



4<sup>th</sup> October 2019

Circular: Housing 31/2019

For the attention of each Director of Service (Housing)

**Arrangements for the Provision by local authorities of  
Social Housing through Turnkey Projects**

Dear Director,

This Circular is to advise local authorities (LAs) on the provision of new build housing through turnkey acquisition and supersedes the arrangements set out in Departmental Circular N16/227 of 24 July 2007 on 'Arrangements for Provision of Social Housing through Turnkey Projects'.

Housing provision via Turnkeys can be a good source for new Social Housing delivery when appropriately located and meeting local housing need. LAs are asked to continue to pursue this source, alongside all the other delivery mechanisms.

**Guidance**

LAs should satisfy themselves that any turnkey acquisition by them, is not removing housing from the market that would otherwise be available to private purchasers, in particular to first-time buyers. Turnkeys are particularly appropriate when the housing would otherwise not be delivered but for the assurance of LA purchase to unlock the development.

Turnkey acquisitions exclude the acquisition of dwellings under Part V agreements; the latter should be administered separately in accordance with the provisions of Part V of the Planning and Development Act, 2000, as amended by Part V of the Urban Regeneration and Housing Act, 2015 and the regulations thereunder.

In deciding on the suitability of a turnkey scheme for social housing delivery, the LA should have due regard for guidance on the procurement and assessment requirements set out in Appendix A of this Circular.

**Running a Turnkey Campaign – Advertisement, Selection Criteria, Assessment**

Under Article 10 of the European Union (Award of Public Contracts) Regulations, 2016, the **acquisition of land or existing buildings** by an LA - as distinct from the construction of a building as a public works contract - is exempt from the provisions of said regulations. Existing buildings includes the purchase 'off plans' of residential units.

A turnkey contract can therefore, be a simple purchase and thereby, excluded from public works procurement requirements. However, there are general procurement principles which apply and, in particular, the LA must be seen to comply with obligations for transparency and equal treatment. Accordingly, the Department recommends that a public notice is published in a prominent local

newspaper, requesting submissions by a certain date (which does not preclude re-advertising and a repeat process) and briefing documentation should set out the pre-determined assessment criteria.

Workflow and template documents suitable for running a simplified turnkey campaign under the article 10 exemption have been developed by the Housing Delivery Office and are included in Appendix C to this Circular; these can be modified as required, to meet the specific needs of an LA.

While the approach to turnkey acquisitions generally used by LAs since the commencement of Rebuilding Ireland is exempt as per Article 10 of the European Union (Award of Public Contracts) Regulations, 2016, there is not a requirement for LAs to rely on this exemption. Turnkey delivery for new social housing, can be procured in compliance with the public procurement requirements as a public works contract, in line with the said regulations.

Whichever approach is used, as with all public works procurement, the terms and conditions that apply need to be stated up front and the means of evaluation and scoring system must be included or referenced from the OJEU or tenders publication. Advice in regard to delivery in this manner is set out in Appendix A.

#### **Points to note on running a turnkey campaign under the Article 10 exemption:**

- A public advertisement should be placed in papers circulating locally and can also be circulated through CIF and/or other LA contacts. Open-ended adverts are discouraged, as they can make evaluation of submissions difficult. It is recommended that all turnkey campaigns have a closing date for submissions; LAs could run turnkey campaigns twice yearly or as required to meet demand.
- A two stage process is recommended:
  - ✓ Stage 1 facilitates the LA casting the net wide to capture all potential turnkey development opportunities, including those which may be less advanced in terms of design/planning. This requires minimal input from potential vendors and minimises cost outlay by interested parties. All that is requested from them at this Stage, is a site location map.

All site locations are then assessed by an evaluation panel established by the LA against the pre-determined pass/fail criteria advertised. In the sample turnkey documents attached, the pre-determined assessment criteria are: suitability of location, land zoning status and availability of utilities. Only those locations deemed suitable by the evaluation panel move onto Stage 2.

