

Public Strategies for Private Prisons

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Public Strategies for Private Prisons: *Overview*

- Federal, state and local funding of the justice system literally exploded in the two decades leading up to the 1990's. Average direct federal, state and local expenditures for police grew by 16%; courts by 58%; prosecution and legal services by 152%; public defense by 259% and corrections by 154%. Federal spending for justice grew by 668%; county spending increased by 710%; state spending surged by 848%. By 1990, annual spending was \$74 billion.
- At the end of 1998 there were 1.8 million in prison
- State & Federal facilities were at 115% of capacity
- 1996 Public prison budget = \$29 billion dollars; \$26 billion operating, \$3 billion capital outlay

- Average Public cost per day \$54.25 Average private cost \$38.17 per day
- Average Public staff turnover per year 12.9%; private unknown (OK 48%)
- Private prison statutory authority exists in 35+ states, DC, U.S. government, territories
- 27 states are under some type of court order/supervision
- Number of Private Management Firms: 15 in US; 4 UK; 2 Australia; 2 South Africa
- Publicly traded = 10
- Facilities under contract end of 1997 = 142
- Rated capacity of private facilities = 132,346 (12-31-98, up from 85,201 in 12-96)
- Private facility capacity utilization = 95.7%
- Anticipated Growth in 1999 20,000+ per year
- Growth in 3 years to keep pace with U.S. rate
- Private prisons are expected to continue to grow in the next 5 years by up to 200% (CThomas)
- Private facilities are in 30 States; + District of Columbia; Virgin Islands; Puerto Rico; Australia; England; Scotland; South Africa; Netherlands Antilles
- PZN/CCA market capitalization in 1998 = \$4,000,000,000

(Data from The Corrections Yearbook and from The Private Corrections Project)

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II. A. Reasons to Privatize

1. Private operators can provide construction financing options that allow the government client to pay only for capacity as needed in lieu of encumbering long term debt.
2. Private companies offer modern state-of-the-art correctional facility designs that are staff efficient to operate, built based upon value engineering specifications.
3. Private operators typically design and construct a new correctional facility in one half the time of a comparable government construction project.
4. Private vendors provide government clients with the convenience and accountability of one entity for all compliance issues.
5. Private corrections management companies are able to mobilize rapidly and to specialize in unique facility missions.
6. Private corrections management companies provide economic development opportunities by hiring locally and to the extent possible, purchasing locally.
7. Government can reduce or share its liability exposure by contracting with private corrections companies.

8. The government can retain flexibility by limiting the contract duration and by specifying facility mission.

9. Adding other service providers injects competition among the parties, both public and private organizations alike.

B. Reasons Not to Privatize

1. There are certain responsibilities that only the government should provide such as public safety and environmental protection. There is a legal, political and moral obligation of the government to provide incarceration. Major constitutional issues revolve around the deprivation of liberty, discipline and preserving the constitutional rights of inmates. Related issues: Use of Force; loss of time credit; segregation

2. Few companies available from which to choose.

3. Private operator inexperience with the key corrections issues.

4. Operator may become a monopoly via political ingratiation, favoritism, etc.

5. Government may lose the capability to perform the function over time.

6. The profit motive will inhibit the proper performance of duties. Private prisons have financial incentives to cut corners.

7. Procurement process is slow, inefficient and open to risks.

8. Creating a good, clear contract is a daunting task.

9. Lack of enforcement remedies in contracts leaves only termination or lawsuits as recourse.

Public Strategies for Private Prisons: *Types of Privatization Being Utilized*

Option 1: State owns *existing prison* and hires private contractor to operate the publicly owned facility (halfway houses and proposed on D.C.).

Option 2: State owns *existing prison* and sells facility to private vendor. Private vendor then enters into contract with state to house inmates in the now privately owned and operated facility (Washington D.C.).

Option 3: State constructs *new prison* according to its specifications and then hires private contractor to operate the publicly owned facility (Ohio and Michigan).

Option 4: State Funds construction of *new prison and owns the facility*. Awards contract to private vendor who builds and operates facility according to the vendor's specifications. (Texas State Prisons).

Option 5: State funds construction for *all* facilities. State builds and operates portion of the facilities funded. Local government selects private vendor to build and operate outstanding portion of facilities funded (Texas State Jails).

