

URBAN AGENDA PARTNERSHIP
ON INNOVATIVE AND RESPONSIBLE PUBLIC PROCUREMENT
FOR THE EU

THE LEGAL FRAMEWORK OF RESPONSIBLE AND INNOVATION PROCUREMENT:
PUT INTO PRACTICE

21TH April 2020

*** The Pact of Amsterdam states that the Action Plan "can be regarded as non-binding". Therefore, the actions presented in this Action Plan are not compulsory. ***

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1 Introduction

1.1 The Urban Agenda for the EU

The ‘Pact of Amsterdam’¹ of May 2016 established the Urban Agenda for the EU. It is a new multi-level working method to promote cooperation between Member States and cities, the European Commission and other stakeholders to promote growth, viability and innovation in Europe’s cities and to identify and successfully address social challenges.

Following the 12 priority themes outlined in the Urban Agenda for the EU, 12 thematic Partnerships were established. Recently, two more partnerships were established in January 2019 (Culture/Cultural Heritage and Security in Public Spaces).

The Urban Agenda for the EU focuses specifically on three pillars of EU policy making and implementation:

- ✓ better regulation,
- ✓ better funding, and
- ✓ better knowledge.

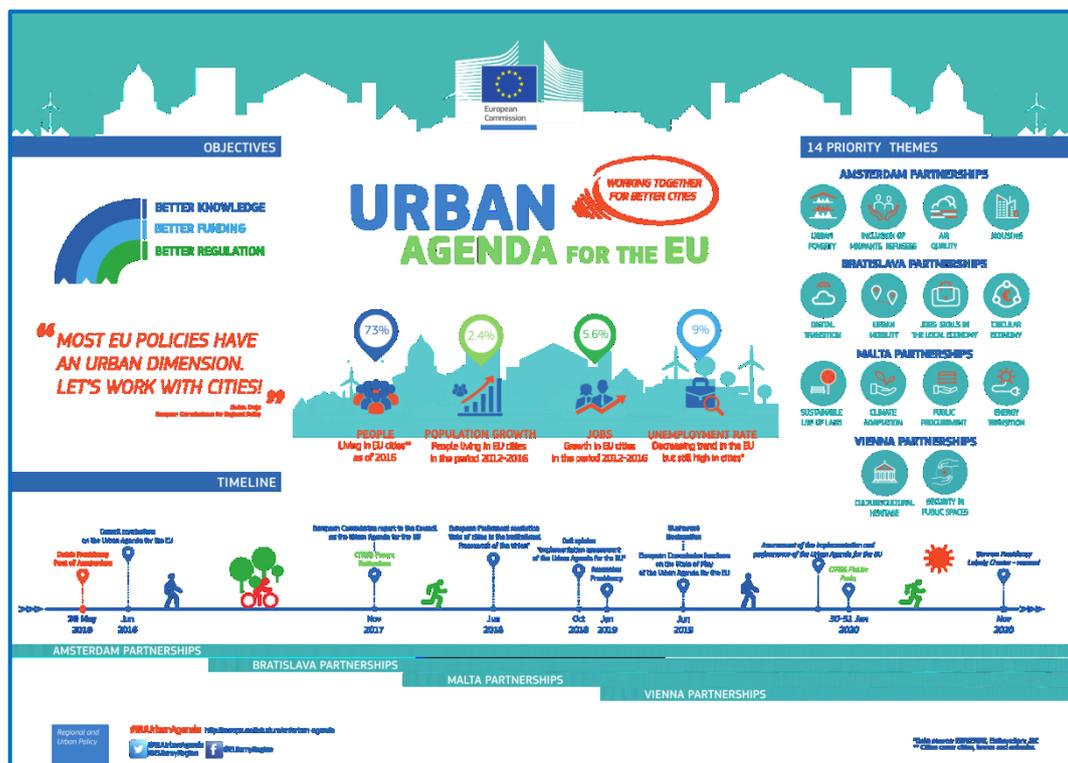


Figure 1.1: The 14 Priority themes of the Urban Agenda for the European Union

¹ The Pact of Amsterdam is available here: <https://ec.europa.eu/futurium/en/content/pact-amsterdam>

1.2 Partnership on Innovative and Responsible Public Procurement

Innovation is vital for public authorities. Innovation brings new goods and services to the market; it enables economic growth and addresses key social and environmental challenges. Public authorities in Europe have a significant role to play in societal transformation, and cities are important public buyers. Using public procurement and specifically innovation procurement as a strategic management tool, cities can significantly increase the positive impact on their social, economic and environmental objectives.

The Partnership on Innovative and Responsible Public Procurement is one of the original 12 Partnerships as stated in the Pact of Amsterdam, and was formally established in May 2017.

The aim of this Partnership is to push forward the development and implementation of an ambitious procurement strategy as an integrated and supportive management tool for governance. Using public procurement and the procurement of innovation as a strategic management tool, cities can significantly increase the positive impact on their social, economic and environmental objectives.

The focus of the Partnership is on the mid- and long-term perspective of public procurement. Thereeto, the Partnership has established three topics that need to be addressed:

1. building a procurement strategy and managing strategic procurement;
2. developing relationships with economic operators; utilising the market potential and bringing it closer to the purchasers;
3. providing guidance on legal tools and improving competence on innovative, sustainable and circular procurement.

1.3 How to use this guide?

The purpose of this guide - as a way to contribute to the third topic of the partnership - is to explore the practical application of the legal framework that public authorities can use to contribute to innovation and responsibility in procuring public services. The 2014 EU directives on public procurement, translated into national laws, offer various procedures of innovation procurement, that enable contracting authorities to make the necessary step forward in obtaining from the market new solutions for existing problems. These innovative procurement procedures differ from 'traditional' procurement instruments. The main difference is the deployment of a form of dialogue or cooperation with the market. In using innovative ways of procuring public services it is possible (or sometimes even necessary) to combine different tools, e.g. innovation partnership and functional specification (and award criteria).

This guidance is aimed at practitioners of public procurement, such as procurement support officers, public buyers, contract managers and legal advisors. As legal regulations and law-incorporated procurement procedures are not necessarily user-friendly and readable, especially for the non-lawyer, infographics, roadmaps and other visual material are used to make the manual easy and clear to understand, and to apply in practice.

This guide can be used in various ways. It can be read 'from cover to cover' and thus provide a sequential instruction on how to apply the legal tools of innovation procurement in practice. Or it can be approached via its separate parts, dependent on the user's need for information about specific issues.

The guidance toolkit is divided into three main parts:

1. The legal framework in a nutshell:

Chapter 2 contains a description of the procurement procedures, as well as the process. By utilizing the various steps in the process, a contribution can be made to responsible and innovative procurement. In this context, a lot can be achieved by using the commonly used procedures.

2. Choosing the right procedure, a decision making model:

Chapter 3 is dedicated to assisting users of the guidance choose an other than the standard open or restricted procedure. It helps to identify the right procedure for procuring innovation, by presenting a decision making model.

3. Practical application of innovation procurement instruments, a decision making model:

In chapter 4 the practical application of innovative procedures (and the use of related instruments) is further elaborated. Each description consists of a concise explanatory text around the specific procedure, followed by a process model that depicts the different steps that the procedure entails. For example, how to set up a competitive dialogue, bearing in mind the legal framework of both the procurement directives and other specific regulations. Several practical examples of innovation procurement from European cities and authorities are supplied. The practical examples help to better the understanding of the procedures and also encourage the European cities to use innovation procurement to its full potential.

Specific legal matters that are related to innovation procurement are presented in chapter 5. Chapter 6 contains conclusions and recommendations. In the annex definitions are supplied of the abbreviations that are used in the document.

2 Framework of Responsible and Innovation Procurement

2.1 The EU directives on public procurement

The 2014 modernized European Directives on public procurement² have opened up the possibilities for public authorities to promote responsible and innovative public procurement. The rules seek to ensure greater inclusion of societal goals in the procurement process.

The Directives set out to achieve the obligations of environmental, social and labour law established by Union law, national law, collective agreements or by the international law. They do not only facilitate but also promote and even require innovative and responsible procurement³, including environmental protection, social responsibility, innovation, combating climate change, employment, and other social and environmental considerations.

The Directives have been prepared to encourage fair and free competition within the EU and to establish an internal market. In conclusion, the Directives facilitate innovative and responsible procurement, while maintaining the basic requirements of competition, transparency and equal treatment.

Directive 2014/24/EU defines innovation as: “the implementation of a new or significantly improved product, service or process, including but not limited to production, building or construction processes, a new marketing method, or a new organisational method in business practices, workplace organisation or external relations inter alia with the purpose of helping to solve societal challenges or to support the Europe 2020 strategy for smart, sustainable and inclusive growth”⁴.

As defined in the EC ‘Guidance on Innovation Procurement’⁵, innovation procurement refers to either buying the process of innovation (research and development services) or the outcomes of innovation created by others.

2.2 The process of public procurement

Procedures

Directive 2014/24/EU gives a choice of several public procurement procedures. Depending on whether the innovative solution is already on the market or needs to be developed, among other things, there is a choice of different procurement procedures available, such as:

² Directives 2014/23 (concession contracts), 2014/24 (classical sectors) and 2014/25 (special sectors)

³ For example: article 18 section 2 of Directive 2014/24/EU

⁴ Article 2 section 1.22 of Directive 2014/24/EU

⁵ Commission Notice ‘Guidance on Innovation Procurement’, Brussels 15.5.2018, C(2018) 3051 final;
<https://ec.europa.eu/transparency/regdoc/rep/3/2018/EN/C-2018-3051-F1-EN-MAIN-PART-1.PDF>

1. Open procedure,
2. Restricted procedure,
3. Competitive procedure with negotiation,
4. Competitive dialogue,
5. Innovation Partnership,
6. Design contest.

The 2014 Directives contain specific procedures that are innovation friendly:

Procedures that refer to buying the **process of innovation** are:

- procurements of research and design (R&D), including:
 - o pre-commercial procurement (PCP);
 - o small business innovation research (SBIR);
 - o innovation partnership.

Procedures that refer to buying the **outcomes of innovation** created by others:

- procedures with negotiation:
 - o competitive dialogue
 - o competitive procedure with negotiation
- design contest.

For **responsible procurement**, such as sustainable and social procurement and not aimed at innovation per se, a lot can be achieved by using the more commonly used open and restricted procedures.

All procedures are briefly explained in this paragraph. Also, the issue of how to apply responsible procurement within the commonly used open or restricted procurement, is described. Three procedures that are especially suited for innovation procurement (4, 5 and 6) are explained in more detail in chapter 4.

1. Open procedure

This is a procedure where all providers interested in the contract and who have responded to a call for competition can submit tenders. All such tenders must be considered without any prior selection process. The selection and evaluation is carried out after the submission of the tenders. It is detailed in article 27 of Directive 2014/24/EU.

2. Restricted procedure

This is a two-stage process where only those providers who have been invited may submit tenders. The Directive sets a minimum of five candidates. It is detailed in article 28 of Directive 2014/24/EU.

3. Competitive procedure with negotiation

The procedure resembles the procedure of competitive dialogue, but the difference is that the solution to the problem has already been defined by the public buyer and the negotiation focusses only on the technical aspect of the specific solution. It is detailed in article 29 of Directive 2014/24/EU.

4. Competitive dialogue

Competitive Dialogue is a procedure whereby the public buyer describes its needs and requirements in a contract notice, subsequently allowing selected candidates individually in a (confidential) competitive

dialogue to offer one or more solutions meeting the set requirements. The procedure is aimed at acquiring tailor made innovative solutions. One of the participants will ultimately be awarded a contract based on the Best Price Quality Ratio. It is detailed in article 30 of Directive 2014/24/EU.

5. Innovation partnership

The contracting authority identifies the need for an innovative product, service or work that cannot be met by purchasing products already available on the market. Therefore, it enters into a contract with the best potential supplier of innovation. It is detailed in article 31 of Directive 2014/24/EU.

6. Design contest

According to Directive 2014/24/EU 'design contests' means those procedures which enable the contracting authority to acquire, mainly in the fields of town and country planning, architecture and engineering or data processing, a plan or design selected by a jury after being put out to competition with or without the award of prizes. The procedure is detailed in chapter II of Directive 2014/24/EU (Article 78-82).

Process

Public procurement consists of structured processes in order to act transparently and to obtain value for money. This is all the more the case with the open or restricted procedure. Although some might consider those processes to be complex and even bureaucratic, the rigid structure might make it easier to effectively implement responsible procurement and include social, economic and ecological goals.

The steps of a procurement process includes:

The steps of a procurement process include:

- 2.1.1. Pre-procurement phase
- 2.1.2. Deciding on the procurement procedure
- 2.1.3. Defining the subject of the contract (subject matter)
- 2.1.4. Selection/exclusion of tenderers
- 2.1.5. Technical specifications
- 2.1.6. Award criteria
- 2.1.7. Contract management

Every step offers their own set of opportunities for innovative and responsible public procurement.

2.2.1 Pre-procurement phase

Being well prepared is half the battle. It is important to gather information in advance and identify the potential downsides involved in procuring (the development of) innovative solutions for a city's needs. It can be useful to consult other public authorities and learn from their experiences, or work together with others. Sharing ideas and lessons learned can be invaluable. It is also useful to know the market.

Undertaking a market analysis or consultation provides information on the availability of products or services.

Preliminary market consultation

A preliminary market consultation can in particular be useful for identifying (legal) pitfalls and opportunities for the next steps in the innovation procurement process, once the specific needs of a public authority are clear. The Procurement Directives specifically allow for preliminary market consultations in order to get so-called ‘advice’ from independent experts or authorities or from market participants, which may be used in the preparation of the procedure.⁶ The consultation is primarily meant to explore the market for (the possible development of) innovative solutions and the market’s potential to deliver them on time. The consultation is also meant to inform economic operators of procurement plans and requirements.

When engaging with the market, it is important to keep a sufficient level playing field for the potential candidates or tenderers and it should therefore be carried out in a transparent and non-discriminatory manner. As a public contracting authority, one should always act “fair” and be accountable by keeping track of the conducts. Acting fair is also about providing information, such as announcing the preliminary market consultation in a way that every potential tenderer can participate and thus diminishing the risk of unduly favouring certain market parties. One way of doing so is by publicizing a Prior Information Notice (PIN) in the Official Journal of the European Union⁷, in which the public authority outlines its requirements and describes the consultation process.

The consultation may not result in an excessive influence of any of the businesses that participated. In order to avoid this, the information must be made available to all potential candidates or tenderers and adequate time must be allowed for the preparation of tenders.

In short, a public authority has sufficient leeway in a preliminary market consultation, provided that it does not have the effect of distorting competition and does not result in a violation of the basic procurement principles of non-discrimination and transparency.

2.2.2 Deciding on the procurement procedure

The results of the preliminary procurement phase offer input for the next stages of the process. And the next step is choosing a procurement procedure (and possibly related instruments), suitable for procuring the intended goods or services.

Selection of tenderers

Sustainable and responsible public procurement can be applied in any procurement procedures – but there are differences in terms of what the public authority will ask for at each stage. In an open procedure, technical and professional ability (including previous experience) are evaluated on a pass/fail basis only.

The evaluation of the selection criteria within the open procurement procedure happens in the same timeframe of the evaluation of tenders. Multi-stage procedures, such as the restricted procedure, offer the

⁶ Preliminary market consultations, Article 40 of Directive 2014/24/EU

⁷ The Official Journal of the European Union (OJ) is the official gazette of record for the European Union (EU). It is published daily (from Monday to Friday regularly, on Saturdays, Sundays and public holidays only in urgent cases) in all of the official languages of the EU. Since 1 July 2013 only the electronic edition of the OJ is authentic and produces legal effects.

opportunity to select tenderers in advance based on technical and professional ability, for example regarding sustainable or social aspects. Below, in paragraph 2.2.4, selection criteria will be discussed furthermore.

Size of the relevant market

The choice of procedure may also be informed by the size of the relevant market. If there are not many companies who can provide the product/service, then an open procedure may be efficient. If it is a very large market, multi-stage procedures may save time because the number of tenders received can be controlled.

Flexible procedures and involvement of the market

Public authorities tend to be reluctant to use sustainable and responsible public procurement, for the effect it will have on competition. Will tenderers be able to respond to environmental criteria and how many valid tenders will be received?

Flexible procedures can help to address these concerns by allowing more interaction between the contracting authority and tenderers. For example, in a competitive procedure with negotiation it is possible to negotiate aspects of environmental performance (above any minimum requirements and the award criteria which have been set) and the reporting arrangements which will apply. By targeting innovative solutions, the competitive dialogue and innovation partnership can help to solve complex environmental problems. However, it must be recognised that these procedures also require a greater commitment of resources and expertise to manage. A simpler solution can be to conduct preliminary market consultation in advance of an open or restricted procedure.

The choice for the tender procedure can add to the possibilities of implementing innovative and responsible procurement. The involvement of the market is important. With the choice of procedure, the tenderers have more or less the freedom to contribute ideas to tackle the challenges.

Title practical example: Rapid Circular Contracting (RCC)

Country: the Netherlands

This is a new way of procurement and has been developed by a Dutch foundation on circular economy, the Stichting Circulaire Economie, as an encouragement for innovation-oriented procurement based on circular ambitions and as an European procurement toolkit. As contracting authorities, governments in particular have an exemplary role in society, also when it comes to the implementation of prestigious circular examples. However, existing procurement processes are yet to challenge the business community sufficiently to come up with smart, innovative circular solutions.⁸

Sometimes, a back and forth between the contracting authority and the tenderers is called upon. Many public buyers are most comfortable with the standard procedures; the Open or the Restricted Procedure. However, those procedures might not provide the needed flexibility. Fortunately, the Directive 2014/24/EU

⁸ For more information: https://www.pianoo.nl/sites/default/files/documents/gerelateerd/fs_40-rcc_sce_explanation.pdf

takes this in consideration. Recital 42 states: “There is a great need for contracting authorities to have additional flexibility to choose a procurement procedure, which provides for negotiations. ... Member States should be able to provide for the use of the competitive procedure with negotiation or the competitive dialogue, in various situations where open or restricted procedures without negotiations are not likely to lead to satisfactory procurement outcomes. ...”

The mentioned procedures can be found in article 29 (Competitive procedure with negotiation) and article 30 (Competitive dialogue) of the Directive. The recital explains when to use those procedures, namely when a non-standard-element can be identified and the aim is to buy works, supplies and services perfectly adapted to the specific needs:

- When contracting authorities are unable to define the means of satisfying their needs or of assessing what the market can offer in terms of technical, financial or legal solutions.
- For works contracts, such situations include works that are not standard buildings or where works includes design or innovative solutions.
- For services or supplies that require adaptation or design efforts, the use of a competitive procedure with negotiation or competitive dialogue is likely to be of value.
- Such adaptation or design efforts are particularly necessary in the case of complex purchases such as sophisticated products, intellectual services, for example some consultancy services, architectural services or engineering services, or major information and communications technology (ICT) projects. In those cases, negotiations may be necessary to guarantee that the supply or service in question corresponds to the needs of the contracting authority.

However, “In respect of off-the-shelf services or supplies that can be provided by many different operators on the market, the competitive procedure with negotiation and competitive dialogue should not be used.” Needless to say, when tendering via any procedure, the basic principles of procurement should be obliged, such as the principles of equal treatment and transparency. Within that framework, a lot is permitted. The Directive states “... Negotiations may concern all characteristics of the purchased works, supplies and services including, for instance, quality, quantities, commercial clauses as well as social, environmental and innovative aspects, in so far as they do not constitute minimum requirements. ...”

In conclusion, it is legally permitted to use a procedure with room for negotiations when a flexibility is required.

For a more detailed discussion of deciding on the right procurement process by using a specific decision making model, please read chapter 3.

2.2.3 Defining the subject of the contract

The Directives describe primarily how to buy, rather than what to buy. That leaves room for the contracting authority to determine the subject matter. Therefore, ecological and social elements may be taken into account.

