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REPORT

on pre-commercial procurement: driving innovation to ensure sustainable high-quality public services in Europe
(2008/2139(INI))

Committee on the Internal Market and Consumer Protection

Rapporteur: Malcolm Harbour

PR_INI

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MOTION FOR A EUROPEAN PARLIAMENT RESOLUTION

on pre-commercial procurement: driving innovation to ensure sustainable high-quality public services in Europe (2007/2139(INI))

The European Parliament,

- having regard to the communication from the Commission of 14 December 2007 entitled "Pre-commercial Procurement: Driving innovation to ensure sustainable high quality public services in Europe" (COM(2007)0799) (the "Commission communication"),
- having regard to Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts¹,
- having regard to Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of utilities contracts for entities operating in the water, energy, transport and postal services sectors²,
- having regard to the Commission interpretative communication on the application of Community law on Public Procurement and Concessions to institutionalised PPP (IPPP)³,
- having regard to all applicable competition rules regarding State Aid and intellectual property rights,
- having regard to the Commission communication of 21 December 2007 on a lead market initiative for Europe (COM(2007)0860), and to the Commission consultation on establishing public procurement networks in support of this initiative,
- having regard to the Commission communication of 25 June 2008 entitled "'Think small first' - A 'Small Business Act' for Europe" (COM(2008)0394), and to the Commission staff working document of 25 June 2008 on the European code of Best practices facilitating access by SMEs to public procurement contracts (SEC(2008)2193),
- having regard to the Commission communication of 13 September 2006 entitled "Putting knowledge into practice: A broad-based innovation strategy for the EU" (COM(2006)0502) and to the resolution of the European Parliament of 24 May 2007⁴,
- having regard to the Commission staff working document of 23 February 2007 entitled "Guide on dealing with innovative solutions in public procurement: 10 elements of good practice" (SEC(2007)0280),
- having regard to the report of the Independent Expert Group on R&D and Innovation

¹ OJ L 134, 30.4.2004, p. 114.

² OJ L 134, 30.4.2004, p. 1.

³ OJ C 91, 12.4.2008, p. 4.

⁴ OJ C 102 E, 24.4.2008, p. 455.

entitled "Creating an Innovative Europe"¹ (the Aho report),

- having regard to the opinion of the Committee of the Regions on Pre-commercial Procurement: Driving innovation to ensure sustainable high quality public services in Europe²,
 - having regard to Rule 45 of its Rules of Procedure,
 - having regard to the report of the Committee on the Internal Market and Consumer Protection and the opinions of the Committee on Industry, Research and Energy and the Committee on Legal Affairs (A6-0018/2009),
- A. whereas the Lisbon Strategy calls for Member States to raise research and development investment to 3% of GDP, a key commitment to drive innovation and the knowledge economy,
 - B. whereas the Aho Report has identified public procurement as a strategic instrument to achieve this goal,
 - C. whereas the Commission and the Member States must help develop the expertise required to make best use of the recommendations of the Commission communication,
 - D. whereas there are currently no instruments available to the Commission to promote pre-commercial procurement pilot projects, and the initiative rests solely with the Member States,
1. Welcomes the Commission communication and supports the proposed risk/benefit sharing pre-commercial procurement model as one of the drivers of innovation;
 2. Endorses the Aho Report and in particular the view that Member States should use public procurement to drive demand for innovative goods whilst improving the quality and accessibility of public services;
 3. Notes that, in spite of the numerous European research programmes, the results thereof have not yet been exploited by public authorities through public procurement;
 4. Notes the attention already given to pre-commercial procurement, in particular in the USA, China and Japan, who are actively exploiting the potential through a range of public policy instruments, such as the Defence Acquisitions Performance Assessment (DAPA) project in the USA;
 5. Considers that pre-commercial procurement constitutes an under-exploited driver of innovation-led growth for the EU with significant potential to achieve high-quality and readily accessible public services for example healthcare and transport, as well as to address the social challenges of climate change, sustainable energy and an ageing

¹ http://ec.europa.eu/invest-in-research/action/2006_ahogroup_en.htm

² OJ C 325, 19.12.2008, p. 44.

