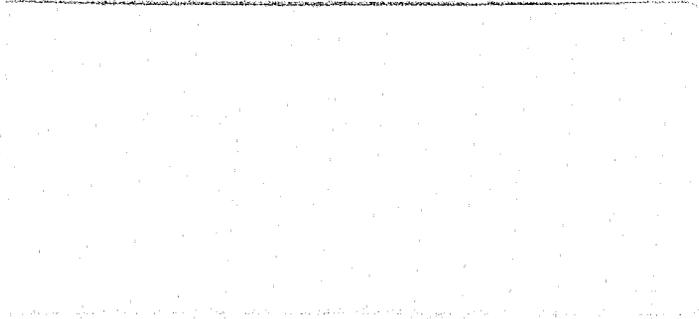


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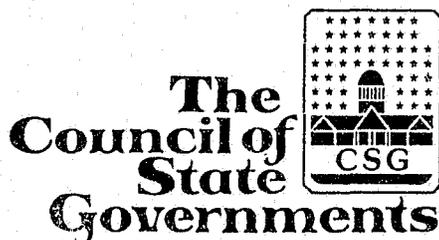
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FINAL REPORT

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ISSUES IN CONTRACTING FOR THE PRIVATE  
OPERATION OF PRISONS AND JAILS



THE URBAN INSTITUTE

Prepared by: Judith Hackett, Project Director (CSG)  
Harry Hatry, Co-Project Director (UI)  
Robert B. Levinson, Consultant  
Joan Allen, Research Associate  
Keon Chi, Research Associate  
Edward D. Feigenbaum, Legal Counsel

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## ABSTRACT

Issues in Contracting for the Private Operation of Prisons and Jails by Judith C. (Sardo) Hackett, Harry Hatry, Robert Levinson, Joan Allen, Keon Chi and Edward Feigenbaum. (Council of State Governments, Lexington, Ky., 1986)

Prison and jail overcrowding is a priority state legislative agenda item. There has been an increasing interest in the potential of reducing the cost of government and the size of the public payroll through the use of private contracts for the operation of state and local correctional institutions. The authors provide practical recommendations to public officials for their consideration before and after choosing the contracting option.

This research discusses a variety of trends in contracting for state correctional facilities and provides the reader with experiences of other public entities that have made a contracting decision. It also clarifies important issues that have developed in the privatization effort.

The major issue areas involve the legal aspects of contracting, policy and program planning, request-for-proposals and contract agreements, and contract monitoring and evaluation methods.

The study will be a valuable tool to public officials in the decision-making process of contracting, as well as in the planning, implementation and evaluation efforts. Recommendations are provided where there is agreement among the experiences of government officials, where there are strong advantages or disadvantages to certain approaches or where legal precedents have been set.

ISSUES IN CONTRACTING FOR THE PRIVATE OPERATION  
OF PRISONS AND JAILS

TABLE OF CONTENTS

	<u>Page</u>
Abstract.....	i
Table of Contents.....	ii
Acknowledgements.....	iii
List of Issues.....	iv-v
Executive Summary.....	vi-xvii
Chapter I: Introduction, Scope, and Methodology.....	1
Chapter II: Trends in Contracting for State Correctional Facilities.....	7
The Issues (Table A).....	22-23
Chapter III: Legal Issues in Contracting for State Correctional Facilities.....	25
Chapter IV: Policy and Program Issues Before Deciding to Contract.....	36
Chapter V: Requests for Proposals and Contract Issues.....	73
Chapter VI: Contract Monitoring and Evaluation.....	112
Chapter VII: Conclusions and Recommendations.....	140
Bibliography.....	149

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We appreciate the support and interest of many individuals at the National Institute of Justice, and their reviewers, who offered advice during the study. Ms. Voncile B. Gowdy, our project monitor, was a valuable resource through-out our work.

While the report is very much the product of all members of the research team, we acknowledge the following primary authors: Chapter II: Trends in State Contracting by Keon Chi; Chapter III: Legal Issues by Edward Feigenbauem; Chapter IV: Policy and Program Issues by Robert Levinson; and Chapters V & VI: Contracting, Monitoring and Evaluation by Harry Hatry. Joan Allen's hard work in preparing extensive reviews of the literature and providing issue-specific references is also gratefully acknowledged. Team members each reviewed and commented upon all sections, making valuable contributions to each from their own perspectives.

The reader is invited to use this work as a preliminary analysis, a place to begin, and to learn from of other's experiences. Each issue could be the subject of in-depth research, and is not intended to be an exhaustive treatment of the subject. We thank the states and local government officials who will read this report, learn from it, and become the future innovators.

LIST OF ISSUES

	Page
<u>Issue #1</u> What are the legal issues in Contracting?.....	25
<u>Issue #2</u> What liability protection will a government agency and contractor need?.....	27
<u>Issue #3</u> How should the responsibility and authority for security be divided between the contracting agency and the private operator?.....	30
<u>Issue #4</u> What provision is there for protecting inmate's rights, including a mechanism for inmates to appeal decisions affecting them?.....	31
<u>Issue #5</u> What specific pre-analysis should a state undertake prior to the contract decision?.....	37
<u>Issue #6</u> What are the reasons for considering or not considering contracting prison operations with private enterprise, particularly with for-profit firms?.....	43
<u>Issue #7</u> How should publicity be handled?.....	48
<u>Issue #8</u> Should contracting be done for (a) existing facilities; (b) a new institution replacing an existing facility; and/or (c) new institution not replacing an existing facility?.....	50
<u>Issue #9</u> What level of offender should be assigned to the contracted facility? What are the differences in attempting to contract minimum versus medium versus maximum security facilities? Are there different considerations for contracting facilities for specific populations?.....	53
<u>Issue #10</u> How many inmates should the contractor be expected to house? What provisions should be made for fluctuations in that number? What control does the contractor actually have over the number of inmates? Should minimum and/or maximums be established in the contract?.....	62

List of Issues (cont'd)

Issue #11

How will inmates be selected? Will the private organization be able to refuse certain inmates?..... 65

Issue #12

What authority and responsibility should a private contractor have for discipline and for affecting the release date of inmates? What will be the relationship of these decisions to the State Board of Parole?..... 68

Issue #13

Should contracting be competitive or non-competitive? Are there enough suppliers to provide real competition? What are the relative merits of for-profit and non-profit organizations?..... 74

Issue #14

What criteria should be used to evaluate private proposals?.... 78

Issue #15

How should the contract price be established and on what basis? What should be included in the contract price?..... 83

Issue #16

What provisions should be made to reduce service interruption and their impact? Should there be provisions to protect the private contractor?..... 91

Issue #17

What standard should be required in RFPs and Contracts?..... 95

Issue #18

What should be the duration of the contract and provisions for renewals?..... 98

Issue #19

What provisions are needed for monitoring in the RFP and Contract?..... 101

Issue #20

What provisions should be made to address concerns of public correctional agency employees?..... 106

Issue #21

How should contractor performance be monitored, and to what extent?..... 113

Issue #22

What results can be expected from contracting?..... 122

Issue #23

How should government evaluate the results of contracting?..... 128

## ISSUES IN CONTRACTING FOR THE PRIVATE OPERATION OF PRISONS AND JAILS

### EXECUTIVE SUMMARY

#### SCOPE

The problem of correctional facility overcrowding has been high on the legislative agendas of many states during recent years. During the last five years, we have also seen increasing interest in the potential of reducing the cost of government and the size of the public payroll through the use of private contracts for public service delivery.

This study presents an analysis of the policy and program implications of one of the more controversial applications of the private contracting method to public services: contracting with the private sector for the operation and management of correctional facilities. The authors have examined the experiences to date of state and local governments that have chosen the contracting option, and provide suggestions for other public officials to aid their consideration of contracting option.

No attempt is made to evaluate the merits of various contractors, nor does the report presume to prescribe a method which all public entities should follow. Nor did this study attempt to conduct a cost-effectiveness analysis of these early efforts, since very few data are available.

A question-and-answer style presentation allows the reader to distinguish the various aspects of the contracting decision, learn from the experiences of other public entities, and clarify the issues in their own situation. Recommendations are provided when the authors found agreement among experiences of government officials, strong advantages or disadvantages of a certain approach, or clear-cut legal precedents.

#### METHODOLOGY

The research team was composed of staff of the Council of State Governments, the Urban Institute, and a consultant experienced in criminal justice matters. The Council of State Governments is a policy research and information agency of the 50 state governments whose team members brought experience in contract management, program design, legal research, and privatization analysis. The Urban Institute is a Washington-based policy research organization whose team members brought experience in local government privatization research, evaluation research, and contract analysis.

The research methodology involved an extensive review of the literature, including both scholarly research and the popular press. We also reviewed studies on contracting correctional services from 22 states. Documents, such as contracts, requests for proposals (RFPs), and inspection reports provided much information about the initial contracting efforts. A final source of data for the study was interviews conducted with corrections agency personnel, contractor personnel, purchasing officials, legislators and legislative staff. The interviews were conducted both in-person and by telephone and provided the anecdotal data used by the research team in preparing this report.

States and local governments have considerable experience in contracting with private firms for various correctional services such as training, medical care or even halfway-house operation. However, state and local experience in contracting for the entire operation and management of a secure adult institution is quite limited.

Documents on contracting correctional services were available from twenty-two states: Alabama, Alaska, Arizona, California, Connecticut, Florida, Illinois, Iowa, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New Mexico, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, Virginia, Wisconsin.

We also examined experiences in contracting adult, and some juvenile, secure facilities in both state and local government. These included a State of Kentucky minimum security institution for adult males; Florida, Massachusetts, Pennsylvania and Shelby County, Tennessee, facilities for severely delinquent youth; an adult facility in Dade County, Florida (not secure); the Bay County, Florida jail; a Ramsey County, Minnesota facility for adult females; and a workhouse in Hamilton County, Tennessee. Both government officials and private vendor staff were contacted. Corporate officials in each of four private, for-profit companies managing corrections facilities were interviewed:

- o Corrections Corporation of America
- o U.S. Corrections Corporation
- o RCA Services, Inc.
- o National Corrections Management, Inc.

The research methodology included three principal tasks:

1. Development of key issue areas
2. Examination of existing experiences
3. Analyses and Recommendations

A consistent interview protocol was used by the research team members and included the following elements:

- o history of the contracting effort
- o scope and size of facility
- o security issues
- o monitoring techniques
- o problems and solutions
- o opinions regarding the success of the effort
- o recommendations

Each interview, trip, document and publication was coded according to the issue to which it pertained. Documents, particularly requests-for-proposals issued by to each jurisdiction, were reviewed. Performance evaluation material was reviewed when available.

An initial list of issues was established by the research team and refined during the course of the project. The final list of decision areas addressed in the report is provided in Table A on the following pages.

TABLE A  
Prison Privatization: The Legal Issues in Contracting for  
State Correctional Facilities

Legal Issues (Chapter III)

- #1 What are the legal issues in contracting?
- #2 What liability protection will a government agency and contractor need?
- #3 How should the responsibility and authority for security be divided between the contracting agency and private operator?
- #4 What provision is there for protecting inmates' rights, including mechanisms for inmates to appeal decisions affecting them?

Policy and Program Issues Before Deciding to Contract (Chapter IV)

- #5 What specific pre-analysis should a state undertake prior to the contract decision? (e.g. cost analysis, legal issues analysis.)
- #6 What are the reasons for considering or not considering contracting prison operation with private enterprise, particularly with for-profit firms?
- #7 How should publicity regarding a change to private operations be handled? (e.g. agency, media, public.)
- #8 Should contracting be done for a) existing facilities; b) a new institution, replacing an existing facility; and/or c) new institution not replacing an existing facility?
- #9 What level of offender should be assigned to the contracted facility? What are the differences in attempting to contract minimum versus medium versus maximum security facilities? Are there different considerations for contracting facilities for specific populations? (i.e. service vs. geography, protective custody, mentally ill, women, deathrow, mothers, and children.)
- #10 How many inmates should the contractor be expected to house? What provisions should be made for fluctuations in that number? What control does the contractor actually have over the number of inmates? Should minimum and/or maximums be established in the contract?
- #11 How will inmates be selected? Will the private organization be able to refuse certain inmates? (e.g. AIDS victims, psychologically disturbed offenders.)

- #12 What authority and responsibility should a private contractor have for discipline and for affecting the release date of inmates? What will be the relationship of these decisions to the State Board of Parole?

Requests for Proposals and Contract Issues (Chapter V)

- #13 Should contracting be competitive or non-competitive? Are there enough suppliers to provide real competition? What are the relative merits of for-profit and non-profit organizations as prison operators?
- #14 What criteria should be used to evaluate private proposals? (e.g. percentages for cost and quality of service.)
- #15 How should the contract price be established and on what basis? (e.g. single fixed-price, fixed unit-price award, cost plus.) What should be excluded in the contract price? (e.g. unit costs, provisions for price increases or decreases, extent of government control for total costs annually, performance and incentive contracting.)
- #16 What provisions should be made to reduce service interruption? (e.g. problems with transition periods, defaults by contractors, work stoppages, fallback provisions.) Should there be provisions to protect the private contractor? (e.g. government obligations.)
- #17 What standards should be required in RFPs and contracts?
- #18 What should be the duration of the contract and provisions for renewal?
- #19 What provisions are needed for monitoring in the RFP and the contract?
- #20 What provisions should be made to address concerns of public correctional agency employees? (e.g. disposition of laid-off public employees after private takeover.)

Contract Monitoring and Evaluation (Chapter VI)

- #21 How and to what extent should contractor performance be monitored?
- #22 What results can be expected from contracting? (e.g. cost, service effectiveness and quality, work stoppages, illegal activity, timing of the alleviation of overcrowding, effects on other prisons in system.)
- #23 How should government evaluate the results of contracting?

The resulting examination of the many decisions faced by public officials provides sound guidance for state officials, without prescribing any single answer to the question: Should we contract? However, the research resulted in many recommendations on policy and procedure that were reviewed and commended by state officials in Kentucky and Florida.

## MAJOR CONCLUSIONS AND RECOMMENDATIONS

A summary of the conclusions and recommendations of the researchers follows. Each recommendation refers to the issues under which the topic discussed may be found.

### 1. Liability

It is evident that private prison contractors will not be able to escape liability under Section 1983 of the Civil Rights Act, and that the contracting government entity will be unable to protect itself from suits resulting from the wrongful acts of the operator it selects, but it may reduce its exposure.

### 2. Type and Size of Facility

States that have decided to use private contractors would avoid a series of problems if they limit contracting to additional minimum security beds. "Special needs" prisons also seem relatively well-suited to the contracting option.

Contracts should set maximum and minimum inmate population levels and specify the consequences if these are exceeded. A tiered price structure stating per diem costs for vacant as well as occupied beds is advisable. Finally, the contract should establish a mechanism for resolving disputes.

### 3. Contracting

Thus far, most state and local government agencies have not used fully competitive procedures when contracting for the operation of correctional facilities. This lack of competition does not appear to have been a major obstacle to obtaining good service, costs or quality. Over the long run, however, it is not the best contracting practice and could lead to major problems. The one state-level secure adult institution contract, the Kentucky's Marion Adjustment Center did involve fully competitive contracting.

At present, few vendors are experienced in operating secure correctional institutions. And there are few government agencies with experience in contracting for the operation of these facilities. Efforts thus far should be characterized as "experimental."

### 4. Monitoring and Evaluation

The state's method for monitoring the contract should be specifically stated and should, for larger (e.g., 150-inmate or more) institutions, include an on-site staff member. Costs to house this individual should be agreed to and documented in the contract.

All the contract efforts we examined were weak when detailing provisions for monitoring vendor performance. This applied both to provisions in the contracts (where little was said) and to the agency's subsequent monitoring procedures (which were not well-formulated). Formal performance criteria were usually vague while procedures for conducting the monitoring were limited. Standards included in the contracts dealt with process, but paid little attention to specifying outcomes.

We found only one systematic, in-depth evaluation of any of these contracting efforts. This was an evaluation of the State of Florida's Okeechobee school for severely delinquent male youth, funded by the federal government. Nor did we find plans for in-depth assessments of the contract effort in any of the other jurisdictions studied. However, on occasion there were plans, especially at the state level, for periodic reviews of the contractor's performance. The State of Tennessee's Legislature, as part of its May 1986 authorization of a trial contract effort for a medium-security facility, is requiring that an evaluation of comparative costs and service quality be done after the first two years. Evaluation is a prerequisite to renewing the contract for an additional two years. These examples are all primarily experimental efforts; there is little past experience to go by anywhere in the country. Since the number of private firms available to undertake these efforts were few, some new organizations were formed to bid on and operate the secure correctional facilities.

#### 5. Impacts

While based on limited information, our observations indicate that initial contract operations have been reasonably successful--at least in the opinion of the government officials. It is not, however, clear that they have been successful from the perspective of profitability for the private firms. Vendor organizations appear to have made major efforts to do the job correctly.

In only one case, the Okeechobee School for Boys in Florida, was there evidence that major problems existed early in the effort. Even there, a follow-up visit indicated that many, if not most, of the problems had been corrected. A county workhouse that changed from public to private management initially had substantial staff turnover problems (Hamilton County, Tennessee), but this apparently did not result in major reductions in service quality. This special effort to do a good job is probably due to the private organizations finding themselves in the national limelight, and their desire to expand the market.

#### 6. Avoiding Future Problems

Although a lack of full competitive bidding and careful monitoring of performance may be understandable for the initial trials, second phase efforts will require more attention to establishing: (a) more credible competitions and (b) comprehensive, formal monitoring requirements and procedures. This applies to future contracts for current providers as well as new private efforts.

Government agencies need greater assurance -- for themselves, for elected officials, and for the public -- that contracting activities will be administered in a fully appropriate, cost-effective and accountable manner. A strengthened contracting process should not be offensive to the private organizations themselves. Most of the officials of these firms supported full monitoring of their work.

## RECOMMENDATIONS

### Contract Goals

1. Before contracting, states should undertake a systematic, detailed pre-analysis to determine if, and under what conditions, contracting is likely to be helpful to the corrections system. This analysis should include an examination of whether statutory authority exists, of current state prison costs, crowding, performance, legal issues involved, availability of suppliers, ways to reduce the likelihood and consequences of contractor defaults, and the attitudes of various interest groups. (Issue #5)

2. If a governments' goal in contracting is to obtain new beds quickly, the private sector offers an attractive alternative. However, if the government seeks a more economical operation, the minimal evidence available to date suggests that contracting does not necessarily save a significant amount of money. (Issues #6 and #22)

### Protection of Inmates/States

3. Careful attention must be devoted to ensure that each contractual component provides adequate protection of the inmate's rights and protects the state from unjust liability claims. (Issues #2 & #4)

4. The government can reduce but not eliminate, its vulnerability to lawsuits when contracting by specifying in the contract that the government be indemnified against any damage award and for the cost of litigation. (Issue #1)

5. The government should consider requiring that a significant performance bond be posted or a trust fund established in order to indemnify it in the event of contractor financial, or other, problems. The agency should, however, determine whether the protection is worth the cost of the bond. (Issue #16)

### Contracting Process

6. Governments should use a competitive bidding process if they decide to contract. This will avoid accusations of cronyism, fraud, and the like. To maximize the number of bidders, the government can:

- o Advertise in major state newspapers and national correctional journals;
- o Develop and maintain a list of potential bidders;
- o Permit both in-state and out-of-state private non-profit and for-profit organizations to bid. (Issue #13)

7. Governments should include information about the bid evaluation process in the RFP. Suggested evaluation criteria include, but are not limited to:

- o Firm's experience and past success in similar undertakings;
  - o Staff qualifications;
  - o Proposed programs;
  - o Firm's financial condition and references;
  - o Cost.
- (Issue #14)

8. A method for resolving any contractual differences that may emerge should be agreed to and be specified in the contract before activation of the facility (Issue #10)

#### Contract Provisions

9. The requests-for-proposals and subsequent contracts should explicitly specify: (a) who is responsible for what expenditures and (b) what levels of performance are expected (including: compliance with minimum standards as to policies, procedures, and practices; results on such performance indicators as maximum numbers of various "extraordinary occurrences;" and compliance with fire, safety, medical, health, and sanitation standards). The RFPs and contracts should also identify sanctions or penalties that will apply for inadequate performance. (Issues #15 & #19)

10. A tiered fee, or variable cost structure that is fair for both parties should be built into the contract so that there will be no future misunderstandings regarding cost for vacant beds and/or additional inmates beyond the specified ceiling (Issue #15)

11. Rebidding of prison contracts should occur approximately every three years. State laws and regulations should be checked before including this specification, since they may suggest a different maximum contract length. (Issue #18)

12. Governments should include special provisions in their contracts to require that the contractor provide advance notice of the end of a union contract period, the onset of labor difficulties or major worker grievances that could result in a work stoppage or slowdown. (Issues #1 and #16)

#### New & Existing Facilities

13. Contracting for new or retrofitted institutions entails many fewer problems (such as personnel problems) than turning over an existing facility to a private firm, and thus should be given preference in a government's initial contracting efforts. (Issue #8)

14. Governments contracting to replace existing facilities should take steps to ameliorate personnel problems including:

- o Require contractor to give employment preference to displaced staff;
- o Provide transfer, retraining, and outplacement services to employees not choosing to work for the contractor;
- o Carefully calculate, and make provisions for, disposition of benefits (especially retirement and vacation/sick leave accrual). (Issue #20)

15. Governments establishing a new contracted facility should develop a public relations plan. Good public relation are crucial for community education. The government should fully inform community leaders and should also keep correctional employees fully informed of any contracting deliberations. The media should be made aware of the contracting initiative at an early stage. Once awarded the contract, the private firm should use community resources for operating the facility, whenever possible by, for instance, hiring local people and buying supplies and services locally. (Issue #7)

#### Selection of Inmates

16. Both the RFP and subsequent contract should be explicit in describing the type and level of offender for which the state is seeking a private contractor and the major architectural features the public agency deems necessary to confirm the prisoners appropriately. The contract should be based on the state's current inmate classification policy and its operational definitions of the privileges and level of supervision to be accorded the type of inmates at the proposed contracted-for custody level. (Issue #9)

17. States should contractually obligate the private vendor to accept all prisoners in certain specifically-designed categories (e.g., minimum security) for the duration of the contract period up to the agreed maximum number of inmates to be incarcerated at any given time (provided for in the contract). This would protect the state against the prospect of selective acceptance. (Issue #10)

18. Selection of inmates for placement in a private facility, and decisions about their movement, is the government's responsibility. The bases for these selections should be written into the contract. Criteria should be mutually agreed upon to avoid future misunderstandings. (Issues #10 & 11)

19. The contract should include a provision that permits the state to make the decisions about inmate reassignment or reclassification in the event that contractual capacity is reached. (Issue #10)

20. Both a minimum and maximum prisoner population level should be stated in the contract in order to facilitate planning and cost estimates.

21. States contracting for large institutions should specify in the RFP and the contract that the selected private vendor can use unit management, that is, can subdivide the the total number of beds into a number of smaller semi-autonomous units. (Issue #15)

#### Level of Authority

22. Government officials must ensure that disciplinary hearings conducted by the contractor following legally required practices when discipline problems occur. A private firm should adopt the policies and procedures utilized by the unit of government. Significant disciplinary actions should be formally approved. The state should consider permanently stationing one or more of its own staff members at large (e.g., 150 inmates or more) private facilities--or at least provide for frequent visits.. This individual's responsibilities would include participation in all disciplinary hearings concerning major rule infractions, the definition of these having been spelled out in written policy statements. (Issue #12)

23. Private companies given authority over inmates--authority that otherwise would have been that of the governmental entity if the contract did not exist-- should closely adhere to the same type of procedures that the government agency would have normally used. Where possible, private contractor discretionary actions involving inmate rights and discipline should be made in the form of a recommendation to the appropriate government agency or official for ratification. (Issues #3 & #4)

24. In the event of an escape attempt, private prison employees should use reasonable and appropriate restraint in the absence of any other specific statutory or case law. Once an inmate has left the facility's property (unless the private prison employees are in hot pursuit or have been deputized), law enforcement officials should become responsible for the ultimate capture and return of the escapee. (Issue #3)

25. Although individual practices may differ in regard to the degree of involvement of the public correctional agency with release decisions, insofar as the private sector is concerned, its contribution to this process should be limited to a presentation of the facts pertaining to the inmate's level of adjustment during the period of confinement in the private facility. Public officials should make the decision. (Issue #12)

#### Monitoring

26. The state should plan (before the RFP is issued) and implement (after contract award) an effective system for continuous contract monitoring. This should include:

- (a) regular timely reports (showing tabulations and analyses of extraordinary occurrences and other significant performance indicators and the results of on-site inspections)
- (b) regular on-site inspections, (at least monthly and preferably weekly) using pre-specified checklists, rating categories, and guidelines on how to complete the ratings
- (c) periodic documented fire, safety, health and medical, and sanitation inspections
- (d) provision for regular interviews with samples of inmates to obtain feedback on such performance elements as treatment of prisoners, amount of internal security, drug use, and helpfulness and adequacy of educational, work, and recreational programs
- (e) annual in-depth, on-site inspections by a team of experts, covering the various procedures used and the results of periodic reports on the facility's quality of services based on pre-contract specified outcomes/results indicators
- (f) explicit provision for prompt review by government officials of the written findings from each of the above procedures with prompt written feedback to the contractor, and identification of what needs to be corrected and by when (and subsequent follow-up to determine level of compliance)
- (g) provision for supplying information obtained from the monitoring process by the time contract renewals and rebidding are scheduled--so this material can be used effectively.

The same monitoring procedures should be applied to publicly operated and contractor operated facilities. Governments with comparable facilities can then use the resulting information as a basis for comparisons--and thus, obtain a better perspective on the relative performance of the contractor. (Issue #21)

27. From a state, local and national perspective, it is highly desirable to obtain systematic, comprehensive evaluations of the costs and effectiveness of contracting secured correctional facilities. A government should require that a comprehensive evaluation be made, (within three years of contract award, of the degree of success of its contracting effort. Where possible as compared to its publicly operated facilities. Other than the philosophical issues, most of the debate over prison contracting can be greatly enlightened by empirical field evidence concerning its elements. It is a great waste of resources if innovative trials of prison contracting are undertaken without including appropriate evaluations from which states and local governments, and society, can learn: Does contracting work, and under what conditions? (Issue #23)

## CHAPTER I

### INTRODUCTION, SCOPE, AND METHODOLOGY

#### INTRODUCTION AND SCOPE

In this work we report on our findings from an examination of key issues that states need to consider regarding contracting for the operation and management of state prisons. This study was conducted during the period November 1985 through September 1986.

We examined the specific issues listed in Table A, pages -----, and discussed in the later chapters of this report. These issues appeared explicitly or implicitly in our preliminary examination of the literature on prison contracting, state and federal legislative hearing reports, reports prepared by a number of state governments, and our own past experience with public sector contracting.

The report's objective is to help state officials in the executive, legislative and judicial branches by providing guidance in their deliberations regarding contracting prison facilities. For states proceeding with contracting, the report offers guidance by suggesting ways to alleviate potential problems and make the effort as successful as possible.

Materials that are currently available on contracting state or local correctional facilities primarily have taken three forms:

1. Arguments as to the advantages and disadvantages of contracting correctional facilities.
2. Surveys covering contracting of individual services (such as medical, food, work training, and education) as well as the management and operation of total facilities.
3. Brief newspaper-type write-ups and reporting on interviews with officials of government and private firms.

Very little information is available concerning early experiences that might shed light on the issues and complications involved. This report tries to reduce this gap. The paper draws from some of the early experiences in contracting to provide information that may help officials identify the policy and program considerations in contracting and ways to alleviate those problems. We suggest elements that seem appropriate for inclusion in requests-for-proposals, the contracting process, and the final contract.

This work, however, is not a cost-effectiveness analysis of correctional facility contracting experiences. Most contracting cases are relatively new, lacking sufficient operational time to allow meaningful evaluation. Thus, the study does not attempt to evaluate whether the experiences to date have been successful or not. In Issue #22 we provide some, mostly qualitative, judgments about the quality and costs of the contracting efforts that we have examined. Issue #23 contains suggestions for procedures that state agencies and others might use to make such assessments in the future.

Contracting experiences concerning full operation of secure adult facilities by state governments are extremely rare. As of this writing, there is only one that appears to fit this category -- a minimum security facility, Kentucky's Marion Adjustment Center, which began operation in January 1986. The analysis draws on some state experiences in contracting secured facilities for juveniles and some experiences at the local level of government, including examples of contracting for adult jail-like operations and secure juvenile facilities for severely delinquent youths.

This paper does not attempt to cover federal experiences (e.g. Immigration and Naturalization Service contracts), partly because of a lack of time or resources to include federal facilities, and also because the INS appear to have substantially different types of inmates than state and local secure facilities. For similar reasons many experiences throughout the country with the contracting of community "half-way houses" have not been examined. However, we found that the experiences of local jails and county and state secure juvenile correctional facilities shed important light on many of the issues discussed in this analysis, and thus such examples have been included.

#### METHODOLOGY

We used the following nine procedures to examine the contracting issues:

1. We obtained documents from 22 states regarding their activities and studies relevant to the contracting of state prisons. Items of direct relevance to this study are listed in the bibliography.
2. Twenty (20) individuals were interviewed regarding state trends and policy perspectives about contracting for corrections institutions. The 12 in-person interviews and 8 telephone interviews were conducted using an open-ended format. The following jurisdictions were contacted:
  - o State of Kentucky. It participated throughout the study. Contacts were made in the Corrections Cabinet, Division of Purchases, Legislative Research Commission, and with selected State legislators.

- o State of Tennessee. It provided information in January of 1986. Contacts were made in the Governor's Office, Department of Corrections, Legislative Research Agency, and with a member of the State Legislature. Officials of Corrections Corporation of America were also interviewed.
- o State of Florida. Information was provided by the Legislative Committee on Corrections, Office of the Attorney General, and the Department of Corrections. We also interviewed an official from National Corrections Management, Inc.

3. A wide variety of published materials were reviewed, including law journals, corrections periodicals, newspaper reports, testimony in a variety of both congressional and state legislative hearings, and reports and memos from interest groups such as the American Civil Liberties Union, the American Bar Association, the American Federation of State, County, and Municipal Employees, National Governors' Association, National Association of Counties, and National Sheriffs' Association. A particularly useful source was the National Institute of Corrections-funded report of an evaluation undertaken of the State of Florida's School for Boys at Okeechobee. This is an institution for approximately 400 severely delinquent male juvenile offenders. First awarded in September of 1982, the contract is with the Eckerd Foundation (a non-profit organization), and the contract is administered by the Florida Department of Health and Rehabilitative Services.

4. We conducted a total of 34 interviews with representatives of the public and private sectors involved in contracting activities in eight jurisdictions. For each setting except those in Massachusetts, we interviewed by telephone at least one representative of the government agency that was contracting the facility and at least one representative of the private organization. In Massachusetts only public officials were interviewed. In total, we interviewed 20 representatives of the public sector and 12 personnel representing private vendors. The telephone interviews took 45 to 75 minutes, with an average of approximately one hour. The contracting sites are:

- o State of Kentucky Marion Adjustment Center. Adult males, 200 beds, minimum security. First contract year began January 1986. (Contractor: U.S. Corrections Corporation.)
- o State of Pennsylvania Weaversville Intensive Treatment Unit. Severely delinquent male youth, 22 beds. First contract year began 1976. (Contractor: RCA Services, Inc.)

- o Bay County, Florida, Jail and Annex. Adult male and female, approximately 350 beds, minimum security. First contract year began October 1985. (Contractor: Corrections Corporation of America.)
- o Hamilton County, Tennessee, Silverdale Detention Center. Workhouse for adult males and females, approximately 340 beds. First contract year began October 1984, 150 beds. (Contractor: Corrections Corporation of America.)
- o Shelby County, Tennessee, Shelby Training Center. Severely delinquent male youth, 150 beds. First contract year began April 1985. (Contractor: Corrections Corporation of America.)
- o Ramsey County, Minnesota, Roseville Regional Correctional Center. Women, minimum security, 42 beds. First contract year began 1984. (Contractor: Volunteers of America, a non profit organization.)
- o Massachusetts Department of Youth Services. Secured treatment facilities for juveniles, 15-20 beds each. Contracting for several years. (Approximately 7 of its 11 secured facilities are contracted to private nonprofit organizations; the other four are operated by state employees.)
- o State of Florida Beckham Hall Community Correctional Center (located in Miami). Adult males, 171 beds. First contract year began October 1985. (Contractor: National Corrections Management, Inc.) This facility was added late in our study when we received information that it might be a secure adult facility. The facility, however, primarily is a work release program and probably should not be labeled a secure facility. Some of its experiences, however, are relevant and are included in this report.

All but the Kentucky interviews were conducted by telephone. The Kentucky interviews were conducted in-person in Frankfort and at the facility in Marion. A semi-structured interview guide was used with different versions for the private and public officials. In each interview we sought the following information: the history of the contracting effort, the scope and size of the facility, security issues, how monitoring was undertaken, what problems had arisen at the facility, and how respondents thought the problems could be solved. We also asked opinions about the success of the effort and what recommendations officials would make to other agencies. In general, we sought information on the issues identified in Table A.

