



Brief Guide to Public Sector EU Procurement Legislation

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The Knowledge
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Introduction

Public procurement in the EU was estimated at about £1000 billion in 2005 (16% of GDP). The opening up of this market was a priority for the completion of the Internal Market. Reports for the European Commission indicate that cross border competition has increased and that the prices paid by public authorities have fallen by as much as 30%. The Commission nevertheless considers there is potential for significant further competition and for further savings for taxpayers.

The opening up of public procurement was facilitated by a number of European directives, the purpose of which was to reinforce treaty requirements for the removal of national barriers to the supply within Europe of goods, works and services. The Directives have recently been consolidated and brought up to date to enable public bodies to embrace the best procurement practices. This is consistent with UK Government policy of seeking value for money from the best sources of supply across the European Community and beyond. There is a similar Directive on procurement by operators in the energy, water and transport sectors. The EU rules have been implemented into national legislation, compliance with which will also meet the EU's international obligations, for example under the World Trade Organisation (WTO) Government procurement Agreement (GPA).

The legislation requires competition above threshold values and prescribes detailed advertising and tendering procedures for purchasers. The use of specifications, standards, selection and award criteria is also regulated.

The European Commission views the application of community Law in Public Procurement as a priority and has taken action against member states in over 150 cases of alleged infringement. There are also sanctions in UK law, such as the suspension of award procedures, the setting-aside of decisions and the payment of damages.

Value for money is best served by a common sense approach to legislation. Knowledge of the framework of the law allows authorities to obtain the benefits, but with the minimum cost, delay and disruption to their operations.

This guide provides a brief outline of the legislation, which can be very complex, and points to useful reference documents and sources of additional information.

What is Public Procurement legislation?

Public procurement legislation sets out procedures and practices to which central and local government and other public bodies must adapt their award procedures, where the value of the contract as estimated under the rules meets the relevant threshold.

The public sector EU directive applies to procedures for the award of supplies, works and service contracts and is implemented through UK Regulations (see Appendix 1). It also applies to the award of works concessions and the conduct of design contests.

Annex 1 gives more details about sources of information on the procurement legislation.

This guide covers the key issues very briefly.

Is the contract covered?

The rules allow certain contracts to be excluded, for example, contracts classified as secret by a member state or contracts awarded under the rules of an international agreement at state level.

A key issue is the value of the contract (contracts are only covered if they exceed the financial threshold). However, valuation is not always straightforward. For example, the legislation requires aggregation of the values of contracts having similar characteristics, which are awarded to meet recurrent needs for goods or services of the same type over given period. The value of all the contracts for "a work" (i.e. a works project) has also to be aggregated. Consequently many more contracts will be covered than first appears to be the case. There are exclusions for small lots but the legislation specifically forbids splitting up contracts or using special evaluation methods to keep the values beneath the thresholds.

It should be noted that some, less detailed, obligations may apply even to 'non-covered' contracts as a result of the Treaty.

The table below gives a brief guide to coverage:

	Areas of Coverage	Threshold
Public Supplies	The purchase or hire of goods, which can include siting and installation.	Schedule 1 bodies £101,323 Others bodies £156,442
Public Works	The building and civil engineering activities listed in Schedule 2 of the Regulations (examples include site clearance and the erection/dismantling of scaffolding). Concessions involving the right to exploit the works.	All bodies £3,927,260
Public Services	All other contracts for services (with listed exclusions such as rights over land and contracts of employment). Minimal rules apply to services listed in Part B of the Schedule 3 of the Regulations.	Schedule 1 bodies £101,323 Others bodies £156,442

Note: Schedule 1 bodies are those listed in Schedule 1 to the Public Contracts Regulations. These are effectively Central Government Bodies and NHS to which the lower threshold applies.



Publishing notices

The regulations require authorities to despatch notices for contracts to the Official Journal of the European Union (OJEU) for publication.)

There are three main kinds of notice:

- Prior information notice
- Contract notice (often referred to as a call for competition)
- Contract award notice

All notices must follow a format required by OJEU and within the timescales indicated in the legislation. The Official Journal will not accept any notices sent in any other format. THEMIS contains the official forms in the format required. THEMIS has approved e-sending status and therefore a 7 day discount can be taken off the normal timescales for response by suppliers, contract to the notice.

Prior Information Notice (known as a PIN)

In the case of supplies and services, this notice is published at the beginning of the financial year to give the market indications of the anticipated spend in general product areas and categories of services. Anticipated works contracts are notified to the market in the same way when the project is approved.

The PIN is no longer mandatory unless used to claim the set timescale discounts that are allowed following the publication of a valid PIN.

