
Pre-Commercial Procurement: Legal, Institutional and Policy framework in Portugal



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1. Pre-Commercial Procurement – Legal Framework

Pre-Commercial Procurement (PCP) is not used on a regular basis by Portuguese public authorities. The most common approach to develop Public Procurement for Innovation (PPI) remains through R&D subsidies, grants or, sometimes, state procurement contracts without R&D procurement. Also, in this last case, the most common approach is that the government remains as owner of the developed technology

Therefore, it is not an easy task to find Best Practices cases on PCP that complies with the procurement model as stated in “COM (2007) 799: Pre-commercial Procurement: Driving innovation to ensure sustainable high quality public services in Europe”.

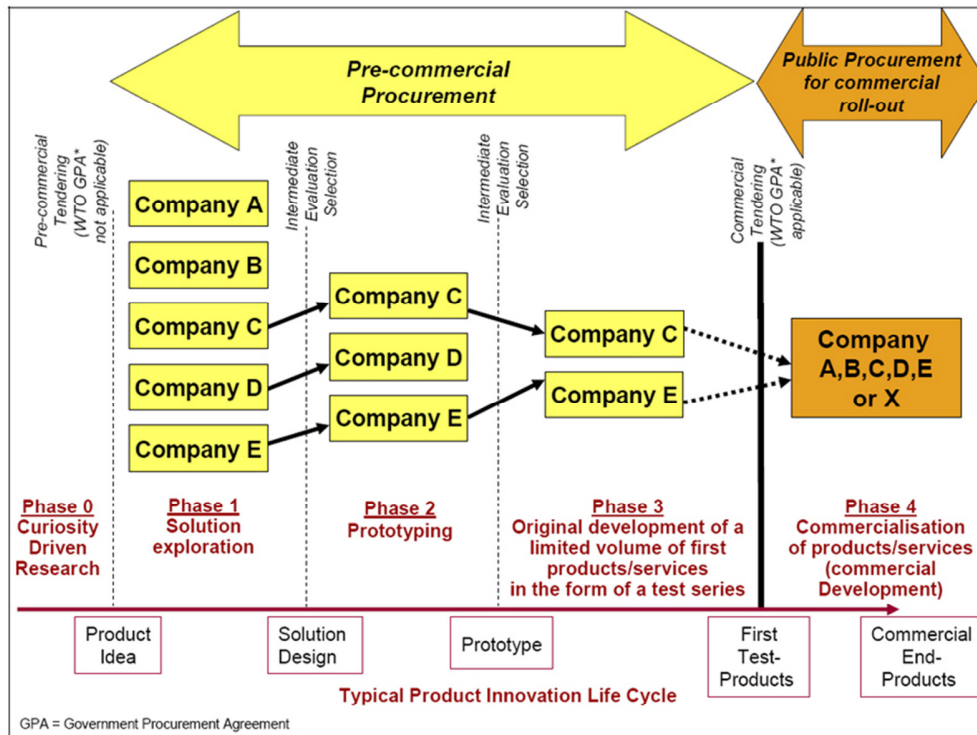


Figure 2: Example illustrating a phased pre-commercial procurement process

Nevertheless, this doesn't mean that the national law isn't prepared to answer to the identified needs to develop a PCP process.

On the beginning of 2008, Portugal transposed into the national law the public procurement directives (2004/17/EC and 2004/18/EC), replacing the 1999 national procurement law (DL 197/99) for the new Code of Public Contracts (DL 18/2008). This new law changed considerably the procedures for public acquisition allowing a larger scope for dialogue between contracting authorities and those who tender in order to determine contract conditions, and also the feasibility of the prototype.

Under the new law, certain legal conditions are in place to allow public authorities to develop tender processes that imply a PCP phase. Of course that the law must by itself fulfill the requisites of transparency and equality to all interested in compete for the contract.

The ongoing national law also has in its spirit the need to have a legal framework adequate for the R&D components that are closely related with technology development and to allow to *small and medium-sized enterprises* (SMEs) to be allowed to enter in a competitive world that was more closed to multinational companies in the previous law.

But this larger freedom granted in the new law doesn't mean that the public authorities may spend money without opening one of the five types of procedure allowed. So, before the Procurement for commercial roll-out (see figure above), which can be done using the figure of Competitive Dialogue, some type of procurement must be done in order to deploy the pilots for the different solutions.

For these main stages of PCP, the figure of "Negotiated procedure without prior publication" can answer to the need by public authorities to deploy in the simplest and most efficient way the development of different solution.

But even if the law allows public authorities to deploy PCP processes, one of the major reasons for the non-generalization of this practice is the time that such mentioned procedures oblige, in particular the Competitive Dialogue. Being known that PCP major value is for the development of mid and long term projects, the risk management and the necessary planning to deploy such a process can be determinant for the non-option on PCP.

