one concrete procurement need identified as a common challenge⁷⁹, which requires new R&D and is described in the common specifications of the joint PCP call for tender. Each procurer in the buyers' group must contribute financially to the total budget necessary to jointly finance the PCP, enabling the procurers to share the costs of procuring R&D services from a number of providers and comparing the merits of the alternative solutions pursued by these competing providers to address the common challenge.

For PPI executed by a group of procurers, the lead procurer must coordinate the preparation and implementation of one joint or several coordinated public procurements of innovative solutions, based on common specifications defined jointly by the buyers' group. Each PPI must focus on one concrete need identified as a common challenge that requires the deployment of innovative solutions⁸⁰.

Projects that aim to implement a PCP/PPI must contain a preparation and execution stage.

Preparation stage

The expected outcomes for the preparation stage, to be included as deliverables/milestones, are:

- a prior information notice for the open market consultation: 5 days before submission for publication to the OJEU, i.e. a minimum of 50 days before the start of the first meeting
- a report on the result of the open market consultation, prior market analysis and its impact on the tender documents; in addition, for PPI, feedback from activities to verify market readiness before deployment (*e.g. conformance testing, certification, quality labelling*)
- completed tender documents based on the Horizon Europe PCP/PPI model contract documents, including the contract notice: 30 days before its submission to the OJEU
- for PCP/PPI executed by a group of procurers: the signed joint procurement agreement confirming the final means of cooperation, including the financial commitment of the buyers' group for the PCP/PPI, and final confirmation of the lead procurer.

⁷⁸ The 'lead procurer' is a public procurer and is the beneficiary appointed by the buyers' group to coordinate and lead the procurement activities. They can be either one of the procurers in the buyers' group or another beneficiary in the action who is established or designated by the procurers in the buyers' group to act as lead procurer.

⁷⁹ Addressing the common challenge in different countries may require, beyond the common core functionality, the development and testing of additional local functionality or adaption of solutions by each procurer due to differences in the local context. A PCP that addresses a challenge consisting of several facets (sub-challenges or building blocks) is considered one joint PCP, as long as all procurers in the buyers' group share the need for - and are willing to co-finance - all the facets of the common challenge.

⁸⁰ Addressing the common challenge in different countries may require deployment and, where applicable, conformance testing, of local functionality or adaption of solutions for each procurer due to differences in the local context.

Execution stage

The expected outcome of the execution stage is the implementation of the procurement procedure and of the PCP/PPI contracts. For PCP, this includes validating and comparing the performance of the competing PCP solutions to verify if they can be converted into permanent service. For PPI, this includes deploying the innovative solutions and evaluating the results in real-life operating conditions, with a duration that allows for appropriate evaluation of the potential impact of these solutions if converted into permanent service.

Deliverables/milestones to be included in the description of work for the execution stage are:

- a copy of the contract award notice published in TED: 48 days after the award of contracts
- at the end of the tender evaluation (for PCP, also after the evaluations of each phase):
 - information on the total number of bids received, particularly the data on the winning tenderer(s) and abstracts of the winning tenders for publication and evaluation purposes
 - final ranking list of the selected projects, final scores and qualitative assessment per criterion for each bid received, along with minutes of the evaluation meeting
 - for PCP: assessing the results achieved by each tenderer in the previous phase
- at the end of the action, give a demonstration to the granting authority:
 - of the deployed innovative solution(s).

Where the WTO Government Procurement Agreement (GPA) does not apply, participation in tendering procedures must be open on equal terms to bidders from EU Member States and all countries with which the EU has an agreement in the field of public procurement under the conditions laid down in that agreement, including all Horizon Europe Associated Countries. Where the WTO GPA applies, tendering procedures must also be open to bidders from states that have ratified this agreement, under the conditions laid down therein.

If the specific call conditions restrict participation or control for security reasons, participation in the PCP/PPI procedure must also be limited to bidders meeting this restriction. If the specific conditions for the topic impose a place of performance obligation, the place of performance of the contract must comply with this obligation.

Specific requirements for pre-commercial procurements (PCPs)

The following requirements apply to ensure that the provisions for PCP in the Horizon Europe rules for participation, the conditions for the R&D services exemption of the EU Directives on public procurement⁸¹, the EU Treaty principles⁸² and the competition rules⁸³ are fully respected.

⁸¹ See Article 14 of Directive 2014/24/EU, Article 32 of Directive 2014/25/EU and Article 13(f)(j) of Directive 2009/81/EC.

⁸² In particular, the fundamental Treaty principles on the free movement of goods and workers, the freedom to provide services, the freedom of establishment and the free movement of capital, as well as the principles deriving therefrom, such as the principles of non-discrimination, transparency and equal treatment.

⁸³ See, in particular, Article 2.3 of the 2014 R&D&I State aid framework.

Definitions

PCP must comply with the Horizon Europe definitions:

‘Pre-commercial procurement’ means procurement of R&D services involving risk-benefit sharing under market conditions and competitive development in phases, where there is a clear separation between the procurement of the R&D services procured from the deployment of commercial volumes of end-products⁸⁴.

‘Risk-benefit sharing under market conditions’ refers to the PCP approach in which procurers share with suppliers at market price the risks and benefits related to the intellectual property rights (IPR) resulting from the R&D.

‘Competitive development in phases’ refers to buying the R&D from several competing R&D providers in parallel and to comparing and identifying the best-value-for-money solutions on the market to address the PCP challenge. To reduce the investment risk for the procurer, reward the most competitive solutions and facilitate the participation of smaller innovative companies, the R&D is also split into phases (solution design, prototyping, original development and validation/testing of the first products), with the number of competing R&D providers being reduced after each phase.

‘Separation from the deployment of commercial volumes of end-products’ refers to the complementarity of PCP, which focuses on the R&D phase before wide commercialisation, and PPI, which does not focus on R&D but on wide commercialisation/diffusion of solutions. Procurers can, but are not obliged, to procure R&D results from a PCP.

Preparation and publication of the open market consultation and call for tender

To prepare the call for tender, an open market consultation⁸⁵ with potential tenderers and end-users must be held to broach the views of the market on the intended scope of the R&D. The results of this open market consultation must be taken into account to fine-tune the tender specifications, so that the gap between state-of-the-art industry development and the procurement needs justifies the procuring of R&D⁸⁶ services.

⁸⁴ See the Horizon Europe Regulation and the PCP Communication COM/2007/799 and associated SEC(1668)2007. Note that PCPs can include the purchase of the first end-products that were developed, installed and tested during the PCP, but not the purchase of larger commercial volumes of end-products requiring quantity production beyond delivering the first products for the PCP.

⁸⁵ The open market consultation should be organised in a way not to preclude or distort competition. In respect of the Treaty principles, the open market consultation must be announced well in advance and widely - via a prior information notice that is published at least 45 days before the first open market consultation meeting in the Official Journal of the EU - and enable potential tenderers regardless of their geographic location to participate at least in English. All information given in answers to questions from participants in the dialogue should be documented and published.

⁸⁶ In line with WTO GPA 2014 Article XIII(1)(f), R&D can cover activities such as solution exploration and design, prototyping, up to the original development of a limited volume of first products or services in the form of a test series. Original development of a first product or service may include limited production or supply to incorporate the results of field testing and demonstrate that the product or service is suitable for production or supply in quantity to acceptable quality standards. R&D does not include quantity production or supply to establish commercial viability or to recover R&D costs, nor commercial development activities such as incremental adaptations or routine or periodic changes to existing products, services, production lines, processes or other operations in progress, even if such changes may represent improvements.

The PCP contract notice must be published EU-wide⁸⁷ in at least English. Offers must be accepted and communication with stakeholders must be enabled at all stages in at least English. All offers must be evaluated according to the same objective criteria, regardless of the geographical location, size of organisation or governance structure of the tenderers.

The prior information notice for the open market consultation and the contract notice must be advertised widely, using in particular Horizon Europe internet sites and national contact points. The Commission must be informed at least 5 days before the expected date of publication of the prior information notice for the open market consultation and 30 days before the expected date of publication of the PCP contract notice. The PCP call for tenders must remain open for at least 60 days.

Tender documentation, procurement and implementation of the contract

The PCP contract that will be concluded with each selected tenderer must take the form of one single framework agreement covering all PCP phases, without contract renegotiations after the award. This framework agreement must contain information on the procedures for implementing the different phases (through specific contracts), including the format of the intermediate evaluations (including evaluation criteria and weightings) for each phase.

For PCP executed by a group of procurers, the R&D service contracts are awarded by the lead procurer and all selected tenderers can be paid by the lead procurer, or pro rata by each procurer in the buyers' group according to their share in the total PCP budget.

The PCP contract notice must contain information on the intended number of R&D providers that will be selected (minimum of 3 providers) to start the PCP, the number of PCP phases and the expected duration and budget for each PCP phase. The PCP must cover the full PCP life cycle of solution design, prototyping, and original development, including installation and testing of a limited volume of test series products/services in the procurer's/end-user's premises. Each of the three PCP phases can be split up into further phases if appropriate.

The following simplified and/or accelerated PCP procedures may be used:

- for PCP that require fast deployment⁸⁸, one specific contract may cover both the second and third PCP phase (fasttrack PCP)
- if fewer than 2 tenderers are capable of performing the R&D services in the EU Member States or Horizon Europe associated countries (for security contracts, this may be restricted to the Member States), the phase 1 contracts may be awarded to a minimum of 2 tenderers.

Procurers must avoid the use of selection criteria based on disproportionate qualification and financial guarantee requirements (*e.g. with regard to prior customer references and minimum turnover*).

Functional/performance-based specifications must be used to formulate the object of the PCP call for tender as a problem to be solved, without prescribing a specific approach to be followed. Evaluation of the tenders must be based on best-value-for-money criteria, not just lowest price.

⁸⁷ Through the Official Journal of the EU, using the TED (Tenders Electronic Daily) web portal.

⁸⁸ Especially where a budgetary commitment for deployment is already available at the start of the PCP.

The PCP process must be organised to avoid any conflicts of interest, including in the use of external experts. Providers cannot be beneficiaries in an action during which the PCP is planned or undertaken. The PCP process must require selected providers to locate the majority of the R&D activities, including the principal researcher(s) working for the PCP contract in particular, in the Member States or Horizon Europe associated countries⁸⁹. For duly justified reasons of public security, this may be limited to the EU Member States.

The PCP procurers must not reserve the R&D results exclusively for their own use. The providers generating results must own the attached IPR, and the procurers must enjoy at least royalty-free access rights to use the R&D results for their own use. The procurers must also enjoy the right to grant (or to require the granting of) non-exclusive licences to third parties, to exploit the results under fair and reasonable market conditions, without any right to sublicense. A call-back provision must ensure that, in case the providers fail to commercially exploit the results within a given period after the PCP, or use the results to the detriment of the public interest, including security interests, the procurers can require transfer of the ownership of the results.

The procurers must inform tenderers of the right to publish public summaries of the results of the PCP project, including information about key R&D results attained and lessons learnt (*e.g. on the feasibility of the solution approaches to meet the requirements and lessons learnt for potential future deployment of solutions*). Details that would be contrary to the public interest, would harm legitimate business interests (e.g. regarding IPR-protected specificities of their individual approaches to solutions) or could distort fair competition may not be disclosed.

To enable the procurers to establish the correct (best value for money) market price for the R&D service, in which case the presence of state aid can in principle be excluded, the PCP call for tender must be carried out in a competitive and transparent way in line with Treaty principles. In addition, the distribution of rights and obligations between procurers and providers (including the allocation of IPR) must be published in the PCP call for tender documents, to obtain a price according to market conditions (and rule out State aid). PCP contracts with providers must contain financial compensation according to market conditions⁹⁰, compared to the exclusive development price, for assigning IPR to the providers.

Specific requirements for public procurements of innovative solutions (PPIs)

Definitions

PPI must comply with the relevant Horizon Europe definitions.

‘Public procurement of innovative solutions (PPI)’ means procurement where contracting authorities act as a launch customer for innovative goods or services which are not yet available on a large-scale commercial basis, and may include conformity testing.

‘Launch customers’, also called early adopters, refer to the first 20% of customers on the EU’s internal market that buy innovative solutions. The solutions have to be new to the procurers in the project, the

⁸⁹ [List of Horizon Europe participating countries.](#)

⁹⁰ The market price should reflect the benefits allocated to the R&D provider (e.g. commercialisation opportunities opened up by the IPR) and the risks assumed by the R&D provider (e.g. the cost of maintaining the IPR and commercialising the products).

procurers' market segment or new to the EU's internal market, and relevant to procurers in other Member States and/or Horizon Europe associated countries.

'Innovative solutions' are new or significantly improved products, services or processes that have already been (partially) demonstrated on a small scale, and may be nearly or already available in small quantities on the market, but which have not been widely adopted yet. Typically, owing to the residual risk of market uncertainty, they have not been produced at a large enough scale to meet mass market price/quality requirements. This also includes existing solutions that are to be utilised in a new and innovative way; PPI does not include the procurement of R&D.

Preparation and publication of the open market consultation and call for tender

Unless the PPI is undertaken as a follow-up to an FP7, Horizon 2020 or Horizon Europe PCP⁹¹, or unless the situation is a low-value PPI below national procurement thresholds, the following obligations apply:

- To prepare the call for tenders, an open market consultation with potential tenderers and end-users must be held to inform the market well in advance of the upcoming PPI and broach the views of the market on the PPI's intended scope. Information retrieved from this consultation about the gap between perceived procurement needs and on-going industry developments must be taken into account in the PPI tender specifications, so that the PPI duly focuses on 'early adoption' of 'innovative' solutions.
- The market must be informed well in advance⁹² of the target date for publishing the PPI call for tenders. Market readiness prior to deployment can be verified through the organisation of e.g. conformity testing, certification or quality labelling of solutions.
- The PPI contract notices must be published EU-wide in at least English, offers must be accepted and communication with stakeholders must be enabled at all stages in at least English. All offers must be evaluated according to the same objective criteria, regardless of the geographical location, size of organisation or governance structure of the tenderers.
- The prior information notices for the open market consultation, early announcements of the expected publication date of the PPI call for tender, and the PPI contract notice must be promoted and advertised widely, using Horizon Europe internet sites and national contact points in particular. The Commission must be informed at least 5 days before the expected date of publication of the PIN for the open market consultation and 30 days before the expected date of publication of the PPI contract notice. The PPI call for tenders must remain open for at least 60 days.

Tender documentation, procurement and implementation of the contract

Procurement procedures covered by the EU public procurement directives that do not involve procurement of R&D can be used. Restricted procedures with shortened timeframes for the submission of offers for reasons of urgency must not be used. Framework contracts/agreements with lots can be used.

⁹¹ In the case of a PPI following a PCP that was implemented according to the conditions described in Annex I, the negotiated procedure without publication foreseen in the EU public procurement directives can then be used (Article 32(3)(a) of Directive 2014/24/EU, Article 50(b) of Directive 2014/25/EU and Article 13(j) of Directive 2009/81/EC). At least three offers must be requested, including from the R&D providers that successfully completed the preceding PCP.

⁹² By means of a prior information notice in the Official Journal of the EU.

For PPI implemented by a group of procurers, the specific contracts for procuring specific quantities of goods/services for each procurer can be awarded and the selected tenderers can either all be paid by the lead procurer, or by each procurer in the buyers' group individually, for their quantity of goods/services procured.

Procurers must avoid the use of selection criteria based on disproportionate qualification and financial guarantee requirements (*e.g. with regard to prior customer references and minimum turnover*).

Functional/performance-based specifications must be used to formulate the object of the PPI call for tenders as a problem to be solved, without prescribing a specific approach to be followed. Evaluation of the tenders must be based on best-value-for-money criteria, not just lowest price.

Procurers must organise their procurement to avoid any conflicts of interest, including in the use of external experts. Potential providers cannot be beneficiaries in an action during which the PPI is planned or undertaken.

To encourage fair and wide exploitation of results, ownership of IPR rights should be assigned to the party generating the IPR, except in duly justified cases (*e.g. when that party is not able to exploit them*).

The PPI call for tender must be carried out in a competitive and transparent way in line with Treaty principles. The distribution of rights and obligations between procurers and providers (including the allocation of IPR) must be published in the PPI call for tender documents, to obtain a price according to market conditions (and rule out State aid).

3.2 Additional requirements for HE PCP/PPI actions (set out in the HE MGA)

Article 6.2.D.5

According to Article 6.2.D.5 of the [HE Model Grant Agreement](#), PCP/PPI procurement costs are eligible, if and as declared eligible in the call conditions, if they fulfil the general eligibility conditions, are calculated on the basis of the costs actually incurred and:

- are incurred for a joint pre-commercial procurement or joint or coordinated public procurement of innovative goods and services targeted by the action and described in Annex 1 and
- the procurement is carried out by a 'contracting authority/entity' as defined in the EU public procurement Directives (in particular, Directives 2014/24/EU⁹³, 2014/25/EU⁹⁴ and 2009/81/EC⁹⁵).

⁹³ Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ L 94, 28.3.2014, p. 65).

⁹⁴ Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ L 94, 28.3.2014, p. 243).

⁹⁵ Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC (OJ L 216, 20.8.2009, p. 76).

The beneficiaries must award the procurement contracts to the tender(s) offering best value for money and use objective and transparent procedures which — unless otherwise provided in the call conditions — include:

- if a preliminary market consultation is carried out: the publication of a prior information notice about the consultation in the Official Journal of the European Union
- the publication of a contract notice in the Official Journal of the European Union
- the publication of a contract award notice within 48 days after concluding the contract(s) in the Official Journal of the European Union

in English and any additional language(s) chosen by the beneficiaries.

Where the call conditions restrict participation or control due to security reasons, the beneficiaries must ensure that the performance of the contract takes place in the eligible countries or target countries set out in the call conditions — unless otherwise approved by the granting authority.

For PPI procurements, beneficiaries that are ‘contracting authorities/entities’ within the meaning of the EU Directives on public procurement must also comply with these Directives and the applicable national law on public procurement.

The beneficiaries which act as procurers (i.e. the buyers group and the lead procurer), the object and estimated cost for each procurement and the estimated financial contribution per member of the buyers group must be set out in Annex 1 and the estimated procurement costs per beneficiary must be set out in Annex 2.

The costs for the cost categories other than procurement costs are eligible only up to 50% of the total estimated eligible costs of the action set out in Annex 2.

This cost will not be taken into account for the indirect cost flat-rate.

Annex 5

According to Annex 5 of the [HE Model Grant Agreement](#), when implementing procurements in HE PCP/PPI actions (i.e. calls that are specifically labelled as PCP/PPI actions), the beneficiaries must respect the following conditions:

- avoid any conflict of interest and comply with the principles of transparency, non-discrimination, equal treatment, sound financial management, proportionality and competition rules
- assign the ownership of the intellectual property rights under the contracts to the contractors (for PPI procurements: unless there are exceptional overriding public interests which are duly justified in Annex 1), with the right of the buyers to access results — on a royalty-free basis — for their own use and to grant (or to require the contractors to grant) non-exclusive licences to third parties to exploit the results for them — under fair and reasonable conditions — without any right to sub-license
- allow for all communications to be made in English (and any additional languages chosen by the beneficiaries)

- ensure that prior information notices, contract notices and contract award notices contain information on the EU funding and a disclaimer that the EU is not participating as contracting authority in the procurement
- allow for the award of multiple procurement contracts within the same procedure (multiple sourcing)
- for procurements involving classified information: apply the security rules set out in Annex 5 mutatis mutandis to the contractors and the background and results of the contracts
- where the call conditions restrict participation or control due to strategic assets, interests, autonomy or security reasons: apply the restrictions set out in Annex 5 mutatis mutandis to the contractors and the results under the contracts
- where the call conditions impose a place of performance obligation: ensure that the part of the activities that is subject to the place of performance obligation is performed in the eligible countries or target countries set out in the call conditions
- to ensure reciprocal level of market access: where the WTO Government Procurement Agreement (GPA) does not apply, ensure that the participation in tendering procedures is open on equal terms to bidders from EU Member States and all countries with which the EU has an agreement in the field of public procurement under the conditions laid down in that agreement, including all Horizon Europe associated countries. Where the WTO GPA applies, ensure that tendering procedures are also open to bidders from states that have ratified this agreement, under the conditions laid down therein.

3.3 Other issues to think about...

Additional activities in HE PCP/PPI actions

HE PCP/PPI actions (i.e. calls that are specifically labelled as PCP/PPI actions) fund two types of activities, both related to the PCP/PPI procurement:

- one single joint public procurement of R&D services (PCP action) or one joint or several coordinated public procurements of innovative solutions (PPI action) and
- additional activities related to the PCP/PPI call for tenders.

For PCP actions, it must be only one PCP procurement per GA; for PPI actions, it can be one joint or several coordinated PPI procurements per GA.

The additional activities must relate to the PCP/PPI call for tenders. This includes activities needed to prepare, manage and follow-up the PCP/PPI procurement (including testing of solutions by the lead procurer, buyers group, or other end-users) and further activities to embed the PCP/PPI into a wider set of demand-side activities.

Activities needed to coordinate and implement the PCP/PPI procurement are mandatory. Further additional activities are optional (*e.g. activities to embed the PCP/PPI procurement into a wider set of demand side activities*), unless otherwise specified in the call conditions/work programme.

Examples of further additional activities: activities that aim to remove barriers to introducing an innovative solution on the market (including standardisation, certification and regulation); activities that prepare the ground for cooperation on future PCP or PPI projects; awareness raising and experience sharing/training.

Best value for money

The beneficiaries must award the procurement contracts to the tender(s) that offer best value for money. The beneficiaries may thus NOT award the contracts based on the lowest price as the only award criterion. In PCP/PPI procurements, in addition to the ‘price’, it is mandatory to take into account also the ‘quality’ of the proposed innovative solutions in the evaluation of tenders.

Joint vs coordinated procurement

For **PCPs**, there must be *one joint* procurement procedure.

There can be only one PCP procurement per PCP action that addresses a common challenge (i.e. a specific procurement need that is part of the mid-to-long-term innovation plans of the buyers group and that requires new solutions to be developed). The common challenge may have several facets or building blocks, as long as all the beneficiaries in the buyers group share the need for all of them and are willing to co-finance all of them. If the common challenge is split in several sub-challenges on which different vendors can compete, the minimum requirements of 3 R&D providers for phase 1 and 2 for phase 3 applies per sub-challenge, in order to obtain a competitive supply chain for each sub-challenge.

The joint procurement procedure (i.e. joint call for tender based on joint tender specifications, joint evaluation of offers, joint contract award) is coordinated and led by one beneficiary (‘lead procurer’ or ‘contracting authority’). The lead procurer may be part of the buyers group or not (i.e. it may also be a beneficiary that is NOT part of the buyers group).

Example: the lead procurer can be a central purchasing body that carries out the procurement for the buyers group, but does not contribute financially to the budget for the PCP procurement.

The lead procurer and buyers group must prepare one joint tender specification for the PCP, that is based on the needs of the buyers group (i.e. the common challenge) and on the feedback from the open market consultation and that define the functionality and performance requirements that solutions should meet rather than prescribing a specific solution.

The lead procurer signs, in the name and on behalf of the buyers group, the PCP procurement contracts with all suppliers selected to participate in the PCP. The lead procurer must be appointed and mandated to sign contracts by the buyers group — as well as other key aspects of the *modus collaborandi* for implementing the PCP procurement must be specified — in the joint procurement agreement, which forms part of the consortium agreement needed for the HE grant.

The PCP procurement contracts to be signed by the lead procurer are:

- a framework contract with each selected provider, covering the whole PCP and
- specific contracts with each selected provider, for each PCP phase.

For **PPIs**, there must be one common challenge, but the procurement may be EITHER one *single joint* OR *several coordinated* procurements.

For joint PPI procurements, there is one joint PPI call for tender launched by the lead procurer, one joint tender specification and one joint evaluation of offers.

For coordinated PPI procurements, there are several separate PPI procurements carried out individually by the different procurers in the buyers group (separate tender PPI call for tenders with separate tender specifications, separate evaluation of offers, separate award decisions). However, all these separation PPI procurements are ‘coordinated’, as they were jointly prepared (through the open market consultation, if applicable joint/coordinated conformance testing, and the joint specification of the common challenge).

It is also possible that one part of the PPI procurement is implemented jointly, and another part in a coordinated way. This happens typically when the lead procurer implements a joint PPI call for tender under his applicable national legislation that awards framework contract(s)/agreement(s), and then individual procurers from the buyers group award separately their own specific contracts under their own national legislation for the amount of innovative solutions they each want to buy from one or more of the provider(s) that were selected for the framework contract(s)/agreement(s).

For PPI procurements, there is no obligation to use one joint tender specification, only to use one joint specification of the common challenge. In case of coordinated procurements or procedures that are partly implemented jointly partly in a coordinated way (*see above*), procurers have the choice to use separate tender specifications that contain a part that is common (i.e. the part that describes the common challenge) and that contain a part that is different/specific to each procurers’ local requirements and or deployment situation.

Coordinated procurement does not require that all procurers in the buyers group start buying all the innovation solutions at exactly the same point in time. The eligibility conditions require that the PPI procurement costs are incurred at some point in time ‘during the duration of the PPI action’. This means that different procurers in the buyers group could start procuring their innovative solutions at different points in time during the PPI action, depending on the timing of their own local deployment plans. It also means that the same procurer may buy multiple batches of innovative solutions at different points in time during the action. However, only those PPI procurement costs that are incurred (i.e. payment of the PPI providers) ‘during the duration of the action’, will be eligible for funding.

Example: This may be needed in PPI procurements:

- with a number of phases (e.g. deployment, validation and operational support) with different interim/final payments that may correspond to the different phases
- where innovative solutions need to be deployed by different procurers at different points in time (e.g. one procurer already has budget availability for deploying innovative solutions earlier than another procurer)
- where different parts of one common innovative solution need to be deployed at different times and/or by different procurers (e.g. procurers in different countries need to buy an innovative software to interconnect their country/region to a common cross-border system). For each procurer, a different lot with corresponding different deployment deadlines and payments may be used.

The procurers in the buyers group may select one or more PPI providers. There is no obligation to use multiple sourcing or not. The choice is left to the procurers.

The PPI procurement contracts are not necessarily signed by the lead procurer and there is not necessarily a framework agreement. The buyers group may choose between direct contracts or a framework contract/agreement with specific contracts (with each selected provider).

For joint procurements:

- the buyers group may mandate the lead procurer, in the joint procurement agreement, to sign the framework contract/agreements and/or the specific contracts/direct subcontracts
- or
- if there is no mandate for the lead procurer to sign, the general rule is that:
 - framework contract(s)/agreement(s) must be signed by all members of the buyers group together
 - specific contracts must be signed by each buyer individually (for the innovative solution(s) each buyer buys individually).


The lead procurer must be appointed by the buyers group — as well as other key aspects of the *modus collaborandi* for implementing the PPI procurement must be specified — in the joint procurement agreement, which can be part of the consortium agreement needed for the HE grant.

How does the PCP budget need to be set up?

For **PCPs**, the budget for the ‘PCP procurement cost’ must be allocated so that it can cover the minimum required number of phases and providers.

The PCP procurement is normally split in 3 **phases** (solution design, prototyping, original development and testing of a limited set of ‘first’ products or services) which are implemented via 3 different specific contracts (under the overall PCP framework agreement). For fasttrack PCPs, the buyers group can combine these last two phases into one phase (*see section 3.2*) and, as a result, implement the PCP with only 2 different specific contracts.

In addition, the buyers group must select multiple competing **providers**, starting with a minimum of normally 3 providers for the first PCP phase (exception to start with 2 providers only if there are not sufficient R&D providers). At the end of each phase, an intermediate evaluation will take place to identify the providers that successfully completed the phase. A call-off will be made to select the providers with the best value for money offers for the next phase.

 In order to obtain a competitive supply chain as a result of the PCP, plan the budget distribution across the phases in a way that there is enough budget for minimum 2 providers in the last PCP phase 3.

Is there a required minimum value/investment for the ‘PCP/PPI procurement cost’?


Because HE PCP/PPI actions (i.e. calls that are specifically labelled as PCP/PPI actions) have as primary aim the implementation of PCP/PPI procurements, these actions fund only two types of eligible costs in the following way:

- The ‘PCP/PPI procurement costs’ includes only the procurement costs that the participants spend on buying R&D services (PCP) or on buying innovative solutions (PPI) from providers on the market (also called the PCP/PPI providers below).

- The costs for additional activities, i.e. the costs for those cost categories other than the PCP/PPI procurement costs, are eligible only up to 50% of the total estimated eligible costs of the action. This is due to the fact that the PCP/PPI procurement is the main objective of a PCP/PPI action.

The ‘PCP/PPI procurement costs’ must thus amount to minimum 50% of the total estimated costs of the action in the budget table, and all ‘additional costs’ can thus amount to maximum 50% of the total estimated costs of the action.

The maximum amount for additional activities is fixed in the GA based on the ‘estimated’ eligible costs of the action, incl. the ‘estimated’ PCP/PPI procurement cost. The amount of EU funding for additional activities does NOT change (i.e. it is NOT reduced by the granting authority) when at the end of the procurement, the costs actually incurred for PCP/PPI procurement end up being less than initially estimated (*e.g. if the buyers group is able to procure at a better price than it had initially budgeted*).

 The GA only imposes a relative investment obligation for the PCP/PPI procurement (minimum 50% of the total estimated costs of the PCP/PPI action). It does not impose a absolute investment obligation (minimum amount of euros). If the call conditions stipulate that the indicative total budget per PCP/PPI action is, for example, 10 mio euro and the buyers group can only afford to spend 4,5 mio on the PCP/PPI procurement cost, it can submit a proposal to the call for an 9 mio euro project.

What does the PCP/PPI procurement cost category cover and what not?

For HE PCP/PPI actions (i.e. calls that are specifically labelled as PCP/PPI actions), the budget category ‘PCP/PPI procurement cost’ is a specific category of costs that covers only the costs of the PCP/PPI procurement (i.e. the price of the PCP/PPI procurement paid to the PCP/PPI providers, including the related taxes; for more info on VAT, *see below*). Only costs of R&D services (PCP) or innovative solutions (PPI) procured by the beneficiaries are eligible in this budget category.

Other costs (i.e. those of the ‘additional activities’) must be charged under the other (standard) cost categories.

Example: *Costs for additional activities can include:*

Personnel costs (e.g. costs incurred by the lead procurer, buyers group and other consortium participants for consulting the market, preparing the call for tender documents etc.) under cost category A

Subcontracting costs (e.g. for web design or publicity campaign to promote the PCP/PPI procurement, for external experts that support the buyers group in evaluation of tenders) under cost category B


Purchase costs (e.g. for travel tickets, consumables and equipment that needs to be bought by the buyers group to test innovative solutions of the providers that win the PCP/PPI contracts) under cost category C

Financial support to third parties (e.g. to award a prize to the solution provider(s) that performed best in the PCP/PPI procurement) and costs for internally invoices goods and services under cost category D.

The PCP/PPI procurement cost itself can not be an in-kind contribution. In-kind contributions can only occur under the additional activities. In-kind contributions that are provided by third parties free of charge (*e.g. personnel resources, equipment, etc*) may be declared as eligible direct costs by those beneficiaries which use them (under the same conditions as if they were their own).

Example: Potential end-users of the solutions (e.g. fire brigade) may make available personnel or equipment to the buyers group (e.g. ministry of interior) to help test innovative solutions.

Indirect costs of the PCP/PPI procurement are NOT reimbursed (the PCP/PPI procurement costs are not included in the pool of costs on which the automatic 25% indirect cost flat-rate is calculated).

 Be aware that for HE PCP/PPI actions, a change to the PCP/PPI procurement costs will always be considered substantial and therefore require an amendment (contrary to the subcontracting of related additional coordination and networking activities).

Annexes 1 and 2 must clearly identify the common challenge (types of R&D services / innovative solutions to be procured in the PCP/PPI), the lead procurer, the buyers group, the total PCP/PPI budget and the estimated PCP/PPI procurement costs per beneficiary, already at the moment of the signature of the GA. Any changes at a later stage (*e.g. after the preparation stage of the project*) are only possible through an amendment). In addition, at the end of the preparation stage of the project, the consortium must confirm (in the periodic report) that the lead procurer has not changed and that the buyers group's commitments to the PCP/PPI budget are still valid or whether changes are needed, based on the feedback of the preparatory work (*e.g. the open market consultation*).

Who can implement and get funding for PCP/PPI procurements?

PCP/PPI procurements must be implemented by entities that are public procurers, i.e. entities that are contracting authorities or contracting entities according to the definition of those terms in the EU Public Procurement Directives [2014/24](#)⁹⁶, [2014/25](#)⁹⁷ and [2009/81](#)⁹⁸.

- ‘contracting authority’ means the State, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or one or several of such bodies governed by public law (for the full definition, *see Article 2(1)(1) of Directive 2014/24*). Bodies governed by public law also include entities financed mostly by the State, regional or local authorities, or other bodies governed by public law and entities controlled by those bodies (for the full definition, *see Article 2(1)(4) of Directive 2014/24*). This includes for example ministries, regions, cities, road management authorities, public hospitals, central purchasing bodies etc.
- ‘contracting entities’ refers to entities operating in specific sectors (such as utilities for water, energy, transport, postal services covered by Directive 2014/25 and contracting entities in the field of security covered by Directive 2009/81). They may be contracting authorities, public undertakings or entities operating on the basis of special or exclusive rights (for the full definition, *see Article 4 of Directive 2014/25*).

Under Horizon Europe, public procurers also include entities that are contracting authorities/entities according to the above definition but to which the EU Public Procurement Directives itself do not

⁹⁶ Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ L 94, 28.3.2014, p. 65).

⁹⁷ Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ L 94, 28.3.2014, p. 243).

⁹⁸ Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC (OJ L 216, 20.8.2009, p. 76).

apply (e.g. *European Research Infrastructure Consortia*).

HE PCP/PPI actions use the standard consortium set-up as other HE actions (i.e. coordinator, beneficiaries, linked third parties, etc). However, the lead procurer (i.e. the procurer that is appointed by the buyers group to coordinate the PCP/PPI procurement) MUST participate as a beneficiary in PCP/PPI actions and the buyers group (the procurers that contribute financially to the budget for the PCP/PPI procurement) MUST participate as beneficiaries or as linked third parties in PCP/PPI actions. Only they can declare 'PCP/PPI procurement costs'. Other participants (even if beneficiaries/affiliated entities) can only participate in the other 'additional activities' under the PCP/PPI action and thus only charge such costs.

The buyers group in PCP/PPI actions includes the public procurers, plus possibly one or more private and/or NGO procurer(s) that provide similar services of public interest. The buyers group is NOT open to other types of procurers that are not providing services of public interest — even if they have the same procurement need.

Example: In a PPI project with a buyers group of hospital procurers that buys an innovative software:

In addition to public hospitals, also private hospitals and NGOs like Médecins sans frontières can be part of the buyers group and can declare PCP/PPI procurement costs

Private companies that are not providing similar hospital services to the public (e.g. IBM, EADS) cannot be part of the buyers group and cannot declare PCP/PPI procurement costs, even if they would be interested to procure the same innovative software system as the hospital procurers

Such other procurers may be involved in the action as beneficiaries/affiliated entities that are responsible for other action tasks under the additional activities (e.g. *certification bodies, end-users*) or as third parties providing in-kind contributions, if they are not potential suppliers of solutions sought for by the PCP/PPI procurement and have no other type of conflict of interest with the PCP/PPI procurement.

In addition, PCP/PPI actions often have other third parties (preferred partners), which are neither lead procurer nor part of the buyers group nor affiliated entities nor third parties providing in-kind contributions, but which have a special interest in closely following the PCP/PPI and may therefore be mentioned in Annex 1 and, if they like, participate as associated partners (e.g. *entities involved in additional activities; other potential buyers for the solutions that have expressed a special interest in the PCP/PPI*).

Finally, there are the suppliers ('contractors'; i.e. the operators that won the PCP/PPI procurement). For the purposes of the HE grant agreement, they are considered 'subcontractors'. They only have a contract (i.e. a procurement contract) with the public procurers in the project that are implementing the PCP/PPI. They do NOT become beneficiaries of the HE grant agreement.

Who should declare the 'PCP/PPI procurement costs'?

As PCP/PPI actions (i.e. calls that are specifically labelled as PCP/PPI actions) fund PCP/PPI procurements that are implemented by a buyers group, PCP/PPI grants are typically multi-beneficiary grants.

When submitting the proposal with the estimated eligible costs for PCP/PPI actions, the consortium must decide which are the participant(s) that will pay the price of the PCP/PPI procurement to the providers of the R&D/innovative solutions (and who may — by consequence — declare the PCP/PPI procurement costs).

PCP/PPI actions can support, under coordination of a lead procurer, the implementation of one joint PCP procurement or several separate but coordinated PPI procurements. In both cases, there are two options for allocating the PCP/PPI procurement costs:

- Option 1 (centralised payment): If the consortium chooses to have all selected PCP/PPI providers paid by the lead procurer, then only the lead procurer must declare 'PCP/PPI procurement cost' equalling the total estimated PCP/PPI procurement costs for the action. Option 1 requires that the consortium mandates the lead procurer to sign the PCP/PPI contracts and pay all PCP/PPI providers from a common jointly committed budget.

or

- Option 2 (decentralised payment): If the consortium chooses to have all selected PCP/PPI providers paid pro rata by each member of the buyers group according to the share of the individual contribution of each member to the total PCP/PPI procurement costs of the action, then each member of the buyers group must declare as 'PCP/PPI procurement costs' his individual share of the action's total PCP/PPI procurement costs.

What about taxes?

For declaring the PCP/PPI procurement costs, the eligible costs for the price of the PCP/PPI procurement include the related duties, taxes and charges, such as non-deductible, non-refundable value added tax (VAT).

Different duties, taxes and charges (in particular also a different VAT rate) may apply, depending on whether the consortium chooses to have all selected PCP/PPI providers paid by the lead procurer or paid pro rata by each procurer in the buyers group (see Option 1 or 2 above).

It is up to the consortium to verify the applicable duties, taxes and charges, including VAT rates, with the responsible national authorities of the countries of the lead procurer and/or the members of the buyers group, depending on whether Option 1 or 2 is chosen.

4. Managing your HE actions with PCP/PPI procurements

If your proposal is selected for funding, the standard processes will be followed for preparing, signing and managing it in the online Grant Management System.

The grant agreement for your project will be based on the HE Model Grant Agreement.

The grant agreement can be amended at any moment in time during the project if needed (— except where the changes would call into question the decision awarding the grant or breach the principle of equal treatment of applicants).

Payments will be done at the end of each reporting period set in the Grant Management System (for PCP/PPIs, these will consist in an initial prefinancing and additional prefinancings at specific moments during the procurement, i.e. after the completion of the preparation phase of the project).

The deliverables/milestones are listed in the minimum conditions set out in [General Annex H of the Horizon Europe Work Programme](#) (see above).

Some specific templates for deliverables you have to submit are available on Portal Reference Documents:

- [PCP/PPI contractor details and project abstracts](#)
- [PCP/PPI end of phase/project results and conclusions.](#)

In addition, the guidance in appendixes 1-12 can help you with some of the other deliverables/milestones:

- PCP:
 - prior information notice (PIN) (appendix 1)
 - request for tenders (RFT) (appendix 2)
 - framework agreement (appendix 3)
 - specific contract (appendix 4)
 - contract notice (appendix 5)
 - contract award notice (appendix 6)
- PPI:
 - prior information notice (PIN) (appendix 8)
 - request for tenders (RFT) (appendix 9)
 - sample contract clauses (appendix 10)
 - contract notice (appendix 11)
 - contract award notice (appendix 12).

Appendix 1 PCP PIN

PCP PRIOR INFORMATION NOTICE (PIN)

This template is intended to help EU beneficiaries to prepare their PCP prior information notices (PINs). Text in green is meant to indicate instructions or options; text in black is sample text.

The PIN has to be filled out online on the [TED – tenders electronic daily website](#).


Use the English version of the *simap* standard form that is most appropriate for your type of organisation:

- for lead procurers in the public sector: ‘Prior information notice’
- for lead procurers in the utilities sector: ‘Periodic indicative notice – utilities’.
- for lead procurers in the defence and security sector: ‘Prior information notice for contracts in the field of defence and security’.

In addition to English, you may publish the PIN (or a summary) in any other language(s).

Remember that publication of the PIN in TED is only a first step. The open market consultation must be actively promoted and advertised widely to potential tenderers across Europe, using in particular also Horizon Europe Internet sites and HE National Contact Points. Promote it also via large European industry events across Europe, relevant industry initiatives at EU level (e.g. European partnerships, EIPs, PPPs, Horizon Europe Missions), sectorial industry associations and chambers of commerce across Europe (e.g. the Enterprise Europe Network), relevant sectorial and innovation procurement related social media channels. In order to treat all potential tenderers equally, such targeted promotion activities can only start AFTER the publication of the PIN in TED.

A copy of the draft PIN must be submitted as a deliverable to the EU granting authority at the latest 5 days before it is sent for publication to the EU Publication Office (see [General Annex H of the Horizon Europe Work Programme](#)).

 This template is provided for information purposes only and is not intended to replace professional legal advice. It can be used as a starting point, but you remain responsible for your PIN and for adapting it to your situation (including ensuring full compliance with the EU grant requirements and the applicable rules under national law).



Supplement to the Official Journal of the European Union

Info and online forms: <http://simap.ted.europa.eu>

Prior information notice

Directive 2014/24/EU

This notice is for prior information only

This notice aims at reducing time limits for receipt of tenders

This notice is a call for competition

Interested operators must inform the contracting authority of their interest in the contract(s). The contract(s) will be awarded without publication of a further call for competition.

Select the first bullet (‘This notice is for prior information only’).

I.1) Name and addresses¹ (please identify all contracting authorities responsible for the procedure)

Official name:		National registration number: ²	
Postal address:			
Town:	NUTS code:	Postal code:	Country:
Contact person:		Telephone:	
E-mail:		Fax:	
Internet address(es) Main address: (URL) Address of the buyer profile: (URL)			

Give the contact details of the lead procurer and all the procurers in the buyers group.

In the internet addresses section, give the project website if you do not want to use the general website of the lead procurer and procurers in the buyers group. Use the address of the buyer profile of the lead procurer and procurers in the buyers group respectively.

I.2) Joint procurement

<input type="checkbox"/> The contract involves joint procurement In the case of joint procurement involving different countries, state applicable national procurement law: <input type="checkbox"/> The contract is awarded by a central purchasing body

Select ‘yes’ for the first question (‘The contract involves joint procurement’).
 Insert the following text in the free text field for the case of joint procurement involving different countries, state applicable national procurement law: ‘This PCP is carried out by [insert name of the lead procurer] in the name and on behalf of the buyers group listed in I.1. The applicable national procurement law is [insert the applicable national procurement law of the lead procurer]’.

Only select ‘yes’ for the second question (‘The contract is awarded by a central purchasing body’), if this is the case for your PCP.

I.3) Communication

<input type="radio"/> The procurement documents are available for unrestricted and full direct access, free of charge, at: (URL) ¹² <input type="radio"/> Access to the procurement documents is restricted. Further information can be obtained at: (URL) ¹²
Additional information can be obtained from <input type="radio"/> the abovementioned address <input type="radio"/> another address: (please provide another address)
Tenders or requests to participate must be submitted ^{5,19} <input type="checkbox"/> electronically via: (URL) <input type="radio"/> to the abovementioned address <input type="radio"/> to the following address: (please provide another address)
<input type="checkbox"/> Electronic communication requires the use of tools and devices that are not generally available. Unrestricted and full direct access to these tools and devices is possible, free of charge, at: (URL)

Select the applicable options to clarify how interested tenderers can obtain the procurement documents and additional information and how they must submit their tenders.

I.4) Type of the contracting authority

<input type="radio"/> Ministry or any other national or federal authority, including their regional or local subdivisions <input type="radio"/> National or federal agency/office <input type="radio"/> Regional or local authority	<input type="radio"/> Regional or local agency/office <input type="radio"/> Body governed by public law <input type="radio"/> European institution/agency or international organisation <input type="radio"/> Other type:
---	--

This section is to be filled in ONLY if the lead procurer is a contracting authority (i.e. NOT a contracting entity).

I.5) Main activity

<input type="radio"/> General public services <input type="radio"/> Defence <input type="radio"/> Public order and safety <input type="radio"/> Environment <input type="radio"/> Economic and financial affairs <input type="radio"/> Health	<input type="radio"/> Housing and community amenities <input type="radio"/> Social protection <input type="radio"/> Recreation, culture and religion <input type="radio"/> Education <input type="radio"/> Other activity:
--	--

Select the lead procurer’s main activities.

Section II: Object³

II.1) Scope of the procurement

II.1.1) Title:	Reference number: ²
----------------	--------------------------------

Use this title: ‘Pre-commercial procurement (PCP) to buy R&D (research and development) services to [specify in a few words the subject and scope of this PCP e.g. improving the energy efficiency of buildings]’.

II.1.2) Main CPV code: [][][][][][][][][][] Supplementary CPV code: ^{1,2} [][][][][][][][][][]

Use CPV 73100000 for R&D services and additional other CPVs, if relevant to the object of the contract (e.g. CPV for medical equipment if the PCP is for medical equipment-related R&D, CPV for software development services if software-related R&D is needed).

II.1.3) Type of contract <input type="radio"/> Works <input type="radio"/> Supplies <input type="radio"/> Services
--

Select ‘Services’ (not ‘Supplies’ or ‘Works’; PCP is an R&D services contract).

II.1.4) Short description:

Use this text:

This PIN provides early information about the expected starting date and purchase volume and about the open market consultation that is organised in preparation of this pre-commercial procurement (PCP).

The procurement aims to trigger new solutions to be developed and tested to address the following challenge: [specify briefly the subject and scope of this PCP e.g. *improving the energy efficiency of buildings*].

[OPTION for PCPs with lots: As the challenge covers a number of sub-challenges, the procurement will be divided into the following lots, each corresponding to one sub-challenge:

- lot 1: [insert name of the sub-challenge to which the lot corresponds]
- lot 2:
- ...]

The main technical challenges to be addressed [per lot] are: [indicate the main target quality/efficiency and/or functionality/performance improvements compared to the current state-of-the art technology – per lot, if applicable - e.g. *30 % energy efficiency improvement, 20% cost reduction, etc*].

Provide any other relevant information. If needed to cope with the character-limit in the forms, distribute text also over 'II.2.4) Description of the procurement' and 'II.2.14) Additional information'.

II.1.5) Estimated total value²

Value excluding VAT: [] Currency: [] [] []

(for framework agreements or dynamic purchasing systems – estimated total maximum value for the entire duration of the framework agreement or dynamic purchasing system)

Give the total estimated value of the PCP framework agreement in euros/other currency (excluding VAT).

II.1.6) Information about lots

This contract is divided into lots yes no

Tenders may be submitted for¹² all lots maximum number of lots: [] one lot only

Maximum number of lots that may be awarded to one tenderer: []

The contracting authority reserves the right to award contracts combining the following lots or groups of lots:

For PCPs with lots select 'yes'. Consider carefully the consequences of restricting the number of lots that tenders may be submitted for, if applicable.

II.2) Description¹

II.2.1) Title:²

Lot No:²

Only fill in if lots are used. Fill in the title and number of each lot.

II.2.2) Additional CPV code(s)²

Main CPV code:¹ [] [] . [] [] . [] [] . [] [] Supplementary CPV code:^{1,2} [] [] [] []

Only fill in if lots are used. Use the CPV codes for each lot.

II.2.3) Place of performance

NUTS code:¹ [] [] [] [] [] Main site or place of performance:

Fill out the 'NUTS codes' of the lead procurer and of all the countries in which testing is expected to take place (typically the countries of those public procurers in the buyers group in whose countries testing is expected to take place).

For the 'Main site or place of performance' specify the place of performance requirement(s) and the location(s) for testing:

At least [insert the percentage chosen by the buyers group/imposed by the HE call conditions for this PCP; it must be minimum 50%] % of the contracted R&D services must be performed in EU Member States or Horizon Europe associated countries⁹⁹).

[additional OPTION for PCPs that involve security-related R&D: Moreover, at least [insert the percentage chosen by the buyers group/imposed by the HE call conditions for this PCP; if there are sufficient R&D providers able to do the work in Europe, it is typically set at 100% for security reasons] % of the contracted R&D services on security components of the solution must be performed in [OPTION if there are participation and/or control restrictions in the HE call conditions: [add the

⁹⁹ [List of Horizon Europe participating countries.](#)

list of countries to which participation and/or control is restricted)]*[OPTION if there are no participation and/or control restrictions in the HE call conditions: [add 'EU Member States or Horizon Europe associated countries']].]*

In addition, contractors must ensure that none of the contracted services are performed in countries nor by entities that are subject to [EU restrictive measures](#) under Article 29 of the Treaty on the European Union (TEU) and Article 215 of the Treaty on the Functioning of the EU (TFEU)¹⁰⁰ (sanctions). They must ensure that none of the goods procured or used for the procurement were developed, produced or supplied in countries or by entities that are subject to such restrictive measures. Testing is expected to take place in the following procurers' countries [insert the relevant countries] *[additional OPTION for PCPs that involve security related testing as part of a larger international test exercise: and/or as part of large [insert the name of the relevant test exercise e.g. EU MODEX disaster management exercises] exercises in the EU].*

Check carefully if the call conditions for your HE grant impose specific requirements (e.g. specific minimum percentages for the place of performance requirement, or specific restrictions on the countries in which the R&D and/or the testing must be performed). If yes, they prevail and must be applied. If no, the place of performance conditions should not be restricted further than 'the EU Member States of Horizon Europe associated countries' unless the buyers group has justified security reasons to do so and in agreement with the granting authority.

II.2.4) Description of the procurement:

(nature and quantity of works, supplies or services or indication of needs and requirements)

Use this text:

This PCP procurement is a joint procurement by different procurers across Europe that are all facing the same common challenge and are thus looking for similar solutions (so-called 'buyers group').

The procurement will take the form of a pre-commercial procurement (PCP) under which R&D service contracts will be awarded to a number of R&D providers in parallel in a phased approach. This will make it possible to compare competing alternative solutions.

Each selected R&D provider will be awarded a framework agreement that covers the following R&D phases and a specific contract per phase.

Choose option 1 or 2 below depending on how many phases you will use (3 or 2 for fasttrack):

[OPTION 1 by default: The 3 phases are: solution design (phase 1), prototyping and lab testing (phase 2), original development, installation, validation and field testing of a limited set of first products or services (phase 3).] [OPTION 2 for fasttrack PCPs (phase 2 and 3 combined into one): The 2 phases are: solution design (phase 1), prototyping and lab testing plus subsequently original development, installation, validation and field testing of a limited set of first products or services (phase 2).]

After each phase, intermediate evaluations will be carried out to progressively select the best of the competing solutions. The contractors with the best-value-for-money solutions will be offered a specific contract for the next phase. *[additional OPTION for PCPs with lots: The phased approach with parallel contracts and intermediate evaluations will be followed within each lot.]*

Testing is expected to take place in [add the locations where testing is expected to take place, in particular test locations of the procurers and other additional test locations]. This testing may also serve as a first customer test reference for the contractors. The procurement is expected to start in [add expected starting date of the PCP] and end in [add expected completion date of the PCP].