Contract Notice

This notice acts as a call for competition for a specific contract and provides specific details of the contract together with criteria for applicants to be selected for invitation to tender. Publication of a contract notice is not mandatory for Part B services.

Contract Award Notice

Within 48 days of the award of the contract, authorities must despatch a contract award notice to the Official Journal (OJEU). For Part B services contracting authorities can withhold authority for publication of the notice by the OJEU but must still despatch the notice in the normal way.

Selecting tenderers

The regulations require sufficient tenderers to ensure adequate competition. The minimum number is 5 in the restricted procedure and 3 in the competitive dialogue and competitive negotiated procedures (providing there are sufficient suppliers meeting the authority's selection requirements).

Suppliers convicted of certain offences (organised crime, fraud, corruption, money laundering) must be excluded from public contracts. The authority also has discretion to exclude suppliers convicted of other criminal offences or grave misconduct in the course of business, as well as to exclude suppliers involved in bankruptcy, insolvency, etc.

The methods by which suppliers are selected to be invited to participate must be objective and non-discriminatory, using information permitted by the regulations. Only information concerning tenderers' economic and financial standing and technical capacity and ability can be considered at the selection stage. Any minimum capacity levels and the rules for selection must be disclosed in the contract notice.

The regulations give suppliers who are not selected the right to be advised of the reasons for non-selection and the correspondence should be retained in case of challenge.

Choice of procedure

The Regulations provide four main award procedures:

- **Open Procedure;** where a notice is placed in the Official Journal inviting tenders from those that meet declared minimum capacity levels, all of those who submit their tender by the date specified in the notice must be considered.
- **Restricted Procedure;** where a notice is placed in the Official Journal inviting expressions of interest and proof of capacity. The authority must declare any minimum capacity levels and the criteria and rules it will use to select those to be included on the tender list.
- **Competitive Dialogue Procedure;** where a notice is placed and participants are selected in the same way as for the restricted procedure. The authority would then conduct a dialogue with those selected to develop their proposed solutions to its requirements before seeking formal tenders from them.
- **Competitive Negotiated Procedure;** where a notice is placed and participants are selected in the same way as the restricted procedure. The authority would determine the winning offer through negotiation with the participants. In certain very limited instances, the negotiated procedure is available without publishing a call for competition.

Note: The competitive negotiated procedure and the competitive dialogue procedure are only available in defined instances. The scope for using the negotiated procedure without a call for competition is even more strictly defined. Authorities who use these procedures must be able, if challenged, to justify their decision and show that the grounds set out in the Directive have been met. It is important that there is an audit trail including where relevant why the open and restricted procedures were not considered appropriate.

Timescales

The legislation imposes minimum timescales for selection and tendering to ensure that applicants are treated equally and given an appropriate opportunity to express interest or submit a tender for a contract.

It is important to note that these are minimum periods: authorities must ensure that any time specified is adequate for responsive tendering. Where a requirement is complex or where there is a need for site visits or on the spot inspection of contract documents then sufficient time must be allowed. The minimum timescales for tenders can be reduced where a PIN has been published which has included as much of the information as needed for a contract notice. The reduced timescale is 36 days or as little as 22 days in urgent circumstances and is substituted for the 52 day timescale in the open procedure and 40 day timescale in the restricted procedure as shown below.

Electronic procurement and timescales

The minimum timescales for response and tenders can also be reduced if contract notices are submitted electronically through an approved system such as THEMIS and additionally if the contract documents are made available for immediate download.

Authorities can reduce the timescales in the table below where:

- The contract notice has been sent to OJ through an approved electronic system (such as Achilles' THEMIS system); 7 days can be removed from the minimum period for responding, taking the 37 days down to 30 in restricted, negotiated and competitive dialogue procedures and 5 days reduction can be made in the accelerated procedures (taking the 15 days to 10). In the open procedure, the 52 days can be reduced to 45 days.
- The contract documents are made available for immediate download from the date of publication of the contract notice in OJEU and the notice gives the appropriate web address; a further five days can be removed from the minimum period for receipt of tenders .

Thus in open procedure, the minimum period can be reduced from 52 to 40 days if both conditions are met and in the restricted procedure the tender return timescale can be reduced from 40 days to 35.

Note: in all cases the timescales must still meet the general requirement of being adequate for responsive tendering.

Technical specifications and standards

Specifications must not be written so as to distort or restrict competition. Unless essential to describe what is required, this specification must not refer to trade names or patents. The specification may refer to a performance or functional specification or to a standard, in which case priority must be given to national standards implementing European standards. Essentially, the contracting authority must describe what it wants and give suppliers an opportunity to prove they can supply something which meets that technical requirement.

