

Judicial Review

Claim Form

Notes for guidance are available which explain how to complete the judicial review claim form. Please read them carefully before you complete the form.

In the High Court of Justice
Administrative Court



<i>For Court use only</i>	
Administrative Court Reference No.	CO/3268/07
Date filed	20-4-07

SECTION 1 Details of the claimant(s) and defendant(s)

Claimant(s) name and address(es)

name
The Law Society

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113 Chancery Lane
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Fax no.
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E-mail address
N/A

Claimant's or claimant's solicitors' address to which documents should be sent.

name
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Claimant's Counsel's details

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John Howell QC, Javan Herberg and Mark Vinall

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Blackstone Chambers
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London EC4Y 9BW

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1st Defendant

name
The Legal Services Commission

Defendant's or (where known) Defendant's solicitors' address to which documents should be sent.

name
N/A

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Legal Director
85 Gray's Inn Road
London WC1X 8TX

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2nd Defendant

name

Defendant's or (where known) Defendant's solicitors' address to which documents should be sent.

name

address

Telephone no.

Fax no.

E-mail address

SECTION 2 Details of other interested parties

Include name and address and, if appropriate, details of DX, telephone or fax numbers and e-mail

name Lord Chancellor and Secretary of State		name	
address Department for Constitutional Affairs Selborne House 54 Victoria Street London SW1E 6QW		address	
Telephone no. 020 7210 8500	Fax no.	Telephone no.	Fax no.
E-mail address		E-mail address	

SECTION 3 Details of the decision to be judicially reviewed

Decision: The decision by the Defendant to seek offers in March 2007 from selected firms of solicitors to enter a new "Unified Contract" for the period 1 April 2007 to 31 March 2010, and the subsequent award of such contracts.
Date of decision: 27 February 2007

Name and address of the court, tribunal, person or body who made the decision to be reviewed.

name The Legal Services Commission	address 85 Gray's Inn Road London WC1X 8TX
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SECTION 4 Permission to proceed with a claim for judicial review

I am seeking permission to proceed with my claim for Judicial Review.

Are you making any other applications? If Yes, complete Section 7. Yes No

Is the claimant in receipt of a Community Legal Service Fund (CLS) certificate? Yes No

Are you claiming exceptional urgency, or do you need this application determined within a certain time scale? If Yes, complete Form N463 and file this with your application. Yes No

Have you complied with the pre-action protocol? If No, give reasons for non-compliance in the space below. Yes No

Does the claim include any issues arising from the Human Rights Act 1998? If Yes, state the articles which you contend have been breached in the space below. Yes No

SECTION 5 Detailed statement of grounds

set out below attached

SECTION 6 Details of remedy (including any interim remedy) being sought

A declaration that the "Unified Contract" in respect of which the Defendant sought offers and which it awarded, and in particular the provisions of clause 13 (save for the power to make the amendments permitted under clause 13.2) thereof, failed and fails to comply with:

- Regulations 4(3), 9(2), 9(4) and/or 9(7) of the Public Contracts Regulations 2006 (SI 2006/5); and/or
- Articles 2, 23(1), 23(2) and/or 23(3)(b) of Directive 2004/18/EC of the European Parliament and Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts;

and/or

- the principle of transparency (a general principle of European Community law).

SECTION 7 Other applications

I wish to make an application for:-

SECTION 8 Statement of facts relied on


[Empty box for statement of facts]

Statement of Truth

~~XXXXX~~ (the claimant believes) that the facts stated in this claim form are true.

Full name Peter Thomas Jacobsen

Name of claimant's solicitor's firm Bircham Dyson Bell LLP

signed  position or office held _____

Claimant ('s solicitor)

(if signing on behalf of firm or company)

SECTION 9 Supporting documents

If you do not have a document that you intend to use to support your claim, identify it, give the date when you expect it to be available and give reasons why it is not currently available in the box below.

Please tick the papers you are filing with this claim form and any you will be filing later.

