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Guide to the EU public procurement rules in the UK

Contract award procedures for public sector bodies in Scotland

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Introduction

This Guide provides an overview of the EU public procurement rules and their application in Scotland. It is intended as an introductory guide for lawyers, procurement officials and policy makers. It is not intended to be relied upon as legal advice.

Readers should note that in March this year the EU adopted a new set of EU Directives governing public procurement. The Scottish Parliament has also adopted legislation governing below threshold contracts – The Procurement Reform (Scotland) Act 2014. These are due to be implemented sometime next year (2015). Until then, the relevant rules governing procurement by public sector bodies in Scotland are those set out in this Guide.

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The rules

The EU Directives

The principal EU public procurement rules are contained in two separate EU Directives¹:

- **Directive 2004/18** on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (the Public Sector Directive); and
- **Directive 2007/66** on improving the effectiveness of review procedures concerning the award of public contracts (the Remedies Directive).

The implementing Scottish Regulations

The Public Sector Directive is implemented in Scotland by the Public Contracts (Scotland) Regulations 2012 (SSI 2012/88) (the Regulations). The Regulations consolidate the earlier Public Contracts (Scotland) Regulations 2006 to include all subsequent amendments to those regulations and introduce some further amendments.

Relationship between the Directives and the Regulations

The Regulations must be interpreted in a manner that is consistent with the Directives. Moreover, both the Directives and the Regulations are to be implemented “purposively”. This means having regard to the underlying purpose of the EU public procurement rules, namely the opening up of public procurement markets to crossborder competition within the EU.

General principles of EU law

Public bodies must always act in accordance with general principles of EU law. So, for example, any requirement limiting contracts to local or national contractors is likely to breach the EU Treaty prohibition on discrimination on grounds of nationality.

Over the years the Court of Justice of the European Union (CJEU) has applied the general principles of EU law to procurements that have not been subject to the full requirements of the Public Sector Directive. These include the principles of non-discrimination, equal treatment, transparency and proportionality.

It follows that even where a public body awards a contract that is not subject to the Regulations, it may still be susceptible to challenge if it fails to observe the general principles of EU law.

Case-law

Given that the Regulations must be interpreted and applied in a manner that is consistent with the Directives, the case-law of the CJEU on the application of the Public Sector Directive is directly relevant to similar questions in respect of the application of the Regulations. There is now a substantial body of EU and UK case-law on the application of the Public Sector Directive and the Regulations. There is also an increasing number of procurement challenges in Scotland.

Guidance

Guidance on a wide range of issues relating to the application of the EU public procurement rules is available from Scottish Procurement Policy Notes and the European Commission.

¹ Please note this Guide does not cover: (1) the separate EU Directive governing utilities procurement (Directive 2004/17 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors), which is implemented in Scotland by The Utilities Contracts (Scotland) Regulations 2012; or (2) the separate EU Directive on defence and sensitive security procurement (Directive 2009/81 coordinating procedures for the award of certain works contracts, supply contracts and service contracts in the fields of defence and security), which is implemented in the UK by The Defence and Security Public Contracts Regulations 2011.

Contracts subject to the regulations

The Regulations apply to the award of a contract where the following three conditions are met:

- the contract is being awarded by a public body falling within the definition of a “contracting authority”;
- the contract to be awarded is a “public contract” for the procurement of works, services or supplies; and
- the estimated value of the contract exceeds the relevant EU threshold.

The following sections consider each of these three conditions.

Contracting Authorities

“Contracting authorities” are defined as:

- the State (i.e. government departments);
- regional and local authorities; and
- bodies governed by public law as well as associations formed by one or several of such authorities.

“Bodies governed by public law” are defined as bodies

- established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character;
- having legal personality; and
- being majority (i.e. more than 50%) financed by one or more public bodies, subject to management supervision by an authority, or having an administrative, managerial or supervisory board more than half of whose members are appointed by an authority (the financing test should be considered each year, for example in the case of universities).

Over the years, the Regulations have been modified to take account of obligations contained in the Government Procurement Agreement of the World Trade Organisation. Under these rules, contracts awarded by certain central government bodies are subject to lower thresholds. The bodies concerned are listed in Schedule 1 of the Regulations.

Public contracts

The Regulations apply to contracts for pecuniary interest concluded in writing having as their object the execution of works, the supply of products or the provision of services.

Works contracts

Works contracts are contracts which have as their object the execution, or design and execution, of works relating to one of the activities listed in Schedule 2 of the Regulations.

Supply contracts

Supply contracts are defined as contracts other than works contracts having as their object the purchase, lease, rental or hire purchase of products (with or without the option to buy).

Services contracts

Service contracts are defined as contracts other than works or supply contracts having as their object the provision of services listed in Schedule 2 of the Regulations. Importantly, the Regulations distinguish between so-called “priority services”, listed in Part A of Schedule 3 of the Regulations (Part A services), which are subject to the full procurement regime, and “non-priority services”, listed in Part B of Schedule 3 of the Regulations (Part B services). The list of Part A and Part B services is set out in Annex 1 of this Guide.

Contracts for Part B services are not subject to the full requirements on advertising and contract award procedures. However particular care needs to be taken when awarding Part B services contracts. The CJEU has ruled that general EU Treaty principles may require the advertising of Part B services if the contract may reasonably be considered to be of interest to contractors established in other EU Member States (*Case C-507/03, Commission v Ireland* and *Commission Guidance on contract awards not fully subject to the provisions of the Public Procurement Directive*).

Framework agreements

The Regulations define a “framework agreement” as “an agreement or other arrangement between one or more contracting authorities and one or more economic operators which establishes the terms (in particular the terms as to price and where appropriate, quality) under which the economic operator will enter into one or more contracts with a contracting authority in the period during which the framework agreement applies” (r.2(1) of the Regulations).

The Regulations set out specific provisions governing the setting up and use of framework agreements, including rules governing “call off” contracts awarded under them. They contain a general provision that authorities may not use framework agreements improperly or in such a way as to prevent, restrict or distort competition.

Further guidance on use of framework agreements can be found in SPPN 5/2010.

Works concessions

The Regulations also set out special rules for “public works concessions”. These are contracts in which the greater part of the contractor’s remuneration comes not in the form of direct payment by the authority, but from the exploitation of the works. A typical example is the construction of a toll bridge or motorway under which the contractor is at least in part to be remunerated by being granted the right to collect the tolls.

Dynamic purchasing systems

These are entirely electronic qualification systems designed to facilitate the repeat procurement of commodity products such as office supplies and stationery. The system must be open at all times to any provider meeting the stated selection criteria and allow them to submit an indicative tender that complies with the specification set by the contracting authority.

Design contests

The Regulations contain specific rules on the running of design contests, where authorities put out to competition requests to produce a design, particularly in the fields of planning, architecture, civil engineering and data processing. There are special valuation rules and thresholds for these contests.

Excluded contracts

There are a series of general and specific exclusions provided for in the Regulations. Any reliance on these exclusions needs to be considered carefully.

The exclusions include:

- contracts for the acquisition of land;
- contracts for financial services in connection with the issue, purchase, sale or transfer of securities or other financial instruments;
- contracts for broadcasting programme material and broadcasting time;
- contracts for arbitration and conciliation services;
- employment contracts; and
- research and development contracts (other than for the exclusive benefit of the contracting authority for its own use, on condition that the service is wholly remunerated by the contracting authority).



