

ALASKA STATE LEGISLATURE
HOUSE STATE AFFAIRS STANDING COMMITTEE

March 20, 2001

9:19 a.m.

MEMBERS PRESENT

Representative John Coghill, Chair
Representative Jeannette James
Representative Hugh Fate
Representative Gary Stevens
Representative Peggy Wilson
Representative Harry Crawford
Representative Joe Hayes

MEMBERS ABSENT

All members present

COMMITTEE CALENDAR

HOUSE BILL NO. 149

"An Act relating to correctional facility space and to authorizing the Department of Corrections to enter into an agreement to lease facilities for the confinement and care of prisoners within the Kenai Peninsula Borough.

- MOVED HB 149 OUT OF COMMITTEE

PREVIOUS ACTION

BILL: HB 149

SHORT TITLE: PRIVATE PRISON IN KENAI

SPONSOR(S): REPRESENTATIVE(S) CHENAULT

Jrn-Date	Jrn-Page		Action
02/26/01	0437	(H)	READ THE FIRST TIME - REFERRALS
02/26/01	0437	(H)	STA, FIN
03/13/01		(H)	STA AT 8:00 AM CAPITOL 102
03/13/01		(H)	Heard & Held
03/13/01		(H)	MINUTE(STA)
03/13/01		(H)	MINUTE(STA)
03/15/01		(H)	STA AT 8:00 AM CAPITOL 102
03/15/01		(H)	Heard & Held MINUTE(STA)
03/20/01		(H)	STA AT 8:00 AM CAPITOL 102

WITNESS REGISTER

REPRESENTATIVE MIKE CHENAULT

Alaska State Legislature
Capitol Building, Room 432
Juneau, Alaska 99801

POSITION STATEMENT: Testified as sponsor of HB 149.

RYNNIEVA MOSS, Staff

to Representative Coghill
Alaska State Legislature
Capitol Building, Room 102
Juneau, Alaska 99801

POSITION STATEMENT: Provided information related to HB 149.

ACTION NARRATIVE

TAPE 01-26, SIDE A
Number 0001

CHAIR JOHN COGHILL called the House State Affairs Standing Committee meeting to order at 9:19 a.m. Committee members present at the call to order were Representatives Coghill, James, Fate, Stevens, Wilson, Crawford, and Hayes.

HB 149-PRIVATE PRISON IN KENAI

Number 0024

CHAIR COGHILL announced that the first order of business would be HOUSE BILL NO. 149, "An Act relating to correctional facility space and to authorizing the Department of Corrections to enter into an agreement to lease facilities for the confinement and care of prisoners within the Kenai Peninsula Borough."

CHAIR COGHILL reminded the committee that testimony had been closed on HB 149 and the bill referred to a subcommittee. Those on the subcommittee were Representatives James, Hayes, and Fate. Others who attended the meeting were Mark Higgins of the Kenai Peninsula Borough, Frank Prewitt of Cornell Corrections, Denny DeWitt from Representative Eldon Mulder's office, Deven Mitchell of the Department of Revenue, Cathy Heroy from Representative Hayes' office, Barbara Cotting from Representative James' office, Brenda Balash from Representative Fate's office, Margot Knuth from the Department of Corrections, and Shawn Cochran from the Fairbanks News-Miner.

CHAIR COGHILL said the subcommittee had submitted a written report and was returning HB 149 to the full committee without any recommendations for changes. He asked the will of the committee.

Number 0226

REPRESENTATIVE CRAWFORD offered Amendment 1:

On line 18, page 2, add:

(4) The cost of construction per bed shall not be more than the Anchorage Jail project.

(5) The cost of daily operation per bed shall not be more than Spring Creek Correctional Center.

REPRESENTATIVE CRAWFORD explained:

I just to want to make sure that this is a good deal for the state. I would like to see a prison built. I would like to see our prisoners brought home from Arizona. Because there were no numbers in the original bill, I felt like we needed some reassurance that the private prison could be done [for] about the same cost as the public prisons that we've built.

CHAIR COGHILL objected for purposes of discussion.

Number 0373

REPRESENTATIVE JAMES said she did not object at all to putting restrictions on the cost. The co-chair of the House Finance Committee has told her they will be putting a dollar amount in HB 149 when it gets to that committee. She said she did not know how the costs of construction compared in Anchorage and in Kenai. "I don't know that they're comparable; I don't know that they're not, either," she said. She would not object to including the limitation in HB 159 because Finance is going to be giving the numbers scrutiny later.