- | | | |
|---|-----------------------------------|--|
| <input checked="" type="checkbox"/> Statement of grounds | <input type="checkbox"/> included | <input checked="" type="checkbox"/> attached |
| <input checked="" type="checkbox"/> Statement of the facts relied on | <input type="checkbox"/> included | <input checked="" type="checkbox"/> attached |
| <input type="checkbox"/> Application to extend the time limit for filing the claim form | <input type="checkbox"/> included | <input type="checkbox"/> attached |
| <input checked="" type="checkbox"/> Application for directions | <input type="checkbox"/> included | <input checked="" type="checkbox"/> attached |
| <input checked="" type="checkbox"/> Any written evidence in support of the claim or application to extend time | | |
| <input type="checkbox"/> Where the claim for judicial review relates to a decision of a court or tribunal, an approved copy of the reasons for reaching that decision | | |
| <input checked="" type="checkbox"/> Copies of any documents on which the claimant proposes to rely | | |
| <input type="checkbox"/> A copy of the legal aid or CLSF certificate (<i>if legally represented</i>) | | |
| <input checked="" type="checkbox"/> Copies of any relevant statutory material | | |
| <input checked="" type="checkbox"/> A list of essential documents for advance reading by the court (<i>with page references to the passages relied upon</i>) | | |

Reasons why you have not supplied a document and date when you expect it to be available:-

Signed _____

Claimant ('s solicitor) _____

BETWEEN:

THE QUEEN

on the application of

THE LAW SOCIETY

Claimant

and

THE LEGAL SERVICES COMMISSION

Defendant

References to [AB/**] are to the Claimant's Authorities Bundle Tab*.

References to [*/**] are to the Main Bundle Tab* and page *

CLAIMANT'S STATEMENT OF FACTS AND GROUNDS

INTRODUCTION

(a) the Claimant

1. The Claimant, the Law Society, is a body incorporated by Royal Charter, in whom various functions relating to the regulation of the solicitors' profession have been conferred by enactment and which also represents the interests of solicitors. Membership of the Law Society is voluntary. There are currently over 135,000 solicitors who are members of it.

(b) the Defendant and the Community Legal Service

2. The Defendant, the Legal Services Commission ("the LSC"), is a statutory body corporate established under Part 1 of the Access to Justice Act 1999 ("the 1999 Act")[AB/4]. It has the functions conferred upon it by or under that Act relating to (a) the Community Legal Service and (b) the Criminal Defence Service¹.

3. The LSC is required to establish, maintain and develop the Community Legal Service for the purpose of promoting the availability to individuals of certain legal services and, in particular, for securing (within the resources made available, and the priorities set, in accordance with Part 1 of the 1999 Act) that individuals have access to services that effectively meet their needs².

¹ See section 1(2) of the 1999 Act.

² See section 4(1) of the 1999 Act. The relevant services are described in section 4(2) of the 1999 Act.

4. The LSC is required to fund the services which form part of the Community Legal Service in accordance with section 5 and the sections following it in Part 1 of the 1999 Act³. In funding such services the LSC is to aim to obtain the best possible value for money⁴.

5. The LSC may only fund services for an individual as part of the Community Legal Service if his financial resources are such that he is an individual for whom they may be funded⁵ and if the LSC has decided to do so in accordance with criteria set out in a funding code (which it prepares and which requires the approval of the Lord Chancellor and each House of Parliament)⁶.

6. The LSC is empowered to fund services as part of the Community Legal Service in accordance with section 6(3) of the 1999 Act. In particular it may fund such services, under section 6(3)(a) of the 1999 Act, by:

“entering into contracts with persons or bodies for the provision of services by them”⁷.

7. An individual for whom services are funded by the LSC as part of the Community Legal Service may not be required to make any payment in respect of such services except in accordance with regulations⁸. A person who provides services funded by the LSC as part of the Community Legal Service may not take any payment in respect of the services apart from that made by way of that funding or any authorised by the LSC to be taken⁹.

³ See section 4(5) of the 1999 Act.

⁴ See section 5(7) of the 1999 Act.

⁵ See section 7 of the 1999 Act.

⁶ See sections 8 and 9 of the 1999 Act.

⁷ In certain cases such contracts may not provide for the payment by the LSC at rates higher than certain maxima: see article 5 of the Community Legal Service (Funding) Order 2000 [AB/7].

⁸ See section 10 of the 1999 Act and regulations 2-5, 15 and 38 of the Community Legal Service (Financial) Regulations 2000 as amended (including the amendment to the definition of ‘assessing authority’ by regulation 4 of the Community Legal Service (Financial)(Amendment) Regulations 2007 [AB/5]). The regulations make provision for contributions in respect of the costs of any services provided to be paid to the assessing authority, that is to say the LSC (unless it has delegated that function under contract or under the Funding Code). When the Unified Contract was entered into the supplier assessed contributions only in the case of legal representation in Specified Family Proceedings.

