Expert Contracts:

Legal measures to foster innovation procurement

EIC Forum – 16 December 2024

Expert contracts objective

The aim is to **understand how can innovation procurement be further fostered through reforms of legal frameworks and practice**

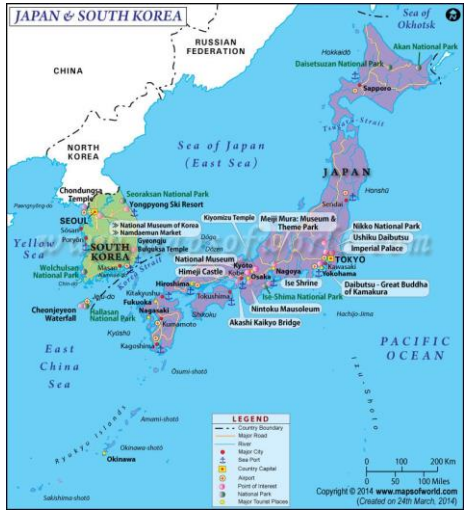
- **identify** how national and European legal frameworks foster innovation procurement in comparison with other leading countries in the world
- **explore** measures to overcome legal hurdles + identify how to boost techniques that are already allowed but that are underutilized due to lack of explanation or legal push for it in the EU legal framework
- **recommend** legal measures to boost the uptake of innovation procurement in Europe

The legal assessment is performed in the context of **expert contracts between DG RTD and procurement lawyers**

- Objective of the expert contracts is to **advise the EIC Forum WG on innovation procurement**
- Useful input for **revision of EU public procurement directives**, **EU startup scale strategy** and **EU innovation act**.

Experts involved

- Public procurement lawyers from 32 countries working together to assess the state of play across all EU Member States and comparison with other parts of the world (UK, USA, Canada, South Korea and Japan).



Tentative timeline & milestones

Date	Activities	Participants
16 Jan 2025	Draft written assessment National context	All experts
16 Jan 2025	Draft written assessment EU context	Corvers
31 Jan 2025	Feedback to National assessments	Corvers
7 Feb 2025	Updated written assessment National context	All experts
14 Feb 2025	Draft consolidation report	Corvers
20 Feb 2025	Webinar	All experts
28 Feb 2025	Final report	Corvers
5 March 2025	Meeting in Brussels	All experts

Barriers and possible solutions

- 12 barriers have been collected over the past years from innovators that are struggling to bring their innovations to the public procurement market, or in other words,
- Companies see the need for 12 big measures that they think are instrumental to scale up innovation procurement more widely in Europe.

1. Policy / Action plan, target, definition

Anchor in EU procurement rules the objective for public procurement to contribute to innovation, to modernize public services and boost industrial growth.

Introduce in legislation that no public procurement can ever block innovation + procurements must contribute to innovation wherever possible. This needs a clear EU wide agreed definition of innovation procurement.

EU Innovation Act should create an EU action plan and EU target for innovation procurement and call on all Member States to adopt national action plans with ambitious targets, timeline and monitoring system.

USA approach:

- **Clear policy that public procurement must contribute to innovation and commercialisation, which drives public procurement rules (FAR).**

EU approach:

- EU benchmarking regularly tracks progress on national innovation procurement policy frameworks and investments and shows that there is growing interest in, but still a lack of setting up EU and national Innovation procurement action plans / targets.
- This is hampered by lack of EU wide definition of innovation procurement (currently only for innovation). Definition of R&D procurement, available in defence procurement directive, is missing (should be put also) in other non-defence directives.

2. Findable innovation procurement business opportunities

Enable innovators to easily find innovation procurement business opportunities and grow their business across the EU market.

Make it mandatory to publish the new dedicated notice for open market consultations on TED + Make it mandatory for procurers to use the new field in all TED notices that indicates if a procurement relates to innovation or not.

Recommend Member States to adopt the same approach for public procurements that are published in their national procurement portals.

