Equator

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MEMO - Nido4 Legal Experimentation Challenge

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This memo is a joint effort of Equator Advocaten and Nido Innovation lab. It focuses on public sector innovation procurement in Belgium. As member state of the European Union, Belgium adheres to European Union legislation in all its legislative procedures. The findings are thus mostly applicable in all other member states.

The English and French versions are free translations by FPS BOSA.

I. PURPOSE OF THIS MEMO

1. This memo is part of the Nido4 contract as tendered by the FPS BOSA (NIDO).

2. The first meeting between the FPS BOSA (NIDO) and Equator Advocaten took place on 26 October 2021. At this consultation, which was also the first time the two parties met, the concrete subject of the contract was further defined and mutual expectations sharpened.

3. Following up on the aforesaid meeting, the FPS BOSA (NIDO) provided Equator Advocaten with some (procurement) documents (including specifications, tendering documents and other administrative decisions), including with regard to the *"Challenge 112"*, *"Challenge PersoPoint"* and the *"Challenge GBA"*. Subsequently, the FPS BOSA (NIDO) also provided some model documents (including model specifications), as well as background information (including their EPSA application).

4. The discussion and the information subsequently provided by the FPS BOSA (NIDO) served as the basis for the first version of this memo, which was delivered to the FPS BOSA (NIDO) on 14 December 2021.

5. This included answers to the following questions:

- (1) "How to put the *Gov Buys Innovation* approach with experiments and subsequent implementation into practise?"

- (2) "Could a follow-up experiment be organised with the same company after a *challenge* on *Gov Buys Innovation*? [Problem: splitting and inside information]"
- (3) "Could a *challenge* on *Gov Buys Innovation* be followed by a follow-up experiment with another company? [Problem: inside information]"
- (4) "If an experiment is a complete success in a *challenge* on *Gov Buys Innovation*, can it be followed by a new public tender for large-scale implementation? [Problem: inside information]"
- (5) "In an implementation phase after multiple *challenges* on *Gov Buys Innovation*, could a product be requested by way of a public tender that conjoins the successes from multiple previous experiments? [Problem: splitting and inside information]"
- (6) "Could one same experiment be awarded to different companies as part of a *challenge* on *Gov Buys Innovation*, in order to test different solutions?"
- (7) " As part of a *challenge* on *Gov Buys Innovation*, could it be determined that in an implementation on a large scale, a company that has the capabilities for implementation would partner with a small company that only had the capabilities for an experiment, but had the idea for the suitable solution ?"
- (8) "Which things need to be borne in mind in the context of *Gov Buys Innovation* in order to enter the European market?"

6. This memo builds on the earlier versions of this memo and covers all four stages of the tender. It presents a blueprint, along with some useful *tips & tricks* that can be used in the onward application of public procurement contracts. It also reflects on the existing problem areas and certain (other) solutions that could be combined.

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II. ANALYSIS OF THE LEGAL OPTIONS

7. The analysis below draw attention to structural solutions and opportunities that can be employed to shape the procurement process. These procedures are briefly explained, in consideration of the specific needs the public sector might have.

II.2. Concrete tools that can be used regardless of the procedure

A. Implementation of a state of the art (SOTA) solution

8. SOTA stands for State Of The Art and is an expression for the current state of technology or knowledge of something that is at the pinnacle of progress to date.[1] The aim of a SOTA is to stop the wheel from being reinvented, but also to ensure that other parties' intellectual property rights are not infringed. The idea is to get an overview of those intellectual property rights that have already been established over existing solutions and that can be further developed as applicable. In practical terms, this involves identifying whether patents or intellectual property rights have already been established over the (potential) (partial) results that could be achieved under the contract to be tendered. As such, a SOTA serves a dual purpose: for one, to see if the desired results are not already in place - which means there is room for innovation - and for another, to see if existing solutions - which are open to continued development - are patent-protected or not.

9. In doing so, patent databases can be used, such as the European Patent Register (http://www.epo.org), WIPO's Patentscope (World Intellectual Property Organisation; https://www.wipo.int/patentscope/en/index.html), Espacenet (https://be.espacenet.com), Benelux Patent Platform (https://bpp.economie.fgov.be/bpp-portal/home), Google Patents (http://google.com/patents) or commercial platforms. When it comes to running searches, it is advised to use queries involving specific key words or tailor the search method to specific classifications. What is especially important when using using key words, is that one should also use multiple ways of wording/phrasing the queries. For instance, when looking for a new development in the area of telephone services, not to run searches purely for the word 'mobile phone/GSM', but also on phone, mobile phone and similar keywords.

10. However, the other intellectual property rights that have not been registered, such as the traditional "copyrights" for instance, often cannot be found in databases, which also makes it more difficult to track them down.

11. For specific design solutions however, it is advisable to try using the OHIM portal (https://euipo.europa.eu/ohimportal/nl/), where one can also run searches using the applications available on the portal, to find out whether specific designs or trademarks have been registered.

B. Conducting a market consultation

12. As part of the SOTA discussed above or in order to find potential partners, it is also possible to conduct a market consultation. This involves looking at the possibilities of finding a practicable solution that meets the needs of the contracting public service. Please note that this market consultation can be conducted both as part of procedures governed by the Public Procurement Act

[1] See also EAFIP Toolkit.

and procedures that fall outside the scope of this Act. In this connection, we also refer to article 51 of the Belgian Public Procurement Act of 17 June 2016 (hereinafter Public Procurement Act), which also devotes a provision to market consultations. This provision reads as follows:

> *"The contracting authority may hold market consultations before commencing a procurement procedure for the purpose of preparing the placement of the contract, as well as to inform the economic operators of its plans and requirements.*
>
> *For this purpose, the contracting authority may, for instance, seek or receive the advice of independent experts, private or public institutions or market participants.*
>
> *Prior market consultations may be used in the planning and conduct of the placement procedure, provided this does not lead to a distortion of competition and does not violate the principles of non-discrimination and transparency."*

13. This provision - which does not apply when the exception set out in article 32 of the Public Procurement Act can be invoked - is worded in very broad terms. It allows both the market to be informed of certain plans, in particular the plan to put a public procurement contract out to tender on the market, but also for certain plans to be checked with the market and for them to provide input. The contracting authority can seek opinions on how best to lend shape to the contract. In doing so, the market will also be challenged in a way.

14. The market consultation can also be used to test the process itself, for instance which procedure (see *infra*) is best observed in advance, or which selection and award criteria (see *infra*) are relevant to identify the best bidder, or the technical specifications themselves.

15. However, it is important to ensure that equality is maintained. A contracting authority should therefore be as transparent as possible, including during the market exploration phase. To this end, it is advisable that the authority announces its market consultation when consulting the market and details how it will shape the market consultation, e.g. by way of a presentation, a workshop, etc. An authority can also use specific questionnaires and interviews with various candidates.

16. To announce market consultations, the contracting authority itself can resort to a traditional prior announcement, or use platforms that serve this purpose such as the FPS BOSA's e-Procurement platform, the *Buy ITPublic* platform of V-ICT-OR or Nido's *Gov Buys Innovation* platform(see *infra*), for instance.

C. Selection criteria

17. Selection criteria should be framed at the selection stage. The purpose of these criteria is to check the suitability of candidates/ bidders to perform the contract, both in terms of their suitability to carry on the professional activity, their economic and financial solvency, and their technical professional competence based on objective criteria. It is about assessing the person of the candidate/ bidder. This assessment occurs during the selection stage and takes in two respects, first, in a negative sense, based on the exclusion grounds set out in articles 67 to 69 of the Public Procurement Act, second, in a positive sense, with the (qualitative) selection criteria. The latter criteria allow the contracting authority to check whether the candidate/ bidder is able to

demonstrate his suitability, instead of checking whether a candidate/ bidder is (potentially) open to exclusion, as an objective indication of unreliability.

18. It is not a question of demonstrating what a business owner cannot do, but rather what they have already demonstrably managed to achieve in the past. To test the offered services, a contracting authority can prepare a set of selection criteria. One of the purposes of meeting these selection criteria is to arrive at an objective indication of reliability. After all, the purpose of selection criteria is to obtain a better assurance that a candidate/ bidder has the economic, financial, technical and professional abilities to perform the contract. The selection criteria may therefore include:

- The business owner's fitness to carry on the professional activity; and/ or
- The relevant economic and financial capacity; and/ or
- The relevant technical and professional competences.

19. The contracting authority can only impose these criteria as a requirement for the candidates/ bidders to take part in the bidding process with the means of proof set out in articles 65 to 74 of the Royal Decree of 18 April 2017. As such, imposing other selection criteria is not allowed. However, an authority can use minimum requirements that must be met by the candidates/ bidders. The minimum requirements should always be proportional to the (value of) the contract.

20. As for the PCP procedure (see *infra*), in theory, one can go wider than the selection criteria set out in the Royal Decree of 18 April 2017, as it does not apply to the PCP procedure. However, it is always recommended to adhere as widely as possible to the regulations set out in the Public Procurement Act and the Royal Decree of 18 April 2017.

21. In the selection criteria for innovation, and certainly in terms of performing so-called research and development services, it is important to gauge experiences with these kinds of services. This seems like a difficult exercise as the target group will often be start-ups that do not have much experience with this type of services themselves. It therefore also seems advisable to gear certain criteria in regards to bidders' experience more towards specific profiles that either have experience with research and development projects or have particular experience in general that may contribute to the development of the solution. Care should be taken with certain requirements in selection criteria such as having experience with R&D services in general, or conversely, becoming too project-specific for instance.

22. Caution is advised when using financial and economic criteria, such as a particular turnover requirement or specific ratios. Here too there is the risk that some start-ups will be left out, even if they have great ideas that would work well in practice. However, even in the case of larger economic operators that transfer certain assets to a holding company for instance, the tendering economic operator itself may not meet such ratio requirements, but still be a reliable party.

D. Award criteria

23. Award criteria are traditionally described by the Council of State (Raad van State / Conseil d'État) as follows:

> *"An award criterion - also referred to as a sub-award criterion - is an assessment standard, a*

touchstone, a characteristic against which to measure. For this to be the case, it seems that it must be a pre-conceived datum against which tenders are compared more or less systematically. However, not every specification or addition relating to an award criterion should necessarily be considered a sub-award criterion."

24. To prepare the award criteria, one can refer to article 81 Public Procurement Act. Said article specifies that the contracting authority is to base the award of the public procurement contract on the most economically advantageous tender. The most economically advantageous tender is not exclusively about the lowest price tendered. The most economically advantageous tender is determined from the contracting authority's perspective either on the basis of:

- price;

  OR

- costs, taking into account cost-effectiveness, such as life-cycle costs, in accordance with article 82 of the Public Procurement Act;

  OR

- the best value for money, established on price or cost, as well as criteria including qualitative, environmental and/ or social aspects, relating to the subject of the contract in question. The criteria may include the following:

  - quality, including technical merit, aesthetic and functional characteristics, accessibility, suitability of the design for all users, social, environmental and innovative characteristics, trade and the terms subject to which the trade occurs;

  - the organisation, qualification and experience of the personnel for the performance of the contract, when the quality of such personnel may have a significant impact on the contract performance level;

  - Customer service and technical assistance, as well as delivery terms such as the delivery date, the delivery method and the delivery or execution period.

25. In this respect, it is evident that the award criteria, like the selection criteria, also need to be related to the subject of the contract. To these award criteria a weighting needs to be assigned that is specified in the tender documents. It is important in this regard that the weighting and the assessment methodology ensure that, if applicable, different criteria are scored according to their degree of importance.

26. It is also important to make sure that if a framework contract, a competitive dialogue or competitive procedure with negotiation (see *infra*) is used, the award criteria are sufficiently resistant to changing circumstances that may arise, for instance in the research and development phase. The fact is that award criteria can be useful at several points in time throughout the procedure, or in the performance of the tender in the case of a framework contract, in order to limit the number of participants, bidders or even contractors and have them just take part in a follow-up tender.

E. Using fixed and conditional parts as an option

27. One possibility in public procurement is to go by tenders that have fixed and conditional parts. In the innovation context, the fixed part would consist of performing the actual research and development track and the conditional part would depend on the results achieved in the fixed part. One could also use multiple conditional parts, where the outlined track, consisting of phases, would also be divided in the tender documents. For instance, phase 1 as a fixed phase, phases 2, 3 and even 4 as conditional parts. However, in order to uphold the equality principle, it is important that an estimation is then conducted in the appropriate manner.