REPRESENTATIVE CRAWFORD said people from Cornell Corrections told him they expect to have economies of scale because the proposed prison in Kenai is a larger prison and that they expect that both their construction and operating costs will be much cheaper than those for the Anchorage jail project.

Number 0505

REPRESENTATIVE STEVENS said he was troubled by (5) because, "My understanding was that the reason we'd even consider privatizing a prison is that it would be less." The proposed amendment says it should not cost more, and he wondered if that was "an open door to ... charge up to that point"?

REPRESENTATIVE CRAWFORD said he just wanted to make sure the new prison would not cost more than what the state is doing on its own already.

REPRESENTATIVE STEVENS wondered if the amendment should say the new prison should cost less than what the state is paying now.

Number 0598

REPRESENTATIVE CHENAULT said he didn't know what the costs are now. He would assume that the costs in Kenai would be a little higher than they are in Anchorage, based on the cost differential in the foundation formula for funding schools.

CHAIR COGHILL asked Representative Chenault if he would support Amendment 1.

REPRESENTATIVE CHENAULT replied no, "just for the simple fact that I don't know what those numbers are."

Number 0663

REPRESENTATIVE JAMES said she didn't think Amendment 1 was necessary because HB 149 has a Finance Committee referral. If making Amendment 1 would make the State Affairs Committee feel better, she didn't think there was anything wrong with it. However, she wanted to support the sponsor of HB 149.

CHAIR COGHILL said he agreed and was going to maintain his objection because he thinks the comparison between the two is "tough language to navigate through." He would prefer not to send HB 149 out of committee with that language, he said.

REPRESENTATIVE STEVENS said he was going to vote for Amendment 1 because, "I think it sends a very clear message that it would just be unconscionable if it cost us more than other projects."

REPRESENTATIVE CRAWFORD said that is the reason why he didn't put in Amendment 1 that it should cost less, but simply said at the very least it should equal what we're doing with the public

prisons today. "They told us that there's 15-20 percent savings, and I'm willing to give them some slack" he said, "but I'd like to have this in there so that I know that we're doing this for the right reasons. The reason that they've used to sell this concept is that it's cheaper for the state. I believe we should have some control here. The original bill just gives them carte blanche." He is aware of the Finance referral, but believes ... that "we're the folks that set the policy ... and it is incumbent upon us to set good policy."

Number 0852

REPRESENTATIVE FATE asked if anyone knew the effective date of HB 53, which authorized the Anchorage jail project. "The reason I'm asking that question simply is that finances aren't static," he said, and the cost for the same thing might be more now due to inflation. Conceptually, he agreed [with Amendment 1], he said.

CHAIR COGHILL asked Representative Crawford if he knew the effective date and/or the change order rate of the Anchorage jail?

REPRESENTATIVE CRAWFORD knew that in other construction projects, additional costs due to inflation are taken into account. What he was attempting to assure that the final cost of the Kenai prison was not more than the final cost of the Anchorage jail. He said he would be glad to say the "final cost" in this Amendment 1.

NUMBER 1006

CHAIR COGHILL asked if there was any objection to inserting "final cost". There was no objection.

Number 1035

REPRESENTATIVE JAMES said she was going to vote against Amendment 1 because she thought HB 149 "could not go to full passage with that language included." She knew that some numbers were going to be crunched in the Finance Committee.

REPRESENTATIVE WILSON said she was uncomfortable about making Amendment 1 "if we don't know the numbers."

REPRESENTATIVE CRAWFORD said he would also be glad to put into Amendment 1 an escalator for inflation.

REPRESENTATIVE FATE said he hadn't considered change orders, and that those are also dynamic and there sometimes are lawsuits that go along with change orders. "It might be good to just leave it the way it is," he said.

Number 1212

REPRESENTATIVE CHENAULT said he thought there are a lot of unknown costs at this point, and that the Kenai Peninsula Borough will work out the numbers through the Finance Committee.

REPRESENTATIVE CRAWFORD said:

I know that when they wrote HB 53, [they] wrote into it what the costs would be two years in advance. Now what's good for the goose ought to be good for the gander. If we can write those costs in on a public jail, why in the world can't we write it in on a private jail?

CHAIR COGHILL noted that the procurement code is invoked in HB 149, so there is some control over cost.