Assessing tenders

There is a choice between two methods of assessing offers:

- Lowest price
- Most economically advantageous tender.

When using the second method, authorities must be prepared to:

- Decide in advance the criteria to be used in judging the tenders.
- Disclose the criteria and indicate the relative weighting of each criterion (or in exceptional cases, the relative ranking only).

Timescales

Procedure	Minimum response required (restricted and negotiated procedure)	Tendering period (restricted and negotiated)	Contract award notice
Open	-	52 days	48 days
Restricted	37 (15) days	40 (10) days	48 days
Competitive dialogue	37 days	Not specified	48 days
Negotiated	37 (15) days	Not specified	48 days

The figures in brackets denote the time allowed under an accelerated procedure. An accelerated procedure may be used where compliance with standard timescales is "rendered impracticable for reasons of urgency". (Reasons justifying use of an accelerated procedure must be set out in the Contract Notice and a clear audit trail for the decision should be documented).

Standstill

Once the winning offer has been chosen, the tenderer must be notified as soon as possible. At the same time the other tenderers and any applicants not already informed of their failure to be selected, including the reasons, must be notified of:

- the name of the 'winning' supplier
- the award criteria used
- the reasons for the decision, including the characteristics and relative advantages of the successful tender and score (if any) obtained by the winning tenderer and the score obtained by the supplier receiving the notification
- a precise statement of the standstill period.

The full range of remedies is available to the court at this stage, (i.e. before the contract is let) including the power to suspend the procurement process, to overturn the award decision. Rendering the contract ineffective, shortening the contract, civil financial penalties and damages are further remedies, if the contract has been let.

A contract cannot be concluded with the winning supplier until the full standstill period has elapsed. The standstill period will usually be 10 days, provided that the contract award decision notice has been sent by electronic means or facsimile, however if one or more of the suppliers to receive a notice is sent the notice by other means, then the standstill period becomes 15 days from when the last notice is sent by such other means or 10 days from receipt.

Keeping records

Authorities must keep records at each stage of the procurement process in case of challenge in the courts or for reporting to the European Commission. These records must detail all decisions made on individual contract awards and should be kept for at least four years. These include:

- justification for the use of competitive dialogue procedure or the negotiated procedure (with or without a call for competition)
- decisions relating to the admission of candidates and choice of tenderers
- assessment of tenders
- dates and copies of notices sent to the Official Journal.
- contract shortening
- financial penalties.

What happens when a supplier challenges?

Suppliers have a number of remedies available to them where authorities breach the regulations. These include:

- suspension of the contract award procedure
- setting aside of unlawful decisions
- correction of documents to remove discriminatory clauses
- damages, including costs of tendering and possible loss of profit
- ineffectiveness of a concluded contract
- contract shortening
- financial penalties.

The supplier must notify the purchaser of the alleged breach and intention to bring proceedings.

Suppliers can also make complaints to the European Commission, which can investigate the complaint and if necessary take action against the Member State (represented by the Office of Government Commerce/Scottish Government) in the Court of Justice of the EU.

The OJEU has also held that contracts outside the application of the directives are nevertheless subject to Treaty requirements, including non-discrimination and appropriate publicity.

Annex 1

Useful references

1. EU Directive

- **2004/18/EC**
The Public Contracts Directive
- **89/665 EEC**
The Remedies Directive.

2. Regulations

- **SI 2006/5**
The Public Contracts Regulations (England, Wales and Northern Ireland)
- **SSI 2006/1**
The Public Contracts (Scotland) Regulations

3. The WTO Government Procurement Agreement 1994

4. Other Documents

UK Office of Government Commerce Guidance Notes, including:

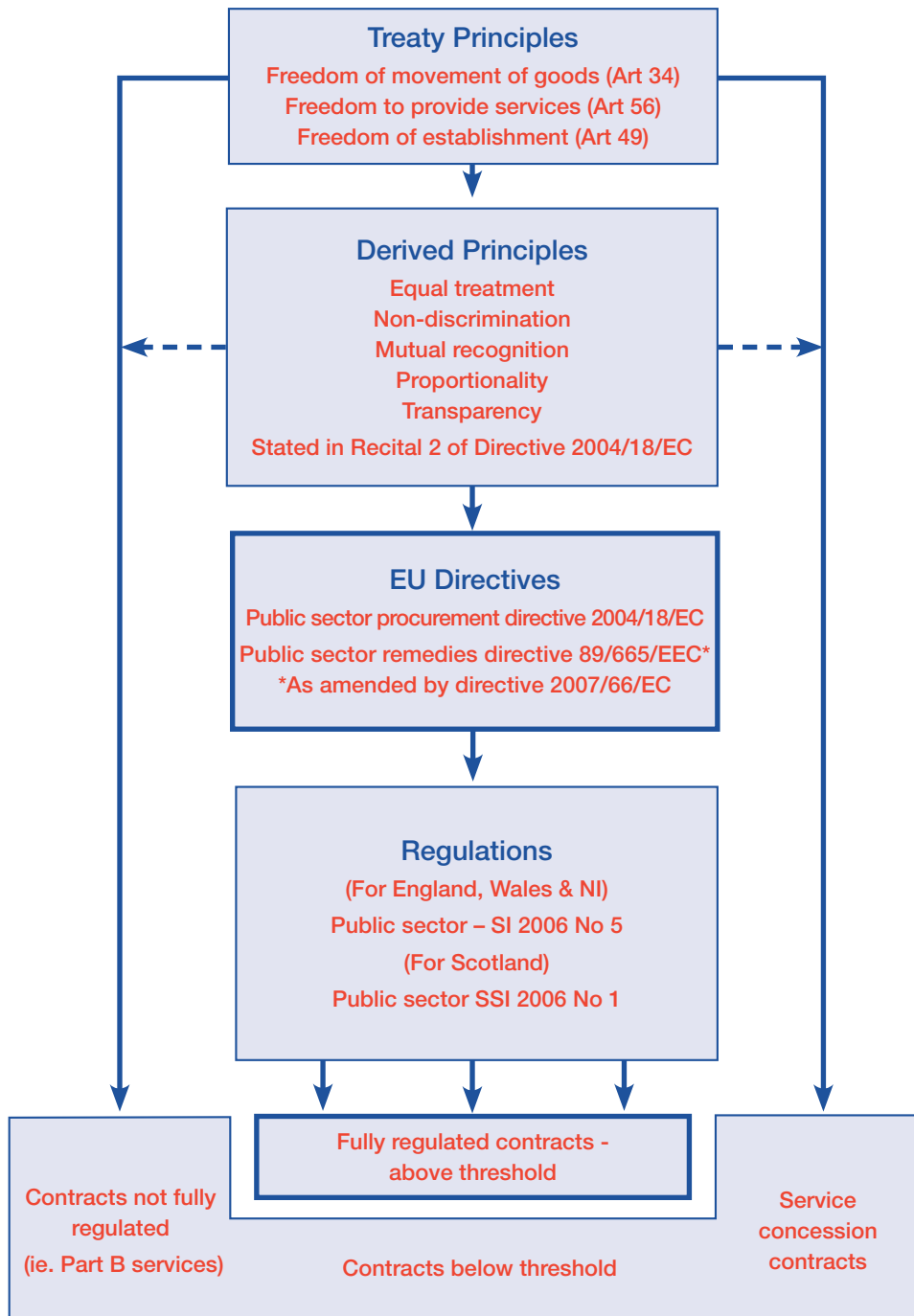
- Framework agreements
- Competitive dialogue procedure
- Environmental issues and procurement
- Social issues and procurement
- Introduction to EC rules
- Mandatory exclusion of economic operators
- 10 day mandatory standstill period.