⁹ See section 22(2) of the 1999 Act. (i) Regulations 15 and 22(3) of the Community Legal Service (Costs) Regulations 2000 [AB/6] and paragraph 6.8 of the Specification allow solicitors to retain any element of costs paid by another party by an agreement or order in favour of the person for whom licensed work has been provided that exceeds the amount payable or paid under the Unified Contract. (ii) In certain circumstances where the statutory charge relates to Legal Help or Help at Court, the statutory charge is payable to the supplier and goes to reduce the amounts payable by the LSC: see section 10(7) of the 1999 Act, regulations 40 and 42-47 of the Community Legal Service (Financial) Regulations 2000, paragraph 2.12

(c) the subject matter of the Claim: the Unified Contract

8. This claim concerns the LSC's decision to replace the General Civil Contract (which expired on March 31st 2007) with a new "Unified Contract" which all those who wish to contract with the LSC for the provision of services as part of the Community Legal Service thereafter were required by the LSC to enter into. It is concerned in particular with the powers of unilateral amendment of that contract contained in Clause 13 of the Unified Contract Standard Terms.

9. The terms of the Unified Contract are set out in the Contract Documents, namely (a) the Contract for Signature (including the Key Information Table and the Annexes)[5d]; (b) the Schedules [5e]; (c) the Unified Contract Standard Terms ("the Standard Terms") [5f]; and (d) the Specification [5g].

10. The Contract for Signature provides that the Unified Contract will start on April 1st 2007 and expire on March 31st 2010, unless it is lawfully ended or extended before then (as it may be for up to two years by the LSC giving not less than 3 months notice before the latter date).

11. The Unified Contract relates to work which a solicitor may perform for individuals who have been assessed as persons for whom work may be provided under the 1999 Act¹⁰. The work that may be performed under the Unified Contract is specified in Schedules issued under it by the LSC. Although each contract is signed with a firm of solicitors, the Schedules are currently issued in respect of particular offices of that firm. The Civil Office Schedules authorise the firm concerned to provide the Contract Work specified in it from the Office (and any Linked Office) specified in it¹¹. They may include provisions specifying the maximum and minimum "matter starts" and licensed work cases that may be undertaken in the period¹². The Office Schedules currently included in the Unified Contracts entered into are for the period from April 1st 2007 to March 31st 2008.

12. The LSC is obliged to pay the solicitor for the performance of Contract Work at the rates of

of the Specification and paragraphs 9-10 of Section B of Annex D to the Solicitor Specification (referred to below).

¹⁰ See the definitions of Contract Work and Client in Clause 1 of the Standard Terms [5f/89-90].

¹¹ See Clause 11A.1 of the Standard Terms [5f/113].

¹² Cf Clause 11.7 of the Standard Terms [5f/112] and the Schedules [5e].

payment set out in the Specification¹³ and, except as the LSC otherwise provides, the solicitor may not charge a fee for services provided under the contract, or seek reimbursement for any disbursements incurred as part of the provision of such services, from anyone¹⁴.

13. The Unified Contract also contains powers (described in more detail below) enabling the whole contract, including the technical specifications it contains, to be amended unilaterally by the LSC with results that cannot now be determined by a solicitor from the contract documents.

14. The Law Society contends that the LSC is acting unlawfully and ultra vires its powers to contract with suppliers under the 1999 Act. The decision to seek offers from solicitors, and the award of contracts, based on the Unified Contract, which is a Part B services contract, containing those powers of unilateral amendment, fail to comply with the Public Contracts Regulations 2006 (“the 2006 Regulations”) [AB/2] and with 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”) [AB/1], which the 2006 Regulations seek to implement. Alternatively the inclusion of those powers of unilateral amendment is incompatible with the principle of transparency with which the LSC is obliged to comply.

THE PUBLIC CONTRACTS REGULATIONS 2006 [AB/2]

(a) the applicability of the Directive and the Regulations

15. The LSC is a contracting authority for the purpose of the 2006 Regulations¹⁵.

16. The “Unified Contract” is a “public services contract” for the purpose of those Regulations, namely “a contract, in writing, for consideration...under which a contracting authority engages

¹³ See Clause 16.1 and 16.2 of the Standard Terms [5f/123].

¹⁴ See Clause 1.9 of the Specification [5g/189]. Currently regulations 15 and 22(3) of the Community Legal Service (Costs) Regulations 2000 [AB/6] and paragraph 6.8 of the Specification [5g/228] allow solicitors to retain any element of costs paid by another party by an agreement or order in favour of the person for whom licensed work has been provided that exceeds the amount payable or paid under the Contract.

