HOUSE COMMITTEE REPORT

(7)

Date Referred to Committee: March 5, 2003 **FURTHER REFERRALS: Finance**

Date of Committee Action: April 1, 2003

The STATE AFFAIRS Committee considered: **SSHB 55**

SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 55 **CORRECTIONAL FACILITIES**

"An Act expressing legislative intent regarding privately operated correctional facility space and services; relating to the development and financing of privately operated correctional facility space and services; authorizing the Department of Corrections to enter into an agreement for the confinement and care of prisoners in privately operated correctional facility space; authorizing the Department of Corrections to enter into agreements with municipalities to expand existing correctional facilities; and providing for an effective date."

Recommends it be replaced with [ ] HCS *or* [ ] CS *for* ____________________(________)

For Senate Bills with new title: [ ] Technical Title [ ] New Title: HCR________ **[ ] Same Title [ ] New Title**

[ ] attach amendments
[ ] add new referral to ____________Committee
[ ] Letter of Intent___________Committee

List of Abbrev for Depts.:
**ADM
CED
COR
CRT
EED
DEC
DFG
GOV
HSS
LEG
LAW
LWF
MVA
DNR
DPS
REV
DOT
UA**

***NEW* FISCAL NOTES**
*Assigned by Chief Clerk's Office

List by Dept(s):	*FN#	Fiscal	Indet.	Zero

***PREVIOUS* FISCAL NOTES**

List by Dept(s):	FN#	Fiscal	Indet.	Zero

Signing with recommendations	Printed Last Name	DP	DNP	NR	AM
Paul K Seaton	SEATON		✓		
Max Gruenberg	Gruenberg		—		
[illegible]	Holm			✓	
~~[illegible]~~					
[illegible]	Dahlstrom		✓		
Bob Lynn	Lynn		✓		
Chair: B Weyhrauch	Weyhrauch		✓		
Chair:					

23-LS0285\W
Luckhaupt
4/9/03

CS FOR SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 55(STA)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-THIRD LEGISLATURE - FIRST SESSION

BY THE HOUSE STATE AFFAIRS COMMITTEE

Offered:
Referred:

Sponsor(s): REPRESENTATIVES HAWKER AND ROKEBERG, Kohring

A BILL

FOR AN ACT ENTITLED

"An Act expressing legislative intent regarding privately operated correctional facility space and services; relating to the development and financing of privately operated correctional facility space and services; authorizing the Department of Corrections to enter into an agreement for the confinement and care of prisoners in privately operated correctional facility space; authorizing the Department of Corrections to enter into agreements with municipalities to expand existing correctional facilities; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* **Section 1.** The uncodified law of the State of Alaska is amended by adding a new section to read:

LEGISLATIVE INTENT. It is the intent of the legislature in sec. 2 of this Act to secure additional correctional facility space and services through a privately operated correctional facility in Alaska. The legislature anticipates a privately operated correctional facility will bring competitive management styles and operations to Alaska and bestow economic benefits in-state as opposed to sending prisoners and associated economic support outside the state.

* **Sec. 2.** The uncodified law of the State of Alaska is amended by adding a new section to read:

AUTHORIZATION TO CONTRACT FOR CORRECTIONAL FACILITY SPACE AND SERVICES WITH THIRD-PARTY CONTRACTOR FOR OPERATION. (a) The Department of Corrections is authorized to enter into an agreement with a municipality for the purpose of acquiring correctional facility space and services for a minimum of 25 years for persons who are committed to the custody of the commissioner of corrections.

(b) The agreement entered into under this section is predicated on and must provide for an agreement between a municipality and one or more private third-party contractors under which private, for profit or nonprofit third-party contractors construct and operate the facility by providing for custody, care, and discipline services for persons committed to the custody of the commissioner of corrections under authority of state law. In an agreement with a municipality, the commissioner of corrections shall require that the municipality procure one or more private third-party operators through a competitive bid process. The procurement requirements of this subsection are satisfied if the municipality, in exercise of its powers under AS 29.35.010(15) for procurement of land, design, construction, and operation of a facility, follows its municipal ordinances and resolutions and procurement procedures.

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

(1) the agreement must cover a minimum of 1,200 prison beds, and, subject to (2) of this subsection, the payments by the Department of Corrections

(A) may not exceed a total per diem cost of $94 an inmate a day or 85 percent of the inmate cost per day to the state for the construction and operation by the state of equivalent facilities, whichever is less; the per diem cost shall be adjusted for

(i) changes in the cost of living from the effective date of this Act until the facility opens;

(ii) costs not incurred until full occupancy;

(B) must be sufficient to cover

(i) a capital component consisting of the cost for the development and construction of the facility, including all debt service; and

(ii) an operating component consisting of the operating costs, not including inmate transportation, based on per diem operating charges for a minimum 1,200 prison beds;

(2) the agreement must provide that the obligation of the Department of Corrections to make payments under the agreement is subject to annual appropriation of funds by the legislature;

(3) the agreement must contain terms providing that the commissioner of corrections may direct the municipality, after notice and reasonable opportunity to cure, to terminate its contract with a private third-party contractor operating the facility in accordance with the provisions of (b) of this section, and to procure a replacement third-party contractor if the commissioner finds that the private third-party contractor has failed to provide or cause to be provided the degree of custody, care, and discipline required by terms of the agreement and that the private third-party contractor has been given notice and reasonable opportunity to cure as provided in the third-party contractor's agreement with the municipality;

(4) the commissioner's authority to enter into the agreement is subject to the condition that the contract between the municipality and the operator requires the operator to provide culturally relevant reformation services to incarcerated Alaska Natives.

(d) Nothing in this section is intended to prevent a municipality from issuing bonds as permitted for municipalities under state law, including AS 29.47.390, to finance construction of the facility. The bonds may be secured by and payable from revenues of the facility, including those described in (c) of this section. Revenues of the facility are not revenues of the municipality for purposes of AS 29.47.390.

* **Sec. 3.** The uncodified law of the State of Alaska is amended by adding a new section to read:

AUTHORIZATION TO LEASE CORRECTIONAL FACILITY SPACE WITH MUNICIPALITIES. (a) To relieve overcrowding of existing correctional facilities in the state, the Department of Corrections may enter into agreements with the following specific municipalities for expanded correctional facilities:

(1) Fairbanks North Star Borough - expansion of the existing Fairbanks

Correctional Center by up to 100 beds;

(2) Matanuska-Susitna Borough - expansion of the existing Mat-Su Pre-trial Facility by up to 107 beds;

(3) Bethel - expansion of the existing Yukon Kuskokwim Correctional Center by up to 96 beds;

(4) Seward - expansion of the existing Spring Creek Correctional Center by up to 150 beds.

(b) The authorizations given by (a) of this section are subject to the following conditions:

(1) the average capital costs for all beds may not exceed $155,000 a bed, adjusted for inflation at the rate of three percent a year from the effective date of this Act;

(2) if expansion of an existing facility is authorized, the state shall enter into a joint ownership agreement with the municipality of the expanded facility, enter onto a long-term lease not to exceed 25 years of the municipality's interest in the facility, and operate the facility; payments under the lease may not exceed $16,700 a bed.

* **Sec. 4.** Sections 1 - 3, ch. 32, SLA 2001, are repealed.

* **Sec. 5.** This Act takes effect July 1, 2003.

23-LS0285\V
Luckhaupt
4/5/03

CS FOR SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 55(STA)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-THIRD LEGISLATURE - FIRST SESSION

BY THE HOUSE STATE AFFAIRS COMMITTEE

Offered:
Referred:

Sponsor(s): REPRESENTATIVES HAWKER AND ROKEBERG, Kohring

A BILL

FOR AN ACT ENTITLED

"An Act expressing legislative intent regarding privately operated correctional facility space and services; relating to the development and financing of privately operated correctional facility space and services; authorizing the Department of Corrections to enter into an agreement for the confinement and care of prisoners in privately operated correctional facility space; authorizing the Department of Corrections to enter into agreements with municipalities to expand existing correctional facilities; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* **Section 1.** The uncodified law of the State of Alaska is amended by adding a new section to read:

LEGISLATIVE INTENT. It is the intent of the legislature in sec. 2 of this Act to secure additional correctional facility space and services through a privately operated correctional facility in Alaska. The legislature anticipates a privately operated correctional facility will bring competitive management styles and operations to Alaska and bestow economic benefits in-state as opposed to sending prisoners and associated economic support outside the state.

* **Sec. 2.** The uncodified law of the State of Alaska is amended by adding a new section to read:

AUTHORIZATION TO CONTRACT FOR CORRECTIONAL FACILITY SPACE AND SERVICES WITH THIRD-PARTY CONTRACTOR FOR OPERATION. (a) The Department of Corrections is authorized to enter into an agreement with a municipality for the purpose of acquiring correctional facility space and services for a minimum of 25 years for persons who are committed to the custody of the commissioner of corrections.

(b) The agreement entered into under this section is predicated on and must provide for an agreement between a municipality and one or more private third-party contractors under which private, for profit or nonprofit third-party contractors construct and operate the facility by providing for custody, care, and discipline services for persons committed to the custody of the commissioner of corrections under authority of state law. In an agreement with a municipality, the commissioner of corrections shall require that the municipality procure one or more private third-party operators through a competitive bid process. The procurement requirements of this subsection are satisfied if the municipality, in exercise of its powers under AS 29.35.010(15) for procurement of land, design, construction, and operation of a facility, follows its municipal ordinances and resolutions and procurement procedures.

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

(1) the agreement must cover a minimum of 1,200 prison beds, and, subject to (2) of this subsection, the payments by the Department of Corrections

(A) may not exceed a total per diem cost of $94 an inmate a day or 85 percent of the inmate cost per day to the state for the construction and operation by the state of equivalent facilities, whichever is less; the per diem cost shall be adjusted for

(i) changes in the cost of living from the effective date of this Act until the facility opens;

(ii) costs not incurred until full occupancy;

(B) must be sufficient to cover

(i) a capital component consisting of the cost for the development and construction of the facility, including all debt service; and

(ii) an operating component consisting of the operating costs, not including inmate transportation, based on per diem operating charges for a minimum 1,200 prison beds;

(2) the agreement must provide that the obligation of the Department of Corrections to make payments under the agreement is subject to annual appropriation of funds by the legislature;

(3) the agreement must contain terms providing that the commissioner of corrections may direct the municipality, after notice and reasonable opportunity to cure, to terminate its contract with a private third-party contractor operating the facility in accordance with the provisions of (b) of this section, and to procure a replacement third-party contractor if the commissioner finds that the private third-party contractor has failed to provide or cause to be provided the degree of custody, care, and discipline required by terms of the agreement and that the private third-party contractor has been given notice and reasonable opportunity to cure as provided in the third-party contractor's agreement with the municipality;

(4) the commissioner's authority to enter into the agreement is subject to the condition that the contract between the municipality and the operator requires the operator to provide culturally relevant reformation services to incarcerated Alaska Natives.

(d) Nothing in this section is intended to prevent a municipality from issuing bonds as permitted for municipalities under state law, including AS 29.47.390, to finance construction of the facility. The bonds may be secured by and payable from revenues of the facility, including those described in (c) of this section. Revenues of the facility are not revenues of the municipality for purposes of AS 29.47.390.

* **Sec. 3.** The uncodified law of the State of Alaska is amended by adding a new section to read:

AUTHORIZATION TO LEASE CORRECTIONAL FACILITY SPACE WITH MUNICIPALITIES. (a) To relieve overcrowding of existing correctional facilities in the state, the Department of Corrections may enter into agreements with the following specific municipalities for expanded correctional facilities:

(1) Fairbanks North Star Borough - expansion of the existing Fairbanks

Correctional Center by up to 100 beds;

(2) Matanuska-Susitna Borough - expansion of the existing Mat-Su Pre-trial Facility by up to 107 beds;

(3) City and Borough of Juneau - expansion of the existing Lemon Creek Correctional Center by up to 25 beds;

(4) Bethel - expansion of the existing Yukon Kuskokwim Correctional Center by up to 96 beds;

(5) Seward - expansion of the existing Spring Creek Correctional Center by up to 150 beds.

(b) The authorizations given by (a) of this section are subject to the following conditions:

(1) the average capital costs for all beds may not exceed $155,000 a bed, adjusted for inflation at the rate of three percent a year from the effective date of this Act;

(2) if expansion of an existing facility is authorized, the state shall enter into a joint ownership agreement with the municipality of the expanded facility, enter onto a long-term lease not to exceed 25 years of the municipality's interest in the facility, and operate the facility; payments under the lease may not exceed $16,700 a bed.

* **Sec. 4.** Sections 1 - 3, ch. 32, SLA 2001, are repealed.

* **Sec. 5.** This Act takes effect July 1, 2003.

Representative Mike Hawker
Alaska State Legislature

Session:
State Capitol
Juneau, AK 99801
907 465-4949 direct
800 478-4950 toll free
907 465-4979 fax

Interim:
716 W 4th Avenue
Anchorage, AK 99501
907 269-0244 office
907 269-0248 fax

Member:
House Finance Committee
Legislative Budget & Audit Committee

House District 32:
Eagle River
Anchorage
Rainbow
Indian
Bird
Girdwood
Portage
Whittier
Sunrise
Hope

Sponsor Substitute for House Bill 55 Sponsor Statement

House Bill 55 authorizes the Department of Corrections to enter into agreement with the City of Whittier for a 1,200-bed medium security correctional facility and services for a period of 25 years. The facility shall be constructed and operated by third-party contractors procured through a competitive bid process. If the authorization is granted, the daily per diem costs may not exceed $94 an inmate a day or 85% of the inmate cost per day to the state for the construction and operation by the state of equivalent facilities.

All of Alaska's 15 regional correctional facilities are currently operating at or over capacity with over 600 Alaskan prisoners housed in Arizona. With prisoner population projected to grow at the rate of approximately 200 inmates per year, the current situation is grave.

Prison overcrowding exposes inmates and staff to the risk of serious injury and death, and exposes the State to civil liability, as well as judicial intervention into the management prerogatives of the executive branch.

The State will benefit economically and socially by procuring in-state prison beds at significantly less cost than State-operated beds; by returning Alaskan prisoners closer to the resources necessary for effective rehabilitation; by diminishing State liability for the effects of prison overcrowding; and by providing programs designed to break the cycle of Alaska Native recidivism.

This bill will create more than 500 direct and indirect, union scale construction jobs, and more than 450 permanent, direct and indirect, jobs for Alaskans associated with prison operations for the 25-year lease term authorized by the legislation. In addition, it will stimulate the Alaskan economy with the purchase of goods and services associated with a $110 million construction project.

The prison will serve as an anchor industry in Whittier, generating vital economic benefits for an economically disadvantaged rural community. Additionally, this project will utilize the recently completed $90 million Anton Anderson tunnel justifying reduced tolls and expanded hours of operation.

Whittier completed a public process documenting local support from 80% of resident, adult registered voters before competitively soliciting contractors and bringing the proposal before the legislature in 2002. Whittier renewed the process with the same results in 2003.

Additionally, this legislation authorizes the Department of Corrections to enter into agreements with the Fairbanks North Star Borough, the Matanuska-Susitna Borough, the City of Bethel, and the City of Seward for the expansion of existing correctional facilities.

rep.mike.hawker@legis.state.ak.us · www.akrepublicans.org\hawker\

Representative Mike Hawker
Alaska State Legislature

Session:
State Capitol
Juneau, AK 99801
907 465-4949 direct
800 478-4950 toll free
907 465-4979 fax

Interim:
716 W 4th Avenue
Anchorage, AK 99501
907 269-0244 office
907 269-0248 fax

Member:
House Finance Committee
Legislative Budget
& Audit Committee

House District 32:
Eagle River
Anchorage
Rainbow
Indian
Bird
Girdwood
Portage
Whittier
Sunrise
Hope

Sponsor Substitute for House Bill 55 Sectional Analysis

Section 1. Provides legislative intent.

Section 2. Authorizes the Department of Corrections to enter an agreement with the City of Whittier for correctional facility space and services for a period of 25 years under various terms and conditions.

Section 3. Authorizes the Department of Corrections to enter into agreements with various municipalities for expansion of correctional facilities under various conditions.

Section 4. Repeals provisions of Chapter 32, SLA 2001, which authorized the Department of Corrections to enter into agreement with the Kenai Peninsula Borough for correctional facility space and services.

Section 5. Provides and effective date.

rep.mike.hawker@legis.state.ak.us · www.akrepublicans.org\hawker\

Chapter 032

Chapter: ▶▶CH032◀◀

Source: SCS CSHB 149(FIN) am S

Action Date: May 29, ▶▶2001◀◀

Effective Date: June 1, ▶▶2001◀◀

01

AN ACT

Expressing legislative intent regarding correctional facility space; relating to correctional facility space; 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; and providing for an effective date.

---

* Section 1. The uncodified law of the State of Alaska is amended by adding a new section to read:

LEGISLATIVE INTENT. It is the intent of the legislature to secure additional correctional facility space through a privately operated correctional facility in Alaska. The legislature expects the Department of Corrections to contract with the Kenai Peninsula Borough for private prison services similar to those currently purchased for medium-security Alaska prisoners in a private prison outside the state. The legislature anticipates a privately operated correctional facility will bring competitive management styles and operations to Alaska. The legislature expects that the initial per diem cost at a private facility (excluding costs related to major medical, prescription medication, and transportation of prisoners and other services excluded in contracts for Alaska prisoner care and custody in private facilities outside the state but including the capital costs for construction of the facility, including debt service) will be 18 - 20 percent less than the current average per diem rate for all state facilities as reported to the federal government for reimbursement purposes, and should be approximately $89 in current dollars.

* Sec. 2. The uncodified law of the State of Alaska is amended by adding a new section to read:

AUTHORIZATION TO LEASE CORRECTIONAL FACILITY SPACE WITH THIRD-PARTY CONTRACTOR OPERATION. (a) The Department of Corrections may enter into an agreement with the Kenai Peninsula Borough to lease space within a correctional facility located within the Kenai Peninsula Borough that will house persons who are committed to the custody of the commissioner of corrections. The agreement must provide that the state agrees to lease the space for a minimum of 20 years.

(b) The agreement to lease entered into under this section is predicated on and must provide for an agreement between the Kenai Peninsula Borough and one or more private third-party contractors under which private, for profit or nonprofit third-party contractors construct and operate 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 one or more private third-party operators through a competitive procurement process. A municipality exercising its powers under AS 29.35.010(15) for procurement of land, design, construction, and operation of a facility, that follows its municipal ordinances and resolutions and procurement procedures, satisfies the procurement requirements of this subsection.

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

(1) the lease must have a minimum of 800 prison beds, and the lease payments must be sufficient to cover

(A) the cost for the development and construction of the facility; and

(B) the operating costs for a minimum of 800 prison beds in the facility for a period of five years, less a reasonable period to achieve full occupancy;

(2) the agreement to lease must contain terms providing that the commissioner of corrections may direct the Kenai Peninsula Borough to terminate its contract with a private third-party contractor operating the facility in accordance with the provisions of (b) of this section if the commissioner finds that the private third-party contractor has failed to provide or cause to be provided the degree of custody, care, and discipline required by terms of the lease agreement;

(3) the commissioner may not enter into the lease if the commissioner finds that the Kenai Peninsula Borough is unable to provide or cause to be provided a degree of custody, care, and discipline similar to that required by the laws of the state;

(4) the commissioner may not enter into the lease unless the contract between Kenai Peninsula Borough and the operator requires the operator to provide culturally relevant counseling services to incarcerated Alaska Natives.

* Sec. 3. The uncodified law of the State of Alaska is amended by adding a new section to read:

APPLICABILITY. The provisions of AS 33.30.031(a) do not apply to an agreement to lease a correctional facility in accordance with the provisions of sec. 2 of this Act. This applicability section does not affect the authority of the commissioner of corrections to designate the correctional facility to which a prisoner is assigned.

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

* Sec. 5. This Act takes effect June 1, ⏩2001⏪.

Chapter 033

Chapter: CH033

Source: CCS HB 65

Action Date: May 25, 2001

Sec. 29.35.010. General powers.

All municipalities have the following general powers, subject to other provisions of law:

(1) to establish and prescribe a salary for an elected or appointed municipal official or employee;

(2) to combine two or more appointive or administrative offices;

(3) to establish and prescribe the functions of a municipal department, office, or agency;

(4) to require periodic and special reports from a municipal department to be submitted through the mayor;

(5) to investigate an affair of the municipality and make inquiries into the conduct of a municipal department;

(6) to levy a tax or special assessment, and impose a lien for its enforcement;

(7) to enforce an ordinance and to prescribe a penalty for violation of an ordinance;

(8) to acquire, manage, control, use, and dispose of real and personal property, whether the property is situated inside or outside the municipal boundaries; this power includes the power of a borough to expend, for any purpose authorized by law, money received from the disposal of land in a service area established under AS 29.35.450 ;

(9) to expend money for a community purpose, facility, or service for the good of the municipality to the extent the municipality is otherwise authorized by law to exercise the power necessary to accomplish the purpose or provide the facility or service;

(10) to regulate the operation and use of a municipal right-of-way, facility, or service;

(11) to borrow money and issue evidences of indebtedness;

(12) to acquire membership in an organization that promotes legislation for the good of the municipality;

(13) to enter into an agreement, including an agreement for cooperative or joint administration of any function or power with a municipality, the state, or the United States;

(14) to sue and be sued;

(15) provide facilities or services for the confinement and care of prisoners and enter into agreements with the state, another municipality, or any person relating to the confinement and care of prisoners.

Sec. ▸▸29.47.390◂◂. Other municipal financing.

(a) A municipality may authorize by ordinance or resolution the issuance of negotiable or nonnegotiable revenue bonds to finance any project that serves a public purpose, and the bonds shall be secured and payable from any source except revenues, including tax revenue, of the municipality.

(b) Bonds issued under this section are not a debt or liability of the municipality and do not create or constitute an indebtedness, liability, or obligation of the municipality, nor do they constitute a pledge of faith, credit, or taxing power of the municipality. Each bond must contain on its face a statement that the municipality is not obligated to pay the principal or the interest on the bonds except from those sources indicated, and that neither the faith and credit nor the taxing power of the municipality is pledged to the payment of principal or interest on the bond.

(c) A municipality may

(1) loan the proceeds of the bonds issued under this section;

(2) pledge, mortgage or assign money, leases, agreements, property, or other assets of the project being financed;

(3) enter into covenants and agreements concerning bonds issued under this section that the municipality determines to be desirable;

(4) provide for any matter that affects the security of the bonds.

(d) In this section

(1) "bonds" means bonds, notes, or other evidence of indebtedness;

(2) "project" includes commercial, manufacturing, agricultural, industrial, residential housing, recreation, tourism, and medical projects and programs.

FISCAL NOTE

STATE OF ALASKA
2003 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: SSHB55
() Publish Date:

Revision Date/Time (Note if correction):
Title: Correctional Facilities
Sponsor: Representative Hawker
Requester: House State Affairs

Dept. Affected: Revenue
BRU: Revenue Operations
Component: Treasury Division
Component No. 121

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
Personal Services						
Travel	15.0	5.0				
Contractual	75.0	40.0				
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	90.0	45.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	90.0	45.0				
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	90.0	45.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2003) cost: 0.0
Check this box (X) if funding for this bill is included in the Governor's FY 2004 budget proposal: [ ]

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

This legislation would authorize the Department of Corrections to enter into an agreement with the City of Whittier for the purposes of acquiring correctional facility space and services for at least 1,200 state prisoners.

The legislation also would authorize the Department of Corrections to enter into agreements ır expanded state prison facilities leased from the Fairbanks North Star Borough, the Matanuska-Susitna Borough, the City of Bethel and City of Seward for a total of 453 additional beds for state prisoners.

See attached page for further discussion.

Prepared by: Deven Mitchell, State Debt Manager — Phone 465-3750
Division: Treasury Division — Date/Time 3/11/03 6:33 PM
Approved by: Larry Persily, Deputy Commissioner — Date 3/11/2003
Agency: Department of Revenue

(Revised 9/2002 OMB)

FISCAL NOTE

STATE OF ALASKA **BILL NO.** SSHB55
2003 LEGISLATIVE SESSION

ANALYSIS CONTINUATION

The legislation authorizes the Department of Corrections to enter into leases with the City of Whittier for at least 1,200 prison beds (and services for the facility), and four municipalities for expanded correctional facilities to be leased by the state (Fairbanks North Star Borough, 100 beds; Matanuska-Susitna Borough, 107 beds; City of Bethel, 96 beds; and City of Seward, 150 beds). The municipalities would fund these projects by issuing lease-revenue bonds. These bonds would require the municipalities to pledge the state's lease payments to the debt service, to the extent they are appropriated, and provide a trustee bank with a title interest in the new or improved facility for the benefit of the bond purchasers. This is a matter concerning the Department of Revenue as the credit of the State of Alaska is used each time a lease is directly pledged to a bond sale and, as such, the Department should be involved in the debt issuance.

Over the past 20 years the state has made a concerted effort to centralize the issuance of debt involving the state's credit through the State Bond Committee. It is noteworthy that the Anchorage jail, which is the most recent instance when the Legislature authorized a lease-revenue transaction, was approved by the State Bond Committee, including all of the Municipality of Anchorage's transaction documents and terms of sale. The national bond rating agencies' primary contact during the reveiw of the Anchorage Jail Revenue Bonds was the State of Alaska Department of Revenue. These bond rating agencies review and rate almost all transactions of the state, and a lack of direct state involvement will draw concern during the state's annual ratings review.

In providing the cost estimates in this fiscal note, the following assumptions were made:
1. The municipalities will issue bonds in FY2004 and FY2005.
2. The municipalities will bring no pledge of additional security to the financing(s), other than the state's credit and bond sale proceeds.
3. The municipalities will have to issue these bonds separately.
4. As state-supported appropriation debt, the bonds will be rated A1, A+, A+, resulting in interest rates comparable to other state-supported certificates of participation.
5. The bonds will have 15-year terms, with fixed-interest rates and level debt service.
6. The municipalities will issue the maximum amount authorized under this legislation ($218,400,000) for the projects, plus the cost of issuing these bonds (while there is no limitation, these costs are estimated at $4,368,000).*

The legislation requires at least one bond sale from each of the municipalities listed. This is an inefficient way to raise funds for projects as each transaction will have fixed costs of issuance. Rating agency, bond counsel, financial advisory, printing and other fees will be incurred four times rather than once. This results in bond issuance costs totalling an estimated $1 million to $2 million more than alternative structuring alternatives.

Due to the State Bond Committee's role in these transactions, the state's bond counsel and financial adviser will have to participate in drafting the legal documents, structuring the transaction, and working with the rating agencies for each of the bond sales. The cost of this effort is estimated at $135,000 over FY 2004 and 2005.

** If bond issuance costs are examined, there needs to be a discussion of the type of sale contemplated -- since issuance costs are ascribed differently with a negotiated sale of securities than with a competitive sale.*

FISCAL NOTE

STATE OF ALASKA	Fiscal Note Number:
2003 LEGISLATIVE SESSION	Bill Version: SSHB 55
	() Publish Date:

Revision Date/Time (Note if correction):		Dept. Affected:	Public Safety
Title	An act expressing legislative intent regarding privately operated correctional facility...	BRU	Alaska State Troopers
		Component	Judicial Services - Anchorage
Sponsor	Representatives Hawker		
Requester	House State Affairs	Component No.	831

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
Personal Services	134.0	134.0	134.0	134.0	134.0	134.0
Travel						
Contractual	19.8	19.8	19.8	19.8	19.8	19.8
Supplies	6.4	6.4	6.4	6.4	6.4	6.4
Equipment	48.6					
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	**208.8**	**160.2**	**160.2**	**160.2**	**160.2**	**160.2**
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	208.8	160.2	160.2	160.2	160.2	160.2
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	**208.8**	**160.2**	**160.2**	**160.2**	**160.2**	**160.2**

Estimate of any current year (FY2003) cost: 0.0

Mark this box (X) if funding for this bill is included in the Governor's FY 2004 budget proposal: ☐

POSITIONS

Full-time	2	2	2	2	2	2
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

This fiscal note includes two new positions to address the construction of a private correctional facility in Whittier and the expansion of Spring Creek Correctional Center in Seward. The positions would provide prisoner transport and consist of two Court Service Officers who would be stationed at the Anchorage Judicial Services office. Year one costs include one-time items for vehicle purchases, firearms, and radios.

Prepared by:	Lieutenant Matthew Leveque	Phone	269-0390
Division	Alaska State Troopers	Date/Time	3/11/03 10:11 AM
Approved by:	William Tandeske, Commissioner	Date	3/11/2003
Agency	Department of Public Safety		

(Revised 9/2002 OMB)

FISCAL NOTE

STATE OF ALASKA
2003 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: SSHB 55
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: Public Safety

Title	An act expressing legislative intent regarding privately operated correctional facility...	BRU	Alaska State Troopers
		Component	AST Detachment
Sponsor	Representatives Hawker		
Requester	House State Affairs	Component No.	2325

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
Personal Services	201.0	201.0	201.0	201.0	201.0	201.0
Travel						
Contractual	29.7	29.7	29.7	29.7	29.7	29.7
Supplies	9.6	9.6	9.6	9.6	9.6	9.6
Equipment	72.9					
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	**313.2**	**240.3**	**240.3**	**240.3**	**240.3**	**240.3**
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	313.2	240.3	240.3	240.3	240.3	240.3
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	**313.2**	**240.3**	**240.3**	**240.3**	**240.3**	**240.3**

Estimate of any current year (FY2003) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2004 budget proposal:

POSITIONS

Full-time	3	3	3	3	3	3
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

This fiscal note includes three new positions to address the expansion of three existing state correctional facilities in Palmer, Bethel and Fairbanks. The three positions would provide prisoner transport. The positions consist of Court Service Officers (one each in Palmer, Bethel and Fairbanks). Year one costs include one-time items for vehicle purchases, firearms, and radios.

The Department of Public Safety transported 43,904 prisoners during FY01; 49,683 during FY02 and 33,957 as of the 7th month of FY03. This cost DPS $1,597.8 (FY01) and $1,705.3 (FY02), which includes an RSA with Department of Corrections for $140.0.

There is no way to determine what the transportation costs would be for an additional 1,653 in-state prisoner beds. Dramatic increases in AST's prisoner transportation funding would likely be required.

Prepared by: Lieutenant Matthew Leveque
Phone 907 269-0390
Division: Alaska State Troopers
Date/Time 3/11/03 10:06 AM
Approved by: William Tandeske, Commissioner
Date
Agency: Department of Public Safety

(Revised 9/2002 OMB)

FISCAL NOTE

STATE OF ALASKA
2003 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: HB 55
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: DOT&PF

Title	An Act expressing legislative intent regarding privately operated prisons	BRU	Highways and Aviation
		Component	Cental Region Highway & Aviation
Sponsor	Hawker & Rokeberg		
Requester	HSTA	Component No.	564

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
Personal Services	0.0	50.0	50.0	50.0	50.0	50.0
Travel	0.0	0.0	0.0	0.0	0.0	0.0
Contractual	0.0	1,014.0	1,014.0	1,014.0	1,416.0	1,416.0
Supplies	0.0	0.0	0.0	0.0	0.0	0.0
Equipment	0.0	0.0	0.0	0.0	0.0	0.0
Land & Structures	0.0	0.0	0.0	0.0	0.0	0.0
Grants & Claims	0.0	0.0	0.0	0.0	0.0	0.0
Miscellaneous	0.0	120.0	120.0	120.0	195.0	195.0
TOTAL OPERATING	**0.0**	**1,184.0**	**1,184.0**	**1,184.0**	**1,661.0**	**1,661.0**
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts	0.0	1,160.0	1,136.0	1,110.0	1,562.0	1,535.0
1003 GF Match						
1004 GF						
1005 GF/Program Receipts	0.0	24.0	48.0	74.0	99.0	126.0
1037 GF/Mental Health						
Other: ARRC maintenance credits						
TOTAL	**0.0**	**1,184.0**	**1,184.0**	**1,184.0**	**1,661.0**	**1,661.0**

Estimate of any current year (FY2003) cost: 4,178.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2004 budget proposal: [ ]

POSITIONS

Full-time		1	1	1	1	1
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

1. 2004 maintains existing 17 hour per day summer schedule and 9.75 hour (average) per day winter schedule. 2005 to 2007 changes to 17 hours per day 6 am to 11 pm 365 days per year to accommodate prison construction. 2008 and 2009 represent 19 hours per day 5 am to midnight 365 days per year to accommodate private prison operations of three 8 hour shifts daily.
2. Department of Corrections vehicles on official public safety business will not be assessed tolls. All other vehicles will be assessed tolls per the current regulations.
3. Operating the Tunnel 24/7 365 days a year would require going from two shifts to three shifts of tunnel operating personnel.
4. One additional PFT State M&O employee would be needed starting in 2005.
5. Total cost of 24 hour/7day operations is $6,969.0. Total cost of 19hour/7day operation is $5,839.0.

Prepared by: Dennis R. Poshard — Phone 465-3900
Division: Special Assistant to the Commissioner — Date/Time 3/12/03 3:41 PM
Approved by: Commissioner Mike Barton — Date 3/12/2003
Agency: Alaska Department of Transportation and Public Facilities

(Revised 9/2002 OMB)

HB 55
WHITTIER PRISON / REGIONAL JAIL EXPANSION
Talking Points

JUSTIFICATION

- All fifteen in-state prisons and jails are at, or over, emergency capacity and 700 Alaskan prisoners are held in Arizona.
- Excessively crowded prisons and jails over tax facilities and staff, exposing inmates, staff and the public to an unreasonable risk of harm (riot, hostage, escape)
- Over crowded prison systems are subject to Court monitoring and Court control over legislative and executive branch prerogatives (fines & budget)
- Alaska was released from Court monitoring only two years ago. When released, over $2 million in sanctions were waived. DOC is currently at serious risk of renewed court monitoring and fines?
- Alaska's correctional system is growing at the rate of 200 inmates per year. If 1,500 to beds are opened in Alaska by 2006, the system will be as full as it is today.
- A centrally located prison will enable prisoners in Arizona to return to Alaska and provide relief to regional jails by transferring long-term sentenced felons out of regional jails, where programs and services are costly and limited.

COST

- The average daily **operating** cost for a state correctional facility ranges from a low of $95 (Palmer) to a high of $185 (Ketchikan), per bed, **without capital debt service.** The average state operating cost is $114.36 per day, per bed.
- The amortized **capital** cost for a State built prison bed ranges from $30 to $50 per day, per bed, without land acquisition and infrastructure costs.
- **The Whittier combined capital and operating cost is $91 to $94 per bed, per day,** plus major medical, for a total cost of under $100 per day, per bed.
- Exporting Alaskan prisoners represents $18 million in lost revenue and jobs, as well as the lost economic multiplier (2.5 to 3 times value) effect on the local purchase of goods, materials, services and creation of indirect jobs
- Arizona beds are not a long-term fix for in-state prison overcrowding because 48% of Alaska prisoners are pre-trial and a high percentage more are short-term, misdemeanant offenders and probation violators who are too costly to export.

BENEFITS TO THE STATE

- Returns $18 million per year to the Alaska economy, with an economic multiplier effect that benefits all Alaskans
- 325 union construction jobs available to all Alaskans
- 228 indirect construction related jobs
- 225 – 275 permanent prison jobs (correctional officers, nurses, therapists, teachers, administrators etc.)
- 200 permanent indirect jobs created as a result of prison demand
- Purchase of goods, materials and services associated with construction and operation over 25 years
- Mitigates State liability for personal injury and sanctions from prison overcrowding
- Returns Arizona prisoners closer to family and support systems
- Whittier is the only plan and legislation that expressly addresses Alaska Native programs
- Adds value to the $90 million Anton Anderson Tunnel
- Offers a Government owned, privately managed comparison to State owned and managed prisons that has stimulated efficiency, cost containment and operating budget savings in other States

WHITTIER INFRASTRUCTURE

- The City is a strategically located former military base and has a well developed utility infrastructure and deepwater port. Chugach Electric, Enstar Gas, Yukon Telephone and cable and abundant water are at, or near the site; an onsite sanitary sewer treatment is proposed similar to other state facilities
- First response, external emergency services in the Whittier/Girdwood area (15 minutes) currently consists of 8 troopers and police, over 100 on site correctional officers (after the prison is built), 47 fire fighters, 8 full response trucks, 33 emergency medical technicians, 4 emt trucks, Anton Anderson Tunnel emergency response vehicles and prison emergency response equipment and vehicles.
- Whittier is 50 minutes by highway from Anchorage fire, life, safety and health resources in the event of natural catastrophe – closer than the State medium security prison at Sutton, Alaska and the maximum security prison in Seward

NATIVE PROGRAMS

- 37% of Alaska's inmate population are Alaska Native men, while Alaska Native men comprise only 7% of Alaska's general population

- Whittier and its prison contractor have teamed with Native corporations in the construction and delivery of programs for Natives, by Natives, currently not offered in State facilities.

- State prisons have not touched the tragic cycle of recidivism among Alaska Natives through conventional State programs. The State has nothing to lose, and everything to gain, by allowing the Native community to try to effect behavioral change among Alaska Native offenders

CORRECTIONAL POLICY CONCERNS

1. Public Protection

- The contract between the State, the City and the Private contractor will require that the prison be built and operated to state and national standards of safety.

- The contract will include on site State monitoring and a provision to remove the contractor for fault

  Prisoners are not released to the community and are transported to and from the prison by troopers or D.O.C. transportation officers

- Close proximity to extensive fire, life, safety and health resources in Anchorage renders protection to the public higher than most regional prisons

2. Best Correctional Practices

- It is axiomatic that a prison built and operated to the State and National standards of the industry will deliver "best correctional practice"

- The State ensures that contract standards are met through the intergovernmental agreement with the City and Contractor

- Proximity to Anchorage ensures optimal access to stable staffing , mental health, adult education, vocational training and other services and rehabilitation resources not available in many small communities

- Starting, untrained, recruit wage and benefits ($36,000) are 20% lower than the State of Alaska, but higher than Correctional officers are paid in Seattle, Portland and other cities where cost of living is higher than the Anchorage area.

- Wage and benefits for other classes (e.g. nurses, data techs, etc.) are commensurate with Anchorage private sector wages, with an above average benefit package valued at 28%.

3. **Community Participation / Procurement Integrity**

- Whittier is a duly organized, second class city with access to the resources, sophistication an savvy necessary to protect the interest of its residents and negotiate a contract with the State that delivers best value to the State and the City

- Whittier completed an exhaustive public process to acquire local support of 80% of resident, adult, registered voters, *before* initiating the procurement process, or approaching the Legislature in 2002. Whittier renewed the process with the same results for 2003.

- Whittier retained the experienced procurement and construction law firm of Perkins Coie to design and administer a competitive procurement process which local State procurement expert Susan Burke testified was consistent with State competitive procurement procedure, as well as conforming to municipal code.

- The selections panel consisted of independent, unbiased Anchorage consultants and engineers experienced with design/build contracting practices, who analyzed and scored proposals from four national corrections companies through a customary competitive bid procedure.

- After the results were announced, no protests or appeals were filed by the three companies that were not selected

- Procurement expert Susan Burke has testified that the Whittier procurement process satisfied the requirements of the State competitive bid process.

4. **Statewide and Regional Needs**

- The Whittier prison addresses regional needs by providing long-term prison beds so sentenced prisoners can be transferred from regional jails, making room form pre-trial, pre-sentence, appeal and pre-release prisoners, as well as returning prisoners from Arizona.

5. **Cost Effectiveness**

The $91 to $94 combined daily capital and operating cost per bed at Whittier is a best value (25% direct savings) under any criteria when compared to the cost of State built and operated prisons and exportation of jobs and revenue.

HARVARD LAW REVIEW
VOL. 115 June 2002 No. 7

III. A TALE OF TWO SYSTEMS: COST, QUALITY, AND ACCOUNTABILITY IN PRIVATE PRISONS

Private prisons are on the rise. Privately operated juvenile facilities — mostly community-based group homes or halfway houses — and federal adult halfway houses have been common in the United States since the 1960s.[1] In 1979, private firms began contracting with the Immigration and Naturalization Service to detain illegal immigrants pending hearings or deportation.[2] Private, large-scale investment in the construction and management of conventional prisons and jails dates from the mid-1980s.[3] Prison privatization has been driven not only by the growing support among lawmakers and the public for private provision of traditional government services,[4] but also by exploding prison populations resulting from stricter drug and immigration laws and changes in sentencing procedures.[5]

By the end of 2000, there were 87,369 state and federal prisoners in private detention facilities in the United States — 6.3% of all state and federal prisoners,[6] and 22.7% more than in 1999.[7] Of these, 15,524 were federal prisoners (10.7% of all federal prisoners) and 71,845 were state prisoners (5.8% of all state prisoners).[8] The use of private facilities is concentrated in the South and the West.[9] Texas and Oklahoma have the greatest numbers of inmates in private facilities; only six states — Alaska, Hawaii, Montana, New Mexico, Oklahoma, and Wisconsin, which combined account for approximately one-fifth of all state inmates -- house over 20% of their prison population in private facilities.[10] Privatization has been less widespread in local jails than in state prisons — only about 2% of jail beds are private — but jail privatization has been called the "next frontier" of privatization.[11]

Comparative studies on the cost and quality of private and public prisons give reason to be cautiously pleased with private prison performance.[12] The empirical evidence is consistent with economic theory, which predicts that with privatization, costs will fall and quality (however defined) may rise.[13] The idealist could ascribe the

---

[1] *See* DOUGLAS MCDONALD, ELIZABETH FOURNIER, MALCOLM RUSSELL-EINHORN & STEPHEN CRAWFORD, ABT ASSOCS. INC., PRIVATE PRISONS IN THE UNITED STATES: AN ASSESSMENT OF CURRENT PRACTICE 4–5 (1998) [hereinafter ABT REPORT].

[2] *Id.* at 5.

[3] *Id.* at 5–6.

[4] *See generally, e.g.*, MAYOR STEPHEN GOLDSMITH, THE TWENTY-FIRST CENTURY CITY: RESURRECTING URBAN AMERICA (1997) (discussing the desirability of contracting out many municipal services).

[5] ABT REPORT, *supra* note 1, at 7-10; Judith Greene, *Bailing Out Private Jails*, AM. PROSPECT, Sept. 10, 2001, at 23, 26 (describing the sudden interest of the Federal Bureau of Prisons in privatization, and attributing the Bureau's need for tens of thousands of new beds to harsher drug sentencing laws enacted in 1986 and to the 1996 Immigration Reform Act).

[6] BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, BULLETIN: PRISONERS IN 2000, at 7 tbl.8 (2001) [hereinafter PRISONERS IN 2000].

[7] BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, BULLETIN: PRISONERS IN 1999, at 7 tbl.10 (2000) (reporting that there were 71,208 inmates in private facilities (5.2% of all state and federal prisoners), of which 3828 were federal (2.8% of all federal prisoners) and 67,380 were state (5.5% of all state prisoners)).

[8] *Id.* The federal and state numbers are not directly comparable, as the federal number includes 6143 federal inmates held in private community correctional centers. *Id.*

[9] For a table of state and federal statutory authority to outsource prison operation, see Charles W. Thomas & Sherril Gautreaux, *The Present Status of State and Federal Privatization Law*, *at* http://web.crim.ufl.edu/pcp/html/statelaw.html (last visited Mar. 18, 2002).

[10] PRISONERS IN 2000, *supra* note 6, at 7 tbl.8 (16,979 out of 87,369).

[11] Richard G. Kickbusch, *Jail Privatization: The Next Frontier*, *in* PRIVATIZATION IN CRIMINAL JUSTICE: PAST, PRESENT, AND FUTURE 133, 135 (David Shichor & Michael J. Gilbert eds., 2001) [hereinafter PRIVATIZATION IN CRIMINAL JUSTICE].

[12] *See infra* Section B.2.

[13] *See infra* Section B.3.

satisfactory performance of private prisons to the power of market incentives; the cynic could point out that given public prisons' bleak history and patchy present, private prisons perform satisfactorily compared to a rather low baseline. Each would be right.