Link with the subject-matter

A contracting authority may lay down special conditions, as long as they have a link with the subject-matter of the contract. “Those conditions may include economic, innovation-related, environmental, social or employment-related considerations.”⁹

It is important to describe the link of the social, sustainable or economic objectives to the subject matter in order to make this link clear. This helps to navigate the narrow path between what is permitted and what might be a bridge too far. For example, Corporate Social Responsibility can be seen as a company-wide policy with no link to the subject matter of the specific tender. On the other hand, social conditions relating to the performance of a contract are specifically permitted by the Directive. In the Netherlands, for example, there is ample experience with navigating this principle of “Social Return of Investment”¹⁰ and it is not unusual to see tenders with the requirement for contractors to employ vulnerable groups when implementing the contract.

Functional terms

In order to allow some leeway, it might be preferable to use functional terms for describing the subject. For example, detailed requirements (such as “recyclable steel suspension bridge”) leaves less room for flexibility in comparison to a description in functional terms (“permanent means of transport over a waterway, structured in a way to diminish waste, reuse materials and contribute to a circular economy”). The last phrasing provides more opportunity to the businesses to come up with a solution (which may or may not turn out to be a recyclable steel suspension bridge) that might be a pleasant surprise for the contracting authority. In describing the challenge, and not the solution you’ve come up with, the market actively engages in the search for the best solution to that challenge. Below, in paragraph 4.2.4, this will be discussed furthermore.

Again, as always, the general principles of public procurement should be obeyed. More specifically, the special conditions should not only have a link with the subject matter, but also be e.g. non-discriminatory and proportional. It is important to know whether such a condition is proportionate to the value of the contract, the type of work/service involved, et cetera.

2.2.4 Selection of the tenderers

When selecting the tenderers for eligibility, the contracting authority can look at exclusion criteria and look at the best way to select the most suitable businesses.

Exclusion criteria

“Contracting authorities should ... be given the possibility to exclude economic operators which have proven unreliable, for instance because of violations of environmental or social obligations, including rules

⁹ Article 70 of Directive 2014/24/EU

¹⁰ For more information: <https://www.pianoo.nl/en/sustainable-public-procurement/spp-themes/social-return-investment-sroi>

on accessibility for disabled persons or other forms of grave professional misconduct, ...”¹¹ In the Directive¹², the compulsory and facultative exclusions are summed up.

It is mandatory for contracting authorities to exclude a potential tenderer when it has been convicted for child labour or other forms of human trafficking offences. It is allowed to exclude businesses which have been breaching environmental, social and labour law.

It is important to realise that subcontractors are not automatically subdued to proactively provide proof to verify whether there are grounds for exclusion. This may vary from country to country. “The contracting authority may require or may be required by a Member State to require that the economic operator replaces a subcontractor in respect of which the verification has shown that there are non-compulsory grounds for exclusion.”¹³

Selection criteria

As mentioned above in paragraph 2.2.2, selection criteria are criteria to evaluate the ability of the tenderer, e.g. in restricted procedures, competitive dialogue procedures and innovation partnerships. Via such criteria, contracting authorities can limit the number of tenderers that they will invite to tender or to conduct a dialogue. Those selection criteria must be objective and non-discriminatory and aimed at the ability of the tenderer, but leaves otherwise freedom of choice, for example to add sustainable or social aspects¹⁴.

Selection criteria can give substance to the organisation's CSR principles. The professional ability may be provided by environmental management measures that the economic operator will be able to apply when performing the contract¹⁵. For example, environmental management systems (e.g. EMAS or ISO 14001) can be used as a requirement for environmental selection criteria. It is possible to demand that the (environmental) management system is third party verified, unless the tenderer objectively has no access to the schemes during the time limits for reasons which are not attributable to them, and where they can prove that the alternative measures they have in place are equivalent to the third party certification requested.

2.2.5 Technical specifications

The technical specifications lay down the characteristics required of a works, service or supply¹⁶, including social and ecological characteristics. These can be formulated in terms of performance or functional requirements or by reference to standards.

For example, a reference to Ecolabels may be used, provided a number of conditions¹⁷ are met:

- they only concern criteria which are linked to the subject matter of the contract;

¹¹ Recital 101 of Directive 2014/24/EU

¹² Article 57 and continued of Directive 2014/24/EU

¹³ Article 71 section 6 (b) of Directive 2014/24/EU

¹⁴ Reduction of the number of otherwise qualified candidates to be invited to participate, Article 65 of Directive 2014/24/EU

¹⁵ Means of proof of selection criteria, Annex XII of Directive 2014/24/EU

¹⁶ Article 42 and continued of Directive 2014/24/EU

¹⁷ 3.5.1 Conditions for using labels, Buying Green! Handbook (European Commission, 2016)

- they are based on objectively verifiable and non-discriminatory criteria;
- they are established using an open and transparent procedure in which all relevant stakeholders, including government bodies, consumers, social partners, manufacturers, distributors and non-governmental organisations, may participate;
- they are accessible to all interested parties;
- they are set by a third party over which the economic operator applying for the label cannot exercise a decisive influence.

The contracting authority is not allowed to demand that a product carries an ecolabel, but may indicate that the criteria of a certain ecolabel must be met. In doing so, the ecolabel may be used as proof of compliance.

2.2.6 Award criteria

Contracting authorities base the award of public contracts on the most economically advantageous tender and may include the best price-quality ratio, which shall be assessed on the basis of criteria, including qualitative, environmental and/or social aspects, linked to the subject-matter of the public contract in question. The cost element may also take the form of a fixed price or cost on the basis of which economic operators will compete on quality criteria only.¹⁸

The Total Costs of Ownership (TCO) refers to the sum of all costs incurred throughout the lifetime of owning or using an asset; they go beyond the purchase price. Life Cycle Costing (LCC) is a technique to establish the Total Costs of Ownership, which includes the initial purchase price as well as maintenance costs, energy consumption, asset disposal, et cetera. Below, in paragraph 4.2.2, the instrument of Total Cost of Ownership will be discussed furthermore.

An action plan can also be used as a sub-award criterion in order to determine how the contract will be implemented. For example, a sub-award criterion might be the advancement of zero emissions. The tenderer should write down how he plans to approach the target of zero emissions. The objective method for assessing the action plan should be made clear to all tenderers.

2.2.7 Contract management

It is imperative to have contract management in place, and to monitor and adjust, if necessary, the performance of the contract. Indeed, a new procurement procedure is required for other modifications of a public contract or a framework agreement during its term than those outlined in the Directives¹⁹. The essence is that substantial modifications may alter the overall nature of the contract or framework agreement. According to the set-up, social and ecological aspects may or may not be a substantial element of the contract.

¹⁸ Article 67 and continued of Directive 2014/24/EU

¹⁹ Article 72 section 5 of Directive 2014/24/EU

2.3 Basic principles of public procurement

Contracts should in all cases be awarded on the basis of objective criteria that ensure compliance with the principles of transparency, non-discrimination, proportionality and equal treatment. Therefore, contracting authorities must create a level playing field for the potential tenderers. A contracting authority should always act “fair” and be accountable by keeping track of the conducts.

The most important principles of public procurement are the following:

- **Non-discrimination** – contracting authorities must ensure equal access to the contract by operators from all EU countries.
- **Equal treatment** – comparable situations must not be treated differently and different situations must not be treated in the same way, unless such treatment is objectively justified.
- **Transparency** – tenders must be published to ensure competition. The procurement procedure must also be transparent, to prevent any risk of partiality or arbitrariness.
- **Proportionality** –the procedures, requirements and criteria should be appropriate to the objectives pursued and should not go beyond what is necessary to achieve them.

The actual tendering procedure brings about a wide range of operational challenges and hurdles, many of which are legal in nature. The challenge for many European cities seems not necessarily to be the EU law on procurement, but rather how to apply the Directives that are transposed in national laws at their local level. The European Directives seem to provide the right balance between compulsory minimum requirements, and opportunities for flexibility and collaboration with economic operators.

There are legal instruments and tools for meeting social and environmental challenges (innovative and responsible public procurement). Cities in general have a desire to address wider challenges through tendering contracts for public services, yet see the procurement-process as uncertain, complex and thus risky. Legal and other types of risk aversion within contracting authorities play an important role in procurement of innovation. Innovation also requires mitigating risks and reducing legal and other uncertainties where possible.

3 Choosing the right procedure: a decision making model

3.1 Introduction

Cities that need innovation, face the choice how to procure innovative solutions to their needs, using public procurement as an innovation driver. Traditional procurement procedures have their limitations, while the procurement Directive 2014/24/EU provides possibilities to procure innovative and responsible.

Which procurement process to choose for your project? There are no de facto absolute criteria for defining the best procurement process, however there are two important factors a city should consider, namely the complexity surrounding a specific project and the level of uncertainty based on the nature and size of the research and development gap of the project.

3.2 Decision Making Model Innovation Procurement Processes

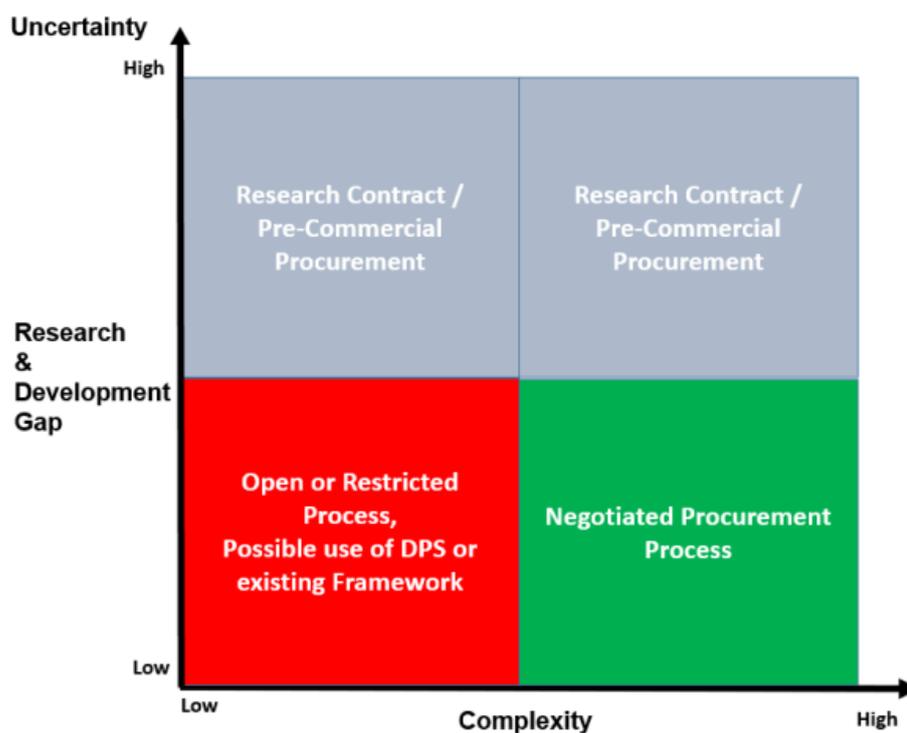


Figure 3.1 Decision Making Model – from Research and Development Gap and complexity perspective²⁰

* Source: Gary Robinson/Scottish Government

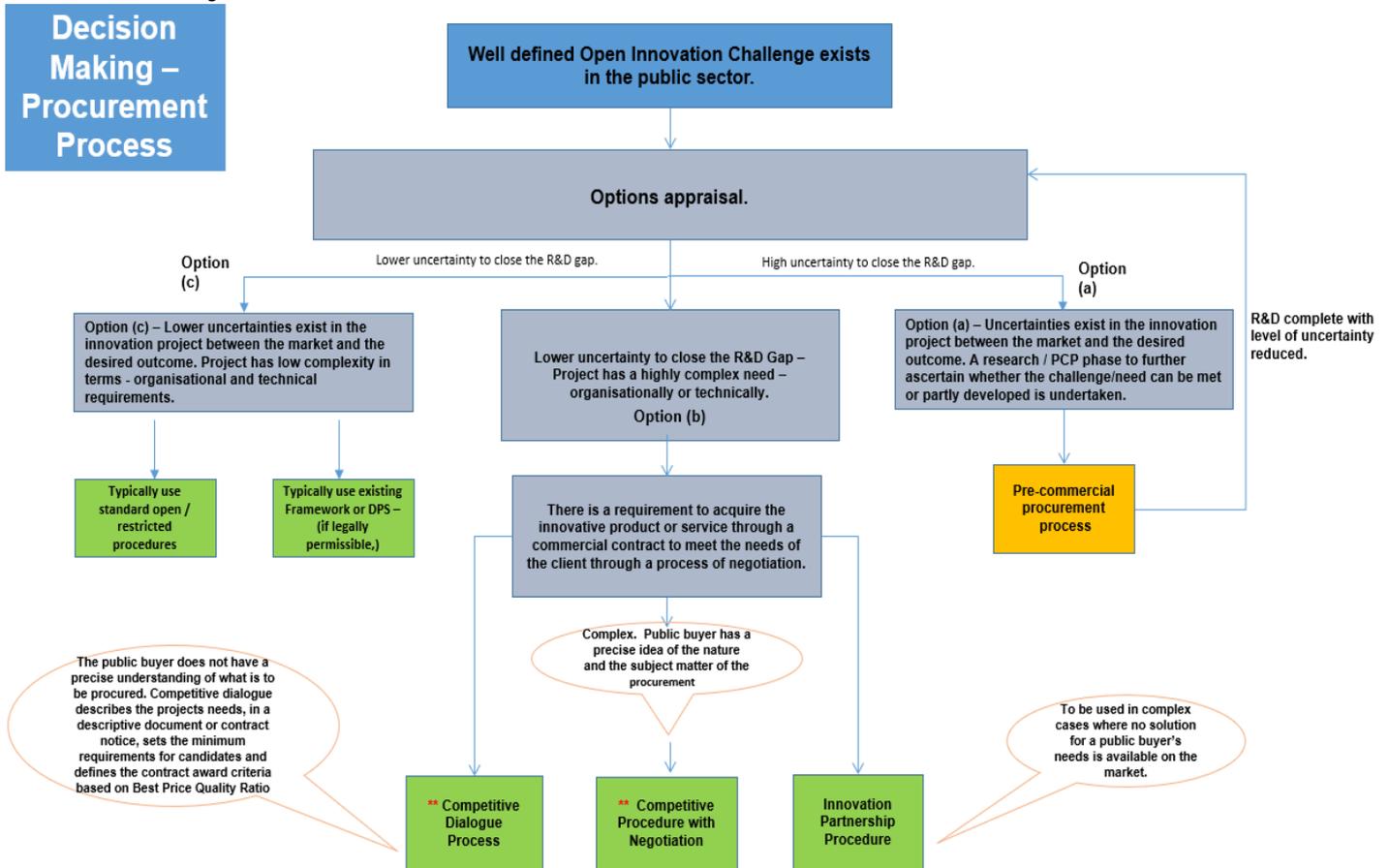
²⁰ DPS = Dynamic Purchasing Systems, article 34 of Directive 2014/24/EU

All innovation projects contain uncertainty, whether it is related to the outcome of the project, or aspects of the project that are unknown and cannot be measured. Unlike traditional procurement projects public authorities may not have specific related background information, particularly when creating new goods, works or services that do not yet exist.

Innovation project complexity refers to both organizational complexity, and the technical complexity of the project. It relates to the project scope, organizational dynamics and structures, policies and regulations affecting the project, new technology complexity and skill sets of staff that interact both within a project and with entities outside of the project domain. Please see also 'The Building Strategy guidance toolkit', which explains organizational challenges and solutions regarding procurement performance and what kind of skills and know-how is required.

The level of uncertainty in combination with the level of complexity determines the type of procurement process that should be used for your project.

Figure 3.2. Procurement Process and Routes to market



* Source: Gary Robinson/Scottish Government

Example:

The objective is to develop an app to improve the uptake of free school meals at a school. From market analysis, we may understand that the project exists at basic technological readiness level, with a Research & Development (R&D) gap made up of many stages (from a basic level to a very advanced level). However, if we also understand that digital suppliers could produce and test a product within 8 weeks, and we have a high level of certainty that this could be achieved (as many similar projects have been undertaken in this way using similar methodologies), and we have appropriate resources, it is likely that a R&D gap is small, and the level of uncertainty that it can be closed maybe low. If we also understand that project complexity is low, then we might look towards the bottom left hand quadrant of the diagram for an appropriate procurement process. So in case there is a need for the development of such an app, there is not a very complex technical problem and it is reasonably certain that the market can make it.

4 Practical application of innovation procurement procedures

This manual focuses on three of the above mentioned procurement procedures: Competitive dialogue (4.1), Innovation partnership (4.2) and Design Contest (4.3), as these procurement procedures are most suitable to push forward innovation. In 4.4 various innovation procurement instruments (listed in chapter 2) are discussed as far as their application is concerned.

4.1 Competitive dialogue procedure

(Recitals 42 & 43 Preamble and article 30 Directive 2014/24/EU)

A competitive dialogue is a way of tendering in which you enter into a dialogue with a number of selected market parties. Together with these parties the public authority works towards the best solution for the public organisation. Competitive sensitive information remains confidential. After a structured process, which usually requires a substantial investment from the participating parties, the public authority awards the contract to one of the providers. Competitive dialogue can be very effective in identifying and negotiating wider social and environmental outcomes. It has also been used widely in construction projects.

A competitive dialogue is a suitable procedure if the public authority has a demand for which there is no known (clear) solution yet. In that case, the public authority can make use of the creativity of the market and find an innovative solution.

