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# Pathway to Procurement

A clear guide through the maze of  
public procurement

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A clear guide through the maze  
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# Introduction

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As the Public Contracts Regulations 2015 (“the 2015 Regulations”) reach their first anniversary, we focus on one of the main mechanisms by which those regulations support the UK government’s priorities of economic growth, by making public procurement faster, less costly and more efficient for businesses and procurers alike and resulting in significant reductions in minimum time limits for tendering.

These changes are intended to provide a much more flexible and commercial approach to public procurement. For both the public and private sector, this should mean quicker procurement processes, reduced procurement costs, speedier decisions and less bureaucracy.

The choice of procedures, for the most part, remain the same: those include the open, restricted, competitive dialogue and a more flexible form of the old negotiated procedure, namely the competitive procedure with negotiation. However, additional flexibilities have now been built into these procedures, including:

- Generally much shorter minimum time periods across all the procedures;
- Accelerated forms of both the open and competitive procedure with negotiation, available under urgent circumstances;
- Sub-central authorities such as, local authorities, having the ability to use of Prior Information Notice as a call for competition;
- Confirmation that negotiation is not mandatory under the competitive procedure with negotiation; and
- Finally, greater flexibility to amend tenders at preferred bidder stage under the competitive dialogue procedure.

We also now have two new procedures that apply in very specific circumstances; the Innovation Partnerships Procedure, which is geared at enabling both the development and purchase of innovative goods, works and services and also, the “Light Touch Regime” which is specific to services with limited cross border interest.

Each of these procedures are described in more detail below and are illustrated through the use of diagrams that highlight the minimum statutory limits which apply to each procedure. Generally, these minimum time limits are much shorter than those within the previous regulations. However, applying the minimum time periods may not always be appropriate. When setting the time limits for responding with tenders, public bodies should always take into account the complexity of the proposed contract and in the interests of proportionality, bear those complexities in mind when setting their deadline for bid responses.

Finally, this document is not intended to cover on-going procurement exercises, or existing framework arrangements commenced, or procured pursuant to the former Public Contracts Regulations 2006. Separate advice should be sought in respect of procurements subject to those former regulations. The procedures covered within this document and the guidance provided in respect of those procedures, relate specifically to procurements conducted under the 2015 Regulations.

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# What is public procurement?

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Public procurement is the process by which public sector organisations buy goods, works or services from third party suppliers. It can range from routine, day-to-day supplies, to complex spends such as large scale infrastructure, major IT or organisational change initiatives.

The underlying aim of public procurement is to ensure competition, which is viewed as a key factor in achieving the twin objectives of accountability in the spending of public money and transparency in decision-making. Those objectives have been underpinned by a succession of European Directives which look to abolish barriers to trade and promote a single market, in particular by ensuring non-discrimination on the grounds of nationality.

Those European Directives have been implemented into UK domestic law through regulations, the most recent being the 2015 Regulations: these set out the procedures and practices which public bodies must comply with when conducting procurements for works, services and supplies over a specific financial threshold. Those thresholds are currently set at:

- Works – **£4,104,394** (all public bodies);
- Services and supplies – **£106,047** (central government), **£164,176** (all other public bodies);
- “Light Touch” procurements - **£589,148** (these are explained further below).

The legal framework, as set out within the 2015 Regulations, is designed to ensure that all public contracts over these financial thresholds are awarded transparently, without discrimination, as well as ensuring that all potential suppliers are treated equally. It should however always be borne in mind that underpinning all public procurement are the principles derived from the Treat on the Functioning of the European Union (“TFEU”), namely equal treatment, transparency, non-discrimination and proportionality. These “principles of procurement” are also reflected in Regulation 18 (1).

**£242bn**

In 2014, £242bn (33%) public sector spending on the procurement of goods and services.

**1/3**

1/3 of public spending is by using procurement



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# What is the procurement process?

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In general terms, the procurement process will begin by the public body formulating its requirements and deciding which of the available procurement procedures best suits its needs. It will subsequently open a bidding process and interested suppliers submit their proposals in response to those requirements.

Those offers will then be evaluated to decide which offer best suits the needs of the procuring body and the successful bidder will then be awarded the contract.

Choice of procurement procedure is key and can determine the success or failure of the procurement process. There are a number of questions which should be addressed before a decision on the correct procurement process is made, such as:

- Do you wish to limit the number of tenders received?
- Are there a large number of potential suppliers?
- Is it possible to specify the requirements for the contract with precision to allow bidders to tender?
- Is the requirement complex, thus requiring solutions to be confirmed and developed?
- Are you looking to develop a product which currently does not exist in the market?
- Is the service you are looking to procure listed within Schedule 3 of the 2015 Regulations and therefore subject to a "Light Touch Regime"?

Having addressed these initial questions, a procuring authority may then choose the most appropriate procedure. Those options include:

The 2015 Regulations do still permit the use of the negotiated procedure **without** a call for competition in limited circumstances, for example, where a contract can only be awarded to a particular provider for technical reasons, or to protect pre-existing exclusive rights.

## The Open Procedure

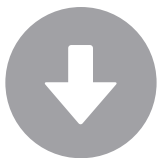


Under this procedure, all interested suppliers responding to the initial contract advertisement must be invited to tender. There is no separate stage of pre-qualification or pre-selection: the grounds for exclusion and fulfilment of the selection criteria are assessed as part of the overall evaluation of the tender submission. Furthermore, tenders may be clarified, once they are received; however, changes to the tender or negotiation with the intended supplier are prohibited. The relevant minimum time periods to be applied under this procedure are set out at diagram 1.