EU approach:

- **New e-notice form for announcing preliminary market consultations** in TED is foreseen but not published yet.
  - Art. 40 Preliminary market consultation does not refer to it yet.
  - Not all market consultations are announced on portals. Lack of transparency and unequal treatment: some companies are informed much earlier than others about upcoming procurements.
  - Result is also biased tender specifications towards vendors that participated in intransparent consultations + companies that were not aware and could not react to preliminary market consultations are excluded from participating in procurements.

- **New field in eforms for PINs, contract notices, contract award notices foreseen to indicate if the procurement relates to innovation**.
  - Articles 48,49,50 for the PINs, CNs and CANs do not refer to this field yet.
  - Companies still lack an easy, manageable way to find innovation procurement business opportunities.

3. Administrative formalities

No more company's offer shall ever be disqualified purely on administrative formalities, when they have technically the best offer.

Require buyer to always give bidder with best technical offer the opportunity to regularize admin. omissions and provide clarifications (as far as allowed) on offers

EU approach:

- **Art 56: Not mandatory for public buyers to first evaluate technical offer and only then admin formalities ('can' but not 'must').** Some buyers still exclude tenderers purely based on formalities without even reading their offer.
- **Too strict approach in EU in allowing corrections.** Public buyers often do not allow corrections in offers even if legally allowed.

USA (FAR) approach:

13.106-2 Evaluation of quotations or offers valuation procedures. (1) The contracting officer has broad discretion in fashioning suitable evaluation procedures…

14.304 Submission, modification, and withdrawal of bids.
(…) a late modification of an otherwise successful bid, that makes its terms more favorable to the Government, will be considered at any time it is received and may be accepted.

14.405 Minor informalities or irregularities in bids
A minor informality is merely a matter of form and not of substance. It pertains to some immaterial defect that can be corrected or waived without being prejudicial to other bidders. The defect or variation is immaterial when the effect on price, quantity, quality, or delivery is negligible when contrasted with the total cost or scope of the supplies or services being acquired.
The contracting officer either shall give the bidder an opportunity to cure any deficiency resulting from a minor informality or irregularity in a bid or waive the deficiency, whichever is to the advantage of the Government.

3. Professional / technical qualification

No more company's offer shall ever be disqualified purely based on professional experience / technical capacity.

Limit disqualification of bidders solely based on lack of performance history to special cases where bidder needs to have 'unusual' professional experience or 'specialized' facilities.

EU approach:

- **Art 58 Technical and professional ability:** Directives set no limits to prevent buyers from setting disproportionally high requirements. Bidders can be disqualified solely based on lack of performance history, even when past performance (on existing solution) is no guarantee for future performance (on novel solutions) and is not necessary to perform the contract (innovation)

➔ Startups/SMEs often considered ineligible based on lack of prior customer references, even when they are technically able to do the work.

USA (FAR) approach:

9.104-1 Responsible prospective contractors.
Bidders cannot be considered ineligible solely based on lack of performance history, unless unusual professional experience or specialized facilities are needed.

12.206 Use of past performance.

Past performance should be an important element of every evaluation and contract award for commercial products and commercial services (not for non-commercially available products / services!). Contracting officers should consider past performance data from a wide variety of sources both inside and outside the Federal Government in accordance with the policies and procedures contained in subpart 9.1, 13.106, or subpart 15.3, as applicable.

4. Unfair financial restrictions

Banning unfair restrictions financial restrictions on companies that jeopardise their participation in public procurements.

