

RUNNING DOWN IMMIGRATION WORK GOING OUT OF SCOPE

The purpose of this document is to consider issues arising out of the changes to the scope of legal aid in the Immigration category arising from Legal Aid, Sentencing and Punishment of Offenders Act 2012 and in particular relating to matters in progress on 1 April 2013 which would be out of scope if started after that date.

Comments may be relevant to other categories of work but address specifically only the Immigration category in which cases are generally concluded within controlled work including Controlled Legal Representation but which may be very lengthy compared to other categories. That part of the category remains within scope and that there can therefore be expected to be a significant number of continuing contracts is also a particular feature. Legal Services Commission/the Commission is used to indicate the Legal Services Commission and/or Legal Aid Agency.

Is there a professional conduct implication of refusing to do remainder work when you are allowed to?

The conduct implications of stopping remainder work will be influenced by the client care letter that the supplier has given to the client (although that will not be determinative – a solicitor would certainly be limited in what they could assert was their retainer with a client, not least by restrictions in the contract documents. The following comments are subject to that. The views of the Solicitors' Regulation Authority could usefully be obtained.

There may be conduct reasons why a supplier should continue to represent a client on remainder work even though they do not wish to carry out remainder work. Stopping acting for a client when you still have the staff /department to do so after the opportunity to transfer has passed is unlikely to be in the best interests of the client or to amount to a proper service to them¹. However, where the department has been reduced in size or staff have left, it is arguable that a supplier should not have to recruit staff to continue to represent clients if they no longer wish to provide that service.

If there is no suggestion of bad faith by the supplier (e.g. that they knew they would not be doing remainder work at all or for long after the cut off of 1.4.2013) then the client has not lost any fees. It is arguable that the outcome was unfortunate and a breach of contract but not a breach of professional ethics, and that a private client whose retainer was ended early as the supplier no longer had the staff would not be able to force the supplier to conclude their case but would probably get their fees back.

¹ Principles 4 and 5.

If there were a suggestion of bad faith then the supplier could be liable for the lost opportunity of having their matter conducted on legal aid and there is the possibility of an award of compensation.

The Legal Services Commission is a large-scale, sophisticated purchaser of services. It is the decision of Government that work is going out of scope and if the Legal Services Commission has failed to make arrangements in its contract with suppliers for withholding fees, especially where it has instead implied that suppliers can choose not to do remainder work, it would, we suggest, be unreasonable for the supplier to be unable to claim the fees on a conduct basis when the Legal Services Commission is not even a client.

Relevant rules

This is a very different situation from that which obtained when personal injury went out of scope as in that situation most ongoing work was already on funding certificates and so could continue until conclusion even with change of representation. In immigration and asylum most work remains at the controlled work level.

“Matters” in this context means matters started before 1 April 2013 in the immigration category where the matter would be outside scope were it started on/after 1 April 2012. The following parts of the contract documents are relevant.

General specification (GS)

References are to the draft specification for 2013.

- 2.5 and 2.6 use of agents limited to those solely or mainly working for that supplier
- 2.10 must employ a full-time supervisor in each category
- 2.49 need to refer existing client if that is needed (and possible) in the course of their case.
- 3.81 ending of controlled work and being able to claim it when a defined event takes place.
- 4.36 payment of claims where the contract has been terminated.
- 4.36 (which is the same in the current specification), says that the Commission will pay as standard or graduated fees or escape fees where the contract has terminated either as a result of its changing terms or the supplier giving three months notice if the supplier decides not to or is not permitted to complete the remainder work. The Legal Services Commission is expressly not able to make any other assessment of what is payable. That seems to address the question of whether a matter can only being completed and is therefore only claimable, where one of the defined events in para 3.81 takes place (such as the case actually ending).

Therefore, if a supplier is not going to have any new contract and it give three months' notice ending on 30 March (before the Legal Service's Commission's notice takes effect) then the supplier can (contractually) shut all its cases on 30 March 2013

and must be paid full fees for them. Or even take a new contract and then terminate on three months' notice after.

Standard Terms 2013 (ST)

- 2.1 and 2.2 obligation to act in good faith and cooperate with Legal Services Commission to achieve best possible value for money.
- 25.1 suppliers can terminate the WHOLE contract by giving three months' notice.

[There is an argument that a supplier could give notice on the whole contract terminating on 30 March 2013 (or possibly even before midnight on the 31 March 2012) and it still count as a "previous contract" if they do continue to have any contract after that – see definitions and Continuity #1.27. While this reading appears unlikely, the language is unclear.

