



Adam Griffith, policy officer at the Advice Services Alliance (ASA), considers the procurement plans for social welfare law (SWL) published by the Legal Services Commission (LSC).

Procurement plans for social welfare law

Introduction

In preparation for the bid round for new contracts in 2010, the LSC has published procurement plans for each of the 134 procurement areas in which it proposes to invite tenders in family and SWL, ie, community care, debt, employment, housing and welfare benefits.¹ ASA and the advice networks have provided detailed comments on the plans to the LSC, which has told us that it will be issuing revised plans (probably in December 2009) before the bid round opens early next year. This article tries to explain what is – and is not – in the plans, and some of the problems that may arise.

What the LSC wants

The plans outline how the LSC's policy decisions, which it set out in *Civil bid rounds for 2010 contracts. a consultation response* (June 2009), will be implemented locally.² By setting out clearly what services the LSC wishes to buy, it is seeking to bring about a change in the 'market' for SWL services, so that:

- some services are provided together, in a more 'integrated' way;
- there is a more equitable distribution of resources between and within areas; and
- services are provided by suppliers which are demonstrably there, on the ground, and accessible to clients.

The LSC is hoping that suppliers will broaden the service they provide (either on their own or through consortia), will bid to provide services in areas where they do not provide them presently, and will be

prepared to meet the 'presence' requirements stipulated by the LSC.

What the plans do not say

While the plans tell us what the LSC wants to buy, where and on what terms, they do not tell providers:

- how successful bidders will be selected;
- how new matter starts (NMS) will be allocated to the successful bidders; and
- how many contracts are likely to be let as a result.

The LSC has stated that selection criteria will be specified when the tender documents are issued. It appears that these criteria will vary from one procurement area to another. However, some indications about the likely criteria are provided by the plans.

What the plans say

The plans set out the proposed allocation of NMS in SWL, how the allocation is divided into different lots for bidding purposes, and the terms on which they are available (see the table for a summary).

Total NMS allocation

The LSC's starting point is its 'indicative spend model'. Based on a number of social or demographic factors, including predicted levels of eligibility for legal aid, the model seeks to compare estimates of relative need between different areas.³ The model is now expressed in terms of the 'indicative' number of NMS for each procurement area in SWL (and family).⁴

The total NMS allocation for SWL in each plan is based on the indicative spend

model, or the actual usage in 2008–09, whichever is the greater.

This means that, in 'overspent' areas (where current NMS usage is more than the indicative spend), the total NMS allocation is capped at the number of NMS actually used in 2008–09. In such areas, the plans state that the LSC is 'unlikely' to or 'will not' award additional NMS during the year.

The division of the total by category

In each procurement area, the total NMS allocated for SWL appear to have been divided up following a two-stage process. First, an allocation is made for community care and employment, based on a minimum of 100 and 150 NMS respectively or on actual usage in 2008–09 if that was greater (the exceptions to this are the allocations for community care in Salford, Southwark, south east London and Northamptonshire, where the allocation is less than the actual usage in 2008–09. The LSC has told us that the first two allocations are a mistake, but that the third is deliberate owing to work being delivered regionally by an office based in Northamptonshire.)

Second, an allocation of housing NMS is made for providers wishing to bid for housing with family. The number of such NMS is generally low, in the region of 100–250, although the LSC has stated that the minimum number will be revised to 150 NMS when the plans are updated. In some areas, however, the allocation is higher, with the highest figure being 800 (areas with a higher allocation for housing

and family include South East Wales, Lambeth, Westminster and Southwark (all at 500); Wandsworth (600); Sefton (650); Newcastle (700); Camden and Hackney & City (both 800).

Once the NMS for housing and family have been allocated, the remaining NMS are specified as being for the 'bundle' of debt, housing and welfare benefits, but without dividing the total between the three categories. This further division is likely to be problematic, for the reasons set out below, but it is expected to be set out in the revised plans due in December 2009.

Geographical division of the total

Some procurement areas are divided into access points (which are generally local authority areas at district level). In these areas the 'bundled' allocation for debt, housing and welfare benefits is divided up between the access points. We understand that bidders will have to bid for some or all of the NMS allocated to the specific access points.

Delivery requirements

The plans specify three types of requirements as far as service delivery is concerned:

- Minimum numbers of NMS in each category';
- Whether or not an authorised litigator is required; and
- Presence requirements.

The minimum numbers of NMS are set at low figures: 20, 30, 50, 75 or 100, depending on the category of law and the procurement area. It seems unlikely that this will be problematic.

