

CHAPTER 12

Innovation Partnerships: Purpose, Scope of Application and Key Elements of a New Instrument of Strategic Procurement

BY

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1. Innovation Partnership as a Specific Instrument of Strategic Procurement

The European legislators consider innovation partnership as an instrument of strategic procurement. In recital 47 of the Public Procurement Directive (PPD), they describe "research and innovation, including eco-innovation and social innovation" as the 'main drivers' for future growth, (*i.e.* sustainable (ecological) and inclusive (social) growth).⁽¹⁾ The PPD aims at encouraging contracting authorities to procure innovative products (*i.e.* products that are guaranteed with high quality and efficiency for the fulfilment of public service tasks combined with major macroeconomic, ecological and social benefits). Against this background and as a reaction to the global financial crisis, the innovation partnership has formed part of the strategy 'Europe 2020' for smart, sustainable and inclusive growth by the European Commission.⁽²⁾

As an instrument of strategic 'innovation procurement', the innovation partnership complements a range of existing instruments for the procurement of innovative products. As paragraph 97(3) of the German Act against Restraints of Competition ("*Gesetz gegen Wettbewerbsbeschränkungen*" – GWB) clarifies, aspects of innovation can be considered at all stages of the award procedure⁽³⁾ – (*i.e.* by

(1) Dir. 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Dir. 2004/18/EC (referred to as 'PPD'), 72. Art. 26-31 of the Directive describe the procurement methods under EU law; a prior version of this piece was published through the Ius Publicum Network Review (www.ius-publicum.com), issue 2, 2018.

(2) EC Com., "Europe 2020. A strategy for smart, sustainable and inclusive growth", COM (2010) 2020 final.

(3) Cf. C. KRÖNKE, "Das neue Vergaberecht aus verwaltungsrechtlicher Perspektive", in *NVwZ* 2016, 568 - 573.

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using functional requirements in the technical specifications [Art. 42(3)(a) PPD], by authorizing tenderers to submit variants [Art. 45 PPD] or by implementing innovative characteristics in the award criteria [Art. 67(2)(a) PPD]). Furthermore, Art. 26(4)(a)(ii) of the PPD shows that innovation partnership is not the only procedural instrument that can be used in order to purchase ‘innovative solutions’. The competitive dialogue procedure, a procedure specifically for carrying out exceptionally complex procurements,⁽⁴⁾ and the competitive procedure with negotiation are also instruments of innovation procurement.⁽⁵⁾ In addition, the Commission has laid out several models of ‘pre-commercial procurement’ as drivers of innovation – even though these models are not (necessarily) covered by the PPD and the GWB (*see* Art. 14[2] PPD and § 116[1][2] GWB).⁽⁶⁾

So why introduce another instrument for procuring innovation? A closer look at the scope of application and the key elements of the rules on innovation partnership reveals that such instrument is intended to provide the contracting authorities with an additional, *specific* procurement procedure for innovative products which addresses a different situation and a different subject-matter – ones not covered by the other instruments. The rules on innovation partnership state that the method is to be used only when solutions that are already available on the market cannot meet the needs of the contracting authority,⁽⁷⁾ which means that the method should be used only when there is a considerable need for innovation under the given circumstances. European legislators’ goal in creating the innovation partnership procedure was to make it possible (or at least easier) for contracting authorities to acquire the ‘innovative result’ of a development process from an innovator, without a need for a separate procurement procedure. The procedure thus⁽⁸⁾ provides incentives for market participants to invest in the necessary – but possibly expensive – development of innovation. The subject-matter of the innovation partnership agreement, the term of which is usually fixed for a relatively long period, includes the development as well as the subsequent purchase of the innovative product (‘development-plus-purchase’).⁽⁹⁾

(4) Dir. 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 contracts (referred to as ‘CPD’), recital 31, 118; even more clearly in recital 42 of the PPD (“with innovative projects”), *op. cit.*, pp. 71-72.

(5) Please refer to part B. III of this paper for the distinction between these procedural instruments of innovation procurement.

