

## BY EMAIL AND BY HAND

The Legal Services Commission  
Policy and Legal Department  
85 Gray's Inn Road  
London WC1X 8TX

Your Ref

Our Ref

PTJ/Y052757

Date

22 March 2007

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Dear Sirs

## Unified Contract for Civil Providers

1. We act for the Law Society. We are instructed by the Law Society to seek judicial review of the decision of the Legal Services Commission ("LSC") to issue, in or about early March 2007, to selected firms of solicitors (in general, those currently providing legal services pursuant to the existing General Civil Contract (hereafter, "the Solicitors")) a new "Unified Contract" for the period from April 1<sup>st</sup> this year to March 31<sup>st</sup> 2010 (with an option for the LSC to extend it up to March 31<sup>st</sup> 2012). The proposed new "Unified Contract" comprises (a) a Contract for Signature; (b) the Schedules; (c) the Contract Standard Terms; and (d) the Specification. The LSC has invited the Solicitors to complete and to return for your signature the Unified Contract by 31<sup>st</sup> March 2007.
2. The proposed new "Unified Contract" is intended to replace the Solicitors' existing General Civil Contracts which are due to expire on March 31<sup>st</sup> this year. As we understand it, the LSC is not prepared to enter into contractual arrangements with civil legal aid practitioners from 1<sup>st</sup> April 2007 on terms other than those contained in the Unified Contract.
3. The LSC is acting unlawfully and *ultra vires* its contracting powers with legal aid practitioners as contained in the Access to Justice Act 1999 ("the 1999 Act"). For the reasons set out below, the offer you have sought from the Solicitors in relation to the Unified Contract, which is a Part B services contract, fails to comply with the Public Contracts Regulations 2006 ("the 2006 Regulations") and with the Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public services contracts ("the Public Sector Directive"), which the 2006 Regulations seek to implement.
4. Please treat this letter as a Letter before Claim for the purposes of the Pre-Action Protocol for Judicial Review. We set out at the end of this letter, by way of summary, the information required in a Letter before Claim.

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## The Public Contracts Regulations 2006

5. The Legal Services Commission (“LSC”) is a contracting authority for the purpose of the 2006 Regulations<sup>1</sup>.
6. The proposed “Unified Contract” will be a public services contract for the purpose of those Regulations, namely “a contract, in writing, for consideration...under which a contracting authority engages a person to provide services”<sup>2</sup>. It is specifically a Part B Services Contract, namely a contract under which services specified in Part B of Schedule 3 are to be provided<sup>3</sup>. Such services include “legal services”<sup>4</sup>. Both the Central Product Classification of the United Nations and the Common Procurement Vocabulary of the European Commission (to which reference may be made to establish the scope of a service category) make it clear that legal services includes the full range of legal advisory and representation services in the different fields of law.
7. Solicitors who are invited to sign the Unified Contract are services providers<sup>5</sup> (and thus “economic operators”<sup>6</sup>) for the purposes of the 2006 Regulations.
8. The estimated value of the Unified Contract to many Solicitors will plainly exceed the relevant threshold of 211,000 euros<sup>7</sup>.
9. Among the provisions of the 2006 Regulations that apply whenever a contracting authority seeks offers in relation to such a proposed Part B Services Contract are regulations 4(3) and 9<sup>8</sup>.
10. Regulation 4(3) provides that:

“A contracting authority shall (in accordance with Article 2 of the Public Sector Directive)—

- (a) treat economic operators equally and in a non-discriminatory way; and

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<sup>1</sup> See regulation 3(1)(w) and (y) of, and Schedule 1 (where it is the successor entity to the “Legal Aid Fund (England and Wales)”) to, the 2006 Regulations.

<sup>2</sup> See regulation 2(1) of the 2006 Regulations.

<sup>3</sup> See regulation 2(2) of the 2006 Regulations.

<sup>4</sup> See item 21 in Schedule 3 to the 2006 Regulations.

<sup>5</sup> See regulation 2(1) of the 2006 Regulations. Such a person is one who offers services on the market and who seeks, or would have wished, to be the person to whom a public services contract is awarded.

<sup>6</sup> See regulation 4(1) of the 2006 Regulations.