28. In all cases, using fixed and conditional parts must always be motivated.

F. *Milestones* and *deliverables* in research and development projects

29. In PCP procedures (see *infra*), but also in innovation partnerships (see *infra*) or competitive dialogues (see *infra*) or any of its variants, it will be important to monitor the progress of the research and development tracks. To this end, *milestones* and *deliverables* can be put in place, combined with an assessment procedure that ensures whether or not a track initiated by a contractor is continued. However, the latter is only relevant when using multiple contractors. Under competitive dialogue (see *infra*), the possibilities are rather limited, when the public procurement contract is performed during the dialogue phase. There, the proposal can only be assessed against the award criteria. In the case of innovation partnerships (see *infra*) or in a different procedure where, for instance, a framework contract or fixed and conditional parts are used, there is more room for assessment by a jury based on different criteria or a different procedure.

G. Using a framework contract

30. Article 2, 35°, Public Procurement Act defines the framework contract as:

> *"An agreement between one or more contracting authorities and one or more economic operators for the purpose of laying down, for a specific period of time, the terms and conditions of contracts to be awarded, particularly as regards prices and, if applicable, the quantities envisaged."*

31. The legal technique of the framework contract essentially aims to establish an enabling legal framework under which concrete (sub-)contracts can subsequently be placed. The enabling framework consists in the fact that, in principle, the competitive element and/ or the market consultation will already have taken place at the level of the framework contract, as a result of which concrete (sub-)contracts based on the framework contract in question can often be awarded and concluded more quickly and more efficiently. The placement of the (sub-)contracts is "hedged" by the competition that has taken place following the conclusion of the framework contract.[2]

32. The relative speed and, in principle, greater ease of awarding (sub-)contracts based on the framework contract will depend to a large extent on whether the framework contract was concluded with one or with multiple economic operators *(cf.* article 43 § 4) and whether the framework contract itself contains *(sensu lato*) or does not contain *(sensu stricto*) all the terms and conditions relating to

[2] S. FRANKARD and G. LAENEN, "Raamovereenkomsten", *OoO* 2020, afl. 2, 295.

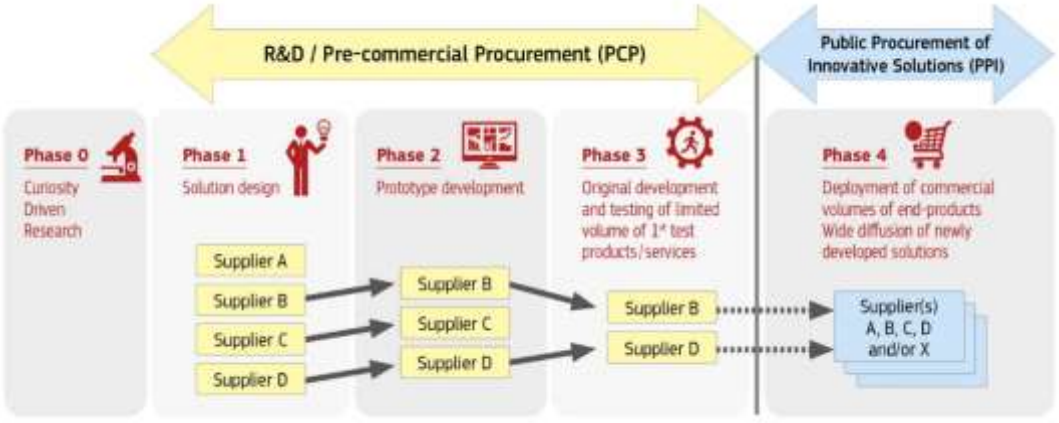
the contracts that are the subject of the framework contract (*cf.* article 43 § 5). In doing so - when the framework contract is concluded with multiple economic operators and where not all terms and conditions have been laid down - in principle a so-called "mini-competition" will need to be held *(cf.* article 43, § 5, 3°).[3] Such mini-competition may be useful for awarding the follow-up contracts, although there too a contracting authority should allow some leeway, given that , in principle, the same award criteria need to be applied as those that were used to award the contract. In practice, this may cause problems, although these are not insurmountable. The trick then is to ensure that there are award criteria in place that allow for the bids of the follow-up contracts to be clearly assessed.

33. Using a framework contract is certainly a useful tool to have multiple contractors on board during the performance phase. As applicable, this may also be combined with fixed and conditional parts, that will need to be assessed based on a specific contract.

34. Using a framework contract is expedient where several market players are challenged to perform the same contract in mutual competition. If the different market players are not required to perform the exact same contract, a contracting authority can consider working with lots. The various public procurement contracts can then be combined if desired, e.g. a lot where several similar solutions will be tested under a framework contract.

H. Precommercial procurement

35. PCP is useful to have multiple market players perform the same contract. In this connection, we refer to the way the European Commission itself structures such calls for tenders. Schematically, this may be represented as follows:



Source: European Commission

36. This is a framework contract, concluded in the first phase with four contractors and a separate agreement for each phase - part contracts - and the systematic parting with one of the contractors. In amongst other things, this system was devised to eliminate the risk of unlawful state aid. However, this system, which is also used in the so-called EAFIP method, is no sure-fire path to success, as the *toolkit* it comes with is not updated on a regular basis, nor does the procedure need

[3] S. FRANKARD and G. LAENEN, "Raamovereenkomsten", *OoO* 2020, afl. 2, 295.

to be concretised in this way. For instance, four parties can also be on-boarded all the way up to the time of completion through this framework.

37. The fact that the PCP and Public Procurement of Innovative Solutions (PPI) can be used in combination means that a contracting authority also immediately gets to purchase the products developed. If a PCP is used without a PPI, one will need to initiate a new procedure after that track has ended, in application of the public procurement laws and regulations.

38. The *pre-commercial procurement* procedure is a cumbersome procedure that could be beyond the means of smaller companies such as innovative start-ups or scale-ups. Such a procedure may impede them to participate in the tender. In this connection, it should be pointed out that larger companies, multinationals, in many cases have dedicated R&D departments, which means they will often have more resources than start-ups or scale-ups to participate in large, time and resource consuming procedures.

II.2. Legal constructions for public procurement contracts

A. Innovation partnership

39. The innovation partnership is based on a prepared specification, in which the market is invited to tender a price to research and develop a particular solution to a problem defined in that specification. Different economic operators will - in all likelihood - approach such a problem from different perspectives. This may lead to different solutions, or different processes being observed in order to come to a solution. Each possible solution is information that will certainly be of interest to the contracting authority. This makes it expedient to allow multiple contractors to perform all or part of the same public procurement contract.

40. In the innovation partnership, the so-called PCP phase (see *above*) may be linked to the PPI phase, whereby the research and development phase is linked to the actual procurement of the innovative solution. The use of this procedure is regulated by article 40 of the Public Procurement Act. In an innovation partnership, the contracting authority enters into an agreement with the best potential innovation partner(s). The partner(s) is/ are expected to create the innovative solution and ensure that it is implemented on a realistic scale for the contracting authority. The needs of the tender issuing institution should be defined in sufficient detail to enable potential bidders to comprehend the nature and scope of the challenge and have sufficient information to decide whether or not they wish to participate.[4]

41. The European Commission communication entitled "Guidance on Innovation Procurement" identifies three stages. Notably the selection phase, the research and development phase and the commercial phase. During the selection phase, candidates are selected based on predefined selection criteria, e.g. their financial solvency and economic capacity, technical ability and suitability to carry out the professional activity. During the research and development phase, the contract is performed and the contractor and the contracting authority work in partnership to arrive to a desired solution that can be procured in the commercial phase. The major differences with the

[4] T. MORTIER, *Overheidsopdrachtenwetgeving anno 2021 (Public procurement law in 2021)*, Mortsel, Intersentia, 2021, 578.

competitive dialogue (see *infra*) here are that a framework is in place that covers the performance of the contract during the research and development phase.

42. Furthermore, the research and development phase can also be subdivided within the innovation partnership. For instance, a contracting authority can use the same pattern as shown in the competitive dialogue (see *infra*), starting with multiple contractors (R&D) in order to eventually end up with (at least) one contractor at the end of the phase, who also commercially offers the services to the contracting authority.

43. The downside however is that this procedure is relatively new, with few practical examples available. Therefore going through the innovation partnership is currently always going to include a learning curve for all participants and there may be certain "teething problems" involved. Initial experience does show that different outcomes (and therefore different performance levels from those originally envisaged) may emerge from the R&D phase than envisaged at the outset of the innovation partnership. In that case, the innovation partnership will need to be terminated early. Another concern is that the innovation partnership by its very nature seems to favour large parties (for the simple reason that the selection criteria need to be designed in such a way that the market parties must be able to both perform the R&D and be able to scale up and deliver - *deployment* of the solution). Start-ups and smaller SMEs are usually unable to comply with this requirement.

44. Generally, this procedure is not combined with a framework contract or with fixed and conditional parts as will be explained below.

B. Competitive dialogue

45. There is the option of using the competitive dialogue set out in article 39 of the Public Procurement Act.[5] This is a multi-stage procedure in which - after a selection phase in which the economic operators are checked for their reliability to perform the contract - there is a dialogue phase followed by the actual submission of a tender. Prior to that, a market consultation may also be organised to ascertain whether or not the desired solution is available on the market and can be procured directly through another procedure.

46. There are many similarities with the competitive procedure with negotiation (see *infra*), but there are also important differences, including the approach and the expectations of the results of the procedure itself. When the contracting authority uses a competitive procedure with negotiation, it only seeks to obtain tenders. In the competitive dialogue, the approach is completely different, as the contracting authority mainly hopes to find solutions that will only allow it to obtain tenders in a second stage. As such, the main difference with other procurement procedures, including the competitive procedure with negotiation, is that at the start of the procurement procedure, the contracting authority does not yet know (exactly) what it wishes to buy, but that this will be established during the dialogue.

47. The competitive dialogue starts with a selection phase in which certain economic operators may be selected if they meet the predefined selection criteria relating to the subject of the contract.

[5] The reasons for using the procedure must be stated, in the same way as applies to the competitive procedure with negotiation. One of the reasons that may exist is the intention to procure innovative solutions, which is one of the justification grounds, *cf*. article 38, §1, first paragraph, 1°, b) Public Procurement Act.

This may limit the number of economic operators that can be selected.[6][7] The selection criteria could include turnover requirements, references or experience, etc., as is traditionally the case in public procurement (e.g. Investigating technical and professional capacity, financial solvency and economic standing and suitability to carry out the professional activity).

48. The selected candidates may subsequently be invited to the so-called dialogue phase. During the actual dialogue, the procuring authority ascertains and establishes how and by which means its needs can best be met, or where the authority's actual need and the outcome thereof are discussed. During this dialogue, all aspects of the contract may be discussed. In doing so however, the contracting authority must abide by the principles of confidentiality and equal treatment.[8] The aspects of the contract itself are reflected in a so-called *"descriptive document"*, which differs from an actual (set of) "*specifications"* on the basis of which the sole tender may be submitted after the dialogue phase has been concluded (see *infra*). This descriptive document specifies what is actually expected and what the functional specifications are that the solution is required to meet.[9] In response to this descriptive document, the dialogue participant may submit a so-called *"dialogue proposal"*, in which the participant gives their view on the performance of the contract, which is normally followed by a (first) round of dialogues. The parties' views on how the contract is to be performed may be discussed in dialogue sessions that are organised in order to clarify the insights the dialogue participant derives from the dialogue. Multiple dialogue sessions may be organised as part of a dialogue round, for instance in the case of research and development with a view to a financial-economic session at which the business plan, the funding, etc. are discussed and a sooner technical-functional session at which the solution *as such* and the way it can be form-fitted are discussed. You can also already request certain prototypes during this phase to check whether the concept proposed by a dialogue participant actually complies with what they are proposing. This need not be free of charge; dialogue participants may be paid a fee. It is important however that this is specified in the specifications themselves in observance of the principle of equality.

49. Several dialogue rounds can be organised, with the list of participants being whittled down in the process. This may be performed through the provision laid down in article 39, §4 *in conjunction* with article 80 of the Public Procurement Act, whereby all proposals are assessed against the award criteria.[10] In doing so, the worst scoring participants can be eliminated during the procedure. Here

[6] *Cf.* article 39, §1, third paragraph *in conjunction with* article 79 Public Procurement Act. However, the limitation of the number of candidates must be imposed transparently. To do so, the announcement/selection guideline needs to provide a transparent arrangement on the basis of which the further selection will be made. In practical terms, this can be done by assigning a score to demonstrated references for instance.

