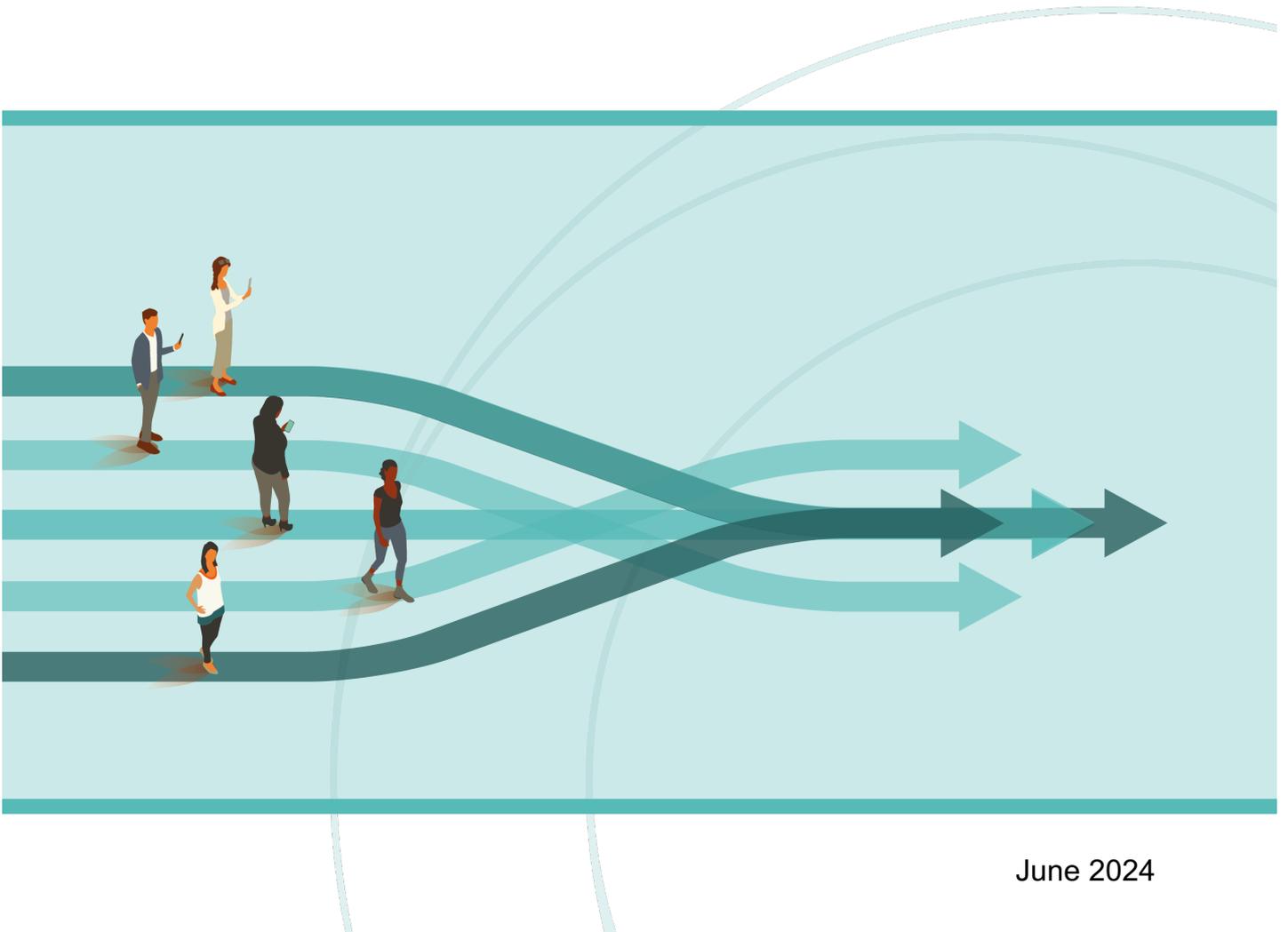




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Procurement Act 2023

Guidance: Competitive Tendering Procedures



June 2024

Guidance on Competitive Tendering Procedures

What are competitive tendering procedures?

1. Effective competition and transparency are key enablers of the procurement objectives of delivering value for money and being seen to act with integrity. There are two competitive tendering procedures in the Procurement Act 2023 (Act): the open procedure and the competitive flexible procedure, and both are commenced via publication of a tender notice.
2. Subject to paragraph 3, all public contracts, including special regime contracts (defined in section 10 of the Act as concession contracts, defence and security contracts, light touch contracts and utilities contracts), will be procured using one of these competitive tendering procedures. There is separate guidance on these special regime contracts.
3. There are limited circumstances where a contracting authority is not required to use a competitive tendering procedure for a public contract:
 - a. where direct award is justified under sections 41 or 43; or
 - b. when awarding a public contract under a framework (referred to in guidance as a 'call-off' contract), as set out in section 45 (although under section 45(3), call-off contracts do generally require competition).

What is the legal framework that governs a competitive tendering procedure?

4. The relevant provisions are:
 - a. section 19 (Award of public contracts following a competitive tendering procedure);
 - b. section 20 (Competitive tendering procedures);
 - c. section 21 (Tender notices and associated tender documents);
 - d. regulation 18 (Tender notices: open procedure);
 - e. regulation 19 (Tender notices: competitive flexible procedure);
 - f. regulation 20 (Tender notices: frameworks);
 - g. regulation 21 (Tender notices: dynamic markets except qualifying utilities dynamic markets); and
 - h. regulation 22 (Tender notices: qualifying utilities dynamic market notices).
 - i. regulation 23 (Associated tender documents)

What has changed?

5. The Act includes an open procedure similar to that in the Public Contracts Regulations 2015 and Utilities Contracts Regulations 2016 and introduces a competitive flexible procedure.
6. The competitive flexible procedure replaces many of the previous more prescriptive procedures. It provides contracting authorities with more opportunity and flexibility to design their own competitive tendering procedure. However, in designing and carrying out their procedure, contracting authorities must have regard to the procurement objectives (section 12) and meet the procedural requirements applicable to the competitive flexible procedure, such as those relating to time limits and transparency.
7. There is no longer a restricted procedure, competitive procedure with negotiation or competitive dialogue procedure but it is possible to adopt a similar approach in practice as part of a competitive flexible procedure where that is appropriate and complies with the Act.
8. A single tender notice replaces the contract notice and, for concessions contracts, the concession notice in the previous legislation.

Key points and policy intent

Choice and design of the competitive tendering procedure

9. Before awarding a public contract under section 19 (Award of public contracts following a competitive tendering procedure), a contracting authority must carry out a competitive tendering procedure. As stated above, the competitive tendering procedure used can take one of two forms (as defined in section 20 of the Act):
 - a. the first is an open procedure, which is a single stage procedure whereby any interested party can submit a tender and the authority will decide whom to award the contract to on the basis of that tender;
 - b. the second is a competitive flexible procedure, which is any other competitive tendering procedure the contracting authority considers appropriate for the purpose of awarding the public contract.
10. There are some circumstances where a contracting authority can only use the competitive flexible procedure; these include:
 - a. where it wishes to limit the number of suppliers before inviting tenders (section 20(4)(a));
 - b. when procuring under a dynamic market (section 34) (see the guidance on dynamic markets and utilities (for utilities dynamic markets)); and
 - c. when reserving a public contract to supported employment providers or public service mutuals (sections 32 and 33) (see the guidance on reserved contracts and light touch contracts).