### When should it be used?

- There are no restrictions on when it should be used;
- It is suitable for simple procurements where tenders can be evaluated on a "like-for-like" basis relatively simply.

## The Restricted Procedure



This procedure is similar in principle to the open procedure however; it includes a separate, pre-qualification stage. Interested suppliers who respond to the contract notice submit an expression of interest against defined criteria relating their legal eligibility, technical capability and financial standing. Only those shortlisted are then invited to tender. Again, there is no scope for negotiation with suppliers.

The standard minimum time periods that apply to both central and sub-central authorities under the restricted procedure are set out at diagram 2. Sub-central authorities, using a prior information notice ("PIN") as a call for competition, have additional flexibilities in relation to the minimum time periods which can be set for receipt of tenders. Those additional flexibilities are demonstrated within diagram 3.

### When should it be used?

- Again there are no restrictions to its use although it is more suitable when there are likely to be a high number of interested parties and therefore shortlisting is justified;
- As there is no negotiation, the procuring authority should ensure that it is able to specify its needs adequately so that suppliers can confidently bid back without the need for contract amendments.

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# What is the procurement process?

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## The Competitive Procedure with Negotiation

This is a new procedure and is only available in limited circumstances which are specified under the 2015 Regulations. The procedure itself is similar to the restricted procedure in that a pre-qualification stage is built into the process. In practical terms, it can be described as a hybrid procedure because, as with the restricted procedure, the procuring authority can accept initial tenders without any negotiation (if it has stipulated that it reserves the right to do so within the contract advertisement). However, if a need for negotiation is identified, then, as with the competitive dialogue procedure, the procuring authority may proceed with successive stages of negotiation, until a solution is identified. The procedure does, however, not permit any clarification or negotiation of the final or winning tender.

Again, the standard minimum time periods that apply to both central and sub-central authorities under this procedure are set out at diagram 4. As with the restricted procedure, sub-central authorities, using a PIN as a call for competition, have additional flexibilities in relation to the minimum time periods applied at receipt of tender stage (please see diagram 5).

### When can it be used?

- The 2015 Regulations are prescriptive in terms of when this procedure may be used – the conditions of use are set out within Regulation 26 (4) and include, by way of example, circumstances where the contract cannot be awarded without prior negotiation because of specific circumstances related to the nature, complexity, the legal or financial make-up of the contract.



## The Competitive Dialogue Procedure

This procedure is limited to genuinely complex procurements where it is accepted that dialogue with suppliers will be necessary. As with the restricted and competitive procedure with negotiation, a minimum number of bidders are invited to dialogue following a pre-qualification stage. The procuring authority then enters into a dialogue to develop one or more solutions to meet its needs. The structure of the dialogue is to be determined on a case by case basis and it is formally concluded when an appropriate solution is identified

A significant change introduced by the 2015 Regulations is that negotiations may continue to a certain degree, following receipt of final tenders in order to “confirm financial commitments or other terms contained in the tender by finalising the term of the contract” provided that this does not materially change the bid or risk distorting the competition process. Previous to this change, procuring authorities could only “clarify aspects” of the final bid or confirm commitments.

### When can it be used?

- The conditions for use mirror those for the competitive procedure with negotiation;
- However, please see UK Government Guidance, “The Lean Sourcing Approach” which now confirms that “*there is now a presumption against the use of the Competitive Dialogue procedure*” which assumes that there will be an increased use in the competitive procedure with negotiation where the relevant conditions for use are met.



## Innovation Partnerships Procedure

This procedure is designed to allow contracting authorities to establish a long-term partnership, with one or more partners, for the development and purchase of innovative works, services or supply.

As with a number of previously mentioned procedures, there is an initial pre-qualification stage, followed by successive stages and de-selection of suppliers. As with the competitive dialogue procedure there is no set time period for the dialogue stage, instead the successive stages should follow the sequence of steps in the research and innovation process, which may include the manufacturing of the products, the provision of the services or the completion of the works. As a result, again there are no specific time periods applicable to this procedure, except for a requirement to leave 30 days between issue of the contract notice and receipt of expressions of interest (please see diagram 7).

### When can it be used?

- The use of this procedure is only permissible when there is a need for an innovative product, service or works that cannot be met by purchasing products, services or works already available in the market.

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# What is the procurement process?

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## The “Light Touch” Regime

The new Light Touch Regime is set out within Regulations 74 to 76 of the 2015 Regulations. It generally covers social, health and other specified services which are subject to a higher financial threshold, currently set at £589,148. The 2015 Regulations do not oblige the procuring authority to follow any of the standard procedures described above; it is free to broadly follow, or adapt any of those procedures, or devise its own bespoke procedure for the purposes of its specific procurement exercise. However, in each case, the adopted procedure must comply with the principles of transparency and equal treatment of all bidders. Given this inherent flexibility, there are no minimum time periods applicable to this process (please see diagram 8).

### When can it be used?

- This procedure may only be used if the service being procured is listed within Schedule 3 of the 2015 Regulations.

## Why is compliance with these procurement processes important?

The EU public procurement regime requires each member state to have remedies available in the event that contracting authorities have not followed the rules. In the UK, the right of an aggrieved bidder to challenge a contracting authority, in terms of the conduct of a procurement exercise, is set out within the 2015 Regulations.