¹⁵ 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 [AB/2].

a person to provide services”¹⁶. It is specifically a Part B Services Contract, namely a contract under which services specified in Part B of Schedule 3 are to be provided¹⁷. Such services include “legal services”¹⁸. Both the Central Product Classification of the United Nations and the Common Procurement Vocabulary of the European Commission [AB/3] (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.

17. Solicitors from whom offers to enter into the Unified Contract were sought and others are services providers¹⁹ (and “economic operators”²⁰) for the purposes of the 2006 Regulations.

18. The estimated value of the Unified Contract in many cases will exceed the relevant threshold of 211,000 euros²¹.

19. The LSC contends, however, that the Unified Contract is a “services concession contract” and that the Regulations accordingly do not apply to the seeking by it of offers to enter into it²². A service concession agreement is defined for this purpose as²³

“a public services contract under which the consideration given by the contracting authority consists of or includes the right to exploit the service or services to be provided under the contract”.

¹⁶ See regulation 2(1) of the 2006 Regulations [AB2].

¹⁷ See regulation 2(2) of the 2006 Regulations [AB2].

¹⁸ See item 21 in Schedule 3 to the 2006 Regulations [AB2].

¹⁹ See regulation 2(1) of the 2006 Regulations [AB2]. 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.

²⁰ See regulation 4(1) of the 2006 Regulations [AB2].

²¹ See regulation 8(4) of the 2006 Regulations [AB2]. 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). It is unlikely that the value of the Unified Contract to very many firms in the three year period from 2007 to 2010 would be less than the relevant threshold value of 211,000 euros, £143,269 at an exchange rate of 0.679 £/Euro.

²² See the letter from the LSC dated April 5th 2007 [5b/56]. For the exclusion from the regulations of service concession contracts, see regulation 6(2)(m) of the 2006 Regulations [AB2].

²³ See regulation 2(1) of the 2006 Regulations [AB2].

20. The LSC's contention is misconceived in law²⁴. The Unified Contract is one for pecuniary interest²⁵. The essential consideration provided by the LSC to the solicitor for entering into the Unified Contract is the guaranteed payment by the LSC of the charges specified in the Unified Contract for services which the solicitor renders for the LSC to enable it to discharge its statutory functions in respect of the Community Legal Service²⁶. The solicitor is given no right to exploit for payment its own services²⁷. There are restrictions on marketing the solicitor's ability to perform Contract Work²⁸. The LSC has the statutory function of determining whether any services, and if so what services, should be provided for an individual for whom they may be funded²⁹. A solicitor is generally precluded from recovering a fee for services provided under the Unified Contract, and from seeking reimbursement for any disbursements incurred as part of the provision of such services, from anyone apart from the LSC³⁰. All rights in any product of the work undertaken (which are not exclusively those of the individuals for whom the services are provided or others) vest in the LSC³¹.

21. In support of its contention the LSC makes two points:

- (1) the first is that "the demand risk rests solely with the solicitor; no guarantee of any throughput of work is vouched by the LSC"³². Whilst the Unified Contract does not currently (as the Law Society understands it) oblige the LSC to guarantee a solicitor that he will be able to charge the LSC for any services if no eligible persons wish to avail themselves of services provided by that solicitor, that feature does not mean that the Unified Contract is one in which the

²⁴ The consequences if the LSC's contention is correct are dealt with in paragraphs 45-46 below.

²⁵ As that term is used in the Directive [AB1].

²⁶ The fact that some limited amounts may be payable to a solicitor by others in certain circumstances (whether by way of contribution from the person for whom funded services are provided when such contributions to the LSC's funding costs are not payable to the LSC directly or under the statutory charge or where more may be recovered from other parties by under a court order or an agreement) is consistent with a contract being one for pecuniary interest: see *Case C-220/05 Jean Auroux and others v Commune de Roanne* (2007) Jan 17th at [45] [AB/14].

²⁷ Cf *Case C-324/98 Telaustria Verlags GmbH and another v Telekom Austria AG* [2000] ECRI-10745 [AB/10] at [30].

²⁸ See Clause 6.1 and 6.2 of the Standard Terms [5f/105] and Clause 1.2 and 1.3 of the Specification [5g/186].

²⁹ See section 8 of the 1999 Act [AB4].

³⁰ See paragraphs 7 and 12, and footnotes 8, 9, 13 and 14, above.

³¹ See Clause 28.19 of the Standard Terms [5f/149].