<sup>7</sup> See regulation 8(4) of the 2006 Regulations. The estimated value of the contract is the value of the total consideration payable, net of VAT, which the LSC expects to be payable under the contract calculated in accordance with regulation 8: see regulation 8(7). As the Unified Contract does not include a total price, the estimated price is the aggregate value of the consideration that the LSC expects to be payable under the contract: see regulation 8(10). There are clearly many Solicitors to whom the value of the Unified Contract in the three year period from 2007 to 2010 would exceed the relevant threshold value of 211,000 euros (£143,269 at an exchange rate of 0.679 Pounds Sterling/Euro).

<sup>8</sup> See regulation 5(2) of the 2006 Regulations.

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(b) act in a transparent way.”

11. Regulation 9 deals with Technical Specifications. For present purposes that means any “specification in a document defining the required characteristics of... services, such as quality levels,..., performance levels,... and conformity assessment procedures”.

Regulation 9 imposes three principal and distinct requirements relating to such technical specifications governing respectively (a) where any technical specifications are to be specified, (b) the objective terms and precision with which they are to be specified, and (c) their effect on economic operators and competition.

12. *Location:* regulation 9(2) governs where technical specifications must be specified. It states that:

“Where a contracting authority wishes to lay down technical specifications which must be met by—

(a) the services to be provided under a public services contract...;

... ..

it shall specify those technical specifications in the contract documents.”

Those documents are defined<sup>9</sup> as

“the invitation to tender for or to negotiate a contract, the descriptive document (if any), the proposed conditions of contract, the specifications or descriptions of the.. services, ...required by the contracting authority..., and all documents supplementary thereto”.

In this case the contract documents in which any technical specifications must be specified are the documents forming the documents constituting the proposed “Unified Contract”.

13. *Objective terms and precision:* the manner in which any technical specifications must be specified in the contract documents is governed by regulation 9(5). This provides that they must be specified in accordance with certain other paragraphs of that regulation. For present purposes the relevant paragraph is paragraph (7) which permits a contracting authority to

“define the technical specifications referred to in paragraph (5) in terms of performance or functional requirements... provided that the requirements are sufficiently precise to allow an economic operator to determine the subject of the contract and a contracting authority to award the contract.”

This proviso is designed to ensure that the technical specifications are specified objectively and with sufficient precision to allow an economic operator to determine for himself what the contract requires him to do, so that he can assess what his obligations will be before he commits himself to the contract on any terms proposed (and, if he wishes, to offer instead services complying with certain other technical specifications that meet the performance or functional requirements of the contracting authority<sup>10</sup>). The proviso is also designed to

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<sup>9</sup> See regulation 2(1) of the 2006 Regulations.

<sup>10</sup> See regulation 9(11) of the 2006 Regulations.

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ensure, in cases in which a contracting authority has to decide to whom to award a public contract, that the offers made are objectively comparable as each is made by reference to the same objectively specified technical requirements.

14. *Effect:* the third requirement in respect of technical specifications imposed by regulation 9(4) is that:

**“A contracting authority shall ensure that technical specifications afford equal access to economic operators and do not have the effect of creating unjustified obstacles to the opening up of public procurement to competition.”**

## THE UNIFIED CONTRACT

15. The Unified Contract indisputably contains technical specifications.

16. The Unified Contract also contains powers enabling the whole contract, including such specifications, to be amended unilaterally by the LSC with results that cannot now be determined by Solicitors from the contract documents.

17. Clause 13.1 of the proposed Standard Terms states that:

**“Subject to the provisions of this Clause 13, we [the LSC] have the right to amend the Contract Documents from time to time if, (i) we consider it necessary or desirable to do so in order to facilitate a Reform of the Legal Aid Scheme, or (ii) our proposed amendments have been approved by Consultative Bodies, or (iii) our proposed amendments are permitted under Clause 13.2 or any other provision of this Contract authorising us to make amendments”.**

The Law Society is a Consultative Body for the purposes of this provision (Clause 1 of the proposed Standard Terms).

18. This power of amendment affects each of the documents forming part of the Unified Contract<sup>11</sup>. Thus:

- (1) any provision may be amended if the LSC considers it desirable to do so to facilitate a “Reform of the Legal Aid Scheme”. This is widely defined to mean “such reforms as we [the LSC] may wish to implement in order better to comply with our statutory duties or fulfil our statutory functions<sup>12</sup>. This would embrace anything that the LSC may want if it considers that it would enable the LSC better to discharge its statutory functions. It would include (for example) any change for that purpose to the services that Solicitors (or certain Solicitors) may, or may be obliged to, perform under the Unified Contract; the terms on which, and the personnel by whom, they are to be provided; the standards which Solicitors must meet and how compliance with them may be assessed; and what information and indemnities it may have to provide the LSC.