Suppliers may not terminate their contract in part but can propose amendments (term #13.13. and 13.14). #13.14 includes allowing you to give notice to stop doing a certain type of contract work. Although not dealt with expressly given the work remains contract work (if you have any contract) not remainder work (#1.27) presumably just the normal claiming rules apply although this could be dealt with in the Regulations or the specification could still be amended.

Immigration general contracts will terminate at midnight 31 March 2013 as a result of the Legal Services Commission notice. Therefore (unless the supplier has a subsequent new contract) GS 4.36.b.ii means the Legal Services Commission can assess any file which is not concluded as the lower of the fixed fees or the actual time. If the supplier terminates before that on notice the Commission cannot assess below the fixed fees. However, if instead of the Legal Services Commission terminating on notice, the Legal Services Commission had amended the contracts and as a result the supplier exercised the right to terminate, then under 25.2 then the Legal Services Commission could still not assess below the level of the Graduated Fee Scheme.

So, an amended contract and a supplier who decides not to continue: supplier gets full payment; Legal Services Commission terminate because the changes are so big: supplier can be assessed down. That does not appear to be a reasonable term and is not very even-handed.

26.1 states "When you become aware that your right to perform any contract work will end, you must immediately notify all clients who will be affected by termination, take all reasonable steps to protect them and their rights, and provide them with information about other providers able to continue their matter or case (and offer to make appointments with such providers) and with such other information as we may specify".

26.11.a Clients have the right to transfer from the effective date of the termination (subject to continuing remainder work). Otherwise clients can only transfer in accordance with paragraph GS 3.47 of the general specification – (c) (iii) allows transfer where the existing provider can no longer act for some professional conduct reason. Confirmation is needed from the Legal Services Commission that the right to

transfer (i.e. that the transfer and signing of a new matter form is authorised) will apply to any client needing to transfer before 31.3.2013 as well as on or after that date.

26.11.b The supplier must confirm that remainder work will not take longer than two years to complete. In the immigration category that may not be long enough given the number of cases that take a long time to conclude. This rule only applies to remainder work (i.e. where the supplier has no further contract) and not to contract work.

PROPOSED SCHEME - THE LEGAL SERVICES COMMISSION ALLOWS “NEW” OUT OF SCOPE MATTERS ON TRANSFER

N.B. The implications of this or any other arrangement put in place will depend very much on how many current suppliers continue after 1 April 2013 with a legal aid immigration contract. If most current suppliers do then this arrangement will affect relatively few clients, as most cases would be continuing as contract work rather than remainder work. However it will be safeguarding a significant minority of clients from being hugely prejudiced in the course of their matter by the fact that their supplier is one of the few stopping work. We recognise it may therefore be advisable to defer a final decision on the scheme until the pattern of the contracts is clear (not necessarily once all appeals have been resolved) – so at the latest by January 2013.

As a general position (subject to comments below) in immigration and asylum work, as there will be suppliers continuing with Legal Services Commission contracts we do not consider that any supplier should be required to continue to work on remainder work cases where they do not have the appropriate staff to do so. In general clients will be much better served by being transferred to a supplier who has a continuing contract than remaining with a supplier who does not want to represent them and may no longer be capable of doing so properly.

We should also favour that quality-related rules (such as supervisory requirements) only be waived in very limited circumstances including principally:

- Where there is no contracted supplier able to fully comply with the requirements within a reasonable distance; or
- For clients whose matters are almost completed (generally successfully – an unsuccessful matter may require expert advice on further challenges)

It is accepted that clients will be subject to the new means assessment rules and that those rules will mean some matters will have to be terminated before they are completed.

Need for Matter Starts prior to 1.4.2013

All unused matter starts (or at least immigration matter starts) in the year to January 2013 are allowed to be carried forward by suppliers who are getting new contracts if they want them to use by end March 2013 together with their usual allocation for January to March 2013. It would be preferable for asylum matter starts to also be made available if there are likely to be transfers of asylum clients due to suppliers withdrawing.

Summary

- Matters can be transferred after 1.4.2013 despite being out of scope
- Matter starts are made available (including being taken from suppliers who will not do remainder work) to enable as many immigration matters as there is demand for to be opened before 1.4.2013
- Suppliers giving notice that they will not do remainder work may not open new matters after 1.1.2013
- Normal fees apply so that if the client transfers generally both the old and new supplier can claim the Graduated Fee Scheme fee
- But reduction can apply where the supplier stops remainder work without notice or has taken on a case in circumstances where they were unlikely to do anything useful on the case.

