

State of Washington  
Legislative Budget Committee

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# Department of Corrections Privatization Feasibility Study

## Report 96-2

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January 19, 1996

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for persons with disabilities.*

## Table of Contents

<b>Part</b>		<b>Page</b>
<b>1</b>	<b>Background and Introduction</b>	<b>Tab 1</b>
<b>2</b>	<b>Legal Thresholds</b>	<b>3</b>
<b>3</b>	<b>Review of Cost Studies--Public vs. Private</b>	<b>6</b>
	Review of Published Sources	6
	Review of Privatization Experiences in Other States-- Choice of Case Studies	7
<b>4</b>	<b>Results of Louisiana and Tennessee Case Studies</b>	<b>9</b>
	Case Study Cost Comparisons	9
	Case Study Qualitative Comparisons	11
	Examples of How the Companies Have Reduced Costs	13
<b>5</b>	<b>Cost Savings Potential of Privatizing Corrections Institutions and Facilities</b>	<b>17</b>
	Interstate Operational Cost Comparison	17
	Interstate Capital Cost Comparison	21
	General Conclusion	25
<b>6</b>	<b>Best Practices for Requests for Proposals and Contracts</b>	<b>26</b>
<b>7</b>	<b>General Guidelines</b>	<b>27</b>

## **Appendix**

## **Tab**

1	Legal Analysis	Tab 2
2	Frequently Cited Cost Studies	Tab 3
3	Cost Analyses for Louisiana and Tennessee	Tab 4
4	Intrastate and Interstate Comparisons of Inmate Demographics and Behavior	Tab 5
5	Interstate Cost Comparisons	Tab 6
6	Capital Costs Comparison	Tab 7
7	Methodology for Equating Capital and Operating Costs	Tab 8
8	Inventory and Analysis of Requests for Proposals Components Relative to Prison Privatization	Tab 9
9	Contract Commentary Prison Privatization	Tab 10

## **PART 1: BACKGROUND AND INTRODUCTION**

The state operating budget for the 1995-97 Biennium provided funds for the legislature to review and identify state programs or services that may be competitively contracted to produce cost savings or improvements in the quality or level of services without harm to the public good. The Legislative Budget Committee (LBC) was asked to do the part of this review relating to adult correctional institutions, and to have a preliminary report completed by January 1, 1996.

### ***Study Objectives***

The LBC's study objectives were set out as follows.

- Work with the Attorney General (AG) to identify any potential legal constraints to implementing privatization, and, if applicable, any statutory changes needed to remove such constraints.
- Verify whether other states and jurisdictions have achieved cost savings through privatization without harm to the public good.
- If savings occur, identify the ways in which they are achieved (e.g., design/operational efficiencies, different levels of service, personnel compensation).
- Evaluate the feasibility and cost savings potential of privatizing Department of Corrections (DOC) institutions and facilities (e.g., specifically the new 1936 bed institution being planned).
- With the assistance of DOC and the Attorney General, evaluate best practices, and develop prototypes for Requests for Proposals (RFPs), contracts, and competitive procedures for privatization.

### ***Study Results***

By addressing the study objectives, this report provides information to assist the legislature in its deliberations on privatization. Although the report makes no recommendation on the policy issue of whether to privatize adult correctional facilities, there are numerous issues and obstacles related to privatization that are addressed in the technical appendices. These technical appendices (particularly those concerning legal issues, RFPs and contracts, and estimating annual ownership costs) are designed to be used as guidelines to be followed in the event that privatization is pursued. Similarly, the report

also contains five general guidelines that could be followed for minimizing the risk to the state, while promoting cost savings without sacrificing quality.

### ***Acknowledgments***

We appreciate the support given to this study by the Department of Corrections, the Office of the Attorney General, the Senate Ways and Means Committee, and the House Office of Program Research.

We are also indebted to the states and private companies that provided us information. In particular, the case studies and examples included in this study would not have been possible without extensive cooperation from the states of Louisiana, Tennessee and Florida, and from the Corrections Corporation of America and the Wackenhut Corporation.

This study was conducted by Bob Thomas, Kathy Gookin, Beth Keating and Valerie Whitener of the LBC staff, with technical assistance from the project consultants, Robert M. Williams and Richard Crane. Cheryle Broom was the project supervisor.

The legal analysis by the Office of the Attorney General was conducted by Richard Heath, Talis Abolins, Deborah Cade, Lee Johnson, Zachary Mosner, Mitch Sachs, and Mike Lynch.

A panel that reviewed our consultant's work on RFPs and contracts consisted of: Linda Brownell (Senate Ways and Means); Karl Herzog (House Capital Budget Committee); Kristen Reiber (House Appropriations); Richard Heath and Talis Abolins (Office of the Attorney General); and Jim Blodgett, Bernie Warner, and Margaret Vonheeder (Department of Corrections).

Cheryle A. Broom  
Legislative Auditor

On January 10, 1996, this report was approved by the Legislative Budget Committee and its distribution authorized.

Senator Al Bauer  
Chair

## **PART 2: LEGAL THRESHOLDS**

The LBC was asked to work with the Office of the Attorney General (AG) to identify any potential legal constraints to implementing privatization, and if applicable, any statutory changes needed to remove such constraints.

In addition to answering the basic questions posed, the AG provided further commentary on a number of legal issues to be considered in the event that the state would pursue privatization. The full text of the AG's analysis is included in Appendix 1. The three basic threshold questions are presented and answered below.

- Is there a constitutional prohibition against contracting prison operations?

No. There is, however, a doctrine that would prevent the state from delegating away its ultimate responsibility to foster and support our prisons. There are no court decisions specifying what is necessary to avoid an unconstitutional delegation of corrections responsibility.

In Washington, a court would likely use a two-part test to determine whether the state's delegation of power is constitutional. Under this test,

1. The legislature must provide standards or guidelines which define in general terms what is to be done and the instrumentality or administrative body which is to accomplish it; and
2. Procedural safeguards must exist to control arbitrary administrative action and any administrative abuse of discretion.

The first requirement would likely be met by adequate statutory standards for private prison operations, and by the detailed requirements of the state's request for proposal and contract.

- Need to retain certain responsibilities

The second requirement would likely be met by the state's retention of ultimate decision-making responsibility in the areas of classification, discipline, sentence-calculation, and release decisions. Other states have strived to accomplish this in a number of ways. The more control that is retained, the less risk of unconstitutional delegation. Conversely, too much

state involvement in facility decision-making may interfere with efficiencies that the private contractor proposes to achieve.

- Are there existing statutory or case law constraints to contracting out prison work?

Yes. Contracting for services that have been traditionally and historically performed by classified DOC prison employees would likely be found to violate existing civil service law as interpreted by the courts. A possible exception in RCW 41.06.380 for certain contracts originally entered into before April 23, 1979, would not apply, as our review discloses no such DOC contracts relating to prisons.

- Legislative authority needed

Legislative authority would have to be provided in order to contract for the operation of a prison without using state civil service employees. In order to remove any such question as to the authority given, the authorization should be in the form of an explicit direction in the statute to contract out the work involved. Repeal of RCW 41.06.380 is not necessary, since it is not that statute that prohibits contracting out in general.

Whatever language might be chosen for authorizing DOC to contract out, the language should be carefully drafted to ensure that the intent to contract out is clear.

- Are there provisions in the relevant collective bargaining agreement against contracting out?

Yes. Under the current collective bargaining agreement DOC has agreed not to contract services when such action would have the effect of terminating classified employees or when the services to be contracted would be the same as those historically provided by classified employees.

- Current agreement expires in June

The effect of existing collective bargaining agreement provisions on the ability of the legislature to direct contracting out is unsettled. State unions have taken the position in court that the legislature may not retroactively change an agency's agreement not to contract out. They have based their position on a state Constitutional prohibition against impairment of contracts. However, even if a challenge to a contracting out statute were to be successful on this ground, it would only bar application of the statute

during the existing term of the contract agreement. Therefore, the constitutional issue could be avoided by stating in the statute that contracting out would not occur until expiration of the current term of the agreement. The current agreement expires on June 25, 1996.

- Issue of removing DOC's discretion in bargaining

The statute and rules as currently written require an agency to bargain personnel matters over which management can lawfully exercise discretion. Therefore, elimination of the contracting out language from the new collective bargaining agreement would not be certain if discretion to contract out is given to management by the authorizing statute. Instead, the statute should direct DOC to contract out. The union could not then argue that contracting out is negotiable.



## **PART 3: REVIEW OF COST STUDIES -- PUBLIC VS. PRIVATE**

One of the feasibility study questions was: ***Have other states and jurisdictions achieved cost savings through privatization without harm to the public good?***

We approached answering this question by reviewing published sources and the experiences of other states that have experimented with the privatization of prisons.

### **REVIEW OF PUBLISHED SOURCES**

- There are surprisingly few studies, and they are of limited value.

We conducted a review of existing literature on privatization of prisons. Although there are numerous published sources that debate the pros and cons of privatization, there are only a few studies that have attempted to compare costs, and they have reached conflicting conclusions. We reviewed the methodologies and conclusions of these studies, recreating the analyses when possible. With the exception of some state-sponsored studies (more on these later) the studies we reviewed had significant limitations or methodological weaknesses. We did not find that we could use these studies to draw any general conclusions about the potential for cost savings through privatization.

See Appendix 2 for more comments on the cost studies we reviewed.

We also reviewed two studies available concerning the quality of operations of public-versus-private facilities. Indicators of quality included such factors as safety issues, availability of programming, satisfaction with food, and job satisfaction of staff. In each case, the studies found no significant differences in quality between the particular publicly and privately operated prisons being compared.<sup>1</sup>

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<sup>1</sup> Charles H. Logan, *Well Kept: Comparing Quality of Confinement in a Public and a Private Prison*, National Institute of Justice, March 1, 1991; and Tennessee Select Oversight Committee on Corrections, *Comparative Evaluation of Privately-managed CCA Prison and State-managed Prototypical Prisons* January 1995.

## **REVIEW OF PRIVATIZATION EXPERIENCES IN OTHER STATES -- CHOICE OF CASE STUDIES**

- Criteria for selecting states for case studies

Since one of our study questions involves the feasibility of privatizing a multi-custody prison in Washington, we sought case studies of privatization in other states that met the following criteria:

  - The experience with privatization should involve a large, multi-custody facility.
  - The state-run facilities to be compared to the privately run facilities should be of similar capacity, design and security levels.
  - Preferably the comparable facilities would have been in operation for several years.
  - The states having such facilities would be willing to provide all the information we would need in a timely manner so as to meet the deadline for this report.
  - The private companies operating the prisons would be willing to provide information needed for this study.
  
- Choice of Louisiana and Tennessee

We were fortunate in obtaining the cooperation of two states -- Louisiana and Tennessee -- that have facilities that are particularly well-suited for apples-to-apples comparisons of costs.
  
- Both states allow for apples-to-apples comparisons

Louisiana has three large, prototypical, multi-custody facilities that are exactly the same design and capacity. One is operated by the state, and the two others are operated under contract by the Wackenhut Corporation (Wackenhut) and the Corrections Corporation of America (CCA), the two largest private operators of prisons. Louisiana's three facilities were all in full operation by the beginning of 1991. At present, the capacity at each of

the facilities is 1474 inmates.

Tennessee also has three large comparable facilities, two of which are state-run, and one of which is operated by CCA. The three facilities were in full operation by mid 1992. The current capacity at each of Tennessee's prototypical facilities is 1336 inmates.

- Benchmark studies in other states

We also reviewed cost studies from other states. The most important of these have been recent attempts to set cost benchmarks for targeted savings from privatization. The way this works is that states either estimate what the public costs would be of operating a particular new facility, or they identify their current costs of operating similar prisons within their system. Through a Request for Proposals (RFP), private companies are asked to respond with proposals that would result in a minimum cost-savings percentage (e.g., seven to ten percent), compared to the benchmark.

If the benchmarks are accurately and appropriately estimated, and the state receives responsive bids, then the compensation provided for in the contracts, compared to the benchmark, should indicate an amount of savings to be expected from privatization.

- Why this study does not report on the recent experiences of states using benchmarks

Two years ago the LBC gained experience in estimating the costs of prison operations. In its report on *Department of Corrections Capacity Planning and Implementation* (January 27, 1994), the LBC identified facility operating costs, by security level, in order to determine if some of the most inefficient prison facilities should be replaced. The findings from the report led to legislative approval of several capital projects intended to achieve operational savings.

Based on our experience, and knowing the care that must go into establishing benchmarks, we would be reluctant to accept projected savings based on benchmarks at face value. The time frame for the present study did not allow for the extent of review that would enable us to say whether recent benchmarking efforts in other states are likely to

result in savings.

## **PART 4: RESULTS OF LOUISIANA AND TENNESSEE CASE STUDIES**

This part of the feasibility study uses the case studies to answer two of the questions posed in the project scope and objectives:

1. Have other states and jurisdictions achieved cost savings through privatization without harm to the public good?
2. If savings have occurred, how have the private companies accomplished this?

In answer to the first question, we reviewed cost information and studies provided by the states and the private companies. For Tennessee, we reviewed and made adjustments to a cost comparison conducted by the state's Fiscal Review Committee for Fiscal Year 1993-1994. For Louisiana, we used state and company data for Fiscal Year 1995-1996. The results of our analyses were submitted to the states and the private companies for technical review and comment in November 1995. Details concerning the comparative costs and our methodology are included in Appendix 3. Summary comments about the results are included in this section.

The first question also contains a qualitative element related to the "public good." We endeavored to address this element by identifying any public safety differences between the public and private facilities (e.g., record of escapes and disturbances) and through examination of any other information that might suggest that there were substantive differences in prison operations and programs.

The second question concerns how private companies operate, and focuses on the issue of what the state might actually be purchasing in the event that it pursues privatization.

### **CASE STUDY COST COMPARISONS**

- Has Louisiana achieved cost savings through privatization?

Until recently, yes. Based on information for 1995-96, the state can expect to break even on its two contracts when all facilities are operating at full capacity. The CCA prison is costing about 1 percent more than the state facility, and the Wackenhut prison is costing about 1 percent less. Historical data suggest, however, that both private facilities previously cost the state less than the state-run

prison on a per diem basis. For example, in Fiscal Year 1993-94, the two privately run facilities were costing the state approximately 4 percent less, even though they were housing fewer inmates.

- Why costs have converged

One explanation for the convergence of costs over time may be the effect of competition. This is an argument made by the private companies that was also mentioned by some state correctional officials. Lean budget years may also have made a difference. For some years the inflationary increases built into the private contracts has been greater than the increases in the corrections budget. So while the per diem cost for the private prisons has inflated, it has not inflated for the public facility.

- Has Tennessee achieved cost savings through privatization?

The best answer is probably yes. During the study period (Fiscal Year 1993-94), the effective per diem for the private facility was less than the weighted average per diem for the two state-run facilities (\$33.63 versus \$34.29), but actually higher than one state facility and lower than another.

This information is somewhat misleading, however, because during the study period, in which additional capacity was being added at all three facilities, both state-run facilities had higher average daily populations (ADPs) than the private facility. Since the marginal cost to the state of placing inmates in its own facilities was less than the per diem for the private facility, this resulted in a lower effective per diem at the state facilities.

- Estimate of longer-term outlook

In order to understand how costs might compare over the long-term, when ADPs would more closely match, the state's Fiscal Review Committee estimated what the costs would be if the ADPs were equalized. Taking the same approach, but with the adjustments explained in Appendix 3, we estimate an average per diem for the state-run facilities of \$35.55 (Fiscal Year 1993-94) when ADPs are equalized. With the private per diem at \$33.63, this represents a potential savings of approximately 5.5 percent. This may be viewed as the expected savings that will be achieved when all the facilities are operating at full capacity.

- The effects of competition

Tennessee officials were of the opinion that competition from the private facility had the effect of keeping costs down at the public facilities. As evidence of this, we observed during our site visits that the private facility's estimate of additional staff needed for a proposed capacity expansion of 170 beds was less than half of the estimate made by one of the state-run facilities. We were told that this difference was causing closer scrutiny of the state prison's request than might otherwise have occurred.

### **CASE STUDY QUALITATIVE COMPARISONS**

- Are the private prisons as safe and secure as the public prisons?

Yes, based on data at hand. We reviewed a year's worth of data from our study prisons regarding rates of escape, major disturbances, and inmate infractions. We also conducted site visits to observe prison environment and operations. A summary of our observations follows. (See Appendix 4 for more detailed information on both interstate and intrastate comparisons of inmate demographics and behavior).

- Escapes

There were three escapes from one of the privately run prisons in Louisiana, and no escapes from either the other privately run or state run prisons. In Tennessee there was a total of three escapes from secure supervision in the two public prisons, and no escapes from the private prison. There was also a total of nine escapes from the two state run minimum security units, and only one escape from the privately run minimum security unit.

- Major disturbances

In Louisiana, each of the private prisons reported one major disturbance, while the public prison reported four. In Tennessee, one of the public prisons reported sixteen major disturbances, while the remaining public and private prisons each reported seven. Some of the difference in numbers may be due to reporting differences, as evidenced in the comparative evaluation completed in Tennessee in January 1995. Although these numbers portray a large amount of major disturbances, none of the prisons experienced disturbances that required the use of outside assistance.

– Infractions

Inmate infractions are an important measure of safety and security. However, rates are dependent upon individual staff reports. In Louisiana, the Wackenhut prison issued 3.05 infractions per inmate, the CCA prison issued 2.8 per inmate, and the state prison issued 4.65 per inmate. In Tennessee, the infraction rates were more similar, with the private prison having issued slightly more infractions than the public prisons. During the study period of the Tennessee comparative evaluation, there were dramatically more injuries to staff and inmates reported at the privately run facility. However, the report indicated reporting differences, and weighted each of the Tennessee prisons the same in the areas of safety and security.

All of the prisons we visited were clean and appeared to be orderly.

- Do the private prisons offer the same quantity and quality of inmate programs as the public prisons?

Generally, yes. The private prisons in our study had similar inmate work requirements to the public prisons. Louisiana private and public prisons have a 100 percent inmate work program. In Tennessee, the private prison has an average of 84 percent of inmates either working or attending full time education programs.

– Rehabilitation

In Louisiana, 26 percent of the inmates at the state prison were enrolled in education programs, while only 20 and 16 percent were enrolled at each of the private prisons. Although the exact numbers were not provided, it was reported that programs are filled to capacity at each of the three prisons. Capacity and enrollment information was not available for other aspects of rehabilitation in Louisiana, but the emphasis in this state is clearly on work skill development and education in addition to a full-time work program.

In Tennessee, 23 percent of the inmates in the private prison participated in education programming, while 20 and 35 percent participated in education in the public prisons. A qualitative study conducted by Tennessee indicates similar programming availability and quality at each of the prisons.



- Limitation of comparisons

In order to make a complete comparison, further data would need to be gathered including the ratio of program completions to enrollments, length of programs and outcome indicators.

- Do the inmates from the private prisons have a higher or lower rate of recidivism than those from the public prisons?

This question cannot be answered within the context of this study. There have been no studies to address this question directly, or that measure recidivism from prison to prison. Although overall state recidivism rates appear in various publications, it is well known that most states define recidivism differently. For instance, the definition of recidivism may include re-arrest, technical violations or new convictions, or may only include actual returns to prison. States also measure recidivism over varying lengths of time, ranging from one year to five years.

- Problems with defining and measuring recidivism

The major links to recidivism appear to be in the areas of age and criminal history. Young offenders with an extensive arrest record for property crimes are more likely to re-offend than older, first-time offenders. A further problem with trying to assign a rate of recidivism to a particular prison is the fact that an inmate rarely spends his/her entire incarceration at only one prison. Given these problems, using available data about recidivism would not be valid.

### **EXAMPLES OF HOW THE COMPANIES HAVE REDUCED COSTS**

In Louisiana and Tennessee, both states designed, built and own their prototypical facilities, and pay all debt service. Therefore, these states do not provide an opportunity to evaluate the savings potential of privatization on capital projects (see discussion of capital costs in Part 5, below).

- What areas of the operational budget are likely candidates for cost savings?

Personnel and supplies comprise approximately 85 to 90 percent of operating costs in the state-run facilities we evaluated. These are the two areas where opportunities for savings are substantial. Personnel (including contracted professional services) accounts for about 70 percent of operating costs,

while supplies account for 15 to 20 percent. The remaining areas of the budget, including such things as utilities and insurance, are not likely to vary significantly due to whether the state or a private company is operating a facility.

- Do the private companies save on supplies?

From all accounts, the private companies do save on supplies, but we do not have information that would permit us to estimate a percentage.

State and company officials in both states agreed that the private companies save money by not having to follow the state procurement rules. They can buy supplies when needed, at the most competitive price, and keep a smaller inventory.

This cost advantage to the private companies is offset by the fact that in both states the private facilities pay sales taxes that the state facilities are exempt from paying. Although this adds to the cost of the contracts, the states recoup some of this cost because the sales taxes are returned to the states as revenues.

- Do the private companies save on personnel costs?

Yes. For the three private facilities included in our case studies, we estimate that the number of staff ranged from 88 to 97 percent of state facilities staffing, and that the average salaries for those personnel range from 69 to 93 percent of state salaries.<sup>2</sup>

- Example of magnitude of possible savings

The magnitude of the potential for savings in the area of personnel can be shown in the following example. If a private facility can operate with 90 percent of state staffing, and at 85 percent of average state salaries, this translates into a personnel savings of 24 percent. Since personnel costs comprise about 70 percent of all operating costs, this results in a savings to the total budget of approximately 16

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<sup>2</sup> The lower end of the salary range was based on comparing the mid-points of the salary ranges for corrections officers at the Avoyelles (state-run) and Allen (Wackenhut) facilities in Louisiana. Corrections officers comprise more than two-thirds of all staff at both facilities. The use of the mid-point for the private facility is a conservative approach (i.e., does not over-estimate) insofar as the private facility has a higher turnover rate than the state-run facility.

percent.

- Are the savings passed on to the states?  
Some of the savings are passed on to the state to the extent that the contracted per diems for the private facilities are less than the states' per diems. The example above shows, however, that personnel can be a major source of profit for the private companies.
- How do the private facilities manage operations with fewer staff?  
From our site visits and reviews of staffing patterns, two general explanations emerged.
  1. There is a greater tendency for staff to have responsibilities in more than one area, and for management staff to have responsibilities in several areas.
  2. More flexibility in the use of staff, including corrections officers, results in fewer staff (and/or less overtime) needed to cover mandatory posts.
- Do the private companies also save on employee benefits?  
Not necessarily. In Louisiana the state spends less on benefits for current employees than either of the private companies, primarily because state government does not participate in the federal social security system. The state does have a retirement system, but its employer contribution to the retirement system is less, as a percentage, than what the private companies pay for social security contributions.<sup>3</sup> Of the two private companies, CCA additionally makes a company stock contribution and has a stock purchase matching plan that can equal an employer contribution of up to 6 percent of salary per year.<sup>4</sup> In Louisiana, Wackenhut makes no employer contribution to retirement, other than social security.

We did not receive full benefit information for the privately run facility in Tennessee. In the area of retirement, the state contributes more than the

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<sup>3</sup> The amount that the state contributes that is needed to cover defined benefits for current employees is 5.357 percent, which compares to the social security employer contribution of 6.2 percent.

<sup>4</sup> During the first year of employment, CCA contributes 2 percent of salary, and 1 percent thereafter. It will match employee contributions up to 4 percent of salary.

maximum of 6 percent paid by CCA. It would be difficult to say, however, which retirement plan ultimately provides the most financial benefits to its members.

## **PART 5: COST SAVINGS POTENTIAL OF PRIVATIZING CORRECTIONS INSTITUTIONS AND FACILITIES**

Although the two case studies indicate that savings from privatization are possible, they do not provide good estimates of the range of potential savings in Washington for two reasons:

- The costs to the states to operate prisons in Louisiana and Tennessee are less than in Washington, even after adjusting for cost of living differences. This is true regardless of whether the prison is state-run or privately run.

When private companies indicate they could save Washington State large percentages in prison operating costs, it is likely they are referring, at least in part, to savings that would come from adopting an approach to operations more like one of these other states. Privatization would be one means of changing operations to realize savings, and might still have the potential for savings that are more directly related to privately run operations per se (e.g., through efficiencies in the procurement of supplies).

- Both states designed and built their prototype facilities, which means that the private companies were not in a position to achieve potential savings through lower development costs had they built the facilities, or through differences in design that might lower operating costs.

In order to provide decision-makers with more information about potential cost savings, we conducted operational cost comparisons between similar facilities in Washington, Louisiana, and Tennessee, and a capital cost comparison of facilities in Washington and Florida.

Florida offers a good example of a large, new, multi-custody facility that is designed, is being built, and will be operated, by a private company (Wackenhut).

### **INTERSTATE OPERATIONAL COST COMPARISON**

- Difficulties in making comparisons

From state to state, budgeting practices are different enough to make interstate comparisons of prison costs difficult. For example, in Washington, prisoners' medical costs are included in DOC's budget, but are not allocated proportionately to all the facilities that utilize the medical services. In Louisiana, chronic and major medical service costs are borne by charity hospitals. From our discussions

with Louisiana officials, it apparently would not be possible to allocate these costs to the state prisons.

- Study approach focuses on areas that can be compared

The approach we took in making the interstate comparisons was to focus on those areas of facility operations for which we were able to collect cost data and make direct comparisons. For Washington and the two other states, the per diem amounts shown in Exhibit 1 (below) represent approximately 85 percent of direct facility per diem costs excluding debt service. Indirect costs, such as headquarters overhead and general government overhead, are not included in direct facility costs and therefore are not reflected in these numbers.

- Choice of Airway Heights as Washington's facility

For the Washington facility, we chose the Airway Heights Corrections Center in Spokane. Among the two newest multi-custody prisons in Washington (McNeil Island is the other one), Airway Heights has the most efficient housing unit design, and it is the prototype for the new 1936 bed facility planned for Grays Harbor.

We used Airway's costs at a capacity of 1424 beds, and made adjustments to the budgets of the Louisiana and Tennessee facilities to show their costs at 1424 capacities. We also adjusted Airway Heights' budget to show the effects of operating all 256 bed housing units as medium security. Otherwise, Washington's costs would have reflected a much higher proportion of minimum security housing.

- Conservative approach in comparing per diems

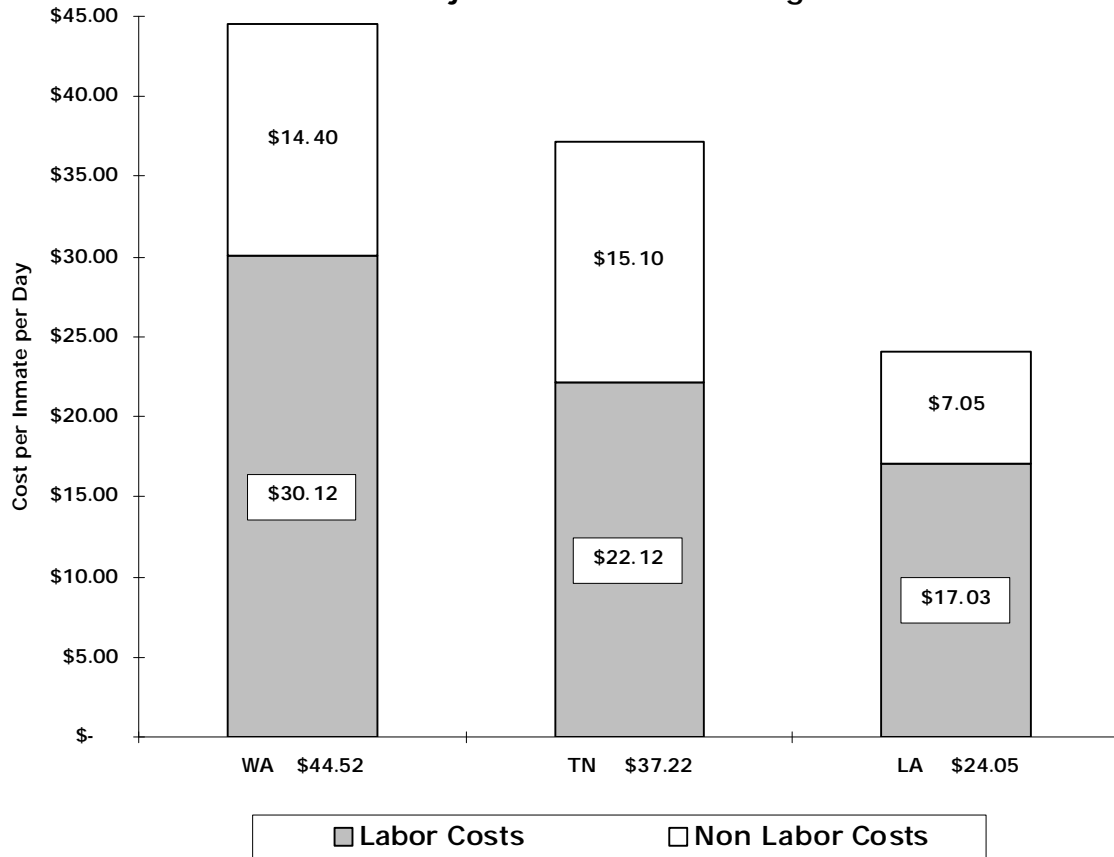
In several instances when we had to make judgment calls about assumptions to use in making adjustments, we chose the assumptions that favored Washington. We did this in order to keep the estimates of cost differences conservative. Thus the spread between Washington's per diem costs and those of the other states may be somewhat understated.<sup>5</sup>

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<sup>5</sup> The major assumptions benefiting Washington were: (1) the inclusion of Seattle in our cost-of-living index increased differences in cost of living, because the cost of living in Seattle is significantly higher than the average for the rest of the state; (2) in adjusting capacities upward and downward to create budgets for 1424 bed facilities in Louisiana and Tennessee, we

## Exhibit 1

Comparable Per Diem Costs for a 1424 Bed Prison,  
FY1996 Dollars Adjusted for Cost of Living Differences



Source: LBC data, 1995

Excludes medical costs, overhead and debt service.

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used worst-case scenarios for cost impacts; and (3) we assumed that staffing at Airway Heights, that is beyond what is required for 1424 beds, would be absorbed with the 512 bed expansion (bringing the facility to 1936 beds), and therefore we did not assume that the current additional staffing would be permanent.

- What are the elements of Washington's higher labor costs?

In comparison to Louisiana's facility, the difference in Washington's cost is due to more FTEs, higher salaries, higher benefits, and employees with more longevity.

In comparison to Tennessee, the difference in Washington's cost is due mainly to higher salaries, higher benefits, and employees with more longevity.

- What are the differences in FTE totals?

The Washington facility has 389 FTEs compared to 343 for Louisiana and 387 for Tennessee. However, these are not perfect comparisons because some contracted personnel might not be counted as FTEs. One example where contracting skews the comparison is in the case of educational programs. Washington shows fewer staff for education (5 FTEs) than Tennessee (22 FTEs) because of the use of contractors.

- What areas of operations show major staffing differences?

Both Louisiana and Tennessee have more staff assigned to security than Washington. This is generally due to a more efficient housing unit design and security staffing plan at Airway Heights, and in the case of Louisiana, to the fact that Louisiana has more guard towers. Both Louisiana and Tennessee have more work assignments for inmates, which requires additional security posts.

