

# THE TRANSFORMING REHABILITATION TIER 1 TENDERING PROCESS: THE VOLUNTARY SECTOR PERSPECTIVE

This is a write-up by James Noble of a discussion convened by New Philanthropy Capital (NPC) on 9 May 2015 amongst representatives from voluntary sector organisations that had unsuccessfully bid in the Transforming Rehabilitation Tier 1 tendering process in 2014. Participants also included organisations that had supported the voluntary sector through this process. The meeting took place under Chatham House rule. We thank all participants for their involvement and honesty.

## Introduction

[Transforming Rehabilitation](#) (TR) is the name given to a major reorganisation of probation services in England and Wales conducted by the Ministry of Justice (MOJ) throughout 2013 and concluding in April 2015. It involved splitting existing probation services into two parts: 1) a National Probation Service, responsible for supervising offenders who pose a high 'risk of harm' to the community; and 2) 21 local Community Rehabilitation Companies (CRCs) responsible for supervising all other offenders—which for the first time includes all prisoners released from custodial sentences of fewer than 12 months.

Following the split, CRCs were then subject to an outsourcing process intended to transfer ownership to organisations from the private and voluntary sector for a period of up to 10 years. MOJ decided that payment of the CRCs would come mainly through a Fee For Service (FFS) but also partly by Payment by Results (PBR) based on whether or not each CRC reduces reoffending rates by a specified percentage.

The competition to run the new CRCs ran over a number of months. In October 2013 MOJ identified eligible bidders through a Pre-Qualification Questionnaire (PQQ). Those that were successful then had to submit their full proposals in June 2014. The result was announced in December 2014 and successful bidders took formal ownership of the CRCs in April 2015.

Throughout the process MOJ said it wanted the voluntary sector to be involved at all levels. At NPC's annual conference in 2013 a senior MOJ official made clear that they were very keen to have a not-for-profit prime. Ministers and Civil Servants regularly praised features of the sector such as its experience, integrity, closeness to local communities and potential for innovation. Encouraged by this, some larger voluntary sector organisations decided to compete against the private sector at the prime or 'Tier 1' level; ie, to own and run CRCs themselves. Smaller voluntary sector organisations also expressed interest at Tier 2 and Tier 3 levels, which would mean being subcontracted by Tier 1s to deliver services and potentially share profits and/or losses.

Despite this, actual voluntary sector involvement in the 'transformed' probation service now seems limited. Private sector led partnerships won 20 out of 21 competitions<sup>†</sup> while none of the charities who bid to run CRCs

<sup>†</sup> The exception is a probation staff 'mutual' led partnership which was successful in the Durham and Teesside CPA.

themselves were successful. Some voluntary sector organisations are named as partners at the Tier 2 level, or are currently 'in conversation' about possible Tier 3 subcontracts, but on the whole it can only be seen as a disappointing outcome for the voluntary sector, particularly for those who wanted to see a 'social prime' that would apply a voluntary sector ethos and approach to the management of a probation service.

NPC convened the discussion reported here to better understand the reasons for this failure and what can be learned for the future.

## Why the voluntary sector participated

The voluntary sector organisations that submitted bids to run CRCs were all well established, successful enterprises with experience of the criminal justice sector and of managing large public contracts. They were attracted to the idea of running a CRC because they wanted to draw on their experience to improve the delivery of probation services. There was also the feeling that the voluntary sector *should* be represented at the highest level of the bidding process because it represents such an important part of the system as a whole.

*'Our vision was not about the status quo, it was about reimagining service delivery.'*

Politicians and officials enthusiastically encouraged voluntary sector organisations to bid, and provided a strong indication of success right up to the point results were announced. The wider 'mood music' from Government was also positive; the TR process needed one or two 'social primes' and the [Social Value Act](#) provided encouragement, as did the Government's oft-stated aim of devolving public services to different types of organisations (with the voluntary sector usually mentioned explicitly).<sup>1</sup> Funding was provided by the Cabinet Office for capacity building to support voluntary and public sector bids.

As a result of these factors, voluntary sector bidders were surprised that as a group they were unsuccessful. They expected to at least be awarded one CRC between them, and to have received nothing for good faith and extensive efforts was a major disappointment.

Participants in our discussions wondered: Had they had been naïve?

