

INNOVATION PROCUREMENT UPTAKE

POSITION PAPER

As Corvers Procurement Services B.V. specialized in the field of Innovation Procurement and having an active role in long-lasting initiatives like the European Assistance For Innovation Procurement (EAFIP) and the SPIN4EIC program, through this position paper we underline the rationale and present the main recommendations for making the EU public procurement legal framework more innovation-friendly and guide public buyers on how to implement more innovation procurement projects.

It must be stressed that the current EU legal framework already allows flexibility to apply innovation-friendly approaches and techniques. However, future amendments to the legal framework should clarify and reinforce the legal measures that public buyers can employ more effectively.

A. The rationale

Innovation procurement (public procurement of research and development and public procurement of innovative solutions) is crucial for driving innovation, modernizing public services, and addressing societal challenges in Europe.

- **Driving Innovation:** Public procurers can play a leading role in driving innovation by assessing the value added of new enablers like advanced materials for the twin transition and EU's resilience and economic security¹
- **Modernizing Public Services:** Innovation procurement enables faster modernization of public services while opening market opportunities for companies in Europe.²
- **Addressing Societal Challenges:** It can be used strategically to stimulate markets and to be incorporated in the regional policy-mix as a means both of addressing societal challenges and of enabling structural change.³

Moreover, Innovation procurement is a powerful public policy tool that can boost business opportunities for SMEs and startups, support innovation and research investment, or provide bespoke and more adapted solutions in public services.⁴ Public procurement of innovative solutions (PPI) facilitates the diffusion of innovative solutions on the market, as public buyers act as early adopters.

Despite the efforts of the European Commission to improve public procurement practices and foster economic recovery by promoting the demand for innovative

¹ [The strategic use of public procurement for innovation in the digital economy - Publications Office of the EU](#)

² [Policy brief on innovation procurement.pdf](#)

³ [Innovation Procurement - a powerful public policy tool](#)

⁴ [gov.ie - Innovation Procurement](#)

goods, services, and works in the EU⁵⁶⁷⁸⁹, Innovation procurement is still underutilised compared to other leading economies in the world. Thus, it is important to tackle the main barriers that slow uptake of innovation procurement and boost the EU legal framework with key innovation-friendly provisions.

Considering the European Court of Auditors report¹⁰ that highlighted the need to address the lack of competition and transparency hampering companies to bring innovations to the public procurement market, as well as the Letta¹¹ and Draghi¹² reports stressing the importance to tackle the following barriers:

- Lack of EU & national action plans for innovation procurement with clear goals, targets, resources and timeline.
- Overly restrictive financial requirements in public procurements that exclude startups / SMEs and even deter large companies from tendering.
- Other hurdles for SMEs (e.g. red tape / slow process, disqualification of small companies for minor administrative unclaritys, underutilization of pre-financing possibilities, unbalance between short time for companies to prepare offers and too long time taken by procurers to award contracts).
- Over-specification of tender documents exclude offers with innovative solutions (underutilization of functional specifications that define the problem to be solved instead of the solution to be provided).
- IPR conditions that hamper innovation and commercialization of results (lack of legal push for public buyers to leave IPR ownership with contractors unless there are justified overriding public interests for the procurer to keep it).
- Difficulties for startups/SMEs to enter sectors where large established players dominate (available mechanisms for implementing multiple sourcing too complex).
- Contracts that do not incentivize innovation (i.e. further cost/quality improvement) after contract signature (underutilization of value engineering)
- Unfair level playing field against low-cost countries due to overly awarding contracts based on lowest price only.

⁵ [EU policy initiatives on Innovation Procurement - European Commission](#)

⁶ [Innovation procurement - European Commission](#)

⁷ [Innovation procurement - European Commission](#)

⁸ [Public Procurement of Innovative solutions - European Commission](#)

⁹ [Public Procurement of Innovation - European Commission](#)

¹⁰ [Special report 28/2023: Public procurement in the EU | European Court of Auditors](#)

¹¹ MUCH MARKET THAN A MORE: SPEED, SECURITY, SOLIDARITY - Empowering the Single Market to deliver a sustainable future and prosperity for all EU Citizens (April 2024), <[Enrico Letta - Much more than a market \(April 2024\)](#)>

¹² The future of European competitiveness - A competitiveness strategy for Europe 1-2 (9 Sept. 2024 https://commission.europa.eu/topics/strengthening-european-competitiveness/eu-competitiveness-looking-ahead_en

- Lack of an easy-to-use uniform legal regime for joint cross-border procurement to tackle common European challenges together.
- Underutilisation of possibilities to strengthen EU strategic autonomy due to lack of clear legal provisions on how this can be implemented correctly.