11. Frameworks can be established under either the open procedure or the competitive flexible procedure. Call-off contracts are awarded in accordance with the terms of the framework (section 45) and are not subject to the competitive tendering provisions in section 20 (see the guidance on frameworks).
12. The contracting authority must ensure that the competitive tendering procedure as designed is a proportionate means of awarding the public contract, having regard to the nature, complexity and cost of the contract. Accordingly, the procurement procedure should not be overly burdensome. Unnecessarily complex and/or time-consuming procedures are also potential barriers that could deter small and medium-sized enterprises (SMEs)¹ and other suppliers from participating.
13. Any competitive tendering procedure must also comply with the areas of the Act that have an impact on their application such as:
 - a. the noticing requirements (see paragraphs 83-89 below);
 - b. the procurement objectives (section 12);
 - c. preliminary steps (preliminary market engagement and lots) (sections 16-18);
 - d. excluding suppliers (sections 26-30 and 57-58);
 - e. modifying a section 19 procurement (section 31); and
 - f. time limits (section 54).
14. The procurement objectives underpin the Act and must be considered when carrying out a procurement, which would include making any decision in relation to the procurement. For example, when designing the competitive tendering procedure, choosing realistic deadlines is important. Short deadlines (particularly if combined with overly prescriptive specifications) may limit SME participation and innovation in tenders.
15. A contracting authority can design a procedure similar to one of the procedures in the previous legislation if helpful, or tailor one of those procedures as it considers appropriate, or design its own procedure entirely.
16. If the requirement for the public contract will be straightforward for suppliers to fulfil (for example, an off-the-shelf solution) then possibilities under the Act include, for example:
 - a. using the open procedure, where any supplier can tender for the contract. This is a simple, transparent process that should maximise the number of suppliers that tender; or

¹Section 123 defines 'small and medium-sized enterprises' as suppliers that (a) have fewer than 250 staff, and (b) have a turnover of an amount less than or equal to £44 million, or a balance sheet total of an amount less than or equal to £38 million.

- b. using the competitive flexible procedure to, for example, provide for a simple two-stage tendering procedure (similar to a restricted procedure under the previous legislation). The first stage could involve assessment of suppliers against conditions of participation and short-listing the suppliers in order to take those selected suppliers into the second stage where they will be invited to submit a tender.
17. If the requirement for the public contract is complex, then the Act allows contracting authorities to design a multi-stage competitive flexible procedure. Possibilities under the Act include, for example:
- a. including post-tender negotiations following a round of open tendering, where all suppliers are invited to submit a tender;
 - b. including post-tender negotiations following a round of selective tendering, where short-listed suppliers are invited to submit a tender;
 - c. including multi-staged negotiations after an initial round of tendering; or
 - d. building in a stage where there is a physical inspection or demonstration of the product, technology or software to be supplied, such as a site visit or requiring suppliers to deliver a pilot.

Carrying out a competitive tendering procedure

18. This section of the guidance sets out key aspects of a competitive tendering procedure that are common to open and competitive flexible procedures.
19. To commence a competitive tendering procedure, a tender notice must be published on the central digital platform. The tender notice will provide access to any associated tender documents or an explanation of how such documents are to be provided. The associated tender documents are used to supplement the information set out in the tender notice. They provide further detail about the procurement and could include, for example, the specification, the award criteria and assessment methodology for the award criteria (if not fully set out in the tender notice), and terms and conditions of the contract. The contracting authority is under no obligation to provide associated tender documents provided all the information necessary to allow suppliers to prepare a tender is contained in the tender notice. When used, associated tender documents must generally be provided free of charge and electronically (see section 96).
20. Section 54(1) provides that a contracting authority must have regard to factors such as the nature and complexity of the contract when setting the date by which tenders must be submitted. This time period must be at least the minimum tendering period set out in section 54 (see the guidance on time limits).

21. Section 21(5) provides that a contracting authority may not invite suppliers to submit tenders in a competitive tendering procedure unless it is satisfied that the tender notice or associated tender documents contain sufficient information to allow suppliers to prepare their tenders and, in particular, details of the goods, services or works required. Therefore, unless the tender notice and/or associated tender documents provide all the information required for suppliers to prepare their tenders, the contracting authority cannot set a deadline for submission of tenders and the tendering period in section 54 (Time limits) cannot commence.
22. Sections 26 and 28 require the contracting authority to consider whether any supplier (including by virtue of their connected persons, associated persons or sub-contractors) is excluded or excludable before assessing which tender best satisfies the award criteria. As a general rule these considerations should be made at the earliest point possible in the competitive tendering procedure but must be made (or confirmed) on assessment of tenders.
23. In certain circumstances, there is an obligation on contracting authorities to notify a supplier in advance of exclusion to allow it the opportunity to replace an associated person or sub-contractor. There is also an obligation for certain contracting authorities to notify and, in some cases, seek agreement from a Minister before excluding a supplier (or before allowing the supplier the opportunity to replace an associated person or sub-contractor) on national security grounds (see section 29).
24. The tender notice and any associated tender documents will set out any conditions of participation that must be met in order for a supplier to be awarded the public contract. Conditions of participation are used to assess whether a supplier can perform the contract. They must be a proportionate means of ensuring the supplier's relevant capacity or ability (see below), having regard to the nature, complexity and cost of the public contract. They are distinct from award criteria, which determine which is the most advantageous tender. Conditions of participation are a means to ensure that suppliers have:
 - a. the legal and financial capacity to perform the contract, or
 - b. the technical ability to perform the contract.
25. A contracting authority may only award a public contract in a competitive tendering procedure to the supplier that submits the most advantageous tender. Section 19(2), defines the most advantageous tender as the tender that the contracting authority considers:
 - a. satisfies the requirements; and
 - b. best satisfies the award criteria when assessed by reference to:
 - i. the assessment methodology set under section 23(3)(a); and
 - ii. if there is more than one criterion, the relative importance of the criteria under 23(3)(b).

26. It is possible for a contracting authority to award separate contracts following a competitive tendering procedure to multiple suppliers (for example, when establishing a framework) if the award criteria and assessment methodology set out in the tender notice and any associated tender documents provide that more than one tender can satisfy the contracting authority's requirements and best satisfy the award criteria and on what basis. In these circumstances, all tenders considered successful pursuant to the award criteria and assessment methodology should be considered the most advantageous tender.
27. In assessing tenders under section 19 (Award of public contracts following a competitive tendering procedure) a contracting authority:
- a. must disregard any tender from a supplier that does not satisfy the conditions of participation;
 - b. may choose to disregard a tender from a supplier who is not a UK or treaty state supplier, or from a supplier who intends to sub-contract the performance of all or part of the contract to a supplier who is not a UK or treaty state supplier. The guidance on treaty state suppliers should be consulted for more information;
 - c. may choose to disregard any tender that offers a price that it considers to be abnormally low for performance of the contract, provided it complies with the relevant provisions in the Act;
 - d. may choose to disregard any tender which breaches a procedural requirement that is set out in the tender notice or associated tender documents, such as a tender being submitted past the required deadline or being over the prescribed word count. For clarity, contracting authorities should highlight which procedural requirements set out in the tender notice or associated tender documents may result in the contracting authority disregarding a tender if breached.

For further information see guidance on exclusions, conditions of participation and, for determining the most advantageous tender, assessing competitive tenders.

28. In a competitive tendering procedure, the contracting authority must release two sets of information once the most advantageous tender has been identified:
- a. firstly, it must provide assessment summaries to suppliers;
 - b. after providing assessment summaries, it must publish a contract award notice on the central digital platform.
29. The contracting authority must not enter into a contract following a competitive tendering procedure without having first issued the assessment summaries and published the contract award notice.