*On the one hand, they felt they had not.* All of the organisations involved had successfully bid for large public contracts before and had relevant experience and skills. While TR was a step-up in terms of the size and significance of the proposed contract, they believed their track record and approach meant they were credible bidders.

*On the other hand, they may have been.* There was speculation as to whether the intention to commission a voluntary sector organisation to run a whole CRC had ever been legitimate and whether they should have taken it at face value. Doubtless some politicians and officials had meant what they said, but participants in our discussion were less sure about the ambitions of those involved in the final decisions.

*'We suspected from the beginning that we were bid candy. That our involvement was politically expedient and nothing more.'*

## Why the voluntary sector failed

Feedback given to voluntary sector organisations on their unsuccessful bids suggests that they lost on technical and commercial grounds. In short, decisions were made on the basis of price and minimising risk rather than quality or any other aspect of the bids.

From the perspective of participants, the result of the TR process exposed a tension within Government between:

- the policy rhetoric and stated commissioning intentions—which sought voluntary sector involvement; and
- procurement teams who sought to apply strict commercial terms.

Ultimately, it seems that the interests of the MOJ commercial and procurement teams prevailed and the choice was made to minimise financial risk to Government and to get the best economies of scale available—while quality assessments were superficial and had less influence on the decision made.

*‘The competition was driven by procurement who were solely interested in transferring risk. We designed something good, but the mechanics of the process were all against this being successful.’*

*‘They were strict on finance rules, but much less strict on quality. For example providers without through-the-gate experience or effective IT systems got through, while we didn’t.’*

A particular problem for voluntary sector participation was the ‘Parent Company Guarantee’ (PCG) which required bidders to have a ‘parent company’ that would stake assets equivalent to the size of the annual contract value as a precondition for ownership of a CRC. While this minimised risk to the Government, it was also a major problem for the voluntary sector bidders who, being smaller organisations than private sector competitors, did not have the necessary capital. This meant that voluntary sector bidders were reliant on third parties to provide the guarantee, which is fundamentally more expensive and brings a range of complicating factors around how the third party minimises their own risk. This barrier proved to be insurmountable, and we were told that at least two voluntary sector bids were deemed technically non-compliant because of aspects of the ‘Parent Company Guarantee’, *before the quality of their bids was even considered.*

This was particularly frustrating for our participants because in their view:

1. The details of the PCG were refined at a late stage in the process; after the PQQ stage (see below) and after a tremendous amount of effort had already been invested. Upon reflection our participants felt that MOJ should have been much more honest and upfront about this condition from the outset.

*‘They should have been clear right at the beginning. We will never get involved in something like this again.’*

2. The PCG requirements were unnecessary. Our participants’ experience across the sector and from other competitions suggests that there are different ways to apply a PCG and that there was no need for it to occupy such a large proportion of the contract. The perception of our participants was that MOJ procurement teams applied the PCG in a formulaic and overly simplistic way, without thinking through the implications or appreciating the flexibility they had at their disposal. More generally, our participants felt this reflected a lack of capacity and expertise within the MOJ procurement team, as well as a very strong aversion to risk, and an unwillingness to really engage with the stated policy aims of the tendering process.

3. MOJ were made aware of the problem during the tendering process but did not take the steps to resolve it.

*‘Despite all the risks and challenges, we felt that the technical matters would be dealt with in the pre-contract stage.’*

## **Other impediments faced by the voluntary sector**

As highlighted above, a significant barrier to voluntary sector involvement was the lack of capital to provide a guarantee themselves and the implications of seeking capital from third parties. Even if voluntary sector

organisations had been able to resolve these details in the short time available, there remains the basic problem that capital and finance is more expensive for smaller organisations. This meant that even if voluntary sector organisations had passed the technical criteria the services proposed would have still been more expensive than the private sector.

The disparity in size between charities and the private sector also meant that the cost of bidding was relatively higher for charities, as bidding costs are fixed. Voluntary sector organisations were also less likely to have the necessary tendering experience in-house so needed to invest extra resources. Another factor making bidding more expensive was that voluntary sector organisations could really only bid to run one or two CRCs, compared to the larger private companies that submitted multiple bids for different areas. In practice this meant that the cost of each charitable bid was proportionally much higher to the organisation but with a lower likelihood of success.