Major areas where Washington has more staff are administration and maintenance (higher than both Louisiana and Tennessee), and Classification and Food Service (higher than Louisiana).

More details on cost differences, including the differences in non labor costs, are included in Appendix 5.

- Are the inmates in the three-state examples similar enough to allow for a fair comparison?

Yes. We looked at demographics, classification and behavior and did not find any documented differences that would effect costs of operations. In other words, if the types of inmates from either of the two comparison state facilities were housed at the Washington facility, no change in operations would be required. Likewise, the current operations at the



other states' facilities could accommodate Washington's inmates. See Appendix 4 for more information on both interstate and intrastate comparisons of inmate demographics and behavior.

### **INTERSTATE CAPITAL COST COMPARISON**

- Difficulties in making comparisons  
Capital cost comparisons from facility to facility and state to state are difficult to develop. Contributing to the difficulty are: unique site conditions; differences in climate and in labor and materials prices; lack of similarity of space programming and inmate mix; lack of uniformity in cost reporting; and differences in timing of capital expenditures. Nevertheless, it is possible to make general comparisons and identify elements contributing to major cost differences.
- Study approach focuses on areas that can be compared  
The approach we took in making the interstate comparison was to focus on the major elements contributing to capital cost: Amounts and types of space, unit construction costs, and ancillary construction costs such as design and administration. In developing the comparisons, we eliminated those items unique to the specific project including land, site development, taxes, and unique local costs (e.g., Washington State allocations for art).
- Choice of Grays Harbor as Washington's facility  
For the Washington facility, we chose the Grays Harbor Correctional Center in Aberdeen. Site infrastructure and development work for this 1936 bed facility is underway, and facility design is in the preliminary schematic phase. Site development work can be viewed as a separate project which can be completed independent of the method for procuring the construction of prison facilities.
- Choice of South Bay, Florida facility to be constructed by Wackenhut Corporation  
For the privatized facility, we chose the 1318 bed South Bay Correctional Facility in Florida. Currently under development, this project provides sufficient similarities in size and inmate mix to allow for broad-level comparisons (i.e., size, cost per bed, unit construction costs). It also offers a financing and ownership model familiar to the State of Washington (i.e., Certificates of Participation with ultimate ownership by the state).

Costs for each facility were adjusted for comparative purposes. As examples, land and site-related costs, taxes, and unique fees were excluded. For the Florida facility, costs were increased by 45 percent to reflect estimated regional labor and material costs differences, by 7 percent to reflect higher costs associated with later construction of the Grays Harbor Facility, and by another 5 percent to provide an allowance for state oversight of the privatized construction. Additionally, reductions were made to the projected cost and size of the Grays Harbor facility to make it comparable to the Florida facility (budget reductions of \$29 million or 20 percent, and space reductions of 154,000 gross square feet or 18 percent, to account for differences in inmate security levels and the fact that Florida space does not include Correctional Industries). More detailed descriptions of all the adjustments made in the comparison are included in Appendix 6.

- How do the adjusted costs of the facilities compare. . .

. . .and what explains the difference?

- Different operating concepts explain significant differences in space

Grays Harbor's projected cost per bed, at \$60,400 after adjustments, is 78 percent higher than the adjusted cost of \$33,900 for the private facility. The two major explanatory factors for this difference are that the cost per square foot for Grays Harbor is approximately 17 percent higher, and the square footage per inmate (or per bed) is 53 percent higher.

Differences in space are largely explained by different operating and programming concepts. As examples:

- Grays Harbor assumes single cells for close security and segregation, whereas the private facility double-bunks these cells.
- Grays Harbor minimum security beds have relatively high per bed space allocations reflecting the incorporation of service and program space in the housing unit, whereas in the private facility program and service space are centralized.
- Other examples of differences are in administra-

tion, physical plant (including warehousing), and dining areas (Florida feeds inmates in housing areas; Grays Harbor provides inmate dining spaces).

- Differences in unit costs

Unit construction costs, as adjusted, include actual construction costs as well as project management, design, permits and fees, and equipment. We did not evaluate the separate components of these costs. We did note that these unit cost differences were less than the developed total construction cost differences between state and privately developed state office building projects reviewed in the LBC study of leasing versus ownership costs.<sup>6</sup>
- Did the approach taken by the state of Florida contribute to the relatively low cost of the private facility?

Most likely, yes. Florida identified key expectations for the facility but did not mandate specifically how the bidders should meet them. For instance, the state identified the mix of inmates to be housed, specifying the ratio of cells to dormitory beds. The state also required that proposers meet all applicable facility and programming standards (e.g., ACA accreditation, building codes, energy analysis), provide minimum program availability (e.g., education) and services (e.g., medical and dental). The state required specification of facility layout, a staffing and operating plan, building finishes and materials, and detailed equipment lists.

Wackenhut’s operating and capital cost bid constituted 25 percent of overall scoring. Florida officials noted that Wackenhut had the highest cost proposal among bidders, but met the criterion for a combined capital and operating cost that was at least 7 percent below the calculated benchmark.
- Is the difference in cost between the Washington and Florida facilities explained by privatization?

Not entirely. The private firm’s operating philosophy and plan, as reflected in the facility design, contributed to the lower costs. However, there is nothing prohibiting a state government from adopting a similar plan. Privatization is a means by which to implement a different concept that can

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<sup>6</sup> LBC Performance Audit: *Capital Planning and Budgeting: Study of Leasing Versus Ownership Costs* December 14, 1995.

result in lower costs, but it is not the only means.

The substantial difference in unit construction costs could be attributable to a private model that strongly focuses on controlling the total costs of ownership, operating and capital.

- How important are capital costs in the total cost of owning and operating a prison?

Our review of the Grays Harbor project indicates that capital costs, after the effects of financing, constitute approximately 18.5 percent of life-cycle costs. This does not include the costs of major repairs and replacements. A conservative estimate of these costs would raise the capital cost percentage to at least 20 percent.

An analysis conducted for the Department of Corrections calculated that the initial cost of the proposed Grays Harbor facility constituted approximately 12.7 percent of total costs. The 12.7 percent calculation underestimated the capital costs percentage because operating costs were overstated and miscalculated in the total cost model.

- Should capital and operating costs be combined in considering the cost savings potential of privatization?

For new facilities, yes. In the Florida example, bidders had to meet a 7 percent cost reduction target that was based on a calculation of what the state's total ownership costs would be. Theoretically, a private company might propose to build a facility that would have capital costs higher than the state's capital costs in order to achieve operational efficiencies through design innovations. These operational savings could outweigh the capital costs and result in overall savings.

For the Florida approach to work well, the full costs of state ownership on an annualized basis need to be accurately estimated and compared to bids that are estimated the same way. Appendix 7 contains an explanation and an example of an approach developed by the capital consultant for this study. It is the approach that we would suggest for Washington State in the event that the state would issue RFPs for design, construction and operation of a new prison.

## **GENERAL CONCLUSION**

- Would privatization of a prison or prisons result in cost savings to Washington?

Not necessarily. Much would depend on the care that was taken in estimating the state's costs, and in designing an RFP, choosing a contractor, and executing and monitoring the contract.

Based on the foregoing analysis, it appears that the greatest potential for savings for Washington State would not come from privatization per se, but from changes in operations (and related facility planning) that can be accomplished through privatization or through changes in state policy and practices.

Savings that would be directly related to privatization could come from two sources:

- The ability of a private company to operate outside of state rules and procedures, collective bargaining agreements and the employee compensation system; and
- From competition between private and public facilities within the same prison system.

The ability of a private company to operate a prison differently from a public facility would depend on the degree of flexibility allowed to the private firm under the contract. Ultimately, even if a private facility can operate for less, the state would not necessarily capture any of these savings for itself unless it received responsive bids with per diem costs lower than its own.

## **PART 6: BEST PRACTICES FOR REQUESTS FOR PROPOSALS AND CONTRACTS**

With assistance from the Department of Corrections and the Attorney General, the LBC was asked to evaluate best practices and to develop prototypes for Requests for Proposals (RFPs) and contracts for the privatization of prisons.

The LBC retained the services of a consultant who has extensive legal expertise in these areas. Since it is unknown what, if any, scenario the state might pursue in the area of prison privatization, we asked the consultant to provide comprehensive lists of elements to be addressed in RFPs and contracts. From these lists, the consultant identified the discretionary and essential elements, and offered commentary and analysis of the elements based on best practices, as appropriate.

It was our intent that the consultant's work would provide guidelines and a framework for developing specific RFPs and contracts. Based on the work that has already been completed, and given the legal and contractual expertise that currently exists within state government, we feel that most, if not all, of any additional work needed for actual RFPs and contracts could be accomplished by in-house resources.

We were assisted in this part of our study by a panel that reviewed and commented upon the consultant's draft report. The review panel consisted of staff from the LBC, the Department of Corrections, the AG, the Senate Ways and Means Committee, and the House Office of Program Research. The consultant's final report is included in Appendix 8 (RFPs) and Appendix 9 (contracts).

## **PART 7: GENERAL GUIDELINES**

Our case studies of Louisiana and Tennessee suggest that these states have had positive experiences both in terms of quality of service and cost. However, there are other examples that could be cited of how privatization of correctional facilities has been a failure. Recently, an inmate riot and takeover of a privately run detention center in New Jersey has caused some to conclude that privatization does not work.<sup>7</sup> Our view is that other jurisdictions' experiences with privatization, either positive or negative, are not predictive of what Washington's experience would be. The outcome in this state would depend in large part on the care taken in designing an RFP, choosing a contractor, and in executing and monitoring the contract.

Although this report makes no recommendation on the policy issue of whether to privatize adult correctional facilities, there are numerous issues and obstacles related to privatization that are addressed in the technical appendices. These technical appendices (particularly those concerning legal issues, RFPs and contracts, and estimating annual ownership costs) are designed to be used as guidelines to be followed in the event that privatization is pursued. Similarly, there are five general guidelines that could be followed for minimizing the risk to the state, while promoting cost savings without sacrificing quality. They are:

1. Requests for proposals should set a minimum cost-saving target that must be met for proposals to be considered responsive. The amount of the target and the methodology for establishing it should be approved by the legislature.
2. Requests for proposals should set standards for programs, operations, and/or facility design and construction defined as *what* should be provided; and should allow respondents to be flexible and creative in *how* to meet those standards. The standards should be subject to approval by the legislature.
3. The state should develop a contingency plan for the smooth transition of operations from one private vendor to another, or to the state, in the event of contract expiration or termination.
4. The state should have an on-site monitor at the privately run facility to ensure that the state's responsibilities for inmates are being fulfilled, and that the contractor is in compliance with the contract.

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<sup>7</sup> This was the conclusion of the Washington Public Employees Association in letter dated July 12, 1995 entitled "Prison Privatization Doesn't Work -- The Riot at Esmor Correctional Services INS Center, Elizabeth, NJ, June 18, 1995."

5. The state should design and set criteria for an evaluation of the costs and quality of programs and operations at the privately run facility in comparison to a similar state facility or to established benchmarks. This evaluation should take place after the private facility has had at least one year of operating at full capacity, and should be conducted by an independent party designated by the legislature.



**APPENDIX 1**  
**LEGAL ANALYSIS**

ATTORNEY GENERAL OF WASHINGTON

**PRISON PRIVATIZATION  
LEGAL ANALYSIS**

**DECEMBER 15, 1995**

TABLE OF CONTENTS

I.	CONTRACTING OUT .....	2
A.	In general .....	2
II.	COLLECTIVE BARGAINING AGREEMENT .....	5
III.	EXISTING STATUTORY REQUIREMENTS .....	8
A.	May the state contract for services so as to avoid, or as result avoid, some of the statutory requirements that would be applicable if the state were to design, build, or operate a facility .....	9
B.	If a private contractor is to construct a facility as part of its contract, does it have to pay prevailing wages .....	12
IV.	OTHER ISSUES .....	14
A.	Bankruptcy .....	14
B.	Debt Limitation .....	15
C.	Condemnation .....	16
D.	Environmental Review .....	17
E.	Hazardous Waste Liability .....	17
F.	Public Records .....	18
G.	State Employees .....	22
H.	Tax Issues .....	24
V.	FOLLOW-UP QUESTIONS TO TALIS ABOLINS' MEMORANDUM OF OCTOBER 5 .....	24
A.	Constitutional Delegation Doctrine .....	24
B.	Use of Force .....	30
C.	State Liability/Qualified Immunity .....	32



**M E M O R A N D U M**

March 12, 1996 December 15, 1995

TO: BOB THOMAS, Principal Management Auditor  
Supervisor, LBC  
VALERIE WHITENER, Management Auditor, LBC

FROM: RICHARD A. HEATH  
Senior Assistant Attorney General

SUBJECT: Privatization Issues Relative To Prison  
Privatization Scenario

In your October 27, 1995, memorandum to me you set forth three scenarios for possible legislative consideration of privatization of a prison facility in Washington. In all three scenarios, the state would own the facility, including the underlying real estate, and would fund the construction of the facility directly with bond funds or indirectly through certificates of participation. The other scenarios are:

- 1) The state would contract with a private entity to take over operation of an existing Washington State facility;
- 2) The state would contract with a private entity to design, construct and operate a new facility on land acquired by the state;
- 3) The state would contract with a private entity to operate a new facility designed and constructed by the state.

You have asked that we respond to certain legal issues arising from these scenarios, and that the responses be in the following format, where applicable: 1) state the basic legal issue; 2) identify its relevance to general privatization issues; 3) identify its relevance to each of the three scenarios; 4) identify the constitutional, statutory, or collective bargaining restraint; and 5) provide the statutory or collective bargaining language that would be required to overcome the constraint.

I reviewed the questions you asked and then requested assistant attorneys general with particular expertise in the subject matters to respond. Except for the response to the tax issues which is attached to this memo, I incorporated their responses below. In addition to me, the persons who contributed to this

project are Talis Abolins of our Corrections Division, Deborah Cade of our Transportation and Public Construction Division, Lee Johnson of our Revenue Division, Zachary Mosner of our Bankruptcy and Collections Unit, Mitch Sachs of our Labor and Personnel Division, and Mike Lynch of our Torts Division. While the contents of this memo represent the considered opinions of the respective authors, they should not be considered formal opinions of the office of the Attorney General.

What follows is a discussion of the issues. It is not always exactly in the format you requested because some of the answers require a different type of analysis. Also, even though you have given us general guidance about the scenarios you are reviewing, each could also include a variety of subscenarios. Accordingly, our answers generally fit the broader scenarios. Should the legislature choose to privatize a prison(s), we will be in a better position to provide more specific advice based upon the plan chosen.

## ISSUES

### CONTRACTING OUT .

In general .

The general rule in the state of Washington is that in the absence of legislative authority to do so a state agency may not contract with an outside company for work traditionally performed by state employees. This rule is based upon a series of Washington appellate court decisions, most of which involved an interpretation of the higher education civil service law. Even though that law has since been repealed, the case law interpreting it would still apply because the current state civil service law is nearly identical in terms of its policy and pertinent language.

The first case was Cunningham v. Community College Dist. No. 3, 79 Wn.2d 793, 489 P.2d 891 (1971), in which the Supreme Court held that civil service food workers could not be laid off in order to contract food service to a private company. The next case in the series was Washington Fed'n of State Employees v. Spokane Comm'ty College , 90 Wn.2d 698, 585 P.2d 474 (1978). In that case, the college entered into a contract with a private organization to perform custodial services at a new administration building

which had never been serviced by state employees. No existing employees were to be laid off or otherwise adversely affected in their employment by this contract. The college expected a cost savings over using civil service janitors as a result of the contract. The union objected on the grounds that custodial services historically had been provided by civil service employees. The Supreme Court agreed, holding that:

[A]s a matter of law, the college has no authority to enter into a contract for new services of a type which have regularly and historically been provided, and could continue to be provided, by civil service staff employees . . .

The court's analysis was based on the policy and language of the civil service law. It held that the procurement of services ordinarily and regularly provided by classified civil servants through independent contracts, although not specifically prohibited by the civil service law, directly contravenes its basic policy and purpose. Spokane Comm'ty College, 90 Wn.2d at 702-03.

In response to the Spokane Comm'ty College decision, the legislature enacted RCW 41.06.380 authorizing state agencies to purchase services by contract if (1) such services were regularly purchased pursuant to a valid contract prior to April 23, 1979; and (2) the contract does not have the effect of terminating classified employees or eliminating classified employee positions existing at the time of the execution or renewal of the contract. Thus, the legislature protected contracting out which was in place prior to the Spokane decision while leaving the decision in the Spokane case intact with respect to contracting out for new services.

The next case involved the layoff of state employee bakers as a result of a decision to buy bakery products from a private source. The court upheld the contract, concluding that the Spokane decision was limited to services and did not preclude an agency from laying off classified employees who had previously been used to produce products. Keaton v. Department of Social & Health Servs., 34 Wn. App.

353, 661 P. 2d 982 (1983). Subsequent cases have consistently followed the rationale of these three decisions.

The three scenarios you have described for privatizing prison facilities have a common theme. In each case, the State would contract with a private entity to either take over operation of an existing facility or to operate a new facility. In each scenario, the state would enter into a contract for services that have been traditionally and historically performed by classified DOC employees. In the absence of legislative authority to do so, such a contract would violate the existing civil service law as interpreted by the courts. These contracts would not be authorized by RCW 41.06.380 because DOC does not have a history of entering into contracts for these services prior to April 23, 1979.

Specific legislative authority will be necessary if the state wishes to operate a prison without using state civil service employees. Enacting a statute authorizing the state to contract out for operation of state facilities would be consistent with the holding in the Spokane decision. The court stated in that case that before an agency will be allowed to contract out for services which have been historically provided by civil service employees, it must be authorized by "clear legislative expression to that effect." Spokane, 90 Wn.2d at 704-05. In order to avoid arguments over whether the legislature intended to authorize contracting out, the safest way to provide such authority would be in the form of an explicit direction in the statute to contract out the services involved.

A recent decision of the Thurston County Superior Court is illustrative of the importance of clarity in drafting. In Washington Fed'n of State Employees v. Joint Center for Higher Education, State of Wash.,<sup>8</sup> the Joint Center for Higher Education's (JCHE) reliance on a general statute for authority to contract out for janitorial services was successfully challenged. The rationale used by the court in striking down the contract was that

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<sup>8</sup>Thurston County Cause No. 94-2-02862-3. This case is on appeal to the state Court of Appeals, Division II.



legislative exceptions to the prohibitions on contracting out will be narrowly construed to preserve the general rule. Initially, the statute in question in that case contained a provision stating, "The board shall contract for financial and personnel services." Six years later, the statute was amended authorizing the board to:

. . . contract services as deemed appropriate to carry out its functions. Such services shall include but not limited to facilities and project management, grants and contract development in monitoring, personnel services, and accounting. RCW 28B.25.050 (emphasis added).

WFSE brought a declaratory judgment action to enjoin JCHE from contracting out for janitorial services. It contended that the "including but not limited to" language of the amendment was not a blanket authorization to contract out, but instead, merely authorized contracting out in two additional professional employment areas--facilities and project management and grants and contract development monitoring. The court agreed, concluding that janitorial functions were not included in the authorization of contracting out because they were not management-type functions.

A question was raised about whether RCW 41.06.380 needs to be amended or repealed to accomplish contracting out. Repeal of RCW 41.06.380 is neither necessary nor appropriate if the legislature wishes to authorize a privatized prison and preserve contracting out that is currently in place. RCW 41.06.380 is not what prohibits contracting out, except as to a subcategory of contracts it would otherwise authorize. However, it does protect other state agencies from challenges to contracts which they currently have which meet the requirements of that statute. A recent Personnel Appeals Board (PAB) decision interpreting RCW 41.06.380 is illustrative. In Rinehart v. Department of Ecology and Dept. of General Admin., PAB No. V93-074 (1995) (decision currently on appeal to superior court), the PAB upheld the contracting for janitorial services at the new Department of Ecology

headquarters building because janitorial services for the Department of Ecology have been provided by contract since before April 23, 1979, and no civil service employees were laid off because of the contract. Therefore, if there is a desire to deal with RCW 41.06.380 and to preserve existing authorization for contracts, any amendment or replacement should be drafted in a way that would preserve that authority.

### **COLLECTIVE BARGAINING AGREEMENT .**

The enactment of a statute which authorizes contracting out would be consistent with the Spokane decision. However, doing so would not necessarily resolve all legal issues involved with the ability to contract out. In the case of a prison privatization, there could still be an issue of whether such a statute would constitute an unconstitutional impairment of the collective bargaining agreement which you identified in your memorandum.

The collective bargaining agreement (CBA) you identified contains the following contracting out language:

Management retains those rights based upon law or state rules or regulations to contract and subcontract services. Management will not, however, contract or subcontract services when such action would have the affect the terminating classified institution employees or employee positions within the bargaining unit existing at the time of the execution or renewal of the contract.

It is further agreed that management shall not contract or subcontract for services for new programs or expansion of existing programs which are to be accomplished under substantially the same conditions and in the same manner as those historically provided by classified employees within the institution.

There could be an issue of whether the statute is in conflict with this provision and, if so, whether the statute violates Art. 1, § 23 of the Washington Constitution or its federal counterpart, Art. 1, § 10 of the United States Constitution. Art. 1, § 23 of the

Washington Constitution provides: "No bill of attainder, ex post facto law, or law impairing the obligations of contracts shall ever be passed." The application of this provision to collective bargaining agreements entered into by state agencies under the authority of the civil service law is not yet settled.

The prohibition against impairment of contracts "is not an absolute one and is not to be read with literal exactness." Home Bldg. and Loan Assoc. v. Blaisdell, 290 U.S. 398, 428, 54 S. Ct. 231 (1934). But when a state interferes with its own contracts, those impairments "face more stringent examination under the contract clause than would laws regulating contractual relationships between private parties." Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 98 S. Ct. 2716 (1978). Accord, Caritas Services, Inc. v. Department of Social & Health Servs., 123 Wn.2d 391, 869 P.2d 28 (1994).

Washington courts use a three-part test to determine if there has been an impairment of a public contract: (1) does a contractual relationship exist, (2) does the legislation substantially impair the contractual relationship, and (3) if there is a substantial impairment, is it reasonable and necessary to serve a legitimate public purpose. Caritas, 123 Wn.2d at 403; Carlstrom v. State, 103 Wn.2d 391, 694 P.2d 1 (1985); Tyrpak v. Daniels, 124 Wn.2d 146, 874 P.2d 1374 (1994); Federation of Employees v. State, 127 Wn.2d 544 (1995).

In Federation of Employees v. State, an issue was whether a new law prohibiting certain payroll deductions for public employees impaired collective bargaining agreements which contained authorization for such deductions. The court held that the new law did unconstitutionally impair those collective bargaining agreements. However, the court expressly limited its holding to the current terms of the contracts. Any renewal of the contracts would be subject to the new statute.

A contract provision with language similar to Article 33 of the DOC CBA was held in a recent superior court case to be impaired by a legislative enactment. Johanson v. DSHS, Thurston County Cause No. 94-2-01459-2 (1995). However, as the court recognized in that case the finding of an impairment does not by itself mean that the impairment is unconstitutional. Once a court has found that a contract is impaired, it must next determine if

the impairment was substantial. The court in Johanson found that there was a substantial impairment of the contract, but that finding also does not end the inquiry. The impairment may nonetheless be constitutional if it was reasonable and necessary to achieve a legitimate public purpose. The court has not yet ruled on this last point. There is also the possibility of an appeal of the court's ruling once it is finalized.

As previously noted, in the Federation of Employees case, the court was careful to point out that its holding was limited to the current terms of the contracts that were in existence at the time of the adoption of the initiative, 127 Wn.2d at 566. Therefore, rather than risk a lawsuit and its attendant delays, the impairment of contract issue could be avoided by specifically stating in the statute that the service portion of the contract will not take effect until the term of the current CBA has expired.

If the legislature chooses to enact a statute authorizing DOC to contract out operation of a prison, it would be wise to draft the statute in such a way as to remove any discretion that DOC may have in making that decision. Otherwise, DOC may have difficulty removing the contracting out provision from the contract when it is re-negotiated. RCW 41.06.150(13) directs the Personnel Resources Board to adopt rules, consistent with the purposes of the civil service law, to provide procedures for:

agreements between agencies and certified exclusive bargaining representatives providing for grievance procedures and collective negotiations on all personnel matters over which the appointing authority of the appropriate bargaining unit of such agency may lawfully exercise discretion.

Within that grant of rulemaking authority, the Board adopted WAC 356-42-050(1) which states in relevant part:

(1) Written agreements may contain provisions covering all personnel matters over which the appointing authority of the appropriate bargaining unit of such agency may lawfully exercise discretion.

Since the statute and rules as currently written require an agency to bargain over personnel matters over which management can lawfully exercise discretion, the outcome of any attempt to remove the contracting out language from the contract would not be certain if DOC is given discretion on whether to contract out a prison. If discretion to contract out is given to DOC then it would probably be faced with an argument from the union that contracting out of a prison is a personnel matter that must be bargained. One way for the legislature to ensure that DOC would not be faced with this argument is to direct DOC to contract out.

### **EXISTING STATUTORY REQUIREMENTS .**

The answers to these questions are based on the statutory requirements that currently exist. In order to privatize a prison, it will be necessary to change existing statutes and to provide specific statutory authority for such a program. The following discussion attempts to identify existing statutes, constitutional provisions and other legal requirements which should be considered when developing a legislative proposal.

May the state contract for services so as to avoid, or as result avoid, some of the statutory requirements that would be applicable if the state were to design, build, or operate a facility ?

The general answer to this question is "no." In the absence of statutory authority to do so, a state agency cannot avoid statutory requirements imposed on it simply by contracting with a private entity to do the work in its place. This answer flows from the general rule that a state agency has only those powers expressly given it or which are necessarily implied. State ex. rel. PUD No. 1 v. Department of Public Service , 21 Wn.2d 201, 208-09 (1944). For example, if an agency has a duty to competitively bid purchases of materials to be used by it, it cannot avoid that duty by contracting with a private entity to purchase the materials on its behalf.

What statute(s) would need to be changed ?

The questions which you asked concern more than just competitive bidding for building construction. Therefore, this answer is broken into several parts.

**Public Works Statutes.** The applicable public works statutes include chapter 43.19 RCW (Department of General Administration authority to construct public buildings), chapter 39.04 RCW (general public works building law), chapter 60.28 RCW (retainage on public works contracts), chapter 39.08 RCW (bonding requirements), chapter 39.12 RCW (prevailing wages), chapter 39.19 RCW (OMWBE requirements), and chapter 39.80 RCW (contracts for architectural and engineering services).

**Competitive bidding for services.** Competitive bidding for services is controlled by two different statutory schemes depending on the type of services being procured. Purchased services are controlled by RCW 43.19.190 and RCW 43.19.1906 -1915. Personal services are governed by chapter 39.29 RCW. Both types of services are defined in RCW 39.29.006.

c. **Procurement of materials and supplies.** Procurement of materials and supplies is governed by RCW 43.19.190 - 1925.

d. **Procurement of computer equipment and services.** Procurement of computer hardware, software and services is generally subject to the provisions of Chapter 43.105 RCW.

e. **Employee Salaries and Benefits.** The salaries and benefits of most state employees are determined under the provisions of Chapters 41.05 and 41.06 RCW, and by the Public Employees Retirement System, Chapter 41.40 RCW. In the absence of legislative authority allowing the Department of Corrections to contract with a private entity for the operation of a prison, these laws would continue to apply to the employees of the prison since they would have to be state employees. See the discussion in answer to the questions you asked in I and II above. Under each of the three scenarios, as I understand them, the persons performing

the services would be employees of the contractor, not employees of the state. As such, the statutes applicable to state employee salary and benefits would not apply. To the extent any of the scenarios involve the use of state employees to perform any of the functions for the private prison, those employees would continue to receive the salaries and benefits that they receive under the current statutes. The issues arising from those questions are addressed in their answers.

What are the implications of the change, i.e., should the changes be broad or specific to one facility?

The answer to this question depends on whether the legislature wishes to make any new procedures applicable to other projects or facilities. It could choose to limit contracting out use to a specific project or broaden its scope. An example of how the legislature has dealt with similar issues in the past is the statute which allows certain exceptions to some of the general bidding laws, Chap. 39.10 RCW (alternative public works contracting procedures). This chapter, which expires on June 30, 1997, authorizes its alternative contracting procedures to be used by certain entities under certain conditions. The Department of General Administration in concert with the Department of Corrections has used this procedure for construction of several prisons. The WSDOT Public Private Initiatives legislation, chapter 47.46 RCW, is another example.

What specifically would the statute have to say in order that it would withstand legal challenge ?

Chapter 39.10 RCW, referenced above, is an example of how to draft language which deals with procedures different than those provided in the general statutes. It begins with a finding that states the legislature's intent to use a different process (RCW 39.10.010), defines the process and its elements, says who can use it and under what circumstances,

provides that the process can be used "notwithstanding any other provision of law" (RCW 39.10.050), and provides that other laws applicable to public works projects are applicable to the extent they are not inconsistent with the chapter (RCW 39.10.090). The last section mentioned is key. If the legislature wants to exempt the process from laws that would otherwise apply, the safest practice is to mention those laws in the enabling legislation. Otherwise, the inference will be that they still apply if not inconsistent. At the very least, it will require legal opinions and/or court decisions to sort out their applicability if the legislature is not specific. Repeal by implication is not favored by the courts. Also, the constitution, Article II, section 37 requires amendments to laws to be set forth in full whenever the law is changed.

The public-private initiatives legislation, chapter 47.46 RCW, was enacted for certain transportation projects. It did not specifically reference the applicability or lack thereof of the general transportation bidding statutes. Accordingly, a legal opinion had to be issued analyzing whether the general statutes apply. It was concluded that the specific initiatives legislation and the general bidding laws conflicted and that the specific law would control. There has been no court challenge to that advice. More specificity in the statute would have been preferable, and is what we would advise for any legislation addressing privatization.

If a private contractor is to construct a facility as part of its contract, does it have to pay prevailing wages?

Under the current statutory scheme, the contractor would be obligated to pay prevailing wages. RCW 39.12.020 requires that prevailing wages be paid to all laborers, workers, and mechanics upon "all public works and under all public building service maintenance contracts of the state. . . ." Whether prevailing wages are required to be paid depends upon whether the project in question is a "public work." The prevailing wage statute does not define



public work. However, RCW 39.04.010 does define public work. It states:

The term public work shall include all work, construction, alteration, repair, or improvement other than ordinary maintenance, executed at the cost of the state or of any municipality, or which is by law a lien or charge on any property therein.

This section further provides that "All public works, including maintenance when performed by contract shall comply with the provisions of RCW 39.12.020." Since Corrections and General Administration are state agencies, their construction contracts would ordinarily be subject to the requirement of paying prevailing wages.

The Attorney General's Office has considered whether other proposed public-private arrangements were "public works" for the purpose of paying prevailing wages. One opinion analyzed a scenario in which a public hospital district would construct public projects on public property under a ground lease and facility lease-back arrangement. The opinion concluded that this project would be a public work for purposes of requiring payment of prevailing wages. AGO 1988, No. 17, copy attached. The opinion writer stated that "it would be contrary to the policy of chapter 39.12 RCW if a state agency or municipal corporation could escape the prevailing wage requirements by so easy a device as a lease/lease-back arrangement."