population;

6. Regrets that many public authorities are not aware of the potential of pre-commercial procurement and do not yet act as “intelligent customers”;
7. Considers that the optimum benefits of this initiative will only be realised if contracting authorities include innovation as one of the goals of their procurement programme;
8. Notes that pre-commercial procurement can be deployed within the existing legal framework of Directives 2004/17/EC and 2004/18/EC, which exempt research and development services from their scope¹ unless the services procured are fully paid for by, and the benefits accrue solely to, the contracting authority;
9. Urges Member States to screen national legislation to ensure that public authorities are not limited in pre-commercial procurement through inexistent, incorrect, or unnecessarily complex transposition of the relevant exemptions and unnecessarily elaborate national tendering requirements and procurement models;
10. Notwithstanding the distinctive approach taken in pre-commercial procurement, notes that good principles of procurement should still apply, namely transparency and competitiveness, to ensure that integrated end-solutions meet customer needs;
11. Endorses the Commission communication, which provides a potential conceptual basis for pre-commercial procurement and its implementation, but considers that there are some gaps regarding the manner of giving effect to the procedure proposed, especially at local and regional level;
12. Considers, as far as local and regional authorities are concerned, that there is still not enough information about the continuing obstacles preventing them from implementing pre-commercial procurement with the aim of promoting genuinely innovative solutions in the public interest;
13. Urges the Commission and Member States to work together to ensure that contracting authorities in local, regional, and other authorities removed from central administration develop the required expertise to implement innovative procurement;
14. Urges the Commission and the Member States to provide local and regional contracting authorities with training guidelines and tools showing how pre-commercial procurement might be used in research and development;
15. Welcomes, therefore, the Commission initiative to fund exchange of good practices and training on pre-commercial procurement in the 2009 work programme of the Seventh Framework Programme;
16. Commends the above-mentioned Commission staff working document on 10 elements of good practice for innovative solutions in public procurement and welcomes the broader activities of Pro Inno Europe in support of innovation; calls on the Commission to draw

¹ Article 16(f) of Directive 2004/18/EC and Article 24(e) of Directive 2004/17/EC

up a similar best practice guide for pre-commercial procurement;

17. Considers that pre-commercial procurement has very great potential as a further step towards embedding innovative procurement, but recognises the need for specialist procurement skills and for Member States, in partnership with business, universities, and training centres, to sponsor training activities for the development of management tools;
18. Calls on the competent Commission Directorates-General to cooperate with each other in producing a comprehensive, easy-to-understand but legally watertight handbook in all the official languages with practical case illustrations showing how the relevant legal principles can be applied correctly in practice, particularly for the use of small and medium-sized enterprises (SMEs) and contracting authorities;
19. Urges the Commission to provide in the handbook, in particular, practical examples of risk-benefit sharing according to market conditions; considers, in addition, that intellectual property rights must be vested in the companies participating in pre-commercial procurement, inasmuch as the US and Japan work on the basis of this model, which encourages numerous companies to become involved in pre-commercial procurement procedures;
20. Notes in particular the importance for successful pre-commercial procurement of developing risk/benefit sharing according to market conditions and the vesting of intellectual property rights in participating undertakings;
21. Calls on the Member States and the Commission to identify in the innovation policy mix medium- to long-term public challenges to be solved by technological solutions developed through pre-commercial procurement; is of the opinion that such solutions could include design contests and challenge funds, such as the US Driverless Vehicle Challenge;
22. Considers that knowledge transfers between technologically innovative universities, research centres and contracting authorities form an integral part of successful pre-commercial procurement;
23. Notes that European innovation agencies, such as VINNOVA in Sweden, Tekes in Finland, Senternovem in the Netherlands and Innovation Norway, play an integral part in the transfer of knowledge between prospective customers and researchers; by fostering cooperation between parties involved in research and development, they encourage the uptake of pre-commercial procurement; therefore encourages the Member States to examine the operation of these agencies as a benchmark for their own activities;
24. Notes the importance of EU Technology Platforms in providing a framework to define research and development priorities and in linking innovations which are ready for exploitation to the needs of prospective customers; also notes that Technology Platforms can align the early market development of new technologies with the needs of public authorities; calls on the Commission, therefore, to ensure better involvement of Technology Platforms in pre-commercial procurement;
25. Welcomes the Commission's Lead Market Initiative (LMI) as a strong catalyst for the use of pre-commercial procurement in support of innovation with a view to the development

of key markets of scale, noting in particular the initiative to establish public procurement networks to support the LMI;