(6) EU Comm., “Pre-commercial Procurement: Driving innovation to ensure sustainable high quality public services in Europe”, COM(2007) 799 final; as well as recital 47 of the PPD, *op. cit.*, p. 4.

(7) Please refer to part B. I and II of this paper for a detailed analysis of the scope of application of the rules on innovation partnerships.

(8) Recital 49 of the PPD, *op. cit.*, p. 73; *see also* S. ARROWSMITH, *The Law of Public and Utilities Procurement*, 3rd ed., 2014, par. 9-126.

(9) S. ARROWSMITH, *The Law of Public and Utilities Procurement*, *op. cit.*, p. 8, paras. 9-128-9-129.

1.1. Scope of application

The GWB provides two requirements for the application of the rules on innovation partnership (§ 119[2][2] of GWB), to wit: (1) The contracting authority must specify the need for an innovative product that “cannot be met by purchasing products, services or works already available on the market” (*see* Section I, below), and (2) the innovation partnership needs to aim at (both) the development of an innovative product and the subsequent purchase of its result (*see* Section II, below). These two requirements are also set in Article 31 (1). The innovation partnership differs from the other procedures that also promote innovation because it can be used by a contracting authority only after complying with the requirements described above (*see* Section III, below).

1.1.1. Solutions available on the market do not meet the procurement need

The first requirement under Article 31(1)(2) of PPD is that products available on the market cannot meet the contracting authority’s need for an innovative product. This requirement should be interpreted in conjunction with the definition of the term ‘innovation’ in Article 2(2) No. 22, PPD (which has not been transposed into German law). Accordingly, innovation means the “implementation of a new or significantly improved product, service or process, including but not limited to production, building or construction processes, a new marketing method, or a new organizational method in business practices, workplace organization or external relations *inter alia* with the purpose of helping to solve societal challenges or to support the Europe 2020 strategy for smart, sustainable and inclusive growth”. An innovative product, therefore, requires (1) an indication of the “innovative” nature of the product, and (2) a degree of innovation from the existing solutions.

1.1.2. Connection of the innovation to the subject-matter of the contract

The innovative aspect, which makes the requested solution stand out from the solutions that are already available in the market, can be related either directly to the subject-matter of the contract (e.g. asking for a building concept with a demand for energy reduction at a certain minimum) or to the procurement process in a wider sense (e.g. using building materials and energy from ecologically sustainable and socially inclusive sources for the construction of a building).

The innovations that are directly connected to the subject-matter of the contract do not raise any specific legal questions. They are called ‘product

innovations', and may be included as part of the functional requirements in the technical specifications.(10)

The scope of innovations related to the procurement process in a wider sense, however, requires an accurate definition. Certainly, Article 22(1), No. 22, of PPD lays down the several types of 'process innovations' (*i.e.* innovations that are related to the "production, building or construction processes, a new marketing method, or a new organisational method in business practices, workplace organisation or external relations"). Despite this broad definition, process innovations still require a specific link between the innovation and the subject-matter of the contract; this makes the contracting authority responsible for implementing the innovative aspect of the procurement by way of (functional) technical specifications, award criteria or an additional contract performance conditions. Although the innovative elements need not form part of the 'material substance' of the subject-matter of the contract, it is still required that they be specifically "linked to the subject-matter of the contract" within the meaning of Article 42(1)(2), Article 67(3) and Article 70(1) of PPD.

1.2. Degree of Innovation

Article 2(1), No. 22, of PPD also provides the indicators for determining how much innovation (compared to already existing solutions) is required for the procurement of an innovative solution through an innovation partnership. According to the definition in Article 2(1), No. 22, of PPD, an innovation is not limited to entirely new products, services or processes, but it may also refer to any significant improvement in the existing products, services or processes.(11) The innovation partnership may therefore be considered by a contracting authority as an option in either of these two scenarios: (1) An eligible product is not available on the market at all (e.g., one-litre cars to be used as police cars).(12) (2) Although there is an appropriate product that is available on the market, either its quality is not satisfying (e.g., electronic cars are available but they lack a sufficient operating distance for use as police cars) or it is not available at a reasonable price (e.g., high performance electronic cars for use as police cars).(13)

(10) Cf. M. BURGL, "Die Förderung sozialer und technischer Innovationen durch das Vergaberecht", in *NZBau* 2011, pp. 577, 580-581, on the significance of functional technical specifications for promoting innovation.

