

PRE-PROCUREMENT- PROCESSES FOR DUMMIES

LESSONS LEARNT DURING
THE CLOUD FOR EUROPE PROJECT



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INTRODUCTION

What is Pre-Commercial Procurement (PCP)?

Pre-Commercial Procurement is a powerful tool for the industry as well as the public sector. It offers an alternative way to obtaining goods or services for a public agency. The main difference to traditional procurement lies in the introduction of research and development phase before buying a commercial solution. So, instead of buying a pig in a poke, public procurers can compare alternatives and filter out the best solutions to address their needs.

- How This Book Is Organized

AN EXAMPLE FOR PCP: THE CLOUD FOR EUROPE-PROJECT

A good example of what a PCPs is for and how it works is the Cloud for Europe-Project. The Project supports public sector cloud use as collaboration between public authorities and industry. The project identifies obstacles, finds innovative solutions and builds trust in European cloud computing. With PCP it identifies innovative solutions for cloud services that best fit public sector needs, but also provides better information to public procurers about the potential of cloud services. Cloud for Europe has been awarded with the National Award for Innovation 2016 of Italy. The project started in June 2013 and ran until June 2017. It is co-funded by the European Commission under the Framework Programme for Research and Innovation (FP7).

PRE-COMMERCIAL PROCUREMENT IN THREE STAGES

Cloud for Europe allows public procurers and private sector organisations to work together and jointly explore innovative solutions. It involves sharing the risks and benefits of developing new products and services until the point of their commercial take-up. Pre-commercial procurement within Cloud for Europe is divided into three stages:

- Phase 1 is solution exploration, which includes an analysis of requirements, a proposal for a solution space in terms of architecture, and first high-level design for open, interoperable cloud services. The consortium will evaluate the results and successful projects will enter phase 2.
- Phase 2 is about specification and prototype implementation, with an aim to demonstrate the feasibility of the proposed solution. Successfully evaluated projects will continue to phase 3.
- Phase 3 will demonstrate the solutions in a test environment, evaluated against performance and interoperability criteria.

CHARACTERISTICS OF PRE-COMMERCIAL PROCUREMENT BY CLOUD FOR EUROPE

With PCP small and medium enterprises (SMEs) get a fair chance to provide services to the public sector, while the public sector can reduce the perceived risks to buy from SMEs. The characteristics of PCP are:

- R&D services
- Framework contract
- Ensure market competition
- Demand side driven approach
- Development in phases
- Contractual arrangements are decided upfront and available to all in advance

CHALLENGES FOR A CLOUD ADOPTION FOR THE PUBLIC SECTOR

- Technical challenges like integration, interoperability, security and organisational gaps.
- Interoperability challenges, like the migration between Clouds, the interoperability between Clouds, various Cloud Standards, the need to avoid service discontinuity and vendor lock-in situations and the possibility of a seamless change of providers e.g. after contract termination.
- Security challenges, such as the protection of safety and privacy, sharing seamlessly and secure beyond EU/EEA, control over access rights and the need for legal certainty on the identification and authentication (eIDAS Regulation) legal barriers in moving to (public) clouds.

