

APSE Energy workshop: Social finance for solar energy

The procurement question.....

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Procurement legislation

- Public Contracts Regulations 2006
- amended in 2009 – new remedies
- new EU Directives:
 - public sector
 - utilities
 - concessionsin force 17 April 2014
- draft Public Contracts Regulations 2015 – in force?



Why is it relevant?

- regulates purchasing by contracting authorities including local authorities and housing associations
- contracts for services, good/supplies, works/construction activities above £ threshold
- below £ threshold, EU Treaty principles may still apply
- failure to follow may lead to challenge
- all about a level playing field

What does it cover?



- new EU Directive definition of procurement:
 - *"the acquisition by means of a public contract of works, supplies or services by one or more contracting authorities from economic operators chosen by those contracting authorities, whether or not the works, supplies or services are intended for a public purpose"*
- new EU Directive definition of public contract:
 - *"contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services"*

....there are some exemptions

- Relevant exemptions from PCR:
 - land acquisition
 - service concessions
 - case law indicates that EU Treaty principles apply (where there is cross border interest)
 - service concessions will be regulated when the new EU Directive on concessions is transposed into UK law (rumoured to be 2016)
- Is your scheme excluded from procurement altogether?

Community energy schemes



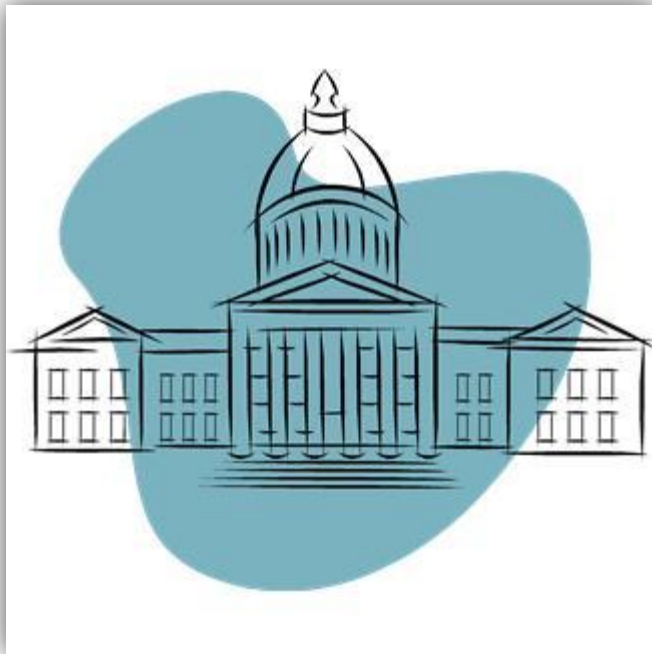
The key question: are you procuring any works, services or supplies for yourself or are you asking someone to step into your shoes?

Considering local authority/housing association activity...



Note: case law arguments that EU Treaty principles may still apply

Supply of electricity.....



- if the LA or HA will be supplied with electricity = procurement rules apply
- OJEU contract notice and tender process
- remember EU Treaty principles throughout
- consider community objectives and delivery vehicles as part of procurement strategy

VEAT notices

- voluntary ex ante transparency notices published in the Official Journal of the European Union
- if valid, protect against contract cancellation remedy (“ineffectiveness”)
- alerts the market before you sign a contract
- risk mitigation
- examples published

Take away points....

- be alive to the procurement rules as part of your scheme strategy
- consider your involvement/roles within the scheme and activities you intend to undertake
- good argument that procurement rules do not apply to schemes solely involving leases/licences of solar panels, no supply of electricity to the LA or HA and the provider not stepping into the shoes of the LA or HA
- residual risk that EU Treaty principles apply?
- carefully consider publishing a VEAT notice



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