Sarah Daley, of Garden Court North Chambers in Manchester, argues that best value tendering (BVT) will not work in criminal legal aid because the nature of the service is completely unsuited to it.[1] This article will compare and contrast the nature of the service with primary health care, where BVT has been in operation since April 2004, to illustrate why this will be a disastrous exercise.

Cut price tendering in criminal legal aid

Dr A C L Davies, Reader in Public Law at Oxford University, has stated that: *Policies of contractualization in public services do appear to have proceeded without a clear view on whether any services are inherently unsuitable for delivery through this method.*[2]

Best value

The BVT scheme is not a genuine BVT exercise and is, in fact, price competitive tendering. A comparison with any genuine BVT scheme from the NHS will demonstrate this. During a tender for a GP practice, the potential contractor is assessed on a multiplicity of factors, only one of which is the price at which it can deliver the service. Each factor is given a weighted percentage in terms of its overall importance.

The short-listed candidates are then invited to an interview to discuss their application. In some primary care trusts (PCTs) the bidders meet with members of local patient groups and are assessed by them. This detailed procedure seeks to best identify which contractor is providing the best value rather than the lowest price.

The BVT scheme does not seek to establish any such complex web of identifying factors of a successful criminal legal aid practice. Solicitors must establish that they can meet a minimal quality standard. Following the passing of this threshold, the sole determinative factor of who will be the winning contractor is who has bid the lowest price.

Set to self-destruct

The BVT scheme is set to self-destruct from the outset because of the extreme pressure that existing providers will find themselves under, leading to irrational and unsustainable decisions. The Legal Services Commission (LSC) has not set a price floor for how low providers can bid which could allow zero-priced or negative bids.[3] This is contrary to both the Public Contracts Regulations 2006 SI No 5 that allow government purchasers to reject bids if they are unfeasibly low and government guidance on how to secure best value.[4]

BVT is used in primary health care to address GP shortages or where a service poses a risk to patients. It is not generally used against existing contract-holders to force them to compete against each other and fight for their contracts.

The system in operation

An analysis of the actual system through which criminal legal aid services will be delivered demonstrates that the BVT scheme will not deliver quality services which are sustainable, self-regulating or cost-efficient.

The nature of the service provided

The LSC has attempted to package work into definable units which can be tendered for. Solicitors will be bidding for units which are designed to produce the same number of cases. Therefore, if one police station generates ten cases every five days and another generates ten cases every two days, both units would attract the same price. No regard is had to what type of cases these may be or to any special requirements that the client may have: that risk is on the contractor.

These cases could range from shoplifting to murder and the clients could have needs ranging from mental health problems to requiring a translator. Solicitors will be pressurised into meeting the bidder's guess about the time that work should take them or risk running the business at a loss.

By way of contrast, the work of GPs is predictable. GPs are required to consult with patients for no longer than 15 minutes, which carves their work into easily definable slots. They have advanced notice of why most of their patients are attending, which enables them to triage some patients to nurses or health care assistants in order to free up valuable GP time. The NHS recognises that some patients have more intensive needs and hence the GP will be paid a sum over and above the average sum: asylum-seekers are one such example.

Choice in health and criminal legal aid

In primary health care, choice of service-users has become a driving force in the improvement of the quality of services and is now entrenched in the NHS Constitution. The Health Secretary has just announced that GP boundaries will be abolished to this end. The ability of the patient to move elsewhere is a powerful incentive to provide as high a quality of service as possible.

This is because the income of a GP surgery is calculated by way of price per patient x number of patients. In a surgery with more than one GP, the NHS has recognised that it is very important to patients to see a doctor of their choice and have hence formalised this as a quality standard.

The BVT scheme has no such regard for the choice of the service-user and the powerful role that this plays in maintaining quality in a market. The LSC has sacrificed choice for exclusivity to make an otherwise unattractive scheme more palatable to potential contractors.[5]

The LSC says that it is only formalising what happens currently as it is only restricting the geographical area from which a choice can be made.[6] This ignores the very real likelihood that once the first contracts are awarded, those specialist criminal legal aid solicitors who are not awarded a contract will close thus reducing significantly the choice available to clients in the future. It also ignores the likelihood that the firms which are awarded contracts may bear no relation to the most popular solicitors in the area.

Incentives and quality

The BVT scheme has not been designed with the incentive systems that a self-regulating market requires. These are present in the primary health care market. On top of their global sum income, there are many other sources of income that GP surgeries can receive by way of providing what are termed 'enhanced services'. Through these additional payments, GPs are constantly incentivised to provide as many services as they can to their patients.

