

## CLS Strategy briefing 6 The Draft Unified Contract

### Introduction

The LSC is currently consulting on the new unified contract. This briefing highlights some of the main differences between the draft contract and the existing NfP contract. It is not intended as a written commentary on every single element of the draft contract. It is written on the basis that the reader has a working knowledge of the existing contract and should not be seen as a substitute for reading either the current contract or the draft contract.

We have highlighted issues in the order in which they occur in the contract documents.

### Structure of the unified contract

The draft contract comprises:

- Contract for signature
- Principal schedule
- Office schedule
- Standard terms
- Specification

It should be noted that there are a number of documents currently missing:

- The Equality & Diversity Annexe
- Part B of the Specification – Payment rates (for calculating fees that are exceptional)
- Section 9 of the Specification – ‘Category of Law Specific Provisions’  
Clearly this is an essential document as it will provide category specific guidance on rules around separate matters
- Part C of the Specification – ‘Guidance’

We have told the LSC that it is unacceptable to be sent a consultation document, which is incomplete. As these documents become available we will inform bureaux.

## **Contract for signature**

Annex A to the contract requires directors and shareholders to indemnify the LSC within 30 days of a request to do so if the company fails to make payment of monies owed to the LSC within 30 days. In other words even if your bureau is a company limited by guarantee your Trustees would have to sign up to personal liability to repay the LSC.

Clearly this is not something that is acceptable and as an organisation Citizens Advice would have to advise all bureaux not to sign the new contract were this requirement to remain. We have raised this with LSC staff and they did seem to understand why this was an issue. They are raising the matter internally and we hope to get a decision on this before the consultation has closed.

## **Principal schedule**

Under a table headed 'Status & Quality Assurance Standard', the alternatives are shown as: "SQM, other or none". This seems a little strange; as the implication of this is that it would be possible to have a contract without any QA standard.

## **Office schedule**

The Standard Terms (Foreword para I) states that each supplier only has one Unified Contract. However, the heading of this schedule suggests that Matter Starts and Licensed Work Cases will still be allocated on an office basis. This suggests that although a consortium or a district bureau may have one overall contract, individual offices will still have to meet specific targets, which will contribute to the overall contract.

The unified contract does allow suppliers to do outreach work at any location in their bid zone, without applying to the LSC for permission. However, as there is still no indication that the LSC will pay for outreach services this clause may not be that helpful.

There is a note at the end of the office schedule that asks suppliers to sign and return a copy of the schedule within seven days of receipt 'so that we know you have received it'. It is not clear whether this would also mean that you have accepted the terms of the schedule.

## **Standard terms**

(Foreword para I). - Suppliers will be responsible for the performance of the organisation as a whole. This means that multi-site services, e.g. several bureaux working as a consortium could be at complete risk if even one bureau underperformed.

## 2. Relationship (p.14 of 62)

2a Suppliers agree to continually 'improve the services you provide to Clients'. How the LSC will measure this is not clear – there needs to be clarification as to precisely what this means.

9. Organisations must nominate a 'Liaison Manager' to deal with the LSC.

14. (p.15 of 62) At the LSC's request, organisations must disclose all financial information specified, including 'information about the operating costs and expenses of your performance of contract work. It is not clear what is envisaged here but potentially it could be very resource intensive.

15. (p.15 of 62) Suppliers are required to demonstrate that they are 'financially viable'. The LSC does not explain what this means, how often this will be required or how they will deal with NfPs on this matter.

19. (p.15 of 62) Suppliers are required to 'ensure that your personnel do not unlawfully discriminate'. Whilst an organisation will hopefully do everything in its power to prevent unlawful discrimination by its staff; people sometimes do bad things and all the organisation can do is take appropriate action afterwards. This should be amended to request that suppliers **take all reasonable steps** to ensure that personnel do not discriminate.