Public prisons are not the most accountable of government systems; in fact, under certain circumstances, private prisons may be more accountable. In the qualified immunity context, recent Supreme Court decisions such as *Richardson v. McKnight*[14] and *Correctional Services Corp. v. Malesko*[15] have held private prisons to at least as high a standard of constitutional protection as public prisons.[16] Judges' and juries' greater skepticism of private agencies than of government may also make private prisons more accountable; moreover, government oversight of private prisons may be less deferential than government oversight of its own operations.[17] In addition, private prisons have substantially greater market accountability because they are concerned with winning new contracts and renewing old ones, and with avoiding both adverse publicity and drops in stock price.[18] The continued promise of private prisons requires three concurrent innovations. First, evaluators must develop a rich set of performance measures, and prison data must be gathered and publicized.[19] Second, the government must implement performance-based contracts that tie compensation to actual results.[20] Finally, the government should maximize the efficiency gains from privatization and minimize opportunities for capture by institutionalizing competition between public correctional departments and private prison firms and making contract monitoring independent of both the public and the private sectors.[21]

A. Private Prisons, Criminal Policy, and Democracy

Critics have argued that statutes authorizing private prisons unconstitutionally delegate core government functions to private parties.[22] This contention has never been tested in court, but such arguments seem dubious given the uneven history of the nondelegation doctrine and the Supreme Court's recent decision in *American Trucking Ass'ns v. Whitman*.[23] True, private prison officials "determine when infractions occur, impose punishments and . . . make recommendations to parole boards,"[24] but as long as they implement well-defined correctional policy with sufficient oversight, this delegation seems unobjectionable on federal constitutional grounds.

One modern-day objection to private prisons stems from opposition to corrections and criminal policy generally: if the problem is the incarceration of too many people, making prisons cheaper or more efficient is a false solution and may exacerbate the

---

[14] 521 U.S. 399 (1997). *See id.* at 401, 412 (holding that private prison guards cannot claim qualified immunity in § 1983 suits).

[15] 122 S. Ct. 515 (2001). *See id.* at 515 (holding that companies operating private correctional facilities, like agencies operating analogous public facilities, are not subject to civil rights suits under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971)).

[16] *See infra* Section C.1(b)–(c).

[17] *See infra* Section C.1(a), (c).

[18] *See infra* Section C.2.

[19] *See infra* Section D.1.

[20] *See infra* Section D.2.

[21] *See infra* Section D.3.

[22] *See, e.g.*, Joseph E. Field, Note, *Making Prisons Private: An Improper Delegation of a Governmental Power*, 15 HOFSTRA L. REV. 649 (1987). *But see* Ira P. Robbins, *The Impact of the Delegation Doctrine on Prison Privatization*, 35 UCLA L. REV. 911, 915 (1988) (arguing that th[illegible] against private prisons on delegation grounds is "extremely close").

[23] 121 S. Ct. 903 (2001) (upholding a portion of the Clean Air Act against a nondelegation challenge).

[24] Jody Freeman, *The Contracting State*, 28 FLA. ST. U. L. REV. 155, 188 (2000) (footnote omitted).

problem.[25] Another objection is the "expressivist" critique "that to turn over responsibility for administering prisons and jails to private, for-profit companies at some level compromises the legitimacy of the state's exercise of its authority to punish."[26] This Part takes a frankly consequentialist view of private prisons and this does not address these critiques. Private prisons might be inherently problematic under some moral theories and acceptable under others (both consequentialist and deontological),[27] but space constraints preclude engaging this debate.

What about the specter of corruption? Industry lobbies government, and regulatory agencies can be captured by the entities they regulate; the private prison industry is no different.[28] Not only may private prison companies lobby for preferential treatment, they may also, as entities that directly profit from incarceration, influence substantive criminal legislation by supporting tough-on-crime candidates, scaring the public about crime, and advocating tougher sentencing.[29] The story is plausible,[30] but it does not explain current levels of prison privatization or modern-day demand for more and cheaper prisons because the forces leading to the explosive growth of the prison population substantially predate the modern growth of the private prison industry.[31]

Moreover, though private prison companies do lobby state and federal governments, so do prison guard unions, which also benefit from increased incarceration rates and prison construction.[32] Prison guard unions generally contribute vastly more money to politicians than do private prison companies.[33] The California prison guard union, for

---

[25] Greene, *supra* note 5, at 26 ("[L]ike the state legislators before them, members of Congress were madly building new prisons . . . , searching for cheap new private-prison beds, and refusing to consider changes in the draconian sentencing laws that were causing most of the increase in prisoners."); Ahmed A. White, *Rule of Law and the Limits of Sovereignty: The Private Prison in Jurisprudential Perspective*, 38 AM. CRIM. L. REV. 111, 145 (2001) (arguing that all imprisonment is "intensely problematic and in many ways inherently irrational," "dysfunctional," and "socially malignant," and that government should "wage its own wars against its citizens . . . in an obvious and maximally costly way").

[26] Sharon Dolovich, The Ethics of Private Prisons 73–74 (Nov. 1999) (unpublished manuscript, on file with the Harvard Law School Library); *see also* Dan Markel, *Are Shaming Punishments Beautifully Retributive? Retributivism and the Implications for the Alternative Sanctions Debate*, 54 VAND. L. REV. 2157, 2233–34 (2001).

[27] The consequentialist treatment does not abandon the moral high ground — consequentialism itself implies certain normative commitments. Even for a nonconsequentialist, private prisons may not be especially problematic. *See, e.g.*, Markel, *supra* note 26, at 2234–40 (arguing that private prisons are consistent with the "confrontational conception of retribution").

[28] *See* RICHARD W. HARDING, PRIVATE PRISONS AND PUBLIC ACCOUNTABILITY 42–47 (1997) (discussing capture or the risk of capture in private prisons in Australia, Florida, and the U.K.); *id.* at 159 (arguing that under the "basic model" of accountability, in which the public sector correctional agency is at the center of privatization decisions, "[c]apture occurs frequently"), DAVID SHICHOR, PUNISHMENT FOR PROFIT: PRIVATE PRISONS/PUBLIC CONCERNS 240–41 (1995) (noting the involvement of Tennessee state officials with the Corrections Corporation of America (CCA) while CCA was bidding on the management of Tennessee's prison system in 1985); Greene, *supra* note 5, at 27 (describing links between the federal government and private prison companies).

[29] SHICHOR, *supra* note 28, at 236.

[30] This very claim is made about prison labor contractors in the nineteenth century. *Id.* at 37 ("[T]hree governors [of Tennessee] during the 1870s and 1880s expressed a negative opinion of the convict lease system but realized that the abolition of this practice would create a severe financial burden on the state, and therefore they continued, albeit reluctantly, this policy.") (footnote omitted); Beverly A. Smith & Frank T. Morn, *The History of Privatization in Criminal Justice*, *in* PRIVATIZATION IN CRIMINAL JUSTICE, *supra* note 11, at 3, 17 ("Prosecutions, sentences, and paroles were all manipulated to ensure a supply of a disproportionately high number of black inmates, in what some have seen as replication of or an economic replacement for slavery without a capital investment in workers.") The claim is also made about modern-day prisons. *See, e.g.*, Greene, *supra* note 5, at 23 (describing how the warden of CCA's Tulsa Jail in Oklahoma had directed the addiction treatment manager "to make a 'sales pitch' to local judges, urging them to sentence offenders to a treatment program in the jail even though the program had been eviscerated in order to cut operating expenses").

[31] HARDING, *supra* note 28, at 94.

[32] *See* Mark Arax & Mark Gladstone, *State Thwarted Brutality Probe at Corcoran Prison, Investigators Say*, L.A. TIMES, July 5, 1998, at A1 ("[State investigators] had watched the [prison guard] union under president Novey ride the prison construction wave, growing from a kind of social club into one of the more powerful forces in the state, with a rank-and-file 27,000 strong.").

[33] *See* ADRIAN T. MOORE, PRIVATE PRISONS: QUALITY CORRECTIONS AT A LOWER COST 33–34 (Reason Public Policy Inst., Policy Study No. 240, 1998) (comparing correctional officers' $1.5 million donations to Pete Wilson alone during his 1990 and 1994 California gubernatorial bids with private prison companies' $150,000 total political contributions nationwide in 1995–1996).

example, endorses and contributes millions of dollars to state candidates and "is among the largest campaign donors in the state."[34] Does privatization further distort criminal policy by replacing a single strong voice for incarceration with two voices? Or does the second, private, voice weaken the first by generally weakening the underlying public sector union? The answer is unclear.

Quite apart from whether political influence peddling distorts criminal policy, does such peddling weaken the case for privatization? Not necessarily, particularly when one considers different kinds of influence peddling: corruption and patronage. If a politician is corrupt and uses his power to extract money from the contractor, then privatization is likely to be inferior to public provision. Conversely, if a politician is involved in patronage and uses his power to pursue other political objectives, like serving politically powerful interest groups such as public employees' unions, private provision is preferable.[35]

B. Do Private Prisons Work?

1. Obstacles to Effective Assessment. — Effectively evaluating prisons requires specifying goals and objectives, developing measures and indicators, and collecting comparison group data. Unfortunately, the political process does not value rigorous evaluation highly.[36] Some states require only cost evaluation;[37] only a handful require comparisons of both cost and quality, often to comply with statutory targets.[38] Some neglect evaluation altogether. What monitoring data exist are often inadequate for outcome evaluation.[39]

As if that were not enough, "cost" and "quality" are not clearly defined. Public agencies and private firms measure costs differently. Public prison budgets usually exclude various central administrative and support expenses, such as medical, legal, and

---

Straight by-the-numbers comparisons are not enlightening because private prisons remain smaller players than public prisons. The interesting point is merely that whoever provides prison services will seek to influence the political process.

[34] Dan Morain, *Davis To Close State's Privately Run Prisons*, L.A. TIMES, Mar. 15, 2002, at A1, *available at* 2002 WL 2461282 (noting that the Correctional Peace Officers' Association spent $2.3 million to help elect Governor Gray Davis); *see also* Arax & Gladstone, *supra* note 32 (listing donations of $5.2 million to state candidates from 1987 to 1998, including $667,000 to gubernatorial candidate Pete Wilson, $159,000 to Attorney General candidate Dan Lungren, and an additional $760,000 in 1990 to defeat Wilson's gubernatorial opponent, Dianne Feinstein).

[35] *See* Oliver Hart, Andrei Shleifer & Robert W. Vishny, *The Proper Scope of Government: Theory and an Application to Prisons*, 112 Q.J. ECON. 1127, 1144–47 (1997).

[36] Alexis M. Durham III, *Evaluating Privatized Correctional Institutions: Obstacles to Effective Assessment*, FED. PROBATION, June 1988, at 65, 67.

[37] *See, e.g.*, OHIO REV. CODE ANN. § 9.06(A)(4) (West 2001 Supp.) (requiring that the contractor "convincingly demonstrate" that it can operate the facility and provide required services with at least a 5 percent savings over the projected cost to the public entity).

[38] *See, e.g.*, ARIZ. REV. STAT. § 41-1609.01(G) (2001) (requiring the contractor to offer cost savings); *id.* § 41-1609.01(H) (requiring the contractor to offer services of "at least equal" quality); *id.* § 41-1609.01(K) (requiring a biennial comparative public-private performance comparison study); *id.* § 41-1609.01(L) (requiring a five-year cost comparison); TENN. CODE ANN. § 41-24-104(c)(2)(A) (1997) (requiring quality to be at least equal to that provided at state prisons); *id.* § 41-24-104(c)(2)(B) (requiring cost to be at least 5% less than the state's cost); *id.* § 41-24-1-105(a) (mandating the establishment of objective performance and cost criteria); *id.* § 41-24-1-105(c) (requiring evaluation of performance, with the contract to be renewed only if the contractor provides "essentially the same quality" as the state at 5% lower cost, or superior services at "essentially the same cost" as the state, where "superior" is defined as 5% better and "essentially the same" is defined as within 5%). The Florida statute requires evaluation of both cost and quality, though only cost savings and not quality improvements are required by the statute. FLA. STAT. ANN. § 957.07 (West 2002) (requiring 7% cost savings, where a private entity's corporate income and sales tax payments count as an offset to costs, and where the cost of services provided to the public entity at no direct cost by other government agencies is allocated to the public entity); *id.* § 957.11 (requiring evaluation of "costs and benefits" of contracts).

[39] Durham, *supra* note 36, at 67; *see* Robert B. Levinson, *Okeechobee: An Evaluation of Privatization in Corrections*, 65 PRISON J. 75, 76, 88 (1985) (citing the vague or nonexistent goals specified in the 1982 contract to run the Florida School for Boys in Okeechobee, a secure facility for adjudicated delinquents; the contract focused on administrative inputs rather than outcomes or even outputs).

personnel administration services, which other state agencies typically handle. Private budgets include these costs but do not include the government's costs of preparing and monitoring contracts.[40] As for quality, definitions differ across studies, and quality is difficult to compare in any case. If one facility has fewer assaults but more escapes than another, is it better or worse?

Few studies are rigorous.[41] Even reasonably good studies leave much to be desired. No study seriously controls for many important factors that influence misconduct rates, such as staff-to-inmate ratios, custody technology, correctional policies, or age and race of inmates.[42]

Furthermore, comparative studies do not adequately address serious overcrowding problems.[43] Overcrowding, which may increase inmate violence and the incidence of infectious and stress-related diseases,[44] thereby contributing to unconstitutional conditions,[45] is a serious problem in prisons and jails. Less expensive prisons allow for more capacity because the same prison budget can build more prisons, and increased capacity can relieve overcrowding. (Of course, cheaper prisons do not guarantee greater capacity, and greater capacity does not guarantee decreased crowding; still, it is reasonable to expect that cheaper prisons will not *exacerbate* crowding.) Thus, to the extent that private prisons decrease costs,[46] privatization can improve conditions in both public and private prisons. Comparative studies between private and public prisons at a specific moment in time cannot register this across-the-board quality increase.

Finally, most studies do not analyze both cost and quality and thus are of limited value in assessing private prisons. Studies that do not look at both elements simultaneously cannot begin to analyze the costs and benefits of private prisons.[47]

2. Evidence from the Studies. — Studies that look at cost or quality alone do, however, provide some information. The most rigorous studies[48] find clearly positive

---

40 ABT REPORT, *supra* note 1, at 35–37; MOORE, *supra* note 33, at 10.

41 For a summary of the cost and quality studies on private prisons and a brief discussion of which studies are more methodologically sound, see 2 GEOFFREY F. SEGAL & ADRIAN T. MOORE, WEIGHING THE WATCHMEN: EVALUATING THE COSTS AND BENEFITS OF OUTSOURCING CORRECTIONAL SERVICES 2, 3 & tbls.2A–2C, 9–10 & tbls.4A–4B (Reason Public Policy Inst., Policy Study No. 290, 2002). For a highly critical evaluation of all prison privatization cost and quality studies (even some of the ones the Reason report considered sound), see also ABT REPORT, *supra* note 1, at app. 2.

42 Scott D. Camp & Gerald G. Gaes, *Private Adult Prisons: What Do We Really Know and Why Don't We Know More?*, *in* PRIVATIZATION IN CRIMINAL JUSTICE, *supra* note 11, at 283, 285 (attributing the insufficiency of current empirical studies to a failure to control for structural factors and only weak attempts to control for age and race); *see also* ABT REPORT, *supra* note 1, app. 2, at 18 ("[T]hese background data are a sine qua non of valid institution performance comparisons. What may appear to be differences in institution performance may be nothing more than differences in the background characteristics of inmates. . . .").

43 *See generally* Peter J. Duitsman, Comment, *The Private Prison Experiment: A Private Sector Solution to Prison Overcrowding*, 76 N.C. L. REV. 2209 (1998).

44 *Id.* at 2211.

45 *See generally* Susanna Y. Chung, Note, *Prison Overcrowding: Standards in Determining Eighth Amendment Violations*, 68 FORDHAM L. REV. 2351, 2362–66 (2000).

46 *See infra* Section B.2.

47 *See* U.S. GEN. ACCOUNTING OFFICE, PRIVATE AND PUBLIC PRISONS: STUDIES COMPARING OPERATIONAL COSTS AND/OR QUALITY OF SERVICE 13 (1996) ("[I]t is important that any study focus on both operational costs and quality of service."). Interestingly, in the GAO study itself (which is really just a literature review), only the Tennessee studies compare both cost and quality, *id.* at 23–25, and these are not particularly rigorous, *see* SEGAL & MOORE, *supra* note 41, at 3 tbl.2B, 10 tbl.4B. Surprisingly, given the solid methodological discussion, the GAO did not examine the Louisiana State University study, the Arizona DOC studies, or the Florida OPPAGA study, which analyzed both cost and quality. Nonetheless, later writers have called the GAO report a "thorough[] review[]," Greene, *supra* note 5, at 25, "one of the more comprehensive reviews," BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, EMERGING ISSUES ON PRIVATIZED PRISONS 26 (2001), and the "most comprehensive study to date," JOEL DYER, THE PERPETUAL PRISONER MACHINE: HOW AMERICA PROFITS FROM CRIME 229 (2000).

48 Six of the twenty-eight cost studies are considered especially methodologically sound. *See* SEGAL & MOORE, *supra* note 41, at 2–3.

cost savings.[49] On the quality side, comparisons are trickier, as there is no single metric representing quality. But none of the more rigorous studies[50] finds quality at private prisons lower than quality at public prisons on average, and most find private prisons outscoring public prisons on most quality indicators.[51] Most of these quality studies do not examine cost, but as private prisons are not expected to be more expensive, this result belies statements in the prison literature that assume that cost reductions must come at the expense of quality.[52] Indeed, the few methodologically sound studies that evaluate both cost and quality suggest that cost is no higher in private facilities and quality is at least roughly equivalent.

Researchers at Louisiana State University compared three Louisiana prisons, one public and two private.[53] The researchers concluded that the prisons were "as comparable as reasonably possible in terms of history, capacity, design, types of inmates, number, gender and ethnicity of inmates."[54] Privatization produced estimated cost savings of 12–14 percent (costs of $22.93 and $23.49 per inmate per day for the two private facilities, compared to $26.60 for the public facility).[55] The quality comparison was a wash, with the private facilities faring better in some areas and worse in others. The private facilities, among other things, reported fewer critical incidents, provided safer work environments for employees and safer living environments for inmates, and had proportionately more inmates complete basic education, literacy, and vocational training courses.[56] The public prison had fewer (zero) escapes and fewer aggravated sex offenses, more effectively controlled substance abuse among inmates, more consistently offered a broad education and vocational adult education program to inmates over four years, and provided more treatment, recreation, and rehabilitative services to inmates.[57]

An Arizona study performed in 2000 by the state Department of Corrections compared three private prisons with fifteen public ones.[58] The study found average savings of 13.6% at the private prisons in 1998 ($40.36 per inmate per day compared to $46.72 at public prisons) and 10.8% in 1999 ($40.88 compared to $45.85).[59] The quality comparison gave the edge to neither group: private and public prisons had about equal inspection results, though public prisons generally had somewhat less severe disciplinary problems.[60]

---

[49] *Id.* at 3 tbl.2A. Most of the less rigorous studies also report cost savings, and none reports that private prisons are more expensive. *Id.* at 3 tbls.2B, 2C. The causes of private prison cost savings are explored below in Section B.4.

[50] Segal and Moore consider eleven of the eighteen quality studies methodologically more sound *See id.* at 9–10.

[51] Of the eighteen studies, only one clearly gives the edge to public prisons. *Id.* at 9–10, tbls.4A, 4B.

[52] *See, e.g.*, Greene, *supra* note 5, at 25 ("[Quality] problems seem to be endemic to the enterprise [of private prisons] — a result, in great part, of the private companies' mission to hold down costs.").

[53] WILLIAM G. ARCHAMBEAULT & DONALD R. DEIS, JR., EXECUTIVE SUMMARY, COST EFFECTIVENESS COMPARISONS OF PRIVATE VERSUS PUBLIC PRISONS IN LOUISIANA: A COMPREHENSIVE ANALYSIS OF ALLEN, AVOYELLES, AND WINN CORRECTIONAL CENTERS, PHASE I (rev. ed. Dec. 10, 1996).

[54] *Id.* at 25.

[55] *Id.* at 73.

[56] *Id.*

[57] *Id.* at 74.

[58] ARIZ. DEP'T OF CORR., PUBLIC-PRIVATE PRISON COMPARISON (2000).

[59] *Id.* at 47.

[60] *Id.* at 2–4. A 1997 study of Arizona's correctional system, which compared a private prison to fifteen public prisons, found 14 percent cost savings in the private prison relative to the public prison average and 17 percent cost savings after adjusting for the private prison's property tax payments. CHARLES W. THOMAS, COMPARING THE COST AND PERFORMANCE OF PUBLIC AND PRIVATE PRISONS IN ARIZONA: AN OVERVIEW OF THE STUDY AND ITS CONCLUSIONS (1997), *available at* http://web.crim.ufl.edu/pcp/research/Ariz.html (last visited Mar. 18, 2002). *But see* Abt Report, *supra* note 1, at 45 (criticizing this study's methodology).

Finally, a 2000 study of Florida prisons compared the private South Bay Correctional Facility, operated by Wackenhut Corrections Corporation, with the most comparable public facility, Okeechobee Correctional Institution.[61] After adjusting for various differences, including capacity, the study found that the private prison's costs were 3.5% lower than the state's costs for fiscal year 1997–98 and 10.5% lower for 1998–99,[62] meeting the 7% cost reduction mandate established by law.[63] Additionally, construction costs were 24% lower for the private prison.[64] As for quality, the study found that South Bay had fully operational programs within six months of opening (as opposed to three years for Okeechobee), had fewer health service deficiencies than Okeechobee, was able to house more inmates three months after opening than Okeechobee could house after seventeen months, and implemented an innovative approach to housing certain "close management inmates."[65] On the negative side, two inmates escaped from South Bay in 1999, while none had ever escaped from Okeechobee.[66]

3. That's Fine in Practice, but How Does It Work in Theory? — Private prisons fare rather well in quality comparisons, but why? Contracts are necessarily incomplete: because the government and the private provider can only describe a general service and cannot specify beforehand in full detail exactly how the contractor should provide that service, the contractor has wide latitude in running the prison.[67] This latitude permits the contractor to cut corners, reducing costs by reducing quality. It is no surprise that early economic models of privatization predicted that private ownership would reduce both cost and quality.[68]

But more recently, economists have observed that cutting corners is not the only way to make money. It is easy to assume that an aversion to out-of-pocket costs will deter firms from implementing a "quality innovation"[69] — but this assumption ignores opportunities for contract renegotiation. Because private prison companies can suggest such innovations to the government and renegotiate their contracts (or, in the real world, include extra services in a higher bid), they *can* capture some of the gains from quality innovation. They therefore have greater incentive to innovate in this way than their public counterparts, who cannot capture such gains.

Thus, while economic theory predicts that costs will decline under private management, it does not necessarily predict the same of quality.[70] Whether quality increases or decreases overall depends on whether cost-cutting or quality innovation has a greater effect.[71]

---

61 OFFICE OF PROGRAM POLICY ANALYSIS AND GOV'T ACCOUNTABILITY, FLA. LEGISLATURE, PRIVATE PRISON REVIEW 2 (2000) [hereinafter FLORIDA STUDY].

62 *Id.* at 5.

63 *See* FLA. STAT. ANN. § 957.07 (Supp. I 2002).

64 FLORIDA STUDY, *supra* note 61, at 3.

65 *Id.* at 10.

66 *Id.*

67 Hart, Shleifer & Vishny, *supra* note 35, at 1134 (discussing the assumptions motivating their incomplete contracting model).

68 *See* JEAN-JACQUES LAFFONT & JEAN TIROLE, A THEORY OF INCENTIVES IN PROCUREMENT AND REGULATION 231 (1993) (noting that "[a] high concern for quality [requires] low-powered incentive schemes" because providers who care too much about cost will reduce quality).

69 *See* Hart, Shleifer & Vishny, *supra* note 35, at 1133.

70 *See id.* at 1143 ("Costs . . . are always lower under private ownership. Quality . . . may be higher or lower under private ownership.").

71 *Id.* at 1137–43.

This simple model does not take into account other factors that may strengthen the case for privatization. For instance, the government may observe a provider's harmful cost cutting and hold it against the provider in future rounds of bidding or decline to renew the contract. If even a few private providers compete against each other, the government can seek an alternative provider once it observes harmful cost cutting, rather than having to retake control of the prison.[72] In addition, because of inefficiencies in current prison practices, there may be opportunities for cost cutting that does not reduce quality.[73]

4. How Does the Private Sector Save Money? — The private sector saves money in several ways. First, private companies save money at the design and construction stage. They can typically design and build prisons in half the time required for governments to do so, because they can avoid the layers of red tape that play a role in safeguarding against government corruption[74] but are arguably unnecessary when the government purchases a service from the private sector (using a procurement process that itself has safeguards against government arbitrariness). Private firms are also usually free of purchasing restrictions and subcontracting quotas. Contracting out prison design and construction reduces costs by 15 to 25 percent.[75]

Second, private companies save money at the operation stage. The main savings come from reducing labor costs, both through lower wages[76] and through more efficient use of labor. A private firm that had a role in designing a facility would be likely to use innovative design techniques that could minimize the number of guards required to monitor inmates. Moreover, because they are not bound by civil service rules in managing their personnel,[77] private prisons use roughly one-third the administrative personnel of government prisons and use incentives to reduce sick time and consequent overtime expenditures.[78] Private firms also save money by "maintaining tight control of inmates and keeping them well-fed and occupied with work, education, or recreation."[79] Finally, private firms are free from many bureaucratic purchasing rules and can often buy supplies at lower cost than the government.[80]

C. Public and Private Accountability

Abuses happen in any system. But how do different systems react to abuse when it occurs? While there is no systematic information about the reaction to prisoner abuse in

---

[72] *Id.* at 1143–44.

[73] The Hart-Shleifer-Vishny model assumes that all cost cutting decreases quality — in other words, that the public sector already operates at the frontier of technological efficiency. *Id.* at 1133. But no one *knows* the most efficient way to run a prison; this information must be discovered. Markets can encourage the discovery of efficient methods; government bureaucracies often do not. *See generally* FRIEDRICH A. HAYEK, *The Use of Knowledge in Society*, *in* INDIVIDUALISM AND ECONOMIC ORDER 77, 77–78, 84, 86 (reprint 1980) (1948).

[74] MOORE, *supra* note 33, at 5 (noting the "often laborious approval process and multiple contact requirements a government construction project must go through").

[75] *Id.* at 4–5.

[76] *See* DYER, *supra* note 47, at 214 (noting that "[m]ost guards at state and federal facilities earn union-scale wages and receive both retirement benefits and health insurance," while "their counterparts at private prisons . . . often earn as little as $7.00 an hour, with little or no benefits"); Greene, *supra* note 5, at 25 (citing "wages and benefits substantially lower than those in government-run prisons").

[77] MOORE, *supra* note 33, at 17.

[78] *Id.* at 16.

[79] *Id.*

[80] *Id.* at 18. Moore provides an interesting example of private sector cost savings: Virginia prisons once kept thirty days of food on hand in expensive warehouses. This practice possibly dated back to when prisons were remote and supplied by mule train, and was never questioned until a private company did something different. *Id.* at 19.

public and private prisons, case studies may provide a flavor of the accountability mechanisms at work.

1. Private Prisons' Legal Accountability. — The traditional hostility of juries toward corporate defendants, private prison guards' inability to claim qualified immunity in § 1983[81] civil rights suits, and courts' unwillingness to defer to the judgment of corporations all increase private prisons' legal accountability relative to public prisons.

(a) Jury Hostility. — Empirical studies have found that juries are more likely to award large verdicts against corporations than against governments.[82] Jury hostility also affects settlements, which are made in the shadow of expected recovery amounts at trial. Consider, for example, the case of the Northeast Ohio Correctional Center, a federal prison in Youngstown, Ohio, run by CCA under a contract with the District of Columbia. As part of a recent settlement of a lawsuit alleging inadequate security and medical treatment as well as excessive force, CCA paid $1,650,000 in damages to the 2000 members of the inmate class — an extraordinarily high settlement amount for class actions involving prisoners.[83] This huge settlement amount probably reflects the well-known tendency of juries, rightly or wrongly, to be less sympathetic to large corporate defendants. Moreover, monetary awards against public prisons are more limited.[84]

(b) Qualified Immunity: The New Bifurcated Regime. — A danger inherent in privatization is that public responsibilities will be performed by private individuals without effective oversight. Recent cases, however, have sought to avoid this pitfall and, in some ways, hold private prisons to an even higher standard than public prisons. Under *Harlow v. Fitzgerald*,[85] government officials (including prison guards[86]) performing discretionary functions are shielded from liability for civil damages if their conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known."[87] In *Richardson v. McKnight*,[88] however, the Supreme Court held that private prison guards do not enjoy this qualified immunity.[89]

---

[81] 42 U.S.C. § 1983 (1994 & Supp. II 1996).

[82] There is no statistical evidence on jury attitudes toward corporations in the prison context, but more general jury studies suggest that juries tend to be turned off by a defendant's wealth and by arguments that a defendant's behavior was profit maximizing. *See* Daniel Kahneman, David A. Schkade & Cass R. Sunstein, *Shared Outrage, Erratic Awards*, *in* PUNITIVE DAMAGES: HOW JURIES DECIDE 31, 40 (2002) (showing higher punitive damage awards for corporations with greater wealth); *cf.* W. Kip Viscusi, *Corporate Risk Analysis: A Reckless Act?*, 52 STAN. L. REV. 547, 550 (2000) (discussing juror bias against companies merely for having undertaken a risk analysis); *see also* Greene, *supra* note 5, at 23 (reporting that in December 2000, a South Carolina jury awarded $3 million in punitive damages against a CCA juvenile prison for abusing a youth using a level of force "malicious to the conscience of mankind").

[83] Alphonse Gerhardstein, *Private Prison Litigation: The "Youngstown" Case and Theories of Liability*, 36 CRIM. L. BULL. 183, 198 (2000). CCA also paid class counsel of the city of Youngstown $803,000 in litigation expenses, and agreed to pay annual fees to Youngstown for ongoing monitoring. *Id.*

[84] *See* 42 U.S.C. § 1997e(d)(3) (capping attorney fees at 150 percent of statutory hourly rates); *Id.* at § 1997(e) (barring recovery for emotional injury in the absence of physical injury). The limitation on recovery for emotional injury may not apply in many cases, but the attorney fee cap may be more significant in cases in which inmates seek damages. Even if the settlement by its terms included attorney fees, the total amount of the recovery would probably be lower than it otherwise would be because expected recoveries affect settlement amounts.

[85] 457 U.S. 800 (1982).

[86] *See* Procunier v. Navarette, 434 U.S. 555, 561 (1978).

[87] *Harlow*, 457 U.S. at 815–19.

[88] 521 U.S. 399, 412 (1997).

[89] Private guards might still have a good faith defense to a § 1983 suit. *Id.* at 413–14.

Thus, *McKnight* bifurcates the treatment of public and private prisons in a way that makes private prisons more, not less, accountable.[90]

Does this dichotomy make sense? If governments are cost-minimizers, it does not.[91] In the presence of liability, cost-conscious governments would hire timid guards, who require less indemnification, for public prisons, and would choose timid contractors, who submit a lower bid, for private prisons; thus, the argument for qualified immunity would not depend on whether the prison is public or private.[92] But governments often do not minimize costs. They often face soft budget constraints, may award contracts to friends or political allies, and may monitor prisons more or less depending on their political ideology.[93] Because government officials' motivations are complex, it is difficult to predict how the effects of qualified immunity will vary as between public and private prison operators. The efficiency arguments for only extending qualified immunity to public guards are thus somewhat indeterminate.

Considerations of compensation and accountability, however, cut against immunity for *both* public and private prisons. On the compensation side, immunity presumably makes a difference in some cases, and where it does, it may prevent victims from being compensated. On the accountability side, immunity allows prisons to externalize the cost of constitutional violations onto prisoners — not a particularly well-represented segment of society.

Nor does qualified immunity seem necessary to reduce the drain on the court system. Most § 1983 prison lawsuits are considered frivolous, and almost all fail before getting to the merits.[94] Qualified immunity would probably not change inmates' filing behavior, and even if it did, it is not clear that this would be desirable, because our system deliberately tolerates a certain amount of meritless litigation to avoid missing the occasional worthwhile claim. A regime of liability, with high procedural hurdles (such as requirements of exhaustion of administrative remedies[95]) or penalties for frivolous litigation (such as the frequent-filer penalties in the Prison Litigation Reform Act[96]), may better serve the goals of compensation and accountability for both government and private actors.

Thus, given the bifurcated regime established in *McKnight*, private prisons are, if anything, more accountable for their constitutional violations than are public prisons.

---

[90] In *Correctional Services Corp. v. Malesko*, 122 S. Ct. 515, 517 (2001), the Court held that private companies operating federal halfway houses, like their public counterparts, were not subject to civil rights suits under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 395–97 (1971), though the offending officials could personally be sued under *Bivens*, which allows awards of monetary damages against federal agents for a violation of federal constitutional rights. *Malesko*, 122 S. Ct. at 517. *Malesko* held private operators to the same standard as public agencies.

[91] *See* Clayton P. Gillette & Paul B. Stephan, Richardson v. McKnight *and the Scope of Immunity After Privatization*, 8 SUP. CT. ECON. REV. 103, 123–24 (2000).

[92] *See id.* at 126. Different prisons may react to liability in different ways; one might imagine reactions that either increase or decrease costs. For instance, a prison may save money by instructing guards to discipline inmates less. Or a prison may spend more money if guards, who would rather avoid litigation even if they are fully indemnified, always call for more backup before disciplining an inmate, to avoid the possibility of a violent confrontation that could lead to a civil rights suit. But under competitive bidding with a cost-conscious government, the cost-cutting reactions will tend to win out over the cost-increasing reactions. Because some forms of timidity decrease costs, while overzealousness presumptively increases costs, a liability regime fosters timidity.

[93] *See id.* at 125–26.

[94] *See generally* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CHALLENGING THE CONDITIONS OF PRISONS AND JAILS: A REPORT ON SECTION 1983 LITIGATION 19 tbl.4 (1994).

[95] 42 U.S.C. § 1997e(a) (1994 & Supp. II 1996) (prohibiting a prisoner from bringing a section 1983 action unless he has exhausted available administrative remedies).

[96] 28 U.S.C. § 1915(g) (1994 & Supp. II 1996) (prohibiting a prisoner from suing in forma pauperis if, on three previous occasions while he was imprisoned, an action of his was dismissed as frivolous, malicious, or failing to state a claim, unless he is "under imminent danger of serious physical injury").

The presence of this additional judicial check should in turn increase private prison quality.

(c) Other Legal Accountability Mechanisms. — Not only may privatization make juries more skeptical of prisons and guards more susceptible to suit, but it may also make judges less deferential. Courts have traditionally been deferential to the government in prison suits because of the common judicial unwillingness to second-guess the political branches.[97] Though this unwillingness is understandable, deference is the enemy of robust accountability. Yet courts have often been hostile to private, for-profit delegations; while the nondelegation doctrine is almost never applied, judicial hostility manifests itself through more vigorous due process scrutiny.[98] As administrative power moves to private prison corporations, courts may abandon their deference to prison officials, because conflicts of interest will appear more obvious and contractual terms will necessarily be incomplete.[99]

In addition to litigation, government monitoring adds a further layer of review. While public prisons have government monitors, monitors of private prisons (even if captured to some degree) are likely to be more independent than monitors of government-run prisons.[100]

2. Private Prisons' Market Accountability. — Market mechanisms, such as governments' ability to rescind or decline to renew private firms' contracts, and more generally, the potential for bad publicity to cause a drop in firms' stock prices, further increase private prison companies' accountability.

(a) Contract Rescission. — A private prison may have its contract rescinded. This possibility is not always as easy as it sounds — the private prison industry is a somewhat concentrated oligopoly, though that may change with increased privatization. But as long as more than one firm is operating and the government continues to run part of the prison system, someone will be available to take over a dysfunctional prison, making the government's threat to rescind a contract somewhat credible. At any rate, even such imperfect discipline is more difficult to impose on public prisons — the government cannot take over its own prison except by firing civil servants, and it cannot have a private firm take it over except by opening a new bidding process, which is more difficult than finding someone to take over an existing contract.

In 1995. for example, an investigative reporter and a surprise inspection revealed appallingly crowded, unsanitary, and abusive conditions at the Bowie County Correctional Facility, a private "warehouse turned prison facility" in Texarkana, Texas, housing 500 inmates from Colorado.[101] After a federal lawsuit and a riot, the state of Colorado terminated Bowie County's contract and relocated its inmates.[102]

At the Seal Beach City Jail, operated by the private Correctional Systems, Inc. since 1994,[103] two private prison guards were indicted in August 2001 for allegedly "arranging and concealing an attack on a drunken inmate who was singing boisterously

---

[97] *See* David N. Wecht, Note, *Breaking the Code of Deference: Judicial Review of Private Prisons*, 96 YALE L.J. 815, 819–20 (1987).

[98] *See id.* at 822–28.

[99] *See id.* at 829–33.

[100] *See* CHARLES H. LOGAN, PRIVATE PRISONS: CONS AND PROS 65 (1990).

[101] DYER, *supra* note 47, at 200–01; Steve Lipsher, *Colorado Withdraws the Rest of Its Inmates from Texas*, DENVER POST, Jan. 1, 1998, at B3, *available at* 1998 WL 6097832.

[102] DYER, *supra* note 47, at 200–01; Lipsher, *supra* note 101. When the prison crowding crisis that prompted Colorado to send inmates to Texas was over, Colorado returned its inmates to in-state prisons, some of which were private. *Id.*

[103] Monte Morin & Stuart Pfeifer, *2 Jail Officers Indicted Over Inmates' Fight*, L.A. TIMES, Aug. 30, 2001, at B8.

in the jail's detoxification cell."[104] Within ten weeks of the attack, both guards had been fired; one guard was charged with federal civil rights violations and the other with being an accessory after the fact for trying to conceal the attack.[105] The first guard was sentenced to over four years in prison.[106] This incident prompted the city to review its contract with CSI and to consider other options.[107]

Similarly, in Santa Fe County, New Mexico, CCA brought in prisoners convicted of murder and rape from Oregon to fill its private jail cells but reportedly failed to notify the Sheriff's Department that it was housing inmates who posed a danger to the public. The Oregon prisoners were removed from the jail only after county officials threatened to cancel the county's contract with the company.[108]

(b) Adverse Stock Price Effects. — Private corporations are sensitive to drops in their stock prices. Contract rescission, as well as the possibility of lawsuits with high damage awards, affects profitability, and perceptions of a company's profitability are reflected in the price of its stock. Thus, a private corporation is punished financially for bad news, and possibly for mismanagement that may impose costs in the future. For example, the INS detention center in Elizabeth, New Jersey, run by Esmor Corrections, erupted in a massive riot in 1994 because the company had continuously cut corners on food and facility upkeep. Esmor's stock price dropped from $20 a share to $7 after news of the riot became known.[109]

While fear of stock price drops may make private prisons conceal their problems[110] — CCA has been accused of covering up escapes from the Youngstown prison described above — such secrecy has its limits, because escapes, riots, and prisoner litigation are hard to cover up. Following disclosure of the problems at the Youngstown prison, CCA's stock hit a one-year low.[111] A more plausible story is that private companies are more concerned with keeping their stock prices high over the long term by insisting on sound management and that guards and wardens can be encouraged to act responsibly through stock ownership in the company.[112]

(c) Greater Market Flexibility. — Not only are private prisons under greater market pressure to keep conditions from getting out of hand, they are also more able to change because they are free from some of the constraints of government management. In July 2001, for instance, four hundred prisoners in a CCA prison in Kentucky started a riot in which "inmates set[] mattresses on fire and toss[ed] TVs and toilets through the windows. Two weeks later, CCA fired the warden and his top assistant, citing 'policy violations.'"[113] Government employment protection, in this case, would have been an obstacle to disciplining the offending prison officials.[114]

---

104 *Id.*

105 *Id.*

106 Lisa O'Neill, *Riverside Man Receives Prison in Civil Rights Case*, PRESS-ENTERPRISE (Riverside, Cal.), Mar. 12, 2002, at B2.

107 Morin & Pfeifer, *supra* note 103.

108 DYER, *supra* note 47, at 206.

109 *Id.* at 203–04; *see also id.* at 211 (contract rescinded after a private prison riot in Texarkana).

110 *Id.* at 204; *see also id.* at 211 (dubbing the tendency to cover up bad news the "Esmor effect"); *id.* at 221 (calling honest disclosure "financial suicide" for a private prison firm and interpreting private firms' fiduciary duty to their shareholders as "an obligation to prevent bad press").

111 *Id.* at 211.

112 *See id.* at 214 (noting that some private firms offer guards and wardens "stock in the prison company in an effort to reduce turnover," but arguing that such stock ownership exacerbates the Esmor effect described above, *supra* note 110).

113 Greene, *supra* note 5, at 23–24.

114 *See supra* p. 1879.

3. *Are Public Prisons Any More Accountable Than Private Prisons? — (a) The Dynamics of Organizational Stasis.* — Susan Sturm describes the "dynamics of organizational stasis," which "lock in the current conditions in prisons" (both public and private) and "disable regular prison participants from achieving institutional self-correction":[115]

> Even in the face of riots, violence, or public exposure of brutal conditions, legislatures frequently provide minimal support for change. The familiar study commission or task force conducts a public hearing or investigation, culminating in a report with recommendations that are infrequently enacted into law. Even when the legislature does respond to abuse with legislation, there is little accountability for its enforcement and the administration may comfortably ignore it without legislative sanction.[116]

Much of Sturm's description of prisons applies equally to public and private prisons — inmates are generally powerless to change prison conditions,[117] and both guards and administrators often resist reform.[118] Other elements, however, apply primarily to public prisons: unions concentrate on preserving their members' pay, benefits, and seniority,[119] and the budgetary process, in which this year's allocation is presumed to be the baseline for next year's, supports the status quo.[120] It is well known that public bureaucracies have different incentives and attitudes toward change than do private companies.[121] Companies concerned about winning a bid, retaining their contracts, maintaining their stock price, or just being marginally more protected against prisoner lawsuits seem more likely to overcome their institutional stasis.

(b) Corcoran State Prison. — Contrast the above factors, which promote accountability in private prisons, with the sad tale of Corcoran State Prison, a California public prison, in which guards killed seven inmates and wounded forty-three others between 1989 and 1995.[122] Rival gang members fought in human cockfights overseen by prison guards; officers abused and beat inmates; problem inmates were disciplined by being locked in a cell and then beaten or raped by an inmate enforcer dubbed the "Booty Bandit."[123]

Conditions at Corcoran are not typical of public prisons. What is striking about Corcoran, however, is how little was done to alter these conditions even once they were discovered. The Corcoran episode serves as a reminder of the weakness of public prisons' accountability. When replacing one's service provider is difficult — and especially when the provider is identified with the purchaser, capturing the policy advice process — moral outrage at abuses can only get one so far.

In 1994, the FBI began its probe of Corcoran, and in 1996, prompted by media attention, the state launched a pair of investigations, one by the Department of Corrections and another by the Attorney General's office.[124] These investigations were stymied by political pressure from the governor's office and the prison guard union, and

---

[115] Susan Sturm, *Resolving the Remedial Dilemma: Strategies of Judicial Intervention in Prisons*, 138 U. PA. L. REV. 805, 810–11 (1990).
[116] *Id.* at 840 (footnote omitted).
[117] *Id.* at 824–26.
[118] *Id.* at 816, 820–21.
[119] *Id.* at 836.
[120] *Id.* at 832.
[121] *See, e.g.*, JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 72–89 (1989) (describing the nonmarket incentives that operate in agencies).
[122] Arax & Gladstone, *supra* note 32.
[123] *Id.*; *see also* Mark Arax, *Ex-Guard Tells of Brutality, Code of Silence at Corcoran*, L.A. TIMES, July 6, 1998, at A1.
[124] Arax & Gladstone, *supra* note 32.

the state probes yielded not a single criminal charge.[125] Instead, state investigators "spent considerable manpower trying to dig up dirt" on the whistleblowers who had reported these abuses to the FBI.[126] One whistleblower, Richard Caruso, was the only officer disciplined as a result of the state investigations (though he sued and received a large settlement from the state, the largest amount ever given to a whistleblowing officer in California).[127] Another whistleblower changed jobs within the prison system because of alleged retaliation by prison officials (and recovered nothing).[128] The FBI inquiry ultimately resulted in charges against eight officers, but all were acquitted in June 2000.[129]

D. The New Frontier: Information, Contracts, Monitoring

While private prisons today provide acceptable quality at a lower cost than do public prisons, they will only continue to do so as long as their buyers — federal and state governments — care. Bad things still happen at private prisons. Private prison companies have not always been forthcoming with information about the types of inmates they are holding,[130] and reports of maximum-security prisoners being housed in portions of private prisons designed for the general population are not uncommon.[131] Effective judicial, legislative, and administrative oversight continues to be necessary. Perhaps the scope of prison litigation should be expanded to keep both public and private prisons honest, but there is no substitute for performance contracts that encourage quality improvements, effective monitoring, and information gathering and disclosure.

