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# Negotiations with Suppliers

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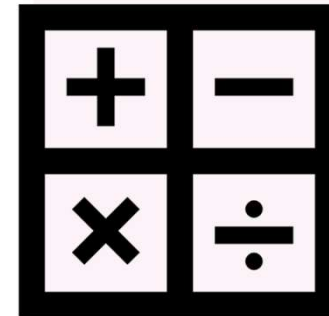
03 June 2026



**How far can you push the line when negotiating with tenderers under the Scottish Regs - including preliminary market engagement, clarifications and post-tender discussions?**

Pushing the line: “happy where you are” versus “if you want a little bit more.”

**AMIX**



How far can you push the line when negotiating with tenderers under the Scottish Regs., including preliminary market engagement, clarifications and post-tender discussions?

- "cautious compliance"
  - *"if you are happy where you are"*
  
- "pushing the line when negotiating"
  - *".....and if you want a little bit more!"*

# The base line for cautious compliance ..... and for pushing the line!



<b>Negotiation - Public Contracts (Scotland) Regulations 2015</b> - higher value	<b>Negotiation - Procurement Reform (Scotland) Act 2014 / Procurement (Scotland) Regulations 2016</b> - lower value
<b>Equally and without discrimination in a transparent and proportionate manner (Reg 19)</b>	<b>Equally and without discrimination in a transparent and proportionate manner (section 8 PR(S)A14)</b>
<b>Preliminary Market Engagement (Reg 41)</b> <i>(non-discrimination and transparency)</i>	- N/A (default s8 PR(S)A14)
- N/A <b>Clarification pre-submission (Reg 19)</b>	- N/A (default s8 PR(S)A14)
<b>Clarification post-submission (Reg 57(5))</b> <i>(equal treatment, transparency)</i>	- N/A (default s8 PR(S)A14)
<b>Competitive Procedure with Negotiation (Reg 30 (12-18))</b> <i>(equal treatment, non-discrimination, confidentiality)</i>	- N/A (default s8 PR(S)A14)

# The base line for cautious compliance ..... and for pushing the line!



Negotiation - Public Contracts (Scotland) Regulations 2015 - higher value	Negotiation - Procurement Reform (Scotland) Act 2014 / Procurement (Scotland) Regulations 2016 - lower value
<b>Competitive dialogue</b> (Reg 31(9-18)) <i>(equal treatment, non-discrimination, confidentiality)</i>	- N/A (default s8 PR(S)A14)
<b>Post-standstill contract amendments</b> (Reg 19 and 72)	- N/A (default s8 PR(S)A14)
<b>Modification</b> (Reg 72)	- N/A (default s8 PR(S)A14) - also P(S)R 3(5)
<b>Light Touch Regime</b> (Reg 76 (2)) <i>(transparency and equal treatment)</i>	- N/A

**MFMA**

**How caution can manifest itself in practice?**

<b>Caution?</b>	<b>Pushing the line?</b>
<p><b><i>Pre-market engagement</i></b></p> <ul style="list-style-type: none"> <li>- Not undertaking any</li> <li>- Limited paper-based RFI</li> </ul>	<ul style="list-style-type: none"> <li>- Facilitated (but documented) discussion</li> </ul>
<p><b><i>Clarification</i></b></p> <ul style="list-style-type: none"> <li>- Blanket “no change”</li> </ul>	<ul style="list-style-type: none"> <li>- Using Reg 57(5) flexibility but mindful of ITT/equal treatment</li> </ul>
<p><b><i>Competitive Procedure with Negotiation</i></b></p> <ul style="list-style-type: none"> <li>- BAFO to single form contract with all bidders</li> </ul>	<ul style="list-style-type: none"> <li>- Negotiating bidder specific contractual solutions</li> </ul>
<p><b><i>Competitive Dialogue</i></b></p> <ul style="list-style-type: none"> <li>- Final bids to single form contract with all bidders</li> </ul>	<ul style="list-style-type: none"> <li>- Dialogue to bidder specific contractual solutions</li> </ul>
<p><b><i>Modification</i></b></p> <ul style="list-style-type: none"> <li>- No modification (even where helpful) owing to “theoretical/hypothetical” potential advantage to bidders</li> </ul>	<ul style="list-style-type: none"> <li>- Is there a real (as opposed to fanciful) prospect that a different tenderer would have won.</li> </ul>

**MFMA**

What the case law “acetate overlay” brings in

Ensure equal treatment, non-discrimination, fairness and transparency (Reg 19)	Examples
Preliminary Market Engagement	<i>Consultant Connect [2022] EWHC 2037 (TCC)</i> <i>Kenman Holdings [2017] CSIH 10</i>
Clarification post-submission	<i>Tideland T-211/02</i> <i>Dem-Master Demolition [2016] CSOH 150</i> <i>Working on Wellbeing [2025] EWCA Civ 127</i>
Post-tender discussions	<i>Siemens [2023] EWHC 2768 (TCC)</i> <i>London Underground [2018] EWHC 2926 (TCC)</i> <i>Varney &amp; Sons [2010] EWHC 1404 (QB)</i>
Competitive Procedure with Negotiation / Competitive Dialogue	<i>Siemens [2023] EWHC 2768 (TCC)</i> <i>Capita Business Services [2023] CSOH 9</i>
Regulation 72	<i>James Waste [2023] EWHC 1157 (TCC)</i> <i>Bechtel [2021] EWHC 458 (TCC)</i> <i>Edenred [2015] EWHC 90 (QB)</i> <i>Gottlieb [2015] EXHC 231</i>