The reasons for challenging a procurement process will vary from one procurement exercise to another and can potentially relate to almost every aspect of the tendering process, such as procedural errors, or lack of equal treatment or transparency in information sharing. As a result, contracting authorities need to ensure that they have minimised the risk of challenge at each stage of the procurement exercise. This will require periodic “sense checks” in order to ensure that the procurement rules and the procedures set out within those rules are being complied with and more generally, the overriding principles of transparency, non-discrimination and equal treatment under the TFEU are being adhered to.

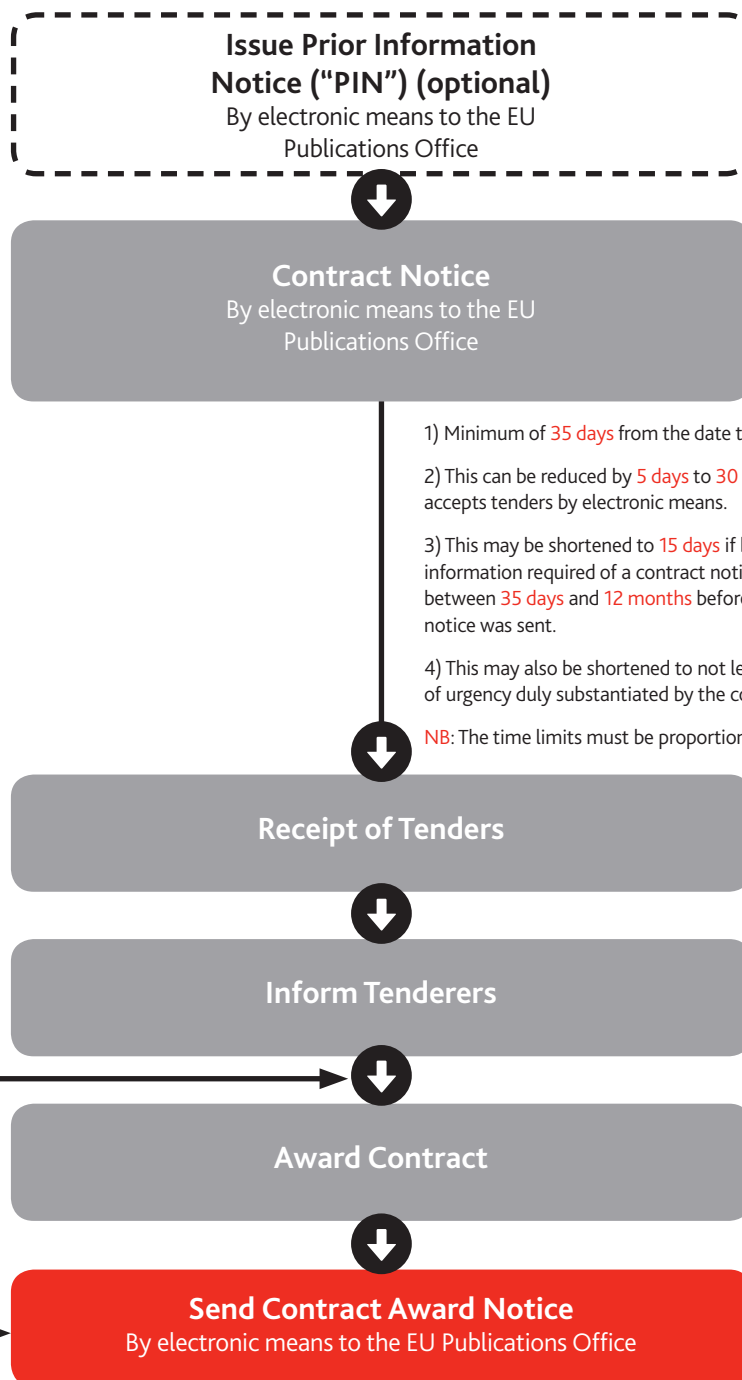
Bidders who have concerns during the bidding process, in terms of the way the procurement is being run, can bring a challenge within a limitation period of 30 days from the date of knowledge of any apparent infringement. Under these circumstances, if the challenge is successful, the courts may order the setting aside of any decision, the amendment of any document, or award damages. If the contract has been entered into when the challenge is brought then, unless the grounds for declaring the contract “ineffective” apply, the court is limited to awarding damages. The remedy of ineffectiveness is only available in limited circumstances, where there have been serious procedural failures (such as a direct award of contract which in fact, should have been publicised by way of a contract notice). Practically, such a declaration will render a concluded contract as ineffective from the date the order is made.

## The remedies available, both before and after contract award, are summarised below:

Before the contract is awarded	After the contract is awarded
Damages may be awarded if an aggrieved bidder has suffered damage or loss as a consequence of breach	Damages may be awarded if an aggrieved bidder has suffered damage or loss as a consequence of breach
The court can set aside the decision to award	In certain circumstances, the remedy of “ineffectiveness” is available. Such an order will be coupled with a civil financial penalty. As an alternative to a declaration of ineffectiveness, the courts may instead shorten the contract term.
The court may order the contracting authority to amend any tender document	

# Open Procedure

Diagram 1



Standstill Period  
applied before  
contract award  
(minimum  
10 day period)