(1) Not only turnover track record, but alternative means of proof shall be allowed for companies to prove their financial capacity (e.g. own capital, bank statements, backing from financial investors etc. shall also be allowed)

(2) Curtail disproportionally high financial guarantees required by procurers, e.g. by setting a max limit (contact value) and by creating a list of unlawful type of financial clauses for B2G transactions, as already exists for B2B and B2C transactions (black and grey list)

EU approach:

- **Directives say that procurers should not set disproportionate selection criteria**, but this still happens in practice as there is no legal clause/legal certainty/legal push on how to do that.
- **Art 58**: Does not clarify that buyers may choose not to set financial capacity requirements or not to require risk indemnity insurance (if contract does not require that). It mentions turnover as the only possible way to prove financial capacity. It only says that procurers may require risk indemnity insurance but does not cap that / limit that to reasonable amounts.

USA (FAR) approach:

(1) 9.104-1 Responsible prospective contractors. A prospective contractor must have adequate financial resources to perform the contract, or the ability to obtain them. -> Any kind of equivalent evidence to prove financial capacity is allowed (not only turnover is listed). Flexibility for contractors that do not have financial capacity yet at tendering stage to reach financial capacity by start of contract. No obligation for public buyer to set minimum financial capacity requirements for procurements that do not require financial resources (e.g. R&D service procurements) as the procurement pays all required resources.

(2) FAR 28 Financial protections and insurance. defines maximum limits for financial guarantees and indemnity insurance coverage for different types of contracts -> Prevents public buyer to set disproportionate requirements

5. Too many ‘price only’ based awards

Create a more fair level playing field for higher quality EU solutions to compete with lower quality, lower cost ones from outside the EU.

Make it the norm to evaluate offers not only on price but also on quality, unless if there is no variation in quality between products from different vendors (standard products). Make it mandatory for strategic procurements (green. Innovation, social) and strategic technologies / critical sectors.

Make it the norm to take into account the Total Cost of Ownership (long term benefits of procured solutions) in evaluation of offers

EU approach:

- **Art 67**: Economically most advantageous tendering includes also buying based on lowest price only. No preference/push for taking quality into account with a significant weighting.

➔ Use of lowest price or insignificant weighting to quality is still too frequently happening.

USA (FAR) approach:

15.101-2 Lowest price technically acceptable source selection process.

15-101-2(c) Defines 5 mandatory conditions that must be satisfied before an agency is allowed to use lowest price only award criteria + also requires a written justification in the tender docs why they conditions are met.

15-101-2(d) Prohibits the use of price only award criteria for specific procurements in sensitive sectors/strategic technology fields, (in addition to defense) this applies to for procurements for:

- Information technology, cybersecurity, advanced electronic testing or audit services, telecom devices and services, technical assistance services, systems engineering or other knowledge based services
- Knowledge based training or logistics services in contingency operations
- Healthcare services and records and personal protective equipment

6. Overspecification of tender specs

Ensure that tender specs do not a priori exclude offers with innovative solutions to be submitted (issue of overspecification of tender specs to well-known established solutions).

Make it the norm that procurers write non-prescriptive functional / performance based tender specifications, or (when not feasible) they allow companies to submit variant offers

EU approach:

- **Preamble 74** mentions that functional / performance based specifications are 'best suited' to achieve fair competition.
- But **Art 42** does not push for this to be the preferred approach over solution prescriptive tender specs.

➔ Still too many public buyers overspecifying tender specs in Europe

USA approach:

FAR Part 11 - Describing Agency Needs

- **11.101 (a)** Agencies need to write requirement documents consistent with the following ***order of precedence*** (1) documents mandated for use by law **(2) performance-oriented documents (3) detailed design-oriented documents** (4) standards, specifications and related publications issued by the government outside the defense or federal series for the non-repetitive acquisition of items'.
- **11.002(a)(2)** Require ***to the maximum extent practicable*** to state requirements in terms of- **(A) Functions to be performed; (B) Performance required; or (C) Essential physical characteristics;**

Case law under the Competition and Contracting Act makes it clear that **'functional specifications are preferred to performance or design specifications, and that performance specifications are preferred to design specifications'**. The House Conference Report on the Competition in Contracting Act expressed a clear preference for functional specifications: '**Wherever practicable, contractors should be told what the Government needs in functional terms. This approach allows the Government to take advantage of the innovative ideas of the private sector.**'

7. Incentives to innovate in ongoing contracts

Introduce incentives that ensure that innovation does not stop after contract signature (enables innovations and innovators to enter the market in all ongoing contracts)

Make it standard practice that procurers use value engineering (VE) to continue bringing in better approaches/solutions that can continue lowering costs and increasing quality for the procurer

EU approach:

- **Directives** provide no legal push, not even explanation / legal certainty, for public buyers to use Value Engineering.