The Directive states it "...to be of use in cases where contracting authorities are unable to define the means of satisfying their needs or of assessing what the market can offer in terms of technical, financial or legal solutions. This situation may arise in particular with innovative projects, the implementation of major integrated transport infrastructure projects, large computer networks or projects involving complex and structured financing..."²¹

"...Such adaptation or design efforts are particularly necessary in the case of complex purchases such as sophisticated products, intellectual services, for example some consultancy services, architectural services or engineering services, or major information and communications technology (ICT) projects. In those cases, negotiations may be necessary to guarantee that the supply or service in question corresponds to the needs of the contracting authority..."²²

The competitive dialogue process is not a complicated procedure. That is why it can be used for smaller projects such as design and innovative solutions. The competitive dialogue can also be applied to legally,

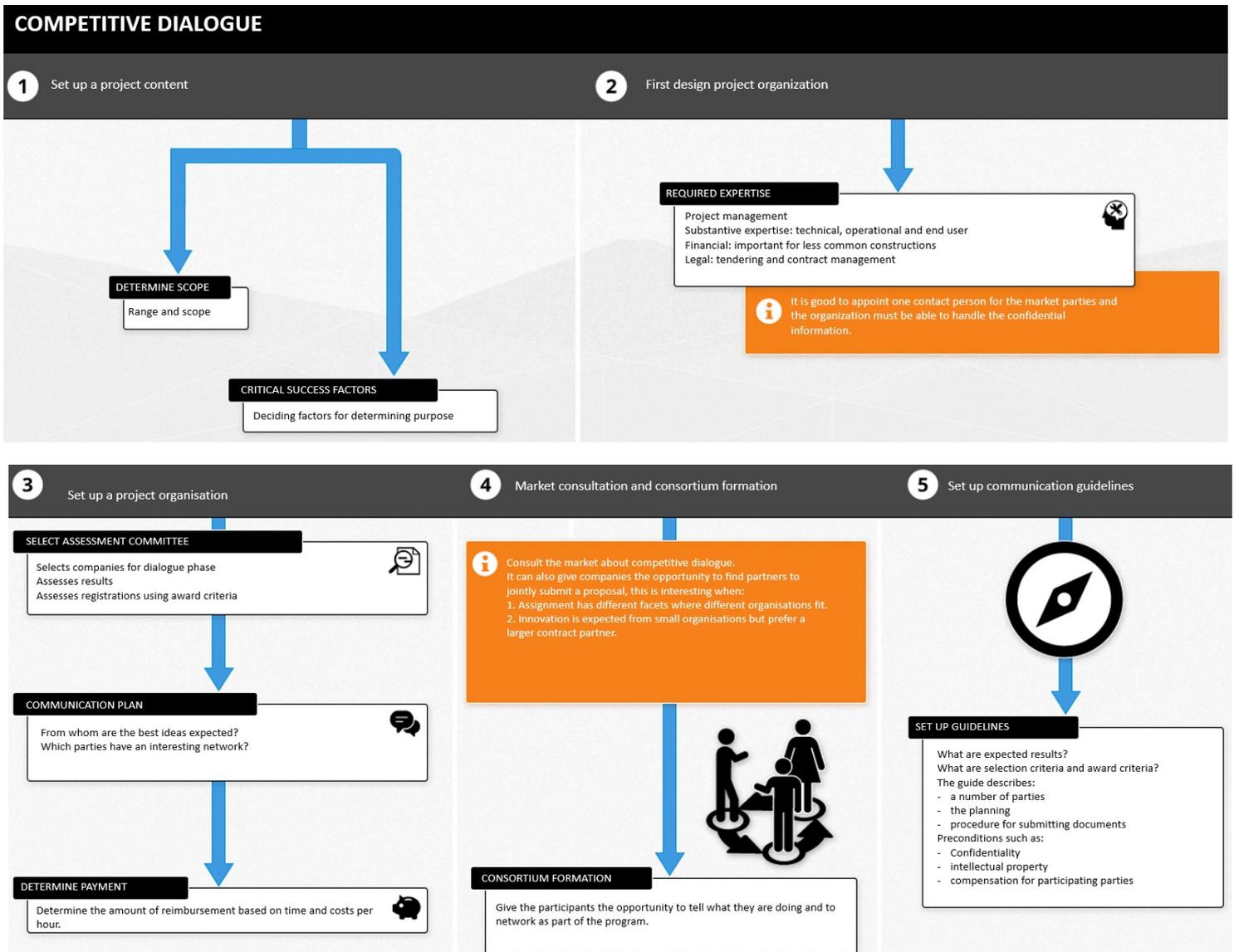
²¹ Recital 42 of Directive 2014/24/EU

²² Recital 43 of Directive 2014/24/EU

financially or technically complex assignments, even when the specifications cannot be properly established in advance. Finally, it can be used when only irregular or unacceptable tenders have been received. The competitive dialogue can therefore be used for the procurement of innovation, especially for large infrastructure and IT projects.

The 10 consecutive steps in the procedure of competitive dialogue are illustrated in the picture below:

1. Set-up of project content
2. First design of project organization
3. Set-up of project organization
4. Market consultation and consortium formation
5. Set-up of communication guidelines
6. Selection of parties
7. Handling of dialogue
8. Final registration
9. Review
10. Selection of winners.



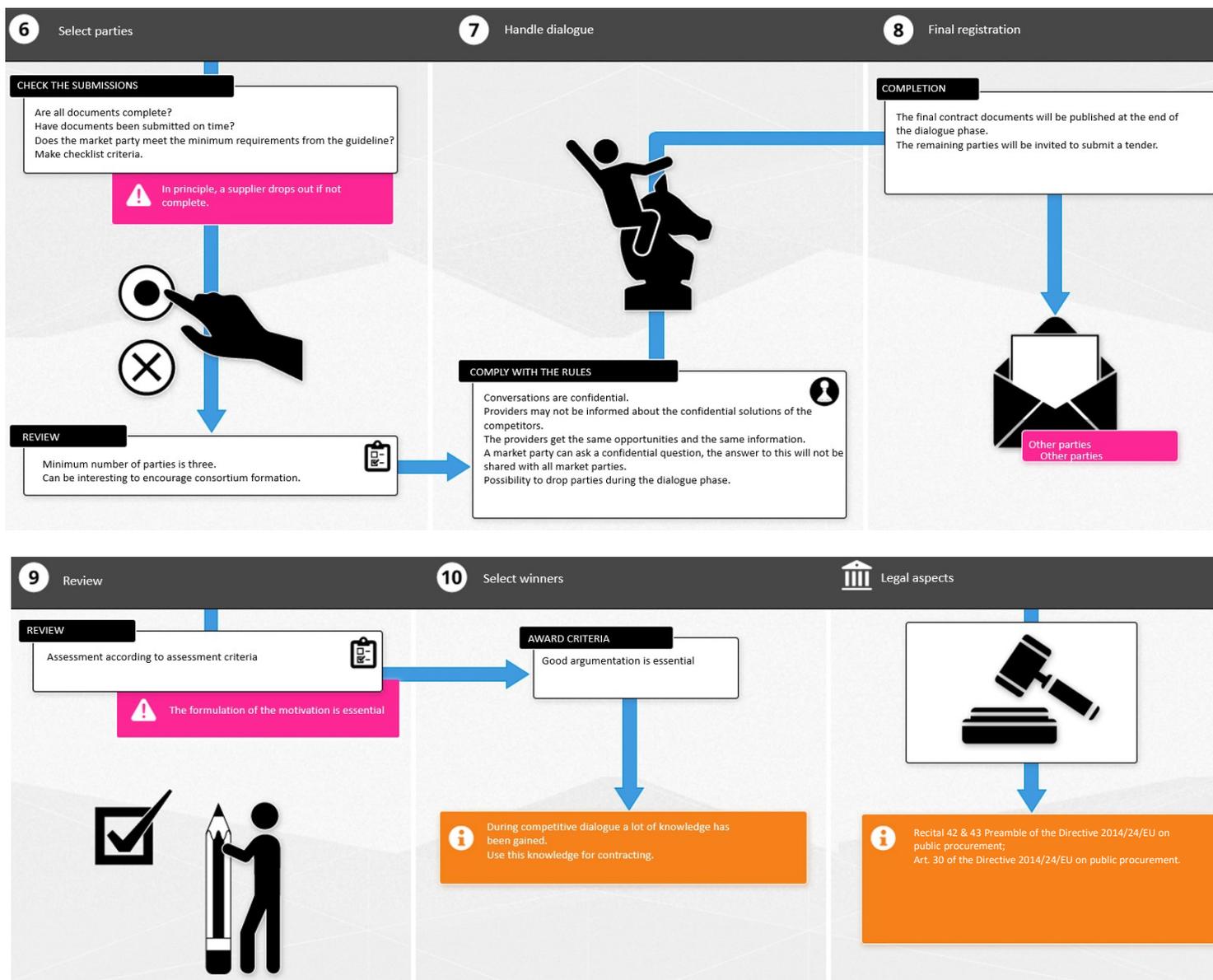


Figure 4.1 Competitive dialogue procedure *Source: Pianoo/Innovatiekoffer

Competitive dialogue procedure – a practical example

Bulgaria/ Gabrovo Municipality: Execution of energy-saving service, modernization and repair of street lighting in the town of Gabrovo by a contract, using the method of a guaranteed result

Amount of the procurement in euro's: € 1,958,000 euro including VAT

Description of the innovation project: Replacement of the existing street (road) lighting with new energy efficient LED luminaries. Gabrovo street lighting is sufficient for now but, apart from LED luminaries that have already been used in certain projects, they are still sodium-vapour lamps and do not meet standard EN 13201-3:2005. The Gabrovo municipality system for managing street (road) lightening also has be developed and upgraded (or replaced) with a new modern one, as the market engagement and consultation show that the modern systems for managing and monitoring are able to realize a good percentage of savings. The third problem with the street (road) lightening that needs solving is managing the electricity cable network and infrastructure. The project is aimed to attract private funding, and to guarantee the result of the investment. The project must be efficient, so that the initial investment will be repaid from the savings in energy.

What was the aim of using innovation procurement for this purchase: The competitive dialogue procedure was chosen as it gives the participants opportunities to offer different solutions. This is the main issue in the procedure with guaranteed result (ESCO) from our point of view - to give full freedom to the participants to bid and propose the solution. The contractor is in charge of the whole system and infrastructure during the contract (around 10 years), for which they are responsible and guarantee the achievement of the set goals. We have seen tenders for ESCO contracts in Bulgaria in which concrete requirements for the used luminaires are set, by way of technical specifications. But we feel that it is not acceptable to make a contractor responsible for reaching a result that is decided on one-sidedly by the contracting authority. The competitive dialogue procedure offers a chance for the public authority to see the offered decision in advance and to create a better partnership relationship with the tenderers (future contractor). Another reason was that by using a dialogue it is easier to explain the actual situation and needs of the public authority. In this case the issue was that we have difficulties in presenting the exact condition of the cable network, needed to find the best solution for who and what responsibilities are in place for the maintenance and operation of the cable network and staircase infrastructure.

What were the important conditions (internal or external) for using innovation procurement in this case: Most important in choosing this approach was the ability to attract private funds. We used the competitive dialogue to find the best technology. Eventually, we aimed to receive an offer how to place luminaries more efficiently (i.e. more luminaries with less power or less luminaries with more power), and to give a chance to the economic operators to offer new technology for power supply etc. This procedure allows tenderers to offer the managing and monitoring system with different resources for the organization of the maintenance from the contractor.

Award criteria: Price - 30%; Guaranteed amount of reduced CO2 emissions - 15%; saved energy - 25,2%; level of the automatic location of a damaged luminary. The evaluation of the project's effectiveness is performed according to the indicator "Net present value" - 14 %.

What are the benefits of this innovation procurement:

- ✓ The solutions come from tenderers and the result of it is guaranteed, as the tenderer is in charge to design and implement the project. The payment is bound to the reached level of the offered result.
- ✓ Important is the result, not the technical execution.
- ✓ We created a good partnership with the tenderers and developed/improved the result of the project on a dialogue level, comparing the different solutions.

4.2 Innovation Partnership

(Recital 49 Preamble and article 31 Directive 2014/24/EU)

The Innovation Partnership is a special form of the procurement procedure, i.e. a specific procurement process with the aim of developing an innovative product or service and subsequently acquiring the resulting services. A special feature of this procedure is the respective two-stage nature of the award procedure and the subsequent contract model. The innovation partnership procedure contains elements of the negotiation procedure and the competitive dialogue. In case the public authorities would like to leave out the competitive phase and use the opportunity to give aid for research and development, they have to follow the rules in article 25 of the COMMISSION REGULATION (EU) No 651/2014 on State Aid.

An innovation partnership is a suitable procedure if there is a need for an innovative product, service or work that cannot be met by purchasing products already available on the market. Therefore, the contracting authority enters into a contract with the best potential supplier of innovation.

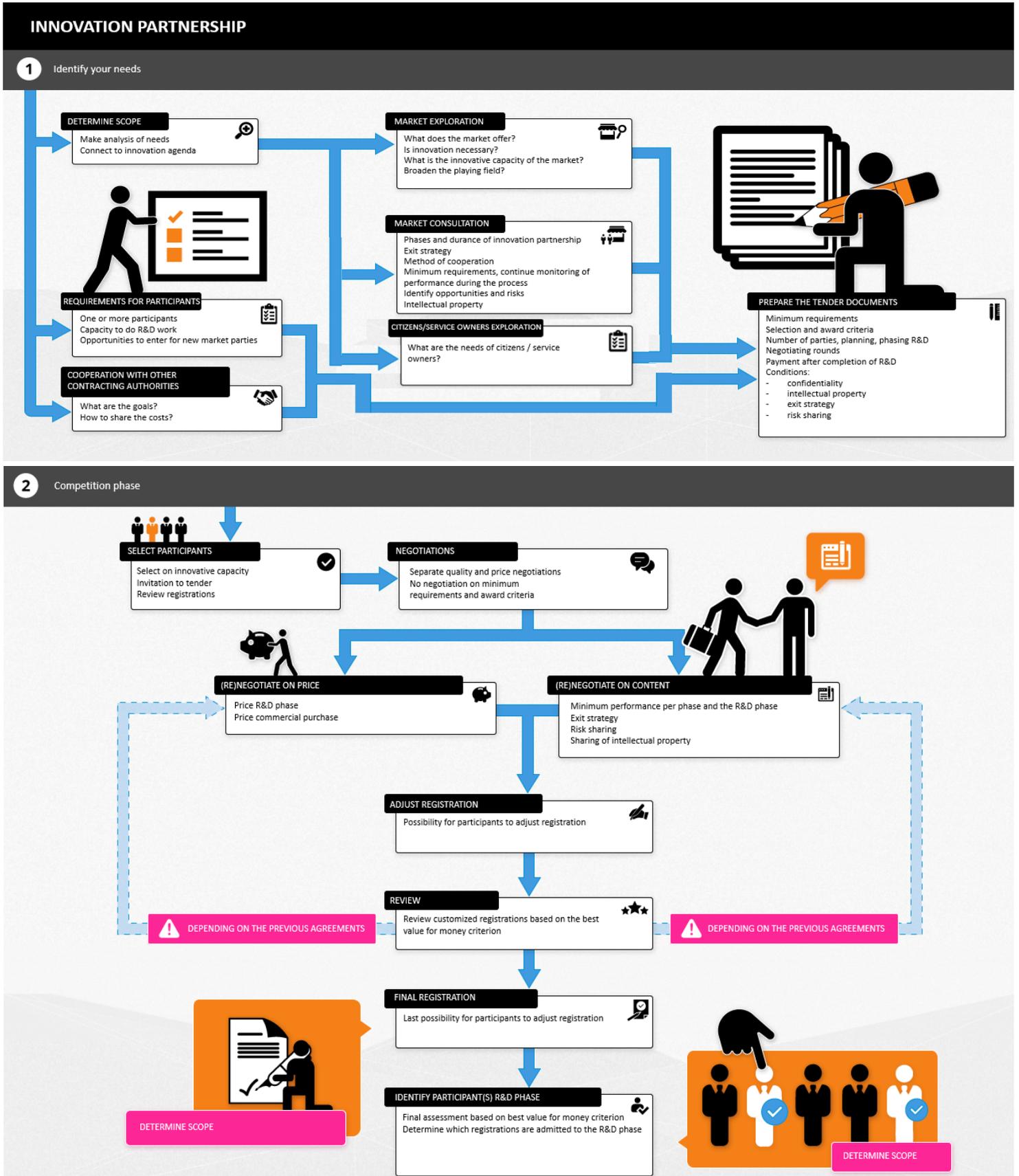
The Directive recognises the need for “a long-term innovation partnership for the development and subsequent purchase of a new, innovative product, service or works provided that such innovative product or service or innovative works can be delivered to agreed performance levels and costs, without the need for a separate procurement procedure for the purchase.”²³

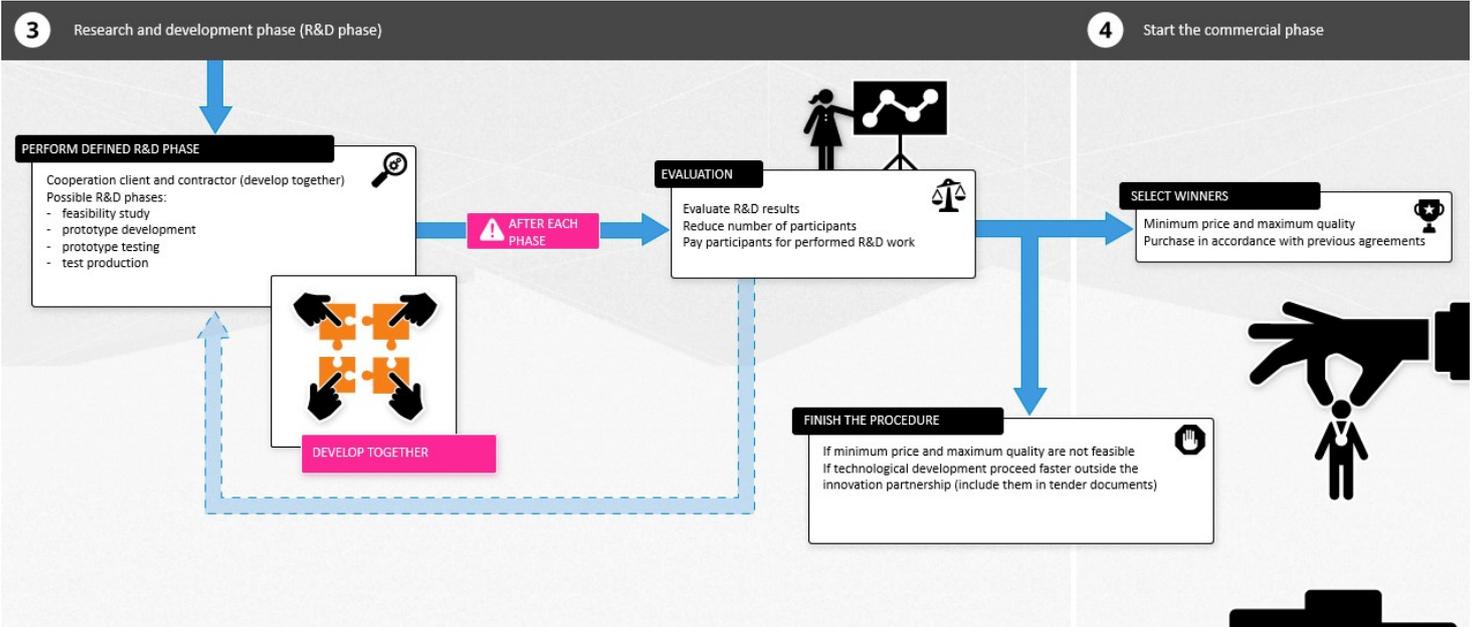
The consecutive phases and steps in the procedure of innovation partnership are illustrated in the picture below:

1. Identifying needs
2. Competition phase
3. Research and development phase
4. Start the commercial phase.

²³ Recital 49 of Directive 2014/24/EU

Fig.4.2 Innovation partnership, * Source: Pianoo/Innovatiekoffer





Title practical example: Oulu waterworks: Procurement of processing for sewage sludge

Country/city: Finland / Oulu

Amount of the procurement in euro's: estimated procurement value € 19–25 million including VAT

Description of the innovation project: Oulu Waterworks (an enterprise owned by the City of Oulu) sought an innovation partner for the comprehensive treatment of sewage sludge, which would cover the essential parts of the treatment, be adaptable to the future changes in the operating environment and meet sustainable development goals. The Innovation Partnership was carried out according to the Finnish Act on Procurements and Concession Contracts of Entities Operating in the Water and Energy Supply, Transport and Postal Services Sector (1398/2016).

What was the aim of using innovation procurement for this purchase: Innovation partnership was selected as the model since the foreseeable changes in the operating environment will create risks in the current sludge treatment processes and the applications of its end products. As a result, there is a need to develop new products and applications.

What were the important conditions (internal or external) for using innovation procurement in this case:

- financial sources
- other: The new sewage sludge directive under preparation which may impose future requirements or restrictions on the treatment or use of sewage sludge

Award criteria: Price 70 % - Quality 30 %

What are the benefits of this innovation procurement: Possibility to find solutions to future challenges. In addition, the selected partner will have to provide sludge treatment service beyond the deadline of 1.5.2020, while also developing the service further.

What are the problems/challenges of this innovation procurement: How to draw up the call for tenders and the award criteria so that the services provided by the different technologies can be compared equally, as the contracting entity did not want to limit the processing methods offered? How to evaluate the development requirements and how to verify the set requirements? It was decided to consider the risk that the new procedure would limit the willingness to participate in the way in which the market dialogue was conducted.

Additional information (in Finnish):

- <http://www.oulunvesi.fi/tulevaisuudenliete>
- <https://www.hankintakeino.fi/fi/keinokkaat-hankintaesimerkit/lietteenkasittelyn-kokonaispalvelu-case-oulunvesi>
- <https://ted.europa.eu/TED/notice/udl?uri=TED:NOTICE:352001-2018:TEXT:FI:HTML>

Title practical example: Contract for the seats of the Helsinki Olympic Stadium

Country/city: Finland / Helsinki

Amount of the procurement in euro's: estimated procurement value € 5.000.000 including VAT

Description of the innovation project: The City of Helsinki had to find an innovative solution when modernising the Olympic Stadium seats to be environmental, low maintenance and long lifetime. The renovation of the Olympic Stadion started in 2015 and the seats of the stadium will be replaced in 2018–2019.