It was expected that the vendors would express favorable opinions towards the efforts, but identification of problems was encouraged and was evident. We expected the on-site people to have more mixed reactions. Most of the public officials that were interviewed were not those persons responsible for deciding to contract. In two instances, we explicitly chose to interview officials understood to be negative towards the effort in order to identify problems as perceived by all concerned.

5. For each of the eight jurisdictions and the Florida School for Boys we requested and reviewed documents relating to the effort, particularly requests-for-proposals, the subsequent contracts, and materials reporting on performance. Those documents were a major source of information for this report.

6. For Kentucky's Marion facility we conducted a series of on-site interviews in mid-May of 1986. This institution appears to be the first contracted facility that can be labeled a state prison with adult state inmates. It is a facility that thus far has housed the least dangerous state prisoners; it is a minimum security facility with no perimeter fence. Organizationally, the contract is monitored in Kentucky's Corrections Cabinet by the Community Services rather than the Adult Correctional Facilities division.

We interviewed seven officials of the Kentucky state government, including the on-site monitor, four persons representing the private vendor, and the executive of the county in which the facility is located. Our preference would have been to interview personnel on site for each of the locations we examined, but limited resources prevented this.

7. Others we interviewed were corporate officials representing three companies in the private for-profit operations: Corrections Corporation of America, U.S. Corrections Corporation, and RCA Services, Inc. We sought their perspective on experiences with contracting to operate correctional facilities.

8. Evidence from the government agencies and private firms relating to performance evaluation was collected, but this type of information was particularly scarce. Since we were not attempting to do cost-effectiveness analysis, officials were not pressed for information regarding performance, nor did we try to develop it ourselves.

9. We coded the information from interview reports, trip reports, and various documents and publications as to which issue each pertained. Then we abstracted and synthesized the material relevant to each issue discussed in the report. The resulting information was used to prepare this report.

#### REPORT OVERVIEW

Chapter II summarizes the present status of state contracting for correctional facilities. Chapter III discusses the legal issues that governments should consider before deciding whether to contract for management of correctional facilities. Chapter IV discusses the program and policy issues. The request-for-proposals and contracting processes are covered in Chapter V. Chapter VI discusses contract monitoring; it provides suggestions regarding how individual governments or others might evaluate contracting efforts and gives our qualitative impressions of the effects to date of the contracting efforts. Chapter VII presents our major findings and recommendations.

When discussing each issue in Chapters III, IV, V and VI, we attempt to define the issue, present the principal findings based on the materials that we reviewed and the interviews conducted, and provide recommendations based on those findings.

This report will not make contracting decisions for states. Nor is it likely to make such decisions easier. We hope, however, that the information provided will help public officials to make better decisions and, if they proceed with contracting, will help them to implement a process that will be more effective for all concerned.

## CHAPTER II

### TRENDS IN CONTRACTING FOR STATE CORRECTIONAL FACILITIES

According to our survey, states appear to be moving slowly and extremely cautiously toward contracting for the operation of their correctional facilities. This survey was conducted in the fall of 1985 and spring of 1986. Our analysis shows that states consider contracting for facility operation as one way to cope with prison overcrowding. Yet proponents and opponents tend to disagree on almost every issue regarding advantages and disadvantages of contracting.

This chapter summarizes the present status of state activities in contracting for the operation of state correctional facilities. Information used in this chapter was collected from a literature survey, testimony, interviews, and documents and staff reports prepared by state agencies in both the executive and legislative branches. Specifically, the chapter highlights the findings of our survey, presents examples of prison contracting, discusses statutory provisions for prison management, and presents arguments for and against contracting for correctional facilities. Before discussing these four topics however, a brief introductory section might be useful. This section addresses the issue of contracting for correctional facilities as an alternative to prison overcrowding and trends in contracting in other areas of public services.

#### PRISON OVERCROWDING

Prison overcrowding has been a major problem at all levels of government, but particularly at the state level. Today, more than one-half million inmates are behind bars in state prisons. A majority of the 550 state correctional facilities hold between 10 to 30 percent more inmates than their prison's capacity. Entire correctional systems in nine states are under court order to ease prison overcrowding, as are individual facilities in 25 other states.

Various measures have been taken by states in their efforts to reduce prison overcrowding. These include new construction, renovation of existing facilities, use of military facilities, use of local jails, pretrial diversion, probation, community work release and treatment centers, and early release under governors' emergency powers acts.

Recently, a few states have initiated new approaches to prison overcrowding. For example, Florida and Kentucky have implemented "house arrest" programs as a diversionary alternative to prison incarceration. Other states including Kentucky, have begun intensive supervision programs under which offenders are released to the community to find gainful employment, pay restitution, and participate in self-improvement programs. Minnesota and Wisconsin have signed interstate agreements for additional bedspace.

As another option for coping with prison overcrowding, several states have considered greater use of private firms to manage and operate state correctional facilities for adult and juvenile prisoners. Private sector involvement in state correctional services is not a new trend. One recent study prepared for the National Institute of Corrections reported that a variety of correctional services was provided by private companies in 39 states, the most frequent services being health, education and vocational training, halfway house and after care programs, and staff training.<sup>1/</sup> In the correctional industry area at least eight state corrections departments have contractual arrangements with private firms.<sup>2/</sup>

Use of a private firm to operate and manage an entire correctional facility raises additional legal, political, and administrative questions for state policymakers, program administrators and employee organizations. In 1985 the American Federation of State, County and Municipal Employees (AFSCME) officially withdrew from the American Correctional Association (ACA) because of ACA's recently adopted policy concerning contracting for correctional services. AFSCME President, Gerald W. McEntee, stated, "As little as 12 months ago the idea of contracting out for correctional services was being laughed off as a pretty harebrained idea; not today. American business has invaded the corrections field."<sup>3/</sup>

Correctional services is one of several areas that government contracts out to private firms. Over the past few years, interactions between government and the private sector have been intensified due primarily to federal deficits, revenue limitations, and perceived public attitudes against "big, costly and inefficient" government.

Since the creation of the Task Force on the Private Sector Initiatives in 1981, the Reagan Administration has increased its efforts to contract out public assets and services--loans, insurance, transportation, postal services, resources, public safety, welfare, and other commercial activities. The list of local services provided by private firms is getting longer. Many localities contract for such services as garbage collection, street maintenance, police and fire protection, wastewater treatment, transportation, and parks and recreation.

States have not been as quick to contract out as localities, but several states have begun experimenting with alternative service delivery methods involving the private sector in health and mental health, social services, employment and training, environment, energy, transportation, facility management, and corrections. Corrections has received a great deal of public attention, however.<sup>4/</sup>

Until recently, most contracts by state agencies were for capital construction and professional services. A 1985 survey of state general services officials conducted by The Council of State Governments showed that a majority of the states contract for legal, medical, engineering, technical and professional services.<sup>5/</sup> Contracting for non-professional services is now receiving serious attention by state policymakers.

## STATE TRENDS

In an effort to identify trends in contracting for state correctional facilities, we conducted a 50-state survey of state correctional directors and legislative service agency directors between December 1985 and July 1986. The survey asked state officials to send The Council of State Governments relevant studies regarding: contracting-out secure, adult, state and local corrections facilities; contracting-out particular correctional services; laws or policies enabling state or local governments to contract-out; and other options to address the problems of prison overcrowding. In some instances, state officials were interviewed for further information and updates. The following are the results of the survey to which all the 50 states responded.

1. Most states had conducted studies on prison overcrowding. Yet documents (statutes, staff reports, papers, memoranda, etc.) on contracting for corrections were available from only 22 states: Alabama, Alaska, Arizona, California, Connecticut, Florida, Illinois, Iowa, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New Mexico, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, Virginia, and Wisconsin.

2. Most of the contracting studies had been conducted in the past two years. Some studies heavily relied on the prison "privatization" reports prepared for the National Institute of Justice and the National Institute of Corrections.6/

3. States tended to use the term privatization as a proxy for contracting. The following are some examples of definitions used by various states for privatization:

Alabama: Privatization - a practice where the applicable government or authority gives up its traditional roles in construction and/or routine management of prison or jails and relies upon private sector businesses to do the job for a fee.

Arizona: The process whereby governmental entities contract with private sector corporations to provide penal custody and services.

California: The term "privatization of prisons" refers to the process whereby all or portions of the public jurisdiction's penal system is contracted out to private and generally profit-motivated vendors.

Connecticut: The term "privatization" is used to describe the private sector's participation in the renovation, construction, and then ownership and/or operation of needed public facilities.

4. States had conducted studies on contracting for prison management primarily because of prison overcrowding, cost savings, and the difficulty of receiving voter approval to raise capital for prison construction. At least two states reported on why they have not considered privatization:

Minnesota: Minnesota currently is not confronted with the serious overcrowding experienced in many states--although populations have been on a steady increase since the mid 1970's. Minnesota has the lowest rate of incarceration in the nation which may be attributed to a number of historical factors. These include a strong probation system, our state community corrections system, our system of sentencing guidelines, Minnesota's relatively low rate of violent crimes, etc.

New York: ...we do not have, in our state, the level of problems...faced by other states. Indeed we may be crowded, but we are not overcrowded. We have no double celling anywhere in our system of 36,000 inmates. We do not have a funding or cost reduction problem, nor are our programs or services in need of major improvements...we have no intention of contracting out the operation of any of our facilities.

5. Several states had considered contracting for the operation of facilities for selected offenders or inmates, usually for those requiring minimum security, parole supervision, or work release. Connecticut and Iowa have considered privately-operated facilities for drunk drivers.

6. At least two states attempted cost comparisons.

Alabama: A study prepared for the governor in July 1985 compared costs per day of a state facility and a privately-run juvenile facility. The study reported that "costs per inmate per year at Staton Correctional Facility are \$2,694 lower than the same costs at Okeechobee Juvenile Facility in Florida." The report compared the two facilities because "Staton Correctional Facility is closely aligned with Okeechobee as to size and mission." The Alabama study concluded that "privatization of correctional facilities in Alabama would significantly raise costs, not reduce them..."

California: The Department of Corrections tabulated costs of state-operated programs with comparable private correctional programs and found that costs for state-operated programs in 1984 were higher than privately-operated programs in terms of actual per capita cost.

7. Private financing of prison construction had been considered by at least eight states: California, Connecticut, Florida, Illinois, Iowa, Michigan, Missouri, and South Carolina. In July 1986 Missouri entered into construction contracts with private firms for a 500-bed maximum security facility. The lease/purchase agreement stipulated that the private firms would design, construct, finance, and lease the facility to the state for 40 years. Recent changes to the tax code, may have made contracting a less attractive investment for private firms.

8. Several state studies have identified concerns and made specific recommendations about private contract correctional facilities.

The following are (a) a list of concerns prepared by the California Assembly's Commission on Public Safety, and (b) recommendations by Florida's Legislative Committee on Corrections, Probation and Parole.

FIGURE A

California's concerns:7/

- o Cost-Effectiveness: Where and how are the economies achieved in the privately run facilities? Do the savings accrue from reduced services and/or lower employee wages and benefits?
- o Public Accountability: Are privately run facilities more or less responsive to the concerns of the public and their elected representatives? How are contract conditions to be enforced short of contract cancellation.
- o Civil Liability: How can the contracting by public agencies be insulated from civil liability for the malfeasance of the contractor and his employees? Is there a danger of bankruptcy to the private company in the face of multiple or excessive damage judgments?
- o Use of Force and Deadly Force: In the absence of peace officer status, will private contract employees be free to use reasonable force to ensure inmate compliance? Will the private employees be able to apply deadly force to prevent escapes?
- o Quality of Services and Facilities: What ensures that inmate employees are adequately trained and that the private facilities are not substandard?
- o Displacement of Civil Servants: Should private contractors be able to directly or indirectly displace civil servants? Should contractors be obliged to hire displaced civil servants?
- o Contract Decision Irreversibility: Once significant reliance has been placed upon a contractor, is cancellation or nonrenewal of the contract a viable option in light of (a) the limited number of private providers; and (b) the long lead time need to rebuild the civil service capability?
- o Skimming the Cream of the Inmates: If private contractors are limited to low risk, low custody, tractable inmates, do the public facilities become more unmanageable due to a higher concentration of more difficult inmates?
- o Punishment vs. Corporate Motivation: As a matter of social or legal philosophy should the administration of justice be placed in private, profit-motivated hands?

FIGURE B

Florida's recommendations:8/

- o The Department should conduct background checks on the private vendor's competence and solvency prior to contract negotiations.
- o Uniform competitive bidding procedures and selection committees that represent multiple interests should be employed. The selection committee should be composed of at least one member from the Department of Health and Rehabilitative Services and one member from the Department of General Services.
- o The Department should develop a model RFP and contract that thoroughly addresses occupancy minimums and maximums, incentives to keep costs low, characteristics of offenders placed, control over admission and release decisions, staff qualifications, staffing patterns, training standards, insurance requirements, and confidentiality of records.
- o The Department should fund an evaluation of the private contractor's operation, one year after start of operations contract. The evaluation should be conducted by an objective, outside evaluator and should compare pre and post contracting measurable standards of performance. A rigorous assessment of the costs and benefits of private vs. public management should be included in the evaluation.
- o Contract length should be statutorily limited to two years.
- o The Department should clearly state in the contract that the private contractor has no direct authority over gain time or disciplinary report decisions or any decisions that affect release or transfer decisions.
- o The Department should list in the contract expected performance standards that will be monitored and measured. These performance standards should include such items as: escapes; number of GEDs earned; inmate on inmate or inmate on officer assaults; use of isolation or restraints; use and availability of innovative programs; staffing patterns; procedures for security and control; use of inmate labor and food and medical service requirements. Penalty clauses for non-performance and reward clauses for high performance should also be included in the contract.
- o The Department should provide a report to each vendor on the past and pending on-the-job injury claims, worker compensation claims, liability suits, as well as past and present regulatory reports. Penalty and reward clauses should be in the contract to reduce or maintain at a constant level the volume of such claims and suits.
- o The Department should list in the contract, governmental services that are to be discontinued under the contract.
- o If the contract entails the management takeover of an existing and staffed facility, the Department should provide a contract provision regarding the placement of existing employees.
- o In keeping with the code of ethics for public officers and employees, no firm should contract with a state agency and receive state funding that employs ex-public employees that made policymaking, staffing, or contracting decisions within the last two years for the contracting agency.
- o The legislature should mandate that vendors provide the same curriculum and training to private correctional officers as provided by the Criminal Justice Standards and Training Commission.

## EXAMPLES OF PRIVATELY-OPERATED CORRECTIONAL FACILITIES

To date, state experiences in contracting for private management of adult inmates in secure facilities are very limited. Private firms managed juvenile facilities in at least 12 states: Florida, Massachusetts, Michigan, New Mexico, New Jersey, Oklahoma, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, and Washington. Two states, Florida and Kentucky, recently contracted with for-profit private firms for the operation and management of minimum security correctional facilities for adult inmates. Illinois and Wisconsin used not-for-profit organizations to manage community adult correctional centers. In Alaska, a restitution center is operated by a private firm, while California uses private beds to alleviate prison overcrowding. The Tennessee Department of Corrections a request-for-proposal (RFP) for a medium security prison for adult inmates, but receiving no responsive proposals, is, as of this writing, considering a revision and reissue of the RFP.

### Florida

In Florida (in October 1985) a private firm, National Corrections Management, Inc., assumed the operation of the Beckham Hall Community Correctional Center, a minimum security work release facility under direct state jurisdiction. Since Beckham Hall operates a non-supervised work release program, it is not secure. The Center with a capacity of 158 adult inmates is currently housed in facilities leased under a use permit from Dade County for \$1 per year. The term of the contract is for a three-year period; the rate of payment for the first year of the contract is \$20.81 per inmate, per day. The Beckham Hall contract was a result of Florida's attempts to find new alternatives in dealing with prison overcrowding. The Florida Department of Corrections is currently evaluating the performance record of the privately-run correctional facility.

### Kentucky

In October 1985 Kentucky awarded a contract for an adult facility to a private firm, Bannum Enterprises, Inc. Under this proposal, the private firm was expected to convert an existing facility, International Harvester Administration Complex in Louisville, to a 200-bed minimum security prison. However, the site was not available for use as a prison. In December a contingency contract was signed with another private firm, U.S. Corrections Corporation, for a private prison at another site. This contract became effective in January, 1986, and the private firm now operates the 200-bed facility known as Marion Adjustment Center in Marion County. The state's Cabinet contracted out the facility as a result of the recommendations of the Governor's Task Force on Prison Options. Kentucky's Corrections Cabinet is monitoring private management of the minimum security correctional facility.

The Florida and Kentucky examples offer considerable information on decisions state policymakers need to make before contracting out management of secure, adult correctional facilities for state prisoners. However, a careful review of the examples raises the question: How different are these two examples from privately-run halfway houses and various types of community correctional or work release centers in many other states?

Kentucky's Marion Adjustment Center has a number of similarities with privately operated halfway houses in the state. Inmates in the Center serve a longer term, which is three years or under, compared to that of one year or less in halfway houses. The Center has tighter restrictions and a self-contained correctional programs. Inmates remain on the grounds. Marion Adjustment Center is located in a rural county with no perimeter fence, while all the halfway houses are located in urban areas in the state. Kentucky's Corrections Cabinet places the Center on a continuum between privately-run halfway houses and other minimum security prisons in the state.

### Illinois

Illinois was one of the first states to use private organizations to operate community correctional centers for felons, as well as for parolees. The state's Department of Corrections has been involved in contractual arrangements with not-for-profit organizations since 1975. The state currently has five contractual correctional community centers and ten state-operate correctional centers. The privately-run correctional centers must abide by the same rules and regulations, directives and procedures required of the state operated facilities. In fiscal 1986 the state appropriated \$3.5 million for contracts to provide housing and services to 252 inmates. In 1983 the Governor's Task Force on Prison Overcrowding recommended that the state "consider the private sector for correctional facilities and services where fiscally cost-effective and administratively feasible. Such contracting shall include community center placements, as well as prison facilities and services." 9/

### Wisconsin

Despite legislation passed in the 1986 legislative session allowing the state corrections agency to contract for operation of community correctional centers by private firms, Wisconsin's only privately-run facility was closed in January 1986 for budgetary reasons. For eight years, Baker House Pre-Release Center in Milwaukee (capacity of 26 beds) housed adult state inmates. One of the 15 state minimum security facilities, Baker House was operated by a non-profit corporation, the Wisconsin Correctional Services. The private correctional facility had placed heavy emphasis on work release, job training, and extensive counseling services.

### Alaska

Contracting with private firms has received considerable review in Alaska. In 1985, legislation was passed authorizing the state Department of Corrections to contract for adult correctional restitution center services. In November the department contracted with a private agency for the operation of a 75-bed correctional restitution center in Anchorage. Alaska plans to expand this to other areas of the state. The purpose of the center is "to provide certain nonviolent offenders with rehabilitation through community services and employment - while protecting the community through partial incarceration of the offender, and to create a means to provide restitution to victims of crimes."10/

## California

The California Department of Corrections has used, on a limited basis, privately-operated correctional programs to house selected state inmates to alleviate prison overcrowding. In fiscal 1986 the Corrections Department was budgeted for 1,700 private beds. By December 1985 the department had 1,000 beds under contract and had issued requests for proposals for an additional 734 private beds for three programs: private re-entry work furlough, private community treatment, and private return-to-custody.

## Tennessee

The Tennessee Department of Corrections issued a request for proposal to operate a medium security prison. A new state law allows the state corrections department to contract with a private firm to manage the state-built medium security 180-bed work camp in Carter County. Under the law, the private firm is required to operate the facility at a cost of 5 percent less than the probable cost to the state of providing the same services. The cost of monitoring the contract is to be added to the vendor's price for determining the cost of private operation.

In a November 1985 special session, Tennessee Governor Lamar Alexander proposed to let a private company build and operate a state prison. The legislature also considered a proposal by the Corrections Corporation of America for the "franchise" to operate Tennessee's entire prison system for up to 99 years. Neither proposal passed before the special session recessed. The session of the 1986 legislature passed the private prison contracting act in April, and the governor signed the bill into law in May 1986. The enabling law, however, is applicable only to the Carter County facility.

## STATUTORY AUTHORITY

At the present time, most states do not have specific enabling legislation for contracting for adult correctional institutions. In some Jurisdictions there is no statutory authorization or prohibition, while others do have legal barriers to contracting. There are other states where privatization requires prior approval from a state's attorney general's office. Yet the trend appears to be headed toward either clarifying or granting statutory authority to state agencies to permit contracting. In all states, however, existing legal barriers may be removed only by legislative measures or by constitutional amendment. Until recently, for example, it was the law of the state of Maryland that "State employees shall perform all state functions within state operated facilities in preference to contracting with the private sector for the performance of those functions..."<sup>11/</sup> In 1984 the legislature added the following to the existing statutory provision:

"... Except where the General Assembly has mandated or authorized the performance of these services by an independent contractor, a service contract may be... exempt from the preference state in Section 8-802 of this subtitle if...

- o The services to be contracted for are not available for performance by state employees;

- o Actual cost savings under contract operation will be 20 percent for any service contract costing up to \$1,000,000; or \$200,000 for any service costing in excess of \$1,000,000; and
- o The potential economic advantage of contracting is not outweighed by the public's interest in having the particular function performed directly by the state government."12/

The following statutory provisions illustrate the extent of the legal basis for contracting for operation of state correctional facilities.

- o Alaska: Chapter 72, Laws of Alaska (1985), Sec. 33.30.060. The commissioner shall determine the availability of state prison facilities suitable for the detention and confinement of persons held under authority of state law. If the commissioner determines that suitable state prison facilities are not available, the commissioner may enter into an agreement with a public agency to provide necessary facilities. Correctional facilities provided through agreement may be in this state or another state. The commissioner may not enter into an agreement with an agency unable to provide a degree of custody, care, and discipline similar to that required by the laws of the state.
- o Florida: Chapter 944.105
  - (1) The Department of Corrections is authorized to enter into contracts with private entities for the provision of the operation and maintenance of correctional facilities and the supervision of inmates. However, no such contract shall be entered into without specific legislative approval and funds being specifically appropriated for the contract.
  - (2) The provisions of ss.216.311 and 287.057 shall apply to all contracts between the department and any private entity providing such services. The department shall promulgate rules pursuant to chapter 120 specifying criteria for such contractual arrangements.

- o New Mexico: Section 1, Chapter 149. Laws of 1985
  - (1) The governor or the legislature may direct that the corrections department cease operation of any minimum security facility and contract for the operation of the facility with a person in the business of providing correctional and jail services to government entities. The department shall solicit bids and award the contract in accordance with the provisions of the procurement code. The contract shall include such terms and conditions as the department may require after consultation with the general services department; provided that the terms and conditions shall include provisions:

- (a) setting forth comprehensive standards for conditions of incarceration
- (b) that the contractor assumes all liability caused by or arising out of all aspects of the provision and operation of the facility
- (c) for liability insurance covering the contractor and its officers, employees and agents in an amount sufficient to cover all liability caused by or arising out of all aspects of the provision and operation of the facility
- (d) for the termination for cause upon ninety days' notice to the contractor for failure to meet contract provisions when such failure seriously affects the operation of the facility
- (e) that venue for the enforcement of the contract shall be in the district court for Sante Fe county
- (f) that continuation of the contract is subject to the availability of funds

(2) When the contractor begins operation of the facility, his employees performing the functions of correctional officers shall be deemed correctional officers for the purposes of Section 33-1-10 and 33-1-11 NMSA 1978 but for no other purpose of state law, unless specifically stated.

- o Wisconsin: 1985 Wisconsin Act 29, Section 46.03 (17)  
To contract with one public, private or voluntary agency for the supervision, maintenance and operation of one minimum security correctional institution in a county having a population of 500,000 or more. To be eligible, an agency must have prior relevant experience.

- o Kentucky: The legal basis for Kentucky's Marion Adjustment Center is not very clear. In fact, the word "private" is not found in the statutory provision: KRS 539.590 The corrections cabinet may establish community residential correctional centers at locations approved by the legislative body of the area where located as places of confinement for convicted felons. The secretary or such person, as said secretary delegates, may at his own discretion transfer prisoners to a residential center from any correctional institution for the purpose of facilitating the rehabilitation of the prisoner except as set out in KRS 439.620.
- o Tennessee: Chapter 932 of 1986 Tennessee Public Act The newly enacted Tennessee law provides for specific guidelines for contracting for operation of a medium security facility.

SECTION 1. Tennessee Code Annotated, Title 41 is amended by adding

SECTION 2. through 15. of this act as a new chapter, to be designated as "The Private Prison Contracting Act of 1986."

SECTION 3.

- (a) The Commissioner is authorized to enter into contracts for correctional services only as provided in this act.
- (b) Contracts for correctional services as defined in Section 2 (d) of this act may be entered into subject to the requirements and procedures of Tennessee Code Annotated, Sections 12-4-109 and 12-4-110, and any additional requirements specified in this act.
- (c) A contract for correctional services as defined in Section 2 (d) (6) of this act is authorized only for the Carter County Correctional Facility and only according to the requirements and procedures specified in this act; no other such contract for any other facility shall be authorized unless the General Assembly grants specific authority for such other contract by law.
- (d) Any inmate sentenced to confinement in the Department shall be legally eligible to be incarcerated in a facility in which a prison contractor is providing correctional services pursuant to this act.

The legislative intent of the Tennessee law, as cited in the bills in the House and Senate, is to authorize the executive branch "to contract with private concerns on a limited basis to afford an opportunity to if savings and efficiencies can be effected for the operation of correctional facilities and at the same time assure that the interests of the state's citizens and employees can be fully protected."13/

#### THE ISSUES

Many states are considering permitting contracting. Granting statutory authority has become widespread (as cited in the preceding discussion.) In order to analyze this trend, major issues and questions should be addressed. Chapters III, IV, V, and VI deal with these issues in specific discussions. Table A, which follows, lists the issues which the study determined to be most important. Our original list of issues was modified and renumbered based on the findings from the various states, the literature, and our examination of specific contract operations.

TABLE A  
Prison Privatization: The Legal Issues in Contracting for  
State Correctional Facilities

Legal Issues (Chapter III)

- #1 What are the legal issues in contracting?
- #2 What liability protection will a government agency and contractor need?
- #3 How should the responsibility and authority for security be divided between the contracting agency and private operator?
- #4 What provision is there for protecting inmates' rights, including mechanisms for inmates to appeal decisions affecting them?

Policy and Program Issues Before Deciding to Contract (Chapter IV)

- #5 What specific pre-analysis should a state undertake prior to the contract decision? (e.g. cost analysis, legal issues analysis.)
- #6 What are the reasons for considering or not considering contracting prison operation with private enterprise, particularly with for-profit firms?
- #7 How should publicity regarding a change to private operations be handled? (e.g. agency, media, public.)
- #8 Should contracting be done for a) existing facilities; b) a new institution, replacing an existing facility; and/or c) new institution not replacing an existing facility?
- #9 What level of offender should be assigned to the contracted facility? What are the differences in attempting to contract minimum versus medium versus maximum security facilities? Are there different considerations for contracting facilities for specific populations? (i.e. service vs. geography, protective custody, mentally ill, women, deathrow, mothers, and children.)
- #10 How many inmates should the contractor be expected to house? What provisions should be made for fluctuations in that number? What control does the contractor actually have over the number of inmates? Should minimum and/or maximums be established in the contract?
- #11 How will inmates be selected? Will the private organization be able to refuse certain inmates? (e.g. AIDS victims, psychologically disturbed offenders.)

- #12 What authority and responsibility should a private contractor have for discipline and for affecting the release date of inmates? What will be the relationship of these decisions to the State Board of Parole?

Requests for Proposals and Contract Issues (Chapter V)

- #13 Should contracting be competitive or non-competitive? Are there enough suppliers to provide real competition? What are the relative merits of for-profit and non-profit organizations as prison operators?
- #14 What criteria should be used to evaluate private proposals? (e.g. percentages for cost and quality of service.)
- #15 How should the contract price be established and on what basis? (e.g. single fixed-price, fixed unit-price award, cost plus.) What should be excluded in the contract price? (e.g. unit costs, provisions for price increases or decreases, extent of government control for total costs annually, performance and incentive contracting.)
- #16 What provisions should be made to reduce service interruption? (e.g. problems with transition periods, defaults by contractors, work stoppages, fallback provisions.) Should there be provisions to protect the private contractor? (e.g. government obligations.)
- #17 What standards should be required in RFPs and contracts?
- #18 What should be the duration of the contract and provisions for renewal?
- #19 What provisions are needed for monitoring in the RFP and the contract?
- #20 What provisions should be made to address concerns of public correctional agency employees? (e.g. disposition of laid-off public employees after private takeover.)

Contract Monitoring and Evaluation (Chapter VI)

- #21 How and to what extent should contractor performance be monitored?
- #22 What results can be expected from contracting? (e.g. cost, service effectiveness and quality, work stoppages, illegal activity, timing of the alleviation of overcrowding, effects on other prisons in system.)
- #23 How should government evaluate the results of contracting?

## CHAPTER II

### NOTES

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2. Keon S. Chi, "The Private Sector in State Correctional Industries: The Control Data Program in Minnesota," Innovations, The Council of State Governments, August 1985.
3. Gerald W. McEnter, Public Employee, American Federation of State, County and Municipal Employees, Vol. 50, No. 5, May 1985, p. 5.
4. Keon S. Chi, "Privatization: A Public Option?" State Government News, June 1985, pp. 4-10. Keon S. Chi, "Private-Public Alliances Grow," State Government News, January 1986, pp. 10-13.
5. Linda Carroll, An unpublished survey on contracting for professional services officers in the fifty state governments, The Council of State Governments, Center for Management and Administration, 1985.
6. Camp and Camp, *ibid.*, and Joan Mullen, Kent J. Chabotar, and Deborah M. Carrow, The Privatization of Corrections, U.S. Department of Justice, National Institute of Justice, 1985.
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8. Florida Legislature, Committee on Corrections, Probation and Parole, "Experiences and Issues in Private Sector Management Contracting and Corrections," August 1985.
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10. Alaska, Laws of Alaska, Chapter 72, 1985.
11. Annotated Code of Maryland, Article 21, 18-802.
12. Annotated Code of Maryland, Article 21, 18-807.
13. H.B. 1334, S.B. 1684.

CHAPTER III  
LEGAL ISSUES IN CONTRACTING FOR STATE CORRECTIONAL FACILITIES

ISSUE #1

What are the legal issues in contracting?

The first major question that a jurisdiction will ask in exploring the question of contracting for correctional responsibilities is, "Is it legal to contract prison services to the private sector?" Although some would disagree, the answer appears to be an emphatic yes. States may contract out the responsibilities of running entire institutions or certain selected prison services unless it is specifically prohibited by state law.

Perhaps the best starting point for this analysis is federal law, which remands federal offenders to the custody of the Attorney General for confinement in "any available, suitable, and appropriate institution or facility, whether maintained by the Federal Government or otherwise..."<sup>1</sup> There is universal agreement that this statute affords the federal government the ability to contract out the total operation of a correctional facility and indeed, the government has done so, at least indirectly. The federal Immigration and Naturalization Service (INS) has recently contracted out the operation of several facilities for detainees held by the INS.

Some states also have provisions in their statutes which permit the state to contract for certain specified levels of correctional treatment. For example, in Alaska, the Department of Corrections is authorized to contract for adult correctional restitution center services, but the law does not permit contracting for adult secure correctional facilities. Most states, however, have provisions that permit some form of service contracting with respect to corrections, such as allowing private food service, health care, facilities maintenance, and other outside contracts. Nevertheless, there is resistance to the concept of total facility contracting in most states.

DISCUSSION OF ISSUE

Contracting for prisons can probably best be described as the delegation of authority for the daily operation of a correctional facility by the governmental entity statutorily responsible for correctional activities to a non-governmental entity. While the idea might seem simple, the concept poses a myriad of legal questions that must be addressed by any jurisdiction that wishes to explore contracting for prison management services as an option.

While it would prove to be of great help to public administrators if the body of law on the points relevant to prison contracting was clear-cut, unfortunately this is not the case. Neither generations of case law nor multitudes of state statutes cover all of the major controversial issues involved in state prison privatization. Ascertainment of "the law" on a given topic is a function of how that particular concept or statute has come to be interpreted over the years. In an area as new as this, the state statutes generally do not address the phenomenon of prison contracting; often the statutes are simply silent.

As a result of the dearth of statutory law, we must look back into the annals of case law on similar subjects to arrive at a general understanding of what constraints might be placed upon a jurisdiction that seeks to contract state adult secure correctional facilities.

#### The Right to Strike

The right of the private contractor's employees to strike has worried some of those considering the total prison facility contracting alternative. While it may be illegal for a state correctional officer to strike, private prison guards are not denied this avenue for expressing their discontent. In National Transportation Service,<sup>2/</sup> the National Labor Relations Board rejected the argument that private employees should be entitled to the same protection as public employees. Private employees cannot be covered under the National Labor Relations Act "merely because they provide services similar to those provided by public employees."<sup>3/</sup>

This problem is conceded by those hoping to be on the receiving end of corrections contracts. They only seem to be able to respond by noting that they will be paying higher wages and offering better benefits to corrections officers than the states currently provide, thus discouraging strikes. In the unlikely event of strike, they generally contend that an emergency preparedness agreement with the state will enable the National Guard to intervene in a timely manner. States should include special provisions in their contracts or enabling legislation that require sufficient advance notice of the end of an employment contract period, the onset of labor difficulties or major grievances that could result in a work stoppage or slowdown.

