

Legal Services Commission Consultation Paper General Civil Contract (Solicitors) & General Civil Contract (NfP) Amendments Relating to Immigration and Asylum Work

Foreword

1. *The Commission's intention to amend the contract and to introduce a performance standard for Controlled Legal Representation (CLR) was presented at a meeting of Immigration Stakeholders at the Commission's London Regional Office on 11 October 2005. Since then, the Commission has given further consideration to the proposals. The main amendments to the original proposals are:*
 - *to modify the breach and fundamental breach proposals for current contracts and to refer to performance being a factor in the decision to grant a new contract or contract extension from 1 April 2007:*
 - *to give full CLR devolved powers to all suppliers from May 2006*
 - *to include the proposed contract amendments.*

Introduction

2. In 2005-06 the Commission had the following Corporate Target for Controlled Legal Representation (CLR):
 - "Increase the success rate of cases where legal aid has been granted to assist people seeking Asylum (Controlled Legal Representation) to 40% by April 2006."
3. For 2006-07 the CLR Corporate Target will be:
 - "To ensure that in 2006-07 there is an overall success rate of 40% in Immigration and Asylum cases where the Commission funds representation at the Asylum and Immigration Tribunal (AIT)."

Corporate target for 2006-07

4. The three changes to the wording have been made for the following reasons.

Inclusion of immigration cases

5. This corporate target was first introduced in 2004-05 to help measure the effectiveness of the April 2004 legal aid reforms. Those reforms applied equally to immigration and asylum and it was always the intention to include immigration cases in the target. The devolved powers criteria that were developed in 2004-05 require a 40% success rate overall in immigration and asylum, not merely in asylum.

Overall success rate for the year of 40%

6. The corporate targets for 2004-05 and 2005-06 both required the level of performance to improve during the course of the respective financial years. The target is for performance to reach 40% by the end of 2005-06.
7. Significant work has been carried out in those financial years to improve the quality of the active supplier base and restrict remainder work for those suppliers that have had their contracts terminated. The majority of this work should reach fruition early in 2006-07 and the vast majority of suppliers contributing to the target will therefore have active contracts. It is therefore reasonable to assume that we should achieve an overall success rate of 40% for the whole financial year, as this is the level of performance we expect of our suppliers.

Cases where the Commission funds representation at the AIT

8. This change has been made to bring the measurement of the corporate target in line with the measures consulted on and agreed as part of the devolved powers criteria.
9. The CLR criterion for devolved powers is to have a 40% successful outcome at CLR at the IAA (now AIT). There is a difference between expecting a 40% success rate at the AIT and expecting a success rate of 40% in all cases where CLR is granted. This is because the CLR merits test allows for the grant of funding in unclear and borderline cases in circumstances that exist in large numbers of asylum cases, for example where the case is of overwhelming importance to the client. It requires the refusal or withdrawal of funding if prospects are poor or appear poor at any stage, for example after investigations.
10. It is reasonable to assume that, although the prospects of success might be unclear at the time CLR was granted, they will not be unclear by the time a supplier represents a client at the AIT, whether that be at the Case Management Review or Substantive Hearing.

Measurement of the target

11. The overall CLR target and the performance of individual suppliers is measured from the information provided by suppliers on their monthly Consolidated Matter Report Forms and can be verified from information available from the Home Office and AIT.
12. Suppliers use a number of different "end point" codes to report the outcome of a case. Some of those end points count towards the target whilst others do not. In 2006-07 the end points will be used as shown in the table below.

End Point Code	Description	Measurement
A	Matter proceeded under other CLS Funding	Excluded from target
B	Client referred/transferred to another organisation	Excluded from target
C	Client advised and taking action themselves or with the help of a third party	Excluded from target
D	Client advised and third party action or decision awaited	Excluded from target

E	Outcome not known/client ceased to give instructions	Excluded from target
R	Matter stopped on adviser's recommendation (prior to AIT hearing)	Excluded from target
S	Matter concluded otherwise	Measured as an unsuccessful outcome
T	Permission to enter or remain permanently is given	Measured as a successful outcome
U	Humanitarian Protection or discretionary leave to enter or remain is granted	Measured as a successful outcome
V	Case results in grant of other permission to enter or remain for a defined period	Measured as a successful outcome
W	Citizenship gained	Measured as a successful outcome
X	Application refused	Measured as an unsuccessful outcome

13. The only change from 2005-06 is to exclude end point code R from the target. Previously, it would have counted as an unsuccessful outcome.
14. As the CLR merits test allows for CLR to be granted in unclear and borderline cases, suppliers should not be penalised for granting funding in cases that, on further investigation, turn out to have poor prospects of success. It is therefore right to exclude those cases from the sample measured.

Measures to underpin the target

Devolved Powers

15. Subject to a condition that they are removable at our discretion, we will give devolved powers to all suppliers from May 2006. This will more clearly place responsibility for decisions with suppliers. We want to have contracts with suppliers whom we are able to trust to make good decisions.

Monitoring reported claims

16. The high proportion of claims not counting towards the CLR target in 2005-06 is a matter of concern and this proportion is likely to increase further through excluding end point code R. Therefore, we will establish parameters for a normal work profile.
17. For example:
 - for every 100 CLR claims we will expect a particular distribution against the end point codes;
 - for a supplier meeting the 40% success rate we will expect a particular proportion of the overall costs to be spent on unsuccessful cases.
18. We will use these measures to target our contract management and audit activity. For example if a supplier is withdrawing CLR in an abnormally high proportion of cases we will investigate whether they are using CLR to provide advice on an appeal for cases that do not satisfy the merits test.