Where areas are designated as being under 'Service Specification A', suppliers are required to employ an authorised litigator. In 'Service Specification B' areas this is not a requirement. The plans state, however, that the LSC will give preference to providers with an authorised litigator if providing services in housing and/or community care, where it needs to distinguish between bids following assessment of the essential criteria.

While the designation as 'A' areas is likely to be justified in many, especially urban or city, areas, doubts have been expressed about whether the local market is sufficiently well developed to justify such a designation in some more rural areas (the representations made to the LSC by ASA and the advice networks included reference to Cornwall & Isles of Scilly, Gloucestershire and Lincolnshire in this context).

The presence requirements

The most important requirements are those relating to presence, ie, the LSC's proposals to require providers to have a permanent or part-time presence, depending on the level of demand in the relevant category or geographical area.⁵

The plans set out what is required in each area, albeit somewhat obliquely at times. The plans do not state what the presence requirement is for a provider delivering housing and family services, although the LSC has confirmed that the requirement is the same as that specified for family services. Most of the plans do not state what the requirement is for the delivery of employment and community care, concentrating instead on the requirements in relation to debt, housing and welfare benefits. However, the LSC has confirmed to us that, in all cases, only a part-time presence is required in employment and community care, as stated in the consultation response.⁶

As far as the debt, housing and welfare benefits bundle is concerned, providers are required to have a permanent presence in the area in nearly all cases (the only exceptions appear to be Leicestershire and Rutland, South Derbyshire and North Derbyshire, where providers are required to have a permanent presence in the procurement area, or in a neighbouring area). The position is more complicated in two situations:

- Where the area is divided into access points – in which case the plans generally specify whether providers are required to have a permanent or part-time presence in each of the access points; and
- Where the plan states that preference will be given to suppliers which can provide services more widely – either in terms of geographical locations or types of clients (some of the plans state that preference will be given to providers which can offer services to socially excluded groups, and/or in more than one location, and/or in specific locations).

Problem areas

NMS availability

The plans assume that the LSC will be able to put on the market a total number of NMS which represents both the amount actually used in 2008–09 (or possibly later – see below) and the number necessary to bring 'underspent' areas into line with the number of NMS suggested by the indicative spend model. In addition, the LSC had suggested previously that it would hold back a proportion of NMS to enable it to cope

Key points

- Each plan sets out the likely allocation in a procurement area of NMS in SWL – ie, community care, debt, employment, housing and welfare benefits – in 2010.
- The total NMS allocated for SWL is based on:
 - the 'indicative spend' for the area; or
 - the actual number of NMS used in 2008–09, whichever is the greater.
- The total is divided between the categories:
 - first, by allocating a number of NMS in employment and community care;
 - second, by allocating a number of NMS for housing with family;
 - with the remainder forming the debt/housing/welfare benefits 'bundle'.
- In approximately 52 areas, the debt/housing/welfare benefits bundle is divided up and allocated to separate 'access points'.
- Each allocation carries with it a requirement to provide services through a 'permanent presence' or a 'part-time presence'.
- The LSC is planning to issue revised plans in December 2009.

with any appeals against its selection and allocation decisions. Ultimately, however, the Legal Help budget is capped, and these additional NMS will have to come from somewhere. The most obvious source is the number of NMS that are allocated but are not used by suppliers, since currently these are in the system and are available theoretically for recycling. In the past, the number of unused NMS has been significant. We understand, however, that in recent months NMS usage has increased significantly, along with the number and value of cases billed. Providers are reporting that their requests for additional NMS are being refused. There appears to be a risk that Legal Help expenditure may have to be controlled. It is possible, therefore, that the LSC may not be able to put on to the market as many NMS as suggested in the plans.

NMS allocation to 'overspent' areas

Even if the LSC does not have to cut the allocation, there is obviously a problem in the 'overspent' areas if NMS allocations are based on historical usage at a time when NMS usage is rising, the country is in a recession, and the LSC has allocated additional NMS as a result. This could cause problems in relation to specific allocations such as those in employment and community care, where usage may be rising to levels beyond those found in the past. It could cause more general

problems if NMS availability in debt, housing and welfare benefits is capped at a time when demand is rising, and the LSC sticks to its guns and refuses to issue additional NMS during the year. We understand that the LSC intends to base the allocations in the revised plans on more recent data, but this may still not reflect current, or likely future, demand.

Dividing up the bundle

In relation to SWL generally, the LSC proposed in its consultation response that the 'starting point' for the division of NMS between the categories should be the proportion of SWL spend that has been used previously on each category nationally.⁷ This would then be subject to sense-checking locally, to establish whether there are any anomalies.