Option 6: Private contractor constructs *new* prison and enters into contract with state where facility is located to house the state's inmates in the privately owned and operated facility.

Option 7: Private contractor constructs *new* prison and enters into contract(s) with a state(s) where the facility is not located to house inmates in the privately owned and operated facility (Youngstown).

Option 8: Local municipality funds construction of facility through the development of a not-for profit corporation which, after receiving state approval, sells tax exempt bonds to fund the construction and equipping of a facility to house inmates from other jurisdictions (Texas).

Option 9: Consortium of counties own or have private facility and operate to house inmates from those counties (Tuscalousa County).

Option 10: State contracts with a private vendor to build and operate a prison in another jurisdiction (proposed in Oregon).

From a presentation at the National Conference on Privatization by Dr. James Austin, Vice President. National Council on Crime and Delinquency, March 1998.

Public Strategies for Private Prisons: *Major Issues*

- **Is the Price Right? Quality vs Cost issues**
- **What Percentage of Public Facilities Should Be Privatized?**
- **Emergency Responses**
- **Cherry Picking**
- **Contract Monitoring**
- **Performance Standards**
- **Liability: Use of Force; Discipline; Sentence Administration; Escape; New Crimes**
- **How is Success Defined?**

Public Strategies for Private Prisons: *Key Points*

The 1987 NIJ report entitled Issues in Contracting for the Private Operations of Prisons and Jails" was an excellent early overview of facility privatization issues. Much has been learned about private corrections in the United States in the eleven years since that early report. In these key points I have revisited the NIJ report in an attempt to update the recommendations and provide additional key points based on present day practices and experiences.

I. Public Policy Considerations

1. Before contracting with a private service provider, a State should undertake a systematic, detailed analysis to determine if, and under what conditions, contracting is likely to be feasible to the correctional agency. This should include an examination of: statutory authority, current state prison costs, crowding, performance standards, legal issues involved, availability of vendors, ways to reduce the likelihood and consequences of contractor defaults, and the attitudes of political stakeholders.

2. A public policy on privatization should be developed that provides guidance on key issues such as contract length, types of private services to be requested, private facility purchase options,

performance standards, and reassurances to public employees.

3. If a government's goal in contracting is to obtain new beds quickly at a lower construction cost, the private sector offers an attractive opportunity. However, if the government seeks a more economical operation, the evidence available to date suggests that contracting does not necessarily save a significant amount of money.

4. The government should have a long range plan that specifies how privatization fits in the agency's plans and specify to what degree privatization will be pursued, e.g. what percentage of agency facilities or services will be offered to private contractors.

5. Public employees should be given the opportunity to participate in the competitive process and to win a contract if it can be proven that the public offer is the most suitable and the most appropriate choice.

6. A key question that needs to be addressed by the public sector is: What is success and how do we determine if we are successful in the delivery of correctional services? The current public trend of determinate sentencing policies bears close watching to insure that privatization does not lead towards harsher sentencing policies,

increased recidivism and further increasing of the scale of imprisonment.

II. Protection of the State and the Inmates

1. Careful attention must be devoted to ensure that each contract provides adequate protection of the inmates rights and protects the State from liability claims.

2. Speculative prisons, proposed by economic development proponents, jeopardize the government debt incurring ability because if a speculative prison built with public trust bonds fails, the government ultimately becomes responsible for repayment of the debt.

3. Private prison contractors will not be able to escape liability under Sections 1983 of the Civil Rights Act, and the contracting government entity will be unable to protect itself from lawsuits resulting from the wrongful acts of the selected operator (Richardson v. McKnight). The government can reduce but not

eliminate its vulnerability to privatization related lawsuits by specifying in law, and subsequently in the contract, that the government be indemnified against any damage award and for the cost of litigation.

4. The government may consider requiring that a significant performance bond be posted or a trust fund established in order to indemnify it in the event of contractor financial, or other problems. The agency will need to determine whether the cost of the additional protection is necessary.

III. The Process of Privatization

1. When contracting, the use a competitive bidding process is highly recommended. This will help to avoid accusations of favoritism or impropriety. To improve the competitive climate the agency can:

- Develop and maintain a list of potential bidders
- Provide public policy and rules for procurement of private facilities and services.
- Permit both private nonprofit and for-profit organizations to bid.
- Assist with the financing of the design and construction

- Provide an ample window of opportunity for development of responses to the agency Request For Proposal (RFP). The RFP is sent to potential bidders to solicit an offer.

