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ALASKA STATE LEGISLATURE
HOUSE OF REPRESENTATIVES
RESEARCH AGENCY

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February 14, 1986

MEMORANDUM

TO: Representative Randy Phillips

ATTN: Janet Seitz

FROM: Katherine Hazard *KH*
Legislative Analyst

RE: Evaluation of Privately Operated Prisons
Research Request 86-086

You asked for information about privately operated prisons in other states. Information specifically addressing the following questions was requested: 1) where are prisons now privately operated; 2) how do costs compare with those operated by the government; 3) what type of overseeing mechanism does the jurisdiction have to ensure proper treatment of prisoners; and 4) how do rehabilitation records and problems with violence or riots compare.¹

Many juvenile correctional facilities, several illegal alien detention facilities, and a few county correctional facilities in the United States are privately operated. In most instances, the government has contracted with private companies for operation of facilities in order to reduce costs. In some cases, contracts have been let because companies could provide needed facilities more quickly than could the responsible government agency. Private facilities are usually monitored by government employees for compliance with contractual agreements, and contracts stipulate the policies by which the company must manage the facilities. In some cases, these policies are more stringent in delineating the required conditions of facilities and services than

¹According to Sam Trivette, Executive Director of the Parole Board, Alaska Department of Corrections, there is not currently a legal distinction between jails and prisons, although there was in the past. Correctional facility is the most generic term; jail usually applies to a smaller facility holding pretrial individuals or those serving short-term sentences. "Prison" is used to describe a correctional facility for persons serving a year or more. In this memorandum no distinction is intended.

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policies of the previous government manager. Statistics on rehabilitation and problems with violence are not available. However, several legal and ethical concerns discussed in articles on this topic are raised toward the end of this memorandum, and a couple of articles addressing these questions are attached.

PRIVATELY OPERATED CORRECTIONAL FACILITIES

Juvenile Facilities

In many states, including Alaska, juvenile correctional facilities are privately owned and operated. According to a U.S. Department of Justice survey report, as of January 1985, the U.S. confines more than 31,390 juveniles in 1,800 privately operated residential programs. Over 450 of the facilities are classified as either medium or maximum security. Four facilities are mentioned most commonly in the literature reviewed: 1) the Pennsylvania Weaversville Intensive Treatment Unit, run by RCA to house 15 to 20 hard-core delinquents; 2) Florida's Okeechobee Training School for 400 to 500 male, serious juvenile-offenders; 3) a juvenile residential facility in Memphis, Tennessee, run by the Corrections Corporation of America (CCA); and 4) a facility operated by Eclectic Communications, Inc. near San Francisco, under contract to the Federal Bureau of Prisons.

In Alaska, the four secure juvenile-offender facilities are State-operated. Only nonsecure facilities are privately owned and operated.

Detention of Illegal Aliens

The Immigration and Naturalization Service (INS) has contracted with private firms to develop and operate facilities for detainees pending hearings and deportation. Although the detainees may have committed an infraction of law, in most cases they are not criminals. Thus, the facilities are minimum security, and staff usually do not encounter the kind of problems endemic to prisons with criminal offenders.

Behavioral Systems Southwest (BSS) operates facilities in Pasadena and San Diego, California. These contracts were let because California county facilities could no longer hold detained aliens, whose numbers were growing at the same time as the state court caseload was skyrocketing. These facilities are primarily for families awaiting hearings. Behavioral Systems Southwest owns some buildings and leases others on a ten-year basis. They holds an annual renewable contract with INS. Behavioral Systems Southwest also operates facilities in Arizona and Colorado. In addition they hold small contracts with U.S. Marshals Service and the U.S. Bureau of Prisons.

The Corrections Corporation of America (CCA) has operated a detention facility in Houston, Texas since 1984. They built this facility to house 350 detainees; for the most part, people held in this facility are adults collected from around the country, who are detained awaiting deportation. In addition to holding inmates referred by the INS, the CCA holds 50-75 medium security inmates for the U.S. Bureau of Prisons in these facilities. The CCA has an annually renewable contract; construction was financed with venture capital.

The CCA also designed, built and operates a 210-bed facility for illegal aliens in Laredo, Texas. In this facility, they hold both juvenile and adult illegal aliens, and they also contract with the U.S. Bureau of Prisons to hold juvenile citizens and aliens.

A private company, Palo Duro, operates a detention facility in Amarillo, Texas for illegal aliens serving terms for immigration offenses. Palo Duro charges the U.S. Bureau of Prisons \$45/day/prisoner.

Neither the juvenile facilities nor the detention centers require armed guards and confinement in both types of facilities is of relatively short duration.

Adult Correctional Facilities

Corrections Corporation of America began operating a 375-bed medium security prison in Chattanooga, Tennessee, in 1985. The facility holds male and female felons sentenced for up to six years, and misdemeanants sentenced for up to one year. They also hold pre-trial women. Inmates are minimum and medium security.

