

The Response of the Birmingham Law Society to the Legal Services Commission Consultation on Best Value Tendering

The Birmingham Law Society submits that Best Value Tendering is fundamentally flawed both conceptually and practically, for the following concerns and reasons:

Bidding for unknown share of an uncertain market

The Birmingham Law Society accepts that, for legal aid funding, fixed prices for criminal cases are here to stay. However, it is extremely difficult, if not impossible, to tender for criminal cases when the Legal Services Commission ('LSC') cannot guarantee volume.

The tendering process may be suitable for businesses bidding for known share of a particular market but is totally unsuitable for bidding in circumstances of an unknown share of an uncertain market.

Without knowing volume criminal law firms cannot decide on fixed or variable costs and cannot budget profit margins from which to make knowledgeable bids. In the current criminal justice system no one can guarantee volume, therefore how can a business be expected to formulate a sustainable business plan for an unknown quantity?

The proposals for best value tendering ('BVT') have been put forward by consultants who have no practical experience of working in the criminal justice system. They may be used to dealing with commodities which are fixed and which can be predicted with reasonable certainty.

In the criminal justice system the changes in government policy, social trends, technological advances and attitude changes in the public make it totally unpredictable to formulate a sustainable business plan with adequate investment and return.

Further the LSC is making no guarantees that all other fee schemes will remain unchanged in the future, e.g. Crown court or Magistrates Court fees, all of which affect the profitability of running a criminal law firm or department.

The scheme is largely flawed as the LSC can neither guarantee nor deliver volume and yet bidders are expected to set a price without knowing the volume and without accurate up to date data.

Effect on delivery of Quality

The Birmingham Law Society fears that, if contracts are granted to firms that offer the lowest price, the risk of delivery at the lowest quality standard, if not below, will be inevitable.

Firms will be tempted to bid low even at completely unprofitable levels, which will undoubtedly lead to an adverse effect on the quality of service.

Further, as firms place bids for increased work at ever lower prices, there will be increased and incentivised pressure to bring down costs by using less experienced fee earners/agents.

As a consequence the whole integrity of the criminal justice system and access to quality legal representation is at grave risk.

Suicide Bids

The Birmingham Law Society believes that either of the current proposals of an 'auction' or 'sealed bids' will lead to firms offering the lowest price simply to win a 'block' to remain in business. Such bids will no doubt lead to eventual insolvency or contracts being terminated due to the drastic reduction of quality.

This will then lead to the LSC incurring considerable further costs in the re-tendering process.

There is also the real risk of firms putting in unprofitable bids for the duration of this contract, in the expectation that a sufficient number of firms will disappear between now and the bidding for the next contract round, for them to justify much higher bids next time.

No evaluation of a proper pilot of Best Value Tendering proposals

The Birmingham Law Society believes it to be wrong to move to a tendering process without sufficient time for a full and proper evaluation of the consequences of a BVT pilot on the criminal justice system.

The Birmingham Law Society are of the view that the implementation of the best value tendering proposals are being implemented and rolled out at such speed that there will be no opportunity for any proper evaluation.

There will be insufficient time to learn from the lessons of a fully evaluated pilot and mistakes will be replicated in the national roll with the potential of extreme disruption and damage to the criminal justice system and to those suspects who are often the most vulnerable in society.

No proper evaluation has been undertaken on an equalities impact assessment.

Interference with a system that has gradually evolved over decades, without any opportunity of proper evaluation is fraught with the dangers of unforeseen consequences.

To proceed without proper evaluation is very reckless, having regard to the potential long term damaging impact on firms currently undertaking publicly funding criminal representation and the clients they represent.

The Taxpayer will no doubt be the loser of the failings of any rushed proposals.

If there is to be a BVT scheme there must be a genuine pilot properly evaluated by both the Legal Services Commission and the Legal profession.

Timetable for Rolling out the Best Value Tendering proposals

The Birmingham Law Society is of the view that the timetable to rollout a scheme of this magnitude and effect within a year is deplorable and reckless and will cause irreparable damage to the delivery of legal services to suspects.

There appear to be no safeguards in the 'hurried' timetable to allow for unknown and unforeseen difficulties.

