

dated

2011

Homes and Communities Agency

and

[Provider]

Short Form Agreement

in relation to the Affordable Homes Programme (ex RSL) 2011-2015

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Framework Delivery Agreement

dated

Parties

- (1) **Homes and Communities Agency**, a body corporate under Section 1 of the Housing and Regeneration Act 2008, of Central Business Exchange II, 406-412 Midsummer Boulevard, Central Milton Keynes MK9 2EA (including any statutory successor) (the **Agency**); and
- (2) [] (company/I&P registration number []) whose registered office is at [] (the **Provider**).

Introduction

- (A) The Agency is empowered under Section 19 of the Housing and Regeneration Act 2008 inter alia to provide financial assistance for the purposes of its objects and under Section 5 of that Act to facilitate the provision of housing.
- (B) The Regulator's Tenancy Standard permits Private Registered Providers to let dwellings at an Affordable Rent only where a new supply agreement has been entered into between such provider and the Agency .
- (C) The Agency has consented to enter into this Agreement to facilitate the provision and supply of housing which is to be let by the Provider at an Affordable Rent. The Agency has also consented to the Provider's use of RCGF proceeds to subsidise the costs to be incurred by the Provider in providing such housing.

1 Definitions and interpretation

1.1 Definitions

In this Agreement unless the context otherwise requires the following terms shall have the meanings given to them below:

Acceptance Date means the date upon which the Agency accepts a Developable Scheme as a Firm Scheme pursuant to Condition 4.2;

Actual Development Costs means in respect of a Firm Scheme the amount of Development Costs actually incurred by the Provider in developing that Firm Scheme.

Additional Design and Quality Standards means in respect of each Firm Scheme the standards offered by the Provider and accepted by the Agency through IMS which are additional to the requirements of the Design and Quality Standards;

Affordable Dwelling means a house, flat or maisonette developed or refurbished pursuant to this Agreement and as more particularly described in the relevant Firm Scheme Details;

Affordable Housing means subsidised housing provided by the Provider that will be made permanently available as low cost rental accommodation (as defined in Section 69 or the HRA 2008) let on an Affordable Rent

Affordable Rent means a rent (inclusive of service charges) which does not exceed eighty per centum (80%) of the market rent for an equivalent property of the relevant size and location) such rent to be assessed and set in accordance with the requirements of the Tenancy Standard;

Affordable Rent Dwelling means an Affordable Dwelling to be occupied on an Affordable Rent basis;

Agreed Purposes means the purposes for which each of the Affordable Dwellings is to be used as such purposes are described in the Firm Scheme Details;

Agreement means this Short Form Agreement (including its Schedules and Appendices (if any));

AHP means the 2011/15 Affordable Homes Programme as described in the Framework Document;

Balancing Sum means such sum as represents the amount by which Public Sector Subsidy in respect of a Firm Scheme exceeds the aggregated Actual Development Costs incurred by the Provider in the delivery of such scheme;

Building Contract means the contract entered into between the Provider and the Building Contractor relating to the construction and development of a Firm Scheme;

Building Contractor means the building contractor or developer appointed or to be appointed by the Provider in respect of a Firm Scheme;

Business Day means any day other than a Saturday, Sunday or a statutory Bank Holiday in England;

Capital Funding Guide means the "Affordable Housing Capital Funding Guide" published on the Agency's website or any successor guide published by the Agency (or any successor body) as updated from time to time;

CDM Regulations means the Construction (Design and Management) Regulations 2007 S.I. No. 320;

Compliance Audit means the procedure (in a form advised by the Agency from time to time) by which an auditor independent of the Provider certifies whether a Firm Scheme developed pursuant to this Agreement satisfies the Agency's procedural compliance requirements (as described in the Capital Funding Guide);

Confidential Information means in respect of the Agency all information relating to the Agency's business and affairs, its employees, suppliers including IMS systems, data and software programs and otherwise relating to the existence or terms of this Agreement in respect of which the Provider becomes aware in its capacity as a party to this Agreement or which is received by the Provider in relation to this Agreement from either the Agency or any of its advisers or from any third party if the information was obtained by that third party directly or indirectly from the Agency or any of its advisors in whatever form in either case (including information given orally and any document electronic file or other means of recording or representing information which includes derives or is copied from such information) and in the case of the Provider means such specific information as the

Provider shall have identified to the Agency in writing prior to the date hereof as confidential information for the purposes of this Agreement but excluding in each case Excluded Information;

CORE means the national information source "Continuous Recording" that records information on new Affordable Housing occupiers and the properties they rent or buy;

Corporation means The Housing Corporation, a body corporate established under the Housing Associations Act 1985, whose investment functions were transferred to the Agency on 1 December 2008 pursuant to the HRA 2008;

Design and Quality Standards means the standards set out in the Corporation's publication entitled "Design and Quality Standards April 2007";

Developable Scheme means each proposed scheme for the development (including, where relevant, the refurbishment) of Affordable Housing submitted by the Provider to the Agency pursuant to Condition 4.1;

Development Costs means the costs relating to the development of a Firm Scheme incurred or to be incurred in respect of such Firm Scheme by the Provider in respect of the heads of expenditure set out in Part 1 to Schedule 1 or such other heads of expenditure as the Agency may in its absolute discretion agree in respect of any Firm Scheme **provided that** any costs falling within the heads of expenditure set out in Part 2 to Schedule 1 shall not be capable of being treated as Development Costs;

DPA means the Data Protection Act 1998;

DPF means the Disposal Proceeds Fund maintained by the Provider in accordance with the requirements of Section 177 of the HRA 2008;

EIR means the Environmental Information Regulations 2004, together with any guidance and/or codes of practice issued by the Information Commissioner in relation to such statutory instrument;

EIR Exemption means any applicable exemption to EIR;

