

BEST VALUE TENDERING FOR CDS CONTRACTS 2010

Response to consultation paper by the Society of Asian Lawyers

The Society of Asian Lawyers is the UK's largest independent legal society with in excess of 1500 legal and other professional members.

SAL members encompass a cross section of the legal world and includes partners in high profile city firms, leading barristers and QC's in house counsel, high street practitioners, legal executives, trainees, pupils, students and everyone in between.

SAL was first formed in 1990 and was a vision of forward thinking Asian legal professionals who wanted a voice for the Asian legal community as well as a forum to discuss important and relevant issues. Moreover they wanted to create a networking hub for like minded individuals.

SAL is a non political organisation run by volunteers and received no funds from external sources. We rely entirely on our membership subscriptions and profits from our annual ball as our main source of income and are therefore heavily reliant on the commitment and loyalty of our members to make SAL work.

EXECUTIVE SUMMARY

By Sundeep Bhatia Chairman of the Society of Asian Lawyers

This year represents the 60th anniversary of the creation of the Legal Aid scheme. The Legal Services Commission and the Ministry of Justice are keen on celebrating this landmark. In reality they should be mourning its imminent demise.

I write as a lawyer who has practiced publicly funded criminal legal works since 1994. I ran my own criminal Legal Aid firm, Brent Law Practice, from 1999 to 2006 and practice publicly funded criminal law as a consultant to the criminal firm of Clive Gomes in Alperton.

Over the length of this Labour administration the Legal Aid fund has been steadily reduced on a case by case basis. At present the work is largely unprofitable.

If the proposals are adopted then the transformation of Britain's Justice System, from a world class protector of human rights to a Cinderella skeleton service will be completed.

Firms who wish to carry on doing criminal Legal Aid work will be forced to bid against each other to do the work for the lowest possible price. Quality and standards will diminish. Soon the only practices left will be largely staffed by the inexperienced and incompetent. Under the proposed scheme firms will bid for blocks of work calculated on the basis of historic data. Unfortunately that counts for nothing in a field where the government continually moves the goal posts.

In its first 11 years of government this labour administration introduced over 3,600 new criminal offences increasing the number of those processed by the Criminal Justice System without any thought of how those increases in traffic would be funded.

However, over the last few months, I have found from personal experience that far less people are being processed by the Criminal Justice System. Instead they are being diverted by fixed penalty charges or cautions. A senior member of the Crown Prosecution Service has confirmed this is being done intentionally to relieve backlogs in dealing with criminal cases at the Crown Court.

These ebbs and flows in police station traffic will be impossible to predict making the calculation of blocks a nonsense.

Under the proposed schemes small Asian and Black minority ethnic firms providing cultural and linguistic support to local Asian and Black communities are most at risk from unscrupulous larger firms using predatory pricing to put their competitors out of business.

The Law Society figures for 2007, published in February 2008, showed that BME solicitors are proportionately more likely to be working in sole partner firms than white solicitors and less likely to be in the largest firms. They are also more likely to be sole practitioners than white solicitors (10% Asian and Black and minority lawyers compared to 5% of white lawyers). Moreover Asian and other minority solicitors are also more likely to work with legally aided clients (34% compared to 23% of white solicitors).

The reforms will leave large, faceless companies using, as far as possible, inexperienced staff.

Even if a few such Asian and minority law firms survive they will not be able to represent people arrested in different geographic areas from those their firms practice in unless a firm has a contract with the Legal Services Commission in that particular area.

Quality will suffer. Miscarriages of justice will increase but will only come to light once this current administration is long gone. The changes also threaten diversity in the Criminal Justice System. Minority pupils will withdraw from doing such work as it involves extremely low pay and anti social working hours.

Qualified Asian lawyers will withdraw from the market and the pool of senior Asian Solicitors, from who Judges can be selected, will be reduced even further.

Asian barristers tend to be instructed by the small minority firms who are most at risk. The disappearance of this firms will also mean that junior members of the bar will see their practices ripped apart.

For the sake of human rights, individual liberties and the pursuit of justice these proposals should be discarded.

If implemented the proposals represent a barbaric act of vandalism on an epic scale.

Will do irreparable damage to the fabric of the Criminal Justice System. Once firms are put out of business those involved will not quickly return to the market place.

Question 1-6 Do you agree that the question of blocks will assist providers in bidding for work in more than one area?

Answer The whole block system makes no sense.

The block system is based upon historic data.

It cannot take into consideration unforeseen actions such as the fact that the Labour administration, in its first 11 years of government, introduced over 3,600 new offences resulting in a greater volume of persons being processed by the Criminal Justice System.

By the same token even a couple of years ago no one could have predicted the way in which individuals would be diverted from the Criminal Justice System by way of fixed penalty tickets, conditional cautioning and more liberal usage of cautioning.

This makes the whole system of calculating blocks nonsensical and represents a risk that few small providers can afford to take.

Question 7 Do you agree that the process should aim to secure a minimum of 8 providers per scheme in the majority of schemes?

It is imperative that a strong network of criminal defence firms remains in order that conflicts of interest can be dealt with and that members of different ethnic communities can have access to firms that represent their culture and languages.

Even if there are eight firms in a given area there is no guarantee that firms reflecting the linguistic and cultural needs of the communities they represent will remain.

Question 8 Do you agree that different approaches to the minimum number of providers should be taken in lower volume schemes?

See answer to question 7.

Do you agree that securing a minimum of four providers, and introducing additional backup requirements will ensure that conflicts are handled appropriately?

The system will not work in relation to complex multi handed conspiracy cases which involve a large number of potential defendants.

Question 10 see answer to question 9

Question 11 Neither option is attractive.

Under option One firms left standing after the block purchase cull will be offering lower standards of service. Choice will be severely restricted and standards will drop.