1. Performance Measures. — Susan Sturm notes that prison officials often know little about their own operations.[132] Prison administrators gather some information to prove the prison's compliance with court orders,[133] but it would be preferable for them to do so without being forced. One way to increase private prisons' disclosure, at least in the case of federal institutions, is by subjecting them to the same Freedom of Information Act disclosure requirements as public prisons[134] — though this, too, is a piecemeal solution.

---

[125] *Id.* (describing also how union officials told guards not to cooperate with the earlier county prosecution of two lieutenants who "delivered a Taser jolt to an inmate's testicles in 1989 and engaged in a cover-up").

[126] *Id.*

[127] *Id.*; Mark Arax, *Defense Landed All the Punches in Corcoran Case*, L.A. TIMES, June 11, 2000, at A1.

[128] Mark Arax, *Judge Dismisses Lawsuit by Prison Whistle-Blower*, L.A. TIMES, Oct. 4, 2000, at A19.

[129] Arax & Gladstone, *supra* note 32; Arax, *supra* note 127.

[130] DYER, *supra* note 47, at 206 (describing a case in which Texas authorities learned that a CCA facility was housing sex offenders from out of state only when a few of them escaped), *id.* at 207 (describing a case in which, without the knowledge of local authorities, a privately run Denver drug rehabilitation program accepted felons from out of state, one of whom, after being expelled from the program, allegedly raped and murdered a local resident); *see also* Gerhardstein, *supra* note 83, at 184–85 (reporting that the private prison in Youngstown did not inform local authorities of the transfer of maximum-security inmates to a medium-security prison).

[131] *See* DYER, *supra* note 47, at 206 (noting that the CCA Houston facility was not designed for inmates with a "violent criminal history"); *id.* at 207 (reporting that at a Texarkana private prison, "murderers and other violent offenders from Colorado were . . . housed in the general population, despite the facility not being rated for maximum-security inmates"); Gerhardstein, *supra* note 83, at 184–85 (noting that at Youngstown, a medium security prison in Ohio, hundreds of inmates "were transferred directly . . . from the Maximum Security Facility at Lorton").

[132] Sturm, *supra* note 115, at 898.

[133] *See id.*

[134] *See* DYER, *supra* note 47, at 216; Nicole B. Cásarez, *Furthering the Accountability Principle in Privatized Federal Corrections: The Need for Access to Private Prison Records*, 28 U. MICH. J.L. REFORM 249, 296–99 (1995).

Perhaps the environmental information regime can provide a model for the disclosure of prison information. The Toxics Release Inventory (TRI),[135] which requires that industrial facilities report the release and transfer of specific chemicals, has been credited with dramatic reductions in pollution.[136] In part because of the existence of these reporting requirements, much formerly fragmented and incomparable data has become standardized and can be aggregated to allow comparisons of different firms or states, or to track performance over time.[137]

Of course, TRI mandates only that information be gathered and made public, not that anything be done with that information. But the mere availability of information, whether environmental information about industrial facilities or correctional information about prisons (floor space, number of violent incidents, recidivism), has real effects.[138] First, "you manage what you measure" — administrators have a natural desire to improve what they have data about.[139] Second, information gathering encourages peer monitoring within an industry, and industry self-regulation can be a valuable supplement to other forms of monitoring or control.[140] Th' ., information is valuable to regulators, would-be regulators, industry actors seeking to stave off regulation, community monitors and "informal regulators," capital markets, labor markets, and customers (in the prison case, state and federal government entities).[141]

Information as regulation has its critics. Regulation proponents charge that information does not guarantee any action or results and that it is most useful in combination with other regulation.[142] From the other side, critics charge that because information is highly contextual, any mandated information will be too simplistic and perhaps misleading, especially when presented at a high level of aggregation.[143] But while particular information initiatives may be flawed, and while mere disclosure may not be sufficient, collecting and publicizing a rich (and meaningful) set of performance indicators will increase the incentives for improvement that are already inherent in the competitive contracting process.

2. Improving Performance Through Contract. — At best, contracts "represent potentially useful accountability instruments [and] vehicles for achieving public law values, such as fairness, openness, and accountability."[144] Private prison contracts should have specific terms, graduated penalties, and strong oversight by a "contract manager" working for the public agency; they should require private prisons to "observe minimal administrative procedures such as notice and hearing requirements," and perhaps explicitly give inmates or surrounding communities third-party beneficiary rights, which would allow oversight through contract litigation when government oversight fails.[145] States could also require, as contractual terms, compliance with

---

[135] 42 U.S.C. § 11023 (1994).
[136] Bradley C. Karkkainen, *Information as Environmental Regulation: TRI and Performance Benchmarking, Precursor to a New Paradigm?*, 89 GEO. L.J. 257, 287–88 (2001).
[137] *Id.* at 260–61.
[138] *Id.* at 295.
[139] *Id.* at 295–305.
[140] *See id.* at 309
[141] *See id.* at 309–31.
[142] *See id.* at 338–45 (noting that industry laggards may be unconcerned with improving their reported information).
[143] *See id.* at 331–38 (also raising data quality and timeliness issues).
[144] Freeman, *supra* note 24, at 201–02.
[145] *Cf. id.* at 202 (making this argument in the context of private nursing homes); *see also* Gerhardstein, *supra* note 83, at 197.

American Correctional Association and National Commission of Correctional Health Care standards.[146]

Moreover, states could mandate that private prisons provide the same training that is required of public prison guards,[147] though requiring certain inputs is presumptively less effective than looking to outcomes where these are measurable. Contracts could require that private firms carry civil rights liability and other insurance; that they disclose conflicts of interest; that they allow access to records and entry to the facility by inspectors; or that they be independently monitored or audited by certified professionals.[148] Finally, contracts could tailor termination rights and provide for easy amendment of contractual terms. In short, contract designers can be highly creative — and thorough — in writing accountability into contractual terms.

Most basically, corrections departments should move toward performance-based contracts. Ideally, performance-based contracts should "clearly spell out the desired end result" but leave the choice of method to the contractor, who should have "as much freedom as possible in figuring out how to best meet government's performance objective."[149] These contracts also structure contractor payments to encourage the desired results, rewarding the contractor for improvements and penalizing it for poor performance or rising costs.[150]

This approach seems feasible for corrections. The American Correctional Association is revising its accreditation standards to include performance measures, and the Office of Juvenile Justice and Delinquency Prevention is developing performance-based standards for juvenile correctional facilities.[151] Performance measures for prisons could include process measures such as the number of educational or vocational programs, or outcome measures such as the Logan quality of confinement index,[152] the number of assaults, or the recidivism rate. Governments could even require that contractors pay for elements that are often externalized, such as the cost of escapes.[153] Because no single statistic adequately captures "quality," and because focusing on any single measure could have perverse effects,[154] performance-based contracts should tie compensation to a large and rich set of variables.

3. Awarding and Monitoring Contracts To Maximize the Gains from Privatization and Minimize Capture. — Accountability can also be improved by redesigning correctional agencies. Under the basic model of accountability, the public correctional agency sets contract terms, awards contracts, and monitors compliance. Capture is frequent, cross-fertilization rare.[155]

---

146 Freeman, *supra* note 24, at 204–05.

147 *Id.* at 205.

148 *Id.* at 206.

149 WILLIAM D. EGGERS, PERFORMANCE-BASED CONTRACTING: DESIGNING STATE-OF-THE-ART CONTRACT ADMINISTRATION AND MONITORING SYSTEMS 2 (Reason Public Policy Inst., How-To Guide No. 17, 1997).

150 *Id.* at 10–14.

151 *See Performance Standards Home: Performance-Based Standards for Juvenile Correction and Detention Facilities*, *at* http://www.performance-standards.org (last visited Mar. 18, 2002); *see also* 1 GEOFFREY F. SEGAL & ADRIAN T. MOORE, WEIGHING THE WATCHMEN: EVALUATING THE COSTS AND BENEFITS OF OUTSOURCING CORRECTIONAL SERVICES 15–16 (Reason Public Policy Inst., Policy Study No. 289, 2002).

152 *See* HARDING, *supra* note 28, at 113–15 (describing Charles Logan's index of prison quality, which includes measures of "security, safety, order, care, activity, justice, conditions and management").

153 *Cf.* OHIO REV. CODE ANN. § 9.07(D)(16)(b) (imposing reimbursement requirements for certain externalized costs).

154 Tying compensation to safety alone could encourage abuse; tying it to the number of civil rights complaints could harm safety.

155 *See* HARDING, *supra* note 28, at 159.

But there are other models of accountability. In the United Kingdom, "the role of the chief inspector of prisons brings some external scrutiny to the prison system generally, including the private sector . . . . This aspect of the accountability system is vigorously independent, with no danger of capture to date."[156] However, the chief inspector's reports are not binding, and the government has resisted attempts to give the office more teeth.[157] In Florida, private prisons have their own regulatory authority that operates independently of that of public prisons; the private prison monitor is in turn independent of the private prison authority.[158] This system minimizes capture, but it also minimizes cross-fertilization.[159] Moreover, "[t]here is also a danger that the monitors may develop a loyalty to the Privatization Commission which in turn might inhibit their willingness to make public criticisms — a variant of the capture principle."[160]

Perhaps the most promising model is one suggested by British penologist Richard Harding, in which both public and private prisons are subject to, and monitored by, an independent body that takes over new prison projects from the outset and allows both public and private systems to bid on them.[161] After the contract term expires, both public and private systems may bid on the prison again, so that facilities can move among private firms and between the private and public sectors, promoting both accountability and cross-fertilization.[162] This model separates the roles of government as purchaser and provider, making it more difficult for service departments to capture the policy advice process and use their power to recommend themselves as service providers.[163]

E. Conclusion

This Part has not engaged the "softer" arguments about privatization, but has rather taken correctional policy as given and prison privatization as ethically neutral in itself. Does political influence peddling weaken or strengthen the case for privatization? It depends whether corruption by corporations is worse than patronage of public prison guard unions — a question that calls for further research.

Turning to the cost and quality comparisons, what imperfect empirical evidence there is suggests that private prisons cost less than public prisons and that their quality is no worse; it is perhaps unsurprising that prison privatization behaves in this respect much like privatization of other state and local services.[164] Moreover, there are many reasons to believe that private prisons are more accountable than public prisons — both because of heightened legal and market accountability for private forms and because accountability in the public sector is so limited. There are also numerous untapped

---

[156] *Id.* at 159–60.
[157] *Id.* at 160.
[158] *Id.* at 161.
[159] *Id.*
[160] *Id.*
[161] *Id.* at 161–62.
[162] *Id.* at 162.
[163] WILLIAM D. EGGERS, COMPETITIVE NEUTRALITY: ENSURING A LEVEL PLAYING FIELD IN MANAGED COMPETITIONS 28 (Reason Public Policy Inst., How-To Guide No. 18, 1998).
[164] *See, e.g.*, ADRIAN T. MOORE, GEOFFREY F. SEGAL & JOHN MCCORMALLY, INFRA-STRUCTURE OUTSOURCING: LEVERAGING CONCRETE, STEEL, AND ASPHALT WITH PUBLIC-PRIVATE PARTNERSHIPS (Reason Public Policy Inst., Policy Study No. 272, 2000) (discussing water and wastewater, solid waste, and highway and street maintenance, in addition to jails and prisons). For a wider-ranging argument in favor of privatizing more of the criminal justice system. see BRUCE L. BENSON, TO SERVE AND PROTECT: PRIVATIZATION AND COMMUNITY IN CRIMINAL JUSTICE (1998).

opportunities for improving private prisons even further with richer information gathering and dissemination, performance contracts, and better monitoring. In short, despite all of their possible faults, private prisons are a promising avenue for the future development of the prison system.

February 25, 2003

The Honorable Bruce Weyhrauch
Representative, State of Alaska
State Capitol
Juneau, AK 99801-1182

RE: HB 55 – Whittier/Cornell Private Prison

Dear Representative Weyhrauch:

Enclosed you will find documents that prove the Cornell connection to Whittier came not from Whittier's citizenry but from Cornell's number one man in Alaska, Frank Prewitt.

There was never a great public outcry from the residents in Whittier to site a Cornell private prison at the head cf Passage Canal. This project arose like the Phoenix from the ashes of the overwhelming defeat of the Cornell private prison in the Kenai Peninsula Borough. Seventy-three percent of the voters in that Borough said NO to the private prison proposal on October 2, 2001.

<u>10/17/01</u>: An E-mail originally sent to two people in Ketchikan from Frank Prewitt was also forwarded by him on the same date to Ben Butler, Mayor of Whittier. It establishes the Cornell plan of attack in this State. (This E-mail was sent to me by Tom Miller, a reporter for the Ketchikan Daily News. He got it from people in Wrangell, as the Prewitt E-mail had been sent to the City of Wrangell, too.)

<u>10/23/01</u>: Mr. Prewitt E-mails a proposed "City of Wrangell" Ordinance and the proposed Wrangell RFQ to Matt Rowley, Whittier City Manager. Please note that the City Council of Wrangell had yet to see this original document, yet Whittier, a competitor, already had it. Mr. Prewitt also suggests that a Town Meeting be held to discuss the project. He even offers to attend to explain the project.

<u>10/26/01</u>: Mr. Prewitt E-mails a seven page Q&A sheet to Matt Rowley for presentation to residents, subheaded: "1. Why should a (sic) 800 (sic) bed, medium security, privately operated prison be located in Whittier?" (I can fax this document to you, if would like a copy of it. So to give both sides of the story, I'll include a rebuttal to Mr. Prewitt.)

10/29/01 – Matt Rowley introduces Ordinance 433-01. With the exception of deleting one Whereas clause on the timber industry and rewording Whereas Clause number five, the Whittier Resolution is word-for-word the Wrangell Ordinance Frank Prewitt E-mailed on October 23, 2001.

10/31/01: Whittier City Manager Rowley E-mails Mr. Prewitt to ask to whom to send the supposedly competitive RFQs. Mr. Prewitt E-mails him suggesting he send it to "Wackenhutt" (sic) Corrections, CCA (our Arizona privateer), Utah's MTC, and " an outfit with an odd sounding name." That outfit was Maranatha Corrections. Matt indicates that he has the RFQ packets ready to send out. This is before a majority of the City Council members had even heard about the project, much less voted on it.

11/5/01 – The City Council of Whittier votes four to one with two absent to adopt Ordinance 433-01.

With the help of Frank Prewitt, Cornell wouldn't be able to lose this contract. Cornell and its representative in Alaska went out like a predatory animal seeking an unsuspecting victim, found it, wrote the enabling Ordinance, wrote the essence of the RFQ sent out by Whittier and gave Whittier the names of companies that might be interested in receiving the RFQ, including itself.

This was a fast-tracked, sole-source contract that could only benefit the company that wrote all of the documents that it would be responding to. There is no way to lose a $1 billion plus contract with a deal that sweet and directed by the potential recipient of the contract.

I hope that you will find these documents interesting reading. Please keep them in mind, while you are listening to testimony on HB 55.

Sincerely,

DEE A. HUBBARD

Dee A. Hubbard
907-252-3155
chubbard@alaska.net

Bruce Harding

From: "Frank Prewitt" fprewitt@ak.net
To: bruce@akgetaway.com
Sent: Thursday, October 18, 2001 10:12 AM
Subject: FW: Prison

Bruce

Sorry I missed your call. I'll be out of the office today, however, the following e-mail will get you up to speed on the situation in Ketchikan.

-----Original Message-----
From: Frank Prewitt
To: billelberson@remax.net; trpm63@hotmail.com
Sent: Wednesday, October 17, 2001 1:17 PM
Subject: Prison

To: Bill Elberson and Roger Stone
Sent: Wednesday, October 17, 2001
Subject: prison

Bill & Roger,

As you know, I represent the team that has successfully brought the private prison opportunity to the doorstep of two Alaskan communities. In both instances local procurement procedures were followed, contracts were signed, preliminary planning and designs were performed and legislation was passed. In Delta Jct, the project did not move forward because of an anti-prison majority shift in the City Council, notwithstanding a positive public vote. On the Kenai Peninsula the project failed when the Borough chose to put the issue to a public vote AFTER months of public hearing, AFTER contracts to perform were signed and AFTER legislation was passed. This was done with full knowledge that, under Alaska case law, the prison was not a legally appropriate subject matter for a referendum. The decision to put the prison to a public vote was made to appease an anti-prison citizens group, who then rallied public employee unions to invest nearly one hundred thousand dollars in a campaign to frighten the public.

Gentlemen, our team has been working on this project for five years and the principals have invested nearly three million dollars in "signed, sealed and delivered" projects only to watch them fail because of mistakes made at the local political level.

When we met, I laid out the steps that are necessary to deliver this project to your community. Due to the time constraints, you must: 1) Select a local government entity that is legally able, and politically willing, to sell revenue bonds without a public vote; 2) Put out a Request For Qualifications (RFQ) to select a contractor to promote, design, build and operate an 800 bed prison; 3) Select a contractor; 4) Negotiate and execute a contract; and 5) Complete the process by January 1, 2002.

Opponents will criticize the process as "fast tracked". Indeed, if the Borough wants to seize this economic development opportunity from another community it must be willing to expedite the public process. The public policy justification for these revenue bonds by passing a public vote is that they are secured by the full faith and credit of the State of Alaska; there is no financial risk to the Borough or the public. Presumably, government officials are elected to make administrative decisions that enhance the general welfare of the public. If they make decisions that the voters disagree with they can be replaced at the polls.

Last year, the Kenai Peninsula Borough's mid-session bill introduction was heavily criticized and near fatal. It is imperative that the Ketchikan Borough legislative package be ready for introduction when the legislature reconvenes on, or about, January 12th. This will leave very little time for planning and production work, even if the Borough meets the January timeframe.

After Monday night's Borough Assembly action I am deeply concerned that Ketchikan is not able, or willing, to take our advice. Today is October 16. In order to meet the January deadline, the Borough must draft, approve and issue an RFQ by November 1. If the Borough allows three weeks for responses, and only one week to evaluate, it will be mid December. The Borough must then award, negotiate and approve a contract, which is, at best, a three-week process. With any slippage due to the holiday season we are in the first week of January.

Whether selected, or not, we are the only team with the experience, data bank and expertise required to give an able and willing community through the steps that are necessary to meet the timeline and deliver the project. We have put two other viable communities on hold because Ketchikan was the first to contact us. But we cannot afford the time that will be lost referring the matter to a volunteer citizens committee and waiting for regularly scheduled assembly meetings. We are also concerned by a statement made by the economic development committee chairwoman that this project will not move forward without an economic impact study and a public vote, whether required, or not.

An RFQ must be issued by the first of November and the Borough must be willing to do everything in its power to complete the process by the first of January. Without that assurance, the project cannot be put together in time for the next legislative session and we will feel compelled to respond to one of the communities who have indicated they can meet the timelines. I hate to put you two under this kind of pressure, but people must be made to understand that if they truly want this project they must act quickly and decisively.

I look forward to hearing from you, good luck.

THE
FOLLOWING
DOCUMENT(S)
ARE
POOR
ORIGINAL
COPIES

Matt Rowley

From: Frank Prewitt [fprewitt@ak.net]
Sent: Tuesday, October 23, 2001 10:55 AM
To: rowley@ci.whittier.ak.us
Subject: prison

Matt

I have e-mailed a draft ordinance and draft RFQ that was prepared for Wrangell. I believe that this may end up a horse race between Whittier and Wrangell, so time is truly of the essence. By the way, the City will own the prison so the "disposing of property" provision may not apply. Feel free to give your attorney my phone number if he has questions about the structure of the deal. I am free to give you advise up until the City takes official action.

I do believe that calling a Town Hall meeting would be helpful. I would be happy to put together an information packet and appear to explain the project and answer questions.

Thanks

Frank

Matt Rowley

From: Frank Prewitt [fprewitt@ak.net]
Sent: Tuesday, October 23, 2001 10:48 AM
To: rowley@ci.whittier.ak.us
Subject: Draft Prison Ordinance

CITY OR BOROUGH OF _____________
ORDINANCE __________

AN ORDINANCE AUTHORIZING THE CITY (BOROUGH) TO NEGOTIATE AN AGREEMENT WITH THE STATE OF ALASKA TO LEASE SPACE WITHIN A CORRECTIONAL FACILITY LOCATED IN ________, AND TO PUBLICLY SOLICIT BIDS FOR THE PROMOTION, DESIGN, CONSTRUCTION AND OPERATION OF AN 800 BED CORRECTIONAL FACILITY, TO BE FINANCED WITH MUNICIPAL REVENUE BONDS

WHEREAS, the State of Alaska Legislature passed SCS CSHB 149 (FIN) am S, "An Act expressing legislative intent regarding correctional facility space; relating to correctional facility space; 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; and providing for an effective date."; and

WHEREAS, the Kenai Peninsula Borough has been barred from implementing the terms of SCS CSHB 149 (FIN) am S by a popular vote of the residents of the Kenai Peninsula Borough; and

WHEREAS, the State of Alaska continues to house 800 Alaska prisoners at a privately owned and privately operated correctional facility in Florence, Arizona; and

WHEREAS, the State of Alaska spends over 18 million Alaskan dollars annually to house prisoners in Arizona; and

WHEREAS, _________ has suffered grave economic harm by the timber policies of the federal government and closure of timber related industries; and

WHEREAS, _________ seeks to diversify its economic base by stimulating new industries and development to backfill the economic void left by timber industry closures; and

WHEREAS, building a correctional facility in _________ will generate over 300 direct and over 228 Davis Bacon wage scale indirect local construction jobs for eighteen to twenty four months; and

WHEREAS, siting a correctional facility in __________ will generate 220 direct and over 200 indirect local permanent jobs; and

WHEREAS, siting a correctional facility in _________ will circulate $28 million dollars annually through the __________ economy; and

WHEREAS, the best interest of the City (Borough) would be served by soliciting competitive bids to select an experienced and able contractor to promote design, build and operate a correctional facility for the City (Borough) of __________; and

Matt Rowley

From: Frank Prewitt [fprewitt@ak.net]
Sent: Tuesday, October 23, 2001 10:49 AM
To: rowley@ci.whittier.ak.us
Subject: wrangell Prison RFQ (1)

City of Wrangell

REQUEST FOR QUALIFICATIONS

"CORRECTIONAL FACILITY PLANNING, PROMOTION, DESIGN, CONSTRUCTION AND OPERATION"

1.0 GENERAL INFORMATION

1.1 Purpose

The City of Wrangell ("city") is requesting responses from qualified firms demonstrating their qualifications and capabilities to contract with the city for the planning, promotion, design, construction and operation of an 800 to 1000-bed medium security correctional facility. The city is preparing a legislative proposal that will be submitted to the Alaska State Legislature ("ASL") and the Alaska Department of Corrections ("ADC") for a privately constructed and operated correctional facility located within the city. The city currently envisions a public-public-private (three-way) arrangement eventually consisting of two or more separate contractual agreements. The first, a long-term government-to-government contract between the Alaska Department of Corrections and the City of Wrangell, is expected to require that the city design, construct and operate an 800-bed medium security prison subject to conditions and standards established by the ADC and ASL. The city expects to meet its obligations under this agreement through a contract with a private builder/operator ("private firm"). The contract will require that the private firm plan, promote, design, construct and operate the proposed correctional facility subject to conditions and standards established by the ADC, ASL and the city. The city intends to select the private firm through this request for qualifications ("RFQ"). The top rated respondent will be invited to enter into a contract with the city.

The city currently anticipates that it will own the correctional facility, and finance its design and construction through the issuance of tax-exempt private development revenue bonds.

This RFQ provides the information that the city deems necessary for interested respondents to effectively present their qualifications and capabilities to participate in this project. The RFQ includes:

- Background Information
- Project Structure and Role of Participants
- Rules Governing Competition
- General Conditions
- Submittal Format
- Evaluation Criteria and Process
- Contract Award Procedure

Matt Rowley

From: Matt Rowley [rowley@ci.whittier.ak.us]
Sent: Wednesday, October 31, 2001 4:57 PM
To: Frank Prewitt
Subject: RE: prison proposals

Thanks. I'll be ready to send a packet out as soon as I get the green light from the council, hopefully Mo iday.

Matt

-----Original Message-----
From: Frank Prewitt [mailto:fprewitt@ak.net]
Sent: Wednesday, October 31, 2001 4:31 PM
To: rowley@ci.whittier.ak.us
Subject: prison proposals

Matt

The Kenai Peninsula Borough sent their request out to five corrections companies: Wackenhutt Corrections in Florida, Corrections Corporation of America, Management and Training Corporation (mtc) in Utah, an outfit with an odd sounding name in Bakersfield California and Cornell Companies of Alaska (274-6667) located in Anchorage on International rd. near C st.

You can probably find them on the internet. I believe only three companies responded to the solicitation.

FYI

Alaska State Legislature

Please enter into the record the following testimony to the House State Affairs

Committee on **HB 55 / Correctional Facilities** Date: March 20, 2003

ALASKA VOTERS ORGANIZATION

RESOLUTION 2003-03

A Resolution to the 23rd Alaska State Legislature in OPPOSITION to the construction of a correctional institution, financed with public funds, to be operated by a private corporation

WHEREAS, since the initial introduction of HB 428 on January 17, 1996 the time and money expended by the Legislature and various municipal jurisdictions promoting and pursuing a private prison financed with public funds has had no benefit for the state or for the taxpayers who have paid these costs; and

WHEREAS, this type of legislation was rejected by the voters in Anchorage, Delta Junction, Kenai, and Wrangell; and

WHEREAS, this legislation was introduced for the benefit of a Texas based for-profit corporation at great expense to Alaskan taxpayers, and to the detriment of our statewide correctional goals; and

WHEREAS, the Second Class City of Whittier, with a population of less than 200 souls, located in the unorganized borough, will never be able to pay for a project of this size without guaranteed state revenue, resulting in the State of Alaska bearing the burden and ultimate responsibility for all costs; and

WHEREAS, Article IX, Section 8 of the Alaska Constitution states: "No state debt shall be contracted unless authorized by law for capital improvements... and ratified by a majority of the qualified voters of the State who vote on this question"; and

WHEREAS, a private prison project built with public money represents an enormous transfer of state funds, more than one billion dollars over twenty five years, with all profits going to a private corporation with minimal investment relative to their large potential gain; and

WHEREAS, it is not in the best interest of Alaska to assume liability for negligent actions taken by a third-party contractor whose primary goals are profit-driven; and

WHEREAS, the privatization of correctional institutions has not been effective to insure public safety or to rehabilitate incarcerated offenders; and

WHEREAS, it is the highest and best use of limited public resources to build a correctional institution with competitive bids; and

WHEREAS, the public safety interests of our state dictate that each correctional institution be closely monitored and run by trained professionals answerable directly and exclusively to public officials, without regard for profit; and

WHEREAS, the State of Alaska has a serious budget deficit, ALL possible options must be considered, including the current arrangement with the privately owned and operated facility in Arizona, to determine the most fiscally responsible plan;

NOW, THEREFORE, BE IT RESOLVED by the Alaska Voters Organization, Board of Directors, that the construction of any correctional institution should be by competitive bid only; and be it

FURTHER RESOLVED that all bonded construction cost for any state correctional institution be approved by Alaska voters as directed in Article IX, Section 8 of the Alaska Constitution; and be it

FURTHER RESOLVED that the operation of any publicly funded correctional institution in Alaska by private corporations be prohibited;

Adopted by the Alaska Voters Organization Board of Directors,
this 20th day of March 2003.

Signed:

Michael McBride

Michael McBride, President

Barbara Mullin

Barbara Mullin, Vice President

Laurie Churchill

Laurie Churchill, Secretary

Petria Falkenberg

Petria Falkenberg, Treasurer

Alaska Voters Organization, Inc.
www.akvoters.org
PO Box 2016
Kenai, Alaska; 99611-2016
907/776-8008
akvoters@gci.net

Subject: **Correcting the record on HB55**
Date: Sun, 23 Feb 2003 12:15:37 -0900
From: Mike Hawker <Representative_Mike_Hawker@Legis.state.ak.us>
Organization: Alaska State Legislature

HB 55 file

To the Senators and Representatives of the 23rd Alaska Legislature:

I prefer to communicate with legislators on a personal basis, but the importance of clearing up mistakes in testimony that was presented last week, and subsequently picked up by various media outlets throughout the State, causes me to send this email note.

I have sponsored HB55 which authorizes the Department of Corrections to contract with the City of Whittier for correctional facilities and services under certain conditions. The Department of Corrections Commissioner Designate, Mr. Marc Antrim, in testimony before the Senate State Affairs Committee on competing SB65, presented claims regarding HB55 by direct reference to the Bill and without any prior notice to me.

Mr. Antrim claimed that HB55 had a "real" cost of $127.25 per day to provide 1,200 prison beds and that SB65 offered the same beds at $110.39 per day.

Quoting the Anchorage Daily News, this assertion regarding HB55 is "Balderdash."

HB55 specifically provides legislative intent that the services be provided at the rate of $91 to $94 per day. Further, if HB55 were amended to allow the guard to prisoner ratio announced by Mr. Antirm for the competing proposal, the actual cost could be further reduced to less than $90 per day.

Mr. Antrim has never discussed the financial specifics of HB55 with its sponsor. I am disappointed in the lack of protocol and disregard for facts demonstrated at last week's Senate hearing.

Thank you for allowing me to clarify the costs contemplated in HB55. I am not asking for your immediate support for HB55, only that the two prison proposals be evaluated fairly and accurately on their respective merits. I am certain that reasonable people will ultimately reach a reasonable conclusion on this issue.

Representative Mike Hawker

CCA
CORRECTIONS CORPORATION OF AMERICA

March 11, 2003

The Honorable Bruce Weyhrauch
Chairman
House State Affairs Committee
Alaska State Legislature
State Capitol-Room 102
Juneau, Alaska 99801-1182

Dear Chairman Weyhrauch:

Corrections Corporation of America (CCA) appreciates the opportunity to present its views on H.B. 55 to your Committee. As you know, CCA has housed Alaska inmates in its Florence, Arizona facilities since 1995 and we highly value this long-standing relationship with the State of Alaska and the Department of Corrections.

We understand that H.B. 55 raises major policy issues which the Committee is addressing. We also understand that the issue of whether or not the State should allow construction of a private-owned prison in Alaska is one which only Alaskans and their elected representatives can decide. Therefore, we believe this is a matter best reserved for Alaskans to decide.

However, CCA wishes to clearly state that if the Legislature and Governor decide to authorize construction of a private prison in Alaska, the following are two issues which we believe are critically important and should be addressed in H.B. 55:

1. An open, competitive bid process conducted under the authority of the State law and under a Request for Proposal compiled by the Commissioner of Corrections', must be written into H.B. 55 to ensure that the State and Department obtain the most cost-effective winning bid; and

2. Any legislation passed by the House and Senate must not be encumbered by potential legal and constructional problems, such whether or not H.B. 55--as currently written--violates Alaska's constitution which prohibits local and special acts.

Finally, CCA wishes to stress that it would intend to participate in any competitive Request for Proposal (RFP) which would be issued under H.B. 55, provided that the RFP process is truly open to public review and is fairly conducted under State competitive biding statutes.

Sincerely,

Brian K. Ferrell, Vice President
State Customer Relations

10 Burton Hills Boulevard, Nashville, Tennessee 37215, Phone: 615-263-3000, Fax: 615-263-3140

Charles Campbell 3020 Douglas Highway Juneau, Alaska
(905) 586-5793 cfc@gci.net

April 9, 2003

Bruce Weyrauch, Representative
Alaska State Legislature
State Capital
Juneau, Alaska 99801

Dear Representative Weyrauch:

My understanding is that House Bill 55 is scheduled for a hearing before the House State Affairs Committee tomorrow morning. I would very much like to t stify but I will not be able to attend that session. And so I will outline some thoughts in this letter, and ask that you have copies of the letter placed in the files of the other members.

As you may know I have had wide experience with prisons and prisoners over many years. I was Director of Corrections in Alaska in the Hammond administration. I have had assignments at seven different federal prisons. I served for time as Special Master to the federal court for the northern district of Texas, and for two years served as Standing Compliance Monitor for the Cleary ruling here in Alaska. I have taught and written extensively in the corrections field. I served as a consultant with four state correctional systems before coming to Alaska in 1979

I make my appeal to you and to the committee as a private citizen and as an Alaskan for twenty-four years. I have no personal stake in this matter, but I am deeply concerned about it. My belief is that the consequences of the State's becoming entangled with a for-profit private prison firm would be deeply unfortunate. Thus, I am adamantly opposed to House Bill 55.

The firm we are dealing here, Cornell Companies, Inc. of Houston, Texas, has invested heavily in trying to get established in Alaska. Their efforts, and the efforts of their sponsors here in Alaska, have been largely responsible the long delay in the State's moving ahead toward resolving some fundamental problems with the State's efforts with corrections.. Three years ago Cornell had a major role in the fiasco at Delta Junction. They tried again in Kenai two years ago, and a year ago they brought forward the truly preposterous idea of a large privately operated prison in Whittier. I can hardly imagine a less suitable site for a correctional facility.

The Cornell people will undoubtedly come before you with an array of charts and graphs, documents and reports, which purportedly illustrate the efficacy of prison privatization. Making these kinds of presentations is what private prison companies do best. When it comes to running prisons they do not do well. The concept they rely on is fatally flawed. Those who operate prisons for profit cannot overcome an inescapable conflict of interest.

Prison privatization has a dismal history, all the way back to the last three decades of the 19th century. Abuses and corruption became rampart then causing the practice to be abandoned throughout the country. We are experiencing now a revival of the idea- with a great increase in sophistication and political acumen on the part of the operators. But the essential flaw in the idea remains. The motivation is all wrong, and cannot be made right. We all honor the profit motive, but when it comes to work with offenders, it simply will not work in a way that serves the best interest of the community. It never has and it never will.

The goal of corrections (as the very term implies) is to work with offenders so that they are less likely to re-offend. Indeed our state constitution requires that correctional administration be based on "principles of reformation..." They may offer lip service but, in order to be profitable, the private prison companies simply cannot afford to be concerned about any such ideas. And thus we have the record of their short cuts, their use of poorly qualified, under-paid staff, inadequate staff training, abuses in inmate management and generally poor performance. Last year's report in the Corrections Yearbook indicated that the annual staff turnover rate in private prisons across the country was 53%. The last reported turnover rate for publicly operated prisons was 16%.

I won't go further along this line, as I believe there will be testimony at the hearing that will make the case against Cornell and against the concept of imprisonment-for-profit pretty well. My hope is that Senator Green's bill, Senate Bill 65 or similar legislation will move forward. The best interests of the public are not served by continuing to have so many Alaskan prisoners confined out of state, thousands of miles from their home communities.

Please let me know if I can be of help to you or to any member of the Committee.

With my best regards always,

C

cc: Members

JAN 3 1 2003

AGREEMENT TO PROVIDE CORRECTIONAL FACILITY PLANNING, PROMOTION, DESIGN, CONSTRUCTION, AND OPERATION

("Agreement")

This Agreement is dated the _____ day of ________________ 2002, between CORNELL CORRECTIONS OF ALASKA, INC. whose address is 5202 A Street, Anchorage, Alaska 99518 (hereafter "**Cornell**"), and the CITY OF WHITTIER, an Alaska municipal corporation, whose address is PO Box 608, Whittier, Alaska 99693 (hereafter "**City**").

Recitals

1. Confinement of prisoners thousands of miles from family and support systems is not a preferred correctional practice nor sound public policy. Confinement thousands of miles from villages, family and cultural support systems is of particular hardship to Native Alaskan prisoners. 7% of the State general population are Native males; but 37% of the State prison population are Native males, including over 300 Native prisoners currently confined in Arizona.

2. The Department of Corrections Master Plan proposes that by 2003 an 800-bed facility will be available in Alaska to allow the return of prisoners from Arizona. The Alaska Legislature has expressed a clear preference for the timely construction of a privately built and operated prison in Alaska.

3. Such a prison facility would enhance long-term employment for the citizens of the City, and would promote construction jobs during the construction of the facility.

4. The City wishes to facilitate the location of a privately operated prison in the City by acting as the direct provider of prison beds to the State of Alaska, Department of Corrections ("**DOC**") through an Inter Governmental Agreement ("**IGA**"), but at the same time, wishes to ensure that the risks of design, construction and operation of such facility is fully borne by the private operator and not itself.

5. Public ownership of the prison will enhance the cost-effective operation of the prison by affording the use of tax exempt bonds to construct the prison, and operation of the prison by a private operator will allow the more cost effective delivery of services.

6. Allocating the risk for planning, promotion, design, construction and operation of a minimum 800 bed medium security prison facility to a private developer imposes proper market incentives upon the developer to make cost effective decisions regarding design, operating expense, staffing levels, long-term warranties from the contractor, and the use of cost effective materials for the life cycle of the facility. Such an arrangement allows the City the opportunity to transfer the financial risk of the project to the private developer. Having that same entity responsible for operation allocates to the private

party the risk of operating the prison under the reimbursement budget created by the Inter-Governmental Agreement.

7. The City requires assistance in seeking legislative support for the State use of a private prison located in Whittier to meet Department of Correction needs.

8. In recognition of these goals, the City of Whittier in Ordinance 433-01 authorized the City Manager to solicit competitive bids or proposals for the planning, promotion, design, construction and operation of a minimum 800 bed medium security prison facility, effective upon reaching necessary agreements with the State of Alaska and issuance of the necessary bonds.

9. By a Request for Qualifications dated November 19, 2001, the City solicited the proposals authorized by Ordinance No. 433-01. After a competitive selection process, the City Council deemed Cornell eligible for negotiation as its Highest Ranked Proposer on December 21, 2001. Pursuant to WMC 3.32.190(F), the City entered into negotiations with Cornell to contract with the City for the planning, promotion, design, construction and operation of a minimum 800 bed correctional facility, subject to State of Alaska approval and appropriate funding.

10. The City considers it in the best interests of its citizens to enter into a comprehensive agreement for the promotion of authorizing legislation and the design, construction and operation of a prison to allow the City to enter into an Inter Governmental Agreement with the State of Alaska for the provision of medium security prison beds.

NOW FOR MUTUAL AND VALUABLE CONSIDERATION, THE PARTIES AGREE AS FOLLOWS:

1. DEFINITIONS.

A. Definitions. As used in this Agreement, the following terms shall have the following meanings:

1. "Commencement of Operations Date" shall mean the commencement of the performance of the operating covenants set forth in section 7, which shall be the earliest date after which all of the following have occurred:

a. The State of Alaska appropriates funds sufficient for Cornell to operate a medium security prison at the location agreed upon by Cornell and the City at a bed rate on a Take or Pay basis acceptable to Cornell;

b. The State of Alaska contracts with the City to provide a correctional facility and services to the State ("IGA");

c. Cornell, through a qualified construction contractor, completes construction of Facilities meeting the requirements of the IGA; and

d. The date of commencement of operations as required by the IGA.

2. "Improvements" or "Facility(ies)" shall mean the prison facilities to be constructed by Cornell meeting the requirements of the IGA. The Facility will be designed and constructed to meet American Corrections Association ("ACA") standards and will meet all current applicable state and federal law applicable to the Facility as of the Commencement of Operations Date. The Facility will be designed to hold a minimum of 800 prisoners, depending on the terms of the IGA. The Facility will be built on the Property.

3. "IGA." The Inter-Governmental Agreement ("IGA") to be negotiated between the State of Alaska Department of Corrections ("DOC") and the City for the purchase of a minimum of 800 medium security prison beds at a daily rate per bed. The beds will be paid by the State on a Take or Pay basis, and shall be paid in advance rather than in arrears, which terms in the IGA are material conditions to this Agreement. Cornell shall have the right to review the proposed final terms of the IGA, and if insufficient in its reasonable and good faith judgment to support the cost of construction and operation, then Cornell may terminate this Agreement upon 10 days advance written notice to the City.

4. "Lender" or "Mortgagee" or "Bond Trustee" shall be used interchangeably as the person financing the construction of the Facility who may hold certain legal and equitable rights and liens in the Facility or revenues from the IGA, or both. It is contemplated that the Project will be financed using tax exempt revenue bonds secured by the Inter-Governmental Agreement to purchase prison beds, and will not be a general obligation bond of the City.

5. "Operator" shall mean the party selected by the City for the operation of the Facility in accordance with the terms of the IGA. Cornell or its successor shall be the Operator for the initial term of this Agreement.

6. "Project" shall mean the prison project, including its design and construction, its operation, and related financing.

7. "Property" shall mean the real property, which will be identified as the location of the Facility, which will be owned by the City or held subject to a long term ground lease of sufficient security to allow financing of the prison and security on bonded indebtedness.

8. "Take or Pay" shall mean the State's obligation under the IGA to pay for the number of beds under contract regardless of whether a prisoner has been delivered to the Facility.

2. **REPRESENTATIONS AND WARRANTIES.**

A. Warranties of Cornell. Cornell warrants:

1. it is authorized to do business in the State of Alaska; and

2. that it is authorized to enter into this Agreement.

B. Warranties of City: City warrants:

1. that it is authorized to enter into this Agreement;

2. that the City, in furtherance of its governmental functions and in the exercise of its police powers, will, subject to the terms of this Agreement and the execution and performance by others of the obligations of the IGA, establish the Facility as an adult medium security correctional facility to house inmates from the State of Alaska, the federal government, and other governmental entities that may wish to house inmates at the constructed Facility; and

3. Any agreement that requires the City's approval as a party shall be promptly submitted to the City Council for consideration and action.

3. **COVENANTS OF THE PARTIES.**

A. Covenants of Cornell. Cornell will exercise due diligence to:

1. Coordinate the planning and promotion of authorizing legislation, the negotiation of an IGA, the architectural design, planning, employment, training, securing the necessary Design Build Contract, monitoring construction and other efforts necessary to construct the Improvements, and act as Operator of the Facility, and in general bring the Project to a timely and successful conclusion.

2. Negotiate, consistent with the covenant of good faith and fair dealing, such other terms and agreements with the City as necessary to complete the Project successfully.

3. Recruit, and, during the construction and operation phases of the Project, hire qualified local residents of the City.

4. Coordinate with bond underwriters and secure bond underwriting for the Project.

5. Cooperate with the City to enter into such agreements with the City and the Alaska Railroad to obtain the consent of the Alaska Railroad to this Project under the Ground Lease.

B. Covenants of City. City will exercise due diligence to:

1. Negotiate to achieve an IGA with the State of Alaska and act on such IGA as expeditiously as reasonably possible.

2. Authorize Cornell or its designee to coordinate and negotiate with the State of Alaska to define the terms of the IGA.

3. Cooperate with Cornell and its bond underwriters in their efforts to arrange and undertake the issuance of tax exempt funding sufficient to build the Improvements and use reasonable efforts to provide that IGA revenues are applied by the Bond Trustee only to payment of bond debt, and payment to the Operator, and the payment in lieu of taxes to the City.

4. Negotiate, consistent with the covenant of good faith and fair dealing, such terms and agreements with Cornell as necessary to complete the Project successfully.

6. Provide unrestricted access to the Property to Cornell for construction of the Facilities, and use best efforts to enter into such security agreements as are reasonably necessary for the financing of the tax exempt bonds.

7. Use its best efforts to secure the consent of the Alaska Railroad Corporation for the Project under the terms of the Ground Lease and Management Agreement dated November 13, 1998, between the Alaska Railroad Corporation and the City of Whittier, (**"Ground Lease"**) as necessary to remain in compliance with the Ground Lease and to satisfy the requirements of the Lender.

4. PLANNING AND PROMOTION OBLIGATIONS.

A. Scope. Cornell agrees, at Cornell's sole expense, to assist the City in its planning and promotion of the project with the Alaska State Legislature and the State of Alaska Department of Corrections. The obligations shall begin immediately upon execution of the Agreement. These duties may include, but are not limited to: lobbying, providing concept design drawings, construction cost estimates, operating budgets to calculate per diem bed reimbursement rates, and such other support as the City may require from time to time.

B. IGA. Cornell, at its sole expense, shall provide the resources and take the lead in negotiating the IGA with the DOC. The City shall also attend such negotiating sessions, with such personnel as it deems necessary in its sole judgment. The City and Cornell shall each bear the expense of their individual efforts, subject to reimbursement from the bond proceeds.

C. No Direct Reimbursement. Cornell shall support the City with the planning and promotion of an IGA and authorizing legislation with the State of Alaska for the project. Cornell will bear its own expenses for the funding of this effort, subject only to the cooperation of the City to recoup such expenditures as part of the bond financing of the Project, to the extent allowable by law. Except for the duty of cooperation, and to the extent allowed by the bond financing, the City shall have no obligation to reimburse Cornell for the costs incurred in planning and promoting the enabling legislation and the IGA.