What was the aim of using innovation procurement for this purchase: There was a need for innovation, as there are no off-the-shelf wood or wood composite products that would meet the requirements for the durability, maintenance and fire safety of the material, while also being attachable to the mounting brackets dating from the 1950s and fulfilling the requirements of the Finnish Heritage Agency. Using the old mounting posts was necessary, since replacing them would have caused the costs to skyrocket, which the procurement entity could not afford. Another objective of the project is to develop a new wood innovation that could be exported.

What were the important conditions (internal or external) for using innovation procurement in this case:

- financial sources

Award criteria: Choosing the partners: quality 80 - price 20 % , final purchase: quality 50 - price 50%.

What are the benefits of this innovation procurement: As a result the contracting entity received the seats that met its requirements – and as a bonus, the product was an environmentally friendly circular economy product.

What are the problems/challenges of this innovation procurement: Placing the award criteria for the prototype seat. The procurement competence of the tenderers, especially when using the electronic procurement system as well as completing the ESPD formula.

Additional information (in Finnish):

<https://www.hankintakeino.fi/fi/keinokkaat-hankintaesimerkit/olympiastadionin-istuinurakka-case-helsingin-kaupunki>

Title practical example: Scotcap

Country/city: Scotland: Research locality ; Inverness, Aberdeen and the Western Isles.

Amount of the procurement in euro's: Contract € 12 million

Description of the innovation project: SCOTCAP is a programme for an innovative point-of-care (PoC) investigation of the lower gastrointestinal (GI) tract using minimally invasive colon capsule endoscopy (CCE). By using CCE the GI investigation can be initiated and executed in primary care.

What was the aim of using innovation procurement for this purchase: Requirement to carry out research and particularly development of service, allied to service evaluation and test of efficacy, followed, if successful by commercial implementation for Scottish Health Boards.

Award criteria:

- Service Quality and Performance / Weighting: 62
- Cost criterion: Cost / Weighting: 38
- https://www.publiccontractsscotland.gov.uk/search/show/search_view.aspx?ID=NOV336720

What are the benefits of this innovation procurement: SCOTCAP, if successful could remove the diagnostic bottleneck for GI disease and bowel cancer risk assessment. This could be achieved by creating an innovative health service based on CCE which can be delivered at point-of-care in the community, at a General Practice or even at the home of the person. Furthermore, it could reduce the total cost of gastrointestinal diagnostics by eliminating unnecessary travel, minimize impact on the daily life of patients, avoid complications, reduce specialist participation, reduce resource utilization and make use of modern digital health technology – while maintaining the medical accuracy of the existing procedures. The procurement allows for R&D and testing of the service in a real life environment. If successful the service could then be implemented across all health boards. Currently the R&D is nearing completion with results and a decision expected in early 2020.

What are the problems/challenges of this innovation procurement: No real issues with the procurement exercise.

Title practical example: Implementation of an innovation partnership for the procurement of a hail sensor

Country/city: Germany / Offenbach

Amount of the procurement in euro's: €25,000–50,000 (production cost), €1,000–1,500 (final product cost)

Description of the innovation project: : The Deutscher Wetterdienst (DWD) is the German Meteorological Service. By implementing an innovative procurement approach (the innovation partnership), it successfully encouraged the German market to create a hail sensor which the DWD in turn needed for accurate analyses. There were more expensive and complex solutions on the market, however the hail sensor fits best to the original performance description of the requested product.

What was the aim of using innovation procurement for this purchase: All existing products were too expensive due to their complexity and additional features. Most of them were not needed, which is why the DWD asked for a more simple product, reducing the cost per sensor.

What were the important conditions (internal or external) for using innovation procurement in this case:

- extra authorisation: no
- competence: yes
- expertise: yes
- financial sources: no
- other: The DWD needed the expertise and knowledge to implement the innovation partnership. For that, it needed to find a supplier to work with and bind itself to by contract

Award criteria: the awarding consisted of a two-step procedure. In the first phase, information was provided about the advertised performance and the aptitude test to find five suppliers at max. In the second phase, an offer by the selected supplier has been negotiated according to performance standards.

What are the benefits of this innovation procurement: The demanded performance or product can be developed together with the supplier, and it can be influenced by the procurement department.

What are the problems/challenges of this innovation procurement: The development phase is rather long, and the product in demand cannot be procured directly.

Title practical example: Less natural fires due to market innovations on satellite data

Country/city: The Netherlands/PIANOO

Amount of the procurement in euro's: €261.000,- euro including VAT

Description of the innovation project: Smart use of satellite data to control, combat and prevent natural fires. The Physical Safety Institute (PSI) and the Dutch Fire Brigade work closely together for this. The PSI wants to use satellite data to obtain an up-to-date picture of the relative humidity in vegetation in the Netherlands. Reduce or even prevent natural fires in the Netherlands - that is the purpose of the PSI and the Dutch Fire Brigade. The use of information is crucial to achieving this goal. The Early Warning Drought project is part of the large-scale and expertise Dutch Fire Service program. Nathalie van der Meyden, tactical purchaser at the PSI: "The challenge is to develop an instrument that processes satellite data into accurate forecasts. Not for a limited area, but for the whole of the Netherlands. Where is there a risk of natural fire? When? And how big is that risk? We have asked the market parties to develop such a product." If it is up to the PSI, not only the Netherlands will benefit from that product. "As a government we would like to share our innovations with other countries. There is also increasingly more drought there. And also the fire brigades there want to be able to anticipate nature fires. "

What was the aim of using innovation procurement for this purchase: Innovation partnership combines the development and procurement phase, so that an assignment can be awarded immediately after development to the market party that has submitted the most economically advantageous tender. The Pre-commercial procurement (PCP) approach is not a tender procedure, but a pre-commercial procurement tool to use the knowledge and creativity of the market to solve the "problem". In principle, the developed solution may not be purchased immediately after the PCP. It is then necessary to complete a regular tender.

What were the important conditions (internal or external) for using innovation procurement in this case: The PSI and Dutch Fire Brigade have already developed innovative solutions with the market by using the PCP approach. Unlike the PCP approach, the developed solution may be purchased directly by using the innovation partnership. "We can continue with the best market party," says Nikoletta Nemeth, team manager purchasing at the PSI. "This procedure makes it possible to describe our needs functionally. We have a clear picture of the goal we want to achieve with the satellite data, but we let the market parties come up with the innovative solutions for an instrument or tool to achieve this goal. We want to give them the opportunity to develop something new, to come up with innovative applications, to pioneer. "For the current project, the PSI is also working with the Ministry of Justice and Security and National Coordinator for Antiterrorism and Security.

Award criteria: Quality - 60%; Price - 40%

What are the benefits of this innovation procurement: a) Bigger chance that the solution meets the specific requirements of the contracting authority and the procedure thus yields several usable innovations. b) Market parties and public authorities both invest in this procedure, which leads to a fairer distribution of costs and risks. c) A clear commitment is issued by the public authorities to the market parties by offering a development budget and offering a purchasing perspective. d) The buyer can award the assignment to one of the participants if his prototype is assessed as the best. This is done on the basis of the award criteria included in the description document.

What are the problems/challenges of this innovation procurement: a) It is possible that one of the dropouts in the process independently develops a better solution. This cannot be purchased just like that. b) The TenderNed tendering platform is unfortunately not adjusted for this procedure yet. TenderNed has the option of registering only once, while there may be several registration moments with Innovation Partnership necessary.

Additional information:

<https://www.pianoo.nl/nl/minder-natuurbranden-door-marktinnovaties-op-satellietdata>

<https://ted.europa.eu/udl?uri=TED:NOTICE:160389-2019:TEXT:EN:HTML&src=0>

4.3 Design Contest

(Recital 120 Preamble and article 78 and continued, Directive 2014/24/EU)

With a Design Contest a contracting authority can gain new ideas or concepts from the market. The contracting authority formulates a challenging problem and reward the submitters of the best solutions with an award. The assessment is done by an independent jury. A Design Contest is a form of tendering that offers a lot of space for creativity of the market parties.

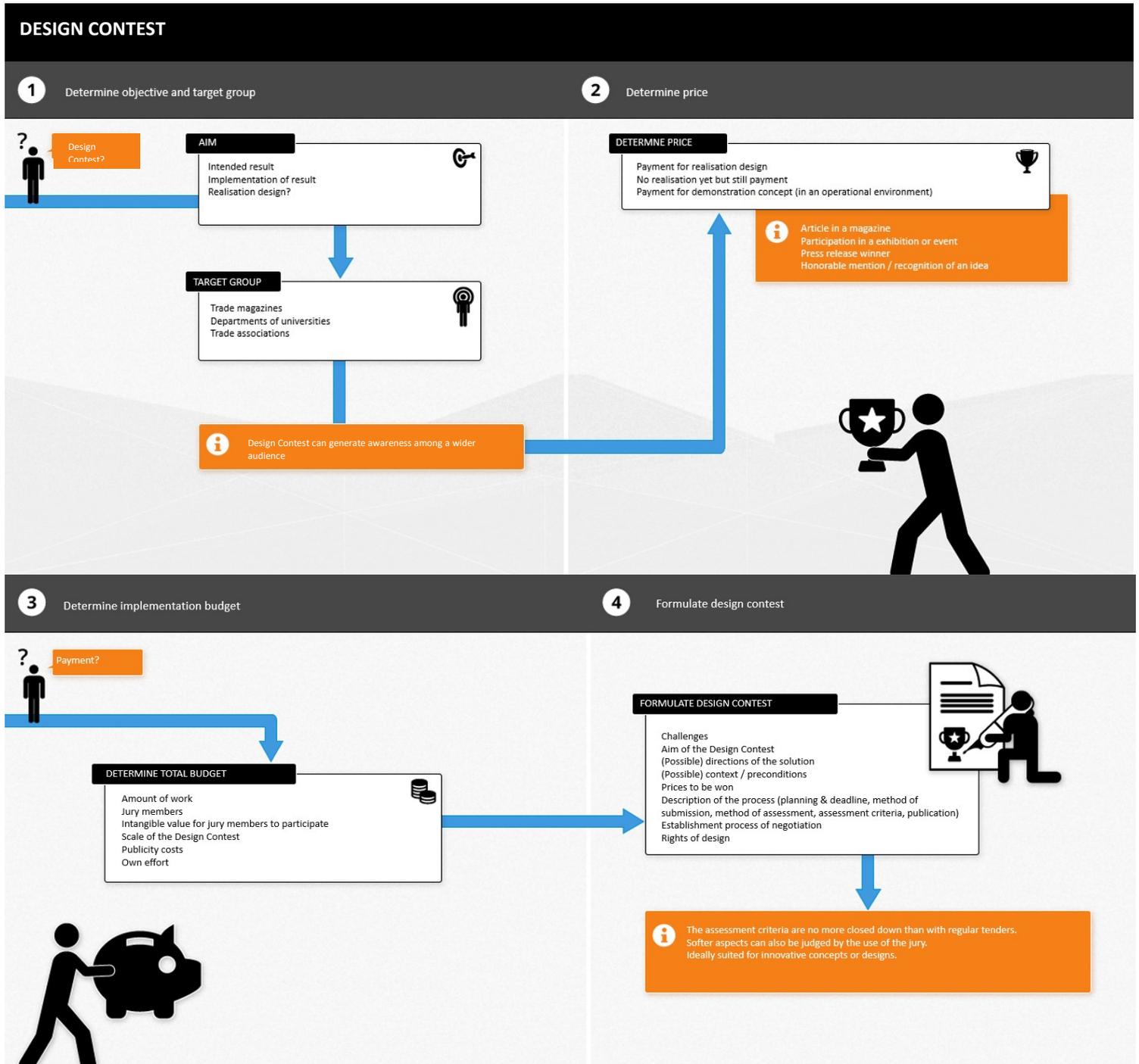
A design contests is the procedure in which a plan or design is selected by a jury after being put out to competition, with or without an award of prizes. If the winner has been identified, it is possible to make use of the negotiated procedure without prior publication²⁴, at least as this intend has been indicated in the contest notice. This leaves some leeway for the contracting authority to act according the outcome of the design contest.

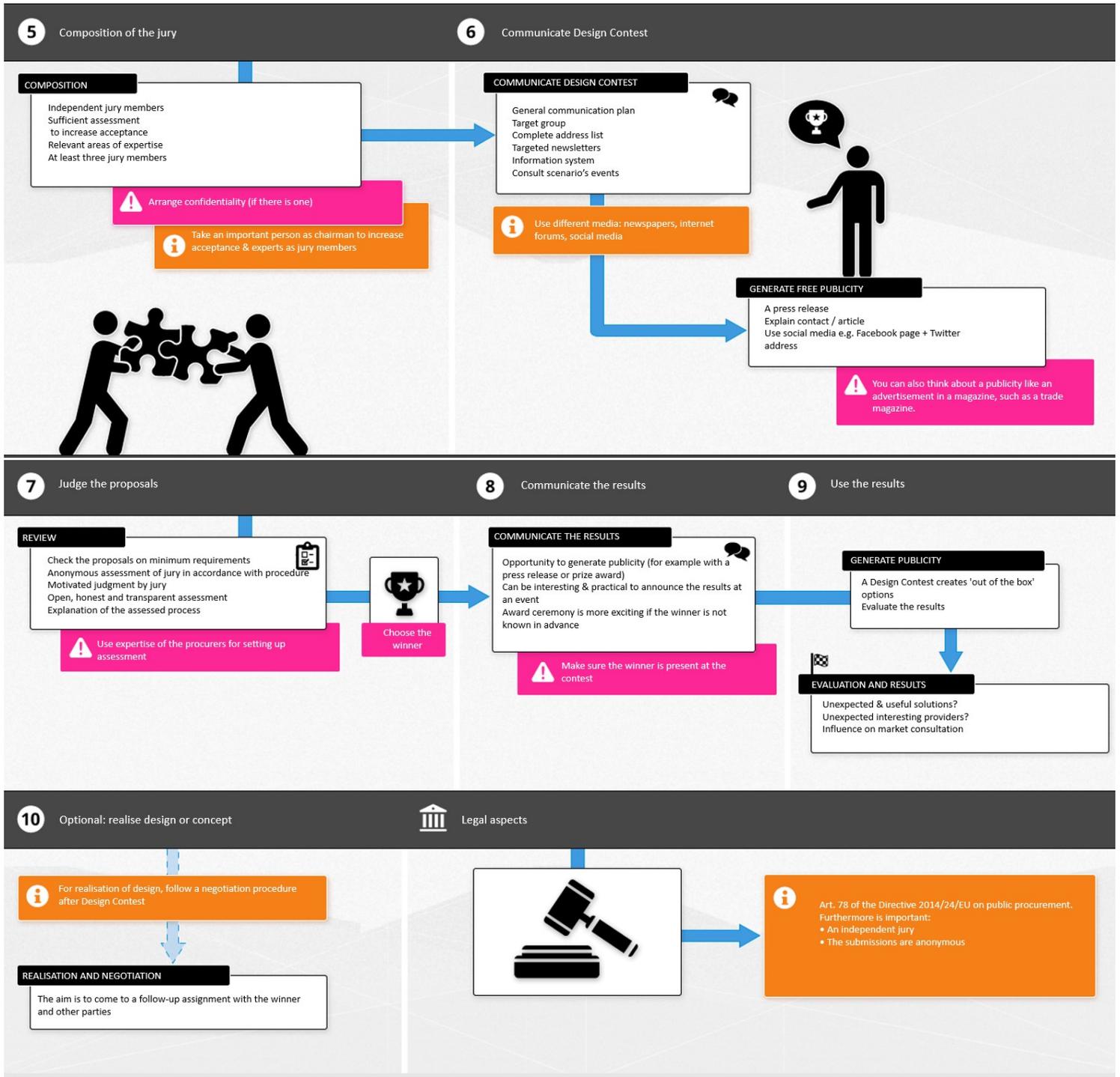
The Directive makes an appeal for a broader use than in the fields of town and country planning, architecture and engineering or data processing. "...these flexible instruments could be used also for other purposes, such as to obtain plans for financial engineering that would optimise SME support in the context of the Joint European Resources for Micro to Medium Enterprises (JEREMIE) or other Union SME support programmes in a given Member State. The design contest used to acquire the plans for such financial engineering could also stipulate that the subsequent service contracts for the realisation of this financial engineering would be awarded to the winner or one of the winners of the design contest by a negotiated procedure without publication."²⁵

²⁴ That procedure is described in article 32 Directive 2014/24/EU

²⁵ Recital 120 of Directive 2014/24/EU

Figure 4.3. Design Contest procedure
 Source: Pianoo/Innovatiekoffer





Regulations:

Art. 78, Art. 79 and Art. 80 of the Directive 2014/24/EU on public procurement.

Title practical example: Lighting of the amphitheatre in the Park of John Paul II in Lublin - implemented as part of co-financing from a project PPI2Innovate – Capacity building to boost usage of PPI in Central Europe

Country/city: : Lublin / Poland

Amount of the procurement in euro's: : € 10 000

Description of the innovation project: Orders in the field of SMART energy were carried out as part of the selected Lublin Civic Budget project. The subject of the contract was the detailed design for innovative lighting - energy-saving LED lamps integrated with a motion sensor and an air quality sensor in the John Paul II Park in Czuby in Lublin. Market consultations were carried out to identify the needs of the City of Lublin in the area of searching for a specific pilot area of an innovative energy order.

With the help of external experts, key issues were identified for acquiring an innovative solution in the field of lighting the mini-amphitheatre and information on the nature of innovation of the future solution. Knowing a broader understanding of investment and project needs, experts could better help identify an appropriate solution through market consultations, the so-called market test and describe the concept for conducting the procedure. This memorandum was to serve the first contact with the market, to communicate the intentions of the contracting authority and a description of what the contracting authority wants to acquire and what general concept on this subject it has.

As part of the Civic Budget project, it was planned to meet the need to light the mini-amphitheatre with two additional lanterns containing motion sensors and equipped with an air pollution sensor. It was established that on the premises of the mini-amphitheatre there are no cyclical events or large events, but it is rather of a district nature. It is a place of dance classes and performances organized by the local community. As a result of market consultations, the subject of the order was finally determined using solutions for lighting integration with broadly defined monitoring systems, i.e. motion sensors (measuring presence + number of people) and air quality sensors.

What was the aim of using innovation procurement for this purchase: The proposed solutions, including the measurement of air quality, it was recognized that in the context of increasing public attention to the problem of environmental protection, a pilot lighting solution with an element of measuring air quality in Lublin would clearly meet the current needs of residents. The advantage was that the investment was visually justified in the light of the citizens' panel initiative launched in Lublin. It focuses on the subject of environmental protection, including the so-called smog problem.

Award criteria: : Price. Data on the energy efficiency of the proposed lighting solution together with the motion sensor were taken into account as part of market consultations: approx. 50% savings can be made using an LED lamp (compared to the usual) and approx. 80% - with a motion sensor measuring the presence and the number of people in the lighting (compared to an ordinary LED lamp)

What are the benefits of this innovation procurement: : Solution for the city to have a complete system of providing environmental data from which the city will be able to download and intentionally process it. Conducting a pilot investment was also important due to the very pilot nature of the undertaking. Thanks to this solution can be properly tested avoiding investment and image risks. The proposed solution not required additional costs, as it could be offered on preferential terms - treated as a pilot as an opportunity for promotion and wider market entry.