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<sup>11</sup> See the definition of Contract Documents in Clause 1.

<sup>12</sup> See the definition in Clause 1 of the Standard Terms.

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- (2) Other provisions of the Contract also allow amendments to be made to the Schedules (detailing what work the supplier may or must do) and to the Specification (which contains rules, Guidance and other operational requirements as well as the rates of payment for Contract Work). Thus, for example:
- (i) the Specification is said to be a “living document” which the LSC may amend when it considers it appropriate to ensure that it continues to achieve “the objectives of contracting”<sup>13</sup>. Indeed, the LSC is now consulting on a completely revised specification which is intended to replace the existing specification from 1 October 2007.
  - (ii) in each Category of Law, Contract Work must achieve a rating of 1, 2 or 3 as determined by “the Independent Peer Review Process”. A rating of 4 as so determined (if confirmed) is a breach of contract and a rating of 5 as so determined (if confirmed) constitutes a Fundamental Breach<sup>14</sup>. The Independent Peer Review Process is defined as the process described in the “Independent Peer Review of Legal Advice and Work Final Process Paper” dated November 2005 or *any* document adopted in its place following consultation<sup>15</sup>. Accordingly these standards to which Contract Work must be performed, what counts as a breach and a fundamental breach of the Unified Contract, and the process by which the assessment of compliance is made may be unilaterally amended by the LSC;
  - (iii) the Unified Contract also provides for Key Performance Indicators (“KPIs”). A KPI is defined as “such measure of your performance as we [the LSC] may specify”<sup>16</sup>. The Standard Terms list 5 current KPIs and indicates that the Unified Contract may be amended to make failure to comply with them a breach after March 31<sup>st</sup> 2008<sup>17</sup>. It is also provided that “we [the LSC] may at any time amend any KPI(s) and/or introduce any additional KPI(s)”<sup>18</sup>. The Unified Contract may also be amended so that failure to achieve them is also a breach of contract<sup>19</sup>. It follows again that what counts as a KPI and what may involve a breach of contract if it is not complied with may be unilaterally amended by the LSC.

19. Clause 13 also allows the LSC to amend the whole contract unilaterally to give effect

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<sup>13</sup> See [8] of the Introduction to the Specification.

<sup>14</sup> See Clause 10.4 to 10.7 of the Standard Terms.

<sup>15</sup> See Clause 1 of the Standard Terms.

<sup>16</sup> See Clause 1 of the Standard Terms.

<sup>17</sup> See Clause 10.9-10.11 of the Standard Terms.

<sup>18</sup> See Annex G to the Standard Terms

<sup>19</sup> See Annex G to the Standard Terms.

to any amendment approved by the Consultative Bodies, including the Law Society.

20. The only constraints that Clause 13 imposes on the LSC's unilateral powers of amendment are these:

- (1) no amendment to the Contract for Signature, the Contract Standard Terms or the Specification (but not the Schedules) may be made without prior consultation (except for amendments under any other provision of the Contract)<sup>20</sup>. If the amendment affects only one supplier, that supplier will be consulted. Otherwise the Consultative Bodies will be consulted. The *maximum* period for consultation is 42 days (but only 21 days if the LSC consider that there is an urgent need for consultation). There is no specified *minimum* period for consultation. "After consultation we [the LSC] may amend the document as originally proposed, or in a modified form, or leave it unamended and any amendment made by us shall be binding on you"<sup>21</sup>. Any amendment may affect all or fewer Suppliers as the LSC chooses<sup>22</sup>;
- (2) the amendment must be complied with from such date as the LSC may specify which generally must be not less than 42 days after notice of the amendment is given (but only 28 days if the LSC consider that there is an urgent need for compliance with it)<sup>23</sup>.

21. The Unified Contract thus contains powers enabling the whole contract, including the technical specifications it contains, to be amended unilaterally by the LSC at short notice with results that cannot now be determined by Solicitors from the contract documents.

## THE FAILURE TO COMPLY WITH THE PROVISIONS OF THE 2006 REGULATIONS

22. The provisions enabling unilateral amendments to be made with results that Solicitors cannot now determine from the contract documents involve a failure to comply with the specific provisions of the 2006 Regulations referred to above.

23. As regulation 9(2) makes plain, if the LSC wishes to lay down technical specifications which must be met by the services to be provided (as it patently does), the LSC is required to set them forth in the contract documents. Reserving a unilateral power to insert new technical specifications and amend any existing technical specification is patently incompatible with the requirement to specify them in the contract documents upon the basis of which Solicitors are invited to contract.