EU Thresholds

Subject to r.8(21) of the Regulations, only public contracts where the estimated value exceeds the relevant threshold will be subject to the full procedural requirements of the Regulations. The thresholds are provided for in the Directives in Euros, and are set individually for supply contracts, services contract and for works contracts.

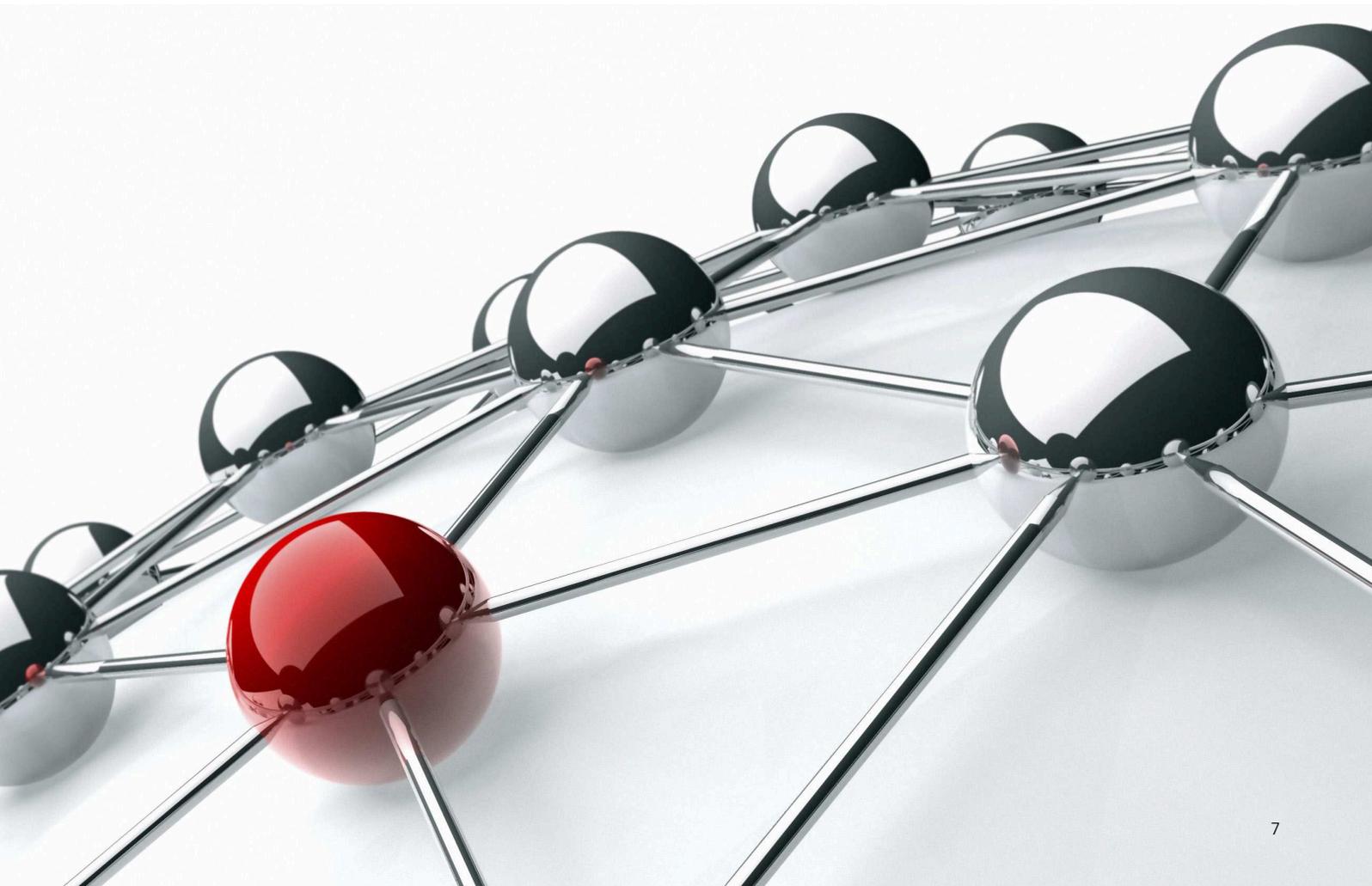
The thresholds have been converted and published by the UK Government in pounds sterling. The current thresholds are set out in the table below.

	Supplies	Services	Works
Authorities listed in Schedule 1	£111,676 (€134,000)	£111,676 (€134,000)	£4,322,012 (€5,186,000)
Other authorities	£172,514 (€207,000)	£172,514 (€207,000)	£4,322,012 (€5,186,000)
Prior Information Notices	£625,050 (€750,000)	£625,050 (€750,000)	£4,322,012 (€5,186,000)
Small Lots	£66,672 (€80,000)	£66,672 (€80,000)	£833,400 (€1,000,000)

The rules on calculating contract value are complex, but the overriding principle is that the valuation method may not be used with the intention of avoiding the rules. There are also specific provisions to prevent the artificial splitting of contracts to avoid triggering the thresholds.

Contracts are valued on the basis of their full duration (net of VAT), including any options to extend.

The Regulations make specific provision for estimating the value of contracts having an indefinite duration, and contracts that include a mix of works, supplies and services.



Advertising requirements

Calls for competition

The Regulations require authorities to advertise public contracts in an open and transparent manner so as to ensure equal access to contract opportunities across the EU. This requires contracts to be advertised in prescribed forms in the Official Journal of the European Union (OJEU).

The Regulations contain an express additional obligation requiring authorities to respect EU Treaty rules when awarding a contract, 'which is below the relevant threshold, or (...) [which] is otherwise exempt from the requirement for prior publication of a Contract Notice'. Specifically, the provision requires the advertising of contracts not otherwise caught by the Regulations where advertising is, "required by (...) general EU obligations, for the benefit of any potential economic operator, [to] ensure a degree of advertising and follow a procedure leading to the award of the contract, which is sufficient to enable open competition and meet the requirements of the principles of equal treatment, non-discrimination and transparency" (r.8(21)). Further guidance on the application of r.8(21) can be found in SPPN 3/2006.

Prior Information Notice

The purpose of the Prior Information Notice (PIN) is to give potentially interested bidders time to prepare for forthcoming tender opportunities, essentially giving the market advance warning of contracts that the contracting authority intends to issue an OJEU Contract Notice for over the next 12 months.

PINs are compulsory when the authority intends to rely on the shortened procedural timetable for expressions of interest. The PIN can be published either in the OJEU or on the authority's "buyer profile" (essentially their internet procurement page). However, where it is published on the buyer profile rather than directly in the OJEU, the authority is required to issue a separate short-form notice to the European Commission.

An authority is required to publish a PIN at the start of a financial year setting out the goods or supply contracts it intends to award that year, if the total value of similar contracts exceeds the relevant threshold.

Contract Notice

The Contract Notice is the standard form OJEU notice to be used for the advertising of contracts. It informs bidders of the detail of the individual contract and is usually the basis on which a tenderer will decide whether or not to express an interest in tendering for a contract. The Contract Notice must be in the form prescribed in the Directives and must contain certain basic information. Standard forms are provided on the European Commission's SIMAP website. In Scotland, authorities can complete OJEU notices through the Public Contracts Scotland portal.

