



Best Value Tendering for CDS Contracts 2010

A Consultation Paper
March 2009

*Criminal
Defence Service*



legal aid – fair access to justice

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Summary information regarding this consultation

Basic information

To	Anyone with an interest in the procurement of publicly funded criminal defence services in England and Wales. This includes legal firms, legal representative bodies, client interest groups and other organisations across the criminal justice system.
Duration	This consultation will be open for 12 weeks from 27 March 2009 to 19 June 2009
How to respond	<p>Online at: www.legalservices.gov.uk</p> <p>In writing to: Best Value Tendering (Crime) Team, Criminal Defence Service, 4 Abbey Orchard Street, London SW1P 2BS</p> <p>Or by email to: cds.directorate@legalservices.gov.uk</p>
Enquiries	<p>Kelly Aynsley at 020 7783 7481</p> <p>Or by email to: cds.directorate@legalservices.gov.uk</p>
Additional ways to become involved	<p>In addition to this formal consultation, the Legal Services Commission (LSC) will organise a series of regional events where the proposals in this paper will be discussed. If you are interested in attending such an event, please contact your local regional office or view the events timetable at www.legalservices.gov.uk. Follow the links to >CDS >Crime Consultations and email us back at cds.directorate@legalservices.gov.uk</p> <p>Views can also be submitted through representative groups.</p>
After the consultation	<p>The Commission will carefully consider all of the responses received, in addition to the comments collated from the regional events.</p> <p>A response to this consultation exercise will be published in 2009 at www.legalservices.gov.uk. If you have registered to complete this consultation online you will be automatically notified of this.</p>
Compliance with the Code of Practice on Consultation	This document and consultation process have been planned to adhere to the Code of Practice on Consultation and is in line with the seven consultation criteria set out at Annex A.

Scope of the consultation

Topic of this consultation	The current Unified Contract (Crime) 2008 will (following extension) expire in July 2010. This consultation is focused on the
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	proposals for the procurement of new contracts through best value tendering.
Scope of this consultation	This consultation details the proposals for a pilot scheme for best value tendering (BVT) and how the tender would operate.
Geographical scope	The new CDS Contract 2010 (replacing the Unified Contract (crime) 2008) will apply in England and Wales. The BVT pilot would be to deliver services in Avon & Somerset and Greater Manchester Criminal Justice System (CJS) areas but participants in the tender could come from any part of England and Wales. The proposed roll-out of BVT will cover all CJS areas in England and Wales.
Impact assessment	An initial impact assessment is attached at Annex 1 of this paper. The impact assessment will be updated when proposals are announced in the response to the consultation paper.

Background

Getting to this stage	<p>This consultation paper represents the second part of a two-stage process of consulting on best value tendering. The initial paper, <i>Best Value Tendering of Criminal Defence Services</i>, was published in December 2007 and our response was published in July 2008. Both of these papers are available at www.legalservices.gov.uk.</p> <p>In addition to the formal consultation we have continued to discuss the emerging proposals with provider representative bodies.</p>
Previous engagement	<p>The December 2007 consultation generated over 200 written responses including a response from all of the main representative bodies.</p> <p>To complement the BVT consultation paper and e-consultation, the LSC conducted 58 regional provider events. These events were held between 21 January and 23 February 2008 throughout England and Wales. 1,083 providers attended the events. These events were designed to explore in more detail the issues and themes surrounding the principles of BVT and provide an opportunity for providers to engage directly with the LSC's policy makers and other local providers.</p>

Foreword by Sir Bill Callaghan



In this, the 60th anniversary year of the Legal Aid and Advice Act 1949, we can be proud of the role that legal aid has played in providing advice, support and representation to the millions of people who otherwise would not have been able to secure their rights in the justice system.

Looking to the future further reform of the legal aid system is required to ensure that future generations have continued access to justice. Legal aid spending is now running at over £2billion a year and in the current economic climate it is more important than ever to demonstrate that public funds are being spent in the most effective way.

This paper forms the second part of the Legal Services Commission's two-stage consultation on best value tendering (BVT). The first stage of consultation was published in December 2007. That consultation paper and our subsequent response outlined the core components of market-based reform, stating that such a system should encourage greater efficiency among providers and create a market where practitioners can make a reasonable return on their investments.

The earlier consultation paper also examined the alternatives to price-based competition, concluding that none of the options would adequately address the challenges of enabling efficient, quality firms to access the requisite volumes of work, paying the right price and maintaining access for clients.

During the first consultation we held meetings in over 50 venues throughout England and Wales and met directly with almost 1,100 practitioners to discuss our proposals. These events made it clear that the legal profession has strong concerns about the impact competitive tendering could have on the criminal legal aid market.

The issues raised in response to the first consultation were invaluable in focusing our discussions with commercial professionals and representative bodies and were crucial in informing the development of the current proposals. We believe the high level case we made for BVT at that time remains compelling, although our views have been considerably influenced by what we have learnt, not least from the legal profession. This paper shows how we have taken on board the points raised in the earlier consultation, for example on quality and sustainability.

Since the time of the first consultation, there have also been significant changes in the economic environment in which both private sector firms and public sector bodies must operate, and these changes have also informed the way in which this second

consultation has developed. We have looked again at our proposals to ensure we are investing in change that gives us the opportunity to deliver best value for money.

The Ministry of Justice must deliver £1billion of efficiency savings up to March 2011 and may also be required to contribute towards a further £5billion savings across Government over the same period, as announced in the 2008 Pre-Budget Report.

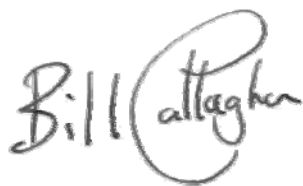
In the face of significant budgetary pressures, the Ministry of Justice and Legal Services Commission have explored alternative options that would guarantee savings from criminal legal aid. These have included potential rate cuts for all levels of legal aid work, and potential significant scope changes for work at the police station.

While such cuts to legal aid rates and scope would certainly secure short to medium-term savings, and could result in a more efficient, less fragmented supplier base over time, price-based competition for criminal legal aid services remains the Commission's preferred method of ensuring sustainability and quality in the medium to long-term.

We acknowledge that it is likely that not all current providers would secure a future contract; this is the nature of competition. We also recognise that the proposed timetable is ambitious.

Nevertheless, BVT offers the best opportunity to secure value for money, while safeguarding quality and enabling efficient providers to benefit by securing optimum volumes and the opportunity to optimise their business structures. These are the opportunities that providers tell us they want, and these are the changes that we agree are required to secure long-term sustainability.

I encourage you to let us have your views on our proposals, and would ask that these views take into account both the economic situation and the scope and fee options that have been considered. No final decision on piloting price-based competition will be taken until we have completed the consultation process and have fully considered the feedback we have received.

A handwritten signature in dark ink, reading "Bill Callaghan". The signature is written in a cursive style, with the first name "Bill" and the last name "Callaghan" clearly legible.

Chair

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¹ All of the annexes published alongside this document can be found at www.legalservices.gov.uk. Follow the links to >CDS >Crime Consultations

1. Executive Summary

- 1.1. The existing Unified Contract (Crime) 2008 will be extended by just under six months and will now expire at the end of June 2010. The key focus of the consultation paper is the detailed proposals for a model of best value tendering (BVT) covering police station and magistrates' court work. Our proposals include when and where the model would be piloted (Greater Manchester and Avon & Somerset Criminal Justice System (CJS) areas), as well as proposals for a future roll-out throughout England and Wales.
- 1.2. We have also included the tender process for the Criminal Defence Service (CDS) Contract 2010 (the replacement for the Unified Contract (Crime) 2008) that will apply to all contracts in England and Wales, with the exception of BVT areas. Our proposals include adopting basic qualification criteria that will in future apply to all legal aid contracts.

Criminal Defence Service (CDS) Contract 2010 proposals

- 1.3. We are proposing only limited changes to the specification for crime services in 2010. These will be contained in separate consultations as listed in Annex 2.
- 1.4. The full list of changes is also summarised at Annex 2. They include, but are not limited to:
 - moving crime specific requirements that are currently in the contract standard terms to the specification
 - incorporating the Duty Solicitor Arrangements into the contract to remove any ambiguities between the two documents and to move the responsibility for compliance from the individual to the firm
 - mapping of the duty solicitor scheme boundaries using postcode sectors to put the qualification process beyond doubt and thereby to remove the uncertainty and delay caused by appeals against decisions based on travel times
 - amendments to limit contract scope for providers that are not successful in securing BVT contracts, including providers outside of BVT areas, to remove their ability to perform contract work at police stations and potentially magistrates' courts within the BVT pilot areas. This is an essential part of BVT.
- 1.5. We are proposing changes in the way the tender will be run, moving from a paper-based system to an electronic system. The system will also incorporate basic checks consistent with the Legal Services Commission's duty to ensure that the providers with which we contract are suitable organisations to enter into such contracts with a public body.

Best value tendering proposals

- 1.6. Following an open competition, NERA Economic Consulting (NERA) was appointed to advise the Legal Services Commission (LSC) on the design of best value tendering for crime lower work, which consists of all work in the police station and magistrates' court. The proposal currently excludes prison law work, which will be subject to a separate regime in future.
- 1.7. The design of the model proposed by the LSC in this paper is based on a collaborative process between NERA as economic experts and LSC and the Ministry of Justice (MoJ) as policy specialists in legal aid. NERA was able to draw on their expertise in designing tenders combined with the detailed knowledge the LSC has of this particular market. The final model for consultation set out in chapter 4 has been developed by the LSC, building on the first consultation, the development work undertaken by NERA, and with further input from procurement specialists and MoJ economists.
- 1.8. NERA produced an initial model centred around two separate auctions for two types of contract: one for own client work and one for duty work. It was based on two simultaneous dynamic online auctions. Essentially, a dynamic auction works by the LSC starting a tender by offering a price against which providers would indicate the volume of work they would undertake at that price. The LSC would then lower the price in schemes until bids match the capacity tendered.
- 1.9. This detailed dual auction model² reflected many of the complexities of the legal aid market and provided a solid basis on which to draw for the design of the proposed model. The proposed model for this consultation seeks to attenuate these complexities, which translated into operational and implementation challenges.
- 1.10. In the model for consultation the LSC and MoJ have accepted that amendments to the dual auction model proposed by NERA, to reduce operational challenges and risks to implementation, might have an impact on the price achieved through the tender process. The LSC and MoJ see this as a necessary trade off to ensure both the LSC and providers can successfully implement and take part in a scheme for BVT to let contracts in 2010.
- 1.11. The final model for consultation has the following features.

Contracts	<p>A single contract tendered, which incorporates police station duty work, a licence to undertake police station own client work, and magistrates' court duty sessions.</p> <p>For magistrates' court representation there are two options, both of which would allow providers that have undertaken publicly funded police station work on a case to undertake magistrates' court representation on that case, regardless of the court location.</p>
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² We have produced a summary of the dual auction model at Annex 3 and you can find the complete version at www.legalservices.gov.uk. Follow the links to >CDS >Crime Consultations

	<p>For cases where publicly funded police station work on a case had not been undertaken, we are consulting on whether:</p> <ul style="list-style-type: none"> • Option 1: only those providers that secure a BVT contract in a scheme can undertake magistrates' court representation in that scheme area, or • Option 2: providers that do not secure a BVT contract, but do hold a CDS Contract 2010, have the opportunity to undertake publicly funded magistrates' court work as they do now, ie with no restrictions.
Bidding	<p>Prices set for police station work based on either:</p> <ul style="list-style-type: none"> • a one-off sealed bid tender where providers enter bids for a volume of police station slots at the price the provider wishes to bid • a multi-round open auction where providers enter bids for a volume of police station slots at the preset price the LSC offers. If the total bids for slots exceed the number available there will be a new round with a lower price. As price falls, providers can reduce volume bids or switch their bids between schemes. <p>In both options, bids will be made online, and minimum and maximum bid volumes are pre set. All schemes within a Criminal Justice System (CJS) area are tendered together.</p>
Price-setting	<p>Prices for police station work set through tender.</p> <p>Prices for magistrates' court work will be fixed at current administratively set rates (based on urban non-London rates). Travel and waiting are therefore rolled up in the fees.</p>
Exclusivity	<p>BVT contracts specific to police station scheme areas for all police station work (duty and own client) and duty solicitor court sessions within BVT areas.</p> <p>Any provider that has undertaken publicly funded police station work on a case may follow the case to magistrates' court, regardless of whether that is based within or outside a BVT area, and regardless of whether they have secured a BVT contract.</p> <p>We are consulting on an option, option 1 above, to limit access to all other magistrates' court work in BVT areas to only those providers that have been successful in the tender for that BVT area.</p> <p>Under Option 2 there would be no such exclusivity in the magistrates' court.</p>
Other features	<p>Volume bids are not made in magistrates' court work.</p> <p>BVT contracts will require that, where publicly funded police station work has been undertaken on a case, and that client requests magistrates' court representation, it must be provided by the provider, except in cases where conflicts of interest arise.</p>

	<p>Sanctions will only be taken where, in a CJS area, we reasonably believe that clients are unable to access magistrates' court representation for the substantive element of their case, and providers are breaching the requirement to follow through a case when requested to do so by a client.</p> <p>Additional quality and performance safeguards:</p> <ul style="list-style-type: none"> • all supervisors must be accredited • supervisor to fee earner ratios • new and amended key performance indicators (KPIs) for police station work
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1.12. The key benefits of the final model for consultation are:

- there is reduced complexity compared with earlier models considered - only one type of contract is available and providers submit a single price for police station work that offers access to all crime lower work
- the model maintains client choice of provider at both the police station and magistrates' court
- the model maintains continuity of service; clients can be represented by the same provider at both the police station and magistrates' court
- the model provides flexibility to fit in with providers' existing business structures - providers are free to determine how much own client work they wish to undertake at the police station and at the magistrates' court (subject to the requirement to ensure clients can secure representation where providers have undertaken police station work)
- the unit that would be tendered – duty slots – is familiar to providers. Bidders should therefore have good information to assess the amount of work for which to bid
- there are two options for the tender mechanism:
 - the sealed bid option offers simplicity, and is attractive to both the LSC and providers in that it requires minimal resource to administer and submit bids, however it is arguably more complex for providers to establish a bidding strategy
 - the open auction is more complex to administer, but allows providers to gain information about the market's collective perception of value when making bidding decisions, which removes significant uncertainty and risk
- unlike the model with two simultaneous dynamic online auctions, there are no disincentives to increase volumes at magistrates' courts (earlier iterations included reduced payments if work exceeded a certain volume).

1.13. A disadvantage of this model is that retaining an administratively set price for the magistrates' court necessarily means that prices for both police station and magistrates' court work are not set through a competitive process, and

this means that the model will not establish the true market price for each individual service. However, we believe the changes are desirable to ensure that both the LSC and providers are able to successfully implement and take part in a scheme for best value tendering (BVT) to let contracts for 2010.

Additional best value tendering specification proposals

- 1.14. We propose to introduce clauses in BVT contracts to require providers to undertake magistrates' court work when the provider has undertaken the police station element and the client wants to retain the provider for representation at the magistrates' court. These conditions will not apply when the provider is precluded from taking on the client for reasons of conflict.
- 1.15. In addition, we propose to remove payment for file review for work done in BVT contracts. We would expect providers to reflect this cost in their bid for work. This brings the specification into line with the civil contract arrangements.
- 1.16. We also propose that all supervisors must be Criminal Litigation Accreditation Scheme (CLAS) accredited, that supervisor to fee earner ratios are introduced, and that new and amended KPIs for police station work are introduced.

Pilot tender and national roll-out

- 1.17. Following the first consultation on BVT the LSC has taken the decision to pilot any finalised model for BVT prior to any widescale implementation. This step enables the LSC, providers and representative bodies to concentrate resources on the pilot areas and to conduct a review of the pilot tender prior to any further roll-out.
- 1.18. If a pilot tender based on the above preferred model is undertaken following this consultation, a full assessment of the tender will be conducted before a decision is taken on a more widespread roll-out of BVT. Our plans for any wider roll-out are detailed in chapter 6 and the indicative timetable for roll-out is contained at Annex 4.
- 1.19. The pilot tender evaluation would address the following areas:
 - the operation of the tender
 - an assessment of prices obtained through tender
 - an assessment of coverage obtained through tender
 - an assessment of the extent to which either consolidation or fragmentation of the market has occurred
 - the impact on civil supply
 - an assessment of the ability of firms to adjust structures, where necessary, to deliver under new contracts
 - an impact assessment of tender outcomes.

- 1.20. There would be good reasons to expedite any full roll-out, given the fiscal pressures that the LSC and wider MoJ face as this would enable the potential benefits offered by BVT to be realised as soon as possible.
- 1.21. If the evaluation of any pilot tender process reveals issues that need to be addressed, we may slow down the roll-out timetable to enable additional work to be undertaken ahead of any further roll-out. For that reason an alternative indicative timetable for roll-out is also shown at Annex 4.

2. Introduction and Background

- 2.1. The Legal Services Commission (LSC) is responsible for administering legal aid in England and Wales. We commission the services the public needs from solicitors, barristers and advice agencies. Legal aid safeguards people's rights and helps them to address their problems. It is essential to the fair, efficient and effective operation of the criminal and civil justice systems and provides access to justice for those who cannot afford to pay for legal representation.

