

April 2010 – Bidding for Social Welfare Law Contracts



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This briefing summarises the Legal Services Commission's proposals for bids for social welfare law contracts from April 2010. By *social welfare law*, the LSC means the following five categories: welfare benefits, debt, housing, employment and community care.

The proposals are set out in the LSC's consultation paper, [Civil Bid Rounds For 2010 Contracts: A Consultation](#). The closing date for responses to the consultation is **23rd January 2009**.

This briefing highlights some key points from the consultation paper and is no substitute for reading the paper in full. The briefing looks at:

- the background to the proposals
- general features of the bid round
- categories of social welfare law for which bids will be invited
- mergers and consortia
- types of service procurement
- bid criteria
- possible options for NfP agencies.

This briefing does **not** cover the consultation paper's proposals for

- bids in other civil categories (i.e. family, mental health, immigration & asylum and low volume categories such as education and public law)
- bids for housing possession court duty schemes
- various changes to civil contract terms and legal aid scope.

Background to the proposals

The current proposals represent a further move towards implementing the overall policy objectives previously set out by the LSC in [Making Legal Rights A Reality: The Legal Services Commission's Strategy for the Community Legal Service](#) (March 2006) and [Civil Legal Aid Contracts: The Next Five Years](#) (April 2008 - also known as *the Route Map*).

As far as social welfare law services are concerned, the LSC's main objectives are to develop what it calls *integrated* services that:

- cover multiple categories of law - the LSC has stated that it intends to move towards purchasing all five social welfare law services together
- deliver the full range of work from Legal Help to Licensed Work, i.e. litigation services provided by solicitors.

Where possible, the LSC will develop such services through Community Legal Advice Centres (CLACs) or Networks (CLANS), jointly commissioned with local authorities. Except in 14 specified procurement areas, no CLACs or CLANS will now begin operation before 1st April 2010. However, this does not prevent tendering processes being run in other procurement areas to set up CLACs and CLANS to begin operation **on or after** 1st April 2010.

Where there are no plans to set up CLACs or CLANS, the LSC will seek to deliver integrated social welfare law services through mainstream legal aid contracts in line with the proposals set out in the consultation paper.

The LSC states that in devising the current proposals it has "sought to balance the need for change with the capacity of providers to deliver it and our desire not to

disrupt services that are working well". One way of achieving this balance will be to allow consortium bids for social welfare law services.

In relation to the 2010 bid round therefore, the LSC seems to have decided against a big bang approach whereby all social welfare law services will be delivered through a single contract in each procurement area. However, nothing in the consultation paper rules out that possibility in at least some areas. The paper is silent concerning the number of social welfare law services that it intends to let. And while the paper states that the great majority of providers can expect to obtain renewed contracts, it goes on to say that there will be "competition in some areas, *particularly social welfare law*, and contracts cannot be guaranteed". More generally, the LSC is under huge pressure to reduce its administrative costs, giving it an incentive to move toward fewer, larger contracts.

The current proposals for social welfare law services will nevertheless have a major impact on the NfP sector.

General features of the bid round

The LSC intends to seek bids for 2010 contracts in **July 2009**. The bid round will be open, so all existing providers will have to bid to have their contract renewed.

There will be no price competition for 2010 contracts, except in two or three (as yet unidentified) procurement areas, where the LSC will pilot *best value tendering* (i.e. some form of price competition). In most areas then, mainstream contracts will continue to be based on the current fixed fee system, although the LSC will consult early next year on possible changes to the fees.

The LSC aims to publish final details on contract terms, fees, quality and auditing arrangements before bids are invited. It also aims to notify applicants of the outcomes of bids at least three months prior to new contracts starting.

Contracts will last three years except in the following two instances, where they will contain provisions for earlier termination:

- in procurement areas where the LSC intends to establish a CLAC
- in the pilot areas for best value tendering.

Categories of social welfare law for which bids will be invited

For social welfare law (and family) services, there are [134 procurement areas](#), largely based on local authority boundaries. The LSC is proposing that organisations wishing to bid for social welfare law services must bid for one or more of the following combinations of categories:

- housing, debt and welfare benefits
- housing and family
- employment
- community care.