#### Legislative Appropriations

Legislatures are not continuing bodies. The actions of one legislative session are generally not considered to be binding, but rather serve merely as precedent. Thus, it may be inappropriate for certain states to enter into an agreement with a private contractor that extends beyond a legislative biennium.

#### Selective Acceptance of Inmates

Questions have recently arisen regarding whether a private contractor would have the ability to discriminate in the acceptance of inmates. For example, could a private contractor refuse to accept an inmate who has Acquired Immune Deficiency Syndrome (AIDS)? States should protect themselves against the prospect of selective acceptance by contractually obligating the private contractor to accept all prisoners in certain specifically defined categories (e.g., minimum security) for the duration of the contract period up to the maximum number of inmates to be incarcerated at any given time (as provided for in the contract). The state should include a contract provision that permits the state to make the decisions relative to inmate reassignment or reclassification in the event that the contractual capacity is reached.

## ISSUE #2

### What liability protection will a government agency and contractor need?

#### DISCUSSION OF ISSUE

Certainly one of the most serious questions on the agenda of state and local governments today is that of government liability and the inability to adequately insure (at a reasonable price) against massive judgments. With prison litigation becoming a cottage industry subject to significant judgments, states may be looking toward prison contracting as a means of contracting away public liability. Contracting-out correctional services will not insulate government from liability.

#### Legal Liability

The important provision at stake here is Section 1983 of the Civil Rights Act.<sup>4/</sup> This law provides in pertinent part that "Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."<sup>5/</sup> Can governments insulate themselves from liability under this statute? Can private contractors be shielded as well, or do they operate under color of state law?

Although the specific question of Section 1983 liability has not yet been litigated with respect to privately-operated state correctional facilities, there are a number of analogous cases which make it quite evident that private prison contractors will not be able to escape liability under Section 1983, and that the contracting government entity will be unable to assure that it will not be sued for the wrongful acts of the operator it selects, but governments may take measures to reduce exposure.

While there is no precise formula for recognizing state action in a given situation, <sup>6/</sup> the Supreme Court has developed a series of tests that help to determine when the necessary component of "state action" is present. Of particular relevance to this discussion is the "public function" concept, which recognizes state action as existing when the state delegates a power to private parties that is "traditionally exclusively reserved to the State."<sup>7/</sup>

The Supreme Court has further refined this concept recently to find state action when the function performed has been "traditionally the exclusive prerogative of the State."<sup>8/</sup> Courts have also found that "detention is a power reserved to the government and is an exclusive prerogative of the state."<sup>9/</sup> This recognizes the right of government to delegate the function.<sup>10/</sup>

While "many private corporations...build roads, bridges, dams, ships, or submarines for the government, acts of such private contractors do not become acts of the government by virtue of their significant or even total engagement in performing public contract."11/

"That a private entity performs a function which serves the public does not make its acts state action."12/ Rather, "the conduct allegedly causing the deprivation of a federal right must be fairly attributable to the State."13/

"The deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state or by a person for whom the State is responsible...[and] the party charged with the deprivation must be a person who may fairly be said to be a state actor."14/

If the 'state actor' is not a state official, he may so qualify "because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State."15/ A private party's joint participation with state officials may characterize the private party as a state actor if he is a willful participant in a joint activity with the state.16/

There is a considerable body of law that indicates that a private prison contractor will be liable for Section 1983 violations because the contractor is acting under color of state law. But does this liability render the governmental entity that contracts out immune from civil prosecution? Again, the answer is that the governmental jurisdiction cannot contract out its liability.

Perhaps the best elaboration of the issues came in the case of Lombard v. Eunice Kennedy Shriver Center for Mental Retardation, Inc. Lombard, a resident at a state institution, filed a civil rights action alleging inadequate medical care on the part of the Shriver Center, a private organization which discharged the affirmative state obligation to provide the care to residents of the state institution.17/ In refusing to dismiss the claim against either the Shriver Center or the Commonwealth of Massachusetts, U.S. District Court Judge Garrity considered the dispositive issue to be the trilateral relationship between the state, the private defendant, and the plaintiff.18/ The Court recognized the affirmative state obligation to provide adequate care, noted the delegation by the state to a private provider under a voluntary assumption, and held that "Shriver must be considered to have acted under color of law, and its acts and omissions must be considered actions of the state. For if Shriver were not held so responsible, the state could avoid its constitutional obligations simply by delegating governmental functions to private entities."19/

Under certain circumstances, the state may so imbue itself with the activities of the private contractor "as to be considered a joint participant in the offending actions."<sup>20/</sup> In Milonas v. Williams, a case involving a juvenile facility, class members were involuntarily placed at the school by juvenile courts and state with detailed contracts drawn up and agreed to by many local school districts which placed students at the facility. <sup>21/</sup> The state provided much of the funding of the tuition at the school; the facility trumpeted this fact in its promotional materials. <sup>22/</sup>

In 1985 the United States Court of Appeals went a step further toward holding government responsible for private contractor actions. In Ancata v. Prison Health Services, Inc.,<sup>23/</sup> a county had contracted out medical care services for jail inmates. The contractor had failed to properly recognize a prisoner's case of leukemia as a result of its initial recalcitrance and subsequent improper diagnosis and treatment. The Court found that, although the contractor "contracted to perform an obligation owed by the county, the county itself remains liable for any constitutional deprivations caused by the policies or customs of the [contractor]."<sup>24/</sup> Significantly, however, the Court also determined that constitutional torts committed by a contractor's employee that were "not a result of the policy or custom of the entity" would not subject the county to liability, apparently insulating the county against ultra vires acts of the contractor. <sup>25/</sup> Such an exemption could carry significant positive implications for states.

Two other forms of liability exist under which government can be found liable. The common law doctrine of respondeat superior holds the master responsible for the acts of his servant toward those whom the master owed a duty of care, if the servant failed to use such care in the course of employment. This can result in considerable civil liability.

Another scenario can arise if the contract activities are not carefully monitored by the contracting government agency. Liability can be imposed for failure to exercise the degree of oversight appropriate to the contract circumstances. However, if the oversight is close and a situation arises which the government should have reasonably recognized and dealt with in an appropriate manner, the government may be liable for the harm resulting from the action or omission. This is a Catch-22 situation for government that is dependent upon the whims of the judge and jury. These types of questions involving oversight are now appearing frequently within the private sector context with corporate boards of directors, group for which the cost of purchasing adequate insurance continues to skyrocket. But the governmental entity should know that, where oversight is concerned, the government may be damned if it does and damned if it doesn't.

A governmental entity can never be totally secure from the potential of a judgment against it resulting from the actions of a private contractor which it has hired to perform certain notable traditional governmental functions. The government can reduce its exposure to a secondary level when contracting out by specifying in a contract that the government be indemnified against any damage award and for the cost of litigation. While indemnification is not the perfect answer that governments would prefer to hear, it is the best available option to insure against the costs of a negative judgment; the contractor must have adequate self-insurance or outside coverage.

ISSUE #3

How should the responsibility and authority for security be divided between the contracting agency and the private operator?

DISCUSSION OF ISSUE

Escapes and Use of Deadly Force

Private prison contractors certainly have an incentive to minimize escapes and injuries. Not only is the negative publicity something to be avoided, but escape and injury clauses may be components of contract performance requirements or incentives. While there are questions in many states as to whether a private prison officer can carry out certain activities, there is also a similar lack of understanding as to what their state counterparts can do. For example, the laws of Tennessee do not provide that corrections officers can use force, but they do provide for the licensing of private security guards.

Some states have specified standards as to when deadly force can be employed. Private prison employees would likely be bound by these regulations, if deemed under these laws to be law enforcement officers. If these employees do not have such authority presumably this deficiency could be corrected by deputizing private prison guards who have completed some type of specific training. In states that subscribe to the provisions of the Model Penal Code, the proper use of deadly force by private correctional officers would not require further legislation. The definitions in the Model Penal Code appear to sufficiently include private prison guards. Deadly force, in any event, is condoned when used in self-defense against a similar imminent threat.

In the event of an escape attempt, private prison employees would likely be able to use reasonable and appropriate restraint in the absence of any other specific statutory or case law guidance. Once an inmate has left the facility's property (unless the private prison employees are in hot pursuit or have been deputized), law enforcement officials should become the parties responsible for the ultimate capture and return of the escapee.

#### ISSUE #4

What provision is there for protecting inmates' rights, including a mechanism for inmates to appeal decisions affecting them?

#### DISCUSSION OF ISSUE

Why is there such resistance to the idea of total facility contracting? Much of the debate centers around constitutional questions--specifically, the potential deprivation of the constitutional rights of incarcerated individuals. The United States Constitution guarantees certain rights to every citizen, and virtually all of these rights inure to those who are incarcerated. Given the high number of prisoners who annually file civil rights actions with courts across the country (approximately 20,000) one might make a strong case that inmates are constantly on the lookout for actions by their captors which allegedly abrogate these precious freedoms.

#### Due Process

One fundamental constitutional right is the entitlement to due process of the law. There are two types of due process recognized by the United States Supreme Court. The first, substantive due process, protects an individual against the arbitrary deprivation of life, liberty, or property. The second, procedural due process, merely affords an individual reasonable notice and an opportunity to be heard prior to the deprivation of any such substantive rights.

Contracting for prison services is said to adversely affect certain due process entitlement. Opponents claim that the very act of delegating the authority to deprive a person of freedom (incarceration) constitutes a fundamental denial of due process rights. The delegation of discipline and 'good time' decisions, inmate assignments, parole recommendations, and similar items are examples. A close examination of precedent, however, shows that the decision to contract out the correctional function, by itself, does not automatically bring with it a concurrent repudiation of due process rights.

Courts have consistently upheld the right of the federal government to contract-out for detention facilities, provided that the facilities complied with certain minimum due process standards.<sup>26/</sup> Assuming that the state has established reasonable safeguards and standards to be followed by the contractor, the mere fact of contracting out, taken alone, does not infringe upon due process. There must be an actual denial of rights, either procedural or substantive, to invoke questions relating to due process.

A particular hue and cry has been raised with respect to the authority of a private entity to impose discipline on an inmate, award or take away "good time" toward early release, assign inmates to appropriate facilities or parts of facilities, or make recommendations to the state's parole board as to a prisoner's suitability for a return to society.

Deserving of special consideration is the fact that virtually all private companies will contract on a per diem/per prisoner basis. A private contractor typically has a fiscal incentive to keep the inmate population at a high level. There is little that can be done, with the possible exception of close monitoring, to ensure that the profit motive does not supersede the individual rights of inmates. But the question remains: how can private entities perform the traditional governmental functions that affect individual rights?

The answer is relatively simple. Private entities exercising authority over individuals that otherwise would have been performed by a governmental entity should endeavor to closely adhere to the same type of procedures that the government agency would have normally used. Where possible, private contractor discretionary actions should also be made in the form of a recommendation to the appropriate government agency or official for ratification. This ensures that there will be additional oversight and review, if not a de novo, or totally new hearing on the facts of the case. By following the necessary steps to provide procedural due process for an incarcerated individual, the contractor is able to better protect the inmate from substantive due process harms. To better protect all parties, the state should specifically authorize such actions to be taken by the private contractor with appropriate standards and safeguards.

Finally, one should note that there are some types of activities for which due process is limited or not even at issue. For example, loss of accumulated 'good time' credits is not subject to a full invocation of due process safeguards.<sup>27/</sup> Neither are liberty interests infringed by a transfer between prisons.<sup>28/</sup> Other examples may also be found in areas that focus on the 'privileges' of inmates, rather than on their 'rights.'

#### Privacy Considerations

The right of the inmate to privacy is a matter of concern. For example, private contractors may not be able to legally acquire state or federal criminal records ("rap sheets") that may be necessary for the proper classification of prisoners. In this case, if the information may not be passed along to the contractor, the government entity should be responsible for determining the appropriate placement of the prisoner. Other information that may be confidential under terms of court agreements may be available to the government itself, but not to its contractors. Finally, there may be constraints imposed upon the release of information pertaining to an inmate by a contractor. This may be problematic if specific information about an escapee must be held confidential by the contractor, yet would serve to improve the chances for the prisoner's recapture. Further questions may arise in the transition from one contractor to another or from a contractor back to the government. Careful attention must be paid to what documents and information may be legitimately retained by the initial contractor.

## SUMMARY

Contracting for a total facility is not impermissible nor an easy logistical process. Careful attention must be devoted to each contractual component to ensure adequate protection of the inmate's rights and protection of the state from unjust liability claims. Where the law is ambiguous, sensitive policy decisions must be made. These determinations can affect the lives and liberty of perhaps thousands, and can potentially impair a jurisdiction fiscally. Contracting for total facilities is a legal alternative, but the governmental entity must also choose the best social, fiscal, and political alternative. The remainder of this volume offers governments help in assessing that decision.

CHAPTER III

NOTES

1. 18 U.S.C. § 4082.
2. National Transportation Service, 240, N.L.R.B. 565, 566, n.8 (1979).
3. Ibid., at 566, n.8.
4. 42 U.S.C. § 1983.
5. Ibid.
6. Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961).
7. Medina v. O'Neill, 589 F.Supp. 1028, 1038 (S.D.Tex. 1984); Flagg Brothers v. Brooks, 436 U.S. 149, 157 (1978); Jackson v. Metropolitan Edison Co., 419 U.S. 345, 352 (1974); Dobyns v. E-Systems, Inc., 667 F.2d 1219, 1222 (5th Cir. 1982).
8. Rendell-Baker v. Kohn, 457 U.S. 830, 842 (1982) (citing Jackson, 419 U.S. at 353); Blum v. Yaretsky, 457 U.S. 991, 1011 (1982).
9. Medina, 589 F.Supp. at 1038.
10. Jackson, 419 U.S. at 351; Flagg Brothers, 436 U.S. at 1734.
11. Rendell-Baker, 457 U.S. at 841.
12. Ibid., at 842.
13. Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982).
14. Ibid.
15. Ibid.
16. Lugar, 457 U.S. at 941; Adickes v. S. H. Kress and Co., 398 U.S. 144, 152 (1970); United States v. Price, 383 U.S. 787, 794 (1966).
17. Lombard v. Eunice Kennedy Shriver Center for Mental Retardation, Inc., 556 F.Supp. 677 (D.Mass. 1983).
18. Ibid., at 680.
19. Ibid.
20. Milonas v. Williams, 691 F.2d 931, 940 (10th Cir. 1982), cert denied, 460 U.S. 1069 (1983)
21. Ibid.
22. Ibid.
23. 769 F.2d 700 (11th Cir. 1985).

24. Ibid., at 705.
25. Ibid., n. 8
26. Medina v. O'Neill, 589 F.Supp. 1028 (S.D.Tex. 1984).
27. Wolff v. McDonnell, 418 U.S. 539 (1974).
28. Meachum v. Fano, 427 U.S. 215 (1976).

**CHAPTER IV**  
**POLICY AND PROGRAM ISSUES BEFORE DECIDING TO CONTRACT**

There are a number of policy and program issues that states need to consider before deciding to contract with a private firm to manage and/or operate a correctional institution.

- o What are the arguments for and against privately operated prisons?
- o What are the most suitable types of facilities to consider?
- o Are there certain types of offenders that should receive special consideration?
- o How are the numbers and types of inmates controlled?
- o What would be the relationship of a private facility to the State Board of Parole?
- o When is publicity appropriate?
- o How can costs and quality issues be compared?

These major issues have been considered by many states and local governments during the past few years; they constitute important first steps. The material presented in this chapter serves as the basis for a policy study or special task force agenda in a state considering the contracting issue. A discussion of each issue is presented. Recommendations are offered, as appropriate.

What specific pre-analysis should a state undertake prior to the contract decision?

DISCUSSION OF ISSUE

Every state considering contracting-out prison facilities should undertake a pre-analysis to help decide whether or not to contract and to assess the scope of the contracting effort.

None of the eight government jurisdictions examined used a written, systematic pre-analysis that preceded the decision to contract. It is possible that one or more of these was done and just not referred to us, but that seems unlikely. Partial exceptions to this were examinations by legislative research agencies in the states of Pennsylvania and Massachusetts. <sup>32/</sup> Those discuss many of the concerns, particularly the legal and other legislative issues involved. However, they do not offer a detailed analysis of any proposed contracting effort.

Thus far the evidence currently available on the effects of contracting is extremely sparse, especially as to the success of these attempts. Therefore, the information on impacts of past trials is currently of limited value to other jurisdictions. While part of this is due to the early nature of many of these pilot contracting efforts, there also has been little systematic collection of evaluative material even on the older contracting efforts; nor have there been systematic cost comparisons. This means that most near future pre-analyses will not be able to obtain useful data on the impact of contracting efforts of other jurisdictions.

RECOMMENDATIONS

Who should do the pre-analysis?

Though the legislature may have initiated the request for the pre-analysis of contracting and may have also undertaken its own form of pre-analysis--(as indicated above) focusing particularly on the general situation and legislative issues--it seems more appropriate that the detailed pre-analysis be undertaken by the executive branch and particularly the corrections agency.

We suggest that the pre-analysis be a team effort. The team should include not only representatives from the corrections department, but also from the state's office of management and budget and the state's procurement office. (Even in a state that has decentralized procurement, if it has a central purchasing office, the special competence of this staff should be included on the team.) There should also be a representative from the health department (at least for that part of the analysis that looks at health, medical, and various safety issues), and an attorney. From the corrections department itself there should be policy, program, and research and evaluation personnel.

The pre-analysis will probably take a minimum of three months (preferably six or more months) to permit a thorough, comprehensive review.

What should be the content of this pre-analysis?

At least the following seven topics should be covered:

1. The intended purposes
2. Legal issues
3. Cost implications
4. Service quality and contract monitoring implications
5. Existence of adequate suppliers
6. Possibility of defaults and their consequences
7. Political issues

Each of these is discussed below:

1. Purposes intended. This part of the pre-analysis is basic. The review team should examine problems in the current system that the contract effort is attempting to alleviate. Typically, this means that the team should determine whether the contracting is attempting to reduce cost, improve service performance (and if so, in what specific ways), reduce overcrowding quickly, has other purposes, or some combination of these.

The findings here will affect, to a great extent, much of the subsequent analysis. For the purposes of this report it is assumed that the state's purposes are all of the above.

As part of their analysis, the review team should consider which types of facilities are to be candidates for contracting; i.e., what security level, what type and how many inmates. The team should also consider whether an additional facility is needed (especially to reduce overcrowding) or to replace an existing state-operated institution, and whether this should be accomplished by having the contractor construct and operate the new structure or take over an existing state-operated facility.

2. Legal issues. As discussed at some length earlier in this report, there are numerous legal issues that each state will need to face. These include such questions as whether statutes already exist, and if not what legislation is needed to permit contracting of prisons; what changes to the state's procurement laws and regulations, if any, are needed to allow contracting and to permit an adequate request-for-proposal effort.

3. Cost implications. Costs will always be a key criterion for a state considering contracting. Probably the first analysis step the team should undertake is a cost analysis of present correctional facility expenses, at least those relating to the type of facility being considered for contracting.

Table B, on the following page, provides an illustrative list of cost elements that should be considered for comparing the costs of government-operated to contracted facilities. The analysis should focus on costs likely to be incurred if the state operated the facility for which a contractor is being considered. For example, if the government is considering a brand new additional institution, it should compare contracting costs to those that would accrue if the state operated that facility. If the contractor would replace state operation of an existing institution, then the cost analysis should identify the expected cost of continuing state operation (considering, for example, whether significant capital funds would be required in the near future for the agency to the facility) as well as the costs that would be required of the contractor. These costs should include fringe benefits for the government employees.

TABLE B

COST ELEMENTS THAT NEED TO BE CONSIDERED IN COST COMPARISONS

	<u>PERSONNEL</u>	<u>INCLUDING FRINGE BENEFITS</u>	<u>SUPPLIES</u>	<u>EQUIPMENT</u>	<u>RENOVATION</u>	<u>CAPITAL</u>	<u>MAINTENANCE</u>	<u>TOTAL</u>
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Administration  
 Food Services  
 Care & Custody  
 Medical, Dental, &  
 Mental Health  
 Education  
 Training  
 Counseling/Religion  
 General Services  
 Recreation

Relevant Utilities  
 e.g., water,  
 electricity, etc.

Relevant Maintenance  
 Relevant Capital Costs  
 Construction  
 Rehabilitation

Contract Administration  
 (contract option only)  
 Contract Monitoring  
 (contract option only)

Special One-Time Costs  
 (if shifting to contractor)  
 e.g., special training or  
 termination costs for  
 current employees

TOTAL

Difficult questions arise as to how much overhead should be included and whether past capital costs, such as debt service, should be included in considering the state's operating costs. To what extent would these expenses change? Which costs would be reduced if the facility was contracted?

The pre-analysis team will want to consider what the costs of a contracting effort would be, or at least what would be the break-even per diem contract price. The team will be handicapped by not having bids from contractors. It may want to obtain informal estimates from possible contractors, but this should not be done in a way that might compromise subsequent competitive bidding. Additionally, the team might renew bids obtained from other jurisdictions on similar projects.

In calculating this break-even point, the analysts need to estimate the additional cost to the state for contract administration and monitoring and for potential special one-time costs if the state shifts a facility from state operation to private operation (e.g., special training of displaced personnel or termination costs for staff that are not retained). These expense elements are also included in Table B.

The analysts should also consider the cost (and other) implications if a higher or lower than anticipated number of inmates need to be assigned to the institution. The contract needs to include provisions for this eventuality to avoid possible larger-than-expected costs.

It is beyond the scope of this report to describe cost analysis in detail, but it will be a key element of pre-analysis. Some cost data probably can be obtained from other states and local agencies; however, the relevance of that information will be limited.

4. Quality of service. Here the analysis team should review the current level of performance of the current facility (if it is to be a candidate for contracting) or of similar existing state-operated facilities. This should act as a benchmark for the potential contracted effort. As discussed later under issues relating to contract monitoring and evaluation, the state should review its own recent performance on maintaining security (such as disturbances and escapes), humane treatment, and success in rehabilitation. The state team might want to compare its own current performance (where it can) against the performance of other jurisdictions. If the state has a record of high performance, this will indicate less reason for contracting than if it has a weak or poor record; the latter implies that trying a different approach might be useful.

The experiences of other state and local governments with contractors may provide clues to the team as to what can be expected in its own state. But again, current information is likely to be quite limited and of restricted applicability.

It is recommended that team members undertake some examination of other selected state and local contracted activities (preferably including interviews on-site with a prison's public and contractor officials and even inmates) to obtain a better perspective on the problems and advantages in contracting.

5. Are there sufficient suppliers? As discussed in Issue #13, a state considering contracting should be concerned about the availability of vendors. Are there enough quality suppliers to produce sufficient competition to provide proposals from which a contractor could be selected? This is currently a problem since only a few companies are now contracting with state or local governments for secured facilities for adult or juvenile offenders.

6. Possibility of default and its consequences. A major concern in contracting is the need to have assurance that the contractor will be able to perform without defaulting. Failure might take the form of bankruptcy, inability to perform adequately, result from major labor disputes (such as strikes), or problems obtaining performance bonds or liability insurance. To some extent this is closely related to the problem of obtaining an adequate set of potential suppliers; however, additional difficulties can also occur, subsequently.

In Issue #16 we discuss provisions that reduce the risk of service interruptions and the consequences of defaults. A key product of this part of the pre-analysis is to identify both the likelihood of such problems and what should be done to prevent their occurrences from having major consequences; e.g., by both preventing them in the first place and by minimizing the consequences if they do occur.

7. Political issues. Inevitably, there will be major interest groups within the state that will be very negative to contracting under almost any conditions. On the other hand there will also be proponents who will push hard for contracting. Members of the review team are not likely to be responsible for political action, but they should identify the likely major obstacles and how legitimate concerns might be recognized if contracting is undertaken.

From the foregoing components the team will be able to put together a comprehensive picture for state legislative and executive officials that should provide considerable guidance for their decisions on contracting. The material throughout this report should be helpful to the pre-analysis team in completing their assignment.

## ISSUE #6

### What are the reasons for considering or not considering contracting prison operations with private enterprise, particularly with for-profit firms?

#### DISCUSSION OF ISSUE

Debate over contracting for the operation of correctional facilities has been heating up at all levels of government during the past two years. Legislative hearings have been held in state capitals as well as in the U.S. Congress.<sup>1/</sup> National organizations of state officials have sponsored conferences on contracting for corrections.<sup>2/</sup> National organizations of lawyers and criminal justice planners have also expressed their concern, while government employee unions announced their opposition to the contracting trend being boosted by private firms.<sup>3/</sup>

State officials have heard testimony from private vendors about the advantages of contracting for the operation of correctional facilities: cost savings, flexibility, quick facilitation, better management, and the like. Bills have been introduced into legislatures in several states to allow contracting, but states have tended to be extremely cautious in making their decisions. Bills in some states have been tabled or defeated; at least one state, Pennsylvania, placed a moratorium on contracting for private prison operations for one year.

The American Bar Association also called for a moratorium on contracting for prisons and jails until the legal issues were resolved. These were issues that arose when a state delegated "to private companies one of government's most basic responsibilities, controlling the lives and living conditions of those whose freedom has been taken in the name of the government and the people." The American Civil Liberties Union (ACLU), while not taking a clear position on the contracting issue, raised a pertinent question: "Do we wish to establish a system whereby those interested in profit margins are given an incentive to influence and control public policy with respect to crucial criminal justice issues?" ACLU also raised a series of questions about the possibility of violations of prisoners' civil liberties by private entities.<sup>4/</sup>

In February 1985, the National Governors' Association (NGA) gave a limited endorsement to contracting for prison operations. NGA's policy statement said, "States may wish to explore the option of contracting out the operation of prisons or other correctional programs. Private enterprise would be expected to run prisons in an approach similar to the way it now operates hospitals, drug and alcohol treatment programs, or job-training programs for government." The statement also said, "States should approach this option with great care and forethought. The private sector must not be viewed as any easy means for dealing with the difficult problem of prison crowding."<sup>5/</sup>

## Reasons for Contracting

Reasons for considering contracting may be grouped under six subheadings: cost-savings, rapid mobilization, capital expenditures, flexibility, management and political considerations.

### Cost Savings:

- o Private contractors may be able to construct new facilities or rent space less expensively than government, or may happen to have inexpensive space available that can later be used for another purpose.
- o Fewer levels of management may allow private companies to provide a comparable level of correctional services at lower costs.
- o Private purchasing procedures and negotiations may save money while avoiding rigid government procurement procedures. More short-term purchasing may be possible in the private sector than in the public sector.
- o Private firms can bring economies of scale to the operation and private firms with contracts for multiple facilities can amortize expenditures.

### Rapid Mobilization:

- o Private contractors may be able to make facilities available more quickly by raising private capital.
- o Private firms with existing facilities may be able to relieve overcrowding faster than government could build a new facility.

### Capital Expenditures:

- o It may not be necessary for government to increase its capital budget if a private firm builds a correctional facility.
- o State government can avoid large amounts of capital expenditures by letting private firms build and run its correctional facilities.

### Flexibility:

- o Private prisons may have increased flexibility to deal with changes in the size of the prison population and special needs prisoners.
- o By contracting with a number of jurisdictions, private firms may be able to achieve greater specialization than a single government.

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\*NEW 04330

\*010 Issues in Contracting for the Private Operation of Prisons and Jails

\*031 Hackett, J

\*031 Hatry, H

\*031 Levinson, R B

\*031 Allen, J

\*031 Chi, K

\*031 Feigenbaum<sup>Y</sup> E D

\*04C A0246

\*04C A1344

\*04F A7713

\*04F B0957

\*04S A0915;DO

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\*06G 85-IJ-CX-0068

\*076 186,,US,EN,,01

- o Private firms may deal more easily with a temporary increase in inmates without long-term commitment of facility space and/or more staff.

Management:

- o A fresh infusion of ideas and energy from private firms may bring some positive changes in the corrections field.
- o Private firms may have more efficient management systems than government because they are in competition, which government is not.
- o Private entrepreneurs may be more creative in employee management, hiring and promotion procedures, thus reducing employee turnover rate and increasing morale.
- o Private firms are free to innovate and use the latest technology and management techniques as is any profit-motivated service industry.
- o Private firms can design a facility to hire fewer highly motivated and highly trained people at a greater wage than the public sector may be able to.
- o Private firms may provide better programs for counseling and training.

Political Considerations:

- o State agencies can justify contracting as a new alternative to prison overcrowding.
- o Contracting may involve the private sector in sharing responsibility for corrections problems.

Arguments Against Contracting

Reasons for not considering contracting may be grouped under five subheadings: philosophical/legal, higher costs, lack of accountability, management and political considerations.

Philosophical/Legal Questions:

- o Profit-motivated employees may lose perspective on the mission of public agency in the interest of expediency.
- o The contractor's first loyalty may be to his firm, and this may conflict with the goal of the public good.
- o Government incentives to pursue alternatives to incarceration may be weakened if new institutions are more quickly and easily available through the private sector.

- o A firm's self-interest may encourage further or extended incarceration.
- o Private industry can lobby for tougher law enforcement and longer prison sentences to keep institutions at maximum occupancy.
- o The government has remanded individuals to the prison-system and private firms should not be given responsibility to carry out their punishment.

Higher Costs:

- o Privately contracted prisons may cost more because of the necessity of government contract administration and monitoring.
- o Private firms may lower employee wage and benefit levels.
- o Private firms may "buy-in" or "lowball" a bid to get their first contract and then greatly increase their costs in future years.
- o There might be hidden costs in contracts.
- o It may be in the interest of the contractor to keep prisons full if contracts are on a per diem basis.
- o Contractors may incarcerate prisoners longer than they need to in order to collect per diem fees, thus costing taxpayers more.
- o In the absence of true competition among qualified private firms, contracted prisons may cost more.

Lack of Accountability:

- o Contracting for prison operation and management may decrease public input into the delivery of correctional services.
- o Corrections is one of a small number of public services which may best be managed by the public sector, because it involves the legally sanctioned exercise of coercion by some citizens over others.
- o Private firms may be less accountable to the public than government because of the profit motive, lack of legal mandate to provide service, and reduced public input.

Management and Services:

- o Privately-managed prisons may compromise correctional standards.

- o Prisoners in privately-managed facilities may be denied as much human contact as they now receive because there might not be as many correctional officers under private management.
- o There is the possibility of bankruptcy in a private firm.
- o The public may be more worried about safety and security if a prison is privately managed.
- o Private firms may skim the market and then leave the more difficult prisoners for the publicly-run institutions.
- o Private firms can reduce or eliminate unprofitable services even though they may still be needed, but not legally protected.

Political Considerations:

- o Contracting proposals may face inevitable resistance from many interest groups, including employee organizations.
- o Contracting proposals can be an unpopular issue in election campaigns.
- o Potential opposition from the community may be severe.

RECOMMENDATIONS

State policymakers should consider the issues of cost, management, timeliness, and accountability before making a decision about contracting with a private firm to manage and operate a correctional facility. A careful analysis of the advantages and disadvantages, opportunities for input from all sectors, and an assessment of past relationships with contracting will all lead to a better final decision.

ISSUE #7  
How should publicity be handled?

DISCUSSION OF ISSUE

Contracting out operation of an entire correctional facility to a private firm raises publicity questions state agencies need to consider--publicity on the nature of contract, bidding, the vendors, site, the impact of privatization, and so forth. The publicity issue also concerns such questions as: Do state agencies need to let the public know about their intention to consider contracting? How do they handle the media on this controversial issue? When and how should correctional employees be informed of contracting? And, how should state government approach the local community where the private facility will be located? Unless these questions are adequately addressed beforehand, state agencies may face unfavorable reaction from the public.

Philosophically, the general concept to privatization may appeal to both conservatives and liberals. Conservatives tend to consider privatization as an alternative way of reducing the size of government, and liberals see privatization as a means to "make scant dollars go farther to create additional government services."

In practice however, contracting for prison management is a potentially divisive issue for correctional employees, policymakers, the media and especially, people in the community. Experiences in Tennessee and Kentucky all point to the significance of public relations as an integral process in contracting for total institution management.

The Kentucky situation deserves attention here. The contract required this private vendor to obtain approval from the local governing body before opening the Marion Adjustment Center. The private firm had visits and meetings with civic groups, officials, and residents in Marion County. Although the company had the support of Marion County's government officials, a group of community residents filed suits. While those law suits were dismissed, residents stayed divided on whether the facility should be allowed to locate in their community.

In Tennessee, a private firm made a big effort to inform correctional employees about its proposal to the state for privatization of the entire prison system. Tennessee's Commissioner of Correction; also sent out a memorandum to all of the correctional employees about this proposal.

Many commentators felt that this effort realized the worst fears of opponents to this strategy; i.e., private industry's real wish to replace the public sector. Neither Kentucky nor Tennessee are highly unionized states. The contracting issue can be even more divisive in states where government employees are unionized.