30. The contracting authority must provide an assessment summary to each supplier that submitted an assessed tender. An assessment summary provides information to enable a supplier to understand why its assessed tender was either successful or unsuccessful. See the guidance on assessment summaries.
31. Under the Act, it is the publication of the contract award notice that initiates the standstill period. The mandatory standstill period is a minimum of eight working days and applies to all public contracts apart from those listed in section 51(3). A contracting authority may voluntarily apply a standstill period to those contracts listed in section 51(3). Where it does so, any voluntary standstill period must also be for a minimum of eight working days. Once the standstill period has ended, the contracting authority may enter into the contract. See the guidance on the contract award notice and standstill.
32. Once the contracting authority has entered into the contract, it must publish a contract details notice. A contract details notice tells interested parties that the contract has been entered into and is mandatory for all contracting authorities except for private utilities and in relation to a contract awarded under section 41 by reference to paragraph 15 of Schedule 5 (direct award: user choice contracts). In certain circumstances the contracting authority must also publish a copy of the contract and the key performance indicators set. See the guidance on the contract details notice and contract documents, and the guidance on key performance indicators.

The open procedure

33. As set out above, section 21(5) provides that the contracting authority must be satisfied, before inviting tenders, that the tender notice or associated tender documents provide sufficient information in order for tenders to be prepared.
34. In the case of the open procedure, the tender notice is the 'invitation to tender' as it invites all interested suppliers to submit a tender. Where used, any associated tender documents would also need to be provided through the central digital platform at the outset of the procurement (i.e. at the same time as the tender notice) in order to meet section 21(5) and enable the tendering period to commence. This can be achieved either by attaching the documents to the tender notice or by providing a direct link to the web page where the documents are provided.

Considering exclusions, conditions of participation and assessing tenders

35. In an open procedure, following receipt of tenders and before awarding a contract, the contracting authority must check whether a supplier is an excluded or excludable supplier, assess any conditions of participation and determine the most advantageous tender.
36. With regard to exclusions, the effect of section 26 and section 28 in an open procedure is that the contracting authority must check whether any suppliers who have submitted a tender are excluded or excludable (including by virtue of their connected persons, associated persons or sub-contractors) before tenders are assessed. This ensures that any tender from an excluded supplier is disregarded (and any tender from an excludable supplier can be disregarded if the contracting authority so decides) before tenders are assessed.

37. A contracting authority could then, for example, take the following approach:

- a. assess the tenders against all of the considerations set out in section 19(3), including checking whether each of the conditions of participation are satisfied, and disregard any tenders as appropriate (see para 27); and
- b. then assess the tenders which have not been disregarded under section 19(3) to determine which is the most advantageous tender.

38. Annex A includes a flowchart for how the open procedure could be carried out, based on the scenario in paragraph 37.

39. There is flexibility for when a contracting authority can assess conditions of participation in an open procedure and they can be assessed at any point following receipt of tenders and before the public contract is awarded. For example, assessment of conditions of participation could take place at the same time as assessment of the tender itself, with different evaluation teams looking at conditions of participation and tenders. As an alternative, a contracting authority could assess tenders first, and only consider the conditions of participation for the supplier that submitted the tender that is the most advantageous.

The competitive flexible procedure

40. In contrast to an open procedure, a competitive flexible procedure will be multi-staged and therefore contracting authorities can (under section 20(4)(a)) limit the number of suppliers participating in a procurement or progressing to the next stage. In this guidance, the process of limiting the number of suppliers (following submission of a request to participate) by assessing conditions of participation and/or any other objective criteria set out in the tender notice or associated tender documents is referred to as the 'participation stage'.

41. The competitive flexible procedure allows the contracting authority the freedom to design its own procedure. The contracting authority may choose to incorporate numerous processes into the procedure, such as negotiation, dialogue or a demonstration stage. In this guidance, 'dialogue' refers to a discussion between the contracting authority and suppliers about any aspect of the procurement. 'Negotiation' is the discussion between the contracting authority and a supplier with a view to improving the content of tenders. The [Sourcing Playbook](#) provides information on how to conduct dialogue and negotiation during a procurement procedure. Including dialogue and/or negotiation can offer benefits such as the ability to test risks and assumptions with suppliers and develop the contracting authority's requirements.

42. The contracting authority may choose to include a site visit or demonstration in a competitive flexible procedure. These can reduce risk by testing the deliverability of key aspects of tenders. A site visit may, for example, identify that a key supporting process has not been developed, that equipment has yet to be obtained or configured, or that systems and processes cannot cope with required peaks in volume.

43. The contracting authority may also require suppliers to deliver presentations during the procedure. Presentations can be helpful to confirm that the proposals or solutions are deliverable, for example, to manage the risk of proposals being incompatible with critical services provided by existing suppliers.
44. The contracting authority must ensure that any assessment of site visits, demonstrations or presentations is conducted in an objective way and in accordance with the award criteria and assessment methodology.
45. This guidance provides some examples of how a competitive flexible procedure could be designed, but it is not exhaustive and contracting authorities should not feel limited to using only those outlined in this guidance.
46. The contracting authority must set out in the tender notice how the competitive flexible procedure is to be carried out. For example, if the intention is to limit the number of suppliers generally or in respect of particular tendering rounds or other selection processes, the criteria by which those suppliers will be chosen must be in the tender notice or, if the procedure is to include negotiation, that must be stated. The contracting authority can also provide associated tender documents to supplement the tender notice, which will give more detail regarding the procurement.
47. As with the open procedure, the tender notice is the first formal step in the procedure, but in the competitive flexible procedure it can be used in two different ways:
 - a. to invite suppliers to submit a request to participate in the procedure; or
 - b. to invite suppliers to submit their first, or only, tender.
48. Section 12 of the Act requires that contracting authorities must have regard to the importance of “sharing information for the purpose of allowing suppliers and others to understand the authority’s procurement policies and decisions”. This is particularly relevant during the carrying out of a competitive flexible procedure.
49. The information provided in the tender notice and any associated tender documents at the outset of a competitive flexible procedure must be sufficiently clear and specific to enable suppliers to identify the nature and scope of the requirement, and decide whether to submit a request to participate or, where no such invitation is made, to submit a tender. If a contracting authority is relying on associated tender documents (in addition to the tender notice) in order to meet this requirement to provide sufficient information, this would mean that the contracting authority would need to provide the associated tender documents at the same time as the tender notice.
50. The contracting authority may continue to update, and provide fuller information in, the associated tender documents as the procurement progresses, particularly in circumstances where certain elements to be included in the final documents may necessarily depend on the outcomes of previous negotiations or dialogue. The key requirement to bear in mind under section 21(5) is, as stated above, that tenders cannot be invited as part of a competitive

tendering procedure unless the tender notice or associated tender documents provide sufficient information to allow suppliers to prepare their tenders.

51. Where an associated tender document is being, or may be, provided after the publication of the tender notice, the regulations allow a contracting authority to provide a link in the tender notice to the web page where that additional associated tender document will be provided, or to provide an explanation of how that document will be provided. For example, a contracting authority may set out in the tender notice that additional associated tender documents will be issued to suppliers at certain stages during the negotiation process.
52. In order to provide as much transparency of the tendering process as possible, not just to suppliers who remain in the process, but also to other interested parties, where additional information is provided after the deadline for submitting a request to participate in, or where there has been no invitation to submit such request, the deadline for submitting a first or only tender, it is advisable to update the published tender notice with any additional associated tender documents as these are released during the procedure.