EU Procurement Regime means all applicable United Kingdom and European procurement legislation and any implementing measures and any other legislation in connection with the procurement of works, supplies or services including European Union directives 2004/18/EC, 89/665/EEC and 2004/17/EC, United Kingdom Statutory Instruments 1991/268, 1995/201, 1993/3228 and 2006/5 insofar as the same are applicable;

Excluded Information means Confidential Information:

- (a) disclosure of which is:
 - i reasonably required for the performance of either party's obligations under this Agreement (including disclosure to either party's professional advisers or commercial funders);
 - ii required by Legislation, Parliamentary obligation or the rules of any governmental or regulatory body having the force of law;

- iii required of the Agency by any other department, office or agency of the Government; or
 - iv is necessary for the purpose of the examination, auditing or certification of either party's accounts or any examination pursuant to Section 6(1) of the National Audit Act 1983 of the economy, efficiency and effectiveness with which the Agency has used its resources; or
- (b) which is (at the point of disclosure by either party) demonstrably generally available and in the public domain (otherwise than as a result of a breach of Condition 10);

Exempted Information means any Information that is designated as falling or potentially falling within the FOIA Exemptions or the EIR Exemptions;

Financial Assistance has the meaning set out in Section 19 of the HRA 2008;

Firm Scheme means a scheme for the development or refurbishment of Affordable Housing accepted by the Agency pursuant to Condition 4.2 details of which are set out in the Firm Scheme Details;

Firm Scheme Completion Date means the date for completion of the relevant Firm Scheme set out in the Firm Scheme Delivery Timetable;

Firm Scheme Default has the meaning given to it in Condition 3.1;

Firm Scheme Delivery Timetable means the timetable for construction and completion of a Firm Scheme as agreed by the Agency through IMS;

Firm Scheme Details means the descriptive and other details in respect of each Firm Scheme as accepted by the Agency through IMS (as the same may be varied from time to time in accordance with the terms of this Agreement);

Firm Scheme Obligations means the Provider's obligations under Conditions 2.4.1 and 5 inclusive;

FOIA means the Freedom of Information Act 2000, and any subordinate legislation made under such Act from time to time together with any guidance and/or codes of practice issued by the Information Commissioner in relation to such legislation;

FOIA Exemption means any applicable exemption to FOIA;

Framework Document means the Agency publication entitled "2011-15 Affordable Homes Programme – Framework";

Fund Proceeds means those proceeds of the DPF and/or RCGF utilised by the Provider in meeting in whole or part the Development Costs;

Funding Conditions mean the Funding Conditions set out within the Capital Funding Guide, as formally accepted by the Provider's board of management and indicated as such on IMS;

HRA 2008 means the Housing and Regeneration Act 2008;

IMS means the Agency's on-line investment management system from time to time or any successor system;

Information means in relation to:

- (a) FOIA, the meaning given under section 84 of the FOIA and which is held by the Agency at the time of receipt of an RFI; or
- (b) EIR, has the meaning given under the definition of "environmental information" in section 2 of EIR and which is held by the Agency at the time of receipt of an RFI;

Information Commissioner has the meaning set out in Section 6 of the DPA 1998;

Insolvency Event means the occurrence of any of the following in relation to the Provider;

- (a) it is unable or admits an inability to pay its debts as they fall due, suspends making payments on any of its debts or, by reason of actual or anticipated financial difficulties, commences negotiations with one or more of its creditors with a view to rescheduling any of its indebtedness;
 - (b) the value of its assets is less than its liabilities (taking into account contingent and prospective liabilities);
 - (c) a moratorium is declared in respect of any indebtedness or the Agency receives a notice under Section 145 of HRA 2008;
 - (d) any corporate action, legal proceedings or other procedure or step is taken in relation to:
 - i the suspension of payments, a moratorium of any indebtedness, winding-up, dissolution, administration or reorganisation (by way of voluntary arrangement, scheme of arrangement or otherwise) other than a solvent liquidation or reorganisation on terms previously approved by the Agency (such approval not to be unreasonably withheld or delayed);
 - ii a composition, compromise, assignment or arrangement with any of its creditor;
 - iii the appointment of a liquidator (other than in respect of a solvent liquidation on terms previously approved by the Agency (such approval not to be unreasonably withheld or delayed), receiver, administrative receiver, administrator, compulsory manager or other similar officer;
 - iv enforcement of any Security over any assets of the Provider; or
 - v any analogous procedure or step is taken in any jurisdiction;
- other than any winding-up petition which is frivolous or vexatious and is discharged, stayed or dismissed within ten (10) Business Days of commencement; or

- (e) any expropriation, attachment, sequestration, distress or execution affects any asset or assets of the Provider which has a material adverse effect on the Provider's ability to discharge its obligations under this Agreement;

Legislation means:

- (a) any Act of Parliament;
- (b) any subordinate legislation within the meaning of Section 21(1) of the Interpretation Act 1978;
- (c) any exercise of the Royal Prerogative; and
- (d) any enforceable community right within the meaning of Section 2 of the European Communities Act 1972;

in each case in the United Kingdom;

NHBC means the National House-Building Council;

Open Book means the declaration of all price components including profit margins, central office overheads, site overheads, preliminaries, contingencies and the cost of all materials, goods, equipment, work and services with all and any books of accounts, correspondence, agreements, orders, invoices, receipts and other documents available for inspection;

Partnering Programme Agreement means an agreement of that name concluded between the Agency (including any predecessor body) and the Provider in relation to the Corporation's National Affordable Housing Programme 2008 -11;