Your memo states that "In all scenarios the state would own the facility, either directly through bond funding or indirectly through certificates of participation." Because of this, there is an even stronger argument for the application of the prevailing wage laws than in the public hospital scenario presented in the AGO.

In another opinion, the Attorney General's Office concluded that a public housing project was a public work where it was paid for with public funds or where it gave rise to a lien or charge, on the part of the contractor or others, against the property of

the housing authority. AGO 1983, No. 2, copy attached. The Washington Supreme Court adopted the rationale of this opinion in Drake v. Molvik & Olsen Elec., Inc., 107 Wn.2d 26, 726 P.2d 1238 (1986). In that case, the court held that a public housing project was "public work" for the purpose of prevailing wage laws, even though it was financed with federal money.

Other public-private statutes have specifically stated that compliance with prevailing wage laws is required. In the WSDOT Public Private Initiatives program, RCW 39.12 is specifically mentioned as a statute that developers participating in the program must comply with. RCW 47.46.030. Also, RCW 39.04.260 requires compliance with prevailing wage statutes for private building construction when 50% or more of the building is for lease or purchase by the state. Therefore, it appears that from a policy standpoint, the legislature has consistently required compliance with prevailing wage laws whenever it has developed a new method of constructing or acquiring public building.

If new legislation were silent on the subject of compliance with prevailing wage laws, it would be our opinion that under the possible scenarios described in your memo, compliance with those laws would be required. The issue would not be subject to interpretation if any new legislation stated clearly whether or not RCW 39.12 is applicable to the project.

## OTHER ISSUES .

### Bankruptcy .

Issue: What effect could bankruptcy laws have on the state's ability to continue operation of the prison if the private contractor declares bankruptcy or is forced into bankruptcy by creditors?

You have provided a copy of the opinion of the Tennessee Attorney General regarding the effect of bankruptcy laws on a privatized prison. Op. 85-286, November 27, 1985, at pp. 12-16. Our Attorney General Bankruptcy & Collection Unit (BCU) has reviewed that opinion and concurs generally in its

analysis. However, it has also identified some additional issues. I will not repeat the Tennessee analysis, but will instead generally discuss the issue and add the concerns raised by the BCU.

**General relevance of bankruptcy of the contractor .**

The issue is relevant to any privatization contract. However, the impact of the bankruptcy laws on the ability of the state to control an operation after bankruptcy would differ depending on the activity contracted. For example, the state would be more likely to maintain control over a function involving its police powers, such as a prison, than over a function that is strictly proprietary, such as computer services.

**Relevance to three scenarios.** Bankruptcy is provided by federal law as a means of extinguishing debt and paying creditors to the maximum extent possible. There are two types of bankruptcy that could affect a prison contractor. They are commonly referred to as Chapter 7 and Chapter 11.

Under Chapter 7 (Chapter 7 of Title 11 of the U. S. Code), the contractor's operation is shut down and its property is liquidated to satisfy the claims of creditors. In such a situation, title to the assets used to perform the contract would be a significant issue. If all equipment, etc. is owned by the state then it would be far less complicated to turn the prison over to another operator than it would be if the contractor owned all of the equipment.

Under Chapter 11 (Chapter 11 of Title 11 of the U. S. Code), the contractor's business would continue to operate under the supervision of the federal bankruptcy court. This, of course, could negatively impact the state's interests in operation of the prison, as it would have to deal with a bankruptcy trustee, the debtor in possession, and/or a creditor's committee.

There are provisions of the bankruptcy law which would protect the state since the contract concerns the exercise of a police power function. The best way for the state to

protect itself in either a Chapter 7 or a Chapter 11 bankruptcy, however, is through carefully crafted contract clauses. The BCU has suggested several clauses which should be in the contract to protect the state in the event of contractor insolvency. Those will be provided during the contract review which will be occurring soon.

Another issue to consider in the bankruptcy/default area concerns the scenario involving the issuance of certificates of participation to fund the construction of the facility. Under the scheme used for construction of the Ecology Building, certificates of participation were sold to investors and are paid from the monthly lease payments the Department pays to the trustee. If the payments are made to the trustee by the state under the prison scenario, there would not be an issue regarding title or right to continue using the facility should the contractor file bankruptcy. However, if the payments are made by the contractor from payments made to it by the state, there would be significant issues which would have to be dealt with in the contract in order to avoid problems caused by the contractor's bankruptcy.

#### Debt Limitation .

You asked whether there would be any constitutional debt limitation problems if a certificate of participation financing arrangement like that authorized in Department of Ecology v. State Finance Comm'n, 116 Wn. 2d 246 (1991) was employed for a privatized prison. The answer is no, if it is the same as the Ecology Building situation. If there are any significant differences, then the issue would have to be reexamined.

#### Condemnation .

As a constitutional matter, can the state's power of eminent domain be used to secure property for a contracted facility? Is such a privately operated facility a public use? (Article I, Section 16 of the Washington Constitution). If condemnation is constitutionally permissible, can the agency use its existing statutory authority to condemn property for

this facility, or is more specific authority needed? These questions would be prevented even if the State chooses to retain ownership of the property.

The first question is whether a privately-operated prison is a "public use," because the State can condemn private property only for a public use. However, the fact that the prison is being privately operated by a profit-making entity should not change the fact that a prison is a public use. One case addressing the issue of whether an acquisition was for a public use is In re Seattle, in which the Washington Supreme Court examined whether the City of Seattle could condemn property for part of the Westlake Mall. The City's argument that this was a public use was based upon its determination that the project was in the "public interest," even though part would be for public use (open space) and part for private retail use. The court held that the acquisition of property that would be leased for retail use was not a "public use." In re Seattle, 96 Wn.2d 616, 638 P.2d 549 (1981). However, unlike a shopping area the fact that the private entity will be operating the prison should not detract from its essential public use if there is a court challenge to exercise of the eminent domain authority.

General Administration's authority in RCW 43.82.010 and 43.82.030 to acquire property and to condemn property for use by state agencies appears to be broad enough to encompass condemnation for the privately operated prison. To avoid any challenge, however, the legislation authorizing the project could state that the Department of General Administration could use its condemnation authority for this project. The legislation creating WSDOT's Public Private Initiatives Program does this in RCW 47.46.030.

## Environmental Review .

Who is responsible for environmental review?

Under the State Environmental Policy Act (SEPA), Chapter 43.21C RCW, and the SEPA Rules, Chapter 197-11 WAC, a state agency that is the proponent of a project acts as the lead agency for that project. WAC 197-11-926. Where a project involves both the public agency and the private entity, then a determination must be made as to whether it is a public or private project for the purpose of determining the lead agency. Given that the prison project should be considered a public project (as it is regarding other issues such as condemnation authority and prevailing wage laws), the state agency should be the lead agency responsible for environmental review of the project. The Washington Supreme Court in Weyerhaeuser v. Pierce Cy., 124 Wn. 2d 26 (1994), held that operation of a landfill is a governmental function and, therefore, Pierce County could not avoid its SEPA requirements by contracting with a private entity to construct and operate a sanitary landfill. See also, Citizens Alliance to Protect Our Wetlands v. Auburn, 126 Wn. 2d 356, 364-66 (1995).

The SEPA Rules provide that an applicant, including a private party, may prepare the EIS. The lead agency, the state in the case of a private prison operation, still has responsibility for insuring that the EIS is prepared properly. WAC 197-11-420. Therefore, under SEPA, the contractor may prepare the EIS so long as the contractor and the state comply with the requirements of WAC 197-11-420.

## Hazardous Waste Liability .

Who is liable for the clean up of hazardous waste which may be on the property?

Both state and federal statutes define what classes of parties are liable for hazardous waste cleanup. CERCLA, 42 U.S.C § 9707; MTCA, RCW 70.105D.010 et seq. Generally, these parties include the current owners and operators of the property; former owners and operators who owned and/or operated the property at the time the contamination occurred; those who arranged for the disposal or treatment of hazardous substances at the site; and those who transported

hazardous substances to the site. Both the state agency and the contractor generally fall into the categories of those who may be liable. A construction contractor may be considered an "operator" based upon its construction activities at the site. Kaiser Aluminum Corp. v. Catellus Development Corp. , 976 F.2d 1338 (9th Cir. 1992).

Responsibility for the cost of cleanup of hazardous substances may be allocated among parties by contract, and these contracts are enforceable under both state and federal law. Car Wash Enterprises v. Kampanos , 74 Wn.App. 537, 874 P.2d 868 (1994); Purolator Products Corp. v. Allied-Signal, Inc. , 772 F.Supp. 124 (W.D. N.Y. 1991). Rather than wait for the issue to arise during construction or operation, the issue of allocation of this responsibility should be addressed in the contract. The only legislative issue here is that the agency should be given specific authority to enter into indemnification agreements with the contractor. WSDOT's Public Private Initiatives statute does not specifically address this; it states that "Agreements under this section ... may address state indemnification of the private entity for design and construction plans." However, the statute states generally that "The department may exercise any power possessed by it to facilitate the development, construction, ..." etc. RCW 47.46.040. WSDOT has general statutory authority to indemnify contractors in RCW 47.01.260(2).

If the agency is going to agree to take financial responsibility for cleanup of contamination found prior to or during construction, then the contractor should agree in that contract to accommodate any reasonable needs that the agency has for investigation, consideration of alternatives, and conduct of remedial action in such a way as to preserve its opportunities to recover cleanup costs from responsible parties. Also, the agency is going to have to consider whether it has funds to set aside for this possibility. An alternative is that the contractor assume responsibility for these costs, incorporate cleanup into construction where possible (which saves some costs), file its own cost recovery actions where possible, and include these costs as project costs that are recoverable.

Public Records .

How are the state's obligations under chap. 42.17 RCW, the public records law, affected when state functions are performed by a private contractor?

The Public Records Act, 42.17.010 et seq., defines "public record" as "any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristic." RCW 42.17.020(27). The state's obligations under the Public Records Act probably are not changed when the governmental function, in this case the operation of a prison, is performed by a private contractor. Any records that are "used" or "retained" by the agency, even if they were originally prepared by the contractor, would be public records and would be subject to disclosure unless covered by one of the specific exemptions in RCW 42.17.310.

Are the records of the private contractor which are in the possession of the state subject to public disclosure under chap. 42.17 RCW, and are the records of the state which are in the possession of the contractor subject to disclosure requests to the contractor?

The "records of the state" that are actually prepared by the state, even though in the possession of the contractor, would still be public records. The definition of public record covers those records that are "prepared, owned, used, or retained" by the state. They do not lose their character as public records just because they are held by a private entity. However, the contractor is probably not a party to whom a public records request may be made; only governmental agencies are governed by the act. Instead, the request should be made of the agency.

The WSDOT in its Public Private Initiatives program has had to address similar public records issues. The major issues confronted with regard to public records have been requests for copies of the developers' proposals immediately after they were submitted and before proposals had been evaluated and selected by WSDOT; requests for WSDOT's in-house evaluations of the proposals; and concerns by the developers about financial records that will have to



be made available to both WSDOT auditors and the State Auditor's Office. The concern regarding the proposals on the part of the developers was the possible release of confidential business and financial information and trade secrets. WSDOT's concern was protecting the integrity of the proposal evaluation and selection process. Regarding release of the technical evaluation reports prepared by WSDOT on the proposals, the developers were again concerned about confidential financial information and trade secrets; WSDOT was concerned about protecting its deliberative processes. Regarding the financial records that will have to be made available to the auditors, the developers are concerned that the state's auditing of records that they do not otherwise make public will have the effect of making those records public.

WSDOT's concern regarding release of the proposals, and that of some proposers, was that because of the way the selection process took place it could put some proposers at a competitive disadvantage. This would happen if their proposals were made public and were thus available to competitors prior to selection. During the evaluation of the proposals, the evaluation team sent questions to proposers to clarify different aspects of their proposals. The proposers also made oral presentations to the Project Review Board. Then the proposers made presentations to the Transportation Commission. At any of these points, it would have been possible for proposers to alter their proposals based on information obtained about one or more of their competitors' proposals. This would be a disadvantage to a proposer that had come up with a unique idea for financing, which is something that might be used in any type of proposal and could be copied by a competitor.

This problem would have two ultimate effects. First, it would undermine the integrity and the appearance of fairness of the selection process. The evaluation period would become a time in which proposers could attempt to get their competitors' proposals and modify their own accordingly. Those proposers who are not up to speed in this type of work would benefit from the work and ideas of those who have more experience and better ideas, and WSDOT would have contributed to that unfairness by making the proposals publicly available. Second, it could

deter proposers in the future from submitting proposals containing information which if released would harm them competitively. This could result in some proposers not submitting anything at all in the program, and in others submitting incomplete proposals, with more details to be filled in in their oral presentations. Evaluation of these proposals would have been much more difficult for WSDOT. Public availability of the records could also deter contractors from offering the more innovative and technologically advanced projects because of the risk of release of trade secrets to competitors.

WSDOT denied the requests for release of the proposals and was not challenged. After the proposals for the six demonstration projects were selected, WSDOT notified the developers that it would release the proposals unless the developers objected and identified parts of their proposals that should be exempt under RCW 42.17.310. Several proposers had no objection to the release of their entire proposal; others identified sections, tables, drawings, or data that they considered to be exempt under RCW 42.17.310(h).

Later, WSDOT received a request for the technical evaluation reports. WSDOT denied this request based upon federal precedent in a nearly identical case. The Thurston County Superior Court ruled that the "deliberative process" exemption in RCW 42.17.310(i) would apply only to the reports on those projects that had not been selected, and that to the extent they were not protected by the "valuable formulae, etc." exemption in RCW 42.17.310(h), the reports on the selected projects must be released. Proposers were then asked to designate those sections that they considered to be trade secrets and exempt under RCW 42.17.301(h).

During negotiations, one developer (a consortium of privately-held companies) expressed serious concerns about the potential release of any financial information that the developer might be required to provide to either WSDOT auditors or the State Auditor during construction or operation of the facility. No exemption covers this type of information.

The alternative public works law, chapter 39.10 RCW, specifically addresses some of these public disclosure issues by exempting some records from the reach of the public records law. RCW 39.10.100 protects certain trade secrets or other proprietary records of bidders, offerors and contractors from disclosure under chapter 42.17 RCW. A similar exemption exists for financial information submitted in WSDOT's prequalification process for highway and ferry system contractors. RCW 42.17.310(m).

The legislature might want to consider including an exemption for certain financial and programmatic information submitted during the course of bidding and performing the type of contract contemplated for privatized projects. As an alternative, it may want to consider an amendment to RCW 42.17.310 which addresses a general exemption for these types of records.

#### State Employees .

Can the private contractor enter into a contract with the state for maintenance and/or operation of a facility under which the employees would remain state employees but would provide services to the contractor with the contractor paying the state for those services?

Generally, the answer is "yes." Having the state provide some services to a contractor on a reimbursable basis is what is contemplated under WSDOT's Public Private Initiatives program. As with other matters discussed in this memorandum, the agency should be given specific statutory authority to enter into such contracts.

The WSDOT law, RCW 47.46.040, provides that the WSDOT may exercise any power possessed by it to facilitate the development, construction, financing, operation, and maintenance of transportation projects. Agreements for maintenance services entered into under this statute must provide for full reimbursement for services rendered by the WSDOT or other state agencies. The WSDOT may provide other services for which it is reimbursed, including but not limited to preliminary planning, environmental certification, and preliminary design of the demonstration projects. Any legislation providing for prison privatization should include

grants of authority, as was done in chapter 47.46 RCW.

There was a question raised in WSDOT's Public Private Initiatives Program as to whether the state had authority to enter into a fixed price contract with a developer, under which the state would provide a service to the developer (such as roadway maintenance) and the developer would pay the state a negotiated fixed price for a given period (such as for a year) as opposed to an hourly rate. The questions were whether this type of contract may violate the constitutional prohibition on gifts of state funds, and whether it would provide for "full reimbursement" as required by the statute. The concern was that if the contract did not adequately compensate the state for the services that it is contractually obligated to provide, then the provision of services that exceed the amount of compensation might be considered a "gift" to the developers. However, case law seems to support such a fixed price contract as not violative of the constitutional prohibition on gifts of state funds or the statute, if reasonable efforts are made to accurately estimate the cost of the services to be performed under the contract.

If the government expends funds to carry out a fundamental governmental purpose, no unconstitutional gift occurs. However, if the expenditures are pursuant to the government's proprietary authority, then the court will look at whether there was consideration or donative intent to determine if there has been a gift. Citizens for Clean Air v. Spokane , 114 Wn.2d 20, 785 P.2d 447 (1990).

Unless there is proof of donative intent or a grossly inadequate return, courts do not inquire into the adequacy of consideration.

Tacoma v. Taxpayers , 108 Wn.2d 67, 743 P.2d 793 (1987). A court will not look into the minute details of the contract to determine if every hour of service that was provided was paid for at actual cost unless there is proof that the compensation is grossly inadequate.

To protect itself from a poor estimate of cost, however, the contract should be very specific about the type and level of services to be provided. The contract should also contain reopener provisions to allow for additional compensation should the need for a particular type of service exceed that which was projected when the contract was written.

In summary on this point, if the state contracts to provide services to the private contractor, it should use its best efforts to accurately project what its costs will be, monitor the contract closely to keep track of the type and level of services being provided in relation to what was contracted for, and seek additional compensation if circumstances change from what was anticipated in the contract. There is no gift if there is a good faith effort to determine fair compensation for the services the state agrees to provide.

#### Tax Issues .

You asked for clarification of the state tax issues that may arise under the three scenarios. I asked the Revenue Division of our office to review the scenarios and provide preliminary guidance. They have provided me a six page analysis. Rather than repeat that analysis in this document, a copy is attached for your review. In summary, the memo points out the different types of tax which would have to be paid and how those payments may differ depending on the scenario used and the components of the scenario. When crafting legislation, the tax consequences should be kept in mind as they would have an impact on the total cost of the contract to the contractor and ultimately to the state. Amendments to the tax code may be appropriate to address any concerns identified.

#### FOLLOW-UP QUESTIONS TO TALIS ABOLINS' MEMORANDUM OF OCTOBER 5 .

#### Constitutional Delegation Doctrine .

Whether the state can delegate the operation of a prison to a private entity first requires an analysis of some basic issues regarding delegation of governmental powers. Our Supreme Court in United Chiropractors of Wash., Inc. v. State of Wash., 90

Wn. 2d 1, 578 P. 2d 38 (1978), considered whether the state could delegate the power to appoint members of the Chiropractic Disciplinary Board to several private chiropractic groups. While not rejecting the notion that governmental authority could be delegated to a private entity, the court held the delegation in question to be unconstitutional as a violation of due process. In its analysis, the court stated that the test by which it measures the constitutionality of a delegation of legislative power to an administrative agency could also be applied to the delegation of such authority to a private entity. That test is:

[D]elegation [of legislative power] is permissible when (1) the legislature has provided standards or guidelines which define in general terms what is to be done and the instrumentality or administrative body which is to accomplish it; and (2) that procedural safeguards exist to control arbitrary administrative action and any administrative abuse of discretion.

United Chiropractors , 90 Wn. 2d at 4. The court also stated that delegation to a private entity raises additional concerns not present in the ordinary delegation of authority to a governmental agency. The court analyzed the function to be performed and concluded that due process had been violated by giving several private organizations the power to decide who would perform the governmental function of regulating the chiropractic profession. At the heart of this analysis, and for analysis of the delegation of police power in general, is public accountability for actions taken.

The delegation analysis also relates to the question asked earlier in your memorandum concerning access by prisoners at a private facility to correctional programs and services which the Department of Corrections is required to provide. Your question appears to have been raised because it is directly relevant to the State's potential to reduce costs through privatization. The analysis of this question remains the same for all three proposed scenarios, as each involves private operation of a corrections facility.

The types of programs and services which the state is required to provide prisoners flow from three basic sources; the state and federal constitutions, statutes, and existing court decrees. Whether the legislature can exempt privatized prisons from these requirements depends on their source. If the requirements flow from constitutional requirements or court decrees, the legislature cannot eliminate or modify them for privatized prisons. It may be a possibility that some of the statutory programs and services could be eliminated or changed. However, before that is done an analysis would need to be made to determine whether the programs or services would have to continue in the absence of a statute because of constitutional or court decree requirements. An analysis should also include whether, if the services continue to be made available to inmates at state operated prisons, there would be any equal protection problems in denying those same services to inmates housed in a private facility.

Contracting out will not allow a private prison to avoid basic constitutional obligations owed by the state to a state prisoner. Skelton v. Pri-Cor, Inc., 963 F.2d 100 (6th Cir. 1991); see also Woodall v. Partilla, 581 F.Supp. 1066, 1076 (N.D. Ill, E.D. 1984), quoting Evans v. Newton, 86 S. Ct. 486, 488 (1966):

[W]hen private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations.

See also West v. Atkins, 108 S. Ct. 2250, 2259 (1988) (private contract physician subject to inmate civil rights lawsuit); Calvert v. Hun, 798 F.Supp. 1226 (ND W.Va. 1992) (even without state contract, doctor was subject to civil rights lawsuit for services rendered). As discussed, civil rights litigation against the State would probably be reduced to actions seeking injunctive relief<sup>9</sup> or

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<sup>9</sup> An injunction is a court order requiring or prohibiting certain types of action by the Defendant. For example, an injunction may be entered to prevent the enforcement of an unconstitutional policy, or to provide prisoners with increased opportunities for religious worship.

involving incidents where a State employee is personally involved in a claimed violation.

The basic constitutional requirements for the conditions of confinement for prisoners are under the Eighth Amendment. In extreme cases, the Eighth Amendment will limit the ability to reduce prisoner access to programs and services. This is especially so where a prisoner's claims involve serious restrictions on access to exercise, or medical services. Ultimately, the standard for proving that the conditions of a prisoner's confinement are cruel and unusual is fairly high.

The State is also required to provide prisoners with meaningful access to the courts. Bounds v. Smith, 97 S. Ct. 1491 (1977). Prisoners must be provided with either a law library, or trained legal assistants. Some privatization contracts let the contractor decide which method of access will be provided.

To the extent that an inmate seeks an injunction to restore programs or services to a constitutionally permissible level, the state would be a likely co-defendant with the contractor.<sup>10</sup> For instance, the fact that the state can delegate responsibility for medical care to a private physician will not absolve the state of its responsibility to ensure that the care is adequate. See Shea v. Spokane, 17 Wn. App. 236, 242 (1977) (city cannot use an independent contractor to shield itself from liability for negligent medical care provided to its prisoners); Calvert v. Hun, 798 F.Supp. 1226 (ND W.Va. 1992) ("the provision of medical services to inmates is traditionally the exclusive prerogative of the state.") In light of the foregoing, privatization will not allow the state to avoid ultimate responsibility for the minimal levels of services and programs that are required by the Constitution.<sup>11</sup>

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<sup>10</sup> This is different than civil rights claims for monetary damages. For damages claims, the civil rights plaintiff would have to prove direct personal involvement by a state employee or official.

<sup>11</sup> As with monetary liability, the State can contractually require the private operator to satisfy any court ordered remedies, such as an order requiring an upgrade of the prison law library. Of course, the cost of such a term is likely to be passed on to the State if it is above and beyond what is required in the contract.



**What is the rationale for retaining ultimate decision-making authority in the areas of classification, discipline, sentence-calculation, and release decisions?**

This question relates to the basic legal issue of the constitutional delegation doctrine discussed earlier. It is fundamental to prison privatization, as the doctrine determines whether, and to what extent, a state can delegate corrections operations to private parties. The analysis of this question remains the same for all three proposed scenarios, as each involves private operation of a corrections facility.

For prisons, the legal constraint presented by the constitutional delegation doctrine is contained in Article XIII of the Washington State Constitution, quoted and discussed in Talis Abolins' October 5 memo. The doctrine has been described in judicial opinions that have reviewed the basic constitutional functions of a state government. See Carter v. Carter Coal Co., 296 U.S. 238 (1936). As discussed, states strive to avoid the legal constraint of an unconstitutional delegation by retaining ultimate decision-making authority with respect to fundamental constitutional responsibilities.

There are no cases from the State of Washington addressing the constitutional delegation doctrine in the context of prisons. However, the basic two-part test set forth in United Chiropractors suggests the framework that is likely to be applied.

First, the legislature must provide general standards or guidelines which indicate what is to be done by the private contractor. See State of Wash. v. Crown Zellerbach, 92 Wn.2d 894, 900, 602 P.2d 1172 (1979). This requirement would be satisfied in the enabling legislation for prison privatization. Presumably, the legislature would provide that the private contractor must comply with the statutory standards for the control and management of prisons, as well as additional general performance standards necessary to

maintain contract compliance. Of course, these general standards would be defined in greater detail within the request for proposal and the contract documents.

Second, adequate procedural safeguards must be provided to control the risk of arbitrary action or abuse of discretion. Other states have generally attempted to address this requirement by retaining ultimate decision-making authority and oversight with respect to fundamental constitutional responsibilities.<sup>12</sup>

With respect to the second requirement, you have asked for the rationale for retaining responsibility in the areas of inmate classification, discipline, sentence calculation, and release. In light of the lack of cases applying the constitutional delegation doctrine to a private prison, most legal authority in this area consists of articles written by commentators. See Thomas and Logan, *The Development, Present Status, and Future Potential of Correctional Privatization in America* (revised paper, 1991). As a result, any rationale for retaining a formal approval authority in a particular area must be based upon one's assessment of which functions of prison management are so fundamental to prison management as to be included within the state's constitutional obligation to "foster and support" our state prisons.<sup>13</sup> The following analysis addresses these functions in order of importance.

#### **Sentence-Calculation/Release**

Incarceration of criminals is regarded as an exclusive prerogative of the state. See Medina v. O'Neill, 589 F.Supp. 1028, 1038 (S.D. Tex.

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<sup>12</sup> See RCW 41.21.110 of the Tennessee Code.

<sup>13</sup> The difficulty of drawing these lines was addressed in a resolution adopted by the American Bar Association based on a report by its Criminal Justice Section on privatization of prisons. A copy of that resolution is attached for your reference.

1984). After conviction, a criminal is explicitly committed to state custody to serve the sentence imposed by law. Therefore, calculation of sentences and release decisions are perhaps the most fundamental areas for the State to retain final decision-making authority. This preserves the State's ultimate role as custodian of the inmate.

### **Discipline**

The imposition of punishment for prisoner misbehavior has long been a fundamental matter of state concern, raising due process requirements. See Sandin v. Conner, 115 S. Ct. 2293 (1995). This is especially true when the sanction involves a loss of good time credits. Wolff v. McDonnell, 94 S. Ct. 2963, 2977-78 (1974). Such decisions frequently affect a prisoner's length of confinement. For this reason, states have retained ultimate decision-making authority over prison disciplinary proceedings.

### **Classification**

Classification is another fundamental component of state prison operations. The importance of the classification process is not limited to a specific facility; it allows corrections officials to track the behavior of an offender within the state system, and assists in risk assessment, custody level, and transfer decisions.

If the legislature wishes to privatize a prison, the decision on what statutory language to use to address these areas will depend upon the manner chosen to privatize the prison. Legislatures in other states have addressed these concerns in various ways. For example, the Legislature may provide that, for each specific area, prisoners in the private facility have an opportunity to appeal the relevant decision or calculation to the Secretary of the Department of Corrections, and that the Secretary shall make the final decision. Alternatively, a process for recommendations to an on-site state liaison may be structured. A state might also involve state officers in the prison disciplinary or classification process. Ultimately,

the language will have to reflect the policy decisions of the state legislature, the existing structures available through the Department of Corrections, and the extent to which the state wishes to retain control in fundamental areas. Obviously, the more control that is retained the less will be the risk of unconstitutional delegation. Conversely, too much state involvement in facility decision-making may interfere with efficiencies that the private contractor proposes to achieve.

#### Use of Force .

What are the implications for salary and retirement benefits if private corrections officers are specifically authorized to perform all of the functions performed by state corrections officers?

In the context in which you asked this question, it involves the basic legal question of how the state can effectively delegate the authority to use force against state inmates to a private person. The general relevance of your question to privatization involves an apparent concern that statutory authority for private use of force might inadvertently limit the private contractor's ability to efficiently and independently structure salary and benefits plans for its private employees.

The question of use of force is independent from questions involving salaries and benefits.

If the employees are truly those of the contractor, explicit statutory authorization for the use of force should not impose any restraint on the private contractor's choice of salary and retirement benefits for its employees.

Are there any other implications of such authority ?

One of the more significant implications of authorizing private use of force is that the state will no longer be in a position to directly authorize or supervise the use of force against state prisoners. This raises the possibility of tort claims based upon negligent

selection, supervision, or retention of the contractor.

Qualified immunity ?

Qualified immunity is relevant to privatization because without it, a private employee will actually suffer greater exposure to monetary liability than state corrections employees. The analysis of this question remains the same for all three proposed scenarios, as each involves private employees using force within a corrections facility.

The relevant legal constraints are the United States Constitution, and 42 U.S.C. § 1983. The latter statute allows prisoners to seek damages against state actors, including private corrections officers. A specific statute authorizing private corrections officers to act as state corrections officers will not automatically provide those officers with qualified immunity. In some cases, immunity can be explicitly provided by statute. Examples of statutory immunities can be found in Chapter 4.24 RCW.

Are there other ways to handle the use of force issue?

There are two established ways in which private corrections officers may be authorized to use lawful force on prisoners: (1) specific statutory authorization, and (2) common law privilege. Another possible way to allow private use of force would be through the contract with the private contractor. However, I recommend that any delegation of authority to use force, including deadly force, also be reflected in state statute. It is doubtful that such an important delegation of responsibility could be done by contract without a statute to back it up.

#### State Liability/Qualified Immunity .

As a threshold matter , you correctly note that the ability of a private corrections officer to use the defense of qualified immunity remains unsettled. This is because no federal court of appeals has yet

to decide this issue. As an example of the legal uncertainty, Talis Abolins' October 5 memo identified two recent cases from lower courts reaching opposite conclusions on this issue.

What existing statutes would need amendments in order to extend to a private contractor the requirement that a plaintiff exhaust state remedies?

This question involves the basic legal question of whether a private contractor can benefit from defenses enjoyed by the state. This question is relevant to privatization, as it determines the extent to which the private contractor is exposed to civil liability. The analysis of this question remains the same for all three proposed scenarios, as each involves private employees who are subject to litigation by state prisoners.

State statutory amendments alone will not improve the ability of a private facility to take advantage of the requirement that a prisoner exhaust internal grievance procedures. It is the relevant federal district court that must certify that the private facility's grievance procedures are adequate before exhaustion will be required. If this approval is given, as in Louisiana, private prison officials may be able to take advantage of the defense that a prisoner must first exhaust internal grievance procedures before pursuing certain civil rights claims.

The defense of exhaustion of state tort remedies also relates to civil rights liability. The relevant legal constraints are the United States Constitution, and 42 U.S.C. § 1983, which allows prisoners to seek damages against state actors, including private corrections officers. Inmates must exhaust state remedies before filing a tort action against the state. RCW 4.92.090. Tort actions can be filed for loss of property and, theoretically, loss of liberty. If a prisoner can bring such a claim against the state, the federal courts will dismiss a federal civil rights claim filed with it that is based upon a loss of property or liberty. See Zinermon v.

