

**HOMES AND COMMUNITIES AGENCY
2011-15 AFFORDABLE HOMES PROGRAMME
FRAMEWORK DELIVERY CONTRACT**

- 1 This note is to assist providers in considering the Framework Delivery Agreement, and to outline the HCA's approach to the contract. This note does not form any part of the contract itself.
- 2 The 11-15 Affordable Homes Programme will be delivered through providers (housing associations, local authorities and developers) entering into a Framework Delivery Agreement (FDA) with the Agency. Each provider will have a FDA for the programme enabling it to offer the new Affordable Rent tenancy and receive grant funding for affordable homes to be constructed and completed over the next four years. Providers whose programme offer includes new supply both in and out of London will be required to enter a separate FDA for each. The FDA for London will become a contract with the Mayor of London from 1 April 2012 following transfer of the HCA's investment functions in London to the Mayor's Office, in line with the Localism Bill.
- 3 Given the four-year programme duration, the FDA offers a number of flexibilities designed to accommodate potential change in its latter stages but still meet Agency aspirations for delivery of affordable homes.
- 4 An FDA may be for a single organisation. There is a separate FDA for Providers working together in consortia arrangements..
- 5 Heads of terms for the contract were published earlier this year and the full contract terms, now available on the HCA website, build on these and take account of provider feedback.
- 6 FDA key features: Programme Offer**
- 7 The FDA establishes a "Programme Offer" which is the agreed high-level four-year programme for a provider (working singly or in a consortium), which has been assessed, negotiated and agreed by the Agency. The Programme Offer forms a baseline against which performance and delivery is measured.
- 8 The Programme Offer sets out the number, tenure and type of new homes to be built in the areas in which those homes are intended to be delivered. It also sets out forecast timescales for delivery, the quality standards to be achieved together with the development costs, the provider's own contributions and the funding required from the Agency. The total funding in the offer is the "Allocated Grant", which is the maximum aggregate payment that can be made to the provider for the base programme offer.
- 9 The Programme Offer also records the number of re-let "conversions" of existing stock to the new Affordable Rent tenure and the consequent investment capacity generated to fund the offer's new affordable homes. The Programme Offer is input to the Agency's Investment management System (IMS).

10 Agreed payment rate

- 11 To incentivise delivery, the Agency will “pay by results” approach for all completions in a provider offer. The total amount of Agency funding in the Programme Offer is applied across all homes due to be delivered under the offer to produce an “Agreed Payment Rate” (for each of Affordable Rent homes and for Affordable Home Ownership homes). This will be paid at practical completion for all homes delivered under the offer. Providers make their claims through IMS.

12 Firm schemes

- 13 To progress their programme providers will propose a “Firm Scheme” to the Agency for acceptance in line with the Programme Offer. Once the Agency has agreed a Firm Scheme, it has an obligation to make payments for those homes at completion at the agreed payment rate provided delivery is in line with the Programme Offer, and the provider has confirmed start on site on IMS within 10 days of that occurring.
- 14 Once a Firm Scheme is agreed through IMS, its details then become the “Firm Scheme Obligations” (e.g. the design standards, number of larger homes to be delivered or the type of supported housing to be provided). There is scope to agree changes to Firm Schemes, but these would be expected to be primarily in respect of delivery timing. The Agency cannot make spending commitments beyond March 2015, so cannot agree to completions which are forecast to occur after this. Therefore all Firm Schemes must complete by this date. However, we expect to work with providers through the quarterly contract review process (see below) to understand the risks to delivery of schemes in the later stages of the programme period, and how those risks might be mitigated – for example through agreeing flexibility to the phasing of schemes.

15 Monitoring and reporting

- 16 The FDA requires the Agency and provider to hold quarterly contract review meetings to review delivery performance. This encompasses: actual (i.e. a “look back”) and proposed delivery (the “look forward”). Providers are required to provide delivery monitoring information for those meetings, and to confirm accuracy of their information (including information input to IMS) via the “Officer’s Certificate”. This certification will be possible via IMS.

17 Programme Change

- 18 As already highlighted, it is anticipated that provider programmes may change over the course of the four-year programme period. The Programme Offer is therefore capable of change and this will be agreed through the “Programme Change” mechanism. Where a Programme Change is proposed (by either side) and agreed, that change is input to IMS and then forms the new baseline Programme Offer.
- 19 The Programme Change mechanism is therefore an important concept in the on-going programme and contract management of providers. The FDA confirms that both parties will act in good faith in seeking to agree a Programme Change.