26. Welcomes the Commission's efforts to improve access to public procurement for EU SMEs in the Small Business Act's European Code of Best Practices;
27. Welcomes the Commission's clarification that pre-commercial procurement can be carried out by contracting authorities at all stages of developing and rolling-out a new product or service, and not only for fundamental research; notes that this comprehensive approach encourages access by SMEs to public procurement;
28. Commends the Commission proposal for clarifying the role of public authorities in fostering research and development and stimulating innovation through their procurement activities; stresses that Member States' procurement policies should not be overly prescriptive, since pre-commercial procurement can be practically organised in different ways to suit specific projects and needs whilst still complying with Community rules;
29. Considers that the concept of pre-commercial procurement is important, but fears that it will be unsuccessful in drawing in SMEs unless it is clearly understood how pre-commercial procurement is to work, particularly in a cross-border context; points out that the key principle of pre-commercial procurement – namely that the public authority does not keep all benefits resulting from the research and development, but that each company retains the ownership rights in respect of the new ideas it generates – ensures legal certainty and the protection of ideas for participating businesses;
30. Recognises that SMEs can benefit from pre-commercial procurement through risk sharing (given their more limited investment capabilities), progressive growth (in size and experience) at each stage of the research and development process and the streamlined bidding process compared to traditional procurement;
31. Calls on the Commission to consolidate these strategies into one single public procurement policy aimed at encouraging innovation through public procurement, pre-commercial procurement, the development of lead markets and SME growth through public procurement;
32. Considers, as part of a consolidated strategy to promote innovation through pre-commercial procurement, that public campaigns would provide an improved climate for contracting authorities to invest more in activities encouraging innovation with a longer-term return on investment; supports in this regard opportunities for networking between local, regional and national public authorities as regards pre-commercial procurement;
33. Considers that pre-commercial procurement can work most effectively if there are sufficient incentives for public authorities to tap into research and development markets and for suppliers to become involved in government projects; notes therefore that financial incentives are extremely important in the uptake of pre-commercial procurement and already exist in certain Member States, where a substantial proportion of the costs of the first pre-commercial procurement can be matched by a central authority;
34. Considers that, within the scope of Community programs to stimulate innovation,

financial incentives for public authorities across the EU to jointly undertake pre-commercial procurement of innovative technology in lead markets and other areas of common European interest should be considered;

35. Notes that such Community pilots would benefit from an automatic Commission review and wide publication of practical experiences and contract clauses enabling procurers to refer to sound precedents which could also be used in a best practice guide;
36. Identifies the need for a European pilot project in the context of pre-commercial procurement in order to show by example an implementation approach that ensures maximum legal certainty and protection for businesses, in particular for SMEs, which, by definition, are the weaker parties compared with contracting authorities and the large undertakings generally involved in public procurement;
37. Notes that strengthening pre-commercial procurement remains one way among many for Member States to raise their game in innovation and research; calls therefore on Member States to promote innovation by engaging all stakeholders, including universities, research institutes and other bodies involved in the promotion of economic development, so as to better engage public authorities with innovative enterprise; considers that this engagement should be included in a consistent strategy for research, innovation and development;
38. Recommends to the Commission and the Member States that, with the aim of encouraging competition, the use of electronic procurement systems and dynamic procedures be promoted in order to facilitate the process of pre-commercial procurement;
39. Instructs its President to forward this resolution to the Council and Commission.

EXPLANATORY STATEMENT

Introduction

Pre-commercial procurement is a specific approach for the public sector to procure R & D, with a view to driving innovation to ensure sustainable high quality public services in Europe. The approach must be seen as part of the broader innovation strategy for the EU, highlighting the importance of public procurement in reinforcing the innovation capabilities of the Union as well as improving public services for European citizens.