Burch, 110 S. Ct. 975 (1990). The rationale is that the prisoner still has a due process remedy through the state, to seek a return of lost liberty or property.

To the extent that a claim of lost property or liberty can be brought against the state, as well as the private contractor, exhaustion of state remedies remains a viable defense to a civil rights action against the state. However, it is uncertain whether an exhaustion of remedies argument could be used by the private contractor or its employees. The state supreme court has placed significant limitations on the power of the state to limit access to the courts for claims against the state. Given these limitations, it is less likely that the court would approve of an exhaustion requirement for a private party. Talis had suggested otherwise in his previous memo, but upon further reflection and discussion of this issue with our Torts Division, he has concluded exhaustion of remedies would probably not be a viable defense for a private contractor in the context of a tort claim.

#### Insurance.

Our Tort Division has reviewed the tort implications of privatizing a prison. It advises that the best protection for the state in connection with possible tort or civil rights claims is to require the contractor to obtain broad and comprehensive liability insurance listing the state as an additional insured. Indemnification and hold harmless contract clauses are also needed but they need to be backed up by adequate insurance. A tender of defense to an insurance carrier is much more effective in alleviating the costs and problems associated with litigation, and also protects the state if the contractor goes bankrupt and is unable to carry out its hold harmless obligations. As a starting point, the language in Article 7 of the Louisiana contract which you provided to us was quite thorough. The state should also require in any RFP on this subject that approval of the contractor's insurance policy is a condition of award of the contract.

**CONCLUSION**

The foregoing are general responses to the questions you have asked. You have not requested a formal attorney general opinion, nor have we treated your request as such. Therefore, the answers and analysis contained herein should be considered that of the individual attorneys who provided it and not that of the Attorney General. If you would like more detail or clarification with respect to any specific area, or if new questions have arisen, please let me know.

---

RICHARD A. HEATH  
Sr. Assistant Attorney

General  
RAH:lla  
Attachment

**NOTE: FOR COPIES OF THE ATTACHMENTS, PLEASE  
CONTACT THE LBC OFFICE**



## **APPENDIX 2**

### **FREQUENTLY CITED COST STUDIES**

This appendix provides brief comments on the most frequently cited evaluations of private prisons. As we noted in Part 3 of this report, we did not find that we could use these studies to draw any general conclusions about the potential for cost savings through privatization. Below, we indicate what we consider to be the major limitations of the cost studies.

#### Studies on the Cost of Public Versus Private Prison Operations

*Comparison of Privately and Publicly Operated Corrections Facilities in Kentucky and Massachusetts*, The Urban Institute, August 1989.

This study made three comparisons between private and public facilities -- two pairs in Massachusetts and one pair in Kentucky.

The study found that costs at the private facility were 10 percent higher than the public facility in Kentucky. Analysis of the two Massachusetts facilities found that the public and private operators were within 1 percent of each other. The quality of operations was found to be the same, if not slightly better, in the private prisons.

The study methodology used for the cost analysis is straight forward, although many limitations were acknowledged by the authors. Some of the limitations were sensitive enough that if corrected, the conclusions could be reversed. For example, one pair of prisons has facilities of very different sizes. One facility had a capacity of 206 prisoners and the other that had a capacity of 350. No correction was made for the advantage the larger prison had through economies of scale.

Another limitation was that capital costs were not counted in a comparable fashion. In Kentucky, the private contractor owned the land and the building and the cost of these were included as part of the contractor's cost per day. No such capital cost/debt service was assessed to the public facility in Kentucky.

Doctor R. Crants, III, "Private Prison Management: A Study in Economic Efficiency," *Journal of Contemporary Criminal Justice*, Vol. 7, No. 1, March 1991.

This frequently cited article by the CEO of Corrections Corporation of America (CCA) cites quantitative data from seven prisons previously operated by the public sector and then operated by CCA. However, no support or source for the figures are given. It appears that CCA costs rather than the amount they were paid by the public entity were used. (One would assume that they were making a profit so that the public sector was paying more than the actual cost to CCA.) Without such detail on how the figures were determined, the integrity of study is difficult to judge.

Charles H. Logan and Bill W. McGriff, *Comparing Costs of Public and Private Prisons: A Case Study*, National Institute of Justice, Report No. 216, September/October 1989.

This is a cost study of a privatized jail, Hamilton County Penal Farm, versus the hypothetical scenario of operating the jail under the public sector. The conclusion is that the private sector is saving the county money, roughly 8 percent in Fiscal Year 1988, and 3 percent in Fiscal Year 1987.

This analysis attempted to account for the same costs for both the private and public scenarios. Weaknesses of the analysis stem from the fact that there is no example of the public sector operating the jail, therefore a theoretical public operation is used for comparison. As a result, some debatable assumptions were used. For example, the staffing level was assumed to be the same under the public sector as under the private operator and the legal liability for the county was assumed to be the same under both scenarios. Also, it appears that some fixed overhead costs were allocated to the theoretical public operation. Since these are not included in the private per diem rate, the comparison may not be balanced.

The study cites qualitative improvements in service, fewer problems for county officials and quantitative benefits not included the cost analysis, such as investment in maintenance by the contractor which would not likely have been done by the public sector.

Martin P. Sellers, "Private and Public Prisons: A Comparison of Costs, Programs and Facilities," *International Journal of Offender Therapy and Comparative criminology*, Vol: 33/3, 1989.

This cost study was done on three pairs of prisons. Privately operated prisons were compared with publicly operated prisons in each case. The conclusion was that private operators provide more services at a lower

cost than their public counterparts. However there are so many methodological weaknesses in the study that the conclusion is in doubt.

The facilities were poorly matched in areas that significantly influence costs including size, location, and design of facilities. In the comparisons, significantly different size facilities were paired. In one case, a 350 bed facility was compared to one with a 109 bed capacity. Facilities in different states were compared with no adjustment for cost of living, such as would be necessary for the comparison included in the study between a rural Tennessee prison and an urban New Jersey prison. Important differences in facility design were also present in one comparison where a two-level facility was compared with a three-level facility. Such design features are critical determinants of the number of security necessary to provide adequate line-of-sight.

Another problem with the study was that the source of the cost data analyzed is not provided. Therefore it is unclear whether the authors tried to establish whether the same cost centers were included for each institution.

And finally, there were questionable calculations of unit cost. The authors tried to equalize the number of services available at each institution but did not recognize that the cost of service varies significantly between programs. For example, adding health services versus adding religious programming was considered comparable. The use of marginal or actual costs would have been more appropriate. Based on figures calculated using average cost per service, the private sector always looked cheaper in the analysis. However, if the actual reported costs used in the article are compared directly, the public sector was cheaper in one out of the three comparisons.

Douglas C. McDonald, ed., *Private Prisons and the Public Interest*, Rutgers University Press, 1990.

This is not an original cost study. The author reviews other people's work and discusses the limitations of previous studies. He notes that failure to use similar cost accounting rules, standardized rules for counting costs, is major problem compromising the validity of most studies.

He concludes that "to the extent that studies are based on simple comparisons of unit costs that have not been computed using standardize accounting procedures, the results are suspect. Where there does appear to be a difference in public and private operations,

labor appears to be the principal cause, rather than the superior ingenuity of the private sector management.”

## **APPENDIX 3**

### **COST ANALYSES FOR LOUISIANA AND TENNESSEE**

#### **LOUISIANA**

The LBC analyzed of the costs to Louisiana in Fiscal Year 1995-1996 of the three prototypical facilities: Allen (Wackenhut Corporation), Winn (Corrections Corporation of America), and Avoyelles (state-run). The three facilities have recently been expanded by 192 beds to reach their current capacities of 1474 inmates. The LBC's analysis compared costs in two ways:

- Costs based on a tentative intake schedule for the 192 bed expansions (i.e., expected flow of additional inmates to the facilities).
- Probable costs if each facility was running at full capacity for the entire fiscal year.

Explanations of the analysis and the sources of information on which it is based follow.

#### **Avoyelles Costs in FY 1995-96**

The estimate is based on projected Fiscal Year 1995-1996 expenditures, adjusted by Fiscal Year 95-96 recurring costs for the 192 bed expansion. An additional adjustment is made to reflect the fact that the Department of Corrections is paying approximately \$410,000 during the fiscal year as its allocation to make up for past underfunding of the retirement system. According to the Louisiana Legislative Actuary, this is a cost that would exist, and would not change, regardless of whether the Allen and Winn facilities are operated by the state or by the private companies.

#### **Adjustments to the State's Costs for Allen and Winn**

Since the costs of property and boiler insurance are included in the Avoyelles budget, the state's estimated costs in this area for Allen and Winn are allocated to those facilities. Amounts were provided by Louisiana's Office of Risk Management.

There were no monitoring costs allocated to the private facilities. According to the Department, additional monitoring related to privatization is not occurring this fiscal year.

The state's expenses for record system analysts and the HVAC service contract are included on the private side since they are also in the Avoyelles budget.

The tax benefits to the state are credited to the private facilities (i.e., are subtracted from the cost to the state). Detail was provided by CCA. We estimated Wackenhut's taxes paid to the state.

**Per Diem Calculations**

For the two private facilities, we used per diem rates specified in the contracts and applied to the tentative intake schedule and to operations at full capacity.

For Avoyelles, we adjusted budgetary figures by a calculation of ADP based on the tentative intake schedule and by full capacity.

The detailed calculations reflect a fiscal year containing 366 days.

The results of the analysis are shown in Exhibit 2. The detailed worksheets and/or computer disks can be provided upon request.

**Exhibit 2**

Effective Per Diems at Full Capacity FY 1995-96			
	Per Diem	Cost in Fiscal Year	ADP
Winn (CCA)	\$23.75	\$12,814,167	1474
Allen (Wackenhut)	\$23.34	\$12,592,687	1474
Avoyelles (State)	\$23.55	\$12,702,196	1474
Effective Per Diems at Estimated ADPs FY 1995-96			
	Per Diem	Cost in Fiscal Year	ADP
Winn (CCA)	\$24.00	\$12,580,733	1432
Allen (Wackenhut)	\$23.45	\$12,393,248	1444
Avoyelles (State)	\$23.66	\$12,571,275	1451

## **TENNESSEE**

The LBC analyzed of the costs to Tennessee in Fiscal Year 1993-1994 of the three prototypical facilities: North West (state), North East (state), and South Central (CCA). We reviewed and made adjustments to a cost comparison conducted by the state's Fiscal Review Committee. The major difference in our approach was that we were primarily interested in how costs to the state compared (i.e., state facilities versus private facility). In contrast, the approach used by the Fiscal Review Committee was to compare how the cost of the private facility *to the private company* compared to the state's costs for its state-run facilities.

Explanations of the analysis and the sources of information on which it is based follow.

### **Variable cost adjustments for NE and NW**

The Fiscal Review Committee made adjustments to the two state-run facilities' budgets to estimate costs if these facilities had operated at the same ADP as the private facility.

We followed the same methodology and made a minor correction to eliminate some medical costs that were allocated to the state-run facilities. The cost comparison was supposed to exclude medical costs.

### **Allocation for major maintenance**

We included the estimated costs of equipment maintenance contracts that are paid for the state-run facilities, but are not reflected in the facility budgets. For the private facility, this cost is covered by the per diem.

### **Payments to Corrections Corporation of America**

We were interested in how the state's cost of operating its two prototype facilities compared with the state's cost of contracting with the private provider.

We used two sources to calculate the gross amount paid to CCA: the daily inmate count for each day in the fiscal year, multiplied by the per diem rates established by the contract; and headquarters' record of payments to CCA. The results are approximately the same. We used the headquarters' payment record for the gross amount paid to CCA.

We evaluated the additional cost adjustments made by the Fiscal Review Committee (e.g., monitoring costs, expenses for South Central paid by the state) and made the same adjustments.

**CCA medical cost adjustment to per diem**

We asked CCA to provide information that would allow us to deduct the medical portion of their per diem, since medical costs are deleted from the state facilities' costs. Until this information is received, we are using an estimate based on the average of state facilities' medical costs as percentages of total budgets.

**Tax benefits to the state**

As a negative cost to the state for South Central, we included state taxes paid by CCA.

The results of the analysis are shown in Exhibit 3. The detailed worksheets and/or computer disks can be provided upon request.

**Exhibit 3**

Effective Per Diems at Equalized Capacity FY 1993-94			
	Per Diem	Cost in Fiscal Year	ADP
North West (state)	\$35.82	\$13,768,440	1053
North East (state)	\$35.28	\$13,558,045	1053
State Wgt. Avg	\$35.55	\$13,663,243	1053
South Central (CCA)	\$33.61	\$12,917,447	1053
Effective Per Diems at Actual ADPs FY 1993-94			
	Per Diem	Cost in Fiscal Year	ADP
North West (state)	\$35.43	\$13,837,891	1070
North East (state)	\$33.22	\$13,931,972	1149
State Wgt. Avg	\$34.29	\$13,884,931	1110
South Central (CCA)	\$33.63	\$12,925,080	1053



## APPENDIX 4

### INTRASTATE AND INTERSTATE COMPARISONS OF INMATE DEMOGRAPHICS AND BEHAVIOR

A year's worth of data was gathered from all of the state-run and privately run prisons in our study. The Washington State Penitentiary, Medium Security Complex was added to the Washington facilities out of concern that the population at the Airway Heights prison is comprised mostly of long-term minimum security inmates. It was thought they may not compare fairly with the medium security inmates from the other states in our study.

#### **DEMOGRAPHICS**

**Question 1 : Do the inmates in the private prisons have the same characteristics as those in the public prisons; and how do their characteristics compare to the inmates in Washington?**

**Answer: Categories of demographics were compared both within states and between states. Exhibit 4 displays some of the major categories. Following this exhibit is a discussion of the differences within states and between states.**

#### **RACE:**

*Within states:* Racial demographics within Louisiana and Washington were almost identical. There was some variation within Tennessee due to classification reflecting the county of origin, rather than the typical centralized classification process.

*Between states:* In Washington State the race demographics reflect a much lower percentage of black inmates than the other study states, and a higher percentage of white and black Hispanic inmates.

#### **EDUCATION LEVEL:**

*Within states:* Education levels did not vary much within states.

*Between states:* There was not much difference in the number of inmates with a greater than eighth grade education in all states. There was a dramatic difference in the number of inmates with a greater than twelfth grade education. The numbers for this are: Louisiana, 6.5 percent; Tennessee, 5.1 percent; and, Washington, 29 percent.

## Exhibit 4

### COMPOSITE DEMOGRAPHICS 1995

Facility Operator	LOUISIANA			TENNESSEE			WASHINGTON	
	Allen Wackenhut	Avoyelles State	Winn CCA	N. East State	N. West State	S. Central CCA	Airway H. State	WSP/MSC State
Capacity	1474	1474	1474	1336	1336	1336	1424	863
Avg. Daily Pop.	1430	1341	1321	1315	1317	1332	962	863
Avg. Age	31.8	31.8	31.9	34	33	29	36.4	35.8
8+ Grade Ed	85.5%	79.4%	86.2%	80.4%	88.2%	86.3%	90.1%	88.7%
12+Grade Ed	6.4%	6.5%	6.7%	6.7%	4.3%	4.3%	24.7%	33.3%
% Non-violent	71%	59%	60%	22.3%	17.5%	26.2%	37.8%	25.7%
% Violent	39%	41%	40%	77.8%	82.5%	73.9%	60.2%	74%

Source: LBC data, 1995.

The higher education level among Washington inmates may reflect greater educational opportunities beyond twelfth grade in Washington prisons.

### **AGE:**

Age is one of the strongest predictors of prison behavior and recidivism, with youth being the disadvantage.

*Within states:* While average ages of inmates were nearly identical in Louisiana prisons (32 years), the average age of inmates in Tennessee varied by up to five years (29 to 34 years). In Washington, the average age at the two facilities was within eight months of each other (36 years combined average).

*Between states:* The privately run Tennessee prison had the lowest average age inmates of the studied prisons. The average age at South Central (CCA) was only 29 years, while the average age at the state run prisons was 33 and 34 years.

### **NUMBER OF CONVICTIONS PER INMATE:**

*Within states:* There was little variation in Louisiana between the two privately run prisons and the state-run prison. About 8 percent of all the inmates had four felony convictions, 20 percent had three felony convictions, 36 percent had two felony convictions, and 30 percent had one felony conviction. The remainder had four or more.

*Between states:* This number was only available for the study prisons in Louisiana. Even if it was available for Tennessee and Washington, it is doubtful these numbers would offer between-state comparisons. Issues such as juvenile convictions, counting only the most serious of multiple offenses, and felonies committed in other states and jurisdictions can result in invalid comparisons.

#### **SENTENCE LENGTHS:**

*Within states:* Within Louisiana and within Tennessee, inmate sentence lengths were nearly identical. Within Washington, there was a striking difference between the number of inmates that have a sentence greater than twenty years. This number was 6 percent at the Airway Heights prison, and 25 percent for the Medium Security Complex in Walla Walla.

*Between states:* Thirty-seven percent of the inmates in the Tennessee study prisons had sentences greater than 20 years. This compares with only 16 percent in Louisiana, and an average of 15 percent in Washington.

#### **OFFENSE CATEGORIES:**

*Within states:* Offense type did not vary significantly within Louisiana. In Tennessee, there were markedly more robbers and murderers at the Northwest prison (state run), but also a lower number of rapists. In Washington, there were almost twice as many drug offenders at the Airway Heights prison.

*Between states:* Louisiana had a greater proportion of non-violent offenders than Tennessee and Washington. This is qualified by a lower number of murderers, robbers, and rapists, and a higher proportion of drug offenders. Washington had a slightly lower proportion of violent offenders than Tennessee.

### **BEHAVIOR**

**Question 2: Do the inmates in the public prisons behave differently from the inmates in the private prisons, and how does their behavior compare to the inmates in Washington?**

**Answer: Inmates in the public and private prisons we studied behave about the same. Comparing their behavior across states is difficult due to differences in definition of major and minor disturbances,**

**major and minor infractions, and the subjective nature of staff reporting.**

**INCIDENTS:**

Although incidents are a very important consideration in comparing operations, available data for this subject area is probably the least reliable. Not only is the format of information drastically different for every state, all of the data is a reflection of reporting judgment, rather than an independent evaluation. Furthermore, what is defined as a major disturbance in one state is a minor incident in another state. There were comments made to us in both Louisiana and Tennessee about a belief of under reporting of infractions and incidents at the private prisons, but headquarters administrators said they thought all of the prisons were safe and secure.

**Exhibit 5**

COMPARISON OF INMATE BEHAVIOR  
1994

Facility Operator	LOUISIANA			TENNESSEE			WASHINGTON	
	Allen Wackenhut	Avoyelles State	Winn CCA	N. East State	N. West State	S. Central CCA	Airway H. State	WSP/MSC State
Capacity	1474	1474	1474	1336	1336	1336	1424	863
Avg. Daily Pop.	1282	1324	1285	1309	1318	1305	604	863
Escapes	0	0	3	8	4	1	2	0
Major Infract Rate	3.05	4.65	2.80	0.46	0.50	0.45	2.19	1.66
Minor Infract Rate	0.47	1.82	1.33	1.13	1.29	1.46	NOT AVAIL	NOT AVAIL
% In School	16	26	20	20	35	23	38	22

Escapes are in whole numbers.  
Infractions represent the number per inmate.  
Airway Heights remains in a start-up mode.

Source: LBC data, 1995

The comparative statistics are shown in Exhibit 5. When the number of incidents is high, as with infractions, a per inmate number is presented, for the purpose of comparing prisons with differing numbers of inmates. When the number of incidents is low, such as escapes and disturbances, the actual totals are presented.

*Within states:* In Louisiana, there were no escapes at Allen, none at Avoyelles, and three at Winn. The assault rates were about the same. There were differences in reported sex offenses and disturbances. The Allen prison (Wackenhut) had the most sex offenses with .08 per inmate, followed by Winn (CCA) with .06 per inmate, and then Avoyelles (state) with .02 per inmate. With regard to disturbances, both the Allen and Winn prisons reported one major disturbance, while the

Avoyelles prison reported four. It should be noted that their definition of major disturbance does not necessarily mean there was use of emergency response teams. When we interviewed headquarters staff about the frequency of disturbances, they said they did not think there was any difference between the study prisons.

In Tennessee, there was a total of three escapes from secure supervision at the state run prisons and no escapes at the privately run prison. There were also nine escapes from the state run minimum security units, and only one escape from the privately run minimum security unit. Drug possessions were about the same at all of the Tennessee prisons. There was a large difference in the number of reported-use-of-force incidents. The Northeast prison (state) reported three incidents, Northwest (state) reported four incidents, and South Central (CCA) reported 24 incidents. The amount of weapons confiscated at the prisons was about the same.

In Washington, there were no reported disturbances for either of the study prisons. There were two escapes from the Airway Heights minimum security complex. The Washington State Penitentiary reported a total of 27 assaults, while Airway Heights reported only one.

*Between states:* The only information that appears valid for comparison between states is escapes. Unlike major and minor disturbances, escapes either do or do not occur, and do not require judgment in reporting. There were three escapes from the Louisiana prisons, 13 escapes from the Tennessee prisons and two escapes from the Washington study prisons.

#### **INFRACTIONS:**

The most serious infraction activity is covered in the incidents above. There is further information to report about the number of disciplinary cases and drug use/possession.

*Within states:* In Louisiana, there were 3.05 major infractions per inmate at Allen (Wackenhut), 4.65 at Avoyelles (state), and 2.8 at Winn (CCA). Infraction activity within the Tennessee study prisons averaged only .47 major infraction cases per year, per inmate, with the privately operated prison having the highest rate. Within Washington, the study prisons showed some differences with 2.2 cases per inmate at Airway Heights, and 1.7 cases per inmate at the Washington State Penitentiary, Medium Security Complex.

*Between states:* An item of noteworthy importance is the number of urinalysis tests conducted. Washington has a policy of annual urinalysis testing for all inmates. Neither of the other study states do the same. In fact, the Tennessee prisons only tested about one-third of their inmates annually. They also had one drug overdose death. The Washington study prisons had none. There were approximately 4.2 urinalysis tests per inmate at the Washington State Penitentiary Medium Security Complex. Of these, .5 percent were positive for drug use. At Airway Heights there were 3.0 urinalysis tests per inmate, and 2 percent were positive.

### **CLASSIFICATION POLICIES:**

*Within states:* All of the study prisons had to abide by their department of corrections' classification policies and were not able to select which inmates they received. The only difference worth noting is the use of geographical classification in Tennessee, versus centralized classification in Louisiana and Washington. The only effect of the Tennessee policy appears to be a higher proportion of black and violent offenders at the Northwest prison.

*Between states:* In Louisiana, minimum custody offenders can have up to ten years remaining on their sentence. It should be noted, however, that the minimum security units we observed were within a double fence with armed towers. Tennessee minimum custody inmates were within a double fence, but no towers (as were the medium custody inmates). Washington requires minimum security inmates to have less than four years until release, but the perimeter is not secure and they work outside of the fence without armed staff.

### **INMATE IDLENESS:**

We gathered information from all of the study states about each and every inmate's daily assignment. Inmates who were medically unable to work were excluded. Inmates who had a work assignment, educational or vocational assignment were counted as a worker. Inmates who were unassigned or simply on a waiting list were counted as idle. The summary results are shown in Exhibit 6.

*Within states:*

All of the Louisiana prisons we studied had a 100 percent inmate work program. Each of the prisons had at least a third of their population working in lines performing menial labor. The value of this work is limited to developing the work ethic, and hopefully motivating inmates

to compete for more meaningful prison jobs. The other two-thirds of the inmates had prison job assignments. Participation in education programs had to be accomplished in addition to a full time work program.

In Tennessee, the idleness rate for the private prison fell right in-between the two public prisons, at 17 percent. The two public prisons had 7 and 23 percent idleness rates. Tennessee also had a prison enterprise program, involving the refurbishment of school furnishings and school buses.

In Washington, the inmate employment rate at the Washington State Penitentiary was 66 percent. This compares with 61 percent at Airway Heights.

*Between states:*

Washington State prisons had the highest rates of inmate idleness. The other states have an apparent goal of keeping inmates busy, and are willing to provide correctional officer supervision for the long work lines.

**PROGRAM OPPORTUNITIES:**

*Within states:*

Louisiana offers a limited opportunity for basic education in prisons. The state-operated prison had the highest capacity education program with 26 percent of the inmates enrolled. The private prisons had 16 and 20 percent of the inmates enrolled. Part of the reason for the lower number of program slots available at the private prisons is due to a loss of federal grants they had come to rely upon. The headquarters administration sees this as a temporary situation, while the private prisons develop new education contracts. Although there was a provision for housing mentally ill inmates separate from the general population, there was no therapeutic program.

In Tennessee, there was a combination of educational and vocational programming available. At the private prison, 23 percent of the inmates were enrolled in these programs, while there was 20 and 35 percent participation at the state-run prisons. All of the prisons had self-improvement programs such as chemical dependency, anger management and mental health. Program capacities and quality were about the same, according to the recent study of privatization.

## Exhibit 6

### COMPARISON OF IDLENESS

STATE	FACILITY	OPERATOR	YEAR	ADP	PROGRAMMING*	IDLE **	TOTAL
Louisiana	Allen	Wackenhut	95	1282	100%	0%	100%
	Avoyelles	State	95	1324	100%	0%	100%
	Winn	CCA	95	1285	100%	0%	100%
Tennessee	Northeast	State	94	979	93%	7%	100%
	Northwest	State	94	958	77%	23%	100%
	S. Central	CCA	94	962	83%	17%	100%
Washington	A. Heights***	State	95	1150	61%	39%	100%
	WSP/MSC	State	95	863	66%	34%	100%

\* Includes all jobs and assignments (including school when it is in lieu of work).

\*\* Includes wait list and unassigned.

\*\*\* Airway Heights remains in a start-up mode and anticipates further work opportunities. (Medically unable to work inmates were excluded.)

Source: LBC data, 1995

In Washington, there is limited programming available in the areas of basic education, vocational training and community college level courses. Program capacities in the areas of education, substance abuse, anger management and other self-improvement classes are fully utilized. Inmates in minimum security are assigned by the prison staff to either work or attend school. Generally, inmates in medium security have their choice of being on a waiting list, working or attending school.

#### *Between states:*

Although Washington scores low on the scale of percentage of inmates employed, we would probably score high on quality and variety of other programs available. There is an expectation in Washington that prison counselors will spend about 30 percent of their time conducting a counseling program. This was not true in either of the other two states. Washington also has established a purposeful link between education, vocational instruction and correctional industries. None of the other states have this policy. In Louisiana, there is only one counselor in a living unit of over 300 medium security inmates. Washington strives for a ratio of one counselor to 65 inmates. Although Tennessee has a counselor-to-inmate ratio that is closer to the level of Washington (Inmate Relations Coordinators), their role is both counseling and security, and does not involve a counseling program.



## **GENERAL OBSERVATIONS**

The prisons we visited appeared clean and orderly. In some cases the inmates walked to meals in double-file lines, and stayed within painted boundaries on sidewalks. Staff were professional both in appearance and performance. There did not appear to be major differences in operations. There were some differences in policy. In Louisiana medium security inmates lived in 110 person dormitories and worked outside of the fence without wrist restraints, but under armed escort. Washington requires two staff escorting medium security inmates with full restraints, and all medium security inmates live in cells with two or more inmates.

## **APPENDIX 5**

### **INTERSTATE COST COMPARISONS**

The information in this appendix provides additional explanation of the interstate cost comparison figures discussed in Part 4 of this report, and summarized in Exhibit 1.

Note: Areas for which we were not able to make direct comparisons, such as health services costs and debt service, were excluded from the amounts shown below. Therefore, actual per diems, adjusted for cost of living differences, would be higher. Also, we did not attempt to compare headquarters' and general government overhead costs.

#### **WASHINGTON AND LOUISIANA**

##### **Washington: \$44.52 per inmate per day**

Assumes Airway Heights Corrections Center at 1424 capacity, consisting of 1024 medium security beds and 400 minimum beds.

Major cost adjustments: Health care costs and debt service excluded because they are not included in the Louisiana facility budget. Staffing changes to reflect operating all four 256 bed housing units in the main facility as medium security. Department average salaries and benefits used. Staff that have been hired in anticipation of a 512 bed expansion were excluded.

##### **Louisiana: \$24.04 per inmate per day**

Uses the Avoyelles prison consisting of 864 medium beds, 288 minimum beds, 130 close/maximum beds, and adds 142 medium beds to bring total capacity to 1424.

Major cost adjustments: Used budget for 192 bed expansion to estimate 142 bed expansion, keeping most staff increases (conservative assumption). Adjusted Louisiana costs upward by 17 percent to reflect regional differences in cost of living. The 17 percent may be somewhat overstated due to inclusion of Seattle in Washington's index. Included some headquarters' administrative costs related to functions that are carried out and are included in the Airway Heights budget.

**Results:**

Difference in cost per inmate per day: \$20.47 (WA greater)

FTE difference : 45.4 (WA greater)

What can explain the differences in cost/inmate/day?

1. 64% of the difference in cost, or \$13.11 per inmate day, is in labor costs. Additional Washington labor costs are the result of four, mutually exclusive factors:

	Cost/inmate/day	Percent of diff.
More FTEs	\$3.51	27%
Higher Benefits	\$4.07	31%
Higher Salaries	\$3.39	26%
More Longevity	\$2.14	16%

2. 36% of the difference, or \$7.35 per inmate day, is in non labor costs. Additional non labor costs in Washington can be traced to three major areas:

	Cost/inmate/day
More spent of education	\$2.57
More spent on food	\$1.56
More spent on utilities	\$1.87

In what areas does Washington appear to have heavier staffing than Louisiana? Areas estimated to have significantly greater staffing are:

Estimated difference in FTEs

Administration/Business	28.0
Classification, Records	24.3
Maintenance	20.0
Food Service	12.8
General Counseling	11.7

Note: Since some staff have dual or multiple responsibilities, it is a matter of interpretation how they should be attributed to certain areas. Also, some staff positions that might be classified as security in one state might be classified within another operational area in the other state, and vice versa.

## WASHINGTON AND TENNESSEE

### Washington: \$44.52 per inmate per day

Assumes Airway Heights Corrections Center at 1424 capacity, consisting of 1024 medium security beds and 400 minimum beds.

Major cost adjustments: Health care costs and debt service excluded because they are not included in the Tennessee facility budget figures we used. Staffing changes to reflect operating all four 256 bed housing units in the main facility as medium security. Department average salaries and benefits used. Staff that have been hired in anticipation of a 512 bed expansion were excluded.

### Tennessee: \$37.07 per inmate per day

Uses the North East prison consisting of 940 medium beds, 300 minimum beds, 96 close/maximum beds, and adds 88 medium beds to bring the total capacity to 1424.

Major cost adjustments: Tennessee Department of Corrections data to estimate costs of 88 bed expansion. Adjusted Tennessee costs upward by 20 percent to reflect regional differences in cost of living. The 20 percent may be somewhat overstated due to inclusion of Seattle in Washington's index.

### Results:

Difference in cost per inmate per day: \$7.45 (WA greater)

FTE difference: 1.9% (WA greater)

What can explain the differences in cost/inmate/day?