What are the problems/challenges of this innovation procurement:

- Allocate sufficient time for proper planning of every stage and for conducting the procedure
- Create a project team composed of people with appropriate competences including external experts if necessary
- Convince decision-makers and internal units responsible for public procurement that it is worth to invest more time and resources at the stage of preparing the proceedings to achieve better results
- When describing the need, it is necessary to confront expectations and capabilities with each other in order to avoid receiving unrealistic ideas for technical, financial or even logistic reasons
- Performing the cost-benefit analysis in a proper way to maintain the legitimacy to continue the activities in accordance with the established concept
- Usage of market knowledge to identify need and create a proper description of the subject of the contract (technical dialogue, market consultations)
- Have incentives for market players to keep them involved during long lasting and often multi-stage proceedings
- Usage of Most Economically Advantageous Tender method of assessment during the selection procedure
- Have well prepared contract which must contain precisely defined obligations of the parties
- Monitoring the results of the conducted innovative procurement and documenting

Title practical example: Public contract for construction works „Children’s Hospital with Speleootherapy”

Country/city: Czech Republic / South Moravian Region, Ostrov u Macochy

Amount of the procurement in euro’s: € 5.881.900,- euro including VAT

Description of the innovation project: The Children’s Hospital with Speleootherapy in Ostrov u Macochy is a specialized therapeutic institute, in which, for over 30 years, children of mostly school age with respiratory-tract diseases have been treated, using speleootherapy - a special climatic healing method that uses the climate in the karst cave as a natural resource. The Children’s Hospital in Ostrov u Macochy is the only workplace of this type in the Czech Republic. Nowadays, however, the hospital’s facilities are no longer satisfactory for patients. The contracting authority, as the founder and investor, therefore plans to build a new children’s hospital building on the outskirts of Ostrov u Macochy near the cave where speleootherapy takes place. The subject of the public contract is processing of the complete project documentation of the hospital building (including the interior design), the construction of the hospital and providing energy management services for the building during the first 3 years of operation. The project documentation will be prepared according to the BIM (Building Information Modelling) model. After the completion of the construction, the building information model will be handed over to the client for further use within facility management.

What was the aim of using innovation procurement for this purchase: As the project is exceptional in many respects, increased demands are placed on the design, execution and functionality of the new building. The contracting authority’s basic requirements include following: a) an architecturally interesting building that fits into the protected landscape area of the Moravian Karst. b) quality work friendly to its surroundings (respect for landscape character, urbanism) users (health safety, pleasant working environment). c) use of renewable energy sources in the operation of the building.

What were the important conditions (internal or external) for using innovation procurement in this case: In particular, the contracting authority’s employees involved in the public procurement process had to find their bearings in new areas and received appropriate training (e.g. design-build method, FIDIC contractual conditions, BIM). The contracting authority established cooperation with several external consultants during the preparation of the tender procedure. The contracting authority also conducted several rounds of pre-market consultations with potential suppliers to verify the suitability of its procedure and the tender specifications envisaged. An important aspect is certainly the fact that the public contract is not funded from the European Structural Funds, but from the contracting authority’s credit facilities.

Award criteria: The offer includes, among others, the design of the building within the scope of the architectural study. In accordance with the principles of architectural competition, which inspired the final stage of the tender, the evaluation of tenders will be carried out anonymously by an independent jury of professionals. Since the contracting authority is objectively not able to determine the weight or other mathematical relationship among the various criteria, they will be listed in descending order according to the importance the contracting authority attributes to them:

- Overall urban-architectural quality of the design,
- quality of energy and technological solutions,
- fulfilment of operational requirements of the assignment;
- quality of the participant’s implementation team,
- added value (i.e. implementation of predefined improvements beyond minimum project requirements).

Since the contracting authority has fixed a fixed price for the execution of the public contract (equal to the estimated value of the public contract), there bid price is not one of the evaluation criteria.

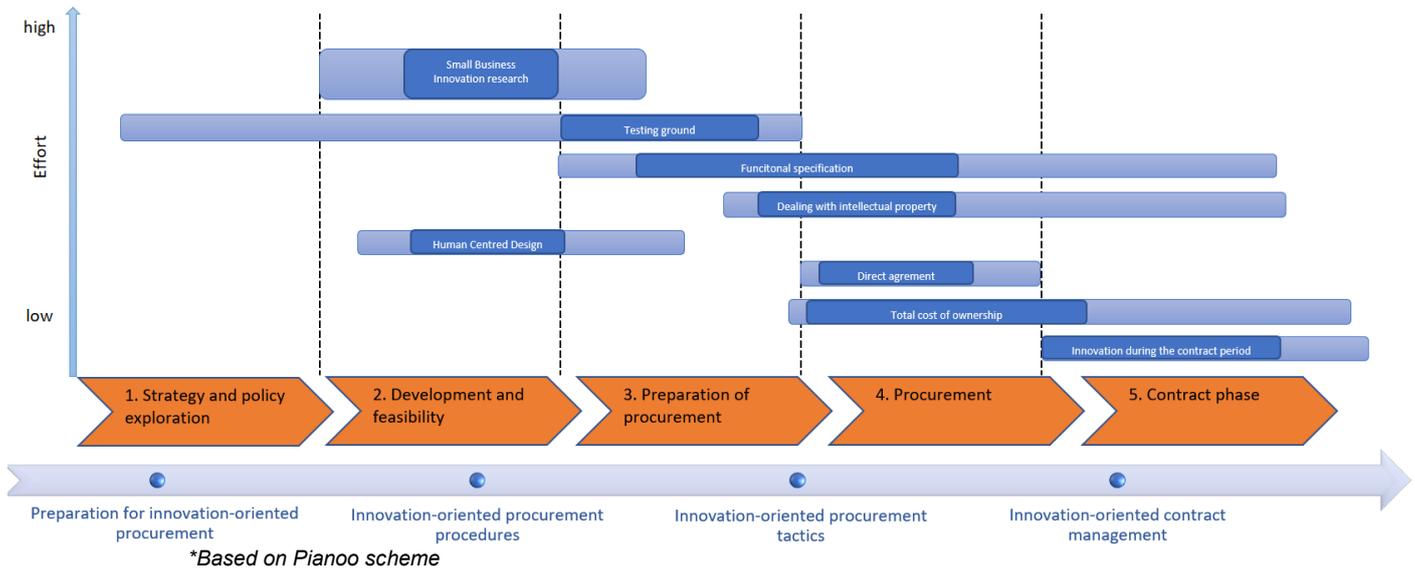
What are the benefits of this innovation procurement: Reducing the energy performance of buildings, use of renewable energy sources, reducing the life cycle costs (and in particular, the operating costs) of buildings, use of non-toxic materials, creating a comfortable environment for both users and employees, emphasis on quality architecture, seeking to level the market environment in the area of public works contracts by prioritizing supplier quality over low prices and setting fair contract terms.

What are the problems/challenges of this innovation procurement: In the Czech context, it is an innovative way of awarding public works contracts, which includes elements of architectural competition. It resulted in a greater administrative and time-consuming tendering procedure. The previous preparation of the project had taken another 1 year and had brought increased costs for the involvement of external consultants, as well.

4.4 Innovation Procurement Instruments

Public authorities can use different instruments, either in the context of the chosen procurement procedure or separately, to procure innovation. In this paragraph, the decision making criteria and the different types of the procurement instruments are described. The instrument(s) can be chosen depending on the phase of the innovation-oriented procurement procedure and the effort of the public authority.

Fig. 4.4 Decision Making Model for Innovation Procurement Instruments



There are different Innovation Procurement Instruments. In this legal framework we focus on the following Innovation Procurement Instruments:

- 4.4.1 Prototype development using Pre-commercial Procurement (PCP) and Small Business Innovation Research (SBIR)
- 4.4.2 Total cost of ownership
- 4.4.3 Direct agreement
- 4.4.4 Functional specification
- 4.4.5 Innovation during the contract period
- 4.4.6 Human Centred Design Thinking
- 4.4.7 Testing ground.

Some of these innovation instruments are based on national law or national practice, e.g. Prototype development using Pre-commercial procurement (PCP) and Small Business Innovation Research (SBIR)

4.2.1 Pre-commercial procurement and Small business research innovation

A public authority that has a need for a product that is not yet on the market, can ask the market to develop (a) specific prototype(s)

Pre-commercial procurement (PCP)

Pre-commercial procurement involves an approach to the procurement of Research and Development (R&D) services, where the contracting authority leaves the new intellectual property rights with the participating economic operator, but keeps the right to use the R&D results and the right to license to third parties.

Pre-commercial Procurement is suitable if the public authority chooses not to reserve the R&D results exclusively for its own use. Furthermore, the scope is R&D services only and does not include commercial development activities. Public authorities and industry share the risks and benefits and therefore co-financing is in order. An important condition for pre-commercial procurement is not to contain a State aid element, i.e. that the procurer should not pay more than market price. Below, in paragraph 5.1, there is more information on state aid.

The Directive states “The co-financing of research and development (R&D) programmes by industry sources should be encouraged. It should consequently be clarified that this Directive applies only where there is no such co-financing and where the outcome of the R&D activities go to the contracting authority concerned.”²⁶

Furthermore, “This Directive shall only apply to public service contracts for research and development services... provided that both of the following conditions are fulfilled:

- (a) the benefits accrue exclusively to the contracting authority for its use in the conduct of its own affairs, and
- (b) the service provided is wholly remunerated by the contracting authority.”²⁷

In conclusion, pre-commercial procurement is exempted from the public procurement directives.

PCP separates the Research and Development phase from commercialisation. As a result, the companies that have developed the product/service, can reuse that for other potential customers. The innovation can be distributed on a large scale. It is a less exclusive situation than regular tender procedures wherein the contracting authority reserves all the results and benefits of the development exclusively for its own use. For companies it is also beneficial because they are challenged in competitive development and are better prepared to exploit arising market opportunities. This is especially important for SMEs. On the other hand, PCP requires a regular tender procedure for the commercial roll-out of the innovation. And a competing company might win. Therefore, no turnover guarantee can be secured in a PCP. And the developing company is required to co-finance the development. It is important for any business to have a profitable return on investment, but especially for SMEs whom in general have less staying power when making a loss.

²⁶ Recital 35 of Directive 2014/24/EU

²⁷ Article 14 Directive 2014/24/EU

The website of the European Commission provides more information on the topic of pre-commercial procurement.²⁸

Small business innovation research (SBIR)

Small Business Innovation Research is a way in which a public authority, through an innovation competition, challenges small businesses to come up with innovative products and services to solve social issues. It has been applied by the Dutch Government since 2005. It has great similarities to the Small Business Research Initiative (SBRI), a programme of the United Kingdom since 2008.

With an SBIR competition, a public authority can use the innovative power of companies. The SBIR is especially interesting for small innovative entrepreneurs (including start-ups). The SBIR ends with the prototype and the public authority has to procure if they would like to acquire the solution on a commercial scale.

“SBIR is a good way for the government to solve specific societal problems or accelerate a desired transition. SBIR is used if there are no ready-to-use products or services to address a challenge. This approach is used when innovation is necessary in order to make products or services available and market them to customers.”²⁹

SBIR stands for Small Business Innovation Research, but SBIR calls are accessible to all companies, small or large, as long as they come from the EU. SBIR takes smaller companies into account due to the short duration time and the phasing of the projects. The SBIR approach reduces risks: the public authority only pays for the best projects and, as a managing customer, has a significant influence on the end result. This makes the SBIR different from a subsidy for financing.

SBIR and PCP are two methods that use the leeway of the Directive and the basis is the same: exemption of the public procurement rules and regulations for co-financing research and development.

The public authority awards a contract to multiple parties to develop an innovative solution in mutual competition. There are different rounds, in which some of the parties continue on to the next phase. After the final phase, at least two prototypes have been developed and tested.

What are the differences between SBIR and PCP? SBIR is aimed at SME's and can be used on a regional or national level. The advantage is the shorter duration time than by using a PCP. PCP is an approach developed by the European Commission. This approach is interesting if a joint effort with different countries is obvious. The costs can be shared and a larger and therefore more interesting market can be offered for business.

²⁸ <https://ec.europa.eu/digital-single-market/en/pre-commercial-procurement>

²⁹ Page 5, SBIR The power of public procurement: innovative solutions to societal challenges, publication of the Dutch Ministry of Economic Affairs, Agriculture and Innovation, December 2011,

If SBIR and PCP do not offer what a public authority is looking for, but it would still like to contract R&D services, the public authority can also set up an own procedure within the basic principles of transparency, non-discrimination, proportionality and equal treatment/level playing field.

It is recommended to obey the following minimum requirements:

- professional purchasing organization;
- well-organized project management;
- affinity with innovation;
- support from internal legal and financial departments;
- respect for intellectual property rights and competition-sensitive information.

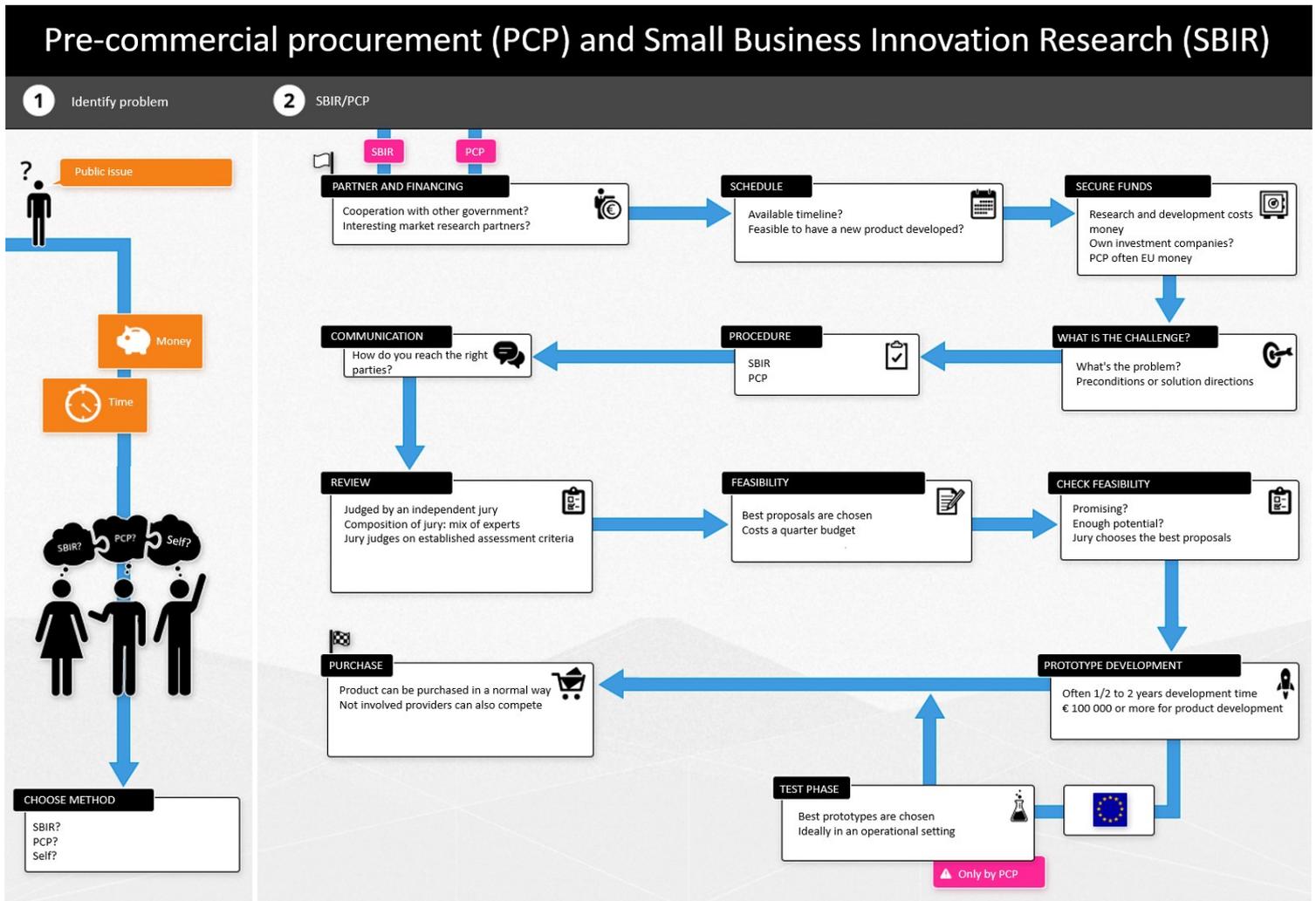


Figure 4.2.1. Infographic Prototype development using Pre-commercial procurement (PCP) and Small Business Innovation Research (SBIR)

* Source: Pianoo/Innovatiekoffer

Legal aspects: Tenders for research and development services are exempt from regular procurement legislation if there is co-financing and if the R&D results are not exclusively for the use of the contracting authority. Only public service contracts for research and development services mentioned in Art. 14 of the Directive 2014/24/EU have to be procured according to the procurement legislation. Research and

development assignments must comply with overarching European regulations: they must be open, fair and transparent and comply with the state aid regulation framework. The different national and European approaches are therefore focused on this.

4.2.2 *Total cost of ownership*

Total Cost of Ownership (TCO) is an instrument that can help the public authority to choose the best provider for a tender. TCO means: taking into account the costs that you expect during the entire life cycle of the purchase. In addition to the financial effects, you can also include e.g. the environmental effects of the purchase and social costs.

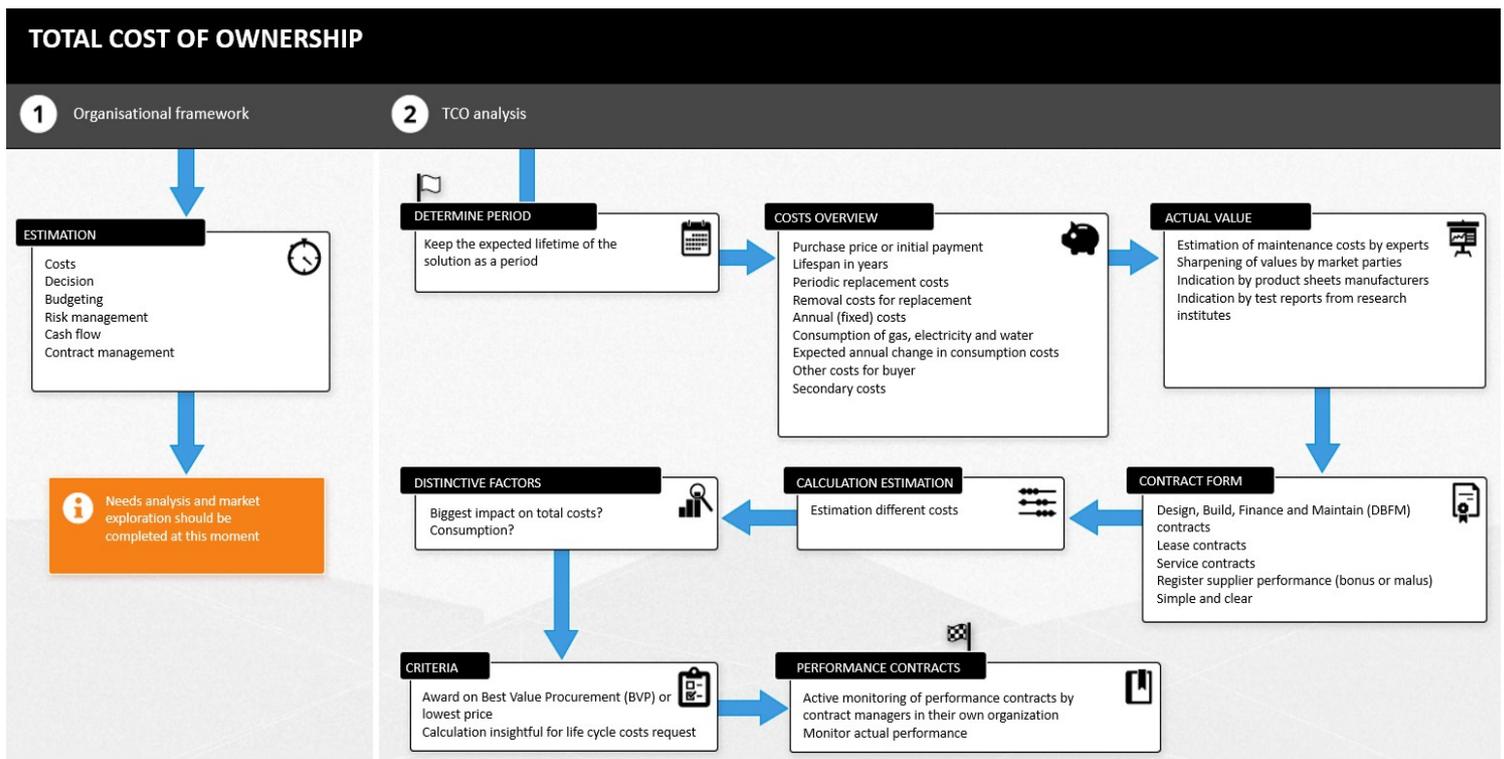
The Total Costs of Ownership (TCO) refers to the sum of all costs incurred throughout the lifetime of owning or using an asset. Life Cycle Costing (LCC) is a technique to establish the Total Costs of Ownership, which includes the initial purchase price as well as maintenance costs, energy consumption, asset disposal, et cetera. The Directives mention life-cycle costing³⁰, which can be used as a first step towards circular procurement (although in a circular economy, not just one but multiple life-cycles should be taken into account) Be aware that when using a life-cycle costing approach, the data to be provided by the tenderers and the method which the contracting authority will use to determine the life-cycle costs on the basis of those data, should be included in the procurement documents. In that way, the contracting authority acts transparently. The European Commission is developing sector specific life-cycle costing calculation tools³¹.