D. Reimbursement Through the Bonds. Cornell and the City will cooperate with each other to seek reimbursement of their planning and promotion expense, including, without limitation, their expenses in preparing and responding to the Request for Qualifications and the negotiation of this Agreement, at the time of financing of the bonds issued for construction of the Project. The City shall pass such resolutions as are necessary to authorize reimbursement of pre-bond issuance expenses.

5. DESIGN BUILD COVENANTS

A. Scope. Upon execution of an IGA between the State and the City, Cornell shall commence the design and construction of the Facility. Cornell shall have full and exclusive responsibility to design and construct the Facility. However, such Facility shall be constructed and operated within the budget established under the IGA, meet the performance requirements of the IGA, and be built to American Corrections Association ("ACA") standards.

B. Design Build Contract. Cornell shall enter into a fixed price design build contract (the "Design Build Contract") with Neeser Construction, Inc., and VECO Alaska, Inc., as the contractor and with the design to be provided by, Livingston Slone, Inc. (collectively the "**Contractor**") for a turn-key design and construction of the Facility in accordance with the requirements of the IGA for a fixed budget price. Cornell may retain such other design firms and construction firms, as it deems appropriate to discharge its obligations under this Agreement. The Design Build Contract shall comply with AS 36.05.010 ("Little Davis-Bacon Act"). The Design Build Contract shall require that the Improvements will be constructed in a good and workmanlike manner, to specifications in conformance with ACA standards, and State of Alaska Department of Corrections ("**DOC**") standards applicable under the IGA existing on or before the Commencement of Operations Date. The Design Build Contract shall require the contractor to obtain payment and performance bonds for 100% of the guaranteed maximum price or lump sum price and in a form approved by the Lender and City, with the Lender and the City as co-obligee with Cornell, as their interests may appear. Cornell shall require the Contractor and its subcontractors to carry builder's risk insurance and general commercial liability coverage and its design subcontractors to carry professional liability coverage in amounts reasonably appropriate to projects of this magnitude and risk and to name the City the Alaska Railroad and Cornell as additional insureds under such policies. Cornell shall provide, or shall arrange for its contractors and subcontractors to provide certificates of insurance to the City consistent with these requirements.

C. <u>Financing</u>. Cornell, at its sole expense, shall coordinate with bond underwriters, as well as the State Bond Committee to the extent required by the IGA, to secure the revenue bonds to be issued by the City and shall provide the support and information necessary to issue and secure the bond. The City will cooperate with the issuance of the bond, and in the disbursement of funds necessary to pay for the design and construction of the Project, including, to the extent allowed, Cornell's and the City's start-up costs and promotional expense as more fully set forth in Section 4(D). The City shall submit the Property and Facility to a deed of trust and other security if necessary for the financing of the Project.

D. <u>Project Cost</u>. The cost of the Project for purposes of this Section 5 shall include the costs of design, financing expense, construction, promotion and planning, development, legal expense, pre-opening activation and startup costs. The City shall cooperate by adopting the necessary authorization resolutions to allow for payment of the invoices submitted by Cornell to the Bond Trustee for payments due under the Design Build Contract. The budget established for bond financing shall include the parties' reasonably incurred promotional and other expenses incurred during the procurement and negotiation of this Agreement, the planning and promotion phase, the negotiation of the IGA, a reasonable developer's fee to Cornell, the lump sum due under the Design Build Contract, the expenses of the bond underwriting and marketing and such other necessary expenditures required to complete the Project. The bond principal shall be an amount, when reduced to a debt service obligation under the bond, that Cornell will still be able to operate the prison for the first five years of the Term, within the revenue stream set by the IGA. The budget shall include an amount not to exceed $10,000 for the City's out of pocket expenses, if any, incurred during the performance of the Design Build Contract, which to the fullest extent allowable, shall be a reimbursable expense to Cornell to be recovered from the bond proceeds. The budget shall include a reasonable contingency for risks of construction and site conditions.

E. <u>Disclaimer of Liability; Cornell's Duty of Indemnification.</u> The City shall have the right, but not the obligation or duty to Cornell, the State, the Lenders or any other party, to oversee, monitor, perform, or review the progress of the design and construction, or the disbursement of funds to or payment of any of Cornell's contractors, any subcontractors or any laborers employed by any of them or any material suppliers, or for any claims or liens that may be filed by any such persons, all of which shall be the sole responsibility of Cornell. Except in the case of the sole negligence or willful misconduct by the party seeking indemnity , Cornell shall indemnify, defend, and hold harmless the City and/or the Alaska Railroad Corporation and their officers, agents, and employees (the "**Indemnitees**") from and against any and all liability, claims, damages, losses, expenses, actions, attorney's fees, costs, and suits whatsoever caused by or arising out of or in any way connected with the Design Build Contract, its performance, acts, or omissions thereunder by Cornell or any of its officers, agents, representatives, employees, or the Contractor or arising from or related to a failure to comply with any municipal, state or federal statute, law, regulation, or rule by Cornell or any of its officers, agents, representatives, employees, or the Contractor. Cornell hereby agrees to require its Contractor and the subcontracts issued by the Contractor to provide said promises of indemnification in favor of the Indemnitees for claims arising out of the performance of any of its subcontracts on the Project.

F. Bond Trustee. The City shall appoint a suitable Bond Trustee, as proposed by and in cooperation with the Lender, to administer the bond proceeds and disburse funds for the Project. The City shall have no duty to investigate the qualifications of the Bond Trustee nominated by the Lender and shall have no liability whatsoever to any person for the appointment of, or conduct, acts or omissions of the Bond Trustee, arising from this Agreement. Cornell shall use its best efforts to ensure such terms (but does not guarantee that these will be achieved) are set forth in subsequent agreements in the IGA, with the Lender, and in the Design Build Contract. Such Lender and/or Bond Trustee shall be solely responsible for the timely payment of construction invoices properly submitted and documented for payment, and the cost of such Bond Trustee shall be a cost subject to financing under the bond.

G. Site Selection. The City and Cornell shall mutually agree upon and identify a site owned or leased by the City suitable for the construction and location of the Facility. Cornell shall be solely responsible for undertaking all necessary site investigations as is required for its Design Build Contract. The City shall provide unrestricted access to the Property for the construction of the Facility. The City shall grant exclusive control over the Property to Cornell during the construction of the Facility. Such access shall be provided at no or nominal cost. The site shall not include the land deemed reasonably necessary by the City for a municipal boat ramp and adequate parking. The location and size of the site shall reasonably meet the requirements needed for the development of a Facility consistent with the requirements of the IGA.

H. Delivery. Cornell shall deliver to the City a completed Facility, constructed in accordance with the IGA and ACA standards, and applicable permits, at the conclusion of the Design Build Contract, free and clear of claims or liens. Cornell shall deliver clear and marketable title to any personal property provided with the

Facility. Cornell shall cause the City to be named on any warranties provided in connection with the Facility.

6. OPERATIONAL PHASE COVENANTS

A. Term, Scope. The term of the operations phase of this Agreement shall begin on the Commencement of Operations Date and end on the end of the fifth year thereafter. The Operator will have full and exclusive authority, consistent with the requirements of the IGA and applicable law, to manage, maintain, and operate the Facility, and shall have exclusive control over the Facility and access to it. The Operator will be required to undertake the steps necessary to have the Facility accredited by the ACA and to meet applicable minimum standards under state and federal law applicable to Facilities of this type.

B. Exclusive Responsibility and Indemnity. The City hereby delegates to Cornell and its designee or assignee the operation of the Facility for the first 5 years after the Commencement of Operations Date for the operation of the Facility in accordance with the terms of the IGA. The performances and obligations imposed by this Agreement for operating the Facility rest exclusively with Cornell, and Cornell shall be exclusively charged with operating the Facility in accordance with the IGA. In addition, Cornell shall bear full responsibility to discharge the obligations, if any, of the City as the Owner of the Facility under the IGA.

Without limiting the obligations of Cornell in section 7 below, and except in the case of the sole negligence or willful misconduct by the party seeking indemnity , Cornell shall fully indemnify, defend and hold the Indemnitees harmless from claims of any kind whatsoever against the Indemnitees arising out of or in any way connected with the operation of the Facility, including, specifically, but without limitation, the obligations of Cornell in subsections G and H of this section, and any lawsuits, claims, or allegations of any kind whatsoever by Facility inmates, visitors, or Facility employees.

The City shall have the right to renew the agreement to operate the Facility with Cornell or its successor for successive five-year terms thereafter in its sole discretion, provided the IGA terms are reasonably acceptable to Cornell during the renewal period. In the event Cornell is not the Operator, such subsequent operator shall assume all such responsibilities under the IGA and further agree to indemnify, defend and hold Cornell and the City harmless from all liabilities incurred as a result of the subsequent operator's actions or omissions.

C. Assignment of IGA Revenues. The City shall assign irrevocably all of the City's right, title and interest in the proceeds of its Take-or-Pay guaranteed per bed fees from the State of Alaska under the IGA to the Bond Trustee who will apply the fees in the following priority: (i) to pay the indebtedness for the bonds that financed the construction of the Improvements; (ii) to pay the payment in lieu of taxes set forth in section 6.I. and (iii) to pay the balance to the Operator of the

Facility. To the extent start-up costs actually incurred by Cornell are not included within the amount financed by the bonds as set forth in section 5.(C), the City acknowledges that a portion of the per diem payment shall be used by Cornell to recover its un-reimbursed start-up costs over the five year term.

D. Compliance with Laws. Cornell shall comply with and cause the Property and Improvements to be in compliance with (i) all laws, ordinances and regulations, and other governmental rules, orders and determinations, whether or not presently contemplated (collectively "Legal Requirements") applicable to the Property and Improvements or the uses conducted on the Property, (ii) the provisions of any insurance policies required to be maintained by Cornell with respect to the Property, and (iii) the terms of any ground lease, easements, covenants, conditions and restrictions affecting the Property. If any additions, alterations, changes, repairs or other work of any nature, structural or otherwise, shall be required or ordered or become necessary at any time during the term of this Agreement because of any of these requirements, the entire expense of the same, irrespective of when the same shall be incurred or become due, shall be the sole liability of Cornell. Any change in the law affecting the Improvements, or additional requirements under the terms of the IGA after the completion of the Improvements shall, however, not be the responsibility of Cornell and Cornell shall be entitled, along with the cooperation of the City, to seek a equitable adjustment in the prison bed fee set in the IGA from the State. It is the expectation of the parties to this Agreement that the per diem fee under the IGA will cover the duties set forth in this Agreement and as further stated in the IGA, but shall not include or cover major medical services, the cost of and provision of prescription medicine, or prisoner transportation, which shall be negotiated as a State provided item under the IGA.

E. Insurance. At all times following the Commencement of Operations Date, Cornell shall carry insurance in amounts described below.

1. Workers Compensation Insurance. Cornell shall provide and maintain in force statutory workers' compensation insurance coverage for all employees of Cornell engaged in work under this Agreement. Coverage must extend to include all departments in which employees are engaging in work and employer's liability protection not less than $500,000 per person, $500,000 per occurrence. The Policy must be endorsed to waive rights of subrogation against the City, and its respective employees, shareholders, officers, directors, agents and other representatives, and their successors and assigns (collectively, the "Additional Insureds").

2. Comprehensive (Commercial) General Liability Insurance. Cornell will provide and maintain in force comprehensive (commercial) general liability insurance, with coverage limits not less than $5,000,000 combined single limit per occurrence and annual aggregates where generally applicable and shall include premise operations, independent

contractors, products, completed operations, broad form property damage, contractual liability coverage including, but not limited to, the indemnification clauses in Sections 5.E., 6.B., and 7, and personal injury endorsements. It shall be subject to a reasonable deductible or endorsements. The City and the Alaska Railroad shall be included as additional insureds. This insurance shall be considered primary of any other insurance carried by the City, the Alaska Railroad or Cornell, or both, through self-insurance or otherwise.

3. Comprehensive Automobile Liability Insurance. Cornell shall provide and maintain in force comprehensive automobile liability insurance covering all owned, hired and non-owned vehicles with coverage limits not less than $1,000,000 combined single limit per occurrence and annual aggregate. This insurance shall contain a "cross liability" or "Severability of interest" clause or endorsement and the City shall be included as an additional insured. This insurance shall be considered primary of any other insurance carried by the City or Cornell, or both, through self-insurance or otherwise. Any transportation contractor engaged by Cornell shall be subject to the same insurance requirement.

4. Professional Liability Insurance. Cornell will provide and maintain in force professional liability insurance or a comparable policy form providing jail keepers' legal liability insurance coverage for errors, omissions or wrongful acts of Cornell, a subcontractor or anyone directly or indirectly employed by them in the performance of services of this Agreement with limits not less than $5,000,000 combined single limit per occurrence and annual aggregate limit. It shall be subject to a reasonable deductible in an amount not to exceed $500,000. This insurance shall contain a "cross liability" or "Severability of interest" clause or endorsement and the City shall be included as an additional insured.

5. Umbrella Liability Insurance. Cornell will provide and maintain in force an umbrella or excess liability insurance coverage with limits not less than $5,000,000 combined single limit per occurrence and annual aggregate limit, or shall otherwise carry general liability aggregate coverage totaling not less than $10,000,000. Umbrella insurance shall contain a "cross liability" or "Severability of interest" clause or endorsement and the City the Alaska Railroad shall be included as additional insureds.

6. Additional Coverage. Cornell is responsible for obtaining any insurance required by the State of Alaska to cover inmate work related injury, disability, or death.

7. Claims Made Coverage. If any of the required insurance is arranged on a "claims made" basis, "tail" coverage shall be required at the expiration of this Agreement for a duration of 24 months. Cornell will be responsible

for furnishing certification of "tail" coverage as described or continuous "claims made" liability coverage for 24 months following expiration of this Agreement. Such continuous "claims made" coverage in lieu of "tail" coverage, must also be retroactive to the effective date of this Agreement.

8. Additional Insured. The liability insurance coverage required for performance of this Agreement shall include the City and the Alaska Railroad as additional insureds but only with respect to Cornell's activities to be performed under this Agreement.

9. Property Insurance. Cornell shall provide and maintain in force insurance on the Facility (including, without limitation, all improvements made by the Operator following completion of the Facility) and all fixtures, equipment and personal Property at the Facility under a standard industry "All Risks of Physical Loss" policy (hereinafter referred to as "**All Risks**") including flood damage (when and to the extent obtainable from the United States government or any agency thereof at commercially reasonable rates); and war risks if commercially available. Such insurance will be written with full replacement coverage (the "**Replacement Value**"), i.e., in an amount equal to the greater of (1) 100% of the full costs of replacement of the Facility and such fixtures, equipment and personal Property (less the cost of excavations, foundations and footings below the basement floor) or (2) an amount sufficient to prevent the City from becoming a co-insurer of any loss under the applicable policy. The insurance company's determination of the amount of coverage required in clause (1) above shall be binding and conclusive on the City and Cornell for purposes of the coverage required by clause (1). A stipulated value or agreed amount endorsement deleting the co-insurance provision of the policy shall be provided with such insurance. If not otherwise included within the "All Risks" coverage specified above, Cornell shall carry or cause to be carried, by endorsement to such "All Risks" policy, coverage against damage due to water and sprinkler leakage, flood and collapse and shall be written with limits of coverage reasonably required by the City, subject to the budget constraints of the IGA, and as required by the Lender for the financing of the Facility, but shall not be required to carry earthquake coverage. The City shall be named as an insured party under such coverage. The City shall assign the insurance proceeds to fund the repairs required by the casualty or loss to Cornell, subject to the terms of the financing, which may require any insurance proceeds to be handled by the Lender. Upon such assignment, Cornell shall be responsible to undertake the repair, unless in its good faith judgment the proceeds are insufficient to complete the necessary repairs, in which event it may decline the assignment of the insurance proceeds and the City shall be responsible for the repairs.

10. Cancellation. There shall be no cancellation, material change, and

potential exhaustion of aggregate limits or intent to not renew insurance coverage without thirty (30) days written notice from Cornell or its insurers to the City. Any failure to comply with the reporting provision of this insurance, except for the potential exhaustion of aggregate limits, shall not affect the coverage provided to the City. Cornell shall provide the City with certificates of insurance reflecting insurance consistent with these provisions.

F. Agreement to Cooperate for Other Contracts. The Operator shall have the right to seek contracts to house prisoners or detainees in the facility held under Alaska state, borough, municipal, or federal jurisdiction. The City agrees to approve and execute such contracts with sending jurisdictions for the housing and care of inmates as requested by Cornell, under the following conditions:

1. Cornell, in its sole discretion, requests the contract in writing;

2. Cornell is not in material default of this Agreement and, if it is in default, not using good faith efforts to cure such default;

3. Cornell certifies that the proposed contract satisfies in all material respects the federal and state laws applicable to the operation of the Facility and is consistent with the IGA and has the consent of the State of Alaska;

4. Cornell certifies that the inmates sought to be transferred under the proposed contract are eligible for housing at the Facility under Alaska state law in effect at the proposed date of the transfer; and

5. Cornell certifies that appropriate and adequate Facility security, bed space, Facility personnel and medical services are available to house the inmates proposed to be housed at the Facility.

6. Such contracts do not impose monetary obligations on the City or materially increase the City's risk of loss or liability to any person.

The City agrees not to unreasonably withhold, condition or delay approval of or refuse to execute such proposed contracts or intergovernmental agreements.

G. Inmate Incarceration Service. It shall be the sole and exclusive responsibility of Cornell to confine and supervise all Inmates assigned to the Facility and to provide safe and humane care and treatment, in accordance with ACA Standards, including the furnishing of subsistence, routine and emergency medical care, training and treatment programs, compliance with sentences and orders of the committing Jurisdiction(s), access to legal process and compliance with all applicable laws and agreements.

1. Food Service. Food service operations may be delivered by Cornell employees, contractor employees or a combination of Cornell staff and contractor employees. All staff, Inmates and contractor employees will undergo medical testing prior to initially reporting for food service duty assignments and will be examined regularly to assure health of the staff. Cyclical menus will be approved by a registered dietician and will provide for a minimum of daily calories to meet or exceed ACA standards and the IGA. All health regulations of the State will be followed and the results of all inspections will be available for review on demand by the City. Special meals will be provided for Inmates when prescribed by medical or religious staff. Food shall not be withheld nor the standard menu varied as a disciplinary sanction.

2. Health Care. On-site infirmary and nursing care may be delivered by Cornell employees, contractor employees or a combination of Cornell staff and contractor employees. Major medical care will be provided directly by the State of Alaska outside of the Facility. All medical, mental health and dental care personnel providing services to Inmates will be appropriately licensed and/or certified under the laws of Alaska and all medical services will be delivered in accordance with ACA standards. All correctional officers will receive annual training in CPR. Cornell will operate or contract with a pharmacy service under the supervision and counsel of a doctor or pharmacist who will provide Inmates with over-the-counter medications and prescribed pharmaceuticals. The scope of on-site medical care will be further elaborated in the IGA.

3. Inmate Programs and Case Management. Cornell will develop and deliver Inmate programs as appropriate to the needs of the Inmate population and to the objectives of the IGA, which will include, but not be limited to culturally relevant services to Alaska native inmates. The educational qualifications, training and verification of all program staff members will satisfy the standards of the ACA and the IGA. Academic and vocational instructors may be either Cornell employees and/or contract employees. All other program staff members will be Cornell employees or subcontractors of Cornell.

4. Inmate Work Program. Cornell will develop and implement a comprehensive work program for Inmates within the Facility. The program's objective will be to provide maximum opportunity for Inmates to be engaged in constructive activities for as many hours each day as possible, considering mandatory Facility schedules.

5. Religion. Cornell will employ the services of a chaplain to develop and conduct a comprehensive religious program with representation from a variety of denominations and faiths. The program will be open to all Inmates who wish to participate and no preference will be given to the

activity of any one denomination, sect or faith over another. Cornell will seek participation of local churches and nonprofit organizations near the Facility. These religious and rehabilitative programs will be instituted and continuously encouraged by Cornell to allow the local community to have a sense of mission to meet the inmates religious needs. It is understood and recognized that improving and changing lives is the focus of these cooperative programs. Cornell will be actively involved in the support and utilization of local applications and broader nationally recognized programs of similar application.

6. Transportation. Cornell will cooperate with the State of Alaska for the transportation of Inmates, which will be the responsibility of the State and not Cornell. Cornell shall be entitled to additional compensation, beyond its per diem bed rate, for any security it provides for transportation of prisoners for medical care outside of the Facility, or other transportation responsibilities or services requested under the IGA, however, such responsibility to pay shall be conditioned upon approval of such compensation in the IGA.

H. Facility Administration. Cornell shall have authority to fully and completely manage the operation of the Facility and to select, hire, train, supervise and discharge all of Cornell's employees assigned to the Facility. Cornell shall enter into all agreements and understandings that are normal, routine and reasonable for the general operations of the Facility under its own corporate identity, unless otherwise specified within this Agreement. Cornell shall prepare Policies and Procedures Manuals covering the operation of all elements of the Facility and shall provide them to the State of Alaska for approval not later than ninety (90) days prior to the expected Commencement of Operations Date of the Facility. These manuals will constitute a comprehensive reference for all actions associated with the Facility and shall incorporate, but shall not be limited to, the following terms and conditions:

1. Personnel Hiring and Qualifications. Cornell will hire staff to American Correctional Association standards, and will train to the State of Alaska Department of Corrections standards. Cornell shall employ a fully trained and uniformly dressed staff to provide 24-hour per day, seven days per week correctional services for the Facility. Prior to their employment, applicants will undergo background investigations to include educational, criminal and employment history to help assure that their personal conduct or history will not jeopardize security of operations or discredit the Facility, Cornell, or the City. Cornell will obtain a criminal record check and a drug test for all employees at the Facility.

2. Emergency Response Plan. Cornell will deliver to the State and the City an Emergency Response Plan for the marshalling of resources to quickly and appropriately respond to any crisis that might arise in the operation of

the Facility. Procedures and plans will be developed in coordination with local and area fire departments, law enforcement agencies and the State Department of Corrections ("**DOC**"), and will be provided to all parties in written form to assure clear understandings. The plan will include procedures to deal with fire, bomb threats, escape, hostage situations, riots, medical epidemics and natural disasters. It will also provide for the notification and reporting of escapes to residents within the City, and to the State.

3. Accreditation. Cornell shall use its best efforts to maintain the accreditation of the Facility by the ACA.

4. Record Keeping. Cornell will adapt its reporting systems for basic compatibility with systems used by the State of Alaska. Cornell shall develop a system of financial accounting and inmate tracking that shall comply with the IGA and shall include, without limitation, files and reports documenting Inmates activities, adjustment, participation, discipline, and any other relevant information, or significant events while in custody at the Facility.

5. License and Permits. Cornell shall undertake all reasonable measures necessary to keep in full force and effect all licenses and permits required for the operation of the Facility, and the City shall cooperate with such efforts, the expense of which shall the responsibility of Cornell.

I. Termination for Cause. The City may terminate the Operator for cause after notice of default in writing if Operator fails to cure such default within the time allowed by Section 8.A. The DOC may terminate the Operator on the terms as set forth in the IGA, provided, however, that the State shall be required in the IGA to agree that, in the event its terminates the Operator, such termination shall not result in a default by the City under the IGA, shall not interrupt the State's obligation to make payments under the Bond, and shall cooperate with the City in securing a substitute Operator.

J. Repairs and Maintenance. Cornell shall, at its own expense, promptly, as and when necessary, keep and maintain the Facility in good condition and repair and make all necessary repairs and replacements to the Facility, whether structural or non-structural, including, but not limited to, the pipes, water, sewage and heating system, plumbing system, window glass, fixtures, and all other appliances and their appurtenances and all equipment used to make the Facility habitable so that the Facility remains in at least the same condition and repair as when received by Cornell, reasonable wear and tear excepted. All repairs and replacements shall be in quality and class at least equal to the original work.

K. Payment in Lieu of Taxes. ("**PILT**") Cornell shall pay to the City, from the IGA a payment in lieu of taxes ("PILT") as follows:

1. per 800 to 1099 beds per diem-- \$.50 per bed per day, totaling \$146,000 to \$200,567.50 per year (e.g., .50 times 1,000 times 365 = \$182,500);

2. per 1100 to 1199 beds per diem-- \$.55 per bed per day totaling \$220,825 per year to \$240,699.25 per year.

3. per 1200+ beds per diem -- \$.60 per bed per day totally \$262,800 or more per year.

The number of beds will be equal to the number of Take or Pay beds paid for by the State under the IGA.

This PILT payment shall be in lieu of property and sales taxes and shall be net of any other taxes paid by Cornell to the City imposed as a result of the operations phase of this Agreement, whether such tax is currently in existence or is imposed in the future, and whether or not such tax is specific to the Facility and its operation or of general application.

L. Priority of IGA. In the event of a conflict between the obligations of the IGA and this Agreement in Sections 6(G) and (H) regarding the standards of operation and administration of the Facility, the terms of the IGA shall control.

7. **INDEMNITY.**

Except in the case of the sole negligence or willful misconduct by the City, Cornell shall fully indemnify, defend and hold harmless the City and its officers, agents, and employees from and against any and all liability, claims, damages, losses, expenses, actions, attorneys' fees, costs, and suits whatsoever caused by or arising out of or in any way connected with this Agreement or its performance by Cornell or any of its officers, agents, representatives, employees, or contractors; or arising out of or in any way related to a failure to comply with any municipal, state, or federal statute, ordinance, law, regulation, rule, or ACA standard by Cornell or by any of its officers, agents, representatives, employees, or contractors.

The obligations of this Section 7 shall survive the termination of this Agreement.

8. **DEFAULTS; DISPUTES.**

A. Default. Any party maintaining that the other is in default of this Agreement shall give written notice to the other party specifying the default and the nature of the acts required to cure the default. The other party shall have thirty days (30) days to cure a monetary default or, if the default complained of is not a monetary default and is of such a nature that it cannot reasonably be completely cured or remedied within a sixty (60) day period, the party shall have the right to cure the default by beginning the cure within the sixty day cure period and diligently prosecute such remedy or cure to completion.

B. Interest. All payments not paid when due shall bear interest at the legal rate of interest established by AS 45.45.010 (2001) until paid.

C. Disputes. In the event of any dispute arising between the City and the Cornell regarding any part of this Agreement or any subsequent agreement contemplated herein, or the Parties' obligations or performance thereunder, either Party may institute the dispute resolution procedures set forth herein. No party may proceed to court litigation until these procedures have been followed. The Parties shall continue performance of their respective obligations hereunder notwithstanding the existence of a dispute.

1. Meeting. Any party may from time to time call a special meeting for the resolution of disputes that would have a material impact on the cost or progress of the Project. Such meeting shall be held at the City's offices in Whittier, Alaska within five (5) working days of written request therefor, which request shall specify in reasonable detail the nature of the dispute. The meeting shall be attended by the City's authorized representative, Cornell's authorized representative and any other person who may be affected in any material respect by the resolution of such dispute. Each authorized representative shall be a person with authority to settle the dispute and shall attempt in good faith to resolve the dispute. In the case of the City, all settlements must be subject to final approval by the Whittier City Council.

2. Mediation. If the dispute has not been resolved within five (5) working days after the special meeting has been held, a mediator, mutually acceptable to the parties shall be appointed. If the dispute relates to design or construction of the Facility, the mediator shall be experienced in design and construction matters. The parties shall share the cost of the mediator. The mediator shall be given any written statements of the parties and may review any documents submitted by the parties. The mediator shall call a meeting of the parties within ten (10) working days after his/her appointment, which meeting shall be attended by the City's authorized representative, Cornell's authorized representative and any other person who may be affected in any material respect by the resolution of such dispute. Such authorized representatives shall be a person with authority to settle the dispute and shall attempt in good faith to resolve the dispute. During such ten (10) day period, the mediator may meet with the parties separately. No minutes shall be kept with respect to any mediation proceedings, and the comments and/or findings of the mediator, together with any written statements prepared, shall be non-binding, confidential and without prejudice to the rights and remedies of any party. The entire mediation process shall be completed within twenty (20) working days of

the date upon which the initial mediation meeting is held, unless the parties agree otherwise in writing. If the dispute is settled through the mediation process, the decision will be implemented by written agreement signed by the parties. In the case of the City, all settlements must be subject to final approval by the Whittier City Council.

3. Litigation, Venue. Any disputes not resolved under the prior procedures may be resolved by filing an action in the court of competent jurisdiction in Anchorage Alaska.

4. Incorporation Into Other Contracts. All contracts by City and Cornell with third parties involved in the Project shall be required by each of the parties to contract to adhere to these dispute resolution procedures, with the exception of the State of Alaska.

D. Force Majeure. A party's failure to perform any of the terms and conditions of this Agreement resulting from force majeure shall not be considered a breach or default of this Agreement for so long as such force majeure continues.

9. **NOTICES.**

A. Notice Procedure. Any notice required or permitted to be given to a party under the provisions of this Agreement shall be in writing and shall be deemed given if sent by nationally-recognized overnight air courier, or if mailed by certified or registered United States mail, postage prepaid, return receipt requested, addressed as follows:

City: City of Whittier
P.O. Box 608
Whittier, Alaska 99693

Attention: City Manager
Facsimile No. 907-472-2404

with copy to: Perkins Coie, LLP
1029 W. 3rd Ave. Suite 300
Anchorage, Alaska 99501

Attention: Michael E. Kreger
Facsimile No. 276-3108

Cornell: Cornell Corrections of Alaska, Inc.
5202 A Street
Anchorage, Alaska 99518

Attention: Marvin Wiebe
Facsimile No. (907) 274-3625

with copy to: Ashburn and Mason, PC
1130 W. 6th Ave.
Anchorage, Alaska 99501

Attention: Donald W. McClintock
Facsimile No. (907) 277-8235

B. Change of Address. Either party may, from time to time, change its notice address by written notice to the other party at its then-current mailing address, in accordance with the provisions of this section.

10. **NO WAIVER.**

No waiver of any condition or covenant of this Agreement shall be deemed to imply or constitute a further waiver of the same or any other condition or covenant, and nothing contained in this Agreement shall be construed to be a waiver on the part of any party of any right or remedy in law or otherwise.

11. **BINDING EFFECT.**

This Agreement and the covenants and agreements of the parties shall be binding upon and inure to the benefit of Cornell and its successors and assigns and to the benefit of City and its permitted successors and assigns.

12. **ASSIGNMENT.**

This Agreement may be assigned by Cornell and its successions and assigns to another entity (which shall include a surviving entity or resulting entity in the case of merger or consolidation) which satisfies the following criteria: (a) the entity adopts and assumes all of the conditions and obligations of Cornell as set forth in this Agreement; and (b) the entity is acceptable to the State of Alaska under the terms of the IGA. Cornell shall have the right to delegate portions of its obligations to subcontractors it may contract with from time to time without consent of the City, however, in no event shall such delegation or assignment release Cornell from its obligations under this Agreement. Cornell shall have the right, without the consent of the City, to assign this Agreement to a wholly owned or commonly controlled affiliate and to assign its rights to revenues under this Agreement as collateral security for its obligations including but not limited to any financing undertaken in connection with the Facility.

13. **LICENSES.**

Cornell shall do all reasonable things necessary to maintain in full force and effect for the Facility all permits and licenses required for the construction, occupancy and operation of the Facility as a medium security prison and the City shall reasonably cooperate with Cornell in procuring and keeping such licenses and permits in effect.

14. **AGREEMENT TO COOPERATE.**

The City hereby agrees to cooperate with Cornell in the performance of Cornell's duties and responsibilities under this Agreement and to do all reasonable things necessary to aid and effect Cornell's performance as a private prison contractor under the terms of this Agreement. The City agrees to assist Cornell in obtaining the State of Alaska's approval of Cornell as the Operator under the IGA, and to cooperate in the securing of revenue bonds for the construction of the Facility. The Parties agree to execute such further documents as may reasonably be required by each other or the Lender providing financing relating to the Facility, including, but not limited to, modifications and amendments to this Agreement, and any other documents executed in connection with the transactions contemplated by this Agreement. At the request of Cornell, the City agrees to use reasonable efforts to (i) ensure the continuation of the IGA and the availability of prisoners to the Facility, (ii) to cooperate with Cornell to accommodate any other sources of inmates which Cornell may identify, which may allow for an additional expansion of the Facility and (iii) to cooperate with Cornell in negotiating adjustments in the per diem rates or other revenue to be paid by the State of Alaska under the terms of the IGA. Upon such request(s), Cornell shall reimburse and pay for the City's reasonable expenses incurred in response to Cornell's request. The City makes no warranty to Cornell regarding the results of its cooperation with others or its best efforts in discharging its obligations under this Agreement. The City shall not be liable for money damages to Cornell as a result of a default in the performance of its obligations under this Agreement, provided only that the City may be liable to Cornell, subject to all immunities and defenses available to it, for Cornell's foreseeable damages incurred in the event the City, after notice and an opportunity to cure, willfully refuses to perform a duty of cooperation under this Agreement, or willfully terminates this Agreement, except for a termination for cause, or as provided in section 16 (Termination Without Fault") below.

15. **NO WARRANTIES.**

The City does not warrant, nor represent that this project is viable, feasible or profitable, or that Cornell will recognize any normal return on its efforts, such risks being wholly undertaken by Cornell. It is the intent of the parties that the responsibility and control of the obligations to promote enabling legislation, negotiate the IGA, design, build and operate the Project remain with Cornell, and except for the specific performances imposed by this Agreement upon the City, including but not limited to the obligation to cooperate and the covenants of good faith and fair dealings, the risk of loss attendant upon such responsibility and control rests only with Cornell.

16. **TERMINATION WITHOUT FAULT.**

235-4245 - Tom

Either party may terminate this agreement, without fault, and without incurring liability to the other, upon the occurrence of any of the following, with 60 days notice to the other party:

A. The legislature adjourns for the 2002 session without enacting legislation in a form sufficient to undertake the Project in Cornell's reasonable judgment; and either party thereafter elects to terminate.

B. The City and the State DOC fail to enter into an IGA with terms sufficient in Cornell's reasonable judgment to undertake the successful design, construction and operation of the Facility, allowing a reasonable return to Cornell, and the satisfaction of the terms of this Agreement; and either party thereafter elects to terminate.

C. The parties are unable to identify a site for the Facility, free of environmental contamination or other site conditions, the presence of which makes the Project uneconomic to pursue.

D. The City is unable, despite its reasonable efforts, to secure the consent of the Alaska Railroad under the Ground Lease for the Project.

E. Cornell is unable, despite its reasonable efforts, to negotiate a Design Build Contract with the Contractor for a lump sum, which with applicable financing and interest rates as available at the time of financing, will allow the operation of the Facility within the budget constraints of the IGA.

In the event a notice of no fault termination is issued by one party, the responding party may, by providing reasonable written assurances of further reasonable efforts by the responding party, request that the Agreement not be terminated. In such event, the Agreement shall remain in effect for the period of time set forth in the notice provided it is reasonably necessary to undertake the reasonable efforts set forth in the notice. At the end of such period, either party may again give notice of no fault termination. In the event of a no fault termination, this Agreement shall be of no further force and effect, except only the provisions of section 7.

17. PARTIAL INVALIDITY.

In the event any clause, term or condition of this Agreement shall be determined to be illegal or unenforceable under any applicable governmental laws, orders, rules or regulations, this Agreement shall remain in full force and effect as to all other terms, conditions and provisions. The enforceability of this Agreement is conditioned upon no protest or complaint being filed by another bidder to the Request for Qualifications challenging this Agreement within 10 days after Council passes an enabling action to authorize the City to enter into this Agreement.

18. COUNTERPARTS.

This Agreement may be executed by Cornell and City in one or more counterparts.

19. **GOVERNING LAW.**

This Agreement shall be governed, construed and enforced in accordance with the laws of the State of Alaska, without regard to conflict of law principles.

20. **HEADINGS, MEANING OF WORDS, ENTIRE AGREEMENT.**

The headings used in this Agreement are inserted for convenience and are not to be considered in the construction of the provisions of this Agreement. This Agreement constitutes the entire agreement of the parties and may be amended or modified only in writing signed by both parties, and all prior agreements or understandings between the parties, either oral or written, are superseded by this Agreement.

21. **INTEGRATION.**

This Agreement is fully integrated and contains all of the agreements of the parties; it supercedes all prior writings and oral agreements exchanged by and between the parties. It may not be amended or modified except by a written agreement signed by both parties in accordance with applicable law.

SIGNED as of the day and year first written above.

CORNELL CORRECTIONS OF ALASKA, INC.

By: ______________________________

____
(Printed Name)

____
(Title)

CITY OF WHITTIER

By: ______________________________

____
(Printed Name)

JAN 3 1 2002

CITY OF WHITTIER, ALASKA
ORDINANCE 434-02

AN ORDINANCE OF THE CITY OF WHITTIER AUTHORIZING THE EXECUTION OF AN AGREEMENT WITH CORNELL CORRECTIONS OF ALSAKA, INC., TO PROVIDE CORRECTIONAL FACILITY PLANNING, PROMOTION, DESIGN, CONSTRUCTION AND OPERATION OF A CORRECTIONAL FACILITY IN THE CITY

WHEREAS, the City of Whittier in Ordinance 433-01 authorized the City Manager to solicit competitive bids or proposals for the planning, promotion, design, construction and operation of a minimum 800 bed medium security prison facility, effective upon reaching necessary agreements with the State of Alaska and issuance of the necessary bonds, and

WHEREAS, by a Request for Qualifications dated November 19, 2001, the City solicited the proposals authorized by Ordinance No. 433-01, and

WHEREAS, after a competitive selection process, the City Council deemed Cornell Corrections of Alaska, Inc. eligible for negotiation as its Highest Ranked Proposer on December 21, 2001 and pursuant to the Request for Qualification and Whittier Municipal Code 3.32.190(F), the City entered into negotiations with Cornell to contract with the City for the planning, promotion, design, construction and operation of a minimum 800 bed correctional facility, subject to State of Alaska approval and appropriate funding, and

WHEREAS, over eighty of the registered voters in the City have signed a petition expressing support for the location of a prison facility in Whittier; and

WHEREAS, the City has identified Lease Parcel 5 of those certain lands under long term lease by the Alaska Railroad Corporation as sufficient in acreage and location for the siting of a prison facility, with sufficient acreage remaining available for a planned City Boat Ramp, and

WHEREAS, Cornell through its representative and the City, through its representatives and attorneys have mutually drafted and negotiated a proposed comprehensive agreement with Cornell which:

(a) authorizes Cornell to pursue the required planning and promotion of the Project to the legislature;

(b) in the event of legislative approval, commits the City, along with Cornell, to enter into negotiations with the State Department of Correction to achieve an Intergovernmental Agreement by which the State would purchase prison facility services from the City, said services to be designed, built and operated during the first five years by Cornell; and

(c) is subject to the issuance by the City of debt obligations in the form of revenue bonds to pay for the design and construction of the Facility, which bonds are to be re-paid by the City out of the funds received from the State for the operation of the facility and are not to be a general obligation of the City; and

WHEREAS, during its drafting and negotiations, its has been the aim of the City's representatives to present a proposed agreement which allocates to Cornell, the State and others the financial risks and performance obligations inherent in the planning, financing, construction and operation, to the fullest extent possible and consistent with the interests and reasonable expectations of the State, Cornell and potential Lenders, and

WHEREAS, the City Council has reviewed the attached Agreement To Provide Correctional Facility Planning, Promotion, Design, Construction, Operation, and

WHEREAS the City Council has determined it is in the best interests of the City of Whittier to enter into said Agreement; now, therefore,

THE WHITTIER CITY COUNCIL ORDAINS:

Section 1. The City Manger is authorized to execute, on behalf of the City of Whittier, the attached Agreement To Provide Correctional Facility Planning, Promotion, Design, Construction, Operation; and,

Section 2. The City Manager is authorized to take further necessary steps consistent with this Ordinance and Ordinance 433-01 for the planning and promotion of a proposed prison facility.

Section 3. This ordinance shall not be included in the Code of Ordinances.

ENACTED BY THE CITY COUNCIL OF THE CITY OF WHITTIER, ALASKA, this ____ day of __________, 2002.

Introduced by: Matt Rowley
Introduction date: 12 February 2002
Public Hearing date: 19 February 2002

Ben Butler
Mayor

ATTEST:

Brenda Krol
City Clerk

Ayes:
Noes:
Absent:
Abstain:

Whittier selects prison promoter

By McKibben Jackinsky
For the Journal
Web posted Monday, January 14, 2002

The seeds of Alaska's first private prison may have found fertile soil in the economically barren city of Whittier.

On Dec. 21, a 6-0 vote by Whittier's city council selected Cornell Cos., based in Houston to plan, promote, design, construct and operate a minimum 800-bed medium security correctional facility. Not selected was Corrections Corp. of America, which operates a facility in Florence, Ariz., where about 800 Alaska prisoners are incarcerated because of a shortage of bed space in Alaska prisons.

Whittier's interest in a private prison came after 73 percent of Kenai Peninsula Borough voters gave the Cornell-led project the cold shoulder Oct. 2.

"We thought that was about as strange as it could be," Whittier Mayor Ben Butler said. "So we thought Whittier should give it a try, and we started the process."

He said Whittier views the prison as a way to save a "dying community."

"We are not trying to debate the philosophical reasons between a private- and a state-operated prison," Butler said. "What we're trying to do is get some economic development going in this town."

Paul Doucette, Cornell's public relations spokesperson in Houston, said Cornell stood ready to work with Whittier. He described the project as a 1,200-bed medium security prison, larger than the 800-bed facility approved by the Whittier council.

Despite voting for the partnership with Cornell, Whittier city council member Arlen Arneson doesn't support the project.

"The majority of (Whittier) people won't 'fess up to it, but 60 to 70 percent of them are against the prison, too," he said. "The simple reason is that the ordinance was written to exclude a public vote. ... There's no public vote. Not even an advisory vote."

Arneson also voiced concern over lack of a feasibility study.

However, Butler said, "We don't have any problems with thinking the prison isn't feasible. The contractor will do a site evaluation and that will be a feasibility study."

In 1998, the Legislature authorized the creation of a private prison by the city of Delta Junction at abandoned U.S. Army facilities at Fort Greely. Corrections Group North, formed by Cornell and Weimar Investments, worked with Delta Junction on that project. Pete Hallgren, the executive director of Delta Junction's department of economic development and the city administrator, said a $75,000 feasibility study "indicated that there wasn't anywhere near enough money appropriated under the enabling legislation to make it financially feasible."

Constructing the private prison was not pursued, lawsuits were filed, and Hallgren said, "We came out of the project defending against a lawsuit by the proposed prison operator. We ended up settling the case for $1.1 million."

Delta Junction has paid $100,000. The remaining $1 million is due July 1.

"It's more money than we've got," Hallgren said.

Jeff Sinz, finance director of the Kenai Peninsula Borough, said the borough invested $75,000 in the project that was ultimately rejected by voters.

Butler said Whittier had spent little on the proposed prison.

"And we have no intentions of really spending on this at all," he said.

Nome, whose lobbyist, Joe Hayes, also lobbies for Cornell, recently gave brief consideration to constructing and operating a private prison.

"It was one of 20 different items that were covered at a legislative priority meeting, but there wasn't an interest in following up on it," said Marguerite Lariviere, assistant to the city manager.

Wrangell and the Ketchikan Gateway Borough are two other areas considering the project. Gary Paxton, interim manager for the Ketchikan Gateway Borough, said the Alaska Department of Corrections has been invited to meet with borough officials Jan. 21 to address the advantages and disadvantages of a prison in Ketchikan, project costs and the need for legislative approval.

"There are enough serious questions that need to be asked of the department that our assembly needs to have them come talk to us," Paxton said.

According to Corrections Commissioner Margaret Pugh, the department has received no such contact from Whittier. Butler has, however, contacted people from Kenai "just to see how it went before and to know what to expect."

"There's no sense in reinventing the wheel," he said.

On Jan. 4, Sen. Lyda Green, R-Wasilla, pre-filed legislation to authorize the Corrections Department to enter into agreements for new or expanded correctional facilities in the Fairbanks North Star Borough, Matanuska-Susitna Borough, the city and borough of Juneau, Bethel, Ketchikan Gateway Borough, Seward and the Kenai Peninsula Borough. The plan, according to Pugh, is similar to one proposed by Gov. Tony Knowles several years ago.

Butler said the city is working with Anchorage legislators to prepare legislation needed to authorize the Corrections Department to work with Whittier.

"All Whittier is trying to do is keep from dying," Butler said. "It would be nice if the city of Whittier could direct its own future."

