

SPICE

Introduction to the **Legal Chapter** in
the final SPICE report **Analysis and
Recommendations**

Final Webinar 30 August 1300 – 1430

1. Content of report - Part II - Legal chapter

- ❑ 53 pages
- ❑ Based on 30+ cases (+ 10 on Joint Procurement)
- ❑ Based on interviews and workshops
- ❑ Based on knowledge of the SPICE team

1. Content of Part II – Legal chapter

3. The concept of procurement of innovation

4. The legal framework

5. Choosing between the procurement procedures

6. Choosing between different procurement approaches, and

7. Choosing between different contractual approaches

1. Content of Part II – Legal chapter

- ❑ The Commission's Guidance on Innovation Procurement – Commission Notice C(2018) 3051
- ❑ SPICE: more focused on thematic fields of transport and mobility
- ❑ SPICE: more comprehensive, more operational (cases, examples, pros/cons), from practitioner's point of view
- ❑ SPICE: may require some experience

2. Procurement of innovation (Chapter 3)

” ‘To procure or not to procure’?

2. Procurement of innovation

Directive 2014/24/EU (Procurement directive)

Article 1 (2)



‘Procurement within the meaning of this Directive is the **acquisition** by means of a **public contract** of works, supplies or services by one or more contracting authorities from economic operators chosen by those contracting authorities, whether or not the works, supplies or services are intended for a public purpose’

2. Procurement of innovation

Directive 2014/24/EU (Procurement directive)

Article 2, no. 22

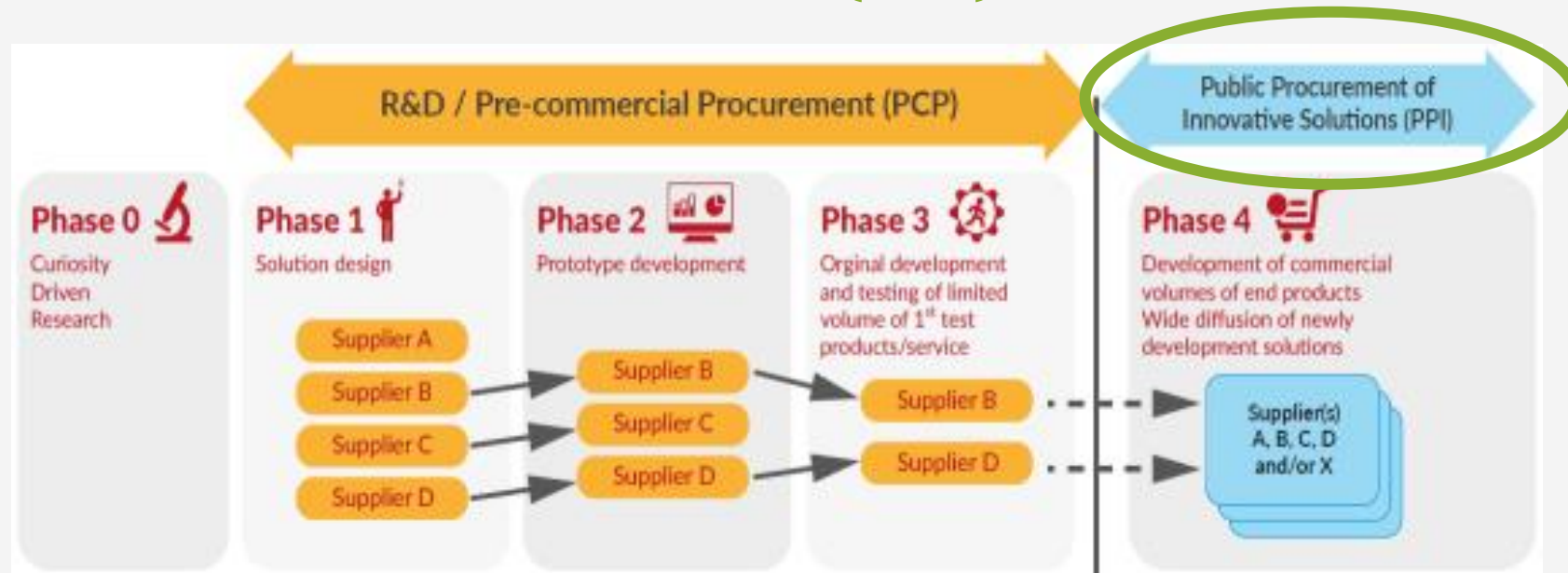


‘innovation’ means the **implementation** of a new or significantly improved product, service or process, including but not limited to production, building or construction processes, a new marketing method, or a new organisational method in business practices, workplace organisation or external relations inter alia with the purpose of helping to solve societal challenges or to support the Europe 2020 strategy for smart, sustainable and inclusive growth;