³⁰ For example: article 68 of Directive 2014/24/EU

³¹ For more information: <https://ec.europa.eu/environment/gpp/lcc.htm>

Figure 4.2.2. Infographic Total Cost of Ownership

* Source: Pianoo/Innovatiekoffer



Legal aspects:

- Art. 68 of the Directive 2014/24/EU (contains information about the life cycle; the regulations about what data should be part of the procurement documents and the method used for the assessment of costs imputed to environmental externalities).
- Annex XIII of the Directive 2014/24/EU (refers to Directive 2009/33/EC of the European Parliament and the Council of 23 April 2009 on the promotion of clean and energy-efficient road transport vehicles: it makes a common method for the calculation of life-cycle costs mandatory for that sector).

4.2.3 Direct agreement

In some cases, there is objectively only one economic operator that can perform the contract, so a direct agreement might be in order. This can be achieved through “below-threshold” contracts and via the European negotiated procedure without prior publication.

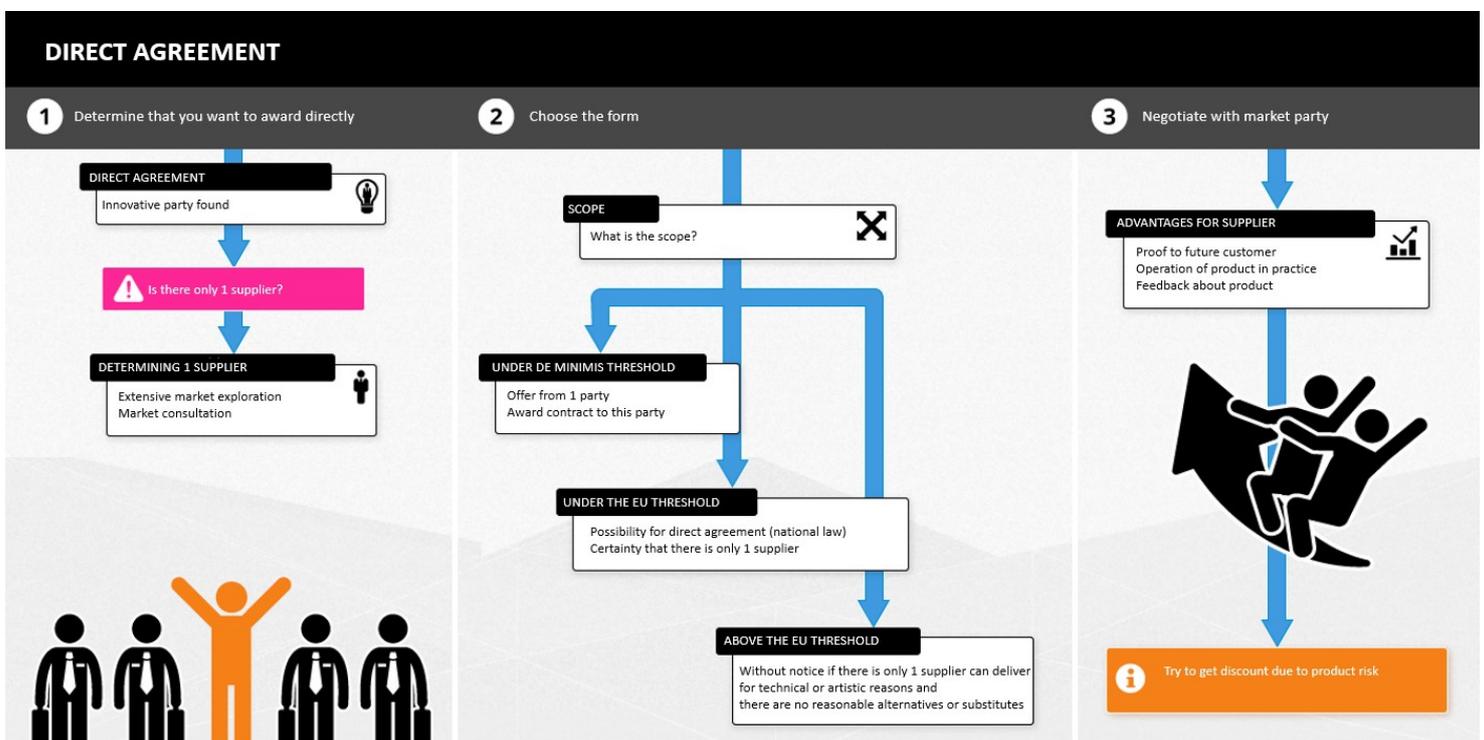
“Below-threshold” contracts are to be used for purchases by contracting authorities that are below the EU financial thresholds for works, supplies and services contracts, as set in Article 4 of Directive 2014/24/EU. The majority of these contracts awarded by contracting authorities are awarded using national rules, policies and procedures, so long as there is no cross-border interest. In that regard, certain cross-border interest must be the positive outcome of a specific assessment of the circumstances. Such an interest must be considered as having been established when its cross-border nature is proved on the basis of

objective and consistent factors³². The national procurement rules are generally simplified procedures and rules, which are less rigorous than the full EU regime.

The negotiated procedure without prior publication may be used in very exceptional circumstances for public supply contracts where “competition is absent for technical reasons”, or for “the protection of exclusive rights, including intellectual property rights”, or “where the products involved are manufactured purely for the purpose of research, experimentation, study or development; however, contracts awarded pursuant to this point shall not include quantity production to establish commercial viability or to recover research and development costs”³³. The first two exceptions shall only apply when no reasonable alternative or substitute exists and the absence of competition is not the result of an artificial narrowing down of the parameters of the procurement. Contracting authorities should provide reasons why there are no reasonable alternatives or substitutes.

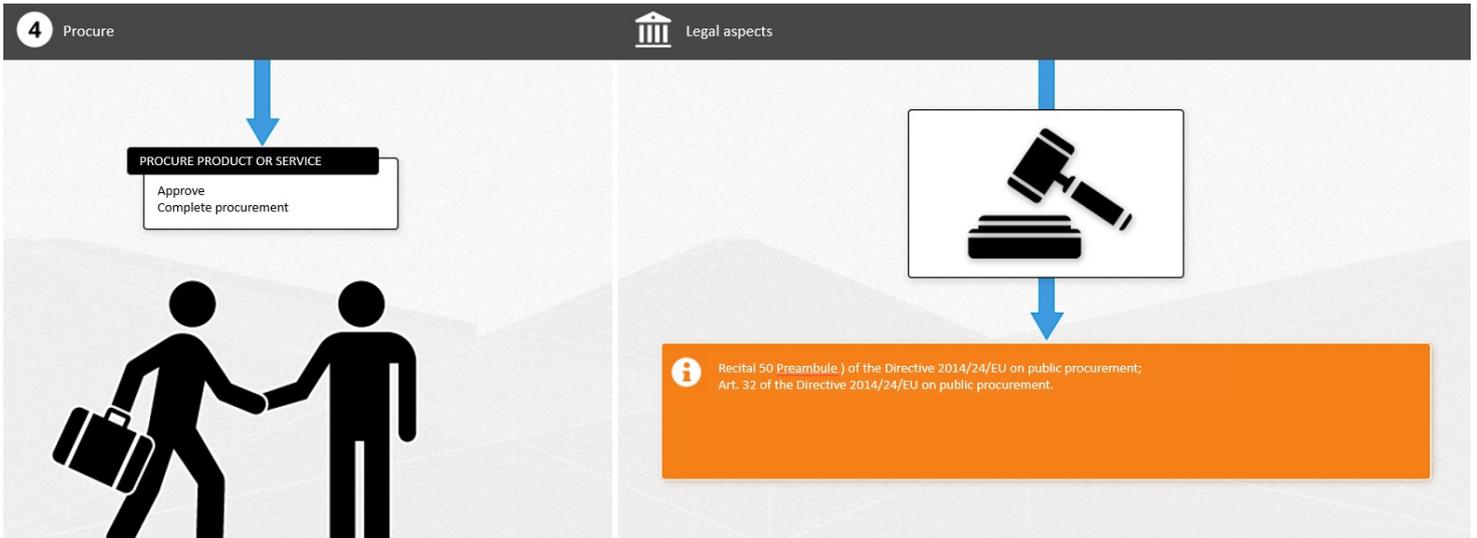
The direct agreement contracts are useful in the case where it is certain and substantiated that there is only one available supplier.

Figure 4.2.3. Infographic Direct Agreement



³² Judgment of 6 October 2016, Tecnoedi Costruzioni, C-318/15, EU:C:2016:747

³³ Article 32 of Directive 2014/24/EU



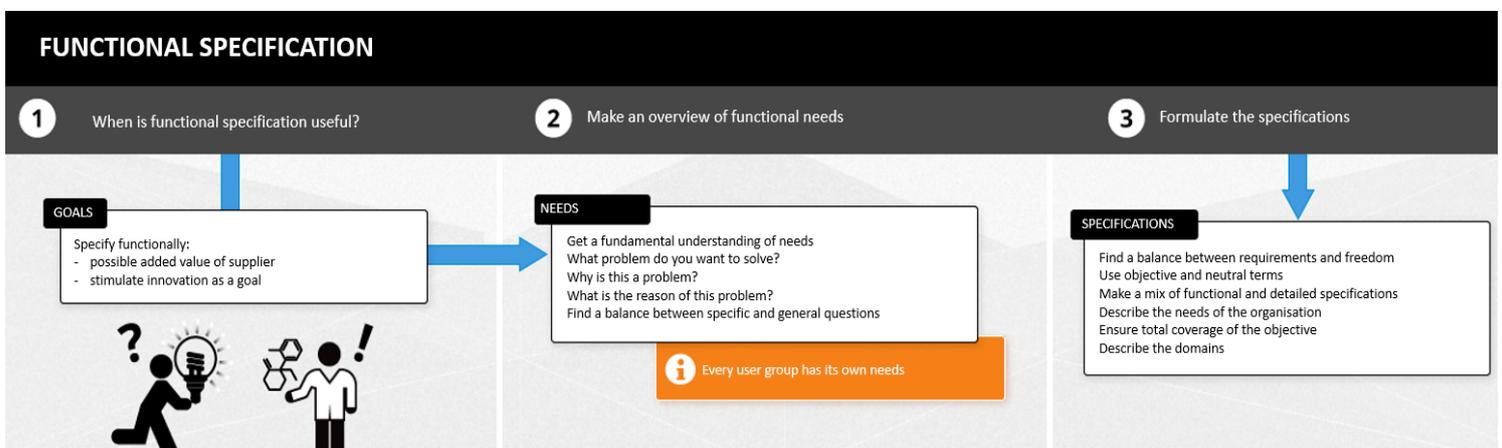
* Source: Pianoo/Innovatiekoffer

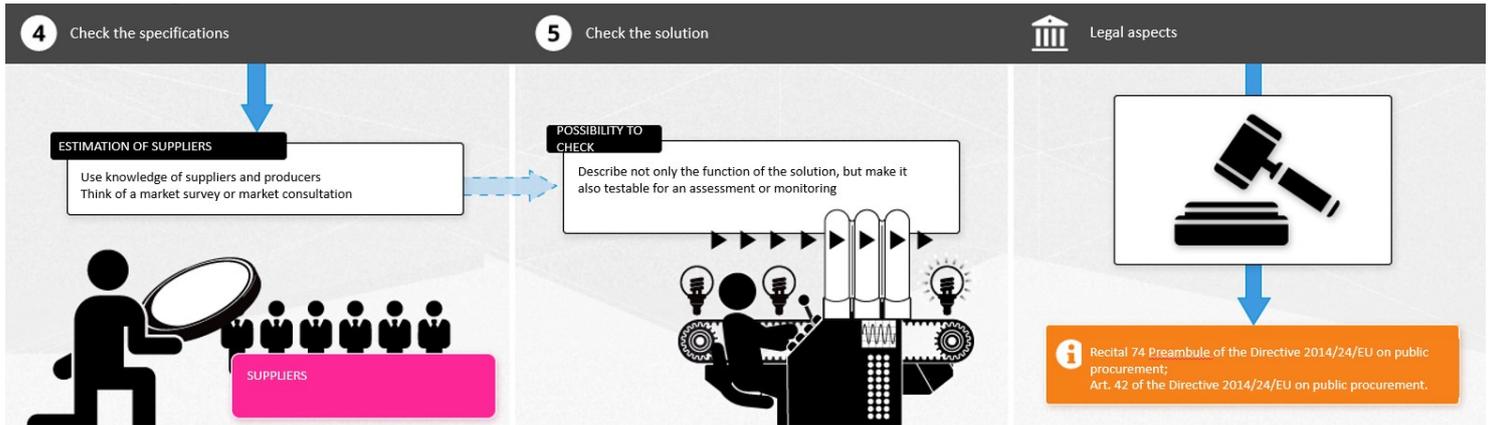
Regulations: Directive 2014/24/EU, recital 50; articles 4 and 32.

4.2.4 Functional specification

Functional specification is a way of tendering in which the public authority clearly describes the requirements that a product, service or solution must meet in a tender, without restricting the freedom of suppliers to come up with innovative ideas. A functional specification describes the challenge, yet not the solution. An example of functional specification is the requirement that a cycle path must handle at least 500 bicycles per hour. In a technical specification, the requirement could have been that this cycle path should be at least 2,50 m wide.

Figure 4.2.4. Infographic Functional specification





* Source: Pianoo/Innovatiekoffer

Regulations: Directive 2014/24/EU, recital 74; Article 42

Title practical example: Urban electric buses and charging stations

Country/city: Bulgaria/ Gabrovo Municipality

Amount of the procurement in euro's: 1 680 000 euro including VAT

Description of the innovation project: One of the main activities implemented through the "Gabrovo Sustainable Urban Transport Development in Gabrovo city" project was to purchase green vehicles. The expert investigation shown that there are two kinds of batteries for the electric buses – standard lithium-ion batteries and the new technology - capacitors. Although the electric vehicles are accepted as green/sustainable vehicles, the main problem is with the harmful materials in their batteries. This problem is better solved through using supercapacitors according to the public information about it. They do not require maintenance, the electric charge is practically not reduced at low temperature because it is not dependent on a chemical reaction, they are more ecological - no toxic substances are used as raw materials, they are with longer life – up to 15 years rather 10 years for the li-ion Battery, the work temperature is also with better performance. The problem was that this technology is not yet approved. It was just tested for a short period in Gabrovo and also in Sofia, so the Gabrovo team decided that it is too risky to try only the new capacitors technology. The real challenge was to allow the two technologies into one procedure, looking for the best value for money and not favouring any of the potential participants because of their battery technology.

What was the aim of using innovation procurement for this purchase: The innovation in this tender is allowing the both technologies in one procurement procedure, due to harmful emissions and social impact during the extraction of raw materials for the production of lithium-ion batteries and the identified problem with their future disposal. On the other hand there is a low level competition when we allowed only the new technology of Supercapacitor and it is not an imposed and proven technology. There is no reliable information on the cost of supercapacitor buses and charging stations, other than "standard" battery packs. So it was necessary to compare participants offering both technologies.

What were the important conditions (internal or external) for using innovation procurement in this case: Most important in choosing this approach was the ability to allowing a new and, in theory, more environmentally friendly technology without incurring disproportionate cost compared to the conventional buses. The municipality of Gabrovo realized and decided to look for a complete solution - vehicles in one with the necessary infrastructure, describing its needs for urban transport service and left the participants to propose their solution. Although two alternatives for guaranteed spacing and loading time have been described, participants are free to offer a combination or other solution.

Award criteria: Energy consumption - 20 %; Warranty period - max. 30 %; Price - max 50 points

What are the benefits of this innovation procurement: a) Increase competition and encourage the innovation in new batteries technology that are with less environmental impact; b) Better price because of the better competition; c) Encourage Bulgarian, and not only, public Buyers to use of functional specification.

What are the problems/challenges of this innovation procurement: a) Choosing award criteria that do not favour any of the technologies (insofar as the procurement contracts examined by the procurement team, the published public procurement estimated charge time or a single charge guaranteed run). b) If choosing a contractor offering buses using supercapacitors to get a mismatch between expectations (theory) and their operation.

Additional information: When we spoke about the innovative/sustainable contract it is important not only to find a better solution but also to try to guarantee that it will work as far as it is possible. It is important to mention that in this case one of the sustainable elements is guaranteed with the clause of the contract that says: "The Contractor undertakes, in the event of a fall in the capacity of the battery during the warranty period below 80% of the original offer, to replace or repair the battery at its own expense so as to meet the offered characteristics (providing the offers in the performance proposal)."