RECOMMENDATIONS

A public relations plan can be helpful in bringing about community education and acceptance. States should inform community members, seeking out active residents with good reputations as volunteers in government service. Secondly, states should also keep correctional employees fully informed of any contracting deliberations. Third, the media should be made aware of the initiative at an early stage. And fourth, the private firm, if awarded a contract, should employ community resources for operating the facility by hiring local people, and buying supplies and services locally.

## ISSUE #8

Should contracting be done for a) existing facilities; b) a new institution replacing an existing facility; and/or c) new institution not replacing an existing facility?

### DISCUSSION OF ISSUE

Questions relating to private sector facility issues concern the relative merits of transferring existing facilities, building new institutions, and/or retrofitting existing structures. Each of these alternatives may be appropriate depending upon the system's particular set of circumstances. Additionally, they each have both positive and negative features.

Type-of-facility issues focus on whether or not there are any particular advantages to be realized by selecting one of three listed alternatives. The literature suggests that each instance of contracting is unique and there are no rules which precisely fit every situation. Nevertheless, there may be insights to be gained from the experience of others.

### Additional Capacity

Much of the justification for contracting out prisons rests on the expectation that private enterprise can supply critically needed correctional bed space within a shorter time period than the public sector. South Carolina, for example, when faced with the need to comply with a lawsuit settlement (concerning overcrowding) that required building five prisons, looked initially to the private sector for assistance.<sup>6/</sup> Generally, the presumption is that private business has less so-called "red tape" and therefore, can move ahead more quickly. Whether this involves converting preexisting structures or constructing new spaces, the speed with which new capacity can be added to help alleviate overcrowding is frequently a major consideration in deciding to go the private route.

The most expedient way to add to capacity is to bring new beds on-line by converting an already existing structure so that it can fulfill a correctional mission. Thus, vacant seminaries, private schools, and mental institutions can be reconfigured to meet a corrections need. A number of potential obstacles in this process have been identified by the Edna McConnell Clark Foundation in its publication Time to Build?<sup>7/</sup> The contracting agency should ensure that the private company:

- o perform early planning activities
- o educate the local public
- o understand the nature of the criminal justice system
- o gather data about critical planning issues
- o make system-level policy decisions
- o perform adequate pre-architectural programming
- o consider operational costs during planning

In the event that the private vendor has not attended to these items problems may develop: (1) in regard to the site selected for the new privately operated correctional facility; or (2) integrating the new facility into the ongoing system. The first of these problems was experienced by a Kentucky corporation, when after winning the contract to provide a minimum security facility for the Kentucky Corrections Cabinet, it could not obtain an agreement from the local community permitting it to operate a correctional institution. Another contractor experienced a variation of the second problem when it took over the management of a State of Florida training school.<sup>8/</sup>

#### Transferring an Existing Correctional Facility

If the public agency's concern is less about additional bed capacity but more in the direction of seeking a new management style, one that purports to be more innovative or cost-effective, then it may consider turning over the administration of a currently operating facility to a private sector company. A variation on this theme occurred when the Florida State Department of Health and Rehabilitative Services (HRS) transferred the management of the Okeechobee Training School for Boys to a not-for-profit entity.<sup>9/</sup> While this was not an adult facility and the private vendor was a not-for-profit agency, many of the problems insured are identical to those that might result if an adult prison was involved.

Initially, the most difficult transition problems to manage concerned personnel on-board at the time of the conversion. For example, how would existing retirement plans be affected; would those employees who opt to hire on with the private corporation retain reinstatement rights should they later change their minds; anticipating that any contract can be terminated, does the state agency have to reserve personnel "slots" so that staff can be rehired and paid should the facility revert to public sector management; what provisions should be made for public sector employees who do not wish to transfer from civil service to the private corporation, etc. Unhappiness about Okeechobee's pending transfer, reportedly, induced some personnel to agitate the in-resident juvenile population and for several days there was genuine concern that the administration would not be able to control the explosive situation which resulted.

Subsequent to the transition stage, another series of problems may emerge in regard to the private sector's desire to "train old dogs to do new tricks." The new management style will be different from the previous one. This means that staff who transferred will have to unlearn prior procedures and adopt new ones; some may have difficulty in accomplishing this. Moreover, at a later time the private company may decide it is easier to train new recruits than to retrain "the old guard." These latter individuals may then be eased out after the new administration has been established. At the Florida training school in less than 18 months after the transition all but one of the top management staff who had transferred from HRS were replaced by the private contractor. The sole survivor was in a position of lessened responsibility. This scenario also reflects the loss of control over personnel that the state implicitly agreed to when it pursued the contracting. Consequently, to protect the public agency's interests, the contract should address the qualifications of staff hired by the contractor, especially at the professional level (e.g., physicians, psychologists, social workers, educators, etc.).

Transferring an ongoing facility from public to private sector management appears to follow a type of "natural evolution." Subsequent instances of similar transfers should be better able to anticipate the aforementioned stages and more prepared to cope with them.

Additionally, while Florida's private vendor did introduce a number of novel program ideas, the initially stated goal of a more cost-effective operation was not realized.<sup>10/</sup> (see also discussion under Issue #22)

Since the state cannot abrogate its responsibility concerning the conditions under which prisoners are confined, contracting with the private sector raises liability issues (regarding the degree to which the private company's new procedures comply with constitutional minima). In order to reduce the likelihood of litigation, one private contractor in Kentucky adopted existing state Department of Corrections' policies and procedures; this also tends to resolve retraining problems. However, such an approach brings into question a purported private sector advantage, namely, their flexibility and readiness to bring novel ideas into corrections.

The public agency's concerns regarding conditions of confinement means that regular and frequent on-site inspections become a necessity, along with requiring periodic reports from the private enterprise. State personnel and resources will be needed to conduct this monitoring function. The contract should specify how the costs involved in conducting these inspections will be reimbursed, how deviations will be resolved, as well as the nature and frequency of both on-site audits and periodic reports.

#### RECOMMENDATIONS

The appropriateness of using private contracting to obtain additional bed space rests on the type of outcome the public agency seeks. If the intent is to obtain new beds quickly, the private sector offers an attractive alternative. If the outcome sought is a more economical operation, the minimal evidence available to date suggests that it is not a likely result of contracting (e.g., Okeechobee, some innovation; Kentucky, adoption of state policies by the vendor).

Contracting for or replacing an existing facility engenders a large number of problems, particularly in regard to on-board, civil service personnel. As in the Okeechobee situation, this can lead to serious problems during the transition. Using private vendors to add to existing capacity by providing new or retro-fitted institutions avoids these issues. It has the advantage of being accomplished more speedily than if the project were undertaken by the public sector.

## ISSUE #9

What level of offender should be assigned to the contracted facility? What are the differences in attempting to contract minimum versus medium versus maximum security facilities?

Are there different considerations for contracting facilities for specific populations?

### DISCUSSION OF ISSUE

Issues regarding level or type of offender involve: (1) accommodating to the security needs of inmates, and (2) addressing questions around special needs that prisoners may have. The following section explores these aspects from the viewpoint of both the public and the private sectors.

Currently, there are no privately operated high security prisons in the country. At least one former state corrections commissioner, Ellis MacDougall, now president of a private corrections company, states: "I don't think there are enough answers to questions in the country and in the courts."

Additional concerns have been expressed regarding the type and/or level of offenders confined in the institutions which are contracted out to private vendors. In October 1985 the Pennsylvania Legislative Budget and Finance Committee indicated that such a contract should specify exactly the characteristics of the prisoners to be housed.<sup>11/</sup> A primary consideration regarding prisoner characteristics concerns their security needs.

### Security

There are no nationally accepted standards which establish whether a particular prisoner warrants minimum, medium, or maximum security. In order to reduce future misunderstandings, the RFP and final contract should indicate quite specifically the security level needs of inmates being considered.

In order to arrive at a mutually agreed upon definition of the characteristics of the contracted-for prisoners, objective criteria will have to be established. Determining a prisoner's security needs usually involves considering the following factors:

- 1) Severity of current offense
- 2) Length of sentence
- 3) History of violence
- 4) History of escape
- 5) Number and/or type of prior commitments
- 6) Number and/or type of pending detainers

This process will be facilitated if the jurisdiction already has an objective classification system in operation. The classification approach should (1) use items which are in some way measurable; (2) be applied to all inmates equally; and (3) be both reliable and valid.

There is a natural tendency to assume that the more problematic prisoners will require a greater degree of security. While generally true, it is by no means always the case. The type of issues that inmates present to administrators range from the mental and physical to those common in everyday life. Being psychotic, having AIDS, or experiencing deep feelings of desperation brought on by serious family, economic, or personal difficulties are independent of whether or not a particular offender is or is not violent or an escape risk.

An additional problem in the security area concerns the lack of any agreed upon definitions as to what constitutes a maximum, medium security institution.12/

Consequently, when the public agency contracts for "x" number of minimum security beds, not only should it specifically describe how appropriate inmates will be identified for those spaces, but also establish expectations regarding what constitutes a minimum security facility. Some of the criteria used to classify institutions utilize the degree of presence of the following:

- 1) External Mobile Patrol - An armed officer who drives a vehicle on a road which circles the institution outside its perimeter
- 2) Gun Towers - Above ground towers from which armed officers can observe a facility's secure perimeter
- 3) Perimeter Barriers - The number and type of physical barriers surrounding the institution (e.g., fence(s), wall, razor/concertina wire, etc.)
- 4) Detection Devices - A television camera, high-mast lighting, electronic intruder-sensing devices on a fence, wall, or in the ground
- 5) Internal Security - Internal architectural features which contribute to security (e.g., sally ports, secure glazing materials and reinforced concrete buildings, electronic steel doors and/or corridor grilles, physical barriers between inmates and staff, etc.)
- 6) Inmate Housing - The proportion of dormitories, squad rooms, single rooms, and cells in a correctional institution (outside versus inside cells, etc.)
- 7) Inmate/C.O. Ratio - The number of inmates relative to the number of correctional officers (i.e., facility's inmate population divided by its total C.O. staff)

### Minimum vs Medium vs Maximum Security

Management issues vary with institution security levels as a consequence of different percentages of prisoners in specific categories. Inmates are not a homogeneous group even within security levels.

One system for classifying prisoners into program/security relevant types employs a fivefold categorization system: Group I (Aggressive-Psychopathic); Group II (Manipulative); Group III (Situational); Group IV (Inadequate-Dependent); and Group V (Neurotic-Anxious).<sup>13/</sup> These groups can be into three clusters: the troublemaker/predatory types -- "Heavies;" a "Moderate" group; and the dependent/anxious/victim group -- "Lights." Characteristics for each of these clusters are shown in Table C, on the following page.

A minimally secure and open institution, whose inmates were appropriately designated, is projected to have 20%-25% Heavies (Groups I & II), 25%-30% Moderates (Group III), and 25%-30% Lights (Groups IV & V). Prisoners appropriately assigned to a maximum security institution might be distributed so that 35%-45% would be Heavies, 25%-30% Moderates, and 25%-30% Lights.<sup>14/</sup> The distribution of these groups at an actual maximum security penitentiary, Central Correctional Institution, in Columbia, South Carolina were: 61% Heavies, 15% Moderates, and 24% Lights over a nine month period for an average population of 1,113. A medium security facility in the same system, Kirkland Correctional Institution during an eight month period with an average population of 747 inmates had the following average percentages in each category: 49% Heavies, 32% Moderates, and 18% Lights.<sup>15/</sup>

Both the anticipated and actual distribution of prisoners in these inmate categories reflect differences in percentages relative to the facility's security level. There are concomitant implications in terms of staffing patterns and differences in construction. The greater the percentage of Heavies, the more correctional officers and institutional security features warranted. The higher the proportion of Lights, the more program staff is required. The greater the proportion of Moderates, the fewer security features needed.

TABLE C

CHARACTERISTIC BEHAVIORS BY GROUP 16/

<u>I-----Heavy-----II</u>		<u>III---Moderate</u>	<u>IV-----Light-----V</u>	
Agressive	Sly	Not excessively aggressive or dependent	Dependent	Constantly afraid
Confrontational	Not directly confrontational	Reliable, cooperative	Unreliable	Anxious
Easily bored	Untrustworthy	Industrious	Passive	Easily upset
Hostile to authority	Hostile to authority	Do not see selves as criminals	"Clinging"	Seek protection
High rate of disciplinary infractions	Moderate to high rate of disciplinary infractions	Low rate of disciplinary infractions	Low to moderate rate of disciplinary infractions	Moderate rate of disciplinary infractions
Little concern for others	"Con artists," manipulative	Concern for others	Self-absorbed	Explosive under stress
Victimizers	Victimizers	Avoid lights	Easily victimized	Easily victimized

Differential Programming by Group Assignment

	<u>Education</u>	<u>Work</u>	<u>Counseling</u>	<u>Staff Approach</u>
Heavy (Groups I & II)	Individualized	Non-repetitive	Individualized (behavioral contracts)	By the book
	Programmed learning	Short-term goals  Individual goals		No nonsense
Moderate (Group III)	Classroom lecture plus research assignments	High level of supervised responsibility	Group and Individual (problem orientation)	"Hands off"  Direct only as needed
Light (Groups IV & V)	Classroom lecture plus individual tutoring	Repetitive	Group and Individual (personal orientation)	Highly verbal
		Team-oriented goals		Supportive

Mention has been made of contractors who may want to avoid troublesome cases and therefore, be unwilling to contract for certain type of individuals.<sup>17/</sup> From another perspective, Commissioner Jeffes of the Pennsylvania Department of Corrections, testifying before the Pennsylvania House Judiciary Committee, suggested it may also be desirable to restrict the type of inmates who will be housed in a private prison (e.g., those convicted of murder, assaults on correctional officers, arson, and certain organized crime offenses), especially where the prisoners will be from out of state.<sup>18/</sup> If the contract addresses only the security level required by the contracted-for prisoners, it will miss dealing with important variables and as a consequence, lead to future misunderstandings and problems.

#### Custody

A final issue concerns operational definitions for custody levels. Custody differs from security in that the latter deals with, for the most part, architectural features of an institution, while the former is concerned with levels of supervision. Prisons usually house inmates in several custody categories; i.e., a single facility will have generally, two custody levels (sometimes more). Contract negotiations regarding the security levels of both inmates and the institution should also specify the type of privileges which will be accorded prisoners in the private facility's various custody grades. These should parallel those found in the state's comparable facilities.

Table D, on the following page, illustrates some of these custody features.

Table D

## INMATE CUSTODY FEATURES 19/

Activity:	CUSTODY—COMMUNITY	OUT	IN	CLOSE
Observation	Periodic; appropriate to situation	Checked at least every hour	Frequent and direct	Always observed and supervised
Day Movement	Unrestricted	Unrestricted	Unescorted but observed by staff	Restricted, on a checkout/checkin basis
Night Movement	Unrestricted	Under staff observation	Restricted, on a check-out/checkin basis	Escorted and only on order of watch commander
Meal Movement	Unrestricted	Under staff observation	Supervised	Supervised and may be escorted or fed in cell or on cellblock
Access to Jobs	All, both inside and outside perimeter	All inside perimeter and supervised outside jobs	All inside perimeter, only	Only selected day jobs inside perimeter
Access to Programs	Unrestricted, including community-based	All inside perimeter and selected outside	All inside perimeter; none out perimeter	Selected programs/activities none outside perimeter
Visits	Contact; periodic supervision; indoor	Contact; supervised; indoor and outdoor	Contact; supervised; indoor only	Non-contact
Leave the Institution	Unescorted	Escorted	Armed one-on-one escort; inmate in at least	Armed escorts; inmate in full restraints
Furlough	Eligible for day pass* and unescorted furlough	Eligible for day pass* and/or escorted	Not eligible for day pass* or furlough	Not eligible for day pass* or furlough

Definitions: \* Day Pass - Permits inmate to be away from institutions only during daylight hours; whereas a furlough means overnight for at least one (or more) nights.

### Programs

Differences in the methods utilized to deliver inmate programs parallel institution security levels, but the assortment of programs is generally the same (e.g., academic/vocational training, counseling/psychotherapy, industries, recreation/leisure activities, work details, etc.). Since time-to-release tends to vary directly with needed security level, high security facilities have a greater concentration of work activities (such as prison industries) to accommodate their prisoners' continuing need for productive activity following completion of time-limited academic and vocational training programs. By contrast a minimum security institution generally has inmates with shorter time-to-release. Therefore, its programs would have to be geared to a different time-frame.

The greater number of correctional officers required to staff a high security institution is balanced in treatment/rehabilitation oriented agencies by the relatively larger number of high salaried program personnel in the less secure facilities. If the public agency has only minimal expectations in regard to prisoner programming, then it will be more costly to operate the high security institutions.

### "Skimming"

Another aspect of the private vendor/inmate selectivity issue, was expressed in union official Dave Kelly's testimony before the House of Representatives' subcommittee, when he states that if private companies house the less dangerous and less violent inmates (i.e., "skimming"), then public institutions will end up with a higher concentration of the worst inmates, thereby increasing public costs.<sup>20/</sup>

It is more costly to build high security institutions appropriate for confining the more dangerous and violent prisoners. However, the day-to-day operation of such facilities may not necessarily be more expensive. Although, high security facilities require greater numbers of correctional officers, less secure institutions are often more program-intensive. The smaller number of correctional officers in these latter facilities is balanced by a greater number of professional program staff, many of whom command high salaries. Thus, the actual cost of operation for institutions at different security levels may not vary as greatly as their construction costs.

"Skimming", if it were to occur, will increase the concentration of more difficult-to-manage inmates in public sector institutions. Initially, this may require retrofitting less secure state facilities to make them more appropriate for prisoners with higher security needs. Eventually it would mean that any newly constructed facilities would have to be built more securely. The short-term effect of contracting-out might be to delay the time when new construction would be required (a cost benefit) but increase the funds needed to build those facilities (a cost detriment).

"Skimming" may lead to additional problems if the jurisdiction does not have an objective classification system. That is, unless there is a reliable the valid method to identify inmates likely to be violent, mistakes may occur and what gets skimmed may not always be pure cream. The Supreme Court recognized this when it held that classification deficiencies may have far-ranging impact on the totality of conditions of confinement.21/

#### "Dumping"

The other side to the selection issue concerns public sector agency "dumping." It is a truism that no one wants to deal with the problematic inmates. If the public agency has total flexibility in selecting who it will send to the private vendor, all the "worst" prisoners within a particular security level might be chosen. Therefore, the contract needs to specify which type prisoner the contractor will house thereby protecting both public and private sector interests.

At the Marion Adjustment Center (Kentucky's private sector minimum security facility) an interesting twist to the "dumping syndrome" occurred; the state selected only its best prisoners because of a desire to have the private contracting project succeed.

#### Special Needs

A second aspect of the type-of-inmate issue concerns special needs prisoners. This refers to factors other than an offender's security needs; e.g., inmates who are aged/infirm, physically and/or mentally ill, retarded, handicapped, require protective custody, women etc. A number of sources seem to agree that contracting-out could be particularly successful if it concentrated on prisoner groups that have specialized requirements. Not only can private prison conditions be tailored to meet the needs of these inmates, but it is probably more cost-effective to house them together than dispersed in general prison settings. Such clustering permits economies of scale which otherwise are precluded.22/

For example, all correctional systems have a number of inmates who must be provided special housing because of their protective custody (PC) status. A prisoner may be placed in protective custody for a variety of reasons:

- 1) fearful because of threats of sexual and/or physical assault
- 2) testified in court against another prisoner in that facility
- 3) being an informant
- 4) case involved a high level of notoriety

PC individuals are kept totally separated from the regular inmate population. The high levels of security and concomitant staffing ratio, along with the small number of these prisoners, means that per capita costs for operating a PC unit are quite high. Moreover, in small units it is difficult to meet recognized standards (ACA, 1981) for special needs inmates in such programs as outdoor recreation and work assignments. It has been proposed that a private sector institution devoted entirely to handling PC cases (gathered from several jurisdictions), would alleviate much of the burden now borne individually by each one.23/ Additionally, this would make available a number of beds in currently overcrowded

This same argument has been advanced regarding female prisoners. Women inmates represent less than 10% of the total prisoner population. Consequently in many states, particularly those with small correctional systems, economies of scale reduce the likelihood that female prisoners will be accorded the same level of program opportunities as available for the male prisoners. A private regional prison could provide better facilities and a wider variety of program activities for the female inmates from several state systems. The same set advantages would result as indicated above for PC prisoners.

#### RECOMMENDATIONS

The issue concerning the level of offender for which a state might seek to contract with a private vendor involves not only questions pertaining to security needs, but also encompasses special needs prisoners. Both the RFP and the subsequent contract should be explicit in describing the type of inmate for which the state is seeking a private contractor, and the architectural features the public agency deems appropriate for any facility proposed to confine those prisoners. Further, the contract should reference the state's current classification policy and its operational definitions of the privileges and level of supervision accorded the type of inmates at the contracted-for custody level.

Assuming that these questions can be resolved -- how one identifies a prisoner's security and custody needs, and what attributes appropriately characterize institutions at each security level -- both the public and the private sectors would be most comfortable if their negotiations concerned only minimum security offenders/institutions. Because of political implications and community resistance, it is much easier to find a site for a minimum as opposed to a maximum security institution. The recommendation would be that only minimum security prisoners/facilities be contracted for once a jurisdiction decides it want to follow the contracting route.

Additionally, the contract should specify the state as being responsible for identifying which inmates meet the agreed upon criteria and how their transfer to the private contractor will be effected. Moreover, should any disagreements arise, the contract should indicate how these will be resolved (referral to a contract-specified public agency staff member in the central office.) The other side of this coin should also be addressed in the contract; namely, the criteria and process by which prisoners confined in the private facility will be identified for transfer back to the public agency and how such moves will be accomplished.

Contracting issues regarding maximum versus medium versus minimum security inmates affect an institution's architectural features and the relative proportions of correctional officer and program personnel in the facility's staffing pattern. Construction costs are substantially greater for the more secure institutions. However, operational costs may not vary directly with level of facility security, depending upon the public agency's stance towards inmate programming. In order for the private contractor to accurately estimate the per diem cost for each prisoner, both the RFP and the contract should specify the government agency's expectations regarding level of inmate programming; i.e., number and type of programs, prisoner/program personnel ratios, and staff qualifications.

## ISSUE #10

How many inmates should the contractor be expected to house?  
What provisions should be made for fluctuations in that number?  
What control does the contractor actually have over the number of inmates?  
Should minimum and/or maximums be established in the contract?

### DISCUSSION OF ISSUE

The issues surrounding the number of inmates contracted for in a private sector undertaking center on limits: setting minimum and maximum numbers, establishing a tiered schedule of per diem payments, and building safeguards into the contract regarding the movement of prisoners into and out of the private sector facility. The need to find a balance between the interests of both the public and private sectors is paramount, along with a continuing attention to the concerns of prisoners.

### Size

Decisions about institution size must balance such factors as economies of scale (which argue for large facilities that can function at lower per capita costs) and concerns about dehumanizing conditions of confinement (which suggest smaller facilities as being more desirable). The recommended size for new public institutions is 500 beds. An increase has been proposed to better accommodate swollen populations without adding inordinately to construction costs. While "smaller is better" still holds, suggested maximum, medium, and minimum figures are, respectively, 500, 750, and 1,000.

One strategy, which avoids both horns of the size-of-institution dilemma, supports unit management.<sup>24/</sup> This approach subdivides large prisons into smaller semiautonomous units. In this way both the economies-of-scale benefits and the humane-conditions-of-confinement criteria can be satisfied. A unitized facility requires only one dining hall, gymnasium, school building, kitchen, laundry, etc., while at the same time close contact can be maintained with the inmate population since the treatment staff's offices are on the same living units where their caseload is housed.

### Minimums and Maximums

Concerns regarding the number of inmates involved in a private sector contract take a variety of forms. On the one hand there is the contractor's need to create a budget and establish a per diem cost figure based on a minimum expected population. In other words, the public agency's contract guarantees "X" number of prisoners at "Y" dollars per day and vacant as well as filled beds are paid for at a set rate (which should be less for the former, provided this is specified in the contract).

The public agency, on the other hand, would desire avoiding any tendency on the part of the contractor to keep beds filled to capacity by retaining inmates beyond the time when prisoners are eligible for transfer to another facility.

A private contractor's proposal to manage Tennessee's entire Department of Corrections dealt with this issue by proposing one large, overall payment rather than a per diem rate.<sup>25/</sup> This approach has frequently been used in contracting for specific services; e.g., Alabama's contract for medical services by its Department of Corrections.<sup>26/</sup> While the Tennessee proposal may avoid the problem of keeping inmates longer to maintain a maximum occupancy level and the resulting highest number of per diem payments, it also presents a reverse problem; namely, releasing prisoners early in order to avoid variable costs since empty beds do not adversely affect the level of payment.

From another perspective in this era of extreme overcrowding, the public agency may want to establish a maximum bed capacity at the private facility. This assures that a certain amount of capacity will be available.<sup>27/</sup> Such limits also protect the private vendor from possible liabilities arising from overcrowding. However these constraints have their downside.

For example, the public agency may need to place more than the agreed upon number of prisoners at the private facility. Contractually established "caps" present real problems under such circumstances. A variation on this issue arose in Tennessee at the privately managed Chattanooga (Hamilton County) Jail, when the county was charged the same per diem rate for each inmate above the contract specified limit as they paid for the "guaranteed" beds. County officials felt that economies of scale should have resulted in a lower per capita cost of the additional prisoners. Thus, it is important for the contracting agency to document its expectations in regard to the cost for housing any inmates above the agreed upon number. (See also discussion of Issue #15).

#### Timing

The contract should specify how quickly the new facility will be filled to the agreed upon minimum number of inmates. A too rapid transfer-in rate may overload private sector staff before operational "bugs" have been resolved. However, too slow an inflow of prisoners will not only delay the overcrowding relief sought by the state, but it will also result in a waste of funds -- payments for unoccupied beds.

Balancing all these conflicting sets of interests becomes a contract negotiation issue. In light of the above considerations, the state may be interested in establishing specific safeguards in the contract regarding decision making authority as it relates to the movement of inmates.

#### RECOMMENDATIONS

Decisions concerning institution size involve balancing economies of scale interests (in favor of large prisons) with consideration regarding humane conditions of confinement (suggesting smaller facilities). The public agency can have the best of both worlds by specifying in the RFP and the contract that unit management be used by the selected private vendor.

A tiered fee structure should be built into the contract so that there will be no future misunderstandings regarding cost for vacant beds and/or additional inmates beyond the specified maximum; both a minimum and populations level should be stated in the contract.

Most critical of all in this area are contractual agreements in regard to inmate movement into and out of the contracted-for facility. As the contract initiator, the state should incorporate statements in the document which will ensure its continuing control over decision-making regarding inmate movement.

Both the public and the private sectors have an interest in ensuring adherence to the provisions agreed to in the contract. A method for resolving any future contractual differences which may emerge should be agreed to before activation of the facility.

## ISSUE #11

How will inmates be selected? Will the private organization be able to refuse certain inmates?

### DISCUSSION OF ISSUE

The nature of eligibility requirements, which prisoners must meet to be placed in a private prison, touches upon the heart of the matter in contractual arrangements. How particular individuals will be selected (i.e., whether or not they meet agreed upon criteria) is critical to the success of the contract. Additionally, a method for resolving differences of opinion must be specified. These considerations affect not only inmates included "in" by the correctional agency but also prisoners selected "out" by the private vendor. Thought also needs to be given to questions concerning what choice, if any, a chosen prisoner has regarding refusing to be transferred.

Corrections has been characterized as the one institution that "can't say no." All of society's other service providers have some sort of screening criteria which establishes a threshold for entrants; this is not the case in the prison business. Whoever the courts sentence will be imprisoned; where they will be incarcerated remains the prison system's only option. The question arises: will this same situation hold for the private sector?

### Eligibility Criteria

The correctional agency will want to set the criteria for placing inmates in the contracted-for beds; therefore, the conditions of eligibility should be specifically mentioned in the contract. From the viewpoint of the private vendor, such an arrangement has both its positive and negative aspects.

Assuming the criteria for admission have been arrived at through a negotiation process, there should be little difficulty provided both sides live up to the terms of the agreement. This presupposes that there is a clear understanding by both parties as to the definitions used to characterize the eligible group. Unfortunately, more often than not, this is more easily said than accomplished.

The contract should specify the factors which will be considered to determine whether or not a particular prisoner qualifies. This assumes that the correctional agency has a formal classification process which assesses every inmate in a consistent fashion on objective measures. In other words, if the private vendor agrees to accept only minimum security prisoners, what are the desiderata by which one determines "minimum security"? (see discussion under Issue #9). In parallel fashion, criteria need to be specified by which the private agency will be able to identify inmates who warrant transfer back to the state's facilities.

### Level of Specificity

The category "minimum custody inmates" is not homogeneous. Within the group of prisoners who qualify for this level of supervision there will be strong and weak, stable and unstable, bright and dull, physically and mentally sound and unsound; troublemakers, victims, and moderates will be found within all of these groups. If there are to be any transfer restrictions regarding selecting prisoners with certain characteristics, these need to be documented from the outset.

### Selection Authority

In addition to how prisoners will be chosen for the private institution, there is the additional consideration regarding who does the selecting. That is, can the private vendor veto a choice made by the public agency? Added to the "selecting in" process, there are considerations in regard to "selecting out"; i.e., are there conditions that must be met before the private corporation can return a previously accepted inmate whose subsequent behavior, in their estimation, no longer makes the individual eligible? What if there are differences of opinion between the public and private agencies as to whether or not a particular inmate met, or continues to meet, the contractually agreed upon criteria. Who arbitrates?

For Kentucky's private facility (Marion Adjustment Center) the state is the selecting authority. The researchers learned, during interviews with state Corrections Cabinet personnel that initially, because of its desire to see the Marion contract succeed, only the best inmates were being identified for transfer. However, as Marion's prisoner count increased fewer of these highly qualified offenders could be located. Consequently, more recent transfers included more typical minimum security inmates. The state faced the dilemma of too few highly qualified prisoners versus the need to fill the contracted-for minimum number of beds at Marion.

### Transfer Willingness

A final concern involves the inmate's options; i.e., do prisoners selected for transfer to a private vendor's institution have a right to refuse to go? This question has legal implications regarding what rights prisoners forfeit as a consequence of their criminal conviction. It has been generally held by the courts that inmates retain only those rights which do not conflict with the fact of incarceration.

Any attempt to limit a correctional agency's authority to transfer inmates would have serious negative consequences for the efficient operation of that system. Prisoners are entitled to a modified level of due process in order to avoid arbitrary and capricious decision-making. Ordinarily, these are built into agency policy and control all inmate movements which involve transfers within a given jurisdiction. When the transfer is across jurisdictional lines (e.g., from one state to another), additional procedures are required as specified in interstate compact agreements.

State correctional agencies have also transferred inmates from their institutions to private sector half-way house facilities in the community. Usually such transfers are desired by the prisoner involved since it results in greater freedom in an area closer to the offender's home. Thus, the issue of an inmate refusing to move to this type private facility rarely arises. Should it occur, the agency most probably would not transfer a prisoner who did not wish to move since the minimal security level of the new facility would raise the issue of escape. Typically, state corrections department avoid confronting the issue of transferring a prisoner to a private sector facility which the individual involved deems to be less desirable than the current place of incarceration.

The courts have ruled that inmates do not have a constitutional right to any particular classification.<sup>28/</sup> Clearly, the correctional agency has the authority to make such transfers. Plausibly, it will not want to set up a situation which challenges a prisoner sent to a private facility to engage in untoward behavior to gain a return transfer.

The decision to transfer to a private prison presents some additional considerations. The private facility may be located further from the inmate's home and family than the institution to which he/she ordinarily would have been designated, or it may not have a program that the prisoner wants, or the inmate's buddy may be in the state's comparable institution, etc. Within these scenarios, there is a disinclination for the inmate to comply. Consequently, the state must maintain control over inmate selection and include "transfer willingness" on the part of selected prisoners into its decision-making equation.

#### RECOMMENDATIONS

Selection of inmates for placement in a private facility is the state's responsibility. As the contract originator, the state agency has control over provisions written into the document. The public sector cannot abdicate its authority to carry out mandated responsibilities. The basis for these selections, and the methods by which chosen inmates will actually be transported to the private facility, should be written into the contract. Criteria should be mutually agreed upon to avoid any future misunderstandings (see Issue #7).

Differences are bound to arise regarding the interpretation of the contract's provisions, and whether or not in a specific instance a specific individual does or does not meet a particular definition. A prior agreed upon mediation method needs to be identified; i.e., a high level state employee in the DOC's Central Office who will perform this function. The purpose of this mechanism will be to temporize frequent recourse to the courts regarding an alleged breach of contract.

## ISSUE #12

What authority and responsibility should a private contractor have for discipline and for affecting the release date of inmates? What will be the relationship of these decisions to the State Board of Parole?