Access to Justice

The Birmingham Law Society believes that a price competitive tendering scheme, of this nature, will seriously damage and disrupt access to justice for suspects in the criminal justice system. Pre-PACE (the Police and Criminal Evidence Act 1984) the majority of convictions were as a result of police station confessions. A whole succession of proven unreliable confessions convinced the Government of the day to introduce safeguards for suspects in police stations, as well as giving the police and other investigatory authorities extra powers.

What goes on in the police station remains one of the most important part of a criminal trial. These proposals will undermine those safeguards and jeopardise defendants' rights to a fair trial.

Reduction of Criminal Litigation Firms and Practitioners

The Birmingham Law Society believes that the BVT proposals will drastically reduce the supplier base. There is no doubt that many firms will go out of business due to the fact that they will be unable to bid at sustainable prices to stay in the market, often being under-bid by others offering unsustainably low bids.

Once these experienced criminal practitioners are lost, they are unlikely to ever return to criminal litigation and most likely be lost forever. As a consequence there is great risk of losing experience and specialist knowledge, which the LSC, will find extremely difficult to replace.

Further, with a reduced number of suppliers competition will in fact be removed for any future bid rounds.

It is of extreme concern that no protection has been afforded to firms in the pilot areas, which may be forced to close down even if the pilot is unsuccessful and unsustainable. These firms, and their lawyers, may be lost for ever.

Loss of ability to undertake publicly funded own client work

Unsuccessful bids will inevitably lead to loss of contracts which, in turn, will lead to firms not being able to do any publicly funded own client work.

By not being able to bid for all police stations where 'own clients' may be arrested, will deny own clients access to solicitors of their choice. This is particularly damaging in not being able to do publically funded work for existing own clients who may be vulnerable due to mental illness, age or language difficulties.

The proposed restriction to do own client work is a denial of access to justice to the public.

CDS Expenditure not out of control

It has been stated by the LSC that the purpose of BVT is to control the legal aid expenditure budget. However, there is no evidence to suggest that the expenditure for police station duty work is currently out of control.

In fact, to the contrary, Government appears to acknowledge that police station expenditure is within budget.

If the overall criminal legal aid budget is too high the LSC should explore other ways for efficiencies and savings. See: The Alternative, below.

Calculation of Block sizes with out of date data.

The Birmingham Law Society fears that block sizes will be calculated on historical data which is now out of date.

Maximum Bid –one eighth of the volume of Block

The Legal Services Commission arbitrarily setting the maximum bid as one eighth of the volume of blocks available on a particular scheme will have devastating effect on firms currently holding more than one eighth of the duty slots on a scheme and on those firms currently undertaking more than one eighth of the work from a particular police station or area.

Length of Contract

The length of a two year contract is too short for the level of investment/capital that an individual firm will be required to undertake, secure and fulfil the contract especially where multiple offices need to be set to work with small volumes.

Many firms are already operating at marginal profitability; the LSC are well aware of the investment and return from criminal litigation from their experience in running the Public Defender Service offices around the country.

Bidding Experience

Very few criminal legal aid practitioners have any experience of price competitive tendering and equally very few will be able to learn sufficient to effectively tender in such a short time span that has been set by the Legal Services Commission. We believe this is deliberate to effectively force firms to bid lower than they need to, or would have done with sufficient knowledge and experience in this area.

Most firms will not have sufficient update information to make sustainable bids.

Reversal of LSC Policy

LSC policy, for over half a decade has been to reduce the number of firms ('suppliers') it contracts with, thus encouraging a smaller number of larger firms. Firms have been encouraged to merge and become larger, requiring them to invest heavily to sustain larger practices. BVT encourages the smallest practice, operating with minimal overheads.

The Alternative

The Birmingham Law Society accepts that, for the foreseeable future, there will be no increase in legal aid expenditure. However, for the last few years, the legal aid budget has been successfully capped, by the LSC at £2bn. There is no suggestion of a reduction.

We believe that in order to maintain the quality of service, the 'equality of arms' which is fundamental to an adversarial system of criminal justice, such as ours, the Government should undertake fundamental reviews of both the substantive criminal law and the procedures of the criminal justice system. A radical review of prosecution and court procedures may delay the implementation of any changes but it would result in significant savings, as happened to family law in the early 1970s. It would also result in a more transparent system of criminal justice. As legal aid spending has stabilised, there is no desperate hurry to change things anyway.