Practical Completion means that stage in the execution of a Firm Scheme when the Firm Scheme has been completed in accordance with the terms of the relevant building contract and/or the terms of this Agreement being fit for beneficial occupation as a residential development in accordance with NHBC or equivalent requirements current at the date of inspection subject only to the existence of minor defects and/or minor omissions at the time of inspection which are capable of being made good or carried out without materially interfering with the beneficial use and enjoyment of the Firm Scheme and which would be reasonable to include in a snagging list, and Practically Complete shall be construed accordingly;

Private Registered Provider has the meaning ascribed to it in Section 80 of the HRA 2008;

Prohibited Act means:

- (a) offering, giving or agreeing to give to any servant of the Agency any gift or consideration of any kind as an inducement or reward:
 - i for doing or not doing (or for having done or not having done) any act in relation to the obtaining or performance of this Agreement; or

- ii for showing or not showing favour or disfavour to any person in relation to this Agreement;
- (b) entering into this Agreement or any other agreement with the Agency relative to this Agreement in connection with which commission has been paid or has been agreed to be paid by the Provider or on its behalf, or to its knowledge, unless before the relevant agreement is entered into particulars of any such commission and of the terms and conditions of any such agreement for the payment thereof have been disclosed in writing to the Agency;
- (c) committing any offence:
 - i under Legislation creating offences in respect of fraudulent acts;
 - ii at common law in respect of fraudulent acts in relation to this Agreement; or
 - iii under the Prevention of Corruption Acts 1889-1916 or the Bribery Act 2010 (once in force); or
- (d) defrauding or attempting to defraud or conspiring to defraud the Agency or the Regulator;

Provider's Representative means the Provider's Development Director or such other person agreed by the Agency to act as the Provider's representative from time to time for the purposes of this Agreement;

Public Sector Subsidy means all funding or subsidy in relation to the Firm Scheme in money or money's worth (including the Fund Proceeds) received or receivable by the Provider from public sector bodies including for this purpose funding from the European Commission, government bodies (whether national or local) or bodies in receipt of lottery funds from the National Lottery Distribution Fund pursuant to the National Lotteries Acts 1993 and 1998 and any further funding by the Agency not provided under this Agreement;

RCGF means the Recycled Capital Grant Fund maintained by the Provider in accordance with the Recovery Determination;

Recovery Determination means the Recovery of Capital Grants and Recycled Capital Grant Fund General Determination 2006;

Register means the register maintained by the Regulator pursuant to Section 111 of the HRA 2008;

Registered Provider means a body entered on the Register as a non-profit organisation (as such term is defined in Section 115 of the HRA 2008);

Regulator means the body established pursuant to Section 81 of the HRA 2008 or any other body with responsibility for carrying on substantially the same regulatory or supervisory functions;

Rental Conversions means in relation to any dwelling owned by the Provider an increase in the rent chargeable for that dwelling from a Social Rent to an Affordable Rent;

Request for Information or RFI shall have the meaning set out in FOIA or any request for information under EIR which may relate to a Firm Schemes, this Agreement or any activities or business of the Agency;

Section 106 Agreement means an agreement entered into by a local planning authority and a person under section 106 of the Town and Country Planning Act 1990;

Section 106 Scheme means a Firm Scheme where the Affordable Housing is part of a larger scheme comprising accommodation which is non-residential and/or residential which is not Affordable Housing which is subject to a Section 106 Agreement;

Security means a mortgage charge pledge lien or other security interest securing any obligation of any person or any other agreement or arrangement having a similar effect (such as a sale or lease and leaseback a blocked account set off or similar "flawed asset" arrangement);

Site means the site identified to the Agency as being the area of land comprised or to be comprised in a Firm Scheme and/or the Affordable Dwellings and common areas developed as part of such Firm Scheme;

Social Housing Grant means grant monies paid by the Agency to the Provider pursuant to a Partnering Programme Agreement;

Social Rent means low cost rental accommodation as defined in Section 69 of HRA 2008 made permanently available for letting to persons at Target Rents on assured tenancy terms and to include those persons nominated by any relevant local authority;

Start on Site Works means:

- (a) excavation for strip or trench foundations or for pad footings;
- (b) digging out and preparation of ground for raft foundations;
- (c) vibrofloatation, piling, boring for piles or pile driving; or
- (d) drainage work specific to the buildings forming part of the Firm Scheme;

Start on Site Date means the date on which:

- (a) the Provider and Building Contractor have entered into the Building Contract;
- (b) the Building Contractor has taken possession of the Site; and
- (c) the Start on Site Works have commenced;

Subcontractor means any subcontractor appointed by the Provider to undertake all or part of the Works;

Submitted Standards means in respect of each Firm Scheme:

- (a) the Design and Quality Standards 2007 (or such other documented standard as the Agency may in its absolute discretion consent to in writing); and
- (b) the Additional Design and Quality Standards (if any);

Target Rents means those rent levels as specified by the Government's Social Rent Guidance in respect of Social Rent as published by the Department for the Environment Transport and the Regions in March 2001 (including any guidance subsequently issued by that or any successor department in relation to that document) and calculated in accordance with the Rent Influencing Regime Guidance as published by the Corporation in October 2001 and any other guidance subsequently issued by the Regulator in relation to that document;

Tenancy Standard means the standard described in Decision Instrument 5: Revision to the Tenancy Standard: Affordable Rent published by the Regulator in April 2011 (including any associated explanatory notes or guidance) as the same may be amended and updated from time to time;

Terminated Scheme means a Firm Scheme terminated pursuant to Condition 3.3.2;

Termination Date means the date upon which termination of this Agreement takes effect pursuant to Condition 3;

VAT means Value Added Tax as presently charged under the Value Added Tax Act 1994 or any tax of a similar nature;

Waiver Condition means provision of satisfactory evidence by the Provider to the Agency that the relevant Prohibited Act was committed by:

- (a) an employee acting independently of the Provider; or
- (b) a subcontractor (or any employee of a subcontractor not acting independently of the subcontractor); or
- (c) an employee of a subcontractor acting independently of such subcontractor; or
- (d) any person not specified in parts (a), (b) or (c)

and the Agency is satisfied that the Provider and/or the subcontractor (as applicable) has taken such action as is appropriate taking in to account the nature and the circumstances of the relevant Prohibited Act. "Acting independently" for these purposes means not acting with the authority or knowledge of any one or more of the directors of the Provider or relevant subcontractor;

Works means all of the works (including design, infrastructure works and all other works necessary for obtaining access to the Affordable Dwellings) to be undertaken in order to ensure that the Affordable Dwellings comprised within a Firm Scheme meet the Submitted Standards and are constructed or refurbished (as applicable) in accordance with the Firm Scheme Details;

1.2 Interpretation

- 1.2.1 words denoting any gender include all other genders.
- 1.2.2 The singular includes the plural and vice versa.
- 1.2.3 Any reference in this Agreement to any condition, sub-condition, paragraph, schedule, appendix or section heading is, except where it is expressly stated to the contrary, a reference to such condition, sub-condition, paragraph, schedule, appendix or section heading of this Agreement.
- 1.2.4 Any reference to this Agreement or to any other document shall include (except where expressly stated otherwise) any variation, amendment or supplement to such document to the extent that such variation, amendment or supplement is not prohibited under the terms of this Agreement.
- 1.2.5 Any reference to any enactment, order, regulation or similar instrument shall (except where expressly stated otherwise) be construed as a reference to the enactment, order, regulation or instrument (including any EU instrument) as amended, replaced, consolidated or re-enacted.
- 1.2.6 A reference to a person includes firms, partnerships and corporate bodies and their successors and permitted assignees or transferees.
- 1.2.7 Headings are for convenience of reference only.
- 1.2.8 A party means a party to this Agreement.
- 1.2.9 The words includes or including are to be construed without limitation.
- 1.2.10 A document in the agreed form is to be the form of the relevant document agreed between the parties and for the purpose of identification initialled by each of them or on their behalf (in each case with such amendments as may be agreed by or on behalf of the parties) or in the form set out in a Schedule or an Appendix to this Agreement.
- 1.2.11 A paragraph in a Schedule or Appendix shall be construed as references to a paragraph in that particular Schedule or, as the case may be, Appendix.
- 1.2.12 A deliberate act or omission of any person shall exclude acts or omissions which were within the contemplation of the parties or which were otherwise provided for in this Agreement.
- 1.2.13 In any case where the consent or approval of the Agency (or any officer of the Agency) is required or a notice is to be given by the Agency, such consent or approval or notice shall only be validly given if it is in writing and signed by (if relevant) the officer stipulated in this Agreement or such other person as may be specified by the Agency by notice in writing to the Provider.
- 1.2.14 An obligation to do anything includes an obligation to procure its being done.
- 1.2.15 Any restriction includes an obligation not to permit infringement of the restriction.

- 1.2.16 The term Site includes each and every part of it.
- 1.2.17 When there are two or more persons affected by the obligations under this Agreement such obligations are to bind each such person jointly and severally.
- 1.2.18 Save where a contrary intention is shown, or where an express discretion is given by this Agreement, the Agency shall act reasonably in exercising its rights hereunder (including in granting approvals hereunder).
- 1.2.19 If there is any ambiguity or conflict between the implied terms and the express terms of this Agreement then the express terms shall prevail.
- 1.2.20 Neither the giving of any approval, consent, examination, acknowledgement, knowledge of the terms of any agreement or document nor the review of any document or course of action by or on behalf of the Agency shall, unless otherwise expressly stated in this Agreement or agreed in writing by the Agency, relieve the Provider of any of its obligations under this Agreement or of any duty which it may have hereunder to ensure the correctness, accuracy or suitability of the matter or thing which is the subject of the approval, consent, examination, acknowledgement or knowledge nor confer impose or imply any liability or responsibility on or on behalf of the Agency in respect of or in connection with the matter to or in relation to which such approval consent examination acknowledgement was given or review made.

2 Purpose

- 2.1 The parties acknowledge the terms of the Regulator's Tenancy Standard and, in particular, the requirements of paragraph 2.4 thereof.
- 2.2 The Provider wishes to charge an Affordable Rent in respect of all of the dwellings comprised in each Firm Scheme to be developed or refurbished (as the case may be) pursuant to this Agreement.
- 2.3 The Agency has agreed to contract with the Provider on the terms hereof (inter alia) to facilitate the provision of Affordable Housing through each Firm Scheme.
- 2.4 The Provider acknowledges and agrees that:
 - 2.4.1 all Fund Proceeds identified in the Firm Scheme Details must be applied solely for the purposes of funding the Development Costs of the relevant Firm Scheme;
 - 2.4.2 all RCGF proceeds used for the purposes of Condition 2.4.1 constitute Social Housing Assistance for the purposes of Section 32 of the HRA 2008;
 - 2.4.3 the Public Sector Subsidy in respect of each Firm Scheme must not exceed an amount equal to the aggregated Actual Development Costs incurred by the Provider in respect of such Firm Scheme;
 - 2.4.4 the Affordable Dwellings provided pursuant to this Agreement shall be deemed to have been provided with public money for the purposes of Section 180 of the HRA 2008;

- 2.4.5 this Agreement is subject to the provisions of the HRA 2008 and any determinations made under it;
- 2.4.6 the Provider's Representative is empowered to act on behalf of the Provider for all purposes connected with this Agreement.