Analysis of the City of Whittier/Cornell Private Prison Resolution and Agreement

Resolution

JAN 3 1 2003

There are a few concerns in Ordinance 434-02, which was adopted by a vote of 7 – 0 on Tuesday, February 19, 2002. This Ordinance enables the City of Whittier to sign an Agreement with Cornell Corrections of Alaska, Inc. to plan, promote, design, construct and operate a minimum 800 bed correctional facility.

Cornell and Corrections Corporation of America were the only two proposers. This method is the same that was used in the Kenai prison – RFQ.

The fourth Whereas clause reads........

"Whereas, over eighty of the registered voters in the City have signed a petition expressing support for the location of a prison facility in Whittier".

When I testified at the City Council meeting Feb. 19, 2002, I questioned whether this was an official petition (that followed all of the requirements listed in AS 29.26.110). I asked if a registered voter had brought it forward, did the Clerk certify it, were those signatures gathered and then were those signatures verified by the City Clerk as being residents of Whittier? Mayor Butler looked a little perplexed and never gave me an answer. I mentioned that if this was an unofficial petition, then I didn't think it wise to have it listed in an official document.

Some residents did state whether they signed or did not sign the petition, when they testified.

At the time of the 2000 General Election there were 119 people votingin Whittier. The number of registered voters was 414. The 2000 Census found 192 residents.

In the sixth Whereas clause it says........

"Whereas, Cornell through its representative and the City, through its representatives and attorneys have mutually drafted and negotiated a proposed comprehensive agreement with Cornell which:

1. authorizes Cornell to pursue the required planning and promotion of the Project to the legislature;

2. in the event of legislative approval, commits the City, along with Cornell, to enter into negotiations with the State Department of Corrections to achieve an Intergovernmental Agreement by which the State would purchase prison facility services from the City, said services to be designed, built and operated during the first five years by Cornell; and

3. is subject to the issuance by the City of debt obligations in the form of revenue bonds to pay for the design and construction of the Facility, which bonds are to be re-paid by the City out of the funds received from the State for the operation of the facility and are not to be a general obligation of the City". (My emphasis)

In subsection (b) the new lingo is "purchase prison facility services", as opposed to the language in the Kenai ordinance of "leasing" bed space. I do not know the significance of "purchasing services" versus "leasing" beds. So far there has never been an answer to this question.

In subsection (c) it talks only about payment for design and construction. The Agreement itemizes further costs that the payment will cover.

Agreement

Throughout the Agreement there are several common threads.

1. A minimum of 800 beds would be provided.

2. All of the risks of design, construction and operation of a private prison would be on Cornell. The City is trying to stay more than an arm's length from those risks.

3. The City will be responsible for almost no payments toward any part of the prison project. As an example, Cornell will be paying for almost all, if not all, the lobbying expenses.

4. The State will be paying for all of the beds, irrespective of having a warm body in them. This is called the "Take or Pay" basis. It is defined in the Agreement as "Take or Pay shall mean the State's obligation under the IGA (Intergovernmental Agreement) to pay for the number of beds under contract regardless of whether a prisoner has been delivered to the Facility." (Page 4 of the Agreement)

   Further, the Take or Pay rate appropriated by the State must be acceptable to Cornell. Advance payment is required.

5. A Bond Trustee will be designated to administer Bond proceeds and disburse funds for the project. The City of Whittier will have no responsibility for the bonds, except to cooperate with the issuance of the Bond and submit the Property and Facility to a deed of trust. It will be up to Cornell to coordinate with bond underwriters and the State Bond Committee to obtain all necessary papers and information to issue the Bond. All costs for this person will come out of the Bond.

   I do not know if this is a standard practice to employ a Bond Trustee. Nor do I know how much this would cost. The questions were asked, but I have no answers yet.

6. Under Warranties of the City (Page 4 of the Agreement) the City warrantees "that the City, . . ., establish the Facility as an adult medium security correctional facility to house inmates from the State of Alaska, the federal government, and other governmental entities that may wish to house inmates at the constructed Facility".

   This means that Cornell can go shopping for inmates, wherever it can find them. The State statutes contain no prohibition against housing out-of-state inmates.

   The City of Whittier will "cooperate with Cornell to accommodate any other sources of inmates which Cornell may identify, which may allow for an additional expansion of the Facility". (Page 21 of the Agreement) If Cornell requests the City to help in this area, Cornell "shall reimburse and pay for the City's reasonable expenses incurred in response to Cornell's request." (Same Page)

   I certainly didn't realize that not only was the State required to fill a 1200 bed facility, but it is also responsible for any expansion of the facility that Cornell identifies.

7. While the City will negotiate to achieve an IGA with the State, the City authorizes Cornell to coordinate and negotiate with the State to define the terms of the IGA.

"Cornell will bear its own expenses for the funding of this effort... ." "...the City shall have no obligation to reimburse Cornell for the costs incurred in planning and promoting the enabling legislation and the IGA" (Page 6 of the Agreement)

9. "<u>Reimbursement Through the Bonds.</u> Cornell and the City will cooperate with each other to seek reimbursement of their planning and promoting expense, including, without limitation, their expenses in preparing and responding to the Request for Qualifications and the negotiation of this Agreement, at the time of financing of the bonds issues for construction of the Project. The City shall pass such resolutions as are necessary to authorize reimbursement of pre-bond issuance expenses." (Page 6 of the Agreement)

   This means that the Bond proceeds will pay Cornell and the City for every expense they have incurred from the very beginning of this project. How many thousands of dollars will that be? I have asked if this is a normal cost built into the Bond, but I have not yet received an answer. I find this incredibly greedy. The Agreement is riddled with snippets of language regarding payments of certain things to come out of the Bond.

10. The Project Costs "shall include the costs of design, financing expense, construction, promotion and planning development, legal expense, pre-opening activation and startup costs." (Page 7 of the Agreement)

11. The Design Build Contract players are Cornell, VECO Alaska, Neeser Construction, Inc. and Livingston Slone, Inc. Same group – different City.

12. Under the Assignment of IGA Revenues section "... the Bond Trustee who will apply the fees in the following priority: (I) to pay the indebtedness for the bonds that financed the construction of the Improvements; (ii) to pay the payment in lieu of taxes set forth in section 6.1, and (iii) to pay the balance to the Operator of the Facility. To the extent start-up costs actually incurred by Cornell are not included within the amount financed by the bonds as set forth in section 5 (C), the City acknowledges that a portion of the per diem payment shall be used by Cornell to recover its unreimbursed start-up costs over the five year term." (Page 10 of the Agreement)

    This is another blatant example of greed. Let me show you a small section of Cornell's 10-Q SEC report on October 30, 2001, which discusses start-up costs.

    "Following a Agreement award, the Company incurs pre-opening and start-up expenses including payroll, benefits, training and other operating costs prior to opening a new or expanded facility and during the period of operation while occupancy is ramping up. These costs vary by Agreement. Since pre-opening and start-up costs are factored into the revenue per diem rate that is charged to the contracting agency, the Company typically expects to recover these upfront costs over the life of the Agreement. Because occupancy rates during a facility's start-up phase typically result in capacity under-utilization for at least 90 to 180 days, the Company may incur additional post-opening start-up costs. The Company does not anticipate post-opening start-up costs at facilities operating under any future Agreements with the FBOP, because these Agreements are currently take-or-pay, meaning that the FBOP will pay the Company for at least 95% of the contractual monthly revenue regardless of actual occupancy.

Newly opened facilities are staffed according to Agreement requirements when the Company begins receiving offenders or clients. Offenders or clients are typically assigned to a newly opened facility on a phased-in basis over a one- to three-month period, although certain programs require a longer time period to reach break-even occupancy levels. The Company incurs start-up operating losses at new facilities until break-even occupancy levels are reached. Although the Company typically recovers these upfront costs over the life of the Agreement, quarterly results can be substantially affected by the timing of the commencement of operations as well as development and construction of new facilities."

What we have here is the Bond paying for pre-start-up costs, prior to the signing of the Agreement, and the Bond paying for the start-up costs, after the Agreement is signed, up to the time the prison is up and running.

13. The State shall be responsible for payment of "major medical services, the cost of and provision of prescription medicine, or prisoner transportation, which shall be negotiated as a State provided item under the IGA." (Page 10 of the Agreement)

14. The City is included on every possible insurance policy that Cornell is required to carry.

15. Cornell requires that "any transportation contractor engaged by Cornell shall be subject to the" $1,000,000 combined single limit per occurrence and annual aggregate comprehensive Automobile Liability Insurance. (Page 10 of the Agreement)

    Last year I asked someone at DOC about this requirement. The State self-insures. If the State could not meet this $1 M requirement, would the Agreement between Whittier and Cornell then dictate to the State the coverage it has to have? I have never received an answer yet.

16. Cornell is not required to carry earthquake insurance. (Page 10 of the Agreement)

17. There is a whole subsection regarding Inmate Incarceration Service. (Pages 13 through 15 of the Agreement) This includes food service, health care, inmate programs, inmate work program, religion and transportation.

    Some of the notable ideas put forth are an on-site infirmary, inmate programs "which will include, but not be limited to culturally relevant services to Alaskan native inmates", one chaplain and payment to Cornell for transportation of inmates.

    It was nice to see that "culturally relevant services" made it into the Agreement, as those services are briefly mentioned in the legislation. Cornell previously said that the Kenai Native Association would be providing some these services. However, the Kenai Native Association has been experiencing monetary problems and probably wouldn't be interested in this project. Testimony was presented that Alaska Native Brotherhood Camp 2 would be interested in providing these services. An effort was made last year to have the Tlingit & Haida Central Council involved. I believe that either a resolution in support of Cornell was defeated, or it was never brought forward.

18. Under the subsection Facility Administration, Cornell will train staff to the State's standards. Staff will undergo background investigations to include educational, criminal and employment history. A criminal record check and drug test will be done on all employees.

    This requirement carries a higher cost than training to the much lower standards of the American Correction Association. I do not have cost figures yet.

An Emergency Response Plan will be delivered to the State and Whittier. The procedures will deal with fire, bomb threats, escape, hostage situations, riots, medical epidemics and natural disasters. The State and City will be notified whenever anyone escapes.

Cornell is responsible for all repairs and maintenance.

If the Cornell Agreement is terminated for cause, the State still has to make payments and work with the City to find another operator. If this happens, would another bond have to be sold to pay the start-up costs of the new operator?

The Payment in Lieu of Taxes are really quite cheap. Cornell must pay Whittier $.50/bed/day, if there are 800 – 1099 beds ($146,000 to $200,567/yr.); $.55/bed/day, if there are 1100 – 1199 beds ($220.825 to $240,699/yr) and $.60/bed/day, if there are 1200+ beds ($262,800 +/yr)

Kenai at least asked for $1.00/bed/day for an 800-bed prison and $1.50/day for a 1,000-bed prison.

19. There is a whole section on Disputes, which require 60-day cure periods, meetings, mediation and litigation. (Pages 17 – 19 of the Agreement)

20. Under Assignment "Cornell shall have the right, without the consent of the City, to assign the Agreement to a wholly owned or commonly controlled affiliate and to assign its rights to revenues under this Agreement as collateral security for its obligations including but not limited to any financing undertaken in connection with the Facility." (Page 20 of the Agreement)

When Allvest was purchased, there was a 10 year Covenant Not To Compete in Alaska. That ends in June 20, 2008. If the prison is completed in 2006 and given the 5-year IGA, would the above Assignment clause mean that Allvest could be back in Alaska again?

21. The reasons given for termination of the Agreement without fault are the Legislature fails to pass enabling legislation in 2002 that in Cornell's judgment doesn't justify the project, the City and State fails to enter into an IGA "with terms sufficient in Cornell's reasonable judgment to undertake the successful design, construction and operation of the Facility, allowing a reasonable return to Cornell, ...", a site can't be identified, the City can't secure the consent of the Alaska Railroad under the Ground Lease (of Lease Parcel 5) or Cornell can't negotiate a Design Build Contract. (Page 22 of the Agreement)

22. The enforceability of the Agreement is conditioned on no protest or complaint being filed by another bidder (CCA) that challenges the Agreement within 10 days after the City Council has adopted Ordinance 434-02, the enabling ordinance. This would be March 1, 2002.

23. Although the Agreement says "This Agreement shall be governed, construed and enforced in accordance with the laws of the State of Alaska, without regard to conflict of law principles" (Page 23 of the Agreement), haven't Cornell and the City in effect written a great deal of the IGA with this Agreement?

24. There are only two subsections that deal with Inmate Incarceration Service and Facility Administration where the Agreement says that if there is a conflict between the Agreement and the IGA, "the terms of the IGA shall control." (Page 17 of the Agreement)

Does this mean that the Agreement takes precedence over the IGA, and presumably the State, in all other sections?

I am sure that there are other areas of this Agreement that might be questionable to other people. These specific issues were brought forward to you, because I felt they needed to be highlighted.

Lest we all forget where the 1200 bed prison idea came from, I have attached the Alaska Journal of Commerce article written by McKibben Jackinsky. In reading it, you should notice that Paul Doucette, a Cornell spokesman, first brought it up.

Dee Hubbard
907-252-3155

January 28, 2003

Subject: [Fwd: HB 55 & SB 99 - Harvard Law Review Article and Rebuttal]
Date: Tue, 08 Apr 2003 14:20:46 -0800
From: Bruce Weyhrauch <Representative_Bruce_Weyhrauch@Legis.state.ak.us>
Organization: Alaska State Legislature
To: Ginny Austerman <Ginny_Austerman@legis.state.ak.us>

bill file

Subject: HB 55 & SB 99 - Harvard Law Review Article and Rebuttal
Date: Tue, 8 Apr 2003 13:29:48 -0800
From: Dee Hubbard <chubbard@alaska.net>
To: undisclosed-recipients:;

At hearings before both the House and Senate State Affairs Committees Cornell handed out a packet of materials designed as selling points for HB 55 and SB 99. One of the included articles was A Tale of Two Systems and was printed in the Harvard Law Review. You can find this article at

http://kuznets.fas.harvard.edu/~volokh/bookproofs.htm)

In my opinion this was a very biased paper written to support the private prison industry. The ties to the Reason Public Policy Institute and the disgraced former Professor Charles Thomas from Florida were intertwined throughout the article's discussion. Because it was published in the Harvard Law Review, private prison companies have used it throughout the US as further documentation of the arguments to privatize prisons.

Included below is a rebuttal to that article, written by a virtual friend of mine from Texas........d

Correctional Law Reporter
(August/September 2002 Issue)

From the Literature...
By Michele Y. Deitch*

Developments in Prison Law

Developments in the Law—The Law of Prisons
115(7) Harvard Law Review (May 2002), p. 1838

The Harvard Law Review dedicates one issue each year to an in-depth exploration of a single topic, and assigns a handful of student authors and editors to tackle various aspects of that subject. This year's topic was prison law, and the editors should be congratulated for addressing this topic when it gets such scant coverage elsewhere. The journal's visibility means that prison law might appear on the radar screen of many lawyers, judges, and academics who previously had little or no knowledge about the field. That's the good news; the bad news is that they are relying on inexperienced students to educate them about these issues.

The piece is divided into six parts and covers five substantive areas: the

PLRA and the Antiterrorism and Effective Death Penalty Act; private prisons; religious practice in prison; detention of deportable aliens; and felon disenfranchisement. While the developments issue in no way claims to be comprehensive, the choice of these sub-topics is a little surprising. Where is the coverage of super-max facilities, of correctional health care, of use of force, of access to courts rights? Where does the piece discuss the extraordinary growth in the prison population, the development of alternatives to prison, and the laws affecting the placement of juveniles in adult prisons? The parts feel disjointed, and no attempt is made to tie them together or show how they relate to each other in the larger scheme.

The developments issue provides a generally helpful summary of the law in these limited areas, if at times the information is a bit theoretical and lacking in practical application. For example, there is a useful legislative history of the PLRA, but discussion of the statute focuses mainly on its impact on the judiciary rather than on prison officials, let alone on prisoners. The section on religious practice, however, provides practical information about specific policies in a number of states, and the discussion of felon disenfranchisement is thoughtful, practical, and timely, if a bit tangential to the subject of "prison law."

My strongest reservations concern the private prisons section, which reads like a lobbying piece for the private prison industry and which was explicitly influenced by the Reason Foundation, a free-market think tank that advocates privatization in this area. Little law is actually covered in the discussion (the Richardson and Malesko Supreme Court cases are mentioned only in passing), which cites extensively from industry-supported studies to argue that private prisons are in fact more cost-effective and accountable than public institutions. There is no evidence that the author approached corrections officials for their points of view, nor did the author discuss issues such as the frequent practice of reducing costs by deliberately understaffing private facilities. Moreover, the author of this part misses a key policy point when reviewing the cited studies: because private operators can pick and choose the "cream of the crop" inmates, who are necessarily less expensive to house, they effectively drive up the prices of the comparison group of public institutions, which are left with the higher-security and more medically-needy inmate population. Thus, many of these studies are comparing apples and oranges. Finally, in arguing that the market will keep private institutions accountable by allowing governments to rescind contracts as necessary, the author ignores the reality of the crises that typically lead to contracts with private providers, leaving corrections officials with little leverage in contract negotiations. One wishes that this part of the article could have been as objective as the other sections.

Certainly, this is a piece worth reading, especially if you are seeking specific information about one of these topics. But read it critically, and remember that it lacks a practitioner's touch.

Copies: Harvard Law Review, Gannett House, 1511 Massachusetts Avenue,

Cambridge, Massachusetts, 02138, (617) 495-7889,
http://www.harvardlawreview.org/

THE LEGAL AND POLITICAL DIMENSIONS OF PRIVATE PRISON

By

David Schultz

INTRODUCTION

The state of Minnesota's choice to make prison privatization a policy option and a way to deliver corrections services brings with it a host of legal and political issues that are unique from those faced when the state or government controls and runs the prisons. These issues include questions regarding whether the state can delegate its corrections authority to private parties and how to solicit, contract with, and monitor private prison vendors. In addition there are legal questions surrounding the control of the personnel of private facilities and the ability of these employees to join unions and strike.

Furthermore, in considering privatization as an option, the State must weigh the relative merits of transferring the operations of its corrections facilities to an outside party. As only one of three states never to have its prisons subject to control by federal court during the height of the prison reform movement from the 1960s through the 1990s (Feeley & Rubin 1998: 13), Minnesota has a reputation as one of the best state corrections systems in the nation. Hence, any decision to privatize must consider the tradeoffs in public versus private control and operation.

Finally, if the state were to privatize, it must also consider the scope of its legal liability and the private prison operator in suits arising from prisoners and other parties who might sue the facility. Encompassing all of these legal questions are numerous political issues about privatization that include the real ability of the state to monitor a facility without the monitor becoming "captured" by the vendor and how to ensure that private prisons remain publicly accountable. Fortunately, the state of Minnesota is neither the first nor the only state to consider privatization, and the state itself already has some experience in this field.

As of December 31, 1997, 31 states and the District of Columbia had privatized some of their corrections facilities, with the total population in private prisons exceeding 106,000 inmates. States such as Texas and Tennessee have used private prisons that date back over 10 years, and states such as Texas, Florida, and Oklahoma, with 41, 10, and 6 private prisons respectively, have extensive histories in developing requests for proposals (RFPs), contracts, and monitoring policies of private corrections facilities. In addition to these state experiences, there have been numerous scholarly and third party evaluations of private prisons, producing solid analysis of the legal issues confronting prison privatization. Finally, Minnesota itself has employed privatization for over 20 years in the delivery of health care and food service in its prisons, and in the last few years the state has housed some of its inmates in the privately owned and operated Prairie Correctional Facility (PCF) in Appleton, Minnesota. Any decision by the state to consider further privatization of its prison facilities can rest upon the wealth of experiences and studies already done on this topic.

This chapter will provide an overview of some of the major legal and political issues the state of Minnesota needs to consider as it contemplates privatizing any of its correctional institutions or services. The discussion here will not provide an exhaustive study of all of the legal issues. Robbins (1987) and Gold (1996) provide far more detail on these matters. Instead, this chapter will review many of the legal and political issues, highlighting those that are of particular or special concern to Minnesota.

The conclusions of this chapter are neither meant to endorse nor oppose privatization, but instead to alert the state to the types of issues it will have to address as privatization is considered. The recommendations that will be offered are suggestions on the specific courses of action the state should consider. These recommendations are based upon the experiences of other states, a review of the current applicable state and federal laws, and general conclusions drawn from the political experiences of similar issues by governments to monitor and regulate private entities.

Overall, the conclusion of this chapter is that the legal and political issues surrounding privatization do not make this course of action impossible, but that there are some specific problems that the state of Minnesota must address if it wishes to pursue this policy option. These problems relate both to the current contract to house inmates at the Prairie Correctional Facility (PCF) and to any future decisions to privatize. The way to address these problems is in privatization enabling legislation or its contracts with private corrections vendors. Issues that need to be addressed include the right to strike, state liability for suits against the private prison operator, and the monitoring and enforcement of contracts that deserve special attention and concern.

WHAT IS PRIVATIZATION?

Privatization refers to a policy option in which a governmental agency lets the private sector supply goods or services previously supplied by the public sector (Saavas 1987; Schultz 1998). In privatizing, the argument is made that private sector vendors can provide the goods or services more efficiently, with greater flexibility, and often times with the same if not greater quality than the public sector.

Often, the misconception is that privatization means turning over the entire delivery of goods and services of some specific type to the private sector, leaving the government with no control over their delivery. This is incorrect. In the context of prisons, no state has completely privatized all of its facilities. Even Texas, where privatization has been implemented more than any other state, only 41 of its facilities have been privatized. In addition, states like Minnesota have several privatization options beyond turning an entire facility over to the private sector (DOJ 1998). These options include privatizing only some services within a prison or the entire corrections system, such as food, health care delivery, or prison industry programs. In addition, even if a state were to consider privatizing an entire facility, there are several options, including: the state owns the facility and rents it out to a private vendor; the state sells an existing facility to a private vendor and the latter runs it according to a contract; the state funds and builds the facility and rents it to a private vendor; and a private vendor builds and runs a facility and contracts with a state to house inmates. All of these arrangements have been implemented in various states (DOJ 1998). The choice of which option a state such as Minnesota may wish to pursue is contingent upon many variables, including costs, resources, and corrections philosophy, among other concerns.

Whatever choice is made, privatizing a corrections facility does not mean that a state is no longer responsible for the inmates or what happens in prison. As shall be noted below, governments remain legally liable for the delivery of corrections services and for the treatment of inmates. This means that when a facility is privatized, the state needs to ensure that the facility is being run according to its specifications and requirements. Hence, in privatizing a facility, a state would need to carefully ascertain what it hopes to accomplish, what it would like the private vendor to provide, how it would like the private vendor to treat the inmates, and how much it will cost the state to have a private party run all or part of some aspect of its corrections services. This means that the relationship between a state government and a private corrections provider is basically a contractual relationship, necessitating that the state exercise care in formulating the contract with the provider. Since many states, including Minnesota, already have experience in entering into contracts with private parties for some corrections services, this is not a novel issue. However, unlike privatizing food or medical care, actually letting a private party assume responsibility for the housing of inmates and the running of prisons themselves creates a host of unique questions about the authority of the state to delegate this power to the private sector.

DELEGATION OF CORRECTIONS AUTHORITY TO PRIVATE PARTIES

United States Constitution

One of the first legal issues confronting the privatization of a corrections facility is a constitutional issue. Specifically, some, such as the American Civil Liberties Union, contend that the operation of prisons is a "core" state function that may not be delegated to a private party. According to this claim, the delegation of an inherently public or legislative function to a private body is a violation of the Due Process clause of the Fourteenth Amendment to the Constitution (Robbins 1988: 9; Gold 1996: 366; Ratliff 1997: 382). Thus far no court has invalidated a corrections privatization plan under the Due Process clause.

The basis of this claim arises from two U.S. Supreme Court cases in the 1930s which placed limits upon the ability of Congress and the federal government to delegate power to private bodies. In *Carter v. Carter Coal Company*, 298 U.S. 238 (1936), and *Schechter Poultry Corporation v. United States*, 295 U.S. 495 (1935), the Court struck down as unconstitutional the delegation of legislative power to either the president or private groups to make industry-wide rules of conduct, including rules regarding minimum wages and workplace safety. Critical to the Court's opinion was that the delegation that occurred in these cases went too far: Congress had delegated away the power to legislate to someone else and that it could not do. Further, even if Congress does not actually delegate away its power to legislate, any other delegation of power must be subject to limits and confine the discretion of the person or body to whom power has been invested.

The importance of the *Carter* and *Schechter* decisions is that the Constitution places some limits on how far a legislature can delegate power to a private body. In the context of corrections, this means that it may be unconstitutional to delegate the power of corrections to private groups if that delegation either actually transfers legislative power to a private group or gives that private group open-ended discretion.

Unfortunately, there is no clear ruling from the Supreme Court on the issue of prison privatization. Moreover, it is unclear what remains of the nondelegation doctrine found in *Carter* and *Schechter*. For one, the Court has not ruled on the issue of prison privatization at all. Second, the Supreme Court has not invalidated a single statute under this doctrine since 1936, making it difficult to ascertain if the doctrine has any teeth left in it.

The most recent formulation of the delegation doctrine was articulated in *Todd and Co. v. SEC*, 557 F.2d 1007 (3rd Cir. 1977). Here, the court ruled that a federal law delegating securities regulation was not invalid. In reaching that holding, the federal court stated a three part test: 1) a government body must have the ultimate power to approve or disapprove any rules formulated by a private body; 2) a government body must reserve the authority to make its own independent findings in disciplinary proceedings; and 3) a government body must ultimately be responsible for sanctions for violations of rules.

The *Todd* test indicates that were Minnesota to delegate over to a private party the sole power to govern a prison facility, make final decisions regarding discipline, and make unreviewable decisions regarding sanctions, then the privatization would be unconstitutional. However, so long as Minnesota reserves to itself final control over the basic rules for running the facility and for reviewing disciplinary proceedings and sanctions, it is unlikely that any court would find privatization to be unconstitutional under the Due Process clause.

Overall, despite some who claim that the Court is reviving the delegation doctrine or that the Due Process clause has some teeth to it (Robbins 1988; Ratliff 1997), there is no reason to expect that a Minnesota plan to privatize would be invalid under the U.S. Constitution unless the state gave too much or unreviewable discretion to a private vendor to operate a facility.

State Constitutional Law

Besides federal constitutional issues, prison privatization might also violate specific state constitutional provisions. This might be the case if a state constitution clearly described operating corrections to be a nondelegable function or if the due process clause of a specific state were interpreted to preclude privatization. However, no state constitution has successfully been invoked to preclude delegation of authority to a private prison operator. More specifically, while there may be some questions about the limits on delegation may occur under the Minnesota Constitution, it does not appear that state law imposes a flat ban on contracting with a private vendor to run all or part of its corrections services so long as the state ultimately remains responsible for the corrections system.

First off, there is no provision in the Minnesota Constitution or constitutional law stating that the operation of corrections is an inherently state function that cannot be delegated to a private party. In fact, there is no language at all in the state constitution regarding corrections. Instead, the authority to create a department of corrections is based on Minnesota Statutes § 241.01, which authorizes the creation of a corrections department, and Minnesota Statutes § 15.06, which creates a department of corrections under a commissioner of corrections who is appointed by the governor. This line of authority thus makes the creation of a corrections system a legislative function that is run by the executive department.

Nothing in this delegation of power seems to preclude the delivery of corrections services by a private vendor.

Other relevant places to turn to in the Minnesota Constitution in regards to privatization are the state due process clause and Article III, § 1. The latter states:

> The powers of government shall be divided into three distinct departments: legislative, executive and judicial. No person or persons belonging to or constituting one of these departments shall exercise any of the powers properly belonging to either of the others except in the instances provided in this constitution.

First, note that Article III does not unequivocally ban the delegation or performance of governmental power by private parties; it merely precludes a member of one branch of government from performing functions reserved for another. Thus, nothing in text or history appears to prevent some privatization of corrections. The issue is how much can be delegated.

The jurisprudence on delegation of powers is the same in the state's due process clause as it is in Article III. The clearest statement of what these two parts of the state constitution mean in regards to delegation of state power to private parties is found in *Remington Arms Company v. G.E.M.*, 102 N.W.2d 548 (1960). Here the Minnesota Supreme Court invalidated a state law that appeared to give to private parties the authority to prescribe rules that would be binding upon those who did not consent. In invalidating the law, the court stated that "[p]ure legislative power...can never be delegated" *Id.* at 570. More specifically, the Supreme Court distinguished between those cases where the legislature delegated its power versus "conferring authority or direction as to its execution," and it also recognized that a "legislature may authorize others to do things which it might properly, but cannot conveniently or advantageously, do itself" *Id.* Nonetheless it stated that:

> [w]e have never understood that the legislature may enact an open-end type of regulation which will give to a private party the arbitrary right to exercise an option to make a law operative on his own terms. *Id.*

The decision in *Remington Arms* appears to parallel the logic of the federal delegation decisions in *Carter* and *Schechter*, placing some limits on delegation. These state limits, like those in the federal constitution, suggest that so long as legislative power itself is not delegated to private prison authorities, then some type of delegation to private vendors to operate and manage corrections institutions is permissible. In effect, the *Todd* test probably represents a fair reading of what the due process and Article III, § 1 clauses limit in terms of delegation.

There is one final wrinkle in the *Remington Arms* decision. One of the concerns the Minnesota Supreme Court expressed in that case was the delegation of power to a private party when "that grant is given to the very persons who will benefit most by an arbitrary and wrongful use of that power" *Id.* at 574. Here conflict of interest is an issue. Specifically, when a private party is given open-ended power to make rules that will serve its benefit, there is a conflict of interest between the private party acting as a neutral regulator versus it acting as an entrepreneur. As Ratliff (1997) points out, giving a private profit-making party too much discretion to make rules may violate state and federal due process. Hence for example, giving a private vendor leeway to define rules of discipline, when to grant good time credits, etc., may conflict with the financial interests of a company paid on an occupancy per diem basis.

What all this means is that while the precedent in *Remington Arms* was to invalidate delegation of ruling-making to a private party who benefited from the rules he wrote, the holding in this case suggests that even if lesser authority were given to a private party, it too might constitute a due process or Article III, § 1 violation.

In short, the state constitution does not prevent the state from delegating to private parties the ability to run some corrections facilities or functions. The constitution does prevent the state from giving these private parties either unlimited or too much discretion to construct rules to govern itself and others. The recommendation here is that the state of Minnesota must be careful not to place itself in a position where a private corrections vendor writes corrections rules or makes corrections policy. Ultimately, all decisions must be reviewable by the state, especially if they are decisions that place legitimate corrections interests in conflict with the vendor's profit motives. One way to assure a constitutional delegation of authority is to enact enabling legislation that proscribes what decisions a private vendor may not make and what authority the vendor does have.

THE NEED FOR ENABLING LEGISLATION

Robbins (1988) and Crane (1998) argue that it is important for a state to enact enabling legislation that would allow for prison privatization. The purpose of such legislation is twofold. First, enabling legislation may be needed to empower the department of corrections or other state agency to contract with private parties for corrections services. Absent this authorization, a state or one of its administrative agencies may lack the legal authority to contract. Hence, to ensure that a privatization plan is not subject to legal challenges of this kind, some type of enabling legislation is needed.

A second reason to have enabling legislation is, as noted above, that a state can use the enabling legislation to address other potential legal or constitutional issues that might threaten a privatization plan. For example, to avert a constitutional challenge that a state has delegated some of its legislative power to a private party, a state's enabling legislation could indicate that the state is not delegating away this type of power and it retains full and final authority over certain types of corrections issues that, were they delegated, probably would be found to be improper delegations of power under federal and applicable state constitutional provisions. As is noted below, several states have done that in their enabling legislation.

There are several other reasons why any state, including Minnesota, should adopt enabling legislation. First, if determining corrections policy is essentially a state function, the state legislature should be responsible for making the decision to privatize and it should be responsible to determine under what terms privatization should occur. Specifically, if the state legislature wishes to accomplish certain goals in privatization, then those goals should be clearly articulated in the legislation. By doing this, the state can measure whether privatization is successful or securing its goals. After all, there are many reasons to privatize and unless the state legislature clearly defines its goals, there is really no way to ascertain implementation success or hold the department of corrections or the private vendor responsible.

Another virtue of enabling legislation is that it allows the legislature to define and consider a host of issues that it considers important in privatization and set the agenda on the types of issues that can eventually be in a contract. More specifically, good enabling legislation will consider a host of issues such as costs, use of force, and escapes, and determine if any of these subjects need specific legal attention. The most famous example of the failure to do this is in Texas where neither the enabling legislation nor the first contracts with the vendors considered the issue of whether it was a crime to escape from a private prison in that state (AFSCME 1998). It was not. Had Texas fully considered the issue, it would have anticipated this issue and written it into the legislation.

A final major reason for enabling legislation is that it defines the terms of the eventual contract and contractual negotiations. This is important because it places some parameters on what the contracts may say, thus giving state negotiators more bargaining power.

Contents of Enabling Legislation

Robbins (1988) and Crane (1998) justify the importance of enabling legislation for many of the reasons described above. Constructing this legislation serves to eliminate many questions regarding the scope of authority of a DOC to contract with private vendors for corrections services.

In his discussion of enabling legislation and in a model statute, Robbins contends that several issues need to be present and addressed. These issues are: 1) responsibility for site selection; 2) contract term and conditions for renewal; 3) standards of operation; 4) use of force; 4) employee training; 5) monitoring; 6) liability and sovereign immunity; 7) insurance; 8) termination of contract and resumption of government control; 9) nondelegability of governmental authority; and 10) conflict of interest provisions. Similarly, Crane (1998) indicates that enabling legislation should address the authority to contract, financing, RFP requirements, contract terms, vendor's qualifications, use of force, monitoring, and the scope of non-delegable state powers, among other topics. Overall, both Robbins and Crane see the need for the state legislature to address several core issues when privatizing corrections services and facilities.

Examples of Enabling Legislation

States have adopted a wide variety of approaches in their enabling legislation. The enabling legislation of seven states (Colorado, Florida, Louisiana, New Mexico, Oklahoma, Tennessee, and Texas) are examined below. Together, these states have over half of the private adult facilities with state or federal contracts in the country as of December 31,1997 (McDonald et.al. 1998). The enabling legislation of each state is varied in detail, issues, and approach, but there are also some common threads that run through all of them. Significantly, many of the provisions suggested by Robbins and Crane are found in many of the state enabling statutes, although curiously, none of the states surveyed has adopted a conflict of interest provision that would preclude family members of governmental employees in the DOC from bidding on a project.

It is also important to note that the enabling legislation to be discussed generally allows for the privatization of the entire public facility, for a private vendor to run a public facility, and perhaps for a private vendor to house some state inmates. Hence, some might argue that this type of enabling legislation is only needed in a few narrow circumstances encompassing situations where more than simply housing a few inmates is involved. For reasons to be noted below, this conclusion is incorrect.

Colorado

Section 17-1-201(1) of the Colorado Revised Statutes authorizes the Department of Corrections to "adopt rules and implement a process to issue requests for proposals for the privatization of correctional facilities." This authorization does not prescribe any specific goals to be accomplished in privatization, but the enabling legislation does address other issues.

Section 17-1-201(2) requires that an annual report be made by the Department of Corrections to the State Legislature regarding the "effectiveness" of the private facility and the comparative recidivism rate between private and public facilities. In addition, § 17-1-202(1) outlines the process the DOC should follow to solicit RFPs. In contracting, § 17-1-201 mandates that a vendor must demonstrate qualifications and competence to manage a facility, that the vendor must follow all applicable state and national standards, including court orders, and that it must comply with and maintain accreditation with national corrections standards, as well as follow state amendments to those standards.

The law also requires the vendor to indemnify the state against any claims brought against it as a result of operating the private facility. Further, the law also requires the vendor to provide a range of "dental, medical, and psychological services and diet, education, and work programs at least equal" to those provided by the state, and that the work and education programs be designed to reduce recidivism. § 17-1-202(3)(f). The legislation also states that the director of DOC shall monitor the facilities and that the vendor shall pay for the monitoring costs.

Section 17-1-203 outlines a list of powers and duties not delegable to the contractor. These include the decision as to which facility an inmate should be initially sent, developing or adopting disciplinary rules, making final decisions on disciplinary action, determining sentencing time or credits, making parole recommendations, and determining inmate eligibility for release.

Finally, Section 17-1-205 requires the vendor to provide a detailed plan for the DOC to assume temporary control of a facility when a contract expires.

Florida

Florida law set up a Correctional Privatization Commission (CPC) in its enabling legislation and the purpose of the commission was for "entering into contracts with contractors for the designing, financing, acquiring, leasing, constructing, and operating of private corrections facilities." Florida Stat. Ann. § 957.03(1) (1998). The CPC members would be appointed by the governor. Four of the members must be from the private sector and none of the members may be a DOC employee.

Unlike the Colorado legislation that is open-ended in terms of the goals of privatization, § 957.07 mandates that the CDC may not enter into a contract unless it yields at least a seven percent savings "over the public provision of a similar facility." This section requires savings to be ascertained and certified, and specifies that this information must be presented to the CDC when it reviews contracts.

Section 957.04 specifies a series of requirements to be found in a contract that are similar to those in Colorado. Issues such as accreditation and what services to supply are generally discussed. However, this section also specifies that an initial contract shall be for three years, with two-year renewal periods.

Louisiana

The Louisiana Corrections Private Management Act (LCPMA) articulates that the basis for privatizing prisons is to provide for "efficient and cost-effective facilities" because the legislature has determined that "adequate and modern prison facilities are essential to the safety and welfare of the people of this state and that contracting for portions of governmental services is a viable alternative considering the fiscal problems facing the state" La. Stat. Ann. § 39: 1800.2 (West 1998). Hence, the primary purpose of privatization here is to save money or to provide for modernization of facilities because the state cannot afford to do it itself.

Section 1800.4 specifies the minimum requirements for vendors and contracts. These requirements again relate to accreditation of the facility, demonstrated competence of the vendor to operate a facility, delivery of specific services, and indemnification of the state. However, § 1800.4(D)(3) allows the vendor to impose discipline, but only in accordance with "applicable rules and procedures." Section 1800.4(G) provides for a monitor, but the private vendor is not required to pay for that person or office. The Joint Legislative Committee on the Budget would also have continuous oversight over any service provided by a vendor.

Finally, § 1800.5 lists the duties and powers not delegable to the contractor, and these powers include the imposition of sentences, releases, and calculation of good time credits. Second, § 1800.7(A) makes it a crime to do anything at a private facility that would be a crime at a public facility. This latter section addresses the Texas problem of it not being illegal to escape from a private prison. Curiously, unlike Colorado, Louisiana seems to delegate to private vendors significant authority to discipline prisoners, or at least not reserving to the state the final authority to make this type of decision.

New Mexico

In New Mexico, § 33-1-17 empowers the DOC to contract for the "operation of any adult female facility...with a person or entity in the business of providing correctional or jail services to government entities," N.M. Stat. Ann. § 33-1-17(A) (West. 1998) or for the "construction of a public facility to house a special incarceration alternative program for adult male and female felony offenders." *Id.* at (B)(4). In the New Mexico statute, the legislature authorized the specific units and facilities to be constructed, not simply creating a general grant of authority to contract. The virtue of this approach is that it gives the legislature significant control over the type and location of facility privatized, not simply letting DOC make the decision. For legislatures concerned with accountability and desirous of making sure their goals are secured, the New Mexico facility and site-specific approach has merit.

Section 33-1-17(D) indicates that contracts and RFPs will follow usual state law and procedure, and this section also mandates that the contractor assume all liability for operating the facility, that the contract set forth standards of incarceration, and that the contract could be terminated upon 90 days notice. Absent from the enabling legislation is a discussion of nondelegable powers, responsibility for discipline, calculation of sentences, and a statement of goals or objectives to be secured by privatizing.

Oklahoma

Oklahoma's enabling legislation is perhaps the most extensive of any of the states examined. Okla. Stat. § 57.561(A) authorizes the DOC to "provide for incarceration, supervision, and residential treatment at facilities other than those operated by the Department of Corrections." These services, which are spelled out, must meet standards approved by DOC. Section 57.561(B) similarly provides DOC with the authority to contract with private vendors for the private construction and operation of corrections facilities.

Section 57.561 provides a very detailed list of requirements that must be met for RFPs, for the actual contracts, and for the monitoring and oversight of a private corrections facility. It requires maintenance of a list of vendors by the DOC, specific data on contracts to be let and vendors who apply, a process for how bids are submitted and reviewed, and factors defining the qualifications of vendors. Section 57.561, subpars. (L) and (M) mandate in the contract that the vendor will indemnify the state against lawsuits, and that the vendor has the resources and expertise to run the prison. Interestingly, § 57.561(N) exempts the private vendor from being bound by applicable "state laws or other legislative enactments governing the appointment, qualifications, duties, salaries, or benefits of wardens, superintendents, or other correctional employees." This places public and private corrections providers on a different competitive footing.

Section 57.561.1 addresses the contracting process and requires the DOC to develop a RFP process. The rest of this section specifies the contents of contracts including costs, term of contract (initially one year with option to renew up to 20 years), indemnification, and performance bonds. Noteworthy also is § 57.561.1(D)(5), which permits the state to terminate the contract for cause and § 57.561.1(D)(13) which provides plans for the state to reassume control in the event of bankruptcy or termination of the contract and requires a demonstration of a cost benefit to the state when the private facility is compared to a similar public facility.

Additional sections of Oklahoma's privatization laws address the siting of corrections facilities (§ 57.561.2), and contracts between private prison operators in the state and the agreements they may enter into with the federal government or other states. This section thus authorizes vendors not doing business with the state to do business with other governmental entities. It also limits contracts to minimum and medium security inmates, criminalizes actions in these prisons that are criminal in public facilities (§ 57.563.2(B)), and provides state training to these facilities.

Tennessee

Tennessee's Private Prison Contracting Act of 1986 authorizes the commissioner of corrections to enter into contracts for correctional services for medium and minimum security prisoners (Tenn. Stat. Ann. § 41-24-103). In awarding contracts, Tennessee stipulates many of the requirements noted above in the discussion of other states regarding the qualifications of a vendor, the rights of the state to cancel a contract with notice, and the process to be used in letting a contract. Yet Tennessee also requires that the "cost of the private operation, plus the state's cost for monitoring the private operation, are no greater than the state's cost for operating a medium or minimum security prison of like design" for the contract to be acceptable to the state (§ 41-24-104(4)(C)(2)(B)), and that the level and quality of services are also of at least the quality offered by the state (§ 41-24-104(4)(C)(2)(A)). Hence, the implicit goal of the Tennessee privatization plan appears to be cost reduction, but no specified level of savings is mandated.

Section 41-24-105 provides for an initial three-year contract with subsequent two-year renewals. Both the quality of services and the costs of the service provided by the vendor are to be reviewed, with the vendor required to provide detailed information about security, escapes, disciplinary action, and a host of other incidents.

Section 41-24-106 requires the governor to develop a plan for resumption of state control prior to the letting of any contract, with the plan open to comment by state officials and an oversight committee. Tennessee law also requires state indemnification by the private vendor (§ 41-24-107), criminalizes specific actions in private facilities that are also criminal in a public facility (§ 41-24-108) and denies private vendors the power to determine sentences, releases, and other issues regarding the computation of time served (§ 41-24-110). This section also exempts the private vendor from the government procurement rules that governmental agencies must follow (§ 41-24-111).

In § 41-24-109, it is stipulated that the commissioner of corrections shall monitor the private facilities and report to the legislature on the contracts. Finally, §§ 41-24-111-112 stipulate the rights of employees under the private facilities. First, § 41-24-111 guarantees former public employees who are now in a private facility the right to continue in the state pension and retirement system. Second, § 41-24-112 grants former state employees who become employees of the vendor the right to join any employee organization, retain sick and leave time accumulated, credit for seniority, and preference in hiring. In effect, unlike other states, Tennessee specifically appears to have contractual language to address the contingency of what to do with state employees who become employees of a private facility.

Texas

Texas' enabling legislation in 1987 gave to the board of corrections the power to contact with private vendors for corrections services, but these contracts are only for minimum and medium security inmates (Tex. Gov. Code §§ 495.001(a)-495.002).

Section 495.003 defines the contract standards and qualifications, specifying the qualifications of the vendor and mandating that the vendor comply with American Correctional Association standards and specific court orders. This section also mandates that the state may terminate a contract for cause (§ 495.003(b)(5)), that there be a minimum savings of 10% when compared to a public facility (§ 495.003(b)(4)), that the vendor provide for regular on-site monitoring (§ 495.003(b)(1)), and that the vendor indemnify the state for any lawsuits.