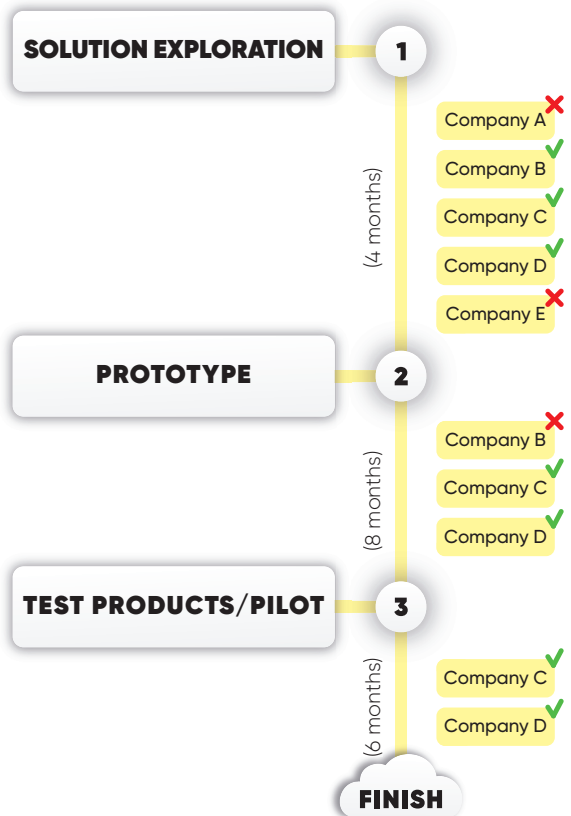
HOW DOES PCB WORK? THE BASICS

A PCP involves several companies competing along the whole path of the PCP. The risks and benefits are shared between the procurers and the suppliers. To facilitate the work a framework contract is put in place, describing the obligation of bidders (R&D services) and of contracting authorities (payment of the agreed price). A PCP has a demand side driven approach (needs and requirements are defined exclusively by the procurer). It is important to retain at least two participating companies until the last phase to ensure a competitive market. Contractual arrangements, rights, and obligations of the parties (including IPRs), are decided upfront and made available to all interested bidders in advance (published in the tender documentation). Thus, a PCP enables procurers to minimize the risk of large deployment contracts by first comparing the pros and cons of competing solution approaches from different suppliers. Still PCPs share not only the risks but also the benefits of R&D between procurers and suppliers.

EXAMPLE PCP OPERATION

A typical PCP operation would look like this:

In this example the lead procurer is an agency for digital Italy (Italian law). In phase 1 (solution exploration) 5 companies start to compete for the best solution. Only three enter the second phase, where the prototype is been developed. Two succeed in delivering a prototype and enter phase 3 to test and pilot the product. A Framework contract is covering all 3 phases.



UNDERSTANDING THE BENEFITS OF PCPS

PCP enables procurers to lower the risk of large deployment contracts:

- by first comparing the pros and cons of competing solution approaches from different suppliers before fixing the requirements/ tender specs for deployment,
- by splitting the R&D in phases with evaluations after each PCP phase that stops further investment in non-viable solutions,
- by sharing the benefits/risks of commercialization/IPRs with the suppliers, and
- by encouraging the development of open interoperable solutions.

From the SMEs point of view Pre-Commercial Procurement increases both the involvement in the tender procedure and the chances of winning contracts.

FOR INDUSTRY

International leadership in new markets

Shorter time to market

Wider market size

Shared risks and benefits

FOR PUBLIC PROCURES

Better quality products at lower price

Opportunity to share development risks with suppliers - license free use for procurers

FOR CITIZENS & POLITICIANS

Quality and efficiency of public services

Highly qualified employment

Attracting foreign investment

Optimising public R&D spending

EXPLORING THE COSTS

- splitting the R&D in phases with evaluations after each PCP phase that stops further investment in non-viable solution approaches,
- sharing the benefits/risks of commercialization/IPRs with the suppliers

INTELLECTUAL PROPERTY RIGHTS (IPRS)

Distribution of rights and obligations related to IPRs shall be specified from the beginning in the tender documents to ensure that offers are comparable, the correct market price is paid and the procurement does not involve illegal State aid.

When the price paid for the PCP is the market price for the R&D services procured under the tendering conditions announced in the call for tender documents, the European Commission does consider PCP not to contain State aid. To ensure that no doubt exists concerning State aid, the correct market price for a PCP where the IPR ownership stays with the PCP supplier should be lower than the price paid for the same R&D service when the procurer obtains the IPR. This can be an ex-ante compensation (price reduction for the R&D) or ex-post compensation (royalties on sales/profits derived from the R&D results from the PCP)

- **IPRs** shall be distributed so to encourage widespread commercialization of results.
- **IPRs** generated by participating company during PCP are assigned to that **company**.
- Contracting Authority has right to:
 - use R&D results for internal purposes, and
 - license or require participating companies to license IPRs to third parties under fair and reasonable market condition,
 - **Call-back provision** if company fails to exploit IPRs within a given timeframe following completion of PCP phases.

CORE JOINT PCP CAPABILITIES

In Joint EU co-funded PCPs, the action shall be carried out as a joint procurement: a single procurement carried out jointly by three or more contracting authorities. There should be only one tender published, and one entity in the consortium awarding the resulting R&D service contracts for all PCP phases, on behalf of all participating public procurers in the consortium. Thus, all participating companies will participate under the same conditions e.g. with regards to taxation, payments, and legal framework for the procurement (legal conditions of the Member State where the PCP call for tender is published).

