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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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