24. Such a unilateral power to insert new performance and functional requirements and to amend any such existing requirements is likewise patently incompatible with the requirement in regulation 9(7) to specify any such requirements sufficiently precisely to allow Solicitors to determine the subject matter of the contract.

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<sup>20</sup> See Clause 13.4 of the Standard Terms.

<sup>21</sup> See Cause 13.7 of the Standard Terms.

<sup>22</sup> See Clause 13.12 of the Standard Terms.

<sup>23</sup> See Clause 13.8 of the Standard Terms.

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25. Moreover, the reservation of such a unilateral power to amend the technical specifications on such short notice creates an unjustified obstacle to the opening up of public procurement to competition contrary to regulation 9(4): the uncertainty involved will necessarily deter service providers and there is no sufficient justification for having unilateral powers to amend the technical specifications of such width at such short notice.

26. Those powers to amend the whole of the Unified Contract<sup>24</sup> are also incompatible with the requirement in regulation 4(3) on the LSC to act in a transparent way in awarding contracts as it means that a service provider cannot determine for himself with reasonable certainty what the contract will require him to do before he enters into it.

27. The LSC has the power to fund services as part of the Community Legal Service by entering into contracts with persons or bodies for the provision of services by them.<sup>25</sup> This power may, however, only be lawfully exercised by the LSC in accordance with obligations imposed upon it under the 2006 Regulations and the Public Sector Directive. The LSC has failed to comply with those obligations, for the reasons set out above.

## CHALLENGE BY THE LAW SOCIETY AND RELIEF SOUGHT

28. The Law Society is not a proposed service provider under the Unified Contract, and hence is not an economic operator for the purposes of the 2006 Regulations. It is therefore not in a position to enforce obligations under the Regulations by way of an application to Court pursuant to regulation 47. There is thus no question of the Law Society having an alternative remedy to an application for judicial review.

29. The Law Society is, however, the professional body representing the large number of Solicitors who are currently being invited to sign the Unified Contract and are (where the threshold requirements in regulation 8 are met) owed a duty under the Regulations which for the reasons set out above has been breached by the LSC. Individual firms of Solicitors are not realistically in a position to bring claims under the Regulations to challenge the terms of the proposed Unified Contract. Since the existing General Civil Contract expires on 31 March 2007, an interim order suspending the procedure leading to the award of Unified Contracts on 1 April 2007<sup>26</sup> or an order setting aside the decision of the LSC to offer the Unified Contract<sup>27</sup> would not be effective to protect their position in respect of work done after 31 March or to protect their existing clients after that date. Such an order would effectively leave many existing assisted clients and many potential new clients without access to legal advice and assistance after that date. To seek such an order would not therefore be in the public interest, as the LSC will appreciate. Moreover, it would be undesirable in terms of efficient management of court resources for there to be a multiplicity of claims raising the allegation of breach of the 2006 Regulations and the Public Sector Directive. The Law Society is thus seeking to protect the interests of the firms which it represents by bringing these

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<sup>24</sup> Whether or not the amendment relates to a technical specification.

<sup>25</sup> Section 6(3)(a) of the 1999 Act.

<sup>26</sup> Pursuant to the power conferred on the Court by regulation 47(8)(a).

<sup>27</sup> Pursuant to regulation 47(8)(b)(i).

proceedings by way of judicial review.

30. In any event, the standing of the Law Society to bring a claim for judicial review is not dependent upon individual solicitors not being in a position to bring claims under the Regulations. The Law Society has a distinct and sufficient interest, as the professional body responsible for the interests of solicitors, in the subject matter of the proposed claim. It is, furthermore, as noted above a Consultative Body under the Unified Contract which the LSC is obliged to consult before making the unilateral changes to the Unified Contract which it is contended breach the obligations laid down by the 2006 Regulations and the Public Sector Directive.