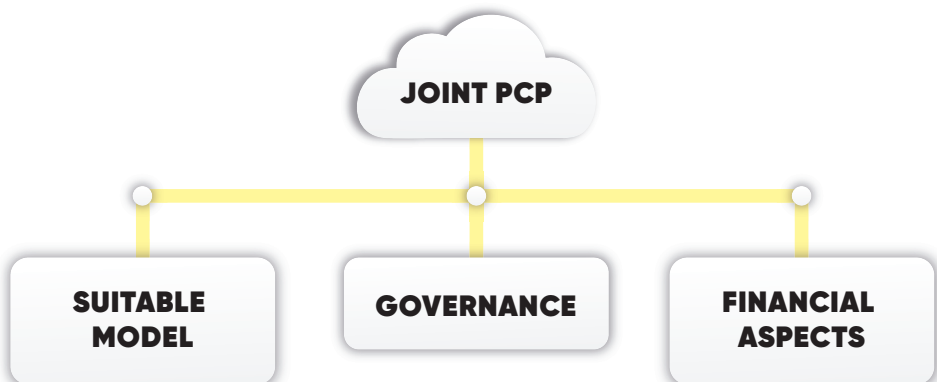
Combining the procurement actions of all the contracting authorities
(at least 3)

Only **one tender** published on behalf of all participating authorities

Only **one entity** awarding the resulting R&D service contracts for all PCP phases on behalf of all participating authorities

VARIATIONS OF JOINT PCP MODELS

Before the publishing of the tender, the project team carried out a long and exhaustive analysis aimed at defining the suitable models for the Joint Pre-Commercial Procurement action. Two models were discussed in detail: “Lead Authority with Joint Framework Contract” and “Common Procuring Entity”.



LEAD AUTHORITY WITH JOINT FRAMEWORK CONTRACT



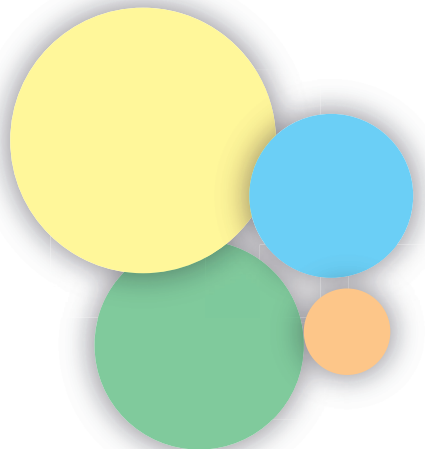
- A group of public purchasing authorities collaborate in such a way that one public purchasing authority of the group is designated as **Lead Authority**.
- Each public purchasing authority will authorise the Lead Procurer to **act on its behalf**, in accordance with the Lead Procurer law.
- Conduct of the Joint PCP Procedure.
- Award, signature and management of the **Framework Contract**.
- All in **consultation** with other purchasing authorities involved in the Joint PCP.