3 Firm Scheme Default

3.1 The following circumstances shall constitute a Firm Scheme Default:

- 3.1.1 A breach by the Provider of the warranties set out in Conditions 4.1 and 5.4;
- 3.1.2 an Insolvency Event has occurred in relation to the Provider;
- 3.1.3 a Prohibited Act has been committed by or on behalf of the Provider (in respect of which the Waiver Condition has not been satisfied);
- 3.1.4 a breach of Condition 8.1
- 3.1.5 the Provider ceases operating;
- 3.1.6 the Provider's status as a Registered Provider is lost or removed;
- 3.1.7 the Regulator directs or recommends that Financial Assistance is not to be given to the Provider by the Agency;
- 3.1.8 the Regulator directs the Provider to repay all or part of the DPF proceeds to be utilised by the Provider in meeting the Development Costs; and/or
- 3.1.9 a breach of the Provider's Firm Scheme Obligations.

3.2 The Provider must notify the Agency immediately in writing on the occurrence of a Firm Scheme Default.

3.3 Where the Firm Scheme Default is:

- 3.3.1 an occurrence specified in Condition 3.1.2, 3.1.3, 3.1.5, 3.1.6, and/or 3.1.7, the Agency shall be entitled forthwith and without any liability to the Provider terminate the Agreement;
- 3.3.2 an occurrence specified in Condition 3.1.1, 3.1.4, 3.1.8 and/or 3.1.9 the Agency may serve notice on the Provider requiring the Provider to remedy the breach and if within a period of thirty (30) Business Days following service of such notice:
 - (a) the breach has not been remedied; or
 - (b) where so permitted by the Agency the Provider has not given an undertaking to remedy the breach on terms satisfactory to the Agency; or
 - (c) if it becomes apparent that the Firm Scheme Default is incapable of remedy either within such period or at all;

the Agency shall be entitled on giving not less than ten (10) Business Days' notice and without any liability to the Provider (but without determining the whole of this Agreement) to terminate the Agreement insofar as it relates to the Firm Scheme in relation to which the relevant occurrence has arisen.

- 3.4 Where this Agreement is terminated by the Agency pursuant to:
- 3.4.1 Condition 3.3.1 the Provider acknowledges and agrees that with effect from the Termination Date it shall be precluded from letting any dwelling comprised within any Firm Scheme at an Affordable Rent or market rent; or
 - 3.4.2 Condition 3.3.2 the Provider acknowledges and agrees that with effect from the Termination Date it shall be precluded from letting any dwelling comprised within the Terminated Scheme at an Affordable Rent or market rent.
- 3.5 Where this Agreement is terminated pursuant to either Condition 3.3.1 or 3.3.2 the Agency shall be entitled to inform the Regulator of such termination.

4 **Firm Schemes – Submission Procedures**

- 4.1 Where the Provider identifies a Developable Scheme, it must submit to the Agency through IMS such details of the Developable Scheme as the Agency may require. Such details must be submitted no later than ten (10) Business Days after the Start on Site Date. In submitting the details of the Developable Scheme, the Provider is deemed to represent and warrant to the Agency that:
- 4.1.1 No part of the Development Costs is being or will be met by or paid out of Social Housing Grant or revenue generated from Rental Conversions;
 - 4.1.2 Where the Developable Scheme is a Section 106 Scheme, no part of the Development Costs will be met by or paid out of Fund Proceeds nor Social Housing Grant; and
 - 4.1.3 the amount of rent (inclusive of service charges in relation to each Affordable Dwelling will not exceed eighty per centum (80%) of the local market rent for a comparable property in a comparable location such rent to be assessed and set in accordance with the requirements of the Tenancy Standard.
- 4.2 If the Agency (acting reasonably) is satisfied with the details submitted under Condition 4.1 it will confirm its acceptance of the Developable Scheme to the Provider through IMS.
- 4.3 With effect from the Acceptance Date, the Developable Scheme shall constitute a Firm Scheme and shall be subject to the whole terms and conditions of this Agreement.
- 4.4 The process in Conditions 4.1 to 4.3 (inclusive) may be repeated.

5 **Firm Scheme Obligations**

- 5.1 The Provider must carry out the design construction or refurbishment (as applicable) and completion of a Firm Scheme so that:
- 5.1.1 when delivered, the Firm Scheme fully complies with the Firm Scheme Details and meets the Submitted Standards; and

- 5.1.2 any applicable requirements of the EU Procurement Regime are complied with.
- 5.2 In delivering a Firm Scheme and in operating and administering such Firm Scheme after Practical Completion, the Provider must observe and comply with Legislation, the applicable terms of the Funding Conditions (where the Firm Scheme is funded in whole or in part by Fund Proceeds), the Capital Funding Guide (which shall be deemed to apply to any Firm Scheme which is funded in whole or in part by Fund Proceeds) and (where the Firm Scheme is funded in whole or in part by RCGF proceeds) the Recovery Determination.
- 5.3 The Provider must in relation to each Firm Scheme notify the Agency in writing (save in respect of Condition 5.3.1, where notification is required to be given through IMS):
 - 5.3.1 immediately once the Start on Site Date has occurred;
 - 5.3.2 as soon as practicable, in the event of the receipt by it of any other Public Sector Subsidy or guarantees of it, or the offer of same, in respect of the Firm Scheme (or any part of it) beyond any amount of Public Sector Subsidy notified to the Agency by the Provider pursuant to Condition 4.1; and
 - 5.3.3 within 10 Business Days of the Firm Scheme having reached Practical Completion.
- 5.4 In giving notification pursuant to Condition 5.3.3 the Provider is deemed to represent and warrant to the Agency that:
 - 5.4.1 the Firm Scheme has been procured, designed, constructed and delivered in accordance with the requirements of this Agreement;
 - 5.4.2 the Firm Scheme has reached Practical Completion;
 - 5.4.3 all confirmations and certifications made or to be made by the Provider in IMS in relation to the Firm Scheme have been or will be correct in all material respects; and
 - 5.4.4 the Provider is a Registered Provider.
- 5.5 Without prejudice to Condition 5.2, the Provider must in operating and administering a Firm Scheme after Practical Completion:
 - 5.5.1 subject to Condition 7.1 not use the Affordable Dwellings for any purpose other than the Agreed Purposes without the Agency's prior written consent;
 - 5.5.2 comply with the Regulator's Tenancy Standard in respect of the Affordable Rent Dwellings;
 - 5.5.3 comply with the Agency's requirements in relation to Compliance Audit in relation to any Affordable Dwellings developed or refurbished with the benefit in whole or in part of RCGF proceeds; and
 - 5.5.4 participate in the CORE system as it applies from time to time .