1. 107% of the difference in cost or \$8.00 inmate day is in labor costs. Additional WA labor cost are the result of four, mutually exclusive factors:

	Cost/inmate/day	Percent of diff.
More FTEs	\$0.15	1.9%
Higher Benefits	\$1.31	16.4%
Higher Salaries	\$4.12	51.5%
More Longevity	\$2.41	30.2%

2. -9% of the difference or (\$.70) per inmate day is in non labor costs.

In what areas does Washington appear to have heavier staffing than Tennessee? Areas estimated to have significantly greater staffing are:

Estimated difference in FTEs

Administration/Business	14.0	(TN has some contracting)
Maintenance	16.0	
Recreation/Library	7.1	

Note: Since some staff have dual or multiple responsibilities, it is a matter of interpretation how they should be attributed to certain areas. Also, some staff positions that might be classified as security in one state might be classified within another operational area in the other state, and vice versa.

## **APPENDIX 6**

### **CAPITAL COSTS COMPARISON**

#### **Comparative Analysis of Florida 1318 vs. Grays Harbor 1936**

The approach we took in making the interstate comparison was to focus on the major elements contributing to capital cost: Amounts and types of space, unit construction costs, and ancillary construction costs such as design and administration. In developing the final comparisons, we eliminated those items unique to the specific project including land, site development, taxes, and unique local costs (e.g., Washington State allocations for art).

For the Washington facility, we chose the Grays Harbor Correctional Center in Aberdeen. Site infrastructure and development work, on and off the main site, for this 1936 bed facility is underway, and facility design is in preliminary schematic design. Site development work can be viewed as a separate project which can be completed independent of the method for procuring the construction of prison facilities. Current planning for this facility would program a total of 867,463 gross square feet. Housing areas would include 656 minimum security beds, 1024 medium security beds, and 256 close security beds. In addition, 100 administrative segregation beds, not included in the 1936 bed capacity, are programmed.

For the privatized facility, we chose the 1318 bed South Bay Correctional Facility in Florida. Currently under development, this project provides sufficient similarities in size and inmate mix (e.g., large multi-custody) to allow for broad level comparisons (i.e., size, cost per bed, unit construction costs). It also offers a financing and ownership model familiar to the state of Washington, Certificates of Participation with ultimate ownership by the state. Programming for this facility includes 1250 medium security beds, 1000 in cells and a 250 person dorm; 68 close custody beds, and 40 administrative segregation beds not included in capacity.

Exhibit 7 summarizes the adjustments that were made to the budgets for the respective projects. Costs and space for each facility were adjusted for comparative purposes. For each facility, land and site related costs, taxes, and unique fees were excluded. For the Florida facility, costs were increased by 45 percent to reflect estimated regional labor and material costs differences and by 7 percent to reflect higher costs associated with later construction of the Grays Harbor Facility (e.g., two years of construction inflation). In addition,

the estimated cost of the Florida facility was increased by 5 percent of the estimated construction contract to provide an allowance for state oversight of the privatized construction.

In addition to the previously noted Grays Harbor exclusions, we eliminated budgeted reserves and contingencies; eliminated the projected construction cost of inmate recreational space (Florida space was a covered court area rather than a fully enclosed gymnasium); eliminated the full cost of 114,805 GSF of Correctional Industries (CI) space (Florida did not include CI space); adjusted housing space and construction costs downward for Florida's proportionally smaller Administrative Segregation Housing capacity (not included in overall facility capacity of either facility); and reduced housing space and construction costs to reflect Florida's lower mix of Close Custody beds.

The projected Grays Harbor cost, as adjusted, was calculated at approximately \$60,400 per bed. Projected Florida privatized cost per bed, as adjusted, was approximately \$33,900. Calculated cost per gross square foot for Grays Harbor was approximately 17 percent higher (\$164/GSF vs \$140/GSF). GSF per bed for Grays Harbor was approximately 53 percent higher (369 GSF/bed vs 242 GSF/bed).

Differences in space are largely explained by different operating and programming methodologies. Exhibit 8 summarizes the programmed space. The programmed space for the Grays Harbor facility has been adjusted downward to reflect:

- Reduction of 114,805 GSF and associated costs for Correctional Industries not included in the Florida facility;
- Reduction of 24,746 GSF and associated costs for the lower Florida Close Custody mix (reduction in proportion to total capacity);
- Reduction of 14,274 GSF and associated costs for the relatively smaller Administrative Segregation capacity in Florida (reduction in proportion to total capacity).

Other explanatory factors in the overall space, for which no adjustments were made, include:

- Grays Harbor assumes single cells for Close Housing and Administrative Segregation; Florida double cells these beds.

- Grays Harbor minimum security beds have relatively high per bed space allocations reflecting the incorporation of service and program space that in the housing space calculation; Florida comparisons are for medium security beds with program and service space centralized.
- Other examples of differences are in administration, physical plant (including warehousing), and dining areas (Florida feeds inmates in housing areas; Grays Harbor provides inmate dining spaces).



## Exhibit 7

### Florida vs Grays Harbor Summary

FLORIDA WACKENHUT					
1,318 Capacity					
Cost Elements	July 1996 Spending Midpoint	Deduct Site and Taxes	Adjust to Grays Harbor Timing (July '98)	Location Adjustment Add	Add 5% of Construction to Other for Oversight
Site Preparation	\$ 3,102,902	-	-	-	-
Project Design and Management	\$ 3,011,010	2,624,519	2,802,585	4,063,748	4,063,748
Building Materials and Labor (Constr Contr)	\$ 21,070,652	21,070,652	22,500,238	32,625,345	32,625,345
Initial Moveable Equipment	\$ 2,576,181	2,576,181	2,750,968	3,988,903	3,988,903
Indirect Costs	\$ 684,592	684,592	731,040	1,060,008	2,691,275
Other Costs	\$ 863,000	863,000	921,552	1,336,251	1,336,251
Sales Taxes	\$ 851,746	-	-	-	-
Property Taxes	\$ 36,000	-	-	-	-
<b>Total</b>	<b>\$ 32,196,083</b>	<b>\$ 27,818,944</b>	<b>\$ 29,706,382</b>	<b>\$ 43,074,255</b>	<b>\$ 44,705,522</b>
Per Bed	\$ 24,428	\$ 21,107	\$ 22,539	\$ 32,682	\$ 33,919
GSF	318,458	318,458	318,458	318,458	318,458
GSF per Bed	242	242	242	242	242
Total Cost/GSF	\$ 101	\$ 87	\$ 93	\$ 135	\$ 140
GRAYS HARBOR					
1,936 Capacity					
Cost Elements	Budgeted Costs*	Deduct Land, Site Work, Art, Contingencies and Taxes	Adjust Recreation Cost and Industries Space and Cost	Adjust Housing Cost and Space for Smaller Ad Seg Comparable to Florida	Adjust Housing Cost and Space for Smaller Close Custody Mix Comparable to Florida
Land Acquisition	\$ 480,825	-	-	-	-
Site Work	\$ 10,732,920	-	-	-	-
Site Work A/E Fees	\$ 450,000	-	-	-	-
Structure A/E Fees	\$ 9,655,409	9,655,409	8,344,549	8,125,314	7,737,872
Structures & Construction	\$ 120,587,211	120,587,211	104,215,766	101,477,730	96,638,936
Reserves & Contingencies	\$ 15,101,815	-	-	-	-
Sales Tax-Construction	\$ 12,006,600	-	-	-	-
Equipment	\$ 6,850,800	6,850,800	5,920,706	5,765,152	5,490,251
Sales Tax-Equipment	\$ 561,766	-	-	-	-
Art	\$ 656,601	-	-	-	-
Permits & Fees	\$ 2,408,369	2,408,369	2,081,398	2,026,714	1,930,074
Project Management - Non sitework	\$ 6,415,680	6,415,680	5,544,659	5,398,986	5,141,544
<b>Total</b>	<b>\$ 185,907,995</b>	<b>\$ 145,917,469</b>	<b>\$ 126,107,079</b>	<b>\$ 122,793,897</b>	<b>\$ 116,938,677</b>
Per Bed	\$ 96,027	\$ 75,371	\$ 65,138	\$ 63,427	\$ 60,402
GSF	867,463	867,463	752,659	738,385	713,640
GSF per Bed	448	448	389	381	369
Total Cost/GSF	\$ 214	\$ 168	\$ 168	\$ 166	\$ 164

\*All costs with the exception of land acquisition, site work, and related site work costs are denominated in July 1998 dollars

Cost/GSF higher than Florida 17%  
GSF/Bed higher than Florida 53%  
Revised Cost/Bed higher than Florida 78%

## Exhibit 8

### Gross Square Feed (GSF) Comparisons Florida vs. Grays Harbor

Florida				
Capacity	1,318			
Adjusted GSF	318,458			
	<u>GSF</u>	<u>Per Bed</u>		
Housing	217,891	165		
Recreation	18,400	14		
Admin & Support	82,167	62		
	<i>Total</i>		242	
Housing				
	<u>Type of Beds</u>	<u>Capacity</u>	<u>Total GSF</u>	<u>Per Bed</u>
Medium Housing	X2 Cells	1000	158,048	158
Medium Housing	Dorms	250	33,533	134
Close Custody	X2 Cells	68	26,310	244
Ad Seg Housing	X2 Cells	40	above	
	<i>Total</i>		217,891	
Admin. & Support				
			<u>Total GSF</u>	<u>Per Bed</u>
	Administration		7,976	6
	Plant Services		17,861	14
	Inmate Programs		26,634	20
	Inmate Services*		29,695	23
	Other		-	-
	<i>Total</i>		82,167	62
<i>*Note: No general Inmate Dining</i>				

Grays Harbor				
Capacity	1,936			
Adjusted GSF	713,640 <small>Excluding Correctional Industries space of 114,805 GSF</small>			
	<u>GSF</u>	<u>Per Bed</u>	<u>Difference</u>	
Housing	404,829	209	26%	
Recreation	23,815	12	-12%	
Admin & Support	284,995	147	136%	
	<i>Total</i>		369	
	53% Higher than Florida			
Housing				
	<u>Type of Beds</u>	<u>Capacity</u>	<u>Total GSF</u>	<u>Per Bed</u>
Minimum Housing	X2 Cells	656	163,510	249
Medium Housing	X2 Cells	1024	164,122	160
Close Housing	X1 Cells	256	81,609	319
			(24,746)	
<i>Close Custody Mix % same as Florida</i>				
Ad Seg Housing	X1 Cells	100	34,608	346
			(14,274)	
<i>Ad Seg Adj to Florida capacity</i>				
	<i>Total</i>		404,829	
Admin. & Support				
			<u>Total GSF</u>	<u>Per Bed</u>
	Administration		30,857	16
	Plant Services		90,174	47
	Inmate Programs		77,187	40
	Inmate Services		84,366	44
	Other		2,411	1
	<i>Total</i>		284,995	147

LBC 12/21/95

## **APPENDIX 7**

### **METHODOLOGY FOR EQUATING CAPITAL AND OPERATING COSTS**

Privatization proposals for construction and operation of facilities require the development of comprehensive bids that include proposed construction costs as well as proposed per diem rates for prison operation. Development of baseline costs, what it would “cost” the state to construct and operate the facility, as well as the formatting and evaluation of proposer responses requires a methodology for combining operating and capital costs into a composite total annual cost, usually expressed in a cost per bed per day or the inmate per diem.

Proposals for the 1318 bed facility in Florida were evaluated by the Florida Privatization Commission on such a combined cost basis. The method selected by the Commission to combine capital and operating costs was to translate the construction costs to a calculated depreciation period; each construction project cost element was depreciated on a straight-line basis over 20 years, except equipment which was depreciated over 10 years. The resulting calculation, slightly over 5 percent, was multiplied times the total construction cost to generate a number which was then added to annual operating costs.

While this approach provides an easy to understand method for translating the capital costs to an annual equivalent, it falls short in evaluating and explaining the actual costs to the public owner for the one-time construction costs. We suggest a more complete methodology that would recognize:

- Linkages between the construction budget and the total cost of the project, primarily the costs of interim financing;
- Linkages between this final cost to be financed and the repayment of this debt over an extended period of time--a period that will be inevitably different than the period of the cost analysis (e.g., 25 year tax-exempt debt against a period of analysis of 30 to 50 years); and
- Linkages between the equivalent annual payment for the period of the analysis and the expected annual operating costs, denominated in the same year dollars. This would allow annual payments to be treated in a manner similar to the operating cost (e.g., the payment of the debt denominated in fixed year dollars where repayment would be valued in future years as an escalating amount indexed to expected inflation).

The LBC has developed a methodology for determining total annual equivalent costs. This methodology provides an annualized equivalent cost for all operating and capital cost elements based on the period of analysis. This methodology translates budgeted capital costs into an amount that needs to be financed over a period of time different from the period of the full analysis. By calculating the present value of the cash flows necessary to finance repayment of project financing, and then translating this present value to an escalating payment over the period of the analysis (e.g., 30 to 50 years), we can then compare the capital cost to the operating equivalent which we also expect to escalate at the same rate over the same period of analysis. Exhibit 9 summarizes the result of this evaluation for the Grays Harbor facility. The estimated project budget is \$185.9 million. Since these outlays will occur in advance of operation, we have developed an estimated construction financing cost which, when added to the budgeted cost, is intended to correspond to the net project cost to be financed. We have projected that the project can be financed with tax-exempt debt at 70 percent of the market rate plus a small risk premium of 1/4 percent related to the use of a Certificate of Participation. (Note: we assume a discount rate equal to the market rate.) The resulting \$162.8 million present value of the typical 25-year repayment of this debt, when discounted at the market rate, is actually 18 percent lower than the cash equivalent of \$197.7 million. This difference of almost \$35 million represents the Federal tax subsidy to tax exempt state projects.

In evaluating the capital cost component of the Grays Harbor facility we found that this factor, when applied to the budgeted initial cost, ranged from 5.8 percent for a 30-year analysis to 4.8 percent for a 50-year analysis. For the 30-year analysis, the initial payment for the \$185.9 budgeted facility would therefore be \$10,725,000 which is 5.8 percent of the budgeted number. The next year payment would be \$11,047,000, 3 percent higher, an increase consistent with the estimated escalation of operating costs. The present value of these payments for a total of 30 years, escalating at 3 percent annually, would be \$162.7 million, the present value equivalent after the tax subsidy.

This \$10,725,000 annual payment, denominated in 1999 dollars (1999 is the planned year of opening), translates into a capital cost per diem of \$15.18 per bed in a 30-year analysis. For a 50-year analysis, the per diem would be \$12.70.

## Exhibit 9

### Factors to Apply to Capital Costs to Correspond to Escalating Annual Payments

These are the factors to apply to develop a payment escalating at an annual rate over the specified period. Assumptions include: 25 year tax-exempt financing at an effective rate of 5.85% (70% of the discount rate of 8% +.25% COP premium), and 3% annual escalation.

<b><u>Budgeted Capital</u></b>	<b>\$185,907,995</b>	
Factors to be used:		
30 Years	5.8%	
50 Years	4.8%	
<b><u>Total Capital to Finance</u></b>	<b>\$197,721,319</b>	<i>Includes Construction Financing</i>
Factors to be used:		
30 Years	5.4%	
50 Years	4.5%	
<b><u>PV Equivalent After Financing</u></b>	<b>\$162,761,805</b>	<i>Impact of Tax-Exempt Financing</i>
Factors to be used:		
30 Years	6.6%	
50 Years	5.5%	

#### Example of Effective Per Bed Capital Per Diem in 1999 Dollars (using factors for Budgeted Capital)

	<u>Annual 1999\$ Payment</u>	<u>Per Bed Capital Per Diem</u>
30 Years	\$10,725,158	\$15.18
50 Years	\$8,977,191	\$12.70

**APPENDIX 8**

**INVENTORY AND ANALYSIS OF REQUESTS FOR  
PROPOSALS COMPONENTS RELATIVE TO PRISON  
PRIVATIZATION**

**INVENTORY AND ANALYSIS OF REQUESTS  
FOR PROPOSALS COMPONENTS  
RELATIVE TO PRISON PRIVATIZATION**

PREPARED FOR  
LEGISLATIVE BUDGET COMMITTEE, STATE OF WASHINGTON

PREPARED BY  
RICHARD CRANE, ATTORNEY AT LAW

DECEMBER 20, 1995

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## INTRODUCTION

This report identifies and analyzes the components used in requests soliciting proposals for the private operation of a state prison. The report identifies the boilerplate, discretionary and essential components of such a Request For Proposals ("RFP") and, where appropriate, provides a commentary on the various approaches other states have taken. The report is broken down into four main sections. The first section covers those components which would be necessary in any RFP involving prison privatization, be it for management of an existing facility, management of a new state-built facility or a contract for the design, construction and management of a facility by a private contractor. The second section lists components unique to an RFP for the take-over of a new or already operational state facility. The third section discusses those components unique to the take-over of a facility which is already in operation by the state, and the last section addresses those components unique to contracts for the design, construction and management of a new correctional facility by a private company.

This report has been prepared by Richard Crane, an attorney who has practiced corrections law for over twenty years. From 1973 through 1981, he was Chief Legal Counsel for the Louisiana Department of Corrections, and from 1984 through 1987, he was Vice President and General Counsel for Corrections Corporation of America, a private prison management company. Since leaving CCA, Richard has assisted the federal, state and local correctional agencies in developing RFP's, evaluating proposals and negotiating contracts for the private design, construction and management of correctional facilities. Among others, Richard has worked with the Tennessee, Virginia, Louisiana, Colorado, North Carolina and Michigan Departments of Corrections in their prison privatization efforts.

Richard graduated from Louisiana State University Law School in 1971 and is a member of the Louisiana and Tennessee Bars. He presently serves on the Practitioners Advisory Committee to the United States Sentencing Commission and writes a regular column on corrections privatization matters for the Correctional Law Reporter, a national publication.

## TABLE OF CONTENTS

<b>RFP COMMENTARY - PRISON PRIVATIZATION .....</b>	<b>1</b>
<b>Management of Existing Facility; Management of New State-Built Facility; Design, Build and Manage</b>	
<b>I. BOILERPLATE RFP COMPONENTS.....</b>	<b>1</b>
A. Definitions .....	1
B. Maintenance of Facility in Accordance with All Applicable Fire, Building, Life-Safety, and Handicapped Accessibility Codes .....	1
<b>II. ESSENTIAL &amp; DISCRETIONARY COMPONENTS .....</b>	<b>2</b>
A. Definitions .....	2
B. Non-Delegable Responsibilities (E).....	4
C. Term of Contract.....	5
D. Indemnification and Hold Harmless Requirements .....	5
E. Invoicing and Payment Terms .....	5
F. Operating Standards (e.g., ACA Standards) (D) .....	6
G. Equipment and Supplies - Who will furnish .....	6
H. Ownership of Equipment, Perishables, and Supplies at Conclusion of Contract .....	7
I. Contract Termination.....	7
J. Tax Issues .....	7
K. Insurance Requirements - Operations.....	7
L. Facility Administration .....	8
M. Personnel .....	9
N. Inmate Records and Reports .....	10
O. Security .....	10
P. Inmate Personal Property (D).....	11
Q. Visitation.....	12
R. Inmate Classification/Transfers .....	12
S. Food Services.....	12
T. Laundry and Clothing.....	12
U. Health Services .....	13
V. Recreation .....	14
W. Library.....	14
X. Access To Courts .....	15
Y. Indigent Inmate Postage.....	15
Z. Commissary .....	15
AA. Sanitation and Hygiene .....	15
BB. Maintenance, Repairs and Renovations .....	15
CC. Utilities .....	15
DD. Inmate Work.....	16
EE. Inmate Education .....	16
FF. Religious Services .....	16
GG. Payments to Discharging Inmates (D) .....	16
HH. Transportation.....	17
II. Telephone .....	17
JJ. Inmate Welfare Fund.....	17
KK. Inmate Trust Accounts .....	17
LL. Resumption of State Control.....	18
MM. Inmate Relations/Grievance Resolution (D).....	18
NN. Industries Development (D).....	18

OO. Volunteer Services (D) .....	18
PP. Inmate Drug Testing (D).....	18
QQ. Proposal Requirements.....	19
RR. Selection Process (E) .....	20
SS. Analysis of Proposals (E).....	20
TT. Cost and Savings Comparison(D).....	22
UU. Performance Bond(D).....	22
<b>RFP COMMENTARY .....</b>	<b>24</b>
<b>Take-over of Existing Facility</b>	
A. Existing Employees (Essential).....	24
B. Use of Existing Equipment, Supplies, and Perishables(E).....	25
C. Maintenance/Warranty Issues(E).....	25
<b>RFP COMMENTARY .....</b>	<b>26</b>
<b>Design/Build/Manage</b>	
I. BOILERPLATE .....	26
A. Definitions .....	26
B. Use and Management of Facility Subject To and Constrained by Federal Tax Laws and Regulations Governing Tax- Exempt Financing (If Applicable).....	26
II. ESSENTIAL & DISCRETIONARY COMPONENTS .....	27
A. Site (State or Contractor Furnished)(E).....	27
B. Design(E).....	28
C. Design and Construction Schedules(E) .....	29
D. Certificates of Occupancy Needed(D).....	29
E. FF&E(E).....	29
F. Ownership of Facility/Option to Purchase(E).....	29
G. Payment Schedules -- Design, Construction & FF&E -- Construction Financing(E) .....	30
H. Performance Bond (B).....	31
I. Facility and FF&E Cost Breakdown and Total(E) .....	31
J. Design and Construction Qualifications(E) .....	31
K. Evaluation Scoring(D).....	31
L. On-Site State Oversight -- Construction Phase (D).....	31

## RFP COMMENTARY - PRISON PRIVATIZATION

### Management of Existing Facility Management of New State-Built Facility Design, Build and Manage

#### I. BOILERPLATE RFP<sup>1</sup>

##### COMPONENTS<sup>15</sup>;

###### A. Definitions

###### 1. Department

*Means the Washington State Department of Corrections*

###### 2. Facility

###### 3. Inmate

###### 4. Inmate Day

*Means either each day the inmate is **housed** at the facility, or each day the inmate is **assigned** to the facility, but housed elsewhere. Which definition is used depends on the State's decision about the contractor's responsibility for inmates housed away from the facility (e.g. for medical care).*

###### B. Maintenance of Facility in Accordance with All Applicable Fire, Building, Life-Safety, and Handicapped Accessibility Codes

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<sup>14</sup> "RFP" means Request for Proposals

<sup>15</sup> Each component has been identified as being an essential , discretionary or boilerplate components. They are defined as follows:

Essential ("E") -- Those components which are necessary to ensure that proposals received in response to the RFP address those issues necessary for the State to make an informed decision in awarding the resultant contract.

Discretionary ("D") - Those components which the State may wish to include in the RFP as a result of policy decisions about the efficacy of the service or information being requested.

Boilerplate ("B") - Those components which contain standard language found in other State RFP's

## II. ESSENTIAL & DISCRETIONARY COMPONENTS

### A. Definitions

#### 1. American Correctional Association (ACA) Standards (Discretionary)

*To create a level playing field for the potential offerors and to facilitate evaluation of proposals, it is very helpful to utilize a set of operational standards as a minimum which all offerors must meet. It is not necessary that the State itself use ACA standards in the operation of its facilities in order to utilize the standards for a privatization project. ACA Standards are the only nationally recognized correctional standards, and meet or exceed the Constitutional minimum requirements for operation of a correctional facility. If the State has its own standards, these can be substituted, in whole or in part, for ACA standards.*

#### 2. Fixed Fee or Per Diem Rate

*Although the State may decide to change the method of payment prior to entering into a contract, the RFP should specify that the offerors operations budgets should be calculated on either a yearly fixed fee or per diem (an amount per inmate per inmate day.)*

*The fixed fee method can result in lower cost proposals because it removes the operator's risk should some beds go unoccupied. On the other hand, a fixed fee can be more expensive if the State ends up paying for unused beds. Therefore, most jurisdictions have opted for requesting that costs be quoted on a per diem basis.<sup>16</sup> Some states have suggested by implication in their RFP's that they were willing to pay a fixed fee, by requesting one per diem rate up to a certain number of inmates and a second per diem above that level.<sup>17</sup>*

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<sup>16</sup> For example, Louisiana, Virginia, Texas, Tennessee have all issued RFP's asking only for a per diem rate.

<sup>17</sup> See, for example, the Florida' Correctional Privatization Commission RFP for a 1318 bed medium and close custody facility for adult males, issued September 9, 1994.

*If this method is used, the first per diem figure should be low enough to ensure that the State is not paying for unoccupied beds, but high enough so that the contractor is comfortable that it can recoup its fixed costs (usually 90-95% occupancy). The second per diem should then be high enough to reimburse the contractor for the variable costs associated with each inmate above the first per diem level (e.g. food, clothing, medical).*

*Whichever method is used, the RFP must contain a population figure on which the proposed budgets are based. In its RFP for a 998 bed facility, Tennessee required offerors to figure their budgets and per diem on 95% occupancy. Virginia has recently required computations based on 90% occupancy.*

### 3. Contract Monitor/Liaison (E)

*The Contract Monitor is a state employee assigned to the facility on a full or part time basis (depending on the size of the facility) to oversee the overall implementation of the contract in order to protect the State's various interests. These interests include:*

- a) The State's continuing responsibility for the inmates sentenced to its custody.*
- b) The need to protect the taxpayer's interest by ensuring that the services contracted for are being provided.*
- c) The need to have a state employee available to perform duties which are not delegable to the contractor.*

### 4. Correctional Services (E)

*These are the services the contractor is expected to provide in operating the facilities*

### 5. Service Commencement Date (E)

*This is the date on which inmates are first received at the facility. It is not the same as the effective date of the contract, but instead marks the day on which payments for the housing of inmates begins.*

## B. Non-Delegable Responsibilities (E)

*Most legal commentators believe that the State cannot constitutionally delegate all of its responsibilities to a private prison operator. Therefore, most states have generally reserved to themselves some or all of the responsibilities set forth below:*

1. Calculating inmate release and parole eligibility dates
2. Calculating sentence credits (good time)

*Because contractors usually profit based on the number of inmates housed at the facility, a potential conflict of interest exists if the contractor is responsible for decisions involving release and the granting, denying or revoking of good time credits. Therefore, these functions should always be reserved to the state.*

3. Taking major disciplinary actions

*Some jurisdictions reserve the authority to hold inmate disciplinary hearings.<sup>18</sup> Others have allowed the contractor to conduct the hearings, recommend findings to the department, involving good time, and otherwise directly impose discipline.<sup>19</sup> Absent state law to the contrary, it appears constitutionally permissible to allow the contractor to conduct disciplinary hearings and even take disciplinary actions short of loss of good time, without involvement by the department. On the other hand, the state may be better able to exercise oversight of the operation if it conducts the hearings or at least reviews and approves all disciplinary actions.*

4. Approving inmates for furlough and work release

*States have usually retained this authority.*

5. Approving inmate jobs and pay

*The State must insure that inmates are used for jobs comparable to those performed by inmates in their own facilities and that inmates are not used to perform tasks which should only be performed by free personnel. All states have usually retained this authority.<sup>20</sup>*

6. Placing an inmate under less or more restrictive custody

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<sup>18</sup> e.g. Federal Bureau of Prisons

<sup>19</sup> e.g. Texas, Tennessee, Louisiana, New Mexico, North Carolina

<sup>20</sup> e.g. Louisiana, Tennessee

*At least one state, Virginia, has felt it necessary to deny the operator the authority to place an inmate in a less restrictive custody status, and some states require approval before an inmate is placed in a more restrictive status. However, the need for either of these two limitations is less compelling than those set forth above.*

#### C. Term of Contract

*The term of most operations contracts is three to five years.<sup>21</sup> The RFP process is too time consuming to justify a shorter term. Also, a minimum of three years is necessary to evaluate the benefits of privatization. It may also be useful to include the ability to exercise options beyond the initial term. However, if the project involves design/build components, there may be tax code prohibitions which preclude operations contracts of longer than five years, including option periods.*

#### D. Indemnification and Hold Harmless Requirements

*In addition to the state's usual indemnification requirements, the RFP should require offerors to demonstrate their ability to indemnify the State, its officers, agents and employees for claims arising out of civil rights actions. Lawsuits under 42 U.S.C. §1983 are the vehicle of choice when inmates sue and such suits cannot be brought directly against the State, but must be against real persons.*

#### E. Invoicing and Payment Terms

##### 1. Start-up Costs Prior To Service Commencement Date (D)

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<sup>21</sup> e.g. Tennessee. Tennessee's contract for its Wayne County facility was for three years, with an option to renew for two years. Recent Virginia RFP's for medium and minimum security facilities have been for three years with no option to renew. In it's January, 1994 RFP for a State "jail", the proposed term was two years with an option to renew for two more years.