### DISCUSSION OF ISSUE

Since the private sector lacks the official authorizations granted to a corrections agency (in order that the latter be able to carry out its lawful responsibilities), questions arise as to the degree to which a private company should be able to restrict the freedom of another person. Within a correctional setting, this issue affects decision-making in regard to imposing disciplinary sanctions and in making recommendations to a parole board or other releasing authority.

The argument has been made that the private sector should not be involved even indirectly in the area of classification or parole release any more than it would be in sentencing.<sup>29/</sup> If prisoners' rights are to be properly protected, the "contractor or his employees could make no disciplinary decision which would affect parole or loss of good time."<sup>30/</sup>

### Disciplinary Problems

Aside from the legal aspects involved (see issue #4) there is the operational question: how can any correctional facility, public or private, function effectively if it does not maintain control over disciplinary procedures? Even if prisoner intake is carefully screened, some individuals transferred to the private facility will engage in untoward behavior resulting in disciplinary charges being filed. A prompt reaction to reported rule infractions is imperative, both from the standpoint of maintaining control of the institution as well as from the legal perspective of inmates having a right to due process in areas affecting their release from incarceration. Consequently, the question becomes not whether the private prison should be involved in handling disciplinary infractions, but rather how this will be done in light of legal implications.

In Kentucky's privately operated Marion facility this issue was temporarily resolved by transferring inmates back to the state agency when they are suspected of having committed a major disciplinary infraction. This approach was predicated on the absence of a legal library at Marion (omitted from contract requirements) and the state's opinion that this lack denies a prisoner constitutionally entitled rights. A subsequent opinion held that because MAC was a minimum facility, a law library was not required. Nevertheless, the contractor has recently installed a law library.

A number of court cases have dealt with inmate rights to due process during the disciplinary hearing process; e.g., Sostre versus McGinnis, Wolff versus McDonnell, and Hayes versus Walker.<sup>31/</sup> It is mandatory that both private and public agencies follow practices which comply with recognized constitutional minima. In many instances these requirements will have been spelled out in already existing state policies. As was decided in Kentucky, other private agencies may simply adopt the state's procedures for handling disciplinary issues, thereby avoiding having to demonstrate that their own procedures meet the required standard.

In order to ensure that appropriate policies and procedures are being followed, the state may want to assign one of its employees to participate in some, if not all, disciplinary hearings held at the private contractor's facility. Under this arrangement, the contract will need to specify who is responsible for such costs as office space, electricity, heating, ventilation, lights, telephone, office equipment and supplies, etc.

Handling disciplinary infractions may be facilitated if the private contractor's authority is stipulated in the agreement. For example, a two stage process could be established, provided the public agency's disciplinary policy groups infractions into minor and major categories and details the possible sanctions permitted for each level of rule violation. Penalties for minor disciplinary infractions would not include placement in segregation or loss of good time; these would be among the options available only for the most serious rule violations. Under this arrangement, the private company would be able to deal promptly with lesser (minor) level untoward behavior -- Stage 1. More serious (major) breaches of regulations -- Stage 2 -- could be dealt with by having the on-site agency representative chair the disciplinary hearing. If there is no public sector representative on-site, the private prison's disciplinary committee would limit its actions to making only recommendations when major rules have been violated. Those recommendations would then be reviewed and (within a stipulated short time period, not to exceed two working days) approved, disapproved, or modified by a specific staff member or designee on the state's staff.

#### Releasing Authority

Whether or not a particular jurisdiction continues to use a Board of Parole, every system has some releasing process which in effect, separates a prisoner from the auspices of the correctional agency. Questions arise concerning the relationship between the private prison and this authority. There appears to be no reason why the private sector cannot play the same role as the state department of corrections; that is, one of providing information to the releasing authority.

In some jurisdictions the corrections system makes specific confidential recommendations to the releasing authority concerning every prisoner being considered. This practice has both its positive and negative aspects when such recommendations are being made by private sector staff. From the point of view of the releasing authority, providing recommendations gives them additional information. The negative side concerns whether or not the private sector should have the authority to exercise such influence.

In regard to the private agency's function in this arena, there would seem to be few problems if it confined itself to presenting the facts concerning the prisoner's level of institutional performance. However, if private prison personnel become more involved (e.g., making recommendations) there may be some basis for a legal challenge -- questioning their authority to sway decisions which result in the restriction of someone else's freedom.

## RECOMMENDATIONS

The public agency needs to be certain that the contractor is conducting disciplinary hearings following legally required practices. It is recommended: (1) that the private agency adopt the policies and procedures utilized by the state; and, (2) that the state permanently station one (or more) of its own staff members at the private facility who in addition to other responsibilities will participate in all disciplinary hearings concerning major rule infractions -- the definition of these having been spelled out in written policy statements.

Although individual practices may differ in regard to the degree of involvement of the state correctional agency with release decisions, insofar as the private sector is concerned, their contribution to this process should be limited to a presentation of the facts pertaining to the inmate's level of adjustment during the period of confinement in the private facility.

## CHAPTER IV

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CHAPTER V  
REQUESTS FOR PROPOSALS AND CONTRACT ISSUES

This chapter discusses a number of issues that states need to consider in deciding what provisions include in requests for proposals (RFPs) and the contract. These issues include:

- o How the RFP process should be handled so as to ensure sufficient competition.
- o What criteria should be used for evaluating proposals and to what extent these should be specified in the RFP?
- o Which capital and operation costs should best be assigned to the private vendor and which should remain a public responsibility?
- o The duration of the proposed contract.
- o Contractor's obligations towards current government employees if the contract calls for a transfer of a facility to private operation or replacement of an existing institution with a new, private facility.
- o Provisions relating to potential problems with vendors such as poor performance or bankruptcy.
- o Provisions covering possible changeovers from one contractor to another or from the private sector back to the state.
- o Which standards the contractor should be required to follow.
- o Contractor obligations regarding the state's monitoring of the contract.

## ISSUE #13

Should contracting be competitive or non-competitive? Are there enough suppliers to provide real competition? What are the relative merits of for-profit and non-profit organizations?

### DISCUSSION OF ISSUE

A major reason proponents give for contracting with the private sector is that it enables the government to encourage competition for the business. This competition in turn, is intended to encourage bidders to keep their prices low and their program at as high a quality as possible -- in order to win the competition. Another reason for competitive contracting is to avoid claims of cronyism that can occur with sole-source contracting.

This raises some important issues for government that need to be resolved early if contracting is being considered.

1. Should the government solicit bids through a formal state request-for-proposal (RFP) process?
2. Are there enough potential suppliers to have an effective competition?
3. How can governments find and develop additional potential suppliers to try to ensure effective competition?

### Competition and Costs

Does competition bring costs down without sacrificing service quality? Our research was not designed to determine an answer to this question. Many accept as a given the principle that competition brings cost down--with the caveat that it has to be real competition. We found two indications that the principle is sound. One piece of evidence was the substantial reduction in price (43%) by the eventual winner in Kentucky during the last phase of the competition when bidding was reopened. In Pennsylvania, when the state switched to competitive bidding on the Weaversville facility, there was more than one bidder, and the contractor (for the first time) reduced its price from the previous year's cost. Note, however, that in both cases the contractor reduced staff. It is also possible that, initially, a contractor will offer a cut-rate price and subsequently raise it. The state's protection, here, is (1) to check the company's financial condition (to be sure the firm is not likely to default because of possible losses incurred during the contract); (2) to have alternative suppliers available when time for rebidding comes up, if the original contractor proposes a large increase; (3) to limit the allowable price increases in multi-year contract; and (4) to be able to take back or discontinue the facility if no bidder comes in at rebid time with a reasonably priced proposal.

### Request for Proposal Process

Should government agencies use a request for proposal process? Most, if not all, states require RFPs for services of this magnitude, or at least make it difficult to use another method. All the state governments whose contracted facilities we examined used RFPs: Kentucky, Florida, Massachusetts, and Pennsylvania. Pennsylvania's Weaversville, facility, however, was operated by a for-profit company from 1976 until 1982 without an RFP or a competitive bid process.

At the local government level, RFPs were less frequent. Bay County (Florida) and Hamilton County (Tennessee) both advertised in newspapers but did not issue formal RFPs.

Bay County, because the contract was to include some construction work, felt it could not legally use an RFP process. Apparently, the county felt the contract would be covered by the state's professional Architectural and Engineering Procurement Law that prohibits competitive price bidding for these types of services. Thus, Bay County advertised requesting "qualifications" statements.

The Hamilton County commissioners were approached by the company that eventually received the contract and did not feel the need for a more formal RFP than that represented by a short newspaper ad.

Ramsey County (Minnesota) initially issued a RFP in 1984 but had no plans to rebid it (as of 1986) because of satisfaction with the operation of the contract.

At this time, given the limited formal evaluation that has been done on any but the Florida Okeechobee contract (and that one was done early in the life of the contracting effort), there is no strong evidence that RFPs are a major necessity. As noted in discussing Issue #22, most contractors appeared to have tried hard to do a good job in these early examples of secured-facility contracting.

Thus, the absence of RFPs has not, to date, appeared to have caused major service problems or led to major cost problems. Nevertheless, it seems likely (as indicated by the findings given earlier) that the RFP process that clarifies what is desired and forms the basis for contract negotiations, also adds competition and helps bring costs down. Over the long run, RFPs are likely to be a necessity in order to ensure fair competition.

### Are There Enough Suppliers? What Type of Suppliers Should Be Sought?

Currently, only a few private companies have direct experience in managing and operating secure correctional facilities. There are not a large number of experienced suppliers. For the most part, even the current vendors have only a very few years of experience as companies delivering this service. Since most firms hire key personnel from state or local correctional agencies, however, even brand new companies may have some staff with many years of experience.

In response to both its initial (1984) and revised (1985) RFPs, Kentucky received five bids. Florida received only one bid for both its initial (1982) and the later (1984) Okeechobee RFP. Pennsylvania's 1982 RFP elicited only one bid, and two bids in 1985. Bay County in 1985 received eight statements of qualifications from contractors, four of whom were asked to bid by the county commissioners. Hamilton County received only one response to its 1984 advertisement. Shelby County, Tennessee did not issue any formal notice but compared, informally, two or three vendors.

Of the facilities we studied, only one contractor seemed both inclined and capable to expand rapidly into new areas. In three cases, the contractors were nonprofit organizations. Of the for-profit firms, two were just starting up. One of the older firms did not believe prison contracts to be a particularly good business opportunity for it.

On the other hand, even if only two bidders are likely, this can make for a good competition if they truly compete. Organizations with correctional experience in half-way houses, for instance, have relevant experience. In addition, there is considerable staff experience in state and local corrections agencies. Some of these employees and managers welcome the more entrepreneurial atmosphere and the different opportunity represented by a new private company.

We suspect that nonprofit organizations are likely to be much less willing to work with inmates in higher-security level settings, probably preferring to work with minimum security or juvenile offenders.

How can a state find and encourage enough potential suppliers to have effective competitions? Kentucky advertised in the state's major city newspapers (but not in the corrections professional journals). It also prepared a bidder's list of over 15 organizations to which it sent copies of the RFP.

Though politically it may be preferable to emphasize suppliers that have offices within the state, this may greatly limit the number of competitive bidders, especially with the current lack of experienced providers. Local firms probably have an inherent advantage, such as "knowing the territory," but this does not mean others should not be invited to compete. Kentucky's 1985 RFP was mailed to firms in ten states; however, Kentucky addresses by far outnumbered others on the RFP mailing list.

Several government agencies permitted and actually received bids from both for-profit and nonprofit private organizations. The Massachusetts Department of Youth Services contracts only with nonprofit organizations, since it does not currently have statutory authority to use for-profit firms. This seems to be an exception, however. Even in Massachusetts the Department of Corrections has the authority to contract with for-profit companies (but currently only at one facility).

Allowing both kinds of enterprises to compete certainly adds to the number of potential suppliers. A preference for nonprofit, such as in Massachusetts youth corrections, is usually due to the belief that private nonprofit organizations will be more likely to give quality service and not cut their level of service to make extra profit. Some of these organizations may also have the advantage of being able to use voluntary help, have lower-paid employees, use contributions to offset their costs, and not have to pay taxes. Such advantages, however, should be reflected in their bids. The temptation of for-profit firms to cut corners to make added profits can, to some extent, be controlled by the corrections agency if it has a good monitoring system (as discussed under later issues).

Another way to expand the number of suppliers involves in the choice of size and security levels of facilities to be contracted. In general, the smaller the facility and the lower the level of security (and, presumably, inmate difficulty), the easier it will be for organizations, especially smaller ones, to bid.

Finally, a state could encourage the formation of new private organizations, especially in states faced with major overcrowding. This solution is not an immediate answer to finding more suppliers but might be appropriate in some situations. Assistance might be in the form of seminars on establishing such organizations, especially for persons already experienced in state or local corrections, or for organizations with some experience in corrections but not secure prison operations.

#### RECOMMENDATIONS

States should use a competitive RFP process; many states may have to in order to meet state procurement laws. This also reduces the likelihood of claims of cronyism and the like.

To maximize the number of eligible suppliers, a state can:

- o Advertise in both major state and national newspapers and national correctional journals.
- o Develop and maintain a list of potential suppliers.
- o Permit both private nonprofit and for-profit organizations to bid.
- o Provide some assistance to encourage the formation of new organizations.

What criteria should be used to evaluate private proposals?DISCUSSION OF ISSUE

Prior to soliciting proposals, the state needs to work out the process for evaluating proposals. This includes such considerations as: the specific evaluation criteria to be used, how they should be weighed against each other and combined to give an overall score, how formal and explicit the evaluation process should be (including how much detail should be spelled out in the RFP), and who should do the evaluation. A key issue in the assessment is the relative weight given cost in determining the winner. This latter question may differ between initial contracts for a facility and rebids.

Purchasing officials generally prefer explicitness -- detailed ground rules for the evaluation -- but correctional officials with little experience in contracting correctional facilities may feel less comfortable with spelling out criteria and weights. Of course, the state's own purchasing regulations may require a particular level of detail.

What evaluation criteria should be used? Pennsylvania's Department of Public Welfare, which ran the 1985 competition for its Weaversville secure facility for seriously delinquent male youth, used five criteria. No weights were given in the RFP, but the criteria were "listed in descending priority order" as follows:

1. Contractor qualifications: "quality, relevancy, or recency of projects of a similar nature conducted or completed by the contractor" and ability to "meet the time constraint."
  2. Professional personnel: personnel qualifications; education and experience.
  3. Cost.
  4. Understanding of the service program problem.
  5. Soundness of approach: proposed treatment plan.
- The State of Kentucky for its 1985 RFP was quite explicit in providing specific evaluation criteria, the weights for each, and scoring system. The principal criteria were:
1. Facility
  2. Staffing
  3. Programs
  4. Security
  5. Experience

Table E, on the following page, shows the information provided in the Kentucky April 1985 RFP, including both the subcriteria and weights for each. As noted at the bottom of Table E, Kentucky set a minimum score for each of the five criteria. If a proposal scored less than 60% on any one of the five major criteria, it would not be considered further. This procedure required the bidder to meet minimum levels for each major criterion. This is unusual. Evaluations of proposals in most other states generally permit the proposal to overcome a poor showing on one criterion with good showings on others. Establishing minimum acceptable scores has the advantage that the bidder has to reach a minimum acceptable level of competence for each important criterion.

TABLE E  
Evaluation Criteria for Kentucky RFP 1/

SECTION 80 RFP SR-903-85  
CON  
PROPOSAL EVALUATION APRIL 12, 1985

80.000 Point Scoring of the Technical Proposals

The evaluation of technical proposals will involve the point scoring of each proposal in each of several areas according to pre-established criteria. A maximum of points will be available for each technical proposal. The cost information will not be available to the technical committee during this evaluation.

The evaluation criteria are:

1. FACILITY:

Ability to meet Codes and Startup Time Frames	10 points
Availability of Transportation	4 points
Space Available	10 points
Vocational Resources	10 points
<u>Community Reaction</u>	<u>6 points</u>
Sub-Total	40 points

2. STAFFING:

Pattern	14 points
Director's Qualifications	8 points
Job Classifications	14 points
<u>Monitoring System</u>	<u>4 points</u>
Sub-Total	40 points

3. PROGRAMS:

Service Work Programs	12 points
Personalized Programs	12 points
Recreational Activities	6 points
<u>Community Resources</u>	<u>10 points</u>
Sub-Total	40 points

4. SECURITY:

Procedures	40 points
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5. EXPERIENCE:

Previous Experience	20 points
<u>Performance in Previous Experience</u>	<u>20 points</u>
Sub-Total	40 points

TOTAL 200 points

80.100 Minimum Acceptable Score

Proposals scoring less than 60% (24 points) in any one or more of the five criteria will not be considered for award of contract.

Kentucky separated the evaluation of costs from the technical assessment. The technical aspects of proposals were evaluated first. Cost proposals were examined only for those proposals considered technically acceptable. The state felt this saved considerable review effort by not wasting time considering costs for technically unsound proposals.

Kentucky used a formula to determine the overall score for each proposal and thereby determine which bidder would be awarded the contract. It divided the "price per inmate per day" (as obtained from the cost proposal) by the total technical score. The proposal with the lowest resulting value received the award. This scoring procedure was spelled out in the RFP.

Kentucky included "facility" as a major evaluation criteria since the contractor was required to select a site within the state and provide a facility at that location. The Pennsylvania solicitation to operate the existing Weaversville facility did not need a facility criteria. Otherwise, there is considerable similarity between these two sets of criteria.

Not explicitly stated in either set is consideration of the financial condition of the bidder and consideration of the background of the firm in terms of, for example, possible criminal connections. Presumably this could be considered part of the contractor qualifications or experience criteria, but it is not explicitly identified.

The Pennsylvania RFP put as its first priority the quality and relevance of projects of a similar nature. This criterion appears to be particularly important for rebidding a contract (as was the case for the Weaversville facility). An official with a private firm expressed considerable concern that state officials carefully consider the effects on personnel and the offender population of bringing in a new company if only "to save a few dollars." With an emphasis in the criteria on relevant experience, the existing contractor can have a considerable advantage over other bidders, especially if the vendor has been doing a good job. This seems reasonable; however, other bidders might be scared off if they perceive the existing contractor as having the inside track for the new contract. The question arises whether the rebid RFP should provide a rating, at least in general terms, of the contractor's performance to date and also provide the most recent contract price. If the private firm's performance has been good, this would put more emphasis on contract price, and vice versa. (This probably only should be done if the government agency has a sound monitoring process and can substantiate work performance).

A special problem occurs with cost. Often, a state will have determined a maximum price that it can pay, probably based on budget limitations. Should the RFP explicitly identify this upper price limit? Purchasing officials tend to dislike putting such information into RFPs, feeling that it inhibits good cost competition. However, experience of the State of Texas' Department of Human Resources for some social service RFPs, in which an upper per diem rate is given, suggest that if bidders feel there is real competition, they will often come in with rates substantially lower than the maximum. This has the advantage of avoiding wasting bidders' time trying to guess how much is available and as occurred in the State of Kentucky, putting in bids that are higher than the maximum funds available. (This situation required Kentucky to amend its RFP and undertake subsequent negotiations to meet state financial constraints.)

#### Evaluation Process

How formal and explicit should the evaluation process be? Kentucky was quite explicit regarding its evaluation process, believing that the more explicit the RFP, the fairer the competition and the fewer problems later. As indicated above, the state spelled out the evaluation criteria, weight given each, and the formula by which the winner would be decided, considering both the technical score and the cost proposal. Not only that, but Kentucky's purchasing process requires that once the award is made that the ratings of each bidder be open information. The state feels this keeps the purchasing process open and discourages improprieties and later complaints by losing bidders.

Who should evaluate the bids? Generally, the assessment is done by the corrections agency initiating the RFP, with the assistance of central purchasing or financial officials. In Kentucky, five people evaluated the proposals. They were appointed by the heads of corrections and finance departments. The basic RFP process was determined by the Finance Cabinet, which houses the state purchasing office.

One possibility is to include on the evaluation team an outside person, such as a representative from another state correctional agency, from a corrections professional association such as the American Correctional Association, or from a state interest group that is reasonably neutral and has no self-interest in the final selection. This has been done on occasion in human service proposal evaluations. For example, Hennepin County occasionally uses outside persons, such as representatives from human service boards. The Utah Division of Youth Corrections has on occasion solicited outside input by asking neutral members of the community to serve on evaluation panels.<sup>2/</sup> The National Association of State Purchasing Officials' "Guide" recommends a third party that can provide technical expertise, a fresh look, no vested interest, and objectivity.<sup>3/</sup>

## RECOMMENDATIONS

We suggest that an explicit, open proposal process be used, one similar to that employed by the State of Kentucky. Prior to writing the RFP the state agency should carefully plan what it wants to look for in proposals, and consider how and by whom the evaluation will be done. This should include specification of the weights for each criterion and how the overall scoring will be done. The procedure should identify how "cost" will be handled and what weight it will have. The RFP itself should spell out the specific evaluation criteria, the weights, and scoring system (so that all bidders will know equally how the evaluation is to be done and what is important to the state.)

Kentucky's practice of specifying a minimum score for each of the major evaluation criteria seems quite appropriate. If a proposal does not meet the minimum requirement for any one criterion, that proposal should be dropped.

We suggest that evaluation criteria include such items as:

1. The experience of the firm in undertaking similar operations and evidence as to degree of success of past performance.
2. Staff qualifications in the desired correctional activities.
3. The quality of the procedures and programs that the bidder proposes.
4. The bidder's financial condition and absence of criminal connections.
5. Evidence that the personnel indicated in the proposal will actually be principals in the contracted effort.
6. Cost.

Doing the technical review first seems reasonable to avoid spending time reviewing costs for proposals that are not technically qualified. The reverse also holds. The state might remove from technical review proposals whose total cost exceeded the amount available.

We further suggest that if there are major budget limitations on the facility that are known to the state, that information be specified in the RFP in order to avoid wasted time by both parties in preparing and reviewing proposals that are above state budget levels.

## ISSUE #15

### How should the contract price be established and on what basis? What should be included in the contract price?

#### DISCUSSION OF ISSUE

A major concern for states in contracting prison facilities is the contract price. In this discussion we address questions regarding: (a) the form in which the price is specified, (b) what might be done about setting maximum or minimum price limits, (c) what elements of cost should be included in the price, (d) timing of payments to contractors, (e) how prices for years beyond the first year in multi-year contracts should be adjusted under the contract, and (f) what provision should be made for reimbursing capital costs.

We do not discuss here questions of what specific prices should be or whether contracted correctional facilities have been less or more costly than publicly-operated facilities. (The latter is discussed under Issue #22.)

#### Form of Contract Price

In most of the facilities whose contracts we examined, the final contractual arrangement took the form of a cost per inmate day--usually one rate regardless of the actual number of offenders during the contract period. (See discussion of tiered price schedule, Issue #10.) (As will be discussed shortly, some contracts also included maximum or minimum prices in the agreement.) Exceptions were the 1985 contract for the State of Pennsylvania's Weaversville facility and the Florida Okechobee School For Boys contracts, which specified fixed total price arrangements. Another potential exception was the 1985 proposal to operate all State of Tennessee correctional institutions for a flat amount, not based on a rate per inmate day basis. The latter proposal was not accepted by the Tennessee legislature.

The underlying rationale for using a rate per inmate day basis is that facility costs are directly related to the number of person days at the facility. However, in most of the cases examined, some substantial capital costs (facility rehabilitation or new construction) were incurred by the contractor and included in the contract price. Thus, some cost elements were "fixed" and did not vary in proportion to the number of inmate days. In addition, economies of scale can sometimes be achieved when there is a high number of prisoners such as by getting better prices for buying supplies in bulk. This suggests that prices could be somewhat variable, depending on the number of inmates.

We found only one example of variable prices. The Bay County Jail 1985 contract specifies (to simplify somewhat) three prices depending on the average number of prisoners for the month: \$29.81 for up to 310 prisoners, \$20.74 for 311-329, and \$7.50 for 330 prisoners and above. These prices were dependent on whether the vendor was able to obtain tax exempt financing for capital costs. The contractor did not obtain such financing, and therefore the price was fixed at \$29.81 up to 330 prisoners and \$7.50 per day above 330.

The Bay County contract also permits the contractor to house inmates from other jurisdictions. The vendor is not permitted to charge less than the price to Bay County. If the charge is higher, the excess is to be shared equally between the contractor and Bay County. (An extra advantage to Bay County is that any outside inmates count toward the minimum number that the county is obligated to pay for.)

Another issue is the effect of the pricing approach on contractor behavior regarding retention of inmates. A fixed-price contract tends to encourage contractors to move inmates out, thus reducing the number at the facility. This would have the effect of reducing the contractor's variable costs and also reducing staff workload. A fixed per diem contract tends to encourage contractors to retain inmates longer, thus maximizing revenues. The importance of the choice of pricing arrangements is affected by the extent to which the contractor can actually influence the length of prison time, as discussed in Issue #12.

#### Provisions for Maximum and Minimum Contract Amounts

A unexpected influx of inmates into a contracted facility can mean large additional cost for the government agency, perhaps forcing it well over its budget. This can be a fearful event. On the other hand, if a much smaller number of inmates than anticipated are assigned to the facility, the contractor can lose a great deal of money because of fixed costs. Thus, both government and vendor receive some protection by specifying maximums and minimums in the contract.

Note that government-operated facilities can, at least in the short run, house additional inmates (through overcrowding) with relatively small additional out-of-pocket costs such as for additional food. Thus, a public agency operating its own facilities has some protection against large budget overruns. If, however, it contracts with a private vendor on a straight per inmate day basis, the government is obligated to pay that daily rate for every prisoner.

Of course, the corrections agency can exercise control by not sending inmates to the contract facilities. A state has flexibility as to where it assigns prisoners. This problem is more of a danger for local governments (such as those contracting their only county jail) where the county has little option but to put the additional inmates into the contracted facility. This happened at Hamilton County, Tennessee, and caused budget problems when there was a large influx of offenders committed for driving while intoxicated (DWI).

The contract with Bay County Florida specifies a maximum dollar obligation, the amount budgeted for the fiscal year. The contract states: "In no event shall the County be required to pay the contractor more during any fiscal year than the amount budgeted."

Both the State of Kentucky's Marion facility contract and Bay County's contract specify a minimum number of inmates, and thus a minimum price. The Kentucky 1986 agreement includes a minimum of 175 inmates for the facility, which the state had planned as a facility for holding 200. The contract price is based on inmate days. Assignment of more than 200 prisoners requires approval by both parties (Section 40.120). The rate per day is the same regardless of the number of extra inmate days.

Contracts by the Massachusetts Department of Youth Services for secure treatment facilities specify both a per diem rate and a maximum total payment for the year.

In order to keep contracts within budget limitations, a state might indicate funding constraints in its request-for-proposals. The State of Kentucky's first RFP produced only one bid that qualified technically, and it was above the state's funding limit set by the Corrections Cabinet. This limit was not published in the RFP. The revised RFP also led to most bids being above Kentucky's unspecified maximum. Finally, after the initial winner (whose bid was below the maximum the state had in mind) failed to secure the site it proposed, the remaining bidders became aware of the maximum.

It is a controversial question regarding whether or not to put specific maximum dollars in RFPs. Purchasing departments often disapprove of such provisions, believing specifying the maximum amount diminishes cost competition. However, if there are enough competitors this specification need not inhibit price competition significantly, especially if the RFP encouraged lower bids by including price as an important evaluation criterion in awards. This would make for more realistic bids from suppliers, would avoid bidders having to second guess the state, and would avoid some wasted effort (as occurred in Kentucky.) The Texas Department of Human Resources has specified in its RFPs a maximum rate that the state will pay for its family service program but encourages proposals at lower rates.

A related question for initial contracts is when does the state start paying the minimum specified in the contract? The Kentucky contract originally provided for a 60-day start-up period (after contract signing) before the minimum took effect. However, the contractor found it difficult to bring the inmate count up to the minimum of 175 during that period and negotiated with the state to delay the effective date to 90 days.

Another question that should be considered in advance of contract signing is whether an inmate-day should be counted for both the day offenders enter prisons and the day they leave. This specification was not clear in most of the contracts we examined. Exceptions were in Bay County, Florida which included the day of entry but not the day of departure -- and Hamilton County, Tennessee where only one of the two days counted. Both versions have the effect of counting one of those two days, but not both.

#### Contract Cost Elements

What cost elements should be included in the contract? The principal bone of contention between governments and contractors concerning these contracts was: who was responsible for which cost elements? Responsibility for certain expenses had not been clearly specified in the contracts.

The following contract elements were particularly prone to insufficient specification, thus opening the possibility of later disputes and serious problems:

- o Certain health costs, especially medication and expenses for treatment outside the facility, as in hospitals or a specialist's office.
- o Certain transportation costs, such as those to and from hospitals and the offices of medical specialists and to other locations for court parole, or disciplinary hearings.
- o The incidental costs of an on-site monitor, such as office space, secretarial assistance, reproduction costs, office equipment, utilities, and telephone.
- o Utilities (especially if the facility is on a site shared with a publicly-operated facility). Utilities include water, sewer, heat, light, gas, electricity, and telephone.
- o Costs of training the private contractor's correctional officers, especially when training is provided by the government.
- o The disposition of funds obtained in a contractor-operated canteen for inmates.
- o Provision for a legal library and paralegal aid for inmates.
- o Provision for an information system compatible with the government's system.
- o The use of inmates to undertake various services for the facility such as maintenance and repairs, food service, and janitorial duties.

The crucial issue here is to determine in advance which items are to be provided by the contractor and insure that the bidders, and subsequently the winning contractor, have included those items.

Most contracts addressed medical costs in some detail and required the contractor take care of in-facility initial treatment and nursing care, while the government paid for outside hospital and specialist care. (The amounts might be billed and paid for by the contractor, such as in Bay County, but these are resubmitted reimbursement by the government -- over and above payments for the operation of the correctional facility.) The Bay County contract requires the contractor to obtain county approval first for such non-emergency health care. The contractor pays for medication but can then bill the county separately for it.

The Ramsey County, Minnesota, 1986 contract for adult female inmates specifies that basic medical care is covered by the private firm's per diem. This care is defined as including: "a physical examination, sick call and self care. The cost of emergency or necessary hospitalization, surgery, outpatient evaluations, and dental care will be borne by Ramsey County. Costs for prescriptions will be borne by Ramsey County..."

In Kentucky's Marion Facility, questions arose over a number of elements: hospitalization of a Marion inmate with a pre-existing medical problem; state training program costs for private firm staff, lack of provision for an on-site prison law library and paralegal assistance; and laws of inclusion of a computer-based inmate records system compatible with the state's approach.

The State of Kentucky, after some initial dispute with the vendor (since the contract did not address the issue), decided the private firm had to reimburse the state for two weeks of training which the state provided to the contractor's correctional officers. The contract, it should be noted, required annual training for project staff. The private company provides space for the state's on-site monitor, although this was not specified in the RFP or contract, but the state corrections department pays for the monitor's telephone. Responsibility was not specified for some of the other expenses of that office; reproduction and secretarial help, were handled informally. While these are small costs, they exemplify problems that should be avoided in future RFPs and contracts.

In general, canteen profits in contracted facilities are used to directly benefit the inmates; however, the wording in the contracts that we examined usually was vague. This could be a source of subsequent contention, and perhaps public embarrassment, if the ground rules are not carefully spelled out in advance.

Using inmates to work on various facility activities is traditional in correctional facilities. The concern here is that the contract should make clear the extent to which inmates can be used for work in operating and maintaining the facility, how they are to be paid, and what elements the contractor is to be paid for. This concern should not conflict with the objective to keep inmates constructively occupied. Also, as one private contractor official noted, work details will require supervision by the contractor, so that savings to the contractor may be small if there are any at all.

Even when competitive bidding was undertaken, we often found that the RFP did not specifically identify which specific costs (items such as those mentioned above) were to be included in the bidder's price. Thus, it appears possible that some bidders included some of these and others did not. Such inconsistency makes comparability among prices more difficult and may lead to misinterpretation by the bid evaluators, as well as disputes after the contract is awarded regarding responsibility for unspecified costs.

### Timing of Contract Reimbursement

Delayed government payments to contractors can be a major concern. The vendor may incur added interest expense, if he needs to borrow funds to pay bills or salaries. An official of the Kentucky facility contractor expressed such delays as one of his major concerns. He thinks that contracts should provide for an advance, or at least prompt payments. Another official of a contracting firm felt that the government agency might delay payments because of budget problems.

Kentucky, however, is one of a number of states which have a "Prompt Payment Act." This guarantees that correct invoices are paid within 30 days of their submission.

### Determination of the Contract Amount for Future Years

Typically, prison facility contracts will be for more than one year. The question arises: what will happen to the price in future years? Contractors do not want to be held to the same price, especially in the face of inflation.

Most of the correctional facility contracts we examined were multi-year and had provisions for automatic adjustments based on cost-of living indices.

The State of Kentucky specified that after the first year of a three-year contract, increases would be based on the U.S. cost of living index. The Bay County contract calls for an "inflation adjustment" based on the Consumer Price Index but also established a minimum increase of two and one-half percent ("in order to provide sufficient funds for salary increases for contractor personnel") and a maximum increase of five percent ("in order to protect the County from unlimited escalation").