³² See the LSC's letter dated April 5th 2006 [5b/56].

consideration given by the LSC consists of (or includes) the right to exploit the services which are provided under the Unified Contract. The right of exploitation is a contractual right enabling the provider to charge others for the services to be performed for the provider's own benefit in lieu of any right to receive payment from the contracting authority for them³³. It is to be contrasted with a contract for pecuniary interest, namely one which provides for the contractor to be paid for what he does³⁴. Thus the nature of a concession as defined in the Directive as one in which the consideration "consists either solely in the right to exploit [what may be provided] or in this right together with payment"³⁵. As AG Fennelly has put it, "the requirement [is] that the concessionaire effectively obtain at least a significant proportion of its remuneration not from the granting entity but from the exploitation of the service"³⁶. The fact that the amount to be paid by the contracting authority may vary according to the take-up of services to be provided by the contractor is not relevant, much less decisive, in determining whether a contract is one for pecuniary interest to which the Directive applies. As the European Court of Justice has held, it is "irrelevant" in determining whether a contract for public supply was for pecuniary interest that the price payable for the supply by the contracting authority varied according to the public's use of the system in question³⁷.

- (2) the LSC further asserts that in any event "the solicitor enters into separate contractual relationships with clients in connection with which payments are

³³ Thus, in valuing a public works concession contract, its value is that the value of the consideration which the contracting authority would itself expect to give for the carrying out of the works by the contractor if it did not propose to grant a concession: see regulation 36(4) of the 2006 Regulations [AB2].

³⁴ See regulation 8(7) of the 2006 Regulations [AB2].

³⁵ See the definitions of 'public works concession' and 'service concession' in article 1(3) and (4) of the Directive [AB1].

³⁶ See his opinion in *Case C-324/98 Telaustria Verlags GmbH and another v Telekom Austria AG* [2000] ECR I- 10745 [AB/10] at [33].

³⁷ See *Case C-272/91 EC v Italian Republic* [1994] ECR I-1409 [AB/9] at [25]; cf [11] of the Order of the President of January 31st 1992 at [1992] ECR I-457 [AB/8]. A public supply contract (considered in that case) was then defined as a contract "for pecuniary interest concluded in writing involving the purchase, lease, rental or hire purchase, with or without option to buy, of products between a supplier (a natural or legal person) and one of the contracting authorities": see article 1(a) of Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts as amended by article 1 of Council Directive 88/295/EEC of 22 March 1988.

currently made under Statutory Instrument, the benefit of such legal aid attaching to the client”³⁸. This assertion and its legal relevance are opaque. The relevant contract providing for remuneration is (and, in accordance with the statutory provisions referred to above, must be) that which the solicitor has with the LSC. Payments are not made by the LSC under any statutory instrument: they are payable under the Unified Contract. Whether the LSC or the person for whom the LSC funds services in order to discharge its own statutory functions is (or are both) to be regarded as benefiting from them is likewise irrelevant.

22. The LSC has also stated that it reserves the right to contend that the Unified Contract is not a public services contract given the absence of competition³⁹. This contention (if advanced) is legally misconceived. The absence of competition is a factor pointing to a further and different breach of European Union law, not a reason why the Directive and Regulations do not apply to the Unified Contract. The European Court of Justice has held in *Case C-458/03 Parking Brixen GmbH v Gemeinde Brixen and Stadtwerke Brixen AG* (a) that “a complete lack of any call for competition in the case of an award of a public service concession...does not comply with the requirements of Articles 43 EC and 49 EC any more than with the principles of equal treatment, non-discrimination and transparency” which it has also held apply to such concessions and (b) further that legislation that *permits* public service concessions to be awarded without a call for tenders infringes these provisions of European law⁴⁰. The requirement for a call for competition can apply with no less force in the case of contracts to which the Directive, and those requirements as well, also apply. A failure to comply with the requirement for a call for competition is thus not a reason for holding that a contract is not a public service contract nor that a contracting authority is not seeking an offer in respect of one for the purpose of the 2006 Regulations when it offers to enter such a contract without any competition.

(b) the relevant provisions of the Regulations

23. Among the provisions of the 2006 Regulations that apply whenever a contracting authority

³⁸ See the LSC’s letter dated April 5th 2006 [5b/56].

³⁹ See its letter dated April 5th 2007 [5b/56].

⁴⁰ See[2005] ECR I-8612 [AB/13] at [50] and [54].

seeks offers in relation to such a proposed Part B Services Contract are regulations 4(3) and 9⁴¹.

24. 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
(b) act in a transparent way.”

25. 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) the location 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.

26. *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 defined⁴² 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 which constituted the proposed “Unified Contract”, in relation to the terms of which the LSC refused to negotiate with individual solicitors.