The national split is given as:

- Community care – 2 per cent;
- Debt – 29 per cent;
- Employment – 4 per cent;
- Housing – 30 per cent; and
- Welfare benefits – 34 per cent.

Since community care and employment are allocated separately (see above), that suggests that the distribution between the three remaining categories would, subject to sense-checking, be:

- Debt – 31 per cent;
- Housing – 32 per cent; and
- Welfare benefits – 36 per cent.

The response does not explain how the division should be applied. Presumably, the NMS allocated to housing in the housing and family service should be factored back in. The starting point still suggests, however, a roughly equal split in NMS between debt, housing and welfare benefits. However, such a split is not generally to be found in the 2008–09 figures for each procurement area. On our calculations, in most procurement areas, a division according to the national split would mean that NMS have to be reduced in at least one category to below the level of current usage. A large amount of common sense is going to be needed here, as it would seem that 'anomalies' are likely to be widespread. The LSC has stated, however, that it will provide figures for each of the three categories in the December 2009 revised plans.

The presence requirements

It seems to us that the LSC may have set the bar too high in relation to some of the presence requirements, particularly in some access points where a permanent presence is required, notwithstanding a low number of NMS allocated. It is open

to debate what the appropriate number of NMS might be to justify a permanent presence, but it seems to us that the LSC is being highly optimistic in asking suppliers to provide a permanent presence when the maximum number of NMS available for debt, housing and welfare benefits is as low as the following:

- 200 (Weymouth & Portland in Dorset)
- 300 (Stroud in Gloucestershire);
- 320 (Craven in North Yorkshire);
- 340 (Salisbury in Wiltshire);
- 345 (Eden in Cumbria)
- 380 (Selby in North Yorkshire);
- 400 (Sedgemoor in Somerset; Christchurch in Dorset); or
- 450 (Welwyn Hatfield in North Hertfordshire).

Some of these proposals may reflect the presence of existing providers that are expected to bid. However, a contract to deliver one or two categories of law may cease to become financially viable when a third category of law is required, and particularly if that requires the employment of an authorised litigator for the first time.

Contracts involving small numbers of NMS may be particularly hard for consortia to deliver if the permanent presence requirements continue to require each member of a consortium to have a permanent presence in the procurement area that is identifiably separate from that of other members. However, the LSC has confirmed that the presence requirements will be reviewed in the light of more up-to-date data in the revision of the procurement plans.

Preferences

In ASA's response to the consultation on 2010 contracts, we argued that there should be more than one supplier in SWL in each procurement area. Some of the plans include preferences for suppliers that are able to provide coverage at additional locations. Some go further and seem explicitly to favour monopoly bids, such as the Wigan plan which states that preference will be given to bidders 'who can deliver a wider service from a permanent presence in both access points in the procurement area'.

Are the plans expecting too much?

It seems to us that some of the plans are overly optimistic in terms of the bids that the LSC might expect to receive, given the existing supply. Several plans (notably in Wales) recognise that existing gaps are being filled substantially by outreach from other procurement areas, but still require

providers to have a permanent presence in the procurement area. We appreciate that the LSC is entitled to ask for what it really wants, but suggest that it would be more realistic to have a fallback position.

Very few of the plans say what would happen if the LSC does not receive sufficient bids that meet the criteria. A few say that the LSC will retender (the Leicestershire and Rutland plan says that 'NMS not awarded through the initial contract award process will be readvertised through subsequent tenders'), but the vast majority are silent on the issue.

Conclusion

The procurement plans represent a significant step forward in terms of the information that suppliers will need in order to bid for contracts from 2010. The LSC's intention to issue revised plans before the bidding period is also to be welcomed. The information that suppliers really need to know, however, is how bids will actually be evaluated, and NMS allocated.

- 1 Available at: www.legalservices.gov.uk/civil/tendering/9796.asp.
- 2 Available at: https://consult.legalservices.gov.uk/inovem/gf2.ti/f/137474/2789765.1/pdf/-/Consultresp_FINAL_.pdf.
- 3 For an explanation of the model, see the LSC's letter to ASA on 21 December 2007, available at: www.legalservices.gov.uk/aboutus/ati/information_released.asp.
- 4 Information from the LSC's letter to ASA on 11 September 2009.
- 5 See paras 4.30–4.33, at note 2 above.
- 6 See para 4.39, at note 2 above.
- 7 See paras 4.82–84, at note 2 above.

The special feature on criminal legal aid that was due to appear in November 2009 *Legal Action* as part of the 'Legal aid at 60: bridging the justice gap' series will be published in December 2009 *Legal Action*.