24. (p.16 of 62) The LSC will assign every provider with a risk rating. The criteria for this rating include contract performance, contract compliance, financial position and 'your ability to work co-operatively' with the LSC. Clearly some of these criteria are subjective; any rating must be based on objective, measurable criteria.

## 3. Looking after Clients, Compliance, Monitoring and Demonstrating Compliance and Required Procedures (p17 of 62)

3. (p.17 of 62) This introduces the requirement to have a case management system. It is helpful that it acknowledges that technical functionality will be 'reasonable' and imposed after consultation, however the concern is the contract will require expenditure on IT that cannot currently be budgeted.

7. (p.17 of 62) This introduces a requirement to conduct internal monitoring, some bureaux may currently do this, but for others it will mean introducing additional systems.

22. (p.19 of 62) New contract report forms can be introduced after 28 days notice. This is unlikely to be sufficient time to allow case management software to be upgraded.

23. (p.19 of 62) This allows the LSC to carry out 'mystery shopping' exercises, but does not explain how a system would work.

25. (p.20 of 62) This requires providers to maintain a 'register of risks' with specified procedures to address each identified risk. Unfortunately it is not clear from the example provided what the LSC is looking for from the NfP sector.

## **8. Claims and Payments (p.27 of 62)**

3. (p.27 of 62) This states that in respect of Controlled Work, Standard Monthly payments will be made that may include payments in respect of final claims and payments on account; but not how the breakdown will be made between the two. This means that a payment would be made every month to contracted bureaux and that there would be an element of this that was payment in advance. Clearly more information is needed on this as it would give bureaux an indication of the likely impact of monthly payment in arrears.

11. (p.28 of 62) Under the new contract if providers forget to claim the VAT, the LSC is not obliged to pay it subsequently.

## **9. Your Account with us (p.31 of 62)**

4. (p.31 of 62) The LSC can set maximum payment on account limits.

7. (p.31 of 62) Any payment on account is repayable on demand (subject to the contract)

## **10. Instruction and Payment of Third Parties (p.32 of 62)**

5. (p.32 of 62) If you are in dispute with a third party and are withholding or delaying payment of their fees (disbursements), you must repay any money you are holding in respect of these fees to the LSC within 28 days. This seems very bureaucratic.

6. (p.32 of 62) This requires third parties to keep accurate time records and also requires them to allow the LSC to audit their records. While barristers might feel comfortable with this and understand the requirement it is questionable how GPs would respond.

## **12. Confidentiality and Data Protection (p.34 of 62)**

The LSC has adopted a presumption that information about suppliers is not confidential. The LSC refers to 'plainly confidential' information (para 1, p.34 of 62) and 'information which we are bound to keep confidential' (para 10, p.35 of 62), however they do not explain what this would include. They do however make it very clear what is not included – see Para 3 and Para 9.

Bureaux have previously stated that they are concerned about some of this data being made public particularly when no context is provided with the data. For example, you may not have met performance standards due to maternity leave by the post-holder. If there is no opportunity for the reason for underperformance to be given then this could create a negative impression with other funders.

## **17. Prohibited gifts, fraud and unethical behaviour**

14. (p.46 of 62) All providers are required to have procedures to identify, address and counter fraud.

## **18. General**

6. (p.47 of 62) This clause means that neither the LSC nor the provider are responsible for delay in performance or non-performance where the cause is 'beyond reasonable control'. However, excluded from this is a delay as a result of 'fire, flood or criminal act caused or committed by any member of the affected party's personnel.' This seems excessively harsh as providers cannot be permanently responsible for staff behaviour.

27. Consortia (p.50 of 62) Lead members of consortia and the LSC 'are the only parties to this contract' but 'you must require them [other members] to enter into such contracts with us and provide such indemnities as we may reasonably require.' This seems strange as the LSC is keen to deal with fewer providers –by having lead agencies etc. This part of the contract seems to fly in the face of that intention.