The Bay County contract is nominally for twenty years, but it provides that either party may request a price adjustment due to "unforeseen circumstances" every three years. Another contingency explicitly identified in the Bay County contract was the possibility that state laws or regulations would be changed thus increasing the cost of operating the facility. If this occurs, the contractor may request an adjustment to the per diem charges. Arbitration is required if the two parties can not agree on the adjustment.

The Florida Beckham Hall contract limits the price for the second and third year of the 3-year contract to no more than the price offered by the contractor for each of these years in its response to the RFP. In addition, the department reserved the right to negotiate the price prior to the beginning of the second and third years. The contract also limits the state's obligation by explicitly making future years of the contract "subject to appropriation of funds by the state Legislature."

All the contracts had "escape clauses" permitting either party, with reasonable notice, to terminate the contract without cause (presumably allowing termination because they couldn't live with the existing price).

Government agencies and contractors do not appear reluctant to attempt renegotiation at almost any time, as circumstances arise. The State of Pennsylvania has recently undertaken renegotiations to reduce costs. The reverse, of course, is also a possibility. An item omitted from the contract might require adding to the contract price.

Inevitably some items will be neglected in developing contracts even after more experience is gained; not every contingency can be anticipated. Nevertheless, it is desirable to keep renegotiations to a minimum.

#### Provision for Reimbursing Capital Costs

If the contractor is responsible for construction or rehabilitation of a facility, this can involve substantial capital costs. The private firm could be paid a lump sum or, as was the case in the examples we examined, can be reimbursed by including this cost in calculating the inmate per diem charge. Over the life of the contract the vendor can recoup the investment and debt service interest expenses. Another option (not found in use in these correctional contracts) is for the contractor to charge an annual fee, equivalent to a leasing or rental fee, to the government. This option could have the advantage of separating a major portion of fixed expense from the per-inmate day variable costs.

A principal question is what should be done if the contract is terminated before the private company has recouped its investment. In most of the cases we examined, the expectation is that the facility would revert to the government or be taken over by a new contractor. Thus, the government generally wants to retain ownership, or at least control, over the institution. An exception is Kentucky's Marion facility, which was purchased by the contractor before the request for proposal was issued. There is no specific provision for the state to obtain the facility when the contract is terminated. A portion of the per diem was identified in the contractor's bid as being for debt service. The vendor presumably wants to retain the property and facility for other uses if and when the correctional facility contract ends.

Other contracts we examined included a formula for reimbursing the private company at termination, basically an amortization schedule. A payment level was established whose magnitude declines each year that the contract is in operation. For example, the Bay County agreement includes renovation of the jail and construction of an annex. Payment at (no-fault) termination is determined by amortizing the principal in equal installments over a twenty year period with an interest cost "the lesser of the prime rate plus one percent (1%) or the interest rate actually paid by [the contractor] on any money borrowed..." (Sections 1 and 8.4)

An associated issue for government is how to protect itself if it unexpectedly needs to terminate the contract; e.g., because of contract problems. The agency could be then faced with a large, budget-busting, cost to pay the contractor for the facility. To reduce this problem the contract could provide for repayment spread over several years (with appropriate interest). Such provisions were not found in the contracts we examined.

## RECOMMENDATIONS

While contracts based on a fixed inmate day rate are the major form currently in use, we recommend that states consider variable daily rates. Rates would be based on steps, being lower for larger numbers of inmates during a particular reimbursement period. This recognizes that certain fixed costs don't change and that there are some economies of scale available to contractors.

To protect the private company a minimum number of inmate days should be indicated through a minimum total contract price or a larger per diem for smaller numbers of prisoners. In addition, a state should include a maximum amount that cannot be exceeded without formal approval. This is desirable to protect state budgets.

Perhaps most importantly, the government should specify explicitly in both requests-for-proposals, and subsequently in the contract, which cost elements are to be included and which are not. Details should be included on such items as: various medical, mental and dental health costs, transportation expenses, use of inmates for work activities, costs for on-site monitoring, training expenses for contractor's correctional staff, utilities, record keeping requirements, legal libraries and other legal aid for inmates. The documents should also specify how facilities will be disposed of, and paid for, at termination of the contract. The result of more careful specification should be bids that are more easily compared and also fewer disputes over contracts and possible public embarrassment.

The request-for-proposal and contract should specify how both current and future costs will be determined under the contract. Minimum and maximum limits on adjustments should be detailed. Provisions for adjustments due to unforeseen circumstances should be included, but re-opening the negotiation process should not be overly "easy." Frequent adjustments of price may defeat the competitive purposes of the original bidding.

Finally, to protect the contractor, the agreement should provide for a specific payment schedule requiring reasonably frequent and timely payments.

## ISSUE #16

What provisions should be made to reduce service interruption and their impacts? Should there be provisions to protect the private contractor?

### DISCUSSION OF ISSUE

The use of private contractors increases the likelihood that service will be interrupted. These interruptions can occur for three major reasons. First, private firms have a greater possibility than public agencies of strikes and substantial financial problems (even bankruptcy). Second, normal change-overs can be expected to occur periodically when contracts come up for rebid. And finally, change-overs can occur if the state, for whatever reason, decides to cancel the contract and return the facility to public management.

This might occur, for example, if the state encounters major legal or contractor performance problems, evidence of corruption or illegal conduct involving the vendor, or political pressure.

If any of these events occur, the government will face major problems maintaining care of prisoners and the condition of facilities, equipment, and inmate records, for which the contractor had been responsible. At minimum, such interruptions add extra expenses to the public agency to correct these difficulties.

Government can avoid from some of these continuity predicaments by preventing them from happening in the first place. For example, it can include in its criteria for evaluating bidders, at least the finalists, such characteristics as:

- o their financial capability, viability, and stability;
- o possible criminal connections, perhaps checked by the state police.

Checking financial capacity (e.g., through past financial statements) appears fairly common in major procurement for many government services.

Another strategy is to include certain protections in the contract; e.g., requirement for a performance bond. This will ensure that added costs resulting from contractor default will be recovered. For example, the performance bond would be available if the private firm goes into bankruptcy or doesn't perform up to contract stipulations. The presence of a bond, purchasing officials have mentioned to us, makes it easier for the government to collect when problems are the fault of the contractor.

The contract can also contain a variety of provisions specifying the contractor's responsibility if there is a change-over. Such provisions can apply whether the change-over is voluntary or involuntary, from one vendor to another, or from the contractor back to the government agency.

The contract should require the private firm:

- o To turn over inmate records in fully satisfactory condition.
- o To turn back equipment and the facility, if these become government property, in good condition.
- o To work with the new contractor (or government agency if the work is being returned to the public sector) to provide an orderly, efficient transition.

In addition to the above concerns, both the contractor and government agency generally want the contract to spell out disposition of property. All the contracts we examined included specific provision for payments to the vendor for any capital facilities or equipment that would be turned over to a new firm or back to the government agency. The provisions included specific formulas for determining the price to the new contractor or government agency.

We found performance bond requirements in several of the contracts we examined. For example, the State of Kentucky contract contains a provision requiring a performance bond "equal to 70% X 200 (inmates) X 365 (days) X rate per inmate per day." The performance bond must be renewed each year and is required throughout the term of the present or any renewal contracts. The performance bond must be submitted "no later than 90 days after award of the contract."

To help protect against extra costs to the government if the vendor defaults, the Kentucky contract for its Marion facility provides in the case of termination because of contractor default: "the contractor shall be liable for any excess costs for such similar services..." and "for administrative costs... in procuring such similar services".

Provisions that explicitly required cooperation or responsibility of the contractor in a change-over (transition period) were rarer. One exception was Hamilton County, which required in its contract that "facilities, including buildings and furnishings,...remain the property of Hamilton County and must be kept in good repair, except for personal property acquired by the company that is not the property of the county." The Hamilton County provision was not explicitly or solely directed at change-overs, but appears to cover such a contingency.

A second example was the Pennsylvania Department of Public Welfare's contract for its Weaversville facility which stipulated that the contractor "will cooperate with the Department of Public Welfare if a new provider is selected from the request for proposal process." The wording is general, but addressed the issue. The Pennsylvania provision explicitly dealt with change-overs. It was added in later contracts, after the contracting process became competitive. (Initially, the awards had been on a noncompetitive basis.) The Weaversville contract also includes a stipulation that "inmate records will be transferred in an orderly fashion."

In general, except for provisions for the disposal or transfer of real property, the contracts we examined generally did not seem to address explicitly the change-over problem.

Another strategy for a state is to take steps to reduce vulnerability to problems due to change-overs, defaults, strikes, and the like. The government, for example, may protect itself by contracting only part of the service and by having a contingency plan if major problems arise. That is, the agency would not contract for all its prisons, or even all its minimum security facilities. This has the advantage that if the contractor runs into major problems, inmates can be transferred, at least temporarily, to other facilities. Or the state might bring in staff from its other facilities or other state agencies to manage operations during a problem period.

Another way to reduce vulnerability to problems arising because of contractor financial instability is to require the submission of annual financial statements showing such information as net worth. This gives the state early warning of potential problems and more time to make needed changes. The contract between Bay County, (Florida) for operation of its jail required the contractor to submit a net worth statement each year. If the company's net worth falls below the amount specified in the contract, the county may declare the contract in default.

Finally, all the contracts we examined permitted the government to terminate the contract without cause, but with reasonable notice and appropriate reimbursement to the contractor. This gives the state an escape clause if circumstances arise, such as political pressure, even though the vendor has not violated the contract. However, activating this provision would inevitably result in added government costs for the termination.

#### Protection for Contractors

There is another side to this issue. The contractor also needs some protection when change-overs occur. Contract clauses that specify payments to vendors for their capital investments do, of course, also protect the contractor. In addition, the private firm needs ample notice and reimbursement of its reasonable costs if a termination occurs for reasons not its fault, especially during the contract term.

#### RECOMMENDATIONS

To protect against vendor defaults, the contract should:

- o Consider requiring performance bonds be provided by the contractor. They should only be required after determining that the added protection to the government is worth the cost of the bond.
- o Specify vendor's obligation to cover additional state costs to replace the contractor (including administrative costs, expenses to bring what may be a run-down facility back to satisfactory condition, and any added funds that the state has to spend during the remainder of the original contract period).

- o Develop a contingency plan in case of an emergency default, such as how the facility will be staffed (e.g., whether from other correctional facilities or temporarily by state police) or where inmates would be sent and how. This will permit the state to react rapidly and also provides reassurance to the public and local community that such a problem will be rapidly corrected.

For all situations:

- o Include contractual provisions that require the current contractor to cooperate in an orderly and efficient transition, including providing inmate records in good shape and turning back the equipment (and facility, if appropriate) in good condition.
- o To avoid default problems in the first place, require during the assessment process that the financial stability of the company be an important evaluation criteria as well as such items as possible criminal connections of the vendors.
- o Require and review annual financial statements from the contractor to ascertain continuing financial stability.

## ISSUE #17

### What standards should be required in RFPs and Contracts?

#### DISCUSSION OF ISSUE

A state will want to ensure that any contracted facility be operated in conformance with state laws, regulations and appropriate correctional principles. State legislators and executive branch officials will likely want confident that contracted facilities will conform because of the brighter spotlight that such institutions are likely to be under, at least during the initial years of contracting. Officials may also feel the need for stricter specification of standards because of the lessened control they will have over day to day operations.

Every state has laws, regulations, and policies applying to their prisons. All require certain types of facility inspections, such as fire and safety. These should apply to contracted facilities as well as those that are government-operated. On the other hand, governments should avoid excessively specifying requirements that inhibit innovation by contractors, such as might be the case if the regulations, for example, specified ratios of correction officers to inmates.

The term "standards" in this discussion refers to benchmarks against which the contractor's processes and procedures are judged, not for the measurement of outcomes (such as numbers of escapes, riots, etc.). Monitoring adherence to standards is discussed in Issues #19 & #21.

Most of the contracted efforts we examined required the contractor to adhere to federal, state (and if applicable, local) laws, rules and regulations. Only one (Kentucky's) spelled out the specific set of standards the contractor would need to adhere to. Many did, however, reference the standards to be complied with, typically applicable state and federal laws and regulations and sometimes the American Correctional Association standards. For example, the 1985 Bay County contract stated under its section on "Standards of Performance" that the contractor should operate and maintain the facility "in a good and workmanlike manner and in a manner that complies with this contract and with all applicable local, state and federal laws, rules and regulations, including but not limited to Chapter 951, Florida Statutes, and Chapter 33-8 Florida Administrative Code."

Kentucky spelled out specific standards in its 1985 RFP. These, the RFP states, were taken for the most part from the ACA standards. The RFP also required compliance with the fire, sanitation, and health codes of the state and local jurisdictions. This RFP provided twelve pages of minimum requirements.

In some contracts that we examined, meeting appropriate ACA standards was required not because the government agency had specified this in an RFP but because the requirement was part of the private firm's proposal. For example, the Bay County contract required the contractor to also operate the facility "in accordance with the then current standards and guidelines of the American Correctional Association." The agreement gave precedence to applicable government laws, rules, and regulations over the ACA standards, should there be a conflict between them.

In some cases, contracts called for a facility to become accredited by the Commission on Accreditation for Corrections (using the ACA standards) by a specified date. For example, the 1985 Bay County contract called for accreditation no later than three years after the start of the contract. Section 5.1. The initial contract for the Florida School for Boys also specified ACA accreditation within 10 months. (That deadline was not met.)

Standards usually cover specific major facility programs and activities, such as:

- |                                    |                           |
|------------------------------------|---------------------------|
| o Security and control             | o Work programs           |
| o Food service                     | o Educational programs    |
| o Sanitation and hygiene           | o Recreational activities |
| o Medical and health care services | o Library services        |
| o Inmate rules and discipline      | o Records                 |
| o Inmate rights                    | o Personnel issues        |

There has been some controversy over the adequacy of the accreditation process of the Commission on Accreditation for Corrections.<sup>12/</sup> Indeed, there will inevitably be some weaknesses in any process that involves outside inspectors obtaining a major part of their information from an announced visit that lasts at most a few days.

Many state-operated prisons currently would have considerable difficulty in meeting the intent of ACA standards. Nevertheless, for contracted facilities, particularly new facilities provided by the private sector, the state may want to require such a set of standards be met by a reasonable time.

A limitation of standards of this type is that they often focus on process and not on results. This could distort of the contractor's effort. For example, one of the evaluators of the Florida School for Boys reported that the contract between the state and the contractor...contained 41 items, over ninety percent of which the contractor complied with. Virtually everyone of these concerned input activities and pertained to administrative/operation functions. Thus, the contractor could have been in total compliance with all contractual provisions even if every released client committed a new offense on the first day in the community."<sup>4/</sup>

Over specification is a potential problem, but we did not find this to be a major one in these contracts. One possible exception occurred in the 1985 Florida Beckham Hall contract. It contained the requirement that "The Agent shall provide 29 employees...". The state's purpose was to ensure that the contractor did not excessively reduce its staffing. Such detailed process specifications, however, restrict the ability of the contractor to innovate-- one of the potential advantages of private organizations. The contractor in this case felt that this requirement adversely limited the Company's flexibility.

In addition to special standards for correctional facilities, state laws and regulations require that public facilities adhere to various fire, safety, health, and sanitation codes, with inspections being made by various state agencies. These are generally applied to contracted correctional facilities as well.

## RECOMMENDATIONS

Prison facility contractors should be required to meet state laws, regulations, and policies regarding publicly-supported facilities and correctional institutions. These requirements, however, should be reviewed to ascertain whether there are regulations that are primarily appropriate to government-operated facilities and that might excessively inhibit the contractor from more efficient or effective operations (such as staff-inmate ratios).

The state should ensure that contracted facilities are subject to government fire, safety, health, and sanitation standards.

Requiring contractors to adhere to a set of operating standards for correctional facilities is quite appropriate. The state may want to apply ACA standards, but may want to strengthen and adapt them to its own internal situation. Standards in contracts should explicitly emphasize implementing desired policies and procedures, not merely require contractors to have written policies and procedures.

If the contractor is taking over operation of an existing, aged prison facility, it could have considerable difficulty meeting ACA standards, at least without extra time and added funds. This will need to be considered when specific standards are incorporated into the contract.

## ISSUE #18

### What should be the duration of the contract and provisions for renewals?

#### DISCUSSION OF ISSUE

This issue addresses the frequency with which the contract should be rebid. The advantage of longer durations of the contract are:

- o There will be fewer times that the state agency will have to go through the considerable work and time required for administering a competitive procurement.
- o If the contract involves substantial capital investment by the contractor, such as the construction or rehabilitation of facilities, multi-year contracts give the contractor more time to amortize their investment.
- o Longer durations provide stability. For example, the longer the duration, the less frequently inmates and employees will be upset by changes of contractors. The shorter the interval between competitions, the more frequent, in general, will be switches in contractors.
- o If rebidding is too frequent, the contractor costs could rise to cover uncertainties and added start-up and shut-down costs.

The advantages of shorter contract duration are:

- o Frequent competitions can bring lower prices and give the government agency the opportunity to switch to a better performing contractor -- or at least provide a continuing incentive to the current vendor to perform well and keep costs down. If the current contractor did not perform well, it would face an increased risk of losing a near-future competition.
- o Longer term contracts may reduce competition at the time of rebidding since some potential rebidders may feel that the holder of the contract has an inside track with the government agency because of experience built up over the years of the contract.<sup>5/</sup>

Contracts also may have renewal clauses permitting them to be renewed up to a specific number of years. In any case, contracts can also have provisions permitting either party to get out of the contract even without cause, though with possible financial penalties.

A problem with longer term contracts is that in most states one legislature cannot legally obligate funds longer than the biennial budget period. Thus, in multi-year contracts the phrase "subject to the availability of funds" is often included.

Multi-year contracts generally provide for annual alterations in the price of the contract, as discussed elsewhere, often with the adjustments based on some form of cost-of-living index

Although long-term contracts help the contractor recoup initial capital investment, contracts can, and usually do, provide that if terminated earlier, the vendor will be reimbursed for the unamortized portion of that capital investment (see issue #15)

We found contracts ranging from one year in length (Ramsey County adult females) to thirty-two years (Hamilton County Workhouse). These are described below.

1. The State of Massachusetts' facility contracts are for one year and may be non-competitively renewed twice. They must be rebid then.
2. The State of Florida's Okeechobee School for Boys used a one-year contract with a one year renewal initially (in 1982) and two one-year renewals for its 1984 contract. Florida's Beckham Hall contract (1985) is for three years. The Florida Committee on Corrections, Probation and Parole recommended contracts be statutorily limited to two years.<sup>6/</sup>
3. The contract for the Kentucky Marion facility is for three years, with two one-year renewals possible beyond that date.
4. The Pennsylvania Weaversville contract is for five years, but requires yearly renewals and annual price reviews.
5. The 20-year Bay County contract permits annual cost of living adjustment and review of the contract price every three years. The 20-year period evidently precludes rebidding during that period. Thus it is potentially of considerable advantage to the contractor getting that first contract. (The county, however, can terminate the agreement at any time even without cause.)
6. The Hamilton County facility appears to have a 32-year contract. The 1984 contract calls for an initial term of four years, with up to seven automatic renewals for four years each. The county can terminate the agreement at the expiration of each four-year term. (Bay County's contract is with the same private firm.)
7. The Ramsey County contract is open-ended, the County is not using RFPs but renegotiates the agreement with the contractor annually.

At least three of the cases examined had contract clauses specifying that continuation was subject to the availability of funds (Kentucky, Pennsylvania, Ramsey County).

At this time we have no explicit evidence as to the optimal duration for contracts. In some ways these arrangements are more similar than they look at first glance. In most cases, the government could terminate at almost any time, though with penalties if there is not a contractor default. In most cases, the private firm can annually negotiate price (at least to some extent). And probably both parties can renegotiate at any time regarding various programmatic responsibilities not clearly specified in the contract.

RECOMMENDATIONS

We suggest that contracts be competitive and provide for rebidding about every three years but not much longer than that. Automatic renewals beyond, say, five years, are probably not good policy even though it is troublesome and time-consuming to conduct a full-fledged rebidding.

Periodic rebidding seems desirable to encourage the private company to keep up the quality of its work, to encourage efficient operation and reasonably low cost (by periodically causing a confrontation with the possibility of losing the contract in the next rebidding competition), and to permit correcting major unforeseen problems in the current contract.

## ISSUE #19

### What provisions are needed for monitoring in the RFP and Contract?

#### DISCUSSION OF ISSUES

There appears to be unanimous agreement among national experts, government agencies and contractors themselves that the contract should include adequate monitoring of performance. This will maximize the likelihood that the vendor provides the services contracted at a satisfactory quality level. There is considerable concern that private organizations, particularly for-profit firms, might sacrifice quality for profit or to avoid losses.

Monitoring is a key element in giving the state adequate oversight over service delivery and helps protect it and the public against contractor deficiencies.

Explicitly mentioning monitoring in the RFP and contract should provide greater assurance to the legislature and public that the service will be performed adequately. It may also provide some protection in certain liability claims by showing that the state made reasonable efforts to protect against various problems.

Three phases of monitoring are needed for the process to be effective: (1) Provisions are needed in the RFP and contract; (2) the actual monitoring practices need to be done properly; and (3) the findings of monitoring activities need to be disseminated and acted on appropriately.

This issue discusses the first phase: RFP and contractual provisions. In the next issue, we discuss specific procedures that government agencies might use to conduct such monitoring and the use of monitoring findings. Issue #19 (on standards) addressed some of the elements that should be monitored for compliance.

Overall, we found the provisions in RFPs and contracts regarding monitoring of contractor performance to be quite general. There was little specification as to the elements contractors would be held accountable for, and how these should be monitored. Contractors could not be sure either that monitoring would be done or, specifically, what their obligations were under the contract. Government monitors would have little in these documents to guide them.

For example, the ACA 1983-1984 evaluation of the contracted State of Florida's School For Boys at Okeechobee reported that "there had been no overall monitoring to determine whether the contractor was complying with contract provisions."<sup>7/</sup> To some extent this is explained by the current lack of experience and formulated procedures for such monitoring. General contract provisions can, at least, keep the door open for subsequent specific monitoring procedures. A problem can arise, however, if the agency subsequently decides it needs certain information from the contractor or access to certain data and these are not stated explicitly in the contract. The agency may have trouble obtaining the material.

The sections below first discuss the types of monitoring activity can be provided for in the RFP and contract, and then briefly discuss provisions that can be included in the contract to encourage good performance, including sanctions if the contractor is not performing adequately.

#### Types of Information Provided in RFP and Contract

Governments can use two basic approaches: (1) periodic in-depth reviews or audits conducted at regular intervals, such as once every year and (2) on-going, continuing monitoring done through required reports from the contractor and on-site inspections by a monitor.

These require specifying in the contract such activities as:

- o Reporting (in a timely way) by the contractor on certain types of incidents and occurrences.
- o Provision of space for, and cooperation with, on-site monitors.
- o Access to the facility, inmates, and to certain records and other materials (including written policies and procedures) -- at any time, even unannounced.
- o Access to data from special fire, safety, medical, and sanitation inspections.

Both Kentucky and Florida (and probably most, if not all, states) require each of their prison facilities to report promptly various "extraordinary occurrences." These include escapes and attempted escapes, prisoner deaths, serious injuries to prisoners and employees, assaults, and major disturbances (such as riots), and significant disciplinary incidents. Kentucky requires its Marion facility contractor to provide such reports. Not as clearly required are reports of disciplinary incidents (other than those classified as extraordinary occurrences). (such as "major violations.")

We did not find contracts that contained targets that would represent satisfactory, or unsatisfactory performance, such as the maximum number of extraordinary occurrences. Such inclusions could be used as a basis for periodic reviews and discussions with vendor personnel concerning their performance and (if they are not easily manipulated) could form a basis for incentive contracting.

The ACA 1983-84 evaluation of the State of Florida School for Boys at Okeechobee reported a lack of "clearly defined objectives" as a complicating factor in the state agency's assessment procedure. "Moreover, the Department of Health and Rehabilitative Services contract did not specify outcome performance expectations; e.g., that Okeechobee's readmission rate under the contractor would not exceed the level attained by the state."8/

A partial exception to this general observation are contracts that require the facility to "pass" various special inspections (usually done by other government agencies, such as fire, safety, medical, and sanitation). If not actually stated in the contract, this requirement appears to be assumed, but the legal contractual responsibility may not be clear under these latter conditions. Such special inspections are conducted for many types of government facilities and should apply no less to contracted correctional institutions even if not owned by the government. Clearly, contract provisions should require contractor cooperation with such inspections with the understanding that problems found to be the responsibility of the contractor be promptly corrected. The State of Kentucky included in its RFP both scheduled and unannounced inspections of the contracted facility by both corrections and other state agencies.

The State of Pennsylvania House Bill 307 (1986) regulating private prisons mandated annual inspections of private correctional facilities by the Department of Corrections.

If the government agency wants access to various records and annual statements from the contractor (such as financial statements, performance bonds, and liability insurance) these requirements should also be written into the contract. Although the government may assume such information would be available to it, even if not specified in the contract, such provisions can avoid later problems. It also puts the contractor on notice that such material will be reviewed, and consequently, should be kept in satisfactory shape. Similarly, the timing and frequency of required reports should be specified.

Of particular concern in corrections is the contractor's responsibility for discipline, sanctions, and the awarding or removal of good time. We did not find much specification in contracts laying out guidelines in these areas (such as a requirement for approval of major disciplinary actions by government officials before the contractor implements them). The Kentucky RFP, for example, requires the contractor to make recommendations (for awarding meritorious good time and for restoring good times) to the Corrections Cabinet, which makes the final decision.

An area of uncertainty is the extent to which the private firm should be required to open its financial records to the government (other than for tax purposes). If the bidding process was competitive and focused on a bottom line, such as total fixed cost or a fixed cost per inmate day, for-profit contractors may feel that their books are, and should be, proprietary. The requirement for an independent audit, paid for by the contractor may be sufficient to protect against inappropriate contractor financial practices.

Some government agencies have used on-site monitors, especially for facilities housing many inmates, e.g. 150 and over. Both Kentucky and Bay County contracts required the private company to provide space for an on-site government monitor. The Bay County contract also provided for space for the contract monitor and for full access to the facility. It says: "...the Contract Monitor shall be provided an office in the jail and shall have access at all times to all areas of the County Detention and to all books, records and reports ... concerning ... the operation and maintenance of the County Detention Facilities" (Section 5.5). The 1984 Hamilton County, Tennessee, contract gives the county "unrestricted rights ... to visit, inspect and talk with the workhouse prisoners and any other personnel...." (pp. 22-23). The October 1986 State of Tennessee RFP for a new medium security facility provided for an on-site monitor for the 180-bed institution.

#### Provisions to Encourage Performance

What provisions should be put into contracts to encourage good performance? Non-compliance with contract provisions can justify either terminating the contract with cause, or involving penalties as specified in the contract. Serious non-compliance ( e.g., in reporting, or in not permitting specified inspections) should be cause for termination.

The Pennsylvania Legislative Budget and Finance Committee in its October 1985 report on private prisons recommended that the law should specify sanctions for non-performance.<sup>9/</sup> Furthermore, not meeting standards specified in the contract, or not correcting major problems found during special inspections, or not meeting specified performance targets in the contract (such as exceeding a maximum number of "extraordinary occurrences") could also be grounds for penalties. If such requirements, and the sanctions, are not contained in the contract, or if the contract stipulations are vague, the government agency could have problems enforcing them.

Note, however, that the major reason for monitoring provisions is not to terminate contracts. Monitoring is done to assess performance, detect deficiencies, provide continuous feedback to management, improve operations, and protect the agency. Additionally, it can help assure high levels of performance since it will motivate the contractors especially if incentives for good performance are provided in the contract.

Though we did not find incentive provisions in any of the corrections facility contracts examined, bonuses might be written into contracts to reward extra-high performance. The key is to have sound performance indicators or targets written into the contract.

## RECOMMENDATIONS

The state should consider its performance monitoring needs in advance of drafting the RFP and final contract. This advance planning should guide the writing of specific contractual performance monitoring provisions. Both requests-for-proposals and subsequent contracts should include specific provisions as to the contractor's obligations relative to performance monitoring. As noted above, these documents should specify: the performance criteria for which the contractor will be responsible; reporting requirements (specified schedules, clearly indicating the information to be provided to the state); full access to the facility and to relevant records; cooperation with various inspections; and, providing space for an on-site monitor, (particularly at "large" facilities).

The contract should also require prompt correction of problem (areas not in compliance) found by the monitoring process. It should also specify the nature of sanctions to be imposed if correction within an appropriate, specified time period is not accomplished.

States should include performance targets in their contracts as a basis for performance and incentive contracting. After it has gained experience with the performance monitoring process and feels the procedures are yielding reliable data on performance, the state should consider adding incentive provisions to their contracts with dollar bonuses for exceeding or penalties for falling short of performance targets.

What provisions should be made to address concerns of public correctional agency employees?

DISCUSSION OF ISSUE

In those instances where a facility switches from state to private operation, the government will need to assist displaced employees. From the time that the government agency first indicates its interest in contracting to the time that the change is made, this can be a difficult period for employees potentially involved in the changeover and may affect service quality levels.

Even if the corrections agency is contracting for a new facility that is not displacing any government personnel, there still may be concerns by other state employees that government facilities currently in operation will also be contracted.

In either situation, state personnel may also reap benefits from contracting. Some employees may see the presence of contracted facilities as offering them more flexibility in career choices.

Four of the nine contracting efforts we examined involved switches from a government to a contractor-operated institution. These were two county jail-type operations in Bay County (Florida) and Hamilton County (Tennessee), the State of Florida's School for Boys at Okeechobee and its Beckham Hall facility.

The Bay County contract required the contractor to hire the public employees if they satisfactorily completed 40 hours of training prior to a certain date. The wages and benefits for new employees were specified in the appendix to the contract. Staff received a raise similar to the one that had been promised by the government plus \$500 more per year. All but one of about 60 public employees accepted the contractor's offer of employment. Approximately 6 months after the contract began, about five staff had left the contractor, with four returning to employment in the sheriff's office.

Employee Benefits

In Bay County the private company's fringe benefits were believed by local officials to be about the same as the county's, except for retirement. The contractor had a stock option plan, but its retirement plan was not believed to be as generous as the public employees' plan. A number of veteran jail officers were unhappy about losing their state retirement benefits when they went to work for the contractor, and this loss was a main financial "bone of contention" for employees considering the switch.

The loss of state pension credits was the main subject of a lawsuit filed by a citizens group against private management of Bay County's jail. Accrued leave time was also an issue for former jail employees hired by the contractor since whether it would be paid and by whom apparently was left ambiguous. The county, however, subsequently accepted responsibility for this payment.

Hamilton County and the contractor agreed to "hire all persons who are presently employed by the county at the work house subject to the right of the company to decide not to retain said employees as the company may deem necessary." The intention was to give employees first chance at the private firm's positions, but at the same time to allow the contractor to dismiss staff who did not work out satisfactorily.

Employees received the same health and life insurance benefits and at the same cost as they had when they worked for the county. The company gave all employees accepted a slight increase in salary. All had to go through special training. Subsequently, there was an attempt to unionize staff at the facility, but it failed when the National Labor Relations Board ruled that the union did not have the right to organize the employees.

The Hamilton County facility contractor has had problems retaining public employees. Most staff were upset at the prospect of private management and opposed it, making the last six months under county operation very difficult. Even 20 months later there appeared to be continuing problems. Only 33 of the original 60 employees that had worked at the county-operated facility before September 1984 remained at the facility as of May 1986. County officials indicated that the contractor may have tried to make changes too rapidly for the employees. Staff turnover has been especially troublesome because of the need to provide new personnel 20 to 40 hours of training before the individual starts work.

Fringe benefits appear to have been comparable to the county's, but the contractor may not have explained its employee stock option plan well enough. Former county staff complained about giving up the county pension plan when they went to work for the contractor.

Employee benefits were discussed in a private firm's 1985 proposal to operate the complete Tennessee correctional system. That proposal was rejected by the state legislature. The vendor asked the state legislature to provide legislation to allow government personnel to choose to remain in the state retirement system with the corporation paying the state portion if the employee did not select the private firm's stock ownership plan. The firm's proposal did not provide any guarantees as to the number of government personnel that it would hire. First the firm wanted to examine personnel needs and possibly hire more staff than Tennessee's current staff to reduce the amount of overtime. Salaries of all correctional officers were to be increased more than 10%, with other personnel receiving at least a five percent raise. The proposal also allowed employees to retain any personal and sick leave that they had accrued under the state system.<sup>10/</sup>

The contractor for the Florida School for Boys immediately initiated layoff procedures reducing staff almost twenty percent (from 225 to 183). Many state employees with long seniority did not wish to transfer and lose their state retirement. The state made efforts to place personnel in other agencies, but many employees had to be terminated.<sup>11/</sup> This situation contributed to substantial staff problems during the early days of the transition.

### Employee Resistance

A government agency will also need to consider options for staff that do not want to be employed by the private firm. Many state and local governments in recent years have used the following elements to help displaced employees:

- o use of natural attrition where possible transfers to other facilities to absorb the displaced personnel,
- o establishing training programs to help employees affected by the contract to fit into other available government positions,
- o a program for referring personnel to, and placing them in, other public and private sector jobs.  
If a government union is involved, an orderly transition would need to be worked out with the union. The situations above did not involve unionized employees. In other contracting situations throughout the country, unionized employees often have fought hard against the contracting effort and to protect employees' rights and benefits if the contract goes forward.