## 2. Start-up Costs After Service Commencement Date (D)

*The contractor will incur costs prior to the Service Commencement Date. These will include the costs of recruiting and training employees, and purchasing supplies and equipment. It is important in the RFP to specify how the contractor will be reimbursed for these costs. States have used a variety of methods: payment of expenses as incurred,<sup>22</sup> a one time payment after all start-up costs are determined,<sup>23</sup> or payment as part of the operating costs after the Service Commencement Date.<sup>24</sup> If the costs are to be repaid as part of the per diem or fixed fee, the RFP should specify over what period of time this will occur. Normally, the contractor is allowed to recapture its start-up costs during the first year of the management of the facility.*

*The most advantageous way to pay the contractor for its start-up costs will depend on the State's financial situation. If the State has the funding available, it is cheaper to pay the start-up costs as they are incurred, rather than , in effect, borrowing the money from the contractor and repaying him over a period of months or years.*

## 3. Operating Costs

## 4. Guaranteed Minimum Payment (D)

*The methods of paying operating costs and the pros and cons of a guaranteed minimum payment are discussed above in II.A.2.*

## F. Operating Standards (e.g., ACA Standards) (D)

*See II.A.1. above.*

## G. Equipment and Supplies - Who will furnish

*Who will furnish these and how they will be paid for, if furnished by the contractor, should be set forth in the RFP so that the contractor can accurately calculate its costs. This is also the place to note what equipment and/or supplies must be purchased from the State's prison industries program.*

## H Ownership of Equipment, Perishables, and Supplies at Conclusion of Contract

*The RFP should make clear that the State will retain ownership of all equipment, supplies and perishables at the conclusion of the contract. Not*

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<sup>22</sup> e.g. Davidson County (Nashville), Tennessee; Tennessee

<sup>23</sup> e.g. Louisiana

<sup>24</sup> Virginia (included in first year's per diem)

*only has the State paid for these through its payments to the contractor, but these items would be necessary for the State to continue operation of the facility at the conclusion of the contract.*

#### I. Contract Termination

*The RFP need only recite that the contract may be terminated for cause or for the convenience of the government. The RFP should also note, probably as part the boilerplate language, that although a multi-year contract will be awarded, it will be contingent on yearly appropriations from the State legislature.*

#### J. Tax Issues

*This section should discuss the applicability of sales, use and property taxes to the contractor. How these are handled is a matter of state law.*

#### K. Insurance Requirements - Operations

*It is important that the RFP be quite specific in this area as to the types and amounts of coverage required and the standards which must be met by the insurers. Typically, states require that insurance companies be authorized to do business in the state, have a Best rating of "A-" or better, and a financial size of "Class 6" or better.<sup>25</sup>*

*The RFP should require that offerors provide proof of their ability to obtain the following insurance:*

- 1. Workman's Compensation insurance in an amount required by the State*

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<sup>25</sup> e.g. Tennessee, Virginia

2. *General Liability insurance, including civil rights coverage and medical and professional liability coverage*
3. *Automobile and other vehicle liability insurance*
4. *Insurance covering instances of employee dishonesty*

*The RFP should require that copies of the proposed insurance policies be included with the offerors proposals.*

#### L. Facility Administration

##### 1. State Policies To Be Applied To Contractor (D)

*As discussed above, there are certain non-delegable responsibilities which the State must continue to perform. Policies in these areas which will impact on the operator's cost should be identified in the RFP. Likewise, if there are other State policies which will impact on the operator's staffing and/or cost, these should be identified in the RFP and supplied to the offerors.*

##### 2. Organizational Chart (D)

*It is helpful to require the offerors to furnish an organizational chart as tool in the evaluation process.*

##### 3. Contractor's Proposed Policies and Procedures in Key Areas Such As Discipline and Grievance Resolution (D)

*As one means of determining whether an offeror is qualified to operate the facility it is useful to require that the contractor furnish proposed policies and procedures in a few key areas. However, the evaluation process is extremely tedious and it is recommended that only one or two proposed policies be required.*

##### 4. Policies, Procedures, and Post Orders Relative To Certain Identified Operations from the Offeror's Most Comparable Facility (e.g. use of force, searches) (D)

*If there is the possibility of site visits to the offeror's most comparable facilities, it is helpful to require that they provide certain policies, procedures and/or post orders from that facility so that evaluators can use these to determine whether the facility is being operated in accordance with the offeror's own policies.*

## 5. Self Monitoring Procedures (D)

*The best policies and procedures in the world mean nothing, if they are not followed. Therefore, requiring the offeror to set forth how it internally monitors compliance with its own policies and procedures is a helpful tool in evaluating their ability to operate the facility.*

## 6. Program Requirements (E)

*The RFP should require offerors to discuss how they will meet minimal operational and program requirements established by statute, court order, consent degree, etc.*

## M. Personnel

### 1. Staffing Pattern

*A staffing pattern format should be included in the RFP to facilitate comparisons with State staffing patterns, as well as those provided by other offerors.*

### 2. Job Descriptions and Job Qualifications

*This section of the RFP should set forth any minimum job qualifications which the State wishes the contractor to meet.*

### 3. Background Investigation

*The RFP should set forth the extent of the background investigation which the contractor must undertake of its employees. The investigation should be at least as extensive as that which the State conducts for its own employees. Because only a criminal justice agency can request a criminal record check from the FBI, the RFP should specify that the Department will conduct this check on each of the contractor's prospective employees. The RFP should also specify whether there will be a charge to the contractor for this service.*

### 4. Drug-Free Work Force & Employee Assistance Programs (D)

*All states have required offerors to provide detailed plans for the maintenance of a drug-free work force. A few have also required the offerors to have an employee assistance program.*

## 5. Employee Training

*The RFP should set forth the minimum training the State will require of contractor's employees. Normally, this would be the same number of hours of pre-employment and in-service training as required by State law and/or Department policy. Offerors should be required to submit training curricula which differentiates between the training provided different types of employees (e.g. security, clerical) and at least one sample lesson plan.*

## 6. Hiring Preferences (D)

*If the Department wishes to encourage hiring of employees in the locality of the facility, laid-off State employees, etc., that should be set forth in this section of the RFP.*

## N. Inmate Records and Reports

*The RFP should require that the contractor maintain inmate records and reports which conform to those of the Department in both format and content. The RFP should also specify whether the contractor will be required/allowed to utilize the Department's automated inmate records and reporting systems. The RFP should require that the contractor's computer equipment be capable of interfacing with the State's inmate information, tracking and trust accounting systems. The RFP should also specify what is included in the term "inmate records" (e.g. medical, psychiatric, mental health, classification).*

*The RFP should require the offerors to discuss their understanding of State and federal laws regarding confidentiality of records. and their ability to maintain same.*

## O. Security

### 1. Use of Force

*The RFP should note those State laws and policies effecting the use of force against prisoners. The RFP should specify whether deadly force will be permitted at the facility. If so, offerors should be required to describe in detail the training to be provided to employees in the use of firearms and the certification and/or licensing requirements they will be required to meet.*

### 2. Escape

*The RFP should set forth the contractor's responsibility for apprehension of escapees. Some states have required contractors to engage only in hot pursuit<sup>26</sup>, while others have required more extensive efforts<sup>27</sup>, still others have not addressed the issue.<sup>28</sup>*

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<sup>26</sup> e.g. Virginia

<sup>27</sup> e.g. North Carolina

<sup>28</sup> e.g. Texas, New Mexico

### 3. On-Site

*The RFP should require offerors to describe certain aspects of their security operation, such as perimeter security, plans for dealing with power failures and work stoppages, and contraband control policies.*

### 4. Off-Site (D)

*The RFP should specify under what circumstances the contractor will be required to provide off-site security (e.g. hospital care, death-bed visits).*

### 5. Security Personnel - Experience (D)

*The State might wish to require offerors to identify the percentage of its security staff which will have one or more years of experience working in a correctional facility at the time the facility is opened, as a way of determining whether the offerors have access to an experienced work force. Most states have required this, with a few setting the minimum percentage of experienced employees required.*

### P. Inmate Personal Property (D)

*If inmates at the privately operated facility are to have the same personal property rights as inmates at State facilities, this should be specified in this section. If inmates at the facility are subject to transfer to State operated facilities, it is preferable that property rights be the same throughout the system.*

### Q. Visitation

*If the State wishes for the inmates to have indoor and outdoor visitation, this should be set forth in this section. Also, if the State intends that the private facility follow the same visitation schedule and same special visit requirements, the should be stated, and a copy of the visitation policy included in the RFP package.*

### R. Inmate Classification/Transfers

*The criteria by which inmates will be selected for the facility should be set forth here. If the State already has a facility housing the same classification of inmate, it should be identified in the RFP.*

*All jurisdictions have sought to prevent the private contractor from "skimming the cream," by denying the contractor any authority to transfer an inmate, without approval. Normally, placement and transfer requests should be handled using the same criteria as used at State operated facilities.*

### S. Food Services

1. Calorie & Protein Requirements (D)
2. Special & Religions Diets
3. Meal Schedules (D)

*To facilitate evaluations, it is helpful to require offerors to list their meal schedules and the amount of time each inmate will be allowed in the dining hall, in order to determine whether the number of seatings necessary to feed the entire inmate population is reasonable.*

#### T. Laundry and Clothing

*If the State intends for inmates at the privately operated facility to wear the same clothes as are worn in the Department's prisons, that should be specified in this section. Also, if the clothing is to be purchased from correctional enterprises, that also should be set forth here, as well as any requirements to purchase other specialty clothing items (i.e. kitchen uniforms) from correctional enterprises.*

*The RFP should also state what clothing the inmate will arrive with when initially transferred to the facility, and what clothing he should have when he leaves the facility. The RFP should also require that the offerors specify the quantity of each item of clothing each inmate will receive.*

#### U. Health Services

*Because of the high cost of health care and the exposure to liability, it is important that the RFP fully set forth the State's expectations in this area. These usually include:*

1. *Standards to be met.*

*The National Commission on Correctional Health Care Standards for Health Care in Prisons are often used as the minimum level of care which must be provided.*

2. *Required 24-hour a day coverage*
3. *Nursing coverage, specifying LPN and/or RN coverage*
4. *Intake physicals*
5. *Medical Director requirements*
6. *Physician requirements*
7. *Extent to which sick call is to be available*
8. *Record keeping*
9. *Special medical programs for inmates with chronic needs*
10. *Mental health services*
11. *Ancillary services (e.g. radiology, laboratory)*
12. *Dental services, including the need for full or part-time dental coverage*
13. *Infirmery space*
14. *Extent of health education*
15. *Need for psychologist/psychiatrist*
16. *Need for part time health care specialists (e.g. neurologist,*

- radiologist)
17. Contractor's responsibility for providing treatment to inmates with long-term illnesses or treatment needs, such as AIDS patients and those in need of dialysis
  18. Prosthetics (e.g. eyeglasses, hearing aids)

### **Health Care Costs**

*The RFP should set forth the contractor's responsibility for the cost of providing the above health care services, as well as medically related transportation and security. States have followed a number of approaches in handling medical care costs in privately operated facilities. All jurisdictions require that the contractor be responsible for on-site medical care and medically related transportation. It is, however, a serious mistake to limit the contractor's monetary responsibility to only on-site care. Therefore, most states have required that the contractor be responsible for off-site medical care up to a certain limit. Some have set a time limit (e.g. first 24 hours)<sup>29</sup>, others have set a dollar limit per inmate, per admission or year.<sup>30</sup> Most recently, the Commonwealth of Virginia has required offerors to submit proposals in which they were responsible for the cost of providing all medical care, except to inmates with T.B., AIDS, or those in need of dialysis.*

*It is suggested that the best approach is one which closely mirrors the responsibility which the State's other prisons have for the cost of providing treatment. This will facilitate the cost comparisons between the public and private operations.*

*If the State has a contract with a managed care provider for health services and/or supplies, and the Department is willing to allow the contractor to participate in the plan, this should be set forth in the RFP. Also, if the Department has or intends to implement a co-payment plan which requires inmates to pay for part of their health care, this should be discussed in the RFP.*

### V. Recreation

*The RFP should set forth in general terms the amount of recreational and leisure time programs it expects the contractor to make available to the inmate population.*

### W. Library

### X. Access To Courts

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<sup>29</sup> e.g. Louisiana, North Carolina

<sup>30</sup> e.g. Tennessee. The Bureau of Prisons plans to release an RFP which requires the contractor to pay up to \$15,000 per inmate, per year in medical costs.



*The RFP should require that offerors explain how they intend to meet the Supreme Court's requirement that inmates have adequate access to the courts. While most states provide access to the courts by providing inmates with a law library, the RFP should not limit offerors to utilizing this method only. Some corrections management companies have had significant success using attorneys to provide inmates with access to the courts and others are exploring various on-line and/or CD-ROM methods of providing access.*

#### Y. Indigent Inmate Postage

*The RFP should indicate how indigency is defined by the Department and the amount of postage which the Department provides to its indigent inmates.*

#### Z. Commissary

*The RFP should indicate any limitations or requirements for the commissary inventory. The RFP should also state how commissary items may be priced, what the prices may cover (e.g. wholesale cost, commissary employees, commissary utilities) and where profits, if any, will go.*

#### AA. Sanitation and Hygiene

*The RFP should require the offerors to describe their sanitation and hygiene plans for the facility.*

#### BB. Maintenance, Repairs and Renovations

*The RFP should specify who is responsible for maintaining and repairing the facility and who is responsible for the associated costs. If the contractor is to be responsible for major repairs and replacements, the RFP should require that proposals discuss the method of funding.*

#### CC. Utilities

*The RFP should state who is responsible for the cost of utilities.*

#### DD. Inmate Work

*The RFP should state that the contractor shall not benefit financially from the labor of inmates, and that all job descriptions must first be approved by the Department. The RFP should also state whether inmates are to be paid by the contractor and, if so, whether there is a set pay schedule. If so, this should be part of the RFP package.*

*The RFP should also require that proposals indicate the minimum percentage of inmates to be assigned to the various job categories (e.g. institutional support, work lines, industries, and educational and vocational activities).*

#### EE. Inmate Education

*In some states, inmate education is provided by an agency separate from the Department of Corrections.<sup>31</sup> If that is the case, this should be stated and the offerors should be advised of the extent of the educational programs to be provided and the attendant security needs. If offerors are to provide the education program, proposals should discuss the educational and vocational programs in detail, including the teaching and security staffs to be provided.*

#### FF. Religious Services

*Offerors should be required to indicate what religious programming they will provide to inmates and how it will be provided.*

#### GG. Payments to Discharging Inmates (D)

*If inmates will be discharging to the street, the RFP should indicate whether they are entitled to discharge payments, and if so, how much they are entitled to and the source of these funds.*

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<sup>31</sup> e.g. Virginia

## HH. Transportation

*The RFP should set forth who is responsible for the following inmate transportation:*

- 1. Initial conveyance of the inmate to the facility*
- 2. Medically related transportation*
- 3. Court related transportation*
- 4. Inter-facility transportation*
- 5. Discharge*

*If the State intends to bind the contractor to its policies regarding security staffing for transportation, this should be set forth and a copy of the policy included with the RFP.*

## II. Telephone

*If the Department has a contract for inmate telephone services, the RFP should indicate whether the contractor will be required or allowed to utilize that contract. The RFP should also state who is to receive any commissions from the carrier and who is responsible for repair and maintenance of telephone equipment.*

*Most states have required that commissions be paid to the state or inmate welfare fund.<sup>32</sup>*

## JJ. Inmate Welfare Fund

*The contractor should be required to abide by the Department's inmate welfare fund policies. A copy of the policy should be included with the RFP. The Louisiana Department of Corrections has placed "seed" money in the welfare fund, in keeping with its policy for the state's own new facilities.*

## KK. Inmate Trust Accounts

*The RFP should indicate whether inmate funds are to be accounted for using the Department's accounting systems or whether the contractor may maintain its own. The RFP should indicate that interest on the funds should be transferred to the inmate welfare fund.*

## LL. Resumption of State Control

*Proposals should discuss how the facility will be returned to the State's control upon termination of the contract.*

## MM. Inmate Relations/Grievance Resolution (D)

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<sup>32</sup> e.g. Louisiana, Virginia

*If a state has an inmate grievance procedure, the contractor will normally be required to follow and integrate itself into that system.<sup>33</sup> However, there is some difficulty in this area because inmates at the privately operated facility will often grieve over policies which are unique to that facility. These grievances, as they proceed up the ladder, are then heard by persons unfamiliar with those policies. As yet, there is not a satisfactory resolution to this problem.*

NN. Industries Development (D)

*If the State wishes for the private operator to develop industries within the prison, the RFP should so state. The RFP should reference any statutory limitations effecting industry development. This section should also specify whether the contractor can operate under the Department's PIE (private sector/prison industry enhancement program) permit.*

OO. Volunteer Services (D)

*The RFP should require that offerors specify areas where they intend to utilize volunteers and how they intend to recruit, train and supervise them.*

PP. Inmate Drug Testing (D)

*If the State intends that the contractor follow its drug testing policies, that should be set forth here. Otherwise, offerors should be told whether a drug testing program is mandatory and required to include details of the testing program in their proposals.*

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<sup>33</sup> e.g. New Mexico, North Carolina, Tennessee

## QQ. Proposal Requirements

### 1. Economy of Preparation (D)

*The private corrections industry has gone overboard in the length of their proposals. While completeness is an obvious essential, the length of the proposals should be limited to a specified number of pages. It may even be appropriate to limit various sections of the proposal to a specific number of pages. As yet, no state has imposed page limitations, but most would do so if they issued another RFP.*

### 2. Number of Submissions (D)

*Offerors will often submit more than one proposal, altering things such as the site, subcontractors, or the budget. It is strongly recommended that offerors be permitted to submit one proposal only in order to simplify the evaluation process.*

### 3. ACA Accreditation (D)

*Most jurisdictions have required private operators to receive ACA accreditation within twenty-four months of their taking over operation of the facility.<sup>34</sup> The cost associated with the accreditation process will be born by the State.*

### 4. National Commission on Corrections Health Care (NCCH) Accreditation or Joint Commission on Accreditation of Health Care Organizations - Out patient. (D)

*While the NCCH standards provide an acceptable level of care for state inmates, there is a lack of confidence in the NCCH accreditation process which emphasizes paperwork, rather than patient care. The Joint Commission Standards for Outpatient Care are new and it is not yet clear whether these standards, or the related accreditation process, is workable in a corrections setting.*

### 5. Purchases From Prison Industries (D)

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<sup>34</sup> e.g Tennessee; Davidson County, TN; Louisiana; Virginia

## RR. Selection Process (E)

### 1. Prebid Conference(E)

*Because of the complexity of the RFP, a mandatory prebid conference is almost always held. The RFP should state the time, date and place for the prebid conference.*

### 2. Oral Presentations(D)

*In addition to evaluating the written proposals, most states have required oral presentation of offerors making the "short list." The oral presentation is usually worth about 10% of the overall points awarded in the selection process. Some thought should be given to combining the oral presentations with on-site visits of the offeror's most comparable facility.*

## SS. Analysis of Proposals (E)

*In this section of the RFP, the State may break down the areas of the proposal and indicate the maximum points which will be awarded for each. Although this can be broken down into smaller segments, the three main areas of the evaluation are services, cost, and qualifications. Usually states award approximately 1/3 of the points in each area.<sup>35</sup>*

### 1. Correctional Services(E)

### 2. Cost Proposal(E)

*The RFP should set forth the number of inmates to be used in figuring costs, so that all offers are comparable. Cost proposals should be prepared using a budget format provided with the RFP. The budget forms should use the same categories as the department's budget with the addition of corporate overhead and profit lines. The RFP should also state whether budgets and cost proposals beyond the first year are to be provided.*

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<sup>35</sup> e.g. Louisiana, New Mexico

3. Contractor's Qualification(E)

a. Firm's Experience in Corrections(E)

*It is recommended that offerors be required to first list their management experience with facilities of similar size, security level and inmate population as the one being proposed. They should then list their experience in the overall management of other correctional facilities, both adult and juvenile. The lists should include the name and phone number of the public body's contact person for each contract. The state may wish to develop a standard format for these listings to facilitate the evaluations.*

b. Company History(D)

c. Company Size and Structure(D)

d. Qualifications and Experience of Management Personnel(D)

i. Security

ii. Legal

iii. Medical Care

iv. Warden

v. Other \_\_\_\_\_

*Proposals should name the present employee who has overall responsibility for each of the above referenced areas, setting forth the person's qualifications and years of public and/or private correctional experience. The listing should also include the number of years of experience with an inmate population similar to the proposed facility. In this section, the State may also wish to request that offerors detail their experience in providing certain types of programs which will be implemented at the proposed facility (e.g. drug treatment programs).*

f. Financial Statements(D)

g. Proof of Insurance (E)

*The proposal should include specimen insurance policies and endorsements and a certified statement from the insurance carrier issuing the policies that such policies are available to the proposer.*

h. Names and Docket Numbers of Lawsuits Pending Against the Offeror(D)

i. List of Lawsuits Settled or Lost in the Past Year, Issues Involved and Settlement Reached or Judgment Rendered(D)

j. List of Disbarments, Indictments, Bills of Information, and/or Convictions for Violations of Federal and/or State Law by Proposer or Any Present or Former Board Member or Officer of the Company Within the Last Five Years(E)

*This provision has recently appeared in Virginia's RFP's and is highly recommended.*

k. Correctional Management Contracts Terminated(E)

*Offerors should list those correctional services contracts which have been terminated, the reasons for the termination and the name and phone number of a contact person with the former contracting agency.*

- m. Key Employee Resignations, Retirements, or Terminations During Last 12 Months and Description of Effect on Firm's Qualifications(D)

*This requirement has recently appeared in Florida's RFP's.*

- n. Identification of Proposed Facility Administrator(D)

#### TT. Cost and Savings Comparison(D)

*Most states have statutory or policy requirements that any privatization project save the state money.<sup>36</sup> In this section, the RFP should detail any such requirements and specify how the comparison will be made. For example, will it be done on a year to year basis, or will the total contract price be looked at and compared to a similar period for a public facility. If the State's cost for a like facility is available at the RFP stage, it might be included in this section. This may, however, encourage some firms to "low ball" their cost proposal simply to get in under the State's per diem.*

#### UU. Performance Bond(D)

*During the early days of private prison management contracts, jurisdictions required the contractor to post a performance bond.<sup>37</sup> However, some states have gotten away from this requirement because of the difficulty and expense of obtaining a performance bond in such a small industry.<sup>38</sup> Further, the State has much at stake in replacing a prison management contractor and this is a task better left to the State, rather than an insurer. Finally, the State is in an excellent position to recoup any costs they may incur if the contractor defaults because the contractor will be usually be paid 45 to 75 days in arrears.*

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<sup>36</sup> e.g. Louisiana, Florida

<sup>37</sup> e.g. Sante Fe, NM; Louisiana

<sup>38</sup> e.g. Tennessee



## RFP COMMENTARY

### Take-over of Existing Facility

#### A. Existing Employees (Essential)

*One of the State's goals in contracting for the management of a currently operated State facility may be to sever its relationship with the employees of that facility. This may be due to union or pension considerations, or an effort to reduce the number of State employees. However, it is generally not possible to create independent contractor status if the contractor does not exercise control over the essential terms and conditions of a person's employment. Therefore, if the State requires that the contractor hire the facility's present employees or if the State maintains control over wage ranges or the terms of employee benefits, a joint employer status may be created. Therefore, it is usually better to require only that the contractor give fair consideration for re-employment to the facility's present employees.*

1. Mandatory Retention, or
2. Offer of Employment, or
3. Consideration for Re-employment
  - a. Application Process
  - b. Fair Consideration
4. Retirement, Health Plan and other Fringe Benefit Issues
5. Union Issues

*In general, a private contractor will not be bound by the substantive provisions of an existing labor agreement unless:*

- 1) *The contractor is certain to, or has indicated that, it will hire all, or essentially all of the facility's work force or,*
- 2) *The contractor consents to be bound by the existing labor agreement.*

*Even then, the firm may not be bound because the National Labor Relations Act provides that "no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership...employees other than guards." Correctional officers are "guards" under the NLRA. See Crossroad Community Correctional Center, 308 NLRB #81 (1992). Therefore, if the present collective bargaining representative of the facility's employees is an affiliate of a union that admits non-guards to membership, such as AFSCME, that bargaining representative could not be certified under the NLRA as the employees bargaining representative .*

#### B. Use of Existing Equipment, Supplies, and Perishables(E)

*If the Contractor will be required to pay for any existing equipment, supplies, and perishables, this should be set forth in this section of the RFP.*

C. Maintenance/Warranty Issues(E)

*The RFP should indicate what maintenance contracts presently exist at the facility and, if they are to be assumed by the contractor, the cost of each. The RFP should also specify what facility equipment is presently covered by warranty and the terms thereof.*

**RFP COMMENTARY**  
**Design/Build/Manage**

**I. BOILERPLATE**

A. Definitions

1. Construction

*This means the design and building of a facility or the renovation of an existing facility to suit the intended needs of the project.*

2. FF&E

*This means furnishings, fixtures and equipment or the providing of same, depending on the context.*

3. Architect

4. Program Statement

*This document, sometimes referred to as the Design Plan or Design Program, defines the types and amounts of space to be included in the design of the facility. Development of such a document by the State prior to issuance of the RFP is essential.*

B. Use and Management of Facility Subject To and Constrained by Federal Tax Laws and Regulations Governing Tax-Exempt Financing (If Applicable)

*The term of management contracts used in conjunction with projects financed using tax-exempt obligations is governed by IRS Advance Revenue Procedure 93-19, issued February 22, 1993. Under this procedure, to avoid classification as a private activity bond, management contracts are essentially limited to a three to five year term with no extension clauses. However, the IRS has proposed revising this procedure such that management contracts might be permitted for up to fifteen years. A final decision from the IRS is expected in Spring, 1996.*

## II. ESSENTIAL & DISCRETIONARY COMPONENTS

### A. Site (State or Contractor Furnished)(E)

*There are a number of reasons which favor use of a state owned site for the private construction of a new facility. These include:*

1. **Time** -- *If private companies are required to obtain a site as part of their participation in the project, there will likely be numerous delays as the contractor acquires ownership of the property and attempts to obtain the necessary zoning and permits. There will also be a considerable delay while an environmental impact study is undertaken. If a State site is used, ownership and zoning will already be established and the environmental impact study can begin immediately upon selection of the site, rather than waiting until a contract has been awarded for the project. Potentially 1 to 2 years can be saved if the facility is constructed on an existing State-owned site.*

2. **Cost** -- *The cost of using privately obtained land will be greater than using a State site. All costs incurred by the private company as a result of purchasing the land, obtaining the necessary permits, and completing an environmental impact study will be passed on to the State.*

3. **Certainty** -- *Potential contractors will typically have neither ownership nor appropriate zoning at the time they submit their project proposals. Thus, evaluation of the proposals and selection of a contractor will require a lot of guess work as to whether the site can be properly permitted.*

4. **Evaluation** -- *Requiring offerors to prepare proposals using the same site will greatly simplify the evaluation process as it will allow for a much better "apples to apples" comparison of the various proposals.*

*If the Contractor is to furnish the site, the RFP should specify the State's expectations in the following areas:*

#### 1. Title(E)

*As set forth above, it is unlikely that offerors will have title to the property on which they intend to build the facility. However, the RFP should require that they have at the very least an option to purchase the site and that a copy of the option agreement be included with the proposal.*

#### 2. Permits (e.g. Land Use and Zoning)(E)

*The RFP should specify what permits the contractor will be responsible for obtaining and should require offerors to set forth a schedule for obtaining these with proof of their ability to do so.*

#### 3. Location Factors(E)

*The RFP should state what, if any, location requirements offerors must meet . These can include distances to hospitals, availability of law enforcement and fire fighting assistance, and availability of utility services.*

4. Acreage and Access(D)

*The RFP should set forth what the State believes a minimum or adequate size for the facility is and whether a buffer zone is necessary around the site. It should also require that the site have a primary and a secondary entrance providing all weather ingress and egress from two directions to publicly maintained roads . Proposal should include an area road map that shows the location of the site and a terrain map showing relief and terrain elevations.*

5. Payments in Lieu of Taxes(D)

*If the property will be exempt from property taxes, the RFP should state whether payments to local government in lieu of taxes will be reimbursed through the management or construction contracts.*

B. Design(E)

1. Program Requirements (e.g. Cells, Dorms, Classrooms)(E)
2. Contract Monitor Space(E)

*Normally this space would be comparable to space provided for the assistant facility administrator.*

3. Building Codes and Standards & other Construction Specifications(E)
4. Plans, etc. to be Submitted with Proposal (E)
5. Computer Analysis of Utility Usage(D)

C. Design and Construction Schedules(E)

*Offerors should be required to include a detailed schedule for the design and construction of the facility. If the State has a deadline for completion of the facility, it should be stated in the RFP. Most private contractors can complete the design and construction of a major secure facility in 18-24 months from the date the contract is awarded.*

D. Certificates of Occupancy Needed(D)

*The RFP should specify that the contractor will be required to obtain a certificate of occupancy from the appropriate authorities and that the Department must also approve occupancy of the facility.*

E. FF&E(E)

1. List of Components(E)

*Offerors should include in their proposals and FF&E budget a detailed list of components and their estimated costs. If certain components are to be purchased from prison industries, this should be stated in this section.*

2. Party to Furnish(E)
3. Ownership at Conclusion of Contract(E)

*The RFP should state that the State will acquire ownership of all equipment at the conclusion of the contract.*

4. Purchases Required from Correctional Enterprises(D)

F. Ownership of Facility/Option to Purchase(E)

*Depending on the method of financing, the facility may be owned by someone other than the contractor or the State. The RFP should specify whether this is acceptable and should also set forth at what point the State will take ownership of the property. This will depend on how the State intends to pay for the construction. Obviously, if the State has paid for the construction up front, it should acquire ownership at that point. If the State does not own the facility, it should have the option to purchase it at any time. If the facility has not been financed by bonds, the State's purchase price should be either the actual cost of land acquisition, construction and FF&E less principal payments to that date or less the depreciation, using straight line depreciation over a specified number of years, whichever is less. If the facility was financed by the issuance of bonds, then the State should have the option to purchase it for the unpaid principal balance of the bonds.*

G. Payment Schedules -- Design, Construction & FF&E --Construction

## Financing(E)

*Occasionally, a jurisdiction will pay for the design and construction of a facility as the work is completed<sup>39</sup>. More often, the debt service is included as part of the per diem or fixed fee paid during the operations portion of the management contract. Sometimes the construction cost is fully paid during the same three to five year term as the management services component of the contract, but more often, it is paid over a twenty or thirty year period. The U.S. Marshall's Service and the Federal Bureau of Prisons have recently been criticized for paying off the debt service within five years.<sup>40</sup>*

*If the construction is to be financed, the RFP should make clear that the Department's obligation to make payments under any financing agreement is solely contingent upon appropriations by the State legislature. Also, each offeror should be required to submit a plan of finance in sufficient detail to facilitate a complete review and evaluation of it. Any limitations on finance plans such as negative amortization or refinancing plans, should be set forth. If the State intends to use an independent architectural and engineering firm to monitor compliance with construction plans and specifications, and anticipates obtaining payment of its A&E from the plan of finance, this should be mentioned.*

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<sup>39</sup> Davidson County, Tennessee (Nashville) used this approach.

<sup>40</sup> New York Times, Nov. 24, 1995, p. 1

H. Performance Bond (B)

*The RFP should require a performance bond for the construction portion of the project.*

I. Facility and FF&E Cost Breakdown and Total(E)

*The RFP should specify the level of detail required for the construction costs. These may include: site acquisition, construction cost, FF&E, off-site utilities, professional fees, and offerors profit,. The State may also wish to have the construction costs broken down by building.*

J. Design and Construction Qualifications(E)

1. Architect/Engineer(E)
2. Construction Firm(E)
  - a. Experience in the Design and Construction of Correctional Facilities (D)
  - b. Qualifications and Experience of Key Design and Construction Personnel(D)
  - c. Proof of Ability to Do Business in Washington State(E)

K. Evaluation Scoring(D)

1. Quality of Design, Construction and FF&E Proposal
2. Cost of Facility and FF&E
3. Architect/Engineer Qualifications
4. Construction Firm Qualifications

*In its September, 1995 RFP for the design, construction and management of a 1500 medium security prison, the Virginia Department of Corrections uses the following scoring:*

- A. *Design, Construction and FF&E Proposal (150 points)*
- B. *Design, Construction and FF&E Cost (150 points)*
- C. *Correctional Services Proposal (150 points)*
- D. *Operations Cost (150 points)*
- E. *Contractor Qualifications*
  1. *Design (50 points)*
  2. *Construction (50 points)*
  3. *Management (150 points)*
  4. *Small, Women or Minority Owned Businesses (50 points)*

L. On-Site State Oversight -- Construction Phase (D)



**APPENDIX 9**

**CONTRACT COMMENTARY PRISON PRIVATIZATION**

**CONTRACT COMMENTARY**  
**PRISON PRIVATIZATION**

PREPARED FOR  
LEGISLATIVE BUDGET COMMITTEE, STATE OF WASHINGTON

PREPARED BY  
RICHARD CRANE, ATTORNEY AT LAW

DECEMBER 20, 1995

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## INTRODUCTION

This report identifies and analyzes the components used in contracts for the privatization of a state correctional facility. The report identifies the boilerplate, discretionary and essential components of such contracts and, where appropriate, provides a commentary on the various approaches other states have taken. The report is broken down into four main sections. The first section covers those components which would be necessary in any contract involving prison privatization, be it for management of an existing facility, management of a new state-built facility or a contract for the design, construction and management of a facility by a private contractor. The second section lists components unique to a contract for the take-over of a new or already operational state facility. The third section discusses those components unique to the take-over of a facility which is already in operation by the state, and the last section addresses those components unique to contracts for the design, construction and management of a new correctional facility by a private company.