Exclusions in a competitive flexible procedure

53. As set out above, section 26 provides that in all competitive tendering procedures, a contracting authority must consider whether a supplier is an excluded or excludable supplier before assessing which tender best satisfies the award criteria. Section 27 of the Act deals specifically with excluding suppliers in a competitive flexible procedure and requires the contracting authority to check if a supplier is an excluded or excludable supplier before permitting it to participate in a competitive flexible procedure. If the supplier is an excluded supplier, it must not be allowed to participate in the procedure. If it is an excludable supplier, a contracting authority may choose to exclude it.
54. If a supplier becomes an excluded supplier during the course of a competitive flexible procedure, a contracting authority must exclude it from progressing further in accordance with section 27. If a supplier becomes an excludable supplier during the course of a procedure, a contracting authority may exclude it from progressing further.
55. A contracting authority must therefore check exclusions at the start of the procedure and prior to assessment of final tenders. Where there are multiple stages in a competitive flexible procedure, contracting authorities should also consider exclusions (and take appropriate action) at key points such as when undertaking an 'intermediate assessment of tenders' (which is an assessment of tenders other than final tenders (see section 20(6))).

Limiting the number of suppliers in a competitive flexible procedure

56. In a competitive flexible procedure, references to a 'request to participate' refers to where a supplier, in response to a tender notice, registers its interest in participating in the procurement. A contracting authority will invite requests to participate when its intention is to limit the number of suppliers that are invited to submit tenders. The reasons to limit the number of suppliers that submit tenders and create a shortlist may include:

- a. to remove those not meeting the conditions of participation or only select a set number of the highest ranking suppliers, in order to keep the procurement administratively manageable and to ensure only suppliers with the relevant, or best, capacity and ability to perform the contract participate. This may be, for example, where preliminary market engagement or the contracting authority's market knowledge suggests that the number of tenders received may be high;
- b. because the requirement is complex and inappropriate for a single-staged open procedure;
- c. because the nature of the procurement means that the cost of preparing tenders or assessing all tenders submitted may be excessive for the contracting authority and/or the suppliers; or
- d. to ensure that suppliers are motivated to tender when the level of competition is extremely high and suppliers may be reluctant to tender due to the low likelihood of success.

57. It should be noted that reducing the number of suppliers participating in a procedure can act as a barrier to start-ups and new entrants, who may have a suitable solution but lack a track record because they are new to a sector. When setting the conditions of participation (or indeed in all aspects of carrying out the procedure), in order to comply with section 12, a contracting authority must have regard to the fact that SMEs may face particular barriers to participation, and consider whether such barriers can be removed or reduced. Therefore, careful consideration should be given to the conditions of participation used to limit the number of suppliers that progress in a competitive flexible procedure in order to reduce the risk of removing suppliers who may have a good solution but limited record. Preliminary market engagement will help quantify this risk.

58. If a supplier does not satisfy the conditions of participation, a contracting authority may choose to prevent them from participating or progressing in a competitive flexible procedure. However, it may be the case that whilst a supplier cannot meet the conditions of participation (or a particular condition) on initial assessment, it can demonstrate that it will be able to do so at a later stage and before the award of the contract. In this scenario a contracting authority may decide (but is not required) to allow the supplier to participate or progress in the procedure with the requirement that it will, if successful, fulfil the conditions before the award of the contract. If the contracting authority decides to allow the supplier to participate or progress in the procedure, it should be mindful of the requirement for equal treatment in section 12. If a contracting authority thinks it is likely to exercise its discretion in this way, it is recommended that this is set out in the tender notice and any associated tender documents so that suppliers are aware of this possibility when deciding whether or not to tender. A supplier must meet all of the conditions of participation to be awarded the contract.

59. If the contracting authority sets a maximum number of suppliers to participate or progress in any stage in a procedure, it must set out in the tender notice the objective criteria to be used to determine which suppliers will be invited to participate or progress.

60. If the contracting authority sets out that a minimum number of suppliers should participate or progress in any stage in a procedure and fewer than the intended minimum number of suppliers remain at that stage, the contracting authority may continue to proceed with those suppliers that do remain.
61. In all cases, the number of suppliers that participate or progress should be sufficient to ensure genuine competition. The Act does not set out a minimum number of suppliers as the minimum number appropriate to ensure genuine competition will vary based on matters such as:
- a. the nature and complexity of the contract;
 - b. the number of suppliers likely to be interested in participating or progressing; and
 - c. the length and complexity of the procedure, including whether it includes any dialogue or negotiation stage.
62. However, it is suggested that, provided sufficient suppliers have expressed an interest to participate, the contracting authority should invite at least five suppliers to progress where the procedure is straightforward with no dialogue or negotiation. Where the procedure is more complex and will include extensive dialogue or negotiation, it is suggested that at least three suppliers are invited to progress. Given the scope for numerous variances in the design of the competitive flexible procedure and in individual contracting authorities' requirements, one size does not fit all.
63. The contracting authority should ensure timely notification to suppliers as the procedure progresses, especially where it is determined that a supplier will not participate or progress further in the procedure, for example when limiting the number of suppliers following their assessment against conditions of participation or following an intermediate assessment of tenders. In the event a supplier is excluded from the procedure, or its tender disregarded, notification to the supplier should include an explanation for the decision, having regard to section 12(1)(c) and (d) of the Act.
64. When a supplier's tender is an 'assessed tender' as defined in section 50(5)², a contracting authority is required to provide an assessment summary to the supplier. If a procedure includes numerous tendering rounds with intermediate assessments of tenders, contracting authorities should inform suppliers as soon as reasonably possible if they are not being taken forward in the procedure. Contracting authorities are advised to use the same feedback structure for intermediate rounds as will be provided for assessed tenders as the assessment summary structure has been designed to ensure suppliers receive a robust explanation for their scores, having regard to section 12(1)(c) and (d) of the Act. When preparing notifications to suppliers who have not submitted assessed tenders, contracting authorities should aim to provide the appropriate level of detail for the stage in the procedure at which the supplier was excluded.

² An assessed tender is a tender that was assessed for the purpose of determining the most advantageous tender under section 19(1) and was not disregarded.

Examples of how a competitive flexible procedure could be structured:

Example 1 - simple two stage competitive flexible procedure, without negotiation or dialogue

65. A contracting authority could carry out a procedure similar to the restricted procedure under the previous legislation and limit the number of suppliers by setting conditions of participation and (if they chose to) a maximum number of suppliers to be invited to participate (as described above). This would be the first stage and would create a shortlist of suppliers. At the second stage, the contracting authority would issue an 'invitation to tender' to the shortlisted suppliers, inviting them to submit tenders. At this point, the contracting authority may provide updated associated tender documents to the participating suppliers. The procedure would not include any negotiation or dialogue with the shortlisted suppliers.
66. Following the submission of tenders, the contracting authority would assess the tenders to determine the most advantageous tender and award the public contract on the basis of that assessment.
67. See Annex B for a flowchart explaining this example in more detail.

Example 2 - multi-stage competitive flexible procedure with limited negotiation

68. A contracting authority could carry out a multi-stage procedure and decide to negotiate specific elements of its requirements or contract terms with the shortlisted suppliers following a participation stage before determining the most advantageous tender. In this scenario the tender notice must set out the contracting authority's intention to negotiate and the specific elements that will be open for negotiation (for example, price and delivery timings) with shortlisted suppliers.
69. In this example, the contracting authority would carry out the participation stage in the same manner as explained above in example 1, setting a maximum number of suppliers (if they chose to) to be invited to submit initial tenders. Those initial tenders would then be assessed by reference to the contracting authority's requirements and award criteria at this point in the procedure.
70. The contracting authority may remove suppliers whose initial tenders do not meet the contracting authority's requirements or award criteria that apply at this point. It must be clear in the tender notice and any associated tender documents in what circumstances suppliers could be removed, for example, which award criteria have minimum requirements and will be scored on a pass/fail basis, leading to a tender being disregarded if the minimum requirements are not met or what objective criteria will be used to select the limited number of suppliers to be taken to the next stage. For example, a contracting authority may choose to only take a specified number of the highest scoring tenders forward. As set out at paragraph 61 and 62, the contracting authority should invite sufficient suppliers to ensure genuine competition.