In those jurisdictions we examined where the new contracted facility was not a replacement for a government-operated institution, public officials did not indicate that correctional employees at other government facilities had complained about contracting. Apparently in none of these cases did other public sector staff feel strongly that the new facility was a threat. In some cases, such as Pennsylvania, officials indicated personnel felt that relief from crowded conditions was needed and consequently did not object to the new facility being contracted.

In the Florida Beckham Hall case, the state had a nearby facility opening at about the same time. About two-thirds of the thirty employees transferred to it or another state facility. The remainder went to work for the contractor. None went without a job.

Our Kentucky interviews with former state staff who had become supervisory employees of the contractor indicated (as might be expected) that they appreciated the opportunity to operate under less bureaucratic conditions. Note that in Kentucky, corrections personnel are not unionized, which also helps to explain the lack of opposition to establishing the privately-operated facility. In addition, the state was already contracting with private companies for low-risk offenders in community settings, and the new Marion facility was put under the director of community residential services rather than the adult prison division--reducing the likelihood of concern by correction's employees.

An official at one of the sites examined indicated there was an "unwritten agreement" that the contractor's employees would not receive more than their public peers. We did not become aware of any formal agreements by a state or local agency that controlled the vendor's employee compensation levels. It is of course likely that if the private firm becomes known for higher wage and benefit levels, pressure could increase raise the public sector's compensation scales. On the other hand, if the contractor's salaries were lower, this could be viewed by opponents of contracting as an attempt to drive down wage levels for state employees. Our examination does not provide evidence regarding the effects of differences in employee compensation.

#### RECOMMENDATIONS

For states considering contracting existing facilities that would require displacing government personnel, the government should consider a number of steps:

1. Undertake extensive preplanning to work out ways to help the employees and reduce the level of anxiety and work interruptions during the transition process.
2. Wherever possible require the contractor to give displaced staff first right to employment with the contractor.
3. Provide retraining, job referral, and placement programs as needed for placing employees that do not switch, into other positions either in or out of government.
4. Carefully work out the disposition of various employee benefits, especially retirement and vacation/sick leave accrual.
5. When a decision has been made on benefits, inform government employees regarding what they will and will not receive. Encourage the selected contractor to brief potential employees clearly regarding: benefits and salaries they can expect; what working conditions will be; and, what training and changes in work assignments and type of work they can anticipate.
6. Move quickly once decisions are made in order to reduce the period of uncertainty for government employees.
7. Explicitly include in pre-analysis cost comparisons any one-time termination personnel expenses (including early retirement and other benefits, temporarily retaining employees until placements are found, training of displaced persons, etc.) that contracting will incur.

For situations in which the government is contracting for a new facility and thus not displacing employees, the state should:

1. Make sure the public sector staff recognize that contracting will not displace existing employees (to counteract rumors to the contrary).
2. Consider whether or not the state should emphasize possible advantages to at least some government employees that the use of contractors may provide; e.g., a more varied array of employment and personal growth opportunities for correctional employees. The state probably should not attempt to control the level of the contractor's salaries and fringe benefits.

## CHAPTER V

### NOTES

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## CHAPTER VI

### CONTRACT MONITORING AND EVALUATION

Monitoring and evaluation are critical elements of any state or local contract-for-service activity. They are especially important in a field as controversial as private prison management. States and local governments must consider the cost of these administrative controls when considering the contracting approach.

The following issues are discussed:

- o What elements of a contract should be monitored?
- o How should the monitoring be done?
- o What are the areas where contracting effecting might be measured?
- o How is evaluation different than monitoring?
- o What evaluation techniques might governments use?
- o What results can governments expect from contracting?
- o What has occurred thus far?

## ISSUE # 21

### How should contractor performance be monitored, and to what extent?

#### DISCUSSION OF ISSUES

Issue #19 focused on what should be specified in the proposal and contracting phases. Here, we cover operational questions, such as what specific elements should be monitored and how the auditing should be done. We also cover a sometimes overlooked key aspect of monitoring: providing for the use of the information obtained.

As noted previously, one element on which all parties, both public and private, agree is that contracted correctional facilities should be carefully monitored. Don't contract without a good monitoring process.

One of the basic purposes of monitoring is to ensure that the contractor is performing satisfactorily. Monitoring is intended to ascertain that prisoners are securely incarcerated (thus protecting the public and penalizing those breaking the law), that the inmates themselves are being adequately treated (without violating their rights or providing unreasonable punishment), and that reasonable rehabilitation efforts are being provided.

The State of Pennsylvania's Legislative Budget and Finance Committee in its October 1985 report stated that the law should designate a specific agency as responsible for monitoring private prisons; this process should include periodic inspections, evaluations, and specifying minimum standards.<sup>1/</sup>

#### What types of monitoring should be used?

The process for auditing corrections facilities appears to take two forms:

- (1) Periodic reviews/audits/inspections -- perhaps once a year by special teams of government personnel.
- (2) Regular, on-going monitoring through periodic reporting (such as on extraordinary occurrences), on-site monitors, or public sector employees that visit the facility frequently, e.g., daily/weekly/monthly.

These options are not mutually exclusive. States usually employ both approaches for monitoring other activities and will almost certainly want to apply them to contract facilities.

Special annual reviews and audits have the advantage that they permit a comprehensive, in-depth, assessment. Since these are done infrequently, the state can utilize on-site experts in all aspects of corrections. Special inspections (such as for fire, safety, health, and sanitation hazards) also use specialists to examine particular elements in their area of expertise.

Regular, frequent reports and visits to a facility permit the government agency to spot and initiate corrective actions on problems as they occur throughout the year.

The content of these monitoring efforts, whether periodic or regular, includes "process" elements (such as information on staff changes adherence to state required policies and procedures) and information on "outcomes"; e.g., frequency of extraordinary occurrences, such as escapes, deaths, assaults, riots, etc.

We found few explicit, formalized monitoring procedures in existence either for regular or periodic reviews. The word "formal" is emphasized since all the contracted correctional facilities were inspected periodically by government personnel, though generally on an informal basis. Some basic reporting was required in all cases, but there appeared to be little in the way of a formal system for aggregating and tabulating that data, analyzing it, and acting on the results obtained.

#### Elements to be Monitored

What elements should be monitored? Clearly, standards (see Issue #19) and other performance indicators identified in the contract should be monitored.

We found that for those contracts containing formal checklists (detailing what the public monitor should examine--some of which were being drafted at the time of our review), the items primarily were indicators of whether the contractor was undertaking certain activities and doing them properly. We found little formal monitoring of results.

Two states (Massachusetts and Pennsylvania) were developing a standardized monitoring system. Both had been contracting their facilities for considerable time, but had not yet implemented a formal, comprehensive monitoring process. Both states were developing monitoring systems for juvenile facilities, whether public or contractor operated.

One state had a new draft instrument (intended for review of juvenile facilities) which asked the monitor to check "does the facility have the heating system inspected annually for safety?" Nowhere in the checklist was the monitor asked to identify whether any safety violations were found during the past year or whether currently there were any outstanding violations (and, if so, how many and how serious). Another example; the item to be examined by the monitor was: "Is the garbage removed from the kitchen weekly?". Nowhere were questions asked whether there were any signs of garbage not being stored in containers or containers that were overloaded or whether there were garbage odors.

This sole focus on process rather than results appeared to be the general practice, not the exception. It also applies to those contracts that specify adherence to the American Correctional Association's standards (for either adult or juvenile correction institutions). Those standards also emphasize process elements rather than results or outcomes.

Process standards are easier to monitor since they are more observable. Identifying actual problem conditions is considerably more difficult and more time consuming. For example, assessing the quality of the food service (including taste, appearance, and temperature) is more troublesome than only examining menus and inspecting the kitchen facilities. It is especially difficult to determine what conditions exist the year and not just at the time of short visits by inspectors or monitors. An ACA standard states that the facility's "written policy and procedure require that in the preparation of all meals, food flavor, texture, temperature, appearance, and palatability are taken into consideration." Unless monitors spend time themselves to either sample the food at frequent intervals (quite possible with on-site monitors or with staff that regularly visit the facility) or interview a sample of inmates to determine if there are an unusual number of complaints, an agency cannot be assured that prisoners are receiving reasonably decent food throughout the year.

Information on some outcomes, however, were common. In all the cases we examined, the contractor was responsible for promptly reporting extraordinary incidents such as escapes, attempted escapes, assaults, deaths, serious illnesses, and major disturbances. Surprisingly, we generally did not find tabulations of such incidents or subsequent reports. Nor were there reports that tabulated and categorized number and type of incidences for the contract facility, or that compared these with similar state institutions or with previous history (before the contractor began operation). Most, if not all, states prepare regular reports on at least some extraordinary incidences (such as escapes) and provide these for each of its correctional facilities. Thus, these data undoubtedly can be made available, but we found little explicit provision for such reports as part of the regular monitoring effort, at least not in a formal way. Informally, public officials monitoring these efforts had some sense of the number of such incidents, though in a surprising number of cases, the actual counts did not seem to be available, unless special checking through records occurred.

The State of Kentucky issues an annual report on extraordinary occurrences, tabulating, by category of occurrence, the number of occurrences for each institution. These are based on the individual extraordinary occurrence reports provided by each facility. The Marion facility began operation in January 1986, and a tabulation had not yet been done at the time of this report that included this new contracted facility. Nevertheless, the various Kentucky state correction officials were well aware of the number of escapes that were occurring and clearly considered this an important indicator of the contractor's performance.

Ideally, the government agency would also regularly assess the success of the contracted facility in rehabilitation/social adjustment; e.g., for inmates released from the institution. At none of the sites we examined were attempts made by the government to examine rehabilitation success, such as by examining post-incarceration employment of inmates even if only at the time of release. Such information could help monitor the facility's work training and counseling programs. Information on rehabilitation and social adjustment is less meaningful in assessing contractor performance when most inmates remain at a facility for only a months. This would not give the contractor much time to provide rehabilitation assistance.

### Performance Indicators

How can data on performance indicators be obtained? At least five sources of data can be used:

(a) From required facility reports. Extraordinary occurrence reports from the contractor's facility to the state are commonly provided. Also needed is information on such elements as the treatment and safety of inmates, the extent of internal strife, level of drug use and degree of program (participation in educational, work, recreational, counseling, programs, etc.). Some data could be tabulated from facility incident/disciplinary reports, such as number of rule violations at various levels of seriousness that are not included in the extraordinary-incidents reports, number of inmates in punitive segregation, etc.

(b) Surveys of inmates and staff. Formal surveys of all, or of a random sample of, inmates can be conducted to obtain feedback on such items as: frequency of internal assaults, extent of use of drugs, treatment by employees, quality of the food and other amenities, and inmate perceptions of the quality and usefulness of various facility programs.

Prisoners are not the most reliable persons to comment on many matters, but feedback from inmates can provide important information on many aspects of facility conditions. For example, though one would expect most offenders to complain about food, major differences among institutions probably can be detected by the relative extent to which prisoners complain.

We found no existing procedures currently in place for systematically surveying inmates as part of a contract monitoring effort -- even if only by a random sample. In part, this is probably due to the lack of such procedures as an accepted part of the regular operation at any prison or jail facility, at least that we know of. The State of Massachusetts Department of Youth Services in its early 1986 draft "Protocol for Program Review" calls for interviews with both clients and staff as part of proposed on-site visits (one to five days). The proposed questionnaire asks the youths about many procedural aspects of the facility, but also asks for their perceptions of other conditions such as: whether they get enough to eat, whether they feel the rules are fair, their attitude towards the staff, and whether they feel the programs are helping them. Use of review forms was proposed for all youth facilities, both those that are contracted and those that are state operated.

Government monitors that are on-site or that visit frequently could also rate these facility characteristics based on informal conversations with inmates and staff.

At Ramsey County, Minnesota's Roseville facility, the non-profit contractor asks each woman at release to complete a questionnaire dealing with such issues as: how safe she felt at the facility, how much she got out of programs, and what she thought of the environment and supervision. This feedback is computer analyzed to identify patterns. The contractor felt that this procedure an important aid to improving programs. While Ramsey County has access to the Roseville questionnaires and reviews them on occasion, it does not currently tabulate the responses to help assess the vendor's performance. This same procedure (i.e., asking released to fill out such questionnaires) probably could be adopted for use in assessing state contractors.

(c) On-site Monitoring. Site inspections can be undertaken through periodic visits to the institution by government auditors or by having an on-site monitor. The on-site monitor approach has both advantages and disadvantages. It has the considerable advantage of permitting continuous checking of many aspects of the facility operation. The on-site monitor can observe on a regular basis the quality of performance and "climate" of the facility and is less susceptible to being misled by temporary "good behavior" than inspectors who are only temporarily on-site. Another important advantage is that the on-site monitor who establishes rapport with the inmates, will hear first hand, and quickly, about problems and major concerns, and will be able to bring these to the attention of both the contractor and the agency.

There are two disadvantages of on-site monitoring. First, it is expensive to maintain the monitor and provide required resources such as secretarial support, telephone, equipment and materials. On-site monitors are not likely to be practical for small facilities; e.g., less than 150 inmates. Frequent, day-long visits, however, might provide a partial remedy.

The second potential problem with on-site monitoring is the possibility that the monitor would be co-opted by the contractor's staff. Becoming friendly or even beholden to contract personnel could lead to the state receiving misleading reports. However, this probably can be alleviated by periodically changing monitors, by proper training, and by continued interaction between state home-office personnel and the monitor.

The State of Kentucky has placed a full-time monitor at the Marion facility. This individual also acts as the parole officer. The monitor/parole officer speaks frequently with inmates and has on occasion received complaints regarding the facility. For example, a problem arose early in the life of the contract about the quality of food served. This problem was brought to the attention of the contractor and, the agency believes, more quickly corrected because of the presence of the monitor. The contractor subsequently subcontracted to a food service company rather than providing the meals itself. Currently, the Marion monitor does not have any formal checklist, but provides monthly a primarily qualitative report.

At Bay County, an employee, not located at the jail, visits it every day.

At the Hamilton County Jail/Workhouse, the county person responsible for the facility spends mornings at the facility monitoring the operation, and prepares a semi-annual inspection report using a 75-item checklist. This compliance checklist was prepared by the contractor's administrator and signed off by the County correctional person responsible for the facility.

At the Shelby County (Tennessee) institution for adjudicated delinquents (who would otherwise have gone to a state facility), a county representative visits "practically everyday". The responsible county judge also visits the site frequently. No specific checklist is used at present.

(d) Follow-up of released inmates. As noted earlier, we found no jurisdiction that was monitoring contractor success in rehabilitating inmates. Such a procedure would require special effort to follow-up released prisoners. This probably could be done on a regular basis in most states by tabulating subsequent reincarcerations or rearrests within the state. To determine clients' post-release employment status, follow-up could be done for those on parole. It would require considerably more resources to track releasees who moved to other states or the employment success rate of inmates that served their entire sentence. It is, of course, much easier to track in-prison successful program completions such as the number of education diplomas granted.

(e) Periodic Reviews and Audits. Periodic, annual or biennial reviews or audits are a frequent practice in state-operated facilities. For the most part, government officials reported doing, or planning to do, an annual review of the contractor's performance. These agencies, however, appeared to be using ad hoc procedures, since the specific content of these reviews did not appear to have been formalized. Two states, Massachusetts, and Pennsylvania recently had developed draft review procedures. Although both contracting efforts are for youth facilities, the monitoring principles seem the same.

Massachusetts Department of Youth Services 1986 draft "Protocol for Program Review" called for review of each facility, whether private or state operated, in the second of their three-year RFP cycle. Thus, these reviews are done once every three years, but at a time that permits the findings to be available before contract rebidding. The department also provides annual evaluation reports, which are primarily qualitative in nature. The Program Review Unit would borrow staff from regional and other department offices to do the monitoring and would train them in the review process.

The process includes: (1) an information gathering phase including examination of monthly and quarterly monitoring reports and the annual evaluation reports, especially to identify issues that should be focused on during the review; (2) on-site monitoring period of from one to five days, including interviews of clients and staff of the facility using "standardized questions and review forms," as well as observation of activities (to include education, recreation, leisure time, counseling, and meals); and (3) preparation of the report and debriefing of both contractor and state officials. The interview forms were developed in part from the ACA national standards, but "modified to reflect Department policies."

The 1986 draft Pennsylvania Department of Public Welfare (Office of Children, Youth and Families) material for monitoring "secure programs" is used with both contracted and state operated facilities. The process includes standardized review instruments for: (1) observations by team members, (2) examination of the institution's case records, and (2) interviews with staff.

Kentucky expects to apply its current review procedures for Community Residential Centers to its new contracted Marion facility. That process calls for a least two on-site inspections annually plus annual review of the facility's procedure manual.

The Kentucky on-site review calls for the inspector to indicate whether each of a number of items are in compliance or not. The on-site inspection covers items grouped as to: "administration/personnel/fiscal" elements (such as whether records, plans, and audits are in order), "sanitation/health/physical" conditions (including facility cleanliness, dietitian approval of meals, records of meals served, and presence of sick calls), "safety/security/emergency" procedures (including absence of dangerous material in inmate living areas, presence of fire and emergency plans, and presence of prisoner counts), "programs" (such as the availability of educational, vocational, recreational, counseling, and work programs), and "records" (to make sure that intake forms are complete, that case records are current, complete, and in secure storage, and that reports of extraordinary occurrences have been filed within the 24 hour required time period).

The Kentucky RFP and contract also specify that the contractor itself should have a "system to monitor programs through inspections and reviews by the administrator or designated staff." However, the state does not appear to require that it be provided with those findings.

#### Use of Information Obtained from Monitoring

A crucial issue is: what should be done with the information obtained? Clearly, it is not enough to just simply undertake even the best of monitoring efforts. Findings need to be reviewed by appropriate state authorities and acted on when action is called for. A major purpose of monitoring is to ensure that the facility is operating at a satisfactory quality level and to encourage as high a level of performance as possible by the contractor.

In addition to a general lack of monitoring requirements, we did not find many formal provisions for either the review process or the use of monitoring information.

An exception was the 1986 draft Massachusetts Department of Youth Services "Protocol for Program Review." It states that the purpose of site program reviews (whether vendor or state operated) is to "enable management staff to make accurate assessments and decisions regarding policy and program development...." The Massachusetts draft protocol calls for a debriefing of both state officials and contractor officials. The review teams are also to discuss compliance issues with facility personnel. Appropriate state program supervisors are expected, subsequently, to monitor the institution's compliance efforts. "In cases where more serious and substantial recommendations are cited, the review team may become involved in developing a compliance plan to insure that their recommendations are being implemented." The draft protocol, however, does not explicitly refer to sanctions for contractors who fail to comply.

A major potential use for monitoring is to provide information to the state for contract renewal and at the time rebidding occurs. In only one case did we find this issue directly addressed. The Massachusetts "Protocol for Program Review," as noted earlier, calls for reviews to be scheduled for programs that are operating in the second year of the RFP cycle, with special attention to the RFP schedule, so that the review findings can be considered in decisions as to future contract renewals or awards.

#### RECOMMENDATIONS

State agencies are urged to develop a formal monitoring process prior to awarding contracts. The RFP and contract should identify actions expected of vendors to facilitate an effective review process, such as providing needed reports and access. A monitoring process should include components such as the following:

- o Regular tabulation, analysis, and reporting of incidents of extraordinary occurrences (e.g., escapes, attempted escapes, deaths, major injuries and illnesses, numbers of assaults both on staff and other inmates, disturbances, use of force by staff, and other major disciplinary violations, i.e., those involving loss of good time). States should, to the extent appropriate, compare the contractor's performance on these indicators to other similar facilities in the state and also to past performance, including years before the contractor took over the institution (if it is not a new facility).
- o Regular systematic sampling of current and released inmates to obtain feedback concerning various conditions and programs in the facility. Preferably, this should also be done for all state institutions, including those that are government operated, for comparison purposes.
- o On-site inspections, conducted at least annually; to examine degree of conformance with state laws, rules, regulations, and policies (including any other conditions specified in the contract). These pertain to: administrative matters including records, health, safety, security, housing, food, and programs. Formal inspection "checklists" should be used to ensure adequate coverage and to ensure that both state and contractor officials know what is to be examined for compliance. This will provide a reliable record of findings over time. These inspections should include not only evidence that the contractor has adequate policies and written materials but also that they are being implemented in the correct manner. Thus, the on-site monitoring team should sample the food, rate the cleanliness, and examine the results of health, safety, sanitation, and fire inspections done by specialists. There are a number of starting points for such a checklist including the American Corrections Association standards and those adopted by states for their own internal purposes. Actual documented behavior, not merely the presences of written policy and practices, should be the focus of attention.

- o On-site monitors, or at least monitors that frequently visit the contracted facility -- preferably unannounced -- should be considered for institutions, especially those with substantial numbers of inmates (e.g., 150). Monitors should use checklists for guidance, which indicate the specific information they should collect. They should be trained in the audit procedures and knowledgeable as to how the information can be obtained. The presence of the on-site monitor, or of frequent inspection visits, will provide reassurance to the public that the state is keeping careful watch over the facility operation. Such a process will provide early warning to the state of facility problems so they can be corrected before becoming worse.
- o The monitoring process should include explicit provision for reviews of both regular and periodic data, and the inspection of reports soon after they are completed. It should require government officials to identify and review needed corrections with the contractor, and include setting written deadlines for when those corrections are to be completed. The process should specify sanctions that will be implemented if satisfactory corrections are not made in a timely fashion. This process should be stated in RFPs and contracts so that bidders, contractors, government monitors, and the public know what is expected. Vendors can then be held accountable for their non-compliance.
- o Finally, facility reviews, particularly of the contractor's performance, should be scheduled and completed at a convenient time prior to the date that decisions are made concerning contract renewal or when rebidding occurs. This means data will be available for evaluating the current contractor's renewal request or new bids.

Essentially the same monitoring procedures should be applied to publicly operated and contracted facilities. Governments with comparable facilities can then use the resulting information as a basis for comparison--and to obtain a better perspective on the relative performance of the contractor.

What results can be expected from contracting?DISCUSSION OF ISSUES

Ultimately the central question for public executives and legislators is whether contracting has positive, negative, or neutral effects on: costs to the government, the quality of service (in terms of providing a secure, humane facility that offers as much successful rehabilitation as possible), and the government's ability to meet its needs for the secure confinement of prisoners.

This study was not an examination of the costs and effectiveness of contracting efforts. Such an evaluation would be premature in view of the short experience of most of the secure facilities being contracted. However, impressions we developed from interviews and from a review of available documentation are presented here.

Impact on Service Quality

Our impression, based on the limited information available, is that the quality of contracted facilities are perceived by government agency oversight officials as being quite satisfactory. We have seen no indication to date that a government agency has been dissatisfied to any significant extent with the quality of the service provided.

One negative situation was the State of Florida's School for Boys at Okeechobee. The American Correctional Association evaluation found considerable staff problems at the time of its evaluation and, in general, a poor organizational climate. There were also indications of high staff turnover. Moreover, personnel at that facility, in comparison to a noncontracted institution with which it was compared, perceived a significantly greater number of "student sex assaults" at the contracted facility. However, the evaluation in its summary statement also said, "In general, it seems reasonable to conclude that the data show no real significant difference between the two facilities in so far as the overall performance of their respective client populations is concerned. Or to phrase it another way, the contractor appears to have delivered a program of equal quality to that conducted by the state." 2/

Data on escapes indicated that the number of escapes was higher than the comparison government-operated facility, but the Okeechobee facility had about the same rate after the changeover as before. Both a subsequent reevaluation and a separate critique of that work, pointed out that the evaluation was conducted after only about one year of the contracted effort, a period during which the facility appeared to be still in the start-up period. Additionally, there appeared to have been some substantial improvement in management during a brief, subsequent examination of the facility by ACA several months after the first assessment.

The Hamilton County facility also had substantial initial problems in staff turnover, but it did not appear to be causing significant problems in service delivery. Grand jury reports for the first half of 1986 indicated considerable satisfaction with the quality of operation of the facility. This indicates that the contractor overcame initial problems, helped by a switch in the contractor's facility administrator. The reports prior to contracting also had reported good quality of conditions at this facility.

Limited escape data were available for Hamilton County, Kentucky's Marion or Pennsylvania's Weaversville facilities. These indicate escape rates which were either lower or about the same as comparison facilities.

It appears that the private organizations made a major effort to do their work correctly. This seems, at least in part, to be because the companies perceived those as trial efforts and recognized that their work would be in the national limelight. They saw the need to be successful in the early efforts for future business to develop.

#### Facility Start Up

Ability to start up a facility more quickly than state or local government has been reported to be a major advantage for private organizations. It is particularly important if a state is attempting to relieve overcrowded conditions. The evidence we found supports this opinion. However, our information is limited to minimum security and local and juvenile facilities, rather than adult maximum or minimum security prisons.

Kentucky's Marion minimum security prison for adult male prisoners accepted inmates within three months after the contract was actually awarded. However, this may be something of a special case since the contractor had purchased the site a few years before. The facility, previously a seminary, needed little modification for its new purpose. Also, in this case, the state spent approximately 15 months completing the RFP process, which diminishes somewhat the time advantage of the private contractor. Kentucky's experience may be somewhat unusual since its initial RFP did not result in a successful competition and had to be reissued.

The State of Pennsylvania's Weaversville secure juvenile facility (housed in buildings already owned by the state), was retrofitted by the contractor in less than one month (after the attorney general ruled in 1975 that even hard core delinquents could not be incarcerated in facilities with adult offenders).3/

Bay County, Hamilton County, and Shelby County all wanted either significant modifications to existing facilities and/or new facilities. In each case the counties felt the contractor provided the facility much quicker than the government could have done; i.e., in each case, in less than one year.

A major reason for the ability of private organizations to start up new or rehabilitated facilities more quickly than a government agency is they can avoid extensive series of reviews and public hearings, including and executive approvals that the government has to go through. Opponents of private contracting argue that this public examination is desirable; that dispensing with it undercuts certain checks and balances. We have no direct evidence on this issue, although the contracting issue was explicitly debated in public in most of the cases examined. In addition, a legislative body often had the opportunity to review the contracted activity prior to its initiation.

#### Treatment of Prisoners

Four cases provided some clues in regard to the treatment of prisoners. As noted earlier, the Florida School for Boys contract-facility was initially found by evaluators to have worse conditions for inmates than a comparison state school. At three adult facilities, however, the limited evidence indicated that the contractor was able to provide improved treatment for inmates. This appears to be the case based on our on-site interviews at the Kentucky Marion minimum security facility, and telephone interviews with public officials of the Bay County Jail, and the Ramsey County facility for adult women prisoners. Unfortunately we have no systematically collected evidence that compares either before and after data or outcomes in similar government-operated facilities. An early 1986 inspection visit to Bay County by the Florida Department of Corrections (a few months after the contractor had taken over operation of the jail) found far fewer and less severe violations than when visited the previous year, prior to contracting.

Contractor policies regarding treatment of prisoners appeared to put somewhat more emphasis on humane treatment than seems the case for public correctional agencies. This may be because physical conditions are better (such as at the new Kentucky facility), staff's lack of years of hardening experience in attempting to treat difficult inmates, and less overcrowding at most of the contracted facilities.

#### Impact on Costs

One might expect public agencies to have already made reliable cost comparisons of the contracted facility either as compared to the cost before it was contracted, or if the contracted facility is an additional facility, as compared to similar state-operated institutions. We have not found available reliable cost information at any of the levels of government studied here. (Even at the federal level, the government did not feel comfortable with the cost comparisons made to date, stating that they did not have in-depth cost comparisons.)

Cost comparisons are not easy to make and need to be done carefully. The expense of contracting, for instance, should include the costs of monitoring. As noted earlier, however, for most state and local agencies there has not been extensive monitoring thus far. However, in Kentucky, which has an on-site monitor (who also acts as parole officer), the cost of the monitor would have to be included. It can also be argued that states should monitor their own state-operated facilities as carefully as they do a contracted institution and, therefore, monitoring expenses should be about the same for both modes of operation.

Another pitfall sometimes encountered in comparing facilities with different levels of security is lumping together all state prisons whether minimum, medium, or maximum; it is more appropriate to compare the costs of facilities at similar levels of security.

In addition, cost comparisons need to take into account expenses that are incurred in the contractor's but not the state-operated prison, or vice versa. For example, the State of Pennsylvania's Weaversville facility for severely delinquent youth is on the grounds of the state hospital, which is responsible for some maintenance and utilities expenses; consequently comparison state facility costs should not include full maintenance and utility costs.

Finally, some have argued that the contractors' costs may reflect a higher level of service resulting from such factors as less crowding and a higher staff-to-inmate ratio. This tends to apply more to juvenile facilities than to adult facilities.

In the following paragraphs we summarize our findings about costs at the individual facilities. These numbers represent only a rough indication of the expenses involved. They have not been obtained from in-depth cost comparisons--which are needed.

Kentucky's Marion facility's contract price was \$25 per inmate day, beginning in January 1986. FY 1983-84 costs per inmate day (excluding any debt service) for the two most comparable minimum security Kentucky state-operated facilities were \$22.74 and \$26.83. Thus the contracted price was quite similar, especially after considering likely price changes since FY 83-84. (Costs at state institutions of higher security levels was over \$30; a comparison with those, however, would be misleading.) The 3-year contract permits adjustments based on the national cost of living index during the second and third years.

Pennsylvania state officials estimated that costs at Weaversville were somewhat lower than at comparable state-operated juvenile facilities. They felt that at least part of the reason for this was that the contractor's employees, who were nonunionized, were paid less than government staff. A recent cost comparison (provided by the state) showed that for FY 85-86 the Weaversville per diem was \$130 compared to \$141 and \$152 for the two similar state-operated facilities with approximately the same capacity; i.e., about 20 to 24 beds. Thus, the contracted institution was approximately 11% less than the state-facilities. The contract price for 1986 was expected to be approximately \$100 per inmate day, a reduction from previous years this would result in even greater differences. One problem with these numbers involves whether they include fully comparable items. For example, the contract facility was not charged for full utilities and maintenance, since it is located on the grounds of a state hospital which supplies some of these functions.

The costs of the State of Florida's School for Boys at Okeechobee were found by the American Correctional Association evaluation to have increased less than the comparison state-operated facility during the initial year of operation by the contractor. "However, the dramatic decrease anticipated (and promised--variously stated at the outset as a 10 or a 5 percent reduction-- has not been realized."4/

County officials estimated that Bay County's contracted jail was operating at a considerable savings compared with what the county would have spent. The contractor, county officials reported to us, was able both to operate the main jail and build and operate a workcamp-jail annex for the same amount estimated to be needed for operation of the main jail by county employees. However, we have not been able to document these impressions.

Hamilton County officials reported that the contractor's per diem rate was approximately 10 percent below the cost incurred when the county government operated this facility. The initial contract rate was \$21 per inmate day. The private firm was negotiating for approximately \$24 per inmate day, beginning July 1986. The contractor was also asking the county for permission to reduce its liability coverage (from \$20 million to \$5 million). Hamilton County had problems with the contract in the past when facility costs escalated due to a large influx of driving under the influence of alcohol (DUI) inmates. Subsequently the contractor agreed to a new rate for DUI offenders (who are held for only 48 hours on weekends). This rate, was \$12, close to half the regular cost.

The Ramsey County contract for adult female offenders (in 1985) specified a cost of approximately \$57 for fully-confined offenders and approximately \$28 for those on work release. Ramsey County had been using Hennepin County's facility for female prisoners which became filled because of new DUI sentencing. If Ramsey County had continued to place women inmates with Hennepin County, that county would have had to add space to its facility. It is estimated that Ramsey County would have been charged \$80-\$90 per diem.

Shelby County's secure facility for juveniles was a new institution so no comparable costs were available. The per diem price in the contract was determined by the statewide per diem cost to counties for retaining youth that otherwise would use state facilities (currently \$65, of which the contractor receives \$63 and the County \$2 for administration costs). Officials noted that if the county operated the facility, it would "commit" the county to retain employees for many years and absorb the high costs for fringe benefits.

Based on this highly limited information, it appears that in most cases the contractor costs were somewhat less than government-operated facilities would have been thereby achieving savings. Our interviews suggest that some of the contractors were having difficulty with their current per diems, such as in Kentucky and Pennsylvania. In both cases, the vendors had recently been asked by the government to bring down costs to budgeted levels. Thus, there remains some question as to whether these operations in the future will be able to maintain their current level of quality. In these two cases, at least, these private for-profit firms are not likely to be achieving much, if any, profit (and may well be operating at a loss).

In sum, the information is not clear. The contracted operations appear to have been tightly budgeted. We found no indication that costs are higher than at government-operated facilities or that the private organizations are making excessive profits.