The LSC will no longer award sole contracts in housing, debt or welfare benefits. Nor will it award contracts in any combination of two of these categories. Organisations wanting a contract in any of these categories after April 2010 will need to cover all three categories (or bid to provide a housing and family law service).

This will have a major impact on the NfP sector. According to our analysis of data provided by the LSC, in April 2008 there were about 400 NfP contracts in either housing, debt or welfare benefits. However, only 17% of these contracts covered all

three categories (37% covered one category only and 46% covered two categories only). This means that over 80% of NfP organisations will need either to expand their services or enter consortium arrangements if they wish to continue doing legal aid work.

For the time being, the LSC will continue to award sole contracts in employment and community care. But note that under the bid criteria, in a competitive situation the LSC will give preference to organisations bidding to provide the greatest number of social welfare law categories (see below).

Mergers and consortia

Organisations will be able to bid together on the basis that they will merge, forming a single legal entity if the contract is awarded.

In relation to social welfare law services only, organisations will be allowed to deliver services through consortia, under which each organisation will maintain its separate identity. This could include consortia of NfP organisations and private practice firms.

The LSC states that each provider in a consortium “could be given a separate but linked contract requiring them to ensure that a client contacting any of the providers will have access to all of the legal aid services that the consortium provides”. But this must amount to **more** than simple referral arrangements. The LSC suggests that it might include consortium members providing advice surgeries at each other’s offices or via video links, or through mutual specialist support arrangements.

The LSC will **not** allow sub-contracting arrangements whereby one organisation holds the contract and sub-contracts entire cases or categories of work to others (note that it does allow sub-contracting arrangements in CLACs and CLANs).

The LSC is discussing the regulatory implications of consortium arrangements with the Solicitors Regulation Authority and representative bodies, including:

- client confidentiality issues where work is referred within consortia
- potential conflicts of interest when work is referred
- the impact of the Solicitors’ Conduct Rules concerning fee sharing on consortium arrangements between NfP organisations and private practice firms.

It is unclear whether consortia bidding for social welfare law services will be able to bid for other categories, such as immigration and asylum, as part of the consortium arrangement.

Types of service procurement

The LSC intends to publish a procurement plan for each procurement area in England and Wales, setting out the services that it wants to buy.

The LSC proposes two types of service procurement, depending on its assessment of current provision and likely competition in each procurement area.

In procurement areas where the LSC considers that there is likely to be what it terms “significant oversupply” and that “the market is capable of moving towards the more fully integrated services that we ultimately want to buy”, it will invite bids based on an expanded service specification called Integrated Services A. This is likely to apply in most urban areas.

In other procurement areas, the LSC will invite bids based on a minimum service specification called **Integrated Services B**.

In relation to social welfare law, there are **two** differences between the two types of service specification. In procurement areas covered by the Integrated Services A specification, bidders **must**:

- be able to deliver services in all locations within a procurement area that are specified in the tender documentation
- if delivering services in housing or community care, be able to offer full Legal Representation (i.e. litigation services) through a solicitor.

Given that organisations bidding for debt and/or welfare benefit contracts will also have to bid for housing contracts, this means that virtually all organisations bidding for social welfare law services in Integrated Service A areas will have to provide solicitor services, either directly or through a consortium. The only exception is where an organisation is bidding to deliver a service in employment law only.

Again, this has major implications for NfP organisations. Currently, just under 25% of agencies with a social welfare law contract employ solicitors.

Bid criteria

Social welfare law bids will be assessed against four types of criteria:

- essential generic criteria
- essential civil specific criteria
- essential category specific criteria
- selection criteria.

Broadly speaking, applicants must satisfy the first three types of criteria in full in order to obtain a contract. The selection criteria will come into play in procurement areas where there are more successful applicants than there is work available.

The criteria are briefly summarised below.

Essential generic criteria

These cover applicants' suitability to contract with the LSC as a public body, and cover the following:

- applicant details, e.g. company registration details
- professional and business conduct
- financial conduct
- compliance with legislation, e.g. Health and Safety, Equality and Diversity
- insurance
- conduct under previous LSC contracts
- references where a provider has not previously held an LSC contract.