The Carter review: Market-based reform

- 2.2. In June 2005 the Lord Chancellor commissioned a review of legal aid procurement, which was conducted by Lord Carter of Coles.
- 2.3. In July 2006 Lord Carter published his review³, and identified the need for fundamental reform in the way legal services are procured so that:
- clients have access to good quality legal advice and representation
 - an efficient provider base offering the right level of quality is able to thrive and remain viable in the longer term
 - the taxpayer and government receive value for money
 - legal aid helps the justice system to be more efficient, effective and less complex.
- 2.4. The review recommended a market-based approach to procurement that defined best value in terms of quality, capacity and price.
- 2.5. Firms across the legal services sector already compete with one another to supply services to clients. A market-based approach to procurement recognises this and would award work to providers who can meet the demand for work in an area according to:
- a quality threshold
 - an ability to deliver sufficient volumes of work
 - services being delivered at the most efficient price.
- 2.6. The review was clear that a market-based approach, based on best value tendering (BVT), with quality at the forefront, could overcome many of the key challenges facing the ongoing provision of legal aid services. Specifically, BVT should help to deliver optimum volumes of work and enable optimisation of staffing structures, so that the price paid for services reflects their cost of provision together with a sustainable profit margin.

³ *Legal Aid: A market-based approach to reform*

- 2.7. This would mean that where services are costly to provide, prices could be higher, and where services are relatively inexpensive to provide, prices could be lower. Overall, however, it would mean that efficient providers that meet the specification and quality requirements would be able to earn a reasonable level of profit.
- 2.8. Market-based methods should encourage providers who meet the required quality level to innovate in delivering their service to clients. Providers would reveal the correct market price to meet demand by competing with each other to provide services as efficiently as possible.

Implementing legal aid reform

- 2.9. Following the publication of Lord Carter's report, the LSC and the Ministry of Justice (MoJ) conducted a joint consultation on the Carter recommendations and in November 2006 published *Legal Aid Reform: The Way Ahead*, which set out how the recommendations might be taken forward.
- 2.10. Fees in the magistrates' court were revised in April 2007 to roll up travel and waiting with the base fee in 16 major urban areas. In January 2008, a major stage of the reform programme was implemented with the introduction of fixed fees in the police station and graduated fees for litigators in the Crown Court.
- 2.11. In December 2007 the LSC published the consultation document, *Best Value Tendering of Criminal Defence Services*, which focused on the principle of BVT and some broad design issues for a possible procurement system. It asked for views on a number of issues ranging from how government should procure criminal defence services in the future, to more technical questions concerning the possible operation of contracts under a market-based system.
- 2.12. The responses to the consultation highlighted the wide range of concerns providers have about the impact that competition could have on the market for criminal defence services. The main issues raised, and what proposals we have made to take account of these objections, are shown below. The detail of how these proposals address the objections is contained within the appropriate section of this consultation document.

Issue raised	How we have taken this into account in our proposals
Insufficient information to inform the discussion on BVT	This consultation sets out specifically how any system of BVT could operate. We propose to pilot any system for BVT, and fully assess any tender mechanism before further roll-out.
Impact of LSC being the sole purchaser of publicly funded CDS services (sustainability, 'suicide bidding')	<p>Our proposals allow providers more than one opportunity to secure work - our tender is scheme based, rather than CJS area based - allowing providers to bid across multiple schemes.</p> <p>Our proposals include options regarding the extent to which magistrate courts' work is exclusively reserved for successful bidders.</p> <p>Our proposals also include an option whereby bids can be revised as the tender progresses, again, allowing more than one opportunity to secure work (option 2: open auction).</p> <p>Our proposals regarding maximum bid sizes will ensure that sufficient supply is secured to allow for competition in future rounds.</p> <p>We have proposed a number of methods to reduce the risk of unsustainable 'suicide' bids. These include:</p> <ul style="list-style-type: none"> • provider support activities • maintaining an administratively set magistrates' court price • an option to allow unsuccessful bidders to continue to undertake publicly funded magistrates' court work • an option to adopt an open auction • contract sanctions where work awarded is not delivered • not including Crown Court work in the tender • an area prospectus to allow all bidders access to information about the area in which they wish to bid.

<p>Inability to guarantee volume</p>	<p>Our proposals are focused on tendering 'blocks' of duty solicitor slots on police station schemes, which then give access to additional police station work. While we cannot guarantee the volume of work that will result from these slots, we propose to produce data to show historical indicative volumes.</p> <p>Our proposals also address how we ensure that providers are able to easily compare indicative volumes between different schemes, through the use of 'blocks' of slots as the unit of tender.</p> <p>Our proposals recognise the complexities of addressing volume variation risks in magistrates' courts. While we have considered a potential solution (two tenders for two separate types of contract - own client work and duty client work - as advised by NERA), we are not proposing to adopt this solution at this point in time, given the operational challenges this solution presents. We are therefore proposing that the rate for magistrates' court should be set administratively.</p> <p>Our proposals include options regarding the extent to which magistrate courts' work is exclusively reserved for successful bidders.</p>
<p>Insufficient competition outside of major urban areas</p>	<p>NERA has undertaken market analysis. This advises that competition can be undertaken in both rural and urban areas, where necessary applying additional safeguards.</p> <p>Our proposals include variations to the model for tender (such as maximum bid size) to better suit different market conditions, such as those present in more rural areas.</p>
<p>Quality</p>	<p>We propose to maintain the quality framework for contracts let through BVT. This includes:</p> <ul style="list-style-type: none"> • all contract work to be undertaken at a Peer Review rating of 3 level or above • accreditation of key staff, and ongoing requirements for duty solicitors • supervisor standard requirements • Specialist Quality Mark requirements • key performance indicators (KPIs). <p>In addition, to this framework, our proposals also cover</p> <ul style="list-style-type: none"> • re-accreditation in line with SRA proposals • introducing supervisor to fee earner ratios, to ensure that supervision is of a sufficient level given we are breaking the direct link between the numbers of duty solicitors employed by providers and the allocation of slots • ensuring that all supervisors are accredited to

	<p>undertake police station and magistrates' court work</p> <ul style="list-style-type: none"> • additional KPIs for police station back-up and own client acceptance rates. <p>We have built up a record of peer review results that are a product of the current quality framework. This shows that fewer than 1% of providers fail to reach the required standard. This gives us confidence that our framework is effective in delivering the quality that we require.</p> <p>Our proposals also maintain an element of client choice at both police station and magistrates' court. Recent research⁴ indicates that clients make choices based on reputation of providers and previous experiences of service. In our view, maintaining client choice adds a real incentive for providers to continue to deliver quality services.</p>
Difficulties experienced in other jurisdictions	<p>Our proposals differ from those made in other jurisdictions in several key ways:</p> <ul style="list-style-type: none"> • our proposals maintain client choice and do not use a system of assignment of defence lawyers to clients • our proposals include ratios for supervision of fee earners that have not been present in other tenders elsewhere • our proposals include key performance indicators and pre-qualification criteria that have not been present in tenders elsewhere • our proposals are tailored for different geographical areas, which has not always been the case in other jurisdictions • our proposals contain escape mechanisms for the most expensive cases, again, not always included in other jurisdictions • our proposals allow for providers to bid for the volumes of work they want (within necessary restrictions), rather than pre-setting 'lots' of work. • we propose low minimum bid sizes in all areas that are based on future (rather than historic) delivery of work. These proposals reduce barriers to entry and allow for the resultant supplier base to be mixed and diverse.

2.13. In April 2007 the Black Solicitors' Network and Society of Asian Lawyers issued judicial review proceedings, challenging the decision to move towards a competitive market without the completion of a cumulative impact assessment for the whole reform programme. Their concern was that the

⁴ Legal Services Research Centre: *Criminal defence services: users' perspectives*, November 2008
March 2009 **Introduction and Background**

introduction of competition would have a disproportionate impact on firms owned and staffed by black, Asian and minority ethnic solicitors, and on their clients. As a result of these proceedings we agreed to:

- publish a cumulative race equality impact assessment (REIA) of the impact to date of the reforms to CDS including the introduction of fixed fees for police station work, magistrates' court fees and changes to very high cost cases (VHCC's). This cumulative REIA was published in December 2007
- publish a consultation paper on the principle of and options for BVT together with draft REIAs assessing as far as practicable the impact of BVT. This consultation paper and accompanying draft REIA cover the detailed options for BVT. We consulted on the principle of BVT in December 2007 (with draft REIA), and responded to this consultation, together with an REIA, in July 2008.
- have regard to the Equality and Human Rights Commission (EHRC) Code of Practice and Guidance in conducting REIAs. All REIAs have taken the EHRC Code of Practice and Guidance into account.

- 2.14. In 2006 the LSC commissioned a report from Managing Diversity Associates (MDA), *Research of Ethnic Diversity amongst suppliers of Legal Aid Services*. This report made a number of recommendations that we have taken into account in our policy proposals. In particular we have proposed low minimum bid sizes in all areas that are based on future rather than historic delivery of work. The initial impact assessment that accompanies this consultation focuses in detail on this impact and the recommendations from the MDA report.

The economic climate and other proposals

- 2.15. As part of the comprehensive spending review the Ministry of Justice (MoJ) is required to deliver £1billion of savings up to March 2011 and is also expected to contribute towards a further £5billion savings across government over the same period, as announced in the 2008 Pre-Budget Report.
- 2.16. Legal aid represents one-fifth of the MoJ's annual expenditure of £10billion. In order to support the MoJ in meeting this considerable challenge, and at the same time deliver a modern and efficient legal aid system, the LSC must continue to seek to improve efficiency wherever possible and rigorously prioritise resources to the most important areas.
- 2.17. Since the publication of the response to the first BVT consultation, the global economic climate has changed significantly and adversely, meaning that these fiscal pressures can be expected to continue. It is imperative that we succeed in our duty to continue to ensure that services are delivered to the public in the most cost-effective way. We describe further below some of the areas MoJ has been exploring in recent months in response to these financial pressures. This has included asking some difficult questions about the scope of the criminal legal aid services we can fund in the future.

Scope of criminal legal aid

- 2.18. Fixed, standard and graduated fees are now in place in nearly all areas of criminal legal aid work. We are currently consulting on the introduction of such fees for prison law work, and have just consulted on a fixed fee element in very high cost criminal cases. Working with the MoJ and Her Majesty's Court Service (HMCS), we have already reintroduced means testing in the magistrates' court and have consulted recently on the introduction of means testing in the Crown Court. These changes should deliver significant savings but the financial pressures outlined above remain. We will continue to focus on improving efficiency, including ensuring the various fee schemes remain effective.
- 2.19. In terms of scope, the UK's obligations under the European Convention on Human Rights (ECHR) mean that it is unlikely we would be in a position to reduce the scope of criminal legal aid at the court level.
- 2.20. The MoJ has however recently examined possible changes to the delivery of advice and assistance at the police station as a means to contribute towards the savings it is required to implement. We currently spend £180million each year on an estimated 50% of the clients entitled to this service. There is recent research⁵ to suggest that take-up has been increasing steadily over the years and, if this trend continues, costs would undoubtedly increase further, placing considerable pressure on the legal aid budget and affecting crucial services in other areas.
- 2.21. An option that was given serious consideration was a significant expansion of telephone advice to cover a much broader range of offences than those that currently fall within the remit of the LSC's telephone advice service, CDS Direct. Under such a scheme, all but the most serious offences – such as rape, murder, terrorism and serious fraud – would qualify for free telephone advice only. Detainees at the police station would retain the right to ask for a face-to-face attendance if they were willing to pay privately, or were able to make arrangements with their solicitor on a pro bono basis. In order to ensure there were adequate protections in place, youths under the age of 18 and vulnerable adults would retain an automatic entitlement to free face-to-face advice, regardless of the offence in question.
- 2.22. The MoJ also considered that there was a likely need for an element of discretion in defined circumstances, in cases that would not routinely qualify but where the interests of justice necessitated the offer of face-to-face advice, exercised by either the police or telephone advisers.
- 2.23. Depending on the detail of the scheme, an expanded telephone advice service could have the potential to offer savings in the region of £70million to £100million per year. Such a scheme would maintain the universal right to consult a solicitor privately at the police station while taking account of advances in technology since the Police and Criminal Evidence Act 1984 first

⁵ Legal Services Research Centre: *Criminal defence services: users' perspectives*, November 2008
March 2009

introduced that right. Facilities to video record interviews have strengthened safeguards greatly, while developments in modern communications mean that we can contemplate a large-scale, quality-assured telephone advice service. It would also speed up access to advice in some cases and potentially bring greater consistency.

- 2.24. An examination of access to legal advice and the provision of legal aid at the police station in a number of other European countries and Commonwealth jurisdictions has shown that many other efficient and respected justice systems do not spend large amounts of public money in support of an automatic right to face-to-face legal advice at the police station. For instance, in Canada and New Zealand free advice is restricted in most cases to telephone advice, while in the Republic of Ireland it is means tested and is only available in relation to specified serious offences. Similarly, in Scotland advice and assistance is only automatically provided free of charge for the most serious offences, including murder. In Belgium and the Netherlands a suspect has no automatic right to speak to a lawyer until after their first interview with police. While care must be taken in making comparisons with other jurisdictions, this suggests that the service currently available in England and Wales is well above the minimum required by the European Convention on Human Rights (ECHR) and the Human Rights Act (2000) (HRA). The MoJ is confident that, provided the scheme was carefully designed, an expanded telephone advice service would meet our ECHR and HRA obligations.
- 2.25. Although an expanded telephone service offers significant financial benefits, we recognise that there are practical difficulties. Some police stations would have difficulties in arranging private facilities for telephone advice given the much higher volume of calls that an expanded telephone advice service would entail. These problems are not insurmountable and should reduce greatly as the police estate is modernised over time.
- 2.26. Equally, further research would enable us to examine the value that is added by face-to-face advice at the police station, compared with telephone advice or no advice. This would enable us to assess the impact of offering telephone advice in a much broader range of cases. We plan to undertake research in this area, working with the MoJ.
- 2.27. After careful consideration, the MoJ decided that the scope of telephone advice should not be expanded significantly at the present time. While the Government has no plans to implement such changes within the life of the next criminal contract starting in 2010, it has not ruled out introducing such a scheme in the longer term, once the impact of the implementation of BVT is understood.

The benefits of best value tendering

- 2.28. The LSC sees BVT as offering the best potential for securing services of the right quality at the right price. It should also:
- enable legal aid providers to bid, taking account of the market conditions and the cost of delivering those services in their local area
 - break the direct link between allocation of duty slots and numbers of employed duty solicitors, thus removing systemic structural inefficiency
 - enable the LSC to allocate work to those providers who offer the best value for money while safeguarding quality
 - allows such providers to benefit from their efficiency by taking on more work where it is available, at more competitive prices.
- 2.29. One aim of any tender process is to establish an economically meaningful price for the service being tendered that would allow competition among quality providers. Suppliers can bid at the price at which they can profitably deliver the service and purchasers should receive the most efficient price set by the market.
- 2.30. A market-based system should encourage greater efficiency among providers, should be more efficient to administer and should create a market where practitioners can make a reasonable profit.
- 2.31. We acknowledge that under competition it is highly likely that not all current providers would secure a future contract. However, the LSC believes that BVT offers the best solution to ensuring a sustainable market for criminal legal aid services over the long term.
- 2.32. The LSC must also be responsive to the wider economic climate and ensure that the final BVT model selected for implementation is sufficiently ambitious to deliver an effective competitive process that selects the most efficient providers.

This consultation paper

- 2.33. This second consultation paper both provides an outline of the 2010 contract proposals, and details a comprehensive model for piloting a market-based approach to procuring criminal defence services. These proposals represent the result of the LSC's work with independent economic advisers as well as engagement with stakeholders.
- 2.34. Following the close of this consultation the LSC will carefully analyse all of the responses received. We will then publish a summary of these responses, our final decisions on the issues contained in the paper and any implementation plan that could follow.

Indicative timetable for the consultation and pilot

Event	Date
Consultation closes	19 June 2009
Response to consultation published	August 2009
Any pilot tender opens	October 2009
Any contract decisions in pilot areas made	January 2010
Any pilot contracts commence	July 2010

Working with NERA Economic Consulting

- 2.35. Following an open competition, NERA Economic Consulting (NERA) was awarded a contract to work with the LSC to design both a technical specification and draft implementation plan for how best value tendering should work in practice. The LSC and MoJ commissioned NERA to work with them to develop a method of tendering for criminal legal aid in the police station and magistrates' court.
- 2.36. The work benefited from both the consultants' economic expertise and experience of auction design, and the LSC's understanding of legal aid. Throughout the development process many methods of tendering for crime lower work were considered that differed both in their scope of work for tender and in the design for the auction.
- 2.37. Models were assessed against a number of economic and public policy imperatives:
- economic efficiency and revealing the right price
 - avoidance of incentives for strategic bidding and bidding unsustainably
 - long-term sustainability of the sector
 - retention of client choice and continuity of service from police station to court
 - practicability of implementation
 - provider readiness
 - potential to provide greatest value for money.
- 2.38. The key issues that informed the development process for BVT in criminal legal aid were that:
- crime lower work is made up of two separate but highly complementary services - police station and magistrates' court work. Each has separate costs of delivery and can be offered as a stand-alone service, although the services are often delivered together and by the same provider
 - prices for each of the services will therefore be different, but there is the potential for benefits - in economic terms, for clients and for the

efficient working of the Criminal Justice System - in ensuring that a provider has the opportunity to conduct both types of work

- a quantity of providers may develop a business model based on providing services across more than one geographical area, and as such may have a strategy contingent on the outcome in several different areas. Making decisions about the most economic bid to make in any one tender in this circumstance requires bidders to take into account the behaviour of a large number of other bidders in a number of different market conditions.