(11) Cf. E. BADENHAUSEN-FÄHNLE, "Die neue Vergabeart der Innovationspartnerschaft – Fünftes Rad am Wagen?" in *VergabeR* 2015, pp. 743, 746.

(12) See for this example also M. BURGL, "Die Förderung sozialer und technischer Innovationen durch das Vergaberecht", *op. cit.*, pp. 577, 581.

(13) Cf. S. ARROWSMITH, *The Law of Public and Utilities Procurement*, *op. cit.*, par. 9-131.

Some authors seem to argue⁽¹⁴⁾ that the use of the innovation partnership procedure should be restricted only to scenario (1) ('new' products, services or processes), and the procedure should not be extended to merely introducing 'significant improvements' according to our scenario (2). These authors do so to distinguish innovation partnerships from competitive dialogues and the competitive procedure with negotiation. However, this interpretation may lead to at least two possible issues, specifically: 1) whether the European legislator had a different understanding of 'innovation' in Article 31(2) PPD on the one hand ('development of an innovative product, service') and in Art. 22(1) No. 22 PPD on the other hand; and 2) whether the procurement needs must necessarily aim at developing a completely new product (e.g., a 'breakthrough innovation' so to speak) or if the legal requirements can be met merely by an 'incremental innovation'. Consequently, the contracting authorities must bear the risk resulting from an uncertain definition of the term 'innovation', that is, if a contracting authority wrongfully considers the innovation partnership to be applicable, and, hence, chooses an incorrect procedure, this will be a violation of the procurement rules, which can be contested through a review procedure.

To minimize the inherent risk for a contracting authority considering an innovative partnership, the authority must monitor the market to avoid choosing the innovation partnership wrongfully. That market review also reduces the tenderer's risks in developing an innovative solution, for a thorough market survey which confirms the novelty of the item makes it less likely that the contracting authority will terminate the contract prematurely.

1.2.1. Development and purchase of innovations

In choosing an innovation partnership among the available procurement methods, the contracting authority must aim at both developing and purchasing the innovative product. This requirement reflects the purpose of the innovation partnership: innovation partnership is intended to encourage tenderers to create innovations by holding out the prospect that the contracting authorities will purchase the product resulting from the innovation.

In purchasing the product, the contracting authority must define the arrangements on intellectual property rights in the procurement documents according to the competition regulations⁽¹⁵⁾ (*see* Art. 31[6][3][1] PPD). Nevertheless, the innovation partnership does not necessarily have to aim at purchasing an exclusive right of use for the innovation. Such an exclusive obli-

(14) *Cf.* E. BADENHAUSEN-FÄHNLE, "Die neue Vergabeart der Innovationspartnerschaft", *op. cit.*, pp. 743, 745.

(15) *Cf.* the R&D Framework, 12, section 33(b); P.C. GOMES, "The innovative Innovation Partnerships under the new EU directive for the public sector", in PPLR, volume 4, 2014, p. 211, esp. pp. 217 f.

gation could run counter to the purpose of innovation partnership to provide incentives for tenderers (because further economic uses of the innovation will become very limited).(16)

Against this background, the material scope of the innovation partnership can be put in context through Article 14(2) of PPD and paragraph 116(1), No. 2, of GWB. In principle, the PPD and the GWB rules cover only certain research and development ('R&D') services, on the condition that the contracting authority (1) holds the exclusive property rights of the outcomes, and (2) solely finances all the services therein. In contrast, as we have seen, the innovation partnership does not necessarily have to result in purchasing the exclusive rights. It is therefore reasonable to assume that Article 14(2) of PPD and paragraph 116(1), No. 2, of GWB do not restrict the application of the rules on innovation partnership. As a result, all activities that contribute to developing the innovative solutions that are not available on the market fall within the material scope of the innovation partnership – even if they are not awarded, per se, by tender pursuant to Article 14(2) of PPD and paragraph 116(1), No. 2, of GWB.(17)