REPRESENTATIVE JAMES observed that the title of HB 149 is, "To authorize the Department of Corrections to enter into an agreement..." She said she couldn't imagine the Department of Corrections making a lease agreement on the facility that was not in line or less than current costs of operation. "We have to trust that there's other people out there ... more knowledgeable than us," she said. "I understand the concern, and it's a valid one, but I just don't think at this point in time in this particular bill that this is necessary, and if it's not necessary, then we ought not put something in that's not necessary."

CHAIR COGHILL announced his intention to bring Amendment 1 to a vote.

Number 1414

REPRESENTATIVE STEVENS had no objection to Amendment 1 if the maker of the Amendment would be willing to add something taking into account inflationary changes.

REPRESENTATIVE CRAWFORD confirmed that he agreed to do so. He withdrew Amendment 1 as presented and offered it as a conceptual amendment including accommodation for inflation.

Number 1480

A roll call vote was taken. Representatives Stevens, Crawford, and Hayes voted for Amendment 1. Representatives James, Fate, Wilson, and Coghill voted against Amendment 1. Therefore, Amendment 1 failed by a vote of three to four.

Number 1534

REPRESENTATIVE CRAWFORD offered Amendment 2 to HB 149:

Page 2, line 16

Insert:

(4) The successful contractor(s) under this chapter shall assume full liability for itself and its agents in respect to the operation and management of the facility.

REPRESENTATIVE CRAWFORD explained that the reason he is proposing Amendment 2 is that after reviewing a number of cases involving Cornell and other private prisons, "it seems that their defense in lawsuits has been that they're just acting as an agent of the state." He said he would like to make sure at the outset that it's known on both sides that the prison contractor is acting on its own "because we don't have the state oversight that we would in a public prison, and I'd like for them to shoulder the liability for any lawsuits resulting from possible mismanagement or actions of their staff," he explained.

CHAIR COGHILL objected for purposes of discussion.

Number 1636

REPRESENTATIVE WILSON asked if the state is not liable anyway.

CHAIR COGHILL said there certainly would be a responsibility.

REPRESENTATIVE JAMES noted that there are three entities involved -- the state, the borough, and the contractor -- and said she wasn't sure that any one of them should have full liability except for their own misdeeds. She understood the

purpose of Amendment 2, but was not convinced that it did exactly that.

REPRESENTATIVE FATE surmised that the matter of liability is going to come up in the contract. "The state and Cornell and any other party would be remiss if they did not have the attorneys there to forge a contract placing those liabilities where they should," he said. He noted that HB 149 does not have a referral to the House Judiciary Committee, and he said he is very uncomfortable going over in this committee legal matters that should be addressed in that committee. He said he was going to vote against Amendment 2. "If we want to remand this to the Judiciary Committee, that's another thing," he said.

Number 1816

CHAIR COGHILL observed that the amendment is getting very specific in an area where HB 149 has allowed for a broad agreement. He wondered if in deciding to define this one area might imply that the legislature did not mean to define other areas. He said he understands the desire, but thinks it will be provided for as a matter of contract.

REPRESENTATIVE CRAWFORD read an excerpt from a lawsuit in which it was stated:

There is no connection between Cornell Companies, Inc., and the state nor the state and the named defendants. As a result, the defendants are not directly linked to the state government and their actions are not directly attributable to the state. This means the company and its employees can be held jointly and separately liable for the actions of the employee.

REPRESENTATIVE CRAWFORD then cited another lawsuit in which Cornell Corrections had attempted to shift liability to the state.

CHAIR COGHILL said Representative Crawford had made his point. "Yes, there is a liability issue," he said, "But I can't believe an agreement between Kenai and the company isn't going to contain those discussions. That is not something we are entertaining in the overall bill."

Number 1962

REPRESENTATIVE HAYES asked if Chair Coghill would be willing to request to the Speaker that HB 149 have a Judiciary Committee referral to address that issue if the sponsor had no objection.

CHAIR COGHILL said no, "simply because we are dealing with a policy agreement between the State of Alaska and Kenai as they enter into a third-party agreement, so I think that ... a policy discussion needs to stay out of the whole legal area of debate.... My interest is in moving this [HB 149] up to the Finance Committee because there are financial issues that need to be dealt with."

REPRESENTATIVE JAMES, noting that she had been a member of the Judiciary Committee for many years, said she did not think the State Affairs Committee needed to put anything in HB 149 that wasn't in HB 53, which had undergone legal review, and on which HB 149 is modeled.