2.39. The detailed design of a tender is key to ensuring the success of the process. Each of the models considered throughout the process addressed the complexities of the market and the key design requirements in a different way. Each presented different benefits and risks.

NERA proposals

2.40. NERA set out an initial proposal covering three models for tendering crime lower work and recommended an economically efficient solution to revealing the best prices for the two areas of work while maintaining the LSC's policy imperatives of client choice and continuity of service. However the complexity of the package of work on offer, and the constraints imposed by essential policy imperatives resulted in an initial model that was both highly sophisticated and untested in a market on the scale of crime lower.

2.41. The model was based on two simultaneous and interrelated 'descending clock' auctions that would take place live and online. Each auction would set a separate price for police station and magistrates' court work, but would give access to both. Auctions would cover a Criminal Justice System (CJS) area, and all schemes within a CJS area would be tendered at the same time in the same auction. Auctions would take place over several rounds, and prices would tick down between each round in schemes for which the volume bid exceeded the capacity being tendered. Providers would state how much work they would be willing to conduct for the price, with the auction closing when the volume bid met the capacity offered across schemes.

2.42. The model had a number of key benefits when assessed against the criteria above:

- the model would reveal the best price for each element of work
- the open multiple round auctions would reveal a lot of information about bidding strategies and market valuations, which would increase the likelihood of economically efficient and sustainable bids
- the model would allow providers wanting to work in more than one scheme to make their bids across schemes in the knowledge of the price available for each individual scheme
- changing prices would allow providers to change volumes between schemes accordingly

- the model would allow retention of client choice and continuity of service
- by covering all of crime lower work the model would provide the potential to deliver greatest value for money.

2.43. The constraints of the model were that:

- the complicated strategies involved in bidding in two separate but interrelated auctions simultaneously would require bidders to have a sophisticated understanding of their cost base, the individual markets and how the two interrelate
- bidding live in two separate but interrelated auctions has not been conducted on a market of this scale
- there would be complexities for the LSC and providers⁶ arising from volume bids on magistrates' court work to enable prices for work to be revealed through the auction.

2.44. The risks associated with implementing the model reduced the likelihood that the key benefits of the model would be realised in the timescales involved, especially given the relative inexperience of the LSC and many providers in tenders of this nature. The LSC and MoJ decided to look at a number of alternative models, seeking NERA's views on these, and assess the impact of relaxing some of the design constraints to achieve a system that could be implemented in 2010. The final model proposed is set out in chapter 4 of this paper.

2.45. A summary of the NERA model, along with a description of other models explored and discounted is contained at Annex 3⁷

⁶ Two simultaneous auctions, and the need to introduce volume restrictions and price penalties for magistrates' court work.

⁷ The complete version of the technical annex developed by NERA is published at www.legalservices.gov.uk. Follow the links to >CDS >Crime Consultations

3. CDS Contract 2010

- 3.1. While we are not consulting on the Criminal Defence Service (CDS) Contract 2010 proposals as part of this paper, this chapter aims to set out at this early stage our current plans for tendering the CDS contract in non-BVT pilot areas. The contents of the contract will be the subject of a consultation with representative bodies at a later date but comments made now will of course be taken into account.

Need for a new contract

- 3.2. The current Unified Contract (Crime) 2008 will be formally extended, and will expire at the end of June 2010. All providers wishing to carry out publicly funded criminal defence services after the contract has ended will be required to apply for a new CDS Contract 2010.
- 3.3. Although we are not under any duty to do so, in accordance with past practice we will consult with representative bodies on the terms and requirements of the new contract. A consultation on the contract standard terms, common across both civil and crime contracts, was presented to representative bodies on 5 March 2009, and a further consultation on the crime specification is currently scheduled to start in the summer.
- 3.4. In addition to this, we will also be running local consultations on minor amendments to the boundaries of the duty solicitor schemes, required to effect a move from the current time-based eligibility criteria to eligibility based on the postcodes within the scheme area. Regional offices may also consult on making changes to boundaries in response to local issues.
- 3.5. For clarity, the following table details the three consultations.

Summary of consultations on contract contents

Event	Date	Details
Consultation on amendments to CDS Contract 2010 Standard Terms	5 March 2009	Consultation with The Law Society and representative bodies on minor amendments to the standard terms
Consultation on amendments to duty scheme boundaries	May 2009	Series of local consultations with all current members of the duty solicitor schemes
Consultation on amendments to the CDS Contract 2010 Specification and Duty Solicitor Arrangements 2008	July/August 2009	Consultation with The Law Society and representative bodies on amendments to the specification and Duty Solicitor Arrangements 2008
Tender for the CDS Contract 2010	October 2009	

- 3.6. For information, we summarise at Annex 2 the main proposals that are currently expected to be included in the above consultations.
- 3.7. This annex also includes information regarding the application process that we intend to follow to award contracts.

Notification of tender

- 3.8. As with previous application rounds, the LSC will publish a notification of tender on our website⁸ and place an advert in relevant publications.
- 3.9. All current holders of the Unified Contract (Crime) 2008 should note that we will not be sending hard copy notifications or application packs as part of the 2010 contract tender process, but instead plan to use the e-tendering facility outlined below.
- 3.10. We will use the e-alert updates and notices on our website to ensure providers are advised well in advance of key dates, and we would encourage providers and other interested parties to ensure that they are registered for this service⁹.

e-tendering

- 3.11. We intend that the application process for the 2010 contracts will comprise an electronic registration process to replace the previous hard copy forms.
- 3.12. The e-tendering system will be hosted by a procurement software specialist company widely used for government procurement and will bring several benefits for firms:
- generic system in use across all LSC contracts
 - elements of the applicants' information can be saved and held online for future applications
 - instant validation of data entered reduces scope for errors in submissions
 - instant submission without need for posting or emailing
 - automatic acknowledgement of applications
 - high levels of data security
 - full audit trail and application history for future reference.
- 3.13. This approach would also significantly reduce the carbon footprint of the tender exercise, in line with government targets on emissions, by making it 'paperless'.

⁸ www.legalservices.gov.uk. Follow the links to >CDS >Tenders

⁹ To register for LSC updates, please visit www.legalservices.gov.uk . Follow the links to >'About Us' >Our Publications >LSC Update Email.

- 3.14. We intend to run a number of training events and offer a helpdesk facility to assist firms in accessing and submitting their applications in this new format. These events will be advertised widely in the relevant media and on our website and we would encourage all firms to attend.
- 3.15. The application process for all contracts will comprise three stages: the pre-qualification questionnaire, the crime specific invitation to tender and the application for duty slots. The details of each of these stages are summarised at Annex 2.

4. Best Value Tendering: Pilot Proposals

Summary of the final model proposed for implementation

- 4.1. The model proposed covers as a minimum, all work within the police station (duty and own), as well as magistrates' court duty sessions. For magistrates' court representation there are two options, both of which would allow providers that have undertaken publicly funded police station work on a case to undertake magistrates' court representation on that case, regardless of the court location.
- 4.2. For cases where publicly funded police station work on a case has not been undertaken, we are consulting on two options:
- Option 1 - only those providers that secure a BVT contract in a scheme area can undertake magistrates' court representation in that area
 - Option 2 - providers that do not secure a BVT contract, but do hold a CDS Contract 2010, have the opportunity to undertake publicly funded magistrates' court work as they do now, ie with no restrictions.
- 4.3. The tender for police station duty slots will set the price per case for all police station work, including own client work in the scheme. We propose two options for setting the price:
- Option 1 - online sealed bid
 - Option 2 - open online auction.
- 4.4. The implications of all options are discussed under each of the headings below.

Detailed description of the tender model

What does a contract cover?

- 4.5. Whichever model is chosen, providers will bid to be awarded a contract that will allow for:
- a volume of police station duty slots on a duty scheme (or schemes)
 - a licence that allows BVT contract holders to undertake own client work exclusively at the police stations where duty slots are awarded
 - a volume of magistrates' court duty slots for magistrates' courts within the scheme area(s) where the contract is awarded.
- 4.6. This consultation also considers two options for magistrates' court representation. Both of these options would allow providers that have undertaken publicly funded police station work on a case to undertake

magistrates' court representation on that case, regardless of the court location.

- 4.7. For cases where publicly funded police station work on a case has not been undertaken, we are consulting on:
- Option 1 - only those providers that secure a BVT contract in a scheme area can undertake magistrates' court representation in that area
 - Option 2 - providers that do not secure a BVT contract, but do hold a CDS Contract 2010, have the opportunity to undertake publicly funded magistrates' court work as they do now, ie with no restrictions.

What do providers bid for?

- 4.8. Providers bid for volumes of duty solicitor cases, in the form of 'blocks' of work.
- 4.9. Police station duty work is divided into units of time, known as slots. Slots differ in length and, even where they do not, will tend to generate different numbers of cases dependent on the business of the scheme. In order to make bids more easily comparable between schemes the work available will be divided up into units known as 'blocks'. The blocks are calculated so that each gives the opportunity to access similar volumes of duty solicitor cases, regardless of which scheme the block arises from.
- 4.10. During the tender it will be important for providers to understand that moving bids for a block of work from one scheme to another is likely to generate the same number of duty solicitor cases, but may require different amounts of time on duty.
- 4.11. The creation of blocks is for the purpose of bidding in the tender process only, and will not affect the way in which duty solicitor schemes are administered.
- 4.12. Providers who are awarded blocks on any scheme are awarded a contract as set out in paragraph 4.5, subject to a decision on the inclusion of magistrates' court work, following this consultation.

How are blocks calculated?

- 4.13. One block is based on the smallest number of cases possible in a Criminal Justice System (CJS) area to enable comparable blocks to be established across schemes.
- 4.14. A block is a number of slots that gives the opportunity for access to a similar volume of cases, regardless of how busy individual schemes are and the duration of slots.

- 4.15. Because of this, the volume of cases obtained from a single slot on the busiest scheme represents the absolute minimum block size for the CJS area, and the numbers of slots that deliver an equivalent volume of cases on the other schemes are a multiple of this. For the purposes of this calculation the 'busiest' scheme is the scheme, which delivers the highest average number of cases per slot, this may not necessarily be the scheme with the highest volume or value of duty cases per year as slots vary in duration.
- 4.16. Because the minimum block possible is relatively small, it is likely that a direct ratio with one slot on the busiest scheme would lead to fractions of slots being included in the blocks across the other, less busy schemes, in order to generate the same number of cases. This would not be practical for the tender process, or the implementation of rotas.
- 4.17. Therefore the volume of cases in each scheme is multiplied by the same factor (eg 10) to reach a point where the number of slots required to deliver the same case volumes across all schemes are whole numbers (or very close to whole numbers).

Block calculation example
<p>Step 1 Calculate the average number of cases produced from 1 slot across schemes.</p> <p>Scheme A - Average number of cases from 1 slot = 10 Scheme B - Average number of cases from 1 slot = 6 Scheme C - Average number of cases from 1 slot = 4</p>
<p>Step 2 Calculate the number of slots required in schemes to deliver the highest average number of cases (in this example = 10).</p> <p>Scheme A = 1 slot = 10 cases Scheme B = 1.67 slots = 10 cases Scheme C = 2.5 slots = 10 cases</p>
<p>Step 3 Multiply the volumes of cases across schemes by the same factor (usually 10) to deliver whole number of slots. This is the block size for each scheme.</p> <p>Scheme A = 10 slot = 100 cases Scheme B = 17 slots = approx 100 cases Scheme C = 25 slots = 100 cases</p>
<p>Step 4 Calculate the maximum number of available blocks.</p> <p>Scheme A 1,095 slots available / 10 slots per block = 109 blocks available Scheme B 1,095 slots available / 17 slots per block = 64 blocks available Scheme C 364 slots available / 25 slots per block = 14 blocks available</p>

- 4.18. It may be that the number of slots is not exactly divisible by the number of blocks. In the example above, in Scheme A, there are 109 blocks of 10 slots, leaving five slots 'left over'. These slots will be shared between winning bidders across the life of the contract, at a rate proportional to the number of blocks they won in the tender.
- 4.19. As an example, a block in the Avon & Somerset CJS area ranges from 10 to 27 slots dependent on the scheme in which it is based, and gives access to approximately 55 cases on any scheme.
- 4.20. A full list of the block sizes for pilot schemes in Greater Manchester and Avon & Somerset is set out at Annex 6, alongside the number of slots that make up each block and the number of cases each would be expected to give access to.

Question 1

Do you agree that the creation of 'blocks' will assist providers in bidding for work in more than one area?

Question 2

What comments do you have regarding the way in which we are proposing to calculate blocks?

Question 3

In your view are the block sizes proposed for Manchester and Avon & Somerset CJS areas reasonable? Please comment.

Who can bid?

- 4.21. The entity for the purposes of bidding is the provider. We will only accept one bid per provider within each tendered CJS area. If a provider currently has (or wishes to have) two or more separate office schedules within the CJS area their bid should be grouped together at a 'firm level' on behalf of the single legal entity, eg 'Smith and Partners' or 'Jones LLP', and individual offices cannot bid separately.
- 4.22. Similarly no individual (partner, director, sole practitioner or owner) will be permitted to submit or be involved in more than one bid for the CJS area being tendered.

What does a bid comprise?

- 4.23. A bid will comprise the number of blocks that the provider wants to undertake, and the price per case at which the provider is bidding to undertake police station work.
- 4.24. Providers may bid for any number of blocks **between** the minimum and maximum bid size for the scheme, as set out below. The minimum and

maximum bid sizes in each area correspond to the potential number of providers that can win blocks of work in each area.

- 4.25. The tender itself will determine the actual number of winning bidders, as all options are based on providers indicating their preferred volume of blocks between the maximum and minimum.
- 4.26. It is not possible to predict the tender outcome. In some areas where there are a large number of providers there is scope for a concentration of volumes in a rather smaller number of providers. In many others it may be that broadly the same number of providers would remain. Our proposals do not start from a view of an ideal number of providers, although the LSC would be concerned if the delivery of services fragmented excessively.

What is the minimum bid size for each scheme?

- 4.27. There are two alternative proposals set out here for the minimum bid size for a scheme.
- Option 1 - the minimum bid size is the size of a single block.
 - Option 2 - the minimum bid size is based on two or more blocks that give access to a volume of work that could generate a sustainable level of income for one fee-earner.

Option 1: Minimum bid is a single block

- 4.28. This is the smallest unit that could be applied for the purposes of bidding while maintaining comparable units across schemes. It sets the lowest barrier to entry for providers and allows the market structure to be set freely by the tender process.
- 4.29. Because blocks are relatively small, and winning a single block would result in the grant of a contract, we recognise that there is a theoretical potential for the market to fragment further, ie result in a larger number of smaller providers.
- 4.30. There is a possibility that further fragmentation could result from providers bidding in a way that is not sustainable in the long term. The impact of this risk and the likelihood that it will materialise is different in different areas and will be fully revealed through competition.

Option 2: Minimum bid is based on two or more blocks that give access to a volume of work that could generate a sustainable level of income for one fee-earner

- 4.31. One way of mitigating the risk of fragmentation in some areas would be to introduce a minimum bid size to the tender process, which would reduce the potential number of contracts on offer, compared to Option 1.

- 4.32. In calculating a potential minimum bid size, the following principles have been applied.
- Set sufficiently low to ensure there are minimal additional barriers to entering the market.
 - Set sufficiently low to ensure that different sizes and types of providers are able to bid.
 - Reflect the rationale for minimum new matter starts requirements proposed in the consultation *Civil Bid Rounds for 2010 Contracts* published by the LSC in October 2008.
 - Secure a level of access that is meaningful and corresponds to our requirements around provider presence in an area – this means the ability to deliver a service that is available regularly to clients.
- 4.33. We propose that where possible we would set the minimum bid size at the number of blocks that would give potential access to between £50,000 and £100,000 of crime lower work. We believe that this would represent a viable minimum that would not exclude providers such as sole practitioners.
- 4.34. The value of crime lower work represents both the value of duty solicitor work available but also access to potential own client police station and magistrates' court work in the scheme area, based on the proportions that are currently undertaken in that scheme.
- 4.35. The minimum number of blocks for which a provider could bid is calculated by first dividing the total value of police station (duty and own) and magistrates' court work generated within a scheme by the number of blocks available in that scheme in order to establish the value of a block, and then calculating the correct number of blocks to give access to between £50,000 and £100,000 of crime lower work.
- 4.36. An example calculation for a minimum bid size is contained at Annex 5.
- 4.37. While minimum bid sizes would vary across schemes, the size of a block would remain uniform within a CJS area. A provider could make a bid for any multiple of blocks equal to or greater than the minimum bid size.
- 4.38. Because the tender process only gives certainty over the number of blocks (and therefore slots) that a provider will receive on winning the tender, this minimum bid size forms neither a guarantee of, nor a requirement to achieve, a certain value of work under a contract. Rather it gives an indication of the average potential income that can be generated by a number of blocks given the scheme's ratio of duty to own police station work, and police station to magistrates' court work.
- 4.39. A benefit of this approach is that while a provider has the potential to access this value of work, there is no restriction in terms of how work is delivered, provided the contract terms are met. In particular, providers may choose to undertake a greater or lesser share of own client work within the market, dependent on their own business model. This minimises the impact that

imposing a minimum bid size would have on the structure of individual firms and the market as a whole.