2. Identify all the cost components of the public operations and the oversight functions so that they can be adequately addressed in negotiations and during the agency budget planning process.

3. Mandate additional certification/credentials in critical areas to include areas such as: firearms; chemical agents; self defense; emergency response apparatus/weaponry; health care; transportation and other areas as determined. Prosecute new crimes perpetrated inside private prisons.

4. Personnel standards and training should be comparable to the agency's standards or ACA standards whichever are higher. Require FBI/felony background investigations of vendor employees and contractors.

5. Governments should include information about the proposal evaluation process in the RFP. Evaluation criteria include, but are not limited to:

- Vendor's experience and past success in similar undertakings:
- Design and construction details
- Timetable and availability
- Staff qualifications
- Qualitative review of operational plan details and program proposals
- **Vendor's financial condition and references**
- **Cost Proposal**

6. A method for resolving any contractual differences that may emerge should be agreed to and be specified in the contract before the service commencement date.

IV. Contract Provisions

1. The requests for proposals and subsequent contracts should specifically state: (a) the responsibilities of each party; and (b) what levels of performance are expected to include: compliance with performance standards as to policies, procedures and practices. The use of nationally recognized standards like those

from the American Correctional Association and the National Commission on Correctional Health Care is recommended.

2. Governments can control contract costs by stipulating that per diems may not rise above the Consumer Price Index-Urban.

3. Contracts should include specific staffing pattern information, inmate activity plans, treatment plans and detailed operational plans. For example: staffing levels are determined by calculating: the minimum required personnel for three shifts, the number of days per week for each person, and a relief factor or ratio; along with mandatory posts, pull posts (which are not always needed, e.g. visiting room officer); support positions and outside subcontractors.

4. Requests for proposals (RFP) and contracts should also identify sanctions or penalties, such as liquidated damages, that will apply for inadequate performance. Liquidated damages may be tied to failure to meet ACA mandatory standards, NCCHC standards, failure to staff, inmate idleness, failure to meet court orders, improper use of force or any other performance standard as defined in the contract.

5. A variable cost structure that is fair for both parties should be built into the contract so that there will be no

misunderstanding regarding cost for vacant beds and/or additional inmates beyond the specified ceiling.

6. The payment structure should be based on a pricing system such as single fixed price, fixed unit-price award, or cost plus. A per diem for actual inmate days is often preferred by States, as it addresses only beds used. There should be a provision to contract for additional services required by the State, court order or other reason. Performance incentives may be desirable to include in the payment section.

7. Prison contracts should be re-bid on a relatively short basis such as every 3-5 years. State laws may mandate a maximum contract length.

8. Governments should include provisions in the contracts to require that the contractor provide advance notification of issues that may result in a major impact on the facility such as the end of a union contract period, major worker grievances that could result in a work stoppage or slowdown, the change of ownership of the facility, rating or loss of insurance coverage, defaults by subcontractors, etc.

9. The contractor should rely on community resources for

operating the facility, whenever possible by, for instance, hiring local people and buying supplies and services locally.

V. Facility Concerns

1. Contracting for new or re-occupied facilities may entail fewer problems (e.g. personnel problems) than turning over an existing facility to a private firm. An important exception may be the case of trying to convert a jail into a prison. The experiences of several states in Texas clearly demonstrated the problems with trying to manage long term state prison incarcerates in former county jail lockups often coupled with poorly trained personnel.

2. Governments contracting to replace existing facilities should take steps to resolve personnel problems including:

- Require contractor to give employment preference to displaced staff**
- Provide transfer, retraining, and outplacement services to employees not choosing to work for the contractor**
- Carefully calculate, and make provisions for, disposition of benefits (e.g. retirement benefits and vacation / sick leave**

accrual).

3. Governments establishing any contract facility should develop a public relations plan as good public relations are crucial for community education. The government should fully inform community leaders and should also keep correctional employees fully informed of contract deliberations. The media should be made aware of the contracting initiative at an early stage.

VI. Selection of Inmates

1. The RFP and contract should be explicit in describing the type and level of offender, and the major construction and security features the agency deems necessary to confine the prisoners appropriately. The contract should be based on the State's inmate classification policy and its operational definitions of the privileges and level of supervision required by the custody level of the inmate population. This will include a section on special populations such inmates with AIDS, the mentally ill, protective custody, pregnant inmates, etc.