The selected operators will retain ownership of the intellectual property rights (IPRs) that they generate during the PCP and will be able to use them to exploit the full market potential of the developed solutions *i.e. beyond the procurement*. *[The market potential is estimated at [insert available figures about the potential total market size, i.e. beyond the procurers].]*

II.2.5) Award criteria¹²

- Criteria below
 - Quality criterion – Name: / Weighting: ^{1,2,20}
 - Cost criterion – Name: / Weighting: ^{1,20}
 - Price – Weighting: ²¹
- Price is not the only award criterion and all criteria are stated only in the procurement documents

¹⁰⁰ Please note that the EU Official Journal contains the official list and, in case of conflict, its content prevails over that of the [EU Sanctions Map](#).

Select one of the 2 options ('Criteria below' OR 'Price is not the only award criterion and all criteria are stated only in the procurement documents').

If you select the first option ('Criteria below'), you must indicate all the criteria and their weighting.

Note that evaluation of the tenders must be based on best value for money criteria (not just lowest price).

II.2.6) Estimated value ^{2,5,6,19}

Value excluding VAT: [] Currency: [] [] []
(for framework agreements or dynamic purchasing systems – estimated total maximum value for the entire duration of this lot)

Only fill in if lots are used.

II.2.7) Duration of the contract, framework agreement or dynamic purchasing system ^{5,6,19}

Duration in months: [] or Duration in days: []
or Start: (dd/mm/yyyy) / End: (dd/mm/yyyy)

This contract is subject to renewal

Description of renewals:

Enter the duration.

II.2.10) Information about variants ¹²

Variants will be accepted

Select 'No'. In PCP, the use of variants is not necessary, since the PCP approach inherently supports the development of several alternative solutions in parallel.

II.2.11) Information about options ^{5,6,19}

Options

Description of options:

Complete if applicable.

II.2.13) Information about European Union funds ^{5,19}

The procurement is related to a project and/or programme financed by European Union funds yes no

Identification of the project:

Select 'yes'.

Use this text:

This procurement is part of a project that is funded by the European Union's Horizon Europe Research and Innovation Programme, under grant agreement No [insert number] — [insert project acronym] (see [insert project website]).

[additional OPTION if the procurement also receives funding from other EU programmes (i.e. if there are procurers in the buyers group whose financial contribution to the PCP budget is funded by other EU programmes, for example the European Regional Development Fund (ERDF)): The procurement receives also funding from the [OPTION 1 for EU programmes: European Union's [insert name of EU programme]][OPTION 2 for national programmes co-funded by the EU (e.g. by Regional Funds, Agricultural Funds): [insert name of national programme] co-financed by the European Union]: [insert beneficiary name and grant agreement number and acronym].]

The EU has given a grant for this procurement, but is not participating as a contracting authority in the procurement.

Note that it is NOT allowed for one and the same procurer to receive funding for his part of the PCP budget from different EU programmes (e.g. Horizon Europe and ERDF). But it is possible for different procurers in the buyers group to receive funding from different EU sources.

II.2.14) Additional information:

Provide relevant additional information, if applicable.

II.3) Estimated date of publication of contract notice: ^{9,19} (dd/mm/yyyy)

Enter the date.

Section III: Legal, economic, financial and technical information ^{5,6,19}

As this PIN is NOT a call for competition, do NOT complete any of the sub-sections in Section III.

Section IV: Procedure

As this PIN is NOT a call for competition, do NOT fill in any of the subsections of Section IV, except for sub-section IV.1.8 which needs to be completed as follows:

IV.1.8 Information about the Government Procurement Agreement (GPA)

The procurement is covered by the Government Procurement Agreement yes no

Select 'no'.

Section VI: Complementary information

VI.2) Information about electronic workflows ^{5,19}

- Electronic ordering will be used
- Electronic invoicing will be accepted
- Electronic payment will be used

Do not fill in. This is not a notice for a call for competition or a notice that aims at reducing time limits for receipt of tenders.

VI.3) Additional information: ²

Use this text:

This procurement is exempted from the WTO Government Procurement Agreement (GPA), the EU public procurement directives and the national laws that implement them. This is because it concerns the procurement of R&D services where the benefits do not accrue exclusively to the contracting authority for its use in the conduct of its own affairs.

Publication of this contract notice in the EU Official Journal is not to be understood as a waiver of this exemption. Publication is made on a voluntary basis and the procurement will not follow the procedures under the EU public procurement directives, but rather the procedure described in the tender documentation.

This PIN is published to announce an open market consultation on a future procurement procedure. The PIN is not a commitment to procure.

The open market consultation will provide you with an overview on the procurement objectives, the PCP process and the main clauses of the contract. You will also have the opportunity to ask questions. It will be held in English /and [add additional language(s), if any]/.


Choose option 1 or 2 below, depending on whether there are participation and/or control restrictions for the open market consultation or not:

[OPTION 1 by default (no restrictions): This PIN invites all interested operators to take part in an open market consultation.

Participation in the open market consultation is not open to entities that are subject to [EU restrictive measures](#) under Article 29 of the Treaty on the European Union (TEU) and Article 215 of the Treaty on the Functioning of the EU (TFEU)¹⁰¹. All information provided during the open market consultation and other background information will be published online in English /and [add additional language(s), if any]/ on the project website ([insert the project website]).]

[OPTION 2 if there are participation and/or control restrictions (based on HE call conditions or other considerations): [Explain what is the reason why the participation is restricted (e.g. explain what are the security aspects that need to be safeguarded)]

This PIN invites all interested operators established in /and controlled from/ [add the list of countries to which participation and/or control is restricted¹⁰²] to take part in an open market consultation. Participation in the open market consultation is not open to entities that are subject to [EU restrictive measures](#) under Article 29 of the Treaty on the European Union (TEU) and Article 215 of the Treaty on the Functioning of the EU (TFEU)¹⁰³. All information provided during the open market consultation and other background information will be provided to all operators that meet the above requirements and that are interested in the PCP in English /and [add additional language(s), if any]/.]

 Not participating in the open market consultation will not exclude you from participating in the PCP call for tender.

All communication (before, during and after the procurement) will be carried out in English /and [add additional language(s), if any]/. Offers for the PCP call for tender will be accepted in English /and [insert additional language(s), if any]/.

Give information on the timing. Choose the timing in such a way that you ensure that this PIN is published 45 days before the start of the first meeting of the open market consultation:

¹⁰¹ Please note that the EU Official Journal contains the official list and, in case of conflict, its content prevails over that of the [EU Sanctions Map](#).

¹⁰² See [Guidance on participation in Horizon Europe restricted calls](#).


¹⁰³ Please note that the EU Official Journal contains the official list and, in case of conflict, its content prevails over that of the [EU Sanctions Map](#).

The open market consultation will be organised in the form of a [insert the format e.g. *physical meeting(s)* (e.g. *plenary style meeting(s)*, *face-to-face meetings*), *online meeting(s)* (e.g. *webinar* or *online Q&A forum*), or a combination of those] that will be held in [insert venue(s)] on [insert date(s) and time or period].

[Please register via [insert registration link] for the open market consultation by [insert date].]

[additional OPTION if tenderers are allowed to supply additional confidential information e.g. via e-mail or in a face-to-face meeting during the open market consultation: Please indicate [by [insert date]] [together with the registration for the open market consultation] if you want to supply (under a non-disclosure agreement) additional confidential information that you do not wish to reveal in public during the open market consultation.]

[OPTION if for example a questionnaire is used: Please submit the following information by completing the open market consultation questionnaire [insert link to the questionnaire] by [insert date].]

 Do not forget that you must ensure equal treatment to all interested economic operators in all instances, including face-to-face meetings. Such meetings can therefore only be used to *listen* to the economic operators, but may not be used to *give* any additional information to the economic operators (except information also provided to all other operators).

Check carefully if the call conditions for your HE grant restrict participation and/or control of operators that can participate. If yes, they prevail and must be applied. If no, and it is not absolutely needed for security reasons, then do NOT restrict participation or control for the market consultation on your own initiative. It will benefit your procurement to have an open PIN — even if later the participation in the procurement itself is restricted to operators from certain countries.

VI.4) Procedures for review ^{5,19}

VI.4.1) Review body		
Official name:		
Postal address:		
Town:	Postal code:	Country:
E-mail:		Telephone:
Internet address: (URL)		Fax:

Do not fill in. This is not a notice for a call for competition or a notice that aims at reducing time limits for receipt of tenders.

VI.4.2) Body responsible for mediation procedures ²		
Official name:		
Postal address:		
Town:	Postal code:	Country:
E-mail:		Telephone:
Internet address: (URL)		Fax:

Do not fill in. This is not a notice for a call for competition or a notice that aims at reducing time limits for receipt of tenders.

VI.4.3) Review procedure
Precise information on deadline(s) for review procedures:

Do not fill in. This is not a notice for a call for competition or a notice that aims at reducing time limits for receipt of tenders.

VI.4.4) Service from which information about the review procedure may be obtained ²		
Official name:		
Postal address:		
Town:	Postal code:	Country:
E-mail:		Telephone:
Internet address: (URL)		Fax:

Do not fill in. This is not a notice for a call for competition or a notice that aims at reducing time limits for receipt of tenders.

VI.5) Date of dispatch of this notice: (dd/mm/yyyy)

Enter the date.

It is the contracting authority's/contracting entity's responsibility to ensure compliance with European Union law and any applicable laws.


- ¹ *please repeat as many times as needed*
- ² *if applicable*
- ³ *please repeat as many times as needed if this notice is for prior information only*
- ⁴ *if this information is known*
- ⁵ *please provide this information if the notice is a call for competition*
- ⁶ *as far as information is already known*
- ⁹ *please provide this information only if this notice is a prior information notice*
- ¹² *please provide this information here or in the invitation to confirm interest, if the notice is a call for competition or aims at reducing time limits for receipt of tenders*
- ¹⁹ *if the notice aims at reducing time limits for receipt of tenders*
- ²⁰ *importance may be given instead of weighting*
- ²¹ *importance may be given instead of weighting; if price is the only award criterion, weighting is not used*

Appendix 2 PCP RFT

PCP REQUEST FOR TENDERS (RFT)

This template is intended to help EU beneficiaries to prepare their PCP requests for tenders. Text in green is meant to indicate instructions or options; text in black is sample text.

Since PCP requests for tenders do NOT fall under the EU Public Procurement Directives, your normal templates may not work. Make sure that you draft the request for tenders in a way that is in line with the requirements for Horizon Europe-funded PCPs in [General Annex H of the HE Work Programme](#) and the HE Model Grant Agreement (see [EU AGA — Annotated Grant Agreement](#), art 6.2.D.5 and Annex 5).

 *This template is provided for information purposes only and is not intended to replace professional legal advice. It can be used as a starting point, but you remain responsible for your request for tenders and for adapting it to your situation (including ensuring full compliance with the EU grant requirements and the applicable rules under national law).*

1. General context and background

Explain the general context:

This procurement is a pre-commercial procurement (PCP).

PCP means that public procurers challenge innovative players on the market, via an open, transparent and competitive process, to develop new solutions for a technologically demanding mid- to long-term challenge that is in the public interest and requires new R&D services.

If you'd like to add a visual you can copy one of the graphics from the first section of this guidance (choose picture depending on how many phases your PCP is using (3 or 2 for fasttrack; same as in PIN)).

PCP is characterised by the following five **features**:

✘ Competitive development in phases to identify the solutions offering the best value for money

PCP targets situations that require radical innovation or R&D and for which there are typically no solutions on or close to the market yet. Different competing providers may have different ideas for solutions to the problem. As R&D is yet to take place, there is not yet any proof as to which of these potential alternative solutions would best meet customers' needs.

PCP therefore awards R&D contracts to a number of competing contractors at the same time, in order to compare different approaches to solving the problem. It thus offers innovators an opportunity to show how well their solution compares with others. It also allows a first customer test reference to be obtained from countries of the procurers that will test the solutions.

Choose option 1 or 2 below depending on how many phases you will use (3 or 2 for fasttrack; same as in PIN):

[OPTION 1 by default: The R&D for this PCP is split into 3 phases (Phase 1: solution design, Phase 2: prototyping and lab testing, Phase 3: original development, installation, wider field testing and validation of a limited set of 'first' products or services).]

[OPTION 2 for fasttrack PCPs (phase 2 and 3 combined into one): The R&D for this PCP is split into 2 phases (Phase 1: solution design, Phase 2: prototyping and lab testing followed by original development, installation, wider field testing and validation of a limited set of 'first' products or services).]

Evaluations after each phase will progressively identify the solutions that offer the best value for money and meet the customers' needs. This phased approach allows successful contractors to improve their offers for the next phase, based on lessons learnt and feedback from procurers in the previous phase. Using the phased approach with gradually growing contract sizes per phase will also make it easier for smaller companies to participate in the PCP and enable SMEs to grow their business step-by-step with each phase.

Depending on the outcome of the PCP (will it result in innovative solutions that meet the tender requirements and offer good value for money?), procurers may or may not decide to follow-up the PCP with a public procurement to deploy the innovative solutions (PPI).

✘ Public procurement of R&D services

PCP addresses mid- to long-term public procurement needs for which either no commercially stable solutions yet exist on the market, or existing solutions exhibit structural shortcomings which require further R&D to resolve. PCP is a way for procurers to trigger the market to develop new solutions that address these shortcomings. PCP focuses on specific identified needs and provides customer feedback to businesses from the early stages of R&D. This improves the likelihood of commercial exploitation of the newly developed solutions.

PCP is explained in the [PCP communication COM/2007/799](#) and the associated [staff working document SEC/2007/1668](#). The R&D services can cover research and development activities ranging from solution exploration and design, to prototyping, right through to the original development of a limited set of ‘first’ products or services in the form of a test series. Original development of a first product/service may include limited production/supply in order to incorporate the results of field-testing and demonstrate that the product/service is suitable for production/supply in quantity to acceptable quality standards. R&D does not include quantity production or supply to establish the commercial viability or to recover R&D costs.¹⁰⁴ It also excludes commercial development activities such as incremental adaptations or routine/periodic changes to existing products, services, production lines, processes or other operations in progress, even if such changes may constitute improvements.

✘ Open, transparent, non-discriminatory approach — No large-scale deployments

Unless there are specific participation and/or control restrictions (*see section 3.1*), PCP procurements are normally open at least to all operators in EU Member States or HE associated countries, on equal terms, regardless of the size, geographical location or governance structure.

Access is extended to operators from WTO GPA signatory countries and other third countries if there are not sufficient operators in EU Member States or associated countries that can perform the R&D work (*see section 3.1*).

In all cases, there is, however, a place of performance requirement that a predefined minimum percentage of the contracted R&D services must be performed in EU Member States or Horizon Europe associated countries (or a more restricted list of countries; *see section 3.1*).

All communication (before, during and after the procurement) will normally be carried out in English (and other languages, if mentioned in section 5).

Any subsequent public procurement of innovative solutions (PPI), for the supply of commercial volumes of the solutions developed in the PCP, will be carried out under a separate procurement procedure. Participation in the PCP is thus not a prerequisite for the provisioning of a solution on a commercial scale.

✘ Sharing of IPR-related risks and benefits under market conditions

PCP procures R&D services at market price, thus providing contractors with a transparent, competitive and reliable source of financing for the early stages of their research and development.

Giving each contractor the ownership of the IPRs attached to the results (foreground) they generate during the PCP means that they can widely exploit the newly developed solutions commercially. In return, the tendered price must contain a financial compensation for keeping the IPR ownership — compared to the case where the IPRs would be transferred to the procurers (the tendered price must be the ‘non-exclusive development price’). Moreover, the procurers must receive license-free rights to use the R&D results for internal use, and licensing rights subject to certain conditions.

The contractors also retain ownership of their background rights (albeit subject to certain rights of use by the procurers, *see section 2.7*).



For more information, *see PCP on the [Europa website](#)*.

✘ Exemption from EU Public Procurement Directives, WTO Government Procurement Agreement (GPA) and EU state aid rules

PCP procurements are exempted from the EU Public Procurement Directives because the procurers do not retain all the benefits of the R&D (the IPR ownership stays with the contractors).¹⁰⁵

¹⁰⁴ See also Article XV(1)(e) [WTO GPA 1994](#) and the Article XIII(1)(f) of the [revised WTO GPA 2014](#).

¹⁰⁵ See Article 16(f) of Directive [2004/18/EC](#) (Article 14 of Directive [2014/24/EU](#)), Article 24(e) of [Directive 2004/17/EC](#) (Article 32 of Directive [2014/25/EU](#)) and Article 13(f)(j) of Directive [2009/81/EC](#).

They are also exempted from the WTO Government Procurement Agreement (GPA) because this Agreement does not cover R&D services¹⁰⁶ (— the PCP being limited to such services and any subsequent PPI procurements relating to commercial-scale supply of such solutions not being part of the PCP procurement).

PCP procurements do not constitute state aid under the EU state aid rules¹⁰⁷ if they are implemented as defined in the PCP communication¹⁰⁸, namely by following an open, transparent, competitive procedure with risk- and benefit-sharing at market price. The division of all rights and obligations (including IPRs) and the selection and award criteria for all phases must be published at the outset; the PCP must be limited to R&D services and clearly separated from any potential follow-up PPI procurements; PCP contractors may not be given any preferential treatment in a subsequent procurement for provision of the final products or services on a commercial scale.


[Add other elements:](#)


Other things to know

The start of this PCP procurement was preceded by an open market consultation (see summary and Q&A on [\[insert project website\]](#)).

This procurement is part of a project that is funded by the European Union's Horizon Europe Research and Innovation Programme, under grant agreement No [\[insert number\]](#) — [\[insert project acronym\]](#) (see [\[insert project website\]](#)).

For PCPs that also receive funding from other EU sources (e.g. if there are procurers in the buyers group whose financial contribution to the PCP budget is funded by other EU programmes, for example the European Regional Development Fund (ERDF)): The procurement receives also funding from the [\[OPTION 1 for EU programmes: European Union's \[insert name of EU programme\]\]](#)[\[OPTION 2 for national programmes co-funded by the EU \(e.g. by Regional Funds, Agricultural Funds\): \[insert name of national programme\]](#) co-financed by the European Union: [\[insert beneficiary name and grant agreement number and acronym\]](#).

 The EU has given a grant for this procurement, but is not participating as a contracting authority in the procurement.

 For more information, see 'Innovation procurement' and 'Links to regional policy' in the [Commission notice on synergies between ERDF funds and Horizon Europe](#).

Note that is not allowed for one and the same procurer to receive funding for his part of the PCP budget from different EU programmes (e.g. Horizon Europe and ERDF). But it is possible for different procurers in the buyers group to receive funding from different EU sources.

2. Tender profile: Services to be procured, tender closing time, procurers, contracting approach, budget, timetable and IPR

2.1 Description of services to be procured

PCP challenge

Explain the common challenge to be addressed and the scope of the R&D services to be procured:

This procurement is for R&D services to develop solutions to tackle the following challenge: [\[specify briefly the subject and scope of this PCP, e.g. improving the energy efficiency of buildings\]](#) [\[additional OPTION for PCPs with sub-challenges: and the following sub-challenges: \[specify the sub-challenges\].\]](#)

This is a common challenge shared by all procurers in the buyers group. [\[additional OPTION for PCPs with sub-challenges: All sub-challenges are shared by all procurers in the buyers group.\]](#)

The main quality/efficiency improvements sought for are: [\[indicate the target quality/efficiency and/or functionality/performance improvements, compared to the current best available solutions, e.g. 30 % energy efficiency improvement, interoperability\]](#).

Establish how many phases your PCP will be using (3 or 2 for fasttrack; same as in PIN):

[\[OPTION 1 by default: The R&D for this PCP will be split into 3 phases \(Phase 1: solution design, Phase 2: prototyping and lab testing, Phase 3: original development, installation, wider field testing and validation of a limited set of 'first' products or services\).\]](#) [\[OPTION 2 for fasttrack PCPs \(phase 2 and 3 combined into one\): The R&D for this PCP is split into 2 phases \(Phase](#)

¹⁰⁶ See the EU's Annex IV of Appendix I to the [WTO GPA](#).

¹⁰⁷ See Point 33 of the [Commission Communication on a framework for state aid for research and development and innovation \(C\(2014\) 3282\)](#).

¹⁰⁸ [Commission Communication: Pre-Commercial Procurement: driving innovation to ensure sustainable, high quality public services \(COM\(2007\) 799\)](#) and [PCP staff working document \(SEC\(2007\)1668\)](#).

1: solution design, Phase 2: prototyping and lab testing followed by original development, installation, wider field testing and validation of a limited set of ‘first’ products or services).]


For fasttrack PCPs, specify an indicative target date for deployment: Given the need for fast deployment, the buyers group aims to start deploying and using solutions that can address the PCP challenge by [enter date by which deployment is needed].

If there are clear limitations on what the maximum price/target price range for the innovative solutions should be, explain this.

Explain the drivers behind the PCP (i.e. why the solutions are needed: to improve which aspects in the quality and efficiency of the public services that the procurer(s) is/are responsible for; to meet regulatory requirements and/or to meet a need for standardisation or certification). Explain also why current solutions don’t meet the need.

Unless explicitly exempted by the HE call conditions of your grant, describe how the gender dimension (i.e. sex and/or gender analysis) should be taken into account in the contract activities/the proposed R&D content. Note that this question relates to the content of the planned research, development and testing activities, and not to gender balance in the teams in charge of carrying out the contract. Sex and gender analysis refers to biological characteristics (such as differences between males and females) and social/cultural factors (such as ethnicity, disability and sexual orientation) respectively¹⁰⁹. For example, in healthcare related projects, the gender dimension can be taken into account by including testing on persons of all possible sexes (ensuring a healthy mix with both male and female test subjects).

For PCPs that include the purchase of some of the R&D results, specify this: The PCP includes the purchase of a limited set of [prototype(s)][and]/[or]/[first products or services] resulting from the R&D. Explain why the limited set of prototype(s)/first products/services are needed for R&D purposes (e.g. if the existing solution used by the procurers has to be destroyed in order to test the new solutions developed during the PCP and/or the procurers need to carry out further testing of the newly developed solutions after the PCP is finished). Explain clearly who is procuring which/how many prototypes/first products or services and where and when and to who they need to be delivered.

 Note that since you are required for your HE grant to award the tender on best value for money solutions, not to the lowest price only solutions, make sure to include NOT ONLY requirements regarding the price, but also regarding quality improvements of the innovative solutions.

Ensure that the targets for the quality/efficiency improvements are set so that they clearly enable to make a step-change beyond what currently available solutions are able to deliver. Use functional or performance-based specifications that include technical minimum requirements that innovative solutions must meet, rather than prescribing a specific solution. Take into account your analysis on the shortcomings of solutions available on the market, the analysis of the needs of the procurers and the outcome of the open market consultation. Alert tenderers as far as possible to any specific requirements of the subsequent phases (e.g. for phase 2: local technical and safety conditions where prototype testing is planned to take place at one of the procurers' labs; for phase 3: local technical, environmental, ethics and safety/security requirements for field-testing). Provide the metrics or indicators that the procurers will use to evaluate and validate, at the end of each PCP phase, to what extent each competing solution has made progress towards reaching the targets.

Expected outcomes (per phase)

Describe the objectives, their associated output and results and the tasks to be carried out (milestones and deliverables) for each of the PCP phases (solution design, prototyping, original development and testing of a limited set of ‘first’ products or services):

Expected outcomes (table for 3 phases)		
Phase 1: Solution design		
	Objective:	Perform research to: 1. elaborate the solution design and determine the approach to be taken to develop the new solutions and

		2. demonstrate the technical, financial and commercial feasibility of the proposed concepts and approach to meet the procurement need			
	Output and results:				
	Milestones and deliverables	By when?	How?	Output and results	
	Milestones:	M1.1) [milestone 1.1]	[dd.mm.yyyy]	[e.g.sent by email to lead procurer, on-site visit]	...
		M1.2) [milestone 1.2]
				
	Deliverables:	D1.1)[deliverable 1.1]			
		D1.1a)[interim deliverable 1.1a]			
		D1.1b)[interim deliverable 1.1b]			
		D1.2)[deliverable 1.2]			
		D1.3)[deliverable 1.3]			
		D1.3a)[interim deliverable 1.3a]			
		D1.4)[deliverable 1.4]			
		...			
Phase 2: Prototyping					
	Objective:	Develop, demonstrate and validate prototypes in lab conditions			
	Output and results:				
	Milestones and deliverables	By when?	How?	Output and results	
	Milestones:	M2.1) [milestone 2.1]	[dd.mm.yyyy]	[e.g.sent by email to lead procurer, on-site visit]	...
		M2.2) [milestone 2.2]	
				
	Deliverables:	D2.1)[deliverable 2.1]			

		D2.1a)[interim deliverable 2.1a]			
		D2.1b)[interim deliverable 2.1b]			
		D2.2)[deliverable 2.2]			
		D2.3)[deliverable 2.3]			
		D2.3a)[interim deliverable 2.3a]			
		D2.4)[deliverable 2.4]			
		...			
	Points to be addressed in report:				
Phase /3/: Development & testing					
	Objective:	Original development and field-testing of a limited set of first [products] /services/ (the test series)			
	Output and results:				
	Milestones and deliverables	By when?	How?	Output and results	
	Milestones:	M3.1) [milestone 3.1]	[dd.mm.yyyy]	[e.g.sent by email to lead procurer, on-site visit]	
		M3.2) [milestone 3.2]	...		
				
	Deliverables:	D3.1)[deliverable 3.1]			
		D3.1a)[interim deliverable 3.1a]			
		D3.1b)[interim deliverable 3.1b]			
		D3.2)[deliverable 3.2]			
		D3.3)[deliverable 3.3]			
		D3.3a)[interim deliverable 3.3a]			
		D3.4)[deliverable 3.4]			

		...			
	Points to be addressed in report:				

Specify the tasks and expected outcomes of each milestone and deliverable in more detail:

M1.1)

M1.2) ...

D1.1)

D1.2) ...

⚠ Do not forget to include the following deliverables (list for 3 phases):

- for each end-of phase deliverable, a section that explains the IPR measures taken by the contractors to protect the results and lists the names and location of personnel that carried out the R&D activities
- at the start of phase 1, phase 1 project abstracts (in the format required by the EU for publication)
- at the end of phase 1, a summary of the main results achieved by each contractor and conclusions from phase 1 (in the format required by the EU for publication)
- at the start of phase 2, phase 2 project abstracts (in the format required by the EU for publication)
- at the end of phase 2, a summary of the main results achieved by each contractor and conclusions from phase 2 (in the format required by the EU for publication)
- at the end of phase 2, a demonstration to the EU of the prototypes developed during phase 2
- [at the start of phase 3, phase 3 project abstracts (in the format required by the EU for publication)]
- at the end of phase 3, a summary of the main results achieved by each contractor and conclusions from the PCP (in the format required by the EU for publication)]
- a deadline by which the contractors must agree on the text for the summary of overall lessons learnt and results achieved from the PCP, for publication
- at the end of the PCP, a final demonstration to the EU of the final products or services developed during the 3 phases.

For phase 2, specify whether prototype validation is expected to be done at the premises of the procurer(s) or the contractors. For PCPs with lots, clarify if there is a need for validating prototypes of contractors from different lots together (to test dependencies between lots and to ensure that building blocks developed in different lots will ultimately work together as expected).

For phase [3], provide information on the timing and the site(s) where the procurers will carry out the testing and validation of the test series. State clearly how many solutions each contractor is expected to develop for the limited test series. Specify whether contractors need to set aside resources for testing the solutions on the premises of *all* or *only some* procurers. Indicate whether they need to plan to have resources available to carry out testing sequentially or in parallel at the different sites. For PCPs with lots, clarify if there is a need for field testing of products/services developed by contractors in different lots together (to test dependencies between lots and to ensure that building blocks developed in different lots ultimately work together as expected).

2.2 Tender closing time

Tender closing time will be: [date and hour, e.g. 5 September 2017, 17.00h]

2.3 Procurer(s) and other parties involved in the PCP

Explain the procurer set-up:

This procurement relates to a joint PCP that will be carried out by the following lead procurer: [name and country of the lead procurer]

The lead procurer is appointed to coordinate and lead the joint PCP, and to sign and award the framework agreement and the specific contracts for all phases of the PCP, in the name and on behalf of the following buyers group:

- [name and country of the member 1 of the buyers group]
- [name and country of the member 2 of the buyers group]
- ...

The lead procurer is [not] part of the buyers group.

The procurers in the buyers group have the following background/profile/responsibilities for:

- [name 1]: [insert responsibilities]
- [name 2]: [insert responsibilities]
-

Explain the responsibilities which the procurers in the buyers group have in their respective countries with regard to setting the acquisition and/or regulatory strategy for the innovative solutions. For example, a regional health procurer should explain here for how many hospitals in his region he is responsible to procure solutions; how many patients are served by these hospitals; how many of these patients are affected by the problem that the PCP aspires to solve, etc. A regional ministry of health should explain for how many citizens (*e.g. specific types of patients*) it is defining regulations that affect the deployment of solutions in the healthcare sector in its region.

For PCPs with third parties providing in-kind contributions to the PCP, add: The following entities are not in the buyers group but participate as third parties giving in-kind contributions to the procurers for the purpose of carrying out the PCP:

- [name, country]
- [name, country]
- ...

Provide a short description of the responsibilities of the third parties, the type of resources they will put at the disposal of the PCP, and the rights and obligations that they will assume with respect to the PCP, *e.g. the type of information they will have access to, and whether they will participate in certain parts of the PCP implementation such as testing*. Explain that they will not have rights to results or IPRs.

For PCPs with preferred partners, add: The following entities are participating as preferred partners with an interest in the PCP, but without being part of the buyers group or giving in-kind contributions for carrying out the PCP:

- [name, country]
- [name, country]
- [name, country]

Explain briefly how the preferred partners will be kept informed about the PCP, what type of information concerning the PCP they will have access to and whether they will attend certain parts of the PCP implementation such as product demonstrations and testing. Explain that they will not have rights to results or IPRs.

 Use the roles that come from the HE grant agreement:

Lead procurer — Appointed by the buyers group to organise and lead the joint procurement; also part of the buyers group, if he contributes to the procurement budget.

Buyers group — The group of procurers that contribute to the procurement budget. For procurers that participate in the EU grant as sole participants (*i.e. entities representing several members, e.g. a central purchasing body, a European research infrastructure consortium or a European regional cooperation group*), indicate which of the members contribute to the PCP procurement budget.

Third parties that provide in-kind contributions to the PCP — Entities that are neither lead procurer nor part of the buyers group, but that give in-kind contributions to the PCP.

Preferred partners — Entities that are neither lead procurer nor part of the buyers group nor third parties providing in-kind contributions, but that have a special interest in closely following the PCP (*entities involved in the Horizon Europe grant 'related additional networking activities'; other potential buyers for the solutions that have expressed a special interest in the PCP*).

Note that only procurers from countries that are eligible for Horizon Europe funding can be lead procurer and/or part of the buyers group since only they can participate as beneficiaries in the Horizon Europe project. Other entities can however perform other tasks for the PCP without obtaining EU funding (*e.g. provide input for the open market consultation, test solutions, put resources at the disposal of the project e.g. for testing, act as preferred partner*).

2.4 Contracting approach

Explain the contracting approach (text for 3 phases):

The PCP will be implemented by means of a **framework agreement** with call-offs for **specific contracts** for each of the PCP R&D phases (altogether 'contracts').

Following the tendering stage, a framework agreement and a specific contract for phase 1 will be awarded to a minimum of [indicate number: minimum 3 (2 is only allowed if the market consultation has shown that there are fewer than 3 eligible tenderers capable of performing the R&D services)] contractors.

A call-off will be organised for phase 2, with the aim of awarding a minimum of [indicate number] phase 2 contracts. Only offers from contractors that successfully completed phase 1 will be eligible for phase 2. The procurers will validate the phase 2 prototypes [identify the site: in the procurer's labs or the contractors' lab].

[A second call-off will be organised for phase 3, with the aim of awarding a minimum of [indicate number: minimum 2] phase 3 contracts. Only offers from contractors that successfully completed phase 2 will be eligible for phase 3.]

Field-testing of the first products/services is expected to take place [insert where (*e.g. at all the sites where procurers of the buyers group are based*)].

The framework agreement will set all the framework conditions for the duration of the PCP (covering all the phases). There will be no renegotiation. The framework agreement will remain binding for the duration of all phases for which contractors remain in the PCP. Tenderers that are awarded a framework agreement will also be awarded a specific contract for phase 1 (evaluation of tenders for the framework agreement and phase 1 are combined). Tenderers are therefore asked not only to submit their detailed offer for phase 1, but also to state their goals, and to outline their plans (including price conditions) for phase 2 [and 3] — thus giving specific details of the steps that would lead to commercial exploitation of the R&D results.

Provide a brief overview of the overall timing of the PCP (including the expected start and finish dates) and of the individual phases.

Indicate clearly (in this section and in the time schedule table below) if:

- the offers for the next phase will be requested together with the end-of phase deliverables for the previous phase — in this case all contractors of the previous phase will be invited to make offers for the next phase, successful completion of the previous phase is evaluated before evaluating the offers for the next phase, to determine which offers are eligible to proceed to the evaluation of offers for the next phase

or if

- the offers for the next phase will be requested only *after* the end-of phase deliverables of the previous phase and after the contractors have been informed of successful completion of the previous phase — in this case only the contractors that successfully completed the previous phase will be invited to make offers for the next phase.

2.5 Total budget and budget distribution (per phase)

Explain the budgetary set-up, specifying in particular:

- the total budget for the PCP
- the maximum budget per phase (and per lot, where applicable)
- the maximum budget per tender per phase (and per lot, where applicable)
- the 'minimum' number of contractors that are expected to be selected per phase (and per lot, where applicable)
- the maximum duration per phase.

Provide for the flexibility to transfer leftover budget from one phase to the next phase in case you receive offers with lower price than expected: For all phases, contracts will be financed until the remaining budget is insufficient to fund the next best tender. The exact number of contracts finally awarded will thus depend on the prices offered and the number of tenders passing the evaluation. As leftover budget from the previous phase will be transferred to the next phase, the total budget available for phase 2 [and 3] may eventually be higher than stated here (but the maximum budget per contractor for phase 2 [and 3] will remain the same). The lower the average price of tenders, the more contracts can be awarded. However, the total value of the contracts awarded can also be lower than initially expected if there are fewer tenders than expected that meet the minimum evaluation criteria.

⚠ State the minimum instead of the maximum expected number of contractors, to allow more contracts than initially expected to be awarded if there are more high quality tenders at cheaper prices than expected.

For PCPs for which there are minimum 3 eligible providers capable of performing the R&D services, ensure that the budget distribution of the PCP:

- starts with minimum of 3 contractors and ends with a minimum of 2 contractors in the last phase
- contains a minimum of 3 phases that between them cover the entire PCP lifecycle: solution exploration; prototyping; initial development and testing of a limited set of first products or services. If needed, each phase may be split up into more phases, e.g. in complex PCPs.

For PCPs for which there are NOT minimum 3 eligible R&D providers capable of performing the R&D services: ensure that the budget distribution of the PCP starts with minimum of 2 contractors and ends with a minimum of 2 contractors in the last phase.

For fasttrack PCPs: ensure that the budget distribution of the PCP contains a minimum of 2 phases that between them cover the entire PCP lifecycle: solution exploration; prototyping; initial development and testing of a limited set of first products or services. If needed, each phase may be split up into more phases, e.g. in complex PCPs.

2.6 Time schedule

Explain the planned time schedule:

Planned time schedule (table for 3 phases)	
Date	Activity
	<u>First tender procedure (framework agreement and phase 1 contracts)</u>
[dd.mm.yyyy]	Publication of contract notice in TED
...	Deadline for requesting tender documents
	Deadline for submitting questions about tender documents
	Deadline for lead procurer to publish replies to questions (Q&A document)
	Deadline for submission of tenders for the framework agreement and phase 1
	Opening of tenders
	Tenderers notified of decision on awarding contracts
	Signing of framework agreements and phase 1 specific contracts
	Publication of contract award notice in TED
	<u>Implementation of phase 1</u>

	Start of phase 1
	Names of winning phase 1 contractors and their project abstracts to be sent to EU (template*) and published on [insert acronym] PCP project website
	Visit of phase 1 contractors to the premises(s) of the procurer(s) to learn about the operational boundary conditions governing the design of targeted solutions
	Deadline for phase 1 interim milestone(s)/interim deliverable(s)
	Visit(s) of the phase 1 supervisor/monitoring team to the contractors' premises to check completion of milestone(s)/interim deliverable(s)
	Feedback from phase 1 supervisor/monitoring team on phase 1 interim milestone(s)/interim deliverable(s)
	Interim payments (if applicable)
	Deadline for phase 1 final milestone(s)/final report/deliverable(s)
	Assessment of phase 1 final milestone(s)/final report/deliverable(s)
	Phase 1 contractors notified as to whether they have completed this phase satisfactorily and successfully
	End of phase 1
	Summary of the results and conclusions achieved by each contractor during the phase sent to EU (template*)
	Payment of balance for phase 1 to contractors that completed this phase satisfactorily
	<u>Second tender procedure (call-off for phase 2)</u>
	Launch call-off for phase 2 (only offers from contractors that successfully completed phase 1 are eligible)
	Deadline for submitting questions on phase 2 call-off documents
	Deadline for lead procurer to circulate replies to questions to phase 2 tenderers
	Deadline for submitting phase 2 offers
	Opening of phase 2 offers
	Contractors notified of decision on awarding phase 2 contracts
	Signing of phase 2 specific contracts
	<u>Implementation phase 2</u>
	Start of phase 2
	Names of winning phase 2 contractors and their project abstracts to be sent to EU (template*) and published on [insert acronym] PCP project website

	Visit of phase 2 contractors to the premises(s) of the procurer(s), where applicable
	Deadline for phase 2 interim milestone(s)/deliverable(s)
	Visit(s) of the phase 2 supervisor/monitoring team to the contractors' premises to check completion of interim milestone(s)/deliverable(s)
	Feedback from phase 2 supervisor/monitoring team on phase 2 interim milestone(s)/deliverable(s)
	Interim payments (if applicable)
	Lab testing of the prototype developed during phase 2
	Feedback from phase 2 supervisor/monitoring team on lab testing of the prototype
	Deadline for submission of phase 2 final milestone(s)/final report /deliverable(s)
	Demonstration of prototype for the EU technical review of phase 2
	Assessment of phase 2 final milestone(s)/final report/deliverable(s)
	Phase 2 contractors notified as to whether they have completed this phase satisfactorily and successfully
	End of phase 2
	Summary of the results and conclusions achieved by each contractor during the phase sent to EU (template*)
	Payment of balance for phase 2 to contractors that completed this phase satisfactorily
	<u>Third tender procedure (call-off for phase 3)</u>
	Launch call-off for phase 3 (only offers from contractors that successfully completed phase 2 are eligible)
	Deadline for submitting questions about phase 3 call-off documents
	Deadline for lead procurer to circulate replies to questions to phase 3 tenderers
	Deadline for submitting phase 3 offers
	Opening of phase 3 offers
	Contractors notified of decision to award phase 3 contracts
	Signing of phase 3 specific contracts
	<u>Implementation phase 3</u>
	Start of phase 3
	Names of winning phase 3 contractors and their project abstracts to be sent to EU (template*) and published on [insert acronym] PCP project website

	Visit of phase 3 contractors to premises(s) of procurer(s), where applicable
	Deadline for phase 3 interim milestone(s)/deliverable(s)
	Visit(s) of the phase 3 /monitoring team to the contractors' premises to check completion of phase 3 interim milestone(s)/deliverable(s)
	Feedback from phase 3 monitoring supervisor/monitoring team on phase 3 interim milestone(s)/deliverable(s)
	Interim payments (if applicable)
	Field-testing of products/services developed during phase 3
	Feedback from phase 3 supervisor/monitoring team on field-testing of the products/services
	Deadline for submission of phase 3 final milestone(s)/final report/ deliverable(s)
	Final demonstration of products/services developed during phase 3 (including to EU representatives)
	Assessment of phase 3 final milestone(s)/final report/deliverable(s)
	Phase 3 contractors notified as to whether they have completed this phase satisfactorily and successfully
	End of phase 3]
	Summary of the results and conclusions achieved by each contractor during the PCP sent to EU for publication purposes (template*).
	Payment of balance for phase 3 to contractors that completed this phase satisfactorily

2.7 IPR

Ownership of results (foreground)

Each contractor will keep ownership of the IPRs attached to the results they generate during the PCP implementation. The tendered price is expected to take this into account.

The ownership of the IPRs will be subject to the following:

- the buyers group has the right to:
 - access results, on a royalty-free basis, for their own use
 - grant (or to require the contractors to grant) non-exclusive licences to third parties to exploit the results under fair and reasonable conditions (without the right to sub-license)
- the buyers group has the right to require the contractors to transfer ownership of the IPRs if the contractors fail to comply with their obligations, notably concerning the protection or exploitation of the results or to protect public interests (including security interests).

For PCPs with control restrictions due to strategic interests in the HE call conditions, use the following option:*[additional OPTION for PCPs with control restrictions due to strategic interests: The contractors must ensure that the results are not subject to control or other restrictions by a country (or entity from a country) which is not one of the eligible countries set out in section 3.1 of this request for tenders — unless otherwise agreed with the granting authority.]*

Commercial exploitation of results

[The market potential of the results is estimated at [insert available figures for the expected size and type of the potential total market size, i.e. beyond the PCP procurers].]

The contractors are expected to start commercial exploitation of the results at the latest [insert number of years (minimum of four years after the end of the Horizon Europe grant)] years after the end of the framework agreement.

Provide information about:

- whether contractors are required to undertake specific activities beyond product development to commercially exploit the results, e.g. *certification of solutions or contribution to standardisation*
- activities that the procurers themselves plan to undertake to help remove barriers to the introduction onto the market of the solutions to be developed during the PCP (e.g. *promotion of R&D results among other public procurers, contribution made by the demand side to regulation, standardisation, and certification*).

The feasibility of the business plan to commercially exploit the R&D results will be assessed as part of the award criteria.

Specify if the PCP is subject to exploitation restrictions/additional exploitation obligations under the HE call conditions of your grant, e.g.:

[OPTION if there are participation and/or control restrictions in the HE call conditions: The contractors may not transfer ownership of their results or grant licences to third parties which are established in countries which are not [include the list of eligible countries set out in the HE call conditions] (or, if applicable, are controlled by such countries or entities from such countries) — unless they have requested and received prior approval by the contracting authority who will request prior approval from the granting authority that is co-financing the PCP.]

[OPTION if there are additional obligations related to standardisation in the HE call conditions: The contractors must promote the dissemination of their results, in particular through [publications and] contribution to standardisation. The contractors and the contracting authority will establish at the start of the framework agreement a list of [planned publications about the results and] appropriate standards to contribute to, and will keep this list updated throughout the framework agreement.

The contractors must — up to four years after the end of the PCP — inform the contracting authority, who will inform in its turn the granting authority that is co-financing the PCP, if the results could reasonably be expected to contribute to European or international standards.]

[OPTION if there are additional obligations in case of a public emergency in the HE call conditions: In case of a public emergency, the contractors must (if requested by the granting authority) grant for a limited period of time specified in the request, non-exclusive licences — under fair and reasonable conditions — to their results to legal entities that need the results to address the public emergency and commit to rapidly and broadly exploit the resulting products and services at fair and reasonable conditions.]

Where the HE call conditions impose additional exploitation obligations, add them here.

[OPTION if there is a right of first refusal for the buyers group: The contractors may not transfer ownership or the results or give exclusive licenses, if this would conflict with the right of first refusal for the buyers group to buy the results. [explain further what is the exact procedure for the buyers group to invoke the right of first refusal, unless already explained in framework agreement].]

For more information, see section XXX in the framework agreement that describes in more detail the rights and obligations regarding exploitation of results.

Check carefully if the call conditions for your HE grant impose specific requirements (e.g. *specific control restrictions and/or exploitation obligations*). If yes, they prevail and must be applied. If no, the IPR conditions should only use such restrictions if the buyers group has justified reasons to do so and in agreement with the granting authority.

Declaration of pre-existing rights (background and sideground)

The ownership of pre-existing rights will remain unchanged.

In order to be able to distinguish clearly between results and pre-existing rights (and to establish which pre-existing rights are held by whom):

- tenderers are requested to elaborate the proposed list of pre-existing rights that they wish to use for their proposed solution in their offers
- procurers and contractors will establish an agreed list of pre-existing rights to be used, before the start of the Framework Agreement and this list will be updated at the start of each specific contract.

Depending on the regime for (specific) background, you can add specific conditions: *[OPTION 1 if there is NO relevant background held by lead procurer, buyers group and third parties providing in-kind contributions]*: The procurers [and third parties providing in-kind contributions to the PCP] do not hold any pre-existing rights relevant to the PCP contracts. *[OPTION 2 if NO relevant background is held by lead procurer, buyers group or third parties providing in-kind contributions]*: The procurers [and third parties providing in-kind contributions to the PCP] hold the following pre-existing rights relevant to the PCP contracts: [list all pre-existing rights that tenderers should be aware about to prepare their offer — and specify those that are available for use and those that must be used to build upon for carrying out the R&D for the PCP].]

For PCPs with control restrictions due to strategic interests in the HE call conditions, add the following option: *[additional OPTION for PCPs with control restrictions due to strategic interests]*: The contractors must ensure that background that is subject to control or other restrictions by a country (or entity from a country) which is not one of the eligible countries set out in section 3.1 and that impact the exploitation of the results (i.e. would make the exploitation of the results subject to control or restrictions) must not be used and must be explicitly excluded from the list of pre-existing rights agreed between the contractors and the contracting authority that will be used for the PCP — unless otherwise agreed with the contracting authority.]

Note that impact the exploitation of results should be understood as making the exploitation of the results subject to control or restrictions, for example if exploitation would require the agreement of the entity owning the background. If such background needs to be used this must be agreed with the granting authority.

Regarding the rights to use for the background, choose option 1 or 2, as applicable: *[OPTION 1 for PCPs in which procurers do not buy resulting prototypes/first products/services]*: The members of the buyers group receive rights to use the background rights related to the developed solution for free during and for the purpose of the PCP. They are not buying developed prototypes or first products/services as part of this PCP. However, they will receive rights to use the background rights related to the developed solution after the PCP at fair and reasonable conditions, the price for which will be established if and when the procurers conduct after the PCP a follow-up procurement to buy developed solutions or first prototypes.]

[OPTION 2 for PCPs in which procurers buy resulting prototypes/first products/services]: The members of the buyers group receive rights to use the background rights related to the developed solution for free during and for the purpose of the PCP. They will be buying [specify whether it is 'developed prototypes' or 'first products'] as part of this PCP and therefore also receive rights to use the background rights related to the developed solution for a duration of [specify the duration for which the procurer want to keep using the PCP solution and the associated background rights after the PCP] after the PCP. This to be taken into account in your financial offer for the PCP.]

Ensure that entities which are under the same control as the procurers in the buyers group also have the same access to background: Rights to use the background related to the developed solution must be granted under the same conditions as above also to entities that are under the direct or indirect control of procurers of the buyers group, or under the same direct or indirect control as procurers of the buyers group, or directly or indirectly controlling procurers of the buyers group *[OPTION for PCPs with control restrictions in the HE call conditions; subject to applicable control restrictions]*.

The framework agreement will contain a provision that describes in more detail the rights and obligations of the different parties regarding the pre-existing rights and results.

 Note that the background meant here is not the same background as in the Horizon Europe grant agreement (here it relates to the procurement; there it relates to the grant agreement).

Check carefully if the call conditions for your HE grant impose specific requirements (e.g. specific control restrictions on background). If yes, they prevail and must be applied. If no, the conditions on background should only use similar restrictions if the buyers group has justified reasons to do so and in agreement with the granting authority.

3. Evaluation of tenders

3.1 Eligible tenderers, joint tenders and subcontracting

Eligibility of tenderers

Explain whether the call for tenders is open to all types of operators (companies or other type of legal entities) or whether there are any eligibility restrictions:

[OPTION 1 by default (no restrictions)]: Participation in the tendering procedure is open on equal terms to all types of operators *[OPTION for PCPs for which the open market consultation has shown that there are sufficient potential interested bidders in the EU Member States and HE associated countries]*: that are established in EU Member States or Horizon Europe

associated countries¹¹⁰ [OPTION for PCPs for which the open market consultation has shown that there are NOT sufficient potential interested bidders in the EU Member States and HE associated countries: that are established in [add WTO GPA signatory countries and other third countries if needed to obtain sufficient amount of offers]] on equal terms, regardless of the size, geographic location or governance structure.]

[OPTION 2 if there are participation and/or control restrictions in the HE call conditions: Participation in this call for tenders is open only to interested operators established in [and controlled from] [add the list of countries to which participation and/or control is restricted].

If there are control restrictions, explain further what ‘control’ means and what type of evidence tenderers must provide in order to enable the contracting authority to assess control: ‘Control’ is defined as the possibility to exercise decisive influence on the operator, directly or indirectly, through one or more intermediate entities, ‘de jure’ or ‘de facto’. Each tenderer must complete Annex [xxx] Declaration of ownership and control to indicate its country of establishment and its country/ies of control and must present the supporting evidence normally acceptable under the law of that/those country/ies as requested in Annex [xxx]. In addition, such a declaration (and supporting evidence) must be submitted for each subcontractor, expert and other entities on whose capacity the tender relies). Additional evidence may be requested by the contracting authority after the submission deadline.

Please note that in case of participation and/or control restrictions, the contractors will have to ensure that the participation and/or control requirements are extended to their subcontractors, affiliated entities and other third parties (including suppliers of components used for the innovative solution) and that any cooperation with nationals of third countries that are not eligible countries or that are controlled by such a country and/or by a national of such a country does not affect the strategic assets, interests, autonomy or security of the EU and its Member States and avoids potential negative effects over security of supply of inputs that are critical to the procurement.]

Please also note that participation in the PCP contract is not open to entities that are subject to [EU restrictive measures](#) under Article 29 of the Treaty on the European Union (TEU) and Article 215 of the Treaty on the Functioning of the EU (TFEU)¹¹¹ — in any capacity (not as main contractor, member of a grouping/consortium, subcontractors, experts or any other type of entity on whose capacity the tender relies or other third parties that are cooperated with). In addition, the contractors must ensure that none of the contracted services are performed in countries nor by entities that are subject to EU restrictive measures (sanctions). They must ensure that none of the goods procured or used for the procurement were developed, produced or supplied in countries or by entities that are subject to such EU restrictive measures. In order to ensure that the EU restrictive measures are respected throughout the supply chain that will be involved in delivering the contract results, the contractors must ensure that these obligations also apply to their subcontractors, affiliated entities and other third parties (including suppliers of components used for the innovative solution) they cooperate with in the research, development, testing and subsequent commercialisation of the results, as well as to any entities succeeding them in their ownership or development of the results.