- 4.40. Where there is not a sufficient volume of work within a scheme to achieve a minimum bid size using this methodology, and also achieve the minimum number of providers in an area (as set out at paragraph 4.47 below), we would propose to revert to one block (Option 1) as the minimum bid size for that area.
- 4.41. The minimum bid sizes we have proposed for schemes in Greater Manchester and Avon & Somerset, should they be implemented following consultation, are set out at Annex 6.

Question 4

Do you have any comments on the proposals for a minimum bid size?

Question 5

Which of the two options for a minimum bid size do you prefer?

- Minimum bid size is a single block
- Minimum bid is based two or more blocks that give access to a volume of work that could generate a sustainable level of income for one fee earner

What is the bid area?

- 4.42. The bid area under the model will be a single police station scheme. All schemes within a CJS area will be tendered at the same time.
- 4.43. Providers can bid in one or more schemes. The comparable blocks described above are proposed to allow bidders to more easily calculate the potential income they may generate by moving volume bids from one scheme to another. This is intended to take some of the complexity out of bid strategies during the tender process.
- 4.44. Providers will not be able to conduct any publicly funded police station work in best value tendering scheme areas in which they have not been successful in winning a contract.

Pilot evaluation

- 4.45. Should we, following responses to the consultation, commence with the lowest minimum bid size (one block) we will review to what extent fragmentation has occurred. Where the risk of fragmentation has materialised, the minimum bid size could be increased, in line with the methodology above, for any future roll-out.

What is the maximum bid size for each scheme?

- 4.46. We have previously consulted on setting the minimum number of providers in a scheme in order to cover conflicts of interest and ensure future competition. Discussions with providers and representative bodies have indicated that six would be sufficient to cover the majority of instances.
- 4.47. However, we propose that in the majority of schemes at least eight providers are retained, to ensure that:
- the system retains the flexibility to respond to cases with more than one defendant
 - sufficient providers remain in the market to compensate for any provider exit during the life of the contract
 - future bid rounds remain competitive.
- 4.48. In order to ensure this we propose to set a maximum bid size in the majority of schemes of one-eighth of the volume of blocks available in that scheme.
- 4.49. We recognise that this provides a limit to the maximum number of duty slots that one provider can bid for in schemes, and we have considered alternative options such as dividing the work available into different sized 'lots', to ensure that the minimum number of providers is retained while allowing for larger individual bids. However, this in itself would restrict providers bidding for specific set sizes of lots. In our view this is more restrictive than necessary.
- 4.50. Limiting the number of blocks one provider can bid for does not in itself limit the market share of that firm. Access to own client work at the police station and the magistrates' court would not be restricted for those with a contract, and equally, providers may secure contracts in more than one scheme. For these reasons we do not expect the maximum bid size to restrict market share unduly.
- 4.51. For schemes where there is less work, and specifically where
- there is an insufficient volume of work to sustain eight providers based on blocks which would give access to between £50,000 and £100,000 of crime lower work and
 - where scheme rules require an office to be located within the scheme area to qualify to tender for entry on the duty solicitor rota (subject to the provisions on new market entrants – see paragraphs 5.2 – 5.5)
- we will reduce the minimum number of suppliers required proportional to the volume of work available, to a minimum of four.
- 4.52. The proposed maximum bid size (and therefore minimum number of providers) by scheme for Greater Manchester and Avon & Somerset is set out at Annex 6.

Question 6

Do you have any comments on the proposals for a maximum bid size?

Question 7

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

Question 8

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

Requirement for back-up

- 4.53. Given that there may be schemes with fewer than six providers, we are proposing to create an obligation to provide back-up cover across schemes to deal with instances where a conflict arises that cannot be dealt with by local practitioners.
- 4.54. We recognise that this is not dissimilar to current practices and there are numerous examples of providers acting in this way under current arrangements. Nevertheless it is important to formalise this arrangement to ensure that, where such exceptional circumstances arise, clients can obtain representation where it is sought.
- 4.55. We propose to include this obligation in the specification for services within all contracts let under a BVT mechanism, with a 50% acceptance requirement for matters referred under this back-up arrangement. The duty requirement to accept 90% of duty calls would remain in all contracts.
- 4.56. Under this arrangement, back-up would be requested from providers based on schemes that are contiguous to the scheme that requires the support service. This operational rule prevents providers being asked to travel unfeasible distances in order to provide the service, thus reducing costs where called upon.
- 4.57. The use of this service is likely to be extremely infrequent. In addition, by applying this provision in all BVT-won contracts, the pool of providers that can be called upon is broadened, which means that an individual provider is unlikely to be called upon with any frequency that would impact disproportionately on their costs. While any additional costs of providing this service would be factored into the police station bid, we suggest that this additional cost would be relatively low.
- 4.58. Any provider delivering services under the back-up arrangement will be entitled to claim either their home scheme police station rate or the police station rate (the lowest winning bid for that police station in the sealed bid tender process) in which they are attending the client, whichever is higher.

Question 9

Do you agree that securing a minimum of 4 providers, and introducing additional back-up requirements will help ensure that conflicts are handled appropriately?

Question 10

Do you agree with the proposal to require back-up in all BVT contracts for contiguous schemes? Please explain your answer.

Magistrates' court work**How are magistrates' court duty sessions allocated?**

- 4.59. Winning bidders will receive a volume of magistrates' court duty slots for magistrates' courts within the scheme(s) where they have won contracts, which they will be obliged to conduct. The volume will be proportional to the volume of blocks won in the police station tender.

Can magistrates' court cases be undertaken by any provider?

- 4.60. Where any provider with either a BVT contract or with a CDS Contract 2010 has undertaken publicly funded police station work on a case, they may follow that case to magistrates' court to undertake representation, regardless of where the court is located (ie regardless of whether the court is within or outside of a BVT area).
- 4.61. For cases where publicly funded police station work on a case has not been undertaken, we are consulting on:
- Option 1 - only those providers that secure a BVT contract in a scheme area can undertake magistrates' court representation in that area
 - Option 2 - providers that do not secure a BVT contract, but do hold a CDS Contract 2010, have the opportunity to undertake publicly funded magistrates' court work as they do now, ie with no restrictions.

Option 1 – Tender including magistrates' court licence for BVT contract winners

- 4.62. Providers winning a contract through the tender process would also win a licence to provide magistrates' court work arising in that scheme area. Providers could not provide magistrates' court work in a scheme area in which they had not won a contract, unless a police station case originating within their scheme area that they had undertaken was transferred to a magistrates' court outside the scheme area.
- 4.63. This would reflect the practice of transferring magistrates' court work between schemes, eg for Saturday courts, and would remove the need to

transfer cases where this occurred. The provider may be required to report the police station at which the earlier work was completed.

- 4.64. Including magistrates' court work in the contract won under tender would provide a benefit to contract winners by providing greater certainty over the amount of work they are likely to be able to conduct under the contract. In essence, providers that do not win in the tender could not continue to undertake work at the magistrates' court in that area.
- 4.65. It is acknowledged that this option is likely to lead to a faster rate of market restructuring than Option 2. Where providers do not win contracts in any area, while they can continue to undertake own client work outside of BVT areas up until any BVT roll-out is complete, and continue to undertake Crown Court work, this is unlikely to be a viable business model for many providers that do not win contracts.
- 4.66. Under the pilot, and any subsequent roll-out, there would be transitional implications in making work under the police station and magistrates' court exclusive. Providers in BVT areas would be able to continue to conduct police station and magistrates' court work in any non-BVT area, provided a CDS Contract 2010 had been secured.
- 4.67. Where providers that have not been awarded blocks in a BVT area undertake work at a police station in another area, and that case is transferred to a BVT area, they may claim for the magistrates' court element of the case. The provider may be required to report the police station at which the earlier work was completed.

Option 1 - Tender including magistrates' court licence for BVT contract winners

Service Area	Police station			Magistrates' court		
	BVT scheme		Non-BVT scheme	BVT scheme		Non-BVT scheme
Contract	Contract held	Contract not held	N/A	Contract held	Contract not held	N/A
Access for BVT contract holders	Yes – exclusive for duty and own	No access	Yes, if qualify for duty. Own client work can be done.	Yes – exclusive	No access, except where matter arises in police station outside of scheme and case is transferred to magistrates' court inside scheme.	Yes
Access for CDS Contract holder (no BVT contract held)		No access	Yes, if qualify for duty. Own client work can be done.		No access, except where matter arises in police station outside of scheme and case is transferred to magistrates' court inside BVT area.	Yes

Option 2 - Magistrates' court cases can be undertaken by any provider with a CDS Contract 2010

- 4.68. Providers winning a contract through the tender process would win blocks of police station duty slots and an exclusive licence to conduct own client police station work in the scheme area(s) in which they were successful.
- 4.69. A licence for magistrates' court work would be obtained through application for a CDS Contract 2010 and would not be subject to price competitive tendering. Nor would the conduct of magistrates' court work be limited to geographical areas as in Option 1.
- 4.70. Providers who were not successful in the BVT tender of police station work would, subject to meeting the criteria in the open registration process for the 2010 contracts (see paragraphs 4.86 and 4.87 below and Annex 2), be automatically eligible for a 2010 contract and could conduct magistrates' court work, including in BVT areas. While they would not be able to conduct any publicly funded police station work in BVT areas, they would not be precluded from providing police station services to clients on a private or pro bono basis.
- 4.71. This option is likely to lead to a slower rate of market restructure than Option 1. Where providers do not win contracts in any area, they are only excluded from undertaking police station work in that area. It may be a viable business model for providers to operate in this way.
- 4.72. This option would lead to more uncertainty in terms of the volumes of magistrates' court work that providers successful in the tender secure. This lack of certainty is likely to impact on the behaviour of bidders during the tender process. They will be less likely to be able to estimate how much work they will have access to during the contract, which both increases the risk of bids made being unsustainable during the life of the contract and means that prices bid may be higher.

Option 2 – Tender for police station work only

Contract type	Police station in own BVT scheme	Police station in BVT scheme where contract not held	Magistrates' court in BVT area	Police station non-BVT areas	Magistrates' court non-BVT areas
Access for BVT contract holders	Yes – exclusive	No access	Yes	Yes, if qualify for duty. Own client work can be done.	Yes
Access for CDS Contract holder (no BVT contract)		No access	Yes	Yes, if qualify for duty. Own client work can be done.	Yes

Question 11

In BVT areas would you prefer that either:

- Option 1 - only those providers that secure a BVT contract in an area can undertake magistrates' court representation in that area
- Option 2 - providers that do not secure a BVT contract, but do hold a CDS Contract 2010, have the opportunity to undertake publicly funded magistrates' court work as they do now, ie with no restrictions?

Crown Court work

- 4.73. Crown Court work is formally outside of these proposals. Therefore, regardless of where providers are located, they can continue to provide Crown Court services from 2010 providing that a BVT contract is secured, or a CDS contract is applied for and awarded for 2010, subject to meeting the necessary criteria (see paragraphs 4.86 and 4.87 below and Annex 2).
- 4.74. For the avoidance of doubt, we will ensure that the process for applications for the CDS Contract 2010, and the application and tender for blocks of work in BVT areas, is streamlined to ensure those providers who qualify to bid for blocks of work in BVT areas but are not allocated blocks of work do not have to subsequently apply for the CDS Contract 2010. A contract would be granted automatically without reapplication, subject to meeting the necessary criteria (see paragraphs 4.86 and 4.87 below and Annex 2).

Prices**What prices will be paid for police station work?**

- 4.75. The tender for police station duty slots will set the price per case for all police station work, including own client work by scheme. We propose two alternative methods for setting the price.
- Option 1 - online sealed bid
 - Option 2 - open online auction
- 4.76. We intend to retain the concept of exceptional cases in BVT areas. These cases will be processed on the current basis by application to the LSC. However, we propose to introduce harmonised escape thresholds for exceptional cases across each CJS area.
- 4.77. For exceptional cases we propose that the exceptional case calculation and payment rates are based on non-London rates for all cases conducted at the police station in BVT areas, and in any subsequent roll-out areas including London.

- 4.78. The escape thresholds proposed are based on the average value of the current scheme escape thresholds in the CJS area, weighted to take into account the volume of cases that have escaped in each scheme.
- 4.79. Exceptional cases escape thresholds outside of BVT areas would remain as currently set out in the Unified Contract (Crime) 2008 until such time as BVT is rolled out.
- 4.80. A summary of the proposed escape rates for all CJS areas is set out at Annex 11.

Question 12

Do you agree with the proposal to unify the escape threshold for exceptional cases across a CJS area? Please comment.

What prices will be paid for magistrates' court work?

- 4.81. Under both options in this paper (including or excluding the licence for the work in the tender), the rates for the magistrates' court element continue to be set administratively. Given that providers are able to move bids between schemes we are proposing to unify the fee payable for magistrates' court work. We are proposing that the applicable fees for all BVT contracts are those currently used in urban areas outside of London. These fees have inbuilt elements for travel and waiting and therefore these items would cease to be claimable in their own right under contracts let through BVT.
- 4.82. The prices proposed per case for all magistrates' court' work conducted by any provider in an area where BVT has been implemented are set out below, and are inclusive of all travel and waiting, but exclusive of VAT. Additional travel and waiting payments will not be made.

Fee type	Cat 1	Cat 2	Cat 3
Lower standard fee	£221.59	£378.46	£357.87
Higher standard fee	£477.41	£792.71	£734.56

- 4.83. While this does mean a change to the way travel and waiting is paid in areas that were not previously subject to the 'urban fee' system, we recognise that by fixing a single fee for magistrates' court work, where there is extra cost in providing services in a CJS area, providers will be likely to factor in these costs in the price bid for police station work.
- 4.84. For non-standard fees we propose that the non-standard fee (NSF) payment and calculation rates are based on non-London rates for all NSF cases conducted at the magistrates' court in BVT areas, and in any subsequent roll-out areas including London.

- 4.85. Where CDS Contract 2010 holders undertake magistrates' court work in BVT areas (eg by following publicly funded cases transferred from a police station outside of the BVT area, or if magistrates' court work is not exclusive after this consultation), they will be paid the fees set out above.

Question 13

Do you agree with the proposal to unify exceptional cases and magistrates' court fee levels? Please comment.

The proposed tender process

How will the tender process work?

- 4.86. Providers will initially be assessed against the same generic and crime specific pre-qualification criteria as all other providers applying for a CDS Contract 2010. These criteria are outlined in Annex 2.
- 4.87. At this point all providers passing the criteria will qualify for a standard (non-BVT) CDS Contract 2010. This will allow providers to undertake work outside of BVT areas, as well as work that is not restricted to successful bidders in BVT areas.
- 4.88. Providers will then indicate the maximum number of blocks that they wish to undertake in the whole CJS area that is being tendered under BVT. This cannot exceed the maximum for the CJS area (ie the sum of all scheme maximums).
- 4.89. Providers will be required to indicate how they intend to fulfil their bids, should they be awarded the maximum number of blocks. This will include demonstrating the following:
- Capacity and capability to fulfil volumes bid for based on:
 - staffing levels of employed staff, including whether staff are full or part-time, and hours worked
 - planned use of agents or other designated fee earners
 - ratios of supervisors to fee earners (see paragraph 5.97 for the required ratio and paragraph 5.96 for supervisor qualifications)
 - undertaking police station as well as the resulting magistrates' court work to meet contractual requirement and KPIs (see paragraph 5.25 onwards regarding requirements for follow-on work and paragraphs 5.90 onwards detailing KPIs)
 - whether staff work exclusively in the CJS area being tendered, or work outside of the area and, where this is the case, the percentage of time worked outside of the area being tendered
 - whether staff work exclusively on CDS work, or undertake other types of legal work and, where this is the case, the percentage of time worked on non-CDS work
 - whether the bid relies upon additional staff recruitment and, where

this is the case, details of plans to ensure that additional staff are in place ahead of the contract commencing

- the maximum number of sites (offices) over which the bid may be spread within the CJS area.

4.90. In assessing how providers will fulfil capacity the LSC will take into account that blocks of work in different schemes may require different resources to service the duty obligations.

- Confirmation of eligibility will be required to bid in areas (ie the provider meets scheme entry rules), or confirmation that where bids are made in areas which the provider does not yet qualify for, that scheme rules will be met ahead of the contract commencing (ie a new office will be opened).
- The amount of information to be provided will be directly proportionate to the size of the work bid for. Where providers are bidding for maximum volumes of work across several schemes and would need to open new offices to qualify for schemes, the risk to the LSC of a successful provider not fulfilling their bid is high, and therefore the evidence requirements will be correspondingly high. Providers currently undertaking CDS work may use their previous performance as supporting evidence for future bids.

4.91. The LSC will then evaluate this information against criteria assessing the extent to which provider's current or future structure is likely to have the appropriate capability and capacity to deliver the volumes indicated by the maximum bid.

4.92. The LSC will then communicate the outcome of this assessment to providers. Where the LSC does not accept that the current or proposed future structure is likely to have the appropriate capability and capacity to deliver the volumes indicated by the maximum bid, the provider's application to tender for blocks will be rejected. This will be subject to appeal by providers.