Section 495.004 follows Colorado and Louisiana in defining some limits on the power of private vendors over inmates. Among those powers not delegable are computing inmate release, parole, good conduct time, and transfers of any kind. Section 495.005 also limits the ability of a vendor to raise sovereign immunity as a bar to suits.

Summary of State Enabling Legislation

The enabling legislation of the seven states examined demonstrates a wide variety of differences. Some states, such as Texas and Florida, have very specific financial goals connected with privatization, whereas Oklahoma, Louisiana, and Tennessee have cost goals but they are vague. Moreover, New Mexico and Colorado seem to have no specific goals stated. Hence, in evaluating performance of private vendors or the success in privatizing corrections facilities, some states seem to have more clearly measurable goals than others.

Second, states vary in the specificity of the enabling legislation. New Mexico authorizes specific sites to be privatized, Florida created a commission, and other states empower their DOC to privatize. The degree of specificity appears to be a matter of choice in regards to how much control a state wishes to retain over privatization decisions versus delegating that power to their DOC.

Third, states such as Tennessee, Louisiana, Texas, and Colorado provided specified powers not delegable to a private vendor, with most of these powers related to computation of sentence. However, Colorado also reserved to itself final authority to discipline, while Louisiana seemed to authorize the private vendor to discipline. Most of the other states left this question unaddressed. These clauses are important to insulate the legislation from constitutional attacks that they violate the nondelegation mandates.

Fourth, states such as Oklahoma and Tennessee criminalized actions in private prisons that would similarly be criminal in a public facility. This provision addresses concerns that escaping or committing other acts in a private prison would in fact be criminal.

Fifth, all of the legislation provides for some type of monitoring system. Colorado requires the vendor to pay for the monitoring costs, but the other states are silent on this issue. In addition, the statutes leave the language somewhat open-ended regarding state or DOC access to the private facility. None of the legislation states unequivocally that the state shall have immediate access to inspect a facility whenever it wishes. Nor do any of the statutes address issues of free access to information or citizen access to the information regarding the operations of the private facility. This type of language seems critical to allowing the public, press, and government the same ability to monitor a private facility as they have to monitor and inspect a public facility.

Moreover, as shall be noted below, the issue of monitoring and enforcement of a contract are fraught with many problems. These problems include issues of regulatory capture, remedies for breach of contract, and other concerns that the experience of these states and the model statute seems to have ignored.

Sixth, all of the statutes address the issue of indemnification and insurance requiring the vendor to indemnify the state fully for all of its costs that might result from lawsuits in the facility.

Seventh, Florida stands out in creating a unit to oversee the privatization of corrections facilities that is separate from the state DOC. Harding (1997: 160-165) advocates this type of privatization system because it avoids the conflict of interest problem between the state DOC serving as the regulator of corrections and as a competitor with a private vendor to supply corrections services. While this model has its virtues in addressing conflicts of interest, it is also open to some serious control problems that might limit the ability of the DOC to monitor.

Eighth, the majority of the states authorizing privatization specifically note that the contracts are for minimum and medium security adult prisoners. While some of the enabling legislation leaves open the possibility that maximum or close-custody inmates may be housed in a private facility, none of the states specifically indicate in their enabling legislation that facilities for these type of inmates will be privatized or how one should define or determine how an inmate is classified. It appears, then, that the trend is for states to retain custody of its most dangerous inmates in their own public facilities.

Finally, absent from all of the enabling legislation was discussion of authorization of use of force. Little attention was given to who may use force and when, or even authorizing private facilities to use force at all. This language, while addressing the prosecution of crimes committed in private prisons, does little to authorize private guards to use force.

Overall, the enabling legislation generally followed the model statutes proposed by Robbins and Crane. The experiences of these states indicate that Minnesota should include many of these provisions in its statute. Yet the examination of these state's statutes, as well as the unique circumstances of Minnesota, also suggest that additional provisions need legislative consideration and enunciation in statute.

Minnesota Enabling Law

Presently, there is only one private prison in Minnesota and it houses some state inmates. However, there is no clear and specific enabling legislation for this private facility that parallels language in the states discussed earlier. Perhaps the reason for this is that the Minnesota facility is a contract to rent beds or space and not to privatize either an existing public facility or to contract for the use of an entire facility. Hence, there could be some questions regarding the applicability of the type of comprehensive enabling legislation found in states and situations where either public facilities are privatized or where an entire private facility is used to house inmates.

However, even in the case of a partial privatization of a facility, or where a private vendor only houses a few of the state's inmates, enabling legislation is still necessary both to ensure that the DOC has the authority to house inmates in this fashion and to insulate the state from any legal or constitutional claims or questions arising out of this arrangement.

The Minnesota DOC is created in Minn. Stat. § 241.01, with the commissioner of corrections appointed by the governor under the provisions of Minn. Stat. § 15.06. The commissioner's duties and powers include determining the place of confinement for inmates and to "utilize state correctional facilities in the manner deemed to be most efficient and beneficial to accomplish the purposes" of corrections (*Id.* at § 241.01, subd. 3a(b) and (f)), and one of the overall goals of the DOC is to "prevent the waste or unnecessary spending of public money" (*Id.* at § 241.01, subd. 3b(1)).

In addition, Minn. Stat. § 241-01, subd. 7 also permits the commissioner to authorize the use of corrections facilities by social service, educational, or rehabilitation agencies and provides that these agencies may be required to pay for use. Finally, § 241.021 gives the commissioner the power to license and inspect all public and private correctional facilities in the state.

Nowhere in this statutory language is there any explicit authorization to privatize a correctional facility or contract for services with a private corrections facility, even the Prairie Correctional Facility (PCF) which already houses Minnesota inmates. Conversely, nothing in chapter 241 states that the commissioner does not have the authority to privatize a corrections facility. In fact, one might be able to argue that the authority to house inmates in a "manner deemed to be efficient and beneficial to accomplish the purposes" of corrections gives the commissioner enough latitude to privatize a facility. Perhaps this is so, but for reasons noted below, this open-ended discretion that is given to the commissioner is not sufficient.

First, let us turn to the current contract between the State of Minnesota and Corrections Corporation of America to house state inmates at PCF. The legislation authorizing this contract is found in Laws 1996, chapter 408, article 1, section 6, subd. 3, where the Minnesota legislature declared that:

> The commissioner shall enter into a contract with a nonprofit correctional facility to house at least 200 inmates at the facility by April 1, 1997, if the cost does not exceed $55 per inmate per day.

There are several reasons why this language fails to sustain the current contract. First, this contract empowers the commissioner to enter into a contract "with a nonprofit facility." While perhaps at one time the PCF was a nonprofit facility, it no longer is and instead it is now owned and operated by CCA, a for-profit corporation.

Second, the legislation empowers the Commissioner to enter into a contract to house at least 200 inmates. The current Minnesota contract requires CCA to "reserve 50 inmate beds for the exclusive use of the State." Hence, the current contract is for a number far less than what the enabling legislation calls for.

Perhaps one could argue that one should not construe the chapter 408 language so literally. Although Minn. Stat. § 645.16 states that legislative intent controls construction, yet § 645.08(1) stipulates that ordinary rules of grammar and usage control construction. What this suggests is that a "nonprofit" facility means a nonprofit facility unless the intent of the legislature was for the term nonprofit to mean something else. That is unlikely because the intent of the legislature in 1996 was to assist the Appleton community in providing state inmates to the PCF while it was still owned by the community. Hence, the intent was not to authorize a blanket power to send inmates to any private corrections facility but to a specific one under clearly defined circumstances that existed at the time. That type of ownership arrangement no longer exists.

In addition, chapter 408 stipulates that the contract must be for at least 200 inmates. One could argue that the 200 number should not be read literally. Again, there is no reason to suggest that the legislature meant the number "at least 200" to mean any number below 200. In fact, if one argues that the 200 figure should not be read literally then one would also have to argue that the stipulation that the cost of $55 per day per inmate should also not be read literally. It is unlikely that one could argue that the legislature would have permitted the commissioner to enter into a contract if the per diem were $60 or $70 per day. The $55 figure is an explicit cap figure on cost. Hence, if the $55 figure must be read literally, then so must the 200 figure and the reference to a nonprofit correctional facility. The upshot of all this is that legislation empowering the commissioner to enter into the current contract with CCA for PCF fails to sustain the authority to enter into that contract.

In addition, the contract itself states that the authority to enter into the current contract with PCF is located in Minn. Stat. § 15.061, which is the general authority of a department or agency to enter into contracts for professional or technical services. However, Minn. Stat. § 16B.17 defines professional and technical services to mean "services that are intellectual in character; that do not involve the provision of supplies or materials; that include consultation, analysis, evaluation, prediction, planning, or recommendation; and that result in the production of a report or the completion of a task."

No reasonable interpretation of Minn. Stat. § 16B.17 would seem to include the delivery of private prison services. The product delivered by a private prison vendor is not intellectual in nature and certainly the final product is not the production of a report and it does seem to include supplies. Overall, the current DOC contract with CCA cannot be upheld under current statutory authority and were it challenged under state law, a plaintiff might well prevail in the claim that the DOC does not presently have authority to contract for the private prison services at PCF.

Moving beyond this specific contract, chapter 408 and § 15.061 are deficient as enabling legislation either for the current contract or for the privatization of correctional facilities in general. First, both fail to specify the issues of state liability, the scope of privatization to occur, the goals of privatization, issues of use of force, computation of good time credits, and a host of other issues found in the enabling legislation of other states. Most importantly, because there are no nondelegation clauses, the state has opened itself up to constitutional challenges that its current privatization is perhaps illegal and unconstitutional.

Second, one cannot appeal to chapter 408 as general authority to privatize because the language of the law was for a specific number of beds with a single vendor. This is not "carte blanche" authority to privatize.

Third, the existence of chapter 408 also points towards sustaining the proposition that, absent explicit enabling legislation, the commissioner does not have the inherent authority to privatize. The mere fact that the legislature had to create this legislation to empower the commissioner to act suggests that the legislature itself thought that, absent this legislation, no inherent power to privatize existed.

Fourth, even if the commissioner has inherent power to privatize, the open-ended discretion given to him or her to privatize and turn over state facilities, operations, and decision-making to a private vendor creates serious delegation of power questions. Hence, presuming this privatization power is inconsistent with state and federal constitutional mandates.

Finally, if in fact the current contract with CCA lacks authorization, what are the implications? Traditionally, habeas corpus is the remedy for an inmate illegally detained (Minn. Stat. § 589.01 *et seq.* (1996). This suggests that perhaps any Minnesota inmate incarcerated in the PCF might be able to file a writ of habeas corpus to obtain release. However, in *State ex rel. Richter v. Swenson*, 243 Minn. 42 (1954), the Minnesota Supreme Court held that habeas may not be used to inquire into the form, manner, or place of confinement. Instead, habeas inquires into the jurisdiction of the court that sentenced the inmate. *Swenson* thus suggests that habeas may not be available to the inmate as a form of relief. Instead, if the contract is declared as lacking authorization, the most likely scenario is that the state will be given the opportunity to transfer the inmate to another facility or the state will be given the opportunity to create the contract legislatively.

Overall, were Minnesota to consider any further privatization as an option, it needs to enact enabling legislation to authorize this course of action.

Recommendations for Enabling Legislation

If Minnesota wishes to privatize any corrections facility, it needs to enact enabling legislation. As noted above, the decision to privatize is essentially legislative because corrections is a state activity. This means that the legislature and not merely an executive agency should make the decisions regarding if, when, and under what conditions corrections should be delivered, and whether privatization is an option. Given that, what should Minnesota's enabling legislation contain?

Perhaps the most important provision is a definition of the goals to be achieved in privatizing. Whether it be cost-savings or some other reason, the legislature needs to specify some goals and objectives so that the performance of privatization can be measured and ascertained.

Second, the enabling legislation needs to contain specific language authorizing the DOC or some other body to contract with private parties to deliver correctional services. The types of services need to be defined: authority to house inmates, authority to build facilities, rent private facilities, or something else. In short, the lines of authority must be clear to ensure both that legislative intent is secured and to preclude *ultra vires* challenges. Moreover, the state could give blanket authority to the DOC to privatize, or it could follow the New Mexico example and authorize specific units. The choice here is contingent upon the goals the state wishes to achieve and the degree of control it wishes to maintain over siting and implementation of facilities.

Third, the state needs to specify what decisions are not delegable to the private vendor. At a minimum Minnesota should follow other states in not delegating decisions concerning calculation of sentences, releases, etc. However, the state may also wish to indicate that it is not delegating the power to make rules of punishment or to discipline. Instead, it reserves that final right to itself.

Fourth, the state needs to include a general indemnification clause that requires the vendor to pay for all the court costs, judgments, etc., arising out of the vendor's management of the facility.

Fifth, the state needs to insert a provision that authorizes private operators to use force and it needs to include a provision that criminalizes acts in a private prison that would be illegal in a public facility.

Sixth, the state needs to specify a plan that the state would follow to resume control of the facility upon a contract termination, breach, or other occurrence such as a major incident or strike.

Seventh, the state needs to stipulate its right to inspect and how it wishes to monitor the facility. This language should say more than the state has the right to monitor. Instead, it must be clear as to the conditions under which the state will inspect, how it will monitor, and how monitoring costs shall be paid.

Eighth, the state should indicate terms of initial and subsequent contracts, and also indicate the conditions for breach of contract. The state can either provide a model contract that defines very specific terms and conditions of a contract or it can provide general guidelines regarding what the contract should contain or address. The recommendation here is that the greater the legislative specificity the better, since that helps ensure that the state's interests are represented and protected.

Ninth, if the state intends to privatize any existing state facility, it should follow the lead of Tennessee and address the status of public employees who become private employees of the vendor. This discussion should address issues of benefits, retirement, seniority, etc.

Tenth, the state should also include within the enabling legislation discussion of the RFP process, the terms needed to be placed in a contract, qualifications for vendors, and a series of other issues regarding the contracting process.

Eleventh, the state should agree on the definition of what constitutes a specific security classification for inmates. The reason for this is to eliminate any disagreements between the state and the vendor regarding what types of inmates are to be housed in a facility. This is especially important if the private vendor also decides to accept inmates from another state.

Finally, the enabling legislation should address the issue of labor strikes and how they will be addressed. As will be noted below, private employees retain right to strike and the state needs to consider this possibility in its enabling legislation.

RFPS AND CONTRACTUAL ISSUES

In addition to enacting enabling legislation to permit privatization, states also need to solicit bids from private corrections vendors and contract for their services. States have taken various approaches to the RFP and contract process, and the terms of both the RFPs and the contracts seem to vary.

Several authors argue that the RFPs and the contracts for private corrections services should be detailed and significantly follow the terms found in the enabling legislation (Robbins 1988; Crane 1998). Specifically, the argument is that the enabling legislation and the actual contracts should parallel one another, with the contract containing all of the terms found in the enabling legislation.

There are several virtues to this approach. First, once the legislature has decided the limits of contracting authority, the contract simply replicates those terms. Second, this approach gives the DOC more leverage in negotiating contracts since they can always use the fall-back position that they cannot bargain on certain terms because the legislature has already spoken or settled the issue. Third, modeling the contract after the legislation suggests that a model or draft contract will be prepared by the state as opposed to letting the private vendor dictate the terms of the contract. This means, then, that in anticipation of soliciting bid from private vendors, the state might wish to create a model privatization contract.

Along with creating a model contract, states might also consider formalizing the RFP process. Specifically, the RFPs would state with particularity the process of soliciting bids, what is considered an acceptable bid, and how contracts are awarded. Oklahoma, Texas, and Minnesota provide three examples of this process.

Oklahoma

The state of Oklahoma appears to provide the most detailed and formal approach to the RFP and contracting process. The state's most recent RFP was issued on January 30, 1998, and it was a 43-page document that could be found on the Oklahoma DOC web page. The RFP provides a detailed account of the purpose of the procurement of proposals, the number of inmates it wishes to house, and the timing of the bidding process. The RFP also offers detailed instructions regarding how a bid shall be offered, what shall be contained in the bid, and under what terms, conditions, and limitations a contract for private corrections services shall be let. Significantly, the RFP details the language provided in the Oklahoma privatization enabling legislation. Finally, the RFP is quite detailed, often to the point of ranging from describing the specific books to be located in prison library to who is responsible for what medical, dental, and other costs under the contract.

Besides the RFP, Oklahoma also makes available a 52-page model contract on the web. This contract is detailed, paralleling the language found in the statute and in the RFP. It covers issues of terms of contract, facilities and maintenance, operations and services, including use of force, escapes, and health services, and it also addresses other topics such as monitoring and remedies for breach of contract.

Overall, Oklahoma provides the most exact and formalized process of matching the enabling legislation to the RFP process and the creation of contracts.

Texas

The Texas Department of Criminal Justice (TDCJ) also makes available on its web page information regarding the solicitation of bids and a model contract (TDCJ 1998). Unlike Oklahoma, which has detailed enabling legislation that provides a guide for the contract solicitation and contracting process, Texas has much less detailed enabling legislation and the TDCJ was significantly entrusted with the authority to create the solicitation or RFP process.

The model contract that the TDCJ has created also is detailed, providing in-depth information on the types of facilities it seeks contracts for, the costs, terms and conditions of the operation of the facility, and the remedies for monitoring, breach, etc. The TDCJ model contract also has detailed information on insurance requirements, liability of the state versus the vendor, and the rights of the state to modify or change the agreement.

Minnesota

Unlike Texas and Oklahoma, Minnesota does not seem to have a formal RFP process for the solicitation of private corrections facilities. In addition, there is no model contract, and the only contract that exists is the current contract for services with CCA to manage the PCF (Minnesota DOC 1997). In addition, as noted above, because there was no formal enabling legislation to permit the DOC to privatize the PCF, there is no language upon which to guide or model the contract.

This lack of enabling legislation, RFP documents, and model contract has presented problems for the state DOC. For example, interviews with Minnesota DOC staff indicated that the current contract was not satisfactory on many fronts since it lacked detail on what to do when the vendor failed to honor terms of the agreement, i.e., failure to provide a drug rehabilitation program as required by contract. In addition, the contract is silent or deficient on many other grounds.

One objection to the above criticism is that comparing the Minnesota contract to those found in Texas and Oklahoma is inapt because in Minnesota we are looking only at the housing of a few inmates and not the privatization of entire public facility or the use of an entire private facility. This argument is not persuasive. There is no reason why a contract to house a few inmates should not address issues such as use of force, library access, etc. While some clauses found in Texas and Oklahoma contracts may not be applicable to the current PCF contract, there is no reason to think that a total failure to address these issues would be proper or protect either the best interests of the state or the inmates.

Monitoring and Inspection

The Minnesota contract is generally silent on the issue of monitoring the vendor. No clause of the contract unambiguously gives the state of Minnesota right of access to the facility for the purpose of monitoring. Clause VI requires the vendor to provide the state with some reports or information on inmates and clause VII designates who the state's representative is for the purpose of administering this contract, yet neither clause guarantees the state the authority to enter and inspect the facility.

In comparison, Article 9.1(A) of the Oklahoma Model Contract requires that the vendor shall provide an office for a monitor and Article 9.1(B) clearly states that the "Contract Monitor, in the performance of his duties, shall have access at all times, with or without notice, to inmates and staff, to all areas of the facility, and to inspect all documents and records relating to the contract and the Owner/Operator's performance." In Texas, clause E.2.2 of the Model Contract provides that the "Contractor shall provide entry at all times by the Texas Board of Criminal Justice and the Department...as well as any other persons designated by the Department, shall be admitted into the facilities at any time." In addition, clause C.9 provides for a contract monitor paid for by the vendor.

Overall, both the Oklahoma and Texas contracts provide greater detail regarding state access and right to inspect a private facility than does the Minnesota contract.

Legal and Law Library Access

Clause I.P of the Minnesota contract mandates that the "contractor shall provide a library which shall be made available to all inmates." This clause states that the library shall have a "collection of titles reflecting the general reading interests of the State inmate population." Clause I.R requires that the "contractor shall allow state inmates to obtain resources through the Law Library Services." Together, these contract clauses are supposed to guarantee inmates adequate access to a prison law library that would meet the constitutionally-mandated rights of access for inmates. However, the language here is too inexact in that it fails to define what materials would be adequate under current constitutional mandates. Instead, it leaves open too much discretion to the vendor to decide how to stock law materials, thus opening the state up to liability for a failure to provide adequate resources.

Section C5.11 of the Texas Model Contract specifically states that the contractor "shall provide space for a legal library containing all the resources necessary to meet all Court Orders and constitutional mandates."

Section 5.30 of the Oklahoma Model Contract and Appendix D go further and state by title the books that the vendor should provide in the library. Both the Texas and Oklahoma contracts are superior to the Minnesota model in that they either make it an affirmative duty of the vendor to stock a library to comply with the Constitution and court orders, or they state what volumes the library should contain. Either language removes vendor discretion, guaranteeing inmate rights and the protection of state interests.

In comparison to Minnesota, Texas and Oklahoma provide greater contractual specificity regarding the library requirements.

Mandated Savings/Goals

There is no clause in the Minnesota contract that mandates that the vendor must provide correctional services less expensively than comparable services offered by the state. Nor are any other goals stated in the contract. In comparison, neither Texas nor Oklahoma specify that in their model contracts. However, in the enabling legislation for both states, cost savings as a goal of privatizing are described. Overall, none of the contracts are good in detailing the specific cost savings of the contract, although all three contracts do require the vendor to indicate a per diem cost per inmate in the contract. However, the issue of cost savings should appear in a contract so that both the vendor and the state are clear as to the reasons for the contract and to indicate that if the mandated savings do not materialize, then the state may repeal the contract.

Liability, Indemnification, and Insurance Policy

Clause X.A of the current Minnesota contract with CCA requires that the "contractor shall indemnify, save, and hold the State, its representatives and its employees harmless from any all claims or causes of action" arising from the performance of the contract. Nowhere in the contract is there a clause specifying that the vendor carry an insurance policy of a specific dollar amount.

Article 8 of the Oklahoma Model Contract provides detailed contractual language concerning insurance and liability. Section 8.1 is a general indemnification clause that protects the state from any claims. Sections 8.2 and 8.3 mandate the vendor to carry insurance to cover death and all claims based on civil rights violations. Section 8.3 also mandates specific dollar amounts for workmen's compensation, comprehensive, automobile, business interruption, and other types of insurance.

In Texas, section H.1 addresses insurance, stipulating that the "contractor shall obtain and provide proof of general liability coverage," worker's compensation insurance, professional liability insurance, contractual liability insurance, boiler and machinery insurance, and environmental insurance, with the dollar amounts of the coverage specified in the contract. Section H.2 articulates specific details on the contractor indemnifying the state from suit arising from the operation of the facility and the scope of the coverage here parallels the Oklahoma language.

Overall, Minnesota contractual requirements regarding insurance are deficient in comparison to language found in Texas and Oklahoma. Under the current contract, the exact insurance requirements are left vague, subjecting the state to unnecessary ambiguity and possible litigation or disputes over the requirements imposed upon the vendor.

Breach of Contract

There is no clause in the Minnesota contract addressing the issue of breach of contract or damages or penalties that result from the vendor breaching the contract.

Article 10 of the Oklahoma Model Contract provides significant detail on breach of contract and remedies. Section 10.1 address the issue of the state's breach of contract while § 10.2 addresses vendor's breach. A vendor is deemed to have breached the contract if he fails to "perform in accordance with any term or provision of the contract"; or if there is "partial performance of any term or provision of the contract" not excused by the state; or if the vendor acts in a way that would be "prohibited or restricted by the contract or law." Section 10.2(C) defines the scope of possible damages for breach, including actual or liquidated damages or termination of the contract, and § 10.3 and Appendix C outline in detail specific dollar amounts for liquidated damages.

Part II, section I.3 of the Texas Model Contract describes the conditions that constitute vendor breach of contract. These conditions parallel the grounds found in the Oklahoma Contract, providing for breach when the vendor fails to "keep, observe, perform, meet, or comply with any covenant, agreement, term, or provision" of the contract. Breaches also include failure to maintain the appropriate accreditation (such as ACA standards) of the facility, and a failure to comply with TDCJ policy. Section I.3.3 outlines the remedies available to the state, and § I.9 provides for penalties and liquidated damages.

Overall, Minnesota's contract is woefully deficient in failing to define the conditions that constitute a breach of contract such that the interests of the state are not really protected very much or at all. Further, for months CCA has failed to meet its contracted obligation to provide a drug rehabilitation program at PCF, indicating an inability or unwillingness on the part of the state DOC to act to enforce the current contract.

Right of State to Change Contract/Contract Contingent Upon Availability of Funds

There is no clause in the Minnesota contract giving the state the ability to alter the contract or making the terms of the contract contingent upon availability of state funds.

In Texas, Part II, § I makes TDCJ performance of any contract with a private vendor "contingent on the availability of appropriated funding" from the state. In the Oklahoma Model Contract, there is similar language. These clauses are important because they give the state the option to nullify a contract if the state legislature does not allocate the money for the contract, thus averting a situation where the state must still pay on a contract even though it has not appropriated money for it.

Contract Termination/Strike Support

There is no clause in the Minnesota contract that provides for what happens when the contract is terminated or what will happen in the event of a strike.

Section 5.18 of the Oklahoma Model Contract mandates that the vendor shall provide the state a plan which details the "procedures for assumption of operations by the Department in the event of the Operator's bankruptcy or inability to perform its duties." Elsewhere, § 2.4 allows the state to terminate the contract for any reason if it determines if it is in its best interest to do so, and § 10.4 describes the procedures to follow for termination for cause conditions.

In Texas, part II, § 1.3.6 permits the state to terminate any contract if funds are unavailable. Similar language is found in § 10.5 of the Oklahoma Model Contract.

None of the three states provide any specific language regarding strike support or what to do if a strike occurs, although § 10.4 of the Oklahoma contract implicitly addresses the issue of strikes by requiring a plan for when the vendor is unable to perform its duties.

Overall, Minnesota does not have adequate contractual language to address strikes or state control in the event of a strike or the termination of a contract. It needs this language even though the state currently is only renting beds because if CCA were to close PCF the state would still need to address the issue of where to house the inmates it has at that facility.

Reserve Right of Final Discipline and Use of Force

There is no clause in the Minnesota contract that specifically addresses or authorizes the private vendor to use force. On the other hand, Clause I.E of the Minnesota contract indicates that "inmates from the state shall be subject to the contractor's policies, procedures, rules, and regulations" and that the "contractor shall have physical control and the power to exercise disciplinary authority over all inmates from the state." This clause authorizes the private vendor to discipline inmates and it invests in the vendor the final authority and decision to make disciplinary decisions.

Section 5.18 of the Oklahoma Model Contract stipulates that the vendor will "comply with the Department policy regarding use of force" and this section of the contract also makes it clear under what conditions and when the vendor may use what types of force. At no point does the state confer unlimited power to the vendor to use force.

Section 5.15 discusses discipline and indicates that the "Department's inmate disciplinary policy shall be used" and that the state reserves the final decision regarding discipline.

In Texas, § C.5.23 states that the contractor "shall impose discipline through rules, regulations and orders pursuant to an Offender disciplinary system meeting or exceeding ACA standards, Court Orders, and TDCJ policy." Section C.6 defines the authorized uses of force by private vendors, indicating both the time when force may be used and the level of force that may be employed in these situations.

Because Minnesota has not enacted enabling legislation that reserves its right to make the final disciplinary decisions or to define the limits in the use of force by the private vendor, Minnesota has potentially opened itself up to a legal challenge that its delegation of use of force and decisions over discipline are an unconstitutional delegation of public power to a private party.

Conclusion

Overall, unlike Oklahoma and Texas, the Minnesota RFP and contracting process is quite deficient and unsatisfactory to protect the interests of the state. A comparison of just a few sections of the Minnesota contract with those of other states indicates that the contract fails to protect adequately the state's legal interests. In addition, it is doubtful that Minnesota DOC has the authority to contract for private corrections services under current state law. Enabling legislation is needed to address the authority to contract issue. It should specify the RFP process and include the terms of a model contract used by the state of Oklahoma.

RIGHT TO STRIKE AND UNIONIZATION

One critical legal or political issue Minnesota should consider as it privatizes a facility is the possibility that employees of the facility could organize and strike. This is a real contingency that confronts the operation of a private facility that is not similarly confronted with a public facility in Minnesota.

Generally, Robbins and others who have written on the topic of the right to strike have not been experts in labor law. Consequently, they have ignored specific problems regarding the unionization of corrections officers and the problems that may occur when a prison facility transfers from public to private control.

The Public Employees Labor Relations Act of 1971 (PELRA) controls the labor relations of all public employees in the state of Minnesota (Minn. Stat. § 179A.00 et seq.). Sections 179A.18 and 179A.19 make it illegal for "essential" state employees to strike, and corrections officers are considered essential officers. Hence, in the event of a termination of a collective bargaining agreement or a breakdown in talks, there is no real threat of a strike unless the strikers wish to face termination and the union representing them wishes to face loss of representation and other representational rights. Instead, § 179A.15-16, for example, call for binding arbitration of disputes.

Once a public corrections facility is privatized, or if a private facility is used to house Minnesota prisoners, that facility and its employees are no longer under the jurisdiction of PELRA. Instead, labor relations in these facilities come under the jurisdiction of the federal government and the National Labor Relations Act (NLRA) (29 U.S.C. § 151-169 (1998). The NLRA does not ban strikes in the private sector. The result of using a private corrections facility is that the State of Minnesota is effectively preempted from legislating on most matters of labor relations. The state would not be able to legislate to ban strikes in these federal facilities because federal labor relations law generally preempts state regulation.

Put another way, the state of Minnesota cannot ban strikes in private facilities where it houses inmates while it may ban strikes under facilities it owns and operates because in the latter case the employees are public and the state has the authority to regulate its own employees.

Is there any way that the State of Minnesota can act to avert the threat of a strike or labor impasse at a private institution? Robbins (1988) argues that states should insist in their contract with private vendors that the latter bargain for no strike clauses or for binding arbitration with their employees. However, just because the state asks that of a vendor does not mean that the union will agree to that clause. Furthermore, there is also some question whether the state could insist on specific bargaining terms of a collective bargaining agreement without violating the NLRA. Contrary to Robbins' (1988) suggestion, states probably cannot force a private vendor to bargain with private employees for certain terms.

In addition, there are several other issues to consider when addressing the right to strike and collective bargaining. First, as of today, there have been no strikes at a private prison facility in the United States. This suggests that while there is a possibility of a strike, the reality of such an occurrence may be slim. Hence, this track record may suggest that the fear of a strike should not be considered a significant concern.

Second, the reason there have not been any strikes so far is that because of specific NLRA rules governing corrections officers, it is very difficult for corrections officers' unions to form in private corrections facilities. Absent a union, a private corrections employer cannot bargain for a no strike clause and absent a union, it is difficult for private corrections officers to strike.

The basis of this difficulty to unionize lies in § 9(b)(3) of the NLRA. This section states:

> [T]he Board shall not...(3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard, to enforce against employees and other persons rules to protect the property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated, directly or indirectly, with an organization which admits to membership, employees other than guards (29 U.S.C.A. § 159(b)(3) (West. 1998)).

The NLRA "guard exclusion" clause traces its genesis to amendments made to the NLRA in the 1947 Taft-Hartley Act (Jensen 1986: 457). Coming out of World War II and having experienced situations where plant guards hired to protect the employer's property went on strike with other employees, there was a concern in Congress that if guards were in the same union or bargaining unit as other employees, their sympathies for their fellow workers would render them unable to perform their duties (Jensen 1986; McGuiness 1981). Hence, in the Taft-Hartley Act, Congress amended the NLRA to preclude guards from either directly or indirectly being in the same union.

Over the years, the National Labor Relations Board (NLRB) and the federal courts have interpreted this provision broadly in at least two respects: first, in regards to the definition of "guard" and, second, in regards to the meaning of "affiliation."

Over the years, the NLRB and the federal courts have ruled that a guard includes fire prevention workers (*Chance Vought Aircraft*, 110 NLRB 1342 (1954)), alarm service employees (*NLRB v. American District Telephone* 205 F.2d 86 (3d Cir. 1953)), and oddly, even janitors and dressing room attendants in some cases (*One Star Boat Company*, 48 LRRM 1262 (1961); *Swift & Company* 117 NLRB 61 (1957)). The most recent pronouncement on what and who the guard exclusion clause covers is found in *BPS Guard Services, Inc. v. NLRB* (942 F.2d 519 (8th Cir. 1991)), where the Eighth Circuit stated:

> the potential for divided loyalty is not limited to security or police-type rule enforcers but instead exists whenever any employee is vested with rule enforcement obligations in relation to his coworkers (*Id.* at 522).

Under the *BPS* standard, correctional officers are clearly guards for the purposes of § 9(b)(3) and therefore may not be affiliated in the same union with other non-guard employees. Moreover, depending on how one interprets the *BPS* rule, many other personnel in a private corrections facility could be considered a guard under § 9(b)(3) if they enforce some rules in relation to other employees in the facility.

What does it mean to be "affiliated?" In *Magnavox Co.*, 97 NLRB 1111 (1952), for example, the Board ruled that guards must be free to "formulate their own policies and decide their own course of action." *Id.* at 1113. In *Mack Manufacturing Corporation*, 107 NLRB 209 (1953), the Board stated that non-affiliation meant a "union representing guards... [must] be completely divorced from that representing non-guard employees." *Id.* at 212. While subsequent decisions over the years have added some nuances to the complete divorce rule, essentially that remains the rule today (Jensen 1986).

In the context of corrections, the affiliation and guard definitions mean that no private corrections officers can be affiliated in the same union with non-corrections officers. This exclusion means that none of the major coalitional unions can seek to represent or assist in the representation of corrections officers. This leaves private corrections officers on their own to organize (McDonald 1998: 61).

The degree of difficulty facing private corrections officers who wish to organize is demonstrated by two examples. First, few private corrections facilities in the United States are unionized. This is true because, in part, most of the private corrections facilities have been in southern right-to-work states (Schlosser 1998: 65). Yet in 1997, in the Wyatt Detention Facility in Central Falls, Rhode Island, the NLRB supervised and certified the election of the Rhode Island Private Corrections Officers Union (RIPCO) to represent the guards. In addition to RIPCO, the National Professional Corrections Employees Union (NPCEU) has formed and it represents a treatment facility in Washington, D.C. Finally, the

Kentucky Corrections Officers Association (KCOA) also represents some units. Overall, though, the number of organized private units is small.

Second, when a public and collectively bargained corrections facility goes private, the union may lose its representation status and it may be difficult to reorganize. The PCF facility in Appleton, Minnesota was represented by AFSCME when it was a public facility. Once it went private, the guard exclusion requirements of § 9(b)(3) precluded AFSCME or any other major union from representing the corrections officers.

Overall, the significance of privatizing or operating a private corrections facility in Minnesota would mean that the state could no longer guarantee that the workers would not strike. However, because of the significant difficulties facing private corrections officers in organizing under the NLRA, the chances of either a union forming or a strike occurring may be slim. Yet the successful formation of unions in other jurisdictions suggests that it may not be impossible for unions to form in private corrections facilities and if they do, the possibility of a strike when labor negotiations break down will increase.

MONITORING, COMPLIANCE, LICENSING, AND REPORTING ISSUES

One of the most important issues facing states when contracting out for any service, including corrections, is the problem of monitoring a private vendor to ensure compliance with the terms of the contract and being able to take appropriate action if compliance is not forthcoming.

Monitoring and Reporting

The first issue in terms of monitoring is the scope of monitoring access the state will be permitted. Monitoring is important because it is the means by which the state ensures that private facilities and vendors are honoring the terms of the contract and operating according to any standards set up by the contract or state law.

The first issue is who will be the monitor, how will the state gain access, and under what conditions will the access occur? Second, what will be the scope of the access by the public or the press? Third, will documents produced by the private vendor be covered by the same freedom of information laws as similar documents produced by state institutions? Will the vendor be engaged in self-reporting of required information, or will the state independently gather information? About what type of events does the state wish to be notified? Does it wish to know about: all inmate incidents? Deaths? Disciplinary or use of force issues? Excessive medical care expenses? Finally, how frequent should the reporting occur? Daily? Periodically? Per incident? All of these are important issues speaking to the degree of oversight the state wishes to have versus the amount of discretion it wishes to give a private vendor.

Yet the bottom line question is does monitoring work and is it an effective tool to ensure compliance? The evidence here is mixed and the answer depends on whom one talks to and when.

In Texas, monitoring is set up under a contract that provides for the state to have access at any time. Initial reviews of the operation of the private prisons labeled them a failure, at least according to the Texas Board of Criminal Justice (TBCJ) (Fair, May 1990). An internal audit of facilities run by CCA and Wackenhut indicated that while both companies had promised "first-class facilities," there were clear deficiencies in medical care, substance abuse programs, and education programs, as well as numerous reports of inmate abuse by inexperienced guards (Fair, May 1990). All indications were that the private prisons were failing to meet the terms of the contract. However, subsequent reports indicated that the vendors were willing to make changes in service delivery and the TBCJ indicated progress (Fair, June 1990). Whether permanent progress has been made in Texas remains a matter of contention.

In Florida, a private commission was set up to engage in monitoring. According to a 1996 report:

> The Correctional Privatization Commission (CPC) utilizes an on-site monitor at each of the two private correctional facilities it contracts. The on-site monitors are employed by the CPC and submit monthly reports. In addition, CPC contracts for an independent annual monitoring of each of the facilities it contracts.
>
> The contract monitoring instrument differs for the DC and CPC privatized facilities. For the DC facility, the monitor reviews adherence to the terms of the contract only. For the CPC facilities, the monitor reviews adherence to ACA standards (Florida Corrections Commission 1996).

In general, the 1996 report noted that the cost and quality of the services provided by the private vendor were satisfactory, although the report did note problems in assessing true per diem costs or in obtaining other satisfactory measures of performance.

Finally, in Ohio, CCA's Youngstown facility was to be monitored by the District of Columbia and this facility was not supposed to have close-custody inmates (Anon 1998). However, many problems have occurred in this facility, including allegations of the housing of maximum security inmates, deaths, beatings, and substandard conditions. Lawsuits have already been filed against CCA in relation to the operation of this facility, with more pending. Additionally, there are calls from Ohio's governor to terminate the contract with CCA to house inmates at this facility.

The lessons of the Texas, Florida, and Ohio facilities are twofold. On the one hand, monitoring may not be enough to ensure compliance. There is evidence that private vendors will do no more than what the state will contract for and then be willing to enforce. If there are no terms in the contract the service will not be provided and even if there are terms in the contract, unless enforced, there is no guarantee that the terms will be honored. The scope of services is directly tied to the willingness and ability of the state to monitor and push for contract compliance.

On the other hand, these examples demonstrate that monitoring can work. Monitoring can reveal deficiencies and when monitoring is coupled with state decisions to enforce, then the DOC can secure compliance with its requirements.

In terms of notification, there have also been problems in the past. The most famous example is when out-of-state inmates in a CCA Texas facility escaped and the state of Texas was not immediately notified. Similar allegations of lack of notification in regards to a change in inmate classification also are being made in connection with the CCA Youngstown facility. In these cases, the private vendor allegedly failed to provide notification of an event the state wanted to know about. Eventually in Texas, the law was rewritten to mandate notification. The outcome in Ohio is still unresolved today.

All this suggests that while monitoring is critical to the privatization process, it is not clear from the evidence that monitoring is enough. Private vendors have strong profit motives to cut financial corners and not provide expensive services. They also have the ability to hide many of these cuts in services from monitors. This means that a state needs clear language mandating the vendor's duties, a monitoring program that allows for the type of access and information gathering critical to assess compliance, and the enforcement tools and resolve to require vendors to honor the contract and obey the law.

Regulatory Capture

One factor compromising the effectiveness of any monitoring program by the state is the problem of regulatory capture. Regulatory capture is a term political scientists use when parties who are supposed to be regulated by the government come to dominate or control the regulatory process (Lowi 1969; Lindblom 1977; Cigler 1991; Farber and Frickey 1991). Regulatory capture occurs when the close contact between the regulatory agency and the regulated industry make the former dependent upon the latter for technical knowledge, when they become sympathetic to the goals of the latter, or when personnel from the state leave to become employees of the regulated industry (political scientists refer to this as the "revolving door" phenomenon). Regulatory capture can also occur as a result of the interest group activity and lobbying of the regulated industry, influencing policy makers and causing the regulatory environment to become insulated from outside influence and biased in their favor as opposed to remaining neutral. This phenomenon is often referred to as the formation of "iron triangles."

Harding, who is sympathetic to the privatization of corrections, acknowledges the reality of regulatory capture when it comes to the monitoring of private prison vendors, labeling the recruitment of former regulators to work for the regulated industry as one of the single most important ways that capture occurs (Harding 1997: 33-4). In reviewing the problem of capture, Harding distinguishes two ways to set up monitoring: by statute or by contract (Harding 1997: 37-8). Statute-based monitoring is a compliance check system that is created by the legislature, defining the types of monitoring to occur, goals, objectives, and reporting mechanisms. With contract-based systems, the terms of the monitoring are determined by contract negotiations between the state and a specific vendor.

Texas is an example of contract-based monitoring while Florida is an example of statute-based monitoring (Harding 1997: 38). Florida law details the terms of monitoring in the contract while Texas law leaves the contract to define the scope and specifics of monitoring. Because the contract itself defines the scope of the monitoring, and the terms of the agreement will reflect the relative bargaining power of the state vis-a-vis the private parties, Harding describes the Texas contract-based monitoring program to be inferior to the Florida model and he advocates the latter as the preferred system for setting up a monitoring program.

However, even with a statute-based system, the problem of capture persists. So long as the distance or goals or the regulator and regulated industry are seen as close or identical, the state will not be able to engage in neutral monitoring. Harding points to the Tennessee prison system, quoting a state official as saying that the private prisons are "in the family of Tennessee prisons" as an example of how easy it is for a regulator not to view private prisons as distinct enough from the state to monitor in an impartial fashion (Harding 1997: 48). In fact, Harding even argues that perhaps the state itself cannot assign to the same department the regulation of prisons and the delivery of prison services. This is because the conflict of interest inherent in a system where a DOC regulates itself poses many regulatory capture-like problems. As an alternative, he proposes to set up a separate regulatory body to monitor and ensure compliance that is distinct from either the state or private corrections services agency (Harding 1997: 162-64).

Harding's concerns are real and his solutions deserve merit. Were the state of Minnesota to consider privatization as a policy option, it must confront the problem of regulatory capture as threatening the ability of the state to monitor. If the state wishes to set up a competitive model where public and private facilities compete against one another then the state should consider reorganizing the DOC to separate corrections regulation from service delivery. Short of that, several other recommendations to minimize capture should be considered.

First, the monitoring program should be statute-based. Currently, Minnesota has two types of monitoring regarding the PCF. There is the compliance monitoring to license the facility. This licensing inspection is part of the inspection process for all the corrections facilities in the state and it is mandated by state law. Second, there is the contract compliance monitoring for the PCF. The scope of this monitoring is defined by the contract the state has with CCA. At a minimum, the state needs to change the monitoring process of the contract to make it statute-based because it does not appear that the current process is adequate to meet the state's interests. For example, the state has been unable to get CCA to provide a drug rehabilitation program at PCF even though it is required by the contract.

A second recommendation for the state is that it should enact legislation that prevents the revolving door phenomenon, banning state officials from leaving office and taking a job with a private corrections vendor within eighteen months after leaving employment with the state. Many states and the federal government already have this type of broad-based revolving door legislation that applies not just to the corrections industry. Revolving door legislation will help lessen the connection between the regulated party and the regulated industry.

Third, the state may wish to consider rotating monitors to prevent the development of personal relationships that could influence the compliance inspection process.

Finally, the state needs to have real remedial options and enforcement tools it can employ to enforce compliance. As noted above, the state either does not have the tools or it is unwilling to use what tools it has to sanction or encourage compliance.

Contract Enforcement, Damages, and Remedies

The success of any privatization program hinges on the ability of the contracting parties to enforce the contract. It is critical that the state of Minnesota be able to enforce breaches of a contract by a private party. Thus far, the record is mixed in terms of Minnesota's ability to enforce its existing contract and there are some questions regarding the overall ability and viability of relying simply upon contract remedies to ensure compliance.

One basic argument given in support of the privatization of corrections services is that if the state wants to secure specific goals it merely needs to negotiate them into the contract. There are several basic problems with that argument.