Detail

Where the Supplier has a contract post April 2013 in Immigration category

1. They should continue opening matters that would go out of scope up until 31 March and should have a schedule of matter starts at at least their current level (pro rata) for the last months of the contract. Any New Matter Starts not being used by other suppliers in February and March should be redistributed to these suppliers.
2. The continuing work by these suppliers on the matters opened is not “remainder work” but is “contract work” (#1.27 standard terms). The supplier continues with the case. If the case is refused and there is a right of appeal then Controlled Legal Representation should be granted on the basis of the usual merits test (this is the same matter), including being granted for representation in the Upper Tribunal. Extensions for disbursements and, if a matter is funded on an hourly basis, extensions to the funding limit, should be granted as before.
3. If the matter requires a funding certificate (either for appeal to the Court of Appeal or for judicial review) then, as it is still one continuing case, a funding certificate should be granted despite being out of scope (this can be authorised by regulation under the Legal Aid, Sentencing and Punishment of Offenders Act 2012).
4. If the matter is subsequently remitted back to the First-tier Tribunal or Upper Tribunal or back to the Secretary of State (as the decision was “not in accordance with the law” or where the Secretary of State withdraws her refusal decision) that is still the same matter although a new controlled work

application may be necessary (legal help or Controlled Legal Representation) and that new application should be allowed subject to means and merits tests.

5. If the new specification does not deal with an issue or situation following amendment consequential to Legal Aid, Sentencing and Punishment of Offenders Act 2012 then the relevant term in the current specification should apply.
6. Post 1 April 2013 these suppliers should also be able to take transfers of clients from suppliers without contracts. Even though this would technically be a “new matter” it would only apply where a matter was not completed at 31 March 2013 and was still not completed at the time a transfer was needed. It would be possible to authorise this under the Legal Aid, Sentencing and Punishment of Offenders Act 2012 through the transitional regulations. It is quite likely that there will be a significant bottleneck of transfers and new matters in the final month or so of the current contract and continuing suppliers are unlikely to have actual capacity (regardless of matter start issues) to be able to absorb all the likely new matters. This approach would also mean that transfers could take place at the optimum point in the case rather than to an arbitrary external time table.
7. The new supplier should be paid as per the normal terms of the contract (i.e. graduated fee if it is such a case even though there will be some that require relatively little work). That is part of the contract now and is part of the “swings and roundabouts” of the system – the Legal Services Commission cannot expect suppliers to accept continuing to lose on the swings but to relinquish all the gains on the roundabouts).

Where the Supplier has no contract post April 2013 in the Immigration category:

A. If the Supplier indicates that they do not intend to complete their remainder work:

8. Suppliers should give at least three months’ notice of their intention to not do remainder work (whether before or after 31 March 2013).
9. Before 31 March 2013 if they give such notice and it terminates their whole Legal Services Commission contract, then this requires the Legal Services Commission to pay them for those matters at the normal graduated fee². The Legal Services Commission contractually cannot in such a case require that the matters are finished or reduce the payment.

² ST 25.1 and GS 4.36

10. If the supplier wished to give “notice” on only part of their contract (for example because they are closing their immigration department but intend to continue with legal aid family work) then they can only do so by giving notice of a proposed amendment to their contract under standard term 13.13 and 13.14 (which should not be unreasonably refused). In that instance it is unclear how their subsequent claims should be assessed under the current terms - there is an argument that as the Legal Services Commission is terminating all the contracts on 31.3.2013, that that allows the Legal Services Commission to assess claims down below the Graduated Fee Scheme fee. However, the contract is not terminated if it is rolled over into the next contract albeit with fewer categories. There is alternatively an argument that a matter not ended in accordance with GS 3.81 (“Ending Matters”) cannot be claimed (although this is unlikely as other parts of the GS and ST assume claims can be made whenever a supplier stops working on them). Given there is no clear basis on which the Legal Services Commission could fairly and consistently claim to be able to assess down from the graduated fixed fees, we should say that in any case where a supplier gave three months notice that they were not going to continue with remainder work they should be able to claim the full GFS fee or exceptional claim as appropriate.
11. In any event, the giving of the three months’ notice (that they were not intending to do remainder work) would justify the Legal Services Commission allowing that supplier no scheduled matter starts for the period after giving notice until the end of their contract and so not being able to commence any new matters in that period (on the basis there is no reasonable prospect of them being completed).
12. The supplier should be required to continue taking all proper steps to advance the cases they have up until their notice to the Legal Services Commission expires. They would need to continue to meet the requirements of the contract throughout the notice period (such as supervisors) or they would lose the protection of being assured of getting their costs as graduated fees etc (not meeting the requirement throughout the three months means that a supplier has not given three months’ notice).
13. However, it would be in clients’ best interests generally to be transferred to other suppliers as early as possible³ unless their case was close to concluding. So the process of transfers would have to be allowed to commence immediately. Suppliers are required to tell their clients of the need to transfer in these circumstances.⁴ Suppliers should be required to continue

³ Need Legal Services Commission confirmation that they are allowed to transfer under GS3.47 (c)(iii) – professional conduct reason.

