

## **Transforming Legal Aid - Consultation**

### **Submission from Andrew Otterburn and Vicky Ling**

Do you have any comments on the findings of the Otterburn report, including the observations set out at pages 5 to 8 of his Report? Please provide evidence to support your views.

The Duty Provider Contract Additional Information published by the LAA in February 2014 included a reference to a finding from the Otterburn Report that “bidding organisations (or their Delivery Partners) employ at least one full time fee earner with relevant experience of crime work for every £83k of the indicative contract value”.

We would like to make it clear that this was not a finding of the Otterburn Report but a calculation made by the MOJ based on certain figures included in it. We understand the MOJ used the aggregate fee income across all surveyed firms of £137,185,864 as shown in table 5.4 to calculate an average per firm of £873,795. They took the average number of fee earners per firm of 21 as shown in table 4.4. They divided this by two as approximately half of the fee earners worked in criminal departments. £873,795 divided by 10.5 results in the figure quoted by the LAA of £83,000.

We do not agree with the way the figure has been calculated, and, as it is before the 17.5% reduction in fees, do not consider it to be an appropriate figure to apply to the new contracts. We believe this capacity test imposes an artificial constraint on firms' ability to develop different operational models.

The problems this test causes was illustrated by one of our clients who currently have seven fee earners and would need one more if they won a duty contract as they would have to cover an additional police station.

It is not clear whether the £83,000 relates to just the duty element or the firm's total crime fees. The wording in the Additional Information document published in the spring would suggest the former whereas in practice the eight fee earners will be working across own client, duty and private work. There will not be a team just working on the duty contract. If it applies to total fees they would need 13 fee earners making the business unviable. They would have to recruit 5 fee earners they would not need.

Each fee earner costs around £40,000 - £50,000. The most junior would be a solicitor or accredited representative on a basic salary of £30,000 + call out payments for attending the police station in the middle of the night, a total of approximately 40,000. If you take this and add £13,000 for his/her share of the support staff, £5,000 for NIC, and £38,000 for his/her share of overheads, the total is £96,000. So they need to bill £96,000 simply to cover his/her costs and this firm is aiming for each fee-earner to generate fees of £125,000 to create a viable long term business which is what they and the MOJ need.

The £83,000 requirement is going to make it make it extremely difficult for good firms to create viable businesses. We would suggest that this requirement is removed completely and that the LAA can instead safely rely on supervisor ratios and peer review to achieve the quality standards they require.

Do you have any comments on the assumptions adopted by KPMG? Please provide evidence to support your views.

We provided KPMG with a copy of our report and summary financial data from the quantitative survey, and were kindly allowed to read a preliminary draft report outlining the methodology followed, however we had no input into the design of their financial models or the underlying assumptions these were based on. In particular we were very clear that the assumption that firms would give up their own client work to undertake duty work was incorrect and would not happen. Any business relies on its regular loyal customer or client base to generate the majority of its income and profits. We believe solicitors' practices are no different from any other business in this respect. In addition, firms will want to maintain a healthy 'own client' following in anticipation of a future re-tender of duty work in four years time. Our concern is that the inclusion of this assumption understated the growth that would be required of firms.

KPMG also assumed that a positive profit was sufficient to ensure viability for providers. We disagree. Our financial analysis allowed for a notional salary for the equity partners of just £51,750, based on the median salary of the highest paid employed fee earners in the participant firms. Having allowed for this notional salary the firms were currently achieving a net margin of 5% in crime and even at this level the financial viability of many of the firms was fragile. This profit is needed to provide working capital and the cash needed to run a contract. Without this firms would be highly vulnerable to any cash flow issues, and in particular would not be able to survive any delays in payments by the LAA, which, for various reasons can occur. We do not believe that a break-even figure would enable firms to remain in the market when developments in IT and changes introduced by the new contracts themselves will require increased investment. They would not be able to generate the working capital and reserves essential to run any business and would be highly likely to fail. We do not believe they would be viable businesses and may have difficulty obtaining bank finance as their business case would be so weak. It is also debatable whether many people would take the personal financial risk of setting up and running a firm when they could earn virtually the same as an employee elsewhere.

Do you have any comments on the analysis produced by KPMG? Please provide evidence to support your views.

We do not believe that it is safe to assume work levels will remain constant for the purposes of modelling future contract sizes and numbers whilst at the same time acknowledging that volumes can fluctuate. That does not appear to be logical. We would suggest that the financial models should assume further reductions in volumes in line with trends over the last three years and that the numbers and volumes of contracts should have sufficient flexibility to accommodate the fluctuations in volumes which are caused by the complex environment of the criminal justice system and over which providers have no control.

Do you have any views on the MoJ comments set out in this document? Please provide evidence to support your views.

The definition of viability is a matter of judgement. At present the firms that participated in our survey were achieving a 9% profit margin overall and 5% in crime. At this level of profitability the supplier base is fragile and vulnerable but most firms have survived. We considered this existing 5% level should be taken as a minimum level required for viability. We believe that for the MOJ to argue that this margin is not necessary is to take a highly imprudent view. They argues that there is very little evidence to support our observation. When faced with a range from 0% to 9% we

believe that to have taken an extreme value is a high-risk assumption. It would have been safer for the MOJ to have taken a more balanced, cautious view and required a minimal mid-range level of profitability of 5%. This would have been more likely to have created a viable supplier base.

If the assumptions and data on which the KPMG recommendations are based remain appropriate, do you consider that there is any reason not to accept the maximum number of contracts possible (525), as the MoJ have done? Please provide evidence to support your views.

The KPMG report identified 30 areas in which further inspection was necessary to determine an appropriate range of contracts. 6 areas had fewer than 3 incumbent providers with the capacity to deliver, 5 areas required an improvement in staff efficiency of more than 20% and 10 areas required market consolidation of more than 20%. In addition, KPMG identified that all London areas required market consolidation of around 50% and choosing 32 areas would present significant challenges to both those bidding and the LAA in evaluating the bids. All these issues create a risk that the MOJ may not be able to deliver its statutory obligations to provide duty representation in police stations and we do not believe the MOJ should proceed without further research and analysis.

Do you have any other views we should consider when deciding on the number of contracts? Please provide evidence to support your views.

We have concerns that the very small numbers of contracts to be awarded in many urban procurement areas would result in a significant number of good quality medium and larger suppliers failing to secure duty contracts. As a consequence the supplier base would be weakened and this would lead to difficulties when re-tendering four years on. To have, for example, just four contracts in areas such as Nottinghamshire, is we believe too few to ensure sustainability of the market.

We also have concerns at the application of contracts to rural areas as the analysis undertaken by KPMG indicated that the market in rural areas was already highly consolidated. Our research indicated a very fragile supplier base in rural areas and we remain concerned that further reductions would weaken this supplier base further and could have un-intended consequences. The problems of over-supply are in London and some urban areas, rather than in rural areas.

**Andrew Otterburn and Vicky Ling**

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