⁴¹ See regulation 5(2) of the 2006 Regulations [AB2].

⁴² See regulation 2(1) of the 2006 Regulations [AB2].

27. *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 authority⁴³). The proviso is also designed to 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.

28. *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.”

(c) the LSC’s unilateral powers of amendment under Clause 13 of the Standard Terms [5f/119-20]

29. Clause 13.1 of the 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”.

30. This power of amendment affects each of the documents forming part of the Unified

⁴³ See regulation 9(11) of the 2006 Regulations.

Contract⁴⁴.

31. Under Clause 13(1)(i) 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"⁴⁵. 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 a solicitor 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 that solicitor must meet and how compliance with them may be assessed; and what information and indemnities it has to provide the LSC.

32. Under Clause 13.1(iii) and other provisions of the Contract the LSC may also make other changes to the provisions of the Contract. Thus:

- (1) amendments may to be made to the Schedules (detailing what work the supplier may or must do), including for example extending it to criminal work⁴⁶;
- (2) amendments may be made to the Specification (which contains rules, Guidance and other operational requirements as well as the rates of payment for Contract Work). Thus 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". (The LSC's intention is in fact that from 1 October 2007 a new specification will apply, subject to consultation with the Consultative Bodies⁴⁷.)
- (3) other amendments which may also be made include the following for example:
 - (i) 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

⁴⁴ See the definition of 'Contract Documents' in Clause 1 [5f/90].

⁴⁵ See the definition in Clause 1 of the Standard Terms [5f/95].

⁴⁶ See Clause 11B of the Standard Terms [5f/116].

⁴⁷ Annex D, Payment Annex to the Solicitor Specification, specifically applies only to the period April 1st 2007 to September 30th 2007 [5d/71].

5 as so determined (if confirmed) constitutes a Fundamental Breach⁴⁸. 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 consultation⁴⁹. 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;

- (ii) 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"⁵⁰. 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 31st 2008⁵¹. It is also provided that "we [the LSC] may at any time amend any KPI(s) and/or introduce any additional KPI(s)"⁵². The Unified Contract may also be amended so that failure to achieve them is also a breach of contract⁵³. 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.

33. Clause 13.1(ii) of the Standard Terms allows the LSC to amend the whole contract unilaterally to give effect to any amendment approved by the Consultative Bodies.

34. The only constraints that Clause 13 imposes on the LSC's unilateral powers of amendments 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

⁴⁸ See Clause 10.4 to 10.7 of the Standard Terms [5f/110].

⁴⁹ See Clause 1 of the Standard Terms [5f/92].

⁵⁰ See Clause 1 of the Standard Terms [5f/92].

⁵¹ See Clause 10.9-10.11 of the Standard Terms [5f/110-1].

⁵² See Annex G to the Standard Terms [5f/175].

⁵³ See Annex G to the Standard Terms [5f/175].

Contract)⁵⁴. 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"⁵⁵. Any amendment may affect all or fewer Suppliers as the LSC chooses⁵⁶;

- (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)⁵⁷.

35. 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 any solicitor from the contract documents⁵⁸.

(d) the failure to comply with the Directive and the 2006 Regulations

36. The provisions of Clause 13 enabling unilateral amendments to be made (otherwise than under Clause 13.2) involve a failure to comply with the specific provisions of the 2006 Regulations referred to above.

37. 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 did), 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 service

⁵⁴ See Clause 13.4 of the Standard Terms [5f/119].

⁵⁵ See Clause 13.7 of the Standard Terms [5f/119].

⁵⁶ See Clause 13.12 of the Standard Terms [5f/120].

⁵⁷ See Clause 13.8 of the Standard Terms [5f/120].

⁵⁸ Clause 2.2 of the Standard Terms [5f/100] requires the LSC to "act in good faith and...as a responsible public authority required to discharge functions under the [1999] Act". This requirement does not render the amendments that may be made under Clause 13 predictable.

providers are invited to contract.

38. 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 any service provider to determine the subject matter of the contract. A solicitor cannot determine with what performance and functional requirements he may be obliged to comply during the contract period.

39. Further, 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.

40. Those powers to amend the whole of the Unified Contract⁵⁹ 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 he will be required to do and on what terms over the contract period before he offers to enter into the contract.

41. The LSC asserts that “the current contractual specification satisfies all the requirements of regulation 9 (and regulation 4 for that matter)” apparently on the grounds (a) that the Directive and Regulations are only concerned with an award, not the implementation, of a contract and (b) that the inclusion of a power of unilateral amendment of a contract, of whatever width, can never infringe these provisions if it is clearly set out the contract documents⁶⁰.

