

CONTRACTING-OUT OF PUBLIC SERVICES AND ITS IMPLICATIONS FOR ACCOUNTABILITY: REFLECTIONS ON THE AUSTRALIAN PUBLIC SERVICE (APS)

A.J. Diale

Department of Public Management
Tshwane University of Technology

ABSTRACT

Contracting-out is one of the alternatives available to the public sector for service delivery. It involves the provision of goods/services by private and/or non-profit organizations, but paid for using public funds. This arrangement raises questions about accountability. In modern democracies, accountability is taken as central to good governance, which includes among others, that public funds be expended for designated purposes, and that government administration be transparent, efficient and in accordance with the law. Two arguments come to light. Firstly, proponents of contracting-out maintain that it improves efficiency and quality by harnessing the virtues of competition, and secondly, legitimate expectations arise that the contracted provider be held publicly accountable. This article seeks to explore this notion of contracting-out of public services in the Australian Public Service and its implications on accountability. The quest to explore the aforesaid notion, two significant reports are referred to. They are *Industry Commission: Competitive Tendering and Contracting by Public Sector Agencies (Report # 48, 1996)* and *Administrative Review Council: The Contracting Out of Government Services - Report to the Attorney-General (Report# 42, 1998)*.

INTRODUCTION

Contracting-out, like other public sector reform initiatives gained widespread popularity in the last two decades. Governments world-wide embraced it with the view to improving efficiency and quality of public services by exposing them to competition with private providers. At the centre of the debate is the issue of accountability on contracted services. Claims have been forwarded that indeed contracting-out enhances

accountability, (Prager: 1994: 174-179). This claim is derived from the assumption held by political and administrative leaders that contract-management and accountability will be straightforward, as will the benefits associated with contracting. Counter claims are it that in fact contracting-out inevitably involves some reduction in accountability through the removal of direct departmental and ministerial control over day-to-day actions of the contractor and their staff, (Mulgan: 1997: 1) (Johnston and Romzek: 1999: 384).

The focus of this article is on contracting-out of public services and its implications on the accountability mechanisms within the Australian Public Service (APS). Firstly, the concept of accountability will be explored in general, and how it applies in the Australian public service. Secondly, to interrogate the notion of contracting-out by considering at the views expressed by both its proponents and those opposed to it. Lastly, a synthesis of the contracting regime within the APS will be reflected upon, and how the issue of accountability is addressed.

ACCOUNTABILITY: A CONCEPTUAL REFLECTION

Accountability is the foundation of any governing process, and the effectiveness of that process depends upon how those in authority account for the manner in which they have fulfilled their responsibilities, both constitutional and legal (Dwivedi and Jabbar: 1988: 8). At its most fundamental level, accountability involves relationships in which an individual or agency is held to answer for performance and involves some delegation of authority to act (Johnston and Romzek: 1999: 387). Another definition is that accountability may be identified as the obligation of subordinates to account to their superiors for the performance of particular duties and to accept control and direction from their superiors in the performance of such duties (Thynne and Goldring: 1987: 8). In this sense it is an aspect of responsibility relationships where one person is responsible to another for specific functions. In such relationships, accountability covers the obligation to account for performance and accept oversight and direction. Accountability relationships are rooted in performance expectations that originate from various legitimate sources within a system of governance. These include the constitution, law, democracy, public interest, agency, profession, clientele, political leadership, interest groups and employees themselves (Johnston and Romzek: 1999: 387).

According to Finn (1993: 53-4) the concept of public accountability recognizes the principle that in a democracy, public officials are seen as the people's representatives or trustees and are accountable to the public for the proper performance of their designated duties. In this regard, firstly, the purpose of accountability measures is to hold governments, agencies and officials to account for their stewardship. Secondly, accountability ultimately is to those from whom power is derived – the people. Thirdly, no single measure can secure effective public accountability on its own. A variety of measures is required. As Johnston and Romzek (1999: 387) observed, public agencies and administrators typically work within several different accountability relationships simultaneously. Fourthly, the avenues of public accountability can take three forms. They are (a) to members of the public directly either through the administrative law system or as a community through the

elections, (b) to the parliament and the parliamentary bodies such as the auditor-general and, (c) to official superiors and peers.

In the Australian Public Service (APS), the main avenue of accountability for public servants is through the hierarchical chain of departmental responsibility to ministers and through ministers to Parliament and the public (Mulgan: 1997: 3). Further, according to the Management Improvement Advisory Committee (MIAC) and the Management Advisory Board (MAB) clear priority is given to the duty of public servants to their immediate superiors. The official view of MIAC/MAB is that accountability of public servants is to be understood within a general structure of constitutional relationships in which ministers are accountable to Parliament and public servants are accountable only to ministers. In this case, accountability is generally reserved, by definition, for relationships within the hierarchical chain of departmental responsibility (Waterford: 1991: 414) (Mulgan: 1997: 2526).