The Horizon Europe eligible countries are explained in the List of Horizon Europe participating countries. Keep in mind the special situation of some countries:

- United Kingdom — The UK is no longer an EU Member State and (currently) it is also not a Horizon Europe associated country. The UK has signed the WTO GPA, however the WTO GPA does not apply to PCP procurements. Therefore, as long as there is no Horizon Europe association agreement with the UK that has legal effect (either through provisional application or its entry into force), the UK is to be considered just like any other non-associated third country. Following the recent agreement between the UK and the EU, this will still be the case for all calls under the 2023 work programme. It is expected that the UK will be able to fully participate as from calls that are launched under the 2024 HE Work Programme until the end of Horizon Europe in 2027.
- Ukraine — There is a Horizon Europe association agreement with Ukraine that has legal effect.
- Russia and Belarus — Given the illegal invasion of Ukraine by Russia and the involvement of Belarus, participation of Russian and Belarus entities in EU funded projects is very limited. For EU calls with submission deadline 10 May 2022

¹¹⁰ [List of Horizon Europe participating countries.](#)

¹¹¹ Please note that the EU Official Journal contains the official list and, in case of conflict, its content prevails over that of the [EU Sanctions Map.](#)

(or later), Russian and Belarus economic operators cannot participate in any capacity in Horizon Europe funded PCPs. Exceptions may only be granted on a case-by-case basis for justified reasons (*e.g. for projects with humanitarian purposes*) in agreement with the granting authority.¹¹² For EU calls with submission deadline before, the restrictions were only for Russian and Belarussian operators targeted by EU restrictive measures (i.e. listed persons subject to an asset freeze, public bodies and public-controlled organisations, e.g. state-owned private entities and entities that fall under one of the sector-specific restrictive measures (*e.g. aviation and space industry, dual use technology*)).

For example, take the case of a Swiss company that is interested to apply for a security related PCP that is restricted to economic operators established in and controlled from the EU Member States. Switzerland is not an EU Member State. Can the Swiss entity still participate in the procurement? No, as it does not meet the 'established in the EU' requirement, it cannot participate in the procurement in any way (not as sole tenderer, nor as member of a group in case of a joint tender, nor as subcontractor, nor as other entity on whose capacity is being relied). Only entities that meet both the 'established in EU' and 'controlled from EU' requirements can participate:

- Operators established in Switzerland and controlled from Switzerland do not meet either the established in EU or the controlled from EU requirement.
- Operators established in Switzerland but controlled from EU countries meet the controlled from EU requirement but not the established in EU requirement.
- Operators established in EU countries but controlled from Switzerland meet the established in EU but not the controlled from EU requirement.

Another example, can a Belgian company that has a department in Switzerland participate in the procurement? Only if the Belgian company is not controlled from outside the EU Member States and if the department in Switzerland does not participate in the procurement in any way (the Swiss department can not participate as lead tenderer, nor as group member in case of a joint tender, nor as subcontractor, nor as other entity on whose capacity is being relied).

Check carefully if the call conditions for your HE grant restrict participation and/or control of economic operators that can participate. If yes, they prevail and must be applied. If no, and it is not absolutely needed for security reasons, then the PCP call for tenders MUST be open at least to operators from all EU Member States and all Horizon Europe associated countries. In case of doubt, check the degree of openness of your call for tenders with the granting authority.

Tenders submitted in collaboration with others

Tenders may be submitted by a single entity or in collaboration with others. The latter can involve either submitting a joint tender or subcontracting, or a combination of the 2 approaches.

For joint tenders:

- explain that the group of tenderers must assume joint and several liability for the performance of the contract
- require that the group of tenderers must mandate one of them with the power to sign the framework agreement and specific contracts provide in their name and on their behalf ('lead contractor')

For subcontracting:

- specify if there are restrictions on the allowed amount(s) that can be subcontracted
- indicate the provisions of national law that apply to subcontracting
- explain that the tender must mention which parts of the contract will be subcontracted
- specify that the contractors remain fully liable to the procurers for the performance of the contract (and that this is the reason why also the subcontracts must reflect the rules of the Horizon Europe grant, including as relates to the place of performance, the definition of R&D services, confidentiality, results and IPRs, the visibility of EU funding, conflicts of interest, language, obligation to provide information and keep records, audits and checks by the EU, the processing of personal data, liability for damages as well as environmental, ethics and security requirements).

Other

Prior participation in the open market consultation is not a pre-condition for submitting a tender.

However, for phase 2 [and 3], participation is limited to tenderers that successfully completed the preceding phase.


¹¹² For more info, see [FAQ explaining the impact of Ukraine related sanctions on Horizon Europe funded projects.](#)

3.2 Exclusion criteria

List the exclusion criteria and the evidence to be provided that will be used for the evaluation of the tender.

The exclusion criteria are as follows:

Exclusion criteria	Evidence
Include conflict of interest and all mandatory (and if applicable, optional) exclusion criteria according to national law.	Specify the required evidence for each criterion.
'B) ...	

 Tenderers that do not comply with these criteria will be excluded.

Explain each exclusion criterion in more detail:


A) Conflict of interest

Tenderers that are subject to a conflict of interest may be excluded. If there is a potential conflict of interest, tenderers must immediately notify the lead procurer in writing.

A conflict of interest covers both personal and professional conflicts.

Personal conflicts are any situation where the impartial and objective evaluation of tenders and/or implementation of the contract is compromised for reasons relating to economic interests, political or national affinity, family, personal life (*e.g. family of emotional ties*) or any other shared interest.

Professional conflicts are any situation in which the contractor's (previous or ongoing) professional activities affect the impartial and objective evaluation of tenders and/or implementation of the contract.

 If an actual or potential conflict of interest arises at a later stage (*i.e. during the implementation of the contract*), the contractor concerned must contact the lead procurer, who is required to notify the EU and to take steps to rectify the situation. The EU may verify the measures taken and require additional information to be provided and/or further measures to be taken.


B) ...

3.3 Selection criteria

List the selection criteria and the evidence to be provided.

The selection criteria are as follows:

Selection criteria	Evidence
A) Ability to perform R&D up to original development of the first products or services and to commercially exploit the results of the PCP, including intangible results in particular IPRs	A) Description of the capacity, materials and equipment that are available to the tenderer for research, prototyping and limited production and supply of the first set of products or services Description of the financial and organisational structures that are available to the tenderer for management, exploitation and transfer of IPRs and for generating revenue by marketing commercial applications of the results
B) ...	

 Tenderers that do not comply with these criteria will be excluded.

Explain each selection criterion in more detail:


A) Ability to perform R&D up to original development of the first products or services and to commercially exploit the results of the PCP, including intangible results in particular IPRs

C) Tenderers must have:

- the capacity, tools, material and equipment to:
 - carry out research and lab prototyping
 - produce and supply a limited set of first products or services and demonstrate that these products or services are suitable for production or supply in quantity and to quality standards defined by the procurers
- the financial and organisational structures to
 - manage, exploit and transfer or sell the results of the PCP (including tangible and intangible results, such as new product designs and IPRs)
 - generate revenue by marketing commercial applications of the results (directly or through subcontractors or licensees).

B) ...

Should there be any doubt as to any of these criteria, tenderers may be requested to provide additional information.

 Avoid selection criteria that are based on disproportionate qualification and financial guarantee requirements (e.g. with regard to references from past customers, references for professional or technical qualifications and minimum turnover). Instead, use the business plan as one of the award criteria for deciding whether to award a contract (i.e. by requiring tenderers to show that they are able, during the PCP, to gradually build up sufficient financial capacity to successfully market their results).

3.4 Award criteria

There are 2 types of award criteria (on/off criteria and weighted criteria).

On/off award criteria


Explain that these are criteria that can only have value 0 or 1 and the score of the other award criteria must be multiplied by this value (so that the total score becomes 0 if a tender scores 0 on an on-off award criterion).

List the on/off criteria and the evidence to be provided. Explain that the offers for each phase will be evaluated against these criteria.

Tenders must comply with the following on/off award criteria:

On/off award criteria	Evidence
A) Compliance with the definition of R&D services	A)
B) Compatibility with other public financing	
C) Compliance with the requirements regarding the place of performance of the contract	
D) Compliance with ethics requirements	
E) Compliance with security requirements	
Additional on/off award criteria for the call-off for phase 2	Evidence
X) ...	

Additional on/off award criteria for the call-off for phase 3	Evidence
X) ...	

 Tenders that do not comply with these criteria will be excluded.

Explain each on/off criterion in more detail:

A) Compliance with the definition of R&D services

Tenders that go beyond the provision of R&D services will be excluded.


R&D covers fundamental research, industrial research and experimental development, as per the definition given in the [EU R&D&I state aid framework](#)¹¹³. It may include exploration and design of solutions and prototyping up to the original development of a limited volume of first products or services in the form of a test series. Original development of a first product or service may include limited production or supply in order to incorporate the results of field-testing and to demonstrate that the product or service is suitable for production or supply in quantity to acceptable quality standards.¹¹⁴ R&D does not include quantity production or supply to establish commercial viability or to recover R&D costs. It also excludes commercial development activities such as incremental adaptations or routine or periodic changes to existing products, services, production lines, processes or other operations in progress, even if such changes may constitute improvements. The purchase of commercial volumes of products or services is not permitted.

The definition of services means that the value of the total amount of products covered by the contract must be less than 50 % of the total value of the PCP framework agreement.

Specify the evidence to be provided to demonstrate compliance with this criterion.

The following evidence is required:

- the financial part of the offer for the framework agreement must provide binding unit prices for all foreseeable items for the duration of the whole framework agreement
- the financial part of the offer for each phase must give a breakdown of the price for that phase in terms of units and unit prices for every type of item in the contract, distinguishing clearly the units and unit prices for items that concern products
- the offers for all PCP phases may include only items needed to address the challenge in question and to deliver the R&D services described in the request for tenders
- the offers for all PCP phases must offer services matching the R&D definition above
- the total value of products offered in phase 1//phase 2] must be less than 50 % of the value of the phase 1//phase 2] contract and the total value of products offered in the last phase must be so that the total value of products offered in all phases is less than 50% of the total value of the PCP framework agreement.
- ...

 Both percentages for the product value inside phase 1 and phase 2 must be set at less than 50% to ensure that tenders that do not go through to phase 2 or 3 still satisfy the definition of an R&D services contract.

B) Compatibility with other public financing

Tenders that receive public funding from other sources will be excluded, if this leads to double public financing or an accumulation of different types of public financing that is not permitted by EU legislation, including EU state aid rules.

Specify the evidence to be provided to demonstrate compliance with this criterion. Require for example a declaration of honour for absence of other incompatible public financing.

C) Compliance with requirements relating to the place of performance of the contract

Tenders will be excluded if they do not meet the following requirements relating to the place of performance of the contract:

¹¹³ See Point 15 of the [Commission Communication on a framework for state aid for research and development and innovation](#) (C(2014) 3282).

¹¹⁴ See Article XV(1)(e) [WTO GPA 1994](#) and the Article XIII(1)(f) of the [revised WTO GPA 2014](#).

- at least [add percentage chosen by the buyers group/imposed by the HE call conditions — minimum 50%] of the total value of activities covered by each specific contract for PCP phase 1 [and 2] must be performed in the EU Member States or in Horizon Europe associated countries¹¹⁵. The principal R&D staff working on each specific contract must be located in the EU Member States or Horizon Europe associated countries.
- at least [add percentage chosen by the buyers group/imposed by the HE call conditions — minimum 50%] of the total value of activities covered by the framework agreement (i.e. the total value of the activities covered by all phases) must be performed in the EU Member States or Horizon Europe associated countries. The principal R&D staff working on the PCP must be located in the EU Member States or Horizon Europe associated countries.

All activities covered by the contract are included in the calculation (i.e. all R&D and operational activities that are needed to perform the R&D services, e.g. *research, development, testing and certifying solutions*). This includes all activities performed under the contract by contractors and, if applicable, their subcontractors.

The principal R&D staff are the main researchers, developers and testers responsible for leading the R&D activities covered by the contract.

For PCPs that involve security-related R&D, add the following additional place of performance requirement, which applies specifically to the work on the security components of the solution: [OPTION for PCPs that involve security-related R&D:

Moreover, at least [insert the percentage chosen by the buyers group/imposed by the HE call conditions for this PCP; if there are sufficient R&D providers able to do the work in Europe, it is typically set at 100% for security reasons]% of the contracted R&D services on security components of the solution must be performed in [OPTION if there are participation and/or control restrictions in the HE call conditions: [add the list of countries to which participation and/or control is restricted]] [OPTION if there are no participation and/or control restrictions in the HE call conditions: [add 'EU Member States or Horizon Europe associated countries']].]


For PCPs with participation and/or control restrictions due to security in the HE call conditions, use the following option:

[OPTION if there are participation and/or control restrictions: The contractors must in addition ensure that the performance of the contract takes place in [add the list of countries to which participation and/or control is restricted] — unless otherwise approved by the granting authority.]

Specify the evidence to be provided to demonstrate compliance with this criterion:

The following evidence is required:

- the financial part of the offer must provide binding unit prices for all foreseeable items for the duration of the whole framework agreement and give a breakdown of the price for the current phase in terms of units and unit prices (hours and unit price per hour), for every type of item in the contract (e.g. *junior and senior researchers*)
- a list of staff working on the specific contract (including for subcontractors), indicating clearly their role in performing the contract (i.e. their personnel profile, whether they are principal R&D staff or not, [OPTION for PCPs that involve security related R&D: whether they are working on security components or not]) and the location (country) where they will carry out their tasks under the contract
- a confirmation or declaration of honour that, where certain activities forming part of the contract are subcontracted, subcontractors will be required to comply with the place of performance obligation to ensure that the minimum percentage of the total amount of activities that has to be performed in the EU Member States or HE associated countries is respected
- ...

 Both percentages for phase 1 [and phase 2] must be set at the minimum percentage to ensure that tenders that do not go through to phase 2 [or phase 3] still satisfy the place of performance requirement.

Check carefully if the call conditions for your HE grant impose specific requirements (e.g. *specific minimum percentages for the place of performance requirement, or specific restrictions on the countries in which the R&D and/or the testing must be performed*). If yes, they prevail and must be applied. If no, the place of performance conditions should not be restricted further than 'the EU Member States of Horizon Europe associated countries' unless the buyers group has justified security reasons to do so and in agreement with the granting authority.

D) Ethics and research integrity

¹¹⁵ [List of Horizon Europe participating countries.](#)

Tenders will be excluded if they:

- do not comply with the following rules:
 - ethical principles (including the highest standards of research integrity, notably as set out in the [European Code of Conduct for Research Integrity](#)¹¹⁶, and, in particular, avoiding fabrication, falsification, plagiarism and other research misconduct)
 - applicable international, EU and national law
- include plans to carry out activities in a country outside the EU if they are prohibited in all Member States or plans to destroy human embryos
- include activities whose aim is to:
 - carry out human cloning for reproductive purposes
 - modify the genetic heritage of human beings in such a way as could make such changes heritable (with the exception of research relating to cancer treatment of the gonads)
 - create human embryos solely for the purpose of research or for the purpose of stem cell procurement, including by means of somatic cell nuclear transfer
- include activities that do not focus exclusively on civil applications
- *[OPTION if the HE grant agreement contains ethics requirements that affect the PCP contracts: do not comply with the following ethics requirements:*
 - **[insert the ethics deliverables from Annex 1 to the EU grant agreement]**.

If the tender involves activities that raise ethical issues, the tenderer must submit an ethics self-assessment that:

- describes how the tender meets the legal and ethical requirements of the country or countries where the tasks raising ethical issues are to be carried out
- explains in detail how the tenderer intends to address the ethical issues identified, in particular as regards:
 - objectives (*e.g. dealing with vulnerable populations and dual-use goods*¹¹⁷, *ensuring that development, deployment and/or use of AI is ethical, robust, safe and lawful*)
 - methodology (*e.g. involvement of children and related consent procedure and protection of data collected, ensuring human oversight and transparency of AI*)
 - the potential impact (*e.g. issues relating to the dual use of goods, environmental damage, stigmatisation of particular social groups, political or financial retaliation, benefit-sharing and malevolent use of results, trustworthy AI systems*).

If the tender involves development, deployment and/or use of artificial intelligence (AI)-based techniques, the self-assessment must address the ethics issues related to the involvement of AI in order to ensure that this is done in a way that is ethical, robust, safe and lawful.

❗ For information on ethics issues, see the guidance for EU grant beneficiaries [How to complete your ethics self-assessment](#).

Call-offs for phases 2 (and 3) may request that this information be updated in the offers submitted for these phases.

Before starting the particular task that raises ethical issues, contractors must provide a copy of:

- any ethics committee opinion required under national law; and
- any notification or authorisation for activities raising ethical issues required under national law.

The framework agreement will contain a provision on ethics.

E) Security

¹¹⁶ The [European Code of Conduct for Research Integrity](#) of ALLEA (All European Academies).

¹¹⁷ See Article 2(1) EU Export Control Regulation No [428/2009](#).

Tenders will be excluded if they do not:

- comply with:
 - EU, national and international law on dual-use goods or dangerous materials and substances
 - *[OPTION if the HE grant agreement provides for a security classification that affects the PCP contracts: the security aspect letter (SAL) annexed to the Horizon Europe grant agreement and Decision No 2015/444¹¹⁸]*
 - *[OPTION if the HE grant agreement contains security recommendations that affect the PCP contracts: the following security recommendations:*
 - *[insert the security recommendations from Annex 1 to the Horizon Europe grant agreement].]*

Tenders themselves must not contain any classified information.

If the output of activities or results proposed in the tender raise security issues or uses EU-classified information, the tenderer must show that these issues are being handled correctly. In such a case, tenderers are required to ensure and to provide evidence of the adequate clearance of all relevant facilities. They must examine any issues (*such as those relating to access to classified information or export or transfer control*) with the national authorities before submitting their offer. Tenders must include a draft security classification guide (SCG), indicating the expected levels of security classification. If necessary for the tender procedure or for performing the contract itself, contractors will be requested to ensure appropriate security clearance for third parties (*e.g. for personnel*).

❶ For information on security, see the guidance for EU grant beneficiaries: [Guidelines on the classification of information in Horizon Europe projects](#) and [Guidance on how to handle security-sensitive projects](#).

Call-offs for phases 2 [and 3] may request that this security information be updated in the offers submitted for that phase.

Before starting the particular task that raises security issues, contractors must provide a copy of any export or transfer licences required under EU, national or international law.

The framework agreement and/or the specific contracts will contain a provision on security.

F)...

Should there be any doubt as to any of these criteria, tenderers may be requested to provide additional information.

Weighted award criteria

Specify the award criteria (and sub-criteria, where applicable), weightings and thresholds for each of the PCP phases:

Weighted award criteria <i>(table for 3 phases)</i>	Maximum points	Thresholds	Weighting
Phase 1: Solution design			
Technical quality criteria			
A) <i>[insert technical quality criterion 1]</i>			
B) <i>[insert technical quality criterion 2]</i>			
X) <i>[insert technical quality criterion x = environmental impact of the proposed project activities and the subsequent solution commercialisation]</i>			

¹¹⁸ Commission [Decision 2015/444/EC, Euratom](#) of 13 March 2015 on the security rules for protecting EU classified information.

Y) [insert technical quality criterion y = digitalisation]			
...			
Total technical quality criteria			
Price			
Phase 2: Prototype development and lab testing			
Technical quality criteria			
A) [insert technical quality criterion 1]			
B) [insert technical quality criterion 2]			
X) [insert technical quality criterion x = environmental impact of the proposed project activities and the subsequent solution commercialisation]			
Y) [insert technical quality criterion y = digitalisation]			
...			
Total technical quality criteria			
Price			
Phase /3/: First product/service development & field testing			
Technical quality criteria			
A) [insert technical quality criterion 1]			
B) [insert technical quality criterion 2]			
X) [insert technical quality criterion x = environmental impact of the proposed project activities and the subsequent solution commercialisation]			
Y) [insert technical quality criterion y = digitalisation]			
...			

Total technical quality criteria			
Price			

Explain each weighted award criterion in more detail:

A) ...

B)...

X) Environmental impact of the proposed PCP project activities and subsequent solution commercialisation

Do no significant harm principle

Horizon Europe funded PCPs must be compliant with the ‘do no significant harm’ principle¹¹⁹ (mandatory minimum requirement):

Explain how your tender ensures compliance with the ‘do no significant harm’ principle as per Article 17 of the EU Taxonomy Regulation (EU) No [2020/852](#)¹²⁰, i.e. is designed in a way that it is not significantly harming any of the six following environmental objectives of the EU Taxonomy Regulation:

- climate change mitigation
- climate change adaptation
- the sustainable use and protection of water and marine resources
- the transition to a circular economy
- pollution prevention and control and
- the protection and restoration of biodiversity and ecosystems.

Compliance means that the proposed activities must not support or carry out activities that do significant harm to any of the six above objectives. This needs to be assessed both for the activities that are proposed to be carried out during the course of the PCP contract (for the R&D activities and for complementary activities such as project management, travel, etc) as well as for the expected lifecycle impact of the innovative solution at a subsequent commercialization stage.

Compliance of the tender’s project methodology with this principle has several benefits. Not only will it enable to ensure that the newly developed innovative solution contributes to protecting the environment. It will also help to improve your position on the financial market, increasing your chances to obtain financial investments for your business, including in particular for further development and commercialisation of the innovative solution developed during the PCP. The EU Taxonomy Regulation provides uniform criteria that enable financial investors to determine the degree of environmental sustainability of different economic activities and shift their financial investments towards environmentally sustainable economic activities.

Additional environmental standards

Where possible, PCP procurements should also define additional environmental requirements that go beyond the ‘do no significant harm principle’ and create positive environmental impacts, in order to contribute to reverse current disastrous trends and/or restore the environment (e.g. decrease GHG emissions and combat climate change, move to a cleaner mix of energy and resource usage, reduce waste, increase circularity, restore precious ecosystems and their biodiversity, improve the air and water quality etc).

Define relevant environmental requirements for the PCP and request tenderers to demonstrate how their approach for both the proposed PCP project activities and the subsequent solution commercialisation will result in a positive environmental

¹¹⁹ [Guidance on the application of the do no significant harm principle in Horizon Europe.](#)

¹²⁰ Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088 (OJ L 198, 22.6.2020, p. 13).

impact. Make smart use of Green Public Procurement principles¹²¹, such as the EU GPP and/or ecodesign criteria, life-cycle costing etc.

Such additional criteria will help to ensure that the PCP is future proof and the resulting solutions will be well-positioned to meet both future legislative trends and growing environmental customer demands by the time they will be commercialised on the market.

 Check carefully whether the call conditions for your HE grant contain additional environmental requirements. If so, make sure to include them in this criterion.

Check also broader environmental legislation in the specific field(s) addressed by the PCP (*e.g. transport, energy, construction, etc*). Be aware that the European Green Deal¹²² created a wave of new legislative initiatives that have either already or will still come into force over the coming years. Be aware also that there are often even additional national environmental requirements (*e.g. several EU countries have already implemented stricter Green Public Procurement action plans, targets and rules than the European ones*¹²³). Your PCP procurement should comply with those.

Y) Digitalisation

Horizon Europe funded PCPs should embrace and take into account the digital transition. The European Digital Decade policy¹²⁴ has set targets for all Member States to reach 100% digitalisation of public services by 2030 and to boost investments in innovative digital solutions to make this happen (*e.g. robotics, AI/big data, blockchain, digital twins, virtual/augmented reality and the metaverse, quantum computing, advanced semiconductor solutions, digital design and manufacturing*). Modernising both manufacturing processes and resulting products with digital technologies can enable the public sector as early adopter of digitally enabled solutions to provide faster, cheaper and higher quality public services to European citizens.

The first report on the status of the Digital Decade calls on Member States to develop action plans in support of innovation procurement and step up efforts to more than double public procurement investments in developing, testing and deploying innovative digital solutions in order to reach full speed adoption of innovative digital solutions in public services¹²⁵. There is a need for significantly higher investment in all fields of public sector activity, such as health, public administration, transport, security, education and culture, construction, energy, water, and environment. Moreover, a Commission recommendation¹²⁶ has identified 10 technology areas as ‘critical’ for the EU’s economic security, meaning areas that require substantial increased investments in Europe: artificial intelligence, robotics and autonomous systems, advanced semiconductors, advanced connectivity and advanced digital technologies, quantum, advanced sensing, space, and energy and biotechnologies, advanced materials, manufacturing and recycling technologies. Clearly, ICT technologies prominently appear as critical for Europe’s economic security. Therefore, reflect on how you can phrase the technical requirements and the award criteria so that they encourage tenderers to make best use of existing digital technologies and/or to develop and test new digital innovations, in order to deliver the buyers group higher quality and/or lower cost solutions.

When doing so, keep in mind that for procurements that involve certain digital technologies there are either Horizon Europe requirements and/or other relevant EU legislation/EU initiatives that need to be taken into account in the specification of your technical requirements:

Artificial intelligence

Artificial Intelligence can bring enormous benefits to improve the efficiency and effectiveness of public sector processes with intelligent data analysis.

In case the procurement involves artificial intelligence, make sure to follow the [Guidance on Ethics by design and Ethics of use approaches for AI](#)¹⁴¹ to ensure that the AI is trustworthy, i.e. lawful, ethical and technically robust.

¹²¹ [More info on Green Public Procurement](#)

¹²² [More info on the state of play of the European Green Deal](#)

¹²³ [GPP National action plans](#) of different European countries

¹²⁴ <https://digital-strategy.ec.europa.eu/en/policies/europes-digital-decade>

¹²⁵ <https://digital-strategy.ec.europa.eu/en/library/2023-report-state-digital-decade>

¹²⁶ Recommendation and Annex respectively: https://defence-industry-space.ec.europa.eu/system/files/2023-10/C_2023_6689_1_EN_ACT_part1_v8.pdf and https://defence-industry-space.ec.europa.eu/system/files/2023-10/C_2023_6689_1_EN_annexe_acte_autonome_part1_v9.pdf

Foresee at least the following minimum criteria: Due diligence is required regarding the trustworthiness of all artificial intelligence-based systems or techniques. AI-based systems or techniques must be developed in a safe, secure and responsible manner, with a clear identification of and preventative approach to risks. To a degree matching the type of risk that the AI application presents¹²⁷, AI-based systems or techniques should be, or be developed to become (implicitly or explicitly contributing to one or several of the following objectives):

- technically robust, accurate and reproducible, and able to deal with and inform about possible failures, inaccuracies and errors, proportionate to the assessed risk posed by the AI-based system or technique
- socially robust, in that they duly consider the context and environment in which they operate
- reliable and to function as intended, minimising unintentional and unexpected harm, preventing unacceptable harm and safeguarding the physical and mental integrity of humans
- able to provide a suitable explanation of its decision-making process, whenever an AI-based system can have a significant impact on people's lives.

Data handling

Regarding data handling, ensure that your procurement is in line with the EU open data strategy¹²⁸.

Using publicly available data in procurements and making more data resulting from procurements publicly available is essential to enable new services and applications across Europe. Therefore ensure that you follow the requirements on open data resulting from Horizon Europe and from the EU directives on open data.

For procurements that involve physical products that include software, ensure compliance with the EU Data Act¹²⁹ and the right to repair that open possibilities for products to be repaired by third parties.

Make use of and contribute also to the new European data spaces wherever possible. The nine initial Common European data spaces are the following:

- an industrial data space — to support the competitiveness and performance of the EU's industry
- a Green Deal data space — to use the major potential of data in support of the Green Deal priority actions on issues such as climate change, circular economy, pollution, biodiversity, and deforestation
- a mobility data space — to position Europe at the forefront of the development of an intelligent transport system
- a health data space — essential for advances in preventing, detecting and treating diseases as well as for informed, evidence-based decisions to improve the healthcare systems
- a financial data space — to stimulate innovation, market transparency, sustainable finance, as well as access to finance for European businesses and a more integrated market
- an energy data space — to promote a stronger availability and cross-sector sharing of data, in a customer-centric, secure and trustworthy manner
- an agriculture data space — to enhance the sustainability performance and competitiveness of the agricultural sector through the processing and analysis of data
- data spaces for public administrations — to improve transparency and accountability of public spending and spending quality, fighting corruption, both at EU and national level
- a skills data space — to reduce the skills mismatches between the education and training systems and the labour market needs.

¹²⁷ See the European AI act for the different risk levels and the corresponding requirements for each level:

<https://digital-strategy.ec.europa.eu/en/policies/european-approach-artificial-intelligence>

¹²⁸ <https://digital-strategy.ec.europa.eu/en/policies/strategy-data>

¹²⁹ Proposal for a Regulation of the European Parliament and of the Council on harmonised rules on fair access to and use of data ([COM \(2022\)68 final](#)).

Ensure also that your tender requirements are in line with the EU GDPR Regulation¹³⁰ to ensure correct handling of privacy issues and processing of personal data. Where required by the Regulation, the handling of personal data requires consent from the owner of the data and must be restricted in scope and time duration. Align the text here with the detailed contractual provisions for personal data in the contract(s) (see Appendix 4, Article XX – Processing of personal data).

If needed, also other security sensitive project data should be restricted geographically, to trusted geographical locations (e.g. restriction of locating the servers handling the data in EU countries only). Align the text here with the detailed contractual provisions for security related data in the contract(s) (see Appendix 4, Article XX – Security related obligations).

Cybersecurity

With the digitalisation of public services and an increasing dependence on networks, another key concern is to consider security requirements in the procurement of ICT-based solutions, in order to protect essential services and critical infrastructures. Ensure therefore that your tender requirements are compliant with the EU Network Information Security Directive (NIS), where needed. Be aware that the new NIS directive (NIS II) extends the digital security obligations to a wider group of entities, i.e. in addition to entities that were already covered by NIS I (healthcare, energy, water supply, transport, banking and financial market infrastructure, digital infrastructures and digital services) the following new sectors are targeted under NIS II: public administrations, waste management, food, space, postal/courier services, manufacturing of certain critical products such as pharmaceuticals, chemicals.

Note also that, in order to better protect Europe against cyber-attacks, the EU Cyber Resilience Act¹³¹ is defining minimum cybersecurity requirements for digital products and the EU has mandated the ENISA Agency to prepare European cybersecurity certification schemes¹³² for ICT products, ICT services and ICT processes — with the goal of establishing (and harmonizing) the cybersecurity compliance of these products, services and processes. Currently, ENISA is developing certification schemes for ICT products, cloud services and mobile networks (in particular, 5G). The resulting certificates will be recognised in all EU Member States.

Blockchain

In case your procurement uses blockchain technology, check if it can make use of the European Blockchain Services Infrastructure (EBSI)¹³³. EBSI is a European wide infrastructure (covering all EU Member States, Norway and Liechtenstein) that enables public administrations, and eventually also companies, to provide cross-border blockchain based services across Europe.

Green digital solutions

In case your procurement has a digital elements, check if there are green initiatives in the digital sector in Europe that your tender requirements should align with.

For example, in the context of the EU Green Deal the EU has announced the introduction of Digital Product Passports that will help buyers to verify and follow up the circularity and green claims of the products they buy on the EU market.

The EU has set also objectives to green datacenters, telecommunications and blockchain networks and is strengthening the eco-design criteria and energy labels to reduce the environmental impact of ICT solutions (reducing CO2 emissions, improving energy efficiency, reparability, circularity etc).

The EU is also working together with European Green Digital Coalition to develop methods that can be used by public procurers to measure the net environmental impact of green digital solutions (that can consist of a combination of hardware and software)¹³⁴. This effort is expected to feed into the European Commission's planned activities to define additional green public procurement criteria for the ICT sector.

Should there be any doubt as to any of these criteria, tenderers may be requested to provide additional information.

Additional sub-criteria may be added for the call-offs for phase 2 [and 3], as a way of making the award criteria more precise, provided that they do not substantially change the existing criteria.

¹³⁰ <https://eur-lex.europa.eu/eli/reg/2016/679/oj>

¹³¹ <https://digital-strategy.ec.europa.eu/en/library/cyber-resilience-act>

¹³² <https://www.enisa.europa.eu/topics/certification>

¹³³ <https://digital-strategy.ec.europa.eu/en/policies/european-blockchain-services-infrastructure>

¹³⁴ <https://www.greendigitalcoalition.eu/>

 The weighted award criteria must ensure that the procurers get the best value for money. It is therefore not permitted to use either lowest price as the sole criterion, without taking quality into account, or highest quality as the sole criterion, without taking price into account.

Set the technical quality and price award criteria, weightings and thresholds so as to favour the most economically advantageous tenders. Define the thresholds per criterion and the total threshold. Pay particular attention to the weighting given to price. It should be sufficiently high to avoid this criteria being neutralised in the evaluation. For example, a weighting of less than 20 out of 100 for price is too low for it to have a significant effect on the result.

State clearly whether all the award criteria will be evaluated by examining the written tender or whether some award criteria will be evaluated on the basis of hearings with or presentations to the evaluation committee.

3.6 Evaluation procedure: Opening of tenders and evaluation

Opening of tenders

Describe the composition of the opening committee, i.e. the number and type of members, without giving their names.

Specify which points will be checked during the opening of tenders, in particular in relation to compliance with the conditions on the content and format of the offer (*see above*).

State that tenders not complying with the formal requirements will be excluded from the tender evaluation.

Give the date for the opening of the tenders and explain how tenderers can participate.

For phases 2 [and 3], explain any differences in the composition of the opening committee or in the procedure.

Evaluation

Describe the composition of the evaluation committee (and its panels, where applicable), i.e. specify:

- whether the evaluation committee is the same as the opening committee
- the number and type of members, without giving their names
- whether, in addition to the lead procurer and buyers group, there will be independent experts on the committee (*e.g. technical experts on the subject, financial experts for evaluating the commercial viability of the solutions proposed or ethical or security experts*).

The evaluation committee will evaluate the tenders, carrying out the following four steps:

- Step 1 — Checking whether the tenderer is not in one of the situations covered by the exclusion criteria
- Step 2 — For tenderers passing Step 1, assessing whether the tenderer has the capacities necessary to perform the contract, on the basis of the selection criteria
- Step 3 — For tenderers passing Step 2, evaluating the tender based on the on/off award criteria
- Step 4 — For tenders passing Step 3, evaluating the tender based on the weighted award criteria.

Explain the tasks of the chair and the members (and the different panels, where applicable).


Specify which members will be involved in the different steps of the evaluation.

Describe how the committee (and its panels) will work (*e.g. when and how they will meet*), and explain the process to be used for making decisions at each of the different steps (*e.g. decision by unanimity*).

Explain the system for scoring, qualitative appraisal and ranking (*e.g. starting from a first round of individual evaluations and concluding with a final agreed qualitative appraisal; the scoring for each tender and the final ranking list of all tenders agreed by the lead procurer and buyers group*).

Specify the type of feedback tenderers will receive from the evaluation of their tender.

For phases 2 [and 3], explain any differences in the composition of the evaluation committee or in the procedure. Highlight in particular that the evaluation of offers for phase 2 [and 3] has only 2 steps: evaluating the offers based on the on/off and weighted award criteria.

 Keep in mind that, under the HE grant, the buyers group and lead procurer are obliged to evaluate the tenders and offers for the call-offs for phase 2 [and 3] *jointly* and must make a *joint* award decision.

Avoid potential conflicts of interest.

Don't forget that, for each phase and each tender received, the evaluation documents must be submitted as deliverable under the HE grant agreement — at the end of the tender evaluation. These deliverables should include: the final scores awarded, a qualitative appraisal per evaluation criterion, minutes of the evaluation meeting and the final ranking list.

4. Content and format of tenders

4.1 Format

Explain the formal requirements that tenders must meet (including the address for submission of the tender and requirements relating to the presentation of the offer and its packaging).

State that all tenders must:

- contain administrative, technical and financial sections
- indicate their minimum validity period (from submission)
- be signed.

Specify that tenders that do not comply with the formal requirements will automatically be rejected.

Explain that more detailed information about the final layout requirements for the phase 2 [and 3] offers will be provided in the call-off.

4.2 Administrative section

List the information that must be included in this section of the tender (including the documentary evidence necessary to identify the tenderer and to evaluate the tender against the exclusion, selection and on/off award criterion B and — for joint tenders — the mandate for the lead contractor).

For PCPs that impose control restrictions based on the HE call conditions, do not forget to include the Annex [xxx] Declaration of ownership and control.

Mention that the lead procurer may request clarification or additional evidence where there is any doubt.

Explain that more detailed information for the phase 2 [and 3] offers will be provided in the call-offs.

4.3 Technical section

Explain what the technical section of the tender must include:

Tenders must include a technical offer, containing:

- a technical plan that outlines: 1) the tenderer's idea for addressing all the requirements given in the PCP challenge description, relating both to functionality and performance; and 2) technical details of how this would be implemented, including also the proposed approach for complying with the do no significant harm principle [and with the gender dimension (if relevant)]
- a draft business plan that explains the proposed approach to commercially exploit the results of the PCP and to bring a viable product or service onto the market
- a list of the pre-existing rights (background) relevant to the tenderer's proposed solution, in order to allow IPR dependencies to be assessed
- a risk assessment and risk mitigation strategy
- a reply to the question "Does this tender involve ethical issues? (YES/NO)" and if YES, an ethics self-assessment, with explanations how the ethical issues will be addressed
- a reply to the question "Does this tender involve: activities or results that may raise security issues and/or EU-classified information¹³⁵ as background or results? (YES/NO)" and if YES information on how these issues will be addressed
- ...

Tenders failing to meet these requirements will be excluded.

The technical part must provide a *detailed* technical offer for phase 1 (including an explanation of the methodology, a work plan and details of deliverables and milestones), and must specify the plans for and objectives of the subsequent phases 2 [and 3] and beyond (including a plan for commercial exploitation of the results).

Explain how the technical section of the tender should be drafted (possibly by providing a template).

¹³⁵ See [Decision 2015/444/EC, Euratom](#) on the provisions on security of EU-classified information.

State that the information provided in the technical section of the tender will be used to evaluate the tenders, on the basis of the technical award criteria and the on/off award criteria A, D and E. (Information regarding on/off award criteria B and C is verified through the financial section of the tender.)

Explain that more detailed information for the phase 2 [and 3] offers (in particular on the technical implementation plan, updated business plan and list of IPRs) will be provided in the call-offs.

4.4 Financial section

Explain what the financial section of the tender must include:


The tender must include a detailed financial offer specifying:

- binding unit prices for all items needed for carrying out phase 1 and for items that are expected to be needed for phase 2 [and phase 3] (given in euros, excluding VAT but including any other taxes and duties)
- a fixed total price for phase 1 and an estimated total price for phase 2 [and 3], broken down to show unit prices and the number of each unit needed to carry out phase 1 (given in euros, excluding VAT but including any other taxes and duties).

In addition, the financial section must include:

- a price breakdown that shows the price for R&D services and the price for supplies of products (to demonstrate compliance with the definition of R&D in on/off award criterion A)
- a price breakdown that shows the location or country in which the different categories of activities are to be carried out (e.g. *x hours of senior researchers in country L at y euro/hour; a hours of junior developers in country M at b euro/hour*), which personnel profile corresponds to principle R&D personnel [OPTION for PCPs that involve security related R&D: and which personnel profile is working on security components] (to demonstrate compliance with the requirement relating to place of performance in on/off award criterion C)
- the financial compensation valuing the benefits and risks of the allocation of ownership of the IPRs to the contractors (i.e. IPRs generated by the contractors during the PCP), either:
 - [OPTION 1 if the procurers choose 'ex ante' valuation of the IPRs: by giving an absolute value for the price reduction between the price offered in the tender compared to the exclusive development price (i.e. the price that would have been quoted were IPR ownership to be transferred to the procurers)]
 - [OPTION 2 if the procurers choose 'ex post' valuation of the IPRs: by confirming the tenderers' agreement with the chosen royalty scheme specified by the procurers, including the percentage of royalties that contractors will have to pay on sales/profits made from commercial exploitation of the IPRs]

in order to ensure compliance with the [EU R&D&I state aid framework](#).

 The unit prices quoted for each category of items (e.g. *hourly rates for junior and senior researchers, developers and testers*) remain binding for all phases (i.e. for the duration of the framework agreement).

Explain how the financial section of the tender should be written.

Explain whether and according to which formula unit prices can be indexed for phase 2 [and 3].

Explain that the financial compensation for allocating IPR ownership to the contractors must reflect the market value of the benefits received (i.e. *the opportunity that the IPRs offer for commercial exploitation*) and the risks assumed by the contractors (e.g. *the cost of maintaining IPRs and bringing the products onto the market*). Note that when the value of the risks equals or exceeds the value of the benefits, the financial compensation offered by vendors may be zero.

State that the information provided in the financial section of the tender will be used to evaluate the tenders on the basis of the price award criteria and the on/off award criteria A, B and C. For on/off criterion B, the financial section can contain a self-declaration asking the tenderer to declare compliance of his offer with other public financing sources.

Explain that more detailed information for the phase 2 [and 3] offer will be provided in the call-off. The price for phase 2 [and 3] offers must be based on the binding unit prices in the tender and the price conditions set out in the framework agreement. Where new units/unit prices (e.g. *for new tasks or equipment*) are subsequently added to the offers for phase 2 [or phase 3], they will become binding for the remaining phases.

Similar price breakdowns will be requested for the call-offs for phase 2 [and 3].

Indicate which VAT regime(s) apply. If all contractors will be paid by the lead procurer (*centralised payments*), it will be the VAT regime of the lead procurer. If the contractors will be paid by each procurer in the buyers group individually (*pro rata*) to

its contribution to the PCP procurement budget; decentralised payments), it will be the VAT regime for each procurer for its share of the payment.

5. Miscellaneous

5.1 Language

All communication (relating to either the tender procedure or the implementation of the contract) must be carried out in English [or [add additional language(s), if any]].

Tenders as well as offers for phase 2 [and 3] call-offs must be submitted in English [and [insert additional language(s), if any]]. Deliverables must be submitted in English [and [insert additional language(s), if any]].

Indicate specific language requirements, if necessary (for example, if certain tasks need to be carried out in cooperation with third parties locally, e.g. for field-testing with end-users who may speak only the local language).

5.2 Tender constitutes binding offer

A signed tender will be considered to constitute a firm, irrevocable, unchangeable and binding offer from the tenderer.


The signature of an authorised representative will be considered as the signature of the tender (and will be binding on the tenderer or, for joint tenders, the group of tenderers).

5.3 Unauthorized communication — Questions

The Q&A from the open market consultation can be found on [indicate the website where the Q&A from the open market consultation phase can be found].

For further questions, you may contact [the lead procurer via email and/or by other means] in English [and any additional languages chosen by the lead procurer and buyers group] until [insert date].

The summary of all questions and answers will be presented in an anonymised Q&A document that will be published on [indicate the website where the Q&A will be uploaded] in English [and any additional languages chosen by the lead procurer and buyers group] (final version planned for [insert date]). For phase 2 and [3], the answers will not be published, but distributed to all contractors that successfully completed the previous phase.

 All other contacts (or attempted contacts) will be considered unauthorised and may lead to the exclusion of your tender.

5.4 Confidentiality

Tenderers must keep confidential any information obtained in the context of the tender procedure (including EU-classified information¹³⁶).

5.5 Contract implementation

Successful tenderers will be requested to sign both a framework agreement for the entire duration of the PCP and specific contracts for each phase (see the models given in Annexes 1 and 2).

Monitoring

During each phase, contract implementation will be monitored periodically and reviewed against the expected outcomes (milestones, deliverables and output or results) for the phase.

Each contractor will be assigned a main contact person (their supervisor) from the monitoring team appointed by the procurers.

There will be regular monitoring meetings between contractors and the supervisor/monitoring team.

Explain how often they will take place, how they will be conducted (physical meetings or remote/online meetings), and what they will involve. The contractors could be asked to discuss the results achieved in the preceding period and present their updated work plan; the monitoring team or supervisor could visit the contractors' premises to periodically monitor progress; the contractors could visit the procurer's premises (in particular at the start of a phase to get to know better the operational environment that solutions need to be designed for). Clarify that the contractors must cover their own costs and thus foresee personnel and travel budgets in their offer. In case of PCPs with lots, clarify if and when there will be meetings that involve contractors from the different lots to sort out dependencies between lots and to ensure that building blocks under development in different lots will ultimately work together as expected.

The monitoring team [or supervisor] will provide regular feedback to contractors after meetings or visits.

¹³⁶ Commission Decision [2015/444/EC, Euratom](#) of 13 March 2015 on the security rules for protecting EU-classified information.

Explain how and when this will take place and how this will allow contractors to continuously improve the way in which their solutions address the problem set out in the PCP description.

Payments based on satisfactory completion of milestones and deliverables of the phase

Payments corresponding to each PCP phase will be subject to the satisfactory completion of the deliverables and milestones for that phase.

Satisfactory completion will be assessed by an assessment committee composed of [describe the composition of the assessment committee, without mentioning their names].

Satisfactory completion will be assessed according to the following requirements:

- if the work corresponding to that milestone/deliverable has been carried out
 - if a reasonable minimum quality has been delivered
 - if the reports have been submitted on time
 - if the monies have been allocated to the planned objectives
 - if the monies have been allocated and the work has been carried out according to the on/off award criteria (place of performance, public funding and R&D definition criteria)
- and
- if the work has been carried out in compliance with the provisions of the contract (including in particular verification if the contractors have duly protected and managed IPRs generated in the respective phase).

'Reasonable minimum quality' of a report means that:

- the report can be read by somebody who is familiar with the topic, but not an expert
- the report gives insight in the tasks performed in and the results
- the report is made using the end of phase report form or (if applicable) the milestone report form and the requirements of this form have been met
- ...

'Reasonable minimum quality' of a demonstration (for phase 2 [or 3]) means:

- the demonstration can be understood by somebody who is familiar with the topic, but not an expert (for instance, somebody with operational but not technical knowledge)
- the demonstration shows how the innovation works, how it can be used and (if applicable) how it is operated and maintained
- the demonstration is accessible to parties appointed by the procurers, unless these are direct competitors of the contractors
- ...

Satisfactory completion in each of the phases does not mean successful completion. (A PCP could, for instance, be satisfactorily completed even if it concludes that the innovation is not feasible.)

The assessment will consider the efforts made by contractors to take into account the feedback from the supervisor or the monitoring team.

Specify the terms of approval for deliverables (for reports and demonstrations respectively), in particular how many days the contractors have to approve/request modifications/reject deliverables, how many days the contractors have to resubmit deliverables.

Where the assessment committee judges the completion of deliverables or milestones to be unsatisfactory, [explain what happens, in particular the possible consequences in terms of reducing or withdrawing payments for that deliverable and/or terminating the contract].

Invoices must be submitted [to the contracting authority]/[pro-rata to each member of the buyers group].

In case pro-rata payments are used, add the following option: *[OPTION for pro-rata payments: For every payment, the contractors must create [insert a number equal to the number of procurers in the buyers group] invoices which divide the amount according to the following distribution:*

- *[insert percentage that equals the ratio between the financial contribution of procurer X to the total PCP costs (including the applicable VAT in country X) and the total PCP costs (including VAT)] percent of the payment to be invoiced to [insert name of procurer X]]*
- *[...] percent of the payment to be invoiced to [insert name of procurer Y]]*
- ...

Note that in an example of a buyers group with 3 procurers, each procurer must contribute the same amount (including VAT) to the total PCP costs (i.e. for each payment 3 invoices equal to one third of the total payment amount; one invoice to each of the 3 procurers).]

Contractors' invoices must provide:

- a price breakdown showing the price for R&D services and the price for supplies of products (in order to demonstrate compliance with the definition of R&D in on/off award criterion A)
- a price breakdown showing the location or country in which the different categories of activities were performed (e.g. *x hours of senior researchers in country L at y euro/hour, a hours of junior developers in country M at b euro/hour*), which personnel profile corresponds to principle R&D personnel *[OPTION for PCPs that involve security related R&D: and which personnel profile is working on security components]* (to demonstrate compliance with the requirement relating to the place of performance in on/off award criterion C).

Explain when payments will be made. Provide information on the amounts of the pre-instalments and interim payments (where applicable) and the payment of the balance.

Eligibility for the next phase based on successful completion of the phase

Eligibility for participation in the next phase will be subject to successful completion of the preceding phase.

Successful completion of a phase will be assessed by the assessment committee against the following requirements:

- if all milestones have been successfully completed
- if the R&D results meet the minimum functionality/performance requirements of the challenge description (i.e. *the minimum quality/efficiency improvements which the procurers set forward for the innovative solutions to achieve*)
- if the results of the R&D are considered to be promising
- ...

'Promising' means:

- for phase 1, that the feasibility is convincing
- *[for standard PCPs with 3 phases: for phase 2, that the feasibility, the applicability in an operational setting and the potential impact of the product is convincing]*

 Note that there is a difference between satisfactory completion (requirement for payment) and successful completion (prerequisite for passing from one phase to the next).

Finalisation of phase 3: Possible follow-up PPI procurements

Follow-up PPI procurements for a *limited* set of prototypes and/or test products developed during this PCP procurement ('limited follow-up PPIs') may be awarded by negotiated procedure (with invitation to minimum 3 potential providers, including those that successfully completed this PCP).

Follow-up PPI procurements for a *commercial volume* of the innovative solutions developed in this PCP procurement will be subject to a new call for tenders.

If possible, please provide an indicative schedule for the procurement process that the buyers group would organise for deploying commercial volumes of the solutions, were the PCP to be completed successfully.

5.6 Cancellation of the tender procedure

The procurers may, at any moment, cease to proceed with the tender procedure and cancel it.

The procurers reserve the right not to award any contracts at the end of the tender procedure.

The procurers are not liable for any expense or loss the tenderers may have incurred in preparing their offer[, except for [insert if mandatory limits under national law]].

5.7 Procedures for appeal

Specify the names of the appeal and mediation bodies foreseen under the national law applicable to the lead procurer and the time periods for filing a complaint and the different stages of dispute settlement.

5.8 Annexes

Annex 1 Model framework agreement

Annex 2 Model specific contracts for phases 1, 2 and 3

Annex 3 Technical specification (optional; needed for example if the PCP challenge is too long to describe in the request for tenders or if there is a need to add specifications describing how the solutions to be developed in the PCP need to interact with the other systems/products/services at the procurers premises)

Annex 4 Templates for exclusion and on/off award criteria (if needed, e.g. *declaration of honour for exclusion criteria, absence of conflict of interest and absence of incompatible other public financing*)

Annex 5 Tender form (optional; only needed if the request for tenders does not specify the information requested from tenderers for each of the award criteria)


Annex 6 Template for reports or deliverables (optional; only needed if the request for tenders does not specify the minimum information contractors are required to submit in the reports or deliverables)

Annex [xxx] Declaration of ownership and control (needed only for PCPs with control restrictions)

Appendix 4 PCP Framework Agreement

PCP FRAMEWORK AGREEMENT

This model is intended to help EU beneficiaries to prepare their PCP framework agreements. Text in green is meant to indicate instructions or options; text in black is sample text.

 *It is provided for information purposes only and is not intended to replace professional legal advice. It can be used as a starting point, but you remain responsible for your contracts and for adapting them to your situation (including ensuring full compliance with the EU grant requirements and the applicable rules under national law).*

PREAMBLE

This is a framework agreement (“Agreement” or “Framework Agreement”) between the following parties:

on the one part,

the “lead procurer” (contracting authority), [insert details of the lead procurer],

acting in the name and on behalf of the [other] members of the buyers group (together with the lead procurer: “procurers”):

1. [insert the details of the procurers in the buyers group (NOT of preferred partners or third giving in-kind contributions to the PCP!)]

- 2.

and on the other hand, the “contractor”, [insert details of the contractor],

[OPTION for joint tenders: acting in the name and on behalf of the other members of group of tenderers:

1. [insert the details of the members of the group of tenderers]

- 2.

The members of the group of tenderers are hereafter collectively referred to as “the contractor” and will be jointly and severally liable vis-à-vis the lead procurer for the performance of this Framework Agreement and the Specific Contracts.]

The lead procurer, buyers group and the contractor(s) shall be referred to together as “parties”, unless otherwise specified.

By signing this Agreement the parties agree to implement the pre-commercial procurement in accordance with the Agreement and all the obligations it sets out.