42. The LSC’s contention is incompatible with the specific terms of the provisions of regulation 9 relied upon and it is inconsistent with the principle of transparency to which regulation 4 gives effect.

43. In relation to transparency, as the Court of Justice has held in *Case C-496/99 EC v CAS*

⁵⁹ Whether or not the amendment relates to a technical specification.

⁶⁰ See the LSC’s letter dated April 5th 2007 [5b/57].

*Succhi di Frutta SpA*⁶¹

"111. The principle of transparency...is essentially intended to preclude any risk of favouritism or arbitrariness on the part of the contracting authority. It implies that all the conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner in the notice or contract documents so that, first, all reasonably informed tenderers exercising ordinary care can understand their exact significance and interpret them in the same way and, secondly, the contracting authority is able to ascertain whether the tenders submitted satisfy the criteria applying to the relevant contract.

116....Although, therefore, any tender which does not comply with the specified conditions must, obviously, be rejected, the contracting authority nevertheless may not alter the general scheme of the invitation to tender by subsequently proceeding unilaterally to amend one of the *essential* conditions for the award, in particular if it is a condition which, had it been included in the notice of invitation to tender, would have made it possible for tenderers to submit a substantially different tender." (Emphasis added).

This does not necessarily preclude, as the Court recognised in [118], the reservation of a power to amend *some* conditions of a contract once it has been awarded provided that the power and the "relevant detailed rules" governing its exercise are included at the outset. Nor does it necessarily preclude specified departures in certain circumstances from certain essential terms. But it does preclude the reservation of a power unilaterally to amend the essential conditions in a manner that may render the subject matter of the contract materially different from that in the contract documents. Were it otherwise the risk of favouritism or arbitrariness would not be precluded as the principle of transparency requires. As the Court of Justice has stated in another case⁶² (illustrating that regulation 9(4) of the 2006 Regulations is a specific application of the principle of transparency in the case of technical specifications),

"The principle of equal treatment of service providers, laid down in Article 3(2) of the Directive, and the principle of transparency which flows from it (see, by analogy, *Case C-87/94 Commission v Belgium* [1996] ECR I-2043, paragraphs 51 to 53, and *Case C-324/98 Telaustria and Telefonadress* [2000] ECR I-10745, paragraph 61) require the subject-matter of each contract and the criteria governing its award to be clearly defined."

44. In this case the unilateral powers of substantive amendment are of such width that the subject matter of the contract is not clearly defined so that a service provider can determine for himself with reasonable certainty what he will be required to do and on what terms over the period of the contract before he offers to enter into it.

THE POSITION IF THE UNIFIED CONTRACT IS A SERVICE CONCESSION CONTRACT

45. As noted in paragraph [22] above, the Court of Justice has held that the award of public service concessions must comply *inter alia* with the principle of transparency, even though they

⁶¹ [2004] ECR I-3801 [AB/11].

⁶² *Case C-340/02 Commission v France* [2004] ECR I-9845 [AB/12] at [34].

may fall outwith the scope of the specific procurement regime established by Directive.

46. Accordingly, even if the LSC's contention that the Unified Contract is a public service concession is correct (which it is not), the Unified Contract is unlawful as it is incompatible with the requirements of transparency.

THE LAW SOCIETY'S STANDING, THE RELIEF SOUGHT AND THE AVAILABILITY OF JUDICIAL REVIEW

47. The Law Society has a sufficient interest in the Unified Contract to seek a declaration in respect of its imposition by the LSC:

- (1) The Law Society is the professional body representing the large number of solicitors invited to sign the Unified Contract. Individual solicitors were, and those who have signed the Unified Contract are, not realistically in a position to bring claims under the Regulations to challenge the terms of the Unified Contract⁶³. Solicitors received the Unified Contract at the beginning of March 2007. They were required to return it completed and signed by March 31st 2007 for it to come into operation on April 1st 2007. Solicitors were faced with a position where the existing General Civil Contract under which they operated expired on March 31st 2007, with no offer of extension by the LSC. Hence an interim order suspending the procedure leading to the award of Unified Contracts on 1 April 2007 or an order setting aside the decision of the LSC to offer the Unified Contract would not have been effective to protect their position after 31 March. Many solicitors are dependent on such work and the LSC is effectively for them a monopoly purchaser of it. Moreover, and quite apart from the fact that it would have been undesirable in terms of efficient management of court resources for there to be a multiplicity of claims before that date, such an order would effectively have left existing assisted clients and potential new clients without any assured access to legal advice and assistance after that date contrary to the public interest. Accordingly, as the LSC was informed in a letter before claim dated March 22nd 2007 [5a/52-3], the Law

⁶³ Those who have signed the Unified Contract would find the assessment of damages for breach of the duties owed to them impractical at this stage given the uncertainty of the effects of the inclusion of the powers of unilateral amendment objected to.