[7] The minimum number of candidates is three, *cf.* article 79 Public Procurement Act.

[8] Among other things, this requires the dialogue participants to have the same information, as well as them being aware of the award criteria on the basis of which the final tender, or the exclusion from the further course of the procedure, will be determined.

[9] *Cf.* article 39, §2 Public Procurement Act: *"The needs and requirements of the contracting authority must be indicated in the tendering notice and detailed in that notice and/or in a descriptive document. These documents shall also indicate and detail the award criteria selected and an indicative timetable."*

[10] Relevant in this context is also article 80 Public Procurement Act, which reads as follows: *"Where the contracting authority uses the option set out in article 38 § 7 and article 41 § 5 to limit the number of tenders admitted to the negotiations or the option set out in article 39 § 4 to limit the number of solutions to be discussed, it shall apply the award criteria set out in the tender documents. In the final stage, the number reached should be able to ensure effective competition insofar as there are sufficient tenders, solutions or candidates that meet the requirements."*

too the principle of competition, same as the other principles must always be observed.

50. The dialogue phase concludes with the request by the contracting authority for final offers to be entered, based on the solutions discussed in the dialogue. These bids need to include all the requirements and necessary elements for performing the project. In doing so, the contracting authority may request clarifications or supplementary information insofar as these clarifications or this supplementary information does/ does not alter the essential elements of the bids which would cause the competition to be distorted. In concrete terms, this would contain the provisions containing the actual solution to be procured, as set out by the contracting authority.

51. Pursuant to article 39 of the Public Procurement Act, the contracting authority is not under obligation to prepare specifications. However, it may be appropriate in this case to make sure that the bidders' tenders include certain elements that were not known at the time when the procedure got under way. If doing so, the contracting authority will need to strike a balance between what it communicates to the bidders on the one hand and the confidential nature of the solutions proposed by the bidders on the other.[11]

52. The tender submitted is non-negotiable. It is however still possible to ask the bidder to explain, clarify or specify the tender, albeit without this changing the actual content of the tender or the obligations incumbent on the parties.

53. A concrete point to consider in conducting this procedure is to also specify a timing. The Public Procurement Act specifies that - albeit indicative - a timing is to be mentioned in the contract notice, or in the descriptive document that is subsequently sent out.

54. The competitive dialogue for instance could be used and structured as follows:

- The dialogue phase is used to perform the actual public procurement contract[12], at a minimum to engage in dialogue about the contract, with the "contract" itself constituting the procurement of a finished product;
    - Please note that in that case, the provisions set out in the Royal Decree of 14 January 2013 cannot be invoked as regards any "tasks" to be performed in the context of the dialogue.
- The dialogue phase is used as a way to further elaborate *milestones* and *deliverables* relating to the public procurement contract that will be finally awarded.

55. Depending on certain choices, it may be decided to use fixed and conditional parts or a framework contract (see *above*) although one will need to be able to justify this in light of a specific procedure. Using a framework contract combined with a competitive dialogue is not ruled out in principle, although objections can be formulated against it from a legal-philosophical point of view. This is because the market perceives this procedure as cumbersome and also demands the contracting authority to perform a lot of preliminary work. As a result, in

[11] Y. MUSSCHEBROECK, "Concurrentiegerichte dialoog" *(Competitive dialogue)*, *OoO* 2020, publication reference no. 2 (219)2 220 75 00).
[12] Arguments in this connection include the *challenge* containing sufficient innovation and the "tender" which constitutes the *challenge* can also be ranked under the exception of article 32 Public Procurement Act.

practice this procedure is not suitable for contracts worth less than € 30,000 or upwards thereof even. This procedure is worth considering only starting from a substantial contract value.

56. The time and effort that both the contracting authority and the companies need to invest during the course of this procedure would be disproportionate to the contract value in case of low budget projects. However, if the contracting authority needs to achieve a particular result and is willing/ able to provide a larger budget and devote the time necessary, the competitive dialogue may be an option.

C. Using *sui generis* procedure structures

57. *Sui generis* procedures may be used when the terms and requirements detailed in article 32 of the Public Procurement Act are duly met. In this case, the subject of the contract can only be limited in scope, i.e. up to the phase where the full functionality of new technology can be reasonably assessed and rid of its riskiness. So technology should not be perfect in some sense. To help assess this, so-called *technology readiness levels* (TRL levels) tend to be used. These levels are indicators of the level of maturity of a technology, broken down into nine separate levels. These are also detailed in Appendix G of the general annexes of the European Commission's Horizon 2020 project work programme.[13]

- TRL 1 - Basic principles observed
- TRL 2 – Technology concept formulated
- TRL 3 – Experimental proof of concept
- TRL 4 - Technology validated in lab
- TRL 5 - Technology validated in relevant environment (industrially relevant environment in the case of key enabling technologies)
- TRL 6 - Technology demonstrated in relevant environment (industrially relevant environment in the case of key enabling technologies)
- TRL 7 - System prototype demonstration in operational environment
- TRL 8 - System complete and qualified
- TRL 9 - Actual system proven in operational environment (competitive manufacturing in the case of key enabling technologies; or in space)

58. Some further definitions:[14]

Proof of concept: A proof of concept usually consists of a small-scale experiment to test the potential of an idea (concept) in practice. The point is not to fully develop the concept but to demonstrate whether it could be feasible to be put into practice. A proof of concept is best used in the early stages of a development, in the first reflections about a concept. A proof of concept shows whether a product, functionality or system can be developed at all.

Prototype: A prototype is the visible, tangible or functional implementation of a concept, which is tested early in the development process. A prototype can be used to test an idea and to find out

[13] This can be consulted at: https://ec.europa.eu/research/participants/data/ref/h2020/other/wp/2018-2020/annexes/h2020-wp1820-annex-ga_en.pdf

[14] B. LEURS and K. DUGGAN, "Proof of concept, prototype, pilot, MVP - what's in a name? Four methods for testing and developing solutions," 20 December 2018, https://www.nesta.org.uk/blog/proof-of-concept-prototype-pilot-mvp-whats-in-a-name/.

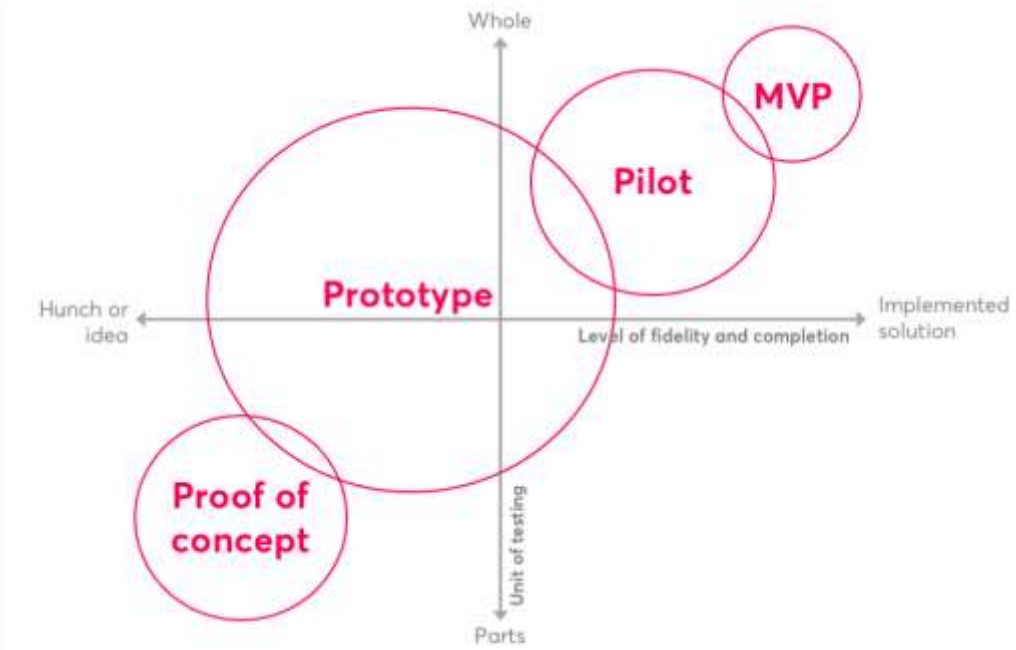
how best to implement it, for instance. Prototypes are best used when a hypothesis about a solution already exists, but there is still uncertainty about what the solution should ideally look like and how it should work. Insights from testing can then be used to improve the concept. Developing and improving the prototype allows the utmost benefit to be derived from what was learned and the concept can be refined. A prototype helps move from a version with little detail or functionality (like a rough sketch illustrating the idea) to a version with much more detail and functionality (giving test users a better sense of how it works). Prototypes are also a way of involving stakeholders in the development of a shared vision or common basis for a solution.

Pilot: Pilots are often used as the first phase of a new policy or service and are the more accepted common practice among government agencies. It is not a test or experiment, but a "live" operation, usually involving a small group of real users or citizens receiving the new service. Pilots are used when an authority believes it has an effective solution which it wants to test in practice. By offering a partially implemented concept to a limited population, they can find out what actually happens. Pilots usually only leave room for making minor adjustments.

Minimum Viable Product (MVP): A MVP allows a contracting authority to quickly learn about a possible solution, using only minimal resources. This is achieved by testing only the essential core of the concept (rather than the solution as a whole) in practice with real users. This means that an authority gets to ascertain at an early stage whether or not there is an actual need or demand for the solution, what works and what does not, and allowing for adjustments to be made accordingly (called pivoting in the lean start-up scene). MVPs can have great potential for situations that face rapid political development cycles or require continuous improvement of public services and public policies. MVPs are about using fewer resources and minimal effort to glean insights and get feedback.

59. The differences between these methods are illustrated in the diagram below. Overall:

- they are used at different stages of the development process.
- they require more or less resources.
- they vary in accuracy, level of detail or completion.
- they may have a different scope (i.e. testing parts or the whole).



60. Proofs of concept and prototypes are usually developed and tested in a controlled environment, such as a workshop or a living lab. Pilots and MVPs on the other hand are usually tested in practice.

61. In its communication, the European Commission clarifies that as far as TRLs are concerned, R&D will only occur if a contracting authority is in the TRL 1 to 6 range.[15] Prior to placing the contract on the market, they will therefore also need to examine the state of the art at the time of procurement and whether or not the exception set out in article 14 of the Traditional Sectors Procurement Directive can be used, as transposed in article 32 of the Public Procurement Act. A contracting authority must be able to prove that the results to be obtained by awarding the contract are actually *"innovative"* within a procurement law context and therefore contain a *"significant improvement"* or a *"new concept"*. From a patent law perspective, an invention *"shall be considered new if it does not form part of the state of the art"*[16]. The state of the art should therefore be duly examined. The way to do so is by conducting a SOTA (see *above*).

D. Competitive procedure with negotiation

62. Another way, not involving interim proposals but actual tenders, is the competitive procedure with negotiation, as defined in article 38 of the Public Procurement Act. This too is a so-called two-step procedure, whereby a selection phase is organised first to be followed by an award phase (tendering phase).[17]

[15] *"In terms of Technology Readiness Levels (TRL) research and development in the sense of article 1 (27) would typically include basic technology research (TRL 1), research to prove feasibility (TRL 2/3), technology development (TRL 3-5) and technology demonstration (TRL 5/6)."*
[16] See article 54 of the European Patent Convention.
[17] The reasons for using this procedure too must be stated. One of the reasons that may exist is the intention to procure innovative solutions, which is one of the justification grounds, *cf* . article 38, §1, first paragraph, 1°, b)

63. The major difference with the competitive dialogue is that here, a set of specifications is used, which the tenders need to comply with from the outset. This provides flexibility to negotiate concrete solutions that the bidders already have in place. The procedure does however also have its limitations. The negotiations as such should not extend to negotiating either the minimum requirements or the award criteria. By contrast, other aspects such as quality, quantity, commercial clauses, social, environmental and innovative aspects are open to negotiation.

64. For instance, an approach could be adopted in which establishing *milestones* and *deliverables* is the subject of the negotiations, involving the additional use of fixed and conditional parts (see *above*) or a framework contract with one or more contractors, as applicable.

65. The benefit of these procedures is that, in principle, albeit taking into account the general principles (such as the principle of equality, the obligation of transparency, the principle of competition, etc.), the civil servant is able to freely modulate the contract in consideration of the desired turnaround time and administrative burden in relation to his need to go into the bidders' proposals in detail and adapt them.

