



Lawful Negotiations

White Paper Conference, Dublin

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A&L Goodbody



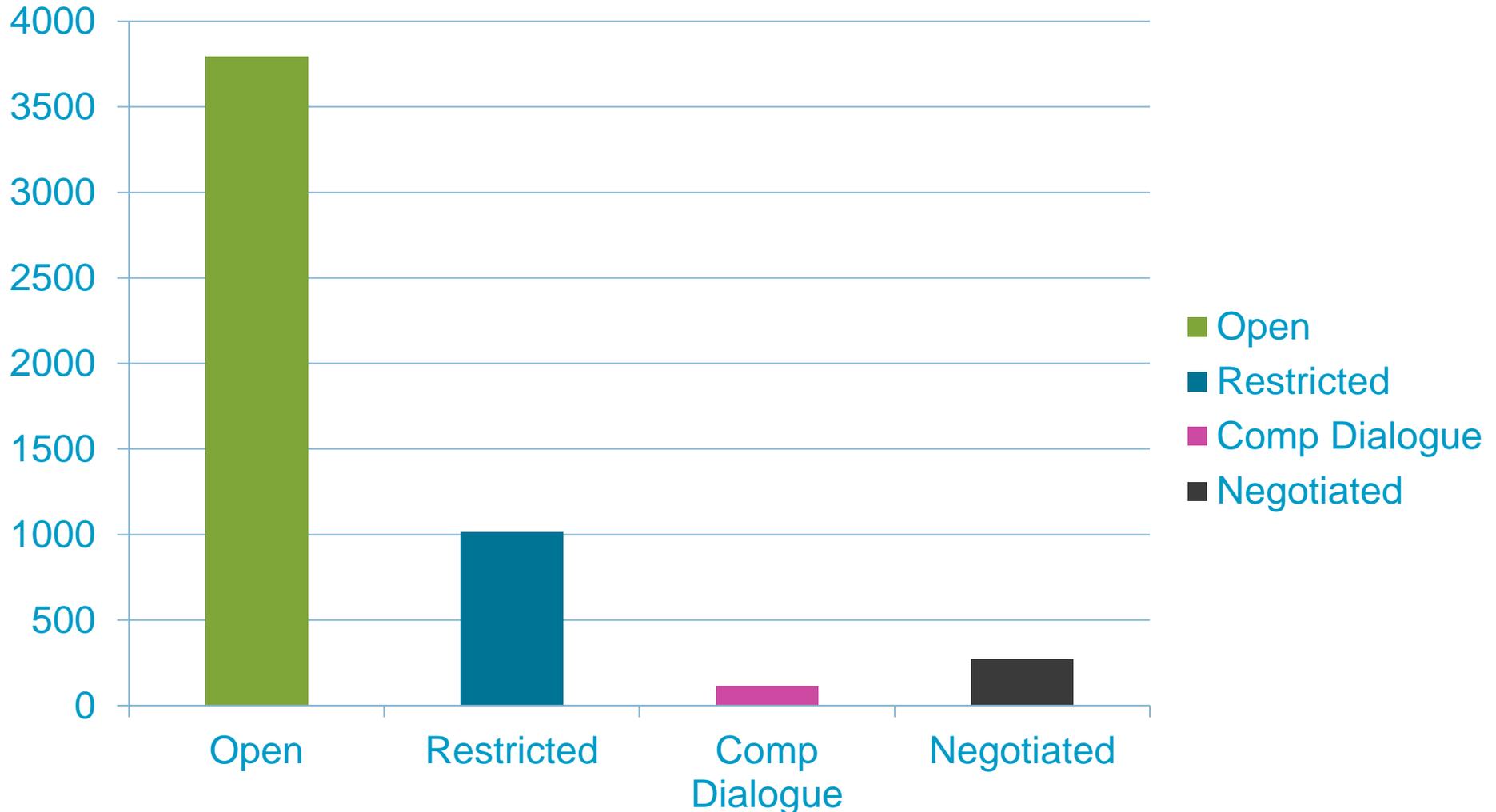
Using real-life examples, how do you create a golden opportunity for lawful negotiation following a final tender in the case of the new competitive procedure with negotiation?