- ✓ Stage 2 requires a more detailed submission by the individual or company submitting the proposal. What should be requested are:
  - ✓ details on the individual or company submitting the proposal;
  - ✓ the site location map;
  - ✓ proposed site layout;
  - ✓ house types;
  - ✓ floor plans, areas;
  - ✓ schedule of materials and finishes;
  - ✓ number and mix of units proposed;
  - ✓ details of planning permission;
  - ✓ location of local amenities and public utilities;
  - ✓ the all-in cost (that is, offer price) of the units; and

✓ a timeframe/programme for completion of the units.

- Following assessment of the Stage 2 submission, only those proposals deemed suitable by the evaluation panel, advance for further discussion and possible agreement for purchase.
- Negotiations and Payment:
  - Negotiation on the phasing/handover dates of units is acceptable;
  - Negotiation on scheme layout, unit types and materials and finishes strays too far into the area of design and should be avoided;
  - Where LAs feel better value can be achieved on the price offered, consideration could be given to a formal 'Best and Final Offer' process;
  - Stage payments are not allowed. A 10% deposit can be paid on contract signing as per standard Law Society Contracts for Sale;
- Financing of Turnkey Developments:
  - Vendors of turnkey developments will often seek stage payments from LAs. These must be avoided where the Article 10 exemption is being utilised;
  - Developers are familiar with financing costs and will provide for full recovery in their offer price to the LA;
  - Where developers insist they are unable to finance a turnkey development without stage payments, evidence of refusals of loan finance should be sought by the LA;
  - Developers who advise the LA that they are experiencing difficulty securing finance should be referred to the newly established Home Builders Finance Ireland (HBFI). Government has established HBFI as part of the measures to address the housing shortage, to provide a source of funding to small and medium-sized builders/developers on a commercial basis. HBFI is open for business and has an initial €750m available from the Ireland Strategic Investment Fund; with an ability to raise further funds on the market should they be required. See [www.hbfi.ie](http://www.hbfi.ie) or email [info@hbfi.ie](mailto:info@hbfi.ie).

### **Departmental Funding Approval**

The Department's approval procedure for turnkeys is a single stage evaluation and approval. Submissions for approval should be by way of a Capital Appraisal – see guidance set out in Appendix B.

It is not expected that the cost of acquisition of a turnkey should exceed the cost of purchase of similar new build dwellings in the area. Independent valuations should reference similar purchase prices in the area.

Notwithstanding the above, it is understood by the Department that in certain regions, the nature of the local property market is such that property prices remain low and the cost of construction may not be reflected in an independent valuation report. In such cases, an opinion report by an independent QS as to a reasonable delivery cost, should be submitted to the Department with the capital appraisal.

### **Recoupment of Expenditure by the Department**

In addition to the amount, payable by the LA to the developer and expenses incurred on items such as advertisement, legal and valuation/QS reports (which must be vouched), the Department will pay to LAs an additional project management fee of €2,000 per turnkey unit, subject to a cap of €40,000 on any one turnkey development.

The €40,000 cap applies to the entirety of a turnkey development proposal within a single housing estate, notwithstanding the project may be delivered in phases over a number of years. Local Authorities are further reminded of the need to deliver value for money.

### **Summary**

Turnkey acquisitions provide a valuable mechanism to deliver social housing for LAs, in particular where used as part of a wider extent of delivery mechanisms. They are of particular use where the LA has no land available for housing in an area. They can lead to significant time savings where the housing is already under construction, or at the very least when Planning Permission is in place. Acquiring a turnkey development that was previously an unfinished estate also has a range of clear benefits.

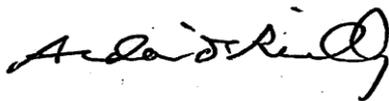
**Appendix A** sets out in some detail up to date procurement advice and guidance on the acquisition of housing units using the turnkey process.

**Appendix B** sets out in detail the capital funding submission requirements in respect of a proposed turnkey development in the form of an abridged capital appraisal. LAs should ensure that all documentation requested is submitted with the capital funding application.