This report has been prepared by Richard Crane, an attorney who has practiced corrections law for over twenty years. From 1973 through 1981, he was Chief Legal Counsel for the Louisiana Department of Corrections, and from 1984 through 1987, he was Vice President and General Counsel for Corrections Corporation of America, a private prison management company. Since leaving CCA, Richard has assisted federal, state and local correctional agencies in developing RFP's, evaluating proposals and negotiating contracts for the private design, construction and management of correctional facilities. Among others, Richard has worked with the Tennessee, Virginia, Louisiana, Colorado, North Carolina and Michigan Departments of Corrections in their prison privatization efforts.

Richard graduated from Louisiana State University Law School in 1971 and is a member of the Louisiana and Tennessee Bars. He presently serves on the Practitioners Advisory Committee to the United States Sentencing Commission and writes a regular column on corrections privatization matters for the Correctional Law Reporter, a national publication.

<b>CONTRACT COMMENTARY-PRISON PRIVATIZATION</b> .....	1
<b>Management of Existing Facility; Management of New State-Built Facility</b>	
<b>I. DEFINITIONS</b> .....	1
A. American Correctional Association (ACA) Standards (Discretionary) .....	1
B. Contract (Boilerplate) .....	1
C. Contractor (B) .....	1
D. Court Orders (B) .....	1
E. Department (B) .....	1
F. Contract Monitor (Essential) .....	2
G. Effective Date of Contract (B) .....	2
H. Facility (E) .....	2
I. Indigent Inmates (D) .....	2
J. Inmate (B) .....	2
K. Inmate Day (D) .....	2
L. Payment Method (fixed fee, per diem or combination)(E) .....	2
M. Partial Default (D) .....	2
N. Partial Takeover (D) .....	2
O. Offer (B) .....	3
P. RFP (B) .....	3
Q. Service Commencement Date (B) .....	3
R. Start Up Period (D) .....	3
S. State (B) .....	3
<b>II. TERM AND SCOPE OF CONTRACT</b> .....	3
A. Term (E) .....	3
B. Option Periods (D) .....	3
C. Scope of Agreement (B) .....	4
D. Conditions Precedent (D) .....	4
<b>III. FACILITY AND PROPERTY</b> .....	4
A. Possession of Facility (E) .....	4
B. Facility Maintenance (E) .....	4
C. Equipment Replacement (E) .....	5
D. Additional Construction and Renovation (E) .....	5
E. Utilities (E) .....	5
F. Taxes/Payments in Lieu of Taxes/Initial Impact Fees (D) .....	5
G. Telecommunications (E) .....	5
H. Destruction of Facility (B) .....	6
I. State Space Requirements (e.g. parole board)(E) .....	6
<b>IV. CONTRACT MONITORING</b> .....	6
A. Monitoring and Evaluation (E) .....	6
B. Access/Inspection by Other State Officials (D) .....	7
C. Contract Monitor(s) .....	7
D. Policy Audits (D) .....	7
E. Financial Statements (D) .....	8
<b>V. OPERATION OF FACILITY</b> .....	8
A. Contractor Obligations (E) .....	8
B. Resolution of Conflicts between standards, policies, etc. (E) .....	9
C. State's Obligations (E) .....	9
D. Contractor's Policy and Procedures Manual (E) .....	9
E. Intentionally left blank .....	9
F. Assignment and Transfer of Inmates (E) .....	10

G.	Safety and Emergency Procedures (E)	10
H.	Medical, Dental and Mental Health Services (E)	10
I.	Infirmery and/or Special Needs Unit (D)	11
J.	Responsibility For Medical and Related Costs (E)	11
K.	Intentionally left blank	12
L.	Food Service (E)	12
M.	Intake and Classification (E)	12
N.	Laundry and Inmate Clothing (E)	12
O.	Recreation (E)	12
P.	Transportation (E)	12
Q.	Inmate Commissary (E)	13
R.	Religion (E)	13
S.	Inmate Grievance Procedures (D)	13
T.	Security and Control (E)	13
U.	Visitation (E)	15
V.	Access to Courts (E)	15
W.	Inmate Discipline (E)	15
X.	Sentence Computation (E)	16
Y.	Release Payments to Inmates (E)	16
Z.	Records and Reports (E)	16
AA.	Inmate Personal Property (E)	16
BB.	General Library (E)	17
CC.	Volunteer Services (E)	17
DD.	Inmate Work (D)	17
EE.	Prison Industries (D)	17
FF.	Vocational and Academic Training (E)	18
GG.	Treatment Programs (D)	18
HH.	Classification and Case Management (E)	18
II.	Inmate Banking (E)	18
JJ.	Inmate Welfare/Betterment Fund (E)	18
KK.	Access to State Computers/Rights to Software (D)	19
LL.	Public Disclosure, Including Release of Information on Inmates (E)	19
MM.	Resumption of State Control (E)	20
NN.	Housing Inmates from Other Jurisdictions (E)	20
OO.	Management of Inmate Mail	20
VI.	EMPLOYEES	21
A.	Independent Contractor Status (E)	21
B.	Facility Administrator (D)	21
C.	Personnel (E)	21
D.	Removal of Employees at State Request (E)	22
E.	Job Descriptions (E)	23
F.	Personnel Records/State Access to Same (E)	23
G.	Employee Training (E)	23
H.	Drug Free Work Force (E)	23
I.	State/Contractor Coordination (D)	23
J.	Hiring Preferences (D)	24
VII.	COMPENSATION AND ADJUSTMENTS	24
A.	Management Payment (E)	24
B.	Payment Adjustments (E)	25
C.	Billings (E)	26
D.	Billing Disputes (B)	26
E.	Taxes (B)	26
F.	Utilities (B)	26

VIII. INDEMNIFICATION, INSURANCE AND DEFENSE OF CLAIMS .....	26
A. Indemnification (E).....	26
B. Insurance (E) .....	27
C. Insurance Services (E).....	27
D. Prior Occurrences (E) .....	28
IX. CONTRACT COMPLIANCE .....	28
A. Breach By State (B).....	28
B. Contractor Breach (E).....	28
C. Waiver (E).....	29
D. Termination Due To Unavailability Of Funds (B).....	29
E. Termination For State's Convenience (D) .....	29
F. Performance Bond (D).....	29
X. PROHIBITIONS .....	30
A. Inmate Classification (D) .....	30
B. Disciplinary Actions (D) .....	30
C. Sentence Calculation (D) .....	30
D. Parole and Release Decisions (D).....	30
E. Approval of Furloughs and Work Release (D).....	30
F. Type of Work Inmates May Perform (D).....	30
<b>ADDITIONAL CONTRACT COMPONENTS .....</b>	<b>31</b>
Takeover Of New Or Operating Facility	
I. POSSESSION OF EXISTING FACILITY (E) .....	31
A. Lease/Use and Possession (E) .....	31
B. Renovations, Construction, Repairs, Improvements (E) .....	31
C. Status of Existing Facility Contracts (E) .....	31
II. POSSESSION OF MOVABLE EQUIPMENT & PERISHABLES (E) .....	31
A. Maintenance, Repair, and Replacement of Movable Equipment (E).....	31
B. Ownership at Termination of Contract (E) .....	31
C. Transfer of Warranties (D).....	31
<b>ADDITIONAL CONTRACT COMPONENTS .....</b>	<b>32</b>
Takeover Of Operating Facility	
I. EXISTING EMPLOYEES (E).....	32
A. Employment Status (E).....	32
B. Consideration for Re-employment (E) .....	32
C. Pension Rights (E) .....	32
D. Accumulated Leave (E) .....	32
E. Other Fringe Benefits (E).....	32
<b>ADDITIONAL CONTRACT COMPONENTS .....</b>	<b>33</b>
Design/Build/Manage	
I. DEFINITIONS .....	33
A. Construction (B).....	33
B. Construction Price (E) .....	33
C. FF&E (B).....	33
D. Architect (B).....	33
E. Facility Design Program (E).....	33

F. Prevailing Wage Laws (B) .....	33
II. SITE .....	33
A. State Furnished (D) .....	33
B. Contractor Furnished (D).....	33
C. Environmental Impact Study .....	34
D. Hazardous Waste Cleanup .....	34
III. DESIGN CONSTRUCTION.....	34
A. Plans and Specifications (E).....	34
B. Construction Oversight by State (D).....	34
C. Design, Construction and FF&E Costs (E).....	34
D. Construction Permits (B) .....	35
E. Changes in Plans and Specifications (B) .....	35
F. Agreement by Parties to Execute Necessary Documents (B).....	35
G. Certificates of Occupancy (E) .....	35
H. Construction Default (B) .....	35
I. Updated Plans and Specifications to Be Furnished (D).....	35
J. Use of Plans and Specifications in Construction of Other State Facilities (D) .....	35
K. FF&E (E).....	36
L. FF&E Inventory (E) .....	36
M. Additional Property (D).....	36
N. Construction Insurance Requirements (B) .....	36
O. Performance Bond (B) .....	36



## CONTRACT COMMENTARY-PRISON PRIVATIZATION

### Management of Existing Facility Management of New State-Built Facility Design, Build and Manage

#### I. DEFINITIONS

A. American Correctional Association (ACA) Standards (Discretionary<sup>1</sup>)

Essential ("E") -- Components necessary to ensure that proposals received in response to the RFP address those issues necessary for the State to make an informed decision in awarding the resultant contract.

Discretionary ("D") - Components which the State may wish to include in the RFP as a result of policy decisions about the efficacy of the service or information being requested.

Boilerplate ("B") - Components which contain standard language found in other State RFP's.

);

B. Contract (Boilerplate)

C. Contractor (B)

*Means the firm awarded the Contract to provide the design, financing, construction, FF&E and/or operation of the Facility required under this Contract*

D. Court Orders (B)

*Means any existing or future orders or judgments issued by a court of competent jurisdiction or any existing or future stipulations, agreements, or plans entered into in connection with litigation which are applicable to the operation, management or maintenance of the facility or related to the care and custody of inmates at the facility.*

E. Department (B)

*Means the Washington State Department of Corrections*

---

<sup>41</sup> Each component has been identified as being essential , discretionary or boilerplate. They are defined as follows:

F. Contract Monitor (Essential)

*The Contract Monitor is a State employee assigned to the facility on a full or part time basis (depending on the size of the facility) to oversee the overall implementation of the contract in order to protect the State's various interests.<sup>42</sup> These interests include:*

*a) The State's continuing responsibility for the inmates sentenced to its custody.*

*b) The need to protect the taxpayer's interest by ensuring that the services contracted for are being provided.*

*c) The need to have a State employee available to perform duties which are not delegable to the contractor.*

G. Effective Date of Contract (B)

H. Facility (E)

I. Indigent Inmates (D)

J. Inmate (B)

K. Inmate Day (D)

*This is usually defined as each day the inmate is at the facility, including the first, but not the last day.*

L. Payment Method (fixed fee, per diem or combination)(E)

M. Partial Default (D)

*This means the partial default of the services to be rendered by the contractor.*

N. Partial Takeover (D)

*This means the State's discretionary assumption of a portion of the services to be rendered by the contractor because of the contractor's failure to perform.*

---

<sup>42</sup> Louisiana originally utilized a full-time monitor at each of its two medium security contract facilities. It later did away with the monitors, although state employees visit the facilities on an irregular basis. Louisiana officials are happy with this arrangement, as, of course, are the contractors. However, it has yet to be established whether such a hands-off approach is a constitutional delegation of authority.

O. Offer (B)

*This means the contractor's original proposal together with any additional materials submitted during the selection process or other agreed-upon clarifications.*

P. RFP (B)

Q. Service Commencement Date (B)

*This is the date on which inmates are first received at the facility. It is not the same as the effective date of the contract, but instead marks the day on which payments for the housing of inmates begins.*

R. Start Up Period (D)

*This is the time between the effective date of the contract and the service commencement date.*

S. State (B)

*Means the State of Washington*

## **II. TERM AND SCOPE OF CONTRACT**

A. Term (E)

*The term of most operations contracts is three to five years.<sup>43</sup> The RFP process is too time consuming to justify a shorter term. Also, it is generally felt that a minimum of three years is necessary to evaluate the benefits of privatization. If the project involves design/build components, the federal tax code may preclude operations contracts of longer than five years, including option periods.*

B. Option Periods (D)

*It may be beneficial to the State to include the ability to exercise options beyond the initial term of the contract. Options should not automatically take effect, but should require some affirmative action on the State's part. Those states which have included option periods have not generally required any formal process of evaluation to determine whether the option should be*

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<sup>43</sup> The contract for Tennessee's Wayne County facility was for three years, with an option to renew for two years. Recent Virginia RFP's for medium and minimum security facilities have been for three years with no option to renew. In it's January, 1994 RFP for a State "jail", the proposed term was two years with an option to renew for two more years. North Carolina's proposed RFP specifies an initial term of five years, with an option for five additional years.

exercised.<sup>44</sup> *There seems to be no requirement in those states surveyed that the contract be resubmitted for competitive comparison with other firms before an option is exercised.*

#### C. Scope of Agreement (B)

*This section sets forth all documents which are included by reference in the contract, such as the Request for Proposal Package with Attachments and Contractor's Offer. It should also provide that, in the event of a conflict, the Contract will control, followed by the Request for Proposals and then the Offer. The contract may also contain a statement that no discussions or implied promises are binding on the State unless included in the contract.*

#### D. Conditions Precedent (D)

*There may be some conditions which must be fulfilled by the contractor before the contract is effective. This could include getting title to the property or the necessary zoning. These contingencies should be set forth in this section.*

### III. **FACILITY AND PROPERTY**

#### A. Possession of Facility (E)

*The wording of this section will depend on the nature of the project. For example, if the project involves the take-over of an existing facility, this section would provide that the State leases or grants a right of use to the contractor of all the real property comprising the facility and its grounds for the term of the contract.*

#### B. Facility Maintenance (E)

*Most states have required the contractor to provide all maintenance, repairs and replacements and to keep the facility in good repair and working order. This section should also set forth the responsible party for all expenses incurred in maintaining and repairing the facility. Normally, the contractor is responsible for paying for all, but the most major repairs.*

*This section should also provide for the minimum standards to be followed by the contractor in maintaining the facility. (e.g. applicable fire, building, life safety and handicapped accessibility codes).*

*This section should also set forth any prohibitions connected with the use of the facility, such as not harvesting timber located on the grounds.*

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<sup>44</sup> One exception is Tennessee where there are statutory requirements which must be met before an option can be exercised. (See, T.C.A. §41-24-105)

*This section would also normally require the State to provide the contractor with copies of any warranties made by third parties covering equipment on the property and to require the contractor to maintain the facility in compliance with the warranties.*

#### C. Equipment Replacement (E)

*The contract will normally require the Contractor to be responsible for the cost of replacing equipment, with some exceptions for major systems.<sup>45</sup>*

#### D. Additional Construction and Renovation (E)

*This section should prohibit the contractor from modifying or renovating any existing buildings or equipment or constructing new buildings without Department approval. If approval is also required by other State agencies, that should be set forth here. This section should also provide at whose expense such modifications, renovations or construction will be undertaken.*

*The State should also reserve the right to construct additional buildings at the facility and require the contractor to cooperate with the State should that take place. If the facility is expanded, the contract will remain in force and the contractor required to accept any increase in the inmate population which the facility can accommodate due to the expansion, subject to a change in the contract price should the contractor be able to identify increased costs (e.g. additional security staff, utilities).*

#### E. Utilities (E)

*This section should specify who is responsible for providing utility services and the expense thereof. Normally, this responsibility would rest with the contractor.*

#### F. Taxes/Payments in Lieu of Taxes/Initial Impact Fees (D)

*This section should specify who is responsible for any ad valorem taxes assessed against the property or for payments made in lieu of property taxes, initial impact fees or other payments to reimburse the local government for expenses incurred because of the location of the facility.*

#### G. Telecommunications (E)

*This section should provide what telecommunications equipment is provided or is to be provided at the facility and who is responsible for the cost and maintenance thereof.*

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<sup>45</sup> In Louisiana's two private management contracts, the contractor is responsible for all repairs and replacements, except for replacement of the HVAC which is the State's responsibility. In Tennessee, the State accepts responsibility for certain major repairs or replacements exceeding \$5000. In Texas, the contractor is responsible for the cost of all repairs and replacements.

*This section should also require that the equipment be capable of interfacing with the State's existing communications and automated information systems, as well as with any future State systems.*

*This section should also set forth the details of the pay telephone contract. Most states require the contractor to use the contract which is in operation at the State's other facilities. All contracts specify how commissions will be dispersed.*

H. Destruction of Facility (B)

I. State Space Requirements (e.g. parole board)(E)

*This section should set forth the space needs for State personnel assigned to the facility on a full time basis and State personnel who are required to be at the facility for various official purposes, such as disciplinary or parole hearings.*

#### **IV. CONTRACT MONITORING**

A. Monitoring and Evaluation (E)

1. Contract Monitor (E)

*It is important to set forth the rights and responsibilities of the Department's contract monitor. These typically include monitoring the contractor's performance under the contract. It may also include the collecting of information to facilitate the comparison of the cost and quality of services provided by the contractor with those provided by the State at comparable facilities.*

*This section should set forth the monitor's authority to act for the Department. For example, the monitor may have the authority to sign release papers, hear disciplinary appeals, award and take away good time credits, etc.*

*Of particular importance are provisions setting forth the monitor's access to the facility. The contract should state that the monitor shall have immediate, complete and unrestricted access to all parts of the facility at any and all times. It should also state that the monitor will have immediate, complete and unrestricted access to all documents pertaining to the obligations of the contractor under the contract. If such documents are not located at the facility, the monitor should have the authority to request and obtain these within a stated period of time.*

*Problems have arisen in some jurisdictions where the monitor had unrestricted access to all meetings, staffings and hearings conducted at the facility. Contractors have argued that some meetings should be confidential - such as those between corporate representatives and facility staff and those involving individual labor/management issues.*

*One state has agreed to such limitations on the monitor's access.<sup>46</sup> Other states have agreed to lesser limitations.<sup>47</sup>*

*Whether this approach will be successful depends in large measure upon the contractor's good faith. It would be quite easy to manipulate the situation so that meetings where the monitor should appropriately be present were declared off limits because of the presence of a corporate staff member. Assuming the parties' good faith, these limitations should resolve the contractor's problems regarding monitor access.*

**B. Access/Inspection by Other State Officials (D)**

*Provisions providing that any government official shall have access to the facility should be avoided. However, a provision obligating the contractor to provide appropriate access to authorized inspection and regulatory agency personnel and legislators on official business is recommended.*

**C. Contract Monitor(s)**

1. Location - On or Off-Site (D)
1. Office Space (E)
2. Staff (D)
3. Equipment (E)

*Most contracts have provided that the monitor have the use of the contractor's office equipment, such as copiers, fax machines, etc. However, it is suggested that the monitor have his own fax machine so as to be able to maintain control over documents which should not be disseminated to the contractor.*

**D. Policy Audits (D)**

*Some contracts have required the contractor to have outside corporate employees to periodically audit facility operations. This stems from the concern that policies and procedures written at the corporate level are often not implemented at the operations level. This is not a problem peculiar to privately operated facilities, but occurs in government operated facilities, as well. If this approach is taken, it is helpful to identify those policies and procedures which the Department feels are particularly sensitive as the ones to be monitored. This would include such policies as: use of force, administrative and disciplinary segregation, and inmate and visitor searches.*

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<sup>46</sup> e.g. Virginia (proposed contract)

<sup>47</sup> Tennessee (meetings with corporate staff or outside legal counsel)

## E. Financial Statements (D)

*In order to be aware of financial problems which might lead to reduced services or even the contractor's bankruptcy, many contracts require the contractor to furnish a yearly audited financial statement. It sometimes also requires a profit/loss statement addressing only contractor's obligations under the contract.*

## V. OPERATION OF FACILITY

### A. Contractor Obligations (E)

#### 1. Legal Requirements (Federal, State and Local Laws; Court Decisions; Consent Agreements) (E)

*This section normally provides that the Contractor shall operate and maintain the Facility in accordance with all applicable federal, state and local laws; and court orders. If there are specific court orders dealing with such things as overall prison conditions, these can be cited in this section.*

#### 2. State and Department Policies Applicable to Contractor (E)

*This section should reference those State and Department policies which the contractor must follow. If the list is lengthy, it would normally be contained in an appendix. In selecting those policies which should be applied to the contractor, the Department should select only those which are essential to a smooth interaction between the State and the contractor. These usually include policies on such things as discipline, grievance resolution, classification and transfers, inmate records, inmate personal property, inmate pay, and sentence computation and credits.*

#### 3. Application of Other Policies During Contract Term (E)

*The contract should also state that the Department may unilaterally add additional policies to the list of those applicable to the contractor.*

#### 4. Standards (e.g., ACA, NCCHC) (D)

*If the State wishes for the Contractor to obtain ACA accreditation, it should require that the Contractor achieve it within a maximum of two years of the Service Commencement Date. It should also require that, at that time and thereafter, Contractor comply with 100% of the mandatory ACA Standards and a minimum of 85% of the non-mandatory ACA Standards, unless prevented from doing so by the Department.*

*A few jurisdictions have also required that the Contractor shall achieve, at its expense, National Commission on Correctional Health Care (NCCHC) accreditation within two years of the Service Commencement Date.*



*However, some feel that the NCCHC accreditation process is poor and that the time and expense involved are not worth the effort.*

5. RFP (D)

*Most states require the contractor to be bound by the specifications in the RFP.*

6. Contractor's Proposal (D)

*All states require the contractor to be bound by its proposal.*

7. State/Contractor Relations

*The contract should contain a provision emphasizing the nature of the contract as a cooperative endeavor between the parties. On the practical side, this should include reference to attendance by contractor's personnel at state-wide administrative meetings, on-going training and the like.*

B. Resolution of Conflicts between standards, policies, etc. (E)

*The following language should be placed in the contract to deal with conflicts:*

*If any applicable federal, state or local laws, court orders, Department administrative regulations, ACA Standards or provisions of this Contract are in conflict, the most restrictive shall apply, as determined by the Department.*

C. State's Obligations (E)

*This section should provide that the State agrees only to perform its obligations as described in the contract and the RFP.*

D. Contractor's Policy and Procedures Manual (E)

*The contractor should be required to provide the Department with a written policy and procedure manual containing all policies and procedures for all services to be rendered under the contract before a specified date. That date should be at least two months prior to the opening of the facility to give the Department time to review and approve it before the contractor begins training its employees.*

E. Intentionally left blank

## F. Assignment and Transfer of Inmates (E)

### 1. Classification Criteria (E)

*This section should either spell out the classification criteria for inmates to be assigned to the facility or reference the appropriate Department policies on the subject.*

### 2. Ramp-up Period (E)

*If the contract is for the operation of a new facility, it should set forth the time frame for transfer of inmates into the facility. The contractor will push for a very fast ramp-up period because of its desire to generate income. Contractors will also urge a fast ramp-up period because they sometimes feel that the facility doesn't begin to settle into routine operation until it reaches its normal operating capacity.*

*The contract should set a pace for the assignment of inmates with which the State is comfortable, based on the State's own experience and the nature of the inmates to be placed in the facility. The contract should also provide that the State may speed up or slow down the transfer of inmates into the facility based on its evaluation of the facility's operations.*

### 3. Transfer of Inmates from the Facility(E)

*The contract should specify the procedure the Contractor must follow to obtain approval for the transfer of inmates out of the facility. Normally, this should be the same criteria as utilized to analyze a request for transfer from a State-operated facility.*

## G. Safety and Emergency Procedures (E)

*Although these areas should be addressed in the contractor's policy and procedure manual, some states, as a matter of good community relations, have also included specific contract provisions requiring the contractor to submit plans in the following areas:*

1. Riot and Disturbance Control (E)
2. Risk Management (E)
3. Natural Disasters (E)
4. Escapes (E)

*Plans in the above areas would be subject to review and approval by the state before implementation.*

## H. Medical, Dental and Mental Health Services (E)

1. Services To Be Provided (E)
2. Staffing (E)
3. Record Keeping (E)

- I. Infirmary and/or Special Needs Unit (D)
- J. Responsibility For Medical and Related Costs (E)
  - 1. On-Site Care (E)
  - 2. Prosthetics (E)
  - 3. High Cost Items -- AIDS Treatment, Dialysis, Transplants, etc. (E)
  - 4. Off-Site Care (E)

*If the contractor is only responsible for off-site medical care for a specified period of time, then the contract should provide for additional payment to the contractor for providing security at off-site medical facilities after the Department has assumed responsibility for the cost.<sup>48</sup> Once the Department has assumed responsibility, the contractor would not normally receive a per diem, thus requiring the security payment.*

5. Catastrophic Limits (D)

*The contract should clearly set forth the contractor's responsibility for the cost of providing health care services, medically related transportation, and the cost of prosthetics (e.g. eyeglasses, hearing aids).*

*States have used a number of approaches in handling medical care costs in privately operated facilities. All jurisdictions require that the contractor be responsible for on-site medical care and medically related transportation. It is, however, a serious mistake to limit the contractor's monetary responsibility to only on-site care. Therefore, most states have required that the contractor be responsible for off-site medical care up to a certain limit. Some have set a time limit,<sup>49</sup> other have set a dollar limit per inmate, per admission or per year.<sup>50</sup> Recently, the Commonwealth of Virginia has been negotiating a contract which will require the Contractor to be responsible for the cost of providing all medical care, except to inmates with T.B., AIDS, or those in need of dialysis.*

*It is suggested that the best approach is one which closely mirrors the responsibility which the State's other prisons have for the cost of providing treatment. This will facilitate the cost comparisons between the public and private operations.*

*If the State has a contract with a managed care provider for health services and/or supplies, and the contractor is required or allowed to participate in the plan, this should be set forth in the Contract. Also, if the*

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<sup>48</sup> e.g. Louisiana, Tennessee.

<sup>49</sup> e.g. Louisiana (48 hours); North Carolina (24 hours).

<sup>50</sup> Tennessee limits the contractor's exposure to \$4000 per admission or three days, whichever comes first. The Federal Bureau of Prisons has proposed a \$15,000 per year limit.

*Department has or intends to implement a co-payment plan which requires inmates to pay for part of their health care, this should be specified in the contract.*

- K. Intentionally left blank
- L. Food Service (E)
  - 1. Calorie and Protein Minimums (D)
  - 2. Department Master Menu or Department Menu Approval (D)
  - 3. Special Diets (D)
- M. Intake and Classification (E)
  - 1. Orientation (D)
  - 2. Fingerprints and Photographs (D)
- N. Laundry and Inmate Clothing (E)
  - 1. Items To Be Provided (D)

*It is preferable that the contractor be required to provide and clothe inmates in the same clothing as is worn in Department operated prisons. The basic issue of clothing for each inmate should be set forth in the contract.*

- 2. Laundry Schedule (D)
- 3. Purchases From Department (D)

*The contract should specify which items of clothing and/or bedding are to be purchased from prison industries. In some cases, states have permitted the contractor to request waivers from these purchase requirements if it can be shown that the contractor can purchase items at a lesser cost elsewhere.*

- 4. Discharge Clothing (D)

*The contract should state what clothing the inmate will arrive with when initially transferred to the facility, and what clothing he should have when he leaves the facility.*

- O. Recreation (E)
  - 1. Program Requirements (D)
  - 2. Staffing (D)
- P. Transportation (E)
  - 1. Intake (E)
  - 2. Discharge (E)
  - 3. Intra-Facilities (E)
  - 4. Medical (E)
  - 5. Court (E)
- Q. Inmate Commissary (E)
  - 1. Items To Be Stocked (D)
  - 2. Pricing (E)

*Normally, the Contractor is allowed to price commissary items to cover the cost of inventory, taxes, commissary personnel and commissary utilities. However, this should coincide with the pricing policies at State facilities. The contract should also provide that the prices charged are comparable to those charged by the Department.*

3. Accounting (E)
  - a. Determining Profit and Loss (E)
  - b. Use of State Automated Systems (D)
4. Profits, Disposition Of (E)

*Profits should be accounted for and used in the same manner as those generated at State operated facilities.*

- R. Religion (E)
  1. Staffing (E)

*The contract should specify to what extent volunteers will be used to provide religious services and whether religious staff will be providing other than religious services, such as counseling. This section of the contract should also specify the employee responsible for overseeing this area of the prison's operations.*

2. Schedule of Services (D)

- S. Inmate Grievance Procedures (D)

*It is highly advisable that the contractor be required to utilize the Department's grievance procedures and the Department's system for maintaining grievance related records. The contract should also deal with whether the contractor must have its grievance procedures approved by the Department of Justice pursuant to the Civil Rights Of Institutionalized Persons Act. If the grievance procedure provides for a Department employee to act on grievances from the privately operated facility, some thought must be given as to that person's power to interpret corporate policies.*

- T. Security and Control (E)
  1. Use of Force (E)
    - a. Types (E)

*The contract must specify whether facility employees are entitled to use both deadly and non-deadly force. The contractor's ability to use these types of force may derive from the common law or statutory authority.*

- b. Where Allowed (E)

*Normally contracts provide that force may only be used:*

- 1) *While on the grounds of the facility*

- 2) *While transporting inmates*
- 3) *During periods of community hospitalization*
- 4) *During court proceedings*
- 5) *While pursuing escapees from the facility*
- 6) *While supervising inmates off the grounds of the facility*

c. When Allowed (E)

*The situations when non-deadly and deadly force may be used should be specifically set forth in the contract. Further, the contract should state that deadly force may only be used as a last resort and that only those employees who are appropriately trained and, if applicable, authorized by law shall be allowed to carry and use weapons.*

d. Weapons Certification (E)

*In some jurisdictions, private contractor employees have derived their authority to carry weapons from existing legislation. Often, this legislation relates to the licensing of private security guards ("rent-a-cops"). In other cases, and the more preferable method of handling this, is to provide specific statutory authority authorizing contractor's employees to use firearms when they meet the minimum qualifications and training set forth in the statute.*

2. Escapes (E)

*This is an area which should be addressed in the policy and procedure section of the contract. However, for political and public relations reasons, a separate section relating to escapes is often included in the contract. It may address the areas set forth below.*

- a. Prevention (E)
- b. Apprehension (E)
- c. Authority for off-site searches (D)
- d. Contractor liability (D)

*Contracts usually provides that the contractor shall engage in hot pursuit of escapees, immediately notify local law enforcement agencies and the contract monitor, and provide other assistance with apprehension as requested by the Department. In Tennessee the contract also stated that if an escape resulted in whole or in part from the contractor's failure to perform pursuant to the provisions of the contract, the State could collect damages.*

3. Post Orders (D)

*The contract should require post orders by post and by shift. Too often, post orders are the same for each shift, although duties might vary greatly from one shift to another. Post orders should be developed for all custodial positions up to and including chief of security, and should be reviewed and approved by the State.*

#### 4. Inmate Drug Testing (D)

*The contract should provide for drug and alcohol testing similar to that provided at State operated facilities. This may include random testing, testing based on reasonable suspicion of drug use and poly-drug "baseline" testing of inmates prior to release on parole, or otherwise. If inmates are charged for such tests, this should be set forth in the contract. If selection of inmates to be tested at random will be the responsibility of the Department, this should be so stated.*

#### U. Visitation (E)

1. Indoor and Outdoor (D)
2. Schedules (D)
3. Attorney Visits (E)
4. Special Visits (D)
5. Conjugal Visits (D)

#### V. Access to Courts (E)

*The contract should only require that the contractor provide the inmate with adequate access to the courts utilizing the system the contractor has proposed, if that is acceptable. The contract should require that the contractor change the method of providing access to the courts if the Department determines that it does not meet Constitutional standards.*

#### W. Inmate Discipline (E)

1. Use of Washington Administrative Code Provisions (D)

*Most states have required the contractor to use Department disciplinary rules and procedures in the operation of the facility.<sup>51</sup> This is preferable because of Constitutional delegation problems and in order to provide uniformity in assessing the rate of disciplinary infractions at each institution. The contract should also require that the contractor use any future inmate disciplinary system which the Department might adopt.*

2. Hearing Officers (E)
3. Appeals (E)

*The contract must also specify who will conduct the disciplinary hearings and review the appeals. Most states allow the contractor to conduct the disciplinary hearing and impose all discipline, except for the loss of good time.<sup>52</sup> The tendency is to use state hearing officers where such a position is a formal one, particularly where hearing officers ride a circuit*

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<sup>51</sup> e.g. Louisiana, Tennessee, North Carolina, Virginia.

