

Co-creation during the PCP procedure

When a public procurer in a PCP procedure gives suggestions, recommendations or instructions to the participants, he should be aware of a couple of legal aspects:

1. A distinction needs to be made between:
 - **Suggestions/recommendations:** these are non-binding and given to the participant in order to improve the solution so that it better suits the procurer's needs. Whether or not the participant implements the suggestion/recommendation, does not determine if he will be invited to bid for the next phase.

In principle, these are confidential between the public procurer and the relevant participant, as long as they do not confer a competitive advantage or change the evaluation criteria.

e.g.: "Have you thought of x/y/z?" "Have you tried to do it like x/y/z?" "Maybe you can try to do/to use x/y/z."

- **Instructions:** in principle, these are formally non-binding, but they are decisive. Whether or not the participant implements the instructions may determine if they will be invited to bid for the next phase. This determines the outcome of the PCP.

As long as there are multiple participants and they can be eliminated at the end of the Phase, the public procurer must ensure compliance with the principles of equal treatment and transparency. This means that he should communicate the instruction to all participants.

e.g.: "Implement x/y/z." "Please do x/y/z, this is what we wish to see in the solution."

In order to determine whether something is a suggestion/recommendation or an instruction, ask yourself: *does it affect the progression to the next phase?*

2. Principles of equal treatment, transparency and proportionality

Keep in mind that giving instructions, meaning that they influence the outcome of the PCP, may entail an infringement of the principles of equal treatment and transparency.

When giving an instruction, the procurer must be aware of this and communicate the instruction in a transparent manner to all participants involved in the PCP to ensure they all equally have the opportunity to implement the instruction.

When giving an instruction, the procurer must also be aware of the proportionality. Instructions should be proportionate and linked to the original PCP objectives.

3. Substantial contract modifications

Keep in mind that an instruction can be a substantial contract modification if it renders the contract materially different in character from the contract initially concluded. Such a modification requires a new procurement procedure.

Keep in mind that when you give an instruction and enforce its implementation, this may require payment for the additional costs that the innovator(s) make.