➔ Value engineering is not enough broadly used in Europe. Contracts often run out of budget / over time and/or do not deliver expected quality.

USA approach:

U.S. Congress Public Law 111-350 and **Budget Circular A-131** issued by the Executive Office of the President of the United States **require every federal agency to run a value engineering program**.

Far 48.201 Clauses for supply or service contracts

- The contracting officer ***shall*** **insert a value engineering clause** in solicitations and contracts **when the contract amount is expected to exceed the simplified acquisition threshold**, except as specified in paragraphs (a)(1) through (5) and in paragraph (f) of this section -> exceptions are for cases that do not frequently appear (for commercial products, exemption only applies if the buyer has no specific requirements for the product, so only if it is a standard product with no tender spec requirements.
- A value engineering clause ***may*** **be included in contracts of lesser value** if the contracting officer sees a potential for significant savings.

52.248-1 Value Engineering clause. (a) The Contractor is encouraged to develop, prepare, and submit value engineering change proposals (VECP's) voluntarily. **The Contractor shall share in any net acquisition savings realized from accepted VECP's, in accordance with the incentive sharing rates in paragraph (f) of this clause**.

8. IPR handling

No more IPR handling that unjustly blocks companies from protecting and commercializing their innovations.

Require that for all public procurements, tender docs must specify the division of IPR rights and obligations in line with applicable IPR, copyright and trade secret law.

Buy usage rights and leave IPR ownership with companies, unless in limited justified cases where the buyer really needs to own the IPR (alike in US)

USA approach:

The **Bayh-Dole Act** (transposed into **FAR Part 27 - Patents, Data, and Copyrights**) ensures that the government adopts as default regime in all its public procurement contracts to:

- **leave IPR ownership with contractors** (to get better/cheaper offers, leave IPR handling costs to suppliers, stimulate commercialisation)
- **only buy those IPR related rights that the government can justify it really needs** to ensure government needs are satisfied: i.e.
  - **license free usage rights are allocated to the government and to all its current and future contractors** (this prevents supplier lock-in for future contracts) +
  - the government **can require licensing to third parties and transfer of IPR ownership to the government in exceptional cases** (if suppliers do not commercialise or abuse IPR / results against the public interest).

EU approach:

- **Art 42 Tender specifications** says that tender specs 'may' specify that transfer of IPR rights is required, but give no explanation / legal certainty on how to implement the other more beneficial approach to leave IPR ownership with suppliers and buy usage rights.

➔ **In practice, in most EU MS, public buyers still often require transfer of all IPR rights** (incl. ownership of IPR) even though they don't need this and it results in less and more costly offers, IPR fights etc.

9. Multiple sourcing

Public procurers need easy way to give the same assignment to multiple companies in every procurement procedure (DPS or FW contract approach too complex to do this, especially for smaller contracts with SMEs).

Allow in every procurement the award of contracts to the best offers (in plural) based on the ranked list.

Important for supply chain resilience/security and for bringing innovators into markets with existing players.

USA (FAR) approach:

FAR 52.216-27 Multiple Sourcing
The government may award a contract for the same or similar supplies or services to one or more sources.