32. Material changes (p.51 of 62) This requires suppliers to notify the LSC of any material alteration 'to the manner in which you perform contract work (including material alterations to you management systems)'. This could be straightforward or onerous. The examples given suggest that only major changes need to be notified (e.g. stopping contract work). It would be helpful to have some examples of minor changes that do not need to be notified.

## **19. How the Contract can be ended (p.53 of 62)**

No fault termination (p.53 of 62) This provides for three-month notice by the LSC 'to facilitate a Reform of the Legal Aid Scheme'. This is too short to allow providers to comply with redundancy notice provisions.

## **21. Consequences of termination (p.57 of 62)**

13. After termination (p.58 of 62) If the contract is terminated for any reason other than 'no fault' then the LSC can set a time period (at least two years) during which any personnel determined by them in whole or in part as responsible for the circumstances leading to the termination, may not apply for a further contract.

## **22. Reconsidering decisions and the review procedure (p.59 of 62)**

7. Formal review must be applied for within 14 days or 28 days if an informal reconsideration has been requested. 28 days seems rather short to expect a Contract or Relationship Manager to deal with such a request. It may be better to allow a longer time limit, otherwise providers are likely to apply to the Regional Manager for a formal review because they need to protect their position, when the matter is still under investigation at the informal stage. A longer time limit would encourage more decisions to be reconsidered at a lower level.

10. This suggests that oral representations to the Contract Review Body (CRB) will be the exception rather than the rule.

### **Annex A – Liaison (p.1 of 14)**

The LSC has introduced a professional code, which encourages both parties (the LSC and the contract holder) to act in a professional manner at all times. It states that impolite or rude communication will not be tolerated.

This section also highlights the items that would always be discussed between the provider and the LSC at regular meetings; it includes 'the value for money provided by the Supplier' but does not explain how this will be defined.

### **Annex D – Client Service (p.4 of 14)**

3. Indemnity Insurance (p.4 of 14) Professional Indemnity Insurance is required and must 'provide the minimum cover required for solicitors in private practice. '

4 – 8 (p.4 of 14) Client service and file review procedures. This lists a number of requirements that are currently in the SQM – although in the SQM there is more detail.

### **Annex E – Monitoring (p.5 of 14)**

The LSC will require the provider to produce an Annual Report for the period 1 January to 31 December. The report will have to include information on issues such as contract performance and compliance – which presumably the LSC will already have. In addition the provider will be required to include statistics in respect of clients' and personnel's 'age group, ethnicity, gender, sexual orientation and disability (if any)'.

Some bureaux have already indicated to us that they are not happy at the idea of asking questions of clients or staff regarding sexual orientation.

## **Annex F – Approved Personnel and Supervisors (p.6 of 14)**

It is not clear whether there will be further requirements regarding approved personnel in any other contract documentation – the information contained in this section is very brief. It also seems that there is information missing on the supervisor requirements as the text under para 8 seems incomplete.

## **Annex G – Key Performance Indicators (p.7 of 14)**

The LSC introduce a number of key performance standards:

- Peer Review Score must be 3 at lowest
- Success rate a minimum of 40% - However not clear how success rate is defined
- Assessment Reduction – a maximum of 5%. We think that this relates to exceptional cases and means that no more than 5% of a provider's exceptional cases are reduced when they are assessed
- Fixed Fee Margin – 20%. This means that your costs should not be less than the fixed fee by more than 20% - it was introduced under tailored fixed fees to make sure that providers don't make too much profit.

## **Annex J – TUPE (p.12 of 14)**

There is a general concern that these requirements are too onerous. The LSC has agreed to clarify why the annex is worded in the way that it is. Citizens Advice is also seeking advice on this annex.

## **Civil Specification**

### **Section 1 – General Rules for Suppliers**

1.4 This requires that if a supplier has provided Controlled Work and the client transfers to another supplier, the first must on request, provide 'reasons for the termination of the retainer'.