⁴ ST 26.10 although strictly this is only for remainder work so where the supplier has no ongoing contract at all.

representing clients properly throughout the notice period unless they have arranged for their case to be transferred to a new supplier. They must not be allowed simply to stop acting for a client and leave them to find their own representative until the three months' notice period is up. Breach of that would mean that three months' notice had not in fact been given and the protection on fees would be lost.

14. That could mean some cases opened only very briefly before being transferred. We suggest there could be a rebuttable presumption applied that the supplier had breached the terms of their retainer with any client taken on in the month before notice was given on the basis that there was no intention of completing the work. Unless the supplier is able to rebut the presumption that would be a sufficient basis for assessing down the fees. The presumption would be rebuttable if the supplier could show that unexpected events beyond their control meant they had only known at the last minute that they were going to have to give notice of stopping remainder work. The assessment of those fees could legitimately include the question of whether any work done on a case the supplier couldn't expect to conclude was reasonably done at all.
15. These arrangements would apply to any supplier who later (post 1.4.2013) had to give notice that they could not complete their remainder work.

B. If the Supplier indicates that they intend to complete their remainder work

16. The supplier should be allowed, if they wish, to continue opening new matters up until the 31 March 2013 and should have a schedule of New Matter Starts up to the same level as their current schedule for February and March. Suppliers should be asked to indicate whether they want and intend to use their matter starts in the final period of the contract and where they do not those should be redistributed.
17. Whilst the supplier continues to meet all the requirements of the contract (e.g. re supervision) they should continue to represent the client. This should their being able to apply for controlled legal representation and full legal representation throughout the normal life of the matter (as above).
18. However, the GS 26.1 and 26.11a require that clients are told that they can transfer when a supplier is not continuing with a contract. If a client chooses to transfer to a supplier with a continuing contract from one purely doing remainder work the contract allows for that. Those transfer cases should be included within those cases that can transfer and sign a "new" controlled work matter to conclude their case with a contracted supplier after 1.4.2013.

19. Some limited flexibility should be allowed in respect of rules on agency and supervisors to deal with the situation where external supervision or less than one Whole Time Equivalent supervisor or wholesale “agency” to a contracted provider will allow matters to be concluded safely and without the need for transfer. There should be a time limit set on this (such as three months in the first instance) with an extension possible but only granted where the arrangements are satisfactory and the work will be concluded within a further reasonable period.

C If the Supplier Stops working on Remainder work without giving notice

20. There will be some suppliers who cannot give three months notice of their inability/unwillingness to continue to do remainder work. This may be entirely unblameworthy and unexpected – a key member of staff leaves unexpectedly for example. The reasons can be sought by the contract manager. There may those suppliers who could have given notice but either chose not give notice or to allow an orderly closing down of remainder work.

21. Regardless of the reasons for no notice being given, where less than three months notice is given and a matter has ended in accordance with the specification (3.66 new specification 3.88 old specification) or has reached a stage for a claim (e.g. end of legal help) then the supplier should be able to claim the normal fee for that work (regardless of whether the value of time engaged is less than the Graduated Fee Scheme fee). The client should be able to transfer to complete their matter with another supplier with a continuing immigration and asylum contract .

22. In the absence of any suitable contracted supplier exceptionally authority could be given for clients to sign up with another supplier who is only otherwise completing remainder work (e.g. if there are no contracted suppliers close by and the matter is close to conclusion).

23. If a matter has not ended in accordance with the specification and is part way through a stage then GS 4.36(b) (ii) applies and the Legal Services Commission may choose to assess matters and pay the lower of the assessed amount for the work done or the graduated fee. That ability to reduce is not mandatory and discretion should be exercised so that where the failure to give three months notice is not blameworthy the supplier is properly rewarded. That might include allowing an escape fee claim where the work done although not complete already exceeds the threshold or in a case paying the full graduated fee for a case almost complete even if below that on an hourly basis.

24. If the supplier has stopped without notice because they have unexpectedly been unable to comply with for example the supervisor requirements, the aim must be to facilitate the orderly but rapid transfer of live matters to contracted suppliers. If the supplier has stopped without notice because they have unexpectedly been unable to comply with for example the supervisor requirements, the aim must be to facilitate the orderly but rapid transfer of live matters to contracted suppliers. The Legal Services Commission should consider whether to agree to waive certain requirements but only to the minimum extent consistent with that aim, for the minimum period necessary and, in any event, for no more than a three-month period.
25. If a supplier is blameworthy in failing to give notice (through, for example, choosing not to give notice to allow an orderly running down and transfers) then the Legal Services Commission are entitled to pay the lesser of the graduated fee or the hourly value.

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