COMMON PROCURING ENTITY

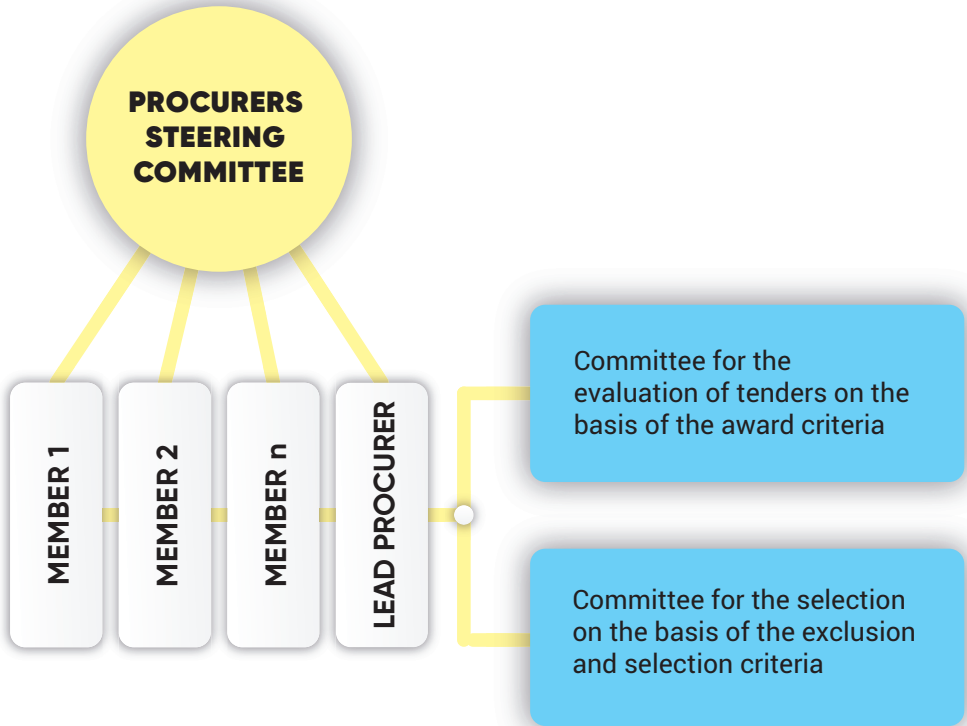
- All the involved public purchasing authorities commonly establish or designate one external legal entity to conduct the joint procurement with a joint mandate and joint resources of all public purchasing authorities.
- Financial risk can be limited to the project.

Lead Authority = Simplest solution

- reduced administrative costs,
- simple governance structure limited to the bodies necessary for the procurement, Common Entity (EGTC or Association under IT law),
- clear responsibilities and financial risk, limited to the project funds, but,
- too much time (from 3 to 6 months, just for the initial authorization from each Public Authority).



ORGANISATIONAL NEEDS – THE PROCURERS STEERING COMMITTEE



Responsible for steering matters relating to:

- The Joint Pre-Commercial Procurement Procedure;
- The approval of all the tender documents;
- The carrying out of any necessary amendments to the Framework Agreement, where permitted;
- Any legal action under the Joint Pre-Commercial Procurement Procedure or the Framework Agreement;
- The process necessary to address any lack of compliance with this Agreement by a Contracting Authority or breaches of the Framework Agreement by either the Tenderer or a Contracting Authority;
- The amicable settlement of disagreements between two or more Contracting Authorities;
- Financial Provisions.

2 EVALUATION COMMITTEES

Appointed by Lead Procurer but nominations suggested by Procurers Steering Board

Work in parallel

If more lots, eventually more evaluation committees

1 Administrative

selection of the basis of the **exclusion and selection criteria**

2 Technical

evaluation on the basis of the **award criteria**

PROCUREMENT AGREEMENT

The Agreement provides the legal framework to allow the cross-border collaboration between the participating public authorities from different EU Member States (Procurers/Contracting Authorities).

Procurers agree on and regulate their mutual responsibilities, and contractually appoint the Lead Authority. The Agreement covers also the management of the tender procedure, the conduct of legal action arising under the Joint PCP Procedure, the lack of compliance with the Agreement and the amicable settlement of eventual disagreement between the Procurers.

“Between Agenzia per L’Italia Digitale (hereinafter referred to as “Lead Contracting Authority”), Via Liszt 21, 00144 – Rome, Italy, and

a) The Kingdom of the Netherlands, represented by the Ministry of Financial Affairs, Directoraat Generaal Belastingdienst, Korte Voorhout 7, Postbus 20201, 2500 EE, The Hague, The Netherlands;

b) Entidade de Serviços Partilhados da Administração Pública, I.P (ESPAP), Av. Leite de Vasconcelos 2, Alfragide, 2614 – 502 Amadora, Portugal;

c) Institutul National de Cercetare-Dezvoltare in Informatica – ICI Bucuresti, acting on behalf of the Ministry for information society, 8-10, Maresal Averescu Avenue, 011455, Bucharest, Romania;

d) Ministerstvo financií Slovenskej republiky, Štefanovičova 5, P.O.Box 82, 817 82 Bratislava 15, Slovakia,

Hereinafter referred to as “Contracting Authorities”

REGULATIONS

Procurers shall ensure European wide publication of the PCP call for tender, at least in English, in the OJEU and online Tenders European Daily (TED).