REPRESENTATIVE STEVENS observed that the whole issue of liability is very complex, and "everyone is going to be sued anyway," and that this area is outside his area of expertise.

CHAIR COGHILL said he thinks that putting in this provision [about Cornell's liability] would require another discussion of what the state would require of the Kenai Peninsula Borough. He thought that would be entering into an area that HB 149 did not intend. He said he would talk to the Finance Committee to see if they want to refer HB 149 to the Judiciary Committee and get into those areas. He spoke against the amendment.

A roll call vote was taken. Representatives Crawford and Hayes voted for Amendment 2. Representatives James, Fate, Stevens, Wilson, and Coghill voted against Amendment 2. Therefore, Amendment 2 failed by a vote of two to five.

Number 2153

REPRESENTATIVE CRAWFORD offered Amendment 3:

Page 1, line 13, through page 2, line 15:

Delete "The agreement to lease entered into under this section is predicated on and must provide for an agreement between the Kenai Peninsula Borough and a private third-party contractor under which the private third-party contractor constructs and operates the facility by providing for custody, care, and

discipline services for persons held by the commissioner of corrections under authority of state law. The commissioner of corrections shall require in the agreement with the Kenai Peninsula Borough that the Kenai Peninsula Borough procure the private third-party operator through a competitive process similar to the procedures established in AS 36.30 (State Procurement Code)."

(c) The authorization given by (a) of this section is subject to the following conditions:

- (1) the lease must provide a minimum of 800 prison beds;
- (2) the agreement to lease must contain terms providing that the commissioner of corrections may terminate for cause a contract with a private third-party contractor operating the facility in accordance with the provisions of (b) of this section;
- (3) the commissioner may not enter into an agreement with an agency unable to provide or cause to be provided a degree of custody, care, and discipline similar to that required by the laws of this state.

* Sec. 2. Section 4, ch. 15, SLA 1998, and sec. 6, ch. 35, SLA 1999, are repealed.

Insert "The agreement to lease entered into under this section is predicated on and 23 must provide for an agreement between the Kenai Peninsula Borough and a private third-party contractor under which separate bids will be submitted for:

- (1) A private third party contractor constructs that facility; and
- (2) A private third party contractor operates the facility by providing for custody, care, and discipline services for persons held by the commissioner of corrections under authority of state law.

(c) The authorization given by (a) and (b) of this section is subject to the following conditions:

- (1) The commissioner of corrections shall require in the agreement with the Kenai Peninsula Borough that the Kenai Peninsula Borough procure the private third party operator(s) through the competitive process established in AS 36.30 (State Procurement Code).
- (2) the lease must provide a minimum of 800 prison beds;
- (3) the agreement to lease must contain terms providing that the commissioner of corrections may terminate for cause a contract with a private third-party contractor operating the facility in accordance with the provisions of (b) of this section;
- (4) (4) the commissioner may not enter into an agreement with an agency unable to provide or cause to be provided a degree of custody, care, and discipline similar to that required by the laws of this state.

* Sec. 2. Section 4, ch. 15, SLA 1998, and sec. 6, ch. 35, SLA 1999, are repealed.

RYNNIEVA MOSS, Staff to Representative Coghill, noted that the amendment was not drafted correctly. "The way it is written, only the first paragraph of HB 149 is deleted," she pointed out.

REPRESENTATIVE CRAWFORD withdrew the amendment as written and offered Conceptual Amendment 3:

REPRESENTATIVE CRAWFORD explained that Amendment 3 separates the bids. The language that is different from HB 149 is:

and a private, third-party contractor under which separate bids will be submitted for:

- (1) A private third-party that constructs that facility; and
- (2) A private third-party contractor operates the facility by providing for custody, care, and discipline services for persons held by the Commissioner of Corrections under the authority of state law.

REPRESENTATIVE CRAWFORD said the reason he offered Amendment 3 is that having the contract for construction tied to the contract for operations can hide the cost of construction and he

believes those should be two separate contracts so the state can see the cost of each.

Number 2251

REPRESENTATIVE JAMES said she thought Amendment 3 has to do with separating the two for the tax-exempt bond issue, and she would like information on that.

CHAIR COGHILL said the bonds and the bundling of the contract are not a policy issue, but a finance issue. He thought the State Affairs Committee should not open up that discussion.