5.6 In discharging its obligations under this Agreement, the Provider must act at all times with the utmost good faith.

6 **Changes to Firm Schemes**

The parties may from time to time agree changes to the Firm Scheme Details and where such changes are agreed they shall be implemented by the Provider amending the Firm Scheme Details in IMS and the electronic confirmation of that amendment by the Agency through IMS.

7 **Repayment of Fund Proceeds**

7.1 The parties acknowledge and agree that where the Development Costs have in whole or in part been met by or paid out of RCGF proceeds such proceeds are and shall be deemed to be Capital Grant for the purposes of the Recovery Determination which shall have and be deemed to have effect (mutatis mutandis) in respect of such proceeds and that each party has the respective rights and obligations described in such determination.

7.2 Without prejudice to any other term of this Agreement, the Agency reserves the right whether following termination of this Agreement or otherwise (which right the Provider expressly acknowledges and agrees) to recover from the Provider the Fund Proceeds where a Prohibited Act has occurred and the Provider has not satisfied the Waiver Condition in respect of such Prohibited Act.

7.3 The Provider shall pay any sum due to the Agency under Condition 7.2 within ten (10) Business Days of demand together with interest at two per centum (2%) above the base rate from time to time of the Royal Bank of Scotland plc such interest to run from the date upon which the Agency's demand was made until the date upon which the Agency receives the demanded payment.

7.4 Where the Late Payment of Commercial Debts (Interest) Act 1998 applies the Parties agree that the rate of interest referred to in Condition 7.3 above shall be a substantial remedy within the meaning of the Late Payment of Commercial Debts (Interest) Act 1998.

8 **Record Keeping**

8.1 The Provider shall in relation to each Firm Scheme developed or refurbished with the benefit in whole or in part of Fund proceeds and on an Open Book basis:

8.1.1 at all times maintain a full record of the income (including Public Sector Subsidy) received and Development Costs incurred by the Provider in respect of the Firm Scheme;

8.1.2 when reasonably required to do so by the Agency, promptly provide a copy of the information referred to in Condition 8.1.1 as the Agency may reasonably require.

8.2 The Provider shall, as and when requested by the Agency make available in a timely manner to the Agency where required in connection with this Agreement a copy of each of all data, materials, documents and accounts of any nature created, acquired or brought into existence in any manner whatsoever by or on behalf of the Provider for the purposes of this Agreement.

- 8.3 On the expiry of this Agreement or (if earlier) upon termination thereof, the Provider shall if requested to do so deliver up to the Agency all the data, materials, documents and accounts referred to in this Condition 8 which it has in its possession, custody or control or as otherwise directed by the Agency.
- 8.4 The Provider must for a period of ten (10) years from the Firm Scheme Date retain all of the data, documents, materials and accounts referred to in this Condition 8 and the Provider may retain such data, documents, materials and accounts in electronic form only.
- 8.5 The Provider acknowledges that The Comptroller and Auditor General shall have rights of access to the information referred to in this Condition 8 pursuant to the National Audit Act 1983 and the Government Resources and Accounts Act 2000.

9 **State Aid**

If the Agency is required pursuant to the Decision of the Commission of the European Communities published on 15 July 2005 in relation to public sector compensation granted to certain undertakings entrusted with the operation of services of general economic interest to recover any amount of overcompensation (as described in the Decision) the Agency will be entitled to recover any such amount from the Provider.

10 **Information and confidentiality**

- 10.1 Each party recognises that under this Agreement it may receive Confidential Information belonging to the other.
- 10.2 Each party agrees to treat all Confidential Information belonging to the other as confidential and not to disclose such Confidential Information or any other confidential information relating to the Agency arising or coming to its attention during the currency of this Agreement to any third party without the prior written consent of the other party and agrees not to use such Confidential Information for any purpose other than that for which it is supplied under this Agreement.
- 10.3 The Provider acknowledges that the Agency is subject to legal duties which may require the release of information under FOIA and/or EIR and that the Agency may be under an obligation to provide or disclose Information:-
- 10.3.1 without consulting the Provider or
- 10.3.2 following consultation with the Provider and having taken (or not taken, as the case may be) its views into account.
- 10.4 The Agency shall be responsible for determining in its absolute discretion whether:-
- 10.4.1 any Information is Exempted Information or remains Exempted Information; or
- 10.4.2 any Information is to be disclosed in response to a Request for Information;
- and in no event shall the Provider respond directly to a Request for Information to which the Agency is required to respond to, except to confirm receipt of the Request for Information and that the Request for Information has been passed to the Agency unless otherwise expressly authorised to do so by the Agency.

10.5 The Provider will assist and co-operate with the Agency as requested by the Agency to enable the Agency to comply with its disclosure requirements under FOIA and EIR within the prescribed periods for compliance and in particular without limitation will (and shall procure that its agents contractors and sub-contractors will), at their own cost:

10.5.1 transfer any Request for Information received by the Provider to the Agency as soon as practicable after receipt and in any event within two (2) Business Days of receiving a request for information;

10.5.2 provide all such assistance as may be required from time to time by the Agency and supply such data or information as may be requested by the Agency;

10.5.3 provide the Agency with any data or information in its possession or power in the form that the Agency requires within five (5) Business Days (or such other period as the Agency may specify) of the Agency requesting that Information;

10.5.4 permit the Agency to inspect such as requested from time to time

10.6 The obligations in this Condition 10 will survive the expiry or termination of this Agreement for a period of two (2) years or, in respect of any particular item of Confidential Information, until such earlier time as that item of Confidential Information reaches the public domain otherwise than by reason of a breach of this Agreement or of any other duty of confidentiality relating to that information.