E. Using a different procedure, such as an open or restricted procedure

66. Other, more straightforward procedures such as the open or restricted procedure can also be used. For this too, selections and award criteria need to be prepared, but an authority cannot engage in dialogue with the market or negotiate the tender. However, the tender can be asked to be explained, clarified or specified. This should not pose a problem, least of all when using fixed and conditional parts or in combination with a framework contract.

67. The benefit of these procedures is that they generally have a shorter turnaround time, just because of the non-negotiability. The drawback of innovative public procurement contracts probably lies exactly in this type of negotiations, as engaging in dialogue always helps to gain a better understanding of new and unprecedented opportunities and negotiations can be useful to apply the innovation to the authority's context.

II.3. Concrete examples of public procurement tools aimed at finding innovation

68. To many civil servants it is not an easy task to embark on a public procurement contract, let alone when the contract is about topics the civil servant and their team do not have much expertise on. Normally, a civil servant neither has the time nor the resources to acquire this expertise to a sufficient extent either. So it is almost impossible for them to acquire enough information from a market analysis alone to enable them to prepare a fitting set of specifications to buy the right solution. Quite the contrary, as the civil servant is not an expert, they will already struggle to find providers and understand what they have to offer through the market analysis. Below are two initiatives that endeavour to address these needs by assisting civil servants in their search for helpful, swift and efficient solutions.

Public Procurement Act.

A. *Gov Buys Innovation*[18] from Nido[19]

69. *Gov Buys Innovation* (GBI) enables civil servants to thoroughly explore the market and test possible solutions to their needs before having to purchase and implement a solution on a large scale. It may be the answer to the problem of public services seeking to introduce more innovation but not knowing where to start.

70. Using "challenges" - in which the role of the civil servant changes from expert on the problem to expert on the solution - Nido guides civil servants on their market consultation around innovative public procurement. Thus, on GBI there is no longer a search for a specific product, but the civil servant searches for a solution to their problem on the basis of an open question, in compliance with public procurement regulations, with or without the application of the possibility contained in Article 92 of the Public Procurement Act. If a civil servant decides on a solution, they can first test it in an experiment. A successful experiment, then may be implemented using a traditional public procurement contract. If it is not a (complete) success, the civil servant will have learned from the experience and can look for other solutions refining their search.

71. It is the intention that a procedure via GBI leads to sufficient information by the end of the journey to decide whether or not it is desirable to procure or recommend an innovative solution to other public agencies, and whether a solution actually meets certain needs and thereby addresses the *challenge* that was introduced to the market.

72. Using multiple successive calls for tenders may be useful in the context of innovative public procurement (see *above*). The innovative, and therefore somewhat experimental, nature of the public procurement contracts issued as part of GBI also means that civil servants often have no answer as to *whether* there will be a follow-up experiment, let alone *what* this experiment would (should) entail. The existence and content of a follow-up experiment will depend on the results derived from the first experiment. In this context, one could argue that this constitutes an objective reason as to why a contracting authority separately put different contracts for experiments out to tender. However, account should also be taken of the contract value and whether the provisions set out in article 92 of the Public Procurement Act and the estimation rules set out in articles 6 and 7 of the Royal Decree of 18 April 2017 (*cf.* article 4, §3 Royal Decree of 18 April 2017) are duly met, or whether the exception set out in article 32 of the Public Procurement Act may be invoked.

B. *Buy ITPublic*[20] from V-ICT-OR[21]

73. Another example worth referencing is the *BuyITPublic* platform, an online procurement platform for ICT devices, managed by V-ICT-OR, the Flemish ICT Organisation. With *BuyITPublic,* V-ICT-OR offers municipal administrations the flexibility of a traditional web shop with the guarantees of a public procurement contract. In addition, the platform offers the guarantee of having surveyed the broad market during the market research, given its large number of products from multiple manufacturers and distributors. A procedure via *BuyITPublic* allows (local) authorities to take a more

[18] https://govbuysinnovation.belgium.be/.
[19] https://www.nidolab.be/nido/.
[20] BuyIT public - V-ICT-OR.
[21] Home - V-ICT-OR.

transparent approach when buying IT products, without too much administrative burden.

74. The platform allows for small orders for IT equipment to be placed on an 'accepted invoice' basis. This principle allows authorities to order up to a maximum of 30,000 euros on an annual basis, per type of product (printers, screens, laptops, etc.) and per supplier. *BuyITPublic* records the totals of the purchases per supplier and product type and alerts users when they have reached the limit. These terms have been imposed to meet the requirements set out in articles 6 and 7 in the Placement Royal Decree referenced above. In doing so a purchase order can be completed within 24 hours and no legal waiting periods for tenders apply. Even the delivery time of each of the products being purchased is known and the delivery time is even used as a selection criterion.

The *BuyITPublic* platform ensures that an authority is presented with a minimum of three suitable products based on its technical requirements. These products are sorted according to price and delivery time. Once an authority has made its choice, it receives an award report from V-ICT-OR so that it can process its award administration in a correct and convenient manner.

III. PROBLEM-BASED ANALYSIS

III.1. Problem 1: splitting and the right to further investigation

75. A first problem is that of splitting up a particular research and development track that should lead to the actual commercialisation of the solution(s) obtained.

In this sense, the following situations are the most plausible:

- a split during the research and development phase;
- a split during the commercial phase;
- a split between the phases of research and development and the phase of commercialisation of the solution(s) obtained.

76. At all times, it must be borne in mind that the research and development phase is in theory excluded from the scope of the public procurement laws and regulations (see article 32 of the Public Procurement Act[22]). Whether research and development actually takes place and can therefore be disregarded under the Public Procurement Act is best ascertained by way of a prior market consultation. This consultation will show whether the contracting authority needs to develop a solution to the problem in question with the help of an innovative partner, or whether a solution is already available on the market. The cases where the need for a separate solution creation arises cannot be determined in an abstract manner, but will greatly depend on the concrete circumstances and in particular on the concrete problem the contracting authority wishes to see resolved. Innovation can take on several forms though. Similarly, there could possibly be innovation even if it were only process-related (e.g. adapting the processes - to a limited degree - which form the basis of an existing solution within one sector) so that this solution can find a new, innovative application in another sector, where such application did not previously exist). However, it is important that this innovation actually *takes place*, in the sense that the intention must be for the contractor to create the innovative solution. For instance, if the contract is designed in such a way that the contractor is asked to investigate all solutions that are available on the market and which solution is the most suitable out of all these solutions, there will most likely not be any development of a solution within the meaning of the aforesaid exclusion. Then the public procurement laws and regulations will be applicable.

77. As mentioned, the presence/ absence of research and development will determine whether or not public procurement laws and regulations should be applied. If there is no research and development, the Public Procurement Act applies in full and the rules on splitting, as set out in this Act, must be observed.

78. From a public procurement law perspective, this means that dividing tendering projects up should not result in a contracting authority actually placing public procurement contracts on the market which, as a result of the said (possibly unlawful) splitting, would be excluded from the scope of the public procurement rules or artificially restrict competition.[23] Contracting authorities are not

[22] I.e. the Public Procurement Act of 17 June 2016, *Belgian Official Gazette* of 14 July 2016.
[23] Artificial restriction of competition means, amongst other things, that the public tenders in question are designed by the contracting authority to favour or disadvantage particular economic operators. If such anti-

allowed to artificially split public tenders in order to avoid certain thresholds (for publication or for the application of a specific procedure), for instance.[24]

79. What is definitely important is that, when a project is divided in different public tenders, any inside information, that a (different) market party may have already acquired in the context of a previous tender, is divulged to any other potential partner (see also *supra*).

A. A division during the research and development phase

80. When a research and development project is divided in different parts during the research and development phase, whereby the development is spread across several sub-contracts for instance, a contracting authority may run into the problem that the purpose of the research and development cannot be achieved, due to the fact that different models are worked on for instance, or that problems arise regarding intellectual property rights and such like. This should therefore be guarded against when contracts are already split during this phase.

81. Furthermore, it is important to bear in mind that in the case of a certain degree of continued development, there must always be an innovative element as well in order to be able to use the exception set out in article 32 of the Public Procurement Act for research and development services.[25] This will have to be checked in advance. For instance, this may be evidenced by the fact that patents are not yet available etc. (see *supra*).

82. In particular, if calling on a different business for the second experiment, said business must be able to draw on previous results, so that continued development (within an established trajectory) can be achieved effectively.

B. A division during the commercial phase

83. There may also be different tenders during the commercial phase, i.e. the products developed will be purchased at various times. What is important in this case is that the contract is not artificially split in order to escape certain obligations, for instance on publication (see *supra*).

C. A division between the research and development and commercialisation phases of the solution(s) obtained

84. In addition, there is the possibility of different tenders between the research and development phases (where, in principle, action can be taken outside the scope of the public procurement laws and regulations) and the commercial phase where the Public Procurement Act comes into full play. This may be useful in certain cases, notably to reintroduce competition to ensure that the contract may be awarded to another business, or for instance that the current business keeps their prices at a competitive level.

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competitive actions were to be taken or an exclusion from the scope of public procurement laws and regulations were to be envisaged, the contracting authority will need to put in place the relevant steps in accordance with article 5 of the Public Procurement Act, with the possible termination of the public contract(s) in question being a real option.

[24] See for instance article 42 Public Procurement Act.

[25] See earlier. In order to (continue to) benefit from the exception, every new public tender (e.g. continued development) must demonstrate the need for innovation and consequently research and development.

85. The important thing here is to keep legislation on intellectual property rights in mind and to define a concrete strategy therefore (see *supra*).

D. Right to further investigation

86. When a contracting authority orders research and development services, it can also be worthwhile to use the research results for further research. It is important to point out that the contracting authority, that was a party to a prior research relationship, may benefit from the research exemption in patent law[26]. In addition, the general restrictions imposed by competition law as enshrined in article 101 of the TFEU should also be pointed out.[27] Also the research exemption in patent law is not absolute. This will need to be taken into account in particular in any follow-up experiments that require using third-party intellectual property rights (see *supra*). In a practical sense however, it is always advisable to expressly include such clauses in the tender documents of the (first) public procurement contract, in particular the right to follow-up experiments and the use of intellectual property rights.

E. Potential remedy: defining a long-term procurement policy

87. It is advisable for a contracting authority, prior to issuing its first call for (innovative) tenders, to think carefully about how they wish to shape their procurement policy in the long term. How likely does the contracting authority believe it is that there will be a follow-up experiment for instance? If this likelihood is considered real, the next question is how the follow-up experiment will relate in terms of content to the initial public procurement contract the authority concerned wishes to place on the market. If the contracting authority has no idea whether there will be a follow-up contract and/ or what this would entail, this significantly reduces the risk that there is an unlawful split. It will still have to be demonstrated though. Should an authority already have an idea of the content of the follow-up experiment, to the extent that it is able to (precisely) define the experiment, it is advisable to compare the content of the two intended specifications in order to check whether there is any overlap. Should such a situation arise, but a contracting authority nevertheless decides to split the contract into smaller contracts (i.e. an initial experiment and a follow-up experiment), it will increase the likelihood that there is an artificial, and consequently prohibited, split.

88. Nevertheless, it is not inconceivable that situations could arise where a contracting authority already has an idea of (the design of) a follow-up experiment, as well as (the broad outlines of) its content. For instance, consider the hypothesis in which a contracting authority, in spite of its desire to let the market come up with various solutions, already has some idea as to the solution that would be most appropriate for it and what needs to happen in regards to this solution in a follow-up experiment. In this situation, and depending on the concrete subject of the two public tenders, it might be more advisable to put out the 'initial public tender' to tender along with the follow-up experiment. This is helpful as, in this hypothesis, the concerned contracting authority already has an idea of what it wants and one large public tender could therefore bring benefits in

[26] In this connection, see J. SWENNEN, "De eigenheid van onderzoeksovereenkomsten" *(The uniqueness of research agreements)*, *RW* 2019-2020, vol. 32, (1242) 1245.
[27] W. DE MEESTER and M. VAN LIMPT, "Balanceren tussen intellectueel eigendomsrecht en mededingingsrecht bij het sluiten van "reverse payment (patent) settlements" *(Balancing intellectual property law and competition law in the conclusion of reverse payment (patent) settlements)* - Lundbeck (C-591/16 P), *TBH* 2021, vol. 7, (938) 939.

terms of the efficient use of time and resources. This applies all the more if the contracting authority's understanding of (the content of) the follow-up experiment tells it that the subject of the basic contract and the follow-up experiment are similar in nature and content.