Other avenues of accountability have become increasingly important in recent years within the Australian public service. The rationale for such a situation is that accountability of government to the people sensibly requires a range of alternative channels rather than the unrealistic single channel implied by the theory of a single ministerial responsibility. This view is expressed by the MIAC/MAB version of accountability at some point. For instance, Parliament has established bodies reporting direct to it, these bodies have powers of calling public servants to account and explain. These bodies include parliamentary committees, independent agents of accountability such as the Ombudsman, Auditor-General, the Administrative Appeals Tribunal and the Freedom of Information legislation which gives the right to seek reasons for administrative decisions (Mulgan: 1997: 3-4) (Mulgan: 1997: 26) (Waterford: 1991: 415). The issue of accountability with regard to contracted services within the Australian Public Service will be dealt with from a perspective of multiple accountability avenues which, as indicated above, is more of a practicality than a theory.

CONTRACTING-OUT: THEORETICAL FRAMEWORK

In simple terminology, contracting is typically viewed as a mechanism by which government can benefit from the efficiencies inherent in private markets. The market model of contracting rests heavily on one key assumption – competition enhances the probability that production will be efficient (Johnston and Romzek: 1999: 385). Sharkansky (1980: 121) also points out that contracting reflects the general proliferation of activities in modern governments beyond the conventional government departments or ministries. Its prominence came as a result of the pressure of financial stringency, the rise of the contract industry and the dominance of a conservative ideology which proclaims the efficiency and quality that accompany contracting (Evatt Research Centre: 1990: 2) (Moore: 1987: 63) (Campbell: 1986: 3).

Contracting-out according to Hartley (1984: 9), is a vast area covering the possible use of private contractors for a whole range of public services that are state-financed, but could be privately supplied. In this case, when a government contracts out a public service, it retains its funding responsibility, but hires a private company to provide the

service. In a contractual relationship between the government and a private producer or service provider, the relationship entails the government as a purchaser of goods or services that are privately produced or rendered. Such an arrangement does not abdicate the responsibility from the government to provide services instead, the government always retains control. In this case, when the government turns to the private sector for help, it develops the specifications for the job to be done and monitors the delivery and controls the funds (Campbell: 1986: 3-4) (Moore: 1987: 61) (Rimmer: 1991: 292).

The primary motivation for contracting out public services as argued by its proponents is due to government sector inefficiency, cutting government costs by employing more efficient private vendors. The injection of competition in the process is viewed as a critical feature that drives down the expenses of government goods and services. The lack of competition as it is argued, results in direct labour departments becoming monopoly suppliers, and are usually protected from possible public-private rivalry. In the absence of competition from rival organizations and private contractors, there will be no sources of information and alternative cost yardsticks to assess the efficiency of a public agency. Public sector agencies are seen as lacking efficiency incentives and inducements. Private providers are reputed to be better managed, technically more efficient, more innovative and willing to introduce new ideas, technologies, equipment and are responsive to customer needs (Moore: 1987: 61) (Hartley: 1984: 10-11) (Prager: 1994: 179-183) (Auriacombe: 1999: 134). Much as contracting out has ardent and warm supporters, so intense is the opposition.

High on the list of controversies about contracting out public services is that, it leads to the loss of managerial control and political accountability. It is argued, since the private provider is an autonomous body, it is not subject to day-to-day managerial supervision like public sector entities (Mulgan: 1997: 7) (Sharkansky: 1980: 118). It is further argued that private industry is characterized by large firms that are monopolistic and bureaucratic, and pursue non-profit aims. The reason being, these firms bid low to eliminate in-house units and eventually establish a monopoly position leading to higher prices, lack of dynamism and poor quality (Hartley: 1987: 11-12). Auriacombe (1999:ive experience that they build up by carrying out projects on their own and, the public distrust of contractors.

Another issue relates to flexibility as a common feature of contracting out. Flexible procedures for arranging contracts permit greater abuse, critics charge that contracting out does not offer all the flexibility that its supporters claim. Quality and efficiency are normally advocated by proponents of contracting out. Its critics maintain that they are not attributes that come automatically, some claims of reduced costs are simply the product of reduced services. The issue of conflict of interest is regarded as a frequent companion of contracting out and, contractors help to confound control by seeking to enhance their access to government (Campbell: 1986: 5) (Sharkansky: 1980: 118-119) (Moore: 1987: 6769).