The information required includes:

- details of the awarding authority;
- a short description of the subject matter of the contract and contract value;
- reference to Common Procurement Vocabulary (CPV) codes relative to the object of the contract (see European Commission Regulation (EC) No. 213 /2008, OJ L74/1 and/or SIMAP website);
- the contract award criteria which will be used to assess and award the contract (though the detailed award criteria and evaluation process can be provided later in the tender documentation); and
- contact details for interested parties to obtain further information.

Technical specifications

Technical specifications must afford equal access and not create unjustifiable obstacles to the opening up of public procurement to competition. The principle is that it must be possible to submit tenders incorporating any of a number of different technical solutions to satisfy the particular requirement. This requires authorities to draw up the technical specifications in terms of functional performance and requirements, either by reference to a particular European standard or, if there is none, to a national standard. Tenders based on equivalent arrangements must also be considered. For example in relation to IT procurement, authorities must wherever possible use common specifications when specifying microprocessors for desktops, laptops, servers or workstations. The requirements for microprocessors must exclude any references to brands (e.g. Intel, AMD), manufacturer-specific processor architectures, trademarks, technology types or other potentially discriminatory descriptors.

To demonstrate equivalence, tenderers should be permitted to use any form of evidence and authorities must be able to provide a reason for any decision that an alternative is not equivalent.

Authorities that wish to set environmental requirements may lay down the environmental characteristics, such as a given production method, and/or specific environmental effects of product groups or services. They can use, but are not obliged to use, appropriate ecolabels, such as the European Eco-label, (multi-) national eco-labels or any other eco-label provided the requirements for the label are drawn up and adopted on the basis of scientific information using a procedure in which stakeholders, such as government bodies, consumers, manufacturers, distributors and environmental organisations can participate, and provided the label is accessible and available to all interested parties.

Authorities should also, whenever possible, lay down technical specifications so as to take into account accessibility criteria for people with disabilities or design for all users. The technical specifications should be clearly indicated, so that all tenderers know what the requirements established by the authority cover.

For further guidance on the requirements in relation to non-discriminatory technical specifications see SPPN(11)2005.



Contract award procedures

The Regulations provide for four main contract award procedures:

- **Open procedure;**
- **Restricted procedure;**
- **Competitive dialogue procedure;** and
- **Negotiated procedure (with and without prior publication of a Contract Notice).**

Authorities can choose freely between either the Open or Restricted procedures but must justify any decision to use the Competitive Dialogue and Negotiated procedures.

The key differences between the award procedures are summarised below. Flow diagrams of the four award procedures are provided in Annex 2 of this Guide.

Open procedure

Under the Open procedure all those candidates that respond to the Contract Notice are entitled to submit a tender for the contract. There is no initial selection stage limiting the number of tenderers who can submit tenders. It may be quicker than the other award procedures but may also be more onerous in terms of the number of tenders to be evaluated.

Restricted procedure²

Under the Restricted procedure the authority may limit the number of candidates using an initial selection stage to shortlist a limited number of tenderers. The selection is generally performed by means of a Pre-Qualification Questionnaire (PQQ), which candidates can complete and submit. The Restricted procedure requires that a minimum of five qualifying candidates must be invited to tender (ITT). It is nevertheless recognised that an authority may proceed under the Restricted procedure with less than five bidders if fewer than five have passed the PQQ stage, provided that there is no suggestion that the PQQ requirements or selection process were unnecessarily onerous or otherwise disproportionate or discriminatory. An authority must also not invite to tender candidates which failed the PQQ, for example those who failed to meet any minimum requirements set out in the PQQ.

Competitive Dialogue procedure

This procedure is designed to be used for the award of “particularly complex contracts”, where it is objectively impossible for the authority to define the means of satisfying its needs or to specify the financial and/or legal solution. Common examples are PPP/PFI contracts, integrated transport infrastructure projects, large computer networks or projects involving complex and structured financing.

Under the Competitive Dialogue procedure, the authority invites at least three candidates to participate in a dialogue with the aim of developing one or more solutions capable of meeting the authority’s “needs and requirements”. The selection is generally performed by means of a PQQ.

The dialogue is conducted on the basis of a “descriptive document” in which the authority sets out its “needs and requirements” as to what it ultimately wants the contractor to deliver. In practice, the descriptive document often forms part of the Invitation to Participate in Dialogue (ITPD) issued to the selected participants (though it may be issued earlier with the PQQ). During the dialogue phase, the authority conducts parallel discussions with each of the participants. The discussions will be used to develop the solution(s) proposed by each of the participants. The procedure allows the authority to run the dialogue phase in successive stages to reduce, on the basis of the previously indicated contract award

² For use of the Accelerated Restricted procedure see SPPN 10/2011.

criteria, the number of proposed solutions. The first dialogue phase generally involves an Invitation to Submit Outline Solutions (ISOS), which may be followed by a down-selection (i.e the exclusion of one or more participants). This is generally followed by an Invitation to Submit Detailed Solutions (ISDS), possibly followed by further down-selection and dialogue. Once the authority is satisfied that it has identified one or more proposed solutions that contain all the elements required and necessary for the performance of the project, it is required to announce the closure of the dialogue phase and invite the remaining participants to submit final tenders (Call for Final Tenders (CFT)/ Invitation to Submit Final Tenders (ISFT)).

Importantly, once the dialogue phase is concluded, there is only limited scope for post-tender negotiations with tenderers, which must not go further than clarifying, specifying or fine-tuning their final tenders.

Negotiated procedure (with and without prior publication of a Contract Notice)

The Negotiated procedure is an exceptional award procedure. It can only be used in a limited number of situations narrowly prescribed in the Regulations. It is for any authority seeking to use the Negotiated procedure to justify its use.

When using the Negotiated procedure, the authority may limit the number of candidates using an initial selection stage to shortlist a limited number of tenderers, generally using a Pre-Qualification Questionnaire (PQQ). The Negotiated procedure allows an authority to invite a limited number of no fewer than three qualifying tenderers to negotiate the contract. The Regulations are silent on how the negotiations should be conducted. However, negotiations must comply with the general principles of equal treatment and non-discrimination (for example, disclosing the same level of detail to each tenderer). In practice, negotiations are generally conducted on the basis of an Invitation to Negotiate (ITN) document issued by the authority and will involve at least one round of formal tendering.

The Regulations also provide for the use of the Negotiated procedure without prior publication of a Contract Notice. This can only be done under one of the situations provided for in r.14 of the Regulations. For example, it can be used when no suitable tenders are submitted pursuant to an Open or Restricted procedure, or when for technical or artistic reasons or reasons connected with the protection of exclusive rights the contract may be awarded only to a particular contractor. The situations in which the negotiated procedure without prior publication of a Contract Notice may be used must always be narrowly interpreted and justified in writing.



Selection stage

The Regulations identify two distinct evaluation stages. The first is the evaluation of the candidates who have expressed an interest in tendering for the contract (selection stage or pre-qualification). The second is the evaluation of the tenders then submitted by those tenderers invited to tender (tender stage).

The selection stage is generally conducted using a Pre-Qualification Questionnaire (PQQ), unless the authority is using the Open procedure. The PQQ will usually prescribe minimum requirements that candidates must satisfy (evaluated on a pass/fail basis) and then score the candidates on the basis of selection criteria relating to their financial and economic standing and their experience and technical ability.