4.93. Where the LSC accepts that the current or proposed future structure is likely to have the appropriate capability and capacity to deliver the volumes indicated by the maximum bid, providers will proceed to the price-setting part of the tender.

4.94. It should be noted that at this stage providers will not be held to their maximum possible bid. Providers are able to reduce volumes and location bids after this point as part of the price setting stage. Providers cannot, however, increase from the maximum for which they have applied, and had approved.

4.95. The two proposed options for the price-setting part of the tender are set out below, together with the likely implications of both options.

Price-setting option 1 – Sealed bid tender

How will a sealed bid work?

- 4.96. Bids will be submitted online.
- 4.97. Once providers have qualified for the price-setting stage of the tender, they will be allocated a user code to participate in the process and access the secure web address where the process will take place.
- 4.98. They will be asked to input the volume of blocks of work they wish to undertake on each scheme within the CJS area, together with the price at which they are prepared to undertake police station cases.
- 4.99. Bids will be the price per case in pounds and pence.
- 4.100. Providers can bid for blocks of work in one or more schemes.
- 4.101. The volumes entered on each scheme must be within the minimum and maximum bid volumes allowed.
- 4.102. The total volume bid across the whole of the CJS area must not exceed the maximum volume indicated by the provider and assessed by the LSC prior to the price-setting part of the tender commencing.
- 4.103. It is proposed that providers will be able to enter their bids within a three-day window. No bids will be viewed by the LSC until the three-day window has closed.
- 4.104. The dates for entering bids will be published at the very beginning of the process, alongside opening the tender for the CDS Contract 2010.

What will happen when the bid window closes?

- 4.105. After the window closes at a set time and date, bids in each scheme will be ranked by price, from lowest to highest. The blocks available on the scheme will be awarded to the bidders who are ranked highest (lowest price bid for the scheme). Blocks continue to be awarded until all available blocks are allocated.

How will the outcome of the tender be confirmed?

- 4.106. Providers will be informed by email of:
 - the rank of their bid among all bids made by scheme
 - the ranking above which available capacity was filled by scheme
 - whether they have been successful in their bid, and a confirmation of the volume of blocks they have been awarded on each scheme.

4.107. It is likely that there may not be the exact capacity available to award the last successfully ranked bidder the full volume of blocks that was bid for. In these cases we will offer the volume available to this winning bidder.

4.108. Where this winning bidder does not accept this volume, we will offer the volume available to each winning bidder, starting at the bidder ranked first (subject to maximum bid size restrictions), and working down the ranking. If the first place bidder accepts the additional volume, we will not offer this volume to other providers. If they do not accept, we will offer the available volume to all providers in turn of their ranking, until the volume is awarded.

How is the police station price set for winning providers?

4.109. Winning providers will be paid the price that they bid in each scheme.

Implications of the sealed bid tender

4.110. A tender of this nature is the simplest option to administer. It requires comparatively low levels of resource from both providers and the LSC in terms of submitting, collating and assessing the bids made. The technology involved is very straightforward, and will require little active support from the LSC for providers to access the bidding platform and submit their bids.

4.111. It could also be argued that the simplicity of the tender process provides less ongoing pressure on bidders than an auction in which there are multiple rounds in which to make decisions.

4.112. Set against this simplicity is the potentially significant complexity involved for providers in compiling their bids, particularly where providers may wish to bid on more than one scheme within a CJS area. In considering the likelihood of multiple scheme bids, proposals set out in chapter 5 regarding scheme rules should be considered. These proposals aim to ensure that scheme rules are not unnecessarily restrictive. Providers who may currently only qualify for a single scheme given their location may, under these proposals, qualify for more schemes without the need to move location or increase the number of offices.

4.113. The complexity in compiling bids arises because providers making bids in more than one scheme have to choose whether to make bids contingent on winning in other schemes (the likelihood of which is unknown), or choose to make all individual scheme bids self-sustaining (ie load all potential overhead costs into each and every scheme bid).

4.114. In addition, this closed format means that providers are unable to gather information regarding the potential attractiveness of schemes during the tender process, and have no information about how the rest of the market values the work. This is even more problematic where they have no historic knowledge of schemes.

4.115. As well as adding complexity to the process of compiling the bid for providers, these drawbacks are likely to have a number of impacts in terms of the result of the tender:

- potential for increased prices where providers load all costs into individual self-sustaining bids
- potential for supply gaps where providers have spread their costs between bids and do not win all bids, which results in complete withdrawal from all areas, including winning areas
- lack of mobility in the market due to providers not having sufficient information to see opportunities to bid in particularly new areas. Increased market mobility is likely to lead to more competition resulting in potentially lower prices
- the 'one-shot' at making the right bid without additional information is likely to increase the risks of uninformed and unsustainable bids.

Price-setting option 2 – Open online auction

How will an open online auction work?

4.116. The process will be conducted online.

4.117. Once providers have qualified for the price-setting stage of the tender, they will be allocated a user code to participate in the process and access the secure web address where the process will take place.

4.118. The auction will begin on a defined start date.

4.119. Providers can make one bid per round, distributing the volume of blocks they have indicated across any number of the schemes in the CJS area. They can bid for single or multiple blocks of work.

4.120. The volumes entered on each scheme must be within the minimum and maximum bid volumes allowed.

4.121. The total volume bid across the whole of the CJS must not exceed the maximum volume indicated by the provider and assessed by the LSC prior to the start of the auction.

4.122. Providers can decrease their total CJS volume bid between rounds, but cannot increase their total CJS volume bid between rounds. At each round the total volume bid across schemes must be the same as, or lower than the previous round.

4.123. The price on a scheme decreases from one round to the next if the volume bid on that scheme exceeds the capacity tendered. When prices decrease, providers can move, increase or decrease volume bids on individual schemes at each round, provided that they do not exceed the total CJS

volume bid in the previous round as described in 4.124.

What will happen when providers log on at the defined start date?

- 4.124. At the defined start date the first round of bidding will commence. Providers will see a screen showing each scheme and the price at which each police station case is offered by the LSC for that scheme.
- 4.125. All schemes within the CJS area will start at a price offered equal to twice the current highest fixed fee within the CJS area. A comparable starting value in all schemes will make it easier for bidders to assess the likely demand in each area. A value that is twice the highest current fixed fee should ensure that the price does not represent a false 'ceiling' for determining the correct price for the scheme.
- 4.126. For each scheme providers will be asked to enter the volume of blocks they wish to bid on that scheme at the price offered.
- 4.127. The first round of bidding will close at a defined date and time. We are consulting on the length of time that providers would have to bid, known as the 'bidding window' as described in 4.150.

What happens when the first round closes?

- 4.128. The total volume of bids for blocks on each scheme will be calculated. Where there is an excess of blocks bid in any scheme, compared to the number of blocks available, a second round will commence.

What happens in the second and subsequent rounds?

- 4.129. Where there is an excess volume of bids offered on any scheme(s), the second round price offered for that scheme will be lower than the price offered for the previous round. The price on all schemes with an excess volume of bids will step down by an absolute amount.
- 4.130. The new prices offered by the LSC for a police station case for each scheme will then be offered on screen. Providers will be asked to enter the volume of blocks they wish to bid on any scheme(s) at the revised price offered by the LSC.
- 4.131. Where providers choose to reduce their **overall CJS volume** from that in the previous round (ie not simply switch volume from one scheme to another), they will be required to enter an 'exit bid' for the volume of work that they wish to exit from the auction. This bid will be the lowest price, in pounds and pence, at which the provider would undertake the volume of work they are exiting, and the scheme(s) on which their exit bid is made. This exit price will be between the price offered for that scheme in the previous round, which was acceptable to the provider, and the price offered in the current round, which was not.

- 4.132. The second and subsequent rounds of bidding will be closed at a defined date and time.
- 4.133. The new volumes bid against the new, lower prices will be reassessed when bidding closes, prices offered amended where appropriate, and the next bidding round will start.
- 4.134. Where prices in a scheme are not amended in the next round, providers cannot move their previous round volumes bid from that scheme. These will be carried forward to the next round.

How many rounds will there be?

- 4.135. The number of potential rounds is not set at the outset of the process, and is based on the way in which providers bid. The price in a scheme will tick down at set intervals during the auction where the volume of blocks offered by providers in any scheme exceeds the volume available in the scheme. When the price offered on the next round in any scheme is too low to be acceptable to a provider, that provider will either move bids to alternative schemes or make an exit bid.

When does the auction close?

- 4.136. The auction closes when the volume of blocks bid by providers at the price the LSC is offering on each and every scheme is equal to or lower than the volume of blocks available on each and every scheme. This is the final round.

How are successful providers selected?

- 4.137. Any provider bidding at the price offered by the LSC in the final round (final round set price) will be successful in the schemes where they have bid for volume at the price offered by the LSC. They will secure the volume of work they have bid for in that scheme. Some providers that presented exit bids in the last round (or had exit bids carried forward) may also be selected.

The final round closed when there were less bids than the work available. How will the other work be distributed?

- 4.138. Any blocks that have not been allocated at the final round set price will be allocated to the provider that has bid the lowest price in their exit bid, up to the volume they have bid in their exit bid. This method of allocation will continue until all blocks are allocated.
- 4.139. All bids made by winning providers, where the volume of work they have bid for is available, will be binding. It may be that the last winning provider is not allocated the full volume of their bid. Where this is the case we will offer the volume available to the last winning provider. Because the offer will be lower than the bid made by the provider (and therefore may not be viable for them) they may decline the offer.

4.140. Where the last winning bidder does not accept the offer, we will offer the volume available to each winning bidder on a pro-rata basis.

How is the police station price set for winning providers?

4.141. The police station price for each scheme is based on either:

- the final round set price except when the volume bid in the last round is lower than is needed. In that case, the price is based on the bid of the last winning provider (ie the last winning exit bid price).

Illustrative example of an open online auction

	Scheme A	Scheme B	Scheme C	Scheme D
Blocks available in scheme	40 blocks	80 blocks	120 blocks	60 blocks
Opening price / police station case offered by LSC	£400	£400	£400	£400
Providers bid for the number of blocks that they want at the price offered. The price offered is the price per case for police station work. Volume bids must be at or between the minimum and maximum bid sizes on individual schemes, and each provider's whole CJS volume bid must not exceed the maximum overall quantity previously stated in their application.				
Cumulative bids received in Round 1	30 blocks	100 blocks	180 blocks	90 blocks
The volume of bids received from suppliers in three out of four schemes exceeds the volume available. Prices are reduced in these schemes in the next round. The price in Scheme A is not reduced as currently the volume of bids received from suppliers is less than the number of blocks available.				
Round 2 price offered	£400	£300	£300	£300

Providers make their bid in Round 2. The new prices offered by the LSC may lead providers to:

- move their bids from one scheme to another
- reduce their bids, showing exit prices for the blocks that they no longer want to bid.

Cumulative bids received in Round 2

50 blocks

90 blocks
+ 10 blocks
exit at £320

150 blocks
+ 15 blocks
exit at £360,
and 15 blocks
exit at £340

70 blocks

Providers change their bids in Round 2 having considered the new prices offered in different schemes. In this example providers have made the following changes.

- Four providers that each bid 5 blocks in Scheme D in Round 1 have moved their 5 block bids to scheme A in Round 2
- A provider that bid 10 blocks in Scheme B in Round 1 has decided that the price offered by the LSC in Round 2 is too low for them. They exit their bid in Round 2, showing their exit price for the 10 blocks at £320
- Two providers that bid 15 blocks each in Scheme C in Round 1 have decided that the price offered by the LSC in Round 2 is too low for them. They both exit their bid in Round 2, showing their exit prices for the 15 blocks, one at £360, the other at £340.

The volume of bids received from suppliers in all schemes exceeds the volume of blocks available. Prices are reduced in all schemes in the next round.

Round 3 price offered

£300

£250

£250

£250

Providers make their bid in Round 3. The new prices offered by the LSC may lead providers to:

- move their bids from one scheme to another
- reduce their bids, showing exit prices for the blocks that they no longer want to bid.

Cumulative bids received in Round 3

60 blocks

80 blocks
+ 10 blocks
exit at £260

130 blocks
+ 10 blocks
exit at £280

50 blocks
+ 5 blocks exit at
£270, 5 blocks exit
at £280, 5 blocks
exit at £275 and 5
blocks exit at £265

Providers change their bids in Round 3 having considered the new prices offered in different schemes. In this example providers have made the following changes.

- Two providers that bid 5 blocks in Scheme C in Round 2 have moved their 5 block bids to scheme A in Round 3
- A provider that bid 10 blocks in Scheme C in Round 2 has decided that the price offered by the LSC in Round 3 is too low for them. They exit their bid in Round 3, showing their exit price for the 10 blocks at £280
- Four providers that bid 5 blocks each in Scheme D in Round 2 have decided that the price offered by the LSC in Round 3 is too low for them. They exit their bid in Round 3, showing their exit prices for the 5 blocks, one at £270, one at £280, one at £275 and the other at £265.

The volume of bids received from suppliers in Schemes A and C exceeds the volume of blocks available. Prices are reduced in these schemes in the next round.

Round 4 price offered	£250	£250	£200	£250
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Providers make their bid in Round 4. The new prices offered by the LSC may lead providers to:

- move their bids from one scheme to another
- reduce their bids, showing exit prices for the blocks that they no longer want to bid.

Cumulative bids received in Round 4	30 blocks + 5 blocks exit at £270, 5 blocks exit at £290, 5 blocks exit at £275, and 5 blocks exit at £280	80 blocks	100 blocks + 10 blocks exit at £230, 15 blocks exit at £240 and 5 blocks exit at £245	60 blocks
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Providers changed their bids in Round 4 having considered the new prices offered in different schemes. In this example providers made the following changes:

- Four providers that bid 5 blocks each in Scheme A in Round 3 have decided that the price offered by the LSC in Round 4 is too low for them. They exit their bids in Round 4, showing their exit prices for the 5 blocks, one at £270, one at £290, one at £275, and the other at £280
- Two providers that bid 5 blocks in Scheme A in Round 3 have moved their 5 block bid to Scheme D in Round 4
- Three providers that bid 10 blocks, 15 blocks and 5 blocks in Scheme C in Round 3 have decided that the price offered by the LSC in Round 4 is too low for them. They all exit their bid in Round 4, showing their exit prices for their blocks: one at £230, one at £240 and the other at £245.

Auction closes after Round 4 as the volume of blocks bid by providers on ALL schemes at the price offered by the LSC is less than or equal to the volume of blocks available.

Result

Providers that have bid in Round 4 at the price offered by the LSC are successful. In addition, where blocks available exceed the number of blocks bid for at the price set by the LSC, the remaining blocks are filled by the provider that exited their bid at the next lowest price until all blocks available are filled. The final price in a scheme is set at the price where all blocks are filled.

Scheme A has 40 blocks available. Those providers that made up the bid for 30 blocks in the final round (Round 4) are successful. 10 blocks remain unfilled. These are filled by the provider that exited at £270, and the provider that exited at £275. £275 becomes the police station price set for **all** successful providers in this scheme.

Scheme B has 80 blocks available. Those providers that made up the bid for 80 blocks in the final round (Round 4) are successful. £250 becomes the police station price set for **all** successful providers in this scheme.

Scheme C has 120 blocks available. Those providers that made up the bid for 100 blocks in the final round (Round 4) are successful. 20 blocks remain unfilled. 10 of these are filled by the provider that exited at £230. The other 10 are offered to the provider that exited at £240. This provider actually exited 15 blocks, and as such has the right to refuse to take 10 blocks without any penalty. Where the last successful provider chooses not to accept the remaining blocks, these will be offered to the other successful bidders. Whether or not the last remaining bidder accepts the smaller allocation, £240 becomes the police station price set for **all** successful providers in this scheme.

Scheme D has 60 blocks available. Those providers that made up the bid for 60 blocks in the final round (Round 4) are successful. £250 becomes the police station price set for **all** successful providers in this scheme.