In a PCP the following regulations are necessary: **Prior Information Notice, Contract Notice** with the following documents attached: **Framework contract/ Framework agreement, Technical Requirements, Invitation to tender/Tender regulation.**

PRIOR INFORMATION NOTICE

The Prior Information Notice (PIN) announces the **open market consultation**: all interested operators are invited to take part. The event aims at providing relevant information at an early stage on the pre-commercial procurement: overview on the procurement objectives, the PCP process and the main clauses of the contract.

FRAMEWORK AGREEMENT

- Obligation of bidders: R&D services,
- Obligation of contracting authorities: payment of the agreed price,
- Demand side driven approach (**needs and requirements are defined exclusively by the procurer**),
- Development in **phases**,
- **Multiple-** and **competing companies** along the whole path of the PCP,
- Retaining of at least **two participating companies** until the last phase to ensure a competitive market,
- Contractual arrangements, rights and obligations of the parties (including IPRs), are **decided upfront** and made available to all interested bidders in advance (published in the tender documentation),
- PCP enables procurers to de-risk large deployment contracts by first comparing the pros and cons of competing solution approaches from different suppliers.

TENDER RELEASE

Distribution of rights and obligations of the parties published in **tender documents**:

- **Contract Notice (TED)**
- **Tender Regulation**
(Context, goals, Procurers, procedure, tendering requirements)
- **Framework Agreement**
(One single Framework Agreement covering all the PCP phases, which shall contain an agreement on the future procedure for implementing the different phases, through specific contracts)
- **Technical Requirements (descriptive document)**

LEGAL CHALLENGES

The legal requirements and related barriers in a Cloud environment have been set up by several public authorities, considering the outcome of the due diligence performed within the consortium. In essence, the legal challenges a European based public organization has to face when adopting Cloud solutions can be divided in two categories: (1) the challenges common to most Cloud services such as applicable law, jurisdiction & dispute resolution, data protection, liability, contractual framework, data portability, interoperability, consumer related concerns and government access to the Cloud and (2) the challenges specific to the public sector, such as public procurement legislation related concerns and specific legislation in the fields of various domains of the legislation, mainly relating to language requirements, archiving, national defense and state secrets, fiscal and bookkeeping legislation, social and criminal procedures and health care requirements.

The tendering process for governmental services is quite different than the one for private industry. Public procurement aims at providing value for money, as using taxpayers' money, while ensuring equal treatment, non-discrimination and transparency. As such, appropriate tendering and awarding procedures need to be followed, with specific rules on financial thresholds, notices, timeframes, grant criteria and documentation. The challenges relating to the public procurement legislation need to be addressed by a new regulatory framework, which is (partially) done by the new Public Procurement Directives, adopted on 15 January 2014, and implemented by April 2016. [6]

By introducing less complex and more flexible negotiation procedures, contracting authorities are better tailored to their needs for best price, which could be beneficial in a public sector Cloud environment. The competitive procedure with negotiation may be used if justified by the specific circumstance in relation to the nature, complexity or the legal and financial modify a given project, or by the fact that the needs of the contracting authority cannot be met by an 'off the shelf' type of solution. Further, the drastic cut of the

administrative burden, by reducing the number of required documents, will ease the life of the economic operators. The compulsory acceptance of self-declarations from bidders is introduced (through a standardized European Single Procurement Document) and only the winning bidder must submit formal evidence (certificates and attestations). Also, the minimum deadlines to submit tenders are shortened. On top, the access to public procurement for SMEs is encouraged, by, amongst others, strong incentives through the “apply or explain” principle and by dividing tenders into lots and limiting the financial capacity requirements for the submission of a tender, which can be considered beneficial in Cloud tenders.

Finally, by introducing the MEAT criterion (Most Economically Advantageous Tender) as the only criterion for award, public authorities will be able to put more emphasis on quality, environmental and social considerations while still considering the price and ‘life-cycle-cost’ of what is procured. As such, contracting authorities may, in their award decisions, consider criteria linked to the production process of the services or even require that works or services bear specific labels certifying specific characteristics.

STARTING YOUR PCP JOURNEY

- Considering a PCP – first steps

BUSINESS CONSIDERATIONS – WHY JOINT PCP

PCPs open a route to market for start-ups and SMEs

This creates international growth opportunities for all types of innovative companies in Europe, even the smallest start-ups – which need help to grow and expand outside their home markets.

