



# **VIth IPA REGIONAL PUBLIC PROCUREMENT CONFERENCE**

## **UTILITIES: FROM EXCLUSIVE RIGHTS TO LIBERALISATION - THE RATIONALE FOR FLEXIBILITY IN DIRECTIVE 2004/17/EC**

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# **Flexibility in the Utilities Regime**

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5. Differences between the Utilities and Classic sectors
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# Utilities in Europe

## Legislative Development

- Public procurement legislation has existed in the EU since the 1970's
- The original rules were basic, unenforceable and did not include utility companies (known as the Excluded Sectors)
- With the introduction of the Single Market in 1993 public procurement came to be seen as a major weakness which needed to be addressed
- The utilities were defined as the Water, Energy, Transport and Telecommunications Industries

# **Meanwhile.....**

## **The Utilities Were Changing...**

- Most utilities were state-owned or mutualised
- Most utilities were based on geographical monopolies
- Prices were set by regulators not the market
- Utilities were under pressure to act in the national interest and therefore under pressure to buy from national champions
- No real economic drivers – most operated on a cost plus basis

# Utilities Were Changing...

## To..

- Privatised organisations with shareholders
- Split up on functional lines eg breaking transmission from generation
- With many monopoly elements removed or opened to competition
- With prices set by the market
- Many international groups emerged who owned the utilities in a variety of countries
- Move from pressure to allocate a scarce resource to provide service at lowest cost

# **Impact on Procurement**

## **Massive Changes Occurred**

- Move from national champions to best provider
- International groups had less local affiliations
- Reduction in power of trade associations and national specifications
- Move from certainty of supply to economic advantage
- Many companies have changed ownership many times leading to changes of policy and less state influence

# **These Changes Were Envisaged**

## **Utilities Argued for Flexibility**

- Initially utilities argued that they should be completely excluded from the rules
- They argued that they were different from the public sector:
  - Less under Government influence to buy nationally
  - More risk of failure with complex processes and installations
  - Contracts were larger, more complex and more restricted

# Differences Between The Classic and Utilities Regimes

- The utilities regime is more flexible:
  - Automatic exclusion for liberalised sectors
  - Higher thresholds
  - Framework Agreements
  - Qualification Systems
  - Use of negotiated procedures
  - Exclusion for affiliated companies
  - Exclusion for goods for re-sale or re-lease



# Exclusions

- Organisations where the basic conditions for liberalisation have been met are automatically excluded in some sectors eg energy whereas some sectors have been wholly excluded including telecommunications.
- Thresholds are higher in the Utilities meaning fewer contracts are covered
- Contracts to affiliates were excluded on grounds that these were partly commercial bodies
- Goods for re-sale/re-lease excluded to provide a level playing field

# More Flexible Processes

- Framework agreements – possible to simply award contracts where the framework has been advertised – unlike the classic sectors
- Qualification systems – uniquely utilities are allowed to advertise in OJEU and set up a standing list of qualified suppliers in multiple stages and draw from it without a further call for competition
- Negotiated procedure – utilities are permitted greater use of the negotiated procedure

# Lessons Learnt

- The utility rules have been no less successful than the public sector rules
- There is an argument that the public sector should be liberalised to copy the utilities
- Flexibility has been tweaked (some conditions becoming tougher others more flexible)
- New systems and processes have evolved to take account of the laws
- It is difficult for the utilities to sustain the argument that the rules were going to be commercially unfair and impossible to operate