Essential civil specific criteria

These apply to all civil categories of law and are as follows:

- applicants must not have had a confirmed peer review rating of 4 or 5 (i.e. following the conclusion of the appeal process) in the last 12 months
- a confirmed peer review rating of 4 or 5 in any of the five social welfare law categories will preclude an applicant from being awarded a contract in any category of social welfare law

- applicants must either already hold the Specialist Quality Mark (or any future recognised Quality Standard) in the relevant categories of law or demonstrate in their bid that they comply with key areas of the standard (including confirming that they will have named supervisors in place in the relevant categories by the time that the contract begins)
- preference may (or possibly will) be given to applicants who already have named supervisors in place
- applicants must have a supervisor to caseworker ratio of at least 1:4 in all relevant categories of law
- where applicants have an Un-recouped Payment on Account ratio (excluding disbursements) in excess of 200% of the value of the previous year's Annual Fund Take, they must satisfy the LSC that the UPOA% will be reduced to less than 200% within 3 months of the award of the contract
- services must be provided from the start date of the contract (preference will be given to applicants who already have service delivery arrangements in place).

Essential category specific criteria: social welfare law

The following criteria, set out in the Social Welfare Law Specification, apply to both the Integrated Service A and B specifications (see above for the additional criteria applying to the Integrated Service A specification):

- applicants must deliver services in at least one of the following: housing, debt & welfare benefits; housing & family; community care; employment
- if providing services in housing, debt and welfare benefits, organisations must deliver in each procurement area a minimum of 100 matter starts per year in **each** category
- if providing services in community care, organisations must deliver in each procurement area a minimum of 20 matter starts per year
- if providing services in employment, organisations must deliver in each procurement area a minimum of 30 matter starts per year
- services in housing, debt and welfare benefits must be delivered from at least one permanent office within the procurement area
- services in community care and employment must be delivered from at least one part-time presence within the procurement area
- debt advice providers must be able to deliver Debt Relief Orders through at least one Approved Intermediary.

Selection criteria: social welfare law

In procurement areas where there are more successful applicants than work available, the LSC will apply selection criteria to further distinguish between bids.

These criteria will act as tiebreakers. Matter starts will be allocated to the highest ranked applicant first (up to the maximum number requested by the applicant), then to the second ranked applicant (up to the maximum requested) and so on until all matter starts have been allocated.

For social welfare law bids, there are two selection criteria.

- Preference will be given to organisations bidding for the highest number of social welfare law categories, providing that category gaps can be filled. In principle then, an organisation bidding for all available matter starts in all five social welfare law categories could be awarded the sole social welfare law contract in a procurement area.

- Preference will be given to organisations able to demonstrate a higher supervisor to fee earner ratio.

Possible options for NfP agencies

The move towards integrated social welfare law services presents major challenges to NfP agencies. For some agencies, employing solicitors will also raise issues of organisational and advice culture, and employing solicitors entails dealing with fairly complex regulatory issues. There is a clear risk that large private sector providers will outflank NfP agencies in bidding for larger contracts.

Time is short and all of the possible options are complex, requiring a lot of planning and work. You should therefore start to consider them now.

In broad terms, there are four possible options for NfP providers:

Withdrawal. Giving up your contract may be the most rational course of action, especially if you are struggling under the current contract or are a small agency with a small contract. Withdrawal may be more attractive if you have access to other funds to provide specialist legal advice. But if you are heavily reliant on legal aid funds, withdrawal will be tantamount to severely curtailing your service or closing down completely.

Expansion. This is the *think big* option, and entails expanding your service to cover multiple categories of law and employing solicitors if you do not already do so. But managing major expansion over a short period is far from easy.

Merger. Merged organisations may be in a stronger position to compete for larger contracts, as mergers may facilitate coverage of multiple categories of law, the rationalisation of service delivery and (in theory at least) reductions in overhead costs. However, mergers between different types of NfP agency will raise issues of organisational and advice culture. And mergers between NfP agencies and private practice firms appear to face major and possibly insurmountable legal hurdles.

Consortia. Joining with others to form consortia may best serve clients by drawing on the strengths of different providers. And it may best ensure a significant NfP sector involvement (including that of non-solicitor advice agencies) in the future provision of legal aid. Consortia will also allow NfP agencies and private practice firms to collaborate, which in some areas may offer the best mix of services. The LSC wants to discuss the detail of consortium arrangements with ASA, and we will produce further guidance as soon as possible.