ALASKA LEGISLATURE COMMITTEE FILES, 2003-2004 8672
11027 HOUSE STATE AFFAIRS

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

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[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.

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[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[illegible]., 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

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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]

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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

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[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 of 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.

10/17/01: 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.)

10/23/01: 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.

10/26/01: 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 frorn 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 <u>OPPOSITION</u> 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

HB 55
file

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

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

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,

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. Financing. 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. Project Cost. 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. Disclaimer of Liability; Cornell's Duty of Indemnification. 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.**

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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 1 200?

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. "Reimbursement Through the Bonds. 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, § I.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