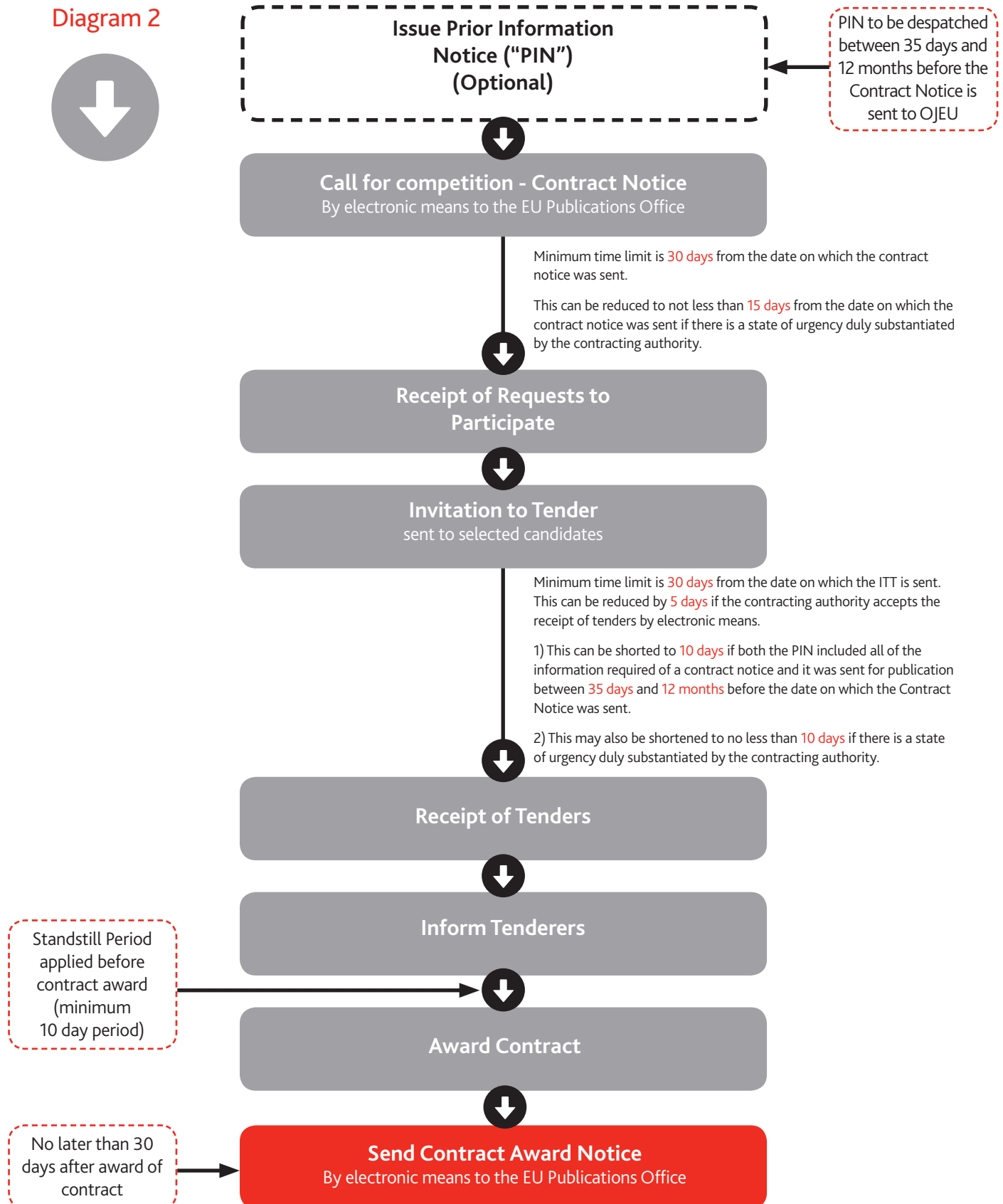
No later than 30  
days after award of  
contract



# Restricted Procedure (using a contract notice as a call for competition)

(applicable to sub-central authorities only)