71. The contracting authority would then carry out negotiations with the remaining suppliers, before inviting those suppliers to submit their final tenders. Once these final tenders are received, the contracting authority would consider them in order to determine the most advantageous tender.

72. A flowchart outlining this example can be found at Annex C.

Example 3 - awarding a contract for complex or less defined requirements

73. A contracting authority may wish to procure a requirement for which it needs to engage with suppliers to help further define the requirement or wish to procure an innovative solution. In this instance, a staged procedure may be the best approach, which would allow, for example, dialogue with suppliers to develop the requirement further or the inclusion of a stage for design or development and testing of the solution with multiple suppliers participating.

74. Section 24 allows for the refinement of award criteria set out in the tender notice or associated tender documents to support a staged competitive flexible procedure (see guidance on assessing competitive tenders). This enables the award criteria to be refined as the procedure progresses. What constitutes a 'refinement' is not defined in the Act, but it could include, for example, adding additional detail to existing criteria, adding related sub-criteria to existing criteria, or amending criteria weightings within a published range). Adding new award criteria would not be permissible under section 24.

75. In this example, the contracting authority would carry out the participation stage in the same manner as explained above, setting a maximum number of suppliers (if they chose to) to be invited to participate. Following the participation stage, the contracting authority may invite shortlisted suppliers to submit initial tenders and discuss the requirement. As a result of this engagement, the contracting authority may gain a better understanding of what is possible and be able to add further detail or sub-criteria to the initial criteria. It may be that the contracting authority is satisfied that it has sufficient clarity at that point to invite final tenders or it could be that it invites intermediate tenders and carries out another round of dialogue before inviting final tenders. See the flowchart in Annex D which outlines this example.

76. In a scenario where requirements are complex or less defined, contracting authorities may wish to consider including a site visit or demonstration as part of the procedure, as such processes can be used to test the deliverability of proposed solutions.

77. Annex E sets out a possible procedure for procuring innovation or product development.

78. The contracting authority may choose to include a 'preferred supplier' stage in a competitive flexible procedure. This would be a stage involving only the supplier that has submitted the most advantageous tender and would be carried out prior to entering into the contract. The preferred supplier stage could involve clarifying or confirming commitments made in the tender or limited post-tender negotiation. This can be useful particularly in complex procurements, for example to ensure that there is an agreed understanding of how the

contract will operate and reduce the risk of issues arising once the contract has been entered into.

79. A preferred supplier stage should be conducted in a transparent and auditable manner. The intention to conduct a preferred supplier stage should be set out in the tender notice and any associated tender documents, and contracting authorities should ensure that the details of key points and agreed outcomes/changes are recorded and retained. Use of a preferred supplier stage must not have the effect of altering the award outcome and must follow the process as set out in the tender notice and associated tender documents.
80. If the tender (and therefore the resultant contract) is amended as a result of preferred supplier discussions, the contracting authority should consider how best to ensure there is transparency of those changes, for example by incorporating any changes in the contract award notice.

Example 4 - A competitive flexible procedure without a separate participation stage

81. A contracting authority is not obliged to have a separate participation stage to limit the number of suppliers that participate in a competitive flexible procedure. It may decide that inviting tenders from all interested suppliers is the best approach because, for example, preliminary market engagement has shown the field of suppliers to be quite small. If there are elements of the solution that could be improved upon after submission of an initial tender, it may be that an open procedure (which only has one stage for receiving tenders before the most advantageous tender is determined) is not appropriate as there needs to be scope for suppliers to update their solutions and submit final tenders before the most advantageous tender is determined. Therefore a contracting authority could use the initial tenders to understand what solutions the market could offer and then invite suppliers to submit final tenders that are assessed to determine the most advantageous tender.
82. A flowchart outlining this example can be found at Annex F.

What are the primary notices linked to competitive tendering procedures?

83. A competitive tendering procedure may have been the subject of a pipeline notice, a preliminary market engagement notice and/or a planned procurement notice before it commenced. If publication of a planned procurement notice occurred at least 40 days and no more than one year before publication of the tender notice then the notice is a 'qualifying planned procurement notice' and the contracting authority may choose to reduce the tendering period.
84. As set out previously, the key notice in a competitive tendering procedure is the tender notice, which commences the procedure. As well as being used as either an invitation to tender or as an invitation for suppliers to submit a request to participate in the procedure, it is used to notify the market of a modification to the terms of procurement.

85. The regulations specify certain information that a contracting authority must include in a tender notice. For all competitive tendering procedures, where relevant, this must include (in accordance with regulation 18):
- a. whether one of the shorter minimum tendering periods set out in the table in section 54 of the Act applies and, if so, which circumstance in the table applies (for example, if a qualifying planned procurement notice has been published, the tender notice must include the unique identifier used for that notice in order to link the tender notice to that same procurement procedure);
 - b. a description of any technical specifications which are expected to be met or a cross reference to where they may be accessed;
 - c. a description of any conditions of participation to be met. Note that for public contracts, contracting authorities will need to follow the requirements of regulation 6 in respect of core supplier information and should set out in the tender notice that suppliers will be required to submit their core supplier information through the platform at a relevant point in the procedure (for example when they submit their request to participate or their tenders). This will ensure that suppliers know where to register and complete their profiles. Refer to guidance on publication of information for further details about supplier information;
 - d. whether a contracting authority intends to use an electronic auction and, if so, a description of that process.
 - e. any payment terms that are in addition to the implied payment terms set out in section 68. The contracting authority may wish to set out in the tender notice any time period that is less than 30 days to apply to contracting authority payments to suppliers, the process for submission of invoices and the process for dealing with disputed invoices (although this level of detail is not required by the Act or regulations);
 - f. where the public contract is awarded by reference to lots, whether a supplier may only submit a tender for a maximum number of lots and, if so, the maximum number; whether a supplier may only be awarded a maximum number of lots and, if so, the maximum number; and whether the contracting authority will award multiple lots to the same supplier in accordance with certain criteria and, if so, a summary of the objective mechanism (see section 23(4) for the setting of award criteria for the assessment of tenders by reference to lots);
 - g. except in the case of a utilities contract or a light touch contract, where the contracting authority considers that the public contract could be awarded by reference to lots but it is not, the reasons for this;
 - h. the award criteria or a summary of the award criteria;
 - i. how tenders or requests to participate may be submitted and the date by when they must be submitted;

- j. if contracting authorities think it might wish to rely on the 'Materialisation of a known risk' ground in paragraph 5 of Schedule 8 to make any future modifications to a contract awarded under the competitive tendering procedure, the known risks. See the guidance on contract modifications.

86. When using the competitive flexible procedure, in addition to the information above, the tender notice must also include:

- a. where the contracting authority intends to select a limited number of suppliers during the procedure, the criteria that will be used to select them;
- b. where the contracting authority intends to select a minimum number of suppliers, the intended minimum number of suppliers;
- c. where the contracting authority is procuring under a dynamic market (and therefore restricting supplier participation to those on the relevant dynamic market or part of the dynamic market) details of the dynamic market or part of the dynamic market;
- d. a description of the process to be followed during the procedure, including whether the procedure may include negotiation at any stage, and whether the award criteria will be refined during the procedure;
- e. whether the tender notice is being used:
 - i. to reserve a contract to supported employment providers in accordance with section 32 of the Act; or
 - ii. to reserve a contract to public service mutuals in accordance with section 33 of the Act.

87. See the guidance on frameworks and dynamic markets for additional guidance on using the tender notice in those cases.

88. See the guidance on publication of information for information that needs to be included in notices generally and how to redact or withhold information that is permitted to be withheld or redacted under the Act.