<sup>52</sup> e.g. Louisiana, North Carolina, New Mexico, Texas

*from one facility to another to conduct hearings. Usually, appeals are ultimately handled by Department employees, although there may be an intermediate appeal to a corporate employee.*

X. Sentence Computation (E)

*This section of the contract provides that the Department shall perform all sentence computations. It should also specify what information the contractor must provide to the State and in what format. Notwithstanding the above, the posting and filing of disciplinary reports, custody changes, etc., may be the contractor's responsibility.*

Y. Release Payments to Inmates (E)

*If the State requires release payments to inmates, the contract should set forth the amount and source of the funds.*

Z. Records and Reports (E)

1. Records to be Maintained (E)

*The State may wish to list the reports it will routinely require in the contract. These could include monthly maintenance and inmate statistical summaries.*

2. Confidentiality (E)

*The contractor should be required to maintain the same confidentiality of records as does the State. Likewise, the contractor should be required to adhere to the State's public records act insofar as those records which would be maintained if the facility were operated by the State.*

3. Technology Standards & Requirements (D)

*It is recommended that the corporation be required to maintain records in the same format as the State so that the records can be incorporated into the State computer system, if necessary.*

AA. Inmate Personal Property (E)

BB. General Library (E)

CC. Volunteer Services (E)

*The contract should set forth the areas where volunteers may be utilized and the extent of their training and supervision.*

DD. Inmate Work (D)

1. Use of Inmate Labor for Facility Operations (E)



*The contract should state that inmate labor may be used for facility operations and maintenance only to the same extent inmate labor is utilized in Department facilities. It should also state that the contractor shall never benefit financially from the labor of inmates in order not to run afoul of Article, II §29 of the Washington State Constitution.*

*Some states have incorporated into the contract the minimum and maximum number of inmates to be used in various work classifications (e.g. institutional support, program services, work lines, industries).*

2. Job Descriptions - State Approval (E)

3. Inmates in Positions of Authority (E)

*The contract should state that inmates will never be placed in positions of authority over other inmates.*

4. Outside Sales (D)

*Federal, and perhaps state, law governs the sale of prison made goods outside the institution. Those same prohibitions ought to be applied to the contractor here.*

5. Inmate Pay (E)

*All states have required the contractor to pay inmates consistent with the state's pay plan for inmates.<sup>53</sup> That plan should be incorporated by reference here.*

EE. Prison Industries (D)

*If the contractor will be required or permitted to develop prison industries, that should be addressed. Some states have encouraged private contractors to bring innovative industries into the prison as a part of the contract.<sup>54</sup> To date, there have been no significant developments in the private sector regarding prison industries. In some cases, states has indicated an intention to establish an industries program within the privately operated facility. Depending on the industries set up, this section of the contract should provide for security to be provided by the contractor.*

FF. Vocational and Academic Training (E)

*The contract should set forth those vocational and academic programs which are to be provided by the contractor and the standards which must be met.*

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<sup>53</sup> e.g. Virginia, Tennessee

<sup>54</sup> e.g. Virginia

*pursuant to House Bill 2010. It is helpful to also include the number of inmates who will participate in each program at any given time.*

#### GG. Treatment Programs (D)

*Mental health, drug abuse and other types of treatment programs which the contractor is to provide, and the standards to be met in doing so, should be set forth in this section, along with the number or percentage of inmates who will participate in these programs at any given time.*

#### HH. Classification and Case Management (E)

*The contractor should be required to comply with Department policies regarding classification and reclassification of inmates. It should also be required to maintain classification information in a way which conforms to the Department's system. Some states have required, although it does not appear to be legally necessary, that the contractor obtain prior approval before changing an inmate's classification within the facility.<sup>55</sup> It is suggested that notice of such changes be all that is required in the contract.*

#### II. Inmate Banking (E)

*Usually the contract requires that the contractor maintain inmate funds in the same manner as the Department. Less often, it requires that the inmate money be deposited in an automatic inmate central banking account maintained by the State.<sup>56</sup> This section should also specify where interest earned on these funds is to be deposited. This is usually the inmate welfare fund.*

#### JJ. Inmate Welfare/Betterment Fund (E)

*Most contracts require the contractor to set up and maintain an inmate welfare/betterment fund. The contract should state that funding will come from those sources identified in State law. In other states this usually includes profits from the inmate commissary, interest from inmate trust account funds, money seized as contraband and profits earned on visiting room vending machines.*

*This section should also specify how the funds in this account may be expended by the contractor. Most contracts require that funds be expended only in accordance with a yearly budget approved by the Department. The section should also state where the funds in the inmate welfare fund will go at the conclusion of the contract.*

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<sup>55</sup> e.g. Tennessee, Virginia

<sup>56</sup> e.g. Louisiana

*In Louisiana, the Department of Corrections provided for initial funding to be placed in this account from inmate welfare funds at other facilities. The theory on which this was done, and it seems logical, is that the inmates being transferred to the new facility had some vested interest in money in the sending institution's inmate welfare accounts.*

KK. Access to State Computers/Rights to Software (D)

*The contract should state whether the contractor will have access to the Department's automated systems. If this is permitted, the contract should reserve to the State the right to lock out certain aspects of these systems from access by the contractor. The section should also provide that the State will retain proprietary rights to all State provided software utilized in connection with the contract. The State may also wish to require the contractor to grant it a license for software developed by the contractor in connection with the contract.*

LL. Public Disclosure, Including Release of Information on Inmates (E)

*It is unclear whether the records of a private contractor are subject to the disclosure requirements of Chapter 42.17 RCW. It is also unclear whether State records in the possession of the contractor are State records within the meaning of the disclosure statute. Nevertheless, the contractor should be required under the contract to disclose information on inmates which the State is required to disclose. In most cases, this information would be equally available from the State and it would serve no real purpose except to aggravate the public and increase the Department's work load to have the contractor deny information which the requester could ultimately receive from the Department. Model language for this section follows:*

**Release of Information.** *Contractor shall not be authorized to release publicity concerning inmates and shall not release personal histories or photographs of inmates or information concerning their arrivals or departures, except as provided herein. Requests for interviews with inmates shall be referred to the Department Liaison. However, information from public records, such as sentence data or information concerning the escape of an inmate, may be given directly to the news media by Contractor. The Contractor may photograph inmates as a means of identification for official use only. Photographs of inmates may be disseminated to appropriate law enforcement officials and the news media in the event of any inmate's escape from Contractor's physical custody.*

*The Public Records Act, 42.17.010 et seq would cover those records which are prepared by the State, but in the possession of the contractor. Also, records that are "used" or "retained" by the Department even if they were originally prepared by the contractor would be public records. It is unclear whether records prepared by the contractor under the contract but not "used" or "retained" by the Department would be public records.*

MM. Resumption of State Control (E)

*If the plan for resumption of State control contained in the contractor's proposal is acceptable, reference should be made to it here. Otherwise, either the Department or the contractor should be required to develop such a plan for review and comment by the other, with the Department maintaining ultimate authority over its acceptance. The plan should provide for the orderly transfer of control of the facility from the contractor to the Department, both temporarily, and under any conditions of termination. The plan should include provisions for the emergency assumption of temporary control by the Department under conditions of natural disaster, in the event of riot or insurrection, or other emergency circumstances identified by the Department. The Department should exercise sole discretion as to whether and to what extent an emergency circumstance exists. The plan should also provide that the contractor's payment will be reduced commensurate with the reduction in services provided by the contractor during the emergency period.*

#### NN. Housing Inmates from Other Jurisdictions (E)

*The contract should state whether the contractor will be allowed to house inmates from other jurisdictions and, if so, what limitations are places on the type of inmates which may be housed. If the State anticipates the housing of other inmates and if the number of beds which will be utilized for this purpose is significant the State may wish to encourage or even require the contractor to actively seek inmates to fill the bedspace and provide some incentive for their doing so. In at least two jurisdictions, this has taken the form of the State providing that the contractor could charge whatever per diem the market would bear and retain a percentage of it for itself and deliver the balance to the State.*

#### OO. Management of Inmate Mail

*To promote the uniform handling of inmate mail, it may be advisable to require the Contractor to follow the State's inmate correspondence policy.*

## **VI. EMPLOYEES**

### **A. Independent Contractor Status (E)**

*One reason for contracting out correctional services is to limit the State's exposure to liability. Therefore, it is essential that the contractor and its employees be seen as independent from the State and not as its agents and employees. Therefore, the overall contract and this provision in particular should confirm the contractor's status as independent, thereby minimizing the State's liability.*

### **B. Facility Administrator (D)**

*The contract should require that the facility and its programs be managed by a single executive officer employed by the contractor. The contract may also require that this individual be subject to the prior written approval of the State. Further, the individual could be designated as a "key employee" whose departure from the facility administrator position would be automatic grounds for termination of the contract. However, since the contract may be terminated for the convenience of the State, the key employee provision is usually not utilized.*

### **C. Personnel (E)**

*Care must be taken in the drafting of these sections of the contract to ensure that the Contractor and its employees comply with IRS regulations governing independent contractor status.*

#### **1. Staffing Pattern (E)**

*The staffing pattern for the facility should be made a part of the contract. It should detail by day and by shift the positions and hours of work. Requiring the Contractor to follow the Department's staffing model in certain key areas may be appropriate, but the Contractor should be allowed to apply for waivers where an equally effective staffing pattern is shown to be workable.*

#### **2. Changes in Staffing Pattern (D)**

*The Contractor should be required to maintain the agreed upon staffing pattern unless it obtains prior approval from the State for a change. The contract should also provide that if the Department determines at any time that the staffing pattern is inadequate, the contractor agrees to place additional employees at the facility and/or revise the staffing pattern. Naturally, if the contractor is required to increase staff, it may request an adjustment in the per diem. See VI below.*

### 3. Percentage of Contractor's Personnel with Corrections Experience (D)

*If the State desires to have the facility operated with a minimum number of experienced security employees, that should be set forth in this section. In the past, to meet this requirement, some contractors have used a very "liberal" definition of security. Therefore, this section should define the term "security employee."*

### 4. Subcontractors (E)

*The contract should identify those areas where subcontractors may be used and require prior approval before a subcontractor is changed or a new area subcontracted out.*

### 5. Filling of Vacancies (E)

*Just as in state operated facilities, one way contractors stay within budget is to delay in filling vacancies. Therefore, the contract should provide that staff vacancies be filled within a specified period of time. Normally, fifteen days for security vacancies and thirty days for all other vacancies would be workable for both parties. The contract should provide that vacancies which exist beyond these periods will result in a reduction in the per diem rate. The contractor should be required to immediately notify the contract monitor of any vacancies.*

### 6. Background Investigations (E)

*This section should set forth the extent to which background investigations are to be conducted on applicants for employment at the facility. Normally this will include criminal and employment histories going back a minimum of five or more years. Less often, psychological and medical histories are required, and credit checks are required on applicants who will handle money or work with accounting records. It is important to require the same background checks on any employee of a subcontractor working at the facility.*

### 7. Criminal History Records (E)

*This should state that the Department will provide NCIC and/or FBI background checks on all prospective employees and should set forth the charge, if any, for this service.*

## D. Removal of Employees at State Request (E)

*Because there may be times when the Department has information of a confidential nature about one of Contractor's employees, the contract give the Department the right to reject any applicant and to require the Contractor to remove any employee from the facility for security reasons. The contract should provide that this is for the benefit of the State, not the Contractor, and the State will not be responsible to the Contractor should it fail to take any action in rejecting or failing to reject any applicant or by requiring or failing to require the dismissal of any employee.*

#### E. Job Descriptions (E)

*The contractor should be required to abide by the written job descriptions provided in its proposal, including but not limited to job title, responsibilities and minimum experience and education. Any revisions or modifications of the job descriptions should require prior written approval of the State. The State may also wish to include in the contract the names of key employees who the Contractor will be assigning to the facility with a requirement that any replacements meet the approval of the State.*

#### F. Personnel Records/State Access to Same (E)

*The contractor should be required to keep a personnel file on each employee which contains at least the records of the background investigation, training and disciplinary actions taken on each employee. It may be necessary to state in this section that the contractor shall obtain a release from each employee allowing the State access to the employee's records.*

#### G. Employee Training (E)

*This section should set forth the minimum employee training requirements for employees. This should be broken down into at least the following categories:*

- 1. Clerical employees with little inmate contact*
- 2. Clerical/support employees with regular or daily contact with inmates*
- 3. Correctional officers*
- 4. Administrative employees*

The contractor should be required to provide documentation to the contract monitor of all employee training. Consistent with the monitor's access, he should be permitted to audit training classes at any time.

If the State is to provide some or all of the training, this should be set forth in this section.

#### H. Drug Free Work Force (E)

#### I. State/Contractor Coordination (D)

*Increasingly, states that have contracted out correctional services have found it helpful to require the contractor to send representatives to periodic meetings with their State counterparts. For example, the facility administrator might be required to attend wardens meetings. Inclusion of the private sector in these meetings facilitates the development and implementation of policies effecting the facilities generally.*

#### J. Hiring Preferences (D)

*The parties may wish to provide for hiring preferences of local residents and/or laid-off State employees.*

## **VII. COMPENSATION AND ADJUSTMENTS**

### **A. Management Payment (E)**

*Although the RFP may have provided that the State would pay the contractor a per diem rate or a fixed fee, the State is free at the contract negotiation stage to negotiate a payment methodology which is in the State's best interest.*

1. Per Diem Rate (D)
2. Fixed Fee (D)
3. Ramp Up Period (E)

*If the contractor is not taking over an existing facility, this section should spell out the method by which payments will be calculated during the ramp-up period. Because the facility will be staffed at a higher level than the inmate population warrants in the early stages, the amount paid can be considerably higher than the normal per diem.*

### **4. Start-Up Costs (E)**

*Normally, payments do not begin until the first inmates are received at the facility. But, the contractor will incur costs prior to the Service Commencement Date. These will include the costs of recruiting and training employees, and purchasing supplies and equipment. This section of the contract should specify how the contractor will be reimbursed for these costs.<sup>57</sup> If the costs are not going to be reimbursed up front, then these costs will be reflected in each billing period for the time frame necessary to fully reimburse the contractor. Normally, the contractor is allowed to recapture its start-up costs during the first year of the management of the facility.*

*The most advantageous way to pay the contractor for its start-up costs will depend on the State's financial situation. If the State has the funding available, it may be less expensive to pay the start-up costs immediately, rather than , in effect, borrowing the money from the contractor and repaying him over a period of months or years.*

*Start-up costs may also be broken down and paid differently depending on whether they were incurred prior to or after the service commencement date*

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<sup>57</sup> In Tennessee, the state paid the start-up costs as they were incurred. In Louisiana, a one-time lump sum payment was made. In Virginia, the start-up costs are included in the first year's per diem rate.



## B. Payment Adjustments (E)

### 1. Yearly (D)

*The parties may wish to specify the payments to be made during each year of the contract and even during the option years, if exercised. Most states, however, have opted to specify the payments only during the first two years of the contract. In most cases, the consumer price index is used to determine the percentage adjustment to be applied to the base rate for the ensuing years. However, recent research indicates that the consumer price index may overstate inflation by anywhere from .2% to 2.0%. Therefore, the contract should provide for a downward adjustment in the CPI rate by a certain specified percentage.*

### 2. Change of Services (E)

*All contracts for private correctional services recognize that the payments are based on conditions which exist at the time of the contract, but which might change in the future. Therefore, it is essential that the contract contain provisions for an upward or downward adjustment in the payments as a result of changes in the law or State policies which otherwise increase or decrease the cost of operating the facility. The contract should also provide that in the event the contractor receives compensation from another source for services it is obligated to perform under the contract, the State may withhold a comparable amount from any payments due the contractor, unless the Department determines that the funds will be used to provide enhanced or innovative services at the facility. Typical change of circumstance language appears in Virginia's proposed contract for a medium security prison. It reads as follows:*

#### **Compensation Adjustment for Change of Services**

*1. The parties recognize that each has entered into this Contract based upon the standards, laws, government regulations and court orders, in effect as of the date of the Contract. If Contractor reduces the services required by this Contract or set forth in its offer, or if there are any changes in standards, laws, government regulations or court orders applicable to the Commonwealth which necessitate a change in the scope of services furnished hereunder so as to increase or decrease the cost of operating and managing the Facility or performing other services contemplated in this Contract, the party believing such a condition exists shall provide reasonable notice, in writing, and documentation supporting the requested compensation adjustment to the other party. Once notified, the receiving party shall advise whether or not they agree to the adjustment in compensation requested.*

*2. If the Contractor receives payments from any other source for services it is to perform under this contract, the Commonwealth may withhold a comparable amount from funds due the Contractor, unless the Director determines that the funds are to be used to provide enhanced or innovative services not contemplated by the Contract.*

C. Billings (E)

*Contracts normally require the contractor to bill the Department in arrears at the conclusion of each calendar month and require the Department to pay the contractor within 30 to 45 days of receiving the invoice.*

D. Billing Disputes (B)

E. Taxes (B)

F. Utilities (B)

**VIII. INDEMNIFICATION, INSURANCE AND DEFENSE OF CLAIMS**

A. Indemnification (E)

*Because of the exposure to liability in the operation of a prison, it is essential that the contract include a very broad indemnification provision, such as the one set forth below:*

**Indemnification.** *Contractor shall indemnify, save and hold harmless the State, and its employees and agents against any and all claims, damages, liability and court awards including costs, expenses, and attorneys' fees incurred as a result of any act or omission by Contractor, or its employees, agents, subcontractors, or assignees, pursuant to the terms of this Contract, except to the extent caused by an act or omission of the State, its officers and employees.*

*Contractor shall not waive, release, or otherwise forfeit any possible defense the State may have regarding claims arising from or made in connection with the operation of the Facility by Contractor without the consent of the State. Contractor shall preserve all such available defenses and cooperate with the State to make such defenses available to the maximum extent allowed by law.*

*In case any action or proceeding is brought against the State by reason of any such claim, Contractor, upon notice from the State, shall defend against such action by counsel satisfactory to the State, unless such action or proceeding is defended against by counsel for any carrier of liability insurance provided for herein.*

*The indemnification provision should also address claims or losses based on contractor's policies and procedures approved by the State making clear that the contractor is still responsible for indemnifying the State. Less clear is what to do about State policies which the contractor is required to implement. This has not normally been addressed, although it would appear to be important to do so. If addressed, it is suggested that the State be responsible only if the contractor has placed the State on notice that a claim arising as a result of a Department policy is based on the unlawfulness of the policy on its face. In such case, the State could be held liable. However, the State would not be liable if the judgment was based on the contractor's failure to appropriately implement the policy.*

## B. Insurance (E)

### 1. Types (E)

*The contract should spell out the types of insurance which must be maintained and who is to pay for each. The contract should be very specific in the coverage provided.*

*Where there is a master policy for all state buildings, the states have chosen to maintain the property insurance on the buildings which comprise the facility and on the contractor's property located therein as well, on the theory that the state can obtain the insurance at a lower cost.*

### 2. Limits (E)

### 3. Defenses (E)

*The contract should contain a provision that nothing therein is intended to waive any immunity defenses available to either the contractor or the State, nor is it intended to waive any limitations on the amount of damages which may be awarded or paid.*

### 4. Lapse in Payments (B)

*The contract may provide language permitting the State to make insurance payments in the event the contractor fails to do so.*

## C. Insurance Services (E)

### 1. Named Insured (B)

*All corrections contracts provide that the Department and all State officers and employees be included as additional insureds.*

### 2. Reporting Requirements (E)

### 3. Notice of Claims (E)

## D. Prior Occurrences (E)

*The contract should provide that the State will remain solely responsible for any losses or costs resulting from litigation relating to events which occurred prior to the effective date of the contract. The contract should also provide that the contractor agrees to cooperate with the State in the defense of these suits and to provide its own reasonable legal assistance.*

## **IX. CONTRACT COMPLIANCE**

### A. Breach By State (B)

1. Grounds (B)

*This section should provide that if the State fails to make any payment due under the contract within the specified time period and the amount exceeds a certain level, the contractor can terminate the contract. The contractor can also terminate the contract after ninety days prior written notice, for any persistence or repeated failure or refusal by the State to substantially fulfill any of its obligations under the contract, unless justified by force majeure or by the contractor's default.*

2. Notification Requirements (B)

3. Waiver (B)

4. Remedies (E)

B. Contractor Breach (E)

1. Grounds (E)

*Typically the grounds for contractor breach are:*

- a. Failure to perform in accordance with any term or provision of the contract;*
- b. Partial performance of any term or provision of the contract; and*
- c. Any act prohibited or restricted by the contract.*

2. Notice (E)

3. Remedies (E)

*Typically the only remedy available in a correctional services contract for a breach by the contractor is termination of the contract. This has resulted in significant problems because of the sometimes disproportionality of the penalty in relation to the breach ("using a cannon to kill a gnat"). Therefore, in more recent correctional services contracts, states have provided for other remedies in the case of breach. These are set forth below:*

a. Actual Damages (D)

b. Liquidated Damages (D)

*If the State elects to invoke liquidated damages as a possible remedy, the contract should include a methodology for determining the extent of the damages. These amounts can be withheld from any amounts owed the contractor.*

*In Tennessee, the state negotiated a formula based on the value of the service and significance of the breach to determine the amount of damages to be paid. (See Appendix 1.)*

c. Partial Default (D)

*The viability of putting the contractor into partial default is questionable. If, for example, the contractor is not providing adequate medical care, this would usually indicate their inability to adequately*

*provide the other services necessary under the contract. So, for the State to take over just the medical care component would probably be only a stop-gap measure. Furthermore, the working relationship which would exist within the facility at that point would likely be strained, at best.*

d. Termination of Contract (E)

C. Waiver (E)

D. Termination Due To Unavailability Of Funds (B)

E. Termination For State's Convenience (D)

*Most contracts have provided that the State can terminate the contract without cause upon the giving of prior notice, usually ninety days. Recently, one state provided that it could not exercise the termination for convenience clause until one year after the service commencement date. It is unclear why the state agreed to this limitation.*

F. Performance Bond (D)

*Typically, all states require performance bonds when they enter into contracts. This may not be the best approach for the management portion of prison privatization project. First, performance bonds in this area are generally very expensive because of the limited experience insurance companies have with them. Second, only a small number of companies perform correctional management services. The State should retain the right to pick one it is comfortable with or to take over the facility management itself. It will be less expensive for the State to protect itself by providing that it may withhold any funds owed to the contractor to compensate it for its actual costs due to any breach of the contract by the contractor. The damages should never exceed the amount of money which the State owes the contractor. Even in the worst case scenario where a contractor has gone bankrupt, employee pay and the acquisition of supplies would not be in such arrears as to put the State in the position of not having sufficient contractor money to pay these obligations.*

**X. PROHIBITIONS**

A. Inmate Classification (D)

B. Disciplinary Actions (D)

C. Sentence Calculation (D)

D. Parole and Release Decisions (D)

E. Approval of Furloughs and Work Release (D)

F. Type of Work Inmates May Perform (D)

## ADDITIONAL CONTRACT COMPONENTS

### Takeover Of New Or Operating Facility

#### **I. POSSESSION OF EXISTING FACILITY (E)**

##### A. Lease/Use and Possession (E)

*Usually states which have hired a management company to run a state owned facility have not entered into a lease agreement with the contractor. Instead, within the correctional services contract they provide a description of the facility and grant use and possession of the facility to the contractor coterminous with the correctional services agreement.*

##### B. Renovations, Construction, Repairs, Improvements (E)

*Especially when taking over an operating facility, it will be important to reach a clear understanding of who is responsible for renovations, construction, repairs and improvements. Some jurisdictions have required as part of the contract that the contractor make certain repairs and improvements. The opposite has been true in other contracts. Which way the state goes depends in large measure on how it wishes the renovations or repairs to be funded.*

##### C. Status of Existing Facility Contracts (E)

*If the facility has maintenance contracts already, their applicability to the contractor should be set forth in this section. It may be that the state wishes to get out from under certain contracts and is able to do so through contracting the management of the facility to a private company. In other cases, it may be advantageous to the state to require the contractor to continue under the same contracts.*

#### **II. POSSESSION OF MOVABLE EQUIPMENT & PERISHABLES (E)**

##### A. Maintenance, Repair, and Replacement of Movable Equipment (E)

*See Commentary II.1.B above.*

##### B. Ownership at Termination of Contract (E)

##### C. Transfer of Warranties (D)

*See Commentary II.1.C above.*

## ADDITIONAL CONTRACT COMPONENTS

### Takeover Of Operating Facility

#### I. EXISTING EMPLOYEES (E)

*One of the State's goals in contracting for the management of a currently operated State facility may be to sever its relationship with the employees of that facility. This may be due to union or pension considerations, or an effort to reduce the number of State employees. It is generally not possible to create independent contractor status if the contractor does not exercise control over the essential terms and conditions of a person's employment. Therefore, if the State requires that the contractor hire the facility's present employees or if the State maintains control over wage ranges or the terms of employee benefits, a joint employer status may exist. Therefore, it is advisable to require only that the contractor give fair consideration for re-employment to the facility's present employees. In every case, the following needs to be addressed in the contract.*

- A. Employment Status (E)
- B. Consideration for Re-employment (E)
- C. Pension Rights (E)
- D. Accumulated Leave (E)
- E. Other Fringe Benefits (E)

## ADDITIONAL CONTRACT COMPONENTS

### Design/Build/Manage

#### I. DEFINITIONS

A. Construction (B)

*This means the design and building of a facility or the renovations of an existing facility to suit the intended needs of the project.*

B. Construction Price (E)

*This is the price to be paid to the contractor for the design and construction of the facility.*

C. FF&E (B)

*This means the furnishings, fixtures, and equipment for the facility.*

D. Architect (B)

E. Facility Design Program (E)

*This is the document defining the types and amounts of space to be included in the design of the facility.*

F. Prevailing Wage Laws (B)

*This means RCW 39.04.010 and RCW 39.12.*

#### II. SITE

A. State Furnished (D)

B. Contractor Furnished (D)

1. Site Description (E)
2. Title and Permits (E)
3. Liens (E)
4. Property Taxes (E)
5. Utility Connections (E)



### C. Environmental Impact Study

*The Contract should state which party will be responsible for preparation of the EIS. If the Contractor is responsible, the Department should retain oversight and review authority as it is ultimately responsible for ensuring that the EIS has been properly prepared. WAS 197-11-420*

### D. Hazardous Waste Cleanup

*Cleanup of hazardous waste may be allocated among the parties in the Contract. See, Car Wash Enterprises v. Kampanous, 74 Wn.App 537; 874 P.2d 868 (1994). If the property is furnished by the Contractor, they would normally be held responsible for this activity. But, if the Department is going to be ultimately responsible for the cost of the cleanup, then the contract should provide that the State has some control over the investigation, consideration of alternatives and actual cleanup, so as to keep its costs down and preserve its rights to recover from the responsible parties.*

## III. **DESIGN CONSTRUCTION**

### A. Plans and Specifications (E)

#### 1. Schedule for Completion (E)

*The private sector can normally complete the construction of a medium security 1500 bed facility in 18-24 months from execution of the contract.*

#### 2. Plan Approvals (E)

### B. Construction Oversight by State (D)

*If the facility is funded by the contractor, the contract may specify that the State's construction oversight expense be a part of that funding.*

### C. Design, Construction and FF&E Costs (E)

#### 1. Payment Schedule (E)

*Occasionally, a state will pay for the design and construction of a facility as the work is completed. More often, the debt service is included as part of the per diem or fixed fee paid during the operations portion of the management contract. Sometimes the construction cost is fully paid during the same three to five year term as the management services component of the contract, but more often, it is paid over a twenty or thirty year period. The U.S. Marshall's Service and the Federal Bureau of Prisons have recently been criticized for paying off the debt service within five years.*

2. Ownership of Facility (E)

*The initial ownership of the facility will vary depending on the method of financing.*

3. Option to Purchase (D)

*If the State does not own the facility, it should have the option to purchase it at any time. If the facility has not been financed by bonds, the State's purchase price should be either the actual cost of land acquisition, construction and FF&E less principal payments to that date or less the depreciation, using straight line depreciation over a specified number of years, whichever is less. If the facility was financed by the issuance of bonds, then the State should have the option to purchase it for the unpaid principal balance of the bonds.*

4. Incorporation of Lease Agreement (D)

*If there is a separate lease agreement, it should be incorporated by reference into the contract.*

5. Prevailing Wage Requirement (E)

*Under RCW 39.12.020, the contractor would be required to pay prevailing wages.*

D. Construction Permits (B)

E. Changes in Plans and Specifications (B)

F. Agreement by Parties to Execute Necessary Documents (B)

G. Certificates of Occupancy (E)

*In addition to the certificates required by law, the contract should also state that the Department must certify the facility for occupancy.*

H. Construction Default (B)

I. Updated Plans and Specifications to Be Furnished (D)

*The contract should require that the contractor provide the Department with final plans and specifications after the completion of the facility.*

J. Use of Plans and Specifications in Construction of Other State Facilities (D)

*This is not often addressed in a correctional privatization contract. However, the State pays for the development of the construction plans and specifications and should have a right to them.*

K. FF&E (E)

1. List of Components (E)
2. Party to Furnish (E)
3. Ownership at Conclusion of Contract (E)

*The contract should provide that all FF&E, perishables and supplies become the property of the State at the conclusion of the contract.*

4. Purchases Required From State (D)

L. FF&E Inventory (E)

*Prior to the service commencement date, the State and the contractor should conduct a joint inventory to ascertain that the required FF&E is in place.*

M. Additional Property (D)

*The contractor should be authorized to purchase additional equipment at its own expense, if it so desires. However, the State should have the right to purchase the equipment at the conclusion of the contract at the contractor's cost, less depreciation using the straight line method over a five year period.*

N. Construction Insurance Requirements (B)

O. Performance Bond (B)