



In the second of two articles, Adam Griffith, policy officer at the Advice Services Alliance (ASA), considers the selection criteria and allocation of new matter starts (NMS) in the recently-completed bid round for social welfare law (SWL). The first article, which looked at the updated procurement plans, was published in April 2010 *Legal Action* 6.

2010 SWL bid round: selection and allocation

Having specified the number of NMS available in SWL in the updated procurement plans and the invitations to tender,¹ the Legal Services Commission (LSC) then has to select which bidders are to be awarded contracts and allocate NMS to them. In order to do this, the LSC has sought to devise a process that complies with the requirements of procurement law and takes account of its experience in previous bid rounds, by specifying selection criteria that provide it with a higher level of confidence that services bid for will actually be delivered.

The result has been a mixture of:

- 'essential' and 'selection' criteria;
- criteria that apply across the whole of SWL and those that apply to individual categories of law;
- criteria that apply to the individual office and those that apply to the organisation that is bidding; and
- criteria that apply only to particular geographical areas.

Essential criteria

The essential criteria relate:

- to the need for debt, housing and welfare benefits services to be provided together;
- to presence requirements (either permanent or part-time);
- to the need to employ a supervisor in each category of law bid for, and to meet the supervisor ratio (one full-time equivalent (FTE) supervisor for every six employed FTE caseworkers);
- to not having a confirmed peer review score of four or five in the category bid for since 26 February 2007;

- to the need to employ an approved intermediary for debt work by 14 April 2011;

- to the need to employ an authorised litigator in housing and community care in Service A areas to deliver legal representation; and

- to providing the minimum number of NMS (20 in community care, 30 in employment, and 50, 75 or 100 in debt, housing and welfare benefits).²

Selection criteria

The selection criteria for SWL are summarised in Table 1.³ In relation to each criterion, bidders have to choose one out of a number of options that attract different scores, up to the maximum stated in the table. The LSC will seek confirmation from successful bidders eight weeks before the contract start date that they are able to meet the commitments which they have made. In relation to the percentage of caseworkers which they need to recruit, bidders are allowed to put forward 'exceptional circumstances' for the LSC to consider when scoring their bids. Bids to provide housing with family services will only be considered if the organisation bidding has been awarded a family contract.⁴

The organisation and the office

Some of the criteria relate to the organisation that is bidding, some relate to the office from which services will be delivered, and some fall between the two. The criteria concerning 'experience' relate

to the organisation. The criteria concerning the location of the office, the type of presence, the need to recruit staff, the presence of the supervisor and the 'employment' of an authorised litigator (in Service A areas and in housing with family bids) relate to the office. The criteria in relation to employing an approved intermediary and having 'access' to an authorised litigator (in housing and community care in Service B areas) refer to these staff members as being 'available' to clients at the office.

Concerns

The criterion that has caused most concern is probably the one relating to welfare benefit appeals, which gives most points to organisations that have been involved in at least ten appeals to the Upper Tribunal since 26 February 2009. This could be to the advantage of organisations with large welfare benefits departments and/or organisations that operate on a regional or national basis. It is possible that scores on this one criterion could be decisive in some areas where there are competing bids to provide debt, housing and welfare benefits services. Since consortia bids will be scored by adding the scores in the individual categories, and averaging them where necessary, the fate of a consortium bid could be decided by the score of its weakest link. The announcement of the selection criteria has therefore caused a number of organisations to reconsider the membership of their proposed consortium. Some organisations may have suffered as a result.