Minimum requirements

The Regulations require that any minimum requirements must relate to the candidate's personal standing, its economic and financial standing and/or its technical and/or professional ability. For example, authorities may wish to set minimum requirements in relation to annual turnover, credit rating, insurance, quality assurance or environmental management standards. Any such minimum requirements must be related and proportionate to the contract to be awarded and must be disclosed to candidates in the Contract Notice.

Ranking - Scored evaluation

In addition to applying minimum requirements, authorities using the Restricted, Competitive Dialogue or Negotiated procedures may wish to reduce further the number of qualifying candidates to be invited to tender or participate in dialogue. This is generally referred to as ranking and must be conducted on the basis of objective and non-discriminating criteria, which must be specified in the Contract Notice.

The Regulations set out an exhaustive list of the types of information that authorities can request from candidates for the purposes of ranking. The prescribed types of information fall within three broad categories:

- **Personal standing;**
- **Economic and financial standing;** and
- **Technical and/or professional ability.**

Personal standing

Under the Regulations, a candidate **may** be excluded from the process if it:

- is bankrupt, being wound up or has made an arrangement with creditors or is in any similar situation;
- is the subject of any sort of winding-up procedure;
- has been convicted of a criminal offence relating to the conduct of its business or profession;
- has committed an act of grave misconduct in the course of its business or profession;
- has not paid tax or social security contributions in its country of establishment or the country of the contracting authority; or
- is guilty of serious misrepresentation in supplying the information required under the Regulations.

The Regulations also specify certain grounds on which candidates **must** be excluded from the process. These are essentially where candidates have been convicted of corruption offences, organised crime or fraud. The Regulations require authorities to exclude any candidate if the authority has actual knowledge that the company or a director or other person having powers of representation, decision or control of the company has been convicted of one of the following offences:

- participation in a criminal organisation;
- corruption;
- bribery (including convictions under the Bribery Act 2010);
- incitement to commit a crime (in Scotland);
- fraud affecting the financial interests of the European Union;
- conspiracy to defraud;
- money laundering; or
- any equivalent offence under the laws of any other 'relevant State' defined as the other 27 EU Member States, Norway, Iceland or Liechtenstein (i.e. EEA countries).

Economic and financial standing

The Regulations provide that a candidate's economic and financial standing may, as a general rule, be demonstrated by means of one or more of the following:

- appropriate bank statements, or evidence of relevant professional indemnity insurance;
- balance-sheets (or extracts therefrom) where publication is a legal requirement of the country in which the bidder is established; or
- statement or accounts showing overall turnover or turnover in the area covered by the contract, for a maximum of the last three financial years available.

Alternatively, a candidate may be allowed to demonstrate, for example, through parent company guarantees, that it has the necessary resources at its disposal from another company.

Technical and/or professional ability

The Regulations provide that the technical and/or professional capabilities of candidates may be demonstrated by one or more of the following means, according to the nature, quantity or importance, and use of the works, supplies or services being procured (as appropriate):

- a list of the works contracts performed over the past five years, accompanied by certificates of completion for the most important works (as are relevant to the contract to be awarded);
- a list of the services contracts performed over the last three years (again relevant to the performance of the contract to be awarded), accompanied by certificates or references from the customers;
- an indication of the technicians and technical bodies available to the candidate;
- a description of the technical facilities and measures used to ensure quality and the candidate's study and research facilities;
- in complex or special purpose procurements, evidence of an independent check or review of specific production capacity or technical capability;
- the educational and professional qualifications of the candidate, and its relevant managerial staff/project managers;
- an indication of the environmental management measures to be used by the candidate in performing the contract (where relevant for works and services contracts);
- a statement of the average annual manpower (labour resources) of the candidate and the number of managerial staff in the last three years;
- a statement of the tools, plant or equipment available to the candidate for performing the contract;
- an indication of the proportion of the contract that the candidate intends to subcontract; or
- for supplies contracts, samples, descriptions and/or photographs of the products to be supplied and any relevant quality assurance certificates.

In addition, authorities must ensure that the information they request and evaluate at PQQ is relevant and proportionate to the performance of the contract they are seeking to award.

Tender stage

Depending on the contract award procedure being used, the tender stage will generally commence with the authority issuing an Invitation to Tender (ITT), Invitation to Participate in Dialogue (ITPD) or Invitation to Negotiate (ITN) to the shortlisted tenderers. When using the single-stage Open procedure the selection and award stages are combined and the ITT effectively incorporates any minimum eligibility requirements.

The tender documentation will always depend on the contract and the award procedure being used but, as a general rule, the authority needs to give the tenderers clear instructions as to:

- the detail of the contract requirements/specification;
- the proposed contract terms and conditions;
- how the tender process will be conducted; and
- the contract award criteria to be applied when evaluating tenders.

Subject to the rules on technical specifications, the Regulations afford authorities a fairly wide degree of discretion as to the specification and proposed terms and conditions of contract. An outline of the requirements around contract award criteria is set out below.

Choice of contract award criteria

The Regulations provide that the contract award criteria must be objective and must be applied in compliance with the principles of transparency, non-discrimination and equal treatment, ensuring that tenders are assessed in conditions of effective competition.

To achieve this, the Regulations require that tenders are evaluated on the basis of either:

- the lowest price; or
- the most economically advantageous tender (MEAT).

Where the authorities choose to award a contract to the most economically advantageous tender, they are required to assess the tenders in order to determine which one offers best value for money. In order to do this, they must determine the economic and quality criteria which, taken as a whole, must make it possible to determine the most economically advantageous tender.

It is Scottish Government policy that contracts must be awarded on the basis of value for money. Authorities should rarely rely on 'lowest price'. Value for money is defined by the Scottish Government as 'the optimum combination of whole-life cost and quality to meet the customer's requirements'. Whole-life cost takes into account all aspects of cost over the contract and can include capital maintenance, management, operating and disposal costs.

Disclosure of contract award criteria

In order to ensure compliance with the principles of equal treatment and transparency, authorities are required to disclose the criteria in the tender document issued to tenderers.

It is the responsibility of authorities to indicate the award criteria and the relative weighting given to each of those criteria in sufficient time for tenderers to be aware of them when preparing their tenders. Authorities may derogate from indicating the weighting of the criteria for the award where objectively, and justified by reasons, the weighting cannot be established in advance, in particular on account of the complexity of the contract. In such cases, they must indicate the descending order of importance of the criteria.

There is now a large and growing body of case-law on the extent of obligations on disclosure of award criteria and further discussion is beyond the scope of this Guide.

Debriefing and standstill

The Regulations make specific provision for the notification of award decisions to unsuccessful tenderers requiring a period of at least 10 calendar days between that notification and the conclusion of the contract with the winning tenderer. That mandatory 10 day standstill period affords unsuccessful tenderers the opportunity to challenge the outcome of the evaluation process.

The Regulations provide that a contracting authority shall by notice in writing as soon as possible after the decision has been made, inform all tenderers and all candidates concerned (if any) of its decision to -

- award the contract; or
- conclude the framework agreement’ (r.32(1) of the Regulations).