Commission Guidance Notes

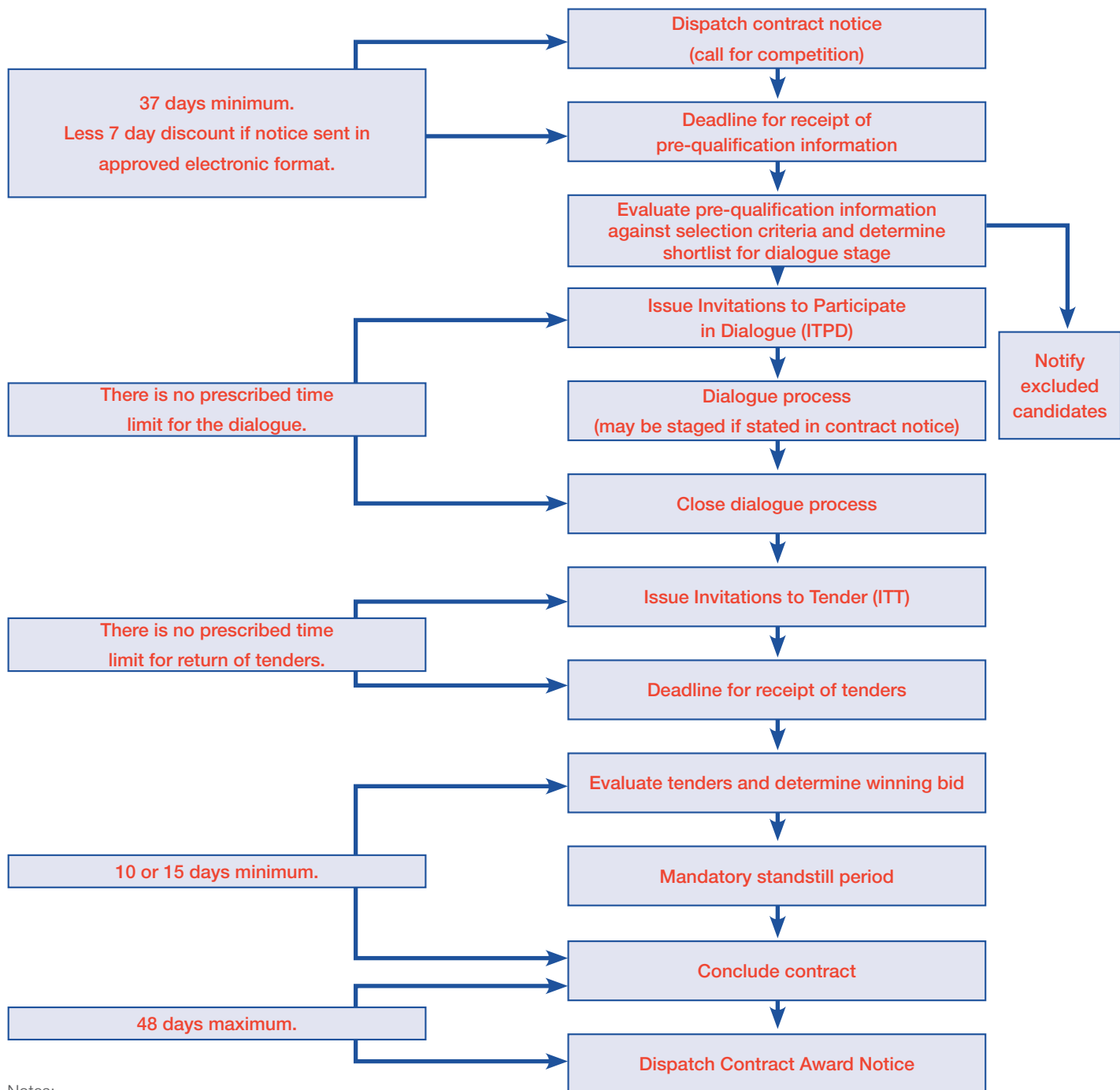
- Product Nomenclatures and Public procurement
- Defining the Term Product Area in Periodic Indicative Notices
- Competitive dialogue
- Framework agreements
- The Commission Interpretative document on the Environment and procurement
- The Commission Interpretative document on Social considerations and procurement
- The Commission Interpretative document on Concessions
- Procurement not fully covered by the directive rules (including low value contracts).

All these policy guidance notes are available through the Achilles THEMIS system as are summaries and transcripts of relevant court cases (including European Court of Justice cases and those in the UK and Irish Courts).

Treaty Principles and Sources of Legislation



Competitive Dialogue Procedure (Public sector)