Final price paid	Scheme A £275 (exit price)	Scheme B £250 (final round set price)	Scheme C £240 (exit price)	Scheme D £250 (final round set price)
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An example of one provider bidding in this auction

Pre-auction	<p>The provider is based in Scheme C. The scheme rules mean that they could also provide services in Schemes A and D from their office.</p> <p>The provider calculates the costs for delivering services across schemes.</p> <p>They calculate that it is cheapest for them to provide services in Scheme C, so in this example they plan to focus the majority of their bid in Scheme C. The costs to this provider of delivering services in Scheme D are marginally cheaper than delivering services in Scheme A. The provider is keen to contain their bid to two areas to ensure that they can deliver their service in the most effective way.</p> <p>The provider recognises that they would need to open a further office if they successfully bid in Scheme B; this is not part of the providers plan.</p> <p>The provider's intention is to secure the majority of their work in Scheme C, as well as obtaining work in either Scheme A or Scheme D.</p> <p>In their application the provider states that they are able to supply a maximum of 20 blocks. The provider expresses an interest in bidding in Schemes A, C and D.</p> <p>The LSC assesses eligibility and the information provided regarding how the provider will deliver the service if they are successful, and approves this 'top level' bid.</p>
<p>Auction opens</p> <p>Round 1 bidding</p>	<p>The provider places the following bid:</p> <p>15 blocks in scheme C for £400 / case offered by LSC 5 blocks in scheme D for £400 / case offered by LSC</p> <p>The provider does not bid in Scheme A at this point as the price offered in scheme D and Scheme A are the same, and it is cheaper for the provider to deliver services in Scheme D.</p>
Round 2 bidding	<p>The prices offered in Schemes B, C and D reduce to £300. The price offered in Scheme A remains the same as Round 1 at £400.</p> <p>The provider maintains their 15 block bid in scheme C; the price offered is still above the price at which the provider can deliver the service.</p> <p>The provider switches their 5 block bid from Scheme D to Scheme A. While the cost to them of providing services in Scheme A is slightly higher than Scheme D, the price offered by the LSC for</p>

	Scheme A is £100 higher than Scheme D, therefore more attractive.
Round 3 bidding	<p>The prices offered in all schemes reduce.</p> <p>The provider maintains their 15 block bid in Scheme C; the price offered is still above the price at which the provider can deliver the service.</p> <p>The provider maintains their 5 block bid in Scheme A. Despite the price offered in Scheme A reducing, it is still £50 higher than that offered in Scheme D, and this difference is great enough for Scheme A to remain a more attractive option than Scheme D.</p>
Round 4 bidding	<p>The prices offered in Schemes A and C reduce. The price offered in Schemes B and D remain the same as Round 3.</p> <p>The provider maintains their 15 block bid in Scheme C; the price offered is still above the price at which the provider can deliver the service.</p> <p>The provider switches their 5 block bid from Scheme A back to Scheme D. The prices offered for both schemes are the same at £250. However, as the cost to them of providing services in Scheme A is slightly higher than Scheme D, Scheme D becomes the most attractive option.</p>
Auction closes	<p>The provider is successful in Scheme C. While they made a bid in the last round at the price offered by the LSC of £200, as the price set was based on an exit price, they are awarded 15 blocks at £240.</p> <p>The provider is successful in Scheme D. In the final round, the price offered of £250 was the price at which the blocks of work available were allocated. The provider is awarded 5 blocks in Scheme D at £250.</p> <p>The provider is awarded 0 blocks in Schemes A and B</p>

Implications of the open online auction

- 4.142. An auction of this nature offers advantages to providers, as well as the LSC. From a provider's perspective, compiling their bid is less complex compared to the sealed bid model. Where providers wish to bid on more than one scheme, they do so on the basis of knowing the prices offered by the LSC on each scheme as these are revealed at each round of the process. This allows providers to assess accurately the attractiveness of prices offered where bids on different schemes can be contingent on one another.
- 4.143. Providers can move or reduce volumes and always have information available to understand the relative viability of their whole bid. Providers only risk losing in this model where they choose to withdraw all volume from any

scheme in light of the prices offered. Providers then place an exit bid which may be accepted. If providers place bids at the set price offered by the LSC on the last round they will secure their bids in full at a price equal to or better than the price they have bid. Providers therefore have the opportunity of offering volumes in multiple schemes in the knowledge that only their total offered will win, rather than parts of their offer. In this way the risk of unsustainable bids is reduced.

- 4.144. In addition, this format means that providers are able to gather information regarding the potential attractiveness of schemes during the tender process, and allows providers to assess this relative attractiveness and enter a bid even where they have no historic knowledge of schemes.
- 4.145. Set against these benefits are the clear challenges that an auction of this nature brings. Auctions have been criticised for being unnecessarily complex and burdensome, both to take part in and to manage.
- 4.146. This system will undoubtedly require more resource both for providers to participate effectively in and the LSC to administer, compared to a sealed bid model. Support would need to be made available to providers throughout the auction period to ensure that any problems in internet access that bidders experience can be addressed or effectively bypassed to allow providers to continue to participate in the process.
- 4.147. The level of resource required would be dependent on the length of time the process ran, which is dictated by two factors:
- the number of auction rounds
 - the bidding window for each round.
- 4.148. Our proposal is to step down the price on each scheme by a given absolute amount rather than a percentage, where there is a greater volume of bid for blocks than available blocks; this will reduce the likely number of rounds during the auction. The ability of providers to enter exit bids where the price offered by the LSC in subsequent rounds is too low ensures that this approach does not limit the ability of providers to reveal their best offers.
- 4.149. We are interested in views on the length of time required for the bidding window. Longer windows will allow providers to adjust their bidding strategies as the auction progresses. Longer windows will also offer flexibility in terms of how providers deploy resources during the auction period. However longer windows will clearly elongate the auction process. We are keen to hear views from providers regarding the length of the bidding window.
- 4.150. Before and throughout the auction we will provide technical support for providers in making their bids. This would potentially be in the form of telephone helplines, and back-up telephone services for making bids in the event of internet access issues, online help and instruction DVDs. We are interested to hear providers' views on the type of support they would find useful.

4.151. There is a range of public and academic opinion on the risks and benefits of auctions, when compared to tendering under a sealed bid; and multi round auctions implemented in other markets have been criticised for driving prices below, or above sustainable market levels, and increasing industry concentration¹⁰. However, the design described above and support offered mitigates a number of risks:

- the type of auction proposed, the descending clock auction, has been specifically recommended by NERA for BVT in crime lower following detailed analysis of the market
- prices will start at a rate above current rates
- minimum and maximum bid sizes have been set to guarantee the process results in a sufficient number of providers to deliver the service necessary and be available for future rounds
- the ability to make exit bids gives providers the opportunity to make their 'best and final offer'
- prices will be set at, or in many cases above, the price offered by the LSC in the final round (eg where exit bid prices are used)
- any BVT process, regardless of how the price is set, will be piloted.

4.152. Another commonly cited¹¹ objection of auctions is the potential for providers to continue to bid beyond a point that is sustainable for their businesses because they feel forced to bid and win a contract, a pressure that may increase during the auction process. However, this is again likely to be mitigated by the low minimum contract sizes which ensure that there are potentially at least as many contracts available as there are current incumbent providers, and also by allowing sufficient time between rounds for providers to reassess their bidding strategy and reflect on their next bid.

Question 14

Are the general principles proposed for assessing how providers intend to fulfil their bids realistic and sensible?

Question 15

Would you prefer the price-setting mechanism to be:

- Option 1 - sealed bid?
- Option 2 - online auction?

Please explain your reasons.

Question 16

In Option 1 - sealed bid, do you consider a three-day window to enter bids reasonable? If not what length of days would you prefer?

¹⁰ For example the ascending multi round auctions used for European 3G spectrum auctions.

¹¹ Ken Binmore & Paul Klemperer 'The biggest auction ever: the sale of British 3G telecom licences' 2002

Question 17

In Option 1 - sealed bid, what sort of support do you think is necessary in order to ensure you are able to participate in the process?

- face-to-face training prior to the tender
- telephone helpline
- online support
- instruction DVD/webcast
- other – please give details.

Question 18

In Option 2- online auction, please indicate your preferred option for making bids in rounds:

- as quickly as possible with 30 minutes between bid windows
- bidding up to four times a day with at least 2 hours between bid windows
- bidding twice a day with at least 6 hours between bid windows
- bidding once a day with at least 12 hours between bid windows
- other – please give details.

Question 19

When making your bids, what time windows would you prefer?

- 7am-10pm
- mornings
- afternoons
- weekends
- office hours only
- other (please specify)

Question 20

In Option 2 - online auction what type of support do you think is necessary to ensure you are able to participate in the process?

- face-to-face training prior to the auction
- telephone helpline
- online support
- instruction DVD/webcast
- access to the bidding platform at locations outside your office
- other – please give details.

5. General Attributes of the Tender Model

5.1. This chapter sets out the general attributes of the model for tendering.

New offices and firms without existing offices in the pilot area

- 5.2. Our proposals are designed to ensure that new entrants are able to enter the market at the time of tender.
- 5.3. We realise that, in the absence of a guarantee of a contract, applicants may not be in a position to set up and open an office in a definite location prior to submitting their bids. At the same time, applicants may prefer to defer their decision on location of a new office until they can assess the viability and attractiveness of the price in each of the tendered procurement areas.
- 5.4. Applicants will be required to complete the online application form giving as much information about the expected office location as possible, and as a minimum give the postcode sector (eg DE75 7) in which they expect to locate their office by the start date of the contract. In this case, however, any subsequent contract will be conditional upon the required office being set up before the contract starts.
- 5.5. New applicants will be required to submit information including the following Specialist Quality Mark (SQM) forms (or approved equivalent):
- QM1 – Quality Mark Application form - requests the contact details of the organisation as a whole
 - SQM Self Assessment Checklist - requests written confirmation of how the organisation meets, or intends to meet, each separate requirement in the SQM
 - Supervisor Self Declaration form – requests information about how the supervisor(s) for publicly funded criminal work will meet the supervisor requirements in the SQM
 - Franchise Status Enquiry Forms (SIF1) – requires organisations to declare any claim against the Solicitors' Indemnity Fund within the last five years
 - Status Enquiry Forms which the LSC submits to the regulator to check for disciplinary proceedings or any other adverse findings by regulatory bodies against the firm or staff as part of your application.

Question 21

Do you have any comments on the proposed entry requirements to bid?

Question 22

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

Mergers and consortia

- 5.6. We recognise that some of our existing providers may wish to merge with other contractors with a view to optimising their business structures. This may enable them to offer more competitive bids at optimum volumes.
- 5.7. Where an application is made on behalf of an entity that plans to merge, the LSC would only accept bids from providers who undertake to have completed the merger before the contract start date. Any contract will be conditional on the completion of the merger.
- 5.8. We will only accept one bid per provider within each tendered CJS area and individual offices within a firm cannot bid separately. Similarly no individual (partner, director, sole practitioner or owner) will be permitted to submit or be involved in more than one bid for the CJS area being tendered.
- 5.9. Once contracts are let and providers are considering a merger, as now, providers must notify us of any potential merger that would require a novation of contract or where the constitution of the firm would be significantly altered. The LSC has the discretion to grant or refuse any such novation of contract. In considering this under BVT tendering we will also consider whether the merger has the potential to impact on conflicts of interest, or create an unacceptably low concentration of suppliers in an area. We will look at each of these cases on an individual basis. Within this our primary concerns would be ensuring sufficient choice for clients and future competition in the area.
- 5.10. We recognise that our consideration of the impact of mergers would need to be swift so as to avoid any uncertainty for providers. Providers should contact the LSC prior to undertaking any merger in order to receive advice on whether the novation will be accepted.
- 5.11. In terms of other consortium arrangements, these are often useful in markets where barriers to entry are high, or where different providers within the market offer the ability to deliver a separate element of a complementary product. Within the CDS market, we have described earlier the need to ensure the ability for a provider to take a case from police station to magistrates' courts. We have also described the steps taken to ensure that barriers to entry are low. Given this we do not propose to award contracts to consortia (including subcontracting proposals) and require providers who wish to join up to form a legal entity to do so prior to the contract start dates as outlined above at paragraph 5.7. We will continue to allow providers to use police station agents as under the current contract and providers may join together to share overheads and resources subject to complying with the terms of the contract and professional rules.

Notification of contract award

- 5.12. In the last consultation respondents indicated that a longer period between the notification of the contract award and the commencement of the contract would allow providers to restructure, either in terms of providing greater

volumes of work in the future or in new areas, or allowing the time necessary to plan an exit from criminal legal aid work well before the contract ceased.

- 5.13. We agree that, given the competitive nature of the process, a longer time period is desirable. The timeline proposed in Annex 4 considerably extends the time period between decisions on the tender, and the commencement of the contract to allow for this.

Changes to the specification and scheme rules under BVT

Principles for scheme rules

- 5.14. As part of the 2010 contract changes (set out in summary at Annex 2 and consulted on separately) it is proposed that the method for determining duty scheme eligibility will change from assessment of travel time to a qualification based on office postcode location based in so far as is possible on the previous service specifications. The specific implications for each scheme will also be consulted on locally.
- 5.15. In the pilot and any subsequent roll-out of BVT we intend to keep scheme rule changes to the necessary minimum. Scheme rules in the majority of BVT areas will be based on the standard rules as consulted in the 2010 contract changes, with the following exceptions:
- where scheme rules are currently more restrictive than the standard rules, restrictions will be lifted to allow any provider that can meet the service specification requirements to compete in the appropriate tender
 - some schemes currently have more relaxed scheme rules that do not necessarily correspond with standard rules for first and additional scheme membership. This is generally where police stations and magistrates' courts within a scheme are located such that it is extremely difficult to meet the standard scheme rules. In these areas we intend to retain the relaxation.
 - there may also be some instances where it is appropriate to redraw scheme boundaries in order to ensure there is sufficient work available during the life of the contract to allow an effective tender to take place, for instance by merging adjoining schemes.
- 5.16. It may also be that there are known regular events that require extra duty solicitor coverage outside of usual sites for delivery, which therefore require exceptional rotas to be issued. Where these events are known sufficiently in advance, these bespoke rotas may be tendered as a separate 'product' in the tender.
- 5.17. In Greater Manchester, the impact of the scheme changes proposed will be the removal of the current restriction whereby membership is restricted to solicitors normally in attendance at a Criminal Defence Service provider's

office within the scheme area. Under the revised criteria, some postcodes within Greater Manchester may map into more than one scheme based on their proximity to the magistrates' court, and providers based in those postcodes will be free to submit bids for each and every scheme to which they are eligible without the need to open additional offices, should they so wish.

- 5.18. In Avon & Somerset we propose to combine the North Avon and Thornbury and Bristol Schemes to create a new, enlarged Scheme called Bristol and North Avon. The amalgamation of these schemes recognises the fact that for many years the same CDS providers have serviced both schemes, and the non-summary work undertaken at North Avon court derives mostly from Bristol police stations. Providers who are successful in securing work on this new scheme will be required to cover all police stations and magistrates' courts within the new scheme boundary.
- 5.19. Maps for the pilot areas of Greater Manchester and Avon & Somerset are included at Annex 7. These maps reflect the postcode sectors within which a provider must be based (or intend to be based) to enter a bid for each scheme.
- 5.20. Full maps of all local scheme areas, including those included in the BVT pilot, will be published as part of a forthcoming consultation on scheme boundaries to be run by each region in late spring.
- 5.21. Where we propose further boundary changes to facilitate any roll-out of BVT, we will consult on those changes in the normal way ahead of the tender.

Question 23

To what extent do you consider that the principles set out for the scheme rules for BVT are appropriate?

Duty solicitor rotas and panel schemes

- 5.22. In BVT areas following the tender, rotas will be produced based on the proportion of blocks won by the provider. They will no longer be allocated on the basis of numbers of individual duty solicitors.
- 5.23. In order to ensure clients are guaranteed services, and to allow the distribution of slots and the calculation of blocks for the bid process, we propose to change all panel and mixed police station schemes to rotas.
- 5.24. Slots will be allocated to ensure that there is a fair distribution between busy and less busy periods.

Question 24

Do you have any comments on the proposals to abolish panels in BVT areas?

Additional specification requirements

Continuity of Service

- 5.25. While the tender is based on bidding for blocks of police station duty slots, the indicative capacity expressed for the purposes of the pre-qualification questionnaire (PQQ) must also factor in capacity for the expected magistrates' court work that will flow from the police station tender. At the outset of the tender, providers will be required to state the maximum number of blocks that they are proposing to bid in any CJS area, and how they plan to deliver this capacity, including magistrates' court work that results. We will give indicative volumes for magistrates' courts in the area prospectus.
- 5.26. Given that the winners of the tender are likely to form the mainstay of the provision in that local market, it is essential to ensure that they have the necessary capacity to follow work through from the police station to the magistrates' court, or there may not be sufficient capacity in the market to meet client demand.
- 5.27. Under BVT there is the potential for a reduction in the number of contracted providers, and dependent on which model is employed for the pilot, it may also be the case that winners are awarded exclusivity of access to magistrates' courts within the area. As such, it is necessary to ensure that clients have the option of continuing with the provider that represented them during the investigation stage where the matter proceeds to court. Where the client requests this, there will be a contractual obligation on the provider to provide representation in court.
- 5.28. To ensure that clients continue to receive services they need, we propose to introduce clauses for providers in BVT pilot areas to require them to undertake magistrates' court work (except in limited circumstances) where the provider has undertaken the police station element of work and the client wants to retain the provider for representation.
- 5.29. Limited circumstances include where there is evidence of conflict.
- 5.30. We will require providers to notify clients of their ability to undertake magistrates' court work where police station court work is undertaken eg in client care letters.
- 5.31. Contract sanctions will only be taken where, in a CJS area, it is clear that clients are unable to access magistrates' court representation for the substantive element of their case, and providers are not meeting the requirements to conduct follow-on magistrates' court work.

File Review

- 5.32. In addition, we propose to remove the payment for file review. We would expect providers to reflect this cost in their bid for work. This brings the specification into line with the civil contract arrangements.

Reporting costs under the BVT contract

- 5.33. Changing the way that prices are set through BVT reduces the need for the LSC to keep detailed records of costs at hourly rates reported against individual cases.
- 5.34. The LSC is keen to reduce unnecessary administration, and would therefore consider the removal of the requirement for providers to report profit costs, travel and waiting on the majority of police station and magistrates' court cases under the BVT contract. This may provide an opportunity to reduce administrative requirements for providers and therefore allow them to take advantage of increased efficiency.
- 5.35. There will however be two instances in which the LSC will continue to require costs information:
- the assessment and payment of police station exceptional cases
 - the assessment and payment of magistrates' court non-standard fees.
- 5.36. The requirements to report client and other case information (such as offence and outcome codes) would remain.
- 5.37. We would welcome your views on these proposals. The LSC currently uses travel and waiting information that is reported to us to influence other parts of the CJS and help drive whole system efficiencies. Equally providers may find collection and analysis of travel, waiting and time spent on cases useful to determine changes to their own costs structures, and therefore the extent to which prices paid through BVT remain viable for the life of the contract (see paragraph 5.54 on risk sharing) and to inform future bids.