The notice is generally referred to as an “Alcatel letter”. The requirement to issue an Alcatel letter only applies to contract award procedures that are subject to the full procedural requirements of the Regulations. So, for example, there is no formal requirement under the Regulations to issue Alcatel letters and observe the standstill period when awarding Part B services contracts or when awarding call-off contracts under framework agreements. In practice though, many authorities do observe a standstill period.

When?

The Regulations require that the Alcatel letter must be in writing and it must be issued ‘as soon as possible after the award decision has been made’. It remains unclear whether the award decision is the decision appointing a preferred tenderer or the final decision of the authority approving the final award of the contract. While arguably the award decision is the final approval immediately prior to entering into the contract, in practice it is often advisable to issue the debrief information with or following the communication of the decision as to preferred tenderer (and to observe the standstill period later when the decision has been made to enter into the contract with the preferred tenderer).

How?

The award decision must be notified in writing. This is usually done by email or fax, in which case the 10 day standstill period starts from the date on which the last of the emails or faxes was sent. If the decision is communicated by post the standstill period is extended to 15 days from the date on which the last of the Alcatel letters was sent.

To whom?

If a candidate that was not shortlisted following the selection stage of the process has already been informed that they were unsuccessful, the authority does not need to issue an Alcatel letter to them (ie. because they are not a ‘candidate concerned’ for the purposes of r.32(1) of the Regulations).

What must it include?

The Regulations prescribe the information that must be included in Alcatel letter. The letter must include:

- the award criteria (as they appear in the tender documentation);
- the reasons for the decision, including the characteristics and relative advantages of the successful tender;
- the scores (if any) obtained by the economic operator which is to receive the notice and the economic operator to be awarded the contract or to become party to the framework agreement;
- the successful operator’s name; and
- a precise statement of either when the standstill period is expected to end or the date before which the authority will not enter into the contract.

Authorities may however withhold any information where the disclosure of such information:

- would impede law enforcement;
- would otherwise be contrary to the public interest;
- would prejudice the legitimate commercial interests of any economic operator; or
- might prejudice fair competition between economic operators.

It is critically important that authorities fulfil their debrief obligations. Further guidance as to what must be included in the Alcatel letter can be found in SPPN 3/2010.

Outside the specific Alcatel letter provisions there is a general right in the Regulations for unsuccessful tenderers to request reasons in writing for their exclusion from the tender process if they have not already been informed (r.32(9) of the Regulations). In addition, the Freedom of Information (Scotland) Act 2002 is increasingly being used to request important information from authorities on the conduct of contract award procedures, procurement policy and decisions.

Contract Award Notice

Authorities are required to publish a Contract Award Notice in the OJEU within 48 days of a public contract being entered into with the successful tenderer.



Remedies

The Regulations provide that a breach of a duty owed to economic operators is actionable by any aggrieved third party who, in consequence, suffers, or risks suffering, loss and/or damage. Proceedings can be brought in the Sheriff Courts or the Court of Session.

The remedies provided for under the Regulations fall into two broad categories:

- pre-contractual remedies; and
- post-contractual remedies.

Time-bar

Before looking at these two broad categories of remedies it is important to emphasise the issue of time-bar. This is important as many procurement challenges fail because they have not been initiated within the period required under the Regulations, meaning that they are time-barred. The Regulations provide that proceedings must be brought within 30 days of the date of knowledge, defined as the point at which the claimant knew or ought to have known of the infringement. The courts will however retain judicial discretion to extend the period within which proceedings must be brought, up to a maximum of 3 months. This change does not affect the separate time-bar provision for bringing proceedings for an ineffectiveness order (see below).

Pre-contractual remedies

If proceedings are brought during the tender process and before the contract has been concluded, an unsuccessful tenderer can request the court to:

- set aside any unlawful decision taken in the process; or
- amend unlawful tender documentation (e.g. discriminatory specification, unlawful selection or award criteria); and
- make an award in damages for loss or damage suffered as a consequence of the breach.

Significantly, the Regulations provide for the automatic suspension of the procurement if legal proceedings are issued and served before the contract has been entered into with the successful tenderer. This removes the need for the claimant to apply to the courts for an interim order (interdict) preventing the authority from awarding the contract.

If proceedings are issued, the automatic suspension will remain in force until such time as the proceedings are determined, discontinued or otherwise disposed of. If the authority wishes to insist on awarding the contract, it must make an application to the court for the automatic suspension to be lifted.

Post-contractual remedies

After the contract has been entered into, there are two remedies available to an aggrieved economic operator:

- damages; and/or
- an ineffectiveness order.

Damages

The challenger is entitled to claim its bid-costs and a proportion of lost profit on the contract depending on its chances of being awarded the contract but for the breach. There are a number of procedural and technical obstacles facing any challenger but damages awards have been made by the courts and many post-award challenges settle before reaching final judgment.

Ineffectiveness

The ineffectiveness remedy is an exceptional remedy that gives courts the power to set aside concluded contracts by making an order rendering unenforceable all future rights and obligations under the contract and imposing fines on the authority. The new remedy is not discretionary; if the court is satisfied that any of the three grounds for ineffectiveness apply, it must make an ineffectiveness order unless a specific derogation applies (r.49(12) of the Regulations), and must impose a fine on the authority. If a specific derogation applies, the court may instead shorten the duration of the contract.

The three grounds for ineffectiveness are:

- failing to advertise a contract when it should have been put out to an OJEU tender process (“illegal divert around”);
- failing to conduct a compliant OJEU tender process and failing to observe the debrief and standstill requirements (“aggravated breach”); and
- failing properly to award an above threshold call-off contract under a framework agreement or dynamic purchasing system.

There are special time limits for seeking an ineffectiveness order. In general, where a Contract Award Notice has been published in the OJEU proceedings must be brought within 30 days beginning with the day after the date of publication of the notice. In other cases, where no Contract Award Notice has been published and no information otherwise given to tenderers, proceedings must be started within six (6) months of the day after the date on which the contract is entered into.

European Commission investigations

It is important to remember that direct action in the courts is not the only remedy available to unsuccessful tenderers and other aggrieved third parties. The European Commission is increasingly taking infringement proceedings against individual EU Member States for specific failure of authorities to comply with the EU public procurement rules. These investigations are conducted under specific EU Treaty rules and can result in formal proceedings being brought against the Member State before the Court of Justice of the European Union. Although it is a long and cumbersome procedure, the Court can fine the Member State if it refuses to remedy the identified breach by the relevant public body (which may include the termination of the offending contract).

In addition, the European Commission may block any EU funding that is related to the contract (eg. where a contract relates to an infrastructure project that is part-funded by EU funds) or initiate state aid proceedings (eg. where concessions are awarded without the private sector concessionaire having been appointed pursuant to an open and transparent tender process). Where projects involve significant public funds there are often specific audit and “gateway” review procedures that make it a condition of funding that private sector contractors/partners are appointed pursuant to OJEU-compliant tender processes.

Single point of enquiry (SPoE)

Finally, while it does not have any formal legal powers to intervene in public sector procurements, the Single Point of Enquiry was set up by the Scottish Government in 2006 to provide an independent, impartial and confidential service for suppliers to the public sector in Scotland. It provides advice on the procurement rules which must be followed by public bodies in Scotland and information on how contracts are advertised and awarded. Where issues arise in specific procurement, it offers to work with tenderers and authorities to try to resolve your concerns. Further details on the Single Point of Enquiry are set out in SPPN 01/2008.