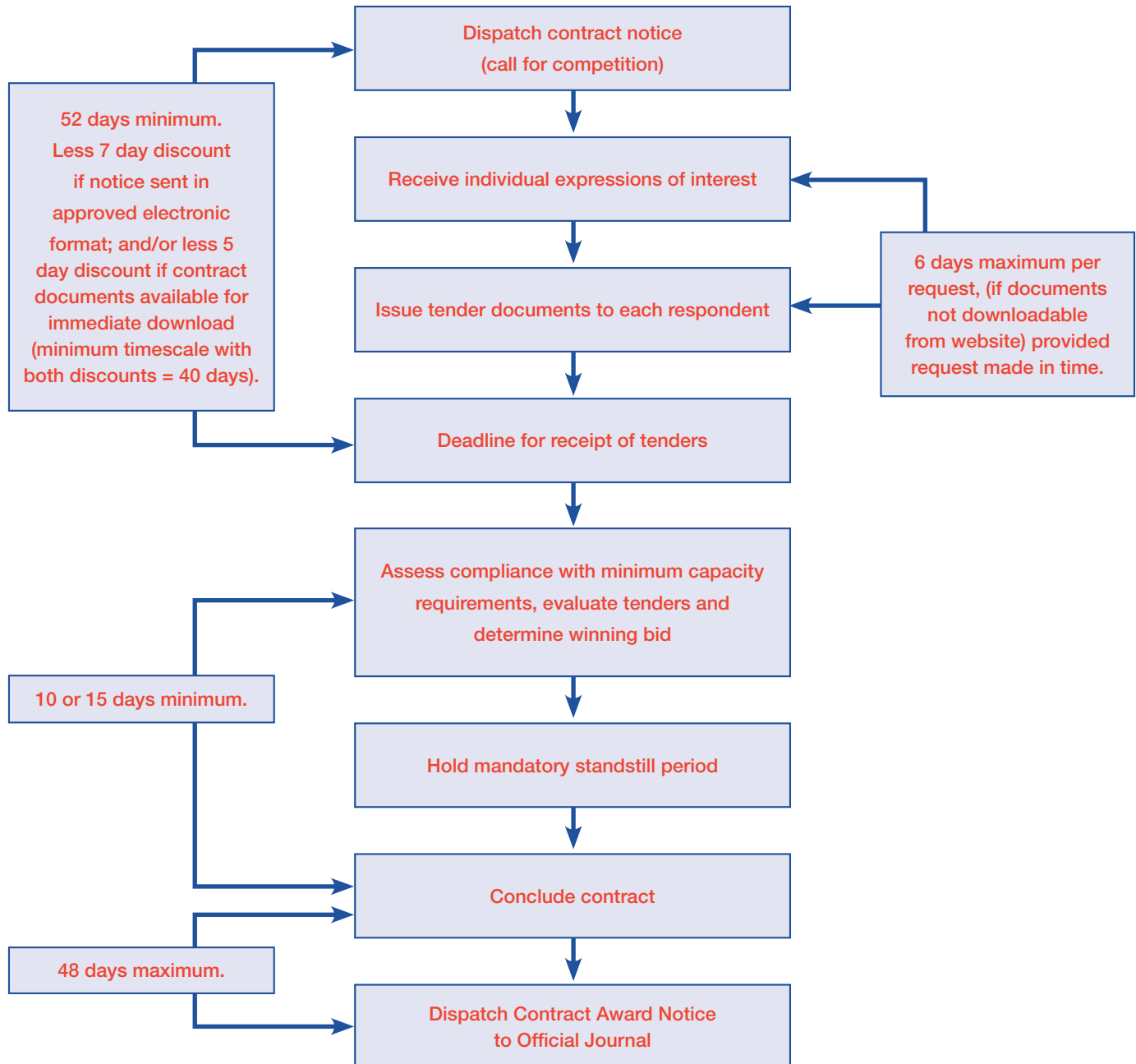
Notes:

Pre-qualification information can be requested on the face of the contract notice or by using a pre-qualification questionnaire. The Directive and the Regulations do not mention the use of such questionnaires, although there is no reason to believe that they cannot be used.

If a tenderer requests further relevant information during the tender stage, then this has to be provided at least 6 days before any deadline for the receipt of submissions. The deadline for receipt may have to be extended in circumstances where a supplier requests further information in sufficient time for dispatch 6 days before the deadline date and for whatever reason the information is not dispatched in that time.

There is express provision for clarification of bids, post-tender and also clarification and confirmation of commitments with the 'winning' bidder. These provisions are found in Reg18(26) and 18(28).