The Agreement is composed of:

Preamble

Terms and Conditions

Annex 1 Request for tenders

Annex 2 Contractor's tender

TERMS AND CONDITIONS

In order to comply with the conditions of the Horizon Europe grant agreement, the framework agreements should contain at least the following provisions:

Article 1 — Subject of the agreement

This Framework Agreement defines the general terms and conditions for the implementation of the PCP procurement of R&D services set out in Article XX and for the Specific Contracts that will be awarded for each of the PCP phases.

Article XX — Duration

Define the duration for the framework agreement and starting and end date for the implementation of the tasks.

Specify that the period of execution of the tasks may be extended only with the express written agreement of the parties before the expiration of the period for execution of the tasks.

Article XX — R&D services to be provided

The contractor shall provide the R&D services (tasks, deliverables and milestones) to develop solutions to tackle the challenge set out in the tender and the Specific Contracts.

Article XX — Pricing, payment and accounting

The price for the R&D services to be implemented for each PCP phase will be set out in the Specific Contracts.

The prices shall be based on the binding unit prices in the tender and the following price conditions:

- if new units/unit prices are added to offer for phase 2 [or 3], they shall become binding for the remaining phases
- ... specify the other price conditions

Specify the payment and invoicing conditions that will apply. Ensure consistency with the request for tenders/tender (if needed via cross-references).

Article XX — Rights and obligations regarding results (foreground), pre-existing rights (background and sideground) and the related rights (including intellectual and industrial property rights)

Include provisions that clarify the rights and obligations related to pre-existing rights (background, sideground) and results (foreground) for:

- the procurers (contracting authority and buyers group)
- the contractor and
- its subcontractors (if any).

Do not forget to include the special IPR provisions from the HE grant agreement into the PCP contracts (*e.g. EU right to object to transfers or licencing of results; additional exploitation or dissemination obligations, additional control restrictions, access to research data, etc.*).

In addition to what is listed in this section, you may specify additional intellectual property provisions, provided they:

- do not conflict with the obligations under the Horizon Europe grant agreement and
- help the procurers or the contractor to implement the PCP as well as disseminate and exploit the results.


XX.1 IPR definitions

Provide IPR definitions, notably for:

- ‘Results (i.e. foreground)’ means any tangible or intangible output that is generated in the PCP, whatever its form or nature, whether or not it can be protected. This includes any material, document, technology, solution, data, knowledge or information (foreground material) as well as any rights attached to it, including intellectual property rights (‘rights on results’ or ‘IPRs attached to the results’).
- ‘Rights on results’: any rights, including industrial or intellectual property rights on the results. They may consist of rights on newly created materials and rights on pre-existing materials (background rights and sideground rights) that are included in the results. They may consist in a right of ownership, a licence right and/or right of use belonging to the contractor, the creator, the contracting authority, the buyers group or to any other third parties, including subcontractors.
- ‘Background’ means any material, document, technology, solution, data, know-how or information (background material) — whatever its form or nature (tangible or intangible), regardless of whether or not it can be protected, including any attached rights such as intellectual property rights (‘background IPRs’) — that (1) is held prior to the signing of the Framework Agreement or a Specific Contract, (2) identified by the parties involved in the PCP as background and (3) needed to implement the PCP or exploit the results of the PCP.
- ‘Background rights’: any rights, including industrial and intellectual property rights on background. They may consist in a right of ownership, a licence right and/or right of use belonging to the contractor, the creator, the contracting authority, the buyers group or to any other third parties, including subcontractors.
- ‘Sideground’ means any material, document, technology, solution, data, know-how or information (sideground material) — whatever its form or nature (tangible or intangible), regardless of whether or not it can be protected, including any attached rights such as intellectual property rights (‘sideground IPRs’) — that is (1) generated during the timespan of the PCP but not in the PCP and (2) needed to implement the PCP or to exploit the results of the PCP.
- ‘Sideground rights’: any rights, including industrial and intellectual property rights on sideground material. They may consist in a right of ownership, a licence right and/or right of use belonging to the contractor, the creator, the contracting authority, the buyers group or to any other third parties, including subcontractors.
- ‘Pre-existing material’: any material, document, technology, solution, information, data or know-how, whatever its form or nature, tangible or intangible, regardless of whether or not it can be protected, which exists prior to the

contractor using it for the production of a result in the implementation of the Framework Agreement or a Specific Contract. It includes both the background material and the sideground material.

- ‘Pre-existing rights’: any rights, including industrial and intellectual property rights on pre-existing material. It may consist in a right of ownership, a licence right and/or right of use belonging to the contractor, the creator, the contracting authority as well as to any other third parties, including subcontractors. It includes both background rights and sideground rights.
- ‘Fair and reasonable conditions’ means appropriate conditions, including financial terms or royalty-free conditions, taking into account the specific circumstances of the request for access (*for example, the actual or potential value of the results, background or sideground to which access is requested and/or the scope, duration or other characteristics of the exploitation envisaged*).
- ‘Generated in the PCP’ means in the implementation of activities described in the PCP Framework Agreement or Specific Contracts.
- ‘Not generated in the PCP’ means not generated in the implementation of activities described in the PCP Framework Agreement or Specific Contracts.

 If you use other definitions (allowed), make sure that they are compatible with your obligations under the Horizon Europe grant agreement.

Provide for some introductory general provisions that ensure that the contractor is responsible that all IPR provisions are respected in any situation, even in case of changes to the contractor/consortium that may occur during/after the PCP (*e.g. in case of subcontracting, in case of mergers/acquisitions*):

The contractor is responsible for ensuring that all third parties that it collaborates with during and after the Framework Agreement and the Specific Contracts respect all intellectual and industrial property-related obligations towards the contracting authority and the buyers group and must pass on its obligations to those entities.

The contractor must ensure that the rights of the contracting authority and the buyers group under the Framework Agreement and the Specific Contracts are upheld under all circumstances, including in case of merger, split, takeover or other corporate restructuring.

XX.2 Ownership of results

Provide details on the rights and obligations in relation to ownership of results. Specify:

- that each contractor that generates results owns the attached IPRs
- who will own results that are not IPRs (*e.g. prototypes and first products resulting from the R&D, design, prototype and first product/service specifications, simulations, data models, drawings, source code*).

XX.2.1 Ownership of the results

Subject to the conditions set out in Articles **XX.2**, **XX.3**, **XX.4**, **XX.5** and **XX.6**, the contractor retains the ownership of all the rights on the results that it generates. This includes the rights on newly created material generated by it and the rights on background and sideground material that may be included in the results or that is essential for the functioning of the use of the results (*see Articles **XX.8** and **XX.9** on pre-existing rights*).

[additional OPTION when the buyers group wants to buy own foreground material and own it after the end of the PCP:

Notwithstanding this, the members of the buyers group will each become owners of [enter number of copies required: e.g. at least one] exemplar of each foreground material, together with all the necessary documentation to use the foreground material as foreseen by the Framework Agreement and Specific Contracts. This applies both where foreground material is software, physical/hardware prototypes or first solution implementations (products or services), simulations, designs, data models, etc. In order to enable them to use and adapt these results (*see Article **XX.4***), they also have the right to obtain a copy of the source code and of the design specifications and any other relevant technical documentation concerning the creation, construction and functioning of the results.

The contractor will retain the ownership of all the other exemplars of the foreground material, generated for which the members of the buyers group do not obtain ownership.]

XX.2.2 Buyers group ownership in case of breach of contract to preserve public interests or to protect or commercialise the results

Conditions

The members of the buyers group may exceptionally require transfer of the ownership of results generated under the PCP procurement to them, if the contractor:

- does not (or no longer) comply with one of the following obligations:
 - ‘compliance with definition of R&D services’ obligation in section [XXX] of the request for tenders
 - ‘place of performance obligation’ obligation in section [XXX] of the request for tenders
 - ‘place of establishment and control’ obligation in section [XXX] of the request for tenders
- decides not to protect the results that it generated or does not seek timely or sufficient protection to enable the buyers group to use the results as provided for in the Framework Agreement or a Specific Contract (see Article XX.3)
- fails to commercially exploit the results within the four years time period and the circumstances of the case show that it has not used its best efforts to do so (see Article XX.5.1)
- uses the results to the detriment of the public interest [OPTION when EU security and/or strategic autonomy interests need safeguarding;], including EU strategic autonomy or security interests] (see Article XX.5.2)
- is subject to a merger or acquisition and the impact analysis concludes that the merger or acquisition negatively impacts the access to or the commercial exploitation of the results, including the EU security interests and EU strategic autonomy objectives set out in Art XX.5 (see Article XX.5.3).

Procedure

The members of the buyers group will notify the contractor of their intention to require the transfer of ownership of results through the contracting authority.

Before exercising their rights, the contracting authority will first contact the contractor to verify any measures that the contractor has taken to achieve successful commercial exploitation of the results, to safeguard EU strategic autonomy and security interests and rules, to prevent use of the results to the detriment of the public interest and to comply with its contractual obligations.


Following the transfer of the ownership of the results to the members of the buyers group, the members of the buyers group may grant licenses to third parties to ensure further protection, usage and exploitation of the results (see Article XX.4.3).

The contractor shall ensure that the commercial exploitation of the results by the members of the buyers group will not infringe any of its other obligations under this Framework Agreement or a Specific Contract, such as its obligations regarding security, confidentiality and the protection of intellectual property or its obligations under data protection legislation.

XX.3 Protection of the results

Provide details on the rights and obligations in relation to protection of results. Specify:

- that each contractor is responsible for the management (including protection) of its IPRs and bears the costs associated with this
- that the procurers have the right to monitor the management of the IPRs
- that the contractor must inform the buyers group (via the lead procurer) of results that can be exploited, regardless of whether they can be protected or not, within [insert number] days from when they are generated. The information submitted to the lead procurer must include information about the contents of the results, the confirmation by the contractor to protect them and the planned timing for protection
- that if a contractor does not seek protection for results that should be protected, the buyers group has the right to itself protect the results
- if the HE call conditions impose control restrictions due to strategic interests, make sure that the results of the PCP will be protected in such a way that they will be free from such restrictions
- whether the contractor is required to deposit copies of results (e.g. the source code and design specifications), for example, under an ESCROW agreement designed to guarantee the buyers group continued access to results in the case of financial bankruptcy of the contractor (or any of its subcontractors).

 If the lead procurer (the contracting authority of the PCP) is also financially investing in the PCP and therefore also wants to receive the same IPR-related rights as the buyers group (e.g. ownership of some copies of the foreground material, and access and licensing rights to the attached IPR rights), then the buyers group needs to be defined in such a way that the contracting authority is part of the buyers group.

The contractor shall be responsible for the management of all the rights on the results that it holds and shall bear the associated costs, including for the protection, examination, grant, maintenance, defence and litigation of the rights on the results.

The contracting authority and members of the buyers group shall be entitled to monitor the management of all rights on the results held by the contractor. The contractor shall submit periodical reports, when requested by the contracting authority and buyers group, no more frequently than [enter a reasonable period, e.g. annually] on the exploitation of the results, including the rights on the results, by the contractor, its licensees or assignees. The contractor shall respond at any time to requests for information from the contracting authority and buyers group about the handling of the rights on the results. The contractor shall ensure that the results are identified, recorded and carefully distinguished from the outputs of other research and development activities that are not covered by the Framework Agreement or a Specific Contract.

The contractor shall inform the contracting authority of any results it generates that can be exploited, regardless of whether they can be protected or not, at the latest [enter a reasonable time, e.g. two months] from the generation of the result. The notification shall include information about the contents of the results, the confirmation by the contractor of its decision to protect said results, the type of protection that will be pursued and, for registered IPRs such as patents and design rights, the planned timing and geographical scope of such protection/ jurisdictions for which the contractor will seek to obtain protection.

If the contractor decides to protect its results, it shall ensure that an application for protection is filed to the relevant authority (national, European Patent Office (for patents) or European Union Intellectual Property Office (for trademarks and designs)) within [enter a reasonable time, e.g. one year] after notifying the contracting authority, and in any case prior to any publication on them.

Where possible, the applications for protection shall include the following statement: 'These results were achieved with EU support. The European Union has certain rights in these results'.

In case of any decision not to continue an application for protection, not to pay maintenance fees, or not to defend in a re-examination or opposition proceeding, the contractor shall notify the contracting authority not less than [enter a reasonable time, e.g. 60 days] before the deadline for responding to the procedure for protection, maintenance or litigation.

If the contractor decides not to protect the results that it generated or does not seek timely or sufficient protection to enable the buyers group to use the results as provided for in the Framework Agreement or a Specific Contract, for example in terms of jurisdictions for registered IPRs, the members of the buyers group retain the right to require that the contractor transfers the ownership of the result to them so that the buyers group can ensure that the results are protected.

[additional OPTION when depositing of results under escrow is required: The contractor shall put a copy of the results it generates (e.g. source codes of software and all related documentation, design specifications of prototypes, documentation about the foreground IP etc) under escrow with a reputable escrow agent. If requested by the contracting authority, a tri-party agreement shall be signed between the escrow agent, the contractor and the contracting authority (on behalf of the members of the buyers group), duly protecting the interests of the contracting authority and the buyers group in case of bankruptcy or liquidation of the contractor and ensuring that in such cases the members of the buyers group shall obtain a copy of the results.]

If the contractor becomes aware of any product or activity of any third party that involves or may involve infringement or other violation of the rights on the results, the contractor shall promptly notify the contracting authority of the infringement or violation.

If the HE call conditions impose control restrictions due to strategic interests, add the following option: [OPTION for PCPs with control restrictions due to strategic interests in the HE call conditions: The contractor must ensure that the results are not subject to control or other restrictions by a country (or entity from a country) which is not [specify the list of countries in line with the list of eligible countries defined in section 3.1 of the request for tenders] — unless otherwise agreed with the contracting authority.]

Check carefully if the call conditions for your HE grant impose specific requirements (e.g. *control restrictions*). If yes, they prevail and must be applied. If no, such restrictions should only be used if the buyers group has justified reasons to do so and in agreement with the granting authority.

XX.4 Access rights to the results

XX.4.1 Access rights to the results for the contracting authority and the buyers group

Provide for the rights and obligations in relation to access to the results. Specify:

- that the contractor grants to the buyers group irrevocable, royalty-free, non-exclusive, world-wide access rights to use the results, for their own purposes (for IPRs: until their expiry date)
- that, for results that are an implementation of design specifications into simulations, prototypes, demonstrators or first products /services, those access rights are limited to a duration of [insert duration] years and to the following purposes for fulfilling the R&D objectives of the PCP: [specify those purposes for your PCP]
- that the buyers group has [the right to grant] [the right to require the contractor to grant — within a reasonable time period specified in the request —] non-exclusive licences to third parties to commercially or non-commercially exploit the results under fair and reasonable conditions, without the right to sub-license.

Don't forget to also foresee rules on subcontractor rights and obligations with respect to the above points (e.g. *that the contractor must ensure that it complies with its obligations under the framework agreement and specific contracts if it uses subcontractors; that it must obtain all necessary rights (transfer, licences or other) from the subcontractors, as if they were generated by itself; that it should refrain from using subcontractors if obtaining those rights is impossible*).

The contractor grants the members of the buyers group, including their affiliated entities, a royalty-free, non-exclusive, worldwide, irrevocable and non-sub-licensable (except as explicitly authorised under this Framework Agreement) license to use its results for their own purposes, during and after the Framework Agreement and Specific Contracts. The contractor also grants a royalty-free, non-exclusive, worldwide, irrevocable and non-sub-licensable license to contractors and subcontractors of the buyers group to practice the results for their own purposes, during and after the Framework Agreement and Specific Contracts.

- For those results that are design specifications (including the rights on such type of results), the access rights are unlimited in duration, or at least until expiration of the attached rights if any. For the avoidance of any doubt, use for its own purposes also allows the buyers group (and any contracting authority appointed by the buyers group to implement a procurement on their behalf) to use the design specifications in tender specifications of future public procurements related to the results.
- For those results that are an implementation of the design specifications into simulations, prototypes, demonstrators or first products /services, the access rights are [OPTION 1 when the buyers group intends to continue to use the results indefinitely: unlimited in duration] [OPTION 2 when the buyers group intends to continue to use the results for a limited time: limited to a duration of [enter the envisaged usage period, e.g. 4] years after the end of the Framework Agreement and Specific Contracts], with the aim to [define the purpose, e.g. 'enable wider validation of the results in production (e.g. across a larger set of future use cases, datasets and users)'], and the license is limited to use of the results for the buyers group own non-commercial purposes. Except in exceptional conditions and subject to the conditions in Article XX.3 (decision of the contractor not to protect/exploit certain results), XX.4.3 (failure of the contractor to license results to third parties) and XX.5 (failure of the contractor to commercially exploit the results or abuse of the results against the public interest), the contracting authority and members of the buyers group do not aim to commercially exploit/sell itself the contractor's results. Commercial exploitation of the contractor's results is in the first place the responsibility of the contractor, as specified in Article XX.5 (commercialisation of results).

Without prejudice to above rights to access the results for various purposes, the members of the buyers group, their (sub)contractors, any contracting authority appointed by the buyers group to implement a procurement in their name and/or on their behalf, enjoy in particular:

- the right to make the results available to their staff and to persons and entities working for them or cooperating with them, including contractors, subcontractors
- the right to integrate the results into the buyers group's infrastructure and to use the results as part of this infrastructure (including the right to load, display, transmit and run the results on the infrastructure) at least for [enter the same envisaged usage period as above, e.g. 4 years] years after the end of the Framework Agreement and Specific Contracts.

- the right to make the necessary copies of the results for internal distribution, archiving, back-up, correcting errors, studying or testing of the functioning of the results
- the right to make compilations, translations, adaptations or other types of arrangements or alterations to the results as is necessary for their intended use, for example to ensure interoperability with other systems implemented by the buyers group
- the right to publish summaries of the results, after consultation with the contractor to ensure that no confidential information is thereby disclosed or that the publication would not interfere with the protection of intellectual or industrial property rights. These rights are in addition to the rights provided for by law, such as the unwaivable rights of, and exceptions for the benefit of lawful users of software or of databases, as foreseen under the applicable EU or national laws.

These rights do not allow, unless expressly permitted by the contractor, the right for the contracting authority and the buyers group to make the results available to the market, neither for free or under open licence terms (open source, open data) nor under market commercial conditions, neither to the general public nor to sectors of the economy. However, the members of the buyers group reserve the right to make available to the public, even for free, any public service provided by them that makes use of the new functionalities enabled by the results that have been integrated in the buyers group’s infrastructure. The contractor retains the right to commercial exploitation of the results, as specified in Article XX.5 (commercial exploitation of results), for any purposes of using the results beyond the scope of the current PCP. The members of the buyers group reserve the right to require the contractor (see Article XX.4.3 access to results for third parties) to give access under fair and reasonable conditions to the results to third parties, for example to third parties interested in developing and commercialising their own use cases on top of the buyers group’s infrastructure.

In case of commercial exploitation of products, services or processes arising or developed from the results by the contractor (or by entities affiliated to it or succeeding it in the ownership or development of the results), the contractor shall ensure that the members of the buyers group (or any contracting authority appointed by the buyers group to implement a procurement in their name and/or on their behalf) are offered the commercial products or services at the best price offered by the contractor (or the entities affiliated or succeeding it) in similar situations to any other third party (in particular without charging for licenses or other rights which the buyers group already have under other provisions of this Framework Agreement or a Specific Contract).

 The limitation of the scope and/or duration of the access rights (to ‘what is needed by the buyers group to fulfil the R&D objectives of the PCP’) is needed for the PCP to remain an ‘R&D procurement’ where the ‘procurers do not retain all the benefits’ and thus be exempted from the WTO rules and the EU public procurement directives.

XX.4.2 Access rights to the results for the EU

The EU has the right to use non-sensitive information relating to the PCP and materials and documents received from the contracting authority and buyers group for policy, information, communication, dissemination and publicity purposes — during the EU grant or afterwards. This concerns notably summaries for publication, as well as any other material, such as pictures or audio-visual material, and other deliverables submitted by the contracting authority and buyers group to the EU, in paper or electronic form.

The right for the EU to use these materials, documents and information is granted in the form of a royalty-free, non-exclusive and irrevocable licence, which includes the following rights:

- (a) use for its own purposes (in particular, making them available to persons working for the EU granting authority or any other EU service (including institutions, bodies, offices, agencies, etc.) or EU Member State institution or body; copying or reproducing them in whole or in part, in unlimited numbers; and communication through press information services)
- (b) distribution to the public (in particular, publication as hard copies and in electronic or digital format, publication on the internet, as a downloadable or non-downloadable file, broadcasting by any channel, public display or presentation, communicating through press information services, or inclusion in widely accessible databases or indexes)
- (c) editing or redrafting (including shortening, summarising, inserting other elements (e.g. meta-data, legends, other graphic, visual, audio or text elements), extracting parts (e.g. audio or video files), dividing into parts, use in a compilation)

- (d) translation
- (e) storage in paper, electronic or other form
- (f) archiving, in line with applicable document-management rules
- (g) the right to authorise third parties to act on its behalf or sub-license to third parties the modes of use set out in Points (b), (c), (d) and (f), if needed for the information, communication and publicity activity of the granting authority and
- (h) processing, analysing, aggregating the materials, documents and information received and producing derivative works.

The rights of use are granted for the whole duration of the industrial or intellectual property rights concerned.

If materials or documents are subject to moral rights or third party rights (including intellectual property rights or rights of natural persons on their image and voice), the contractor must ensure that they comply with their obligations under this Framework Agreement and Specific Contracts (Articles XX.8 and XX.9 on pre-existing rights) in particular, by obtaining the necessary licences and authorisations from the rights holders concerned.

Where applicable, the EU granting authority will insert the following information: “© – [year] – [name of the copyright owner]. All rights reserved. Licensed to the EU under conditions.”

XX.4.3 Access rights to the results for third parties

If requested by the contracting authority or buyers group, the contractor shall, within a reasonable time period specified in the request, grant to the third parties specified in the request a non-exclusive and non-sub-licensable license to use and exploit the results, and any background or sideground which may be necessary for the use or exploitation of the results, under fair and reasonable conditions.

If the contractor fails or refuses to grant the requested licenses, the contracting authority and members of the buyers group retain the right to grant themselves a non-exclusive and non-sub-licensable license to the third parties to use and exploit the results (or to appoint an independent third party to do so).

XX.5 Commercial exploitation of results

Provide for the rights and obligations in relation to commercial exploitation of the results:

XX.5.1 Responsibility of the contractor to commercially exploit results

The contractor shall take prompt action to ensure that its results are exploited commercially (directly or indirectly through another entity, through transfer or licensing), even if they cannot be protected, in order to ensure swift availability of the developed solutions on the wider market and to generate revenue by marketing commercial applications of the results.

In particular, the contractor must use its best efforts to exploit its results up to [four] years after the end of the Framework Agreement and Specific Contracts, including where they are capable of commercial exploitation, to exploit them commercially (i.e. marketing a commercial application of the results, directly or indirectly, through a subcontractor or licensee).

If, despite a contractor’s best efforts, the the results are not exploited within one year after the end of the Framework Agreement and Specific Contracts, the contractor must (unless otherwise agreed in writing with the contracting authority and buyers group) use the Horizon Europe Results Platform¹³⁷ to find interested parties to exploit the results.

If the contractor fails to commercially exploit the results within the four years time period and the circumstances of the case show that it has not used its best efforts to do so, the members of the buyers group retain the right to require that the contractor transfers the ownership of the results to them so that the buyers group can ensure that the results are commercially exploited.

It is important that the period of time allowed for commercial exploitation of results is set in such a way as to give the contractor a fair and reasonable amount of time to exploit the results in the relevant sector. This will ensure that the potential for marketing the product or service is valued correctly (Horizon Europe uses as an appropriate length of time 4 years). The period should take account of the fact that: 1) the contractor needs to start producing the good or service in quantity and to invest in large scale promotion activities and 2) the potential first customers, public procurers, generally take time to prepare and launch a PPI after the PCP has been completed.

¹³⁷ [Horizon Europe Results Platform](#)

⚠️ If the duration of the Horizon Europe grant is finally longer than initially foreseen (i.e. if the HE action duration is extended), you must also extend duration of the framework agreement and the specific contracts (via an amendment). The formulation above ensures that if this happens, the duration for the obligation on the commercial exploitation in the framework agreement will also be automatically extended (as it will start counting from the new end date specified in the amendment).

XX.5.2 Additional obligations/limitations for the exploitation of results due to public interests

Security or strategic autonomy

[OPTION when safeguarding of EU security interests is important, in particular when the PCP involves security related R&D and/or when the HE call conditions impose specific additional security obligations: In order to [explain the reason, e.g. safeguard the delivery of public services through the buyers group’s infrastructure against potential physical and cyber threats and to protect the exchange of security sensitive information], the contractor shall ensure to safeguard EU security interests in the commercial exploitation of the results.]

[OPTION when safeguarding of EU strategic autonomy is important, in particular when the PCP involves critical technologies or critical assets, and/or when the HE call conditions impose specific additional EU strategic autonomy obligations: In order to safeguard security of supply of inputs critical to the functioning of the buyers group’s infrastructure and fair competition in the supply chain compliant with EU rules and interests, the contractor shall ensure to safeguard EU strategic autonomy in the commercial exploitation of the results. For this purpose, the contractor shall ensure that a significant amount of the commercial exploitation of the results takes place in the EU Member States and/or countries associated to Horizon Europe¹³⁸. In particular, the contractor must produce minimum [enter a reasonable percentage, e.g. 50%] of the products, services or processes that incorporate results or that are produced through the use of results in [add the list of countries in line with the list of eligible countries defined in section 3.1 of the request for tenders].]

[additional OPTION for PCPs that involve security-related R&D: Moreover, for results that are security components, the contractor must moreover produce [enter a reasonable percentage (typically more demanding than the one in the previous paragraph), e.g. 100%] in [OPTION if there are participation and/or control restrictions in the HE call conditions: [add the list of countries to which participation and/or control is restricted]] [OPTION if there are no participation and/or control restrictions in the HE call conditions: [add ‘EU Member States or Horizon Europe associated countries’]].]

[additional OPTION when EU security and/or strategic autonomy interests need safeguarding, in particular when imposed by the HE call conditions: The contractor must ensure that, in the commercial exploitation of results, any cooperation with entities established in other countries, or controlled by such countries or entities from such countries, does not affect the EU security or strategic autonomy interests and avoids potential negative effects over security of supply of inputs critical to the functioning of the buyers group’s infrastructure.]]

Standardisation

[OPTION if there are additional obligations related to standardisation in the HE call conditions: The contractors must promote the dissemination of their results, in particular through [publications and] contribution to standardisation. The contractors and the contracting authority will establish at the start of the Framework Agreement a list of [planned publications about the results and] appropriate standards to contribute to, and will keep this list updated throughout the Framework Agreement and for each Specific Contract. The contractors must — up to four years after the end of the Framework Contract and Specific Contracts — inform the contracting authority, who will inform in its turn the granting authority that is co-financing the PPI, if the results could reasonably be expected to contribute to European or international standards.]

Public emergency

[OPTION if there are additional exploitation obligations in case of a public emergency in the HE call conditions: In case of a public emergency the contractor must, if requested by the contracting authority on behalf of the buyers group or the EU, commit to rapidly and broadly exploit the products and/or services resulting from the PCP at fair and reasonable conditions to address the public emergency. This provision applies up to four years after the end of the PCP.]

Other

Where the HE call conditions impose other additional exploitation obligations, add them here.

¹³⁸ [List of Horizon Europe participating countries.](#)

If the contractor uses the results to the detriment of the public interest [*OPTION when EU security and/or strategic autonomy interests need safeguarding, in particular when imposed by the HE call conditions*], including EU strategic autonomy or security interests], the members of the buyers group are entitled to require that the contractor transfers the ownership of the results to them, in order to stop use of the results against the public interest and ensure commercial exploitation of the results by another party in line with the exploitation conditions.

The contractor must ensure that these obligations also apply to its subcontractors, affiliated entities and other third parties it cooperates with in the commercialisation of the results, as well as to any entities succeeding them in their ownership or development of the results.

Check carefully if the call conditions for your HE grant impose specific requirements (e.g. specific exploitation obligations or control restrictions). If yes, they prevail and must be applied. If no, such restrictions should only be used if the buyers group has justified reasons to do so and in agreement with the granting authority.

XX.5.3 Obligation to notify a planned merger or acquisition

In case of a merger or acquisition by an entity from a country (or controlled by a country) that is not an EU Member State or Horizon Europe associated country, the contractor must notify the contracting authority at least [enter a reasonable period, e.g. three (3) months] in advance of the decision to implement the merger or acquisition and:

- describe in detail the identity, ownership and control structure of the potential new merged entity or the potential new owner(s)
- include a reasoned assessment of the likely impact of the possible merger/acquisition on:
 - the access to the results and to the background and sideground that is essential for accessing the results, as foreseen by the Framework Agreement and Specific Contracts for the contracting authority and for third parties
 - the commercialisation exploitation of the results, including the EU security interests and EU strategic autonomy objectives above

The contracting authority and buyers group may request the contractor for additional information to verify the potential impact, upon which the contractor must promptly provide the requested information.

In case the impact analysis concludes that the merger or acquisition negatively impacts the access to or the commercial exploitation of the results, including the EU security interests and EU strategic autonomy objectives set out in Article XX.5, the members of the buyers group are entitled to require that the contractor (both the contractor before or after the merger or acquisition) transfers the ownership of the results to them so that the buyers group can ensure that the interests are preserved and protected.

XX.6 Transfer and licensing of results

Provide for the rights and obligations in relation to transfer and licensing of results. Specify:

- *that the contractor may grant non-exclusive licences to third parties allowing them to exploit the results (or otherwise give the right to exploit them) — unless this impedes the access rights of the buyers group or unless the HE call conditions impose restrictions to a specific list of eligible countries*
- *that the contractor may transfer ownership or give exclusive licenses to its results — unless this is prohibited (or restricted) by the HE call conditions or the ethics, security or EU strategic autonomy obligations and provided that it ensures that its obligations (in respect of the results) apply to the new owner and that this new owner is obliged to pass them on in any subsequent transfer (e.g. by including a requirement to do so in their arrangements with the new owner).*

You may foresee a right of first refusal for the buyers group to buy the results.

You should also foresee a procedure for transfers when there are procurers in the buyers group that still have (or may still request) access rights to the results (e.g. that the contractor must give them at least 45 days advance notice of its intention to transfer ownership of the results and that this notification must include sufficient information on the new owner to enable the procurers to assess the effects on their access rights. A procurer can object within 30 days of receiving notification, if it can show that the transfer would adversely affect its access rights. Should an objection be raised, the transfer may not take place until agreement has been reached between the parties concerned).

XX.6.1 Non-exclusive licensing of results

[OPTION 1 by default (no restrictions): The contractor may on its own initiative without prior authorisation from the contracting authority, give non-exclusive licenses to third parties to exploit the results that it owns, to the extent that:

- such licenses do not affect the rights — including the access rights — of the contracting authority, buyers group or the EU related to the results, and
- such licenses do not affect the obligations — including the security and ethical obligations — of the contracting authority and buyers group related to the results, and
- such licenses are not granted to entities which are subject to [EU restrictive measures](#) under Article 29 of the Treaty on the European Union (TEU) and Article 215 of the Treaty on the Functioning of the EU (TFEU)¹³⁹ (sanctions).

The contractor must ensure in the licensing agreement that all its obligations under the Framework Agreement and Specific Contracts are passed on to the third party and that the third party has the obligation to pass on these obligations in any potential subsequent licensing.]

[OPTION 2 if there are participation and/or control restrictions in the HE call conditions: Non-exclusive licensing is subject to the same restrictions as exclusively licensing of results, as specified in Article [XX.6.2](#).]

Check carefully if the call conditions for your HE grant impose specific requirements (e.g. control restrictions). If yes, they prevail and must be applied. If no, such restrictions should only be used if the buyers group has justified reasons to do so and in agreement with the granting authority.

XX.6.2 Exclusive licensing and transfer of ownership of results

Conditions

Exclusive licensing and transfers of ownership of the results are restricted as follows:

- the contractor may not transfer or give exclusive licenses if this would affect the rights — including the access rights — of the contracting authority, buyers group or the EU related to the results
- the contractor may not transfer or give exclusive licenses if this would affect the obligations — including the security and ethical obligations — of the contracting authority and buyers group related to the results
- the contractor may not transfer or give exclusive licenses to entities that are subject to [EU restrictive measures](#) under Article 29 of the Treaty on the European Union (TEU) and Article 215 of the Treaty on the Functioning of the EU (TFEU)¹⁴⁰ (sanctions)
- *[OPTION if the HE call conditions include a right for the EU to object to transfers or licensing:* the contractor may not transfer ownership of its results or give licences to third parties which are established in a non-EU country not associated with Horizon Europe if the EU granting authority objects to the transfer; the notification procedure below must be followed]
- *[OPTION if there are participation and/or control restrictions in the HE call conditions:* the contractor may not transfer ownership of its results or give licences to third parties which are established in countries which are not [include the list of eligible countries set out in section 3.1 of the request for tenders] (or, if applicable, are controlled by such countries or entities from such countries) — unless they have requested and received prior approval by the contracting authority who will request prior approval from the granting authority that is co-financing the PCP. The notification procedure below must be followed.]
- *[OPTION if there is a right of first refusal for the buyers group:* the contractor may not transfer ownership or the results or give exclusive licenses, if this would conflict with the right of first refusal for the buyers group to buy the results. [explain further what is the exact procedure for the buyers group to invoke the right of first refusal].]

The contractor must ensure in the transfer/licensing agreement that all its obligations under the Framework Agreement and Specific Contracts are passed on to the new owner/licensee and that this new owner/licensee has the obligation to pass them on in any subsequent transfer/licensing.

Notification procedure

¹³⁹ Please note that the EU Official Journal contains the official list and, in case of conflict, its content prevails over that of the [EU Sanctions Map](#).

¹⁴⁰ Please note that the EU Official Journal contains the official list and, in case of conflict, its content prevails over that of the [EU Sanctions Map](#).

If the contractor intends to transfer or grant a licence to a third party in one of the notification cases listed above, they must notify the contracting authority who will request prior authorisation to the EU granting authority. The notification must be done at least [specify an appropriate period, e.g. three months] in advance and:

- identify the specific results concerned
- describe in detail the intended new owner or licensee and the planned or potential exploitation of the results and
- include a reasoned assessment of the likely impact of the intended transfer or exclusive license on:
 - the access rights to the results and on the background and sideground that is essential for accessing the results as foreseen by the Framework Agreement and Specific Contracts for the contracting authority, the members of the buyers group or for third parties
 - the commercialisation exploitation of the results in line with public interests and EU interests, in particular regarding competitiveness [OPTION when safeguarding of EU strategic autonomy interests is important for the buyers group, in particular when the PCP involves security-related R&D and/or when the HE call conditions impose specific additional security obligations: and EU strategic autonomy objectives as specified in Article XX.5] as well as consistency with ethical principles and security considerations on EU interests.

The contracting authority may on behalf of the EU granting authority request the contractor for additional information to verify the potential impact, upon which the contractor must promptly provide the requested information.

Before granting the authorisation, the EU granting authority will verify the potential impact of the intended transfer or exclusive licensing.

The EU granting authority may object to the transfer or exclusive licensing or may condition its authorisation to measures ensuring that the transfer or exclusive licensing will not have unintended or undesirable consequences.

Before the EU granting authority gives its written authorisation, the transfer may not take place and any transfer or exclusive licensing agreement concluded before or without a written authorisation will be null and void.

Check carefully if the call conditions for your HE grant impose specific requirements (e.g. specific control restrictions). If yes, they prevail and must be applied. If no, such restrictions should only be used if the buyers group has justified reasons to do so and in agreement with the granting authority.

XX.7 Pre-existing materials and pre-existing rights (background and sideground)

Provide for the rights and obligations concerning pre-existing materials and rights (background and sideground). Specify:

- rules regarding ownership of pre-existing rights (remains unchanged)
- that the parties must inform each other about the generation of/changes in pre-existing rights within [insert number] days from the generation /change
- that the contractor introducing background must within [define period] of the signing of the PCP framework agreement provide the lead procurer with a list of the pre-existing rights it holds and/or has access to (e.g. via its subcontractors) at the date of the agreement and a list of the software necessary for the operation of the prototype and first products/services that will be developed during the PCP, specifying which software is closed source software. An updated list (to the extent necessary) must be provided with each bid for the next phase
- the access that the parties must grant each other to each other's pre-existing rights and sideground for carrying out the tasks assigned to them in the PCP, for exploitation of results generated in the PCP and for using the results for their own purposes (normally at least to the buyers group)

The conditions for access should be fair and reasonable to all parties, e.g. — as appropriate for your PCP —:

- on a royalty-free, non-exclusive basis, access to each other's background, for carrying out the tasks assigned to them in/during the PCP
- under fair and reasonable conditions and on non-exclusive basis, access to each other's background, for exploitation of results generated in the PCP and for using the results for their own purposes in particular also after the PCP
- under fair and reasonable conditions and on non-exclusive basis, access to each other's sideground, for carrying out the tasks assigned to them in the PCP, for exploitation of results generated in the PCP and for using the results for their own purposes in particular also after the PCP.

XX.8 Ownership of and access to pre-existing materials and rights

Background and sideground remain the property of the party providing it, or as the case may be, its licensor(s) and nothing contained in this Framework Agreement or a Specific Contract shall affect the rights of each party in their background or sideground.

Subject to pre-existing obligations that may apply to background or sideground, the members of the buyers group grant the contractor a royalty-free, non-exclusive, irrevocable and non sub-licensable license to use their background and sideground for the performance of the Framework Agreement and Specific Contracts, during the period of the Framework Agreement or Specific Contract.

[OPTION 1 in case the procurers have background that is relevant to the PCP: The buyers group hold the following background that is relevant to the PCP: [specify relevant background].] [OPTION 2 in case the procurers do NOT have background that is relevant to the PCP: The buyers group do not hold any background that is relevant to the PCP.]

Subject to pre-existing obligations that may apply to background or sideground, the contractor grants the buyers group and (sub)contractors that assist them in executing the Framework Agreement and Specific Contracts (including in particular in evaluation or testing of solutions) a royalty-free, non-exclusive, irrevocable and non-sub-licensable (except as explicitly authorised under this Framework Agreement) license to use its background and sideground for the execution of the Framework Agreement and Specific Contracts and during the period of the Framework Agreement and Specific Contracts.

Regarding the rights to use for the background rights, choose option 1 or 2 below, as applicable: [OPTION 1 for PCPs in which procurers do not buy resulting prototypes/first products/services: The members of the buyers group are not purchasing developed prototypes or first products/services as part of this PCP. However, subject to pre-existing obligations that may apply to background or sideground, the contractor grants to the members of the buyers group — and also to (sub)contractors that practice the results for the buyers group’s own non-commercial use — a license to use its background and sideground under fair and reasonable conditions to the extent needed to use the results for the the buyers group’s own non-commercial purposes, beyond the execution of the Framework Agreement and Specific Contracts and after the Framework Agreement and Specific Contracts.] [OPTION 2 for PCPs in which procurers buy resulting prototypes or first products/services: The members of the buyers group are purchasing [specify whether it is ‘developed prototypes’ or ‘first products’] as part of this PCP. Subject to pre-existing obligations that may apply to background or sideground, the contractor grants to the members of the buyers group — and also to (sub)contractors that practice the results for the buyers group’s own non-commercial use — a royalty-free, non-exclusive, irrevocable and non-sub-licensable (except as explicitly authorised under this Framework Agreement) license to use its background and sideground to the extent needed to use the results for the buyers group’s own non-commercial purposes, beyond the execution of the Framework Agreement and Specific Contracts and after the Framework Agreement and Specific Contracts for [specify the duration for which the procurers want to keep using the PCP solution and the associated background rights after the PCP. This period must be the same as in request for tenders and must be aligned with the period for usage rights that is defined for access of the buyers group to the results in Article XX.4.1].]

These licenses are in addition to rights provided for by law, such as the unwaivable rights of, and exceptions for the benefit of lawful users of software or of databases, as foreseen under the applicable EU or national laws.

Subject to pre-existing obligations that may apply to background or sideground, the contractor also grants rights to use its background and sideground — under the same conditions as above — to entities that are under the direct or indirect control of members of the buyers group, or under the same direct or indirect control as members of the buyers group, or directly or indirectly controlling members of the buyers group *[OPTION for PCPs with control restrictions in the HE call conditions; subject to applicable control restrictions]*.

Check carefully if the call conditions for your HE grant impose specific requirements (e.g. specific control restrictions). If yes, they prevail and must be applied. If no, such restrictions should only be used if the buyers group has justified reasons to do so and in agreement with the granting authority.

XX.9 List/evidence of pre-existing materials and pre-existing rights (background and sideground)

XX.9.1 List of pre-existing materials and pre-existing rights

In order to be able to distinguish clearly between rights on newly created materials, and newly created rights on the one hand and pre-existing materials and pre-existing rights on the other hand, and to establish which pre-existing materials and rights are held by whom, the parties must establish an agreed list of all their pre-existing materials and pre-existing rights

(background and sideground) that may be used for the performance of this Framework Agreement and Specific Contracts, including identification of the rights' owners.

The contractor must provide the declaration listing pre-existing materials and pre-existing rights in its offer for the Framework Agreement and must provide an updated version of it to the contracting authority within the bid for each Specific Contract in order to have the updated list approved by the contracting authority at the latest [specify a reasonable time, e.g. 30 days] after the start of each Specific Contract. If there are no pre-existing materials nor pre-existing rights, the contractor must provide a declaration to that effect.

The list of pre-existing material and pre-existing rights shall identify, for each pre-existing material and right, the tasks, deliverables or other aspects related to the performance of the Framework Agreement and Specific Contracts contract that may be affected by pre-existing material/right, the pre-existing material/right concerned, the rights to the pre-existing material, the rights holder and any prior obligations on the pre-existing rights that may apply to the results. Such list will include, but is not limited to, a list of the software necessary for the performance of the Framework Agreement and Specific Contracts (including but not limited to software necessary for the operation of the prototypes and products or services that will be developed during the Framework Agreement or Specific Contract), specifying which software is closed source software.

The contractor shall inform the contracting authority about any evolutions in any of its pre-existing material and pre-existing rights that affect the performance of the Framework Agreement or a Specific Contract. This includes any changes to the background (including the rights on the background) and about the generation of new sideground (including new rights on the sideground) within [specify a reasonable time, e.g. 30 days] from the change or generation and at the latest by the end of the corresponding phase and with each bid for the next phase.

[OPTION for PCPs with control restrictions due to strategic interests in the HE call conditions: The contractor must ensure that background that is subject to control or other restrictions by a country (or entity from a country) which is not one of the eligible countries set out in section 3.1 of the request for tenders and that impact the exploitation of the results (i.e. would make the exploitation of the results subject to control or restrictions) must not be used and must be explicitly excluded from the list of pre-existing rights agreed between the contractor and the contracting authority that will be used for the PCP — unless otherwise agreed with the contracting authority.]

Note that background that impacts the exploitation of results should be understood as making the exploitation of those results subject to control or restrictions, for example if exploitation would require the agreement of the entity owning the background. If such background needs to be used this must be agreed with the granting authority.

Check carefully if the call conditions for your HE grant impose specific requirements (e.g. specific control restrictions). If yes, they prevail and must be applied. If no, such restrictions should only be used if the buyers group has justified reasons to do so and in agreement with the granting authority.

XX.9.2 Evidence of pre-existing rights

If requested by the contracting authority, the contractor must, in addition to the list mentioned under Article XX.9.1, provide evidence that it has the ownership or the right to use all the listed pre-existing materials and rights, except for the rights owned or licensed by the contracting authority and buyers group.

The contracting authority may request this evidence even after the end of this Framework Agreement and Specific Contracts. This evidence may refer, for example, to rights to: parts of other documents, images, graphs, sounds, music, tables, data, software, technical inventions, know-how, IT development tools, routines, subroutines or other programs ('background technology'), concepts, designs, installations or pieces of art, data, source or background materials or any other parts of external origin.

This evidence must include, as appropriate:

- the name and version number of the work
- the full identification of the work and its author, developer, creator, translator, data entry person, graphic designer, publisher, editor, photographer, producer
- a copy of the licence to use the product or of the agreement granting the relevant rights to the contractor or a reference to this licence

- a copy of the agreement or extract from the employment contract granting the relevant rights to the contractor where parts of the results were created by its personnel

and

- the text of the disclaimer notice if any.

Provision of evidence does not release the contractor from its responsibilities if it is found that it does not hold the necessary rights, regardless of when and by whom this fact is revealed.

Article XX — Confidentiality

The parties shall keep confidential any data, documents or other material (in any form) that is identified as confidential at the time it is disclosed. This applies during the implementation of the Framework Agreement and Specific Contracts and up to [insert number of years (minimum 4 years after the end of the Horizon Europe grant)] years after their end.

If information has been identified as confidential only orally, it shall be considered to be confidential only if this is confirmed in writing within 15 days of the oral disclosure.

Unless otherwise agreed between the parties, they may use confidential information only to implement the Framework Agreement and Specific Contracts.

The parties may disclose confidential information to their staff or to third parties involved in the PCP implementation only if:


- (a) they need to be aware of this information in order to implement the PCP activities under the Framework Agreement and Specific Contracts and
- (b) they are bound by an obligation of confidentiality.

The contracting authority and members of the buyers group may disclose confidential information to the EU granting authority if required under their Horizon Europe grant agreement.

The confidentiality obligations cease to apply if:

- (a) the disclosing party agrees to release the other party from the obligation
- (b) the information becomes generally and publicly available, without breaching any confidentiality obligation or
- (c) the disclosure of the information is required by EU or national law.

This does not change the security obligations, which still apply. Stricter confidentiality obligations apply for information that is EU-classified or subject to a security recommendation.

 If the duration of the Horizon Europe grant agreement is longer than foreseen (i.e. if the action duration is extended), you must also extend the confidentiality obligation for the framework agreement (via an amendment).

Article XX — Promotion, publicity and communication

XX.1 Dissemination obligations

The contractor shall undertake communication activities to create publicity about its participation to the procurement, and to promote the objectives and the results of the R&D carried out under the PCP (in particular, to other potential customers with the objective to achieve commercial exploitation of the results; see Article XX on commercial exploitation of results).

When undertaking these activities, the contractor shall ensure that they do not infringe any of its other obligations under this Framework Agreement or a Specific Contract, such as its obligations regarding protection of intellectual property, confidentiality, security restrictions or its obligations under data protection legislation.

Where the buyers group or HE call conditions impose additional dissemination obligations (e.g. open access obligations) on the PCP contractors for the results of the PCP, add them here.

XX.2 Obligation of prior notification of the contracting authority

During the implementation of the Framework Agreement and Specific Contracts and for a period of [insert number] [years]/[months] after the end of the Framework Agreement and Specific Contracts, the contractor shall inform the contracting authority [indicate number] days in advance of any (written or oral) publication or any other type of communication (in any media or form) relating to the services or results. Information on communication activities expected to have a major media impact shall be provided sufficiently in advance to allow the lead procurer to inform the EU.

The contractor must, in particular, submit a draft copy of any publications:

- for written publications — at the same time as the submission to the editor for publication or at least one month before the date intended for publication, whichever is earlier
- for oral communications or other types of disclosure — twenty calendar days before the forecasted date of submission to the organiser of a scientific meeting or of said other type of disclosure.

If requested by the contracting authority, the contractor shall remove any confidential or security sensitive information before the disclosure.

Both parties agree that they will balance any of their requests to remove confidentiality, security or intellectual property-sensitive aspects from a publication proposed by the other party against the other party's objective to maintain sufficient information related to the performance of the Framework Agreement and Specific Contracts or the results that is necessary for the appropriate presentation or understanding of the publication.

XX.3 Recognition of EU funding

All communication activities about the PCP and/or its results (including in electronic form and via social media), as well as infrastructure, equipment and major results financed by the PCP shall display the EU emblem and include the following text:

- for communication activities: 'This [publication][communication] is part of the [acronym of the HE grant] project that has received funding from the European Union's Horizon Europe Research and Innovation Programme'
- for infrastructure, equipment and major results: 'This [infrastructure][equipment][insert type of result] is part of the [acronym of HE grant] project that has received funding from the European Union's Horizon Europe Research and Innovation Programme'.

If results are incorporated in a standard, the contractor must — unless the contracting authority requests or agrees otherwise in writing or unless it is impossible — ask the standardisation body to include the following statement in (information related to) the standard: 'Funded by the European Union'.

If results are protected through registered IPR, the contractor must — wherever possible under the applicable rules — include in its applications for protection the following statement: 'These results were achieved with EU support. The European Union has certain rights in these results'.

When displayed together with another logo, the EU emblem shall have appropriate prominence. The contractor may use the EU emblem without first obtaining approval from the EU. This does not, however, give the contractor the right to exclusive use. Moreover, the contractor may not appropriate the EU emblem or any similar trademark or logo, either by registration or by any other means.

All communication activities shall indicate that the opinions expressed reflect only the author's views and do not represent the contracting authority's or the EU's official position. The contracting authority, in agreement with the EU granting authority, may waive this obligation in writing or provide the text of the disclaimer.

XX.4 Communication/publication rights for the contracting authority and the buyers group

The contracting authority and members of the buyers group may use, for the purposes of communication and publicity, all information relating to the PCP, documents (notably summaries) and deliverables, and any other material (such as pictures or audio-visual material) from the contractor (including in electronic form).

The contracting authority and members of the buyers group may, in particular, publish the name of the contractor and its project abstracts, the summaries of the main results from the R&D and the lessons learnt during the PCP (*e.g. relating to the feasibility of the different approaches to meeting the procurers' requirements that were explored, and the lessons learnt for potential future use of the solutions proposed*).

This does not change the confidentiality obligations under Article XX.

Moreover, before publishing this information, the contracting authority shall consult the contractor, in order to avoid harm to legitimate business interests (*e.g. regarding aspects of the solutions that could be IPR-protected*) or distortion of competition.

XX.5 Communication/publication rights for the EU

The EU may use, for the purposes of communication and publicity, information relating to the PCP, documents (notably summaries) and deliverables, and any other material (such as pictures or audiovisual material) from the contractor (including in electronic form).

If the EU's use of these materials, documents or information would risk compromising legitimate interests, the contractor may, however, ask the contracting authority to request the EU granting authority not to use it.

The right to use the contractor's materials, documents and information includes:

- (a) use for its own purposes (in particular, making them available to persons working for the EU granting authority or any other EU service (including institutions, bodies, offices, agencies, etc.) or EU Member State institution or body; copying or reproducing them in whole or in part, in unlimited numbers; and communication through press information services)
- (b) distribution to the public (in particular, publication as hard copies and in electronic or digital format, publication on the internet, as a downloadable or non-downloadable file, broadcasting by any channel, public display or presentation, communicating through press information services, or inclusion in widely accessible databases or indexes)
- (c) editing or redrafting (including shortening, summarising, inserting other elements (e.g. meta-data, legends, other graphic, visual, audio or text elements), extracting parts (e.g. audio or video files), dividing into parts, use in a compilation)
- (d) translation
- (e) storage in paper, electronic or other form
- (f) archiving, in line with applicable document-management rules
- (g) the right to authorise third parties to act on its behalf or sub-license to third parties the modes of use set out in Points (b), (c), (d) and (f), if needed for the information, communication and publicity activity of the granting authority and
- (h) processing, analysing, aggregating the materials, documents and information received and producing derivative works.

If the right of use is subject to rights of a third party (including the contractor's staff), the contractor shall ensure that it obtains the necessary approval from the third parties concerned.