Europe faces societal challenges, in the areas of health, sustainability, ageing and security. Some of the required improvements are so technologically demanding that, either no commercially stable solution exists as yet, or existing solutions exhibit shortcomings which require new R&D solutions. Public services require new equipment in order to perform cutting-edge medical research, reducing energy consumption in public buildings as well as protecting their citizens from security threats without having to intrude upon their privacy. Pre-commercial procurement can help meet this gap between supply and demand in the public sector.

Examples of life-changing innovative solutions that emerged from R&D procurements include: the Internet Protocol technology, the Global Positioning System and key innovations in semiconductor technology. In the US, R&D public procurement has enabled public authorities to create new markets for biotechnology and nanotechnology applications. The US public sector is spending \$ 50 billion per year on R&D procurement, an amount which is 20 times higher than in Europe and an amount that represents approximately half of the overall R&D investment gap between the US and Europe. Therefore pre-commercial procurement has been identified as one of the crucial policy tools to help the European public sector address major public challenges and also offers the EU a major opportunity to foster its innovative base.

The Commission Communication gives guidance on how EU rules can be used to stimulate public procurement innovation in Europe within the R&D sector. It considers, for example, how new provisions can be drafted that promote a competitive R&D procurement policy but that exclude State aid; how IPRs can best benefit pre-commercial procurement; and how procuring R&D services, involving risk-sharing, can best be utilised.

In the past there has been a substantial lack of awareness of how to optimise R & D procurement in the EU. The current practise in the EU has followed from exclusive development, which allows the public purchaser to reserve all results and benefits from the development of a product for their exclusive use. Thus, companies that have developed a product or service for a public body are unable to reuse their findings for other potential customers. This has led to market fragmentation, financial barriers to procuring competing developments and a lack of impetus from public authorities to procure innovatively. Pre-commercial procurement, on the other hand, allows for an R & D procurement approach that involves risk-benefit sharing, without necessarily constituting as State aid. Further still, it allows for the cost-effective development of innovative solutions. Therefore, the Commission communication on pre-commercial procurement offers an example of how public authorities

can procure innovatively, in line with the procurement directives and State aid rules, as well as creating significant incentives for both companies and public authorities to procure innovatively.

There is no mandatory EU budget for R&D procurement: under FP7, the Commission cannot fund Member States to undertake R&D projects together in the form of calls for tender, and with CIP, the Commission cannot fund procurements undertaken by a number of Member States for developments in the R&D stage, therefore neither CIP or FP7 can be used to launch pre-commercial procurement pilots. Your Rapporteur aims therefore to highlight this, and to call on the Commission to explore new policy actions for the next programming period to support Pre-commercial Procurement.

General remarks on Pre-commercial procurement

The European Parliament's resolution of June 2007 on the transposition and implementation of public procurement legislation encouraged the wider use of pre-commercial procurement in the EU. Your Rapporteur welcomes the Commission communication on the concept of pre-commercial procurement and believes that the approach will help public authorities address major societal challenges as well as help in developing Europe's innovative base.

Your Rapporteur is of the opinion that pre-commercial procurement offers substantial opportunities for SMEs, both in the public procurement sector and in their overall development and experience. Pre-commercial procurement is automatically more accessible to SMEs than regular large commercial procurement contracts. Pre-commercial procurement contracts which fall under the applicable exemptions to the procurement Directives, are of benefit to smaller companies who normally don't meet the requirements of regular commercial procurement contracts. Also, the step-based approach offered by pre-commercial procurement means that tasks and budgets can grow with the size and experience of a small expanding business. Risk-benefit sharing, where the commercialisation rights are left with participating companies rather than public authorities, also provides an opportunity for SMEs to sell on to other clients after the pre-commercial procurement. Therefore, it should be recognised that pre-commercial procurement compliments and builds on the important "think small first" principle.