Had a voluntary sector prime been successful, economies of scale would have continued to work against them. A feature of the outcome of TR has been the appointment of small number of private organisations to run a number of different CRCs, which creates efficiencies not available to the smaller organisations in the voluntary sector. Indeed, this may have been a factor in the late withdrawal of a private sector bidder that only won one area<sup>2</sup>.

A final major difficulty, unique to charitable bidders, was how trustees could meet the legal requirement of 'due diligence'<sup>3</sup> with the information available. The size, risk and irrevocable nature of the contracts meant that trustees were faced with a major decision that had the potential to massively impact upon their organisations. Unfortunately, the information provided was insufficient to understand the risk profile so that, in effect, trustees of any successful bidders would have been personally liable had things had gone wrong. Which is not an acceptable or workable situation.

*'There was no way for us to judge risk, which caused extreme anxiety about selling the charity down the river.'*

## Reflections on the competition process

Our participants felt strongly that the competition process itself had failed to achieve its objectives while adding considerable stress and unnecessary work for those bidding organisations involved. Four broad problems were discussed:

- They found the process very chaotic and confused, with questions unresolved, deadlines and key aspects changing right up to the later stages of the competition. Perhaps the most significant late-stage alterations to the contract requirements were the Parent Company Guarantee (described above) and payment mechanism—the final details of which were only available at a late stage in the process.
- The process was felt to be much more complex than it needed to be. Bidders needed to get to grips with vast amounts of documentation and detail.
- The MOJ did not appear to have the capacity to run or support an effective tendering process. Bidders who passed the PQQ stage received around four days of support from officials, but our participants estimated they needed three or four times that to resolve all issues and questions they had. The calibre and experience of officials supporting the bidders was described as 'inconsistent'; some did not seem to understand their own processes and our participants cited examples of contradictory information being given by different officials.
- The specification offered limited scope to describe the quality of bidders' proposed approaches. More generally, our participants concluded that considerations around quality, vision, and innovation were largely irrelevant to the final decision of whom to commission.

*'We felt that MOJ did not understand or appreciate our model.'*

Our participants did acknowledge that they would have benefited from more commercial experience from the outset. Voluntary sector organisations whose partners brought in commercial leads learned that knowledge and awareness in this area was invaluable for identifying problems and issues at an early point, while there was still time to address them.

## Pace of reform

Underlying the perceived failure of the tendering process is the key point that there was not enough time to do it in. While 20 months may seem like a long time, it is a relatively short period for such a fundamental reform and to award contracts that will run for many years. The main driver of the timeframe is widely seen as the political need to get it done before the General Election in May 2015

The effect of this was a rushed process that lacked genuine consultation and failed to reflect the complexity of the criminal justice system. Moreover, the MOJ appeared to lack the capacity or expertise to deliver the process within such a short time frame, contributing to the problems highlighted above.

*'MOJ seemed to be making things up as they went along. They careered across different issues in an unseemly way. Overall it seemed highly disconnected and uncoordinated.'*

The pace of change affected all organisations' capacity to understand and influence what was going on. Organisations both inside and outside of the formal bidding process found themselves constantly trying to keep up and interpret changing demands, rather than critiquing or trying to improve what was happening.

## PQQ process

The PQQ process was intended to determine whether bids met minimum criteria before organisations invested significant resources in developing full tenders. Unfortunately, voluntary sector led bids that passed the PQQ stage went on to fail on technical criteria that should have been identified earlier. Two reasons were suggested for this failure:

- MOJ staff had not got to grips with the technical requirements in time for the PQQ process, or indeed new requirements were being added after that process had taken place. This is evident in that new requirements were being made right up to the deadline for tenders.
- It was appealing to have visible voluntary sector participation in the later stage of the procurement process, even though there was little likelihood of their success.

There was consensus that the voluntary sector Tier 1 bids should not have passed the PQQ stage and our participants struggle to understand how they ever did given the strict commercial thresholds.

*'It was a sham. We should never have been invited. Their governance processes should have ruled us out at earlier. We received legal advice but our enthusiasm got the better of us.'*

## Transparency

Following the PQQ stage, when formal procurement began, there were strong feelings of isolation between bidding organisations who were not allowed to talk to one another.