- 20 A wide range of types of change may be proposed and agreed to a Programme Offer (see Annex 3 of the Framework Document). But the key principle is to achieve (or increase) delivery of new affordable homes. Therefore, wherever possible, providers will be given the opportunity to remedy any issues and maintain delivery.
- 21 Should there be changes which providers are unable to accommodate within their own resources it will not be possible to compensate for this by increasing the amount of HCA funding available (ie increasing the agreed payment rate while delivering the same, or a smaller number of homes). In such circumstances, it is more likely that the Agency would agree a reduction in the number of new homes to be delivered, and a consequential reduction in the total allocation of funding available to the provider.

22 Programme default

- 23 “Programme Default” can, in principle, allow the Agency to terminate the entire contract. However, the condition is drafted to allow providers substantial opportunity to put matters right. Programme Default events fall into two categories: those capable and incapable of remedy. The latter e.g. fraud or misrepresentation allow, in principle, termination forthwith. The former, the provider is allowed time to remedy (30 working days). It will be key to good management of the contract, that both parties act in good faith, and that a programme default is not called on a “hair trigger” basis. Ultimately, the concept of Programme Default (and termination) exists to protect the Agency and acts as a backstop where a provider consistently fails to deliver, and is unable to demonstrate that it can put things right.
- 24 In circumstances where programme default has occurred and possible termination of the entire programme might follow, a number of potential actions may arise.
- Firstly, where there is programme default for which remedy has not yet been agreed, the Agency may choose not to agree new firm schemes until such times as it knows that remedy for the default has been agreed (to incentivise both sides to reach agreement quickly).
 - Secondly, if termination occurs, then, in the case of breaches deemed incapable of remedy (such as insolvency or misrepresentation) the Agency may terminate without any further liability to the provider. However, where termination arises as a result of failure to agree a remedy for breach (including a failure to agree a Programme Change), the Agency will allow the provider to proceed with agreed firm schemes and will pay on completion of the homes in the normal way, provided those have been delivered in line with the agreed Programme Offer.

25 Repayment of grant and adjustments following termination

- 26 It is anticipated that circumstances in which termination of the whole Agreement occurs will be extremely rare. However, because the Agency pays for completions based on the Agreed Payment Rate, early termination of the FDA could lead to circumstances where the payments made to date, are in excess (or less than) the funding required to deliver the programme at that stage. An example of the former would be where early delivery has been achieved mainly through schemes comprising non attributed grant units and none or low numbers of schemes which require funding have been delivered. Where payment has been made in excess of required funding, a balancing payment will be due from the provider.
- 27 If payment on completion up to the point of termination is less than the funding required for the homes which have been delivered, the Agency will be unable to make an additional balancing payment (delivery of the programme overall will only be achieved if the aggregate VFM can be achieved – there is therefore no scope to increase the average funding per unit rate for individual providers or programmes without jeopardising delivery of the programme as a whole). In such circumstances, the provider will be permitted, by agreement (including with the TSA) to continue to generate capacity through conversions up to the amount required to pay for the programme delivered to date (less the funding already paid). An annex to the FDA illustrates both scenarios.
- 28 Other circumstances (in addition to termination) where it is deemed that any grant already paid may be recoverable and the method of calculation are set out in the “Repayment of Grant” condition. This could be where a Firm Scheme has not met its obligations, for example, if the Compliance Audit process finds that a Firm Scheme has been delivered to a lower design standard. This scenario is included in the FDA annex.
- 29 Importantly, the Agency will not seek to recover payment which has been correctly allocated (see below), for completed homes which have been delivered in line with the obligations of the FDA.

30 Allocation of grant

- 31 The application of the Agreed Payment Rate, means that individual schemes will receive payment at completion based on the number of homes delivered. It is however, very important that the agreed payment rate is not confused with the amount of funding which it is agreed is required for a scheme and which is used for future recovery calculations e.g. following disposal of a home. The starting point for this is the “Total Grant Required” – the maximum amount of grant which can be apportioned to a scheme for recovery purposes.
- 32 Annually, a provider must submit a return reconciling grant payments received against the total grant required for individual schemes. Grant cannot be allocated in excess of the Total Grant Required, nor allocated to schemes comprising non attributed grant units.

33 Standard conditions

- 34 The FDA includes a number of standard obligations used in Government contracts covering, for example, Freedom of Information, confidentiality and health & safety.

35 Q & A

36 The requirement to practically complete all homes by March 31st 2015 means that providers could be faced with capacity constraints in the latter stages of the programme. Can the Agency mitigate this by offering flexibility to complete in 2015 -2016?