Question 25

What are your views on the additional requirements to ensure providers must deliver services at the magistrates' court where they have previously provided the police station element of the case?

Question 26

Do you think that removing the requirement to report profit costs, travel and waiting on the majority of police station and magistrates' court cases under BVT would be of benefit to providers? Please comment.

Public Defender Service (PDS)

- 5.38. As our directly employed service, the PDS continues to offer the benefit of ensuring that we can respond quickly in the event of service breakdown across England and Wales, and continue to secure necessary services for

clients. While we have no immediate plans to expand PDS, we will ensure that it retains its current market share in areas where BVT is rolled out.

- 5.39. We will reduce the volume of blocks available for tender in areas where PDS is currently operating. This reduction will be based on the percentage market share of crime lower work that PDS is undertaking just ahead of BVT tenders opening. This work will therefore not be available for tender.
- 5.40. In schemes where we have reserved work for PDS, we will reduce the minimum number of providers required by one.
- 5.41. We may also consider allocating any capacity that becomes available in schemes during the life of contracts to PDS (ie where successful bidders exit the market during the life of the contract), where we consider this to be a more cost-effective way of ensuring coverage of supply.

Addressing risk in the tender process

Unsustainable bids

- 5.42. The proposed system mitigates the risk of unsustainable bids in a number of ways:
 - magistrates' court work will continue to be set at administrative prices and will not be subject to tender
 - all schemes within a CJS area are tendered at the same time, giving multiple opportunities to win bids
 - we are releasing information about the schemes in an area prospectus to ensure all bidders have access to the same information about the likely volume of work in a scheme area. This will help them to make informed bids.
- 5.43. The second option for price-setting, the open auction model, allows for several rounds of bidding, which reveal information about the cost of delivering services and the relative attractiveness of schemes. This reduces the risk of unsustainable or uninformed bids.
- 5.44. As providers observe that other bidders are exiting (and therefore entering exit bids), or observe that the level of excess supply in the auction drops sharply at the price offered by the LSC in that round, they gain a better understanding of the sustainable level of bids. Understanding the actions of others (in aggregate) allows them to make inferences about their own assessment of the benefits and costs of providing services.

Speculative bidders

- 5.45. Where an applicant bids for, and subsequently wins, work in an area but either does not take up this contract or gives notice to terminate early without reasonable cause and without providing six months notice, and this creates the need to run a second tender to replace that contract, we will include

terms in the contract/tender process that allow us to recover the cost of that subsequent tender from the defaulting provider and prevent them from re-tendering. We would regard a 'reasonable cause' as one being outside the applicant's control, which prevents them from delivering the contract.

- 5.46. Where a defaulting provider also has offices in other locations delivering CDS services, we will further reserve the right to apply sanctions including withdrawing duty solicitor slots on any or all schemes, and terminating the whole contract including any offices in non-BVT pilot areas. Defaulting without reasonable cause would also be likely to prejudice any future application for duty schemes or a CDS contract for a period of two years.
- 5.47. This is to discourage providers or individuals from entering speculative bids with no intention of undertaking the work.

Supplier concentration and collusion

- 5.48. As part of its analysis of the market for criminal legal aid, NERA conducted a review of the level of supplier concentration within police station schemes in order to understand the potential impact of introducing competition on a national basis. A summary of the analysis conducted by NERA is set out in the technical annex¹².
- 5.49. Broadly, markets with a small number of suppliers that make up a large proportion of the market share are designated as more concentrated, and are at greater risk of low levels of competition. NERA also analysed the level of concentration of schemes against the classification of those schemes into five broad geographical types, ranging from 'continuous urban', where a scheme is part of a larger conurbation eg Manchester, to 'rural' where a scheme lies in a predominantly rural area eg Sedgemore / Taunton Deane.
- 5.50. The analysis shows that approximately 15% of schemes nationally could be characterised as concentrated, and that these schemes tended to be rural, with a low population density and low volumes of crime. These schemes are less likely to be able to sustain large numbers of providers and this is simply a characteristic of the smaller volume of work available.
- 5.51. Competition, and the ability to amend price, provides the potential to increase the number of providers in concentrated areas, however it will be important to monitor the competition process and the outcomes of tenders to ensure that collusion does not occur. Issues of conflict will also be managed in areas with a low number of suppliers by the requirement for back-up from a neighbouring scheme, as outlined in chapter 4.
- 5.52. The pilot areas for the introduction of best value tendering are Greater Manchester, a mostly urban area, which has scheme areas categorised as low risk under NERA's analysis, and Avon & Somerset, which has a number

¹² The complete version of the technical annex developed by NERA is published at www.legalservices.gov.uk. Follow the links to >CDS >Crime Consultations
March 2009

of concentrated and rural schemes, but only one, Mendip Yeovil & South Somerset, which NERA suggests may be at risk of a low level of competition.

- 5.53. Piloting in these differentiated CJS areas with the variations we have proposed for different schemes will allow us to review the tender process and the impact of price tendering in both urban and rural schemes, and where current levels of concentration vary.

Sharing risk under the contract

Unforeseeable changes

- 5.54. Under any fixed-price contract there are risks that changes in circumstances may mean that prices bid under the tender process are no longer the right price for the market. Should these risks be realised, the resultant costs may be borne by the provider, the LSC or both.
- 5.55. Under any tender process the price bid by providers will contain a premium for this risk borne by them. To reduce this risk, and resulting premium, we will endeavour to publicise as part of the tender any changes known to the LSC at the time of tender. However, inevitably not all of the potential risks will be identifiable at the time of the tender, and if realised, some risks may lead the price bid to be unsustainable.
- 5.56. There are two external factors that are inherently difficult to predict and which may affect the sustainability of price under the best value tendering model:
- changes to legislation
 - changes in the crime procedure rules.
- 5.57. We recognise that, should changes take place that are not anticipated at the time of tender and this leads to prices becoming unsustainable, there is the potential for providers to exit the market, leading to an interruption to client supply.
- 5.58. Response to the first consultation overwhelmingly asked for the LSC to build capability into the contract to share the risk of any unanticipated external changes. The LSC has a limited capability to amend contracts during their cycle, primarily in response to changes in legislation that necessitate contractual changes, but this is unlikely to be a flexible enough tool to share risk.
- 5.59. Therefore should changes take place that render the price set during the tender unsustainable, we would propose that incumbent providers have the ability to request a re-tender, which would allow providers the opportunity to determine a sustainable price, given the nature of the change. Any such tender would be required to be open to new bidders in line with procurement law.

- 5.60. We would agree to undertaking a re-tender where more than 50% of contract holders within the scheme requested this, and where evidence was provided that the external changes identified had led to the prices paid becoming unsustainable. As currently provided for in the contract the supporting evidence required may take the form of audited accounts.

Changes in CJS estates

- 5.61. It is not proposed that estate change for magistrates' courts will affect the sustainability of prices for magistrates' court work, which are set at a national rate.

Police station closures

- 5.62. It may or may not be possible to predict police station closures at the time of tender. Where these can be forecast, we will let contracts that correspond to proposed police station closures. However, where these changes have not been predicted, we propose to adopt the following approach.
- 5.63. Where police stations close either permanently or for significant periods of time (eg in excess of six months), the work is diverted to an alternative police station, but the rota for the original station is maintained. We propose that where work is diverted, providers from the original area are able to claim either the previous fee as set by the tender in their area, or the fee set by the tender in the area the work is diverted to (the lowest winning bid in the sealed bid tender process), whichever is the higher, for the remaining duration of work being diverted or of that contract, whichever is the shorter. This ensures that we have capacity in the system to deal with increased volumes at the diverted site.
- 5.64. Subsequent contracts would be tendered based on the revised structure of the CJS in that area.
- 5.65. Where providers' work is permanently diverted, they would form part of the pool of providers on the scheme that the work is diverted to, and as such could invoke a re-tender as described above, provided that in excess of 50% of the total pool of providers requested a re-tender.

Contract length of the BVT contracts

- 5.66. There are obvious trade-offs in the determination of the optimal contract length. Shorter contract periods result in:
- the ability of providers to reset prices regularly, therefore increasing the ability to reflect change in their prices
 - potential for increased competition - the competitive pressures exerted by the possibility of new entry add to the existing competition between providers and help to reduce price
 - the need to run the process more often. The costs associated with the preparation and running of the event – particularly when staggered

contracts are used throughout the CJS areas that comprise England and Wales – could be challenging if the contract period is too short.

- 5.67. Many providers have previously expressed a preference for long contract periods, eg to recover capital costs or secure advantageous financing, even though with longer contract lengths some providers could perceive an elevated risk that the value of their contracts would be eroded over time as a result of adverse macroeconomic conditions.
- 5.68. Given the proposals, detailed at paragraph 5.54 and below, regarding risk sharing, and the limitations on amending contracts following the Unified Contract Judicial Review (UCJR), our initial proposal would be to set the contract length at two years with the ability for the LSC to extend by up to two years. We do however recognise that if providers prefer a longer contract term, and on the whole are prepared to accept the risks of this longer contract term, it is likely to be in the interests of the LSC to let longer contracts.

Providers exiting the market

- 5.69. We will seek to minimise the need to conduct numerous tenders to address allocation of work resulting from providers that exit the market mid-contract. We will maintain the right to re-tender, but consider the following factors in deciding whether a further tender is required:
- the number of remaining providers
 - the extent to which conflict issues can be addressed
 - when in the contract life cycle providers exit.
- 5.70. Given the above, we would therefore generally propose the following approach. Where providers exit the market but at least six providers remain, we will offer any slots that become vacant to existing providers on the scheme in proportion to their current share of slots. Providers' rights/obligations to take up a reasonable amount of extra work (if we decide not to re-tender) in the event of other providers exiting the market will be set out in the BVT contract.
- 5.71. Where providers exit the market and less than six providers remain, we will consider how long is left for the contract to run, and the extent to which conflict issues arise on that scheme that cannot be managed by the remaining providers. Where possible, we will offer any slots that become vacant to existing providers on the scheme in proportion to their current share of slots on a provisional basis and continue to monitor the operation of the scheme, particularly to ensure that conflicts of interest can be addressed. Providers' rights/obligations to take up a reasonable amount of extra (if we decide not to re-tender) in the event of other providers exiting the market will be set out in the BVT contract.
- 5.72. Where conflict issues are likely to arise or have arisen, or where providers are unable to take up the additional capacity, we will undertake an open tender to reallocate the vacant slots, or slots that have been reallocated on a

provisional basis. We may at this stage vary the minimum and maximum bid size available during this additional tender to secure a sufficient number of providers, and, where possible, allow current scheme providers to bid for additional work (up to the original maximum bid size).

Question 27

Do you agree with the following proposals on risk sharing:

- the ability for providers to request a re-tender in the circumstances set out?
- the introduction of change provisions when police stations close?

Question 28

Do you agree that the contract length should be 2 years (+ ability to extend by up to 2 years)? What would the ideal contract length be for you?

Question 29

Do you agree with the way in which we propose to reallocate work should providers exit the market part way through a contract?

Volumes of work: Risks and impacts

Security of volume

- 5.73. While estimates of available police station and magistrates' court work volumes will be provided, the tender model provides no guarantees on volumes of cases arising from either the police station or the magistrates' court. Volumes may vary from time to time, and average volumes on each scheme may vary. The only way to truly guarantee volume is to introduce a system that directs clients to specific providers. Experience of other jurisdictions and research has shown that to do so may reduce the incentives to provide a quality service. Equally, research has also shown that clients value the ability to make choices between contracted suppliers.
- 5.74. While the system does not guarantee volumes, it guarantees the ability of providers to access work through duty slots and limits the number of providers that are able to undertake own client work at the police station, and, in the first option outlined at paragraph 4.62, at the magistrates' courts. These changes increase certainty from the current system. The volumes that are ultimately obtained through the contract are, to an extent, within the ability of the provider to influence. In constructing bids, providers must make judgements based on their level of confidence in retaining police station duty clients through to any magistrates' court appearance, and attracting new clients.

Neighbouring schemes

- 5.75. Under the proposed model, while providers will be able to bid to provide police station services in more than one scheme, providers who do not win bids in their chosen schemes will not be able to provide services that are paid for under contract in those schemes.
- 5.76. Some clients may regularly require police station services in more than one scheme area. This may mean that they will not be able to receive legal aid services from their preferred solicitor unless the provider wins in more than one scheme, and will instead have to regularly instruct two or more providers.
- 5.77. Given that a provider will be able to make bids for several schemes, and clients have a choice of solicitors that have won blocks within a scheme, we do not anticipate that a large number of clients will be significantly affected by this change. All providers will have passed the minimum quality threshold.
- 5.78. Under the second option proposed in paragraph 4.68, client choice at the magistrates' court is not restricted. Clients who wish to retain the same solicitor for the purpose of police station advice may elect to engage their preferred solicitor on either a private or, where providers wish, on a pro bono basis at the police station. These providers can then conduct magistrates' court work on a legally aided basis where they hold a CDS Contract 2010.

Previous clients

- 5.79. Clients may currently choose to instruct a solicitor from whom they have had previous advice or representation but who is not located in the scheme in which they are arrested. This may be because of a related matter, of which the solicitor has specific information, or it may simply be the client's preferred choice.
- 5.80. While in many cases the client will be likely to receive the same or similar service from another provider based in the scheme area that they require, there may be an impact on the client if under the new model they are compelled to instruct a new solicitor even though there is significant information relating to the matter arising from previous matters. Clients who wish to retain the same solicitor, who does not hold a BVT contract, for the purpose of police station advice in a BVT area may elect to engage their preferred solicitor on either a private or, where providers wish, on a pro bono basis. Under the second option proposed in paragraph 4.68, these providers could then conduct magistrates' court work on a legal aid basis where they hold a CDS Contract 2010.

Niche providers

- 5.81. Niche providers may specialise in a particular area of work or specialise in providing services to a particular client. For instance clients may be referred to a particular provider through a third party organisation such as a union.

- 5.82. While firms of this nature may conduct a significant amount of police station work it is unlikely that this will be concentrated in one geographical location, and therefore it will be unlikely to be economical for those providers to choose an area or areas in which to bid.
- 5.83. While in many cases the client will be likely to receive the same or similar service from a provider based within the scheme area they require, there may be an impact on the client if under the new model they are compelled to instruct a new solicitor even where the case or client group may have specific needs that they believe may be better met by a specialist provider. Clients who wish to retain the same solicitor, who does not hold a BVT contract, for the purpose of police station advice in a BVT area may elect to engage their preferred solicitor on either a private or, where providers wish, on a pro bono basis. Under the second option proposed in paragraph 4.68, these providers could then conduct magistrates' court work on a legally aided basis where they hold a CDS Contract 2010.

Quality in best value tendering

Peer Review, the Specialist Quality Mark and key performance indicators

- 5.84. The LSC is committed to ensuring that legal aid clients receive services that meet our specified requirements, and quality is a key part of our current and future commissioning process.
- 5.85. We propose that for the initial areas in the pilot, the quality framework will be based on maintaining the Specialist Quality Mark and current professional, supervisory and training requirements (with enhancements, detailed below), achieving a Peer Review rating of three or above, key performance indicators (as shown in the Unified Contract (Crime) July 2008 plus one addition and one amendment), management information and current audit tools.
- 5.86. In order to have a truly competitive market, the LSC wants to facilitate the entry of new providers into the market. We consider this as fundamental to ensuring effective competition in future bids rounds and see it as integral to the sustainable future of criminal legal aid services.
- 5.87. After the initial pilot, the requirement for a Peer Review rating of three will no longer be an entry requirement for best value tendering but it will remain a contractual requirement for those successful in the tender. To date, fewer than 5% of crime providers have failed to achieve a Peer Review rating of three or above on their first review. Fewer than 1% fail on second review.
- 5.88. However the LSC will continue to use current contract management methods, such as key performance indicators (KPIs) and control audits to identify potentially high-risk providers. Should, through the process of this contract management, any potential concerns be raised about the quality of a provider's performance (through unusual case profiles), a Peer Review may be prioritised for these providers.

- 5.89. Providers who, after following the published Peer Review process, receive an unacceptable rating (four or five) will have their contract terminated in accordance with our rights under the standard terms.
- 5.90. In addition we will make the following changes to the KPIs and time limits to ensure that clients' interests continue to be safeguarded.
- Introduce one new KPI for those firms undertaking work in BVT pilot areas. From the start date of the contract, firms will be required to accept a minimum 50% of back-up calls offered to them by the DSCC, and the time limit in the contract specification for accepting these calls before they are re-deployed will be set at two hours.
 - Amend the current time limit in the contract specification for accepting own client calls before they are re-deployed from two hours to 30 minutes for those undertaking work in BVT pilot areas. This will bring the requirement into line with the time limits for accepting duty rota and panel calls. DSCC performance statistics for the last year show that 95% of firms nationally are currently meeting this requirement.
- 5.91. Where providers accept calls, first contact with the client should be made within 45 minutes in 80% of cases.