More information about the tender in English:

http://www.sppregions.eu/fileadmin/user_upload/Tenders/Gabrovo/E-buses_Gabrovo_Final_innovation.pdf

4.2.5 Innovation during the contract period

With "Innovation during the contract period" a contracting authority encourages a supplier to come up with innovative solutions during the contract period. The public authority must already include possibilities and incentives to do this in the agreement in advance. Otherwise, a new procurement procedure would be required due to material changes to the initial contract, in particular if the changes would have had an influence on the outcome of the procurement procedure, had they been part of the initial procedure.³⁴

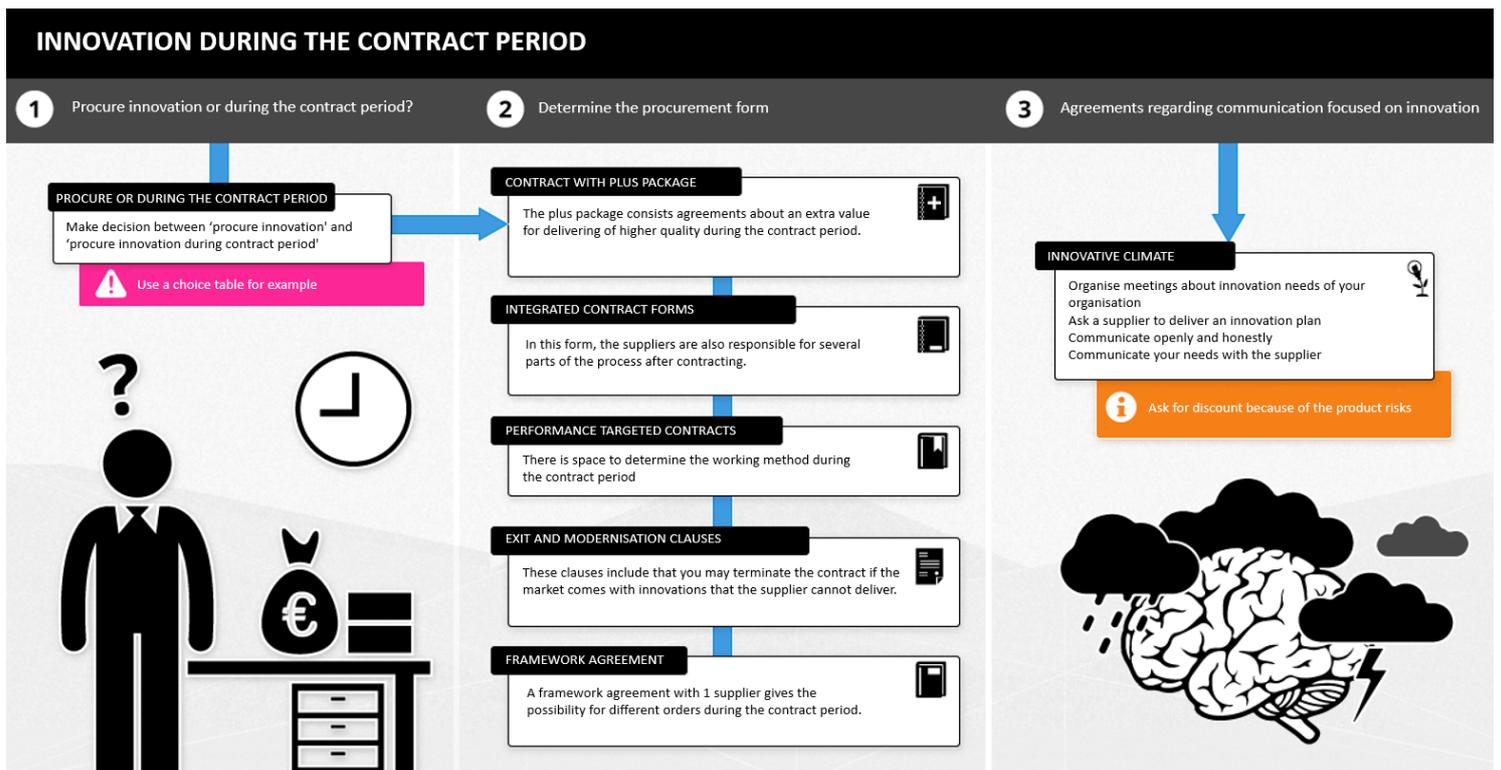
Agreements about an open way of collaboration would give room to innovation. In this way, the public authority promotes trust between itself and the supplier and the threshold for innovative proposals is lowered. It is about finding the right innovative performance stimuli.

One approach is to set a clause in the contract pledging a reward for better performance than the one offered during the tender process.

https://ec.europa.eu/environment/gpp/pdf/news_alert/Issue76_Case_Study_151_Vaasa.pdf.

Another way of stimulating innovation during the contract period is to set a clause in the contract, stipulating that in case of additional benefits for the public authority (mainly financial) those benefits will be shared with the contractor.

Figure 4.2.5. Infographic Innovation during the contract period



³⁴ Recital 107 and article 72 of Directive 2014/24/EU



*Source: Pianoo/Innovatiekoffer

Regulations:

- Directive 2014/24/EU, recitals 107 and 111;
- Directive 2014/24/EU article 72.

Title practical example: Social Participation

Country/city: The Netherlands/ Alphen aan de Rijn, Kaag en Braassem and Nieuwkoop (3 municipalities procuring jointly)

Amount of the procurement in euro's: € 11 million euros per year of the contract with a 4 years intended initial term

Description of the innovation project: The municipality of Alphen aan de Rijn (together with two neighbouring municipalities) organised a public procurement in 2014 in which it decided to combine all social care services in one public procurement procedure. The goal of this innovative procurement was to allow for greater input by the care providers into what care was to be provided to individual clients. The municipality would create the conditions under which the care was to be provided and the care providers and clients would be able to determine which care would be specifically provided. This was a major shift from the previous procurement of social support services whereby the municipality would have to individually procure each specific service and estimate the exact number of times these specific services would be needed for the duration of the contract.

What was the aim of using innovation procurement for this purchase: The aim of the procurement was twofold, first to consolidate the provision of social support services to one single provider by forcing the existing providers of various services to work together. Second the actual care provided would no longer be determined by the municipality but rather by the care provider and the client with the municipality only procuring "care where needed".

What were the important conditions (internal or external) for using innovation procurement in this case: Important conditions were the willingness and ability of the care providers to find a way of working together in an organized fashion across different expertise and the ability and willingness of the municipality to provide clear management and expectations of the services that were to be provided by the care providers in the procurement documentation.

Award criteria: Most economically advantageous tender (MEAT) with a 90% weight for quality and a 10% for price. quality being further specified as: services offered and ability to perform required services (20%), identification of risks and opportunities in the assignment in the offer submitted (26%), planning of services (5%) and interviews with key personnel (39%).

What are the benefits of this innovation procurement: The advantages of this type of procurement are that an integrated solution is provided by the care providers for the citizens of the municipalities involved. There is no longer a need to contract with large number of separate care providers but rather with one consortium that will provide all the necessary care and will coordinate the services provided in a more efficient fashion

What are the problems/challenges of this innovation procurement: The major problems and challenges in this type of procurement consist of finding a proper way for the care providers to work together. They need to be focussed not on their own interests but on those of the clients. Additionally, for the municipality this type of procurement is extremely complex to organize as it requires extensive knowledge of the services required and it does not allow for much steering opportunities once the contract has been concluded.

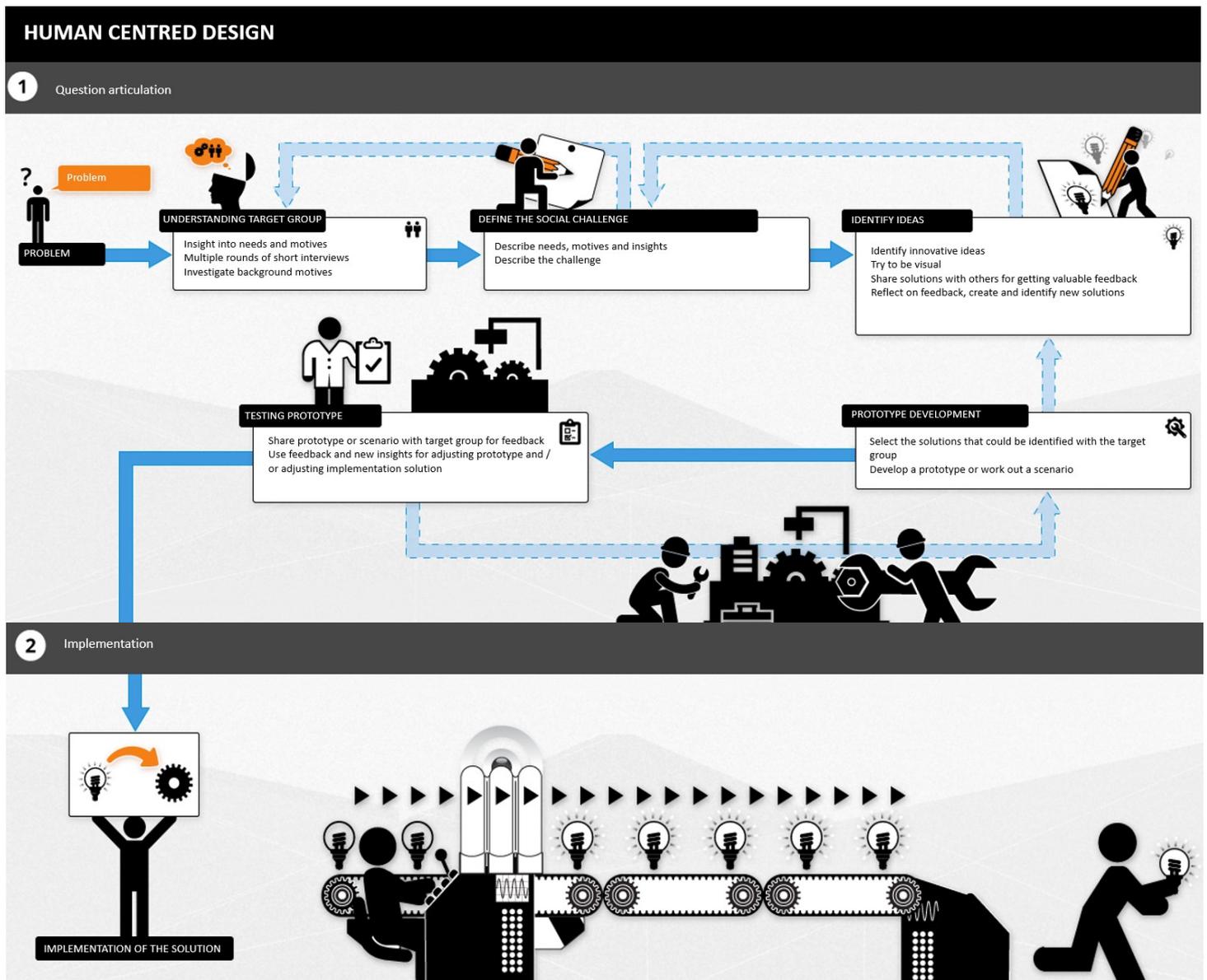
Additional information:

As a point of additional information it is important to note that this particular approach to public procurement became necessary due to a lack of possibilities provided by normal public procurement procedures. In the area of social support services (and youth care) it is essential that the practitioners are allowed the space and flexibility to use their own judgement when it comes to caring for patients. This is not something that is usually well provided for in a public procurement procedure. Allowing this type of flexibility in a normal procedure would require a gamble from the side of the municipality with regard to costs and this is something that is neither possible (due to lack of funds) nor desirable from a perspective of good governance (it becomes difficult for the city council to control the municipality if there are no

4.2.6 Human centred design

Human Centred Design Thinking is a method that can help with societal issues that require an innovative solution. Human Centred Design Thinking makes more use of creative skills and less of analytical skills. It is a creative people-oriented method to solve problems together with the target group. Examples where Human Centred Design Thinking has been applied are: projects where the inconvenience from a large building project must be limited; a technique must be developed to remove plastic from rivers; improving target group transport; public transport services; meal service for the elderly and walking routes in the public space.

Figure 4.2.6. Infographic Human Centred Design



* Source: Pianoo/Innovatiekoffer

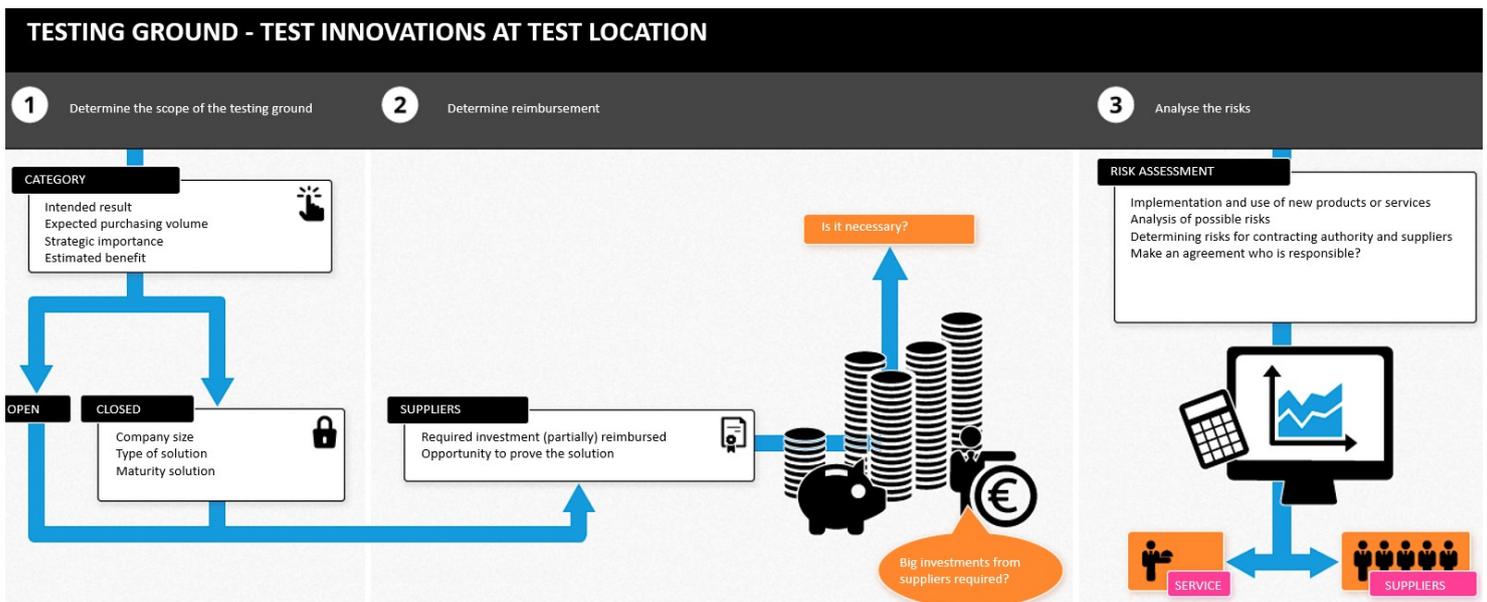
Legal aspects: There are no legal restrictions on the implementation of Human Centred Design Thinking. Guidance for this approach may need to be put out to tender. If this approach forms part of another instrument such as the needs analysis, the SBIR (Small Business Innovation Research) or the Innovation Partnership, then you must of course take into account the legal framework of that instrument or procurement form. Human Centred Design Thinking is just another way for the contracting authority to develop the procurement documents that will be published. So it is an instrument in particular for communicating and describing the needs of a contracting authority.

4.2.7 Testing ground

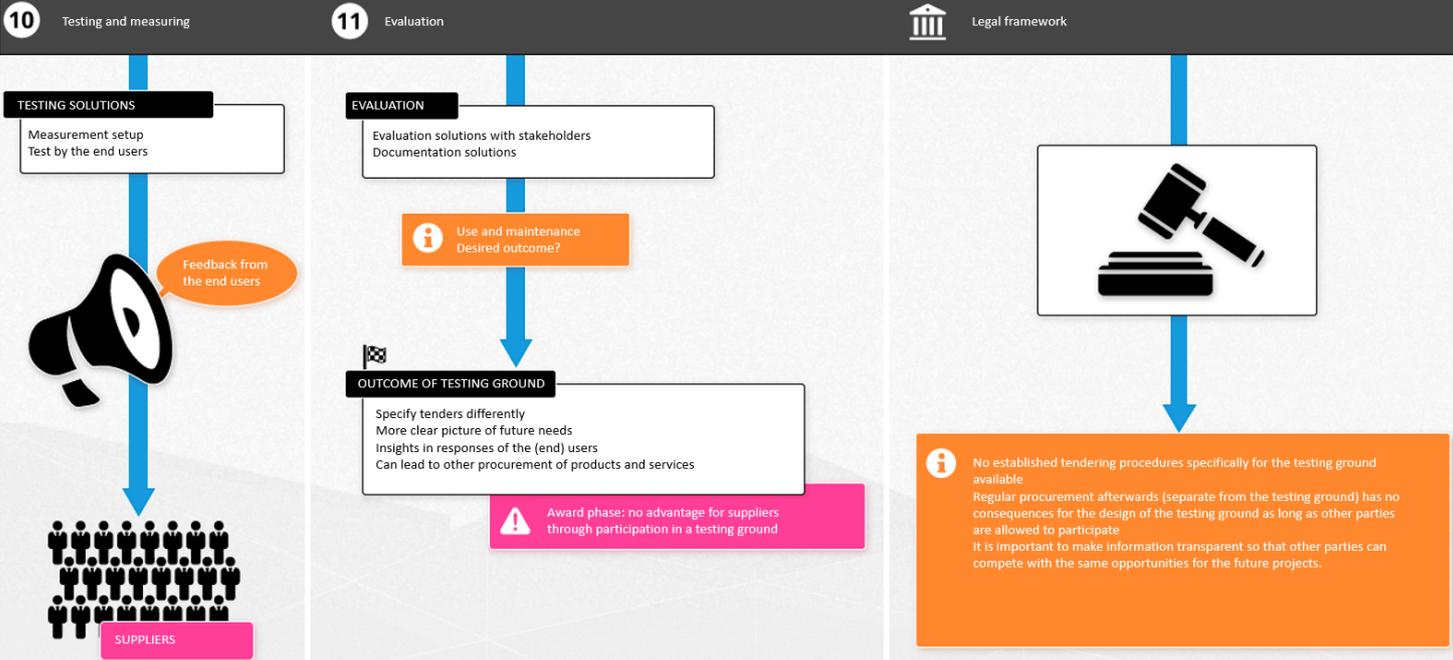
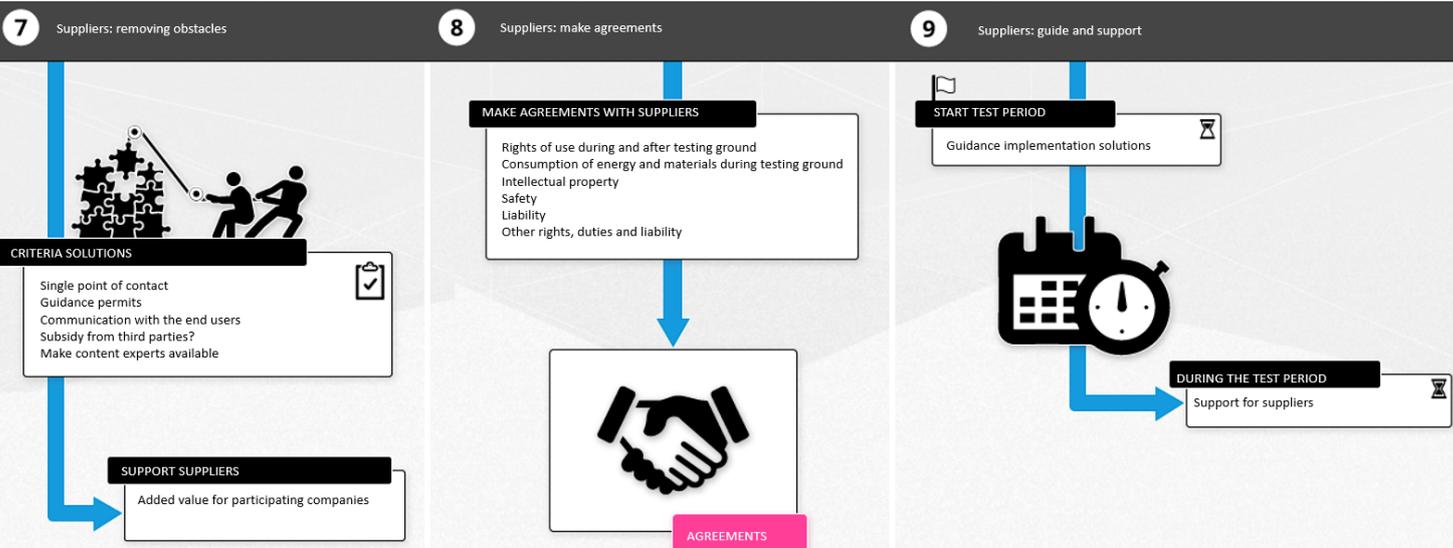
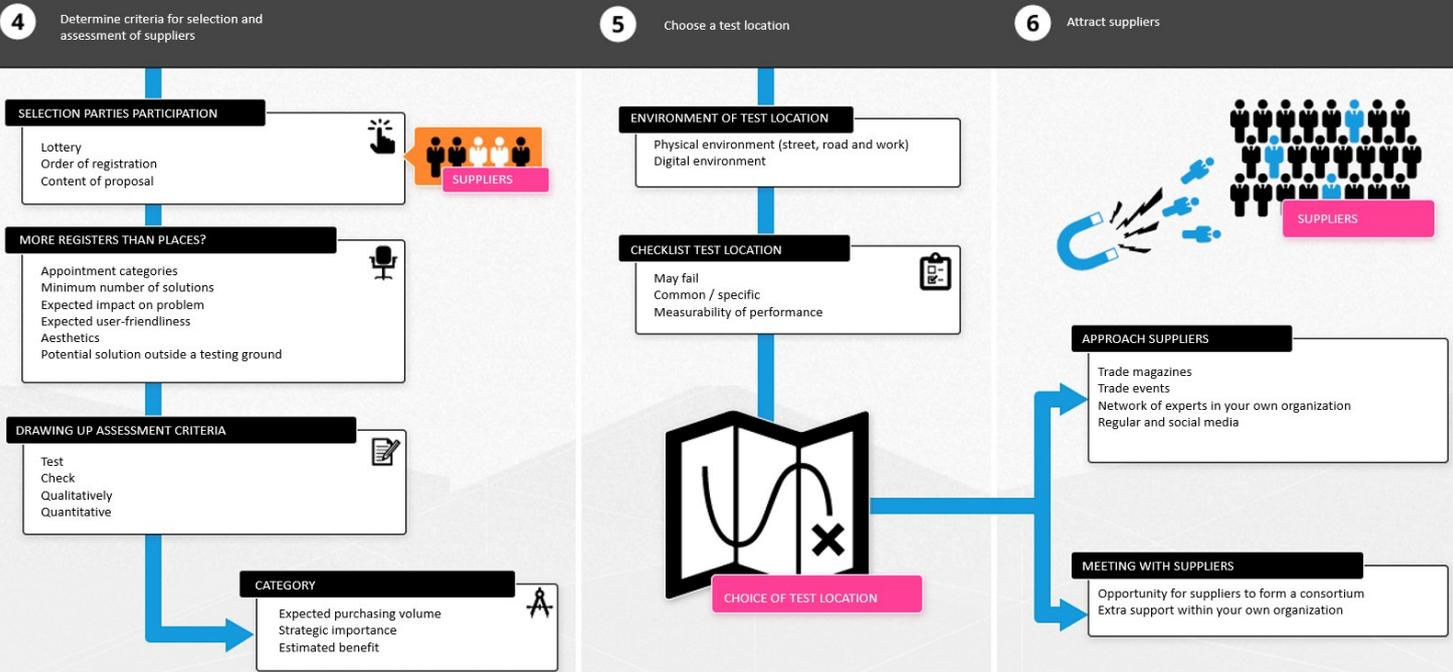
A testing ground is an instrument that gives a practical possibility to the public authority to open up and to test innovative solutions for own organisation. A testing ground can be a physical environment, such as a street or a building, but also a digital environment. As a contracting authority you determine the rules that apply to the providers of the solutions.