89. If the nature and content of the subject of the two contracts are so different, it would seem possible for the contracting authority to opt for separate public tenders. If in this hypothesis relevant differences prevent the joint call for tenders, a contracting authority will find itself under obligation to tender several separate contracts.

90. In addition to paying attention to the subject of the 'initial public tender' and the follow-up experiment, it is advisable to allow the time necessary between the points in time when the various public tenders are issued, when the various associated awarding decisions are taken and the points in time when the tenders are awarded. For instance, if a so-called follow-up experiment is already placed on the market in parallel with the 'initial public tender', the need for a separate tender loses some of its credibility. This would then increase the likelihood of an artificial, and consequently prohibited, split.

91. When implementing various solutions in an specific public tender, a contracting authority can set out from the same principles as outlined above. At first glance, it appears that the subject of an implementation tender should be distinguishable in terms of its nature and content from the previous tenders that were aimed at the separate development of the various solutions. It is also conceivable that, in issuing the individual tenders for the development of (an) innovative solution(s), the contracting authority concerned did not yet have any idea of the possible implementation of one or more solutions. If a contracting authority does already have an idea of the desired solution(s) and their possible implementation, it could be argued that a single large tender should be issued to (be able to) avoid the risk of splitting. The tender could then be structured in such a way that the business concerned would not only be obliged, in performance of the tender, to create a solution to the problem in question, but to also implement the solution, on call-off by the contracting authority, for instance by using fixed and conditional parts (see *above*).

92. The above mainly relates to the situation where a contracting authority wishes to put out a first call for an innovative tender, but has not yet actually put it out to tender and therefore still has some time to consider *whether* or not a risk of artificial splitting could occur and, if so, how this can be remedied (e.g. through joint calls for tenders). In practice however, situations may arise, where an initial public tender has already been issued and the contracting authority concerned, in view of the good results deriving from the said contract, wishes to organise a follow-up experiment, or bring together solutions from separate tenders. In these situations, it is important to define/ determine the subject of the follow-up tender (e.g. an experiment, a large-scale implementation, etc.) in such a way that it cannot form a technical whole with the tender(s) previously issued. In other words, the subject of follow-up tenders should be defined in such a way as to start from a different angle. In this regard, it can also be useful to expressly state the follow-up experiment in the decision to tender and to clarify in the tender documents why the contract in question is being tendered separately. An example could be because the contracting authority only gained insight into what the best solution to its problem was after the first contract was completed and which kind of possibilities this offered, or which matters still need to be (further) investigated through the follow-up experiment in question.

93. It should also be pointed out that if tenders come within the scope of the legislation on public procurement, contracting authorities can order additional services as set out in article 38/1 of the AUR.[28] In doing so, the following provision is made:

> *"A change may be made without a new placement procedure, for additional works, supplies or services to be provided by the original contractor that have become necessary and were not included in the original tender, if a change of contractor:*
>
> > *1° is impossible for economic or technical reasons, such as when the additional goods or services must be interchangeable or interoperable with existing equipment, services or facilities acquired under the original tender; and*
> >
> > *2° would lead to significant inconvenience or a considerable cost increase for the contracting authority.*
>
> *However, the price increase resulting from the change may not exceed fifty per cent of the value of the original tender. If several consecutive changes are made, this limitation applies to the value of each change. Any such consecutive changes are not allowed to be used to circumvent public procurement legislation. The present paragraph is not applicable to tenders awarded by contracting entities carrying out activities in the water, energy, transport and postal services sectors set out in Title III of the Act.*
>
> *To calculate the amount set out in the second paragraph, where the tender contains an indexation clause, the updated value is used as the reference value."*

94. This option provides some leeway to order additional services from a contractor under a public tender where public procurement laws and regulations were applied and which come within the scope of the AUR. Even in that case it is advisable however to already further frame or widen this option in the specifications, given that also other forms of review clauses can be used, whereby the services to be called off can be increased.[29] As regards public tenders that do not come within the scope of the public procurement laws and regulations (i.e. e.g. public tenders that have research and development as their subject and therefore fall under the exception of article 32 of the Public Procurement Act), a similar provision can be included. It is important that there is a degree of transparency regarding the fact that additional services can be ordered from one same company, without launching a new call.

95. Do bear in mind that public tenders that do not come within these regulations[30] may in principle be freely tendered, in observance of the principles of equality, fair competition and transparency. This is because the Public Procurement Act does not apply to the procurement of pure research and development services (article 32 of the Public Procurement Act), which means that the thresholds set out in the public procurement laws and regulations do not apply to such

[28] Belgian Royal Decree of 14 January 2013 establishing the general implementing rules for public procurement, *Belgian Official Gazette* 14 February 2013 (abbreviated below as: AUR).
[29] There are limits to this too. It should be clearly defined in which cases the review clause will be applied and, as applicable, at which value (price) additional services will be ordered.
[30] These are therefore aimed at the procurement of pure research and development services (exception set out in article 32 Public Procurement Act).

public tenders (including the threshold set out in article 92 of the Public Procurement Act). Consequently, there are no particular concerns in terms of the value of such public tenders. For instance, the aforesaid freedom of procurement could include using a sandbox for these pure research and development contracts[31] or a market survey on the *Gov Buys Innovation* platform (see *supra*), transparently communicating on public procurement contracts and the terms applicable thereto.

Specific question (1): "How to put the *Gov Buys Innovation* approach with experiments and subsequent implementation into practise?"

In practice, and at first glance, the innovative and therefore somewhat experimental nature of the public procurement contracts issued through the *Gov Buys Innovation* programme seems to mean that the contracting authority concerned will often have no answer as to *whether* there will be a follow-up experiment, and thus definitely not as to *what* this experiment would (should) entail. The fact of the matter is that the existence and content of a follow-up experiment will (often) depend on the results derived from the first experiment. This is thus an objective reason why a contracting authority would have to issue separate calls for tenders.

III.2. Problem 2: inside information

96. A second problem a contracting authority may experience in its procurement policy is that of inside information. Broadly speaking, this problem implies that (a) particular economic operator(s), through previous contact with the contracting authority in question, has/ have been able to acquire specific knowledge which other (potential) bidders may potentially not have. Such knowledge potentially risks giving the economic operator(s) that obtained more information an (unjustified) competitive advantage over other (potential) bidders, thereby adversely affecting equality between economic operators and having a negative impact on the element of fair competition.

97. This applies even more so when tendering follow-up experiments. The purpose of these follow-up experiments, is to use solutions already developed by (other) companies in a follow-up contract, which results in the continued development of the solution obtained, or its incorporation into a new solution yet to be developed. In other words, these follow-up experiments build on a previously awarded public procurement contract, or on previous solutions from a particular potential bidder. The same risk may also arise when the solutions are commercialised. However, this does not take away from the fact that patents may also be established and that the first contractor is not allowed to use his benefit, with or without limitation in time.

98. The main risk of inside information is a potential violation of the principle of equality and the resulting transparency obligation.[32],[33] In this connection, readers are referred to a ruling

[31] Example in Flanders: https://www.vlaanderen.be/digitaal-vlaanderen/onze-oplossingen/digitale-strategie-0/sandbox-vlaanderen-ruimte-voor-innovatie-en-experiment.
[32] This not only applies to public tenders that come within the scope of public procurement laws and regulations, but it is also an autonomous principle that applies to any contract concluded with a public authority.
[33] See article 4(1) Public Procurement Act, which reads as follows: "*The contracting authorities shall treat economic operators* ***equally and non-discriminatorily*** *and shall act in a* ***transparent and proportionate*** manner" (own emphasis).

returned by the Court of Justice (28 May 2020, C-796/18; ISE), denouncing these actions. Specifically, the offences in the ruling related to the continued development of software, whereby a current business was alleged to have a competitive advantage in said continued development. The Court of Justice ruled as follows in this case:

> *73. ISE considers that, in practice, the contracts for the adaptation, maintenance and development of the base software are reserved exclusively for the software publisher since its development requires not only the source code for the software but also other knowledge relating to the development of the source code.*
>
> *74. It should be stated in this regard that, if a contracting authority is considering organising a public procurement procedure for the maintenance, adaptation or development of software acquired from an economic operator, it must ensure that adequate information is communicated to potential candidates and tenderers in order to allow effective competition to develop on the secondary market for the maintenance, adaptation or development of the software.*
>
> *75. In this case, in order to ensure compliance with the principles of public procurement set out in Article 18 of Directive 2014/24, the referring court must establish, first, that both the Land of Berlin and the City of Cologne have the source code for the 'IGNIS Plus' software, second, that, in the event that they organise a public procurement procedure for the maintenance, adaptation or development of that software, those contracting authorities communicate that source code to potential candidates and tenderers and, third, that access to that source code is in itself a sufficient guarantee that economic operators interested in the award of the contract in question are treated in a transparent manner, equally and without discrimination."*

99. Specifically, this means that the results of an initial public tender should be shared (in full) with other potential candidate bidders in order to maintain equality between them. This implies that bidders need to be in an equal position when preparing to take part in the tendering process for the contract in question and it is therefore absolutely prohibited for one particular bidder to have more extensive or different information than the others. All potential bidders need to have access to the same data so they may start from an equal position when preparing to bid for the public tender.[34] In other words, the contracting authority must create an *equal level playing field*. However, this principle of openness may be restricted depending on what information is involved (e.g. confidential information, intellectual property rights, etc.). So on that point too, the relevant safeguards need to be built in, to ensure that any *issues* regarding equality will be remedied. In order to do so in practice, all textual results should be shared with the potential candidate bidders, information sessions may be organised[35], etc.

100. A useful tool to safeguard transparency could be to put a so-called PIN *(prior information notice*) or pre-information notice out on the market, especially when the public tender will also effectively fully result under the regime of public procurement laws and regulations. This could be

[34] See, in amongst other things, ECJ 28 May 2020, C-796/18; ISE, as cited above.

[35] The intention is then to inform as many parties as possible about this session. See S. VAN GARSSE, M. THEIRSSEN and J. DE MUYTER (eds.), *Marktraadpleging door openbare besturen (Market consultation by public authorities)*, Groot-Bijgaarden, Vlaams Kenniscentrum PPS *(Flemish Knowledge Centre on Public Private Partnerships)*, 2008, 18. Be transparent about the way in which the market consultation will be organised, e.g. by clarifying this in the announcement of the planned market consultation.

done by communicating through a website[36], clarifying the public procurement tender and stating that specific solutions are currently being researched that will be included in a report. In that case, the specific purpose of this communication is not to immediately purchase services or products, but to see what is available on the market, in order to draw up specifications based in part on the input from the market players. It is not unthinkable that different market players are able to offer the same thing.

101. However, when disclosing certain information gathered during the preparation or during the performance of the first contract, a contracting authority needs to be mindful at all times of the possibly confidential nature of certain information/ documents. As regards contracts that come within the scope of the public procurement laws and regulations, please refer to article 13 of the Public Procurement Act, which reads as follows:

> " § 2. *Without prejudice to the obligations regarding the publication of awarded public tenders and the provision of information to candidates, participants and bidders, the contracting authority shall not disclose information provided to it by an economic operator as being confidential, including any trade or business secrets and the confidential aspects of a tender*.
>
> *The same applies to any person who has knowledge of such confidential information as acquired in the course of their duties or of the tenders assigned to them*." (own emphasis)

102. It follows from this provision that a contracting authority may not disclose confidential information of an economic operator concerned when organising a market consultation for instance (the purpose of which may be to provide information to interested economic operators). This certainly seems to apply to the matters which the economic operator in question expressly identified as confidential in their bid. As for the other information - including any industrial or trade secrets - it may not always be entirely clear to a contracting authority which information is or is not confidential and consequently may or may not be disclosed to other (potential) bidders. For instance, public procurement laws and regulations do not define the concept of confidentiality nor, by extension, do they define the concepts of industrial secrets and trade secrets. Legal doctrine did attempt to provide contracting authorities with guidelines to appraise whether or not certain information may be disclosed.[37] Accordingly, certain information would come under trade secrets and therefore not be allowed to be disseminated, if the following conditions are met:

- (1) information that the economic operator in question has provided and highlighted as being confidential, meaning that, if the dissemination of this information is not imposed by any standard and the economic operator has to take concrete measures to preserve the confidentiality of said information;
- (2) the information concerned must be substantial in nature, i.e. the disclosure of such confidential information improves the competitive position of economic operators to

[36] E.g., the *Gov Buys Innovation* platform .