Number 2354

REPRESENTATIVE STEVENS observed, "This is very important issue and I don't think we should rush into ... making a decision on it." He noted that separating the contracts would not mean that the same contractor could not get both.

REPRESENTATIVE CRAWFORD agreed.

CHAIR COGHILL said he thought that was a legitimate discussion and that the bill as written asks for the Commissioner of Corrections to require an agreement with the Kenai Borough that they go through a competitive bid process. At that point is where I think that division should be made, he said.

REPRESENTATIVE CRAWFORD said there is another significant area in the original bill that says, "a competitive process similar to the procedures established in AS 36.30." The language we changed was instead of "similar to" just using the language "36.30" so that we are held to exactly the same competitive bid process that the state goes through for procurement.

REPRESENTATIVE JAMES called for the question.

Number 2439

A roll call vote was taken. Representatives Stevens and Crawford voted for Conceptual Amendment 3. Representatives James, Fate, Wilson, Hayes, and Coghill voted against Conceptual Amendment 3. Therefore, Conceptual Amendment 3 failed by a vote of two to five.

REPRESENTATIVE HAYES offered Conceptual Amendment 4:

On page 2, line 16, I would like to delete section 2.

REPRESENTATIVE JAMES objected for purposes of discussion.

REPRESENTATIVE HAYES explained that in subcommittee, concern had been addressed about the Delta Junction issue. He said he thought removing section 2 allows Delta Junction to remain in the process in some way.

CHAIR COGHILL observed that Delta Junction was involved in a lawsuit, and "this would kind of disconnect from that." He indicated he would vote for the amendment.

REPRESENTATIVE JAMES reported that she had talked with the mayor of Delta Junction since he testified and that "they don't have any problem with this part."

CHAIR COGHILL summarized that Conceptual Amendment 4 would simply delete line 16, which is the repealer of HB 53. He understood it would not change the situation that Delta is in, but would "only be a matter of showing them some degree of comfort that we are not intending to do them any harm."

REPRESENTATIVE HAYES said that was correct.

REPRESENTATIVE WILSON sought clarification that Amendment 4 was for the benefit of Delta Junction.

REPRESENTATIVE HAYES said, "What this does is it allows HB 53 to stay on the books, but it gives Delta a little more wiggle room to try to not just have the prison on Fort Greely, but ... to look at other areas," or at least it shows a good-faith effort to do that.

REPRESENTATIVE JAMES observed that the prison on Fort Greely is dead for all practical purposes.

CHAIR COGHILL observed:

The reason it's a dead issue is because they're not going to be able to get the place on the base for prison beds as they had supposed. The bill specifically talked about using the base. In repealing this section of HB 149, all we would be saying is that if it should happen in the next year or so that minds changed on the federal level and Delta Junction could obtain use of the base, then they would

be able to pursue it, and that's all it would be saying.

REPRESENTATIVE STEVENS wondered if Amendment 4 might be clouding the issue.

REPRESENTATIVE CHENAULT said he didn't think anyone wants Delta Junction to be injured by HB 149, and he does not think it is the intent of HB 149 to damage Delta Junction in any way. House Bill 149 gives Kenai and the state an opportunity to complete another project to bring prisoners back into the state and create jobs.

REPRESENTATIVE STEVENS said he thought Representative Stevens had a good point. House Bill 149 has gone through Legislative Legal Services the way it is. Although he does not object to what Representative Hayes is trying to achieve, he is concerned about clouding the issue, and before voting on Amendment 4, he would want legal counsel to advise on what the deletion would do.

REPRESENTATIVE JAMES maintained her objection to the amendment.

A roll call vote was taken. Representatives Hayes and Coghill voted for Amendment 4. Representatives James, Fate, Stevens, Wilson, and Crawford voted against Amendment 4. Therefore, Amendment 4 failed by a vote of two to five.

Number 3032

REPRESENTATIVE JAMES moved to report HOUSE BILL NO. 149, "An Act relating to correctional facility space and to authorizing the Department of Corrections to enter into an agreement to lease facilities for the confinement and care of prisoners within the Kenai Peninsula Borough," out of committee with individual recommendations and the accompanying fiscal notes. There being no objection, HB 149 was passed out of the House State Affairs Standing Committee. [HB 149 MOVED OUT OF COMMITTEE]

ADJOURNMENT

There being no further business before the committee, the House State Affairs Standing Committee meeting was adjourned at 10:05 a.m.