Introduce a performance standard for CLR

19. We will introduce a performance standard into the contract that requires a 40% success rate at appeal. We have already stated publicly that from April 2007 we are only looking to contract with suppliers who reach this standard. As well as having an overall target of 40% we will also specify a minimum standard of 35% in both asylum and immigration as we have noted a significant variance in the performance of some suppliers in the two areas of law and we consider that performance below 35% in either category is unacceptable.
20. Introducing the performance standard is intended to drive up performance during the course of 2006-07 and enable us to distinguish between suppliers, on the basis of their performance, when considering the grant of contracts, or contract extensions, for 2007-08 onwards.
21. The performance standard will apply to all appeals concluded from the date the performance indicator is in force. Although CLR for some of these appeals will have been granted by the Commission (because the supplier did not have devolved powers) we consider that it is reasonable not to exclude them from measurement because:
 - The supplier, in making the application for funding, must have considered that the case satisfied the merits test
 - The Commission will have determined the application for CLR on the basis of information provided by the supplier
 - All suppliers have the devolved power to withdraw CLR (and so could be expected to have done so at any time, and particularly if further information or analysis of the case suggested that the prospects of success had decreased)
 - Doing so would unfairly prejudice suppliers who have exercised devolved powers

Proposed contract amendments and associated monitoring

22. Currently, all suppliers have devolved powers to grant CLR in connection with a review and reconsideration under section 103A of the Nationality and Immigration Act 2002. To grant CLR for other proceedings in the immigration category suppliers must have been specifically granted the devolved power to do so, in writing. Until now, such grants have been made by letter.
23. We will issue all suppliers with an addition to the Performance Indicator Annex (recently issued to specify the Peer Review performance indicator) specifically to grant them full devolved powers to grant CLR in the immigration (including asylum) category and to specify the CLR performance indicator. This will replace grants made by letter. The proposed addition to the annex is set out in **Appendix A**.
24. Account Managers will monitor suppliers' performance and will contact them regularly if necessary. However, this is no substitute for suppliers monitoring their own performance, which they should do. We are very conscious that "hands-off" monitoring relies on suppliers accurately reporting case outcomes to us. Clause 3.2 of the Contract Standard Terms includes the following requirement:

“.....You must perform your obligations to record and report data accurately....”

25. The Commission does not anticipate that any supplier would consider intentionally misreporting case outcomes. However, such is the importance of the performance indicator that, to be fair to suppliers that are meticulous in their reporting, we will view misreporting as a serious breach of contract which may amount to a Fundamental Breach (as defined in the Contract Standard Terms). In any event, the Commission will randomly audit immigration cases, compare past performance with reported performance and will carry out other monitoring to validate reporting accuracy.
26. The introduction of a performance indicator necessarily requires there to be sanctions for failure to meet the required level of performance. As with the Peer Review performance indicator, the amendment distinguishes between breach of contract and Fundamental Breach (which is defined in the Contract Standard Terms). While we do not anticipate any suppliers' performance being so far below the required standard as to constitute a Fundamental Breach, we must have this provision in place to protect clients and public funds.

APPENDIX A
Legal Services Commission Consultation Paper
General Civil Contract (Solicitors) & General Civil Contract (NfP)
Amendments Relating to Immigration and Asylum Work

Contract for Signature – Performance Indicator Annex

Peer Review

The quality of your Contract Work in any Category of Work, as determined by the Independent Peer Review process specified by us, is a Performance Indicator.

The quality of your Contract Work in any Category of Work must be either Rating 1, Rating 2 or Rating 3 as determined by that Independent Peer Review process.

If the quality of such Contract Work is Rating 4, as determined by that Independent Peer Review process, this is a breach of Contract.

If the quality of such Contract Work is Rating 5, as determined by that Independent Peer Review process, this is a Fundamental Breach.

The specified Independent Peer Review Process is that managed by the Institute of Advanced Legal Studies.

Immigration and Asylum

Your Contract Work success rate at the Asylum and Immigration Tribunal (AIT) (“success rate”) is a Performance Indicator. It must equal or exceed all the following levels of performance:

- Overall success rate of 40% in Immigration and Asylum cases where the Commission funds representation at the AIT
- Success rate of 35% in Immigration cases where the Commission funds representation at the AIT
- Success rate of 35% in Asylum cases where the Commission funds representation at the AIT

You must report the outcomes of such cases promptly (see Clause 3.2 Contract Standard Terms). We reserve the right to take delayed reports into account. Repeated misreporting or late reporting is a Fundamental Breach. We will measure your performance by looking at outcomes from each 1 April (or, if later, from the date this Performance Indicator comes into effect) and the following 31 March (and at such dates earlier than 31 March as we consider appropriate).

If your success rate fails to equal or exceed all the specified levels of performance, this is a breach of Contract.

If your success rate is no better than half of any of the specified levels of performance, this is a Fundamental Breach.

In determining whether or not there has been a breach of Contract, we will normally take into account performance over at least six months but reserve the right to take into account

performance over at least three months if we consider there has been a Fundamental Breach.

This Annex specifically grants you the Devolved Power (which you must exercise) to grant Controlled Legal Representation in the Immigration (including Asylum) Category of Work. Any previous, specifically granted, Devolved Powers to grant Controlled Legal Representation in the Immigration (including Asylum) Category of Work are hereby cancelled. We reserve the right to cancel this Devolved Power at our complete discretion, at any time.

[Please note we will use this performance indicator to enable us to distinguish between suppliers seeking a new contract, or a contract extension, from 1 April 2007 and, to do so, may measure performance to such date, earlier than 31 March 2007, as we consider appropriate].