89. The next notice in the sequence will be one of the following:

- a. procurement termination notice: to inform interested parties that a contracting authority has decided not to proceed with the award of a contract after having previously published a tender notice. Private utilities are not required to publish a procurement termination notice;
- b. contract award notice: to notify the market of the outcome of a competitive tendering procedure and to alert the market to the fact that a contract is about to be entered into. It is the contract award notice that initiates any mandatory or voluntary standstill period.

What other guidance is of particular relevance to this topic area?

Guidance on assessing competitive tenders
Guidance on conditions of participation
Guidance on exclusions
Guidance on modifying a competitive procurement
Guidance on covered procurement objectives
Guidance on preliminary market engagement
Guidance on lots
Guidance on time periods
Guidance on contract award notices and standstill

Where can I go for more information or training?

The [Sourcing Playbook](#)

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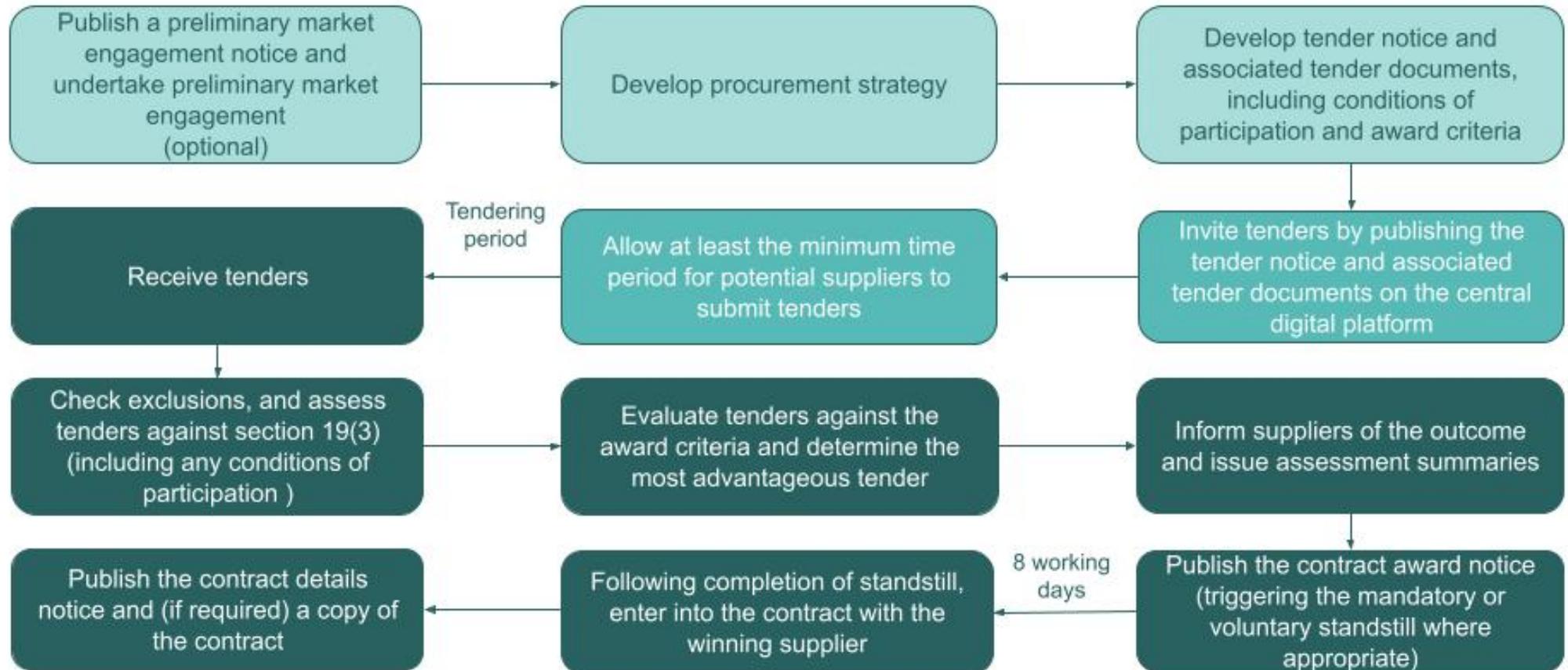
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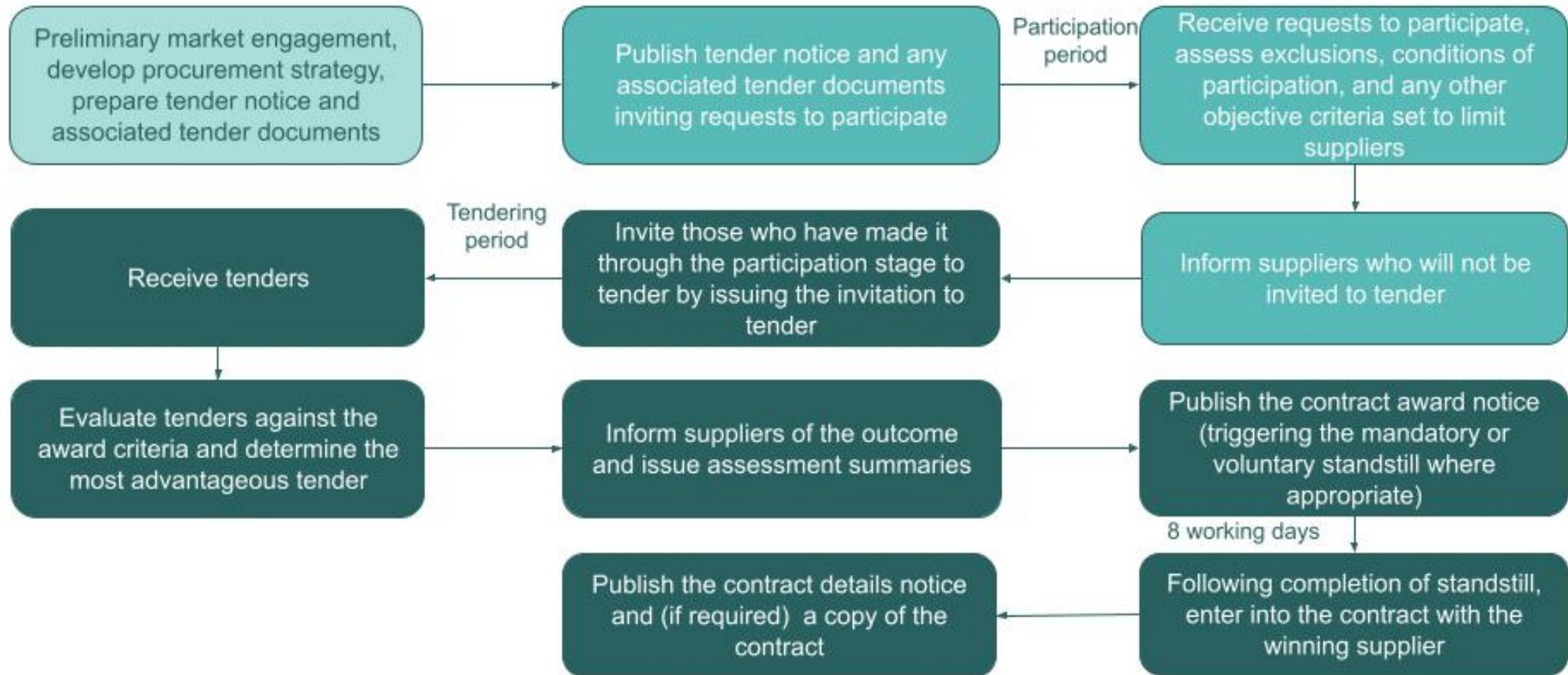
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Annex A-The open procedure³