Society intended to (and does) bring this claim by way of judicial review to protect the interests of the firms which it represents.

- (2) In any event, the standing of the Law Society to bring this claim for judicial review is not dependent upon individual solicitors not being in a realistic 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, a Consultative Body under the Unified Contract which the LSC is obliged to consult before making the unilateral changes to the Unified Contract.

48. The Law Society seeks a declaration that the LSC's introduction of the new Unified Contract failed to comply with the above requirements of the Regulations and European law referred to above. This relief is of real and practical importance for a number of reasons, including the following:

- (1) under Clause 13.2 of the Standard Terms [5f/119], the LSC has a power (to which the Law Society does not object) to amend the contract to comply with or take account of any decision of (inter alia) a United Kingdom court or to take account of any UK legislation or any EU legislation having direct effect. 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 and the principle of transparency which are directly effective as a matter of Community law.
- (2) the LSC would in any event be obliged to have regard to a declaration made by the Court as to the compatibility of those provisions with the 2006 Regulations and the Public Sector Directive and/or the principle of transparency before exercising its unilateral powers of amendment under Clause 13. The Law Society understands that, as presently advised, the LSC intends to make substantial amendments to the Unified Contract in October 2007
- (3) At present the Unified Contract only covers civil work. The LSC proposes to bring criminal work within the scope of the Unified Contract on the expiry of the General Criminal Contract on 31 March 2008. A declaration would have considerable significance for that decision.

49. In its response to the letter before Claim, the LSC does not contend that a declaration would not be of real and practical importance. Nor does it suggest that individual solicitors had or have a practical and realistic remedy under the Regulations. It contends, however, that “the sole and exclusive remedy for [a breach of the Regulations] lies pursuant to the machinery set out in regulation 47⁶⁴, that is to say in proceedings brought under that provision in the 2006 Regulations.

50. The LSC’s contention is misconceived:

- (1) regulation 47 of the 2006 Regulations does not purport to exclude judicial review of a public body’s failure to comply with the requirements of the 2006 Regulations or those of European law. As the Court of Appeal stated in *R (Sivasubramaniam) v Wandsworth County Court*⁶⁵, for example,

“Nearly 50 years ago Denning LJ stated in *R v Medical Appeal Tribunal, Ex p Gilmore* [1957] 1 QB 574, 583 that “the remedy by certiorari is never to be taken away by any statute except by the most clear and explicit words”. All the authorities to which we have been referred indicate that this remains true today. The weight of authority makes it impossible to accept that the jurisdiction to subject a decision to judicial review can be removed by statutory implication.”

- (2) in any event the function of regulation 47 is not to oust the jurisdiction of the court on judicial review: it is to confer additional remedies in private law on economic operators for non-compliance by a contracting authority with its obligations under the Regulations. For that reason the obligations to comply are made duties owed to such persons, breach of which is made actionable by them if they suffer or risk suffering loss or damage⁶⁶. The Law Society accepts that the existence of such an alternative remedy is relevant to the question whether permission to claim judicial review should be granted to a person who may be able to invoke it and to the court’s discretion as to any relief it may grant. But that is no reason why the Law Society (which has a sufficient interest in the Unified Contract but which cannot bring proceedings in private law for breach

⁶⁴ See the LSC’s letter dated April 5th 2007 [5b/57].

⁶⁵ [2002] EWCA Civ 1738, [2003] 1 WLR 475, [AB/15] at [44]; cf also *R (G) v the Immigration Appeal Tribunal* [2004] EWCA Civ 1731, [2005] 1 WLR 1445 [AB/16] at [21] (statutory review intended by Parliament to be used in place of judicial review but it did not remove court’s jurisdiction to entertain such a claim).

⁶⁶ See in particular regulation 47(1) and (6) of the 2006 Regulations [AB2].

of any duty owed to it under regulation 47 as it is not an “economic operator” for the purpose of that provision) should be denied permission to claim a declaration in this case in all the circumstances.

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Blackstone Chambers

Wednesday, 18 April 2007