FAR 6.202 Establishing or maintaining alternative sources. (a) Agencies may exclude a particular source from a contract action or establish or maintain an alternative source or sources for the supplies or services being acquired if the agency head determines that to do so would- (1) Increase or maintain competition and likely result in reduced overall costs for the acquisition, or for any anticipated acquisition; (…)

EU approach:

- **Art 67 Contract award**. It only allows to award 1 contract to the tenderer with the best offer. Multiple sourcing only possible via workaround with complex FW or DPS.

➔ **Multiple sourcing is not sufficiently used**

10. EU strategic autonomy

USA (FAR) approach:

Extensive strategic autonomy clauses used <u>in all R&D procurements in all sectors</u> (> 50Bn $/year):

1) R&D contracts only awarded to US established and US controlled bidders
2) Majority of R&D for the contract must be done in US
3) Subcontracting outside US only allowed upon approval
4) Bidders allowed to keep IPR ownership on condition that after contract they reinvest percentage of profits from IPR back into R&D and production in the US
5) Exclusive transfer or licensing of IPR to players outside the US not allowed. Non-exclusive transfer or licensing outside the US can be objected by the buyer.

Lighter clauses (above clauses 4 & 5 linked to IPR) are used to protect strategic autonomy <u>in all other non-R&D procurements</u>.

Need for clear legal provisions on how public procurers can reinforce EU strategic autonomy. Define minimum set of mandatory provisions needed to safeguard a minimum level of EU strategic autonomy.

Clarify strategic autonomy clauses are possible in R&D procurements across all sectors e.g. requiring place of performance for R&D and follow-up commercial production in Europe, sourcing strategic assets from Europe, limiting subcontracting, limiting participation to EU established & controlled companies, limiting loss of strategic autonomy in case of merger / takeover, preventing key IPR leakage

EU approach:

- **Directives** do not provide legal certainty/clear clauses.

➔ Above type strategic autonomy clauses used in some contracts in defense and in EU funded PCPs, but **underutilised in the bulk of other procurements**.

11. Joint cross border procurement

Create a 28th regime that a public buyer in any EU country can use to launch a joint procurement together with public buyers from other EU countries

Due to differences in the transposition of the existing EU public procurement directives, procurers often experience difficulties when trying to do joint public procurements of innovative solutions together with procurers from other countries (no problem not for R&D procurements as they typically fall outside of national public procurement legislations).

12. Facilitate participation of startups/SMEs

Too much red tape, slow decisions/payments,
SME subcontractor rights not well protected

- Define **max deadline for buyer to evaluate offers** (equal to time for supplier to make offers?)
- Require buyers to publish whenever **possible the preliminary ranking** at opening of bids
- Generalise **use of advance payments** to startups + also to SMEs that are in financial difficulties but whose expertise is crucial for the buyer
- Introduce **accelerated payments to SMEs** (15 days)
- Require lead contractor to have written contract with **consortium members** and **subcontractors** (often startups/SMEs) that **protects at least following basic rights** (clear task description, clear payment amounts & deadlines, respect of subcontractor's IPR etc)
- Require all tender docs be published in **machine readable format** (enabling automatic translation)
- Speed up procurement process (**use more IT & AI**)

USA (FAR) approach:

When to use advance payments is clearly defined (FAR 32.403)
e.g. for small businesses (often to be used), for financially weak tenderers (if their technical ability is essential for procurer), for R&D procurements (if participant is non-profit organisation / university)

Accelerated payment obligation (max 15 days) to small business contractors (FAR 32.009)

Obligations on contractors to respect basic rights of subcontractors
Contractors must pay SME subcontractors also with 15 days (FAR 52.232.40), must respect / let them keep their IPR ownership (FAR 27) unless in exceptional cases where the procurer needs to buy all IPR…

EU approach:

- **Directives**: All these points are possible (not forbidden), but there is no legal encouragement or requirement to do so
- **Some EU countries have already started doing** some of the aspects in the grey box (e.g. BE requires buyers to do advance payments and publication of preliminary ranking and DE/AT have mandatory model contract for subcontracting that protects rights of subcontractors)

Questions?

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