Annex 1. Part A and Part B services

“Part A services”

- “Priority” services subject to the full procedural rules of the Directives:
- Maintenance and repair services
- Land transport services (except for rail services), including armoured car services, and courier services, except transport of mail
- Air transport services of passengers and freight, except transport of mail
- Transport of mail by land and by air
- Telecommunications services (except voice telephony, telex, radiotelephony, paging and satellite services)
- Financial services
 - Insurance services
 - Banking and investment services (except contracts for financial services in connection with the issue, sale, purchase or transfer of securities or other financial instruments, and central bank services)
- Computer and related services
- R & D services (except research and development service contracts other than those where the benefits accrue exclusively to the contracting authority for its use in the conduct of its own affairs on condition that the service provided is wholly remunerated by the contracting authority)
- Accounting, auditing and book keeping services
- ‘Priority’ services subject to the full procedural rules of the Directives (Annex 11A of the Public Sector Directive and Annex XVIIIA of the Utilities Directive)
- Market research and public opinion polling services
- Management consultant services (except arbitration and conciliation services) and related services
- Architectural services; engineering services and integrated engineering services; urban planning and landscape engineering services; related scientific and technical consulting services; technical testing and analysis services
- Advertising services
- Building cleaning services and property management services
- Publishing and printing services on a fee or contract basis
- Sewage and refuse disposal services; sanitation and similar services.

“Part B services”

- Hotel and restaurant services
- Rail transport services
- Water transport services
- Supporting and auxiliary transport services
- Legal services
- Personnel placement and supply services
- Investigation and security services, except armoured car services
- Education and vocational education services
- Health and social services
- Services contracts for the provision of ‘non-priority’ services, subject only requirement to issue a contract award notice and to comply with the general rules on non-discrimination. (Annex II B of the Public Sector Directive and Annex XVII B of the Utilities Directive)
- Recreational, cultural and sporting services
- Other services.