In addition, 28% of PCP contracts are awarded to companies from another country than the procurers. This is significantly more than the average amount of cross-border public contract award in Europe.

So not only are public services being improved and made more efficient, European companies are getting opportunities for cross-border growth as well as market leadership.

But think how much could be achieved if governments and public administrations directed more of their spending towards innovation. Given PCP results to date, the impact on EU competitiveness could be substantial.

WHAT ARE THE FINANCIAL OPPORTUNITIES?

- comparing/learning from several alternative solutions approaches in parallel before fixing the requirements/tender specs for deployment,
- splitting the R&D in phases with evaluations after each PCP phase that stops further investment in non-viable solution approaches,
- sharing the benefits/risks of commercialization/IPRs with the suppliers
- encouraging the development of open interoperable solutions.
- PCP increases both the participation of SMEs to the tender procedure and the awarding of actual contracts to SMEs.

Companies receive money for R&D after each PCP process step, in case they are successful.

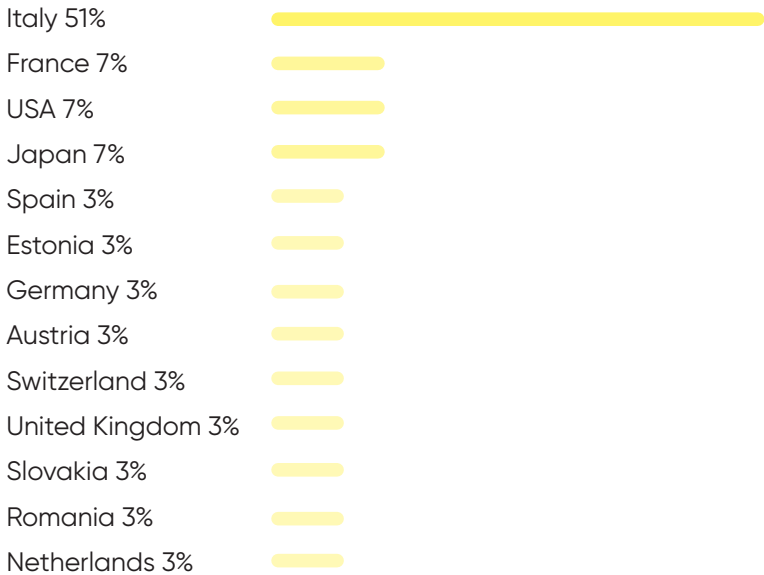
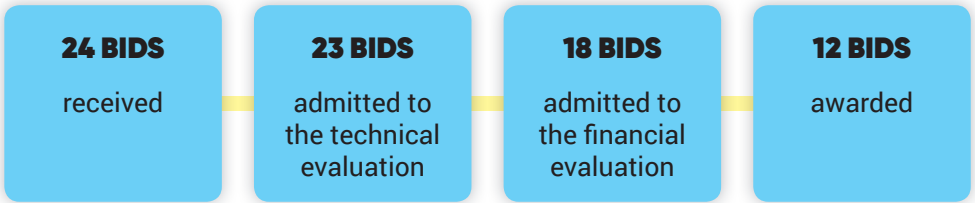
FINDING BIDDERS/CONTRACTORS

- Market consultations: It is important to have at least 1 market consultation event with industry partner invited to discuss the challenges of the PCP.

THE SERVICES

- Federated Certified Services Brokerage for EU Public Administration Cloud. Challenge is to create FCSB that will enable secure legislation-aware exploitation of cross-border provided services within Federated EU PA Cloud. By Addressing Interoperability, Service governance, Data portability, Identity propagation, Service certification, Legislation awareness, Legislation compliance assessment, Service usage metering
- Secure Legislation-Aware Storage. Provides a basis for a Personal Digital Asset service used to share documents and data between government and citizens/companies. Offers encryption, archive, and storage platform compliance. Establish trust on a contractual basis. Allows easy selection (and the procurement) of legislation compliant cloud (storage) services. Provides new tools to manage the access rights of the citizens to personal data in a legislation compliant way. Tackle with multiple regulations concerning the storing of data.
- Legislation Execution Cloud Services Consider national/international legislation requirements. Integrates legal awareness into business processes. Supports Public Cloud Services in heterogeneous and dynamic legislation environments.