**Appendix C** contains a simplified turnkey process workflow, under the exemption provided for in article 10 of the European Union (Award of Public Contracts) Regulations, 2016. It also contains sample turnkey documentation suitable for running a simplified turnkey process under the article 10 exemption. The documentation can be modified as required to meet the specific needs of an LA. Queries in relation to the Housing Delivery Office simplified turnkey process or requests for soft copies of the documentation can be requested from the Housing Delivery Office; email [paul.benson@housing.gov.ie](mailto:paul.benson@housing.gov.ie)

Any queries in relation to this Circular can be directed to the Senior Advisors in the Department, [paul.altman@housing.gov.ie](mailto:paul.altman@housing.gov.ie) or [derek.kavanagh@housing.gov.ie](mailto:derek.kavanagh@housing.gov.ie) or to the Housing Delivery Office as above.

Yours sincerely



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Social Housing Capital Investment Programmes

## Circular Housing 31/2019

### Guidance on the Procurement and Assessment Requirements for a Turnkey Proposal

#### Background

There have been considerable changes in National and EU Procurement requirements since Departmental Circular N16/2007 of 24 July 2007 on 'Arrangements for Provision of Social Housing through Turnkey Projects'; in particular, significant changes arise from the publication of the European Union (Award of Public Contracts) Regulations 2016, SI 284/2016 (the transposition into Irish law of EU Directive 2014/24/EU), as well as recent case law.

SI 284/2016 specifically notes:

10. (1) *These Regulations do not apply to public service contracts for—*

*(a) the acquisition or rental, by whatever financial means, of land, existing buildings or other immovable property or any interest in or right over any such land, existing buildings or immovable property,*

The **acquisition of land or existing buildings** by an LA, as distinct from the construction of a building as a public works contract, is not therefore subject to the provisions of the 2016 regulations.

It is important to note that the advice hereunder is not an interpretation of EU law, but sets out the routes to deliver turnkey housing projects in a manner that should be compliant with procurement rules and would be least likely to be the subject of challenge before the courts.

#### Procurement

EU procurement regulations set out requirements for EU-wide advertising of public works contracts of sufficient value to be of interest to operators in other EU jurisdictions. For public works contracts this value, effective from the 1<sup>st</sup> January 2018, is €5,548,000 (excl. VAT).

Should a turnkey proposal fall within the definition of a public works contract and not be able to demonstrate clear compliance with EU public procurement requirements for public works, it could leave the local authority open to legal challenge.

Regulation 2 – Interpretation, SI 284/2016 offers the following definition of a public works contract: *“public works contract” means a public contract having as its object one or more of the following:*

- (a) the execution, or both the design and execution, of works related to one of the activities listed in Schedule 1;*
- (b) the execution, or both the design and execution, of a work;*
- (c) the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority exercising a decisive influence on the type or design of the work.”*

Schedule 1 lists construction works (including renovations, demolitions, site works, etc.).

Accordingly, the more the turnkey procedure moves away from the simple purchase of buildings, towards the design and/or execution of works, the more likely it is to be open to full EU procurement requirements,

as a public works contract.

In the circumstances where a completed building is purchased, it is clear that its acquisition is exempt from public procurement rules relating to public works contracts under the Article 10 exemption. Furthermore an agreement to purchase a yet-to-be-completed building would also be exempt. However it may only be considered exempt to the extent that the Local Authority is not '*exercising a decisive influence on the type or design of the work*'.

In the case of housing, the purchase of a house 'off the plans' (i.e. before or during construction) is standard practice and the State is not excluded from these standard means of acquisition. The turnkey mechanism should, however, reflect standard private purchase procedures, with the purchase price being paid only when the completed units are handed over. Such an arrangement does not preclude the payment of an upfront deposit of 10% when the contract for purchase is signed. Any such contract deposit payment should be made through a solicitor and held in an escrow account.

Considerations which would heighten the interpretation of the turnkey as a public works contract and which should be avoided would be:

- Interim payments;
- Up front transfer or purchase of lands – the construction of the housing would then become a works contract on the LA's lands and subject to normal procurement requirements;
- Significant involvement in the design under item 2c of SI284/2016 quoted above. Choice of tiles or internal colours (as any purchaser might do in the event of a purchase 'off plans') should not trigger this clause. It can be seen that inputting on site layout, type of units or basic specification would be seen to exercise a decisive influence on the design;
- Onsite input/direction during construction– the procurement exemption applies to completed buildings, not on-site involvement during construction which implies a construction contract.