31. The Law Society intends to restrict the relief sought, on its proposed claim for judicial review, to a declaration as to the compatibility of the Unified Contract with the 2006 Regulations and the Public Sector Directive. It recognises that, absent the LSC agreeing to suspend or abandon the introduction of the Unified Contract on 1 April 2007 and to continue with the old General Civil Contract, the Unified Contract will come into effect on 1 April 2007 in respect of those Solicitors who choose to sign and return it to the LSC. A declaration will, however, be of real and practical importance for a number of reasons, including the following:

- (1) The LSC will have the contractual power, under the Unified Contract, to make any amendments to the Contract to comply with or take account of any decision of (inter alia) a United Kingdom court.<sup>28</sup> The Law Society contends that the LSC would be under a duty to have regard to and to give effect to a declaration of the Court that certain provisions of the Unified Contract violated its obligations under the 2006 Regulations and the Public Sector Directive, which are directly effective as a matter of Community law.
- (2) Before exercising its unilateral power of amendment under Clause 13, the LSC would in any event be obliged to have regard to and take into account any declaration by the Court as to the compatibility of those provisions with the 2006 Regulations and the Public Sector Directive. The Law Society understands that, as presently advised, the LSC intends to make substantial amendments to the Unified Contract in October 2007 as recommended in Lord Carter's Review of Legal Aid Procurement "Legal Aid – A market-based approach to reform (July 2006)", the DCA's Consultation Paper – "Legal Aid: a sustainable future (July 2006)" and the DCA's analysis of responses (November 2006).
- (3) Finally, any declaration would have considerable significance for the LSC's proposal to replace the existing criminal legal aid contract for many practitioners with the Unified Contract on 1 April 2008 when similar issues will no doubt arise. It is in the public interest to determine now what the legal position will then be.

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<sup>28</sup>

Clause 13(2) of the Unified Contract.

## **ACTION REQUIRED**

32. In order to avoid any unnecessary proceedings being brought and unnecessary costs being incurred, however, we would be grateful if:

- (1) the LSC will inform us whether (and if so to what extent) it disagrees with the matters set out in this letter (and if so why), and;
- (2) if the LSC accepts that there has been, or will be, any failure by it to comply with any provision of the 2006 Regulations and the Public Sector Directive, what it proposes to do about it,

by no later than **4pm on Thursday 5th April 2007**. Despite the fact that the Law Society is not seeking to have this matter heard or resolved before the introduction of the Unified Contract on 1 April, the matter is urgent because once the Unified Contract is in force, Solicitors are potentially exposed to the impugned power of unilateral amendment. Therefore, if it is possible for the LSC to provide a substantive response sooner than the date proposed above, it would be desirable for it to do so.

33. Our client intends to issue proceedings without further notice thereafter.

34. By way of summary, and addressing the information required by the Judicial Review Pre-Action Protocol:

(1) ***Name and Address of the proposed defendant***

The Legal Services Commission  
Policy and Legal Department  
85 Gray's Inn Road  
London WC1X 8TX

(2) ***The Claimant***

The Law Society  
113 Chancery Lane  
London WC2A 1PL

(3) ***Reference Details***

The Law Society is acting through solicitors, as set out below.

(4) ***Details of the matter being challenged***

The decision of the LSC to issue, in or about early March 2007, to selected firms of solicitors a new "Unified Contract" for the period from April 1<sup>st</sup> this year to March 31<sup>st</sup> 2010.

(5) ***The Issue***

As set out above in this letter.

(6) ***The Details of the action that the Defendant is expected to take***

The LSC is invited to suspend the introduction of the Unified Contract on 1 April 2007 and to extend the existing General Civil Contract whilst an amended version of the Unified Contract is developed which complies with the LSC's legal obligations as set out above. In the alternative, the LSC is invited to consent to a declaration that the Unified Contract breaches

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the 2006 Regulations and the Public Sector Directive for the reasons set out above.

(7) *Details of legal advisers dealing with this claim*

Bircham Dyson Bell LLP  
50 Broadway  
London SW1H 0BL  
Tel: 020 7227 7000  
Fax: 020 7222 3480  
Reference : **PTJ/Y052757**

(8) *Details of any interested parties*

Secretary of State and Lord Chancellor  
Department for Constitutional Affairs  
Selborne House  
54 Victoria Street  
London SW1E 6QW

Although all Solicitors invited to enter into the Unified Contract are in theory interested parties, it is clearly impracticable to serve them. In any event, the Law Society will be publicizing to its members the fact of the intended application for judicial review.

(9) *Details of information sought*

The Law Society seeks a detailed response to this Letter before Claim.

(10) *Address for Reply and Service of court documents*

Bircham Dyson Bell LLP, at the address given above.

(11) *Proposed reply date*

4pm on Thursday 5th April 2007 or sooner if possible.

Yours faithfully



**Bircham Dyson Bell LLP**

cc: Secretary of State and Lord Chancellor,  
Department for Constitutional Affairs