Article XX — Conflicts of interest

XX.1 The contractor shall take all measures necessary to prevent a situation arising where the impartial and objective implementation of the Framework Agreement or a Specific Contract is compromised for reasons involving economic interests, political or national affinity, family, personal life or any other shared interest.

The contractor shall also take all measures necessary to prevent a situation in which its (previous or ongoing) professional activities affect the impartial and objective implementation of the Framework Agreement or a Specific Contract.

XX.2 The contractor shall notify the contracting authority without delay of any situation constituting or likely to lead to a conflict of interest (including changes of ownership) and shall immediately take all steps necessary to rectify this situation.

The contracting authority may instruct the contractor to take specific measures to remedy the situation.

Article XX — Ethics and research integrity

XX.1 The contractor shall carry out the tasks assigned to it in the Framework Agreement and Specific Contracts in compliance with:

- (a) ethical principles (including the highest standards of research integrity) and
- (b) applicable international, EU and national law.

The contractor must commit to and ensure the respect of basic EU values (such as respect for human dignity, freedom, democracy, equality, the rule of law and human rights, including the rights of minorities). The contractor must pay particular attention to the principle of proportionality, the right to privacy, the right to the protection of personal data, the right to the physical and mental integrity of persons, the right to non-discrimination, the need to ensure protection of the environment and high levels of human health protection.

In case the development, deployment and/or use of the PCP solution involves artificial intelligence (AI), the contractor must ensure that the artificial intelligence is trustworthy, i.e. lawful, ethical and technically robust. The artificial intelligence system

must preserve and protect the following six general ethical principles based on fundamental rights as enshrined in the Charter of Fundamental Rights of the European Union (EU Charter), and in relevant international human rights law¹⁴¹:

- respect for human agency: human beings must be respected to make their own decisions and carry out their own actions. Respect for human agency encapsulates three more specific principles, which define fundamental human rights: autonomy, dignity and freedom
- privacy and data governance: people have the right to privacy and data protection and these should be respected at all times
- fairness: people should be given equal rights and opportunities and should not be advantaged or disadvantaged undeservedly
- individual, social and environmental well-being: artificial intelligence systems should contribute to, and not harm, individual, social and environmental wellbeing
- transparency: the purpose, inputs and operations of artificial intelligence programs should be knowable and understandable to its stakeholders
- accountability and oversight: humans should be able to understand, supervise and control the design and operation of artificial intelligence-based systems, and the actors involved in their development or operation should take responsibility for the way that these applications function and for the resulting consequences.

The contractor may not:

- carry out activities in a Member State for an activity which is forbidden in that Member State
- carry out activities in a country inside or outside the EU, if they are prohibited in all EU Member States

The contractor may not carry out activities which:

- (a) aim at human cloning for reproductive purposes
- (b) intend to modify the genetic heritage of human beings in a way which could make such changes heritable (with the exception of research relating to cancer treatment of the gonads) or
- (c) intend to create human embryos solely for the purpose of research or for the purpose of stem cell procurement, including by means of somatic cell nuclear transfer
- (d) lead to the destruction of human embryos (for example, for obtaining stem cells).

The contractor may not carry out activities that do not focus exclusively on civil applications.

The contractor shall respect the fundamental principle of research integrity — as set out in the European Code of Conduct for Research Integrity¹⁴².

This implies compliance with the following essential principles:

- reliability in ensuring the quality of research reflected in the design, the methodology, the analysis and the use of resources
- honesty in developing, undertaking, reviewing, reporting and communicating research in a transparent, fair and unbiased way
- respect for colleagues, research participants, society, ecosystems, cultural heritage and the environment
- accountability for the research from idea to publication, for its management and organisation, for training, supervision and mentoring, and for its wider impacts.

and means that the contractor must ensure that persons carrying out research tasks follow the good research practices and refrain from the research integrity violations described in this Code.

XX.2 Before starting any activity that raises an ethical issue, the contractor shall submit to the lead procurer a copy of:

¹⁴¹ For more information, see [Horizon Europe guidance on ethics by design and ethics of use approaches for AI](#).

¹⁴² European Code of Conduct for Research Integrity of ALLEA (All European Academies).

- (a) any ethics committee opinion required under national law and
- (b) any notification or authorisation for activities raising ethical issues required under national law.

[OPTION if the HE grant agreement contains ethics requirements that concern the PCP contracts: XX.3] In addition, the contractor shall comply with the following additional ethics requirements:

- [insert the ethics deliverables from Annex 1 to the HE grant agreement].]

Article XX — Security-related obligations

[OPTION if the PCP involves dual-use goods or dangerous materials or substances: XX.X] Activities involving dual-use goods or dangerous materials and substances shall comply with applicable EU, national and international law.

Before starting the activity, the contractor shall provide the contracting authority with a copy of any export or transfer licences required.]

[OPTION if the HE grant agreement provides for a security classification that affects the PCP contracts: XX.X] Classified information shall be treated in accordance with the security aspect letter (SAL) annexed to the Horizon Europe grant agreement and EU Decision No 2015/544¹⁴³ until it is declassified.

Tasks involving classified information may not be subcontracted without prior written approval from the contracting authority.

The contractor shall inform the contracting authority of any changes relating to security and, if necessary, request an amendment.]

[OPTION if the HE grant agreement contains security recommendations restricting disclosure or dissemination that affect the PCP contracts: XX.X] The following results may be disclosed or disseminated only if the contractor has first obtained written approval from the contracting authority:

- [insert the results subject to a security recommendation restricting disclosure or dissemination from Annex 1 to the HE grant agreement].]

[OPTION if the HE grant agreement contains other security recommendations that affect the PCP contracts: XX.X] In addition, the contractor shall comply with the following additional security recommendations:

- [insert the security recommendations from Annex 1 to the HE grant agreement].]

Define the applicable rules regarding location, access and processing of security related data. In case the HE call conditions impose other geographic restrictions (e.g. restrictions on the participation and/or control of contractors to the procurement, place of performance requirements, etc), agree in cooperation with the granting authority how to best ensure consistency of the rules on handling of security related data with those other restrictions.

The localisation of and access to [all security related data handled under the contract] [all data related to contract activities that are performed on the security components of the solution] [...] processed by the contractor shall comply with the following:

- the data shall only be processed within the territory of [the European Union and the Horizon Europe associated countries¹⁴⁴] [the European Union][...] and will not leave that territory
- the data shall only be held in data centres located with the territory of [the European Union and the Horizon Europe associated countries] [the European Union][...]
- [no access shall be given to such data outside of [the European Union and the Horizon Europe associated countries] [the European Union][...] or [access to data may be given on a need to know basis only to authorised persons established in a country which has been recognised by the European Commission as providing adequate protection to security related data [as defined in EU Decision No 2015/544] [...]]
- the contractor may not change the location of data processing without the prior written authorisation of the contracting authority.

¹⁴³ Commission Decision [2015/444/EC, Euratom](#) of 13 March 2015 on the security rules for protecting EU-classified information.

¹⁴⁴ [List of Horizon Europe participating countries.](#)

Article XX — Processing of personal data

The contractor shall process personal data in compliance with the applicable EU and national law on data protection, in particular Regulation [2016/679](#)¹⁴⁵ (including as relates to authorisations and notification requirements).

Contractors must ensure that personal data is:

- processed lawfully, fairly and in a transparent manner in relation to the data subjects
- collected for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes
- adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed
- accurate and, where necessary, kept up to date
- kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data is processed and
- processed in a manner that ensures appropriate security of the data.

Define the conditions to be respected regarding location, access and processing of personal data. In case the HE call conditions impose other geographic restrictions (e.g. restrictions on the participation and/or control of contractors to the procurement, place of performance requirements, etc), agree in cooperation with the granting authority how to best ensure consistency of the rules on handling of personal data with those other restrictions.

The localisation of and access to the personal data processed by the contractor shall comply with the following:

- the personal data shall only be processed within the territory of [the European Union and the Horizon Europe associated countries]¹⁴⁶ [the European Union][...] and will not leave that territory
- the data shall only be held in data centres located with the territory of [the European Union and the Horizon Europe associated countries] [the European Union][...]
- [no access shall be given to such data outside of [the European Union and the Horizon Europe associated countries] [the European Union][...] or [access to data may be given on a need to know basis only to authorised persons established in a country which has been recognised by the European Commission as providing adequate protection to personal data]
- the contractor may not change the location of data processing without the prior written authorisation of the contracting authority
- any transfer of personal data under the Framework Agreement or a Specific Contract to third countries or international organisations shall fully comply with the requirements laid down in Chapter V of Regulation (EU) 2016/679.

The contractor may grant its staff access to data only in so far as is strictly necessary for implementing, managing and monitoring the Framework Agreement and Specific Contracts.

The contractor must inform the staff whose personal data are collected and processed by the procurers and/or the EU. For this purpose, the contractor must provide them with the privacy statements of the procurers and the EU, before transmitting their data. If explicit prior consent from the data subjects is needed, the contractor must obtain such consent.

Article XX — Obligation to provide information and keep records

XX.1 The contractor must, at any time during the implementation of the Framework Agreement and Specific Contracts or afterwards, provide any information requested by the procurers in relation to the Agreement or Contracts.

XX.2 The contractor must keep, for a period of up to [insert number of years (minimum 5 years after the end of the HE grant agreement)] years after the end of the Framework Agreement and Specific Contracts, records and other supporting documentation relating to their implementation.

¹⁴⁵ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC ('GDPR') (OJ L 119, 4.5.2016, p. 1).

¹⁴⁶ [List of Horizon Europe participating countries.](#)

This obligation includes records and other supporting documentation on scientific and technical implementation (in line with the accepted standards in the field) and on the price charged and the costs incurred by the contractor.

The contractor must keep the original documents. Digital and digitalised documents are considered originals if they are authorised under national law.

Should there be ongoing checks, reviews, audits, investigations, litigation or other pursuits of claims (including claims by a third party against the procurers), the contractor must keep all records and other supporting documentation until the end of these procedures.

Article XX — EU checks, reviews, audits and investigations

Should the EU (including the European Court of Auditors, the European Public Prosecutor's Office (EPPO) or the European Anti-Fraud Office (OLAF)) decide to carry out a check, review, audit or investigation, the contractor must make available all information, records and other supporting documents relating to the implementation of the Framework Agreement and Specific Contracts.

Should there be an on-the-spot visit, the contractor must allow access to its premises and must ensure that the information requested is readily available.

Article XX — EU impact evaluation

Should the EU carry out an impact evaluation (of its grant to the procurers), the contractor must make available all information, records and other supporting documents relating to the implementation of the Framework Agreement and Specific Contracts.

Article XX — Breach of contract

Set out the consequences in case of breach of contract (in line with the law applicable to the contract).

Don't forget provisions on partial/improper implementation of tasks and breach of other obligations.

Include a section on liability for damages:

XX.1 The contractor must compensate the contracting authority and members of the buyers group if they are held liable by the EU for damage sustained as a result of the implementation of the Framework Agreement or a Specific Contract (or because it was not implemented properly).

XX.2 The EU cannot be held liable for any damage caused to the contractor or caused by the contractor in connection with the implementation of the Framework Agreement or a Specific Contract.

Set out clear rules for termination of the Framework Agreement and Specific Contracts, reduction or recovery of payments and liquidated damages. Think of including not only such rules for typical breach of contract situations that may occur in any type of procurement, but think also of how to use them for breaches of PCP specific provisions (e.g. breaches of compliance with the place of performance requirements, with the R&D definition, with the place of establishment and control requirements (if any), with IPR and commercialisation requirements).

[OPTION in case there are preferred partners and third parties providing in-kind contributions to the PCP: Article XX — Participation of preferred partners and third parties providing in-kind contributions to the PCP]

Complete as applicable to the specificities of the PCP. Name the preferred partners and third parties providing in-kind contributions to the PCP and explain the boundary conditions for their participation, i.e. *the rights and responsibilities under the agreement and specific contracts*.

Pay particular attention to clearly set out the rules for participating in testing/monitoring/evaluation of results, confidentiality, processing of personal data and communication.

Specify also clearly the IPR-related rights (e.g. *access rights to results needed to follow the implementation of the PCP*) and obligations of preferred partners and third parties providing in-kind contributions to the PCP (e.g. *access rights to pre-existing rights, sideground or results (foreground) needed by contractors to implement the PCP or exploit its results*.)

Article XX — Amendments

Include a provision on amendments. Specify that they must be made in writing.

Include a clause that the amendment may not have the purpose or the effect of making changes to the contracts which might call into question the decision awarding the contracts or result in unequal treatment of tenderers.

Article XX — Interpretation

Include a provision specifying that the terms set out in the framework agreement have precedence over those in annexes and that the terms set out in Annex 1 (request for tenders) have precedence over those set out in Annex 2 (contractor's tender).

Specify that the same applies to the specific contracts.

Article XX — Applicable law and dispute settlement

Choose:

- the law applicable to the framework agreement and to the specific contracts
- the dispute settlement mechanisms, in particular the competent court or other dispute settlement mechanisms (e.g. arbitration or mediation, if allowed under national law) and the deadlines to respect.

Article XX — Entry into force

Define the entry into force (*e.g. upon signature of the last party*).


SIGNATURES

The lead procurer signs for the buyers group and — in case of joint tenders — the lead contractor for the group of contractors.

Appendix 5 PCP Specific contract

PCP SPECIFIC CONTRACT

This model is intended to help EU beneficiaries to prepare their PCP specific contracts. Text in green is meant to indicate instructions or options; text in black is sample text.

 *It is provided for information purposes only and is not intended to replace professional legal advice. It can be used as a starting point, but you remain responsible for your contracts and for adapting them to your situation (including ensuring full compliance with the EU grant requirements and the applicable rules under national law).*

PREAMBLE

Similar set-up as the framework agreement: Lead procurer concludes and signs in in the name and on behalf of the buyers group.

Annex the contractor's offer.

Specific contracts must contain at least the following elements/provisions:

TERMS AND CONDITIONS

Article 1 — Subject of the contract

This Specific Contract defines the specific terms and conditions for the implementation of the PCP procurement of R&D services set out in Article XX — for the [1st]/[2nd]/[3rd] PCP phase.

Article XX — Duration
Specify the duration of the specific contract and starting and end date for the implementation of the tasks.

Specify that the period of execution of the tasks may be extended only with the express written agreement of the parties before the expiration of the period for execution of the tasks.

Article XX — R&D services to be provided

The contractor shall provide the R&D services (tasks, deliverables and milestones) set out in the offer for this phase.

Specify the scope of the specific contract (i.e. which phase and which lot, if any).

Specify the individuals in charge of carrying out the R&D activities for the specific contract and their location (country where they carry out the R&D activities).

Article XX — Price and payment arrangements

The price to be paid by /the lead procurer/[the procurers in the buyers group] for the R&D services set out in Article XX shall be /EUR/[other currency] [amount in figures and in words].

Specify the amounts of pre-instalments and interim payments (if applicable) and final payment in figures and words. In case of pro rata payments by the procurers in the buyers group, split the amount pro rata per procurer according to their contribution to the total PCP costs (with and without VAT).

Specify which invoice for which payment x the contractor has to send to whom (lead procurer or buyers group) after approval of deliverable x. Specify how many days after receipt of the invoice payment(s) have to be made to the contractor.

Specify the contractor's bank account details and the currency in which payments will be made.

Article XX — Security related obligations

Add a provision on security if specifically needed for the phase and not already covered by the provision in the framework agreement.

Article XX — Entry into force

Specify the entry into force date.

SIGNATURES

Same as for framework agreement: The lead procurer signs for the buyers group and — in case of joint tenders — the lead contractor for the group of contractors.

Appendix 6 PCP Contract notice

PCP CONTRACT NOTICE

This template is intended to help EU beneficiaries to prepare their PCP contract notices. Text in green is meant to indicate instructions or options; text in black is sample text.


The contract notice has to be filled out online on the [TED — tenders electronic daily website](#). Use the English version of the simap standard form that is most appropriate for your type of organisation:

- *for lead procurers in the public sector: ‘Contract notice’*
- *for lead procurers in the utilities sector: ‘Contract notice — utilities’*
- *for lead procurers in the field of defence and security: ‘Contract notice for contracts in the field of defence and security’.*

In addition to English, you may publish the contract notice (or a summary) in any other language(s).

Remember that publication of the contract notice in TED is only a first step. The call for tenders must also be actively promoted and advertised widely to potential tenderers across Europe, using in particular also Horizon Europe Internet sites and HE National Contact Points. Promote it also via large European industry events across Europe, relevant industry initiatives at EU level (e.g. European partnerships, EIPs, PPPs, Horizon Europe Missions), sectorial industry associations and chambers of commerce across Europe (e.g. the Enterprise Europe Network), relevant sectorial and innovation procurement related social media channels. In order to treat all potential tenderers equally, such targeted promotion activities can only start AFTER the publication of the contract notice in TED.

A copy of the draft contract notice must be submitted as a deliverable to the EU granting authority at the latest 30 days before it is sent for publication to the EU Publications Office (see [General Annex H of the Horizon Europe Work Programme](#)).

 *This template is provided for information purposes only and is not intended to replace professional legal advice. It can be used as a starting point, but you remain responsible for your contract notice and for adapting it to your situation (including ensuring full compliance with the EU grant requirements and the applicable rules under national law).*



Supplement to the Official Journal of the European Union

Info and online forms: <http://simap.ted.europa.eu>

Contract notice

Directive 2014/24/EU

Section I: Contracting authority

I.1) Name and addresses ¹ (please identify all contracting authorities responsible for the procedure)

Official name:		National registration number: ²	
Postal address:			
Town:	NUTS code:	Postal code:	Country:
Contact person:			Telephone:
E-mail:			Fax:
Internet address(es) Main address: (URL) Address of the buyer profile: (URL)			

In the contact points section, give the contact details of the lead procurer.

In the internet addresses section, give the project website if you do not want to use the general website of the lead procurer.

Use the address of the lead procurer’s buyer profile.

I.2) Joint procurement

- The contract involves joint procurement
In the case of joint procurement involving different countries, state applicable national procurement law:
- The contract is awarded by a central purchasing body

Select 'yes' for the first question ('The contract involves joint procurement').

Insert the following text in the free text field for the case of joint procurement involving different countries, state applicable national procurement law: 'This PCP is carried out by [insert name of the lead procurer] in the name and on behalf of the buyers group listed in I.1. The applicable national procurement law is [insert the applicable national procurement law of the lead procurer]'.

Only select 'yes' for the second question ('The contract is awarded by a central purchasing body'), if this is the case for your PCP.

I.3) Communication

- The procurement documents are available for unrestricted and full direct access, free of charge, at: (URL)
 Access to the procurement documents is restricted. Further information can be obtained at: (URL)
- Additional information can be obtained from
- the abovementioned address
 another address: (please provide another address)
- Tenders or requests to participate must be submitted
- electronically via: (URL)
 to the abovementioned address
 to the following address: (please provide another address)
- Electronic communication requires the use of tools and devices that are not generally available. Unrestricted and full direct access to these tools and devices is possible, free of charge, at: (URL)

Select the applicable options to clarify how interested tenderers can obtain the procurement documents and additional information and how they must submit their tenders.

I.4) Type of the contracting authority

- Ministry or any other national or federal authority, including their regional or local subdivisions
 National or federal agency/office
 Regional or local authority
- Regional or local agency/office
 Body governed by public law
 European institution/agency or international organisation
 Other type:

This section is to be filled in ONLY if the lead procurer is a contracting authority (i.e. NOT a contracting entity).

I.5) Main activity

- General public services
 Defence
 Public order and safety
 Environment
 Economic and financial affairs
 Health
- Housing and community amenities
 Social protection
 Recreation, culture and religion
 Education
 Other activity:

Select the lead procurer's main activities.

Section II: Object

II.1) Scope of the procurement

II.1.1) Title: _____ Reference number: ² _____

Use this title: 'Pre-commercial procurement (PCP) to buy R&D (research and development) services to [specify in a few words the subject and scope of this PCP e.g. improving the energy efficiency of buildings]'.

II.1.2) Main CPV code: [] [] [] [] [] [] [] [] [] [] Supplementary CPV code: ^{1,2} [] [] [] []

Use CPV 73100000 for R&D services and additional other CPVs, if relevant to the object of the contract (e.g. CPV for medical equipment if the PCP is for medical equipment-related R&D, CPV for software development services if software-related R&D is needed).

II.1.3) Type of contract Works Supplies Services

Select 'Services' (not 'Supplies' or 'Works'; PCP is an R&D services contract).

II.1.4) Short description: _____

Use the following text:

This contract notice invites interested operators to submit tenders to this PCP procurement. The procurement is open on equal terms to all types of operators that are established in [and controlled from] [add the list of countries to which participation and/or control is restricted, same list as specified in section 3.1 ‘eligibility of tenderers’ in the RFT] and that fulfil the requirements set out in section 3 of the request for tenders which defines the eligibility of tenderers, exclusion and selection criteria.

The procurement aims to trigger new solutions to be developed and tested to address the following challenge: [specify briefly the subject and scope of this PCP e.g. *improving the energy efficiency of buildings*].

[OPTION for PCPs with lots: As the common challenge exists of a number of sub-challenges, the procurement will be divided into the following lots, each corresponding to one sub-challenge:

- lot 1: [insert name of the sub-challenge to which the lot corresponds]
- lot 2:
- ...]

The main technical challenges to be addressed [per lot] are: [indicate the main target quality/efficiency and/or functionality/performance improvements compared to the current state-of-the art technology — per lot, if applicable — e.g. 30 % energy efficiency improvement, 20% cost reduction, etc].

Provide any other relevant information. If needed to cope with the character-limit in the forms, distribute text also over ‘II.2.4) Description of the procurement’ and ‘II.2.14) Additional information’.

II.1.5) Estimated total value ²
 Value excluding VAT: [] Currency: [] [] []
(for framework agreements or dynamic purchasing systems – estimated total maximum value for the entire duration of the framework agreement or dynamic purchasing system)

Give the total estimated value of the PCP framework agreement in euros/other currency (excluding VAT).

II.1.6) Information about lots
 This contract is divided into lots yes no
 Tenders may be submitted for all lots maximum number of lots: [] one lot only
 Maximum number of lots that may be awarded to one tenderer: []
 The contracting authority reserves the right to award contracts combining the following lots or groups of lots:

For PCPs with lots select ‘yes’. Consider carefully the consequences of restricting the number of lots that tenders may be submitted for, if applicable.

II.2) Description ¹

II.2.1) Title: ²	Lot No: ²
------------------------------------	----------------------

Only fill in if lots are used. Fill in the title and number of each lot.

II.2.2) Additional CPV code(s) ²
 Main CPV code: ¹ []
 Supplementary CPV code: ^{1,2} []

Only fill in if lots are used. Use the CPV codes for each lot.

II.2.3) Place of performance
 NUTS code: ¹ []
 Main site or place of performance:

Fill out the ‘NUTS codes’ of the lead procurer and of all the countries in which testing is expected to take place (typically the countries of those public procurers in the buyers group in whose countries testing is expected to take place).

For the ‘main site or place of performance’, specify the place of performance requirement(s) and the location(s) for testing:

At least [insert the percentage chosen by the buyers group/imposed by the HE call conditions for this PCP; in any case it must be minimum 50%] of the contracted R&D services must be performed in EU Member States or Horizon Europe associated countries¹⁴⁷).

[additional OPTION for PCPs that involve security-related R&D: Moreover, at least [insert the percentage chosen by the buyers group or imposed by the HE call conditions for this PCP; if there are sufficient R&D providers able to do the work in Europe, it is typically set at 100% for security reasons] of the contracted R&D services on security components of the

¹⁴⁷ [List of Horizon Europe Associated countries](#)

solution must be performed in [OPTION if there are participation and/or control restrictions in the HE call conditions: [add the list of countries to which participation and/or control is restricted]] [OPTION if there are no participation and/or control restrictions in the HE call conditions: [add 'EU Member States or Horizon Europe associated countries']].]

In addition, the contractors must ensure that none of the contracted services are performed in countries nor by entities that are subject to [EU restrictive measures](#) under Article 29 of the Treaty on the European Union (TEU) and Article 215 of the Treaty on the Functioning of the EU (TFEU)¹⁴⁸ (sanctions). They must ensure that none of the goods procured or used for the procurement were developed, produced or supplied in countries or by entities that are subject to such restrictive measures. Testing is expected to take place in the following procurers' countries [insert the relevant countries] [additional OPTION for PCPs that involve security related testing as part of a larger international test exercise: and/or as part of large [insert the name of the relevant test exercise e.g. EU MODEX disaster management exercises] exercises in the EU].

II.2.4) Description of the procurement:

(nature and quantity of works, supplies or services or indication of needs and requirements)

Use this text:

This PCP procurement is a joint procurement by different procurers across Europe that are all facing the same common challenge and are thus looking for similar solutions (so-called 'buyers group').

The procurement will take the form of a pre-commercial procurement (PCP) under which R&D service contracts will be awarded to a number of R&D providers in parallel in a phased approach. This will make it possible to compare competing alternative solutions.

Each selected operator will be awarded a framework agreement that covers 3 [2 for fast-track PCPs] R&D phases.

Each selected R&D provider will be awarded a framework agreement that covers the following R&D phases and a specific contract per phase.

Choose option 1 or 2 below depending on how many phases you will use (3 or 2 for fasttrack):

[OPTION 1 by default: The 3 phases are: solution design (phase 1), prototyping and lab testing (phase 2), original development, installation, validation and field testing of a limited set of first products or services (phase 3).] [OPTION 2 for fasttrack PCPs (phase 2 and 3 combined into one): The 2 phases are: solution design (phase 1), prototyping and lab testing plus subsequently original development, installation, validation and field testing of a limited set of first products or services (phase 2).]

After each phase, intermediate evaluations will be carried out to progressively select the best of the competing solutions.

The contractors with the best-value-for-money solutions will be offered a specific contract for the next phase. [additional OPTION for PCPs with lots: The phased approach with parallel contracts and intermediate evaluations will be followed within each lot.]

Testing is expected to take place in [add the locations where testing is expected to take place, in particular test locations of the procurers and other additional test locations]. This testing may also serve as a first customer test reference for the contractors. The procurement is expected to start in [add expected starting date of the PCP] and end in [add expected completion date of the PCP].

The selected operators will retain ownership of the intellectual property rights (IPRs) that they generate during the PCP and will be able to use them to exploit the full market potential of the developed solutions i.e. beyond the procurers. [The market potential is estimated at [insert available figures about the potential total market size, i.e. beyond the procurers].]

II.2.5) Award criteria

- Criteria below
 - Quality criterion – Name: / Weighting: ^{1,2,20}
 - Cost criterion – Name: / Weighting: ^{1,20}
 - Price – Weighting: ²¹
- Price is not the only award criterion and all criteria are stated only in the procurement documents

Select one of the 2 options ('Criteria below' OR 'Price is not the only award criterion and all criteria are stated only in the procurement documents').

If you select the first option ('Criteria below'), you must indicate all the criteria and their weighting.

¹⁴⁸ Please note that the EU Official Journal contains the official list and, in case of conflict, its content prevails over that of the [EU Sanctions Map](#).

II.2.6) Estimated value

Value excluding VAT: [] Currency: [] [] []
 (for framework agreements or dynamic purchasing systems – estimated total maximum value for the entire duration of this lot)

Only fill in if lots are used.

II.2.7) Duration of the contract, framework agreement or dynamic purchasing system

Duration in months: [] or Duration in days: []
 or Start: (dd/mm/yyyy) / End: (dd/mm/yyyy)
 This contract is subject to renewal yes no Description of renewals:

Enter the duration.

II.2.9) Information about the limits on the number of candidates to be invited (except in open procedures)

Envisaged number of candidates: []
 or Envisaged minimum number: [] / Maximum number: ²[]
 Objective criteria for choosing the limited number of candidates:

Do not fill in.

II.2.10) Information about variants

Variants will be accepted yes no

Select 'No'. In PCP, the use of variants is not necessary, since the PCP approach inherently supports the development of several alternative solutions in parallel.

II.2.11) Information about options

Options yes no Description of options:

Complete if applicable.

II.2.12) Information about electronic catalogues

Tenders must be presented in the form of electronic catalogues or include an electronic catalogue

Complete as applicable. Avoid conditions that might unduly restrict participation.

II.2.13) Information about European Union funds

The procurement is related to a project and/or programme financed by European Union funds yes no
 Identification of the project:

Select 'yes'.

Use this text:

This procurement receives funding from the European Union's Horizon Europe Research and Innovation Programme, under grant agreement No [insert number] – [insert project acronym] (see [insert project website]).

[OPTION if the procurement also receives funding from other EU programmes (i.e. if there are procurers in the buyers group whose financial contribution to the PCP budget is funded by other EU programmes, for example the European Regional Development Fund (ERDF))]: The procurement receives also funding from the [OPTION 1 for EU programmes: European Union's [insert name of EU programme]][OPTION 2 for national programmes co-funded by the EU (e.g. by Regional Funds, Agricultural Funds): [insert name of national programme] co-financed by the European Union]: [insert beneficiary name and grant agreement number and acronym].]

The EU has given a grant for this procurement, but is not participating as a contracting authority in the procurement.

Note that it is NOT allowed for one and the same procurer to receive funding for his part of the PCP budget from different EU programmes (e.g. Horizon Europe and ERDF). But it is possible for different procurers in the buyers group to receive funding from different EU sources.

II.2.14) Additional information:

Use this text:

Participation in the open market consultation that was held as part of the preparation for this procurement is not a prerequisite for submitting a tender.

This procurement is exempted from the WTO Government Procurement Agreement (GPA), the EU public procurement directives and the national laws that implement them. This is because it concerns the procurement of R&D services where the benefits do not accrue exclusively to the contracting authority for its use in the conduct of its own affairs.

Publication of this contract notice in the EU Official Journal is not to be understood as a waiver of this exemption. Publication is made on a voluntary basis and the procurement will not follow the procedures under the EU public procurement directives, but rather the procedure described in the tender documentation.

The [open]/[negotiated]/[restricted] procedure was chosen in Section IV.1.1) 'Procedure' for formal reasons only. This is because it is not possible to publish a contract notice without selecting one of the listed procedures.

Offers may be submitted in English [and [insert additional language(s), if any]]. All communication (before, during and after the procurement) can be made in English [and [add additional language(s), if any]].

More information

See:

- the project website (see [insert address])
- the open market consultation Q&A (see [insert address])
- PCPs on the [Europa website](#)

or contact:

- [insert email address or interactive web address]

Provide other additional information (if applicable).

Please ensure that interested operators can ask questions about the procurement and tender documents and give them sufficient time to do so.

Section III: Legal, economic, financial and technical information

III.1) Conditions for participation

III.1.1) Suitability to pursue the professional activity, including requirements relating to enrolment on professional or trade registers

List and brief description of conditions:

Complete as applicable. Avoid conditions that might unduly restrict participation.

You can refer to the tender documents for further information.

III.1.2) Economic and financial standing

Selection criteria as stated in the procurement documents

List and brief description of selection criteria:

Minimum level(s) of standards possibly required: ²

Complete as applicable. Avoid conditions that might unduly restrict participation (in particular disproportionate financial guarantee requirements, *e.g. minimum turnovers*).

You can refer to the tender documents for further information.

III.1.3) Technical and professional ability

Selection criteria as stated in the procurement documents

List and brief description of selection criteria:

Minimum level(s) of standards possibly required: ²

Complete as applicable. Avoid conditions that might unduly restrict participation (in particular disproportionate qualification requirements *e.g. references from past customers*).

You can refer to the tender documents for further information.

III.1.5) Information about reserved contracts ²

The contract is reserved to sheltered workshops and economic operators aiming at the social and professional integration of disabled or disadvantaged persons

The execution of the contract is restricted to the framework of sheltered employment programmes

The options for reserved contracts do not apply.

III.2) Conditions related to the contract ²

III.2.1) Information about a particular profession (*only for service contracts*)

Execution of the service is reserved to a particular profession

Reference to the relevant law, regulation or administrative provision:

Complete if applicable. Avoid conditions that might unduly restrict participation.

III.2.2) Contract performance conditions:

Complete if applicable. Avoid conditions that might unduly restrict participation.

III.2.3) Information about staff responsible for the performance of the contract

Obligation to indicate the names and professional qualifications of the staff assigned to performing the contract

Select 'yes'. Further explanation is provided in the section about the place of performance requirement in the PCP request for tenders.

Section IV: Procedure

IV.1) Description

IV.1.1) Type of procedure

- Open procedure
 - Accelerated procedure
 - Justification:
- Restricted procedure
 - Accelerated procedure
 - Justification:
- Competitive procedure with negotiation
 - Accelerated procedure
 - Justification:
- Competitive dialogue
- Innovation partnership

For procurers in the public sector: select 'open'.

For procurers in the utilities, defence and security sector: select 'open', 'negotiated' or 'restricted' (restricted procedure is particularly useful when the tender documents are sensitive and can be revealed only to those tenderers that will pass to the second stage of the tendering process).

In Section VI.3 Additional information, you will have to state that this procurement is exempted from the EU public procurement directives and the national laws that implement them (i.e. it is not an open, negotiated or restricted procedure subject to the EU public procurement directives; the choice here must be made for formal reasons only, because it is mandatory for filling out the form).

IV.1.3) Information about a framework agreement or a dynamic purchasing system

- The procurement involves the establishment of a framework agreement
 - Framework agreement with a single operator
 - Framework agreement with several operators
 - Envisaged maximum number of participants to the framework agreement: ² []
- The procurement involves the setting up of a dynamic purchasing system
 - The dynamic purchasing system might be used by additional purchasers

In the case of framework agreements, provide justification for any duration exceeding 4 years:

Select 'Framework agreement with several operators'.

Do not fill in any number under 'Envisaged maximum number of participants to the framework agreement'. In the free text field, state the minimum number of framework agreements that you plan to award (according to the request for tenders, there should be one per selected operator). For PCPs with lots, enter the total minimum number of framework agreements counted across all the lots.

Complete 'The procurement involves the setting up of a dynamic purchasing system', if applicable.

IV.1.4) Information about reduction of the number of solutions or tenders during negotiation or dialogue

Recourse to staged procedure to gradually reduce the number of solutions to be discussed or tenders to be negotiated

Select 'no', unless a negotiated procedure is used.

IV.1.5) Information about negotiation (only for competitive procedures with negotiation)

The contracting authority reserves the right to award the contract on the basis of the initial tenders without conducting negotiations

Do not fill in, unless a negotiated procedure is used.

IV.1.6) Information about electronic auction

An electronic auction will be used
Additional information about electronic auction:

Select 'no'.

IV.1.8) Information about the Government Procurement Agreement (GPA)

The procurement is covered by the Government Procurement Agreement yes no

Select 'no'.

IV.2) Administrative information**IV.2.1) Previous publication concerning this procedure ²**

Notice number in the OJ S: [] [] [] [] /S [] [] []-[] [] [] [] [] []
(One of the following: Prior information notice; Notice on a buyer profile)

Provide information on the PIN announcing the open market consultation.

Provide information on other previous publications (if applicable).

IV.2.2) Time limit for receipt of tenders or requests to participate

Date: (dd/mm/yyyy) Local time: (hh:mm)

Enter date and time.

IV.2.3) Estimated date of dispatch of invitations to tender or to participate to selected candidates ⁴

Date: (dd/mm/yyyy)

Do not fill in, unless a restricted procedure is used.

IV.2.4) Languages in which tenders or requests to participate may be submitted: [] [] ¹

Select at least 'English' and add additional languages, if any.

IV.2.6) Minimum time frame during which the tenderer must maintain the tender

Tender must be valid until: (dd/mm/yyyy)
or Duration in months: [] (from the date stated for receipt of tender)

Complete as applicable.

IV.2.7) Conditions for opening of tenders

Date: (dd/mm/yyyy) Local time: (hh:mm) Place:
Information about authorised persons and opening procedure:

Complete as applicable.

Section VI: Complementary information**VI.1) Information about recurrence**

This is a recurrent procurement yes no
Estimated timing for further notices to be published: ²

Select 'no'.

VI.2) Information about electronic workflows

- Electronic ordering will be used
 Electronic invoicing will be accepted
 Electronic payment will be used

Complete as applicable.

VI.3) Additional information: ²

--

Provide any other additional relevant information.

VI.4) Procedures for review**VI.4.1) Review body**

Official name:

Postal address:

Town:

Postal code:

Country:

E-mail:

Telephone:

Internet address: (URL)

Fax:

Give the names of the review bodies (also called 'appeal bodies') foreseen under the national law applicable to the lead procurer.

Depending on the country, this may or may not be the same body that is competent when the EU public procurement directives do apply.

Do NOT leave this section blank (otherwise you risk multiple complaints procedures in different countries).

VI.4.2) Body responsible for mediation procedures ²		
Official name:		
Postal address:		
Town:	Postal code:	Country:
E-mail:		Telephone:
Internet address: (URL)		Fax:

Give the names of the mediation bodies foreseen under the national law applicable to the lead procurer.

Depending on the country, this may or may not be the same body that is competent when the EU public procurement directives do apply.

Do NOT leave this section blank (otherwise you risk multiple complaints procedures in different countries).

VI.4.3) Review procedure
Precise information on deadline(s) for review procedures:

Use the following text:

The procurement is exempted from the EU Public Procurement Directives (including the EU Procurement Remedies Directives 89/665/EEC and 92/13/EEC; *see above*) and the national laws that implement them.

Publication of this notice in the Official Journal is not to be understood as a waiver of this exemption by the contracting authority.

The deadlines for the review procedures at the bodies for review and mediation, mentioned in IV.4.1) and IV.4.2) are: [complete].

VI.4.4) Service from which information about the review procedure may be obtained ²		
Official name:		
Postal address:		
Town:	Postal code:	Country:
E-mail:		Telephone:
Internet address: (URL)		Fax:

Give the contact details of a contact person at the lead procurer.

Make sure that this contact person has sufficient information about the context and background of the procurement.

VI.5) Date of dispatch of this notice: (dd/mm/yyyy)

Enter date.

It is the contracting authority's/contracting entity's responsibility to ensure compliance with European Union law and any applicable laws.

¹ please repeat as many times as needed

² if applicable

⁴ if this information is known

²⁰ importance may be given instead of weighting

²¹ importance may be given instead of weighting; if price is the only award criterion, weighting is not used

Appendix 7 PCP Contract award notice

PCP CONTRACT AWARD NOTICE

This template is to help EU beneficiaries to prepare their PCP contract award notices. Text in green is meant to indicate instructions or options; text in black is sample text.


The contract award notice has to be filled out and published online on the [TED — tenders electronic daily website](#) within 48 days after conclusion of the contracts (see [EU AGA — Annotated Grant Agreement, art 6.2.D.5](#)).

Use the English version of the *simap* standard form that is appropriate for your type of organisation:

- for lead procurers in the public sector: ‘Contract award notice’
- for lead procurers in the utilities sector: ‘Contract award notice — utilities’
- for lead procurers in the field of defence and security: ‘Contract award notice for contracts in the field of defence and security’.

In addition to English, you may publish the contract award notice (or a summary) in any other language(s).

A copy of the published contract award notice should be submitted to EU granting authority as part of the deliverables at the end of the tender evaluation (see [General Annex H of the Horizon Europe Work Programme](#)).

 This template is provided for information purposes only and is not intended to replace professional legal advice. It can be used as a starting point, but you remain responsible for your contract award notice and for adapting it to your situation (including ensuring full compliance with the EU grant requirements and the applicable rules under national law).



Supplement to the Official Journal of the European Union

Info and online forms: <http://simap.ted.europa.eu>

Contract award notice Results of the procurement procedure

Directive 2014/24/EU

Section I: Contracting authority

I.1) Name and addresses ¹ (please identify all contracting authorities responsible for the procedure)

Official name:		National registration number: ²	
Postal address:			
Town:	NUTS code:	Postal code:	Country:
Contact person:			Telephone:
E-mail:			Fax:
Internet address(es) Main address: (URL) Address of the buyer profile: (URL)			

In the contact points section, give the contact details of the lead procurer.

In the internet addresses section, give the project website if you do not want to use the general website of the lead procurer.

Use the address of the lead procurer’s buyer profile.

I.2) Joint procurement

<input type="checkbox"/> The contract involves joint procurement In the case of joint procurement involving different countries, state applicable national procurement law:
<input type="checkbox"/> The contract is awarded by a central purchasing body

Select ‘yes’ for the first question (‘The contract involves joint procurement’).

II.1.6) Information about lots

This contract is divided into lots yes no

Select 'yes' if lots are used.

II.1.7) Total value of the procurement (excluding VAT)

Value: [] (Please give the total value of the procurement. For information about individual contracts, please use section V)
or

Lowest offer: [] / Highest offer: [] taken into consideration

Currency: [] [] []

(for framework agreements – total maximum value for their entire duration)

(for dynamic purchasing systems – value of contract(s) not included in previous contract award notices)

(for contracts based on framework agreements, if required – value of contract(s) not included in previous contract award notices)

Indicate the total final value of all contract(s)/agreement(s) awarded (and not already included in previous contract award notices), across different specific contracts and across all lots (if applicable), in euros/other currency.

Details on the value of the individual contracts must be given in Section V. 'Award of contract'.

II.2) Description¹

II.2.1) Title:²

Lot No:²

Only fill in if lots are used. Fill in the title and number of each lot.

II.2.2) Additional CPV code(s)²

Main CPV code:¹ [] [] . [] [] . [] [] . [] [] Supplementary CPV code:^{1,2} [] [] [] []

Only fill in if lots are used. Use the CPV codes for each lot.

II.2.3) Place of performance

NUTS code:¹ [] [] [] [] [] Main site or place of performance:

Fill out the 'NUTS codes' of the lead procurer and of all the countries in which testing is expected to take place (typically the countries of those public procurers in the buyers group in whose countries testing is expected to take place).

For the 'main site or place of performance', specify the place of performance requirement(s) and the location(s) for testing:

At least [insert the percentage chosen by the buyers group or imposed by the HE Call conditions for this PCP; in any case it must be minimum 50%] % of the contracted R&D services must be performed in EU Member States or Horizon Europe associated countries¹⁴⁹).

[additional OPTION for PCPs that involve security-related R&D: Moreover, at least [insert the percentage chosen by the buyers group or imposed by the HE call conditions for this PCP; if there are sufficient R&D providers able to do the work in Europe, it is typically set at 100% for security reasons] % of the contracted R&D services on security components of the solution must be performed in [OPTION if there are participation and/or control restrictions in the HE call conditions: [add the list of countries to which participation and/or control is restricted]] [OPTION if there are no participation and/or control restrictions in the HE call conditions: [add 'EU Member States or Horizon Europe associated countries']].]

In addition, the contractors must ensure that none of the contracted services are performed in countries nor by entities that are subject to [EU restrictive measures](#) under Article 29 of the Treaty on the European Union (TEU) and Article 215 of the Treaty on the Functioning of the EU (TFEU)¹⁵⁰ (sanctions). They must ensure that none of the goods procured or used for the procurement were developed, produced or supplied in countries or by entities that are subject to such restrictive measures.

Testing is expected to take place in the following procurers' countries [insert the relevant countries] [additional OPTION for PCPs that involve security related testing as part of a larger international test exercise: and/or as part of large [insert the name of the relevant test exercise e.g. EU MODEX disaster management exercises] exercises in the EU].

II.2.4) Description of the procurement:

(nature and quantity of works, supplies or services or indication of needs and requirements)

Use this text:

The procurement was announced in the form of a pre-commercial procurement (PCP) with a phased approach, i.e. a framework agreement covering different R&D phases.

¹⁴⁹ [List of Horizon Europe Associated countries](#)

¹⁵⁰ Please note that the EU Official Journal contains the official list and, in case of conflict, its content prevails over that of the [EU Sanctions Map](#).

After each phase, intermediate evaluations are carried out to progressively select the best competing solutions. The contractors with the best-value-for-money solutions will be offered a specific contract for the next phase.

A total budget of [enter the total estimated budget for the PCP that was announced in the contract notice] was earmarked for awarding the contracts to a minimum of:

- [enter minimum number of R&D providers that were expected to start phase 1 as announced in the contract notice] contractors for phase 1
- [enter minimum number of R&D providers that were expected to start phase 2 as announced in the contract notice] contractors for phase 2 and
- [enter minimum number of R&D providers that were expected to start phase 3 as announced in the contract notice] contractors for phase 3.

[OPTION 1 if the procurement is started:

[OPTION if the award of contracts proceeded as planned: Sufficient amount of good quality tenders were received to award the planned amount of contracts [for lot x] (see section V for more information).]

[OPTION if the award of contracts proceeds with less contracts as planned: The PCP is started with fewer contracts than initially planned [for lot x] because [insert reason: e.g. insufficient amount of good quality tenders were received] (see section V for more information).]

The abstracts of the winning tenders are available on [insert project website].

The PCP is expected to start in [enter expected start date for phase 1] and end in [add expected completion date for phase 3].]

[OPTION 2 if the procurement will not be started: [Lot x of] the PCP will not be started because [insert reason: e.g. insufficient amount of good quality tenders were received [for lot x]] (see section V for more information).]

If needed to cope with the character limit in the forms, distribute text also over 'II.1.4) Description of the procurement' and 'II.2.14) Additional information'.

II.2.5) Award criteria

- Quality criterion – Name: / Weighting: ^{1,2,20}
- Cost criterion – Name: / Weighting: ^{1,20}
- Price – Weighting: ²¹

Specify the award criteria that were used and their weighting.

II.2.11) Information about options

Options yes no Description of options:

Complete if applicable.

II.2.13) Information about European Union funds

The procurement is related to a project and/or programme financed by European Union funds yes no

Identification of the project:

Select 'yes'.

Use this text:

This procurement receives funding from the European Union's Horizon Europe Research and Innovation Programme, under grant agreement No [insert number] – [insert project acronym] (see [insert project website]).

[OPTION if the procurement also receives funding from other EU programmes (i.e. if there are procurers in the buyers group whose financial contribution to the PCP budget is funded by other EU programmes, for example the European Regional Development Fund (ERDF))]: The procurement receives also funding from the [OPTION 1 for EU programmes: European Union's [insert name of EU programme]][OPTION 2 for national programmes co-funded by the EU (e.g. by Regional Funds, Agricultural Funds): [insert name of national programme] co-financed by the European Union]: [insert beneficiary name and grant agreement number and acronym].]

The EU has given a grant for this procurement but is not participating as a contracting authority in the procurement.

Note that it is not allowed for one and the same procurer to receive funding for his part of the PCP budget from different EU programmes (e.g. Horizon Europe and ERDF). But it is possible for different procurers in the buyers group to receive funding from different EU sources.

II.2.14) Additional information:

Add any other relevant additional information.

Section IV: Procedure

IV.1) Description

IV.1.1) Type of procedure

- Open procedure
 Accelerated procedure
Justification:
- Restricted procedure
 Accelerated procedure
Justification:
- Competitive procedure with negotiation
 Accelerated procedure
Justification:
- Competitive dialogue
- Innovation partnership
- Award of a contract without prior publication of a call for competition in the Official Journal of the European Union in the cases listed below
(please complete Annex D1)

For procurers in the public sector: select 'open'.

For procurers in the utilities, defence or security sector: select 'open', 'negotiated' or restricted.

In Section VI.3 Additional information, you will have to state that this procurement is exempted from the EU public procurement directives and the national laws that implement them (i.e. it is not an open, negotiated or restricted procedure subject to the EU public procurement directives; the choice here must be made for formal reasons only, because it is mandatory for filling out the form).

IV.1.3) Information about a framework agreement or a dynamic purchasing system

- The procurement involves the establishment of a framework agreement
- A dynamic purchasing system was set up

Complete if applicable.

IV.1.6) Information about electronic auction

- An electronic auction has been used

Select 'no'.

IV.1.8) Information about the Government Procurement Agreement (GPA)

The procurement is covered by the Government Procurement Agreement yes no

Select 'no'.

IV.2) Administrative information

IV.2.1) Previous publication concerning this procedure ²

Notice number in the OJ S: [] [] [] [] /S [] [] [] - [] [] [] [] [] []

(One of the following: Prior information notice used as a call for competition; Contract notice; Voluntary ex ante transparency notice)

Provide information on the PIN announcing the open market consultation and the contract notice.

Provide information about other previous publications, if applicable.

IV.2.8) Information about termination of dynamic purchasing system

- The notice involves the termination of the dynamic purchasing system published by the above contract notice

Complete if applicable.

IV.2.9) Information about termination of call for competition in the form of a prior information notice

- The contracting authority will not award any further contracts based on the above prior information notice

Do not fill in. This does not concern the termination of a call for competition via a prior information notice.

Section V: Award of contract ¹

This section must be filled out as many times as needed, i.e.

- in case lots are used, for every lot and every contractor that was awarded a contract for that lot
- for every contractor that was awarded a framework agreement and/or specific contracts
- for all the contracts that were awarded and not already announced in previous contract award notices.

Contract No: [] **Lot No:**² [] **Title:**

A contract/lot is awarded yes no

Complete for every framework agreement and for every specific contract.

Complete for every lot, if applicable.

V.1) Information on non-award

The contract/lot is not awarded <input type="radio"/> No tenders or requests to participate were received or all were rejected <input type="radio"/> Other reasons (discontinuation of procedure) Notice reference: [][][][]-[][][][][][] ⁷ (year and document number)
--

Complete as applicable in case of non-award.

V.2) Award of contract

V.2.1) Date of conclusion of the contract: (dd/mm/yyyy)
--

Enter date.

V.2.2) Information about tenders Number of tenders received: [] Number of tenders received from SMEs: [] (SME – as defined in Commission Recommendation 2003/361/EC) Number of tenders received from tenderers from other EU Member States: [] Number of tenders received from tenderers from non-EU Member States: [] Number of tenders received by electronic means: [] The contract has been awarded to a group of economic operators <input type="radio"/> yes <input type="radio"/> no

Complete as applicable per awarded specific contract (and per lot, if applicable) that was not already included in previous contract award notices.

V.2.3) Name and address of the contractor ¹			
Official name:		National registration number: ²	
Postal address:			
Town:	NUTS code:	Postal code:	Country:
E-mail:		Telephone:	
Internet address: (URL)		Fax:	
The contractor is an SME <input type="radio"/> yes <input type="radio"/> no			

Give the name and address of the operator (single entity or consortium) that won the contract in question per awarded specific contract (and per lot, if applicable) that was not already included in previous contract award notices. In case of a consortium, list all members of the consortium.

V.2.4) Information on value of the contract/lot (excluding VAT) Initial estimated total value of the contract/lot: ² [] (for framework agreements or dynamic purchasing systems – estimated total maximum value for the entire duration of this lot) Total value of the contract/lot: [] or Lowest offer: [] / Highest offer: [] taken into consideration Currency: [][][] (for framework agreements – total maximum value for this lot) (for dynamic purchasing systems – value of contract(s) for this lot not included in previous contract award notices) (for contracts based on framework agreements, if required – value of contract(s) for this lot not included in previous contract award notices)
--

Complete as applicable per awarded specific contract (and per lot, if applicable) that was not already included in previous contract award notices.

V.2.5) Information about subcontracting <input type="checkbox"/> The contract is likely to be subcontracted Value or proportion likely to be subcontracted to third parties ⁴ Value excluding VAT: [][][] Currency: [][][] Proportion: []% Short description of the part of the contract to be subcontracted:

Complete as applicable per awarded specific contract (and per lot, if applicable) that was not already included in previous contract award notices.

Section VI: Complementary information

VI.3) Additional information: ²

--

Complete if applicable.