Meanwhile non-bidding organisations, often with a keen interest in the reforms, found themselves entirely excluded. Indeed, from the perspective of everyone not directly involved, the tendering process appeared to be conducted behind closed doors, which limited their ability to support bidding organisations and critique or improve the process.

*'From the outside no one could really tell what was going on, nor were they able to understand the various operating models. It was impossible to unpick.'*

## Withdrawal by Serco and G4S

In December 2013 two of the leading private sector organisations, Serco and G4S, withdrew from the competition following media coverage about other contracts they had mismanaged<sup>4</sup>. At the time, this was seen as beneficial to voluntary sector bidders because it removed some of the competition, but ultimately it may have had a more detrimental effect.

- Both Serco and G4S had both been active at building partnerships with possible voluntary sector providers. It was therefore a significant setback for those organisations to suddenly find that: the time and resources they invested in this had been wasted; and they needed to find new partners in a much shorter time frame.
- It reduced the market of potential bidders to such an extent that a genuine competition might not have been possible in some areas. Our participants felt that this became a risk to the credibility of the reforms as a whole, because a proper competition was needed to say that CPAs have been awarded to the best bidder. Ultimately this may have encouraged MOJ to be more relaxed about technical criteria at the PQQ stage so they could have a credible number of bidders in the final round.

*'They were living in fear of market failure. They only just managed to get one compliant bidder in each area.'*

As well as G4S and Serco, other potential private sector providers withdrew from the process at various stages, indicating that it was not only the voluntary sector that struggled with the process and requirements.

## Reflections on the encouragement and support received from the Government

The general impression of the participants in our discussions is that different parts of the Government did not work well together effectively to design, support or administer the TR procurement process and that contradictory agendas and objectives stymied the process and prevented the stated outcomes from being achieved.

Many civil servants in MOJ policy teams actively encouraged voluntary sector involvement. They also provided funding for partnership and capacity building, which was seen positively by the sector at the time. But this funding and support was ultimately wasted because other considerations within MOJ held sway.

The Cabinet Office was another 'cheerleader' for the voluntary sector and employee mutuals, and also contributed significant public money to the process in the form of support grants. Our participants felt that the Cabinet Office could have taken a stronger role in scrutinising MOJ and holding them to account, as well as trying to resolve some of the issues outlined in this paper.

*'The Cabinet Office were led down this path as much as we were.'*

Our participants felt that tensions within government could and should have been resolved and that greater coordination and consistency should have been possible. But they saw little evidence of officials speaking to one another and suspected that civil servants were mainly trying to please their respective ministers while failing to address the serious procurement obstacles being placed in front of the voluntary sector.

*'Someone needed to say that this was much bigger than risk transfer.'*

## The consequences for the voluntary sector

There were a few positives to the voluntary sector's involvement in the TR process. Participating organisations gained tendering experience and improved knowledge of the pitfalls, they have also taken some lessons and a healthy scepticism about central government commissioning which may be valuable in future. Also, by participating in the Tier 1 process they have built relationships with successful Tier 1s that may help them in negotiations to deliver Tier 2 and 3 contracts.

*'We learned a lot. We are a better organisation today because we understand our weaknesses.'*

*'Lots of conversations are ongoing. We are getting good second Tier stuff.'*

But the negatives outweigh the positives. In particular the significant amount of money and resources that organisations invested in the process: Both internally on staff time, and externally in bringing-in outside help.

*'We spent a fortune. A huge amount of time money and effort was wasted.'*

Of course, organisations that bid for contracts always do so on the understanding that they risk getting nothing for it, but this has a different dimension when charities are involved because of the social opportunity cost. In this case, substantial amounts of charity resources were invested in a fruitless process that might otherwise have been invested in frontline services to improve peoples' lives. Our participants concluded that MOJ had behaved irresponsibly with charity resources and failed to grasp the moral implications of what they were doing. A wider lesson from this is that Government should be much more aware and circumspect about the expenditure of charitable resources on its own processes.

*'There is a morality about this. Government needs to be more careful about charitable resources and consider the social opportunity cost.'*

*'MOJ needs to reflect on the cost to the voluntary sector of this process and where that resource would have been spent otherwise—which was frontline resources.'*

## Conclusions

The Transforming Rehabilitation tendering process was an unhappy experience for the voluntary sector. Despite the hope that it would be different to previous government outsourcing programmes (a hope strongly encouraged by the Government itself), the sector again finds itself left with slim pickings and an uncertain future. Meanwhile, the opportunity for a probation system led by established criminal justice organisations has largely been eschewed in favour by private companies with limited direct experience or track record.