2. The state should contractually require the vendor to accept all prisoners in certain categories (e.g., medium security) for the duration of the contract period up to the agreed maximum number of inmates to be incarcerated at any given time. Mandate classification parity among public and private facility inmate populations. This will protect the State against 'cherry picking', selection of only the best inmates by the private operator.

3. Selection of inmates for placement in a contract facility, and decisions about their movement, is the government's responsibility as described in the contract. Criteria should be mutually agreed upon to avoid future misunderstandings. The contract should include the provision that the State makes the decisions about inmate reassignment, reclassification and transfer to and from the facility. Public officials should make the decision, based on vendor input, to award sentence credit and whether to release an inmate.

4. Minimum and maximum inmate population levels should be stated in the contract in order to facilitate planning and cost estimates.

5. States contracting for large institutions should specify in the

RFP and the contract that the selected private vendor should use unit management, a system of smaller population sub- units within a facility.

VII. Level of Authority

1. Government officials must ensure that disciplinary hearings conducted by the contractor follow legally required practices when discipline problems occur. A private firm should adopt the policies and procedures utilized by the agency. Major disciplinary actions should be formally approved by the contract monitor.

2. Private companies should closely adhere to the same type of procedures used by the government agency. Where necessary contractor discretionary actions involving inmate rights and discipline should be made in the form of a recommendation to the agency or official for approval.

3. In the event of an escape attempt, private prison employees should use reasonable and appropriate apprehension measures according to state law. Generally, once an inmate has left the facility's property, law enforcement officials should become responsible for the ultimate capture and return of the escapee.

4. Private operators should be required to obtain an agreement with local law enforcement or other government entity to provide assistance in the event of an emergency. Private operators are responsible for the associated costs of such an emergency response.

VIII. Contract Monitoring

1. The State should assign a full time contract monitor to work on-site at the private facility .

2. The State should plan for this critical task and implement an effective system for continuous contract monitoring. Planning occurs prior to the issuance of an RFP and is written in the contract. This should include:

A. regular timely reports showing tabulations and analysis of performance standards and the results of inspections;

B. regular onsite inspections using a detailed checklist based on the contract performance standards, rating categories, and guidelines on how to complete the ratings;

C. periodic documented fire, safety, health, medical, and sanitation inspections;

D. participation in disciplinary hearings concerning major rule infractions, approval of inmate classification actions, addressing sentence and time credit issues

E. provision for regular interviews with inmates to obtain feedback on such performance standards as treatment of prisoners, amount of internal security, drug use, and helpfulness and adequacy of educational, work, treatment and recreational programs;

F. annual in-depth, onsite inspections by a term of experts, covering the various procedures used and the results of periodic reports on the facility's quality of services based on performance standards;

G. provision for prompt review by government officials of the written inspections, identification of a corrective action plan with due dates, and follow-up to determine the compliance;

H. provision for relating information from the monitoring process for consideration during contract renewals;

3. The same monitoring procedures should be applied to publicly operated and contractor-operator facilities. Governments can then use the resulting information as a basis for comparisons and making future privatization decisions.

IX. Contract Evaluation

1. The government and the private operator should cooperate on systematic, comprehensive evaluation of the cost and operational effectiveness of the contract. A government should require that a comprehensive evaluation be made of the degree of success of the contract within a few years of contract award. Where possible the contracted facility should be compared to publicly operated facilities.

2. Agreement on the success of prison privatization is important. While the most discussed comparison usually involves cost of services as compared to public prisons, other variables may have greater bearing on the overall degree of success experienced by privatization efforts. Quality of service analyses, studies of recidivism and public safety could become critical review components. One researcher's classification of important dimensions of prison services and quality of confinement was defined by Logan, 1992 as:

Security: with respect to inmates, staff and community

Activity: ensure inmates are not idle, promote rehabilitation

Safety: environment hazards, sanitation, free from disease

Justice: rule of law inside prison, fairness

Order: enforce inmate compliance, ensure orderly running of institution

Care: medical, dental, psychological

Conditions: crowding, health risk

Management: staff capability, efficiency

X. Summary

Success in privatizing prisons that are cost-saving, safe and secure is highly dependent on the care taken in: developing a public policy that includes a long range plan; managing the procurement process; identifying all the state's costs; developing a request for proposal, preparing a contract which includes performance standards, choosing the contractor, executing the contract, and monitoring the contract.