11 **Health and Safety and Equality and Diversity**

11.1 The Provider will comply in all material respects with all relevant Legislation relating to health and safety, equality and relevant employment matters and will use reasonable endeavours to procure that its employees, servants, agents and Subcontractors do likewise.

11.2 The Provider shall have due regard to the public sector equality duty under Part 11 of the Equality Act 2010 insofar as its activities under this Agreement could reasonably be deemed to be functions of a public nature for the purposes of that Part.

11.3 To the extent that the Agency is a 'client' for the purposes of the CDM Regulations:

11.3.1 where the Provider is engaging consultants and a contractor or contractors as Subcontractors to deliver a Firm Scheme the Provider elects to be the only client in relation to such Firm Scheme; or

11.3.2 where the Provider is contracting with a developer as a Subcontractor to deliver a Firm Scheme the Provider shall procure that such developer shall elect to be the only client in relation to that Firm Scheme on or before the date that a Developable Scheme becomes a Firm Scheme;

and the Agency hereby agrees to such election.

11.4 The Provider shall not seek to withdraw, terminate or in any manner derogate from such election pursuant to Condition 11.3.1 or (if appropriate) shall procure that any developer/employer shall not withdraw, terminate or in any manner derogate from any

election pursuant to Condition 11.3.2 without the Agency's prior written consent, which the Agency may in its absolute discretion withhold.

11.5 The Provider shall maintain an accurate record of all health, safety and environmental incidents which occur on or in connection with each Firm Scheme.

12 **Co-operation**

12.1 Each party undertakes to co-operate in good faith with the other to facilitate the proper performance of this Agreement and the delivery of the Firm Schemes. Without prejudice to the generality of the foregoing the Provider shall co-operate fully and in a timely manner with any reasonable request from time to time:

12.1.1 of any auditor (whether internal or external) of the Agency and/or

12.1.2 of the Agency where the Agency is required under any legislation to provide any document relating to the Firm Schemes to any person.

13 **Notices**

13.1 Any notice to be given hereunder shall be in writing and shall be sufficiently served if delivered by hand and receipted for by the recipient, (but not by facsimile or electronic mail) or sent by a recorded delivery service addressed in the case of either party to the other party's registered office as set out at the beginning of this Agreement or to such other addresses as either party may from time to time notify to the other in writing **provided that** such other address is within England and Wales.

13.2 Any notice shall be deemed to be given by the sender and received by the recipient:

13.2.1 if delivered by hand, when delivered to the recipient;

13.2.2 if delivered by a recorded delivery service, three (3) Business Days after delivery including the date of postage;

provided that if the delivery or receipt is on a day which is not a Business Day or is after 4.00pm it is to be regarded as received at 9.00am on the following Business Day.

14 **No fetter on statutory functions**

Notwithstanding anything apparently or impliedly to the contrary in this Agreement or any of the deeds and documents referred to herein, in carrying out its statutory duties or functions the discretion of the Agency shall not be fettered, constrained or otherwise unlawfully affected by the terms of this Agreement or any such other deed or document.

15 **No agency**

15.1 Nothing in this Agreement or otherwise shall be held, implied or deemed to constitute a partnership, joint venture or other association or, save as expressly provided, the relationship of principal and agent between the parties.

15.2 The Provider shall at all times be independent and nothing in this Agreement shall be construed as creating the relationship of employer and employee between the Agency and

the Provider. Neither the Provider nor any of its employees shall at any time hold itself or themselves out to be an employee of the Agency.

16 Exclusion of third party rights

Except as otherwise expressly provided no person who is not a party to this Agreement shall be entitled to enforce any terms of this Agreement solely by virtue of the Contracts (Rights of Third Parties) Act 1999.

17 Assignment and sub-contracting

17.1 The Agency will be entitled to transfer or assign all or part of this Agreement.

17.2 The Provider will not be entitled to transfer or assign all or part of this Agreement.

18 Entire agreement

18.1 This Agreement and the conditions herein contained together with the Schedules and Annexes constitute the entire agreement between the parties and, subject always to Condition 6, may only be varied or modified in writing by agreement under the seals of the parties.

18.2 The Provider hereby acknowledges that save as set out or referred to in the Agreement there are and have been no representations made by or on behalf of the Agency of whatsoever nature on the faith of which the Provider is entering into this Agreement.

19 Severability

If any term, condition or provision contained in this Agreement shall be held to be invalid, unlawful or unenforceable to any extent, such term, condition or provision shall to that extent be omitted from this Agreement and shall not affect the validity, legality or enforceability of the remaining parts of this Agreement.

20 Cumulative rights and enforcement

20.1 Any rights and remedies provided for in this Agreement whether in favour of the Agency or the Provider are cumulative and in addition to any further rights or remedies which may otherwise be available to those parties.

20.2 The parties acknowledge that money damages alone may not properly compensate the Agency for any breach of the Provider's obligations hereunder and the parties hereby expressly agree that in the event of the breach or threatened breach of any such obligation in addition to any other rights or remedies the Agency may have in law, in equity or otherwise the Agency shall be entitled to seek injunctive or other equitable relief compelling specific performance of and other compliance with the terms of such obligations.

21 Waiver

21.1 The failure of any party at any one time to enforce any provision of this Agreement in no way affects its right thereafter to require complete performance by the other party, nor may the waiver of any breach or any provision be taken or held to be a waiver of any subsequent breach of any provision or be a waiver of the provision itself.