Table 1: Summary of selection criteria for 2010 contracts: maximum points obtainable

Criterion	Debt	Housing	Welfare benefits	Community care	Employment	Housing with family
Have an office in the procurement area or access point	5	5	5	5	5	5
Experience of delivering legal services in the category (or another SWL category)	8	8	8	5 (community care cases only)	8 (employment cases only)	8
Lower percentage of caseworkers to recruit	5	5	5	5	5	5
Supervisor at the office	6	6	6	3	3	8
Type of presence	N/A	N/A	N/A	5	5	N/A
Access to or employment of an authorised litigator	N/A	5	N/A	5*	N/A	5
Employ an approved intermediary	5	N/A	N/A	N/A	N/A	N/A
Experience of welfare benefit appeals	N/A	N/A	5	N/A	N/A	N/A
Maximum points	29	29	29	23 or 28*	26	31
Additional points in specific areas	Yes	Yes	Yes	No	No	No

*Service B areas only

A wider concern is that the LSC has been unable to devise selection criteria that will distinguish between bids either effectively or credibly. In many areas, where there is competition, there is likely to be considerable bunching of scores at the higher end, and indeed at the maximum level, which could give rise to a number of allocation problems.

Perhaps the largest concern, however, is that the selection criteria are unable to distinguish between bids on any grounds that really reflect the quality of the service provided. Since success or failure may turn on margins of very few points, there is a danger that some good providers could lose out, and even be lost altogether. This may happen especially in 'overspent' areas, where there is a significant amount of competition and a reduced allocation of NMS compared to recent usage.⁵

Allocation

Where bidders bid for more NMS than are available, the LSC proposes three mechanisms for allocating NMS:

- allocation to the highest scoring bidder first, followed by the next highest, and so on, until all available NMS have been allocated;
- where bids score equally, but there are insufficient NMS to satisfy them in full, allocation on a 'pro rata' basis (in proportion to the number of NMS bid for);
- specific provisions if it is unable to award NMS in all three categories of debt, housing and welfare benefits. These allow the LSC to reallocate a certain number of NMS between categories, to award the minimum number of NMS specified in the category in question, and to apportion the

minimum between consortia members if necessary.⁶

Allocation problems

A number of problems could arise, however, especially in relation to composite bids for debt, housing and welfare benefits. If there is no competition and bidders receive what they ask for, this could still produce an unbalanced allocation between the three categories, since bidders are only required to bid for the minimum NMS specified in each category (generally, 50, 75 or 100 NMS). It is not clear what would happen to any NMS that are not bid for: would the LSC retender, seek to persuade bidders to take more than they have bid for, or pull them back into the national pot, either for use elsewhere in this bid round or with a view to subsequent reallocation to meet demand elsewhere?

Where there is competition, the same problems could arise, unless the LSC can use successfully the specific provisions mentioned above. Where this happens, however, the LSC is likely to be making contract offers that are substantially different from those that organisations bid for, which may include offers of the minimum NMS required in one or more categories. The minimum numbers are low, however, and represent a fraction (40 per cent at best) of the number of cases that could be started by one FTE member of staff, according to the LSC's 'capacity test' (200 cases a year in community care; 250 in housing; and 300 in debt, welfare benefits and employment).⁷ Since the bidder would need to employ a supervisor in the relevant category, it may not consider the contract offered to be

financially viable. However, its ability (and possibly that of any consortium to which it belongs) to do work in any of the three categories will be at stake. This may result in contract awards being made, and accepted, that prove problematic later on.

We anticipate that there will be a number of areas where bids will score equally. If this leads to allocations on a pro rata basis, there could be problems if organisations are offered significantly fewer NMS than they bid for. This could again be particularly problematic for consortia bids.

Conclusion

The LSC has had a difficult task in trying to devise a system that complies with procurement law while also having the potential to produce meaningful and viable bids. The LSC made its task more difficult by requiring composite bids in debt, housing and welfare benefits. The system devised could give rise to a number of problems. It is almost bound to have some unintended and unanticipated consequences. At this stage, all we can do is cross our fingers and hope for the best.

- 1 See Adam Griffith, '2010 social welfare law bid round: what is on offer?', April 2010 *Legal Action* 6.
- 2 See *SWL and family services information for applicants* para 7.26, available at: www.legalservices.gov.uk/civil/tendering/social_welfare_family.asp.
- 3 See Annexes B-E in *SWL and family services IEA annexes*, available at: www.legalservices.gov.uk/civil/tendering/social_welfare_family.asp.
- 4 See note 2, para 14.11.
- 5 See note 1.
- 6 See note 2, section 14.
- 7 See note 2, para 13.11.