CONTRACTS



RISKS WORTH NOTING

Joint PCP is a quite new instrument for procurement

Lesson Learned: the process is time consuming

- It took time to understand what joint PCP is.
- It took time to convince procurers that PCP is different from commercial procurement.
- As the lead procurer is the legal entity, it has to follow national legislation.
- Legal aspects need time – procurers agreement, tender documentation
- Bidding companies need time to understand as well what PCP is
- Division into **lots**: public procurers must know that managing a PCP tender with a very large number of contractors can be very difficult (e.g. in terms of administrative verification for all the participating consortia)
- the methodology of work of the monitoring group should be specified in the tender documentation, to facilitate the work of its members

Recommendation:

- Flexible interpretation - where possible - rather than a restrictive interpretation of the tender regulation clauses, in order to obtain a solution

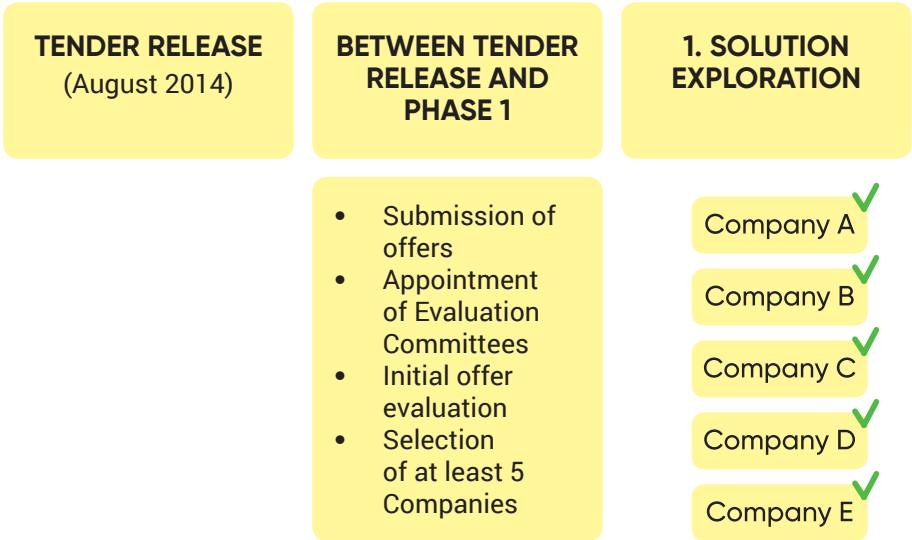
DO'S AND DON'TS

- Take care of the timeline that falls between tenders as bidders are asked to submit a technical and financial offer at the end of each phase. The evaluation has to be done in the transition from “phase k” to “phase k+1” as it is very time consuming.
- Explain and define the PCP peculiarities, and specify all the activities, in chronological order, that contractors are required to undertake following the awarding of the tender.
- Provide a clear overall view of the procedure: include a detailed timetable in the tender documents: information and details related to the activities to be performed by the Contractors, including the associated terms.
- Include an easy way to accept the formalization of consortia and temporary grouping of enterprises in the tender regulation.

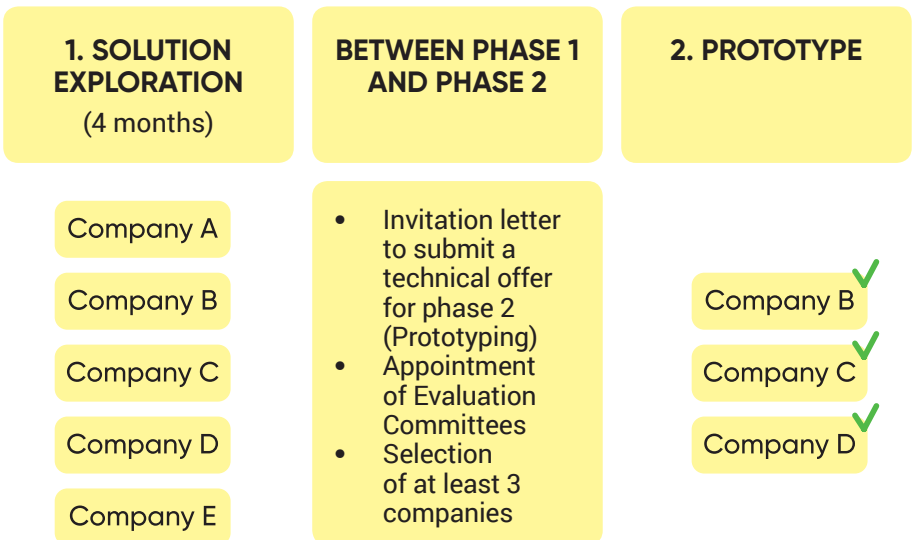
PCP STEPS

Don't forget the "Between the tender time" when planning the overall procedure.