Legal aspects: There are no established tendering procedures specifically for a testing ground. It is useful to use procedures that have been developed for (somewhat) comparable instruments, such as a Competition. If you offer a substantial compensation to the participants, the use of a tendering procedure is recommended to prevent illegal state aid. A regular tender afterwards, which is separate from the testing ground, has no consequences for the design of the testing ground, as long as other parties may also participate in the tender. However, it is important that the information provision is transparent, so that even parties who have not participated in the testing ground can compete with the same opportunities for future assignments.

Figure 4.2.7. Infographic Testing ground



* Source: Pianoo/Innovatiekoffer



5 Specific legal aspects

When using the instruments and procurement forms that stimulate innovation, public authorities have to be aware of state aid, intellectual property and specific contract issues.

5.1 State aid

The state aid rules can be found in Articles 107, 108 and 109 of the Treaty on the Functioning of the European Union (TFEU). Local authorities must comply with this framework when providing state aid. State aid is in principle prohibited (Article 107, paragraph 1, TFEU), because it can distort competition on the European market. A measure only provides state aids if all the conditions of the cumulative criteria of the state aid prohibition are met.

State aid is defined as an economic **advantage** in any form conferred on a **selective basis to undertakings** by public authorities. Therefore, subsidies granted to individuals or general measures open to all enterprises are not covered by this prohibition and do not constitute State aid (examples include general taxation measures or employment legislation). An advantage, within the meaning of Article 107 (1) of the Treaty, is any economic benefit which an undertaking could not have obtained under normal market conditions. Public support to undertakings only constitutes state aid if it distorts or threatens to distort competition and only insofar as it affects trade between Member States. You can find more about State aid at https://ec.europa.eu/competition/state_aid/overview/index_en.html

State aid can have many forms and is not limited to the traditional subsidy/fund. Support in the form of guarantees, loans, risk capital, reduced rent and land sales under the market value can also be an example of state aid.

In the field of state aid, the decision of the European Court in case C-280/00³⁵ is fundamental. According to the judgement state aid can be avoided when the public resources are provided following four conditions:

- first, the recipient undertaking is actually required to discharge public service obligations and those obligations have been clearly defined;
- second, the parameters on the basis of which the compensation is calculated have been established beforehand in an objective and transparent manner;
- third, the compensation does not exceed what is necessary to cover all or part of the costs incurred in discharging the public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations;
- fourth, where the undertaking which is to discharge public service obligations is not chosen in a public procurement procedure, the level of compensation needed has been determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in

³⁵ Judgment of the Court of 24 July 2003, Altmark Trans GmbH, Case C-280/00, EU:C:2003:415

discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.

State aid and public procurement

Public procurement should follow the EU rules so the contracting authorities comply with the principles of transparency and equal treatment of economic operators in this case the public procurement.

But we can presume that there is no State aid in the case of using a competitive and transparent public procurement procedure which is in line with the EU public procurement rules to achieve best value for money, i.e. fair market price for the acquisition of works, supplies or services.

For more information:

- Sanchez-Graells, Albert, State Aid and EU Public Procurement: More Interactions, Fuzzier Boundaries (October 8, 2019). L Hancher & JJ Piernas López (eds), Research Handbook on European State Aid Law (2nd edn, Edward Elgar, 2020, Forthcoming).

Available at SSRN: <https://ssrn.com/abstract=3466288> or <http://dx.doi.org/10.2139/ssrn.3466288>

5.2 Intellectual property

Intellectual Property Rights (IPR)

Intellectual Property Rights (IPR) form an exclusive right to a product. Intellectual Property Rights are traditionally divided into intellectual property rights and copyrights.

Intellectual property rights and copyrights have been agreed upon with many international agreements that Member States have both ratified and provided for by national laws. Intellectual property rights are managed by the World Intellectual Property Organisation (WIPO). The WIPO also manages some international agreements, such as the Berne Convention.

Intellectual Property Rights in Public Procurements

Intellectual property rights are to be taken into consideration in public procurements irrespective of whether the procurement is innovative or not. The Directive on Public Procurement defines the arrangements applicable to intellectual property rights and copyrights in the procurement documents. In an innovation procurement, the division of intellectual property rights, such as patents or the explicit and royalty-free right to use the innovation, may be highly important since the object is a new technical solution or product that has not existed previously and therefore may be commercially interesting. Contracting authorities need to take intellectual property rights into consideration in the invitation to tender documents for many procurements.

It is recommended to define and agree on such rights in the invitation to tender documents. Contracting authorities should make sure that they receive sufficiently broad rights to use the innovation and at a minimum of costs. It is generally not necessary for a contracting authority to procure exclusive rights to the acquisition. Procurement of exclusive rights is very costly, and the supplier does not have the same interest in developing and producing such an acquisition as when the supplier has the exclusive rights to it.

In addition, the contracting authority generally does not have a need or desire to have the intellectual property rights because the nature of the contracting authority's activity does not include competitive commercial exploitation of the product. There might be a reason to procure exclusive rights or all rights to the acquisition when the acquisition has a strategic significance to the contracting authority, the state, or its security, or the purpose of the acquisition requires it. A typical example of this could be products used for military or security usage. In these situations, it may be critically significant that the product in question will not be produced or developed for others.

An acquisition that contains intellectual property rights may also be developed together. In these situation one may either divide the exclusive rights between the contracting authority and the supplier (shared rights), or the exclusive rights can go to either the one and the other would have sufficient right of use. The later exploitation of shared rights may be administratively cumbersome because all changes to the product, and therefore to intellectual property rights, would always require the approval of both parties.

In the case of copyrights, it might be sensible for the contracting authority, who has partially financed the development, to specify in the invitation document to tender or in the contract that the investment of the contracting authority will be taken into account in future development products. The contracting authority may demand in the contract that future features in the product (updates and upgrades) are to be included in the original acquisition and therefore also in the price, or that they will be compensated in the future, for example, by cheaper prices for new versions. If the new versions are included in the original price of the acquisition, this may have the effect of increasing the estimated value of the acquisition.

If a completely new ICT programming product is being developed as the product of the procurement, for example in an innovation partnership procedure, the contracting authority might want to consider the use of an open source code. Open source code licensing terms are applied on programs produced using open source code, which makes broader usage rights to the program than with so-called closed source codes. Requiring open interfaces in the invitation to tender documents might be recommended, in that way the programs are compatible and can be thus easily integrated. Open source code and open interfaces prevent vendor-lock-in situations.

Copyrights can be licensed nearly endlessly. Because of this, it is also necessary to mention something regarding the rights of third parties in the invitation to tender. In principle, the contracting authority and the supplier cannot agree on anything regarding the rights of third parties. The contracting authority can essentially require in the invitation to tender an indemnification that the supplier ensures and is responsible for the contracting authority having sufficiently broad rights of use of the product and that the rights of third parties do not prevent the contracting authority from using the product for its intended use for the duration of the product's lifespan.

The contracting authority might want to ensure in the invitation to tender that its rights of use are adequate in relation to the acquisition's intended purpose. It must be stated that everything needs to be agreed to with the supplier, such as the scope, the transfer of usage rights, release within and without the organization, the right to alter or further develop the product oneself or with a third party, chop up or share or modify the product. Licenses are generally organization specific or individual specific. The development

of a product may also include some of the contracting authority's own material. These are to be carefully protected. In addition, if common materials, common intermediate versions, etc. are produced during the development, these are to be agreed upon separately. The machine and source code of computer programs normally belongs to material protected by the supplier's exclusive rights. The contracting authority can, however, protect itself with an Escrow agreement against a supplier's possible bankruptcy. Situations are defined in an Escrow agreement in which the contracting authority receives the usage of the machine and source codes and documentation together with the supplier's material.

Nowadays many programs are procured as services, mostly in a SaaS-model (Software as a Service). In program services agreements, the contracting authority is to make sure that the contracting authority receives sufficiently broad usage rights to the service. In SaaS services it is not possible to agree that the contracting authority would receive exclusive rights to the acquisition. In its software services, the supplier produces a generic or a somewhat configured service to all of its clients. The software service supplier or a third party who has developed the software service, owns the exclusive rights to the service. In software services it is more important to agree on the location of the software service (i.e. in which country the servers are located), secure connections, data security and protection, and whether the service is provided by a private or public cloud. It is very unusual to sign Escrow agreements in Software as a Service, simply because the contracting authority doesn't need to be protected by exclusive rights of the machine or source code or other material protected. There are no exclusive rights. Generally, the supplier is a different entity than the actual developer of the software service, who is the owner of exclusive rights.

Intellectual property rights are usually protected in agreements as business or professional secrets. The terms of intellectual property rights and business and confidentiality should be considered in conjunction. If not, there might occur a conflict between the rights of use and the confidentiality terms, which may result in an unforeseen restriction in the usage of the acquisition.

Now, and especially in the future, there are challenges in regard to products produced with artificial intelligence and robotics. Who owns the exclusive rights of technological solutions produced with artificial intelligence? The development might be generated by the innovation itself and not by the work of supplier.

5.3 How to choose the right contract?

Urban Agenda focuses on the three pillars of EU policy making and implementation Better regulation, Better funding and Better knowledge.

There are two kind of public procurement of innovation:

- The first type of Procurement of Innovation may be called adaptive and responsive procurement – this are all the tenders that met our definition gave during our first meeting in Haarlem: "The term "innovation" can be defined as something original and more effective and, as a consequence, new, that "breaks into" the market or society"
- A second type of procurement concerns when, in specific cases, cities need to develop innovative products and services that are not yet readily available on the market, such as an Innovation partnership.

One of the elements of the sustainable development is linked to the way how we find funds and what we receive for that. The public authorities need to provide taxpayers with the best possible quality services, while at the same time saving costs. This is why the way the public authorities spend public money is very significant. Sustainable spending is linked to setting conditions on the payment to achieve a sustainable return on investment. All this helps local and central governments

Public procurement procedures are instrumental in awarding a contract, but the content of the contract depends on the contracting parties (freedom of contract). In relation to innovation and responsibility, the following aspects are important: flexibility, risk management, sharing risks and benefits, cooperation. The tender should combine the opportunities to assign a contract according to the directive 2014/24/EU rules, and also to use the opportunities that different kind of contracts give to the public authorities.

Such kinds of contract could be:

1. Energy Performance Contracting (EPC) - means a contractual arrangement between the beneficiary and the provider of an energy efficiency improvement measure, verified and monitored during the entire term of the contract, where investment in that measure are paid for in relation to a contractually agreed level of energy efficiency improvement or other agreed energy performance criteria, such as financial savings.

The Energy Service Company (ESCO) contract has the advantage that the value of the investment is paid out of the realized savings, which does not require a large initial investment for the public authority. Thus hiring an ESCO enables customers to renew their technology and improve competitiveness and productive assets. The result, the public authorities' needs are covered during the whole contract period as the payments are linked to the received result.

2. Leasing contract - A contract between a lessor and lessee that allows the lessee rights to the use of a property owned or managed by the lessor for a period of time. The agreement does not provide ownership rights to the lessee; however, the lessor may grant certain allowances to modify change or otherwise adapt the property to suit the needs of the lessee. During the lease period, the lessee is responsible for the condition of the property. This kind of contract is widely use in the private sector as it allows to the companies to have a new technology (mainly vehicles) after the contract period is end and signed a new contract. This is a solution for the waste management as the lessor receives the goods at the end of the contract and he is in charge of the waste. On the other hand the new technology means better solution with less environmental impact, operating costs and may be better quality deliver to the users.

3. Outsourcing contracts - Outsourcing is the business practice of hiring a party outside a company to perform services and create goods that traditionally were performed in-house by the company's own employees and staff. Outsourcing is a practice usually undertaken by companies as a cost-cutting measure. As such, it can affect a wide range of jobs, ranging from customer support to manufacturing to the back office.

Outsourcing can help public authority to reduce labour costs significantly. When a company uses outsourcing, it enlists the help of outside organizations not affiliated with the company to complete certain tasks. The outside organizations typically set up different compensation structures with their employees than the outsourcing company, enabling them to complete the work for less money. Businesses can also avoid expenses associated with overhead, equipment, and technology.

In addition to cost savings, companies can employ an outsourcing strategy to better focus on the core aspects of the business and push forward innovation and responsibility, e.g. circularity. Outsourcing non-core activities can improve efficiency and productivity because another entity performs these smaller tasks better than the firm itself. This strategy may also lead to faster turnaround times, increased competitiveness within an industry and the cutting of overall operational costs.

Companies use outsourcing to cut labour costs and business expenses, but also to enable them to focus on the core aspects of the business, innovation and responsibility.

Examples of Outsourcing

A manufacturer of personal computers might buy internal components for its machines from other companies to save on production costs. A law firm might store and back up its files using a cloud-computing service provider, thus giving it access to digital technology without investing large amounts of money to actually own the technology, without buying new materials and machines for own technology and using extra energy (usage of existing facilities is often more sustainable and circular).

To sign any of the exemplified contracts the public authority would need a tender/procedure where they should follow the rules of the DIRECTIVE 2014/24/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 February 2014.

6 CONCLUSIONS AND RECOMMENDATIONS

Risk-avoiding behaviour might influence the choice to procure traditionally. There is a perception that innovative and responsible procurement often involves huge legal risks. However, that is not the correct representation of reality. European regulation and legislation provides sufficient opportunities and tools for innovative procurement and procurement of innovation. Public authorities are choosing often for the known and frequently applied traditional procurement processes due to being unfamiliar with all the available processes and instruments of procurement.

An attempt has been made in this legal framework to remove those barriers. This document starts with the description of the procurement procedures, as well as the process. By utilizing the various steps in the process, a contribution can be made to responsible and innovative procurement. A lot can be achieved by only using the traditional procurement procedures.

The processes and instruments for procurement of innovation are briefly and clearly represented using the step-by-step roadmaps and the relevant legal aspects of EU regulations and legislation are presented per procurement process and instrument. To make it easier for the user to choose the right process or instrument to procure innovation, two decision making models are included in this document.

The practical examples have been added to give a better picture of how these processes and instruments of procurement of innovation are applied in practice. In this way, European cities can be encouraged to procure (more) innovation.

The analyses of the practical examples shows benefits, conditions but also dilemmas of procurement of innovation. The benefits of using of processes and instruments of procurement of innovation are the solutions for the challenges European cities are dealing with, e.g. CO₂ reduction, energy transition, use of renewable energy sources, reducing the life cycle costs, use of non-toxic materials etc.

The dilemmas of procurement of innovation are situated in the lack of experience with the procedures and instruments of procurement of innovation for public authorities and market parties, lack of political and managerial support, lack of financial resources to cover the possible risks, lack of competence and expertise.

In the Netherlands, a discussion about the procedure for Social and other specific services is quite persistent. A dilemma specific to the procurement of Social and other specific services is due to the requirement under the public procurement Directive to organise a competitive procedure, even under the so-called “light regime”. This requirement clashes with the need for flexibility and continuity of care which is inherent to the field. In the area of social support services (and youth care services) involving the most vulnerable groups in a society it is essential that the practitioners have the space and flexibility to use their own judgement when it comes to caring for patients. Currently the flexibility required for the procurement of such services can only be created with a tremendous amount of time and effort put in by the municipality and care providers prior to the competitive procedure (see the example provided on page 47), despite the application of a so-called “light regime”-procedure. In these types of fields it would be far preferable to

have a direct award system in which the municipality and various care providers can have a permanent dialogue as to the wishes and needs of the clients, municipality and service providers. The need for amending the public procurement rules for the procurement of social health services is further exemplified by the fact that these public services do not have cross-border dimension given the specific local and cultural context they are provided in, which makes subjecting them to the EU public procurement regulation disproportionate and not necessary.

It is important to allocate sufficient time for proper planning of every stage and for conducting the procedure, convince decision-makers and internal units responsible for public procurement that it is worth to invest more time and resources at the stage of preparing the proceedings to achieve better results, use the market knowledge to identify need and create a proper description of the subject of the contract (technical dialogue, market consultations), have incentives for market players to keep them involved during long lasting and often multi-stage proceedings. Also monitoring of the results of the conducted innovation procurement is very important and documenting its superiority in relation to the standard solutions used at the contracting authority in order to consolidate the image of innovative procurements as more effective.

A characteristic of the award criteria for procurement of innovation is that the weight of the price criterium should always be lower than the weight of the qualitative criteria.

We hope this legal framework manual will help public authorities to push forward innovation and responsibility through procurement. Don't be afraid, just go ahead.

ANNEX: Definitions (in alphabetical order)

DPS	=Dynamic Purchasing System
EPC	=Energy Performance Contracting
ESC	=Energy Supply Contracting
ESCO	=multilingual classification of European Skills, Competences, Qualifications and Occupations
EU	=European union
OJEU	=Official Journal of the European Union
PBC	=Performance-based contracting
PCP	=Pre-commercial procurement
PCR	=Public Contracts Regulations
PPI	=Public procurement of innovative solutions
SBIR	=Small Business Innovation Research
SMEs	=Small and medium-sized enterprises
TCO	=Total Cost of Ownership
TFEU	=The Treaty of Functioning of the European Union
TRL	=Technology Readiness Level