[37] M. VASTMANS and P. DE MAEYER, "Het "zakengeheim" en overheidsopdrachten: een stand van zaken" (*Trade secrets and public procurement: a round up*) in B. DEMEULENAERE, C. DE KONINCK, P. FLAMEY and P. THIEL (eds.), *Jaarboek Overheidsopdrachten 2010-2011 (2010-2011 Public Procurement Yearbook)*, Brussels, EBP Consulting, 2011, (487) 491.

whom the information is disclosed;

- (3) the dissemination of said information results in harm for the company to which it relates, as the company will lose a competitive advantage which came with the confidentiality of aforesaid information.

103. The principle of confidentiality of particular data provided by the contractor to the contracting authority not only relates to information gathered during the placement procedure, but also to information of which the contracting authority has become aware during the performance of the (initial) tender, as set out in the AUR (which does allow the actors to derogate therefrom, subject to express justification[38]). Article 18 AUR specifies that the contracting authority[39] must put the relevant measures in place to prevent any confidential information, documents or data from being disclosed to third parties who have no right to know thereof, regardless of the manner in which the contracting authority became aware of it during the performance of the contract. This also applies to the knowledge a contracting authority acquires of a drawing, model, know-how, method or invention belonging to the contractor, except when these are the subject of the tender.

104. A second element that may impact the level of transparency a contracting authority may or may not assign to certain information, relates to intellectual property rights that may protect the information/ documents a contracting authority wishes to disclose. In this connection, when drawing up the relevant documents for the public tender that is to serve as the start sign of a long-term project (meaning the contracting authority may wish to put a follow-up experiment on the market after this, or a contract aimed at the implementation and/ or amalgamation of solution(s)), it will be important for the contracting authority to pay sufficient attention to its acquisition of certain intellectual property rights or certain user rights to the solution(s) obtained. In doing so, the contracting authority needs to strike a balance between, on the one hand, a sufficient degree of communication regarding the (content of the) solution(s) obtained with the aim of ensuring equality between (potential) bidders and, on the other hand, avoiding the risk of the contracting authority violating the existing intellectual property rights on the part of the company/ companies in question through said communication, or (unwittingly) promoting such violation as a result of third parties infringing the existing rights based on the information provided. In the way it is worded, article 19(3) AUR endeavours to lend shape to such a required balance. For one thing, this article expressly specifies that the publication of general data on the existence of the (previous) contract and the results obtained therefrom must be drafted in such a way that these data and these results cannot be used by third parties without the (initial) contractor's permission. A contracting authority wishing to communicate on such matters should also inform the contractor in question about said communication, as well as mentioning the contractor's intervention in achieving relevant results.

105. In spite of the fact that procedures for *pre-commercial procurement* (see *supra*) are in theory excluded from the scope of the public procurement rules and one could therefore argue that a contracting authority does not need to put in place the above measures, it is nevertheless recommended that the above practice be applied in these procedures as well. In doing so, contracting authorities can also try to remedy any existing inside information as widely as possible.

[38] *cf.* article 9 AUR.
[39] However, this also includes the contracting business, see the wording of Art. 18 KB AUR.

Adopting a different approach does not rule out the possible risk of violating the basic principles of equality, transparency and competition[40].

Specific question (2): "Could a follow-up experiment be organised with the same company after a *challenge* on *Gov Buys Innovation*?"

Based on what was examined for the problems of splitting and inside information, it is safe to conclude that a follow-up experiment can be performed with the same company. This does come with some concerns however:

Equality among bidders: When a new public tender is issued that may come within the scope of public procurement laws and regulations, attention should be drawn to the need for other potential bidders to have access to the same information as the first contractor. Anticipatory action is crucial in this context. For instance, an initial specification should take into account intellectual property rights (that the contractor was able to acquire as part of the previous contract and to which new contractors should also have access).

Follow-up contract under public procurement laws and regulations: Article 38/1 AUR (and other review clauses) refer to the possibility to order additional services as part of an ongoing public tender. In some cases, the follow-up experiment could therefore potentially be framed within an initial tender. However, if the second tender does not come within the scope of applicable public procurement laws and regulations, such a possibility may also be included in the (initial) tender documents. In this way, possible obstacles towards the future are avoided.

Confidential information/ intellectual property rights: When certain information is to be shared, a contracting authority must first make sure that this information is allowed to be shared. In this connection, it is worth pointing out the regulations on trade secrets and intellectual property rights. The important thing here is to include adequate clauses in the tender documents so that (part of) the intellectual property rights of the results achieved during an initial *challenge* also accrue to, or can be used by the contracting authority.[41]

The above guidelines set out from the hypothesis that the contracting authority wishes to await the outcome of the initial tender and then see whether or not it wishes to launch a follow-up public tender on the market. This follow-up tender could also include the implementation of the solution of the first tender. The contracting authority could anticipate this implementation by including the relevant clauses in the initial tender documents, to allow a possible implementation tender to be fulfilled by the first contractor.

Specific question (3): "Could a *challenge* on *Gov Buys Innovation* be followed by a follow-up experiment with another company?"

Based on the above, it is safe to conclude that it is possible that a follow-up experiment on *Gov Buys Innovation* is made with another company, although there are some concerns here too. These are similar to those mentioned under specific question (2).

[40] These, as fundamental principles of European law, also apply to procedures that exist outside of the public procurement laws and regulations, such as those relating to *pre-commercial procurement*.
[41] Here too, be aware of the requirement to share intellectual property rights when applying the exception set out in article 32 of the Public Procurement Act of 17 June 2016.

The main concerns here are confidential information, intellectual property rights and equality between the bidders. When deciding to place a new public tender on the market, a contracting authority must always ensure that the candidate bidders have access to the same information.

Preferably, the initial tendering documents include a clause in which the possibility of further research is specified, so that the research findings can be taken forward.

It is in this case also important to take into account the contract value and - if the Public Procurement Act applies - the requirements set out in article 92 of the Public Procurement Act. As indicated *supra*, multiple tenders with the intention to artificially split a contract in order to repeatedly tender experiments below the threshold that would be performed by one same business is not permitted.

Specific question (4): "If an experiment is a complete success in a *challenge* on *Gov Buys Innovation*, can it be followed by a new public tender for large-scale implementation?"

A further question that arises, taking into account what was set out *supra*, is whether after a successful follow-up experiment, a new public tender can be launched for implementation on a large scale. The answer to this is affirmative, but again it should be borne in mind that the business that carried out the first experiment, may have an advantage. This is not necessarily a problem, but as already stated in the previous questions, care should be taken to ensure that equality between all bidders is preserved. This may involve sharing certain information with other potential candidate bidders. Consideration should again be given to other risks such as, among others, the risk of disseminating confidential information or violating intellectual property rights.

For large-scale implementation, if possible somehow, competition must be organised. Also in light of the nature of the contract, public procurement legislation will be applicable in full.

If a monopoly was obtained by the contractor who carried out the challenge (e.g. the only one who owns the intellectual property rights necessary to present the solution), then certain *light procedures* may also be used[42]. It is however always preferable to let the element of competition play as widely as possible.

Specific question (5): "In an implementation phase after multiple *challenges* on *Gov Buys Innovation*, could a product be requested by way of a public tender that conjoins the successes from multiple previous experiments?"

This is possible, at least when it is also possible from the perspective of intellectual property law. The specifications of the implementation phase should then include the concrete outcomes to be taken into account. The technical specifications should therefore be drafted accordingly, but again only insofar as this does not imply a distortion of competition. Should it turn out that there are other success stories, a bidder must still be in the position to try demonstrating the equivalence of their solution.

[42] Such as the negotiated procedure without prior publication set out in article 42 of the Public Procurement Act of 17 June 2016.

III.3. Problem 3: (in)ability to work with multiple contractors

106. Another issue, or opportunity, to consider is the possibility of using multiple contractors going through the same public procurement procedure. In principle, this is possible and in certain cases even advisable.

107. For instance, in the case of *precommercial procurement* (see *supra*), or *sui generis* procedures used for tenders governed by article 32 of the Public Procurement Act (see *supra*), it is useful to have several market players perform the same tender. Using such framework contracts is also governed by the Public Procurement Act, whereby a tender may be awarded to more than one contractor[43], which may be combined with essentially any procurement procedure (see *supra*).

108. In particular, reference should also be made to the specific procedure of the innovation partnership (see *supra*).[44] Article 40 of the Public Procurement Act expressly provides that the innovation partnership can be initiated with multiple contractors and the contracting authority is expected to part with certain contractors *en cours de route*.

Specific question (6) "Could one same experiment be awarded to different companies as part of a *challenge* on *Gov Buys Innovation*, in order to test different solutions?"

Yes, it is possible - both within the scope of public procurement legislation and outside of this scope - to work with framework contracts. It allows the same public tender to be awarded to multiple bidders, with each bidder researching and developing their own solution.

However, it is important to work this procedure out clearly in the tender documents, in particular how an economic operator is admitted to a next phase and how to part with certain economic operators during the process, how economic operators will be paid and so on. In terms of fees and payments, several systems are conceivable. Given the principle of cost-sharing, a part can be paid at the start of a new phase (in case the public tender is outside the application of the AUR) and the remainder paid at the end of the phase if certain *milestones* are met. This is also to keep some leverage towards the contractor.

The latter is particularly important when the public tender is not covered by public procurement legislation, as the contracting authority cannot fall back on the regime elaborated in the AUR.

III.4. Problem 4: (im)possibility of getting market players to cooperate

109. A fourth issue to consider is the possibility of allowing market players to cooperate. Specifically, this may for instance be the case, when using follow-up experiments, having to build on a solution from an initial contractor, who will also have to intervene in certain cases.

110. Of course, an economic operator can always choose with whom to work. In fact, economic operators have wide contractual freedom to enter into cooperation with another party or not. However, this freedom is not unlimited either. For instance, economic operators are not allowed to enter into cartel agreements, nor are they allowed to distort competition as such. In this connection,

[43] Article 43 Public Procurement Act.
[44] Article 40 Public Procurement Act.

reference may be made to article 101 of the TFEU[45], but also to the secondary regulations that have been transposed in Belgium in the Economic Law Code (e.g. in terms of B2B relations, which recently came into force), that set out from the broadest possible competition and in this way help to determine the freedom of contract between parties and economic operators.

111. The question then arises as to how economic operators can decide to work together or intervene in the context of a public procurement contract. In an initial public tender, companies are entirely free to jointly compete. In that case, it is up to them to put in place mutual agreements on issues such as intellectual property rights amongst other things (notably, who gets to take the proverbial *credit* for certain research results and such like).[46]

112. It is more complicated if a company that has performed an initial contract wishes to partner up with another company on a follow-up contract, or where it would be desirable for the company of the initial contract to assist another company on a follow-up contract. In that case, the situation is similar to the situation where the same company participates in the follow-up contract of a contract it has been awarded. In principle, it is possible to have companies work together if the contracting authority ensures that the principles of inside information are respected (see *supra*).

113. Operationally, there are conceivable situations where the contracting authority itself would want the intervention of a previous contractor. In doing so, when placing a new public tender on the market, a contracting authority could stipulate in the tender documents, as one of the conditions imposed, that the prospective contractor may be required to lend their assistance in future public tenders relating to the solution(s) they have developed. This may include reference to public tenders that may involve the further development or implementation of said solution, but within certain

[45] *1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:*

- *a) directly or indirectly fix purchase or selling prices or any other trading conditions;*
- *b) limit or control production, markets, technical development, or investment;*
- *c) share markets or sources of supply;*
- *d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;*
- *e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.*

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

*3. The provisions of paragraph 1 **may, however, be declared** inapplicable in the case of: [through legislation that is]*

- any agreement or category of agreements between undertakings,
- any decision or category of decisions by associations of undertakings,
- any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

- *a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives,*
- *b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of* the *products in question."*
  (own emphasis)

[46] In this connection, see also J. SWENNEN, "De eigenheid van onderzoeksovereenkomsten" *(The uniqueness of research agreements), RW* 2019-2020, vol. 32, (1242) 1245.

conditions that must be included in the tendering documents. Among other things, this could be useful towards linkages, for example. For instance, a price could be requested per hour, for linking other solutions to the existing system and the like more. In a practical sense however, there are stumbling blocks such as intellectual property rights but also business secrets, that will need to be covered in the tendering documents of both an initial contract and a follow-up contract.

114. Another possibility is to include exchange or brainstorming sessions in a framework contract with multiple contractors, even though here too intellectual property rights must not be forgotten. Economic operators are not going to be eager to share their practices with other economic operators.