Your Rapporteur also draws attention to the need to train procurers on how to deal with innovation in public procurement. Pre-commercial procurement is a highly skilled profession that requires well-trained people. When dealing with commercially ready products, such skills may be accumulated through general experience. However, when goods and services are based on new innovative products, technological knowledge is necessary to help those involved follow through pre-commercial procurement. Therefore, the practical use of pre-commercial procurement should be seen in conjunction with the available skills and experience.

The Commission communication also recognises that whilst pre-commercial procurement is naturally suited to large government departments, such as those in health and defence, if local and regional authorities are to take-up pre-commercial procurement, cross-European networking is important. Therefore, to help local authorities make the most out of pre-

commercial procurement, links across Member States should be established for experience and resource sharing.

Therefore, pre-commercial procurement offers an important opportunity for both Public Authorities to improve their services and for the EU as a whole to improve its innovative base. Europe must develop demanding solutions to address the demanding problems the EU faces and pre-commercial procurement should be recognised as one of several policy tools to meet this challenge.

5.11.2008

OPINION OF THE COMMITTEE ON INDUSTRY, RESEARCH AND ENERGY

for the Committee on the Internal Market and Consumer Protection

on Pre-commercial procurement: Driving innovation to ensure sustainable high quality public services in Europe
(2008/2139(INI))

Rapporteur: Anni Podimata

SUGGESTIONS

The Committee on Industry, Research and Energy calls on the Committee on the Internal Market and Consumer Protection, as the committee responsible, to incorporate the following suggestions in its motion for a resolution:

1. Welcomes the Commission's Communication; believes that pre-commercial procurement has the potential to be significantly beneficial to innovation and to offer updated and high quality public services in the European Union;
2. Notes that, in spite of the numerous European research programmes, the results thereof have not yet been exploited by public authorities through public procurement;
3. Urges the Commission to draw up guidelines or provide further clarification on certain aspects of the procedure, including provisions concerning state aid and intellectual property, in order to create a transparent and stable environment for public authorities and companies;
4. Calls on the Member States to honour their commitment to invest 3% of GDP in research and development (R&D), of which 2% should be provided by the private sector, as a key element in strengthening EU innovation and enhancing the knowledge economy;
5. Envisages a special role for pre-commercial procurement in addressing major socio-economic challenges for which the European Union has to elaborate a strategic approach, such as the transition towards a sustainable, energy efficient, low-carbon society, which would serve as a valuable tool in helping both governments and industry to reach climate change targets;

6. Invites the Commission to explore policy options at EU level including financial incentives that would encourage public authorities across the European Union jointly to undertake pre-commercial procurement projects in areas of common interest;
7. Calls on the Member States and the Commission to promote the participation of small and medium-sized enterprises in pre-commercial procurement procedures;
8. Draws attention to the valuable role that universities and research institutes play in R&D; therefore would welcome their participation in pre-commercial procurement;
9. Recommends to the Commission and the Member States that, with the aim of encouraging competition, the use of electronic procurement systems and dynamic procedure be promoted in order to facilitate the process for pre-commercial procurement.

RESULT OF FINAL VOTE IN COMMITTEE

Date adopted	4.11.2008
Result of final vote	+: 36 -: 0 0: 3
Members present for the final vote	Jerzy Buzek, Giles Chichester, Pilar del Castillo Vera, Den Dover, Lena Ek, Nicole Fontaine, Adam Gierek, David Hammerstein, Rebecca Harms, Erna Hennicot-Schoepges, Mary Honeyball, Romana Jordan Cizelj, Pia Elda Locatelli, Eugenijus Maldeikis, Reino Paasilinna, Atanas Papanizov, Aldo Patriciello, Francisca Pleguezuelos Aguilar, Anni Podimata, Miloslav Ransdorf, Vladimír Remek, Herbert Reul, Amalia Sartori, Andres Tarand, Patrizia Toia, Nikolaos Vakalis, Adina-Ioana Vălean, Dominique Vlasto
Substitute(s) present for the final vote	Ivo Belet, Daniel Caspary, Zdzisław Kazimierz Chmielewski, Juan Fraile Cantón, Robert Goebbels, Gunnar Hökmark, Eija-Riitta Korhola, Pierre Pribetich, Esko Seppänen, Silvia-Adriana Țicău, Vladimir Urutchev