21.2 Where in this Agreement any obligation of a party is to be performed within a specified time that obligation shall be deemed to continue after that time if the party fails to comply with that obligation within the time.

21.3 Any waiver or release of any right or remedy of either party must be specifically granted in writing signed by that party and shall:

21.3.1 be confined to the specific circumstances in which it is given;

21.3.2 not affect any other enforcement of the same or any other right; and

21.3.3 (unless it is expressed to be irrevocable) be revocable at any time in writing.

22 **Survival of this Agreement**

22.1 Insofar as any of the rights and powers of the Agency provided for in this Agreement shall or may be exercised or exercisable after the termination or expiry of this Agreement the provisions of this Agreement conferring such rights and powers shall survive and remain in full force and effect notwithstanding such termination or expiry.

22.2 Insofar as any of the obligations of the Provider provided for in this Agreement remain to be discharged after the termination or expiry of this Agreement the provisions of this Agreement shall survive and remain in full force and effect notwithstanding such termination or expiry.

22.3 Without limitation the provisions of Conditions 5.2, 5.5, 5.6, 7 - 10 and this Condition 22 and such other provisions of this Agreement as are necessary to give effect to such Conditions are expressly agreed by the parties to survive the termination or expiry of this Agreement.

23 **Execution**

This Agreement may be executed in any number of counterparts and each counterpart will when executed be an original of this Agreement and all counterparts together will constitute one instrument.

24 **Governing law**

This Agreement shall be governed by and construed in accordance with the laws of England and Wales and the parties irrevocably submit to the exclusive jurisdiction of the courts of England and Wales.

Schedule 1

Part 1

Development Costs

Heads of expenditure

1 Acquisition

- 1.1 Purchase price of land/site.
- 1.2 Stamp Duty Land Tax on the purchase price of land/site.

2 Works

- 2.1 Main works contract costs (excluding any costs defined as on costs).
- 2.2 Major site development works (where applicable). These include piling, soil stabilisation, road/sewer construction, major demolition.
- 2.3 statutory agreements, associated bonds and party wall agreements (including all fees and charges directly attributable to such works) where applicable.
- 2.4 Additional costs associated with complying with archaeological works and party wall agreement awards (including all fees, charges and claims attributable to such works) where applicable.
- 2.5 Irrecoverable VAT on the above (where applicable).

3 On costs

- 3.1 Legal fees and disbursements.
- 3.2 Net gains/losses via interest charges on development period loans.
- 3.3 Building society or other valuation and administration fees.
- 3.4 Fees for building control and planning permission.
- 3.5 Fees and charges associated with compliance with European Community directives, and the Agency's requirements relating to energy rating of dwellings, Eco-Homes certification and Housing Quality Indicators.
- 3.6 In-house or external consultants' fees, disbursements and expenses (where the development contract is a design and build contract) (see note below).
- 3.7 Insurance premiums including building warranty and defects/liability insurance (except contract insurance included in works costs).
- 3.8 Contract performance bond premiums.
- 3.9 Borrowing administration charges (including associated legal and valuation fees).

- 3.10 An appropriate proportion of the Provider's development and administration costs.
- 3.11 Marketing costs – for sale schemes only.
- 3.12 Post-completion interest - for sale schemes only.
- 3.13 Irrecoverable VAT on the above.

Note 1

Where the development contract is a design and build contract, the on-costs are deemed to include the builder's design fee element of the contract sum. The amount included by the builder for design fees should be deducted from the works cost element referred to above, as should other non-works costs that may be submitted by the builder such as fees for building and planning permission, building warranty, defects liability insurance, contract performance bond and energy rating of dwellings.

Note 2

Some items will not qualify as Development Costs unless the Provider can clearly demonstrate that such costs are properly chargeable to the housing development, i.e. for the sole use of the residents or to comply with any statutory obligations that may have been imposed.

Examples of these are as follows:

- works to any roads which do not exclusively serve the housing development;
- landscaping to areas of land which lie outside the boundaries of the Site;
- district heating systems;
- trunk sewers and sewage disposal works;
- special refuse treatment buildings;
- public conveniences;
- community halls, club rooms, recreation rooms.

Note 3

Subject to the above, where any cost incurred or to be incurred by the Provider is common both to the development of the Affordable Dwellings within any Firm Scheme and to any other activity, asset or property of the Provider, only such part of that cost as is attributable to the development of the Affordable Dwellings may be treated as a cost in respect of which grant under this Agreement may be paid.

Schedule 1

Part 2

Costs which are not Development Costs

Capital costs incurred:

- 1.1 which are not eligible for Social Housing Assistance as defined in Section 32(13) of the HRA 2008;
- 1.2 on land (forming part of the total site acquired) which will not be used exclusively for housing provision purposes directly related to the Firm Scheme;
- 1.3 on estate offices, factories, letting offices;
- 1.4 on stores (other than external storage provision required by Design and Quality Standards);
- 1.5 on medical or dental surgeries, clinics;
- 1.6 on police stations, public libraries, bus shelters;
- 1.7 on shops, restaurants, public houses, offices;
- 1.8 on transformer and other related buildings;
- 1.9 on maintenance depots, tools, plant and vehicles;
- 1.10 on garages (other than integral garages on market purchase scheme types) and greenhouses;
- 1.11 on separate commercial laundry blocks and related equipment.

This Agreement has been executed as a deed and is delivered and takes effect on the date stated at the beginning of it.

THE COMMON SEAL of)
HOMES AND COMMUNITIES AGENCY)
was hereunto affixed in the presence of:)

Authorised Signatory

EXECUTED as a **DEED** by affixing)
THE COMMON SEAL of)
[PROVIDER])
in the presence of:)

Authorised Officer