Option two is meaningless. If firms are able to do Magistrates' Court work (in London) at significantly lower rates than they previously were conducting them for then that will be extremely unattractive.

Moreover if such firms have an own client base then in many circumstances they will not be aware that those own clients have been arrested because they would have been dealt with at the police station by one of the on call duty solicitors with a contract in that particular area. There is therefore a very real prospect that the own client would be processed without the firm holding a Magistrates' Court only contract being aware that the own client has been arrested.

Question 12 The unification of escape thresholds for exceptional cases across CJS equate to substantial reductions for those firms operating in the London area.

Any system of payment at the police station must take into consideration the fact that certain offences such as murder investigations require substantially more work than more mundane matters. However that being said, sometimes even the simplest matter of theft from a shop can require a large input of time due to the fact that an individual has learning difficulties, mental health problems or because the services of an interpreter are needed.

Question 13 See answer to question 12.

Question 14 General principles proposed for assessing how providers intend to fulfil their bids realistically and sensibly.

The Criminal Justice System in this country is respected worldwide. It is important that qualities are maintained. The bid process will inevitably result in a decline in standards.

One of the ways in which this decline will be achieved is by means of lowering the criteria providers need to fulfil.

Thus, at the present time, duty solicitor slots are assigned to individual solicitors. That individual solicitor is responsible for the performance of his/her duty slot. There is therefore a degree of accountability and duty solicitors handle the telephone contact with the police station in the first instance and can assess how serious or otherwise a case is. The danger now is that slots will actually belong to firms rather than individual solicitors and solicitors firms will only be required to have one duty solicitor to four non duty solicitor staff.

Thus it seems inevitable that less qualified staff will be carrying out work at the police stations with a subsequent reduction in standards.

Question 15 Neither price setting mechanism is attractive. Both will lead to predatory pricing with solicitors firms putting in unrealistic bids in order to put their competitors out of business.

Questions 16 to 21 The whole bidding system is unworkable and there can be no conditions put in place which would make the system workable or in any way attractive.

Questions 22 Do any of the proposals set out in this consultation document create an unreasonable restriction on new market entrants.

The answer to this has to be yes. The reforms make the requirement to enter the market complex. There is no guarantee that any bid will be successful and that any money invested in a bid will see any return.

Therefore the only firms that will be able to risk attempting to enter the market are larger firms with more substantial resources.

This means that new niche firms will find it extremely difficult to enter the market.

BME solicitors quite often establish their own firms because they reach a glass ceiling in existing firms and cannot progress any further.

Such firms do not normally attract applications from English lawyers who seem to look down upon such firms. Thus, not by design, such firms provide training and learning opportunities for BME solicitors.

Moreover such small firms tend to instruct BME barristers chambers. There would therefore be a knock on effect. Diversity within the legal profession would be deeply affected and irreparably damaged.

Moreover because of the glass ceiling effect BME solicitors would not be in a position whereby they could rise to heights from which they could be selected for positions in the judiciary.

Question 23 The suggestion that scheme rules can be varied where appropriate is akin to moving the goalposts in different areas. Such a system seems to be required because of weaknesses in the scheme created.

Question 24 No strong views

Question 25 This becomes necessary because the fees for Magistrates' Courts are so low that many people may otherwise not be tempted to deal with matters at the Magistrates' Court.

Question 26 Any steps to relieve the administrative burden of hard pressed legal aid firms is to be applauded.

Question 27 There is no guarantee that the LSC would accede to any such request for a re tender. Moreover if a request is made for a re tender there is also the possibility that the firm making the request may not receive a contract after the re tendering. This vague hope that the LSC might agree to a re tender does not in any way alleviate the unreasonable risk that firms have to take in relation to calculating blocks in the future when the governments legislative and policing policies are so volatile and uncertain.

Question 28 The whole scheme is so flawed that the length of the contract is almost an irrelevance. However the contracts need to be long enough to allow a firm to plan for the future and therefore two years is preferable to shorter periods.

Question 29 The whole process of reallocation is extremely messy. It also appears to be chaotic and ill thought out.

Question 30 The existing qualification standards for duty solicitors are rigorous enough. Anything more than what exists already would represent an additional cost for firms in circumstances where fees have already been cut to the bone and where the latest proposals are designed to cut fees further. Therefore the proposals are not acceptable.

Question 31 The whole supervisor duty solicitor ratio is wrong and is designed to make it cheaper for firms to service police stations at the expense of

the qualifications of those attending police stations. Therefore the link between individual solicitors and duty solicitor slots should not be broken.

If the link is broken then the use of less qualified staff will lead to miscarriages of justice.

Question 32 Please see response to question 30.

Question 33, 34 & 35 These reforms are dangerous and deeply damaging.

Under those circumstances the timetable is inappropriate.

Any pilot scheme should run for a minimum period of two years before the system is rolled out nationwide.

Question 37 This deals with impact assessment on a national basis.

One point arising out of the Carter Review was that BME firms will be decimated in certain geographical areas such as London where there are larger BME communities and more BME owned and run firms. Therefore discussing the effect on a national basis is unhelpful when, in certain areas, there may be no BME owned or run firms.

A separate impact assessment of areas such as London with large BME communities is required.

CONCLUSION

The Society of Asian Lawyers condemns Best Value Tendering as being the biggest threat to the legal system in this country for a generation. The effect of the reforms will be to set back diversity in the legal profession many decades.

The Society of Asian Lawyers does realise the constraints on public spending in the light of the current volatile environment and is keen to assist the LSC in implementing an alternative policy which is fairer and which would provide higher standards for our clients and which would help to ensure continued cultural diversity within the legal system.

This would take time and under no circumstances should the LSC and Ministry of Justice rush ahead with this folly.