*'We were overly optimistic about the rhetoric from MOJ. We thought they were genuinely interested. We built an exciting, imaginative solution, we got hung up on this—we believed them.'*

Also troubling is the way the Government now seems to have 'moved-on' from TR without facing up to the failure to commission the voluntary sector (indeed it has tried to present the outcome as a positive for the sector)<sup>5</sup>, nor acknowledging the huge amount of the sector's time and resource it wasted on a process that was loaded against them from the start.

Nevertheless, we continue to believe that the voluntary sector has a lot to offer the management and delivery of large public sector contracts and hope that the issues highlighted here can be addressed for future tendering

processes. For this to happen there needs to be a concerted effort by charities and all relevant parts of Government. In particular we need to consider the issue of risk from the voluntary sector perspective: what kind of guarantee is appropriate and how can trustees fulfil their legal responsibilities of due diligence? We would like to see ministers and civil servants—especially senior officials in procurement teams—coming together to work out a solution these issues and creating a level playing field for the sector.

Until this happens we expect that any charities that are looking at major contracts will be increasingly sceptical about rhetoric from politicians and officials. Ultimately, they should be prepared to cut their losses and withdraw from processes that are unfairly stacked against them—and do so publically so that the issues they have faced are understood widely.

For those working in criminal justice, TR—and other major payment by results contracts, have become so dominant that many charities will need to engage in the process whether they like it or not. However, there is the important outstanding question about where the voluntary sector will fit in future. This was an important finding of Clinks' recent survey of the sector<sup>6</sup> which found a lot of uncertainty about the future. The sector wants to be involved because it aims for a better criminal justice system and its organisations are embedded and committed to the cause. But we need a clearer picture about what a good probation system looks like and where charities fit in.

A further concern is how other sources of funding seem to be diminishing as charitable trusts and foundations question whether they should be involved in an area where the public and private sectors are so dominant. NPC worries that a large swathe of good voluntary sector work could diminish without proper funding and support, leading to worsening outcomes for individuals and society.

Given these concerns there is a pressing need to monitor the voluntary sector's involvement in the transformed probation service. It is also crucial for the Government to be transparent by publishing how money is being spent, on what, and what the role of the sector is in reality.

## References

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<sup>1</sup> For example, see [The Conservative Party Manifesto 2015](#), Page 45

<sup>2</sup> Hadley, P., ['Probation services 'preferred bidder' walks away before contract signing, as chaos deepens'](#), *Speak up for Justice*, 13 November 2014

<sup>3</sup> Charity Commission (2011) [Charities: due diligence checks and monitoring end use of funds](#)

<sup>4</sup> Meikle, J., ['G4S and Serco hand over offender tagging contracts over fraud claims'](#) in *The Guardian*, 12 December 2013

<sup>5</sup> Ministry of Justice press release, 29 October 2014, ['Voluntary sector at forefront of new fight against reoffending'](#)

<sup>6</sup> Clinks (2015) [Early doors: The voluntary sector's role in transforming rehabilitation](#)

## TRANSFORMING THE CHARITY SECTOR

NPC is a charity think tank and consultancy which occupies a unique position at the nexus between charities and funders, helping them achieve the greatest impact. We are driven by the values and mission of the charity sector, to which we bring the rigour, clarity and analysis needed to better achieve the outcomes we all seek. We also share the motivations and passion of funders, to which we bring our expertise, experience and track record of success.

**Increasing the impact of charities:** NPC exists to make charities and social enterprises more successful in achieving their missions. Through rigorous analysis, practical advice and innovative thinking, we make charities' money and energy go further, and help them to achieve the greatest impact.

**Increasing the impact of funders:** NPC's role is to make funders more successful too. We share the passion funders have for helping charities and changing people's lives. We understand their motivations and their objectives, and we know that giving is more rewarding if it achieves the greatest impact it can.

**Strengthening the partnership between charities and funders:** NPC's mission is also to bring the two sides of the funding equation together, improving understanding and enhancing their combined impact. We can help funders and those they fund to connect and transform the way they work together to achieve their vision.

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