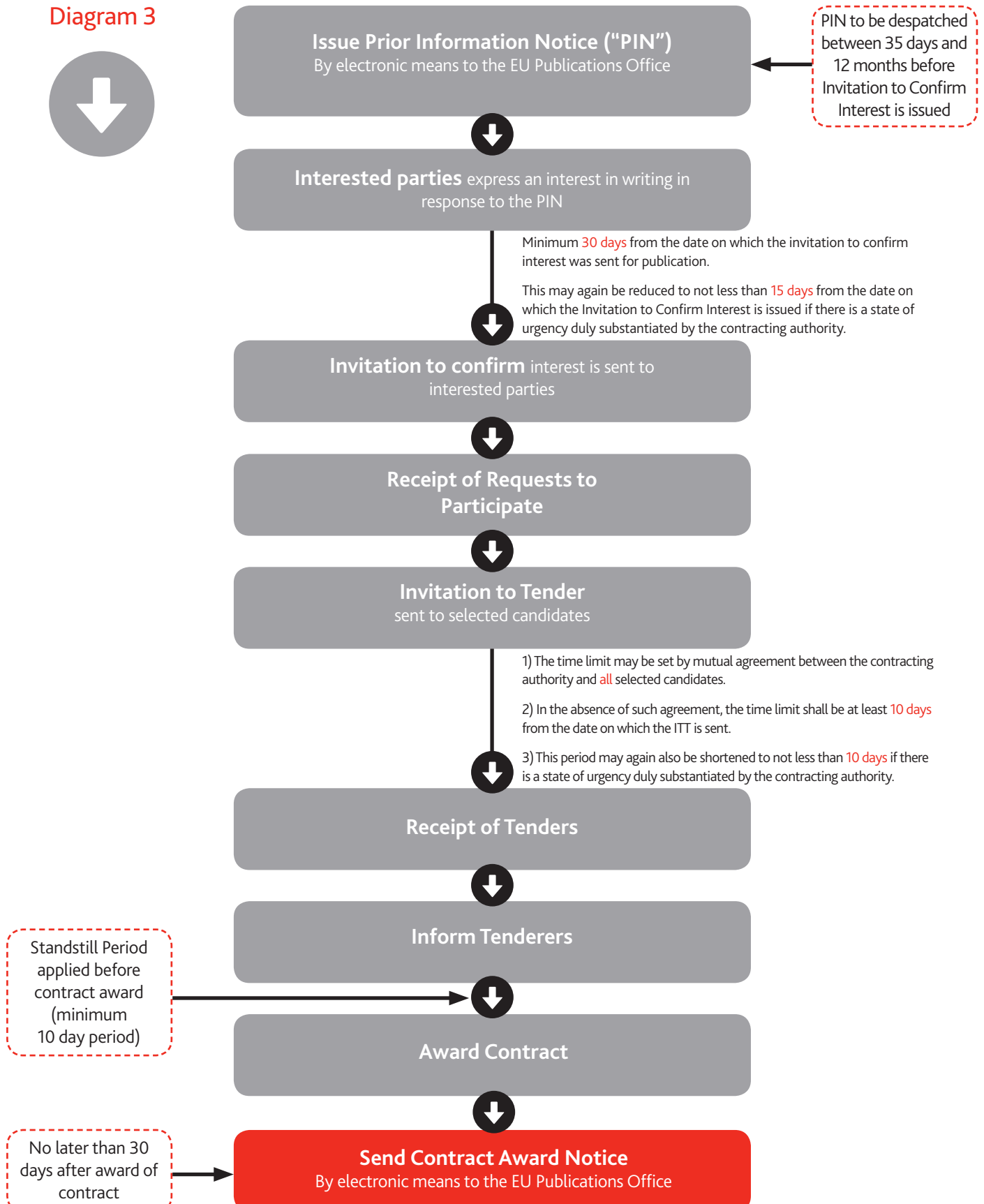
Diagram 2



# Restricted Procedure (using a pin as a call for competition)

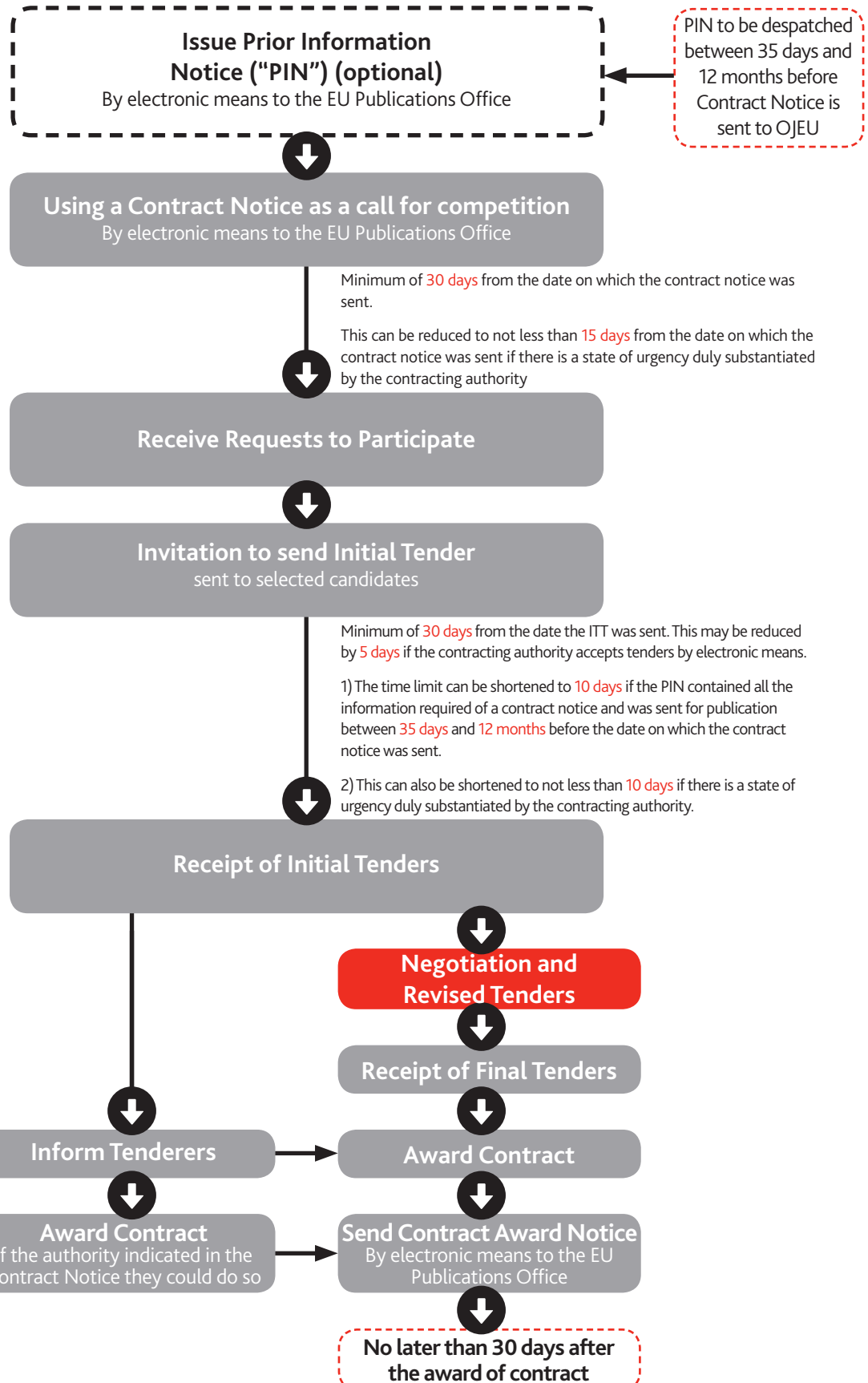
(applicable to sub-central authorities only)