The question of whether contracting out is desirable is beyond the scope of this article, the issue however is, if used what implications does it have on accountability mechanisms. The general view is that the logic of accountability under contracting is that of specifying the mutual expectations, responsibilities, and obligations of the contracting parties. The

accountability question is confined to the contract service being delivered, and does not take into account the presence of multiple, conflicting, and shifting expectations held by diverse, legitimate sources of expectations (Mulgan: 1987: 7)(Sharkansky: 1980: 118)(Campbell: 1986: 4)(Johnston and Romzek: 1999: 387-388). The following section is an attempt to reflect on the exercise of contracting out in the Australian Public Service and its implications on the accountability mechanisms.

CONTRACTING-OUT AND ACCOUNTABILITY IN THE AUSTRALIAN PUBLIC SERVICE (APS): A SYNTHESIS

There is pressure, which manifests itself both socially and economically, throughout the Australian Public Service (APS) to become more effective and efficient in providing a range of services. In response, a number of public sector reforms were introduced. Some reforms were aimed at improving internal arrangements and in others, the introduction of competition from outside the agency (Industry Commission: 1996: 2). To be precise, the notion of Competitive Tendering and Contracting (CTC) experienced a huge upsurge. According to Aulich (2001: 150), there is nothing new about the use of competitive tendering and outsourcing at all three levels of the government in Australia, what is new though is the extent of their use. CTC has two features which distinguish it from the traditional way of providing public services. Firstly, it requires clear redefinition of services to be delivered and secondly, periodic opening of their delivery to competition from external suppliers (IC: 1996: 2).

One of the premises as postulated by Campbell (1986: 3) is that when the public sector decides to use the private sector rather than its own employees to deliver a service, it does not give up its responsibility to provide that service. In this case, regardless of how and by whom the services are delivered, government continues to oversee and have ultimate responsibility. It will always retain control since responsibility and accountability cannot be abdicated. This is the view also shared by the IC and Administrative Review Council reports that whatever the method of service delivery, a government agency must remain accountable for the efficient performance of the functions delegated to it by government. Included in what actions agencies have to account for is to translate broad programme objectives into detailed specifications, choosing the person to deliver the service, ensuring that the service required, is actually delivered and, dealing equitably and responsively with clients and the public (IC: 1996: 4-5) (ARC: 1998: 5).

CTC, as the IC reports acknowledge, involves redefining responsibilities and relationships between key stakeholders, and introduces a new player into the chain in the form of the contracted service provider. When imposing a contract in the accountability chain, service provision is placed in the hands of persons not under the day-to-day control of government departments. Technically, the service provider is accountable only for performance as specified in the contract. In essence, the contractor is an independent entity responsible only for its own actions in the course of performance of its duties. Redefining the responsibilities and relationships in public service delivery to accommodate the contracting arrangement has its own ramifications.

As Campbell (1986: 5) notes, managing a contract requires special knowledge and skills that many government jurisdictions lack, and will have to acquire. Secondly, contractor selection also presents problems in that there is a misconception that the lowest is always the best unless bid specifications are sufficiently precise to guarantee the quality of service delivered and lastly, the danger of political favoritism that may exist. But as Aulich (2001: 159-160) argues, addressing these ramifications is another way of holding agencies accountable. This can be achieved by introducing the notion of contract management. In terms of contract management, once the contract has been awarded the agency must ensure that the terms and conditions of the contract are met, and the specifications agreed to are satisfied. The issue of skills, expertise and know-how of managing a contract is beyond the scope of this analysis, and to argue it out requires a separate research effort.

According to the IC report (1996: 5-6), CTC offers the potential to enhance accountability in a number of ways. They are the following:

- (a) In terms of the CTC, the agency is required to clearly specify the service to be delivered and to precisely allocate responsibilities between the agency and the contractor for the delivery of service. The contracting agency has to make every effort to eliminate confusion about the lines of responsibilities: they should be kept as clear and as simple as possible.
- (b) CTC can enhance accountability by requiring the contracting agency to specify the criteria on which the contractor's performance is to be measured and monitored. However, the difficulty on some services have to be recognised, particularly where the service provider has to exercise some discretion on the amount and mix of services to be provided to clients and,
- (c) To provide the ability of persons to seek redress where they are dissatisfied with the manner in which a service is provided. A change from direct to contracted provision ought not to undermine the ability of individuals or institutions to seek redress for decisions or actions for which government is accountable.