*29(8) Unless otherwise provided for in this Regulation, a contracting authority shall negotiate with a tenderer the initial and all subsequent tenders submitted by that tenderer, **except for the final tenders** within the meaning of paragraph (16), to improve the content of the tenders.*

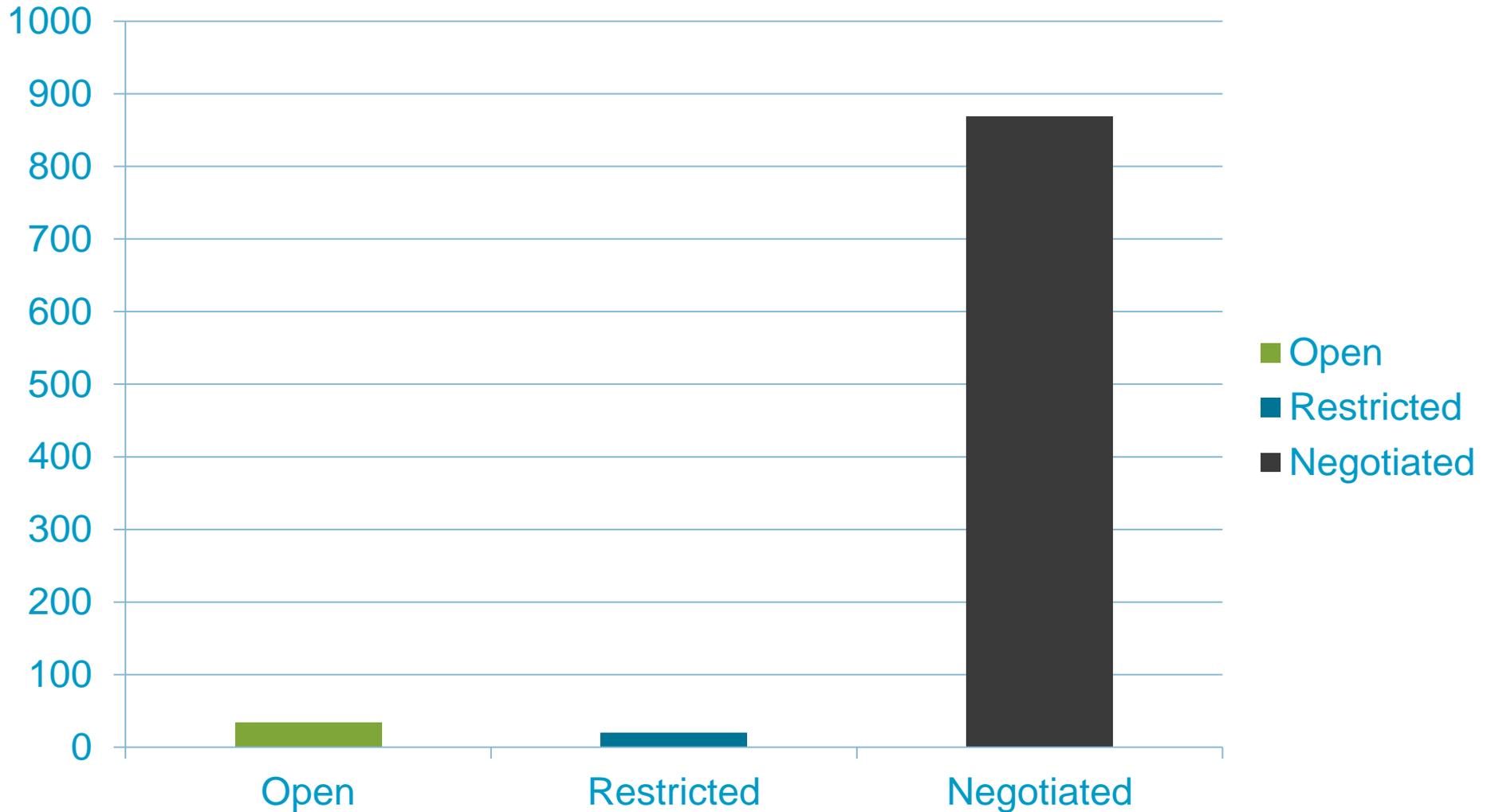
European Union (Award of Public Authority Contracts) Regulations 2016

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1. Does the Irish Public Sector Negotiate?
 2. Do Irish Utilities Negotiate?
 3. What Does it Mean to “Negotiate”?
 4. Grounds for using Competitive Dialogue or the Competitive Procedure with Negotiation
 5. Competitive Dialogue v. Competitive Procedure
 6. What can a Contracting Authority do with Final Tenders in a Competitive Procedure?
 7. Real Life Examples
 8. Creating a Golden Opportunity
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Procedures - Ireland



Procedures - Ireland



In a negotiated procedure, the Directive enables the contracting authority to act flexibly not only at the time it awards the contract but also during the prior discussions. The procedure is not, however, to be equated with private contracting. It requires the contracting authority to play an active role in determining the terms of the contract, with special reference to prices, delivery deadlines, quantities, technical characteristics and guarantees.