Diagram 3



# Competitive Procedure with Negotiation (using a contract notice as a call for competition) (applicable to central or sub-central authorities)

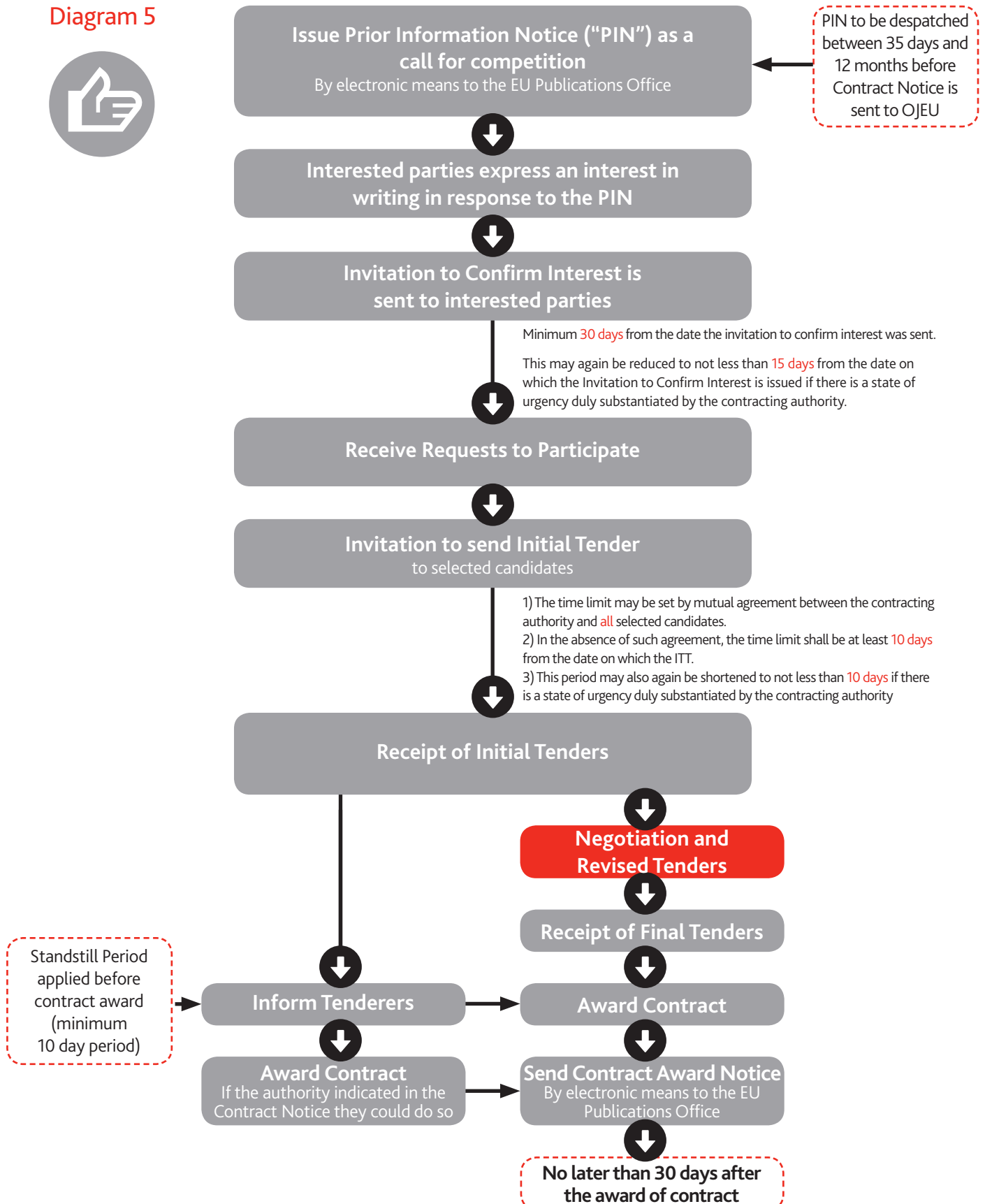
Diagram 4



# Competitive Procedure with Negotiation (using a pin as a call for competition)

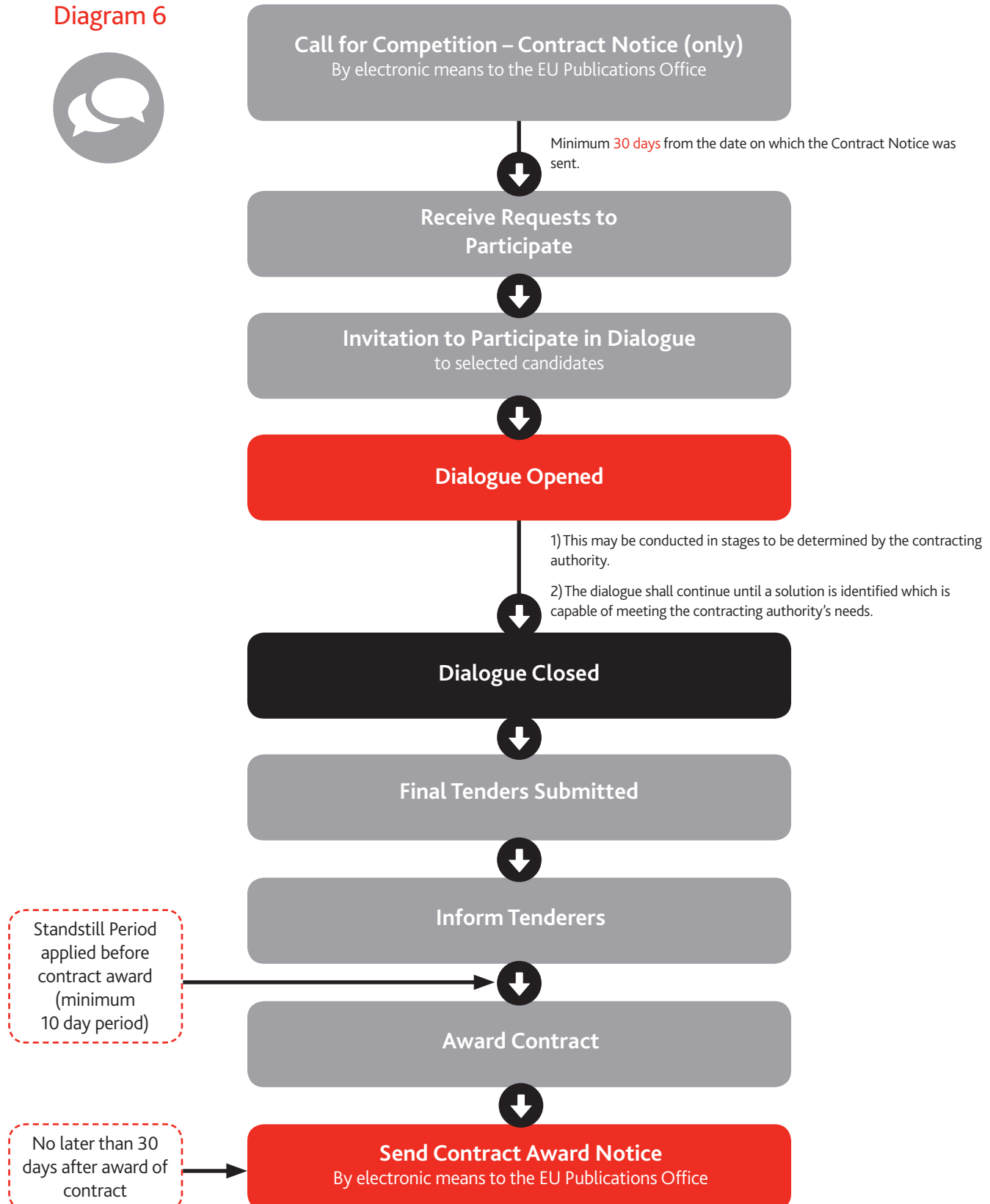
(applicable to sub-central authorities only)