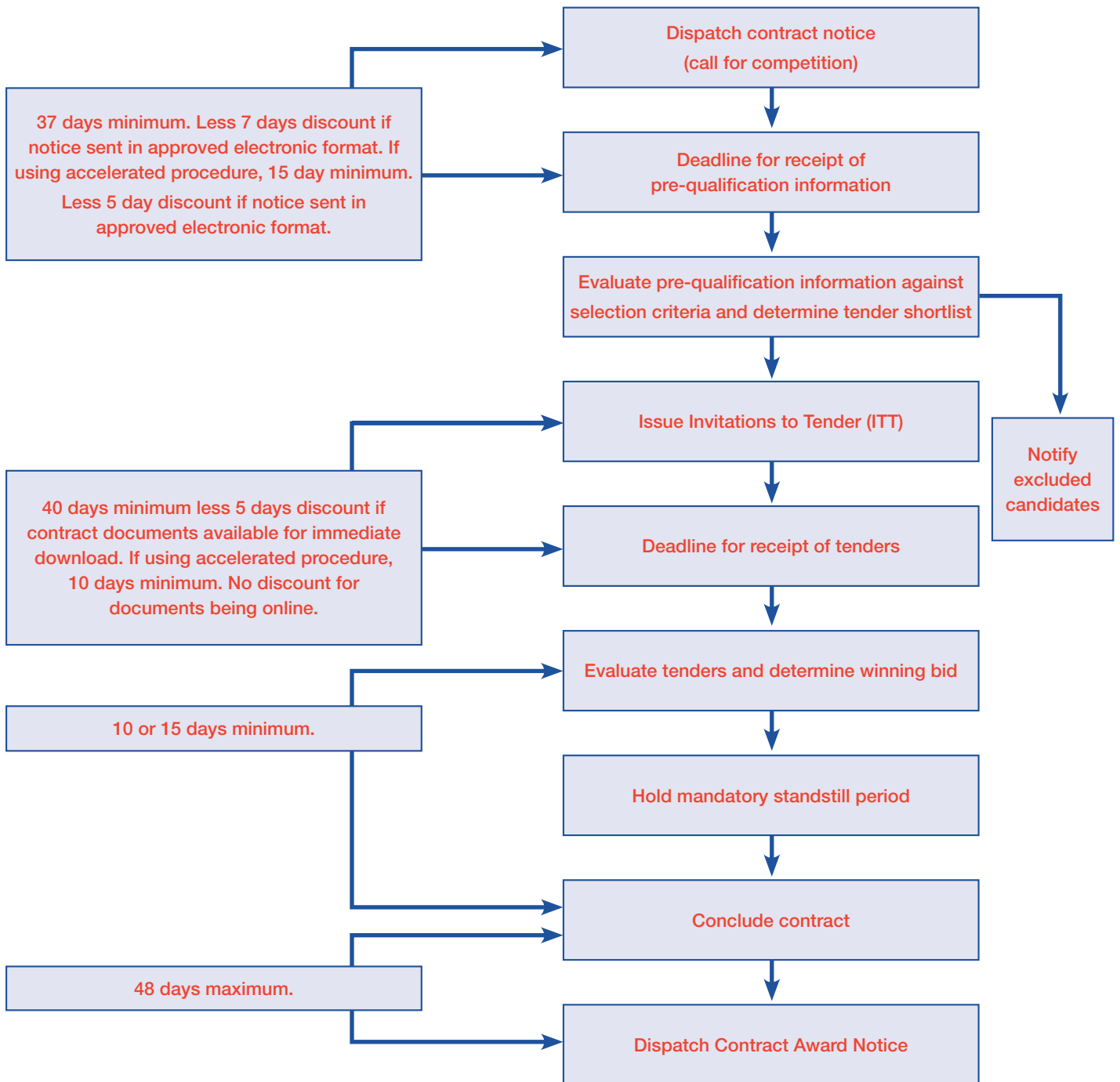
Open Procedure (Public sector)



Notes:

If a tenderer requests further relevant information during the tender stage, then this has to be provided at least 6 days before the tender return deadline. The deadline for receipt of tenders may have to be extended in circumstances where a tenderer requests further information in sufficient time for dispatch to the tenderer 6 days before the tender receipt deadline date and for whatever reason the information is not dispatched in that time.

Restricted Procedure



Notes:

Pre-qualification information can be requested on the face of the contract notice or by using a pre-qualification questionnaire. The Directive and the Regulations do not mention the use of such questionnaires, although there is no reason to believe that they cannot be used.

If a tenderer requests further relevant information during the tender stage, then this has to be provided at least 4 days before the tender return deadline. The deadline for receipt of tenders may have to be extended in circumstances where a tenderer requests further information in sufficient time for dispatch to the tenderer 4 days before the tender receipt deadline date and for whatever reason the information is not dispatched in that time.



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Our EU and procurement consultancy services are available in many forms depending on a company's individual requirements and can include long term partnerships or short term contracts.

Advice can be offered as:

- Annual EU consultancy
- Contract by contract
 - EU processes and internal procedures
 - EU project strategy
 - EU audits
- As part of the THEMiS system
 - Annual subscription
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EU Training

Achilles offers a range of training through either in-house or open courses or conferences on various EU topics.

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For more information and to discuss your specific requirements, please contact the EU services team:

T: +44 (0)1235 838115

F: +44 (0)1235 821093

E: eclegislation@achilles.com

W: achilles.com/euservices

THEMiS - the knowledge bank for regulated procurement

THEMiS is an online subscription-based system which provides purchasers with the tools to help them to comply with EU regulated procurement.

It allows you to:

- Have easy access to EU help
- Access up-to-date information on changes to EU procurement
- Ask your EU questions to dedicated experts in the field of EU procurement legislation
- Excellent source of information
- Quick response to questions asked
- Create and submit your Notices to OJEU electronically.

