

EMERITUS PROFESSOR RICHARD MULGAN
POLICY AND GOVERNANCE PROGRAM
Crawford School of Economics and Government
JG Crawford Building No. 13

Canberra ACT 0200 Australia
Telephone: +61 2 6125 2561
Facsimile: +61 2 6125 5570
Email: richard.mulgan@anu.edu.au
www.anu.edu.au

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Senate References Committee on Education, Employment and Workplace Relations
Inquiry in to the DEWR tender process to award employment services contracts

This submission is addressed to Term of Reference (a) (i) ‘the design of the tender, including the weighting given to past performance’ as well as the final Term of Reference (i) on ‘the best way to maintain an appropriate level of continuity of service and ongoing sector viability while still ensuring service quality etc’. The submission draws on arguments already published in an article on the Job Network tender process in *The Public Sector Informant* (‘Church, State and the Unemployed’, *Canberra Times* 5 May 2009). The intention is not to take sides on the issues raised in the inquiry, but more to help clarify some fundamental dilemmas in the outsourcing of public services.

Debates over the tender, and this inquiry itself, reflect a clash between two views of the relationship between governments and private service contractors. On one view, service providers under contract are independent organisations with their own priorities and objectives who choose to align themselves with the government’s specific requirements in order to seek material benefits for themselves. On the other view, service providers under contract are trusted partners of the government in the common goal of assisting those in need, a goal which they share independently of any contractual arrangement.

By and large, the former view (*contract for mutual benefit*) fits the assumptions and objectives of private sector providers who undertake the delivery of public services for profit. Operating in a competitive market, they expect to be held to the strict terms of a contract and to submit themselves to regular re-bidding for their contracts. The latter view (*partnership with shared goals*) generally suits the approach of not-for-profit providers, such as church-based organisations. They see themselves as having a mission of social service, to assist those in need, which they share with the secular institutions of government. While they willingly sign up to the conditions of government contracting and accept government payments, their rationale for providing services does not derive from the contracting process. Governments, in their turn, have been willing to co-opt them into partnership, harnessing their social conscience to the provision of public welfare.

These two approaches represent two contrasting models about the nature of contracts used in the contracting out of government services. One model is the so-called ‘classic’ contract (typified in the one-off ‘spot’ contract in a commercial market). Contractors have their own divergent interests which coalesce around a specific agreement to exchange goods and services for a particular price. Classic contracts are limited to the express terms of the contract and offer the advantages of clarity and competition.

The alternative model is the more open-ended, ‘relational’ or ‘partnership’ contract (typified in marriage or employment contracts). Because the contract covers unforeseeable situations into the future, the respective parties agree to enter into an ongoing relationship based on certain general principles. The emphasis is less on specified contractual terms and more on shared values, cooperation and trust. In many cases, the contractual relationships can continue indefinitely, until broken off by one of the parties.

In the heyday of the outsourcing movement, in the mid 1990s, the classic contract was the dominant model. Supporters of contracting out, such as the (then) Industry Commission in its 1996 report on *Competitive Tendering and Contracting Out by Public Sector Agencies*), stressed the value of clear specification and competition. Specifying precise outputs in a contract would help to re-orient public sector performance towards results. Detailed specification would also enable alternative providers to compete effectively for contracts and would thus lower costs while improving accountability.

The classic contract model still underlies the more routine areas of government outsourcing, such as cleaning and rubbish collection (where the greatest savings have occurred). For more complex services, however, such as IT and human resources management, it quickly proved inadequate, because of the frequent difficulty of specifying every requirement in advance. During the last decade, there has been a steady move towards the practice and language of relationship contracts. Contractors now tend to enter into ‘partnerships’ and ‘alliances’, endorsing the government’s overall values and objectives as a basis for the services they provide and accepting complex arrangements for ongoing communication with departmental officials.

The former Job Network was a trail-blazer in this trend, as successive contractual arrangements became less reliant on detailed specification and placed more emphasis on general overall performance. A simplified five-point ‘star’ rating system, introduced in 2001, was superimposed on the earlier host of specific performance indicators. The best performing service providers were exempted from the need to compete for new contracts. The regular tender processes became a means of replacing inadequate providers rather than of subjecting everyone to an open competition.

The government’s decision, in the recent round of tenders, to open all positions up for competition and to impose a level playing field for all potential providers has effectively moved the Job Services contracts away from the partnership model, more towards the classic contract model. By so doing, it could claim to be gaining the advantages of specification and competition offered by classic contracts while guaranteeing transparency and fairness for the process.

Commercial providers generally accept open competition as part of their working environment and appear to have had no fundamental objection to the government’s process (though entering the tender would have imposed considerable extra costs on providers who were previously exempt from tendering). Not-for-profits, however, have proved much less comfortable with the new system. Their reasons are not based solely on a natural desire to avoid competition or to avoid the costs of tendering. Because they see themselves as the government’s allies, sharing the government’s goals of public service and commitment to the disadvantaged, they have regarded the process as a betrayal of longstanding relationships and a breach of trust. As Frank Quinlan, the director of Catholic Services Australia remarked, ‘today’s decision challenges the nature of the relationship between the Government and the non-profit sector’ (*The Australian* 3/4/09).

The reaction of the church-based groups has been similar to that of a trusted employee, regularly said to be a valued member of a company’s team, who is then told that his or her job is to be re-advertised in the interests of improving efficiency and out of fairness to other prospective employees who deserve their chance to be considered. Short-term contractors expect such treatment; continuing employees do not.

In defending the conduct of the tender, the Department and the relevant Minister, Brendan O’Connor, argued that the tender process had been conducted scrupulously according to the terms of the tender, at arms-length from politicians and under the supervision of an external probity provider. Substantial weighting in the decisions (30 per cent) had explicitly been allocated to past performance. Existing providers would deliver the great bulk of new services and the proportion of services being offered respectively by the not-for-profit and private sectors remained unchanged. None the less, this response does not fully meet the issue of principle, that if the government wants a continuing relationship of trust with church-based providers it cannot be regularly subjecting them to open arms-length competition.

The present relationship of trust between government and the church-based providers was cemented under the previous government, particularly when Tony Abbott was minister (1998-2003). When Mr Abbott was called on to talk up the benefits of the Job Network, he always singled out the role of the church groups with their compassion and commitment to public service. The policy that well-performing groups would be excused from re-tendering, while not explicitly designed for church groups, certainly helped to meet these groups' expectations as trustworthy partners.

For the future, the government needs to decide whether to reinstate such a preferential system or to continue to open up all services to competition in each tender round. The latter course has the advantage of transparency and fairness and allows ministers to avoid any accusations of favouritism. But it risks alienating the church groups, whose general support and assistance will be increasingly needed by government in a time of deepening recession and unemployment.