5.11.2008

OPINION OF THE COMMITTEE ON LEGAL AFFAIRS

for the Committee on the Internal Market and Consumer Protection

on pre-commercial procurement: driving innovation to ensure sustainable high-quality public services in Europe
(2008/2139(INI))

Rapporteur: Aloyzas Sakalas

SUGGESTIONS

The Committee on Legal Affairs calls on the Committee on the Internal Market and Consumer Protection, as the committee responsible, to incorporate the following suggestions in its motion for a resolution:

1. Considers that the concept of pre-commercial procurement is important, but fears that it will be unsuccessful in drawing in small and medium-sized enterprises unless it is clearly understood how pre-commercial procurement is to work, particularly in a cross-border context; points out that the key principle of pre-commercial procurement – namely that the public authority does not keep all benefits resulting from the R&D but that each company retains the ownership rights in respect of the new ideas it generates – ensures legal certainty and the protection of ideas for participating businesses;
2. Identifies the need for a European pilot project in the context of pre-commercial procurement, in order to show by example an implementation approach that ensures maximum legal certainty and protection for businesses, in particular for small and medium-sized enterprises, which, by definition, are the weaker parties compared with contracting authorities and the large undertakings generally involved in public procurement;
3. Calls on the competent Commission Directorates-General to cooperate with each other in producing a comprehensive, easy-to-understand but legally watertight handbook in all the official languages with practical case illustrations showing how these legal principles can be applied correctly in practice, particularly for the use of small and medium-sized enterprises and contracting authorities;

4. Urges the Commission to provide in the handbook, in particular, practical examples of risk-benefit sharing according to market conditions; considers, in addition, that intellectual property rights must be vested in the companies participating in the pre-commercial procurement, inasmuch as the US and Japan work on the basis of this model, which encourages numerous companies to become involved in pre-commercial procurement procedures.

RESULT OF FINAL VOTE IN COMMITTEE

Date adopted	4.11.2008
Result of final vote	+: 25 -: 0 0: 0
Members present for the final vote	Carlo Casini, Titus Corlăţean, Bert Doorn, Monica Frassoni, Giuseppe Gargani, Lidia Joanna Geringer de Oedenberg, Neena Gill, Othmar Karas, Klaus-Heiner Lehne, Katalin Lévai, Antonio López-Istúriz White, Antonio Masip Hidalgo, Hans-Peter Mayer, Manuel Medina Ortega, Aloyzas Sakalas, Francesco Enrico Speroni, Diana Wallis, Jaroslav Zvěřina, Tadeusz Zwiefka
Substitute(s) present for the final vote	Sharon Bowles, Eva Lichtenberger, Rareş-Lucian Niculescu, Georgios Papastamkos, József Szájer, Jacques Toubon, Renate Weber

RESULT OF FINAL VOTE IN COMMITTEE

Date adopted	22.1.2009
Result of final vote	+: 35 -: 0 0: 0
Members present for the final vote	Cristian Silviu Buşoi, Charlotte Cederschiöld, Janelly Fourtou, Evelyne Gebhardt, Martí Grau i Segú, Malcolm Harbour, Christopher Heaton-Harris, Iliana Malinova Iotova, Alexander Graf Lambsdorff, Kurt Lechner, Toine Manders, Nickolay Mladenov, Catherine Neris, Zita Pleštinská, Karin Riis-Jørgensen, Zuzana Roithová, Heide Rühle, Leopold Józef Rutowicz, Christel Schaldemose, Andreas Schwab, Eva-Britt Svensson, Marianne Thyssen, Bernadette Vergnaud, Barbara Weiler
Substitute(s) present for the final vote	Emmanouil Angelakas, Wolfgang Bulfon, Colm Burke, Giovanna Corda, Brigitte Fouré, Joel Hasse Ferreira, Filip Kaczmarek, Othmar Karas, Olle Schmidt
Substitute(s) under Rule 178(2) present for the final vote	Jean-Pierre Audy, Michel Teychenné