# Pre-market engagement (Reg 41)



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*(1) Before commencing a procurement, a contracting authority may conduct market consultation with a view to preparing the procurement and informing economic operators of the authority's procurement plans and requirements.*

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*(2) For this purpose, a contracting authority may act as it considers appropriate, including seeking or accepting advice from independent experts or authorities or from market participants.*

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*(3) Such advice may be used in the planning and conduct of the procurement procedure, **provided that it does not have the effect of distorting competition and does not result in a violation of the principles of non-discrimination and transparency.***

## Key pre-market engagement cases

- *Consultant Connect [2022] EWHC 2037 (TCC)*
- *Kenman Holdings [2017] CSIH 10*

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# Pre-market Engagement

## Pushing the line? – tips from practice?

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Transparency / clear process – often from PIN

Clear process aims

Clear process records

Objectivity of decisions taken pursuant to the pre-market engagement

# Clarifications pre-tender

## Pushing the line – tips from practice?

AMIA

Process usually entirely set out in ITT conditions

Care to ensure confidentiality but also to ensure equal sharing of appropriate information pursuant to confidential clarification questions

## Clarifications post-submission / pre-decision



### Regulation 57(5)

“Where information or documentation to be submitted by an economic operator is or appears to be incomplete or erroneous, or where specific documents are missing, a contracting authority may request the economic operator concerned to submit, supplement, clarify or complete the relevant information or documentation within an appropriate time limit, provided that such requests are made in full compliance with the principles of equal treatment and transparency.”

## Clarifications post-tender / pre-decision tips from practice (less pushing the line)

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Trend towards ITTs better tying down bids (no qualifications/assumptions)

Usually a “bid compliance” dynamic reducing post-tender clarification

Usually a difficult compliance issue if  
“clarification” is purporting to lead to any  
“restatement of bid”

# Post-tender negotiation

## Pushing the line – tips from practice?

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For complex requirements (CPN and Competitive dialogue), can use the ITT to provide clarity on areas which may be subject to further change

Avoid “bidder Tee’d up” negotiation wherever possible, i.e:

- Ensure bidder “held” without need for amendment

Ensure any proposed amendments between evaluation and award would not be substantial / fall outwith permitted measures under Regulation 72.

# Modification of contracts/Regulation 72 - a brief word



Specific and understood parameters under the 2015 Regulations for contracts above 2015 Regulation thresholds

No specific process beneath 2015 Regulations threshold but overall general principles tend to be mirrored (importantly - also to ensure no circumvention)

***WHY ARE YOU MODIFYING?***

## Slide 18

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**KB1** Noted you only wanted a couple of slides added on this but thought I would check if you wanted reg 72(a-f) slide breakdowns included too?

Kate Burrows, 2026-06-02T10:07:55.105

**AMIA**

**CPN / Competitive Dialogue and the looking  
glass**

## CPN (Reg 30)

- Permit request to participate
- Provide a description of needs
- Include minimum requirements
- Specify award criteria
- Timescales
- May limit participants (min. 3)
- May award on initial tender (if stated) or negotiate up until final tender

MMx

- Must not negotiate minimums
- Treat economic operators **equally**
- Provide information **without discrimination**
- Not reveal confidential information without agreement
- May conduct successive stages

# Competitive Dialogue (Reg 31)



- Permit request to participate
- Out-turn opportunity / contract could involve changes to essential aspects
- May limit participants
- Award criteria
- Define needs KB1
- Time limits
- Open dialogue with participants (min. 3)
- Ensure **equal treatment**
- Provide information **without discrimination**
- Not reveal confidential information
- May conduct successive stages
- Invite solutions presented / specified in dialogue
- Final tender may be clarified, specified and optimised (essential aspects may not change)

## Slide 21

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**KB1**

Yellow highlights on this slide and next slide are words where I couldn't quite make out your notes - grateful if you could check and clarify, thanks

Kate Burrows, 2026-06-02T10:39:39.610

# Competitive Flexible Procedure (s20 PA23)

**MFIA**

- Tender notice
- Tender process
- Authority requirements (sufficiently clear and precise)
- Award criteria (refinement possible (s24))
- Conditions of participation (s19)
- Procedural requirements
- Proportionate means of award
- May have intermediate assessment

# Bigger differences?



## PC (S) R 2015, reg 19

Contracting authorities **must**:  
treat economic operators **equally and without discrimination** and act in a **transparent** and **proportionate** manner

## PA 23 (s12)

An authority **must have regard to**:

- **Sharing information to allow understanding**
- Acting and being seen to act with **integrity**
- Treating suppliers the same unless differences between the suppliers justifies different treatment

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**Thank you  
Any Questions?**



**Because legal matters**