2. Public Procurement – Institutional framework

2.1. Central Agency for Procurement

On a Central level Portugal has a mixed system of Public Procurement, where Ministries and agencies have the power to carry out procurement processes independently at the same time there is a central agency responsible to public procurement on transversal needs by the entities, such as paper, cleaning services, security or fuel. This central agency is also responsible for the launch and operation of the Framework Agreements.

Although the responsibilities and the core of action of this central agency remain similar along the years, its juridical personality has been changing during the years. For many years the Direcção Geral de Património (DGP) was the responsible entity for the Portuguese public procurement, until it was extinct by the Government in 2006, being created the Agência Nacional de Compras Públicas (ANCP), a Public company with budgetary and institutional independence from the traditional Public Administration.

ANCP was mainly created to give a capable response to the changes in the procurement law, with the transposition of the directives, which now should negotiate and disseminate the use of central electronic catalogues, auction tools and a profit oriented procurement negotiations. The main responsibilities from DGP were included and added the transformations that came from the introduction of ICT in the procurement processes.

Already in 2010, the government already announced the fusion of ANCP with Empresa de Gestão Partilhada de Recursos da Administração Pública (GeRAP), also a public company. The way how this fusion will affect the procurement strategy in place is still unknown, but the most likely is that the fusion is only to improve efficiency and reduce costs, rather than to implement a different strategy from what Portugal has now.

But the central agency responsible for public procurement in Portugal mainly deals with the acquisition of products and services that are standard for all Public Administration, potentiating scale economies, and not so much in promote the acquisition of innovation. To note that this dematerialization of procurement processes are by itself processes of procurement for innovation, since new markets were created for products such as auction tools, electronic catalogues and the elimination of product stocks.

One of the contracts that this agency tries to implement was the procurement for aggregated needs on energy (electricity and fuel). But these contracts were mainly to take advantage of scale economies and not to promote R&D in energy efficiency or renewable energies.

2.2. Central Government and Local Government procurement policies

As stated in the first chapter, it's not visible experiences on PCP cases although central and local governments have the ability and the means to promote PPI. Most of the known cases refer to the development of products and services that aim to satisfy a particular need and most of the times the product becomes exclusive propriety of the client, not being possible for the company to commercialize the product/ service due to Intellectual Propriety Rights (IPR).

Local Governments have been showing in the last years a more dynamic attitude towards procurement for innovation, seeking to improve and strengthen the SMEs of the regions clustered in Excellence Centers. Also the success of the Living Labs has reveal to be an excellent instrument to look at PCP as a way to create internal dynamics with the objective of sharing risks, promote a competitive development in phases and facilitate the separation of the R&D phase from deployment of commercial volumes.

At a national level can be more difficult to create this dynamics, but the Digital Agenda for Europe can be an effective enabler to create such movements, particularly the European Innovation Partnerships. It's clear that to deploy the already existent R&D products and services a European/ national movement is needed to put the commercialization in the public agenda, being PCP an optimal tool to achieve that goal.

2.3. National programs and initiatives

The national program for innovation underlies the Technological Plan, which started to be under the responsibility of the Ministry of Economy and Innovation, but the coordination has been transferred later to the structure of coordination of the Lisbon Strategy, whose main mission is to follow up and monitor the implementation of the foreseen initiatives, promoting and supporting projects developed by the Civil Society within the ambit of the Technological Plan.

The Technological Plan is an action agenda with the main aims of mobilizing enterprises, families and institutions to be involved and overcome the modernization challenges. Since 2006 the Portuguese Government has assumed the Technological Plan as a priority in the implementation of its public policies.

The Technological Plan is based on three axes:

- I. **Knowledge** - *To qualify the Portuguese for the knowledge society, fostering structural measures which aim at enhancing the average qualification level of the population, implementing a broad and diversified lifelong learning system and mobilizing the Portuguese for the Information Society.*
- II. **Technology** - *To overcome the scientific and technological gap, reinforcing public and private scientific and technological competences and recognizing the role played by enterprises in the process of creation of qualified jobs and Research & Development (R&D) related activities.*
- III. **Innovation** – *To boost Innovation, helping the productive chain to get adapted to the challenges of Globalization by means of the diffusion and development of new procedures, organizational systems, services and goods.*

Is under the Innovation axe that the most emblematic projects about energy are included, mainly:

- a) The constitution of a funding line for innovation in the field of renewable energies
- b) Installation of solar panels
- c) Improve the energy efficiency in public buildings
- d) Creation of a network of electrical supply stations for cars
- e) Promotion of other renewable energies (biomass, solar, photovoltaic, waves, bio combustibles)

This actions and respective goals are expected to create markets and new products and services for the general population. A closer look is advisable since they can reveal to be good examples on how could PCP be an alternative answer to the traditional means of procurement or funding agreements.

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