2. Distinguishing Innovation Partnerships From Other Procedures Which Also Promote Innovation

The requirements as described in the preceding section clearly separate the material scope of the innovation partnership from those of other procedures that also promote innovation.(18) In contrast to the negotiated procedures and the competitive dialogue, under an innovation partnership the solutions sought cannot be already available on the market.(19) Consequently, an innovation partnership's scope of application is considerably limited because of the specific focus on innovations.

The unique feature of the innovation partnership is the specific and formalized regulation of 'development-plus-purchase agreements', that is, it merges development and purchase in one single procurement procedure. In fact, it is a valuable enrichment to the available procurement procedures prior to 2016. The provisions on innovation partnerships include several concrete precautions to ensure the principles of equal treatment and transparency (e.g., Art. 31[2] of PPD requires a preliminary agreement on intermediate targets, remuneration

(16) P.C. GOMES, "The innovative Innovation Partnership", *op. cit.*, p. 215.

(17) See, for the opposite view, E. BADENHAUSEN-FAHNLE, "Die neue Vergabeart der Innovationspartnerschaft", *op. cit.*, p. 14.

(18) Please refer to Part A of this article for these procedures above in A.

(19) Cf. E. BADENHAUSEN-FAHNLE, "Die neue Vergabeart der Innovationspartnerschaft", *op. cit.*, p. 14.

instalments on performance levels, and a maximum cost for the innovative product).(20)

2.1. Key elements of the award procedure

The innovation partnership award procedure has three phases:(21) (1) submission of requests to participate, (2) negotiation, and (3) execution of the innovation partnership. As recital 49 of the PPD states, the innovation partnership is based on the rules of the competitive procedure with negotiation. Thus, the rules for the competitive procedure with negotiation apply to the innovation partnership in the same way, if and insofar as there are no specific rules on innovation partnership and the application of rules on competitive procedure with negotiation does not run counter to the rationale of the innovation partnership.(22) In German procurement law, the procedural details of the innovation partnership are not provided in the GWB; instead, they are set out in the “*Vergabeverordnung*” (‘VgV’) and other subordinate regulations.

2.1.1. Submission of requests to participate

The award procedure starts with the publication of a contract notice, including a call for submission of requests to participate (§ 19[2][1] VgV). The contracting authority may, however, describe the need for an innovative product by (functional) technical specifications (§ 19[1][3] VgV) either in the publication notice (e.g. a more practical option) or in the procurement documents. The authority indicates which elements of this description define the minimum requirements to be met by all tenders (§ 19[1][4] VgV). It also defines the selection criteria concerning, in particular, the candidates’ capacity in the field of research and development, and in developing and implementing innovative solutions (§ 19[1][4] VgV). According to § 127(5) GWB (and § 52[2][1], No. 5, VgV), the procurement documents must include the award criteria as well as their relative weighting (or the descending order of importance for such criteria). The *minimum* time limit for receipt of requests to participate is 30 days from the date on which the contract notice is sent (§ 19[3] VgV).

Based on the submitted information, the contracting authority selects those enterprises that will further participate in the procedure. In this context, paragraph 42[2][1] VgV explicitly prescribes that only those competitors that have established proof of meeting the selection criteria (*i.e.* according to § 122[2]

(20) S. ARROWSMITH, *The Law of Public and Utilities Procurement*, *op. cit.*, p. 13, par. 9-128.

(21) Cf. also E. BADENHAUSEN-FÄHNLE, *VergabeR 2015*, *op. cit.*, p. 14.

(22) Cf. M. FEHLING, “Forschungs- und Innovationsförderung durch wettbewerbliche Verfahren”, in NZBau, 2012, pp. 673-676.