In addition, attempting to deliver a turnkey on the basis of a Part 8 agreement, could be seen to be a public works contract.

### **Transparency & Equal Treatment**

If a turnkey contract is a simple purchase and thereby excluded from public works procurement requirements, there are still non-procurement EU principles which apply and, in particular, the LA must be seen to comply with its obligations for transparency and equal treatment.

In turnkeys this is particularly the case to avoid challenge from vendors whose properties were not successful. Accordingly, the Department would recommend that a public notice be published in a prominent local newspaper, requesting submissions by a certain date (which does not preclude re-advertising and a repeat process) and setting out the pre-determined assessment criteria.

### **Turnkey – Alternative Delivery**

Notwithstanding the above, there is no requirement for local authorities to rely on the exemption under Article 10 of SI 284/2016 from the public works contracts requirements if the turnkey housing delivery proposal is procured in compliance with the public procurement requirements for public works contracts as set out in the said regulations.

As with all public works procurement, the terms and conditions need to be stated up front and the means of evaluation and scoring system included or referenced from the OJEU or tenders publication. This may in itself raise difficulties as there is no inbuilt mechanism for demonstrating value for money, as there is for instance in a competitive tender for a construction project. Further difficulties arise in assessing the merits of one proposal against another<sup>1</sup> and for ensuring a proper competition where cost is one of the criteria, which opens the possibility of challenge to the means of evaluation from an unsuccessful proposer, which is why robust transparent evaluation criteria may to some extent assist.

Where LAs are not relying on the Article 10 exemption and are proceeding in accordance with the Award of Public Contracts Regulations, there should be no restriction on early transfer of the lands (by way of security) with scheduled payments, once this is specifically mentioned in the advertised conditions.

Such delivery could use a land purchase form of contract, with the works delivered by way of the GCCC form of contract PW-CF2 (Contractor's Design) and could be delivered following a Competitive Dialogue process, although that is not a necessity, in particular where SI284/2016 limits this process to where the item to be purchased is difficult to define. Experience to date suggests that any Competitive Dialogue process can delay delivery, as it has its own specific requirements, which may again question its suitability if the Turnkey route is being selected to achieve 'speed of delivery'. Any use of such a process should be the subject of detailed and project specific, specialist procurement advice.

### **Conclusion**

To benefit from the exemption set out in Article 10 of SI284/2016, it is important that the turnkey be for acquisition of completed, new build housing or at least closely follow the standard procedures for purchase 'off plans' and avoid any influence on the design.

Alternatively, new build turnkey delivery can follow public procurement compliance requirements which allow for input on the design and interim payments, through the mechanisms of public works contracts.

Any proposed turnkey which does not strictly follow one or other of the above two routes, could result in a successful challenge to an LA, with the attendant risk of an adverse award of financial compensation. Accordingly, the Department's approval for turnkeys must be on the basis that it is clear from the capital appraisal, that one of these routes has been closely followed.

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<sup>1</sup> For instance how would an LA with 70% of its housing list requiring one bedroom dwellings assess the relative merits of two proposals, one for 20 town centre one bedroom apartments at €180,000 each, with another for 10 three bedroom peripherally located houses at €300,000 each.

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Requirements in respect of a Capital Funding Application for a Turnkey Proposal

The submission to the Department in respect of a Turnkey Proposal is by way of a Capital Appraisal and should contain all of the following information:

1. Evidence of Social Housing Need in the Area
2. Copy of the Public Notice inviting turnkey proposals
3. Details of the Evaluation Process undertaken
4. Drawings of the Proposal (Floor Plans & Site Layout Map indicating clearly the dwellings to be purchased)
5. Planning Status of the turnkey proposal
6. Sustainable Community Proofing Assessment
7. Independent Valuation (or QS cost opinion/report, if applicable)
8. Cost (completed Form HCA3) and Value for Money Evaluation
9. Indicative programme for delivery and phasing (if applicable)
10. Local Authority Recommendation