First, unless the basic terms of a contract are determined by statute, the contract negotiation process will define the terms of the contract, including the terms of inspection, standards to be met, etc. This opens up the possibility that there will be a lack of uniformity throughout the state as each contract defines potentially different terms of enforcement, remedy, etc.

A second problem in enforcement is that the state must articulate a contract that defines what to do in cases of noncompliance or breach. For example, a total failure by a vendor to honor a contract constitutes a breach of a contract and would probably merit cancellation of a contract. Yet what if the breach is only partial? The state needs to have tools at its disposal that define what constitutes a material versus minor breach and how these are handled. As noted above, the Oklahoma RFP and model contracts seek to do that, defining the grounds both of what constitutes contract violations and what remedies, included liquidated damages, are available.

Similarly, §§ G3.3 and G.3.5 of the Texas Model Contract provide for the withholding of or deductions from per diems if the inspector deems that there is a breach or partial breach of the contract or if the vendor is not complying with the contract. This option of withholding payments offers the state remedies for noncompliance that are more satisfactory and quicker than simply going to court.

Third, even if damages and an enforcement mechanism are articulated by statute or contract, the state must be willing to take steps to enforce the contract if breaches or violations occur. For example, Minnesota currently seems unwilling or unable to act to enforce its current contract with CCA for housing inmates at PCF, specifically in regards to the delivery of a drug rehabilitation program.

Fourth, while a contract is a contract, enforcement of these agreements is not a private issue but a matter for the judiciary to handle. No matter how clear a contract and how defined the remedies or damages clauses are, ultimately breaches of contract are legal issues for the courts to address. For example, the general rule of law is that determination of contract damages is a judicial matter and that liquidated damages clauses will not be enforced by the courts unless damages could not be ascertained at the time of contract formation. What this means is that the courts may not necessarily go along with negotiated clauses specifying damages and they may or may not defer to contractual definitions regarding what constitutes a material versus minor breach, etc.

Finally, even if the terms of a contract are negotiated, parties may not always honor the terms or may sue to fight enforcement of the contract. For example, New Mexico had a contract with CCA for a women's corrections facility that included a clause giving the state the option to buy. When the state sought to exercise that option, CCA sued. Eventually the suit was settled, according to Nick D'Angelo, general counsel for the New Mexico Department of Corrections, with CCA agreeing to pay the state $3.5 million and lowering its per diem in return for the state forgoing its option to purchase the facility. The point here is that just because terms are in a contract that does not mean that these terms will necessarily be enforced or obeyed.

Overall, Nick D'Angelo's advice is that at a minimum, the state must specify in clear and unambiguous language what it wants the vendor to provide and the state should avoid drafting hasty contracts.

Licensing

One feature that appears to be unique to Minnesota in terms of regulating corrections facilities is that they must be licensed and inspected by the commissioner of corrections. Section 241.021 stipulates that the commissioner shall "inspect and license all correctional facilities throughout the state, whether public or private." Minn. Stat. § 241.021 subd. 1. This general power to license and inspect requires one inspection every two years, empowers the commissioner to issue rules to require any facility to meet minimum state standards, and permits the revocation of licenses of any institution that does not meet the promulgated minimum state standards (Minn. Stat. § 241.021 subds. 2 and 3).

The power of licensing institutions serves several important objectives. First, it gives the State additional leverage to inspect and monitor and to ensure that certain minimum standards are being met. Second, it provides another avenue to enforce corrections standards, using the licensing process and the threat of revocation to ensure compliance. Third, this licensing process, used in conjunction with contract monitoring, gives the State two different yet complementary enforcement tools to promote state corrections goals. Finally, a licensing system seems to act as a check on the creation of speculative prisons, that is, prisons built privately and then used to house inmates, all without the knowledge of the state (Swope 1998). Instead, the licensing prevents the state from being surprised by a new facility.

However, while the licensing of corrections facilities strengthens the regulatory arm of the State, it does not replace the need for enabling legislation, contract formation, and monitoring. In the case of licensing, this process applies to all corrections facilities in the state regardless of whether they house state inmates. In the case of contracts, these involve a private vendor housing state inmates and the contract interests that the state has in this situation with a private vendor are clearly different from that of a state acting as a general and neutral regulator. Hence, the state needs both licensing and the contracting process to address distinct legal and financial interests.

Finally, given that the state may be a regulator and a purchaser of corrections services, there may be some conflicts of interest in performing both roles. This means that the state needs to keep these two roles distinct, lest it confront due process challenges that it is illegally using the licensing process as a way to enforce contracts.

Conclusion

Were Minnesota to consider privatization as a corrections policy option, it needs to make some decisions regarding monitoring, reporting, and enforcement. Its existing contract with CCA for PCF is deficient in that it does not guarantee the state full access to the PCF at any time for the purposes of inspection. Nor does the contract have language defining the conditions constituting breach of contract or remedial policies to follow to correct contract deficiencies. All of these problems hamper the effectiveness of the state-monitoring program.

At a minimum, the state should enact a statute defining the scope and requirements of monitoring. The statute should be used to guide specific contracts and the statute should guarantee state, press, and public access to a private facility equal to the access accorded to a public facility. The law should also define how monitoring should take place, with the state providing the monitor. In addition, the statute and the contract should specify conditions of breach and remedies, such as found in Oklahoma, and there should be a system that allows the state to withhold payments for noncompliance. There should also be detailed language regarding what the state wishes to be notified about and when. There must also be some mechanism to provide for an independent review of any self-reporting provided by the vendor to preclude the possibility of misrepresentation. Finally, the state should continue to use its licensing system as a means of regulating private prisons, but it must not rely solely on that licensing process to protect its interests when contracting for corrections services.

Yet the most important lesson of monitoring is enforcement. Enforcement or implementation oversight is the single most important variable influencing successful compliance. The current record of Minnesota DOC is mixed in terms of its willingness or ability to enforce the current CCA contract. Were Minnesota to expand its corrections privatization, the lesson from other states is that contracts with the private vendors are only as good as the enforcement mechanism.

PRIVATE PRISON OPERATOR LEGAL LIABILITY

42 U.S.C. § 1983 Lawsuits

Any individual who operates under the "color of the law" to deprive an individual of her civil rights may be sued under 42 U.S.C. § 1983. In general state governments that operate correctional facilities cannot be sued under § 1983 because of sovereign immunity (Chaires and Lentz 1996). However, sovereign immunity is not an absolute protection from lawsuits.

The Supreme Court has ruled that state entities are liable for § 1983 violations in their own facilities, yet the Eleventh Amendment and the principle of sovereign immunity generally grants to state actors a qualified immunity from § 1983 suits for monetary damages brought against them as a result of their operating a prison. This means that, in general, state entities are not liable for monetary damages arising out of § 1983 suits, yet they and state actors or agents are subject to injunctive relief in these suits (*Edelman v. Jordan*, 415 U.S. 651 (1974)). In addition, while state actors are protected from monetary damages arising out of the performance of their official duties, they may be liable for damages when sued in their individual capacities (*Ex parte Young*, 209 U.S. 123 (1908)).

One question the privatization of corrections services raises is whether the principle of sovereign immunity similarly grants private corrections vendors qualified immunity from § 1983 suits. Until recently the answer to that question was speculative and much ink was spilled debating the policy and legal implications of shielding private prison operators from these types of suits (Robbins 1998; Carter 1998; Koenig 1998; Schaffer 1996). Moreover, in *Tinnen v. Corrections Corporation of America*, 1993 U.S. Dist. LEXIS 20309 (W.D. Tenn. Sept. 21, 1993), *Smith v. United States*, 850 F.Supp. 984 (M.D. Fla. 1994), and *Citrano v. Allen Correction Center*, 891 F.Supp. 312 (W.D. La. 1995), federal courts did hold that private corrections operators possessed qualified immunity from suits that paralleled the immunity enjoyed by states. These opinions suggested that private operators would be entitled to the same immunity benefits as states and, more importantly, that qualified immunity might translate into financial savings in terms of reduced insurance premiums.

However, in 1997, the Supreme Court ruled in *McKnight v. Richardson*, 117 S.Ct. 2100 (1997), that private prison operators did not enjoy a qualified immunity against § 1983 suits even though states would be entitled to such an immunity when they operated a corrections facility.

The Court declined to extend qualified liability to private corrections vendors for several reasons, but at the heart of their analysis was that the context of public versus the private administration and delivery of corrections services was different, such that a government needed the qualified immunity while private market participants did not.

The *McKnight* decision raised several important points with significant implications for the privatization of corrections services. First, the decision clearly established different liability standards for public versus private prisons. Suits arising out of publicly-operated prisons grant states a qualified immunity against lawsuits while private operators will not receive the same qualification. While states are not absolutely immune from § 1983 suits, in part because individual agents of the state may be named defendants in these suits and the state may be required to indemnify these parties for any litigation or damage awards, the *McKnight* decision definitely sets a precedent that private prison operators bear a liability that states do not.

Second, *McKnight* potentially changes the cost calculations regarding the operation of private prisons. While the justification for private corrections is that private vendors can deliver corrections services more efficiently at costs cheaper than offered by the state, these savings may be offset by the increased liability and legal costs associated with these vendors not receiving limited liability. More specifically, private vendors may face higher costs in terms of insurance premiums and judgments. Moreover, and this is purely speculative, juries may be more willing to award higher punitive damages against private vendors in § 1983 cases than they would have offered if the state were liable and could be sued. The basis for this claim is that citizens may be less concerned that taxpayers will be on the hook for the damage award when the suit is against a private party. Again, it is too soon to know if this claim will prove to be true, but nonetheless there is a potential that private vendors could be facing significant liability costs as compared to a state government.

Third, *McKnight* does not mean that states are off the hook in terms of § 1983 suits against private parties. In *West v. Adkins*, 487 U.S. 41 (1988), and in *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982), the Supreme Court held that a private actor is a state actor when the function being "performed has been traditionally the exclusive prerogative of the state." Yet state agents may still be named parties to the suit and in fact have been so named in three current cases. This means that states may not use private prisons to escape any legal responsibility they have as a result of the infringement of civil rights caused by private prison vendors. Hence, states cannot shield their liability by hiding behind a private operator (Gold 1996: 380; McDonald 1998: appendix 21; *Nelson v. Prison Health Service, Inc.*, 1997 WL 821531 (M.D.Fla. 1997)). If private vendors are less respectful or less likely to protect the rights of inmates than are state operators, then both the private vendor and the state may face increased exposure to § 1983 when the corrections system is privately as opposed to publicly owned and operated.

Finally, the potential increased operating and insurance costs surrounding the operation of private corrections facilities should force states to reevaluate the indemnification and insurance requirements in their contracts with private vendors. Current contracts may not have enough insurance requirements or may be lacking language that requires private vendors to indemnify the state fully for all the potential § 1983 expenses.

Overall, the denial of qualified liability to private corrections operators potentially exposes both the state and private operators to liabilities that the state as a prison operator does not face. How this will impact the efficiency and operating costs of private prisons is yet to be seen.

Legal Liability of Private Corrections Operators

In addition to § 1983 liability, *McKnight* indicates that private vendors may also be responsible for other types of legal claims that states are not. A quick review reveals that the potential basis of claims is extensive.

42 U.S.C. § 1985 Civil Rights Liability

Section 1985 addresses private discrimination by private parties. Passed as part of the 1871 Civil Rights Code, § 1985 was originally part of the "Klan Acts" and was aimed at preventing the Ku Klux Klan from discriminating against Blacks. Specifically, § 1985 provides that:

> If two or more persons in any State or Territory conspire to prevent...for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or equal privileges and immunities under the laws...the party so injured or deprived may have an action for

> recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

The focus of § 1985 is on preventing two or more individuals from interfering with the rights of another. This means that the state itself is not liable for civil rights deprivations under this law. Even public officials acting in their official capacity as public officials are not liable (*Graves v. United States*, 961 F.Supp. 314 (D.D.C. 1997)). Hence, only when public officials or employees are acting as private individuals or parties is there any legal liability attached to the state via § 1985. This means that private prison operators, as private persons, may be part of a conspiracy to violate the civil rights of individual prisons even though the same exposure does not attach to the state when it operates its own corrections facilities (Chaires and Lentz 1996).

To prove a § 1985 violation, a prisoner would need first to demonstrate a conspiracy between two or more persons in the private corrections facility. Here, policies adopted by the warden or any of her staff may be considered when looking to see if two or more people agreed to deprive someone of their civil rights. This agreement could also pertain to the case where guards conspire among themselves or when any of the different private parties so agree to engage in certain types of behavior. What type of behavior could result in a § 1985 violation?

Merely discriminating against prisoners *qua* prisoners is not enough. Courts have held that prisoners in themselves do not constitute a protected class (*Justice v. Coughlin*, 941 F.Supp. 1312 (N.D.N.Y. 1996); *Malsh v. Austin*, 901 F.Supp 757 (S.D.N.Y. 1995); *Lowe v. Carter*, 554 F.Supp. 831 (D.C.Mich. 1982)). Instead, a prisoner would need to show either that he was a member of a protected class, such as a specific race, national origin, or religion, or that a specific constitutionally-protected right was being infringed (for example, there was a First, Eighth, or Fourteenth Amendment civil rights deprivation). Were this demonstrated, along with an explicit or implicit agreement between two persons, then the private prison would be legally liable for the civil rights deprivation.

Hence, unlike a state prison operator, a private vendor faces unique § 1985 liabilities.

Tort Liability

Another type of liability private prison operators face is for torts committed by the corrections facility, staff, and employees. Unlike the State of Minnesota, which generally enjoys limited tort liability immunity under state law (Minn. Stat. § 3.736), a private vendor would not be able to claim this immunity or limit on tort awards.

The implications of this tort liability are potentially enormous. Specifically, while the state of Minnesota can protect itself against liablity for the torts committed by its staff, were an employee of a private corrections vendor to commit assault, battery, or any other tort against an inmate, that employee would be liable for the tort and the private vendor would similarly be liable under the doctrine of respondeat superior.

Hence, the potential for tort liability may potentially drive up the costs of operation of a private facility, imposing additional concerns for the state in terms of insurance requirements to be specified in the contract with the private vendor.

Compliance with other Federal and State Laws

Operation of a private prison may also impose other legal liabilities upon a private vendor. For example, according to the recently decided Supreme Court decision, *Pennsylvania Department of Corrections v. Yeskey*, 118 U.S. 1952 (1998), private vendors and state operators of prisons must comply with a host of new requirements under the Americans with Disabilities Act. In addition, building codes and Occupational Safety and Health Administration (OSHA) requirements may impose specific legal requirements upon private vendors that the state does not face when it operates a facility. Perhaps the state of Minnesota could alter some of its laws to exempt or modify application of these laws when it comes to private prisons, but there are potentially many federal laws that could be applicable to private prison operators.

"Deliberate Indifference" and the Eighth Amendment

One last potential legal dilemma facing the state of Minnesota and a private vendor grows out of the Eighth Amendment's cruel and unusual punishment clause. In *Farmer v. Brennan*, 114 S.Ct. 1970 (1994), the Court held that state prison officials, and presumably those acting under contract with the state, may be held liable for their deliberate indifference to prisoners' Eighth Amendment rights when they knowingly disregard a substantial risk of harm to the prisoner. This standard requires proof, either direct or circumstantial evidence, of an objective component of harm and a subjective component: that the state official or actor knew of the risk and failed to act or directly caused the harm. Under this ruling, the courts have held that a state may be liable for an Eighth Amendment violation if it deliberately refuses or neglects to provide medical care or other services to prisoners. Given this standard and earlier rulings such as *West v. Adkins*, 487 U.S. 41 (1988), a state that contracts out to a private vendor to provide corrections services could still remain liable under the Eighth Amendment if it knows of possible violations or abuses by the private vendor but fails to do anything about it.

Similarly, as noted earlier, a state can be held liable for actions of a private party if one can demonstrate "state action." To show that, a party would need to connect some non-neutral involvement between the government and the challenged activity. Specifically, if one can demonstrate that the state was sanctioning or encouraging the deprivation of civil rights of an inmate by a private corrections vendor, or even if the state turned a blind eye to this deprivation by a private vendor, then the state may also be liable for the civil rights deprivation.

The importance of the deliberate indifference and state action doctrines here is that a state such as Minnesota cannot necessarily insulate itself from legal liability by turning its facilities over to a private vendor. If the state remains heavily involved in the oversight of a private prison, one may be able to assert that the state involvement rises to the level of state action, thus implicating the state as a defendant to any suit. Conversely, if the state deliberately refuses to get involved as a way to escape liability, such deliberate indifference may still implicate the state under the Eighth Amendment. In either case, the state needs to strike a balance between too much and too little oversight, not only to address the scope of its liability, but also to balance the ability of the private contractor to be flexible enough to save operational costs versus the state's need to mandate standards to ensure that it has not unconstitutionally delegated away its constitutional responsibilities.

Conclusion

Overall, private corrections vendors must bear all of the responsibilities of state prison operators but do not reap any of the legal benefits. One commentator stated concisely:

> Private jail and prison operators are apparently subject to statutes fashioned to render state agencies liable for their misconduct, but ineligible for the benefits derived from statutes and common law doctrines that preclude or limit the liability of public bodies, such as state tort liability and the doctrine of sovereign immunity (Grant 1986: 135-6).

Private prison operators potentially face many legal issues and liabilities that states do not face when they operate corrections institutions themselves. The exact scope of this liability and how it will impact costs, operations, and program is not yet clear because cases such as *McKnight* have only recently made it clear that private prison operators do not enjoy qualified liability from civil rights claims. Hence, litigation is currently occurring that will determine how this liability plays out in court, and future litigation will no doubt also open up private prison operators to additional sources of liability that states do not confront.

CONCLUSION

The legal issues surrounding the privatization of prison facilities are significant yet do not pose an insurmountable barrier should the state of Minnesota decide to pursue this option to deliver corrections services. This chapter reviewed what the state of Minnesota needs to consider or undertake were it to privatize some or all of its corrections facilities. Included in the conclusions and recommendations are:

$ The state of Minnesota presently does not have statutory authority to privatize its corrections services. This means that even the current contract with CCA to provide corrections services at the PCF may be illegal.

$ Because the state of Minnesota has not reserved for itself the final determination regarding the use of force or the imposition of discipline at the PCF, its current contract allowing for the private vendor to use force and discipline inmates may violate the federal or state constitutional clauses against the delegation of legislative or public authority to a private party.

$ If the state of Minnesota wishes to privatize corrections services, it needs to enact enabling legislation defining the goals of privatization, the powers to be delegated to the vendor, powers to be reserved to the state, the RFP process, and the general content of the contract with private vendors.

- $ The state enabling legislation needs to provide for the creation of a state model contract that would form the basis of all contracts with vendors.

- $ Contracts with private vendors need to be very specific with regards to the delivery of services to be offered by the vendor.

- $ Contracts with private vendors need to specify in detail the conditions for what constitutes a breach of contract, the remedies for breaches, and the possible liquidated damages or penalties in the event of a breach.

- $ Contracts with private vendors need to specify in detail the insurance requirements to be met by these vendors and the contracts must indemnify the state against all claims arising out of the private operation of a corrections facility.

- $ Contracts with private vendors must specify a process for the state to monitor compliance and to verify any services and reporting made by the private vendor to the state. Any monitoring program set up must guarantee the state access to the private facility and records without notice and at any time.

- $ Contracts with private vendors must seek to avoid the problem of regulatory capture by preventing former state officials from assuming employment with a private corrections provider for 18 months following the termination of state employment.

- $ Contracts with private vendors must specify a plan and procedure for the resumption of state control in the event of a strike, the inability of the vendor to perform the contract, or the termination of the contract.

In addition to the above recommendations, there are two additional concerns that need to be noted. First, were the state of Minnesota to privatize a corrections facility, the employees at this facility could strike and the state could not prevent this strike. Because the employees at the facility would no longer be state employees, they would be governed by federal law, and state legislation to preclude strikes would be federally preempted.

Second, the private operation of a corrections facility introduces a degree of legal liability that state operation does not face. The scope of this liability is potentially significant, leading perhaps to costs and expenses by a private party that would make its operation of a facility more expensive than state operation.

REFERENCES

AFSCME. 1998. *Should Crime Pay? A Review of the Evidence*. Washington, D.C.: AFSCME.

Anon. 1998. "Louisiana Seizes Youth Jail After Abuse Reports." *New York Times*, July 24: A10.

Anon. 1998. "Four Ohio Prisoners Caught After Escape." *New York Times*, July 29: A11.

Bates, Eric. 1998. "Private Prisons." *The Nation*, January 5, 1998: 11-18.

Butterfield, Fox. 1998. "Profits at Juvenile Prisons Earned at a Chilling Cost." *New York Times*, July 15: A1.

Butterfield, Fox. 1998. "U.S. Suing Louisiana on Prison Ills." *New York Times*, November 6: A14.

Carter, Brett R. 1998. "Civil Rights" *Richardson v. McKnight*: The Rise and Fall of Private Prison Guards' Qualified Immunity. 28 *University of Memphis Law Review* 611-640.

Chaires, Robert D. and Susan A. Lentz. 1996. "Some Legal Considerations in Prison Privatization." *Privatization and the Provision of Correctional Services: Context and Consequences*, pp. 31-61. Mays, Larry G. and Tara Gray. Cincinnati: Anderson Publishing Company.

Cigler, Allan J. 1991. "Interest Groups." In William Crotty, ed., *Political Science: Looking to the Future*, v. 4. Evanston: Northwestern University Press.

Crane, Richard. 1998. "Wanted: A Model Law for Regulating Privatization." *Correctional Law Reporter*, v. ix, no. 6: 83-92.

DeLisser, Eleena. 1998. "Ohio's Governor May Press Closure of CCA-Run Jail." *Wall Street Journal*, July 29: A6.

Department of Justice. 1998. *National Workshop on Privatization: Workshop Materials.* San Francisco, California.

Dipiano, John G. 1995. "Private Prisons: Can They Work? Panopticon in the Twenty-First Century. 21 *New England Journal on Criminal and Civil Confinement* 171-202.

Fair, Kathy. 1990. "State Board Calls Private Prisons Failure." *Houston Chronicle*, May 16: 1A.

Fair, Kathy. 1990. "Turnaround in Private Prisons." *Houston Chronicle*, June 10: 1A.

Farber, Daniel A. and Philip P. Frickey. 1991. *Law and Public Choice: A Critical Introduction*. Chicago: University of Chicago Press.

Feeley, Malcolm M. & Edward L. Rubin. 1998. *Judicial Policy Making and the Modern State: How the Courts Reformed America's Prisons.* New York: Cambridge University Press.

Fleming, Joseph Z. 1998. "The Privatization Precedent Set by the Lord Chancellor in *Iolanthe*: An Analysis of *Walker v. McKnight*. 30 *The Urban Lawyer* 233-250.

Flo da Corrections Commission. 1996. *Annual Report: An Assessment of Florida's Priv tization of State Prisons.*

Gold Martin E. 1996. "The Privatization of Prisons." 28 *The Urban Lawyer* 359-399.

Gran , Judy S. 1986. "Prisons for Profit." 7 *Hamline Journal of Public Law and Policy* 123-141.

Hadden, Douglas. "Wyatt Guards Organize." *The Times.*

Harding, Richard W. 1997. *Private Prisons and Public Accountability.* New Brunswick: Transactions Publishers.

Harvard Law Review. 1997. "The Supreme Court's Leading Cases." 111 *Harvard Law Review* 390-400.

Jaffe, Greg and Rick Brooks. 1998. "Hard Time: Violence at Prison Run by Corrections Corp. Irks Youngstown, Ohio." *Wall Street Journal*, August 5: A1.

Jensen, Eric M. 1986. "The NLRA's Guard Exclusion: An Analysis of Section 9(b)(3)'s Legislative Intent and Modern-Day Applicability." 61 *Indiana Law Journal* 457-493.

Koenig, Heidi. 1998. "*Richardson v. McKnight*: What does the Future of Qualified Immunity Hold for Nongovernmental Employees?" 58 *Public Administration Review* 8-9.

Lifsher, Marc. 1998. "Busting into the Prison Business." *Wall Street Journal*, May 27: B10.

Lindblom, Charles. 1977. *Politics and Markets.* New York: Basic Books.

Lippke, Richard L. 1997. "Thinking About Private Prisons." *Criminal Justice Ethics*, Winter/Spring 1997: 26-38.

Logan, Charles H. 1990. *Private Prisons: Cons and Pros.* New York: Oxford University Press.

Lowi, Theodore. 1969. *The End of Liberalism.* New York: Norton.

Mays, Larry G. and Tara Gray. 1996. *Privatization and the Provision of Correctional Services: Context and Consequences.* Cincinnati: Anderson Publishing Company.

McDonald, Douglas and Elizabeth Fournier, Malcom Russell-Einhorn and Stephen Crawford. 1998. *Private Prisons in the United States: An Assessment of Current Practice*. Cambridge: Abt Associates, Inc.

McGuiness. 1981. *Guard Unions and the Problem of Divided Loyalties*. Philadelphia: University of Pennsylvania Industrial Research Unit.

Minnesota Department of Administration. 1997. *An Evaluation of Minnesota's State Corrections Institutions*. St. Paul.

Minnesota Department of Corrections. 1997. Contract Between State of Minnesota and Corrections Corporation of America.

Park, Paula. 1998. "Two Dead in Ohio." *Washington City Paper*, vol. 18, no. 15, April 17-23: 22-28.

Ratliff, Warren L. 1997. "The Due Process Failure of America's Prison Privatization Statutes." 21 *Seton Hall Legislative Journal* 371-424.

Robbins, Ira P. 1987. "Privatization of Corrections: Defining the Issues." 40 *Vanderbilt Law Review* 813-888.

Robbins, Ira P. 1988. *The Legal Dimensions of Private Incarceration*. Chicago: American Bar Association.

Saavas, E.E. 1987. *Privatization: The Key to Better Government*. Chatham: Chatham House Publishers.

Schaffer, Robert G. 1996. "The Public Interest in Private Party Immunity: Extending Qualified Immunity From 42 U.S.C. § 1983 to Private Prisons." 45 *Duke Law Journal* 1049-1087.

Scheb, John M. II and David H. Folz. 1989. "Prisons, Profits, and Politics: The Tennessee Privatization Experiment." *Judicature*. August/September: 98-102.

Schlosser, Eric. 1998. "The Prison-Industrial Complex." *Atlantic Monthly*, December: 51-79.

Schultz, David. 1998. *The Politics of Civil Service Reform*. New York: Peter Lang Publishing, Inc.

Simon, Ellen. 1992. "Who's Minding the Rights of Inmates When Justice Goes to the Lowest Bidder? *Human Rights*. Spring: 22-25.

State of Colorado. 1998. *West's Colorado Revised Statutes Annotated*. St. Paul: West Group.

State of Florida. 1998. *West's Florida Statutes Annotated*. St. Paul: West Group.

State of Louisiana. 1998. *West's Louisiana Statutes Annotated.* St Paul: West Group.

State of Minnesota. 1997. *State of Minnesota Department of Corrections Contract for Services with Corrections Corporation of America.*

State of Minnesota. 1996. *Minnesota Statutes.*

State of New Mexico. 1998. *New Mexico Statutes Annotated.* Charlottesville: Michie Law Publishers.

State of Oklahoma Department of Corrections. 1998. *Correctional Services Contract.* (February 13, 1998).

State of Oklahoma. 1998. *Oklahoma Statutes Annotated.* St. Paul: West Group.

State of Oklahoma. 1998. *A Request for Proposal by the State of Oklahoma Department of Corrections: Inmate Housing* (January 30, 1998).

State of Pennsylvania. 1998. *Purdon's Pennsylvania Statutes Annotated.* St. Paul: West Group.

Swope, Christopher. 1998. "The Inmate Bazaar" *Governing.* October: 18-22.

Texas Department of Criminal Justice. 1998. *Solicitation, Offer, and Award, Continued Award.* <http://www.tdcj.state.tx.us/html/private_prisons_solicitation_1.html>.

United States Government Accounting Office. 1996. *Private and Public Prisons: Studies Comparing Operational Costs and Quality of Service.* Washington, D.C.: Government Printing Office.

Wessel, David and John Harwood. 1998. "Capitalism is Giddy with Triumph: Is it Possible to Overdo It?" *Wall Street Journal*, May 14: A1.

Yarden, David. 1994. Review of *Privatizing Corrections Institutions.* 21 *American Journal of Criminal Law* 325-334.

Subject: [Fwd: Additional info for tomorow's hearing on HB 55]
Date: Wed, 09 Apr 2003 13:19:00 -0800
From: Bruce Weyhrauch <Representative_Bruce_Weyhrauch@Legis.state.ak.us>
Organization: Alaska State Legislature
To: Ginny Austerman <Ginny_Austerman@legis.state.ak.us>

bill file

Subject: Additional info for tomorow's hearing on HB 55
Date: Wed, 9 Apr 2003 13:50:00 -0500
From: "Frank Smith" <fsmith@kanokla.net>
To: <Representative_Bruce_Weyhrauch@legis.state.ak.us>
CC: <Representative_Nancy_Dahlstrom@legis.state.ak.us>, <Representative_Jim_Holm@legis.state.ak.us>, <Representative_Bob_Lynn@legis.state.ak.us>, <Representative_Paul_Seaton@legis.state.ak.us>, <Representative_Max_Gruenberg@legis.state.ak.us>, "Ethan Berkowitz" <Representative_Ethan_Berkowitz@legis.state.ak.us>

Dear Representative Weyhrauch,

The sponsor of HB 55 requested at the last Committee hearing that my statements be verified. I sent some documentation to the Committee within a few days.

I have received today the just-posted URLs for a settlement in which the federal government successfully sued Arkansas, substantially over the behavior of its contractor, Cornell Cos. I believe some of the many things that Cornell has been accused of include:
    Not assuring that its educational program met IDEA guidelines.
    Approximate year-long failure in filling a psychologist's position, despite far more accessible labor market than they would experience in Whittier.
    Filling the psychologist's position at last with a practical nurse with forged psychologist's credentials. She testified in a court case as an "expert" and "treated" juvenile inmates.
    Not assuring that adequate suicide prevention measures were in place, resulting in death.
    Serious fire code violations.
    Falsifying records involved in a death of a juvenile.
    Gratuitously assaulting juvenile inmates.
    Having assigned staff attend a meeting, rather than monitoring suicidal juveniles.
    A staff member fired for allowing other youths to abuse a juvenile murdered his estranged wife, her companion and killed himself not long after leaving Alexander.

The URL for the settlement is:
http://www.usdoj.gov/crt/split/documents/alexyouth_sett.pdf
The URL for the complaint is:
http://www.usdoj.gov/crt/split/documents/alexyouth_comp.pdf

The question of where liability lies if Cornell abuses or neglects prisoners at Whittier is a thorny one which should be resolved before the matter is passed from Committee.

In testimony Cornell supporters have termed Alaska's contract with CCA for holding prisoners at Florence to be "successful." I began a table last night with synopses of documents questioning such a notion. The original documentation is so extensive I could not finish it though I worked for many hours. I have attached numerous pages. I will fax it to the Committee when done, probably today.

The sponsor asked about the foundation for my statements about Cornell's New Morgan Academy and its closure. I previously sent a compendium of stories which included some of the horror stories about New Morgan, dozens of incidents of abuse, including repeated sexual abuse of female juveniles there, and the reasons for its closure.

Cornell bases much of its proposal on a supposed study "proving" that private prisons save money for states and deliver adequate services, one that was written by a student for the Harvard Law Review. The student has been a Reason Institute fellow and may still be. The "study" is not a study at all and it is not even a review of the literature. It is more commonly known as a note which would not be subject to the peer review involved in an actual research project. Another Reason Institute fellow co-authored a study which claimed that six escapes at CCA Youngstown (written prior to two murders) "...show why the private sector's role in prison management role in prison management and construction should expand." Youngstown was closed not long afterward and remains empty, leaving the city holding the bag for its infrastructure improvements and tax givebacks. URL at: http://www.heartland.org/Article.com?artId=800

We have yet to see an economic feasibility study on the Whittier proposal. An actual study done on Delta Junction indicated the project could not go forward profitably unless the contractor charged almost $100/day. That was four years ago and despite the need to only convert, rather than build, prison buildings. The labor force is Delta is immensely larger than Whittier, which might have 6-10 potential employees amongst its residents. The previous supporters of this legislation, last session, maintained that Whittier deserved a chance at the prison as supposed economic development. A billion dollar proposal divided by 10 jobs would mean a subsidy of $100,000,000.00 per job. This is in a community which has already received huge state grants including the $60 million dollar one-way auto tunnel and millions in port improvements with a population, including women, children and retirees, of 182 residents.

I visited the state of Louisiana this past week. I was denied entrance to the extremely troubled juvenile facility at Tallulah because of what the Secretary of Juvenile Justice's office termed "extensive litigation" with "all kinds of people" at the place and was requested to postpone my visit. Two successive private operators have made an unbelievable mess of things there. The state finally assumed control, but is unable to close it because of the bond problem even though the state did not directly back or issue the bonds. Another facility at Jena sits idle after horrendous abuse of juveniles by still another private national contractor. I will fax an article which shows that this troubled private prison has jeopardized the state's entire bond rating, which could cost the taxpayers hundreds of millions of dollars. Here is its URL:
http://capitolwatch.reallouisiana.com/html/B6580F65-D326-470E-9E68-9B26E920C49B.shtml

Thank you again for your continuing interest in the facts regarding this bizarre proposal.

Sincerely,

Frank Smith

APR 14 2003

APR 14 2003

FAIRBANKS LEGISLATIVE INORMATION OFFICE
119 N. CUSHMAN ST. SUITE 101
FAIRBANKS, AK 99701

WRITTEN TESTIMONY TRANSMITTAL SHEET

TO: Representative Bruce Weyhrauch, Chair	FROM: Fran/Fbx LIO
COMPANY: House State Affairs Committee	DATE: 4/10/2003
FAX NUMBER: 465-2273	
PHONE NUMBER: 465-4963	FAXED ON:
RE: Written Comments on HB 55	TELECONFERENCED ON: 04/10/2003

☐ URGENT ☐ FOR REVIEW ☐ PLEASE COMMENT ☐ PLEASE REPLY ☐ PLEASE RECYCLE

NOTES/COMMENTS:
Enclosed, please find the originals of the written testimony for HB 55.
Fran/Fbx LIO

Subject: **House Bill 55**
Date: Mon, 07 Apr 2003 22:01:36 -0800
From: William Hathaway <billandann@gci.net>
To: Fran Zarling <Fran_Zarling@legis.state.ak.us>, Brad Wilson <brad@psea.net>, daniel_colang@correct.state.ak.us

Please allow me a short note to explain why I think private prisons are not a good idea for Alaska. For the following reasons and many others I urge you to vote against private prisons.

1. Missouri is doing away with its private prisons because the liability paid to law suits is 600 times greater than that paid at State run prisons.

2. Texas is reducing or doing away with its private prison contracts after having to sent the Texas Rangers into several of them to restore order. Oklahoma is close behind.

3. Pennsylvania, Connecticut, and Wisconsin are suing and jailing the wardens at their private facilities for failing to adequately control contraband within their facilities.

4. Low pay, no benefits, and lack of training lead to rampant corruption and ineptitude at private prisons. Low pay and high turnover rates will, forever, prevent conditions from improving.

5. The rate of escapes from private prisons exceeds those of State run prisons by a factor of greater than ten. This is not providing the public with the protection it deserves.

6. On several well publicized occasions private prison companies have hired people who cannot pass a standard background check. Corrections Corporation of America reportedly hired a person in one state, as a substance abuse counsler who had a felony drug related warrant in another state.

7. The cost per bed per day listed on all of the Corrections Corperation of America contracts that I was able to find out about DOES NOT include two very important costs. Transportation and medical costs are still incurred by the State. If you ADD these two costs to the cost per bed per day listed on the contracts you will find that private prisons are NOT COST EFFECTIVE.

8. Ask any Alaskan prisoners returning from the private facility in Arizona. 8 out of 10 will tell horror stories about "renting a guard", rampant contraband, and legal violations that are covered up. Almost without exception they are happy to return to PROFESSIONALLY run State Prisons.

For anyone who doubts these statements please check out the following web sites. corrections.com, corrections chat, law enforcement chat, the corrections professional, and corrections forum.

Frank Smith
390 S.E. 110 Ave.
Bluff City, KS 67018-7630
(620)967-4616
fsmith@kanokla.net
March 14, 2003

Representative Bruce Weyrauch
Chairman, State Affairs Committee
Room 102, State Capitol
Juneau, AK 99801
FAX: (907)465-2273

Dear Chairman Weyrauch,

Thank you for allowing me to testify yesterday afternoon. As I indicated in testimony, I am a volunteer citizen activist. No one has ever paid me for my contributions to the private prison question.

You asked if I provide written information about HB 55, and there was also a request to provide specifics of testimony about which there was objection by Rep. Hawker, I think. KTOO only had an audio stream on the hearing.

I'm also not sure which information if any, might have been objected to on my part. (Perhaps all?) I was not testifying from written notes so let me provide details as well as I can recall, off the top of my head.

I mentioned that this Whittier project has a price tag of $1,000,000,000. Ms. Margo Knuth testifying as counsel for DOC last year put the figure at ($985,000,000). Because of proposed contract modifications, inflation, etc., I'm sure this is now over a billion dollars. My comments about that were made because the Committee needs to be aware that it is essentially hearing from salesmen and they are going to present their product in the best possible light.

I agreed with Mako Hagerty's testimony, that prisons are a "failed experiment." While there is some subjectivity involved in this estimation, I did provide some specifics. Ms. Bowery testified on Tuesday and said the "savings" in the Tennessee system were but cents a day. I'd never heard of her before but her facts and opinions were quite accurate. I supplied the 38 cents per day figure in testimony following hers Tuesday, and which she testified to yesterday.

- I mentioned that Cornell's New Morgan Academy in Pennsylvania was closed, due to loss of contracts with sending agencies, because in part of chronic sexual abuse of juvenile wards. There is a plethora of stories from the Pennsylvania press documenting this. I would be happy to provide URLs.
- I suggested that you ask Mr. Wiebe about Cornell's non-renewal of the Santa Fe jail contract. The reason Cornell gave is that it was not financially rewarding, but

I'm not sure that was the prime factor. I understand that a scathing Grand Jury report may exist covering the difficulties.

- I mentioned that a contractor (a pair of brothers, I believe) built eight prisons and left the Texas municipalities bonding for them holding the bag. The state took them over in "distress sales" for about half the construction costs. I can research this and provide a URL if you'd like.
- I mentioned that contracting for private prisons has been failing since the 18th Century. In that context I mentioned former AK DOC Director Charles Campbell's exhaustively researched work on the issue, covering about 75 years. That book is "The Intolerable Hulks." Third edition (2001) is in paperback published by Fenestra books. ISBN 1-58736-068-3 Mr. Campbell has also been a federal prison warden and was the Cleary Monitor in Alaska.
- My own recent work on Native Americans in private prisons is in "Capitalist Punishment," by Clarity Press. It can be ordered from Amazon, Bookmasters, etc. It contains chapters by a number of international experts in the field. Here's a description http://www.bookmasters.com/clarity/b0020.htm I'd be happy to send my chapter to you in Acrobat or text format in an e-mail, or to fax it to you.
- I have approximately 150 pages of affidavits and statements from Alaska prisoners at CCA-Florence's CADC, mostly Natives, who allege that they were treated brutally in what might best be described as "guards' riots." I worked for years as an investigator and find those statements have internal validity and consistency. I am inclined to believe them, particularly as it appears they were written contemporaneously with the incidents and the inmates appear to have been separated and out of communication with each other, but their descriptions coincide to a great degree. I also spoke to a prisoner a few months ago who verified the description of the second incident. My wife and I had visited him three years ago at Florence. Though present, he was not involved in the second incident that happened after our visit (he was absent for the first). He indicated that part of the problems the prisoners were trying to peacefully resolve involved being fed food labeled "Not for human consumption," getting food served past its expiration date, and not receiving hot meals for which the State of Alaska had contracted. There were also complaints, as Sen. Hoffman related, about lack of Native cultural activities. I should mention that CCA considers this to be one of their "model" prisons.
- The closure of the CCA prison at Youngstown, Ohio has been widely covered in the popular press. I can provide article URLs or you can get them from Legislative Research, of course. I may have mentioned murders and escapes, which are the crucial issues regarding its failure, but the tax givebacks and infrastructure provided were also essentially wasted for the community.
- The closure of the Wackenhut juvenile prisons at Jena and Tallulah, Louisiana has also been widely covered in the popular press. Wackenhut has duplicated this miserable performance overseas, to the point where many immigrant children sewed their lips together in protest over the conditions that they endlessly were forced to endure. An Australian government minister resigned over the scandal.
- I think I mentioned that a city in Wyoming, population 9,000 and on the road sytem, turned down a prison siting on the grounds that it did not have sufficient

population to staff such a facility. I believe it was Rawlins. I'd be glad to find a URL for the story.

- The figure of 8 families on some sort of public assistance in Whittier was obtained from the Alaska Division of Public Assistance last year. I can provide the e-mail with the info if you'd like.
- The population figure for Whittier was U.S. Census Bureau data. Almost the entire Whittier population lives in the Buckner building. In the summertime, the vacancy rate is zero. I think there may be many, many more voters in Whittier than residents and I would be curious as to how many people receive PFDs at Whittier addresses. I wonder if people from Outside who tied their boats up there only in the summertime could be recipients.
- The CCA Crossroads prison at Shelby, Montana gave assurances that it would not import prisoners from other states upon which contingencies the legislature allowed its construction. Montana is experiencing a substantial decline in prisoner population due to accelerating releases because of budget pressures. It started pulling prisoners out of Crossroads and CCA is now lobbying vigorously to remove the exclusion. This creates serious problems not limited to what happens to imported convicts who commit a new crime while at Crossroads. Does Montana pay for prosecution imprisonment afterward? The Great Falls Tribune extensively covered this. One prisoner was recently murdered there by another.
- I may have mentioned contractor/tribal involvement with troubled corporations. I've heard and read that KNA is foundering, and they were involved in the Kenai and original Whittier proposals. I think Chugach, which was involved with the Delta project, also had considerable financial difficulties. There are many stories regarding KNA in the Peninsula Clarion, the Anchorage Daily News, and George Wright, who has been involved with ANB, KNA, etc. has been regularly in the press, including the Juneau Empire. He testified yesterday in support of SB 99, but I'm not sure if he was on yesterday's list for HB 55. Much of the fiscal problems relate to pull tabs and bingo licenses.
- I suggested asking Cornell and its consultant Mr. Prewitt about their roles in the lawsuit involving Delta Junction. I think it might be particularly germane to ask about former legislative influence that may have been used to get the City to settle what appeared to me to be a rather winnable case. This was referred to in an Anchorage Daily News story. I also suggested asking Mr. Wiebe about the suits involving the state of Utah and the municipality of Oxnard, California. The settlement of the Utah suit (for $1.6 million, I think) is posted on the internet as are stories in Utah newspapers. The Oxnard settlement ($1.1 million, I think) I obtained on a FOIA from the City of Oxnard and would be happy to provide it and background if I can dig them out from whatever pile I threw them in last year.
- I mentioned the Arkansas "professional" who was hired, after a long period of vacancy, to the treatment position in the Cornell's managed juvenile facility. This was covered in the state press and there was discussion in the Arkansas legislature about it. She had falsified her credentials, not for the first time. She even testified as an "expert" in court cases. I believe the corporation had warnings.

Please direct me to any other issue I may have missed in this response.

Regarding your request for additional written information to be put into testimony, I would add:

Whittier residents had the prison proposition put to them, I am told, as a way to get the tunnel (which the state put some $60 million or so into, for one-way auto traffic) opened 24/7 and with reduced or no tolls. I think it presently costs $15 per round trip. Mr. Butler denies my information about the petition. I understand that numerous opponents from Whittier wanted to testify yesterday but the high winds have interrupted their phone service.

I suggested facetiously last year that some residents might have considered hosting the world's largest bordello if it meant free tunnel passage.

Cornell claims a prison would "add value" to the tunnel. That's an interesting turn of phrase. I wouldn't think, that if someone took half the money in my wallet, that they were somehow "adding value" to it.

Although there is substantial pressure mounting against the prison proposal in Whittier, it is suppressed by community pressure that wants the state to absorb those additional tunnel costs. I was informed yesterday that a fiscal note has been recently attached to the tunnel opening 24/7. I didn't get the figure, but might be on the order of $7 million per year. Local Whittier opposition was voiced in a Tuesday hearing on SB 65.