VI.4) Procedures for review

VI.4.1) Review body		
Official name:		
Postal address:		
Town:	Postal code:	Country:
E-mail:		Telephone:
Internet address: <i>(URL)</i>		Fax:

Give the names of the review bodies (also called ‘appeal bodies’) foreseen under the national law applicable to the lead procurer.

Depending on the country, this may or may not be the same body that is competent when the EU public procurement directives do apply.

Do NOT leave this section blank (otherwise you risk multiple complaints procedures in different countries).

VI.4.2) Body responsible for mediation procedures ²		
Official name:		
Postal address:		
Town:	Postal code:	Country:
E-mail:		Telephone:
Internet address: <i>(URL)</i>		Fax:

Give the names of the mediation bodies foreseen under the national law applicable to the lead procurer.

Depending on the country, this may or may not be the same body that is competent when the EU public procurement directives do apply.

Do NOT leave this section blank (otherwise you risk multiple complaints procedures in different countries).

VI.4.3) Review procedure
Precise information on deadline(s) for review procedures:

Use the following text:

The procurement is exempted from the EU Public Procurement Directives (including the EU Procurement Remedies Directives 89/665/EEC and 92/13/EEC; *see above*) and the national laws that implement them.

Publication of this notice in the Official Journal is not to be understood as a waiver of this exemption by the contracting authority.

The deadlines for the review procedures at the bodies for review and mediation, mentioned in IV.4.1) and IV.4.2) are:

[complete].

VI.4.4) Service from which information about the review procedure may be obtained ²		
Official name:		
Postal address:		
Town:	Postal code:	Country:
E-mail:		Telephone:
Internet address: <i>(URL)</i>		Fax:

Give the contact details of a contact person at the lead procurer.

Make sure that this contact person has sufficient information about the context and background of the procurement.

VI.5) Date of dispatch of this notice: *(dd/mm/yyyy)*

Enter date.

- ¹ please repeat as many times as needed
² if applicable
⁴ if this information is known
⁷ mandatory information not to be published
²⁰ importance may be given instead of weighting
²¹ importance may be given instead of weighting; if price is the only award criterion, weighting is not used

Annex D1 – General procurement

Justification for the award of the contract without prior publication of a call for competition in the Official Journal of the European Union

Directive 2014/24/EU

(please select the relevant option and provide an explanation)

Do not complete. Not applicable.

1. Justification for the choice of the negotiated procedure without prior publication of a call for competition in accordance with Article 32 of Directive 2014/24/EU

- No tenders or no suitable tenders/requests to participate in response to
- open procedure
 - restricted procedure
- The products involved are manufactured purely for the purpose of research, experiment, study or development under the conditions stated in the directive (for supplies only)
- The works, supplies or services can be provided only by a particular economic operator for the following reason:
- absence of competition for technical reasons
 - procurement aiming at the creation or acquisition of a unique work of art or artistic performance
 - protection of exclusive rights, including intellectual property rights
- Extreme urgency brought about by events unforeseeable for the contracting authority and in accordance with the strict conditions stated in the directive
- Additional deliveries by the original supplier ordered under the strict conditions stated in the directive
- New works/services, constituting a repetition of existing works/services and ordered in accordance with the strict conditions stated in the directive
- Service contract to be awarded to the winner or one of winners under the rules of a design contest
- Procurement of supplies quoted and purchased on a commodity market
- Purchase of supplies or services on particularly advantageous terms
- from a supplier which is definitively winding up its business activities
 - from the liquidator in an insolvency procedure, an arrangement with creditors or a similar procedure under national laws and regulations

2. Other justification for the award of the contract without prior publication of a call for competition in the Official Journal of the European Union

- The procurement falls outside the scope of application of the directive

Do not complete. Not applicable.

3. Explanation

Please explain in a clear and comprehensive manner why the award of the contract without prior publication in the Official Journal of the European Union is lawful, by stating the relevant facts and, as appropriate, the conclusions of law in accordance with the directive: (500 words maximum)

Do not complete. Not applicable.

Appendix 8 PPI PIN

PPI PRIOR INFORMATION NOTICE (PIN) FOR THE OPEN MARKET CONSULTATION

This template is intended to help EU beneficiaries to prepare their PPI prior information notices. Text in green is meant to indicate instructions or options; text in black is sample text.

 *The PIN and open market consultation are optional for 'limited follow-up PPIs' (i.e. PPIs that are limited to the procurement of a limited set of prototypes and/or test products developed during a preceding PCP funded by FP7, H2020 or HE). Such PPIs may however voluntarily choose to publish a PIN (with or without open market consultation).*

 *This document was designed for joint PPIs' (standard case); for 'coordinated PPIs', please double-check the instructions, to make sure they work.*


The PIN has to be filled out online on the [TED — tenders electronic daily website](#). Use the English version of the simap standard form that is most appropriate for your type of organisation:

- for lead procurers in the public sector: 'Prior information notice'*
- for lead procurers in the utilities sector: 'Periodic indicative notice — utilities'*
- for lead procurers in the field of defence and security: 'Prior information notice for contracts in the field of defence and security'.*

In addition to English, you may publish the contract notice (or a summary) in any other language(s).

Remember that publication of the PIN in TED is only a first step. The open market consultation must be actively promoted and advertised widely to potential tenderers across Europe, using in particular also Horizon Europe Internet sites and HE National Contact Points. Promote it also via large European industry events across Europe, relevant industry initiatives at EU level (e.g. European partnerships, EIPs, PPPs, Horizon Europe Missions), sectorial industry associations and chambers of commerce across Europe (e.g. the Enterprise Europe Network), relevant sectorial and innovation procurement related social media channels. In order to treat all potential tenderers equally, such targeted promotion activities can only start AFTER the publication of the PIN in TED.

A copy of the draft PIN must be submitted as a deliverable to the EU granting authority at the latest 5 days before it is sent for publication to the EU Publication Office (see [General Annex H of the Horizon Europe Work Programme](#)).

 *This template is provided for information purposes only and is not intended to replace professional legal advice. It can be used as a starting point, but you remain responsible for your PIN and for adapting it to your situation (including ensuring full compliance with the EU grant requirements and the applicable rules under national law).*



Supplement to the Official Journal of the European Union

Info and online forms: <http://simap.ted.europa.eu>

Prior information notice

Directive 2014/24/EU

This notice is for prior information only

This notice aims at reducing time limits for receipt of tenders

This notice is a call for competition

Interested operators must inform the contracting authority of their interest in the contract(s). The contract(s) will be awarded without publication of a further call for competition.

Select the first bullet ('This notice is for prior information only').

I.1) Name and addresses¹ (please identify all contracting authorities responsible for the procedure)

Official name:		National registration number: ²	
Postal address:			
Town:	NUTS code:	Postal code:	Country:
Contact person:			Telephone:
E-mail:			Fax:
Internet address(es) Main address: (URL) Address of the buyer profile: (URL)			

If the lead procurer is responsible for carrying out a joint open market consultation (see I.2.), give the contact details of the lead procurer and all the procurers in the buyers group.

If procurers carry out separate open market consultations (see I.2.), each procurer must complete a separate PIN for its own open market consultation and give his own contact details.

In the internet addresses section, give the project website if you do not want to use the general website of the procurer(s) involved. Use the address of the buyer profile of the procurer(s) involved.

I.2) Joint procurement

<input type="checkbox"/> The contract involves joint procurement In the case of joint procurement involving different countries, state applicable national procurement law: <input type="checkbox"/> The contract is awarded by a central purchasing body

Select 'yes' for the first question ('The contract involves joint procurement'). The EU Public Procurement Directives do not distinguish between joint and coordinated procurements.

- Provide the following 2 types of information in the free text field for 'In the case of joint procurement involving different countries, state applicable national procurement law': clarify who is responsible for which parts of the procurement

Explain:

for joint PPIs whether:

- the lead procurer is responsible for the whole procurement procedure, i.e. for coordinating the open market consultation, joint tendering, joint evaluation of offers and joint contracting of all PPI contracts

or

- the lead procurer is only responsible for part of the procurement procedure and each procurer in the buyers group is responsible for the rest (e.g. the lead procurer is responsible for coordinating the open market consultation, the joint tendering, the joint evaluation of offers and possibly also the award of a framework contract/agreement, but each procurer in the buyers group is responsible for the specific contracts for the innovative solutions it buys for itself)

for coordinated PPIs whether:

- the lead procurer is responsible for preparing the jointly agreed tender specification and for coordinating a joint open market consultation, but each procurer in the buyers group is responsible for carrying out a separate procurement for the innovative solutions it buys for itself

or

- the lead procurer is responsible for preparing only the jointly agreed tender specifications, but each procurer in the buyers group is responsible for carrying out a separate open market consultation and a separate procurement for the innovative solutions it buys for itself

- state the applicable national procurement law(s)

In case the lead procurer is responsible for the whole procedure, mention only the national procurement law of the lead procurer; if there are shared responsibilities, mention the national procurement laws of all actors (and specify that they apply for the stages they are each respectively responsible for).

Only select 'yes' for the second question ('The contract is awarded by a central purchasing body'), if this is the case for your PPI.

performed). If yes, they prevail and must be applied. If no, such restrictions should only be used if the buyers group has justified reasons to do so and in agreement with the granting authority.

II.2.4) Description of the procurement:

(nature and quantity of works, supplies or services or indication of needs and requirements)

Explain any differences in scope per lot.

This PPI procurement is *[OPTION for coordinated PPIs: part of a set of coordinated procurements that are] implemented by different procurers across Europe that are all facing the same common challenge and are thus looking for similar solutions (so-called 'buyers group').*

Indicate briefly which part concerns the core functionality and performance requirements that are common to all procurers in the buyers group (and, if applicable, which part concerns additional 'local' functionality due to differences in the local context of some of them). Refer to the project website for more detailed information about the joint requirements.

Explain (per lot, in case lots are used) how the procurement will be implemented:

The procurement will be implemented as follows:

Explain whether conformance testing/certification/quality labelling is required and when it will take place (before launching the contract notice and the request for tenders or as part of the evaluation procedure before contract award). Use one of the following options:

[OPTION 1: On [insert the planned date for conformance testing if that is planned to take place before the launch of the PPI request for tenders], a conformance testing is planned [and quality labelling] to establish if there are vendors on the market that can meet the requirements.]

[OPTION 2: As part of the tender evaluation procedure, it will be evaluated before contract award if the tenderers can meet the requirements [and have obtained proof of [conformance testing][certification][quality labelling] of their solution from the appropriate designated bodies].]

Explain where and when interested tenderers can obtain additional information about the modalities for conformance testing/certification/quality labelling (e.g. *in a separate document published on the project website or — in case open market consultations with several rounds are used — in a future updated PIN that will be published after a first round of open market consultation, or in the PPI request for tenders*).

Explain briefly key implementation specificities of the procurement procedure(s) (e.g. *for coordinated PPIs with a joint open market consultation: explain which procurers in the buyers group will buy which volume/type of solutions by when and how their procurement procedure(s) is/are coordinated, in case of a competitive dialogue indicate how long the dialogue phase is expected to take and how it will be implemented, e.g. in how many different stages*).

Contract implementation will consist of a deployment phase (which is expected to be completed [insert number] months after contract award) and an operational validation phase ([insert a number that reflects an appropriate duration for evaluating the impacts on conversion into permanent service of the solutions] of months — during which the solutions will be evaluated in real-life operational conditions).

For coordinated PPIs with a joint open market consultation, explain differences in timing of the phases for the different procurers in the buyers group.


Indicate briefly whether the operational validation will be done by an independent third party or not and what role the contractors will need to play during the evaluation.

Specify the IPR regime:

[OPTION 1 for PPIs where the IPR stays with the contractors (standard option for HE funded PPIs): The selected operators will retain ownership of the intellectual property rights (IPRs) that they generate in the PPI and will be able to use them to exploit the full market potential of their innovative solutions i.e. beyond this procurement. [The market potential is estimated at [insert available figures about the potential total market size, i.e. beyond this procurement].]

[OPTION 2 for PPIs where the IPR stays with the procurers (exceptional situation for HE funded PPIs): The procurer(s) will retain ownership of the intellectual property rights (IPRs) that the contractors generate in the PPI because [explain briefly the reason why]. However the contractors will be granted access rights and will be able to use them to exploit the market potential of their innovative solutions i.e. beyond this procurement [mention applicable restrictions, if any]. [The market potential is estimated at [insert available figures about the potential total market size, i.e. beyond this procurement].]

Provide any other relevant information. If needed to cope with the character limit in the forms, distribute text also over 'II.1.4) Description of the procurement' and 'II.2.14) Additional information'.

 Do not forget that if you change the quality/price requirements and/or extend the buyers group for a case where conformance testing happens before launching the PPI request for tenders, updated information should be published in a second PIN (published once the set-up is finalised).

II.2.5) Award criteria ¹²

- Criteria below
 - Quality criterion – Name: / Weighting: ^{1,2,20}
 - Cost criterion – Name: / Weighting: ^{1,20}
 - Price – Weighting: ²¹
- Price is not the only award criterion and all criteria are stated only in the procurement documents

Select one of the 2 options ('Criteria below' OR 'Price is not the only award criterion and all criteria are stated only in the procurement documents').

If you select the first option ('Criteria below'), you must indicate all the criteria and their weighting.

Note that evaluation of the tenders must be based on best value for money criteria (not just lowest price).

II.2.6) Estimated value ^{2,5,6,19}

Value excluding VAT: [] Currency: [] [] []
(for framework agreements or dynamic purchasing systems – estimated total maximum value for the entire duration of this lot)

Only fill in if lots are used.

II.2.7) Duration of the contract, framework agreement or dynamic purchasing system ^{5,6,19}

Duration in months: [] or Duration in days: []
or Start: (dd/mm/yyyy) / End: (dd/mm/yyyy)

- This contract is subject to renewal
- Description of renewals:

Enter the duration.

II.2.10) Information about variants ¹²

- Variants will be accepted

Complete as applicable. Consider that accepting variants is an effective way to induce innovation.

II.2.11) Information about options ^{5,6,19}

- Options
- Description of options:

Complete as applicable.

II.2.13) Information about European Union funds ^{5,19}

The procurement is related to a project and/or programme financed by European Union funds yes no
Identification of the project:

Select 'yes'.

Use this text:

This procurement receives funding from the European Union's Horizon Europe Research and Innovation Programme, under grant agreement No [insert number] — [insert project acronym] (see [insert project website]).

[additional OPTION if the procurement also receives funding from other EU programmes (i.e. if there are procurers in the buyers group whose financial contribution to the PPI budget is funded by other EU programmes, for example the European Regional Development Fund (ERDF)): This procurement receives also funding from the [OPTION 1 for EU programmes: European Union's [insert name of EU programme]][OPTION for 2 national programmes co-funded by the EU (e.g. by Regional Funds, Agricultural Funds): [insert name of national programme] co-financed by the European Union]: [insert beneficiary name and grant agreement number and acronym].]

The EU has given a grant for this procurement, but is not participating as a contracting authority in the procurement.

Note that it is NOT allowed for one and the same procurer to receive funding for his part of the PPI budget from different EU programmes (e.g. Horizon Europe and ERDF). But it is possible for different procurers in the buyers group to receive funding from different EU sources.

II.2.14) Additional information:

Provide relevant additional information, if applicable.

II.3) Estimated date of publication of contract notice: ^{9,19} (dd/mm/yyyy)

Enter the date.

Section III: Legal, economic, financial and technical information ^{5,6,19}

As this PIN is NOT a call for competition, do NOT complete any of the sub-sections in Section III.

Section IV: Procedure

As this PIN is NOT a call for competition, do NOT fill in any of the subsections of Section IV, except for sub-section IV.1.8 which needs to be completed as follows:

IV.1.8) Information about the Government Procurement Agreement (GPA) The procurement is covered by the Government Procurement Agreement <input type="radio"/> yes <input type="radio"/> no
--

Select 'yes' if WTO GPA is applicable to the PPI.

Select 'no' if WTO GPA is not applicable to the PPI.

Section VI: Complementary information

VI.2) Information about electronic workflows ^{5,19}

<input type="checkbox"/> Electronic ordering will be used <input type="checkbox"/> Electronic invoicing will be accepted <input type="checkbox"/> Electronic payment will be used

Do not fill in. This is not a notice for a call for competition or a notice that aims at reducing time limits for receipt of tenders.

VI.3) Additional information: ²

--

 Open market consultations are mandatory for all PPIs, except limited follow-up PPIs without open market consultation.

For the latter, adapt the text as appropriate.

This PIN is published to announce an open market consultation on a future procurement procedure. The PIN is not a commitment to procure.

The open market consultation will provide you with an overview on the procurement objectives, the PPI process and the main clauses of the contract. You will also have the opportunity to ask questions. It will be held in English /and [add additional language(s), if any]/.

Choose option 1 or 2 below, depending on whether there are participation and/or control restrictions for the open market consultation or not (not applicable for limited follow-up PPIs or low-value PPIs below national procurement thresholds without open market consultation):

[OPTION 1 by default (no restrictions): This PIN invites all interested operators to take part in an open market consultation. Participation in the open market consultation is not open to entities that are subject to [EU restrictive measures](#) under Article 29 of the Treaty on the European Union (TEU) and Article 215 of the Treaty on the Functioning of the EU (TFEU)¹⁵². All information provided during the open market consultation and other background information will be published online in English /and [add additional language(s), if any]/ on the project website ([insert the project website]).]


[OPTION 2 if there are participation and/or control restrictions (based on HE call conditions or other considerations): [Explain what is the reason why the participation is restricted (e.g. explains what are the security aspects that need to be safeguarded)] This PIN invites all interested operators established in /and controlled from/ [add the list of countries to which participation and/or control is restricted¹⁵³] to take part in an open market consultation. Participation in the open market consultation is not open to entities that are subject to [EU restrictive measures](#) under Article 29 of the Treaty on the European Union (TEU) and Article 215 of the Treaty on the Functioning of the EU (TFEU)¹⁵⁴. All information provided during

¹⁵² Please note that the EU Official Journal contains the official list and, in case of conflict, its content prevails over that of the [EU Sanctions Map](#).

¹⁵³ See [Guidance on participation in Horizon Europe restricted calls](#).

¹⁵⁴ Please note that the EU Official Journal contains the official list and, in case of conflict, its content prevails over that of the [EU Sanctions Map](#).

the open market consultation and other background information will be provided to all operators that meet the above requirements and are interested in the PPI in English [and [add additional language(s), if any]].]

 Not participating in the open market consultation will not exclude you from participating in the PPI call for tender.

All communication (before, during and after the procurement) will be carried out in English [and [add additional language(s), if any]]. Offers for the PPI call for tender will be accepted in English [and [insert additional language(s), if any]].


Give information on the timing. Choose the timing in such a way that you ensure that this PIN is published 45 days before the start of the first meeting of the open market consultation:

The open market consultation will be organised in the form of a [insert the format e.g. physical meeting(s) (e.g. plenary style meeting(s), face-to-face meeting(s), online meeting(s) (e.g. webinar or online Q&A forum), or a combination of those] that will be held in [insert venue(s)] on [insert date and time or period].

[Please register by [insert date].]

[additional OPTION if tenderers are allowed to supply additional confidential information e.g. via e-mail or in a face-to-face meeting during the open market consultation: Please indicate [by [insert date]] [together with the registration for the open market consultation] if you want to supply (under a non-disclosure agreement) additional confidential information that you do not wish to reveal in public during the open market consultation.]

[OPTION if for example a questionnaire is used: Please submit the following information by completing the open market consultation questionnaire [insert link to the questionnaire] by [insert date].]

 Do not forget that you must ensure equal treatment to all interested economic operators in all instances, including also in face-to-face meetings. Such meetings can therefore only be used to *listen* to the economic operators, but may not be used to *give* any additional information to the economic operators (except information also provided to all other operators).

[OPTION for coordinated PPIs with separate open market consultations: Please note that other procurer(s) are also carrying out open market consultations for procuring similar innovative solutions. More information about this: [insert project website page that lists all ongoing/planned open market consultations website organised by procurers in the buyers group].]

[OPTION for follow-up PPIs (normal and limited with PIN): This PPI procurement was preceded by a pre-commercial procurement (PCP). For more information about this PCP, see [insert website PCP project and reference to PIN, contract notice and contract award notice of the PCP].]

Check carefully if the call conditions for your HE grant restrict participation and/or control of economic operators that can participate. If yes, they prevail and must be applied. If no, and it is not absolutely needed for security reasons, then do NOT restrict participation or control for the market consultation on your own initiative. It will benefit your procurement to have an open PIN — even if later the participation in the procurement itself is restricted to operators from certain countries.

VI.4) Procedures for review ^{5,19}

VI.4.1) Review body		
Official name:		
Postal address:		
Town:	Postal code:	Country:
E-mail:		Telephone:
Internet address: (URL)		Fax:

Fill in the applicable review body responsible for review procedures for open market consultations (if provided for by national law). Not needed for limited follow-up PPIs without PIN.

VI.4.2) Body responsible for mediation procedures ²		
Official name:		
Postal address:		
Town:	Postal code:	Country:
E-mail:		Telephone:
Internet address: (URL)		Fax:

Fill in the applicable review body responsible for review procedures for open market consultations (if provided for by national law). Not needed for limited follow-up PPIs without PIN.

VI.4.3) Review procedure

Precise information on deadline(s) for review procedures:

Fill in precise information regarding the applicable time lines (if review body provided for by national law). Not needed for limited follow-up PPIs without PIN.

VI.4.4) Service from which information about the review procedure may be obtained ²

Official name:

Postal address:

Town:

Postal code:

Country:

E-mail:

Telephone:

Internet address: (URL)

Fax:

Fill in accordingly (if review body provided for by national law). Not needed for limited follow-up PPIs without PIN.

VI.5) Date of dispatch of this notice: (dd/mm/yyyy)

Enter the date.

It is the contracting authority's/contracting entity's responsibility to ensure compliance with European Union law and any applicable laws.

¹ please repeat as many times as needed

² if applicable

³ please repeat as many times as needed if this notice is for prior information only

⁴ if this information is known

⁵ please provide this information if the notice is a call for competition

⁶ as far as information is already known

⁹ please provide this information only if this notice is a prior information notice

¹² please provide this information here or in the invitation to confirm interest, if the notice is a call for competition or aims at reducing time limits for receipt of tenders

¹⁹ if the notice aims at reducing time limits for receipt of tenders

²⁰ importance may be given instead of weighting

²¹ importance may be given instead of weighting; if price is the only award criterion, weighting is not used

Appendix 9 PPI RFT


PPI REQUEST FOR TENDERS

This template is intended to help EU beneficiaries to prepare their PPI requests for tenders. Text in green is meant to indicate instructions or options; text in black is sample text.

 *The request for tenders is mandatory for all types of PPI procurements (including 'limited follow-up PPIs', i.e. PPIs for a limited set of prototypes and/or test products developed during a preceding PCP funded by FP7, H2020 or HE).*

 *This document was designed for joint tenders ('joint PPIs'; standard case); for coordinated tenders ('coordinated PPIs'), please double-check the instructions, to make sure they work.*

Since PPI requests normally fall under the EU public procurement directives, your normal templates should normally work. Adapt them according to the instructions in this document and then cross-check against the applicable national law. Make sure that you draft the request for tenders in a way that is in line with the requirements for Horizon Europe funded PPIs in the (see [EU AGA — Annotated Grant Agreement](#), art 6.2.D.5 and Annex 5).

 *This template is provided for information purposes only and is not intended to replace professional legal advice. It can be used as a starting point, but you remain responsible for your request for tenders and for adapting it to your situation (including ensuring full compliance with the EU grant requirements and the applicable rules under national law).*

1. General context and background


Explain that the procurement is a public procurement of innovative solutions (PPI).

Mention which EU Public Procurement Directive and national public procurement laws apply.

Mention that the PPI is part of an EU project — a HE grant and possibly other EU grants (use same wording as in section II.2.13 of the contract notice) — and that the contracts will therefore be subject to additional rules that come from the EU grant(s).

Indicate if the PPI is a limited follow-up PPI (i.e. for a limited set of prototypes and/or test products developed during a preceding PCP funded by FP7, H2020 or HE) or not:

- If 'YES' provide information about the results/outcomes of the preceding PCP and the URL to the PCP project website. Explain the procurement setup followed (*explain if there is no open market consultation and the PPI uses the negotiated procedure without publication; explain that offers will be asked from at least 3 economic operators, including the providers that successfully completed the PCP*).
- If 'NO' because a normal (i.e. non-limited) follow-up PPI, provide information on the results/outcomes of the PCP and the URL to the PCP project website. Mention that there was an open market consultation for the PPI and provide the link to the summary of the outcomes of this open market consultation and the Q&A on the PPI project website.
- If 'NO' because no follow-up PPI, mention that there was an open market consultation for the PPI and provide the link to the summary of the outcomes of this open market consultation and the Q&A on the PPI project website.

 There are 2 types of follow-up PPIs, i.e. those for a limited set of prototypes and/or test products and those for a commercial volume of the innovative solutions developed during the PCP. For the first, there is no requirement to perform an open market consultation for the PPI; for the latter there is a requirement to perform an open market consultation for the PPI.

In case the PPI is a low-value PPI (i.e. the procurement value is below national procurement thresholds), provide information about any prior preparatory activities and/or market engagement that has taken place to prepare the PPI.

2. Tender profile: Goods/services to be procured, tender closing time, procurers, contracting approach, budget, timetable and IPR

2.1 Description of goods/services/work to be procured

Indicate the PPI challenge to be addressed and the requirements that the procurers have set in terms of functionality, performance. Define the required quality improvements and possibly also price requirements for the innovative solutions (use same wording as in contract notice). Indicate clearly also the minimum requirements that solutions must meet. Explain clearly who is procuring which/how many innovative solutions and where and when they need to be delivered. Explain the drivers behind the PPI (i.e. why the solutions are needed; why the current solutions don't meet the needs; if they are linked to regulatory requirements and/or the need for standardisation or certification).

Indicate which part of the requirements concerns the core functionality and performance requirements that are common to all procurers in the buyers group (and if applicable, which part concerns additional functionality due to differences in the local context of some of them). Refer to the project website for more detailed information about the joint requirements. Mention whether variants are accepted or not. Explain that variants must meet the minimum requirements.

In case of PPIs with lots, clarify if different lots must be evaluated together (to assess dependencies and interoperability). Explain that contract implementation will consist of a deployment phase (expected to be completed [insert number] months after contract award) and an operational validation phase ([insert number] of months — during which the solutions will be evaluated in real-life operational conditions). In case of coordinated PPIs with different time lines, explain differences in timing of the phases for the different procurers in the buyers group.

List the metrics/indicators that will be used to evaluate the solutions in real-life operational conditions (in particular to measure how far they reach the set targets).


Specify which resources contractors need to set aside for the evaluation. Indicate if the procurers plan to carry out the evaluation sequentially or in parallel at the different sites.

Describe the objectives, their associated output and results and the tasks to be carried out (milestones and deliverables) for each of the 2 phases (deployment and operational validation) and lots/specific contracts (if applicable).

Do not forget to include the following deliverables:

- for each interim deliverable, a section that explains the IPR measures taken by the contractors to protect the results of the innovative activities
- at the end of the tender evaluation, abstracts of the winning tenders (in the format required by the EU for publication)
- at the end of the PPI, a summary of the main results achieved by each contractor and conclusions from the PPI (in the format required by the EU for publication)
- a deadline by which the contractors must agree on the text for the summary of overall lessons learnt and results achieved from the PPI, for publication
- at the end of the PPI, a final demonstration to the EU of the innovative solutions procured.

Unless explicitly exempted by the HE call conditions of your grant, describe in the tender how the gender dimension (i.e. sex and/or gender analysis) should be taken into account in the contracts/ the proposed R&I content of the PPI. Note that this question relates to the content of the planned contract activities, and not to gender balance in the teams in charge of carrying out the contracts. Sex and gender analysis refers to biological characteristics (such as differences between males and females) and social/cultural factors (such as ethnicity, disability and sexual orientation) respectively¹⁵⁵. For example, in healthcare related projects that involve testing, the gender dimension can be taken into account by including testing on persons of all possible sexes (ensuring a healthy mix with both male and female test subjects).

 Note that since you are required for your HE grant to award the tender on best value for money solutions, not to the lowest price only solutions, make sure to include NOT ONLY requirements regarding the price, but also regarding quality improvements of the innovative solutions.

To describe the common challenge, use functional or performance based specifications that include minimum requirements that solutions must meet, rather than prescribing a specific solution. Ensure that the specifications are based on an analysis of the procurers' needs and take into account the feedback from the PPI open market consultation or from the preceding PCP. Ensure that the scope of the PPI does not include the procurement of R&D services. Ensure that the targets for the

quality/efficiency improvements are set so that they clearly target innovative solutions that are not widely deployed on the market yet. Ensure that the PPI focuses on one common (core) challenge that requires a solution that is to a significant extent similar across the different countries (and can therefore be procured together — jointly or coordinated). Allow variants if possible (they encourage innovation).


2.2 Tender closing time

Specify the tender closing time.

2.3 Procurer(s) and other parties involved in the PPI

Explain the procurer set-up (i.e. which procurer(s) is/are launching this PPI request for tenders; how it is linked to the EU project (is this procurement the single joint PPI procurement or one of several coordinated PPI procurement(s)); who is the lead procurer and what his role is in this particular procurement (i.e. that he coordinated the creation of common tender specifications; if he also carried out a common open market consultation or not; if he also launched the request for tenders for this PPI or not; if he is also part of this PPI or not; if he is also mandated to sign contracts for this PPI or not); if there are third parties giving in-kind contributions; if there are preferred partners; what the third parties/preferred partners will do, which information they will get access to, etc).

Explain the profile of the procurer(s) that are launching this request for tenders (role and function; scope of their activities and responsibilities and how the innovative solutions procured fit into their plans to modernize their public services).

 Note that the lead procurer has a less prominent role for coordinated PPIs than for joint PPIs (*see section 1.2 of the prior information notice for more info about the role of the lead procurer in different joint and coordinated PPI set-ups*). In case of joint PPIs, there is only one joint PPI request for tenders launched. In case of coordinated PPIs, there are several separate PPI requests for tenders launched by the individual procurers in the buyers group.

Note that only procurers from countries that are eligible for Horizon Europe funding can be lead procurer and/or part of the buyers group since only they can participate as beneficiaries in the Horizon Europe project. Other entities can however perform other tasks for the PCP without obtaining EU funding (*e.g. provide input for the open market consultation, test solutions, put resources at the disposal of the project e.g. for testing, act as preferred partner*).

2.4 Contracting approach

Explain the contracting approach (i.e.:

- which procedure will be used: open/competitive dialogue/negotiated procedure
- if conformance testing/certification/quality labelling is required and when (before launching the request for tenders or afterwards as part of the tender evaluation)
- if lots or framework agreement/contract with specific contracts will be used
- expected number of contracts to be awarded (per lot/specific contract, where applicable)
- if the lead procurer has a mandate to sign contracts for the buyers group).

If conformance testing/certification/labelling still needs to be done, explain how it will be implemented, in particular:

- by whom: by the procurer(s) themselves or by an independent third party
- when: when exactly in the procurement procedure (in any case before contract award)
- costs: who will carry the costs for conformance testing/certification/quality labelling (the procurer(s), the tenderers or a combination of both)
- requirements: what features are verified during conformance testing/certification/labelling.

 PPI procurements are normally NOT allowed to use:

- the restricted procedure with shortened time-limit for urgency reasons
- the innovation partnership procedure (PPI does not cover the procurement of R&D).

Limited follow-up PPIs (i.e. PPIs that for a limited set of prototypes and/or test products developed during a preceding PCP funded by FP7, H2020 or HE) may use a negotiated procedure without publication (i.e. no call for tender published, request

for tender sent to at least 3 operators, including all those that successfully completed the preceding PCP). Low value PPIs (i.e. PPIs with a procurement value below the applicable national procurement threshold) may use the procedures foreseen for such procurements by the applicable national procurement law(s).

If direct contracts are used in a joint PPI, the procurer(s) can choose to make the lead procurer responsible for contracting (or not). If the lead procurer is made responsible, he signs for the buyers group. Otherwise each procurer signs for the innovative solutions it buys for himself.

If framework contracts/agreements are used in a joint PPI, procurers are advised to make the lead procurer responsible for signing the framework contract/agreement, while each individual procurer remains responsible for signing the specific contract for the innovative solutions it buys himself that reflects its additional local functionality.

2.5 Total budget and budget distribution

Explain the budgetary set-up, specifying in particular:

- the total budget for the PPI
- the amount/budget of the innovative solutions that are planned to be procured (per lot/specific contract per procurer, if applicable)
- the maximum budget per lot, where applicable
- the maximum budget per specific contract, where applicable
- the number of contractors that are expected to be selected (per lot/specific contract, where applicable)
- the planned and maximum duration of the PPI contracts (including the duration for each lot/specific contract, if applicable).


2.6 Time schedule

Explain the planned time schedule.

Make sure that the PPI covers 2 phases (deployment and operational validation — for evaluating the results and the impact of the innovative solutions on the conversion into permanent service).

Reflect the time schedule for both phases. Indicate clearly the target date for completing the deployment of the innovative solutions, which is also the target date for the procurer(s) to start to operate the procured solutions in real-life operating conditions and to evaluate the results.

If providers need to remain involved during the operational validation phase, indicate this clearly. Clarify also how the validation in real-life operating conditions will take place (duration of the evaluation, evaluation methods, indicators, etc).

 Ensure that the PPI call for tender remains open for submission of tenders for at least 60 days (not applicable if the PPI concerns a limited follow-up PPI or a low-value PPI). In any case, ensure that there is sufficient time for tenderers to prepare high quality bids.

The procurer(s) may award the contracts for deployment and the contracts for the operational validation to different economic operators (*e.g. in case evaluation of results is to be carried out by an independent third party*).

The deployment phase may be divided into several deployment phases (*e.g. from month x-y deployment in country a, from month u-v deployment in country b etc*). Likewise for the operational validation phase.

Foresee, if applicable, a special annex that describes in detail the specificities of the deployment and evaluation of operating the procured innovative solution(s).

2.7 IPR

Ownership of results (foreground)


Indicate that each contractor will keep ownership of the IPRs attached to the results they generate (standard option — unless exceptional duly justified cases, *e.g. when the contractor is not able to protect or exploit the results*).

Specify that the tendered price is expected to take this IPR allocation into account.

If ownership remains with the contractor, summarise briefly any access and licensing rights on results that the procurer/buyers group wishes to retain.

If ownership is transferred to the procurer/buyers group, explain clearly why this deviation is needed, and indicate under which conditions the contractors will get access rights to use and commercially exploit their results to a wider market.

For PPIs with control restrictions due to strategic interests in the HE call conditions, use the following option: *[additional OPTION for PPIs with control restrictions due to strategic interests: The contractors must ensure that the results are not subject to control or other restrictions by a country (or entity from a country) which is not one of the eligible countries set out in section 3.1 of this request for tenders — unless otherwise agreed with the granting authority.]*

 Choose 'procurer' above if this is a request for tenders for a coordinated PPI procurement carried out by one individual procurer. Choose 'buyers group' if this is a request for tenders for a joint PPI.

Check carefully if the call conditions for your HE grant impose specific requirements (e.g. *control restrictions*). If yes, they prevail and must be applied. If no, such restrictions should only be used if the buyers group has justified reasons to do so and in agreement with the granting authority.

Commercial exploitation of results

Explain to potentially interested tenderers that there is potential for them to commercially exploit the results of the PPI contracts, since the procurement need corresponds to a wider market need. Describe the potential market (and its estimated size) for the innovative solutions beyond the PPI procurer(s).

Provide information about:

- whether contractors are required to undertake specific activities beyond product development to commercially exploit the results, e.g. *contribution to standardisation*
- activities that the procurer(s) themselves plan to undertake to help remove barriers for wider deployment of the innovative solutions (e.g. *promotion of the results of the PPI towards other public procurers, contribution made by the demand side to regulation, standardisation*).

Specify if the PPI is subject to exploitation restrictions/additional exploitation obligations under the HE call conditions of your grant, e.g.:

[OPTION if there are participation and/or control restrictions in the HE call conditions: The contractors may not transfer ownership of their results or grant licences to third parties which are established in countries which are not [include the list of eligible countries set out in the HE call conditions] (or, if applicable, are controlled by such countries or entities from such countries) — unless they have requested and received prior approval by the contracting authority who will request prior approval from the granting authority that is co-financing the PPI.]

[OPTION if there are additional obligations related to standardisation in the HE call conditions: The contractors must promote the dissemination of their results, in particular through [publications and] contribution to standardisation. The contractors and the contracting authority will establish at the start of the contract a list of [planned publications about the results and] appropriate standards to contribute to, and will keep this list updated throughout the contract. The contractors must — up to [complete] years after the end of the PPI — inform the contracting authority, who will inform in its turn the granting authority that is co-financing the PPI, if the results could reasonably be expected to contribute to European or international standards.]

[OPTION if there are additional obligations in case of a public emergency in the HE call conditions: In case of a public emergency, the contractors must (if requested by the granting authority) grant for a limited period of time specified in the request, non-exclusive licences — under fair and reasonable conditions — to their results to legal entities that need the results to address the public emergency and commit to rapidly and broadly exploit the resulting products and services at fair and reasonable conditions.]

Where the HE call conditions impose additional exploitation obligations, add them here.

For more information, see section **XXX** in the *[Contract] [Framework Agreement][Framework Contract][or][Specific Contract]* that describes in more detail the rights and obligations regarding exploitation of results.

Check carefully if the call conditions for your HE grant impose specific requirements (e.g. *specific exploitation obligations or control restrictions*). If yes, they prevail and must be applied. If no, such restrictions should only be used if the buyers group has justified reasons to do so and in agreement with the granting authority.

Declaration of pre-existing rights (background and sideground)

Explain that the ownership of pre-existing rights will remain unchanged (standard option — unless exceptional duly justified cases).

Explain that in order to be able to distinguish clearly between results and pre-existing rights (and to establish which pre-existing rights are held by whom):

- tenderers will be requested to list the proposed list of pre-existing rights that they wish to use for their proposed solution in their offers
- procurer(s) and contractors will establish a agreed list of pre-existing rights to be used before the start of the contracts.


If already known, declare whether any relevant background is held by the procurer(s) or third parties providing in-kind contributions (and specify those that are available for use and those that must be used to build upon for delivering the innovative solutions for the PPI).

For PPIs with control restrictions due to strategic interests in the HE call conditions, add the following option: *[additional OPTION for PPIs with control restrictions due to strategic interests: The contractor must ensure that background that is subject to control or other restrictions by a country (or entity from a country) which is not one of the eligible countries set out in section 3.1 and that impact the exploitation of the results (i.e. would make the exploitation of the results subject to control or restrictions) must not be used and must be explicitly excluded from the list of pre-existing rights agreed between the contractors and the contracting authority that will be used for the PPI — unless otherwise agreed with the contracting authority.]*

Note that impact the exploitation of results should be understood as making the exploitation of the results subject to control or restrictions, for example if exploitation would require the agreement of the entity owning the background. If such background needs to be used this must be agreed with the granting authority.

Define clearly the allocation of the rights to use for background (which rights to use, for how long do the procurers obtain for the background rights that are held by the contractors) and explain that this allocation of rights to the procurers need to be taken into account in the financial offer.

Ensure that entities which are under the same control as the procurers in the buyers group also have the same access to background: Rights to use the background related to the developed solution must be granted under the same conditions as above to entities that are under the direct or indirect control of procurers of the buyers group, or under the same direct or indirect control as procurers of the buyers group, or directly or indirectly controlling procurers of the buyers group *[OPTION for PPIs with control restrictions in the HE call conditions; subject to applicable control restrictions]*.

 The background meant here is not the same background as in the Horizon Europe grant agreement (here it relates to the procurement; there it relates to the grant agreement).

Check carefully if the call conditions for your HE grant impose specific requirements (e.g. control restrictions). If yes, they prevail and must be applied. If no, such restrictions should only be used if the buyers group has justified reasons to do so and in agreement with the granting authority.

3. Evaluations of tenders

In case lots or framework agreements/contracts are used, explain both the conditions/procedure for the framework contract/agreement and for the specific contracts/lots.

3.1 Eligible tenderers, joint tenders and subcontracting

Eligibility of tenderers

Explain the eligibility conditions. Explain whether the call for tenders is open to all types of operators (companies or other type of legal entities) or whether there are any eligibility restrictions:

[OPTION 1 by default (no restrictions): Participation in the tendering procedure is open on equal terms to all types of operators [OPTION for PPIs where the open market consultation has shown that there are sufficient potential interested bidders with good price/quality solutions in the EU Member States and HE associated countries and there are NO international public procurement agreements such as the WTO GPA or other bilateral public procurements between the EU and third countries that apply: that are established in EU Member States or Horizon Europe associated countries¹⁵⁶] [OPTION for PPIs where the open market consultation has shown that there are NOT sufficient potential interested bidders with good

¹⁵⁶ [List of Horizon Europe participating countries.](#)

price/quality solutions in the EU Member States and HE associated countries or where there ARE international public procurement agreements such as the WTO GPA or other bilateral public procurement agreements between the EU and third countries that apply: that are established in [add WTO GPA signatory countries and other third countries with whom the EU has applicable bilateral public procurement agreements] on equal terms, regardless of their geographic location, size or governance structure.

As a minimum, participation must be open to tenderers from EU Member States, HE associated countries and other countries with which the EU has an agreement in the field of public procurement. This means that; 1) if the WTO Government Procurement Agreement applies to the PPI, then participation must also be open to tenderers from States that have ratified this agreement. 2) if a bilateral agreement on public procurement between the EU and another third country applies to the PPI, then participation must also be open to tenderers from that third country. Participation must be open to all types of operators from any of the above eligible countries, regardless of their geographic location, size or governance structure.]

[OPTION 2 if there are participation and/or control restrictions in the HE call conditions: Participation in this call for tenders is open only to interested operators established in [and controlled from] [add the list of countries to which participation and/or control is restricted].

If there are control restrictions, explain further what ‘control’ means and what type of evidence tenderers must provide in order to enable the contracting authority to assess control. ‘Control’ is defined as the possibility to exercise decisive influence on the operator, directly or indirectly, through one or more intermediate entities, ‘de jure’ or ‘de facto’. Each tenderer must complete Annex [xxx] Declaration of ownership and control to indicate its country of establishment and its country/ies of control and must present the supporting evidence normally acceptable under the law of that/those country/ies as requested in Annex [xxx]. In addition, such a declaration (and supporting evidence) must be submitted for each subcontractor, expert and other entities on whose capacity the tender relies). Additional evidence may be requested by the contracting authority after the submission deadline.

Please note that in case of participation and/or control restrictions, the contractors will have to ensure that the participation and/or control requirements are extended to their subcontractors, affiliated entities and other third parties (including suppliers of components used for the innovative solution) and that any cooperation with nationals of third countries that are not eligible countries or that are controlled by such a country and/or by a national of such a country does not affect the strategic assets, interests, autonomy or security of the EU and its Member States and avoids potential negative effects over security of supply of inputs that are critical to the procurement.]

Please also note that participation in the PPI contracts is not open to entities that are subject to [EU restrictive measures](#) under Article 29 of the Treaty on the European Union (TEU) and Article 215 of the Treaty on the Functioning of the EU (TFEU)¹⁵⁷ — in any capacity (not as main contractor, member of a grouping/consortium, subcontractors, experts, any other type of entity on whose capacity the tender relies or other third parties that are cooperated with). In order to ensure that the EU restrictive measures are respected throughout the supply chain that will be involved in delivering the contract results, the contractors must ensure that these obligations also apply to their subcontractors, affiliated entities and other third parties (including suppliers of components used for the innovative solution) they cooperate with in the research, development, testing and subsequent commercialisation of the results, as well as to any entities succeeding them in their ownership or development of the results.

 The Horizon Europe eligible countries are explained in the List of Horizon Europe participating countries.

Keep in mind the special situation of some countries:

- United Kingdom — The UK is no longer an EU Member State and (currently) it is also not a Horizon Europe associated country. Therefore, when the WTO GPA applies to the PPI, then the PPI call for tenders must be open to UK entities. However, when the WTO GPA does not apply to the PPI procurement, then, as long as there is no Horizon Europe association agreement with the UK that has legal effect (either through provisional application or its entry into force), the UK is to be considered just like any other non-associated third country. Following the recent agreement between the UK and the EU, this will still be the case for all calls under the 2023 work programme. It is expected that the UK

¹⁵⁷ Please note that the EU Official Journal contains the official list and, in case of conflict, its content prevails over that of the [EU Sanctions Map](#).

will be able to fully participate as from calls that are launched under the 2024 HE Work Programme until the end of Horizon Europe in 2027.

- Ukraine — There is a Horizon Europe association agreement with Ukraine that has legal effect.
- Russia and Belarus — Given the illegal invasion of Ukraine by Russia and the involvement of Belarus, participation of Russian and Belarus entities in EU funded projects is very limited. For EU calls with submission deadline 10 May 2022 (or later), Russian and Belarus economic operators cannot participate in any capacity in Horizon Europe funded PPIs. Exceptions may only be granted on a case-by-case basis for justified reasons (*e.g. for projects with humanitarian purposes*) in agreement with the granting authority.¹⁵⁸ For EU calls with submission deadline before, the restrictions were only for Russian and Belarussian operators targeted by EU restrictive measures (i.e. listed persons subject to an asset freeze, public bodies and public-controlled organisations, e.g. state-owned private entities and entities that fall under one of the sector-specific restrictive measures (*e.g. aviation and space industry, dual use technology*)).

Check carefully if the call conditions for your HE grant restrict participation and/or control of economic operators that can participate. If yes, they prevail and must be applied. If no, and it is not absolutely needed for security reasons, then the PCP call for tenders MUST be open at least to operators from all EU Member States and all Horizon Europe associated countries. In case of doubt, check the degree of openness of your call for tenders with the granting authority.

Tenders submitted in collaboration with others

Provide for the rules that tenderers should respect if they wish to submit offers that are joint tenders and/or contain subcontracting.

Other


Explain that prior participation in the open market consultation (if any) is not a pre-condition for submitting a tender.

3.2 Exclusion criteria

Explain the exclusion criteria (*e.g. conflict of interest*) and the evidence to be provided that will be used for their evaluation.

3.3 Selection criteria

Explain the selection criteria and the evidence to be provided for their evaluation.

 Avoid selection criteria that are based on disproportionate qualification and financial guarantee requirements (*e.g. with regard to references from past customers, references for professional or technical qualifications and minimum turnover*).

3.4 Award criteria

Explain that there are 2 types of award criteria (on/off criteria and weighted criteria).

On/off award criteria

Explain that these are criteria that can only have value 0 or 1 and the score of the other award criteria must be multiplied by this value (so that the total score becomes 0 if a tender scores 0 on an on-off award criterion).

List the on/off criteria (*e.g. ethics and security requirements from the HE grant agreement; conditions for conformance testing/certification/quality labelling (if part of the tender evaluation, etc)*) and the evidence to be provided.

Do not forget to include the special ethics and, if applicable, security provisions from the HE grant agreement into the PPI contracts.

Do not forget that the Horizon Europe ethics requirements now also include requirements to ensure that the purchase, testing and deployment and/or use of AI is ethical, robust, safe and lawful. In case the innovative solutions that the PPI will procure may involve AI, ensure that you require tenderers to demonstrate in their offer how their solution complies with those requirements, including human oversight, transparency and trustworthiness of the AI is ensured.

You can base your ethics and security requirements for tenderers on the guidance for EU grant beneficiaries (*especially, [How to complete your ethics self-assessment](#) and the [Guidelines on the classification of information in Horizon Europe projects](#) and [Guidance on how to handle security-sensitive projects](#)*). If you re-use text from these documents, don't forget to replace 'grant beneficiaries' by 'contractors' and 'research' by 'innovation' (PPI contracts may not procure R&D).

Require ethics and security authorisations (if any) to be submitted with the tender (or at the latest at the start of the deployment phase).


¹⁵⁸ For more info, see [FAQ explaining the impact of Ukraine related sanctions on Horizon Europe funded projects](#).

Remind them also that the tenders themselves must not contain any EU-classified information and that any security issues must be examined with their national security authorities — before submitting their offer. Contractors may be requested to ensure security clearance.

If conformance testing/certification/quality labelling is part of the tender evaluation, indicate also how this is connected with the procurement need (e.g. to demonstrate compliance with minimum functionality/performance requirement x).

For PPIs that involved security-related goods/services, add the following place of performance requirement, which applies specifically to the work on the security components of the solution: [OPTION for PPIs that involve security-related goods/services: At least [insert the percentage chosen by the buyers group/imposed by the HE call conditions for this PPI; if there are sufficient R&I providers able to do the work in Europe, it is typically set at 100% for security reasons]% of the contracted work on security components of the solution must be performed in [OPTION if there are participation and/or control restrictions in the HE call conditions: [add the list of countries to which participation and/or control is restricted]][OPTION if there are no participation and/or control restrictions in the HE call conditions: [add 'EU Member States or Horizon Europe associated countries']].]

For PPIs with participation and/or control restrictions due to security in the HE call conditions, use the following option: [OPTION if there are participation and/or control restrictions: The contractors must in addition ensure that the performance of the contracts takes place in [add the list of countries to which participation and/or control is restricted] — unless otherwise approved by the granting authority.]

 Check carefully if the call conditions for your HE grant impose specific requirements (e.g. specific minimum percentages for the place of performance requirement, or specific restrictions on the countries in which the contract work must be performed). If yes, they prevail and must be applied. If no, such restrictions should only be used if the buyers group has justified reasons to do so and in agreement with the granting authority.

Weighted award criteria

Explain the award criteria (and sub-criteria and their weightings, where applicable). In case the deployment and operational validation phase may be awarded to different operators, include award criteria for each of the 2 phases (deployment and operational validation).

Specify the formula for calculating the total score.

As Europe is in a twin green and digital transition, pay particular attention to use weighted award criteria that can contribute to speeding up this transition. For example:

X) Environmental impact of the proposed PPI project activities and subsequent solution commercialisation

Do no significant harm principle

Horizon Europe funded PCPs must be compliant with the 'do no significant harm' principle¹⁵⁹ (mandatory minimum requirement):

Explain how your tender ensures compliance with the 'do no significant harm' principle as per Article 17 of the EU Taxonomy Regulation (EU) No [2020/852](#)¹⁶⁰, i.e. is designed in a way that it is not significantly harming any of the six following environmental objectives of the EU Taxonomy Regulation:

- climate change mitigation
- climate change adaptation
- the sustainable use and protection of water and marine resources
- the transition to a circular economy
- pollution prevention and control and
- the protection and restoration of biodiversity and ecosystems.

¹⁵⁹ [Guidance on the application of the 'do no significant harm principle' in Horizon Europe](#)

¹⁶⁰ Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088 (OJ L 198, 22.6.2020, p. 13).

Compliance means that the proposed activities must not support or carry out activities that do significant harm to any of the six above objectives. This needs to be assessed both for the activities that are proposed to be carried out during the course of the PPI contracts (for the activities linked to deployment and/or testing of the innovative solutions, as well as for complementary activities such as project management, travel, etc) as well as for the expected life cycle impact of the innovative solution at further/wider commercialization stage.

Compliance of the tender's project methodology with this principle has several benefits. Not only will it enable to ensure that the newly developed innovative solution contributes to protecting the environment. It will also help to improve your position on the financial market, increasing your chances to obtain financial investments for your business, including in particular for further development and commercialisation of the innovative solution developed during the PCP. The EU Taxonomy Regulation provides uniform criteria that enable financial investors to determine the degree of environmental sustainability of different economic activities and shift their financial investments towards environmentally sustainable economic activities.