37 The Agency currently has no resource beyond the current Spending Review period, and so cannot make any commitments after March 2015.

38 Once in contract, we will work with providers to mitigate this risk as part of the quarterly contract review meetings through their “forward look” and the associated ability to agree programme changes. This is intended to ensure that risks in delivering allocations are highlighted and dealt with at sufficiently early stages.

39 Can the Agency mitigate the risk of schemes missing the March 2015 deadline by allowing payments at start on site (to provider’s solicitor) in 2014-15 for draw-down in the following year (on practical completion)?

40 As outlined above, the contract review process is intended to reduce the risk of schemes missing the March deadline. There is also the possibility of subdividing schemes (by phases) to maximise the number of homes for which grant draw-down at completion can be applied within the backstop date. We cannot pay for completions in advance of those occurring, as this would constitute payment in advance of need.

41 Is the framework sufficiently flexible to accommodate changing offer assumptions?

42 Programme change is intrinsic to the 2011-15 contractual framework because it is likely that initial programme offers will vary through the four years. Therefore a wide concept of Programme Change has been drafted to allow flexibility where changes to the agreed offer are necessary, as outlined above.

43 The HCA is contractually committed to act reasonably and in good faith in seeking to reach agreement over Programme Changes. The Agency's primary focus is to maximise the delivery of new supply and will offer providers reasonable opportunities to do so, including to propose remedies where required.

44 Could a termination event lead to: repayment of all grant received by the defaulting consortium member or all grant received by all consortium members, or only the grant for the failed scheme?

45 As outlined above, it is anticipated that termination of the FDA will be rare.

46 As payment is made at completion, it is more likely that default would lead to withholding of payment. Assuming a prohibited act had not occurred, a default would not require repayment of all grant received by the defaulting member or other members. In this case default would result in no grant payment for the failed scheme. Where payments under the agreed payment rate differ from the total grant required, there may be a scenario where a balancing payment is due at termination. But termination is not intended to lead to repayment of all grant where agreed schemes had been delivered.

47 The impact in terms of repayment will depend upon the act/omission of each consortium member. The general principle is that if and to the extent that the relevant consortium member is responsible for a repayment event, that member be liable to repay. The lead member will be liable to repay grant paid not yet attributed to individual schemes.

48 Will progress be monitored and measured against the progress of other provider FDAs?

49 No, it will be measured against the provider's own delivery forecasts. Performance management is focussed on the contracted parties. But significant non-performance against delivery forecasts might open a discussion with the Agency about reducing allocations to allow those to be applied to providers with clear capacity and a proven track record to be able deliver more if further allocation were made available.

50 How will the Agency treat savings achieved by providers?

51 Overall, the presumption is to endeavour to maximise delivery of new supply. If costs savings are achieved but delivery is broadly in line with the agreed programme offer expectations, we will encourage providers to go further and deliver more affordable homes.

52 However, if a provider failed to deliver a higher cost element of its allocation, for example, only smaller units or not in the higher cost areas originally agreed, this would be addressed through the quarterly contract reviews and the Programme Change provisions. The provider would be offered the opportunity for remedy, but if programme delivery is not in line with the agreed Programme Offer, that could lead to a reduction in the aggregate allocation.

53 Can a consortium contract have grant rates that vary by member?

54 The agreed payment rate is a blended result of a provider's overall offer and provides an incentive to delivery across all schemes. For consortia arrangements the Agency is not prescriptive on the payment arrangements a Lead Partner agrees with its members. It is therefore anticipated that applying a single payment rate should be workable for the vast majority of contracts.

55 Can the Agency be more specific about the liabilities of consortium members?

56 The obligations assumed by lead partner and members will depend on their respective roles e.g. in some cases the lead may take on the development function on behalf of some members. The consortium members also have the opportunity to remedy the default of others but if they chose not to take up that opportunity, they are not contractually liable for a failure in the delivery obligations of, for example, departing members.

57 It is likely however that a Programme Change would result to reflect the change in what the consortium was then capable of delivering. To the extent that this has implications for the remaining consortium members, the Agency would expect that to be regulated through the terms of the consortium arrangements.

58 Programme changes could result in removal of, new or replacement consortium members. It is not the Agency's intent to operate "punitively" in respect of remaining members. Any programme change as a result of members changing would be proportionate to the delivery expected from the revised programme offer.

59 Will consortium members be "forced" to remedy the shortcomings of others?

60 No. It is not the intention to act punitively with respect to consortium members.