From aspects (a) and (b) above, one can make a deduction that, central to the theme of CTC in enhancing accountability, is contract management which involves contract design and service specification. The contract in this case, provides a formal link between the contractor and the contracting agency. It is a legal structure through which the key elements of the relationship should be made clear. Aspect (c) involves the extension of administrative law to contracted services. The report suggests that accountability can be enhanced by greater responsiveness to clients through increasing the capacity to achieve high levels of redress (IC: 1996: 6-7). This is the view expressed by chapter 3 of the ARC report (1998). The view expressed is that of using administrative law as a remedy when and where a contractor delivers a government service. According to ARC (1998: 16), the avenues of redress that the administrative law system provides serve two purposes. Firstly; to ensure that individual members of the community are treated fairly, lawfully, rationally, openly and efficiently by agencies. Secondly; to enhance and complement other mechanisms of government accountability in place. This system, as the ARC notes, feeds useful information back into government decision-making in that, complaints provide agencies

with an opportunity to monitor their performance. These complaints, for example, can act as early warning systems which can be used by public sector managers to identify deficiencies in their agencies or programmes they administer. Thus, administrative law plays a unique role in maintaining public accountability by ensuring that the administration is accountable to an individual in respect of its decisions that affect that person. Furthermore, it improves the whole system of government decision-making by increasing its openness and transparency (ARC: 1998: 17).

By contrast, administrative law remedies may not, in the absence of legislation, be available to people affected by actions of a government contractor. The commonly used administrative law remedies are the Ombudsman and the Freedom of Information (FOI) Act. The prevailing situation is, the ARC (1998: 18-20) observes, the Ombudsman can only address complaints made in relation to a matter of administration, not by directly addressing the complaint. This means the Ombudsman may only be able to investigate the manner in which the relevant agency has dealt with the contractor. Even in the case of FOI Act, a person may only make a request for access to documents in the government's possession, but not to information or documents held by the contractor, unless the legislation so provides. The other handicap is the lack or absence of the right, by the public, to seek review of the decisions of a contractor that affects their interests or reasons for those decisions. When a service is directly provided by a government agency, mechanisms are available for members of the public to seek judicial review of administrative decisions under the *Administrative Decisions (Judicial Review) Act 1977* (ARC: 1998: 20).

According to aspects indicated above, if administrative law was to be used as a remedy to enhance accountability through citizen redress, then the existing scenario is not adequate to solve problems experienced by recipients of contracted government services and other members of the community who may be affected by the contractor's actions. The reason for this argument lies in the primary pre-condition that there has to be a contractual relationship between the recipients and the provider. Unless this is so, the recipients may not be able to enforce the contractor's contractual obligations to the responsible agency, neither will it be possible to lay complaints to the Ombudsman about poor service. Accountability in this case requires that service recipients be able to complain about poor service so as to enable the government agencies to keep track of service standards.

To counter the limitations indicated above, the ARC (1998: 21-28) further suggests the possibility of using private law remedies. They are;

- *Contractual remedies:* These involve the existence of a contractual relationship between the provider and the recipient where the recipient has the right to take action to enforce the proper performance of a contract. The privacy of a contract makes this option not a viable solution to contracted public services.
- *Torts remedies:* Law of torts makes provision for the remedy in case of loss or damage suffered by a person as a result of the actions of the contractor. The limitation of this option is that, the nature of the complaint should not be of service quality.
- *Consumer law remedies:* These may apply only if there is a contract between the contractor and the recipient, others may be complaints made to regulatory bodies. These remedies are relevant only to service recipients rather than other members of

the community, and their availability and content varies between jurisdictions. The disadvantage of this option is that, they do not apply to government bodies due to the principle of 'Crown Immunity'.

- *Other remedies:* These include Industry Complaints Mechanisms, State and Territory Complaints Schemes, and changing service providers.

What is evident from the second category of remedies is the individualistic nature of their orientation, they rely predominantly on the prevalence of a contractual relationship between the service recipient and the contractor and, they largely exclude third parties. These remedies place the burden of proof on the complainant to demonstrate the loss or damage suffered and gives little if any, recognition for complaints of service quality. The report further recognizes the inadequacy of the existing public and private law remedies in contracted government services, and thereby suggests the extension of the public law remedies by enacting the necessary legislation and enhancing them by private law remedies (ARC: 1998: 29).

SUMMARY AND CONCLUDING REMARKS

The significance of the social and economic challenges facing the APS undermines the notion of an anonymous career public service with what it is charged to do. As O'Faircheallaigh, Wanna & Weller (1999: 5) acknowledge, public officials are today compelled to perform in line with procedures that are explicitly stated to determine responsibility and sheet-home accountability for the implementation of programmes. Public managers are expected to be more accountable for their actions and decisions, their jobs are increasingly becoming contestable and their activities are subject to market testing or contracting out. This assertion affirms the contention of this article that, regardless of the method of service delivery, accountability rests squarely with government agencies.