The Quality and Outcomes Framework is a reward system which is designed to incentivise GPs constantly to demonstrate their quality on paper. Each year, every GP surgery will receive a payment which is proportionate to their percentage score in addition to their other sources of income.

The LSC relies heavily on contract monitoring and key performance indicators (KPIs) as its means of ensuring quality in the market. In response to questions at the recent LAG conference, 'Legal aid at 60: bridging the justice gap', the LSC's chief executive Carolyn Regan said that quality would be maintained through contract monitoring. *Best value tendering for CDS contracts 2010. A response to consultation* deals with quality at paragraphs 1.20–1.24. At paragraph 3.113, reference is made again to rectifying behaviour through recourse to the contract.[7] KPIs are, however, a poor means of maintaining quality because private law remedies cannot deliver public service improvements; the remedy for breach of contract is money or contract termination.

Enforcement of these contracts will be very difficult for the same reasons it is difficult to enforce any government contract for non-standard goods. Once firms begin exiting the market the LSC may come to regret its lack of power and the shortage of alternative providers to which to turn.

Contract management without a public law of contract

The LSC's faith in contract management as a means of ensuring quality is misplaced. In *The public law of government contracts*, Dr Davies considers the peculiar risks involved in public contracting.[8] The complexity of providing criminal services will make it difficult to reduce into writing, with renegotiation a likely consequence (at *Best value tendering for CDS contracts 2010. A response to consultation* paras 5.77–5.78, the LSC has said that the expensive process of retendering will be its preferred option to renegotiation).[9]

Equality in the provision of services

The LSC has so far failed to comply with its positive duty to promote equality and eliminate unlawful discrimination by failing to conduct an equality impact assessment on the effect of these pilot schemes. There is no indication that it intends to comply despite prompting from the Criminal Bar Association and the Black Solicitors Network among others.

In contrast, health care providers must reach out positively to minority groups and satisfy the PCT that they are catering for the needs of all their patients in an effort to reduce health inequality. The NHS recognises that taking a neutral approach to the provision of a service as important as health care can be indirectly discriminatory. The same principle inevitably applies to ethnic minority clients of criminal legal aid solicitors.

Public consultation and service-user involvement

The NHS has become a user-led service with most surgeries having patient groups which meet and discuss the needs of the patients and the management of the surgery with GPs or service providers. Criminal legal aid has no such accountability mechanism. Services are particularly vulnerable because there are few people willing to claim an interest. This responsibility has passed to criminal solicitors who the LSC can dismiss as interested only in their own profits. We may be falling into the unfortunate trap of not appreciating the value of criminal defence solicitors to society until most of them are forced to leave the profession by these reforms.

High stakes

The health of our legal aid service is something too valuable to gamble with by introducing BVT in criminal legal aid. While the LSC plays at creating a market and dabbles in the complex area of commissioning, our most fundamental value of liberty is at stake – and it is the liberty of some of the most disadvantaged and vulnerable people in society.

Solutions and the way forward

It is time for the LSC to focus its attention on where money could be saved in criminal legal aid. Recently, the Ministry of Justice has highlighted some of the inconsistencies and inefficiencies in the consultation paper *Legal aid: funding reforms*.[10] It is well known that one per cent of Crown Court cases are taking up almost 50 per cent of the legal aid budget, but this is not the target of these reforms.[11] There is nothing to suggest that criminal legal aid lawyers are not otherwise already providing excellent value for money.

1 The LSC has announced the postponement of the pilot of its BVT scheme for criminal defence services in Greater Manchester and Avon and Somerset. The pilot will now be postponed for at least two months from the proposed launch in October 2009. See 'CDS News' at: www.legalservices.gov.uk/criminal/cds_news_10310.asp.

2 *The public law of government contracts*, Dr A C L Davies, Oxford University Press, 2008, p215.

3 *Best value tendering for CDS contracts 2010. A response to consultation*, LSC, July 2009, para 3.153, available at: https://consult.legalservices.gov.uk/inovem/consult.ti/BVT2010/listdocuments.

4 See, for example, *Managing public money*, HM Treasury, 2008, Annex 4.4, available at: www.hm-treasury.gov.uk/psr_mpm_ index.htm.

5 See note 3, para 3.63.

6 See note 3, para 3.75.

7 See note 3.

8 See note 2, chapter 7.

9 See note 3.

10 Available at: www.justice.gov.uk/ consultations/docs/legal-aid-funding-reforms.pdf. The consultation will close on 12 November 2009.

11 Lord Carter's review of legal aid procurement, *Legal aid: a market-based approach to reform*, July 2006, p27, para 43.