We support the implementation of the following measures:

B. Recommendations for EU public procurement directives

Against the context explained above, procurers can be encouraged and given assurances through clear legal basis to implement innovation procurement. More specifically, based on the practice and legal assessment conducted by different experts, we support the following main measures:

- Provide a common definition of Innovation procurement across all Public Procurement Directives.
- Clarify how to use an innovation-friendly IPR allocation between buyers and suppliers.
- Foster multiple sourcing techniques allowing the access of SMEs to the public procurement market.
- Reinforce the award of contracts based on value for money criteria.
- Implement the use of value engineering for continuous improvement of public contracts and the sharing of savings between contractors and public buyers.
- Foster the use of functional specifications.
- Include provisions and guidance measures that can help reinforce EU strategic autonomy & resilience (e.g. use of strategic autonomy clauses for R&D procurements etc, a buy European preference vis-à-vis third countries, and a possibility also to put certain local content requirements vis-à-vis WTO GPA countries where justified for EU security reasons - e.g. to ensure security of supply - via a broader use of the security exemption from WTO GPA).
- Include some additional specific measures to make it easier in particular for startups to enter the market (e.g. accelerated payments, accepting any type of financial capacity evidence etc.).

Some of these are further developed below.

1. Uniform definition of innovation procurement across all PP directives

- Mirror the definition from the EU Innovation Act to clarify that innovation procurement covers all procurements that buy R&D, innovative solutions (supplies/services/works) or a combination of both.
- Introduce the same definition of R&D procurement from the defence procurement directive in the classical and utilities public procurement directives.
- Include a definition for public procurement of innovative solutions in all civil and defence public procurement directives (see definition in EU benchmarking of

innovation procurement investments¹³ that is referred to in 2021 EC guidance notice on innovation procurement¹⁴).

2. Clear legal provisions to ensure effective implementation of innovation principle in Public Procurement rules

- The application of the Innovation Principle requires ensuring that no public procurement blocks innovative solutions and that public procurements actively encourage innovation where possible in the procurement procedures.
- It is important to mirror in all Public Procurement directives the European Innovation Act provisions that make key steps in all procurement procedures innovation friendly and clarify procurement specific implementation aspects.

3, Intellectual Property Rights (IPR)

- Tender documents must define the distribution of IPR rights & obligations in line with IPR/trade secret law. Moreover, confidentiality/IPR/trade secrets must be respected during preliminary market consultations.
- Require equal treatment of bidders regardless of where in the EU they protect their IPR.
- As a default, establish that the ownership of IPR should remain with contractors.
- Public buyers (and current & future contractors) should get free of charge, adequate usage rights. Usage rights for contractors automatically prevents supplier lock-in and fosters wider use of innovations.
- Public buyers can invoke licenses rights to enable third parties to exploit the results in exceptional situations (non-commercialisation/abuse of results by contractor + emergency situations alike Covid).
- Transfers of IPR ownership to public buyers should be justified (comply or explain) and limited to pre-defined exception cases (e.g. when open licensing policies require free publication of results, when counterintelligence/security or privacy/confidentiality prohibits commercialisation, when nobody else shall be allowed to use a copyrighted item except the buyer (e.g. a new visual/logo for a city)).
- Public buyers should ensure that contractors apply same IPR terms established with public buyers in contracts with their subcontractors (leaving subcontractor his IPR), barring justified exceptions.

4. Evidence / Certifications for R&I Excellence

- Introduce a certification mechanism to recognise high-quality R&I outcomes. R&I program certifications, such as "EU Seal of Excellence", and successful

¹³ [Benchmarking of innovation procurement investments and policy frameworks across Europe](#)

¹⁴ [Innovation procurement - European Commission](#)

completion of relevant R&D grant projects should qualify as evidence for selection criterion on professional R&I capacity in innovation procurements.

5. Market analysis and open market consultation

- Require buyers to do a market research/state of the art analysis, to understand the state of play across the EU market, including EU funded R&I outcomes, before launching an innovation procurement.
- Require buyers to do a preliminary market consultation before launching an innovation procurement, to cross-check key draft procurement clauses with suppliers and understand the positions of different players.

6. Enable companies to transparently find innovation procurement opportunities

- Require buyers to use the new TED notice for announcing preliminary market consultations.
- Require buyers to use the new field in TED notices to indicate if it concerns an innovation procurement.

7. Revising Article 32.3(a) of Directive 2014/24/EU (and similar article in utilities and defence directives)

- Align with Article XIII(f) of the WTO GPA to include limited production or supply of first products and services to incorporate the results of field testing and to demonstrate that the good or service is suitable for production or supply in quantity to acceptable quality standards, ensuring TRL 9 readiness of solutions. (now description stops at development without ltd production after testing, and does not cover services)
- Clarify that this article allows public buyers to act as first customers for first solutions from suppliers that participated in a preceding R&D services procurement like a PCP (currently this is only clarified in 2021 EC guidance on innovation procurement).

8. R&D services exemption (Art 14 Dir 2014/24/EU, Art 12 Dir 2014/25/EU, Art 13(j) Dir 2009/81/EC)

- Remove double negation in formulation of the exemption as it can cause confusion. Clarify that PCP falls under this exemption and that the EU Treaty principles still apply when this exemption is used.

9. Security-Related Exemptions

- Clarify in the 2014/24/EU directive's preamble terms like "essential security interests" and "disclosure contrary to security interests." Harmonising practices across EU will enhance the directive's efficacy.