To enhance accountability on contracted public services requires stern efforts on the part of lawmakers and public sector managers to redefine responsibilities and relationships between various stakeholders. Included in the list of ingredients is the notion of contract management (i.e. empowering responsible public officials with the necessary skills), introducing and enacting the new legislation that will close the grey areas that currently exist between public and private law remedies, and make it possible for the public and other service recipients to access the contracts of those services that directly affect them. An umbrella approach to replacing public sector practices with those of the private sector, without taking cognizance of the uniqueness of the public sector and its ethos, will in the long run leave the public, its multitudes of legitimate expectations and institutions at the mercy of the self-interested market forces.

BIBLIOGRAPHY

- Administrative Review Council Report # 42. 1998. *Contracting Out of Government Services*. Report to the Auditor-General. www.ag.gov.au/arca/arc42.html.
- Aulich, C. 2001. Competitive Tendering and Contract Management in Australia. In: Aulich, C, Halligan, J & Nutley, S. (ed). *Australian Handbook of Public Sector Management*. Allen & Unwin, Sydney.
- Auriacombe, C. 1999. Reflections on the New Public Management. *SAAPAM Journal of Public Administration*, June (34) 2, 124 – 136.
- Campbell, A.K. 1986. Private Delivery of Public Services: Sorting out the Policy and Management Issues. *Public Management*. December (68) 12, 3 – 5.
- Diale, A. J. 2004. *Contracting out of Public Services and its Implications for Accountability: Reflections on the Australian Public Service (APS)*. Refereed Proceedings of the annual ooiCTRLD Multidisciplinary Spring International Faculty Student Conference, Honolulu, Hawaii. May 26-31: 17 – 20.
- Dwivedi, O.P. & Jabbar, J.G. 1988. Public Service Responsibility and Accountability. In: Dwivedi O.P. & Jabbar, J.G. (ed). *Public Service Accountability: A Comparative Perspective*. Kumarian Press, Inc. Connecticut.
- Evatt Research Centre. 1990. *Breach of Contract: Privatization and the Management of Australian Local Government*. Pluto Press, Sydney.
- Finn, P. 1993. Public Trust and Public Accountability. *The Australian Quarterly*. Winter (65) 2, 50-59.
- Hartley, K. 1984. *Why Contract Out?* Proceedings of a Conference. Royal Institute of Public Administration. London.
- Industry Commission Report # 48. 1996. *Competitive Tendering and Contracting by Public Sector Agencies*. Australian Government Publishing Service, Melbourne.
- Jhnston, J.M. & Romzek, B.S. 1999. Contracting and Accountability in State Medical Reform: Rhetoric, Theories and Reality. *Public Administrative Review*. September/October (59) 9, 383-399.
- Moore, S. 1987. Contracting Out: A Painless Alternative to the Budget Cutter's Knife. In Hanke, S.H. (ed). *Prospects for Privatization: Proceedings of the Academy of Political Science* (36) 3, New York.
- Mulgan, R. 1997a. The Process of Accountability. *Australian Journal of Public Administration*, March (56) 1, 25 – 36.
- Mulgan, R. 1997b. *Contracting Out and Accountability*. Discussion Paper 51, May. Australia National University.
- O'Faircheallaigh, C. Wanna, J & Weller, P. 1999. *Public Sector Management in Australia: New Challenges, New Directions*. 2nd edition. Brisbane, Australia.
- Parker, R.S. 1980. Responsible Government in Australia. In: Weller, P. & Jaensch, S. (ed). *Responsible Government in Australia*, Drommond.
- Prager, J. 1994. Contracting Out Government Services: Lessons from the Private Sector. *Public Administration Review*, March/April (54) 2, 176 -184.

- Rimmer, S.J 1991. Competitive Tendering, Contracting Out and Franchising: Key Concepts and Issues. *Australian Journal of Public Administration*, September (50) 3, 292 – 302.
- Sharskansky, I. 1980. Policy Making and Service Delivery on the Margins of Government: The Case for Contractors. *Public Administration Review*, March/April (40) 2, 116 – 123.
- Thynne, I. & Goldring, J 1987. *Accountability and Control: Government Officials and the Exercise of Power*. Law Book Company, Sydney.
- Waterford, J 1991. A Bottom Line on Public Sector Accountability. *Australian Journal of Public Administration*, September (50) 3, 414 – 417.