Annex 2. Contract award procedures

Diagram I - Open procedure

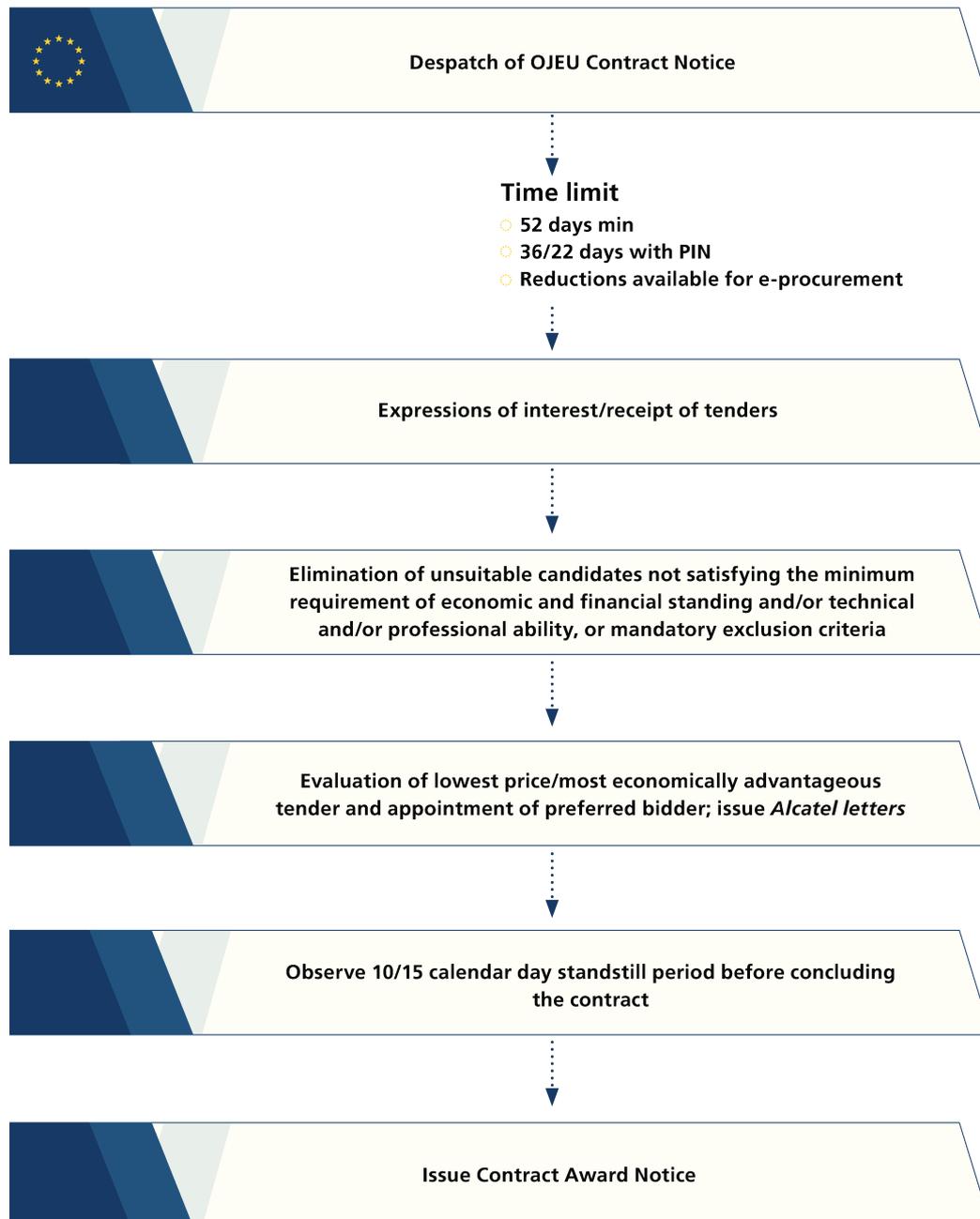


Diagram 2 - Restricted procedure

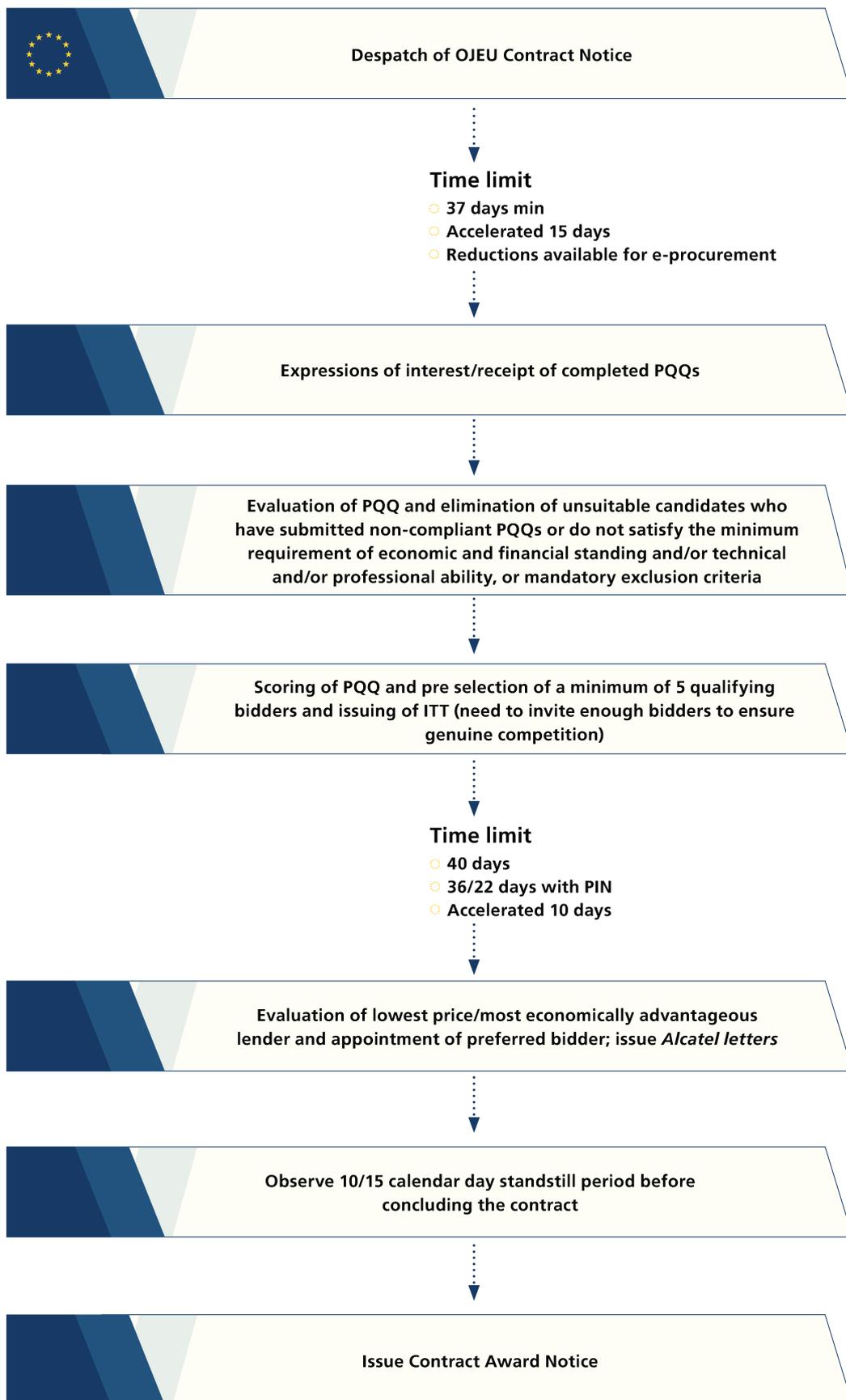


Diagram 3 - Competitive Dialogue procedure

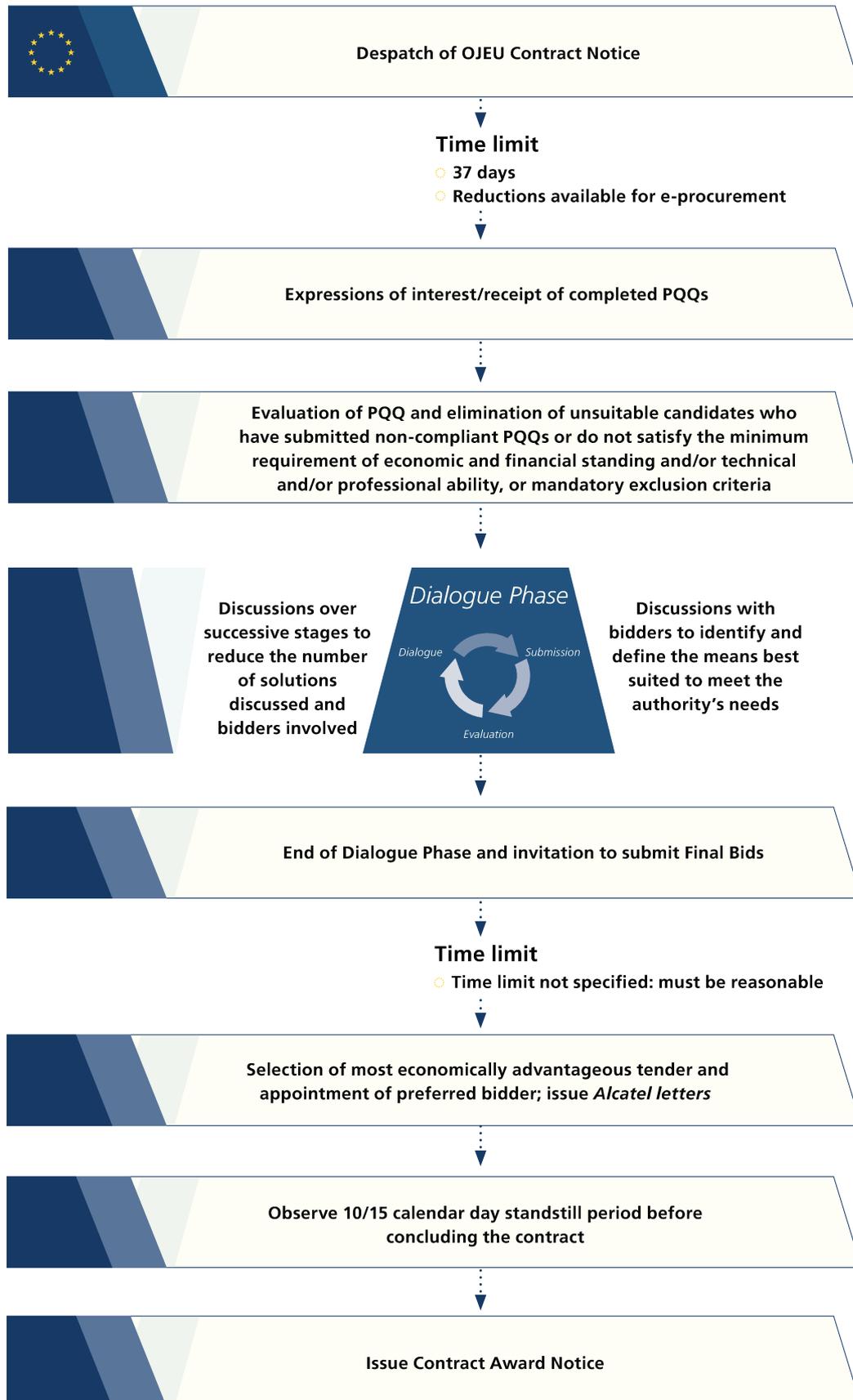
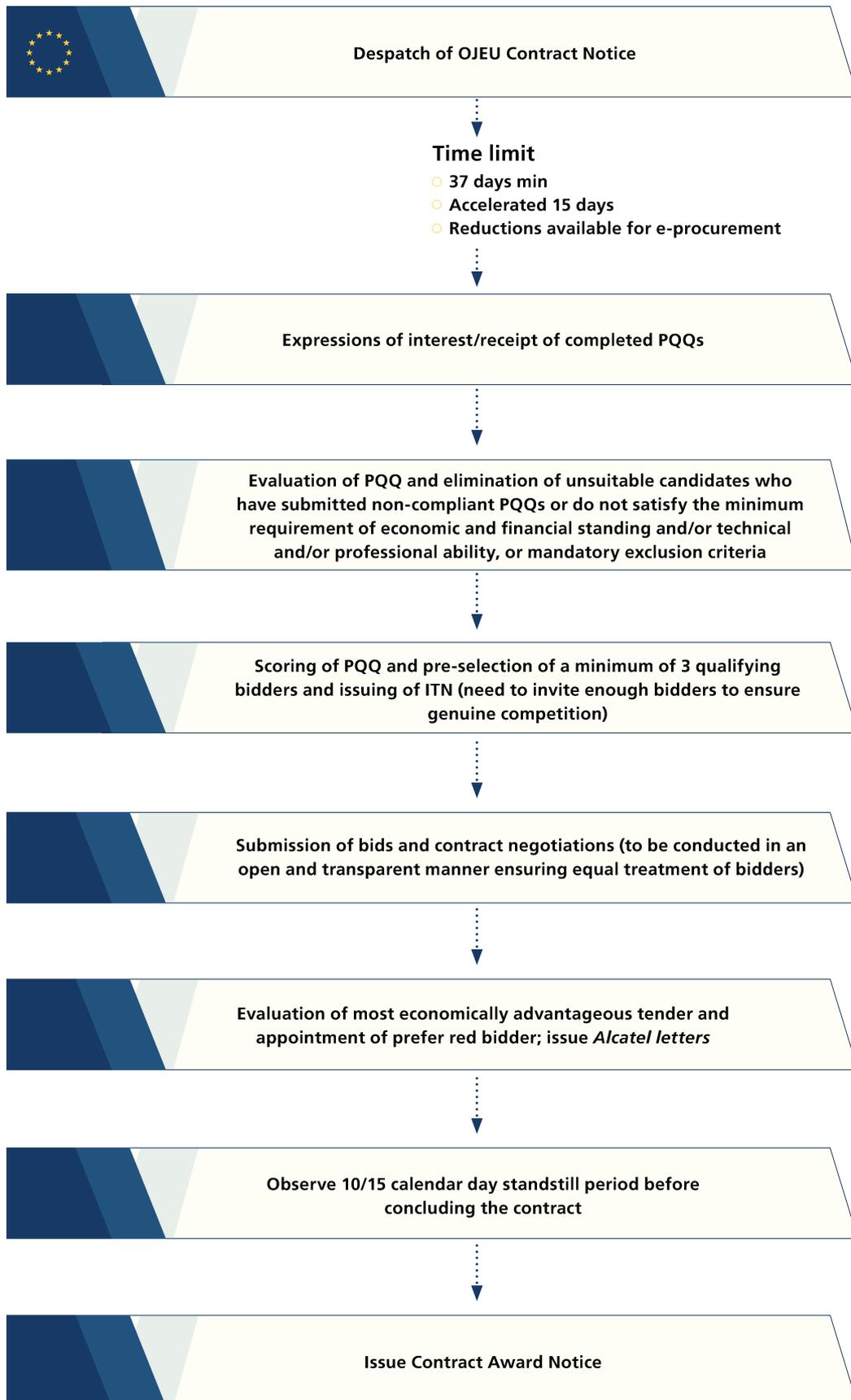
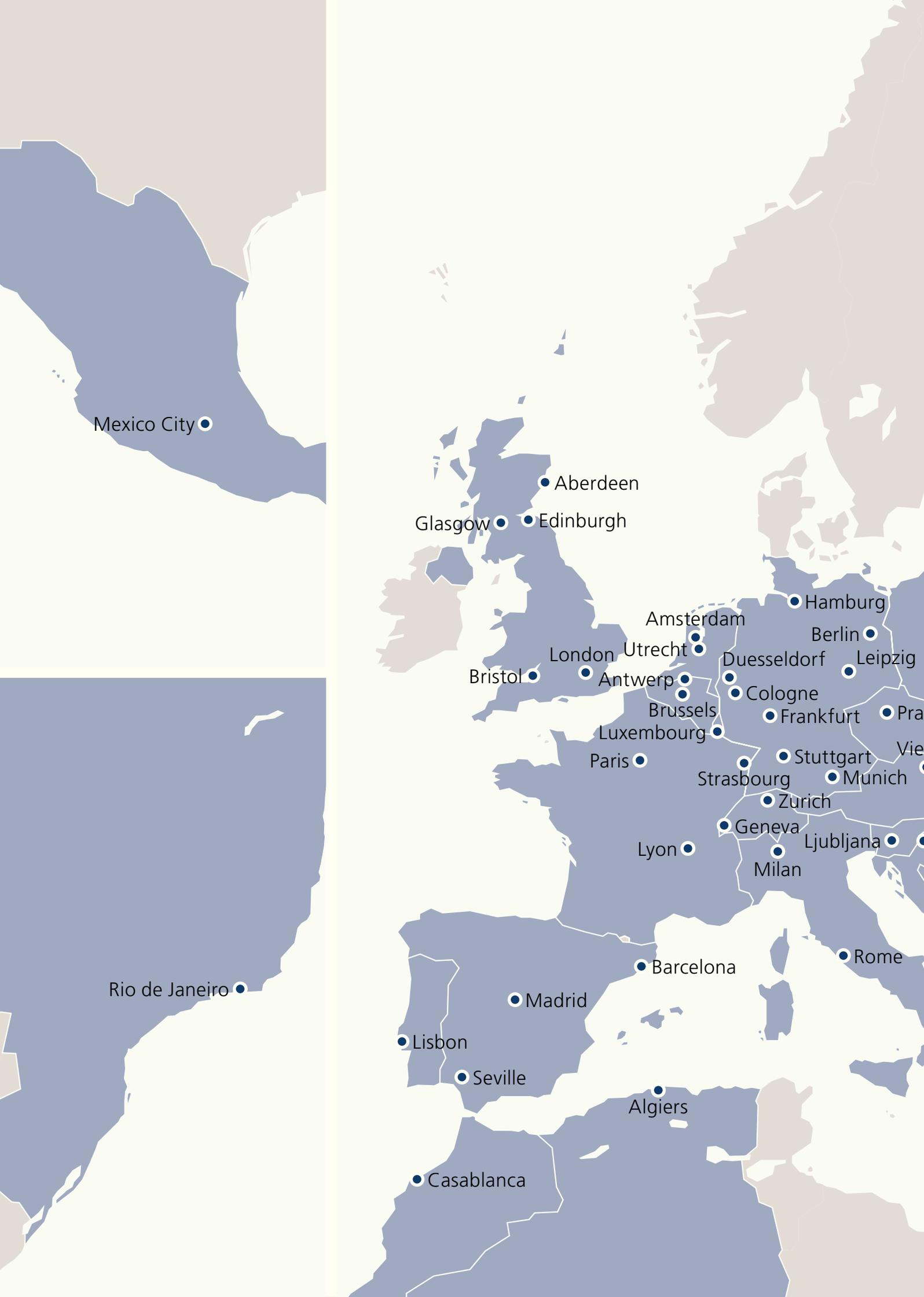


Diagram 4 - Negotiated procedure (with prior publication of an OJEU Contract Notice)







Mexico City

Rio de Janeiro

Aberdeen
Glasgow
Edinburgh

Amsterdam
Utrecht
London
Bristol
Antwerp
Brussels
Luxembourg
Paris
Strasbourg
Geneva
Lyon
Hamburg
Berlin
Duesseldorf
Leipzig
Cologne
Frankfurt
Pra
Stuttgart
Munich
Zurich
Ljubljana
Milan

Barcelona
Madrid
Lisbon
Seville
Algers
Casablanca
Rome



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