“Negotiations”

CAs should indicate beforehand the min requirements which characterise the nature of the procurement & which should not be changed in the negotiations

Recital 45

Award criteria and their weighting should remain stable throughout the entire procedure & should not be subject to negotiations

Recital 45

negotiate... to improve the content

Reg 29

Adequate safeguards ensuring observance of equal treatment & transparency

Recital 45

CAs shall not reveal to the other participants confidential information

Reg 29

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- Where needs cannot be met without adaptation of readily available solutions
 - Where the contract includes design or innovative solutions
 - Where prior negotiations needed because of the nature of the requirement, the complexity or the legal and financial make-up or because of its risks
 - Where the technical specifications cannot be established with sufficient precision
 - In the case of unacceptable/irregular tenders
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- Negotiations needed to get a satisfactory procurement outcome
 - CA unable to define the means of satisfying its needs or of assessing what the market can offer in terms of technical, financial or legal solutions
 - Works includes design or innovative solutions
 - Services or supplies that require adaptation or design efforts
 - Not for off-the-shelf services or supplies
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Comp Dialogue v. Comp Procedure

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	CD	CP
Shortlist down to 3	√	√
Award criteria – best price-quality ratio	√	X
Initial tender basis for negotiations to improve content	X	√
Dialogue to identify and define solutions	√	X
Successive stages	√	√
Right not to negotiate	-	√
No change to minimum requirements or criteria	√	√
Info not disclosed in a discriminatory manner	√	√
Non-disclosure of confidential info	√	√
Negotiation of final tender	√	X

1. Verify (Reg 29(16)(b))

Verify that final tenders are in conformity with the minimum requirements and comply with Reg 56(1)&(2) i.e.:-

- a) comply with the specified requirements, conditions and criteria taking into account Reg 45 (variants)
- b) has been submitted by a tenderer not subject to mandatory or discretionary exclusion & meets selection criteria
- c) meets non-discriminatory rules and criteria referred to in Reg 65 (rules for shortlisting)

2. Assess (Reg 29(16)(c))

Assess the final tenders on the basis of the award criteria

3. Award (Reg 29(16)(d))

Award the contract in accordance with Regs 66-69

4. Clarify (Reg 56(4))

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

5. Change?

5.1 Pre-contract:

- Limited scope?
- Non-material changes arising from clarification

5.2 Post-contract:

- Greater scope?
 - Non-substantial changes (Reg 72(7))
 - Change pursuant to an option clause or variation clause (Reg 72(1)(a))
 - Minor changes (Reg 72(4))
 - Additional works, supplies or services (Reg 72(1)(b))
 - Unforeseeable changes (Reg 72(1)(c))
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- Need for change often arises in complex projects
 - Disproportionate costs/time involved in requiring all tenderers to carry out site surveys, obtain planning permission, obtain credit approval from lenders
 - Lender due diligence at Preferred Bidder stage may lead to row back on risk allocation
 - Change in law/policy (Dublin Waste to Energy Project, Decision S.A. 36591 and VEAT Notice 2013/S 119-202532)
 - External circumstances (London Underground PPP, Decision M264/2002)
 - Change in Technical Specification (*Nordecon v. Rahandusminsteerium* Case C-561/12)
 - Change in Funder Support Letter (SIAC v. NRA [2004] IEHC 128)
 - Refusal of planning permission
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Creating a “Golden Opportunity” (Mitigating the Risk!)

- Pre-market engagement
- Appropriate scoping and specification from outset
- Limit minimum/mandatory requirements
- Appropriate weighting of award criteria
- Clarifications
- Review clauses
- Option clauses
- VEAT Notices
- Notice of Modification of a Contract during its Term

...and if you want to negotiate final tender, use the CD procedure!



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