Additional environmental standards

Where possible, PPI procurements should also define additional environmental requirements that go beyond the 'do no significant harm principle' and create positive environmental impacts, in order to contribute to reverse current disastrous trends and/or restore the environment (*e.g. decrease GHG emissions and combat climate change, move to a cleaner mix of energy and resource usage, reduce waste, increase circularity, restore precious ecosystems and their biodiversity, improve the water and air quality etc*).

Define relevant environmental requirements for the PPI and request tenderers to demonstrate how their approach for both the proposed PPI project activities and the subsequent solution commercialisation will result in a positive environmental impact. Make smart use of Green Public Procurement principles¹⁶¹, such as the EU GPP and/or ecodesign criteria, life-cycle costing etc.

Such additional criteria will help to ensure that the PPI is future proof and the resulting solutions will be well positioned to meet both future legislative trends and growing environmental customer demands by the time they will be commercialised on the market.

 Check carefully whether the call conditions for your HE grant contain additional environmental requirements. If so, make sure to include them in this criterion.

Check also broader environmental legislation in the specific field(s) addressed by the PPI (*e.g. transport, energy, construction, etc*). Be aware that the European Green Deal¹⁶² created a wave of new legislative initiatives that have either already or will still come into force over the coming years. Be aware also that there are often even additional national environmental requirements (*e.g. several EU countries have already implemented stricter Green Public Procurement action plans, targets and rules than the European ones*¹⁶³). Your PPI procurement should comply with those.

(Y) Digitalisation

Horizon Europe funded PPIs should embrace and take into account the digital transition. The European Digital Decade policy¹⁶⁴ has set targets for all Member States to reach 100% digitalisation of public services by 2030 and to boost investments in innovative digital solutions to make this happen linked to e.g. robotics, AI/big data, blockchain, digital twins, virtual/augmented reality and the metaverse, quantum computing, advanced semiconductor solutions, digital design and manufacturing. Modernising both manufacturing processes and resulting products with digital technologies can enable the public sector as early adopter of digitally enabled solutions to provide faster, cheaper and higher quality public services to European citizens.

The first report on the status of the Digital Decade calls on Member States to develop action plans in support of innovation procurement and step up efforts to more than double public procurement investments in developing, testing and deploying innovative digital solutions in order to reach full speed adoption of innovative digital solutions in public services¹⁶⁵. There is a need for significantly higher investment in all fields of public sector activity, such as health, public administration, transport,

¹⁶¹ [More info on Green Public Procurement](#)

¹⁶² [More info on the state of play of the European Green Deal](#)

¹⁶³ [GPP National action plans](#) of different European countries

¹⁶⁴ <https://digital-strategy.ec.europa.eu/en/policies/europes-digital-decade>

¹⁶⁵ <https://digital-strategy.ec.europa.eu/en/library/2023-report-state-digital-decade>

security, education and culture, construction, energy, water, and environment. Moreover, a Commission recommendation¹⁶⁶ has identified 10 technology areas as ‘critical’ for the EU’s economic security, meaning areas that require substantial increased investments in Europe: artificial intelligence, robotics and autonomous systems, advanced semiconductors, advanced connectivity and advanced digital technologies, quantum, advanced sensing, space, and energy and biotechnologies, advanced materials, manufacturing and recycling technologies. Clearly, ICT technologies prominently appear as critical for Europe’s economic security.

Therefore, reflect on how you can phrase the technical requirements and the award criteria so that they encourage tenderers to make best use of existing digital technologies and/or to develop and test new digital innovations, in order to deliver the buyers group higher quality and/or lower cost solutions.

When doing so, keep in mind that for procurements that involve certain digital technologies there are either Horizon Europe requirements and/or other relevant EU legislation/EU initiatives that need to be taken into account in the specification of your technical requirements:

Artificial intelligence

Artificial Intelligence can bring enormous benefits to improve the efficiency and effectiveness of public sector processes with intelligent data analysis.

In case the procurement involves artificial intelligence, make sure to follow the [Guidance on ethics by design and ethics of use approaches for AI](#)¹⁴¹ to ensure that the AI is trustworthy, i.e. lawful, ethical and technically robust.

Foresee at least the following minimum criteria: Due diligence is required regarding the trustworthiness of all artificial intelligence-based systems or techniques. AI-based systems or techniques must be developed in a safe, secure and responsible manner, with a clear identification of and preventative approach to risks. To a degree matching the type of risk that the AI application presents¹⁶⁷, AI-based systems or techniques should be, or be developed to become (implicitly or explicitly contributing to one or several of the following objectives):

- technically robust, accurate and reproducible, and able to deal with and inform about possible failures, inaccuracies and errors, proportionate to the assessed risk posed by the AI-based system or technique
- socially robust, in that they duly consider the context and environment in which they operate
- reliable and to function as intended, minimising unintentional and unexpected harm, preventing unacceptable harm and safeguarding the physical and mental integrity of humans
- able to provide a suitable explanation of its decision-making process, whenever an AI-based system can have a significant impact on people’s lives.

Data handling

Regarding data handling, ensure that your procurement is in line with the EU open data strategy¹⁶⁸.

Using publicly available data in procurements and making more data resulting from procurements publicly available is essential to enable new services and applications across Europe. Therefore ensure that you follow the requirements on open data resulting from Horizon Europe and from the EU directives on open data.

For procurements that involve physical products that include software, ensure compliance with the EU Data Act¹⁶⁹ and the right to repair that open possibilities for products to be repaired by third parties.

Make use of and contribute also to the new European data spaces wherever possible. The nine initial Common European data spaces are the following:

¹⁶⁶ Recommendation and Annex respectively: https://defence-industry-space.ec.europa.eu/system/files/2023-10/C_2023_6689_1_EN_ACT_part1_v8.pdf and https://defence-industry-space.ec.europa.eu/system/files/2023-10/C_2023_6689_1_EN_annexe_acte_autonome_part1_v9.pdf

¹⁶⁷ See the European AI act for the different risk levels and the corresponding requirements for each level: <https://digital-strategy.ec.europa.eu/en/policies/european-approach-artificial-intelligence>

¹⁶⁸ <https://digital-strategy.ec.europa.eu/en/policies/strategy-data>

¹⁶⁹ Proposal for a Regulation of the European Parliament and of the Council on harmonised rules on fair access to and use of data ([COM \(2022\)68 final](#)).

- an industrial data space — to support the competitiveness and performance of the EU’s industry
- a Green Deal data space — to use the major potential of data in support of the Green Deal priority actions on issues such as climate change, circular economy, pollution, biodiversity, and deforestation
- a mobility data space — to position Europe at the forefront of the development of an intelligent transport system
- a health data space — essential for advances in preventing, detecting and treating diseases as well as for informed, evidence-based decisions to improve the healthcare systems
- a financial data space — to stimulate innovation, market transparency, sustainable finance, as well as access to finance for European businesses and a more integrated market
- an energy data space — to promote a stronger availability and cross-sector sharing of data, in a customer-centric, secure and trustworthy manner
- an agriculture data space — to enhance the sustainability performance and competitiveness of the agricultural sector through the processing and analysis of data
- data spaces for public administrations — to improve transparency and accountability of public spending and spending quality, fighting corruption, both at EU and national level
- a skills data space — to reduce the skills mismatches between the education and training systems and the labour market needs.

Ensure that your tender requirements are in line with the EU GDPR Regulation¹⁷⁰ to ensure current handling of privacy issues and processing of personal data. Where required by the regulation, the handling of personal data requires consent from the owner of the data, must be restricted in scope and time duration. Align the text here with the detailed contractual provisions for personal data in the contract(s) (*see Appendix 10, Article XX - Processing of personal data*).

If needed, also other security sensitive project data should be restricted geographically, to trusted geographical locations (*e.g. restriction of locating the servers handling the data in EU countries only*). Align the text here with the detailed contractual provisions for security related data in the contract(s) (*see Appendix 10, Article XX – Security related obligations*).

Cybersecurity

With the digitalisation of public services and an increasing dependence on networks, another key concern is to consider security requirements in the procurement of ICT-based solutions, in order to protect essential services and critical infrastructures. Ensure therefore that your tender requirements are compliant with the EU Network Information Security Directive (NIS), where needed. Be aware that the new NIS directive (NIS II) extends the digital security obligations to a wider group of entities, i.e. in addition to entities that were already covered by NIS I (healthcare, energy, water supply, transport, banking and financial market infrastructure, digital infrastructures and digital services) the following new sectors are targeted under NIS II: public administrations, waste management, food, space, postal/courier services, manufacturing of certain critical products such as pharmaceuticals, chemicals.

Note also that, in order to better protect Europe against cyber-attacks, the EU Cyber Resilience Act¹⁷¹ is defining minimum cybersecurity requirements for digital products and the EU has mandated the ENISA Agency to prepare European cybersecurity certification schemes¹⁷² for ICT products, ICT services and ICT processes — with the goal of establishing (and harmonizing) the cybersecurity compliance of these products, services and processes. Currently, ENISA is developing certification schemes for ICT products, cloud services and mobile networks (in particular, 5G). The resulting certificates will be recognised in all EU Member States.

Blockchain

In case your procurement uses blockchain technology, check if it can make use of the European Blockchain Services Infrastructure (EBSI)¹⁷³. EBSI is a European wide infrastructure (covering all EU Member States, Norway and Liechtenstein)

¹⁷⁰ <https://eur-lex.europa.eu/eli/reg/2016/679/oj>

¹⁷¹ <https://digital-strategy.ec.europa.eu/en/library/cyber-resilience-act>

¹⁷² <https://www.enisa.europa.eu/topics/certification>

¹⁷³ <https://digital-strategy.ec.europa.eu/en/policies/european-blockchain-services-infrastructure>

that enables public administrations, and eventually also companies, to provide cross-border blockchain based services across Europe.


Green digital solutions

In case your procurement has a digital elements, check if there are green initiatives in the digital sector in Europe that your tender requirements should align with.

For example, in the context of the EU Green Deal the EU has announced the introduction of Digital Product Passports that will help buyers to verify and follow up the circularity and green claims of the products they buy on the EU market.

The EU has set also objectives to green datacenters, telecommunications and blockchain networks and is strengthening the eco-design criteria and energy labels to reduce the environmental impact of ICT solutions (reducing CO2 emissions, improving energy efficiency, reparability, circularity etc).

The EU is also working together with European Green Digital Coalition to develop methods that can be used by public procurers to measure the net environmental impact of green digital solutions (that can consist of a combination of hardware and software)¹⁷⁴. This effort is expected to feed into the European Commission's planned activities to define additional green public procurement criteria for the ICT sector.

 The weighted award criteria must ensure that the procurer(s) get the best value for money. It is therefore not permitted to use either lowest price as the sole criterion, or highest quality as the sole criterion, without taking price into account. Set the technical quality and price award criteria, weightings and thresholds so as to reward the most economically advantageous tenders. Define the thresholds per criterion and the total threshold. Pay particular attention to the weighting given to price. It should be sufficiently high to avoid this criteria being neutralised in the evaluation. For example, a weighting of less than 20 out of 100 for price is too low for it to have a significant effect on the result.

State clearly whether all the award criteria will be evaluated by examining the written tender or whether some award criteria will be evaluated on the basis of hearings with presentations and/or solutions demonstrations and/or submission of samples to the evaluation committee.

When defining the price criterion, consider to use life-cycle costing and the total cost of ownership to take into account all the benefits and costs of the innovative solutions over the entire life time during which the solution is expected to be used.

If variants are accepted, ensure that the chosen award criteria and the formula can be applied to variants as well as to tenders which are not variants.

If lots or framework contracts are used, indicate the award criteria (and sub-criteria, where applicable) and their weightings for each lot/specific contract.

If framework agreements are used, indicate the award criteria and their weightings for each specific contract. If sub-criteria are to be used for the specific contracts, explain that sub-criteria may be specified in the call-off for each specific contract to formulate more precisely the award criteria for that specific contract. These sub-criteria must not cause substantial modifications to the award criteria for that specific contract.

3.5 Evaluation procedure: Opening of tenders and evaluation


Opening of tenders

Describe the procedure for opening the tenders (*e.g. composition of the opening committee; which points will be checked during the opening of tenders, etc*).

If lots or framework agreements are used, explain differences in the composition of the opening committee or in the procedure for the different call-offs/lots.

Evaluation

Describe the procedure for the evaluation (*e.g. composition of the evaluation committee; tasks; who is involved in the different steps of the procedure; how the committee will work; system for scoring, qualitative appraisal and ranking; feedback to tenderers*).

 For joint PPIs, the buyers group and the lead procurer must evaluate the tenders *jointly* and must make a *joint* award decision. For coordinated PPIs, each procurer carries out an *individual* evaluation and makes an individual award decision for

¹⁷⁴ <https://www.greendigitalcoalition.eu/>

the procurement that he carries out *individually* (based on the same common tender specifications established by all procurers in the buyers group).

Avoid potential conflicts of interest.

Do not forget that — at the end of each tender evaluation (for each lot and call-off, if applicable) — the evaluation documents and information on the winning tender(s) must be submitted as deliverables under the HE grant agreement. They should include: the final scores awarded, a qualitative appraisal per evaluation criterion, minutes of the evaluation meeting and the final ranking list as well as information and abstracts on the winning tenderer(s) (using this [template*](#)).

If lots or framework agreements are used, explain any differences in the composition of the evaluation committee or in the procedure for the different call-offs or lots.

4. Content and format of tenders

4.1 Format

Explain the formal requirements that tenders must meet (including address for submission of the tender; deadline for submission; requirements relating to the presentation of the offer and its packaging, etc).

In case of hearings with presentations/solutions demonstrations/submission of samples to the evaluation committee, specify how and in what form this should be done (and who will bear the costs, liability for damages etc.).

If framework agreements are used, explain that more detailed information about the final layout requirements for the offers for these call-offs will be provided in the call-off.

4.2 Administrative section

Explain the information that must be included in this section of the tender (including the supporting documents to identify the tenderer; supporting documents for exclusion, selection, and award criteria; for joint tenders: the mandate for the lead contractor; specific administrative requirements for variants, e.g. separate envelope, etc).

For PPIs that impose control restrictions based on the HE call conditions, do not forget to include the Annex [xxx] Declaration of ownership and control.

If framework agreements are used, explain that more detailed information for the offers for these call-offs will be provided in the call-offs.

4.3 Technical section

Explain what information the technical section of the tender must include:

Don't forget to require that tenderers:

- indicate if their tender involves ethics/security issues (YES/NO answer)
- include their proposed approach for complying with the do no significant harm principle [and with the gender dimension (if relevant)]
- provide a list of the pre-existing rights (*background*), in order to allow IPR dependencies to be assessed.

If framework agreements are used, explain that more detailed information for the offers for the call-offs will be provided in the call-offs.

4.4 Financial section

Explain what information the financial section of the tender should include.


If framework agreements are used:

- specify differences in the financial part of the offer for the specific contracts (*e.g. if specific contracts are needed for different procurers to address local specificities*)
- explain that more detailed information for the offers for the call-offs will be provided in the call-off.

Unit prices quoted in the tender and the price conditions set out in the framework agreement remain binding for all the call-offs. Where new units/unit prices (*e.g. for new tasks or equipment*) are subsequently added to offers for call-offs, they will become binding for the remaining duration of the framework agreement.

Don't forget to indicate which VAT regime(s) apply. This can differ depending on whether contractors will be paid by the lead procurer (centralised payments in joint PPIs) or by the procurer(s) individually (for the innovative solutions they buy for themselves; decentralised payments in joint or coordinated PPIs).


Remind tenderers that their prices should reflect the distribution of IPR rights and obligations described in the tender documents.

 If there are restrictions on participation/control or place of performance requirements, do not forget to ask tenderers to include a price breakdown that shows which persons/personnel profiles will be performing which type and percentage of work (for security projects, differentiating between security and non-security related work) in which country.

5. Miscellaneous

5.1 Language, unauthorised communications, Q&A, confidentiality, cancellation, appeal procedures

Include provisions on language, confidentiality, cancellation and appeal procedures in compliance with the applicable national law.

 English must be allowed: All the tender documents must be published at least in English. Offers must be accepted in English and communication between the procurer(s) and the tenderers must be enabled at all stages throughout the procurement at least in English.

Other languages are optional (*for example, if certain tasks need to be carried out in cooperation with third parties locally, e.g. for field-testing with end-users who may speak only the local language*).

5.2 Contract implementation

Monitoring

Include provisions on monitoring of contract performance in compliance with the applicable national law.

The procurer(s) are advised to appoint a monitoring team (and appoint a supervisor/main contact for each contractor) that will monitor how well the contractors perform their tasks (with respect to the contractual requirements, targets and milestones) and provide feedback to contractors to improve their performance for the rest of the contract.

Tenderers should be informed about the monitoring requirements (i.e. whether monitoring will take place via physical meetings or remote/online meetings; frequency and scope of the monitoring, *e.g. visits to the procurer(s) site to learn how to fit the innovative solutions into the operational environment, to take stock and update the work plan, to periodically monitor progress on implementing the deliverables, etc*) and the feedback they will get.

Clarify that the contractors must cover their own costs for their participation in monitoring activities.

If lots are used, clarify if and when there will be meetings with contractors from different lots to sort out dependencies and interoperability between lots.

Payments


Include provisions on invoicing and payments in compliance with the applicable national law.

Payments must be made subject to the *satisfactory* completion of the corresponding deliverables and milestones (and not satisfactory delivery may be linked to further consequences, *e.g. fines/penalties/contract termination*).

In case of centralised payment by the lead procurer: one invoice is issued to the lead procurer for the total amount (including VAT); in case of decentralised payments: separate invoices are issued to the procurer(s) for the purchased amount (including VAT).

Consider to include value engineering provisions in the PPI contracts. Value engineering can incentivise contractors to keep improving the quality/cost ratio of their solution after contract award by awarding part of the additional cost savings/quality improvements that are achieved after contract award to the contractors; *see section 2.5.6 and 2.8.2 (G) in [Module 2 of the European Assistance for Innovation Procurement Toolkit](#)*.

Other

 Do not forget that — at the end of each phase/at the end of the action — a summary of the results and conclusions of the project must be submitted as deliverable under the HE grant agreement (using this [template](#)*).

6. Contracts

Depending on the contracting approach (procurement needs, division of responsibilities for contracting, etc), different contracts will be needed (*direct contract, framework contract or framework agreement with specific contracts, lots, etc*).

For joint PPIs, the lead procurer (if it participates) and the member(s) of the buyers group that participate in the PPI contract should be defined collectively as 'procurers'; for coordinated PPIs, there is only one 'procurer' for each contract; groups of tenderers should be defined collectively as 'the contractor'.


If several procurers participate in a contract, a 'lead procurer' must be defined. This should be the lead procurer of the EU grant (if he participates). The lead procurer should centralise the communication channels (i.e. all communications between the parties should go via him).

See Annex 1 for sample clauses.

Appendix 10 PPI Sample contract clauses

SAMPLE CONTRACT CLAUSES

This model is intended to help EU beneficiaries to prepare their PPI contracts. Text in green is meant to indicate instructions or options; text in black is sample text.

 *It is provided for information purposes only and is not intended to replace professional legal advice. It can be used as a starting point, but you remain responsible for your contracts and for adapting them to your situation (including ensuring full compliance with the EU grant requirements and the applicable rules under national law).*

Article XX — Rights and obligations regarding results (foreground), pre-existing rights (background and sideground) and the related rights (including intellectual and industrial property rights)

Include provisions that clarify the rights and obligations related to pre-existing rights (background, sideground) and results (foreground) for:

- *procurer(s)*
- *the contractor and*
- *its subcontractors (if any).*

Do not forget to include the special IPR provisions from the HE grant agreement into the PPI contracts (e.g. EU right to object to transfers or licencing of results; additional exploitation or dissemination obligations, additional control restrictions, access to research data, etc).

In addition to what is listed in this section, you may specify additional intellectual property provisions, provided they:


- *do not conflict with the obligations under the Horizon Europe grant agreement and*
- *help the procurers or the contractor to implement the PPI as well as disseminate and exploit the results.*

XX.1 IPR definitions

Provide IPR definitions, notably for:

- *'Results (i.e. foreground)' means any tangible or intangible output, that is generated in the PPI, whatever its form or nature, whether or not it can be protected. This includes any material, document, technology, solution, data, knowledge or information (foreground material) as well as any rights attached to it, including intellectual property rights ('Rights on results' or 'IPRs attached to the results').*
- *'Rights on results': any rights, including industrial or intellectual property rights on the results. They may consist of rights on newly created materials and rights on pre-existing materials (background rights and sideground rights) that are included in the results. They may consist in a right of ownership, a licence right and/or right of use belonging to the contractor, the creator, the contracting authority, the buyers group or to any other third parties, including subcontractors.*
- *'Background' means any material, document, technology, solution, data, know-how or information (background material) — whatever its form or nature (tangible or intangible), regardless of whether or not it can be protected, including any attached rights such as intellectual property rights ('background IPRs') — that is (1) held prior to the signing of the PPI contract(s), (2) identified by the parties involved in the PPI as background and (3) needed to implement the PPI or exploit the results of the PPI.*
- *'Background rights': any rights, including industrial and intellectual property rights on background. They may consist in a right of ownership, a licence right and/or right of use belonging to the contractor, the creator, the contracting authority, the buyers group or to any other third parties, including subcontractors.*
- *'Sideground' means any material, document, technology, solution, data, know-how or information (sideground material) — whatever its form or nature (tangible or intangible), regardless of whether or not it can be protected, including any attached rights such as intellectual property rights ('sideground IPRs') — that is (1) generated during the timespan of the PPI but not in the PPI and (2) needed to implement the PPI or to exploit the results of the PPI.*

- ‘Sideground rights’: any rights, including industrial and intellectual property rights on sideground material. They may consist in a right of ownership, a licence right and/or right of use belonging to the contractor, the creator, the contracting authority, the buyers group or to any other third parties, including subcontractors.
- ‘Pre-existing material’: any material, document, technology, solution, information, data or know-how, whatever its form or nature, tangible or intangible, regardless of whether or not it can be protected, which exists prior to the contractor using it for the production of a result in the implementation of the [Contract] [Framework Agreement]/[Framework Contract]/[or]/[Specific Contract]. It includes both the background material and the sideground material.
- ‘Pre-existing rights’: any rights, including industrial and intellectual property rights on pre-existing material. It may consist in a right of ownership, a licence right and/or right of use belonging to the contractor, the creator, the contracting authority as well as to any other third parties, including subcontractors. It includes both background rights and sideground rights.
- ‘Fair and reasonable conditions’ means appropriate conditions, including financial terms or royalty-free conditions, taking into account the specific circumstances of the request for access (*for example, the actual or potential value of the results, background or sideground to which access is requested and/or the scope, duration or other characteristics of the exploitation envisaged*).
- ‘Generated in the PPI’ means in the implementation of the activities described in the PPI [Contract] [Framework Agreement]/[Framework Contract]/[or]/[Specific Contracts]
- ‘Not generated in the PPI’ means not generated in the implementation of the activities described in the PPI [Contract] [Framework Agreement]/[Framework Contract]/[or]/[Specific Contracts].

 If you use other definitions (allowed), make sure that they are compatible with your obligations under the HE grant agreement.

Provide for some introductory general provisions that ensure that the contractor is responsible that all IPR provisions are respected in any situation, even in case of changes to the contractor/consortium that may occur during/after the PPI (*e.g. in case of subcontracting, in case of mergers/acquisitions*):

The contractor is responsible for ensuring that all third parties that it collaborates with during and after the [Contract] [Framework Agreement]/[Framework Contract]/[and]/[Specific Contracts] respect all intellectual and industrial property-related obligations towards the contracting authority and the buyers group and must pass on its obligations to those entities.

The contractor must ensure that the rights of the contracting authority and the buyers group under the [Contract] [Framework Agreement]/[Framework Contract]/[and]/[Specific Contracts] are upheld under all circumstances, including in case of a merger, split, takeover or other corporate restructuring.

XX.2 Ownership and protection of results

Provide details on the rights and obligations in relation to ownership and protection of results. Specify:

- who will own the rights on the results, i.e. the IPRs attached to the results generated by the contractor (standard option is that they are owned by the contractor — unless exceptionally in duly justified cases the procurer(s) need to keep ownership of them, *see below*)
- who will own the results themselves that are generated by the contractor (*e.g. products/services deployed, product/service specifications, data models, drawings, source code*).

If IPRs are owned by the contractor, specify:

- that each contractor is responsible for the management (including protection) of its IPRs and bears the costs associated with this
- that the procurer(s) have the right to monitor the management of the IPRs
- that the contractor must inform the procurer(s) (via the lead procurer, if the lead procurer is participating in this particular contract) of results that can be exploited, regardless of whether they can be protected or not, within [insert number] days from when they are generated. The information must include information about the contents of the results, the confirmation by the contractor to protect them and the planned timing for protection
- that if a contractor does not seek protection for results that should be protected, the procurer(s) for which the contractor is deploying solutions have the right to itself protect the results

- if the HE call conditions impose control restrictions due to strategic interests, make sure that the results of the PPI will be protected in such a way that they will be free from such restrictions
- whether the contractor is required to deposit copies of results (*e.g. the source code and product/service specifications*), for example, under an ESCROW agreement designed to guarantee the procurer(s) for which the contractor is deploying solutions continued access to results in the case of financial bankruptcy of the contractor (or any of its subcontractors).

⚠️ If the lead procurer (the contracting authority of the PPI) is also financially investing in the PCP and therefore also wants to receive the same IPR-related rights as the buyers group (*e.g. ownership of some copies of the foreground material, and access and licensing rights to the attached IPR rights*), then the buyers group needs to be defined in such a way that the contracting authority is part of the buyers group.

If IPRs are owned by the procurer(s), specify:

- that the procurer(s) will inform the contractor if the procurer(s) protect results of the PPI, the planned timing, process and scope of the protection.

⚠️ Ownership of IPRs attached to results ('rights to results') generated by contractors should only exceptionally be reserved to the procurer(s) (*e.g. when the contractor is not able to exploit the foreground IPR*).

If the HE call conditions impose control restrictions due to strategic interests, add the following option: *[OPTION for PPIs with control restrictions due to strategic interests in the HE call conditions: The contractor must ensure that the results are not subject to control or other restrictions by a country (or entity from a country) which is not [specify the list of countries in line with the list of eligible countries defined in section 3.1 of the request for tenders] — unless otherwise agreed with the contracting authority.]*

XX.3 Access rights to the results

Provide for the rights and obligations in relation to access to the results. Make sure to specify clearly the access for the procurer(s), the contractor(s), third parties and the EU.

XX.3.1 Access rights to the results for the parties

If IPRs are owned by the contractor, specify:

- which type of access rights the procurer(s) for which the contractor is deploying solutions will have to use the results (standard is license-free rights to use the results)
- what type of licensing rights the procurer(s) for which the contractor is deploying solutions will have with regard to the results (*e.g. licence for their own purposes or for granting non-exclusive licences to third parties allowing them to exploit the results*; standard is non-exclusive licenses to third parties to exploit the results)
- that the contractor may transfer ownership of their results — unless this is prohibited (or restricted) by the security obligations and provided that they ensure that their obligations (in respect of the results) apply to the new owner and that this new owner is obliged to pass them on in any subsequent transfer (*e.g. by including a requirement to do so in their arrangements with the new owner*).

If IPRs are owned by the procurer(s), specify:

- under which conditions the contractors will get access rights to use and commercially exploit their results (standard should be that access under fair and reasonable conditions and on non-exclusive basis; refusal to access is possible only in exceptional duly justified cases).

XX.3.2 Access rights to the results for the EU

The EU has the right to use non-sensitive information relating to the PCP and materials and documents received from the contracting authority and buyers group for policy, information, communication, dissemination and publicity purposes — during the EU grant or afterwards. This concerns notably summaries for publication, as well as any other material, such as pictures or audio-visual material, and other deliverables submitted by the contracting authority and buyers group to the EU, in paper or electronic form.

The right for the EU to use these materials, documents and information is granted in the form of a royalty-free, non-exclusive and irrevocable licence, which includes the following rights:

- (a) use for its own purposes (in particular, making them available to persons working for the EU granting authority or any other EU service (including institutions, bodies, offices, agencies, etc.) or EU Member State institution or body;

copying or reproducing them in whole or in part, in unlimited numbers; and communication through press information services)

- (b) distribution to the public (in particular, publication as hard copies and in electronic or digital format, publication on the internet, as a downloadable or non-downloadable file, broadcasting by any channel, public display or presentation, communicating through press information services, or inclusion in widely accessible databases or indexes)
- (c) editing or redrafting (including shortening, summarising, inserting other elements (e.g. meta-data, legends, other graphic, visual, audio or text elements), extracting parts (e.g. audio or video files), dividing into parts, use in a compilation)
- (d) translation
- (e) storage in paper, electronic or other form
- (f) archiving, in line with applicable document-management rules
- (g) the right to authorise third parties to act on its behalf or sub-license to third parties the modes of use set out in Points (b), (c), (d) and (f), if needed for the information, communication and publicity activity of the granting authority and
- (h) processing, analysing, aggregating the materials, documents and information received and producing derivative works.

The rights of use are granted for the whole duration of the industrial or intellectual property rights concerned.

If materials or documents are subject to moral rights or third party rights (including intellectual property rights or rights of natural persons on their image and voice), the contractor must ensure that they comply with their obligations under this [Contract] [Framework Agreement]/[Framework Contract]/[and]/[Specific Contracts] (Articles XX.X and XX.X on pre-existing rights) in particular, by obtaining the necessary licences and authorisations from the rights holders concerned.

Where applicable, the EU granting authority will insert the following information: “© – [year] – [name of the copyright owner]. All rights reserved. Licensed to the EU under conditions.”

XX.3.3 Access rights to the results for third parties

Don't forget to foresee rules that define rights and obligations for third parties to access the results.

XX.4 Commercial exploitation of the results

Specify what are the rights and obligations of the procurer(s) versus the contractor(s) in the commercial exploitation of the results.

XX.4.1 Responsibility to commercially exploit the results

Specify who has the responsibility to commercially exploit the results (the contractor(s) or the procurer(s)).

If the contractor is given the responsibility to exploit the results, define the period within which this is expected to be done. Specify also that if he fails to commercially exploit the results within that period and the circumstances of the case show that the contractor has not used its best efforts to do so, the buyers group has the right to require that the contractor transfers the ownership of the results to them so that the buyers group can ensure that the results are commercially exploited.

XX.4.2 Additional obligations/limitations for the exploitation of results due to public interests

Specify any aspects that need to be taken into account to ensure that results are commercially exploited in line with public interests. Depending on who commercialises results (the contractor and/or the procurer(s)), explain what is the impact on the other party if one needs to take actions to ensure alignment with the public interest:

Security or strategic autonomy

[OPTION when safeguarding of EU security interests is important, in particular when the PPI involves security related testing/deployment and/or when the HE call conditions impose specific additional security obligations: In order to [explain the reason, e.g. safeguard the delivery of public services through the buyers group's infrastructure against potential physical and cyber threats and to protect the exchange of security sensitive information], the [procurer(s)]/[contractor] shall ensure to safeguard EU security interests in the commercial exploitation of the results.]

[OPTION when safeguarding of EU strategic autonomy is important, in particular when the PPI involves critical technologies or critical assets, and/or when the HE call conditions impose specific additional EU strategic autonomy obligations: In order to safeguard security of supply of inputs critical to the functioning of the buyers group's infrastructure and fair competition in

the supply chain compliant with EU rules and interests, [the contractor]/[the procurer(s)] shall ensure to safeguard EU strategic autonomy in the commercial exploitation of the results. For this purpose, the [contractor]/[procurer(s)] shall ensure that a significant amount of the commercial exploitation of the results takes place in the EU Member States and/or countries associated to Horizon Europe¹⁷⁵. In particular, the [contractor]/[procurer(s)] or providers appointed by the procurer(s) must produce minimum [enter a reasonable percentage, e.g. 50%] of the products, services or processes that incorporate results or that are produced through the use of results in [specify the list of countries in line with the list of eligible countries defined in section 3.1 of the request for tenders].

[additional OPTION for PPIs that involve security-related goods/services: Moreover, for results that are security components, the contractor must moreover produce [enter a reasonable (typically more demanding percentage than the one in the previous paragraph), e.g. 100%] in [OPTION if there are participation and/or control restrictions in the HE call conditions: [add the list of countries to which participation and/or control is restricted]]/[OPTION if there are no participation and/or control restrictions in the HE call conditions: [add 'EU Member States or Horizon Europe associated countries']].]

[additional OPTION when EU security and/or strategic autonomy interests need safeguarding, in particular when imposed by the HE call conditions: The [contractor]/[procurer(s)] must ensure that, in the commercial exploitation of results, any cooperation with entities established in other countries, or controlled by such countries or entities from such countries, does not affect the EU security or strategic autonomy interests and avoids potential negative effects over security of supply of inputs critical to the functioning of the buyers group's infrastructure.]]

Standardisation

[OPTION if there are additional obligations related to standardisation in the HE call conditions: The [contractor]/[procurer(s)] must promote the dissemination of their results, in particular through [publications and] contribution to standardisation. The [contractor]/[procurer(s)] and the contracting authority will establish at the start of the [Contract] [Framework Agreement]/[Framework Contract] a list of [planned publications about the results and] appropriate standards to contribute to, and will keep this list updated throughout the [Contract] [Framework Agreement]/[Framework Contract]/[and for each Specific Contract]. The [contractor]/[procurer(s)] must — up to four years after the end of the [Contract] [Framework Agreement]/[Framework Contract]/[and]/[Specific Contracts] — inform the contracting authority, who will inform in its turn the granting authority that is co-financing the PPI, if the results could reasonably be expected to contribute to European or international standards.]

Public emergency

[OPTION if there are additional exploitation obligations in case of a public emergency in the HE call conditions: In case of a public emergency the [procurer(s)] must if requested by the EU] [contractor(s)] must, if requested by the contracting authority on behalf of the buyers group or the EU], commit to rapidly and broadly exploit the products and/or services resulting from the PPI at fair and reasonable conditions to address the public emergency. This provision applies up to four years after the end of the PPI.]

Other

Where the HE call conditions impose additional exploitation obligations, add them here.

If the commercial exploitation of results is done by the contractor and he uses the results to the detriment of the public interest *[OPTION when EU security and/or strategic autonomy interests need safeguarding, in particular when imposed by the HE call conditions:], including EU strategic autonomy or security interests], the members of the buyers group are entitled to require that the contractor transfers the ownership of the results to them, in order to stop use of the results against the public interest and ensure commercial exploitation of the results by another party in line with the exploitation conditions. The contractor must ensure that these obligations also apply to its subcontractors, affiliated entities and other third parties it cooperates with in the commercialisation of the results, as well as to any entities succeeding them in their ownership or development of the results.*

XX.4.3 Obligation to notify a planned merger or acquisition

In case commercial exploitation of results is done by the contractor, explain what the contractor needs to do in case of a merger or acquisition, in order to ensure that commercialisation of results does not negatively impact the access rights of the procurer(s) to the results nor the alignment with public interests in the commercialisation of results.

¹⁷⁵ [List of Horizon Europe participating countries.](#)

XX.5 Transfer and licensing of results

Provide for the rights and obligations in relation to transfer and licensing of results. Specify:

- that either party (contractor and the procurer(s)) may grant non-exclusive licences to third parties allowing them to exploit the results (or otherwise give the right to exploit them) — unless this impedes the access rights of the other party or unless the HE call conditions impose restrictions to a specific list of eligible countries
- that either party (contractor and the procurer(s)) may transfer ownership of or give exclusive licenses to its results — unless this is prohibited (or restricted) by the HE call conditions or the ethics, security or EU strategic autonomy obligations and provided that it ensures that its obligations (in respect of the results) apply to the new owner and that this new owner is obliged to pass them on in any subsequent transfer (e.g. by including a requirement to do so in their arrangements with the new owner).

For results that are owned by the contractor, you may foresee a right of first refusal for the buyers group to buy the results. You should also foresee a procedure for transfers when either party still has (or may still request) access rights to the results owned by the other party (e.g. that the contractor must give the procurer(s) at least 45 days advance notice of its intention to transfer ownership of the results and that this notification must include sufficient information on the new owner to enable the procurer(s) to assess the effects on their access rights. A procurer can object within 30 days of receiving notification, if it can show that the transfer would adversely affect its access rights. Should an objection be raised, the transfer may not take place until agreement has been reached between the parties concerned).

XX.5.1 Non-exclusive licensing of results

[OPTION 1 by default (no restrictions): Either party may on its own initiative without prior authorisation from the other party, give non-exclusive licenses to third parties to exploit the results that it owns, to the extent that:

- such licenses do not affect the rights — including the access rights — of the other party or the EU related to the results, and
- such licenses do not affect the obligations — including the security and ethical obligations — of the other party to such results, and
- such licenses are not granted to entities which are subject to [EU restrictive measures](#) under Article 29 of the Treaty on the European Union (TEU) and Article 215 of the Treaty on the Functioning of the EU (TFEU)¹⁷⁶ (sanctions).

The party must ensure in the licensing agreement that all its obligations under the *[Contract] [Framework Agreement]/[Framework Contract]/[and]/[Specific Contracts]* are passed on to the third party and that the third party has the obligation to pass on these obligations in any potential subsequent licensing.]

[OPTION if there are participation and/or control restrictions in the HE call conditions: Non-exclusive licensing is subject to the same restrictions as exclusively licensing of results, as specified in Article [XX.7.2.](#)]

XX.5.2 Exclusive licensing and transfer of ownership of results

Conditions

Exclusive licensing and transfers of ownership of the results are restricted as follows:

- either party may not transfer or give exclusive licenses if this would affect the rights — including the access rights — of the other party or the EU related to the results
- either party may not transfer or give exclusive licenses if this would affect the obligations — including the security and ethical obligations — of the other party related to the results
- either party may not transfer or give exclusive licenses entities that are subject to [EU restrictive measures](#) under Article 29 of the Treaty on the European Union (TEU) and Article 215 of the Treaty on the Functioning of the EU (TFEU)¹⁷⁷ (sanctions)
- *[OPTION if the HE call conditions include a right for the EU to object to transfers or licensing:* either party may not transfer ownership of its results or give licences to third parties which are established in a non-EU country not

¹⁷⁶ Please note that the EU Official Journal contains the official list and, in case of conflict, its content prevails over that of the [EU Sanctions Map](#).

¹⁷⁷ Please note that the EU Official Journal contains the official list and, in case of conflict, its content prevails over that of the [EU Sanctions Map](#).

associated with Horizon Europe if the EU granting authority objects to the transfer; the notification procedure below must be followed)

- *[OPTION if there are participation and/or control restrictions in the HE call conditions:* either party may not transfer ownership of its results or give licences to third parties which are established in countries which are not [include the list of eligible countries set out in section 3.1 of the request for tenders] (or, if applicable, are controlled by such countries or entities from such countries) — unless they have requested and received prior approval from the EU granting authority; the notification procedure below applies]
- *[OPTION in case there is a right of first refusal for the buyers group:* the contractor may not transfer ownership or the results or give exclusive licenses, if this would conflict with the right of first refusal for the buyers group to buy the results. [explain further what is the exact procedure for the buyers group to invoke the right of first refusal].]

Either party must ensure in the transfer/licensing agreement that all its obligations under this [Contract] [Framework Agreement]/[Framework Contract]/[and]/[Specific Contracts] are passed on to the new owner/licensee and that this new owner/licensee has the obligation to pass them on in any subsequent transfer/ licensing.

Notification procedure

If a party intends to transfer or grant a licence to a third party in one of the notification cases listed above, [the contractor wishing to implement exclusive transfer/licensing must notify the contracting authority who will request prior authorisation to the EU]/[the procurer(s) wishing to implementing exclusive transfer/licensing will request prior authorisation to the EU].

The notification must be done at least [specify an appropriate period, e.g. three months] in advance and:

- identify the specific results concerned
- describe in detail the intended new owner or licensee and the planned or potential exploitation of the results and
- include a reasoned assessment of the likely impact of the intended transfer or exclusive license on:
 - the access rights to the results and on the background and sideground that is essential for accessing the results as foreseen by the [Contract] [Framework Agreement]/[Framework Contract]/[and]/[Specific Contracts] for the contracting authority, the members of the buyers group or for third parties
 - the commercialisation exploitation of the results in line with public interests and EU interests, in particular regarding competitiveness *[OPTION when safeguarding of EU strategic autonomy interests is important for the buyers group, in particular when the PPI involves security-related goods/services and/or when the HE call conditions impose specific additional security obligations:* and EU strategic autonomy objectives as specified in Article XX.5] as well as consistency with ethical principles and security considerations on EU interests.

The [contracting authority may on behalf of the EU granting authority request the contractor]/[EU granting authority may request the contracting authority] for additional information to verify the potential impact of the intended transfer/licensing, upon which the [contractor]/[contracting authority] must promptly provide the requested information.

Before granting the authorisation, the EU granting authority will verify the potential impact of the intended transfer or exclusive licensing.

The EU granting authority may object to the transfer or exclusive licensing or may condition its authorisation to measures ensuring that the transfer or exclusive licensing will not have unintended or undesirable consequences.

Before the EU granting authority gives its written authorisation, the transfer or licensing may not take place and any transfer or exclusive licensing agreement concluded before or without a written authorisation will be null and void.

XX.6 Pre-existing materials and pre-existing rights (background and sideground)

Provide for the rights and obligations concerning pre-existing materials and rights (background and sideground). Specify:

- rules regarding ownership of pre-existing rights (standard is that they remain unchanged, except in exceptional duly justified cases)
- that the parties must inform each other about the generation of/changes in pre-existing rights within [insert number] days from the generation /change
- that each party (contractor or procurer(s)) introducing background must within [define period e.g. 2 weeks] of the signing of the PPI contract(s) provide the other party with a list of the pre-existing rights it holds and/or has access to (e.g. via its subcontractors) and a list of the software necessary for the operation of the products/services that will be deployed during the PPI, specifying which software is closed source software

- the access that the parties must grant each other to each other’s pre-existing rights for carrying out the tasks assigned to them in the PPI, for exploitation of results generated in the PPI and for using the results for their own purposes (standard is access rights at least for the procurer(s) for which the contractor is deploying solutions)

The conditions for access should be fair and reasonable to all parties, e.g. — as appropriate for your PPI —:

- on a royalty-free, non-exclusive basis, access to each other’s background, for carrying out the tasks assigned to them in/during the PPI
- under fair and reasonable conditions and on non-exclusive basis, access to each other’s background, for exploitation of results generated in the PPI and for using the results for their own purposes in particular also after the PPI
- under fair and reasonable conditions and on non-exclusive basis, access to each other’s sideground, for carrying out the tasks assigned to them in the PPI, for exploitation of results generated in the PPI and for using the results for their own purposes in particular also after the PPI.

Make sure you implement — if applicable — any control obligations imposed by the HE call conditions for your grant, e.g.:

Subject to pre-existing obligations that may apply to background or sideground, the contractor also grants rights to use its background and sideground — under the same conditions as above — to entities that are under the direct or indirect control of procurers of the buyers group, or under the same direct or indirect control as procurers of the buyers group, or directly or indirectly controlling procurers of the buyers group *[OPTION for PPIs with control restrictions in the HE call conditions; subject to applicable control restrictions]*.

[OPTION for PPIs with control restrictions due to strategic interests in the HE call conditions: The contractor must ensure that background that is subject to control or other restrictions by a country (or entity from a country) which is not one of the eligible countries set out in section 3.1 of the request for tenders and that impact the exploitation of the results (i.e. would make the exploitation of the results subject to control or restrictions) must not be used and must be explicitly excluded from the list of pre-existing rights agreed between the contractor and the contracting authority that will be used for the PPI — unless otherwise agreed with the contracting authority.]

Note that background that impacts the exploitation of results should be understood as making the exploitation of those results subject to control or restrictions, for example if exploitation would require the agreement of the entity owning the background. If such background needs to be used this must be agreed with the granting authority.

If framework agreements are used, an updated list of pre-existing rights must be provided with each call-off (if needed).

Third parties providing in-kind contributions to the PPI and preferred partners should be covered in the Article on participation of preferred partners and third parties providing in-kind contributions.

Article XX — Confidentiality

The parties shall keep confidential any data, documents or other material (in any form) that is identified as confidential at the time it is disclosed. This applies during the implementation of the *[Contract]/[Framework Agreement]/[Framework Contract]/[and]/[Specific Contracts]* and up to *[insert number of years (minimum 4 years after the end of the Horizon Europe grant)]* years after their end.

If information has been identified as confidential only orally, it shall be considered to be confidential only if this is confirmed in writing within 15 days of the oral disclosure.

Unless otherwise agreed between the parties, they may use confidential information only to implement the *[Contract]/[Framework Agreement]/[Framework Contract]/[and]/[Specific Contracts]*.

The parties may disclose confidential information to their staff or to third parties involved in the PPI implementation only if:

- they need to be aware of this information in order to implement the PPI activities under the *[Contract]/[Framework Agreement]/[Framework Contract]/[and]/[Specific Contracts]* and
- they are bound by an obligation of confidentiality.

The *[procurers]/[procurer]* may disclose confidential information to the EU granting authority if required under their Horizon Europe grant agreement.

The confidentiality obligations cease to apply if:

- the disclosing party agrees to release the other party from the obligation

- (b) the information becomes generally and publicly available, without breaching any confidentiality obligation or
- (c) the disclosure of the information is required by EU or national law.

This does not change the security obligations, which still apply. Stricter confidentiality obligations apply for information that is EU-classified or subject to a security recommendation.

 If the duration of the Horizon Europe grant agreement is longer than foreseen (i.e. if the action duration is extended), you must also extend the confidentiality obligation for the PPI contract(s) (via an amendment).

Article XX — Promotion, publicity, communication

XX.1 Dissemination obligations

The contractor shall undertake communication activities to create publicity about its participation to the procurement, and to promote the objectives and the results of the PPI (in particular, to other potential customers with the objective to achieve wider commercial exploitation of the results).

When undertaking these activities, the contractor shall ensure that they do not infringe any of its other obligations under this *[Contract] [Framework Agreement]/[Framework Contract]/or/a Specific Contract*, such as its obligations regarding protection of intellectual property, confidentiality, security restrictions or its obligations under data protection legislation. *Where the buyers group or HE call conditions impose additional dissemination obligations (e.g. open access obligations) on the PPI contractors for the results of the PPI, add them here.*

XX.2 Obligation of prior notification of the contracting authority

During the implementation of the *[Contract] [Framework Agreement]/[Framework Contract]/and/[Specific Contracts]* and for a period of *[insert number] [years]/[months]* after the end of the *[Contract] [Framework Agreement]/[Framework Contract]/and/[Specific Contracts]*, the contractor shall inform the *[lead procurer]/[procurer]* *[indicate number]* days in advance of any (written or oral) publication or any other type of communication (in any media or form) relating to the services or results. Information on communication activities expected to have a major media impact shall be provided sufficiently in advance to allow the *[procurers]/[procurer]* to inform the EU.

The contractor must, in particular, submit a draft copy of any publications:

- for written publications, at the same time as the submission to the editor for publication or at least one month before the date intended for publication, whichever is earlier
- for oral communications or other types of disclosure, twenty calendar days before the forecasted date of submission to the organiser of a scientific meeting or of said other type of disclosure.

If requested by the contracting authority, the contractor shall remove any confidential or security sensitive information before the disclosure.

Both parties agree that they will balance any of their requests to remove confidentiality, security or intellectual property-sensitive aspects from a publication proposed by the other party against the other party's objective to maintain sufficient information related to the performance of the *[Contract] [Framework Agreement]/[Framework Contract]/and/[Specific Contracts]* or the results that is necessary for the appropriate presentation or understanding of the publication.

XX.3 Recognition of EU funding

All communication activities about the PPI and/or its results (including in electronic form and via social media), as well as infrastructure, equipment and major results financed by the PPI shall display the EU emblem and include the following text:

- for communication activities: 'This *[communication]**[publication]* is part of the *[acronym of the HE grant]* project that has received funding from the European Union's Horizon Europe Research and Innovation Programme'
- for infrastructure, equipment and major results: 'This *[infrastructure]**[equipment]**[insert type of result]* is part of the *[acronym of HE grant]* project that has received funding from the European Union's Horizon Europe Research and Innovation Programme'.

If results are incorporated in a standard, the contractor must — unless the contracting authority requests or agrees otherwise in writing or unless it is impossible — ask the standardisation body to include the following statement in (information related to) the standard: 'Funded by the European Union'.

If results are protected through registered IPR, the contractor must — wherever possible under the applicable rules — include in its applications for protection the following statement: ‘These results were achieved with EU support. The European Union has certain rights in these results’.

When displayed together with another logo, the EU emblem shall have appropriate prominence. The contractor may use the EU emblem without first obtaining approval from the EU. This does not, however, give the contractor the right to exclusive use. Moreover, the contractor may not appropriate the EU emblem or any similar trademark or logo, either by registration or by any other means.

All communication activities shall indicate that the opinions expressed reflect only the author’s views and do not represent the contracting authority’s or the EU’s official position. The contracting authority, in agreement with the EU granting authority, may waive this obligation in writing or provide the text of the disclaimer.

XX.4 Communication/publication rights for the procurers

The [procurers]/[procurement] may use, for the purposes of communication and publicity, all information relating to the PPI, documents (notably summaries) and deliverables, and any other material (such as pictures or audiovisual material) from the contractor (including in electronic form).

The [procurers]/[procurement] may, in particular, publish the names of the contractor and its project abstracts, the summaries of the main results from the PPI and the lessons learnt during the PPI (*e.g. relating to the feasibility of the delivered innovative solutions to meeting the procurers’ requirements, and the lessons learnt for potential future use of the solutions proposed*). This does not change the confidentiality obligations under Article XX.

Moreover, before publishing this information, the [procurers]/[procurement] shall consult the contractor, in order to avoid harm to legitimate business interests (*e.g. regarding aspects of the solutions that could be IPR-protected*) or distortion of competition.

XX.5 Communication/publication rights for the EU

The EU may use, for the purposes of communication and publicity, information relating to the PPI, documents (notably summaries) and deliverables, and any other material (such as pictures or audiovisual material) from the contractor (including in electronic form).

If the EU’s use of these materials, documents or information would risk compromising legitimate interests, the contractor may, however, ask the [lead procurer]/[procurement] to request the EU not to use it.

The right to use the contractor’s materials, documents and information includes:

- (a) use for its own purposes (in particular, making them available to persons working for the EU granting authority or any other EU service (including institutions, bodies, offices, agencies, etc.) or EU Member State institution or body; copying or reproducing them in whole or in part, in unlimited numbers; and communication through press information services)
- (b) distribution to the public (in particular, publication as hard copies and in electronic or digital format, publication on the internet, as a downloadable or non-downloadable file, broadcasting by any channel, public display or presentation, communicating through press information services, or inclusion in widely accessible databases or indexes)
- (c) editing or redrafting (including shortening, summarising, inserting other elements (e.g. meta-data, legends, other graphic, visual, audio or text elements), extracting parts (e.g. audio or video files), dividing into parts, use in a compilation)
- (d) translation
- (e) storage in paper, electronic or other form
- (f) archiving, in line with applicable document-management rules
- (g) the right to authorise third parties to act on its behalf or sub-license to third parties the modes of use set out in Points (b), (c), (d) and (f), if needed for the information, communication and publicity activity of the granting authority and
- (h) processing, analysing, aggregating the materials, documents and information received and producing derivative works.