Sample Contract Performance Standards

1. Health and Safety: The facility is in compliance with all local, state and federal fire and health codes. The facility retains on file regular inspections from these authorities that are available for review.

2. ACA Accreditation: Owner/Operator will become a candidate for ACA accreditation within nine (9) months of initial contract and achieve accreditation within thirty-six months of the Services Commencement Date.

3. Emergency Procedures: The facility has in place procedures

to follow in the case of an emergency and has provided a copy of such to the department.

4. Sanitation and Hygiene: The facility provides equipment and supplies to ensure the maintenance of a clean and healthy environment for all. Hygiene items are provided to inmates for their personal use through the commissary or through indigent procedures as necessary.

5. Health Services: Medical, mental health and dental services provided are comparable to those of the department in compliance with contractual obligations and ACA standards.

6. Food Services: Food services provided for inmates include a master menu schedule; special diets meeting medical or religious requirements; three meals daily served at regular times during each twenty-four hour period with no more than fourteen hours between the evening and morning meals.

7. Property: The property matrix of the DOC is utilized. The facility provides for the secure storage of inmate property. Inmates utilize the grievance process to seek reimbursement of lost or damaged property caused by the facility.

8. Inmate Services: There are laundry services available to inmates; the facility provides a commissary for inmates comparable in goods and prices of DOC facilities. Inmates are allowed correspondence and mail delivery services in accordance with policy; telecommunication costs for inmates are comparable to those to those in DOC operated facilities; visiting policies and practice enable inmates to continue ties with family.

9. Grievance Procedures: Inmates are afforded access to a reasonable, impartial and non- discriminatory procedure which includes a final level of appeal to the state. The facility is responsible for responding to grievances on matters occurring during the inmates incarceration in the facility except sentence administration and classification to a higher or lower security.

10. Disciplinary Procedures: The facility follows the DOC 's disciplinary policy or one comparable with disciplinary action reasonable and sanctions proportionate in relation to the violation. The facility provides complete, accurate and detailed reports to the contract monitor within seven (7) working days of the finalized disciplinary action.

11. Inmate Activity: A minimum of 80% of eligible inmates are productively occupied outside their cells for at least six hours per day or thirty hours a week involved in work, education, vocational or habilitative programs. Inmate labor may be utilized for facility operations and maintenance but not for the personal benefit of any employee.

12. Inmate Programs: The facility offer at least basic literacy education, adult basic education, general educational development; substance abuse programs-cognitive approaches and self help programs; the opportunity for vocational program assessment; and other programs as specified in the contract.

13. Security and Control: The facility provides security and control in accordance with accepted operating standards. Security measures are reviewed on a monthly basis to include tool and key control, internal and external security, search and seizure practices and emergency procedures.

14. Use of Force: The facility follows the DOC's use of force policy , reports all incidents according to policy and provides written reports as follow-up through the contract monitor in a timely manner.

15. Access to Courts: Inmates are afforded access to the courts by use of legal materials or a person trained in law or a combination of both. The law library, where applicable, contains the required legal materials.

16. Case Management: Inmates receive orientation services, meet with their respective case managers within the first ten days to be assigned an earned credit level, and be reviewed every 120 days for earned credit level and adjustment. Case managers have regular contact with inmates and handle requests to staff and grievances when possible.

17. Inmate Records and Reports: The facility maintains records on individual inmates. The case manager maintains individual files documenting each inmates program goals, employment, earned credit, disciplinary records, programmatic involvement and any other significant information. Inmate records and time calculation are monitored/audited by the Sentence Administration unit.

18. Racial Balance: Racial balance is maintained in accordance with DOC policy in housing, program and job assignments.

19. Urinalysis Testing: Five (5%) percent of the inmates are randomly tested for drug use monthly.

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Other Web Resources:

**Oklahoma State Statutes references can be found at:
<http://oklegal.onenet.net/statutes.basic.html>**

**Oklahoma Private Prison information:
http://www.doc.state.ok.us/DOCS/private_prisons.htm**

United States legal reference sources:
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