The proponents have claimed that comparing a public prison in Anchorage to a private one in Whittier is an "apples to apples" comparison. It is hardly that. The transportation for a theoretical workforce in Whittier would present substantial problems. The Seward Highway trip is often hazardous and lengthy; the tunnel passage involves long waits. I'm sure you must have driven this road when it was either icy, obstructed by snow or landslides or blocked by some octogenarian driving his Winnebago to Kenai 15 miles an hour below the speed limit with his left blinker on the whole way. In contrast, Mat-Su already has all the labor force (a 7% unemployment rate) and services available that a new facility would require. The highway to Sutton had considerable improvement three years ago.

I can't conceive that Cornell would pay the kind of wages it would take to attract competent staff to a Whittier facility. I would urge you to ask Cornell for the starting and average wages for their guards at all their facilities, nationwide. Cornell singles out the Y-K facility in Bethel to compare costs. But Bethel has DOC staff that puts in substantial overtime because the facility is too small. These professional correctional officers often have substantial time in pay grade and range, so their cost is higher. It is no more accurate to compare their average compensation against proposed Whittier salaries than it is to average all Wal-Mart employees by including the four family members who occupy numbers 7-10 on the current Forbes Magazines "10 Richest in the World" list.

Bethel officers spend much time escorting and processing inmates in this too-small facility. They receive a geographic differential, 38% I think, because of the higher cost of living there. Limitations in that posting include things like its isolation from mainstream Alaska and municipal water that appears to have been pumped directly from a hog wallow.

Cornell proponents have stated that they would draw their Whittier staff from "South Anchorage and Girdwood." Both of these areas are in the "high rent" district and I'd bet I could process all such applicants during an afternoon coffee break. The people who would need low paying jobs like this, who would be desperate enough to commute, have the least reliable transportation.

I should also note that being a correctional officer requires more than being given a badge and a set of keys. It takes a rare temperament, patience, courage and a great deal of common sense to perform this work professionally.

There has been testimony (I would refer you in particular to Charles Campbell's testimony before Senate Finance on 5/3 last year) received about the tenure of prison employees. According to the Corrections Yearbook, the most recent edition which The turnover rate for private prison guards is 54% a year, I think, compared to 14% in public prisons. You can't train novices for this difficult work and expect them to perform adequately with this kind of turnover. It would be like going into war in a platoon manned entirely by recruits fresh out of boot camp commanded by Lieutenants recently graduated from Officers' Candidate School. There would be no effective mentoring process. There would be little "screening out" of unsuitable employees on the job.

Yesterday Mr. Wiebe testified that the privates have an advantage because they can get rid of non-performing employees. It is my opinion, based on years of labor studies and managerial involvement, that there is virtually no difference in terminating the employment of state or private employees for the first six months to a year of tenure, depending on the State pay range.

Cornell maintains that it can have a facility on line more quickly than the DOC could itself. But the DOC would have available to it the same "cookie cutter" designs as the private sector. It could have the same contractors bidding. When Charles Campbell was DOC director he brought in the Sutton Medium facility on time and under budget.

I briefly looked at the David Reaume study that Cornell presented in support of its proposal. I've just received a couple of days ago. I tried to call him but did not get him home nor was there an answer by machine. I tried 10 rings once, then 6 rings the second time, just in case I'd misdialed. I have never differed before with Mr. Reaume's opinions and have particularly appreciated his opposing tax and budget discourses with Scott Goldsmith of UAA. Both men are both very persuasive. But Mr. Reaume begins with this caveat on page 2: "According to information provided by Cornell Companies..." This is the crux of the matter. Can such a study be based upon information supplied by a contractor that stands to make perhaps hundreds of millions in profits on the proposal?

On page 6, Mr. Reaume possibly mistakenly assumes that the profits from this venture in Whittier will remain in Alaska, when in fact they will go to stockholders and executives largely in Houston, Texas. His pay scale assumptions (p. 4) seem to be predicated on what is being paid in the public sector in Alaska as well as Cornell's representations to him. But this private industry has been referred to as "Kentucky Fried Prisons," with workers making comparable wages. This is not a career. Even in Florence, where because of worker shortages and contract provisions, the private prison operators have had to and were able to pay wages not much less than the public prisons (though the benefits are much less, I think) they've still made a mess. I refer you to the state of Hawaii's audit of CCA's Florence Detention Center. It found essentially that the prison was being run by its inmates. Female audit team members were excluded from that part of the site review because their safety within the prison could not be guaranteed by the contractor. Before and while Kenai was being debated I heard that Cornell was paying only $8.50 per hour for halfway house staff, jobs not entirely dissimilar to that of guards. A letter writer to the Clarion referred to this figure as being presented in Cornell's recruiting in Fairbanks. According to SEC filings, I think, Cornell's executive compensation scale starts at $636,000 per year. Watch those averages.

One of the substantial costs of Alaskan corrections in the past decade has been for halfway houses run by Cornell. I have long heard that increases in these contracts, including budget modifications, has been vastly higher than what might be required by inflation or cost of living increases. I don't have those figures but I would urge you go get them from DOC and look at the alleged escalations.

I have further heard that after years of capitulation to the contractor's demands, Governor Murkowski's DOC held the line in Nome and a requested massive increase was finally resolved at a far lower level for huge savings to the taxpayer. Again, I don't have the figures so this is hearsay, but you could request them from DOC.

With respect to the Reaume study, let me once again direct you to his figures (p. 5). I thought I heard in testimony today that the prison will have a staff to inmate ratio of six-to-one. But Reaume uses figures of 300 hundred jobs and 1,200 prisoners, or a ratio of four-to-one. This apparent discrepancy needs to be resolved.

On page 6, Reaume states that he has not estimate any "Whittier-specific" impacts. I would contrast his study with the intensive Delta Junction economic feasibility study that is over 50 pages long with 150 pages or more of addenda. I can supply these two you if you like. In that proposed siting, even with the contractor getting the facility essentially for free and with the conversion costs being bonded by the City of Delta Junction, they couldn't make a go of it for the price that Cornell says it can accommodate in Whittier. Someone needs to explain this apparent contradiction. Reaume also implies that the staffing of this prison would come from "...Anchorage and nearby communities." But unless the contractor paid wages that would induce qualified people to commute to Whittier, which is most unlikely, I can't imagine that this facility could be staffed. The state DOC is unable to fill its staffing needs despite paying much higher wages.

Mr. Reaume indicates (p.8) that social workers could be hired at a median wage rate of $15.38 per hour. But DFYS can't hire nearly enough social workers though it pays much more than that, because it's such a difficult job and private employers pay so much higher. The legislature has heard substantial testimony regarding that, over the years. Working in a prison is far more stressful than working in an Anchorage or Juneau office, so I have problems with his hypothesis.

As long as I'm writing about studies, Cornell has brought up Sasha Volokh's article in the Harvard Law Review. That wasn't a "study" at all, but a very selective review of the literature by a very biased author, in my estimation. He was affiliated for years with the Reason Institute in Los Angeles that never found a privatization proposal it didn't like. I had interesting correspondence with him last year (which you're welcome to) because, for instance, he used work of thoroughly and notoriously discredited "research" authors such as Charles Thomas who resigned from his tenured position at the University of Florida after disclosure of his receipt of millions in CCA stock.

Ironically, authors who he quoted extensively such as Judith Greene, who evaluated every Alaskan inmates' file perhaps 25 years ago on a state contract, disagree wholeheartedly with Volokh's conclusions.

As far as building Alaska's next prison, I think it is unquestionable that the state needs to bring prisoners back from CCA Arizona. Although I heard a story said to have originated from Alaska private prison proponents last year that I was "...working for CCA," I think even less of them than I do of Cornell.

I opposed Mr. Prewitt's shipping of Alaskans to CCA Arizona nine years ago. I don't even think that shipping our inmates to public facilities (which was discussed in SB 65 testimony on Tuesday) would have ever been a good idea. The distance from family and support systems virtually guarantees recidivism. A California CDC study that I supplied to Alaska DOC employees in 1992 found that prisoners receiving visits from three or more people during the final year of their incarceration in a remote facility had one-sixth the recidivism rate of those who received none. The public facilities that have taken in prisoners from other states, such as the notorious prisons at Brazoria, Texas and Wallens Ridge, Virginia, were simply awful, perhaps a direct result of interjecting the profit motive into corrections. I possess a half-hour "training" videotape made at Brazoria where a combination of public deputies and private guards resemble storm troopers at full flight with real victims being chewed by real dogs.

While the expansion in Lyda Greene's SB 65 is certainly justified in Bethel and Fairbanks, I would hope that the size of the new prison proposed at the Sutton (Palmer) site could be scaled back. The legislature and the bureaucracy need to examine why so many people are being held for so long, and come back so often. In many other states, short term and non-violent prisoners are being disgorged at an astounding rate, with legislatures and governors desperately trying to make up budget shortfalls.

I heard from the Kansas House minority leader and a majority finance committee member called me to discuss at length a current bill dealing with this matter a few days ago. Today I got a call from a majority Senator. All agreed with me that these measures are upon us and support passage. Given the cushion Alaska has in Arizona, however unsavory it might be, Alaska has within its power the freedom to undertake course corrections to solve the budgetary constraints, while providing the public protection it is tasked to do and making efforts to address the societal problems and cultural discordance we are experiencing that contribute to our high incarceration rate.

So it seems the Legislature's responsibility to, in this age of fatal fiscal diseases, examine the history of those with whom it might jump into bed. I particularly would urge you to read excellent stories in the Anchorage Daily News by Tom Kizzia on 5/6/02 and to a Wall Street Journal reporter Joseph Hallinan article on 5/1/02. Mr. Hallinan is a widely respected author in the field of incarceration. Amanda Coyne in the Anchorage Press contributed another quality piece in its 5/9/02 edition. I can send you any or all of those.

I can also provide you with a floppy disc or CD containing a massive compilation of Cornell's and CCA's problems.

I hope that this testimony fills some of the needs for the facts that you are trying to assemble. I hope that the bill does not pass out of committee, as the many previous versions occupied the legislature far beyond any possible utility.

Sincerely yours,

Frank Smith

Frank Smith

Subject: **House, Senate Committees debate prison bills**
Date: Fri, 14 Mar 2003 12:38:25 -0900
From: Dee Hubbard <chubbard@alaska.net>
To: undisclosed-recipients:;

Lawmakers rumble over prison cost
DEBATE: House panel wrestles with which financial figures to believe.

By Sean Cockerham Anchorage Daily News
(Published: March 14, 2003)
http://www.adn.com/alaska/story/2767217p-2815878c.html

Juneau -- Backers of a proposed 1,200-bed private prison in Whittier are attacking the Corrections Department argument that a state-run prison in the Matanuska-Susitna Valley would be cheaper.

It Ã§can be done at significantly less cost than the government can provide the same services," Rep. Mike Hawker, R-Anchorage, told a House panel Thursday.

Hawker is sponsoring the House version of the Whittier private prison bill.

He contradicted earlier assertions by state Corrections officials that the private prison would cost $94 per prisoner per day, compared with $110 for a state-run prison of the same size outside Sutton.

"The question is whose figures do you believe," said Sen. Gary Stevens, R-Kodiak, chairman of the Senate State Affairs Committee.

His committee on Thursday moved the Senate versions of both the Mat-Su and the Whittier prison bills on to the Finance Committee to sort it out.

Lawmakers agree that Alaska, which now houses hundreds of its inmates in a private prison in Arizona, has a serious and growing prison overcrowding problem. But the state faces deep budget cuts, and some legislators, including Stevens, question whether the time is right to build either prison.

The proposed Mat-Su and Whittier prisons would be twice as big as Alaska's largest existing prison, Spring Creek Correctional Facility in Seward.

Gov. Frank Murkowski has endorsed the bill calling for the state-run prison in Mat-Su. He opposed private prisons during his campaign, and his commissioner of corrections, Marc Antrim, has said he believes prisons ought to be run by the state rather than for profit.

Antrim testified last month that the state's costs under the Whittier private prison bill would be an estimated $127.25 a prisoner a day. The proposal for a state-run prison would cost $110.39, he said.

Those numbers struck right at the heart of the arguments from private prison backers, who claim it would be cheaper than a government operation because of lower wages and benefits for prison workers and other efficiencies.

But Hawker and Texas-based Cornell Companies, the private prison firm pushing the Whittier project, said that the state's figures are bunk.

On Thursday Hawker told the House State Affairs Committee that the Whittier bill, House Bill 55, requires that the private prison not cost the state more than $94 per prisoner per day.

The discrepancy between the state's figures and Hawker's boil down to whether his numbers include other costs of running a prison, such as medical expenses for prisoners and inmate programs. Hawker insists that such expenses are included in the $94.

Antrim doubts such expenses could realistically be met in Whittier for $94 a day.

The House versions of both the Whittier and Mat-Su bills also authorize expansion of the overcrowded state-run regional prisons in Fairbanks and Bethel.

The Whittier bill also would expand Spring Creek, while the Mat-Su bill would use federal funds to add space for 200 pretrial federal prisoners in Anchorage.

Under both the bills, local governments would bond for the construction costs. The state would then contract with the municipalities for prison operations. Under Cornell's plan, it would run the prison for Whittier.

The state's costs would run from $40 million to more than $50 million a year, for a new prison.

The cheapest option would be to leave the Alaska prisoners in Arizona, state figures say. But persistent objections are raised that having the prisoners thousands of miles from their homes is bad for rehabilitation, and that the state's money is being exported.

Private prison proposals have won favor in the Legislature in the past, but have been killed by local opposition in South Anchorage, Delta Junction and Kenai.

Hawker, the Anchorage lawmaker whose district includes Whittier and parts of South Anchorage, said most registered voters in Whittier support the private prison.

Last year the Whittier prison proposal, pushed by Cornell in partnership with Anchorage construction giant Veco, passed the House but died in the Senate.

Frank Prewitt, a former state Corrections chief who is now a Cornell consultant lobbying for the Whittier private prison, said Thursday that its doors could be open in two years, faster than the Mat-Su prison. And, with the state's inmate population steadily growing, there will be room for both prisons over the long term, he said.

Reporter Sean Cockerham can be reached at scockerham@adn.com or 1-907-586-1531

ON THE WEB

For more about the Alaska Legislature, including easy ways to contact lawmakers, go to adn.com/legislature.

Representative Mike Hawker

Alaska State Legislature

Session:
State Capitol
Juneau, AK 99801
907 465-4949 direct
800 478-4950 toll free
907 465-4979 fax

Interim:
716 W 4th Avenue
Anchorage, AK 99501
907 269-0244 office
907 :69-0248 fax

Member:
House Finance Committee
Legislative Budget
& Audit Committee

House District 32:
Eagle River
Anchorage
Rainbow
Indian
Bird
Girdwood
Portage
Whittier
Sunrise
Hope

Memorandum

To: Representative Bruce Weyrauch, Chair
House State Affairs Committee

From: Representative Mike Hawker

Date: 3/5/2003

Re: House Bill 55-Correctional Facilities

I request House Bill 55 "An Act expressing legislative intent regarding privately operated correctional facility space and services; relating to the development and financing of privately operated correctional facility space and services; authorizing the Department of Corrections to enter into an agreement for the confinement and care of prisoners in privately operated correctional facility space; authorizing the Department of Corrections to enter into agreements with municipalities to expand existing correctional facilities; and providing for an effective date." be scheduled for a hearing at the earliest possible convenience in the House State Affairs committee.

Attached to this memo are the sponsor statement, sectional analysis, pertinent statutes, and background material. Anchorage will be the only teleconference sight, unless we receive more information or requests.

If you have any questions, please contact Sara Wright of my staff at 465-6899.

Thank you for your time and consideration.

rep.mike.hawker@legis.state.ak.us · www.akrepublicans.org\hawker\

Subject: **A little history of HB 498, article and response on HB 55**
Date: Sun, 2 Feb 2003 15:24:50 -0900
From: Dee Hubbard <chubbard@alaska.net>
To: undisclosed-recipients:;

If you don't remember what happened last year with HB 498 (Whittier private prison), Rep. Croft offered a sweeping amendment that would have changed the whole focus of HB 498. The number of private beds would have decreased from 1,000 to 250. Public beds would have been added to Fairbanks (100), Mat-Su (250), Seward (150) and the City of Kenai (250). Bethel would still have gotten 96 beds. It would have unbundled the projects. As the bill was written, none of the State projects could be started, until the Whittier project had begun construction. The Croft amendment would have allowed all projects to start at the same time. The public prison daily bed rate less certain administrative costs would be set a $79/bed/day, ten dollars LESS than the bed rate for Cornell as stated in the bill ($89-$91/day/bed).

When the Croft amendment came up for a vote, there was a tie - 18 yes to 18 no. Rep. Wilson changed her vote from yes to no. that made the final vote 17 yes to 19 no, and the amendment failed. Rep. Wilson continued to vote with Cornell on the rest of the amendments, final passage and reconsideration.

Senator Taylor never got the chance to have a floor vote on HB 498, as the bill never got out of Senate Rules. However, he, Sen. Cowdery and Sen. Therriault did vote to move the bill out of Senate Judiciary. All three of them signed No Recommendation on the bill report.

The following article comes from today's Juneau Empire. The letter following it is a response from Frank Smith.

d

Southeast lawmakers unite to boost region's strength
Region has half the number of seats it had in the Legislature at the time of statehood

By TIMOTHY INKLEBARGER
JUNEAU EMPIRE 2003
February 2, 2003
http://juneauempire.com/stories/020203/sta_lawmaker.shtml?p

A newly formed bipartisan caucus of Southeast lawmakers will focus on areas of mutual concern such as transportation, fishing, timber and education, said chairwoman Rep. Peggy Wilson of Wrangell.

The eight state lawmakers from Southeast held their first organizational meeting Wednesday.

"We may represent different parties, but our districts face many of the same challenges, issues and concerns," Wilson said in a prepared statement. "As a united force we will have a stronger voice in the legislative process."

A declining population in Southeast since statehood has meant a drop in representation in the Legislature.

Wilson said in the last two years, her hometown of Wrangell has dropped from 2,400 residents to 2,100.

The state recently released figures that show the Southeast population declining from 73,082 in the April 2000 census to an estimated 71,972 on July 1, 2002.

The region's population had risen just 0.6 percent from 1990 to 2000, and then declined by 0.7 percent from 2000 to 2002. In that period, 2,315 more people moved away than moved in to the area, and 1,205 more babies were born than people died.

"The main reason that we pulled together like this is because the population of Southeast is getting smaller but none of our problems are going away," she said.

Republican Sen. Robin Taylor, also of Wrangell, said Southeast's influence has been cut in half since statehood in 1959.

Southeast lawmakers then controlled a quarter of the Senate and House, with 10 representatives and five senators, Taylor said. Today the region is represented by just over half that, with three senators and five representatives.

Taylor said the region's political clout also has been diminished because Southeast is divided politically. Four members of the Southeast delegation are Democrats, and four are Republicans.

Democrats include Sen. Kim Elton and Rep. Beth Kerttula, both of Juneau, Rep. Albert Kookesh of Angoon, and Sen. Georgianna Lincoln of Rampart.

Republicans include Wilson and Taylor, Rep. Bruce Weyhrauch of Juneau and Rep. Bill Williams of Saxman.

Elton said resource issues are of interest to the entire delegation, adding that lawmakers would work together on topics for which they can reach a consensus.

"... I think we're all smart enough to know that we don't dissipate our energy by arguing and focusing on what pushes us apart," Elton said.

Although the caucus didn't get into many specific issues at its first meeting, Elton said members did discuss a bill offered last session by Wasilla Republican Sen. Lyda Green to expand prisons.

Green's Senate Bill 231 would have added prison beds to correctional facilities in Juneau, Fairbanks, Ketchikan, the Matanuska-Susitna Borough, Bethel, the Kenai Peninsula and Seward. Juneau's Lemon Creek Correctional Center would have gained 64 beds, but the bill never made it to a floor vote in the Senate or House.

Elton said it is uncertain if a different version of the bill this session will include new beds for prisons in Juneau and Ketchikan.

"That's an issue that ought to unify the Southeast caucus," Elton said.

But Taylor, who prefers private prisons to public ones, said it would make less sense to add to existing prisons than to build a new one or have a private prison company do it.

Wilson said the caucus plans to meet twice a month throughout the session.

The caucus also plans to hold teleconferenced meetings to get comments from constituents.

• Timothy Inklebarger can be reached at timothyi@juneauempire.com.

February 2, 2003

Dear Empire Editor,

It is no surprise that Robin Taylor and Peggy Wilson are once again trying to build a billion dollar boondoggle in Whittier. From the APOC site, one sees these legislators owe a substantial part of their campaign funds to executives and their relatives from Cornell Corrections and Veco, the proposed builders of the immensely overpriced, useless and unstaffable 1,200 bed private prison. Last year Representative Wilson also supported the building of a private Veco-Cornell prison in her home town of Wrangell, but local voters turned it down 72%-28%. Taylor has been on the Veco payroll for years as shown by his conflict of interest reports. In 2002 he brought an ordinance before the Wrangell Council to build such a prison. But prior to the introduction of "his" ordinance (since he is also on a substantial retainer as Wrangell's City Attorney), the exact same document was brought to the City Council of Whittier, Wrangell's competitor. It was delivered to them by Cornell vice-president, attorney Frank Prewitt, perhaps the true author, unless it was written in the Houston, Texas Cornell Headquarters. Prewitt urged the Whittier City Manager to act quickly to "win" the "wired" "... horse race," for siting of the prison. If Senator Taylor actually did write the Wrangell ordinance, sharing it with Cornell and Whittier would seem to be a violation of Bar Association ethics. When will the Empire ask these legislators the appropriate questions? Will George Wright, the disgraced bingo and pull tab operator, once again get his client, the Alaska Native Brotherhood, to provide a "beads and feathers" cover for this current attempted raid on the state treasury, now that the former front group, Kenai Native Association, has been virtually bankrupted by its association with Wright?

Sincerely,

Frank Smith
390 S.E. 110 Ave.
Bluff City, KS 67018
(620)967-4616

Wrangell RFQ to Whittier.bmp	**Name:** Wrangell RFQ to Whittier.bmp **Type:** Bitmap Image (image/bmp) **Encoding:** base64

SSHB55 Line Item Detail

FY06		Operations	Medical		Administration		Inmate Programs		Statewide Direct Costs		Reimbursed Gratuities	
Line Item	Amount	Comments	Amount	Comments	Amount	Comments	Amount	Comments	Amount	Comments	Amount	Comments
PS												
Travel												
Contractual												
Supplies												
Equipment												
Gratuities												
TOTAL	$0.0		$0.0		$0.0		$0.0		$0.0		$0.0	

FY07		Operations	Medical		Administration		Inmate Programs		Statewide Direct Costs		Reimbursed Gratuities	
Line Item	Amount	Comments	Amount	Comments	Amount	Comments	Amount	Comments	Amount	Comments	Amount	Comments
PS	$0.0											
Travel	$0.0											
Contractual	$20,586.0	$94.00 per day cost includes capital costs	$2,901.8	Hospitalization & Other Professional Medical/Dental/Lab & Opthamology Contracts	$972.4	DOA DP Chargebacks & Other DOA Chargebacks - some small contracts	$792.8	Education & Other Contracts	$2,299.5	Broad assumptions made for distribution of costs to several various components that provide direct services - line items could fluctuate drastically. Costs by line item pending distribution.	$344.4	Gratuities for inmates are the responsibility of the State. Currently the state reimburses Arizona for these costs.
Supplies	$0.0											
Equipment	$0.0											
Gratuities	$0.0											
Miscellaneous	$0.0											
TOTAL	$20,586.0		$2,901.8		$972.4		$792.8		$2,299.5		$344.4	Gratuities are estimated @ 85% working inmates at an estimated $1.85 an hour for 365 days per year.

FY08		Operations	Medical		Administration		Inmate Programs		Statewide Direct Costs		Reimbursed Gratuities	
Line Item	Amount	Comments	Amount	Comments	Amount	Comments	Amount	Comments	Amount	Comments	Amount	Comments
PS	$0.0											
Travel	$0.0											
Contractual	$41,172.0	$94.00 per day cost includes capital costs	$5,803.5	Hospitalization & Other Professional Medical/Dental/Lab & Opthamology Contracts	$1,944.7	DOA DP Chargebacks & Other DOA Chargebacks - some small contracts	$1,585.6	Education & Other Contracts	$4,599.0	Broad assumptions made for distribution of costs to several various components that provide direct services - line items could fluctuate drastically. Costs by line item pending distribution.	$688.8	Gratuities for inmates are the responsibility of the State. Currently the state reimburses Arizona for these costs.
Supplies	$0.0											
Equipment	$0.0											
Gratuities	$0.0											
Miscellaneous	$0.0											
TOTAL	$41,172.0		$5,803.5		$1,944.7		$1,585.6		$4,599.0		$688.8	Gratuities are estimated @ 85% working inmates at an estimated $1.85 an hour for 365 days per year.

FY09		Operations	Medical		Administration		Inmate Programs		Statewide Direct Costs		Reimbursed Gratuities	
Line Item	Amount	Comments	Amount	Comments	Amount	Comments	Amount	Comments	Amount	Comments	Amount	Comments
PS	$0.0											
Travel	$0.0											
Contractual	$41,172.0	$94.00 per day cost includes capital costs.	$5,803.5	Hospitalization & Other Professional Medical/Dental/Lab & Ophthalmology Contracts	$1,944.7	DOA DP Chargebacks & Other DOA Chargebacks - some small contracts	$1,585.6	Education & Other Contracts	$,599.0	Broad assumptions made for distribution of costs to several various components that provide direct services - line items could fluctuate drastically. Costs by line item pending distribution.	$688.8	Gratuities for inmates are the responsibility of the State. Currently the state reimburses Arizona for these costs.
Supplies	$0.0											
Equipment	$0.0											
Gratuities	$0.0											
Miscellaneous	$0.0											
TOTAL	$41,172.0		$5,803.5		$1,944.7		$1,585.6		$4,599.0		$688.8	Gratuities are estimated @ 85% working inmates at an estimated $1.85 an hour for 365 days per year.

$55,793,600 divided by 1,200 beds divided by 365 days = $127.39 per manday

Operations	$94 x 1200 beds x 365 days =	$41,172,000	Based on SSHB55
Medical	$13.25 x 1200 beds x 365 days =	$5,803,500	removed personal service costs
Administrative	$4.44 x 1200 beds x 365 days =	$1,944,720	costs will be the same
Programs	$3.62 x 1200 beds x 365 days =	$1,585,[illegible]50	removed personal service costs
State Dir Costs	$10.50 x 1200 beds x 365 days =	$4,599,0[illegible]0	costs will be the same
Grituities	85% of 1200 x $1.85 per hour x 365 days =	$688,755	[illegible] will be the same
$125.81 Per Bed x 1200 beds x 365 days = Total Daily Cost of		$55,793,535	

SSHB55 Line Item Detail

TOTAL
$0.0
$0.0
$0.0
$0.0
$0.0
$0.0
$0.0
$0.0
$0.0
$27,896.8
$0.0
$0.0
$0.0
$0.0
$27,896.8
$0.0
$0.0
$55,793.6
$0.0
$0.0
$0.0
$0.0
$55,793.6
$0.0
$0.0
$55,793.6
$0.0
$0.0
$0.0
$0.0
$55,793.6

Independent Analysis

HB55 / SB99

THE WHITTIER PRISON

A Government / Private Sector Partnership

Background

In 1995, all fifteen of Alaska's regional prisons and jails were operating at emergency levels of overcrowding. The State was held in contempt of court, fined over two million dollars and ordered to reduce the inmate population. To provide *temporary* relief, the Department of Corrections entered into a contract to house up to 1200 Alaska prisoners in a two-thousand bed, privately owned and operated prison in Arizona.

The Arizona private prison contract is a model government/private sector partnership. Alaskan corrections officials have testified that the contractor has delivered safe and humane prison services that meet or exceed the standards of the State of Alaska, at one half the cost of comparable in-state prison services.

Public Policy

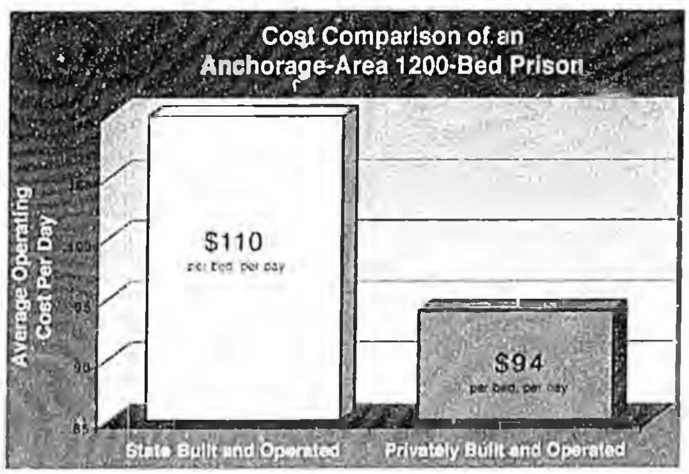
While exporting Alaskan prisoners to Arizona was a necessary, "stopgap" measure to relieve in-state prison overcrowding, it is poor long-term public policy.

From an economic perspective, over the past eight years Alaska has poured more than 100 million dollars into the Arizona economy, funding hundreds of Arizona jobs and supporting the bottom line of a corporation that doesn't even do business in Alaska.

From a social perspective, confining prisoners (38% of whom are Alaskan Native) three thousand miles from family and support systems has a dampening effect upon rehabilitation, family cohesion and prisoner morale.

The Challenges

COST: If exporting Alaskan prisoners to other states is poor public policy, why is the Arizona contract in its eighth year? Answer: Under the Department of Corrections' historical operational structure and personnel policies it simply costs too much to build and operate a state correctional facility.[1] Alaska's daily cost, per inmate, in Arizona is $64.83, without travel, major medical and State contract administration.



In Alaska, the statewide average cost of care, per day, per inmate is $113.31 *without capital debt service.*

In current dollars, the Alaska Department of Corrections estimates that the combined capital and operating cost of the 1200-bed SB 65 medium security prison is over $110 per day, per bed and can be completed in four to five years. The total combined capital and operating cost for the 1200-bed HB 55 Whittier Prison is $94 per day per bed[2] and can be completed in two years.

---

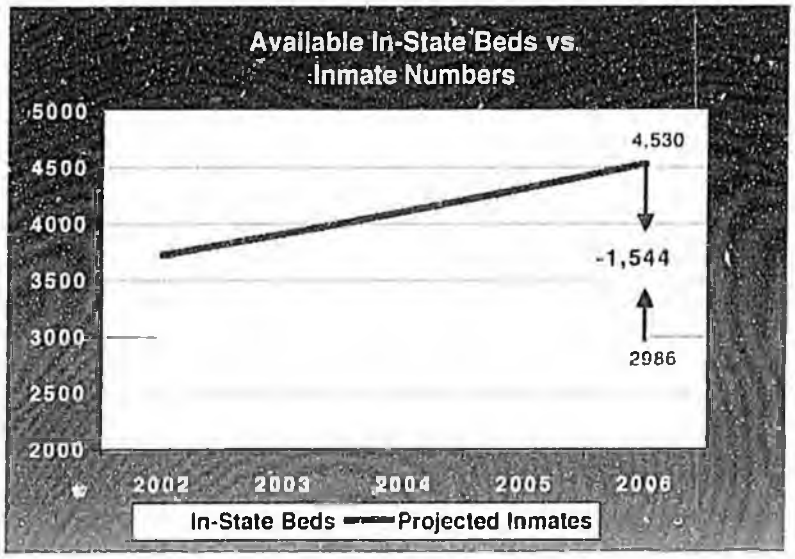
[1] Legislative Packet: Alaska Projected Bed Demand & Cost Analysis, Sec. 1

[2] ibid.

HB 55: A Government / Private Sector Partnership

The Challenges — Continued

INEFFICIENCY: Jails are meant to hold prisoners from arrest until sentencing. The mission of a jail is safe, secure confinement... no frills, no programs, just confinement. After sentencing, long-term prisoners (usually felons) should be transferred to central prisons that capture the efficiency and cost savings of economy of scale, and provide meaningful access to rehabilitation resources. Only prisoners with short sentences should remain in local jails.



The Department of Corrections' regional correctional facilities are multi-purpose facilities that house prison and jail services under one roof. Duplicating prison and jail services throughout the State is expensive, inefficient and ineffective.

GROWTH: The State currently houses 640 sentenced Alaskan prisoners in Arizona. The remaining sentenced and pre-trial prisoners occupy every available bed, in every available facility in Alaska, and the inmate population continues to grow by 200 prisoners, per year. *By 2006, the State of Alaska will be short 1,544 prison and jail beds and more than 200 halfway house beds.*[3]

The Solution

HB 55: An Act Authorizing the Department of Corrections to enter into an agreement with the City of Whittier for the care and confinement of 1200 prisoners in a government-owned, privately built and managed prison, and authorizing the expansion of existing correction facilities where justified and necessary.

The Whittier prison plan is a logical and cost effective plan to return Alaska prisoners from Arizona and to provide relief for regional jail overcrowding. In combination with the strategic expansion of existing State facilities, long-term sentenced offenders can be moved out of regional facilities and the Alaska inmate population can be safely and efficiently managed for another five years.[4]

---

[3] Legislative Packet: Alaska Projected Bed Demand & Cost Analysis, Sec 2
[4] ibid.

HB 55: A Government / Private Sector Partnership

What are the Benefits of the Whittier Plan?

BENEFITS TO THE STATE

- The State makes no capital lease payments to the City of Whittier. The cost for construction is paid from the per-diem rate for operations.
- Minimizes financial risk to the State by having one firm responsible for design, construction and, for the first five years, operations.
- Diminishes State legal liability for overcrowding in existing State prisons and regional jails.
- Proximity to Anchorage, as compared with proximity to Arizona, will lower prisoner transportation and monitoring costs.
- Proximity to Anchorage ensures the State's lowest personnel and contractual services costs.
- Requiring the operating contract to be re-bid after five years ensures that the State receives the best value.
- Establishes a government owned, privately managed cost comparison to State-owned and managed prisons that will stimulate State cost containment.
- Adds value to the $90 million Anton Anderson Tunnel (Whittier's railroad-vehicle tunnel).
- Proximity to Anchorage and local deep-water port ensures lower construction material costs.
- Returns Arizona prisoners closer to Alaska support systems. Provides enhanced opportunity for rehabilitation of all Alaska prisoners returned from Arizona.
- Supports Governor Murkowski's plan of increased infrastructure development within the state in order to stimulate economic development.
- A new facility will be designed to be operationally efficient, reducing long-term operating costs.

BENEFITS TO THE ANCHORAGE AREA

- Purchase of materials, goods and services associated with Construction of a 1200 bed prison will boost the economy.
- Creates at least 325 Davis-Bacon construction jobs for 1.25 years.
- Adds at least 228 indirect construction related jobs for 1.25 years.
- Increase of 300 direct, permanent prison jobs for Whittier and Anchorage-area residents.
- Adds a minimum of 200 permanent indirect jobs to the Anchorage/Whittier area.
- Alaska will no longer be supporting Arizona's economy. The Whittier Plan returns at least $18 million per year to the Alaska economy, with an economic multiplier effect that benefits all Alaskans.
- Provides an anchor tenant industry to an Alaskan community with limited opportunity for economic development.

HB 55: A Government / Private Sector Partnership

The Whittier Advantage

Community Support

- Whittier conducted an exhaustive public process gathering 80% registered voter approval (through public hearings and public petition process) before passing enabling ordinances and procuring prison development services.

State Procurement Process Satisfied

- Whittier retained the law firm of Perkins Coie to design and administer a competitive Request for Proposals, patterned after the State procurement process. The process was independently reviewed by procurement expert, and former Assistant Attorney General, Susan Burke, who testified before the Legislature that the process satisfied State competitive bid requirements.

Proximity to Anchorage

- The location, 40 miles from Anchorage, ensures lowest cost and most abundant personnel pool.
- Abundant staff housing is available in South Anchorage, Bird Creek, Indian, Girdwood (15 minute commute) and Whittier.
- Proximity to Anchorage ensures optimal access to least costly and most abundant health care, counseling, job training, facility maintenance and other resources and services necessary for safe, and effective prison management.

Site Already Identified

- The City of Whittier has identified a prison site at the head of Passage Canal that is owned by the Alaska Railroad Corporation and is leased by the City. The site is served by a reliable utility grid, including Chugach Electric and Enstar Natural Gas. Domestic and emergency water needs are abundant on-site resources.
- Preliminary assessments find the site environmentally clean and without risk of avalanche or flood danger.

Financing

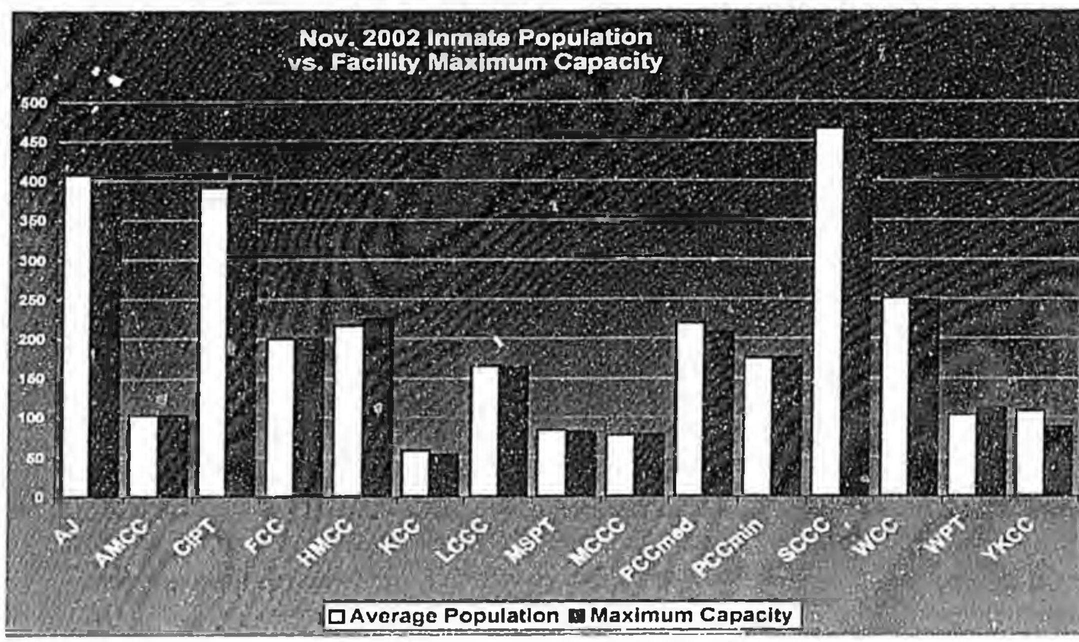
Under the Whittier plan, the City will finance construction through the sale of tax-exempt revenue bonds. The bonds will be secured by an intergovernmental agreement between the City and the State to lease prison beds for a period of twenty-five years. At the end of that time, the title of the prison could transfer to the State. The operating contract for the Whittier prison will be put out to competitive bid after the first five-year term. This approach protects the State and ensures that Alaska receives the most cost-effective services. The capital costs for the Whittier prison will be paid as a portion of the daily per-bed rate from the leased beds. *There will be no direct capital cost to the state.*

Financing costs for construction will be paid through the per-diem rate established by contract. This protects the State from construction cost over runs.

HB 55: A Government / Private Sector Partnership

Action Is Needed

Even with 700 prisoners housed in Arizona and the addition of 284 beds at the new Anchorage Jail, Alaska's 15 Corrections Facilities are operating at or above maximum capacity. Maximum capacity includes all of the beds currently available. When a prison or jail is operating over maximum capacity, it means that inmates are being housed in locations not intended for that purpose. This could include putting three prisoners in a cell intended for two, placing cots in the gym or even using infirmary beds. The chart below shows that in November of 2002, the average inmate population exceeded maximum capacity in eight facilities. Two facilities exceeded emergency capacity. Four of the facilities were full and only three facilities had any beds available (25 total). The Department of Corrections' projections show that that the inmate population will increase by 200 prisoners per year. The Legislature must act soon to mitigate the anticipated overcrowding.

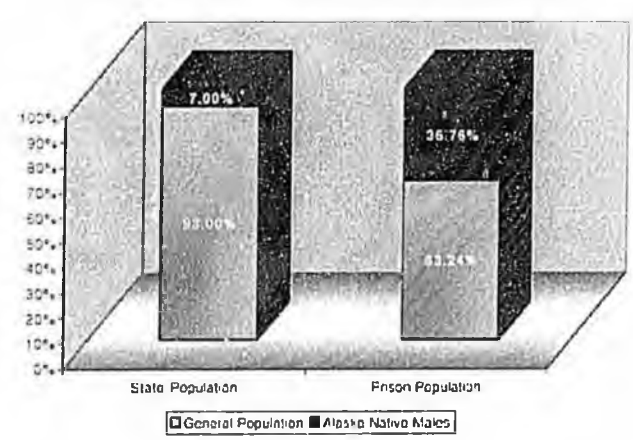


Alaska Native Concerns

Male Alaska Natives make up only seven percent of the general population in Alaska, yet a staggering thirty-seven percent of Alaska's prison population is Alaskan Native men. Over three hundred Alaskan Native prisoners (many from the most remote regions of the State) are housed in Arizona, far from the support systems necessary for rehabilitation.

The majority of Alaskan Native offenders do not have criminal personalities and do not respond to conventional correctional programs. The center-piece of the Whittier Prison Plan is Cornell Companies' commitment to exceed the minimum program standards
of the State by developing new programs specifically designed to reduce the recidivism rate of Alaskan Native Offenders.

State and Prison Population Comparison
Alaska Native Male Inmates vs. Overall Population



HB 55: A Government / Private Sector Partnership

The Operator

Cornell Companies of Alaska will operate the Whittier prison for the first five-year term of the contract with the State. Cornell currently employs more than 300 Alaskans at community correctional centers located in Anchorage, Fairbanks, Nome and Bethel. The firm is also one of the top three private corrections companies in the United States, and the only company that offers a continuum of juvenile and adult correctional services.

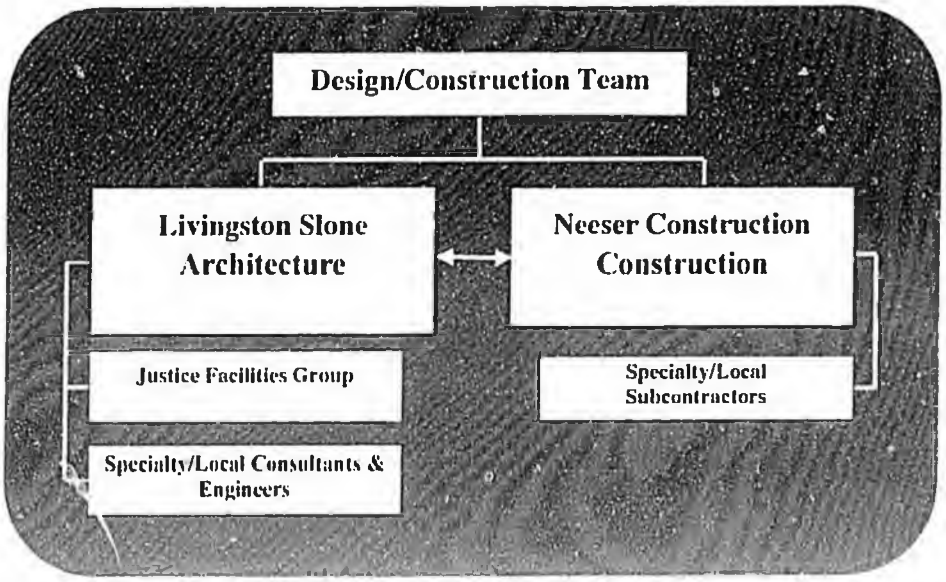
Cornell's Seven Key Principles

1. *People Security*
2. *Program Security*
3. *Accountability/Responsibility/High Expectations*
4. *Role Modeling*
5. *Teamwork/Communication*
6. *Dignity and Respect*
7. *Cleanliness/Environment of Care*

At present, Cornell operates 72 facilities, in 13 states and the District of Columbia, and has a service capacity of 15,000 prison, jail, pre-release and treatment beds. Cornell understands the need for a cost-effective corrections solution for Alaska and they will work with the City and State managers to ensure that the Whittier prison meets the State's needs.

Design/Builder

The design and construction team for the Whittier Prison is Livingston Slone Inc., and Neeser Construction, Inc. Both firms are long-time Alaska companies and both are dedicated to assisting the State in finding more cost-effective solutions for correctional facilities. Each firm has participated in the design and construction of many of Alaska's largest public projects, including the new Anchorage Jail, the Elmendorf Mall and the Alaska SeaLife Center.



HB 55: A Government / Private Sector Partnership

Notes

2/26/2003