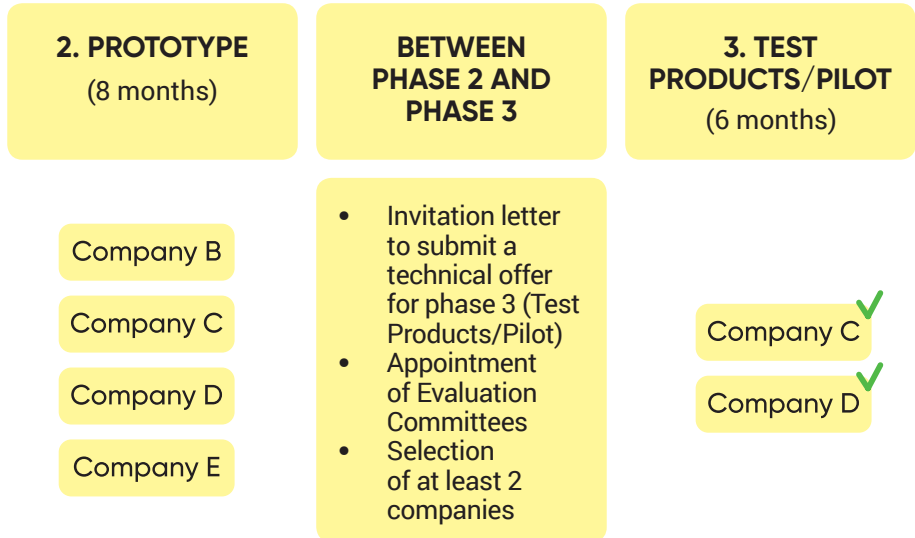
Solution Design



Prototype Development



First Test Series Production



WHERE IS THE INNOVATION?

- The service will come soon.
- There are novel features also providing open interfaces for interoperable solutions.
- The public sector understands better what they want to procure (and what cloud computing is).
- The industry can provide suitable solutions to European public administrations.
- SMEs are interested to become a solution provider for the public sector.

4 TIPS FOR YOUR PCP

If you want your own Pre-Commercial Procurement, we have collected 4 tips for the different stakeholders.

1. **Communicate.** The necessary steps of a Pre-Commercial Procurement (PCP) procedure are not self-explaining and clear to everyone. A continuing and early started exchange with and feedback to the contractors throughout the procedure is necessary for mutual understanding of all sides involved.
2. **Set up a knowledge archive.** Contractors have many questions. Questions and answers should be collected in a FAQ and shared with the contractors for more transparency.
3. **Be patient and be flexible towards procurers.** From the procurer's point of view, the PCP process is complex and time consuming:
 - It takes time to understand what joint PCP is.
 - It takes time to understand the difference of PCP compared to commercial procurement.
 - Legal aspects need time – procurer's agreement, tender documentation.
 - Bidding companies need time to understand what PCP is.
 - As the lead procurer is the legal entity, it must follow national legislation.
 - Recommendation: To get a solution be flexible and do not stick to a rigid interpretation of the tender regulation clauses.
4. **Be patient and be flexible towards vendors.** From the vendor's point of view, the PCP process is complex and time consuming, too.
 - Legal departments of industry bidders need to understand the difference compared to traditional procurement – even though the process follows the national procurement regulation.
 - The "risk sharing" of IPRs is difficult to agree, especially for large companies.
 - Recommendation: Teach industry (legal departments) to better understand the PCP process.

MORE INFORMATION AND INTERNET RESOURCES

<http://www.agid.gov.it/cloudforeurope>

<http://www.cloudforeurope.eu/>

http://cordis.europa.eu/project/rcn/109302_en.html