Supervisor qualification and fee earner ratio

- 5.92. Best value tendering will remove the direct link between the number of duty solicitors employed by a firm and the number of slots allocated. Best value tendering also means that all firms must undertake an element of duty work.
- 5.93. Historically duty work has been delivered by firms that must have employed solicitors that are accredited by the Criminal Litigation Accreditation Scheme (CLAS), which covers both the police station qualification (PSQ) and magistrates' court qualification (MCQ).
- 5.94. Accreditation for MCQ is not currently a requirement for providers that do not deliver duty work. These providers have been able to qualify as supervisors through obtaining the PSQ and demonstrating casework experience.
- 5.95. As we move to a procurement system that may potentially result in fewer providers undertaking work in some schemes, and adds a requirement to follow duty work through to the magistrates' court, we want to ensure that clients who choose their providers are able to access services that are delivered or supervised by CLAS-accredited solicitors, ie supervisors have obtained both the PSQ and MCQ.
- 5.96. We therefore propose that qualification as a supervisor must be through accreditation by full CLAS ie obtaining both the PSQ and MCQ.
- 5.97. In addition, as we are breaking the direct link between duty solicitors and allocation of slots, we wish to ensure that all fee earners have access to

appropriate levels of supervision. We therefore propose to introduce a minimum ratio of one supervisor to four fee earners. This ratio applies to any employed or designated fee earner. Providers delivering CDS work must not exceed this ratio for staff working on crime cases.

Ongoing requirements for duty solicitors

- 5.98. In removing the direct association between duty solicitor rotas and individual duty solicitors we will also remove the requirement for duty solicitors to undertake personally 50% of slots allocated to them.
- 5.99. In order to ensure that the experience of duty solicitors does not diminish over time, and to ensure that they maintain a working and current knowledge of police station and magistrates' court practice and procedures, in the proposals for the revised Duty Solicitor Arrangements (as moved into the contract specification) we propose to introduce the following requirements.
1. All duty solicitors who wish to perform duty work on duty schemes in the BVT pilot areas should either:
 - be accredited
 - have been re-accredited by the Solicitors Regulatory Authority (SRA) before the start date of the contract
 - become re-accredited by the SRA within one year of the launch of the re-accreditation process¹³.
 2. An amendment to the current requirement increasing the number of police station attendances duty solicitors must undertake per year from 12 to 24, with a minimum requirement of at least one attendance per month¹⁴.
 3. Duty solicitors must undertake a minimum of 12 magistrates' court attendances per year, with a minimum requirement of at least one attendance per rolling quarter¹⁵.
- 5.100. We would expect that providers would factor any additional cost of meeting these requirements into their bids in BVT areas.
- 5.101. We will continue to examine ways in which quality standards can be driven up, over time.

¹³ The SRA has recently extended all Criminal Litigation Accreditation Scheme (CLAS) memberships to January 2010. No details are available from the SRA at the time of publication regarding the process that will be followed after that point to either require re-accreditation or to extend current memberships.

¹⁴ Attendances may be either on an own solicitor or a duty solicitor basis.

¹⁵ Attendances may be either on an own solicitor or a duty solicitor basis.

Question 30

Do you agree with the proposal that under BVT contracts solicitors may only qualify as supervisors through CLAS accreditation?

Question 31

Do you agree that the requirement for the supervisor to fee earner ratio should be not lower than 1:4? If not, what would the appropriate ratio be, and why?

Question 32

Do you agree that the individual continuous qualifying requirements for duty solicitors should be amended as proposed?

Preparing to bid

Getting providers ready for tendering

- 5.102. The LSC recognises the demands that change will place on providers, particularly in the current economic climate. Some providers will have to make changes to internal structures and to the ways in which they provide services in order to maximise efficiencies. The Provider Readiness section of the LSC is at an advanced stage of planning how we can best support providers through change.
- 5.103. During 2007 Provider Readiness carried out a survey of the current IT capability of the provider base, and commissioned an independent financial survey by consultant Andrew Otterburn. These surveys have crystallised the requirement of the provider base for support, and in consultation with The Law Society, and our Provider Reference Groups, Provider Readiness has designed a detailed programme of training. We are currently looking at the possibility of making this available face to face in small workshop style events, and online.
- 5.104. The proposal under consideration is for training that will be devised and delivered by experienced consultants who will understand the current challenges faced by publicly funded providers of legal services. It will be delivered in a number of separate modules covering IT and basic financial understanding, the opportunities offered by growth, merger and alternative business structures, and longer term strategic planning. We will seek to tailor the training in order to make it accessible to all areas of the provider base, and in particular we will be working with representatives of professional bodies to ensure that we are engaging fully with black, Asian and minority ethnic firms in order to ensure that the support offered fully addresses their specific needs. More information on these proposals can be found on our website¹⁶.

¹⁶ Please go to: <http://www.legalservices.gov.uk> and follow the links to >about us >transforming legal aid

Area prospectus

5.105. A copy of a template area prospectus is attached to this document at Annex 9. It should be noted that this has been populated with example data and is in no way representative of the local market information that will be published in advance of the tender. We have published the area prospectus now to invite views from practitioners on:

- the classifications of data used
- whether there is unnecessary information within the prospectus
- whether there are other types of information providers would like to see incorporated.

5.106. A specific prospectus for each area has not been published at this time. It is our intention to publish a version of the specific area prospectus for the relevant areas prior to running the pilot when tenders open and, if the decision to roll-out is taken following the pilot, prior to running tenders elsewhere under a BVT system. Actual market information will only be published in the versions of the prospectus issued prior to tender.

Question 33

What are your views on the area prospectus? Specifically:

- the classifications of data used
- whether there is unnecessary information within the prospectus
- whether there are other types of information you would like to see incorporated.

6. Pilot Tender Evaluation and Indicative Timetable for Roll-out

- 6.1. If a pilot BVT tender were to be undertaken following this consultation, a full evaluation of the tender would be conducted prior to a decision being taken as to a more widespread roll-out of BVT. Our plan for wider roll-out is detailed in Annex 4.
- 6.2. Any pilot tender evaluation would address the following areas.
- Operational review of the tender mechanism, dealing with issues such as whether providers and LSC were able to access the right information at the right time, obtaining feedback from those that participated
 - Assessment of prices obtained through tender, reviewing the extent to which prices in different schemes had increased or decreased
 - Assessment of coverage obtained through tender, to review whether sufficient supply had been secured to enable the LSC to continue to meet its statutory duties, and the potential impact on civil supply
 - Assessment of the extent to which either consolidation or fragmentation of the market has occurred, comparing the number of providers on schemes to the current supply base, and reviewing the extent to which different size firms had secured contracts for different volumes of work
 - Assessment of the ability of firms to adjust structures, where necessary, to deliver under new contracts, assessing the extent to which providers were planning to adjust structures and ensuring that providers that had secured work through BVT would meet the commitments made in their bids
 - Equalities impact assessment of tender outcome
- 6.3. We will publish any review of any pilot tender, together with the decision as to whether full roll-out is to go ahead.
- 6.4. Where any review recommends full roll-out, we will prefer to expedite any roll-out timetable. Given the budgetary pressures that the LSC and wider MoJ family face, and the potential benefits of BVT, we feel that these benefits should be realised as soon as possible. Our preferred indicative roll-out timetable is shown at Annex 4.
- 6.5. Where the outcome of the pilot tender review reveals potential issues that can be addressed, we may slow down any roll-out timetable to enable additional work to be undertaken ahead of any further roll-out. The indicative timetable for any roll-out in these circumstances is therefore also shown at Annex 4.

Rolling out contracts to incorporate BVT

- 6.6. It is our intention to limit the need to terminate any contracts. We therefore intend to let the CDS Contract 2010 with clauses that 'future proof' the contract to allow for BVT roll-out. These will include the following:
- Clauses to allow for continuation of service to ensure that providers are able to undertake representation at the magistrates' court in cases where they have undertaken publicly funded police station work; this is regardless of where the magistrates' court is based. These clauses will be applicable for the contract and irrespective of BVT roll-out
 - Clauses to reflect any change in payment rate for magistrates' court work as BVT is rolled out. Where any provider undertakes work in a magistrates' court where BVT is rolled out any payments will be as described in paragraph 4.81 and below. This clause will necessarily be linked to the proposed timetable for any BVT roll-out
 - Clauses to restrict providers from undertaking own client police station work (and potentially magistrates' court work dependent on the final agreed model for BVT other than those cases described above) in areas where BVT is rolled out. This clause will necessarily be linked to the proposed timetable for BVT roll-out
 - Clauses to make it clear that duty solicitor work will be allocated in schemes as at present, up until BVT is rolled out in that scheme. After this point providers with the CDS Contract 2010 will not be scheme members or allocated police station slots or magistrates' court duty sessions unless they are successful through the BVT tender. This clause will necessarily be linked to the proposed timetable for BVT roll-out.
- 6.7. These clauses enable those providers who are not successful in any BVT tender to continue to undertake any work that is not exclusive to providers who have won in a BVT area (ie Crown Court work, and potentially magistrates' court work where this is not exclusive). This approach will reduce the need for numerous contract terminations, and additional applications to tenders.
- 6.8. Where providers are successful through the BVT tender, they will receive a BVT contract that will replace their CDS Contract 2010, detailing the work they have access to (ie which police station schemes they can undertake work on and the allocation of duty sessions at both police station and magistrates' court, and in addition, where magistrates' court work becomes exclusive, the licence to undertake work in courts where they have been successful through the BVT tender). These contracts will also cover any additional work that is not exclusive to BVT contract holders, such as Crown Court work.
- 6.9. The replacement BVT contracts will include additional clauses to address any new specification requirements, such as those detailed in chapter 5. We will

consult on amendments to the specification and Duty Solicitor Arrangements with representative bodies in the usual way (as described in Annex 2) after we have responded to this consultation.

The future of best value tendering

6.10. This consultation sets out the proposals for introducing best value tendering for crime lower work. However, in line with the direction of travel set out in Lord Carter's report ¹⁷ we will continue to review the applicability and suitability of tendering to all areas of legal aid. In particular we will look to prioritise in those areas where:

- there is a potential for savings
- there is a potential, or actual, breakdown in required supply at current price
- we are commissioning new types of services.

6.11. Any future proposals would be subject to full consultation.

Question 34

Do you have any comments on the proposals for the scope of the pilot review?

Question 35

Do you have any comments on the proposals for the roll-out timetable?

¹⁷ 'Legal Aid: A market-based approach to reform'

Summary of Questions

Question 1

Do you agree that the creation of 'blocks' will assist providers in bidding for work in more than one area?

Question 2

What comments do you have regarding the way in which we are proposing to calculate blocks?

Question 3

In your view are the block sizes proposed for Manchester and Avon & Somerset CJS areas reasonable? Please comment.

Question 4

Do you have any comments on the proposals for a minimum bid size?

Question 5

Which of the two options for a minimum bid size do you prefer?

- Minimum bid size is a single block
- Minimum bid is based on two or more blocks that give access to a volume of work that could generate a sustainable level of income for one fee earner

Question 6

Do you have any comments on the proposals for a maximum bid size?

Question 7

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

Question 8

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

Question 9

Do you agree that securing a minimum of 4 providers, and introducing additional back-up requirements will help ensure that conflicts are handled appropriately?

Question 10

Do you agree with the proposal to require back-up in all BVT contracts for contiguous schemes? Please explain your answer.

Question 11

In BVT areas would you prefer that either:

- Option 1 - only those providers that secure a BVT contract in an area can undertake magistrates' court representation in that area
- Option 2 - providers that do not secure a BVT contract, but do hold a CDS Contract 2010, have the opportunity to undertake publicly funded magistrates' court work as they do now, ie with no restrictions?

Question 12

Do you agree with the proposal to unify the escape threshold for exceptional cases across a CJS area? Please comment.

Question 13

Do you agree with the proposal to unify exceptional cases and magistrates' court fee levels? Please comment.

Question 14

Are the general principles proposed for assessing how providers intend to fulfil their bids realistic and sensible?

Question 15

Would you prefer the price-setting mechanism to be:

- Option 1 - sealed bid?
- Option 2 - online auction?

Please explain your reasons.

Question 16

In Option 1 - sealed bid, do you consider a three-day window to enter bids reasonable? If not what length of days would you prefer?

Question 17

In Option 1 - sealed bid, what sort of support do you think is necessary in order to ensure you are able to participate in the process?

- face-to-face training prior to the tender
- telephone helpline
- online support
- instruction DVD/webcast
- other – please give details.

Question 18

In Option 2- online auction, please indicate your preferred option for making bids in rounds:

- as quickly as possible with 30 minutes between bid windows
- bidding up to four times a day with at least 2 hours between bid windows
- bidding twice a day with at least 6 hours between bid windows
- bidding once a day with at least 12 hours between bid windows
- other – please give details.

Question 19

When making your bids, what time windows would you prefer?

- 7am-10pm
- mornings
- afternoons
- weekends
- office hours only
- other (please specify)

Question 20

In Option 2 - online auction what type of support do you think is necessary to ensure you are able to participate in the process?

- face-to-face training prior to the auction
- telephone helpline
- online support
- instruction DVD/webcast
- access to the bidding platform at locations outside your office
- other – please give details.

Question 21

Do you have any comments on the proposed entry requirements to bid?

Question 22

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

Question 23

To what extent do you consider that the principles set out for the scheme rules for BVT are appropriate?

Question 24

Do you have any comments on the proposals to abolish panels in BVT areas?

Question 25

What are your views on the additional requirements to ensure providers must deliver services at the magistrates' court where they have previously provided the police station element of the case?

Question 26

Do you think that removing the requirement to report profit costs, travel and waiting on the majority of police station and magistrates' court cases under BVT would be of benefit to providers? Please comment.

Question 27

Do you agree with the following proposals on risk sharing:

- the ability for providers to request a re-tender in the circumstances set out?
- the introduction of change provisions when police stations close?

Question 28

Do you agree that the contract length should be 2 years (+ ability to extend by up to 2 years)? What would the ideal contract length be for you?

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Question 33

What are your views on the area prospectus? Specifically:

- the classifications of data used
- whether there is unnecessary information within the prospectus
- whether there are other types of information you would like to see incorporated

Question 34

Do you have any comments on the proposals for the scope of the pilot review?

Question 35

Do you have any comments on the proposals for the roll-out timetable?

The following questions should be considered along with the impact assessment at Annex 1.

Question 36

Do you agree with the methodology and conclusions of the initial impact assessment that accompanies this consultation? If not, please give details of the aspects of the assessment you disagree with. Do you have any suggestions as to how the impact of the proposals should be assessed?

Question 37

Do you agree with the methodology and conclusions of the initial equality impact assessment, which sets out our assessment of the potential impact of the proposals on people because of race, gender, disability and age?

If not, please explain your objection. Can you suggest any other factors that should be taken into account and do you have any information that might assist the Commission in assessing whether the proposals in this consultation paper might impact disproportionately on particular groups?

Responding to this Consultation

Please send your responses to this consultation by 19 June 2009 to:

Email: cds.directorate@legalservices.gov.uk

Address: CDS Policy Team
Legal Services Commission
4 Abbey Orchard Street
London SW1P 2BS

Electronic versions of this document can be found at www.legalservices.gov.uk

We are able to supply copies of this consultation document in alternative formats (such as large print) where a reasonable request is made.

For enquiries or comments about our consultation process, you can also contact Cate Jolley, Consultation Co-ordinator via email at consultation@legalservices.gov.uk or on 020 7783 7200.

Please attach any evidence to support your response. Representative groups are asked to give a summary of the people and organisations they represent, and where relevant who else they have consulted in reaching their conclusions, when they respond. Individual contributions will not be acknowledged unless specifically requested.

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004). The LSC will process your personal data in accordance with the DPA.

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, among other things, with obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Commission.

Your opinions are valuable to us. Thank you for taking the time to read this document and respond.

Annex A: The Seven Consultation Criteria

This document and the consultation process have been planned to adhere to the Code of Practice on Consultation and are in line with the seven consultation criteria, which are:

Criterion 1: When to consult

Formal consultation should take place at a stage when there is scope to influence the policy outcome.

Criterion 2: Duration of consultation exercises

Consultations should normally last for at least 12 weeks, with consideration given to longer timescales where feasible and sensible.

Criterion 3: Clarity of scope and impact

Consultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposals.

Criterion 4: Accessibility of consultation exercises

Consultation exercises should be designed to be accessible to, and clearly targeted at, those people the exercise is intended to reach.

Criterion 5: The burden of consultation

Keeping the burden of consultation to a minimum is essential if consultations are to be effective and if consultees' buy-in to the process is to be obtained.

Criterion 6: Responsiveness of consultation exercises

Consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation.

Criterion 7: Capacity to consult

Officials running consultations should seek guidance in how to run an effective consultation exercise and share what they have learned from the experience.

Annex B: Interested stakeholders

This consultation document may be of particular interest to anyone with an interest in the procurement of criminal defence services in England and Wales. This includes legal firms, legal representative bodies, client interest groups and other organisations across the criminal justice system. Representative bodies and agencies are asked to alert their key stakeholders to the launching of this consultation exercise.

Please feel free to forward this document, a link to it or the contact details set out at the beginning of this document to any organisations or individuals who you think might be interested.

We look forward to receiving a wide range of views.

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