GWB the suitability to pursue the professional activity [No. 1], the economic and financial standing [No. 2], technical and professional ability [No. 3]) and have not been excluded may be selected. In particular, the candidates' experience in developing and implementing innovative solutions⁽²³⁾ as well as – depending on the complexity of the demanded solution – their economic and financial resources are of particular relevance for the innovation partnership. The contracting authority has discretion in selecting the candidates for the negotiation phase with utmost consideration to the principles of equal treatment and transparency. Furthermore, it can decide to limit the number of tenderers to three from the outset (§ 19[1][4] VgV and § 51 VgV).

3. Negotiation

The negotiating phase commences upon the invitation to the selected participants to submit tenders in the form of research and innovation projects (§ 19[1][4] VgV). The initial and all subsequent tenders are subject to negotiations that allow some flexibility with regard to organizing them; however, the final tenders must not be negotiated (§ 119[7][2] GWB and § 19[5][1] VgV). This negotiation phase aims at improving research and innovation projects in terms of content and adapting them to the contracting authority's needs. Therefore, the entire content of the procurement, except for the minimum requirements and award criteria, are subject to negotiations (§ 19[5][2] VgV). The contracting authority is permitted to carry out the negotiations in successive stages in order to reduce the number of tenders to be negotiated by applying the previously specified award criteria (§ 119[7][2] GWB and § 19[5][3] VgV). However, the contracting authority should carefully preserve the confidentiality of the information they obtain during the negotiations, while ensuring equal treatment to all competitors (§ 19[6] VgV).

The negotiation phase ends by awarding an innovation partnership to one or more tenders (§ 19[7][1] VgV). The sole criterion is the best price-quality ratio, taking into account the innovation as an important factor.⁽²⁴⁾ Therefore, the awarding of an innovation partnership that is based on the lowest price or the lowest cost is – in contrast to other procurement procedures – inadmissible (§ 19[7][2] VgV). The contracting authority can enter into an innovation partnership with only one or with several partners (§ 19[7][3] VgV).

(23) *Ibid.*, p. 22.

(24) *Ibidem*, p. 22.

4. Performance of the Innovation Partnership

According to the general purpose of the innovation partnership procedure, the executive phase can be sub-divided into (1) an R&D-phase, which includes the development of the innovative solution, and (2) a purchase phase, when the innovative product is purchased (§ 19[8][1] VgV). The R&D-phase must be structured by intermediate targets, which have been agreed individually, and are adapted to the innovation degree of the proposed solution. Furthermore, there must be an agreement on an appropriate partial remuneration for achieving these targets (§ 19[8][2-3] VgV).

In principle, there are three possibilities to terminate an innovation partnership:

- (1) The innovative solution is purchased after completing both phases of the innovation partnership.
- (2) Only the R&D phase has been completed and the solution is not purchased because the performance levels or the maximum costs have not been met (§ 19[10] VgV, § 18[10] SektVO, § 3b[5], No. 9, VOB/A EU). If the contracting authority still aims at purchasing the innovative product despite non-compliance with the agreements, there must be a separate contract award after another tendering.⁽²⁵⁾
- (3) The R&D phase is not completed, and the innovation partnership is terminated early (also in case it affects only a single innovation partner) at the end of a development stage. For this eventuality, the contracting authority must point out in the contract notice or in the procurement documents, whether and under which conditions it is going to exercise its right of termination (§ 19[9] VgV).

5. Outlook: Made for ‘Big Innovation’

It will be exciting to see whether and how the new instrument of innovation partnership will be used in practice. Due to its very specific scope of application (*see above in B. I. and II.*) and complex procedural structure (*see above in C.*), and in view of the (typically) high technical and legal demands for establishing a partnership, the innovation partnership procedure will probably be reserved for large, centralized and experienced contracting authorities, dealing with challenging procurement issues. It is therefore even more important to emphasize that the innovation partnership is – by far – not the only instrument of public procurement law that can be used as a tool of fostering (smaller) innovation (*see above in A.*). The innovation partnership is clearly made for ‘big innovation’.

(25) S. ARROWSMITH, *The Law of Public and Utilities Procurement*, *op. cit.*, p. 13, par. 9-142.