115. The role of the contracting authority will thus rather focus on facilitating the search for suitable partners in a call for tenders and may, for instance, be aimed at providing a platform with potential partners or sub-contractors that a bidder or former contractor can call upon. In this connection, it is worth pointing out the value of organising an open market consultation ahead of placing a public tender on the market, that is aimed at implementing solution(s) obtained in a previous tender. Such a market consultation, which can be used by the contracting authority to inform business owners of its plans and requirements[47], may see to it that companies find one another and enter into a business relationship in an organic manner. Such a market consultation could then take on the form of an information session with a subsequent *networking moment*, for instance. In doing so, business-to-business *matchmaking* is promoted from the market itself. In this connection, it is also worth pointing out *Gov Buys Innovation*'s intuitive marketplace and the initiatives of *Sandbox Vlaanderen* (Flanders), where events, fairs, etc. are co-attended or are specifically organised.

III.5. Problem 5: problems with large-scale implementation

116. For a contracting authority wishing to invest in innovation, it does not seem desirable that any innovative solution(s) obtained cannot be implemented. In the majority of cases, such solutions will most likely be able to prove their worth only if they are implemented, produced and purchased (on a large scale).

117. Potential questions here could include whether price agreements can be made during the research and development phase, where provisions are included in the specifications (for the research and development services) setting maximum prices or determining the production itself and the division of the market. In principle, this is not allowed, as a research agreement cannot contain such "hardcore restrictions", distorting the element of competition (see also *supra*).[48]

118. Other potential questions may focus on the way in which the call for tenders is conducted, which outcome is to be achieved or which terms need to be set. In this connection, two main options appear to be conceivable: tendering the combination of the research and development services and the implementation/ purchase of the commercialised solutions, or separate tenders (see also

[47] Art. 51(1) Public Procurement Act. Moreover, in doing so, a contracting authority is not prohibited from highlighting the possible benefits of cooperation, without making this compulsory.
[48] On this topic, see J. SWENNEN, "De eigenheid van onderzoeksovereenkomsten" *(The uniqueness of research agreements)*, *RW* 2019-2020, vol. 32, (1242) 1254.

supra).

119. As indicated above, the innovation partnership also allows for the acquisition of the end products, services or works that result from the research and development services of the procedure. Other solutions are conceivable, such as the implementation being included into the specifications for example by using options, or by using fixed and conditional parts. The latter implies that the contracting authority designates the development of the solution(s) as an obliged part within the public tender and the implementation of relevant solution(s) as a conditional part,[49] thus the implementation part would be conditional, while the research and development services would then be considered to be obligatory.

120. For a contracting authority to validly use the technique of obligatory and conditional parts, it must take a number of things into account. First of all, the contracting authority is required to demonstrate why splitting the contract into fixed and conditional parts is necessary.[50] In the case of an innovative procurement policy, this could be for instance, the uncertainty whether such innovation can be created and that the contracting authority consequently cannot make any prior judgement on whether or not an implementation can or will take place. Whether or not implementation will go ahead depends on whether and, if so, what innovative solutions (will) emerge from the first public tender. In addition to the required justification of the need to use obligatory and conditional parts, the implementation of a conditional part should not alter the overall nature of the public tender. This, according to some authors, would mean that the entire public tender that was initially for works, supplies or services, should not acquire a different qualification through the performance of the conditional part.[51] As mentioned briefly above, the contracting authority's decision to implement the conditional part (i.e. the implementation of the innovative solution(s) obtained) must be communicated in accordance with the rules set out in the tendering documents.[52] In other words, the tendering documents must contain provisions defining the conditions under which the contracting authority can order the execution of the conditional part, the scope, as well as the method of communication of this execution decision. It is also recommended that the tendering documents address the consequences the decision to perform the conditional part will entail. Clauses that are included in the tendering documents must be drafted in clear, precise and unambiguous terms.[53]

121. As to the procurement terms, in case the implementation is not split from the research and development track, it should also be borne in mind that these are not easy to determine. When the actual solution is not known to the contracting authority yet, it will not be easy to start defining boundary conditions on the basis of which to tender (e.g. prices, etc.).[54]

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[49] Art. 57(1) Public Procurement Act.
[50] Art. 57(1) Public Procurement Act.
[51] B. SCHUTYSER, "Moeilijk gaat ook. Een paar gedachten over varianten, opties, vaste en voorwaardelijke gedeelten en percelen" *(Taking the difficult path gets you there too. Some thoughts on variants, options, fixed and conditional parts and lots)* in B. WATHELET, C. DE KONINCK, P. FLAMEY and P. THIEL (eds.), *Jaarboek Overheidsopdrachten 2020-2021 (2020-2021 Public Procurement Yearbook)*, Brussels, EBP Consulting, 2021, (617) 638.
[52] Art. 57(1) Public Procurement Act.
[53] Art. 57(3) Public Procurement Act.
[54] In this connection, readers are referred to the BOSA Future Proof Skills challenge on the *Gov Buys Innovation*

122. If the actual commercialised tender is made to occur by way of a separate procedure, the procedures set out in the public procurement laws and regulations apply in full.

Specific question (7) "As part of a *challenge* on *Gov Buys Innovation*, could it be determined that in an implementation on a large scale, a company that has the capabilities for implementation would partner with a small company that only had the capabilities for an experiment, but had the idea for the suitable solution? "

From a competition law angle, this is not exactly straightforward and due account will need to be taken with the concrete circumstances that arise.

Contractually stipulating that an implementation on a large scale requires mandatory collaboration (with other companies within or outside of the tender) seems a few bridges too far. Nevertheless, as the mandates to arrive at solutions in principle will relate only to the research and development services, a research agreement is not intended to include provisions on how a party should commercialise these results and how the market is to be divided.[55] For this reason, a research agreement can for instance not specify that, in order to commercialise the solution, the services of small or medium-sized companies must be called upon to further develop part of the solution, or *vice versa*.

The "small business" as cited in the example must itself also be free to choose a contracting party it would like to work with. The same obviously applies to the "large company" mentioned in the example (see above problem 4).

Furthermore, it also does not seem to be the role of a contracting authority to start distorting competition in this way and serious questions can be raised about the compatibility of such possibilities with article 101 TFEU.

III.6. Problem 6: bottlenecks in European public procurement

123. In this case, only contracts that come within the scope of the Public Procurement Act and are therefore subject to the obligations that apply to exceeding certain thresholds should be taken into account.

124. From the moment a contracting authority issues public tenders that are equal to or exceed a certain threshold, the tenders will have a somewhat different course/ regime than those that are under the threshold. The thresholds referred to here are the European thresholds, as set out in article 11 Royal Decree of 18 April 2017.[56] With effect from 1 January 2022, the following thresholds

platform (https://govbuysinnovation.belgium.be/2021/03/challenge-fod-bosa-competenties-oplossingen-gezocht/), where the entire concretisation of a large-scale implementation could only be determined after a successful experiment, as it used new technologies that were as yet unknown to the public sector and where it was not known whether they could be used in a government procurement context.

[55] On this, see J. SWENNEN, "De eigenheid van onderzoeksovereenkomsten" *(The uniqueness of research agreements), RW* 2019-2020, vol. 32, (1242) 1254.

[56] Consequently, these thresholds only apply to public procurement contracts governed by public procurement laws and regulations (including the Public Procurement Act). Consequently, these thresholds in principle do not apply to PCP and PPI proceedings.

will apply in respect of public tenders[57]:

- EUR 5,382,000 for public works tenders;
- EUR 140,000 for public supply and service tenders placed by the federal contracting authorities set out in Annex 2, part A of the Royal Decree of 18 April 2017;
- EUR 215.000 for public supply and service tenders not awarded by listed federal contracting authorities.

125. To determine whether or not a public tender meets or exceeds the European threshold applicable to it, the contracting authority should also take into account any required options, lots, as well as obligatory and conditional parts when estimating the tender.[58] If it is determined that the value of the public tender in question equals or exceeds the applicable threshold, a contracting authority will have to take several (ancillary) issues into account in the (European) procurement procedure. Importantly, prior to tendering, a public authority needs to understand the various obligations that apply to the tender as a result of reaching/ exceeding the European thresholds.

126. Specific elements to consider are as follows:

- The publication of the tendering notice in TED (Tenders Electronic Daily - European publishing platform), as well as the awarded tender;
- The use of the ESPD (European Single Procurement Document);
- Divergent rules in legal protection (Act of 17 June 2013) including the observance of a waiting period.

127. On the other hand, there are also contracts that are not subject to the Public Procurement Act, in particular research and development services as set out in article 32 of the Public Procurement Act. In such cases, sufficient transparency should be ensured, which could also result in using the European publishing platform TED. Notices may also be made on this platform for procedures that are not subject to the provisions of the Public Procurement Directives or the Public Procurement Act. Doing so also gives the project more attention.

128. What also often happens with PCP - and especially with the projects subject to the grants under the Horizon 2020 project - is that a project site is established where there is the widest possible communication and where tendering documents are also available. In doing so, it is possible to involve other European or even more international economic operators.

129. Specific bottlenecks occur due to the Belgian Coordinated Language Acts of 1966 on the use of languages in administrative matters.[59] Under these laws, the internal and external communication of, i.e. contracting authorities, must be in one of the national languages. To have a greater international reach within Europe, it is desirable to also start working in English. This

[57] Med. EC No 2021/C 457/01, Countervalues of the application thresholds of Directives 2014/23/EU, 2014/24/EU, 2014/25/EU and 2009/81/EC of the European Parliament and of the Council, *Pb.C.* 11 November 2021, vol. 457, 1.
[58] Art. 7, §1 Royal Decree of 18 April 2017.
[59] Acts of 18 July 1966 on the use of languages in administrative matters, *Belgian Official Gazette* of 2 August 1966.

happens in practice, but the question rises whether English could be applied as the primary language. The answer to that is certainly debateable.

130. Another concern is the funding of such public tenders. A European public tender will normally need to have a larger budget that also takes into account the European context, i.e. travel costs, accommodation costs, remote control costs, etc. Such public tenders focussing on all possible European bidders, will therefore require a different approach administratively, but also logistically, compared to the Belgian public tenders currently awarded by Belgian authorities.

131. However, in addition to areas of concern, there are also opportunities. Whereas European funding was already mentioned above, this also provides opportunities to establish partnerships with other European contracting authorities. To some extent this does require networking and knowledge about issues at play in other countries. The European Commission encourages such partnerships. For instance, there is the Innovation Procurement Platform, available to be consulted at: https://innovation-procurement.org. Contracting authorities can exchange information as well as issue calls for partnerships on this platform.

132. Working with consortia at a European level can be rewarding, but also requires more management, requires to take into account the occasionally complex administrative requirements when making a decision in a particular country and may impact timings. For example, when forming a consortium with an Italian state-owned company, there may be a certain internal process to be followed.

133. At the European level, consortium agreements are also often used, with specific agreements being made between the authorities, including towards the aim of aligning needs.

Specific question (8): "Which things need to be borne in mind in the context of *Gov Buys Innovation* in order to enter the European market?"

The European market actually differs in little from the Belgian market, due to the fact that the Belgian market is also part of the European Union's internal market. Above we have outlined some concerns with regard to calls for tenders themself, but also with regard to entering the European market.

Concrete focus areas include monitoring which calls are launched at a European level, e.g. Horizon 2020 projects, for which funding may be obtained. In many cases, these projects also require financial input from the authority concerned, but they offer the possibility of making larger investments, with European partners as well as with European economic operators.

IV. RESULTS AND BLUEPRINT

134. In the context of innovative public procurement, it is particularly important to be able to test solutions. Often an authority does not develop these solutions itself, but relies on innovative companies that are experts in the domain of the need the authority in question has. After all, innovation in administration is not the same as innovation in the private sector and academia. What is innovative for the public sector must already be known and existing enough to build on it with a whole administration and be used without fear of wasting taxpayers' money. The innovative solutions offered by innovative companies are therefore normally already commercially available, or can be offered commercially with minor modifications. An experiment or test phase then investigates ways of solving a specific situation. It essentially tests which innovation is most interesting for public administrations to implement.

135. Initially, for such public tenders, a contracting authority should investigate what is available on the market. This can be done through market research, which may or may not be outsourced. The market research does not have to take the form of a so-called market consultation, but can be broader (a reference can also be made to the SOTA described above, exploring what already exists on the market). The aim is to identify which solutions may be relevant to solving the problem within the specific situation at hand. The purpose of market research is to arrive at certain proposals on the basis of which the public tender can be performed.