### **Section 2 – Applications for Contract Work**

*This includes information about signing of the Legal Help form, giving advice to clients who have already received advice from another provider and when a provider can refuse to take on a case.*

2.4 & 2.5 Satisfactory evidence of the client's means must be obtained before assessing financial eligibility. However this assessment can be carried out before this when it is not practicable to get the evidence or pre signature telephone advice is given.

2.11 States that the assessment of the client's means must be fully completed and the form signed in your presence before the Controlled Work is commenced.

This is a change to previous practice by the LSC – the current NfP General Civil Contract Specification Rule 2.6a) states ‘Where the form is signed in the course of an interview, you can claim all reasonable time from the beginning of the interview.’

Some providers may see this as detrimental to the adviser/client relationship. There are those who feel it is better practice to encourage the client to explain their problem and establish a rapport before asking the client to go through the Legal Help Form and sign it.

2.23 This section applies to cases where clients have received previous legal help on the same matter. It places a much greater duty on a subsequent provider to consider and record on the file whether it is reasonable to provide further Legal Help to a client within six months of previous advice.

2.24 If a client refuses to give you consent to contact the previous organisation that provided advice then you cannot assist the client and cannot claim for any work done up to that point.

2.27 If the client is dissatisfied with the service provided by the previous provider, the new provider is required to assist the client in putting his/her complaint in writing to the appropriate regulator and copy to the LSC’s regional office. It is not clear whether the new provider could claim time for this work. Also note that the LSC have listed the ASA as a regulator – this is incorrect.

2.46 This paragraph deals with the issue of ‘cherry picking’ ‘You may not refuse to undertake work which is within the scope of your Contract and which you have the appropriate skills and capacity to carry out because you believe that your costs are likely to exceed any Standard Fee or Graduated Fee you would be entitled to claim for that work.’ This implies that the tactic of only taking on short cases to make the fixed fee sustainable may be difficult however it is not clear how the LSC could monitor this other than through mystery shopping.

## **Section 5 Carrying out Controlled Work**

*This Section covers issues around Separate Matters*

5.7 This makes it clear that the LSC intends to be restrictive in the number of Matter Starts that can be opened in respect of one client.

5.8 Refers to Category Specific matter Start Guidance – unfortunately Section 9 is not yet available.

5.14 This refers to separate matters that fall under different categories of law and suggests that if only brief advice is given under another category of law then it should count as the same matter. It then goes on to say, ‘If however, an issue in another Category of Law is pursued beyond brief advice, then a separate Matter Start should be used.’ There is no definition of ‘brief’.

5.24 If the client has ceased to give instructions and the adviser has closed their file, no further claim can be made if the client needs further advice on the same matter (unless there has been a material change in the case). This will cause considerable problems for clients with chaotic lives, for example due to addiction problems or mental health problems and who often lose contact with their advisers for long periods of time.

## **Section 6 Carrying out Licensed Work**

*This is not applicable to most bureaux*

6.17 Payments on account. There is no longer a £250.00 automatic payment on account when a certificate is issued. The supplier must apply; but can do so after three months. Subsequent applications are made at six-monthly intervals, as now.

## **Section 7 Payment, claiming and assessment of Contract Work**

7.11b The LSC is not obliged to make payment in respect of claims for controlled work if they are submitted over two months late (currently three).

7.24 Tolerance work is to be paid at 85% of the Standard Fee.

7.46c There is a general provision on assessment that 'you may not claim for any additional costs incurred by you or your client because you are based in a location different from your client.' It is not clear exactly what this means; but it suggests that organisations will not be paid additional sums for doing outreach sessions, for example or home visits.

7.51 This allows the LSC to extrapolate assessment findings to 'other claims for payment for Controlled Work at hourly rates'. This means for example that the LSC could assess a small sample of exceptional case claims and apply the findings to all the exceptional cases carried out by a provider. Under Tailored Fixed Fees, exceptional claims are assessed individually.