2. Procurement of innovation

SPICE focus on:

✓ Procurement of innovation (PPI)



NOT procurement of research and innovation (R&D)

2. Procurement of innovation

Procurement of R&D vs. procurement of innovation

PROCUREMENT OF R&D

- Exempted from EU procurement directives (i.a. no complex procedures) – art. 14
- Not commercial volumes
- Only test and pilots
- PCP or other R&D-procurement actions

PROCUREMENT OF INNOVATION

- Subject to the EU procurement directives – if contract above thresholds
- Commercial procurement/volumes
- Implementation of market ready solutions (or development and implementation)

3. The legal framework (Chapter 4)

- ❑ The Procurement Directive (2014/24/EU)
- ❑ The Utilities Directive (2014/25/EU)
- ❑ The Concessions Directive (2014/23/EU)
- ❑ The Defense and Security Directive (2009/81/EF)

Considering concessions?

4. Procurement procedures (Chapter 5)

Open procedure

Restricted procedure

Competitive procedure with negotiation

Competitive dialogue

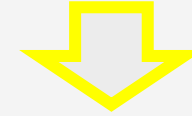
Innovation partnership

Design contest

Choose Dialogue!

Even though procurement of innovation may be supported by any **procurement procedure available in the procurement directives,**

the dialogue-based procedures are indisputably the **most suitable procedures for procuring innovative solutions**



procurement procedures

- Open procedure
- Restricted procedure
- Design contest

- Competitive dialogue
- Competitive procedure with negotiation
- Innovation partnership (combined R&D and procurement)

Why Dialogue?

- *Dialogue with the market* is a significant element of procuring innovation
 - either as preliminary market consultations
 - or**
 - during the procurement process

It allows to:

- ✓ gradually collect more knowledge on
 - optimal specifications and
 - optimal contractual terms

compared to what the market can offer and what the authority needs
- ✓ gradually amend the tender documentation accordingly

5. Procurement approaches* (Chapter 6)

If you want to enhance the possibilities of innovative solutions to win the tender!

- Willing to encourage the involvement of SME's?
- Willing to accept yet unknown solutions?

* Definition:

“Procurement approaches” are the operational approaches (technical or legal) one can adopt and mix for each single procurement project to enhance the possibilities for innovative solutions to win a tender.

Examples of procurement approaches

- Market consultation
- Functional / open specifications
- Variants
- TCO /LCC for price evaluation
- “Innovative characteristics” for qualitative evaluation
- Remuneration for participating in dialogue/procedure
- Free test sites / living labs
- Joint (cross border) procurement

Using 'innovative characteristics' as award criteria (1/3)

- ❑ Qualitative sub-award criteria based on parameters related to innovation
- ❑ Can be objective or subjective
- ❑ Awarding suppliers for offering new or optimised solutions (instead of low price)

Using ‘innovative characteristics’ as award criteria (2/3)

Objective measurable criteria for innovation:

- How close does a solution come to meeting specific standards
- How close does a solution come to meeting specific labels
- The extent or quantity of emissions, drainage, thermal loss, electrical consumption or fuel consumption
- Efficiency objectively measured on time, speed, loading or unloading capacity, congestion reduction etc.
- Weight of goods or packing

Using ‘innovative characteristics’ as award criteria (3/3)

Subjective measurable criteria for innovation:

- To which extent does the solution meet the requirements, needs or purposes of the contract
- Feedback on user experience during the tender procedure from, for example, expert users
- Ergonomic design for improvement of efficiency or working environment
- Improvement of work processes (time, number of steps, reduction of manual processes, posture positions etc.)

Functional requirements / open specifications

Entail obligations in terms of transparency and quality assurance with focus on:

- Evaluation criteria vs. (details in) technical specification in (conventional) descriptive specifications
- Contract provisions on how to test and control the deliveries
- Minimum requirements to make sure that the solution meets the needs of the procuring authority (same considerations when allowing variants)

6. Contractual approaches (Chapter 7)

- If technical specifications are not fixed
- If need for enhancing innovation or performance during contract term
- Contractual approaches can
 - ❑ act as catalyst for innovation during contract term
 - ❑ ensure that the deliverables fulfil the requirements of the contract

6. Contractual approaches

- Alliancing/partnering
- Public-Private-Partnership (PPP)
- Agile contracts
- Applying tests and test phases