Diagram 5



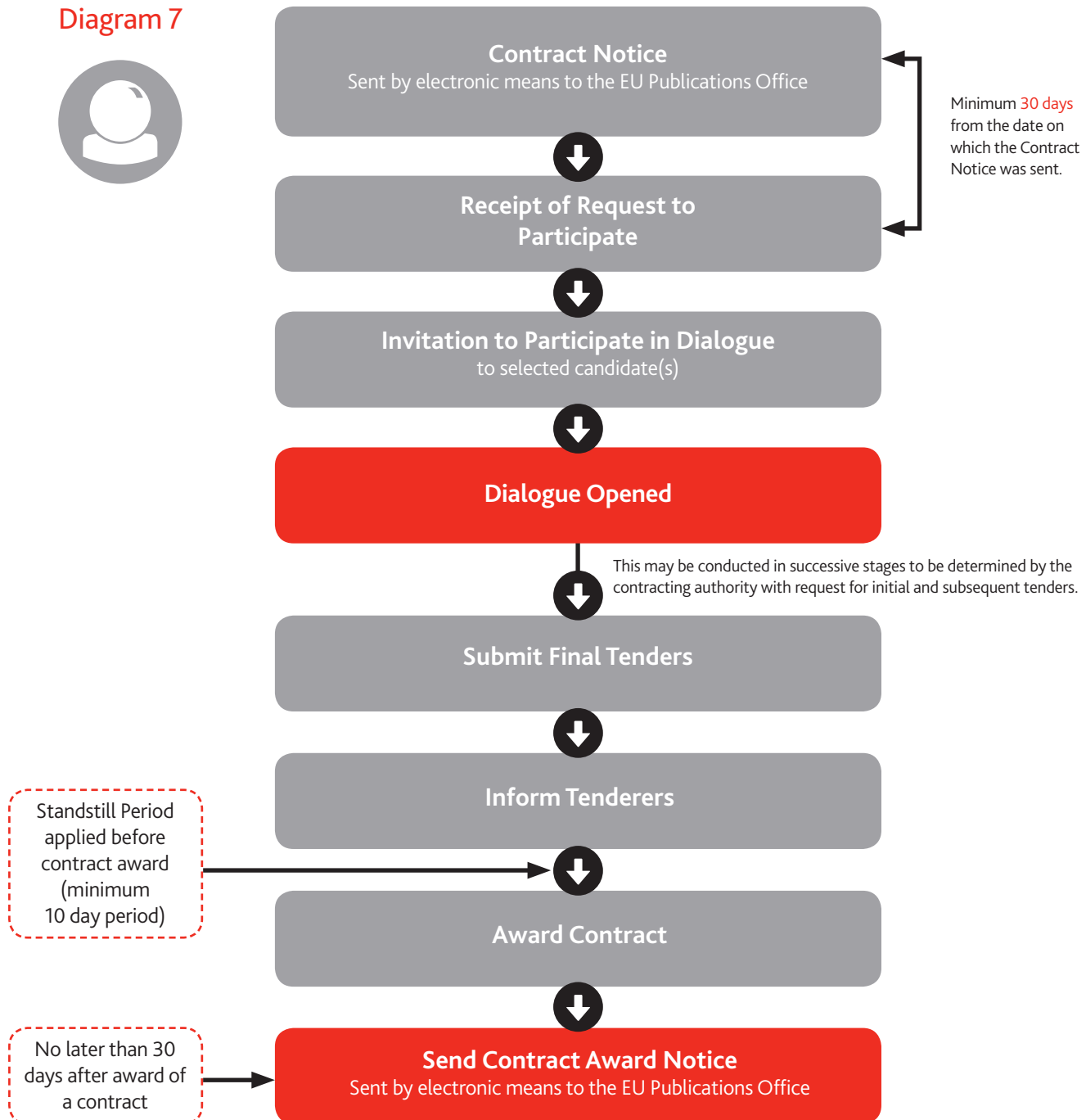
# Competitive Dialogue Procedure

Diagram 6



# Innovation Partnerships Procedure

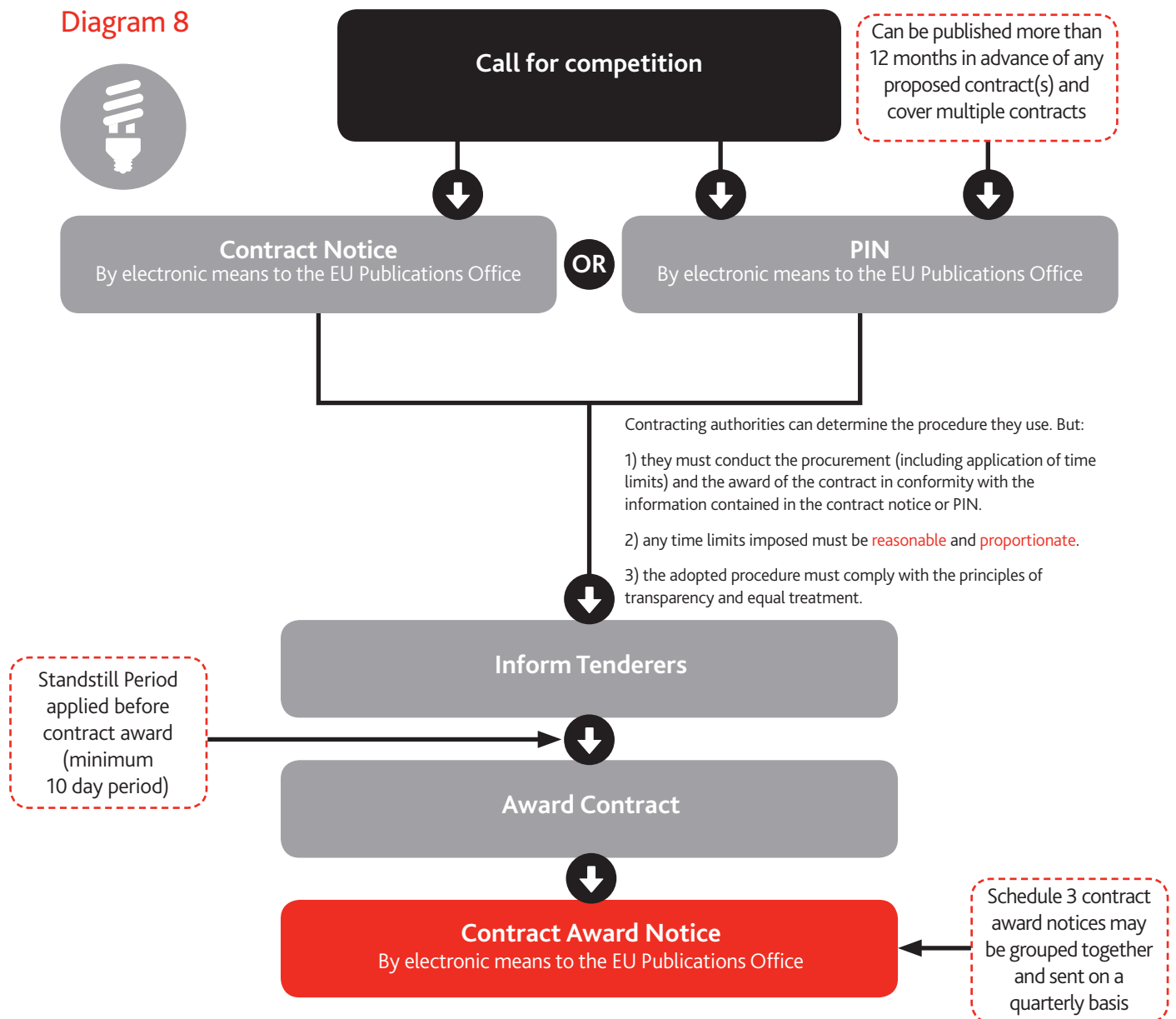
Diagram 7



# Light Touch Regime

(applies to service contracts which fall under Schedule 3 of the 2015 Regulations)

Diagram 8





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