136. The concepts proposed should then essentially be able to be tested (in a *living lab*) for their performance and desirability in practice. This is a second phase, where solutions/ services need to be procured in the first instance and also comply with public procurement laws and regulations.

137. During a third phase, the performance phase, the procured solutions/ services are then actually tested (in a *living lab* or otherwise), further developed as applicable, and monitored. The intention is namely for the solutions being tested to actually meet certain needs the public service has. In other words, for the solutions to actually respond to the public tender that was placed on the market.

IV.1. Phase 1 - Market research

138. A first stage is the market research. An authority identifies in this stage what is available in the market to execute their public tender. As explained above, it is advisable to be as transparent as possible at this stage. Please note however, that it is not necessary to list all solutions in a report. For instance, it may be decided to focus on certain solutions that have certain aspects in them, e.g. only solutions that have an innovative aspect, etc. The market research can therefore ensure that the specifications of the public tender are further refined.

139. This research can be done by the contracting authority itself, through questioning the market[60], or it can be outsourced to a third party, that is then charged with conducting a study with the object of identifying possible solutions for the public tender. This public tender then essentially addresses the needs that may be perceived by an administration, as a contracting authority in general.

[60] An example is the approach on the *Gov Buys Innovation* platform.

Practical example: aggression in the ticketing hall

Problem for the contracting authority: How can the contracting authority act to reduce aggression in the ticket hall of an administrative building in a preventive and curative manner?

Proposed solutions (solutions are always given from the perspective of one's own expertise):

- Security experts: body searches at the entrance

- Communication experts: flyering

- Technical experts: more camera security

- HR experts: hire more security guards

- Innovative procurement: Looking at what options are available on the market.

There are several ways to meet a particular need. A public tender may then serve to list all possible solutions in a report. Also, some solutions may not yet be completely optimised and might need to be further developed or refined.

140. It is important not only to identify the various solutions during the market research phase, but also the degree of innovation (and, if applicable, the need for continued development), the availability of the solution on the market (i.e. whether there is competition in the field of a specific solution), the price of the solution, etc. These are all questions that need to be answered and summarised in a report prepared by a contractor.

141. For this last case however, a public tender needs to be issued. This public tender may then consist of carrying out a study tender that identifies the concrete options to bring a solution to a public procurement need. This public tender may take on the form of an open procedure, but may also be placed on the market as a competitive procedure with negotiation, if can be demonstrated that a more complex contract requiring negotiation is necessary for instance, within the meaning of article 38, §1, first paragraph, 1°, c) of the Public Procurement Act of 17 June 2016. In that case the tendering documents need to detail what is actually to be investigated. The subject of the contract needs to reflect what can be expected of the tender issuing business.

An example of a tendering description could be:

> *"This public tender comes as part of XXX. The subject of this public tender is to identify several possible solutions that could help solve XXX. Not in the least, this relates to the identification of existing solutions available on the market, but also the identification of solutions that have already been minimally developed and that may, by way of continued development, bring the contract to a successful conclusion.*
>
> *In doing so, the contractor shall identify what the possible solution consists of, its cost and its availability on the market. The contractor shall also justify the choice of each specific solution offered and specify the level of innovation of the solution.*
>
> *The contractor shall summarise the above findings in a report to be submitted to the contracting authority."*

142. When it comes to detailing the subject of the public tender, one needs to consider what is actually expected from the contractor. Whether they are to handle the entire track, i.e. the purchase and monitoring of certain services, or just the market research.

143. In addressing the market to explore the existence of certain solutions, it is also crucial to have or create a wide network. Further efforts should also be made in this regard. When the market research is carried out, it must be publicised so that the network can be widened and solutions that are available on the market are explored.

144. If the intention is to have the contractor also perform the monitoring, or if the assessment of the implementation of one of the solutions is to occur in a practical living lab case, this too needs to be included in the public tender. In the first phase mainly strategic choices therefore need to be made and the market research must be carried out further.

145. A subsequent phase will then look into how these solutions can be purchased for further testing in a particular environment. Remember that any additional solutions may be added and tested *en cours de route*, but also that the specifications to the public tender itself can be further refined and sub-questions may be formulated.

146. The first phase is completed by deciding which solutions are actually interesting enough to offer scope for further exploration. With these solutions, a public service can move on to the second step, i.e. purchasing the specific solutions, services that are available on the market and that may be worth testing/ developing (in a *living lab*).

IV.2. Phase 2 - The purchase of specific solutions/ services available on the market that are useful to be tested/ developed (in a *living lab*)

147. In the second phase, it should be decided based on the market research which solutions or services will be procured for further investigation in light of the public tender. The procurement of these services will require the application of public procurement laws and regulations. However, as also explained above, there is a wide range of modalities that can be used. For one thing, there are various procedures that may be observed, but there are also various possibilities to tender with multiple contractors.

148. If the solution proposed is already at an advanced stage, the subject of the public tender could then be a kind of *minimal viable product* (see *above*) (in light of the TRL), where a solution proposed by a market player is tested against certain parameters (in a *living lab*). In doing so, it constitutes a kind of pilot project where a product or a certain working method is tested and whereby is investigated whether it might be desirable to procure such products or services on a larger scale.

Practical example: aggression in the ticketing hall

Model framework contract: In this phase a contracting authority may seek to hire the services of security firms that will provide security guards, where certain scenarios are tested to see whether the presence of security guards has a preventive or curative effect. If an authority is looking to tender with only one party, a framework contract can be used so that the contract can be awarded to several market players.

Example of using lots: Where the intention is, for instance, to hire services from security firms but also to hire services from a communications agency that provides flyers, a contracting authority may opt to place one overall contract on the market where there is a lot for services from security firms and a lot for services from a communications agency, or it may opt to place several public tenders on the market.

Example innovative procurement: An experiment is being procured, allowing the most appropriate solution to be tested in the government context. During the experimentation phase, it can be ascertained in which areas the solution needs to be modified and whether, with the modifications, a solution can provide a suitable answer to the contracting authority's needs. Should the experiment be successful, the contracting authority will know what it is looking for and it could move on to large-scale implementation after the experiment. Should the experiment not be a (complete) success, the contracting authority will have learned from the experiment and can implement new, more need-based specifications for a subsequent experiment.

149. During this phase, the necessary decisions should also be made in terms of procurement law. Thus, it should be decided what procedure will be observed, how the subject of the public tender will be included, etc. A key consideration here is to leave room for other equally valid solutions with which to bid, that are (or may be) available on the market. It is important to never lose sight of the principles of equality and competition in doing so. After the procurement procedures have been completed, the public tender(s) is(are) awarded and can be performed.

Practical choices to be made for the implementation of the second phase

1. - Choice of procedure

For this second phase, the first step is to choose a procurement procedure, as well as the modalities under which the public tender will be placed on the market. We would draw your attention to the range of procedures found in public procurement laws and regulations such as the open procedure, the restricted procedure, the competitive procedure with negotiation, as well as the simplified negotiated procedure with prior publication, the negotiated procedure without prior publication, the competitive dialogue, the innovation partnership and the possibility of having contracts performed based on the accepted invoice, *cf.* article 92 of the Public Procurement Act of 17 June 2016. Consideration should also be given as whether to use a framework contract, to opt for splitting the contract into lots, etc.

2. - The subject of the public tender

The subject of the public tender too needs to be determined at this stage, i.e. the contracting authorities expectations must be expressed. These expectations may take on different forms, but also depend on whether the public tender qualifies as a public services contract or as a public supply contract. For instance, if the intention is to purchase a particular product, it will be a public supply contract. If the goal solely consists in testing a particular product and this test is to be co-performed by the contractor, without any product being purchased, the public tender will be qualified as a public services contract.

The procedure for the public tender can be conducted in several stages. There may be an initial

continued development, followed by a test phase and this may even end in a purchase phase, for instance to avoid splitting the contract and having to use follow-up contracts.

It may also be that, after a test phase for example, a purchase can be made immediately, whether or not on a large scale. This is possible, but is to be included in the specifications and needs in the estimation of the public tender value.

3. - Selection criteria

Selection criteria must not be forgotten. These should relate to the subject of the public tender. A key concern here is not to unduly tailor things to one particular solution and also not to unnecessarily hamper competition.

In some cases, no selection criteria need to be prepared. This applies in the case of the negotiated procedure without prior publication, or the possibility set out in article 92 of the Public Procurement Act of 17 June 2016 to use an accepted invoice, for instance.

4. - Award criteria

It is also important that the award criteria are already prepared at this stage. A variety of criteria may be used. An important point to consider here is also to assign a weighting, as well as to consider a particular assessment method so that the most economically advantageous tender can be selected.

5. - Technical provisions

Consideration should also be given to technical provisions as to how this will be worded in the tendering documents. The idea is not to draft the technical provisions in a way that only one party can participate in the performance of the public tender. This could be considered to be infringing competition law, as well as being contrary to the principle of equality. If a particular solution emerges in the report prepared in the first phase, it is preferable to also functionally describe the solution. It is advisable to add the phrase "or equivalent", where certain technical requirements are put in place.

6. – Intellectual property rights

In terms of intellectual property rights too, choices need to be made, which in part will depend on the track that will be observed. When specific research and development services are to be performed, it may be useful to reserve certain intellectual property right, including whether intellectual property rights are being co-purchased or whether they are to remain vested with the contractor in full or in part. Also economic realities should also be taken into account. If a particular product is already fully commercialised and does not require continued developments, it is more likely that a market player will not want to transfer his intellectual property rights.

7. – Monitoring

Consideration should also be given to the performance of the public tender (Who will follow up on the performance of the public tender?) and the monitoring of the results (Who will monitor the results? Is this to be a contractor involved in another public tender? Will this be performed by way of self-reporting or will the contracting authority concerned assume the monitor role itself?). The

final aim is to find out whether the solution tested can actually be put into practice in the public sector. The requirements put forward in the third phase should also be translated into the provisions of the tendering documents.

8. – General implementation provisions

Other general implementation provisions also need to be detailed. One may set out from the provisions specified in the AUR, but certain other arrangements also need to be made. This includes assessment times, which ideally need to be included in the tendering documents. Other provisions may also need to be included (e.g. interaction with another monitoring contractor, etc.). In any case, it should not be forgotten to include review clauses in accordance with articles 37 *et seq.* of the AUR.

9. - Termination provisions

In some cases, it is also useful to specify the conditions for terminating the public tender. In research and development tenders, it may turn out after a while that the desired solution still cannot be achieved, which makes it expedient to have rules in place to enable putting an end to the contractual relation.

IV.3. Phase 3 Testing and developing the solutions, services (in a living lab) and the monitoring thereof

150. In addition to the tendering procedure, the public tender also needs to be performed and monitored. Certain tests need to be carried out, in a *living lab* or otherwise and, if necessary - partly depending on the subject of the public tender that was determined in the second phase - further developed. In addition, these tests should also be monitored. During implementation, it is important that there is some strategy on the basis of which monitoring will be carried out and where adjustments can be made as applicable in the case of actual research and development services, but also that, in general, a report is kept on the performance of the solutions that have been tendered. The aim is to identify parameters that indicate whether the solution turns out to be more or less efficient.

Practical example: aggression in the ticketing hall

Example innovative procurement: An experiment is procured for a market solution, developing a perfume that has calming effects to stop aggression.

If this public tender was awarded to a bidder providing research and development services, it is appropriate to monitor it closely. In concrete terms, this means examining which parameters can be usefully adjusted in the process to make the concept succeed in a demonstrable way.

151. Reporting can be done in several ways. A system of self-reporting may be imposed on the company in the tendering documents, preferably also providing a template for the contractor to use. Alternatively, monitoring could be done either by the contracting authority itself or by a third-party contractor performing a monitoring tender.

152. It may happen that there is a lack of knowledge on specific points to start monitoring correctly and assess the solution. In such cases, it is allowed to be assisted by (external) experts.

Please note however that when dealing with confidential information, it is preferable to also conclude a confidentiality agreement with such (external) experts.

153. When several equivalent solutions are being tested, it may also be useful to assess these solutions side by side, or to set a time to exchange experiences (albeit without this allowing the intellectual property rights of the other parties to be infringed). This will open up room to discuss the various *lessons learned*, the experiences that were gained while carrying out these public tenders.

154. Ideally a report should be available at the end of this phase, showing whether or not a solution is on hand that fills the need of the contracting authority, or in other words, showing that the need of the authority can be duly met with the solutions tendered. Such a report can then be used for the further procurement of the solutions on a large, commercial scale.