If the right of use is subject to rights of a third party (including the contractor's staff), the contractor shall ensure that it obtains the necessary approval from the third parties concerned).

Article XX — Conflicts of interest

XX.1 The contractor shall take all measures necessary to prevent a situation arising where the impartial and objective implementation of the [Contract]/Framework Agreement]/Framework Contract]/or]/a Specific Contract] is compromised for reasons involving economic interests, political or national affinity, family, personal life or any other shared interest.

The contractor shall also take all measures necessary to prevent a situation in which its (previous or ongoing) professional activities affect the impartial and objective implementation of the [Contract]/Framework Agreement]/Framework Contract]/or]/a Specific Contract].

XX.2 The contractor shall notify the [lead procurer]/[procurer] without delay of any situation constituting or likely to lead to a conflict of interest (including changes of ownership) and shall immediately take all steps necessary to rectify this situation.

The [lead procurer]/[procurer] may instruct the contractor to take specific measures to remedy the situation.

Article XX — Ethics and integrity

XX.1 The contractor shall carry out the tasks assigned to it in the [Contract]/Framework Agreement]/Framework Contract]/and]/Specific Contracts] in compliance with:

- (a) ethical principles (including the highest standards of integrity) and
- (b) applicable international, EU and national law.

The contractor must commit to and ensure the respect of basic EU values (such as respect for human dignity, freedom, democracy, equality, the rule of law and human rights, including the rights of minorities). The contractor must pay particular attention to the principle of proportionality, the right to privacy, the right to the protection of personal data, the right to the physical and mental integrity of persons, the right to non-discrimination, the need to ensure protection of the environment and high levels of human health protection.

In case the development, deployment and/or use of the PPI solution involves artificial intelligence (AI), the contractor must ensure that the artificial intelligence is trustworthy, i.e. lawful, ethical and technically robust. The artificial intelligence system must preserve and protect the following six general ethical principles based on fundamental rights as enshrined in the Charter of Fundamental Rights of the European Union (EU Charter), and in relevant international human rights law¹⁷⁸:

- respect for human agency: human beings must be respected to make their own decisions and carry out their own actions. Respect for human agency encapsulates three more specific principles, which define fundamental human rights: autonomy, dignity and freedom
- privacy and data governance: people have the right to privacy and data protection and these should be respected at all times
- fairness: people should be given equal rights and opportunities and should not be advantaged or disadvantaged undeservedly
- individual, social and environmental well-being: artificial intelligence systems should contribute to, and not harm, individual, social and environmental wellbeing
- transparency: the purpose, inputs and operations of artificial intelligence programs should be knowable and understandable to its stakeholders
- accountability and oversight: humans should be able to understand, supervise and control the design and operation of AI based systems, and the actors involved in their development or operation should take responsibility for the way that these applications function and for the resulting consequences.

The contractor may not:

- carry out activities in a Member State for an activity which is forbidden in that Member State
- carry out activities in a country inside or outside the EU, if they are prohibited in all EU Member States.

The contractor may not carry out activities which:

¹⁷⁸ For more information, see [Horizon Europe guidance on ethics by design and ethics of use approaches for AI](#).

- (a) aim at human cloning for reproductive purposes
- (b) intend to modify the genetic heritage of human beings in a way which could make such changes heritable (with the exception of research relating to cancer treatment of the gonads) or
- (c) intend to create human embryos solely for the purpose of research or for the purpose of stem cell procurement, including by means of somatic cell nuclear transfer
- (d) lead to the destruction of human embryos (for example, for obtaining stem cells).

The contractor may not carry out activities that do not focus exclusively on civil applications.

The contractor shall respect the fundamental principle of research integrity — as set out in the European Code of Conduct for Research Integrity¹⁷⁹.

This implies compliance with the following essential principles:

- reliability in ensuring the quality of research reflected in the design, the methodology, the analysis and the use of resources
- honesty in developing, undertaking, reviewing, reporting and communicating research in a transparent, fair and unbiased way
- respect for colleagues, research participants, society, ecosystems, cultural heritage and the environment
- accountability for the research from idea to publication, for its management and organisation, for training, supervision and mentoring, and for its wider impacts.

and means that the contractor must ensure that persons carrying out research tasks follow the good research practices and refrain from the research integrity violations described in this Code.

XX.2 Before starting any activity that raises an ethical issue, the contractor shall submit to the [lead procurer]/[procurer] a copy of:

- (a) any ethics committee opinion required under national law and
- (b) any notification or authorisation for activities raising ethical issues required under national law.

[OPTION if the HE grant agreement contains ethics requirements that concern the PPI contract(s): **XX.3** In addition, the contractor shall comply with the following ethics requirements:

- [insert the ethics deliverables from Annex 1 to the HE grant agreement].]

Article XX — Security-related obligations

[OPTION if the contracts involve dual-use goods or dangerous materials or substances: **XX.X** Activities involving dual-use goods or dangerous materials and substances shall comply with applicable EU, national and international law.

Before starting the activity, the contractor shall provide the [lead procurer]/[procurer] with a copy of any export or transfer licences required.]

[OPTION if the HE grant agreement provides for a security classification that affects the PPI contract(s): **XX.X** Classified information shall be treated in accordance with the security aspect letter (SAL) annexed to the HE grant agreement and EU Decision No 2015/544¹⁸⁰ until it is declassified.

Tasks involving classified information may not be subcontracted without prior written approval from the [lead procurer]/[procurer].

The contractor shall inform the [lead procurer]/[procurer] of any changes relating to security and, if necessary, request an amendment.]

[OPTION if the HE grant agreement contains security recommendations restricting disclosure or dissemination that affect the PPI contract(s): **XX.X** The following results may be disclosed or disseminated only if the contractor has first obtained written approval from the [lead procurer]/[procurer]:

¹⁷⁹ European Code of Conduct for Research Integrity of ALLEA (All European Academies).

¹⁸⁰ Commission Decision [2015/444/EC, Euratom](#) of 13 March 2015 on the security rules for protecting EU-classified information.

- [insert the results subject to a security recommendation restricting disclosure or dissemination from Annex 1 to the HE grant agreement].]

[OPTION if the HE grant agreement contains other security recommendations that affect the PPI contract(s): **XX.X** In addition, the contractor shall comply with the following security recommendations:

- [insert the security recommendations from Annex 1 to the HE grant agreement].]

Define the applicable rules regarding location, access and processing of security related data. In case the HE call conditions impose other geographic restrictions (e.g. restrictions on the participation and/or control of contractors to the procurement, place of performance requirements, etc), agree in cooperation with the granting authority how to best ensure consistency of the rules on handling of security related data with those other restrictions.

The localisation of and access to [all security related data handled under the contract] [all data related to contract activities that are performed on the security components of the solution] [...] processed by the contractor shall comply with the following:

- the data shall only be processed within the territory of [the European Union and the Horizon Europe associated countries¹⁸¹] [the European Union][...] and will not leave that territory
- the data shall only be held in data centres located with the territory of [the European Union and the Horizon Europe associated countries] [the European Union][...]
- [no access shall be given to such data outside of [the European Union and the Horizon Europe associated countries] [the European Union][...] or [access to data may be given on a need to know basis only to authorised persons established in a country which has been recognised by the European Commission as providing adequate protection to security related data [as defined in EU Decision No 2015/544] [...]]
- the contractor may not change the location of data processing without the prior written authorisation of the contracting authority.

Article **XX** — Processing of personal data

The contractor shall process personal data in compliance with the applicable EU and national law on data protection, in particular Regulation [2016/679](#)¹⁸² (including as relates to authorisations and notification requirements).

Contractors must ensure that personal data is:

- processed lawfully, fairly and in a transparent manner in relation to the data subjects
- collected for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes
- adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed
- accurate and, where necessary, kept up to date
- kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data is processed and
- processed in a manner that ensures appropriate security of the data.

Define the conditions to be respected regarding location, access and processing of personal data. In case the HE Call conditions impose other geographic restrictions (e.g. restrictions on the participation and/or control of contractors to the procurement, place of performance requirements, etc), agree in cooperation with the granting authority how to best ensure consistency of the rules on handling of personal data with those other restrictions.

The localisation of and access to the personal data processed by the contractor shall comply with the following:

¹⁸¹ [List of Horizon Europe participating countries.](#)

¹⁸² Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC ('GDPR') (OJ L 119, 4.5.2016, p. 1).

- the personal data shall only be processed within the territory of [the European Union and the Horizon Europe associated countries]¹⁸³ [the European Union][...] and will not leave that territory
- the data shall only be held in data centres located with the territory of [the European Union and the Horizon Europe associated countries] [the European Union][...]
- [no access shall be given to such data outside of [the European Union and the Horizon Europe associated countries] [the European Union][...] or [access to data may be given on a need to know basis only to authorised persons established in a country which has been recognised by the European Commission as providing adequate protection to personal data]
- the contractor may not change the location of data processing without the prior written authorisation of the contracting authority
- any transfer of personal data under the [Contract]/[Framework Agreement]/[Framework Contract]/[and]/[Specific Contracts] to third countries or international organisations shall fully comply with the requirements laid down in Chapter V of Regulation (EU) 2016/679.

The contractor may grant its staff access to data only in so far as is strictly necessary for implementing, managing and monitoring the [Contract]/[Framework Agreement]/[Framework Contract]/[and]/[Specific Contracts].

The contractor must inform the staff whose personal data are collected and processed by the [procurers]/[procurer] and/or the EU. For this purpose, the contractor must provide them with the privacy statements of the [procurers]/[procurer] and the EU, before transmitting their data. If explicit prior consent from the data subjects is needed, the contractor must obtain such consent.

Article XX — Obligation to provide information and keep records

XX.1 The contractor must, at any time during the implementation of the [Contract] [Framework Agreement]/[Framework Contract]/[and]/[Specific Contracts] or afterwards, provide any information requested by the [procurers]/[procurer] in relation to the [Contract] [Framework Agreement]/[Framework Contract]/[or]/[a Specific Contract].

XX.2 The contractor must keep, for a period of up to [insert number of years (minimum 5 years after the end of the HE2020 grant agreement)] years after the end of the [Contract] [Framework Agreement]/[Framework Contract]/[and]/[Specific Contracts], records and other supporting documentation relating to their implementation.

This obligation includes records and other supporting documentation on scientific and technical implementation (in line with the accepted standards in the field) and on the price charged and the costs incurred by the contractor.

The contractor must keep the original documents. Digital and digitalised documents are considered originals if they are authorised under national law.

Should there be ongoing checks, reviews, audits, investigations, litigation or other pursuits of claims (including claims by a third party against the procurer(s)), the contractor must keep the records and other supporting documentation until the end of these procedures.

Article XX — EU checks, reviews, audits and investigations

Should the EU (including the European Court of Auditors, the European Public Prosecutor's Office (EPPO) or the European Anti-Fraud Office (OLAF)) decide to carry out a check, review, audit or investigation, the contractor must make available all information, records and other supporting documents relating to the implementation of the [Contract]/[Framework Agreement]/[Framework Contract]/[and]/[Specific Contracts].

Should there be an on-the-spot visit, the contractor must allow access to its premises and must ensure that the information requested is readily available.

Article XX — EU impact evaluation

Should the EU carry out an impact evaluation (of its grant to the [procurers]/[procurer]), the contractor must make available all information, records and other supporting documents relating to the implementation of the [Contract] [Framework Agreement]/[Framework Contract]/[and]/[Specific Contracts].

Article XX — Breach of contract

Set out the consequences in case of breach of contract (in line with the law applicable to the contract).

¹⁸³ [List of Horizon Europe participating countries.](#)

Don't forget provisions on partial/improper implementation of tasks and breach of other obligations.

Include a section on liability for damages:

XX.1 The contractor must compensate the [procurers]/[procurer] if they are held liable by the EU for damage sustained as a result of the implementation of the [Contract] [Framework Agreement]/[Framework Contract]/[or]/[a Specific Contract] (or because it was not implemented properly).

XX.2 The EU cannot be held liable for any damage caused to the contractor or caused by the contractor in connection with the implementation of the [Contract] [Framework Agreement]/[Framework Contract]/[or]/[a Specific Contract].

Set out clear rules for termination of the [Contract] [Framework Agreement]/[Framework Contract]/[and]/[Specific Contracts], reduction or recovery of payments and liquidated damages. Think of including not only such rules for typical breach of contract situations that may occur in any type of procurement, but think also of how to use them for breaches of PPI specific provisions (e.g. breaches of compliance with any applicable place of performance requirements, place of establishment and control requirements, with IPR and commercialisation requirements).

[OPTION in case there are preferred partners and third parties providing in-kind contributions to the PPI: Article **XX** — **Participation of preferred partners and third parties providing in-kind contributions to the PPI**]

Complete as applicable to the specificities of the PPI. Name the preferred partners and third parties providing in-kind contributions to the PPI and explain the boundary conditions for their participation, i.e. the rights and responsibilities under the contract(s).

Pay particular attention to clearly set out the rules for participating in monitoring/evaluation of results, confidentiality, processing of personal data and communication.

Specify also clearly the IPR-related rights (e.g. access rights to results needed to follow the implementation of the PPI) and obligations of preferred partners and third parties providing in-kind contributions to the PPI (e.g. keep confidential information about product implementation details of IPR protected parts of the solution).]

Appendix 11 PPI Contract notice

PPI CONTRACT NOTICE

This template is intended to help EU beneficiaries to prepare their PPI contract notices. Text in green is meant to indicate instructions or options; text in black is sample text.

⚠ *The contract notice is optional for 'limited follow-up PPIs' (i.e. PPIs that are limited to the procurement of a limited set of prototypes and/or test products developed during a preceding PCP funded by FP7, H2020 or HE). Such PPIs can use the negotiated procedure without publication (i.e. not publish a contract notice, but send the request for tenders to at least 3 potential providers, including those that successfully completed the preceding PCP).*

⚠ *This document was designed for joint PPIs' (standard case); for 'coordinated PPIs', please double-check the instructions, to make sure they work.*

The contract notice has to be filled out online on the [TED — tenders electronic daily website](#). Use the English version of the simap standard form that is most appropriate for your type of organisation:

- for lead procurers in the public sector: 'Contract notice'*
- for lead procurers in the utilities sector: 'Contract notice — utilities'*
- for lead procurers in the field of defence and security: 'Contract notice for contracts in the field of defence and security'.*

In addition to English, you may publish the contract notice (or a summary) in any other language(s).

Remember that publication of the contract notice in TED is only a first step. The call for tenders must also be actively promoted and advertised widely to potential tenderers across Europe, using in particular also Horizon Europe Internet sites and HE National Contact Points. Promote it also via large European industry events across Europe, relevant industry initiatives at EU level (e.g. European partnerships, EIPs, PPPs, Horizon Europe Missions), sectorial industry associations and chambers of commerce across Europe (e.g. the Enterprise Europe Network), relevant sectorial and innovation procurement related social media channels. In order to treat all potential tenderers equally, such targeted promotion activities can only start AFTER the publication of the contract notice in TED.

A copy of the draft contract notice must be submitted as a deliverable to the EU granting authority at the latest 30 days before it is sent for publication to the EU Publications Office (see [General Annex H of the Horizon Europe Work Programme](#)).

⚠ *This template is provided for information purposes only and is not intended to replace professional legal advice. It can be used as a starting point, but you remain responsible for your contract notice and for adapting it to your situation (including ensuring full compliance with the EU grant requirements and the applicable rules under national law).*



Supplement to the Official Journal of the European Union

Info and online forms: <http://simap.ted.europa.eu>

Contract notice

Directive 2014/24/EU

Section I: Contracting authority

I.1) Name and addresses ¹ (please identify all contracting authorities responsible for the procedure)

Official name:		National registration number: ²	
Postal address:			
Town:	NUTS code:	Postal code:	Country:
Contact person:			Telephone:
E-mail:			Fax:
Internet address(es) Main address: (URL) Address of the buyer profile: (URL)			

If the lead procurer is responsible for carrying out a joint call for tenders (see I.2.), give the contact details of the lead procurer and all the procurers in the buyers group.

If procurers group carry out individual calls for tenders (*see 1.2.*), each procurer must complete separate contract notices for its own calls and give his own contact details.

In the internet addresses section, give the project website if you do not want to use the general website of the procurer(s) involved. Use the address of the buyer profile of the procurer(s) involved.

I.2) Joint procurement

- | |
|---|
| <input type="checkbox"/> The contract involves joint procurement
In the case of joint procurement involving different countries, state applicable national procurement law:
<input type="checkbox"/> The contract is awarded by a central purchasing body |
|---|

Select 'yes' for the first question ('The contract involves joint procurement'). The EU Public Procurement Directives do not distinguish between joint and coordinated procurements.

Provide the following 2 types of information in the free text field for 'In the case of joint procurement involving different countries, state applicable national procurement law':

- clarify who is responsible for which parts of the procurement procedure

Explain:

for joint PPIs whether:

- the lead procurer is responsible for the whole procurement procedure, i.e. for coordinating the open market consultation, joint tendering, joint evaluation of offers and joint contracting of all PPI contracts

or

- the lead procurer is only responsible for part of the procurement procedure and each procurer in the buyers group is responsible for the rest (e.g. the lead procurer is responsible for coordinating the open market consultation, the joint tendering, the joint evaluation of offers and possibly also the award of a framework contract/agreement, but each procurer in the buyers group is responsible for the specific contracts for the innovative solutions it buys for itself)

for coordinated PPIs whether:

- the lead procurer is responsible for preparing the jointly agreed tender specification and for coordinating a joint open market consultation, but each procurer in the buyers group is responsible for carrying out a separate procurement for the innovative solutions it buys for itself

or

- the lead procurer is responsible for preparing the jointly agreed tender specifications, but each procurer in the buyers group is responsible for carrying out a separate open market consultation and a separate procurement for the innovative solutions it buys for itself

- state the applicable national procurement law(s)

If the lead procurer is responsible for the whole procedure, mention only the national procurement law of the lead procurer. If there are shared responsibilities, mention the national procurement laws of lead procurer and all procurers in the buyers group (and specify that they apply for the stages they are each respectively responsible for).

Only select 'yes' for the second question ('The contract is awarded by a central purchasing body'), if this is the case for your PPI.

I.3) Communication

<input type="radio"/> The procurement documents are available for unrestricted and full direct access, free of charge, at: <i>(URL)</i> <input type="radio"/> Access to the procurement documents is restricted. Further information can be obtained at: <i>(URL)</i>
Additional information can be obtained from <input type="radio"/> the abovementioned address <input type="radio"/> another address: <i>(please provide another address)</i>
Tenders or requests to participate must be submitted <input type="checkbox"/> electronically via: <i>(URL)</i> <input type="radio"/> to the abovementioned address <input type="radio"/> to the following address: <i>(please provide another address)</i>
<input type="checkbox"/> Electronic communication requires the use of tools and devices that are not generally available. Unrestricted and full direct access to these tools and devices is possible, free of charge, at: <i>(URL)</i>

Explain (per lot, in case lots are used):

The procurement will be implemented as follows:

Explain briefly key specificities in how the procurement will be implemented (e.g. in case of a competitive dialogue, indicate how long the dialogue phase will take and how it will be implemented e.g. in how many different stages).

If the market readiness to deliver solutions compliant with the requirements is already established (e.g. via conformance testing/certification/quality labelling before launching the contract notice), explain where interested tenderers can find the results of this exercise.

If the readiness of the market to deliver solutions compliant with the requirements still needs to be established (e.g. via conformance testing/certification/quality labelling as part of the evaluation of offers before contract award), explain that interested tenderers can obtain additional information about the modalities for the required conformance testing/certification/quality labelling in the PPI request for tenders.

Contract implementation will consist of a deployment phase (which is expected to be completed [insert number] months after contract award) and an operational validation phase ([insert a number that reflects an appropriate duration for evaluating the impacts on conversion into permanent service of the solutions] of months — during which the solutions will be evaluated in real-life operational conditions).

Indicate briefly whether the operational evaluation will be done by an independent third party or not and what role the contractors will need to play during the evaluation.

Specify the IPR regime:

[OPTION 1 for PPIs where the IPR stays with the contractors (standard option for HE funded PPIs): The selected operators will retain ownership of the intellectual property rights (IPRs) that they generate in the PPI and will be able to use them to exploit the full market potential of their innovative solutions i.e. beyond this procurement. [The market potential is estimated at [insert available figures about the potential total market size, i.e. beyond this procurement].]

[OPTION 2 for PPIs where the IPR stays with the procurers (exceptional situation for HE funded PPIs): The procurer(s) will retain ownership of the intellectual property rights (IPRs) that the contractors generate in the PPI because [explain briefly the reason why]. However the contractors will be granted access rights and will be able to use them to exploit the market potential of their innovative solutions i.e. beyond this procurement [mention applicable restrictions, if any]. [The market potential is estimated at [insert available figures about the potential total market size, i.e. beyond this procurement].]

Provide any other relevant information. If needed to cope with the character limit in the forms, distribute text also over 'II.1.4) Description of the procurement' and 'II.2.14) Additional information'.

II.2.5) Award criteria

- Criteria below
- Quality criterion – Name: / Weighting: ^{1,2,20}
 - Cost criterion – Name: / Weighting: ^{1,20}
 - Price – Weighting: ²¹
- Price is not the only award criterion and all criteria are stated only in the procurement documents

Select one of the 2 options ('Criteria below' OR 'Price is not the only award criterion and all criteria are stated only in the procurement documents').

If you select the first option ('Criteria below'), you must indicate all the criteria and their weighting.

Note that evaluation of the tenders must be based on best value for money criteria (not just lowest price).

II.2.6) Estimated value

Value excluding VAT: [] Currency: [] [] []
(for framework agreements or dynamic purchasing systems – estimated total maximum value for the entire duration of this lot)

Only fill in if lots are used.

II.2.7) Duration of the contract, framework agreement or dynamic purchasing system

Duration in months: [] or Duration in days: []
or Start: (dd/mm/yyyy) / End: (dd/mm/yyyy)

This contract is subject to renewal yes no Description of renewals:

Enter the duration.

II.2.9) Information about the limits on the number of candidates to be invited (except in open procedures)

Envisaged number of candidates: []
or Envisaged minimum number: [] / Maximum number: ? []
Objective criteria for choosing the limited number of candidates:

Complete as applicable. Avoid conditions that might unduly restrict participation.

II.2.10) Information about variants

Variants will be accepted yes no

Complete as applicable. Consider that accepting variants is an effective way to induce innovation.

II.2.11) Information about options

Options yes no Description of options:

Complete as applicable.

II.2.12) Information about electronic catalogues

Tenders must be presented in the form of electronic catalogues or include an electronic catalogue

Complete as applicable. Avoid conditions that might unduly restrict participation.

II.2.13) Information about European Union funds

The procurement is related to a project and/or programme financed by European Union funds yes no
Identification of the project:

Select 'yes'.

Use this text:

This procurement receives funding from the European Union's Horizon Europe Research and Innovation Programme, under grant agreement No [insert number] – [insert project acronym] (see [insert project website]).

[OPTION if the procurement also receives funding from other EU programmes (i.e. if there are procurers in the buyers group whose financial contribution to the PPI budget is funded by other EU programmes, for example the European Regional and Development Fund (ERDF)): This procurement receives also funding from the [OPTION 1 for EU programmes: European Union's [insert name of EU programme]][OPTION 2 for national programmes co-funded by the EU (e.g. by Regional Funds, Agricultural Funds): [insert name of national programme] co-financed by the European Union]: [insert beneficiary name and grant agreement number and acronym].]

The EU has given a grant for this procurement but is not participating as a contracting authority in the procurement.

Note that it is not allowed for one and the same procurer to receive funding for his part of the PCP budget from different EU programmes (e.g. HE and ERDF). But it is possible for different procurers in the buyers group to receive funding from different EU sources.

II.2.14) Additional information:

[OPTION for all PPIs (except limited follow-up PPIs without open market consultation): Participation in the **open market consultation** that was held as part of the preparation for this procurement is not a prerequisite for submitting a tender. For more information about the open market consultation Q&A, see [insert address].]

Offers may be submitted in English [and [insert additional language(s), if any]]. All communication (before, during and after the procurement) will be made in English [and [add additional language(s), if any]].

More information

See:

- the project website (see [insert address])
- PPIs on the [Europa website](#)

or contact:

- [insert email address or interactive web address].

Provide other additional information (if applicable).

Please ensure that interested operators can ask questions about the procurement and tender documents and give them sufficient time to do so.

Section III: Legal, economic, financial and technical information

III.1) Conditions for participation

III.1.1) Suitability to pursue the professional activity, including requirements relating to enrolment on professional or trade registers

List and brief description of conditions:

Complete if applicable. Avoid conditions that might unduly restrict participation.

You can refer to the tender documents for further information.

III.1.2) Economic and financial standing

Selection criteria as stated in the procurement documents

List and brief description of selection criteria:

Minimum level(s) of standards possibly required: ²

Complete if applicable. Avoid conditions that might unduly restrict participation.

You can refer to the tender documents for further information.

III.1.3) Technical and professional ability

Selection criteria as stated in the procurement documents

List and brief description of selection criteria:

Minimum level(s) of standards possibly required: ²

Complete if applicable. Avoid conditions that might unduly restrict participation.

You can refer to the tender documents for further information.

III.1.5) Information about reserved contracts ²

The contract is reserved to sheltered workshops and economic operators aiming at the social and professional integration of disabled or disadvantaged persons

The execution of the contract is restricted to the framework of sheltered employment programmes

The options for reserved contracts do not apply.

III.2) Conditions related to the contract ²

III.2.1) Information about a particular profession (only for service contracts)

Execution of the service is reserved to a particular profession

Reference to the relevant law, regulation or administrative provision:

Complete if applicable. Avoid conditions that might unduly restrict participation.

III.2.2) Contract performance conditions:

Complete if applicable. Avoid conditions that might unduly restrict participation.

III.2.3) Information about staff responsible for the performance of the contract

Obligation to indicate the names and professional qualifications of the staff assigned to performing the contract

Complete if applicable. Avoid conditions that might unduly restrict participation.

Section IV: Procedure

IV.1) Description

IV.1.1) Type of procedure

Open procedure

Accelerated procedure

Justification:

Restricted procedure

Accelerated procedure

Justification:

Competitive procedure with negotiation

Accelerated procedure

Justification:

Competitive dialogue

Innovation partnership

Indicate the selected procedure.

It is not allowed to use accelerated procedures (the PPI call for tender must remain open for submission of tenders for at least 60 days) nor the innovation partnership procedure (PPI does not cover the procurement of R&D).

IV.1.3) Information about a framework agreement or a dynamic purchasing system

- The procurement involves the establishment of a framework agreement
 - Framework agreement with a single operator
 - Framework agreement with several operators
 Envisaged maximum number of participants to the framework agreement: ² []
- The procurement involves the setting up of a dynamic purchasing system
 - The dynamic purchasing system might be used by additional purchasers

In the case of framework agreements, provide justification for any duration exceeding 4 years:

Complete as applicable.

IV.1.4) Information about reduction of the number of solutions or tenders during negotiation or dialogue

- Recourse to staged procedure to gradually reduce the number of solutions to be discussed or tenders to be negotiated

Complete if applicable (e.g. in case a competitive dialogue is used).

IV.1.5) Information about negotiation (only for competitive procedures with negotiation)

- The contracting authority reserves the right to award the contract on the basis of the initial tenders without conducting negotiations

Complete if applicable.

IV.1.6) Information about electronic auction

- An electronic auction will be used
- Additional information about electronic auction:

Complete if applicable. Avoid conditions that might unduly restrict participation.

IV.1.8) Information about the Government Procurement Agreement (GPA)

The procurement is covered by the Government Procurement Agreement yes no

Select 'yes' if WTO GPA is applicable to the PPI.

Select 'no' if WTO GPA is not applicable to the PPI.

IV.2) Administrative information

IV.2.1) Previous publication concerning this procedure ²

Notice number in the OJ S: [] [] [] [] /S [] [] [] [] [] [] [] [] [] []
 (One of the following: Prior information notice; Notice on a buyer profile)

Provide information on [the PIN announcing the PPI open market consultation and] previous contract award notices (if any).

PIN not applicable for limited follow-up PPIs without PIN or low value PPIs.

Provide information about any other previous publications (if applicable).

IV.2.2) Time limit for receipt of tenders or requests to participate

Date: (dd/mm/yyyy) Local time: (hh:mm)

Enter date and local time.

IV.2.3) Estimated date of dispatch of invitations to tender or to participate to selected candidates ⁴

Date: (dd/mm/yyyy)

Do not fill in, unless a restricted procedure is used.

IV.2.4) Languages in which tenders or requests to participate may be submitted: [] [] ¹

Select at least 'English' and add additional languages, if any.

IV.2.6) Minimum time frame during which the tenderer must maintain the tender

Tender must be valid until: (dd/mm/yyyy)
 or Duration in months: [] (from the date stated for receipt of tender)

Complete as applicable.

IV.2.7) Conditions for opening of tenders

Date: (dd/mm/yyyy) Local time: (hh:mm) Place:
 Information about authorised persons and opening procedure:

Complete as applicable.

Section VI: Complementary information

VI.1) Information about recurrence

This is a recurrent procurement yes no
 Estimated timing for further notices to be published: ²

Complete as applicable.

VI.2) Information about electronic workflows

- | |
|--|
| <input type="checkbox"/> Electronic ordering will be used |
| <input type="checkbox"/> Electronic invoicing will be accepted |
| <input type="checkbox"/> Electronic payment will be used |

Complete as applicable.

VI.3) Additional information: ²

--

Provide any other additional relevant information.

VI.4) Procedures for review

VI.4.1) Review body		
Official name:		
Postal address:		
Town:	Postal code:	Country:
E-mail:		Telephone:
Internet address: (URL)		Fax:

Complete as applicable.

VI.4.2) Body responsible for mediation procedures ²		
Official name:		
Postal address:		
Town:	Postal code:	Country:
E-mail:		Telephone:
Internet address: (URL)		Fax:

Complete as applicable.

VI.4.3) Review procedure
Precise information on deadline(s) for review procedures:

Complete as applicable.

VI.4.4) Service from which information about the review procedure may be obtained ²		
Official name:		
Postal address:		
Town:	Postal code:	Country:
E-mail:		Telephone:
Internet address: (URL)		Fax:

Complete as applicable.

VI.5) Date of dispatch of this notice: (dd/mm/yyyy)

Enter date.

It is the contracting authority's/contracting entity's responsibility to ensure compliance with European Union law and any applicable laws.

¹ please repeat as many times as needed

² if applicable

⁴ if this information is known

²⁰ importance may be given instead of weighting

²¹ importance may be given instead of weighting; if price is the only award criterion, weighting is not used

Appendix 12 PPI Contract award notice

PPI CONTRACT AWARD NOTICE

This template is to help EU beneficiaries to prepare their PPI contract award notices. Text in green is meant to indicate instructions or options; text in black is sample text.

 The contract award notice is mandatory for all types of PPI procurements (including 'limited follow-up PPIs', i.e. PPIs for a limited set of prototypes and/or test products developed during a preceding PCP funded by FP7, H2020 or HE).

 This document was designed for joint PPIs' (standard case); for 'coordinated PPIs', please double-check the instructions, to make sure they work.

The contract award notice has to be filled out and published online on the [TED — tenders electronic daily website](#) within 48 days after conclusion of the contracts (see [EU AGA — Annotated Grant Agreement, art 6.2.D.5](#)).


Use the English version of the simap standard form that is appropriate for your type of organisation:

- for lead procurers in the public sector: 'Contract award notice'
- for lead procurers in the utilities sector: 'Contract award notice — utilities'
- for lead procurers in the field of defence and security: 'Contract award notice for contracts in the field of defence and security'.

In addition to English, you may publish the contract award notice (or a summary) in any other language(s).

If framework agreements are used, verify whether national law requires publishing separate contract award notices for each contract based on the agreement (or grouped notices on a quarterly basis).

A copy of the published contract award notice should be submitted to EU granting authority as part of the deliverables at the end of the tender evaluation (see [General Annex H of the Horizon Europe Work Programme](#)).

 This template is provided for information purposes only and is not intended to replace professional legal advice. It can be used as a starting point, but you remain responsible for your contract award notice and for adapting it to your situation (including ensuring full compliance with the EU grant requirements and the applicable rules under national law).



Supplement to the Official Journal of the European Union

Info and online forms: <http://simap.ted.europa.eu>

Contract award notice Results of the procurement procedure

Directive 2014/24/EU

Section I: Contracting authority

I.1) Name and addresses ¹ (please identify all contracting authorities responsible for the procedure)

Official name:		National registration number: ²	
Postal address:			
Town:	NUTS code:	Postal code:	Country:
Contact person:			Telephone:
E-mail:			Fax:
Internet address(es) Main address: (URL) Address of the buyer profile: (URL)			

If the lead procurer is responsible for awarding contracts (see I.2.), give the contact details of the lead procurer and all the procurers in the buyers group.

If procurers individually award contracts (see I.2.), each procurer must complete separate contract award notices for the contracts it awards itself and give his own contact details.

In the internet addresses section, give the project website if you do not want to use the general website of the procurer(s) involved. Use the address of the buyer profile of the procurer(s) involved.

I.2) Joint procurement

<input type="checkbox"/> The contract involves joint procurement In the case of joint procurement involving different countries, state applicable national procurement law: <input type="checkbox"/> The contract is awarded by a central purchasing body

Select 'yes' for the first question ('The contract involves joint procurement'). The EU public procurement directives do not distinguish between joint and coordinated procurements.

Provide the following 2 types of information in the free text field for 'in the case of joint procurement involving different countries, state applicable national procurement law':

- clarify who is responsible for which parts of the procurement procedure

Explain:

for joint PPIs whether:

- the lead procurer is responsible for the whole procurement procedure, (i.e. for coordinating the open market consultation, joint tendering, joint evaluation of offers and joint contracting of all PPI contracts)
- or
- the lead procurer is only responsible for part of the procurement procedure and each procurer in the buyers group is responsible for the rest (e.g. the lead procurer is responsible for coordinating the open market consultation, the joint tendering, the joint evaluation of offers and possibly also the award of a framework contract/agreement, but each procurer in the buyers group is responsible for the specific contracts for the innovative solutions it buys for itself)

for coordinated PPIs:

- the lead procurer is responsible for preparing the jointly agreed tender specification and for coordinating a joint open market consultation, but each procurer in the buyers group is responsible for carrying out a separate procurement for the innovative solutions it buys for itself
- or
- the lead procurer is responsible for preparing only the jointly agreed tender specifications, but each procurer in the buyers group is responsible for carrying out a separate open market consultation and a separate procurement for the innovative solutions it buys for itself

- state the applicable national procurement law(s)

If the lead procurer is responsible for the whole procedure, mention only the national procurement law of the lead procurer. If there are shared responsibilities, mention the national procurement laws of all lead procurer and all procurers in the buyers group (and specify that they apply for the stages they are each respectively responsible for.

Only select 'yes' for the second question ('The contract is awarded by a central purchasing body'), if this is the case for your PPI.

I.4) Type of the contracting authority

<input type="radio"/> Ministry or any other national or federal authority, including their regional or local subdivisions <input type="radio"/> National or federal agency/office <input type="radio"/> Regional or local authority	<input type="radio"/> Regional or local agency/office <input type="radio"/> Body governed by public law <input type="radio"/> European institution/agency or international organisation <input type="radio"/> Other type:
---	--

This section is to be filled in ONLY if the procurer that awarded the contract(s) covered by the contract award notice (lead procurer or not) is a contracting authority (i.e. NOT a contracting entity).

I.5) Main activity

<input type="radio"/> General public services <input type="radio"/> Defence <input type="radio"/> Public order and safety <input type="radio"/> Environment <input type="radio"/> Economic and financial affairs <input type="radio"/> Health	<input type="radio"/> Housing and community amenities <input type="radio"/> Social protection <input type="radio"/> Recreation, culture and religion <input type="radio"/> Education <input type="radio"/> Other activity:
--	--

Select main activities of the procurer that awarded the contract(s) covered by the contract award notice (lead procurer or not).

Section II: Object

II.1) Scope of the procurement

II.1.1) Title:	Reference number: ²
----------------	--------------------------------

II.2.2) Additional CPV code(s) ²Main CPV code: ¹ [] [] . [] [] . [] [] . [] [] Supplementary CPV code: ^{1,2} [] [] [] []

Only fill in if lots are used. Use the CPV codes for each lot.

II.2.3) Place of performanceNUTS code: ¹ [] [] [] [] [] Main site or place of performance:

Fill out the 'NUTS codes' of the countries of all the procurers that are buying innovative solutions through the PPI.

For the 'main site or place of performance', specify the place of performance requirement(s) and the location(s) for testing:

[OPTION for PPIs that involve security-related goods/services: At least [insert the percentage chosen by the buyers group or imposed by the HE call conditions for this PPI; if there are sufficient providers able to do the work in Europe, it is typically set at 100% for security reasons]% of the contracted work on security components of the solution must be performed in [OPTION if there are participation and/or control restrictions in the HE call conditions: [add the list of countries to which participation and/or control is restricted]] [OPTION if there are no participation and/or control restrictions in the HE call conditions: [add 'EU Member States or Horizon Europe associated countries']]].]

In addition, the contractors must ensure that none the contracted work is performed, in countries or by entities that are subject to [EU restrictive measures](#) under Article 29 of the Treaty on the European Union (TEU) and Article 215 of the Treaty on the Functioning of the EU (TFEU)¹⁸⁵ (sanctions). They must ensure that none of the goods procured or used for the procurement were developed, produced or supplied in countries or by entities that are subject to such restrictive measures.

In case conformance testing/certification/quality labelling is required, include the countries in which this will take place:

[Conformance testing]/[Certification]/[Quality labelling] is expected to take place in the following countries [insert the relevant countries] [additional OPTION for PPIs that involve security related testing as part of a larger international test exercise: and/or as part of large [insert the name of the relevant test exercise e.g. EU MODEX disaster management exercises] exercises in the EU].

II.2.4) Description of the procurement:*(nature and quantity of works, supplies or services or indication of needs and requirements)*

Use this text:

The procurement was announced as a public procurement of innovative solutions [with x lots][with x specific contracts].

A total budget of [enter the total estimated budget for the PPI that was announced in the contract notice] was earmarked for awarding the contracts to [x lots][x specific contracts].

*[OPTION 1 if the procurement is started:**[OPTION if the award of contracts proceeded as planned: Sufficient amount of good quality tenders were received to award the planned amount of contracts [for lot x] (see section V for more information).]**[OPTION if the award of contracts proceeds with less contracts as planned: The PPI is started with fewer contracts than initially planned [for lot x] because [insert reason: e.g. insufficient amount of good quality tenders were received] (see section V for more information).]*

The abstract(s) of the winning tender(s) are available on [insert project website].

The PPI is expected to start in [enter expected start date] and end in [add expected completion date]. Deployment of the innovative solutions is expected to take place between [enter expected start date for deployment, per lot or specific contract if applicable] and [add expected completion date for deployment, per lot or specific contract if applicable]. Evaluation of operating the deployed solutions in real-life operational conditions is expected to take place between [enter expected start date for evaluation, per lot or specific contract if applicable] and [add expected completion date for evaluation, per lot or specific contract if applicable].

Explain any differences in scope per lot.

Explain per lot, if applicable:

The procurement will be implemented as follows.

Explain briefly key specificities in how the procurement will be implemented (e.g. in case of a competitive dialogue, indicate how many economic operators were selected to participate in the dialogue phase, the duration and amount of phases of the dialogue phase).

If conformance testing/certification/quality labelling was required, explain where the results of this exercise can be found. Contract implementation will consist of a deployment phase (which is expected to be completed [insert number] months after contract

¹⁸⁵ Please note that the EU Official Journal contains the official list and, in case of conflict, its content prevails over that of the [EU Sanctions Map](#).

award) and an operational validation phase ([insert a number that reflects an appropriate duration for evaluating the impacts on conversion into permanent service of the solutions] of months — during which the solutions will be evaluated in real-life operational conditions).

Indicate briefly whether this evaluation will be done by an independent third party or not and what role the contractors that will deploy the solutions will need to play during this evaluation period.

Specify the IPR regime: [OPTION for PPIs where the IPR stays with the contractors (standard option for HE funded PPIs): The selected operators will retain ownership of the intellectual property rights (IPRs) that they generate in the PPI and will be able to use them to exploit the full market potential of their innovative solutions i.e. beyond this procurement. [The market potential is estimated at [insert available figures about the potential total market size, i.e. beyond this procurement].]] [OPTION 2 for PPIs where the IPR stays with the procurers (exceptional situation for HE funded PPIs): The procurer(s) will retain ownership of the intellectual property rights (IPRs) that the contractors generate in the PPI because [explain briefly the reason why]. However the contractors will be granted access rights and will be able to use them to exploit the market potential of their innovative solutions i.e. beyond this procurement [mention applicable restrictions, if any]. [The market potential is estimated at [insert available figures about the potential total market size, i.e. beyond this procurement].]]]

[OPTION 2 if the procurement will not be started: [Lot x of] the PPI will not be started because [insert reason: e.g. insufficient amount of good quality tenders were received [for lot x]] (see section V for more information).]

If needed to cope with the character limit in the forms, distribute text also over 'II.1.4) Description of the procurement' and 'II.2.14) Additional information'.

II.2.5) Award criteria <input type="checkbox"/> Quality criterion – Name: / Weighting: ^{1,2,20} <input type="radio"/> Cost criterion – Name: / Weighting: ^{1,20} <input type="radio"/> Price – Weighting: ²¹

Specify the award criteria that were used and their weighting.

II.2.11) Information about options Options <input type="radio"/> yes <input type="radio"/> no Description of options:

Complete as applicable.

II.2.13) Information about European Union funds The procurement is related to a project and/or programme financed by European Union funds <input type="radio"/> yes <input type="radio"/> no Identification of the project:
--

Select 'yes'.

Use this text:

This procurement receives funding from the European Union's Horizon Europe Research and Innovation Programme, under grant agreement No [insert number] — [insert project acronym] (see [insert project website]).

[OPTION if the procurement also receives funding from other EU programmes (i.e. if there are procurers in the buyers group whose financial contribution to the PPI budget is funded by other EU programmes, for example the Regional Development Fund (ERDF)):

The procurement receives also funding from the [OPTION 1 for EU programmes: European Union's [insert name of EU programme]] [OPTION 2 for national programmes co-funded by the EU (e.g. by Regional Funds, Agricultural Funds): [insert name of national programme] co-financed by the European Union]: [insert beneficiary name and grant agreement number and acronym].]

The EU has given a grant for this procurement but is not participating as a contracting authority in the procurement.

Note that it is not allowed for one and the same procurer to receive funding for his part of the PCP budget from different EU programmes (e.g. HE and ERDF). But it is possible for different procurers in the buyers group to receive funding from different EU sources.

II.2.14) Additional information:

Add any other relevant additional information.

Section IV: Procedure

IV.1) Description

IV.1.1) Type of procedure <input type="radio"/> Open procedure <input type="checkbox"/> Accelerated procedure Justification: <input type="radio"/> Restricted procedure <input type="checkbox"/> Accelerated procedure Justification: <input type="radio"/> Competitive procedure with negotiation <input type="checkbox"/> Accelerated procedure Justification: <input type="radio"/> Competitive dialogue <input type="radio"/> Innovation partnership <input type="radio"/> Award of a contract without prior publication of a call for competition in the Official Journal of the European Union in the cases listed below (please complete Annex D1)

Indicate the selected procedure.

It is not allowed to use accelerated procedures (the PPI call for tender must remain open for submission of tenders for at least 60 days) nor the innovation partnership procedure (PPI does not cover the procurement of R&D).

IV.1.3) Information about a framework agreement or a dynamic purchasing system <input type="checkbox"/> The procurement involves the establishment of a framework agreement <input type="checkbox"/> A dynamic purchasing system was set up
--

Complete as applicable.

IV.1.6) Information about electronic auction <input type="checkbox"/> An electronic auction has been used

Complete if applicable.

IV.1.8) Information about the Government Procurement Agreement (GPA) The procurement is covered by the Government Procurement Agreement <input type="radio"/> yes <input type="radio"/> no
--

Select 'yes' if WTO GPA is applicable to the PPI.

Select 'no' if WTO GPA is not applicable to the PPI.

IV.2) Administrative information

IV.2.1) Previous publication concerning this procedure ² Notice number in the OJ S: [] [] [] [] /S [] [] [] [] [] [] [] [] [] [] [] (One of the following: Prior information notice used as a call for competition; Contract notice; Voluntary ex ante transparency notice)
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Provide information on the [PIN announcing the PPI open market consultation,] the PPI contract notice and previous contract award notices (if any). PIN not applicable for limited follow-up PPIs without PIN or low value PPIs.

Provide information about any other previous publications (if applicable).

IV.2.8) Information about termination of dynamic purchasing system <input type="checkbox"/> The notice involves the termination of the dynamic purchasing system published by the above contract notice

Complete as applicable.

IV.2.9) Information about termination of call for competition in the form of a prior information notice <input type="checkbox"/> The contracting authority will not award any further contracts based on the above prior information notice

Do not fill in. This does not concern the termination of a call for competition via a prior information notice.

Section V: Award of contract ¹

This section must be filled out as many times as needed, i.e.

- if lots are used, for every lot and every contractor that was awarded a contract for that lot
- if framework agreements are used, for every contractor that was awarded a framework agreement and specific contracts
- for all the contracts that were awarded and not already announced in previous contract award notices.

Contract No: [] **Lot No:** ²[] **Title:**

A contract/lot is awarded yes no

Complete for every contract/agreement (and every lot and every specific contract, if applicable).

V.1) Information on non-award

The contract/lot is not awarded

No tenders or requests to participate were received or all were rejected

Other reasons (discontinuation of procedure)

Notice reference: [][][][]-[][][][][][]? (year and document number)

Complete as applicable in case of non-award.

V.2) Award of contract

V.2.1) Date of conclusion of the contract: (dd/mm/yyyy)

Enter date.

V.2.2) Information about tenders

Number of tenders received: []

Number of tenders received from SMEs: [] (SME – as defined in Commission Recommendation 2003/361/EC)

Number of tenders received from tenderers from other EU Member States: []

Number of tenders received from tenderers from non-EU Member States: []

Number of tenders received by electronic means: []

The contract has been awarded to a group of economic operators yes no

Complete as applicable (per lot and per specific contract, if applicable).

V.2.3) Name and address of the contractor ¹

Official name:			National registration number: ²
Postal address:			
Town:	NUTS code:	Postal code:	Country:
E-mail:			Telephone:
Internet address: (URL)			Fax:
The contractor is an SME <input type="radio"/> yes <input type="radio"/> no			

Give the name and address of the operator (single operator or consortium) that won the contract in question (per lot and per specific contract, if applicable). In case of a consortium, list all members of the consortium.

V.2.4) Information on value of the contract/lot (excluding VAT)

Initial estimated total value of the contract/lot: ² []

(for framework agreements or dynamic purchasing systems – estimated total maximum value for the entire duration of this lot)

Total value of the contract/lot: []

or

Lowest offer: [] / Highest offer: [] taken into consideration

Currency: [][][]

(for framework agreements – total maximum value for this lot)

(for dynamic purchasing systems – value of contract(s) for this lot not included in previous contract award notices)

(for contracts based on framework agreements, if required – value of contract(s) for this lot not included in previous contract award notices)

Complete as applicable (per lot and per specific contract, if applicable).

V.2.5) Information about subcontracting

The contract is likely to be subcontracted

Value or proportion likely to be subcontracted to third parties ⁴

Value excluding VAT: [] Currency: [][][]

Proportion: []%

Short description of the part of the contract to be subcontracted:

Complete as applicable (per lot and per specific contract, if applicable).

Section VI: Complementary information**VI.3) Additional information:** ²

[]

Complete if applicable.

VI.4) Procedures for review

VI.4.1) Review body		
Official name:		
Postal address:		
Town:	Postal code:	Country:
E-mail:		Telephone:
Internet address: (URL)		Fax:

Complete as applicable.

VI.4.2) Body responsible for mediation procedures ²		
Official name:		
Postal address:		
Town:	Postal code:	Country:
E-mail:		Telephone:
Internet address: (URL)		Fax:

Complete as applicable.

VI.4.3) Review procedure
Precise information on deadline(s) for review procedures:

Complete as applicable.

VI.4.4) Service from which information about the review procedure may be obtained ²		
Official name:		
Postal address:		
Town:	Postal code:	Country:
E-mail:		Telephone:
Internet address: (URL)		Fax:

Complete as applicable.

VI.5) Date of dispatch of this notice: (dd/mm/yyyy)

Enter date.

It is the contracting authority's/contracting entity's responsibility to ensure compliance with European Union law and any applicable laws.

¹ please repeat as many times as needed

² if applicable

⁴ if this information is known

⁷ mandatory information not to be published

²⁰ importance may be given instead of weighting


²¹ importance may be given instead of weighting; if price is the only award criterion, weighting is not used

Annex D1 – General procurement

Justification for the award of the contract without prior publication of a call for competition in the Official Journal of the European Union

Directive 2014/24/EU

(please select the relevant option and provide an explanation)

 Annex D1 should be completed ONLY for limited follow-up PPIs with negotiated procedure (i.e. PPI procurements for a limited set of prototypes and/or test products developed during a preceding PCP funded by FP7, H2020 or HE which opted for a negotiated procedure).

1. Justification for the choice of the negotiated procedure without prior publication of a call for competition in accordance with Article 32 of Directive 2014/24/EU

- No tenders or no suitable tenders/requests to participate in response to
 - open procedure
 - restricted procedure
- The products involved are manufactured purely for the purpose of research, experiment, study or development under the conditions stated in the directive (*for supplies only*)
- The works, supplies or services can be provided only by a particular economic operator for the following reason:
 - absence of competition for technical reasons
 - procurement aiming at the creation or acquisition of a unique work of art or artistic performance
 - protection of exclusive rights, including intellectual property rights
- Extreme urgency brought about by events unforeseeable for the contracting authority and in accordance with the strict conditions stated in the directive
- Additional deliveries by the original supplier ordered under the strict conditions stated in the directive
- New works/services, constituting a repetition of existing works/services and ordered in accordance with the strict conditions stated in the directive
- Service contract to be awarded to the winner or one of winners under the rules of a design contest
- Procurement of supplies quoted and purchased on a commodity market
- Purchase of supplies or services on particularly advantageous terms
 - from a supplier which is definitively winding up its business activities
 - from the liquidator in an insolvency procedure, an arrangement with creditors or a similar procedure under national laws and regulations

Select 'The products involved are manufactured purely for the purpose of research, experiment, study or development under the conditions stated in the directives (for supplies only)'.

2. Other justification for the award of the contract without prior publication of a call for competition in the Official Journal of the European Union

- The procurement falls outside the scope of application of the directive

Do not complete. Not applicable.

3. Explanation

Please explain in a clear and comprehensive manner why the award of the contract without prior publication in the Official Journal of the European Union is lawful, by stating the relevant facts and, as appropriate, the conclusions of law in accordance with the directive: (500 words maximum)

Use this text:

This public procurement of innovative solutions is limited to the procurement of a limited set of /prototypes/ /test products/ developed during the preceding PCP that was funded from the European Union's /Framework Programme 7/ /Horizon 2020/ /Horizon Europe/ Research and Innovation Programme, under grant agreement No [insert number] — [insert project acronym] (see [insert project website]). The publications related to this PCP procedure are [insert the No of the PIN that announced the open market consultation for the PCP, the contract notice and award notice(s) for the PCP].