THEMiS provides:

- UK, European and Irish Court Cases, summarised by Professor Sue Arrowsmith, Professor of Law at Nottingham University:
 - Key Issues
 - Facts
 - Judgments
 - The only system to include Professor Arrowsmith's summaries
- EU Directive and UK Regulations consolidated to include the latest amendments
- Full Amendment to the EU Directives and UK and Scottish Regulations
- Policy guidance from the European Commission, OGC and Scottish Government
- Infraction cases
- EU Articles written by experts in the field of EU procurement legislation
- A 'Give me guidance' section, with over 350 frequently asked questions, linked to other documents within THEMiS:
- The ability to "Ask Achilles" advisors your EU question, answered via email
- Full search facility: product codes, CPV, CPC, Nace and Nuts codes
- Notice creation and submission tool allowing you to send notices to the OJEU electronically

There are three levels of subscription for THEMiS:

- Standard
- Premium
- Platinum

THEMiS is used by a variety of organisations including utilities within the rail, gas, electricity, water ports and airports, oil and gas industries, and lawyers.

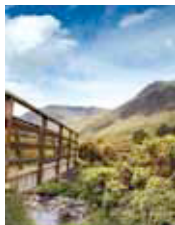
For further information please contact: EU Team, Achilles Information Limited, 30 Park Gate, Milton Park, Abingdon, Oxfordshire.

Tel: 01235 838115 or email themis@achilles.com.

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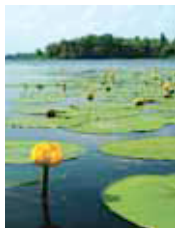
Iberoamerica



North America



Asia Pacific



Central Europe



Achilles global office locations

Argentina

Aquiles Argentina
T: +54 11 4342 6636
E: argentina@achilles.com

Australia

Achilles Information (Australia) Pty Ltd
T: +61 (0)7 3821 7211
E: australia@achilles.com

Brazil

Aquiles Brasil Ltda
T: +55 21 3344 6333
E: brazil@achilles.com

Chile

Aquiles Chile Limitada
T: (56-2)582 06 68
E: chile@achilles.com

Colombia

Aquiles Colombia
T: +57 (1)622 2324
E: colombia@achilles.com

Denmark

Achilles Systems AS
T: +45 5155 2008
E: denmark@achilles.com

Germany

Achilles Information GmbH
T: +49 (0)211 53883 244
E: germany@achilles.com

Hong Kong

Achilles Information Hong Kong Ltd
T: +852 2815 7100
E: hongkong@achilles.com

Ireland

Achilles Procurement Services Limited
T: +353 (0)1 4020111
E: ireland@achilles.com

Italy

Aquiles España y Portugal, SL
T: +39 (0)6 8520 3835
E: italia@achilles.com

Kazakhstan

New office
T: +7 (3122)355756
E: fpk@achilles.com

Nigeria

Achilles Information Ltd
T: +234 1 2717591-3
E: nigeria-ops@achilles.com

Norway

Achilles Information Centre (Arendal)
T: +47 37 06 35 00
E: aic@achilles.com

Norway

Achilles Systems AS (Stavanger)
T: +47 51 96 91 00
E: as@achilles.com

Peru

Aquiles Perú SAC
T: +51 1 712 0301
E: peru@achilles.com

Portugal

Aquiles España y Portugal, SL
T: +351 213 507 014
E: portugal@achilles.com

Slovakia

Achilles Information Slovakia s.r.o
T: +421 (0)2/ 5939 6135
E: slovakia@achilles.com

Spain

Aquiles España y Portugal SL
T: +34 91 426 4910
E: spain@achilles.com

Sweden

Achillevs Information AB
T: +46 (0)8 444 1720
E: sweden@achilles.com

UK

Achilles Information Limited (Oxfordshire)
T: +44 (0)1235 820813
E: uk@achilles.com

UK

Achilles Information Limited (Derby)
T: +44 (0)1332 524906
E: link-up@achilles.com

UK

Achilles Information Limited (Aberdeen)
T: +44 (0)1224 524906
E: fpal@achilles.com

USA

Achilles Information, Inc
T: +1 281 447 2205
E: usa@achilles.com

Venezuela

Aquiles Sistemas de Información, CA
T: +58 (212)285 6576
E: venezuela@achilles.com



Achilles Information Limited

30 Park Gate, Milton Park, Abingdon, Oxon, OX14 4SH, UK

T: +44 (0) 1235 820813 **F:** +44 (0) 1235 821093 **E:** enquiries@achilles.com **W:** www.achilles.com

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