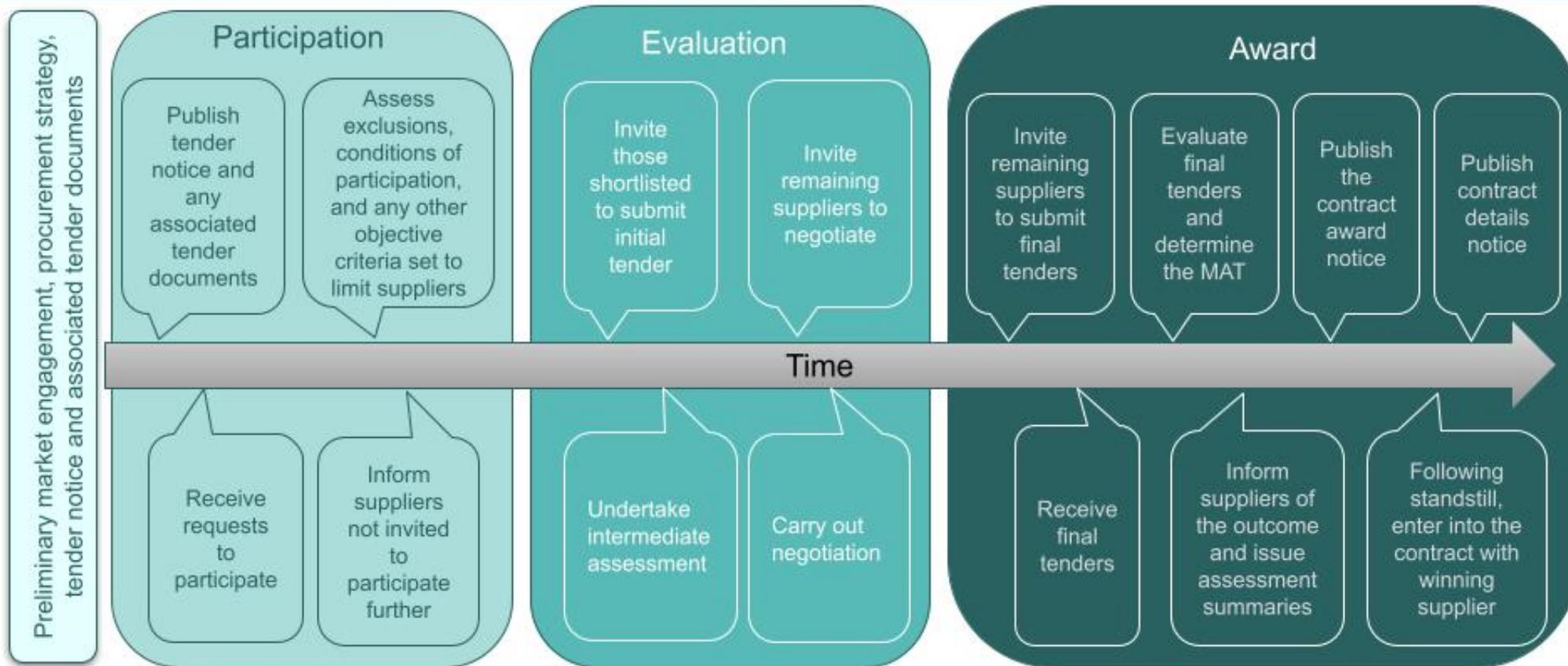
³ The procedure set out in this diagram is provided for illustrative purposes only and does not comprehensively cover all the relevant obligations during the procurement process.

Annex B-Simple two stage competitive flexible procedure, without negotiation or dialogue⁴



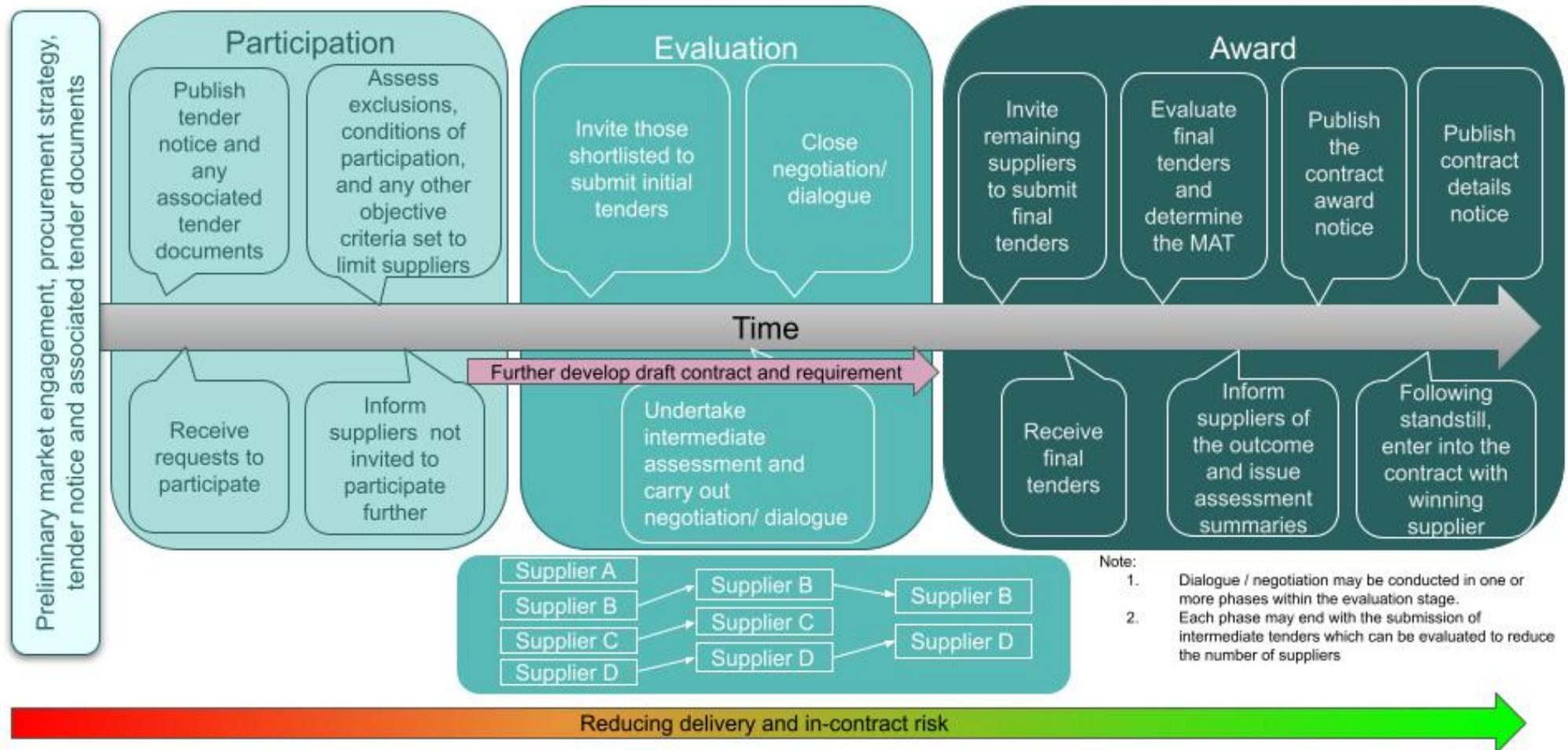
⁴ The procedure set out in this diagram is provided for illustrative purposes only and does not comprehensively cover all the relevant obligations during the procurement process.