### Attitudes

Public officials inevitably are concerned about the public's reactions to correctional institution contracting. During our study, we became aware of major public controversy over the contracting efforts in two of the eight jurisdictions. Both of these are recent. In Bay County, the Sheriff, many jail employees, and various members of the community strongly opposed shifting the jail operation to the contractor. Several citizens joined in a law suit against private operation of the jail, saying the county lacked authority to transfer operations to a private vendor, though such authority was passed by the Florida legislature in 1985. Final disposition was pending.

In Marion County, Kentucky, the location where the new prison was installed by the contractor, resulted in considerable community opposition. Relations improved greatly when the contractor hired a substantial number (about 45 persons, in fact most of the staff) from county applicants.

Contracting by the states of Pennsylvania, Massachusetts, and Florida, and Shelby County, Tennessee, (all secure facilities for severely delinquent youth), did not appear to result in any significant public relations problems. Contracts for non-secure community correctional facilities for youth, especially with non-profit organizations, has been done frequently throughout the United States, perhaps explaining in part the lack of debate over such arrangements.

With evidence from only one state-contracted adult minimum security facility, it does not seem appropriate at this time to make any generalizations as to public attitudes.

## ISSUE #23

### How should government evaluate the results of contracting?

#### DISCUSSION OF ISSUES

A state or local government that transfers from publicly to contractor-operated prison facilities should evaluate that effort. The purpose of such an assessment is to determine whether the effort should be continued, reduced in scope, returned to government operations, or expanded to other facilities.

In Issues #19 and #21 we discussed monitoring the performance of the current contractor. Here, we are not so much concerned with the performance of a specific vendor under a specific contract, but in evaluating the process as a whole. For example, a private firm might fulfill the basic requirements of the contract, but costs and overall performance levels may not be sufficiently advantageous to warrant further expansion or even continuation.

Another distinction between monitoring and evaluation is that monitoring needs to be done on a regular and frequent basis to make sure the contractor is meeting contractual performance requirements and to provide input for contract renewal and rebidding cycles. An evaluation, such as the type discussed here, needs to be done only once every several years but synchronized with the budget contract cycle.

Information obtained through the government's regular monitoring process should be of considerable use for the evaluation. The evaluation process, however, will place more emphasis on comparing the costs and performance and without contracting -- a much more difficult process.

We found only one attempt to conduct an evaluation: the assessment by the American Correctional Association of Florida's School for Boys at Okeechobee. It compared the contract facility with another, similar institution for seriously delinquent male youths.<sup>5/</sup> Most recently, a specific requirement to undertake an evaluation was required by the May 1986 Tennessee Legislature when it authorized contracting at one medium security prison. That legislation permits contract renewal only if the contractor is found to be providing "at least the same quality of services as the state at a lower cost, or if the contractor is providing services superior in quality to that provided by the state at essentially the same cost."

RECOMMENDATIONS The sections below discuss and present our recommendations on: (a) the timing of the evaluation, (b) who might do the evaluation, (c) the specific performance indicators for which data should be collected and the collection procedures to obtain the information, and (d) the evaluation design, that is what comparisons should be made to enable the government to estimate the extent of success or lack of it. Because of the lack of actual experiences in evaluating contracting for prison operation, this issue draws heavily on our previous experience in evaluating other public services.

### Timing of the Evaluation

The evaluation should cover information obtained after the contracting approach has had a chance to get past the shake down period. A one-year period is likely to be needed to iron out bugs. The assessment should extend for a minimum of one (preferably two or more) years beyond the initial start-up period. (In cases where the contract is terminated early a very useful evaluation could be conducted to find out what went wrong.) Subsequently, the state might want to evaluate its contracting approach in depth perhaps every four or five years.

As will be discussed later, the evaluation activity should begin before the first contract is initiated in order to collect baseline data. This allows comparisons to be made with the period before the contract began.

If a state selects an "experimental design" for its evaluation approach, it will be indispensable for the evaluation to begin before the contract period covered by the experiment.

### Who Should do the Evaluation

A full fledged evaluation requires evaluation expertise to assure that the design is sound. Many state correctional agencies have personnel in their research, statistics, or planning units that probably can direct such evaluations -- if given the time to do it. For those states that do not have staff available to plan and monitor the evaluation, they should seek outside help such as a university or consulting firm. An evaluation aimed at assessing prison contracting is a complex task and some special expertise is likely to be needed.

### Data Elements to be Collected and Associated Data Collection Procedures

Indicators of Effectiveness: Table F gives an illustrative list of performance indicators that states should consider as possible criteria for assessing the effects of their contracting efforts. These are similar to the performance indicators discussed earlier for the monitoring efforts (see Issue #21). Except for the reincarceration indicators in Table F, data for the performance indicators could be obtained through an on-going monitoring process undertaken by the state. As discussed later, the performance indicators chosen as evaluation criteria also need to be collected on non-contracted facilities so as to permit comparison.

TABLE F

Illustrative Indicators For Evaluating  
Correctional Facility Effectiveness

<u>Performance Dimensions</u>	<u>Performance Area</u>	<u>Performance Measure</u>
I. Internal Control and Security	A. Escape frequency	1a. Number of escapes, attempts, unauthorized leaves per ADP
	B. Victimizations, incidents, and protection of offenders(categorized by type)	2a. Number of incidents of problems in internal security per ADP*
		2b. Number of offenders victimized one or more times per ADP
		2c. Number of inmates involved in suicides, attempted suicides, and self-inflicted wounds per ADP
	2d. Percent of sample inmates reporting substantial fear for own personal safety.	
II. Confinement Conditions	A. Overcrowding	3a. Number overcrowded offender days (for all facilities of the relevant security level)
	B. Sanitation conditions and facility maintenance	4a. Number of major violations of state standards related to food handling, preparation and storage;vermin control; bathing, drinking, and toilet facilities; and liquid and solid waste disposal
		4b. Rating of level of facility appearance
	C. Fire Safety	5a. Number of major violations of state codes related to automatic fire protection and standpipes;portable fire extinguishers;electrical, heating,and mechanical equipment;combustible and flammable;exit facilities; structural features; occupancy limits;smoking and alarm systems.

Table F (continued)

Performance Dimensions	Performance Area	Performance Measure
III. Social Adjustment and Rehabilitation	D. Safety of building and physical surroundings	5b. Number of fires by seriousness of damage
	E. Health	6a. Number of inmates and employees receiving serious injuries per ADP (accidental and intentional)
	A. Within Facility progress and achievement	7a. Sick days per ADP
	B. Recidivism (with breakouts) for seriousness)	8a. Number of inmates successfully completing educational program divided by the number of inmates with less than a high school diploma or without a GED
	C. Employment success	8b. Number of inmates completing vocational training divided by the number of inmates with no vocationally oriented work skills
		8c. Percent of inmates earning "goodtime"
		9a. Percent of released inmates with subsequent in state arrests within 12, 24, and 36 months of release
		9b. Percent of released inmates with subsequent in state convictions within 12-24 months of release
		9c. Percent of released inmates with subsequent in state reincarcerations within 12 and 24 months of release
		10a. Percent of released inmates that are gainfully employed 12 and 24 months after release

\*This can include such incidents as disturbances, drug incidents, contraband and weapons found in shakedowns, or disciplinary actions.

Source: This table is adapted from the reference shown in Note 6.

We have discussed data collection procedures for most of these effectiveness indicators under Issue #21. These procedures include: (1) tabulation of data provided by reports from each institution on incidents such as: escapes, assaults, and other extraordinary occurrences; information from on-site inspections (both those done by specialists such as health, medical, safety, fire, and sanitation inspectors and by special correction agency teams); and (2) data from interviews of inmates such as on internal safety, discipline, treatment by staff, and on the quality and availability of programs such as recreation, education, vocational training, and work experience.

Evaluation of rehabilitation success is particularly difficult. Many states can probably determine reincarceration rates and even rearrest rates, at least those that occur within the state. It is much more difficult to identify success in obtaining legitimate employment. If the released prisoners are on parole, this information should be readily available. If not, some of the data might be obtained through special agreements with state unemployment insurance offices, which maintain records of wages paid by employers to employees in jobs covered by unemployment insurance. A considerably more difficult and costly procedure is to find, contact and interview ex-inmates by mail, phone, or in-person. Finding the prisoners and gaining their cooperation is difficult if they are not on parole, so we do not encourage this option unless the state believes it has the necessary resources.

Procedures for collecting these various data, based on data collection trials with the states of Minnesota and North Carolina, are further discussed in the report referenced on Table F.

Process Indicators: The evaluation should include descriptive information about the programs and practices of the contracted institution and compare it to government-operated facilities. Such information can be quite useful in providing explanations for observed differences in costs and effectiveness.

For example, ratios of the number of staff to number of inmates, both in total and for various types of staff (such as for recreation, counseling, case work, various programs, and medical services) may be informative. In addition, differences in the procedures used for security, programs, and in the treatment of prisoners should be identified.

A state, however, can not automatically assume that differences in correctional practices are in themselves good or bad. Only when these differences relate to outcomes will a jurisdiction be able to determine whether such elements are associated with better or worse outcomes. Thus, higher staff-to-inmate ratios, size of salaries and fringe benefits, and the like may indicate higher quality service, but they also could have negligible effect and even indicate inefficiency.

Primarily, process indicators provide clues to the question: "Why did the observed differences in outcomes occur?" This information can offer important suggestions regarding how prison programs might be improved in the future.

Cost Analysis: A major part of the evaluation should be a comparison of the costs of the contract facility with the likely costs if it were not contracted. This is a more complex issue than may seem at first glance.

The costs for the contracting effort should include expenses incurred administering the contracting process (including the RFP phase) and of monitoring contractors. They should include the contract's cost, including any amendments and adjustments that were made.

In comparing these expenses to those of similar state-operated facilities, the analysis should first determine that comparable elements are included for both types of facility. For example, state-operated facilities have fringe benefit costs that need to be included. If utilities are included in one type of organization they should be included in the other. If certain medical costs are not paid by the contractor out of the contract price but were paid directly by the state, the state-operated facility costs to be compared should also exclude these medical costs.

In Issue #14 on contract pricing, we identified a number of other cost elements for which there have been problems in determining responsibility. These same elements should be examined carefully in this cost analysis. Table D (in Issue #5) listed individual cost elements that should be considered.

A major cost analysis problem concerns how capital costs will be handled. In situations where the contractor has constructed or rehabilitated a facility, normally those costs will be included somehow in the contract price. If a comparison is made with existing state-operated facilities, past or current capital costs (such as the cost of debt service) are not included in the state agency's budget. It is not clear how this perennial cost analysis question should be resolved. Some government cost analysts have suggested that an imputed "rental" cost be added to the government costs, particularly to reflect the funds lost by the government by not using the property for other purposes. We suggest that the basic cost comparisons be done without this input, but that a comparison including an imputed capital cost also be shown.

Timing and Public Acceptance: A major reason for contracting in some cases is to accelerate adding prison capacity. The savings in time should be estimated in the evaluation. The evaluation should also include such important considerations as the ability to save time in getting a new facility started and public acceptance.

Another crucial issue is the degree of public acceptance of the prison contracting effort. Situations such as Kentucky's, where the facility is a new and not owned by the state, entails resolving special problems with the citizens of the community where the institution is located. How successful has the program been in alleviating such problems in the community?

Media, political attention, and attitudes towards the contracting effort are important when assessing the success of a contracting effort. They will affect the type problems faced by the state in operating facilities. The evaluation should provide evidence of current attitudes.

## What Comparisons Are Needed ?

A major question for the evaluation is the way in which the evaluation attempts to determine whether there were advantages to contracting and whether the outcomes were due to the use of contracting as distinct from other factors.

If the facility is an "add-on" (such as the case in Kentucky), then the state should compare the contract operations to both (1) the option of not adding the additional facility at all, and (2) to the option of adding the facility but operating it by government employees. In the first case, the bottom line question is whether the additional cost is worth the reduction in crowding elsewhere. In the second case, the question is whether the contract institution is more or less efficient and/or effective than a state-operated facility would be.

If the contract is to take over an existing facility, or to build and operate a new facility to replace an old one, then comparisons can be made both between costs and performance of the old one, and between the new arrangements and any comparable facilities still government-operated.

A state has a spectrum of possibilities, from highly sophisticated evaluation designs to relatively simple ones. These differ in the strength of the evidence they can provide about whether or not the contracting process itself resulted in improved or worsened prisons. Below we discuss three basic design types: (1) before versus after (time series) evaluations, (2) comparison group evaluations without special assignments of inmates, and (3) experimental evaluations with random assignment of inmates to contract and non-contract facilities. There are numerous variations that will not be discussed here. Combinations of these designs are possible and are likely to be appropriate. For more detail on such designs, we refer the reader to texts on program evaluation.

Before Versus After (Time-Series) Designs: For those situations where the government contracts a facility that it has been operating, the contracting effort can be evaluated by comparing performance before and after the switch.

This design requires the government agency to have available comparable data on each performance indicator, preferably for a few (e.g. three) years, prior to the switch to contracting. Performance data for the first year of the contract should be collected, but at least one additional year should be included to make for a fair comparison (since the first year is a start-up period). The basic principle here is to identify whether there has been an improvement, worsening, or no change in performance after switching to contracting.

Used alone this time series design is quite weak. A major problem is that many factors other than contracting could have affected performance. For example, the number and types of inmates assigned to the facility, state laws, regulations and policies, and the basic state environment could have changed, thereby affecting performance in ways unrelated to the switch to a contract.

Also, the agency may have modified data collection procedures from before the switch to afterwards, reducing the comparability of the information. Similarly, a state may not have adequate data from an earlier period as it does currently. This problem can be alleviated if the state arranges to collect baseline data prior to the switch to contracting.

For cost analysis, time series cost data should be adjusted by a price-level index to reflect changes over time. To show benefits, either the performance level should have increased substantially without major increases in costs, or costs should have decreased significantly without a significant decline in performance.

Comparison Groups without Random Assignment: Inevitably the state will want, and need, to compare the contract facility to similar state-operated institutions. Tennessee mandated this comparison of quality and cost of service to similar facilities in its May 1986 legislation authorizing contracting for one prison. (The legislation, however, does not preclude the use of random assignments as discussed later). To make these comparisons, a state needs to collect similar information, using comparable data collecting procedures, for the comparison institutions as well as for the contract facility -- and over the same time period. If the state introduces a new monitoring process for the contracted facilities that provides new performance data, similar monitoring procedures should be applied to the comparison facilities so that collected information will be comparable.

The key problem in implementing this type of evaluation is to identify "similar facilities". This is a tricky, complex issue. There are numerous characteristics that tend to make two correctional facilities dissimilar. These include such characteristics as:

- o The level of security. (This has many nuances; facilities within any one category such as minimum, medium, and maximum security, can still differ appreciably among themselves as to their security features.)
- o The characteristics of the inmates, such as the severity of the crimes for which they are in prison, whether they are first time or repeat offenders, their age, race, and sex.
- o Age of the institution.
- o The number of prisoners incarcerated.
- o Whether the facility is in an urban, suburban, or rural setting. (Presumably the more urban the facility, the more difficult it may be to operate the institution smoothly).

Since any one state is not likely to have a large number of prison facilities, its choices for the comparison institutions will be limited; a perfect match is not likely. Therefore, the assessment will have to settle for the best possible match on characteristics such as the above.

Probably the most troublesome issue is the characteristics of There are numerous procedures for classifying prisoners using various scales. For example, the Federal Bureau of Prisons assigns each inmate to one of six "security levels" based on a score derived from a number of social and criminal history variables.<sup>7/</sup> The American Correctional Association in its evaluation of the Florida School for Boys used a personality inventory, a behavior checklist, and a social history rating form to compare inmates of a contract institution with those in a government-operated facility.

Such procedures can be used both to select comparison facilities and subsequently to identify the extent of their differences as to inmates thereby helping with the later interpretation of the findings. The evaluators should, at the least, consider the differences as a possible reason for any differences found in performance. Should contract facilities show better results than comparison institutions and also have more "difficult" inmates, this would present a strong case in favor of the contracting method. On the other hand, if the contract institution showed better performance, but had substantially less difficult prisoners, this would indicate that the reason for the contracting facility's success might have been that they had easier inmates with which to work.

The American Correctional Association evaluated the Florida School for Boys at Okeechobee for severely delinquent male youths (with funds provided by the National Institute of Corrections, not the state). ACA compared the facility to a state-operated facility, the Dozier School for Boys.<sup>8/</sup> The ACA evaluators felt there was insufficient baseline documentation available to use the before vs. after design.

The ACA evaluation found that Okeechobee had a higher percentage of residents incarcerated for more serious offenses (about the same percent of residents with crimes involving weapons and bodily harm, but substantially more residents with two or more prior placements at training school or with the offense of theft of a firearm) and a higher percent of black inmates (58% versus 44% at the comparison site). To compensate, the evaluators divided each facility's population into sub-groups, comparing performance of these sub-groups on frequency of serious infractions of rules and academic achievement scores.

The ACA evaluators confronted two other problems likely to face other evaluations. They found that the data available on number of assaults had not been collected in a consistent manner. Escapes, which the evaluators had also hoped to compare, were so few from the two facilities that no statistically meaningful comparisons could be made.

This Okeechobee evaluation was itself evaluated or criticized.<sup>9/</sup> The reviewers were not happy with what they felt to be large differences in inmate characteristics between the two facilities being compared. They expressed even more concern that the contract facility was in its early stages at the time of the evaluation, while the comparison site was well established.

The State of Kentucky during the first few months of the privately managed Marion facility intentionally sent inmates who were least likely to trouble to the new, minimum security facility. Thus, the first 100-150 inmates were probably among the least difficult inmates in the state system. There are other minimum security facilities to which the contracted facility could be compared, but their prisoners would likely be somewhat more difficult to handle--complicating the task of any future evaluator. The contract institution is still in its initial start-up period, however, and more difficult inmates are beginning to be assigned to it.

Experimental Designs : This is the most powerful and the preferred form of evaluation. However, it also is the most complex to undertake.

In this design the state correction agency would assign inmates of similar security levels randomly to the contract facility (the experimental group) and to the comparison institution (the control group). This process maximizes the likelihood that the inmates at the facilities being compared would be similar.

Though such experimental evaluation raise legal questions, states should be able to apply this procedure to some extent since the corrections agency is responsible for choosing the inmate's placement location. The experimental design requires that offenders be randomly assigned during the period covered by the evaluation, which would probably need to be for a few years. The size of the facilities being compared should also be similar; e.g., to assure that the overall mix of inmates is similar between facilities. Those responsible for prisoner assignments to institutions would need to follow the procedure carefully during the experiment.

With this experimental procedure, the differences found in performance, if data are collected in similar ways at both types of facilities, would provide strong evidence as to the relative merits of the two types of correction facility management as implemented by a particular vendor.

#### RECOMMENDATIONS

In evaluating its contracting effort a government should utilize as many of the above three experimental design procedures as it can. Every effort should be made to obtain comparable data on a preselected set of result and cost indicators, both before and after the contract effort started (to permit a before versus after comparison) and for agency-run as well as contract institutions.

The comparison group design will likely be the approach most often used given the difficulties with using an experimental design. Because differences between comparison facilities are inevitable, it is likely that any evaluation will produce at least somewhat ambiguous results.

One year should be allowed as a start-up period, with at least one year of post start-up period performance included in the evaluation. An experimental approach with random assignments of inmates to the contracted- and government-operated facilities should be used if possible; however, officials must consider the practical and legal problems in implementing and sustaining such an experiment long enough to be evaluated.

One final observation on the limitations of these evaluation designs: even if the best of evaluation designs is used, the contracting effort will represent just one trial. Ideally there would be many efforts undertaken under many different conditions to determine whether, as a whole, the private approach appears to have significant benefits under typical conditions. One example can not give the complete picture. The one vendor might be particularly competent or especially incompetent. The contract or the government-operated comparison institution might be particularly good or exceptionally weak. Preferably, there should be a national effort to support and encourage appropriate evaluations so that all states can learn from a collection of experiences undergone a variety of conditions.

## CHAPTER VI

### NOTES

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3. Charles H. Logan and Sharla P. Rausch, "Punish and Profit: The Emergency of Private Enterprise Prisons," Justice Quarterly, September 1985, p. 314.
4. Robert B. Levinson, "Okeechobee: An Evaluation of Privatization," The Prison Journal, Autumn-Winter 1985.
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Albert R. Robert and Gerald T. Powers, "The Privatization of Corrections: Methodological Issues and Dilemmas Involved in Evaluative Research," The Prison Journal, Autumn-Winter, 1985.
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7. Janus, Mabel and Williams, "Security and Custody," Federal Probation, March 1986.
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**CHAPTER VII**  
**CONCLUSIONS AND RECOMMENDATIONS**

We examined reports provided by twenty-two states and experiences from nine state and local government jurisdictions in contracting for the management and operation of secure facilities. These probably represent most of the current existing experiences in the United States. Only one instance, however, is an adult state correctional institution: Kentucky's Marion minimum security facility. Six of the nine jurisdictions contracted with for-profit firms. The other three, Florida, Massachusetts, and Minnesota, contracted with nonprofit organizations.

Our review of these experiences provided the basis for the conclusions and recommendations discussed throughout this report. They are summarized here.

**CONCLUSIONS**

1. **Liability**

It is evident that private prison contractors will not be able to escape liability under Section 1983 of the Civil Rights Act, and that the contracting government entity will be unable to protect itself from suits resulting from the wrongful acts of the operator it selects, but it may reduce its exposure.

2. **Type and Size of Facility**

States that have decided to use private contractors would avoid a series of problems if they limit contracting to additional minimum security beds. "Special needs" prisons also seem relatively well-suited to the contracting option.

Contracts should set maximum and minimum inmate population levels and specify the consequences if these are exceeded. A tiered price structure stating per diem costs for vacant as well as occupied beds is advisable. Finally, the contract should establish a mechanism for resolving disputes.

3. **Contracting**

Thus far, most state and local government agencies have not used fully competitive procedures when contracting for the operation of correctional facilities. This lack of competition does not appear to have been a major obstacle to obtaining good service, costs or quality. Over the long run, however, it is not the best contracting practice and could lead to major problems. The one state-level secure adult institution contract, the Kentucky's Marion Adjustment Center did involve fully competitive contracting. At present, few vendors are experienced in operating secure correctional institutions. And there are few government agencies with experience in contracting for the operation of these facilities. Efforts thus far should be characterized as "experimental."

#### 4. Monitoring and Evaluation

The state's method for monitoring the contract should be specifically stated and should, for larger (e.g., 150 inmate or more) institutions, include an on-site staff member. Costs to house this individual should be agreed to and documented in the contract.

All the contract efforts we examined were weak when detailing their provisions for monitoring vendor performance. This applied both to provisions in the contracts (where little was said) and to the agency's subsequent monitoring procedures (which were not well-formulated). Formal performance criteria were usually vague while procedures for conducting the monitoring were limited. Standards included in the contracts dealt with process, but paid little attention to specifying outcomes.

We found only one systematic, in-depth evaluation of any of these contracting efforts. This was an evaluation of the State of Florida's Okeechobee school for severely delinquent male youth, funded by the federal government. Nor did we find plans for in-depth assessments of the contract effort in any of the other jurisdictions. However, on occasion there were plans, especially at the state level, for periodic reviews of the contractor's performance. The State of Tennessee's Legislature, as part of its May 1986 authorization of a trial contract effort for a medium-security facility, is requiring that an evaluation of comparative costs and service quality be done after the first two years. The evaluation is a prerequisite to renewing the contract for an additional two years.

These examples are all primarily experimental efforts; there is little past experience to go by anywhere in the country. Since the number of private firms available to undertake these efforts were few, some new organizations were formed to bid on and operate the secure correctional facilities.

#### 5. Impacts

While based on limited information, our observations indicate that initial contract operations have been reasonably successful--at least in the opinion of the government officials. It is not, however, clear that they have been successful from the perspective of profitability for the private firms. Vendor organizations appear to have made major efforts to do the job correctly.

In only one case, the Okeechobee School for Boys in Florida was there evidence that major problems existed early in the effort. Even there, a follow-up visit indicated that many, if not most, of the problems had been corrected. A county workhouse that changed from public to private management initially had substantial staff turnover problems (Hamilton County, Tennessee), but this apparently did not result in major reductions in service quality. This special effort to do a good job is probably due to the private organizations finding themselves in the national limelight, and to their desire to expand the market.

6. Avoiding Future Problems

Although a lack of full competitive bidding and careful monitoring of performance may be understandable for the initial trials, second phase efforts will require more attention to establishing: (a) more credible competitions and (b) comprehensive, formal monitoring requirements and procedures. This applies to future contracts for current providers as well as new private efforts.

Government agencies need greater assurance -- for themselves, for elected officials, and for the public -- that contracting activities will be administered in a fully appropriate, cost-effective and accountable manner. A strengthened contracting process should not be offensive to the private organizations themselves. Most of the officials of these firms supported full monitoring of their work.

## RECOMMENDATIONS

### Contract Goals

1. Before contracting, the government should undertake a systematic, detailed pre-analysis to determine if, and under what conditions, contracting is likely to be helpful to the corrections system. This analysis should include an examination of whether statutory authority exists, of current state prison costs, crowding, performance, legal issues involved, availability of suppliers, ways to reduce the likelihood and consequences of contractor defaults, and the attitudes of various interest groups. (Issue #5)
2. If a government's goal in contracting is to obtain new beds quickly, the private sector offers an attractive alternative. However, if the government seeks a more economical operation, the minimal evidence available to date suggests that contracting does not necessarily save a significant amount of money. (Issue #6 & #22)

### Protection of Inmates/States

3. Careful attention must be devoted to ensure that each contractual component provides adequate protection of the inmate's rights, and protects the state from unjust liability claims. (Issues #2 & #4)
4. The government can reduce but not eliminate its vulnerability to lawsuits when contracting by specifying in the contract that the government be indemnified against any damage award and for the cost of litigation. (Issue #1)
5. The government should consider requiring that a significant performance bond be posted or a trust fund established in order to indemnify it in the event of contractor financial, or other, problems. The agency should, however, determine whether the protection is worth the cost of the bond. (Issue #16)

### Contracting Process

6. Governments should use a competitive bidding process if they decide to contract. This will avoid accusations of cronyism, fraud, and the like. To maximize the number of bidders, the government can:
  - o Advertise in major state newspapers and national correctional journals;
  - o Develop and maintain a list of potential bidders;
  - o Permit both in-state and out-of-state private non-profit and for-profit organizations to bid.(Issue #13)

7. Governments should include information about the bid evaluation process in the RFP. Suggested evaluation criteria include, but are not limited to:
  - o Firm's experience and past success in similar undertakings;
  - o Staff qualifications;
  - o Proposed programs;
  - o Cost(Issue #14)
8. A method for resolving any contractual differences that may emerge should be agreed to and be specified in the contract before activation of the facility. (Issue #10)

#### Contract Prisons

9. The requests-for-proposals and subsequent contracts should explicitly specify: (a) who is responsible for what expenditures and (b) what levels of performance are expected (including: compliance with minimum standards as to policies, procedures, and practices; results on such performance indicators as maximum numbers of various "extraordinary occurrences;" and compliance with fire, safety, medical, health, and sanitation standards). The RFPs and contracts should also identify what sanctions or penalties that will apply for inadequate performance. (Issue #15 & #19)
10. A tiered fee, or variable cost structure that is fair for both parties should be built into the contract so that there will be no future misunderstandings regarding cost for vacant beds and/or additional inmates beyond the specified ceiling. (Issue #15)
11. Rebidding of prison contracts should occur approximately every three years. State laws and regulations should be checked before including this specification, since they may suggest a different maximum contract length. (Issue #18)
12. Governments should include special provisions in their contracts to require that the contractor provide advance notice of the end of a union contract period, the onset of labor difficulties or major worker grievances that could result in a work stoppage or slowdown. (Issue #16)

#### New vs Existing Facilities

13. Contracting for new or retrofitted institutions entails fewer problems (such as personnel problems) than turning over an existing facility to a private firm, and thus should be given preference in a government's initial contracting efforts. (Issue #8)
14. Governments contracting to replace existing facilities, should take steps to ameliorate personnel problems, including:

- o Require contractor to give employment preference to displaced staff;
  - o Provide transfer, retraining, and outplacement services to employees not choosing to work for the contractor;
  - o Carefully calculate, and make provisions for, disposition of benefits (especially retirement and vacation/sick leave accrual).(Issue #17)
15. Governments establishing a new contracted facility should develop a public relations plan. Good public relations are crucial for community education. The government should fully inform community leaders and should also keep correctional employees fully informed of any contracting deliberations. The media should be made aware of the contracting initiative at an early stage. Once awarded the contract, the private firm should use community resources for operating the facility whenever possible by, for instance, hiring local people and buying supplies and services locally. (Issue #7)

#### Selection of Inmates

16. Both the RFP and subsequent contract should be explicit in describing the type and level of offender for which the state is seeking a private contractor and the major architectural features the public agency deems necessary to confine the prisoners appropriately. The contract should be based on the state's current inmate classification policy and its operational definitions of the privileges and level of supervision to be accorded the type of inmates at the proposed contracted-for custody level. (Issue #9)
17. States should contractually obligate the private vendor to accept all prisoners in certain specifically-designed categories (e.g., minimum security) for the duration of the contract period up to the agreed maximum number of inmates to be incarcerated at any given time (provided for in the contract). This would protect the state against the prospect of selective acceptance. (Issue #10)
18. Selection of inmates for placement in a private facility, and decisions about their movement, is the government's responsibility. The bases for these selections should be written into the contract. Criteria should be mutually agreed upon to avoid future misunderstandings. (Issues #10 & 11)
19. The contract should include a provision that permits the state to make the decisions about inmate reassignment or reclassification in the event that the contractual capacity is reached. (Issue #10)

20. Both a minimum and maximum prisoner population level should be stated in the contract in order to facilitate planning and cost estimates. (Issue #10)

States contracting for large institutions should specify in the RFP and the contract that the selected private vendor can use unit management, that is, can subdivide the the total number of beds into a number of smaller semi-autonomous units. (Issue #15)

#### Level of Authority

22. Government officials must ensure that disciplinary hearings conducted by the contractor follow legally required practices. A private firm should adopt the policies and procedures utilized by the unit of government. Significant disciplinary actions should be formally approved. The state should consider permanently stationing one or more of its own staff members at large (e.g., 150 inmates or more) private facilities, or at least provide for frequent visits. This individual's responsibilities would include participation in all disciplinary hearings concerning major rule infractions, the definition of these having been spelled out in written policy statements. (Issue #12)
23. Private companies given authority over inmates--authority that otherwise would have been that of the governmental entity if the contract did not exist-- should closely adhere to the same type of procedures that the government agency would have normally used. Where possible, private contractor discretionary actions involving inmate rights and discipline should be made in the form of a recommendation to the appropriate government agency or official for ratification. (Issues #3 & #4)
24. In the event of an escape attempt, private prison employees could use reasonable and appropriate restraint in the absence of any other specific statutory or case law. Once an inmate has left the facility's property (unless the private prison employees are in hot pursuit or have been deputized), law enforcement officials should become responsible for the ultimate capture and return of the escapee. (Issue #3)
25. Although individual practices may differ in regard to the degree of involvement of the public correctional agency with release decisions, insofar as the private sector is concerned, its contribution to this process should be limited to a presentation of the facts pertaining to the inmate's level of adjustment during the period of confinement in the private facility. Public officials should make the decision. (Issue #12)

## Monitoring

26. The state should plan (before the RFP is issued) and implement (after contract award) an effective system for continuous contract monitoring. This should include:

- (a) regular timely reports (showing tabulations and analyses of extraordinary occurrences and other significant performance indicators and the results of on-site inspections)
- (b) regular on-site inspections (at least monthly and preferably weekly), using pre-specified checklists, rating categories, and guidelines on how to complete the ratings
- (c) periodic documented fire, safety, health and medical, and sanitation inspections
- (d) provision for regular interviews with samples of inmates to obtain feedback on such performance elements as treatment of prisoners, amount of internal security, drug use, and helpfulness and adequacy of educational, work, and recreational programs
- (e) annual in-depth, on-site inspections by a team of experts, covering the various procedures used and the results of periodic reports on the facility's quality of services based on pre-contract specified outcomes/results indicators
- (f) explicit provision for prompt review by government officials of the written findings from each of the above procedures with prompt written feedback to the contractor, and identification of what needs to be corrected and by when (and subsequent follow-up to determine level of compliance)
- (g) provision for supplying information obtained from the monitoring process by the time contract renewals and rebidding are scheduled--so this material can be used effectively.

The same monitoring procedures should be applied to publicly operated and contractor operated facilities. Governments with comparable facilities can then use the resulting information as a basis for comparisons--and thus, obtain a better perspective on the relative performance of the contractor. (Issue #21)

27. From a state, local, and national perspective, it is highly desirable to obtain systematic, comprehensive evaluations of the costs and effectiveness of contracting secured correctional facilities. A government should require that a comprehensive evaluation be made, within three years of contract award, of the degree of success of its contracting effort. Where possible the contracted facility should be compared to publicly operated facilities. Other than the philosophical issues, most of the debate over prison contracting can be greatly enlightened by empirical field evidence. It is a great waste of resources if innovative trials of prison contracting are undertaken without including appropriate evaluations from which states and local governments, and society, can learn: Does contracting work, and under what conditions? (Issue #23)

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