Annex C- Multi-stage competitive flexible procedure with limited negotiation⁵



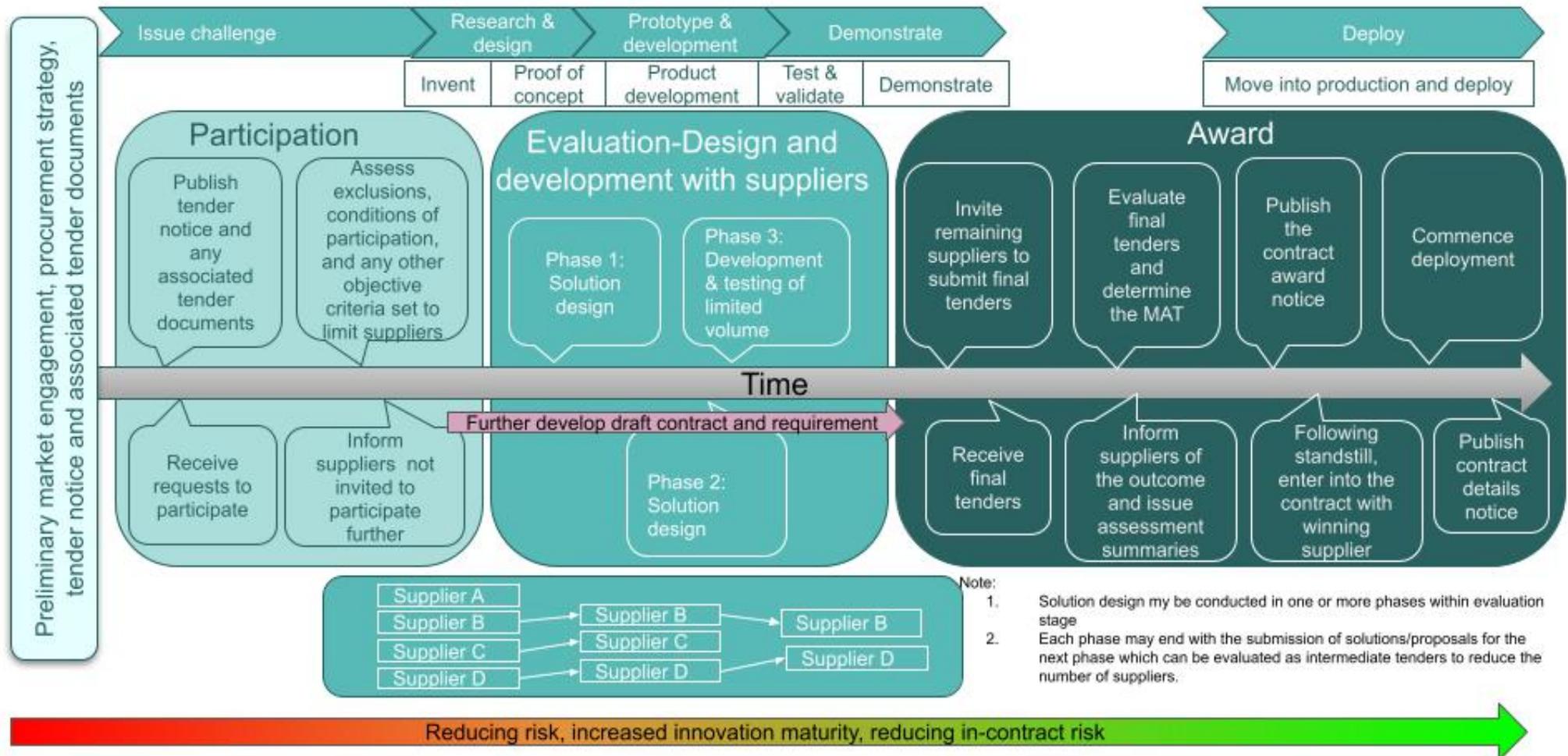
⁵ The procedure set out in this diagram is provided for illustrative purposes only and does not comprehensively cover all the relevant obligations during the procurement process.

Annex D-Competitive flexible procedure with dialogue and/or negotiation to further develop the requirement⁶



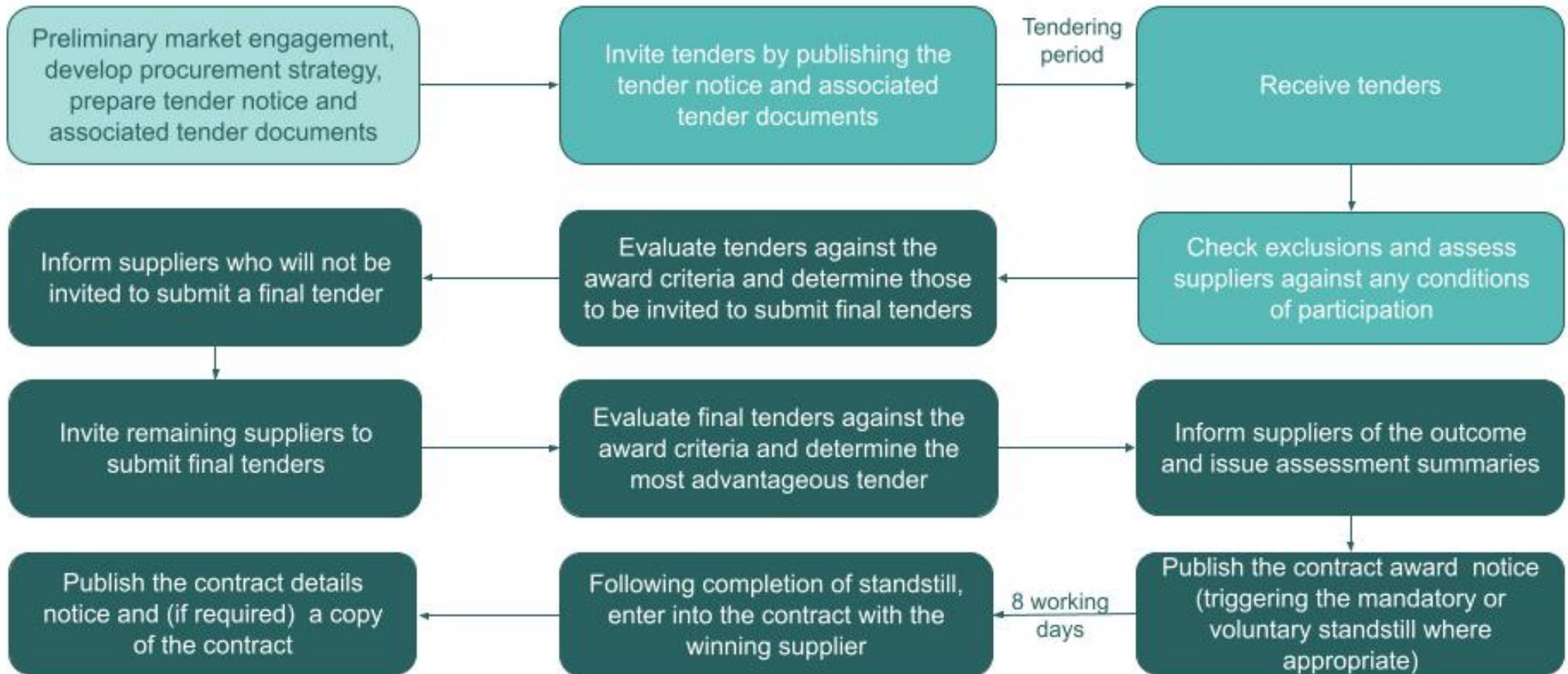
⁶ The procedure set out in this diagram is provided for illustrative purposes only and does not comprehensively cover all the relevant obligations during the procurement process.

Annex E-Competitive flexible procedure when tendering for innovation or product development⁷



⁷ The procedure set out in this diagram is provided for illustrative purposes only and does not comprehensively cover all the relevant obligations during the procurement process.

Annex F-Competitive flexible procedure without a separate participation stage⁸



⁸ The procedure set out in this diagram is provided for illustrative purposes only and does not comprehensively cover all the relevant obligations during the procurement process.