In October 1985, the Corrections Corporation of America began building a 400-inmate county prison in Panama City, Florida. This facility is designed to hold pre and post-trial persons, requiring minimum, medium and maximum security.

Buckingham Security Limited (BSL) is managing the Butler County Prison in Pennsylvania. The staff are county employees; however, Buckingham Security Limited sets the number of staff and the hours of work. The county contracted for management services in order to save money. The BSL has been operating the prison only since October of 1985, thus it is too early to make costs comparisons.

Buckingham Security Limited plans to build and operate a facility in Idaho for protective custody inmates from several western states. According to Gwen Hush, Administrative Assistant of Buckingham Security Limited, protective custody inmates require special care, and are among the most expensive inmates to detain in a regular facility. She said

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the theory behind the planned facility is that detention will be less expensive if the protective custody inmates are in one facility, rather than dispersed throughout facilities in several states.

RELATIVE COST

In general, privately operated adult facilities, other than the immigration detention facilities, have been in operation for too brief a period to allow cost comparisons, and juvenile facilities vary so widely in the type of treatment offered that comparisons between facilities (and for the same facility prior to and after private operation) cannot be made readily. A cost comparison for two detention facilities is shown in the table below.

Comparative Cost of Publicly and Privately Operated Immigrative Detention Centers

<u>Facility</u>	<u>Government</u>	<u>Private</u>	<u>Percent Savings</u>
Silverdale Detention Center (Chattanooga, Tennessee)	\$24/person/day	\$21/person/day	12.5
Immigration Detention Center (Houston, Texas)	\$26.45/person/day	\$23.84/person/day	9.8

* * * *

OVERSEEING MECHANISMS

The type of overseeing mechanism varies for both government and privately run correctional facilities. The Commission on Accreditation of Corrections, of the American Correctional Association (ACA), sets standards for correctional facilities. There is no unilateral mandate for compliance with these standards. Apparently the ACA standards are more rigorous than many government correctional facility standards. Eileen Bergsmann, of the Commission on Accreditation, said that although the commission has no legal authority to set or enforce standards, judges have looked to the ACA standards for direction in decisions about correctional facility conditions.

For private facilities, the overseeing mechanism depends on the individual contract. Both Buckingham Services Ltd. and Corrections Corporation of America promise to meet the American Correctional Association standards within a time described in their contracts. The CCA is obligated to meet ACA standards within two years of taking over management of a facility.

Mr. Jim Anthony, of Correction Corporation of America, noted that these obligations are in addition to and above requirements to comply with the state's Department of Corrections policies. In addition, in each correctional facility managed by CCA, the contracting government agency has a person on site daily to monitor compliance with the agreement. In privately operated illegal alien detention facilities, the U.S. Immigration and Naturalization Service stations an employee to monitor compliance with contractual obligations.

Questions of liability are frequently raised in discussion of privatization of correctional facilities. Attached is an article in which it is argued that government cannot eliminate or reduce its liability to inmates by delegating to private entities the operation of detention or correctional facilities (Attachment A). Mr. Anthony of CCA argues that not only can CCA accept liability, but they have. According to Mr. Anthony, CCA carries insurance and indemnifies the county from any law suit based on the performance of the company; they are obligated by contract to pay any amount owed to the defendant and to cover all legal expenses incurred by the government in the suit.

PROBLEMS AND SUCCESSES

No studies have been done comparing problems and successes of privately operated and government-run correctional facilities. Although juvenile facilities and illegal alien detention centers may have been operated for a long enough period to allow comparison, adult correctional facilities have not been.

Concern has been raised that employees, many of whom are already poorly paid and minimally trained, will be paid less and given less training. From the reports reviewed, it appears that staff are often paid less by private companies, although in a few instances the starting salaries were higher. Training requirements in several instances were less for privately operated institutions. This is part of a broadly voiced concern that privately operated facilities will reduce personnel to economize, and that this will in turn result in lower quality service in correctional facilities.

Concerns have also been raised about the legal and ethical implications of operating correctional facilities for profit. One concern raised in many articles is that private employees will be dispensing justice, such as in how to punish inmates for starting fights, when to put an inmate in solitary confinement, etc. Critics claim that dispensation of justice is a responsibility endowed to government. Company employees can also influence the duration of an inmate's time in the correctional facility by their recommendations to parole boards. Mr. Anthony, of

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CCA, said that although employees are responsible for making recommendations, the parole board is the agency which determines the inmates release time, and the responsibility for dispensation of justice is retained by public agencies. Attached are two articles which discuss several legal and ethical questions in greater detail (Attachment B).

Two questions for which no answers were suggested in the reports reviewed but which maybe relevant to your request are: 1) What provisions are there to prevent private employees running correctional facilities from striking? 2) What happens if a private corporation operating a correctional facility goes bankrupt?

Private sector financing of correctional facility construction was also discussed in detail in a report by the National Institute of Justice. According to their report, depending on the length and type of lease, prevailing interest rates, and other factors, leasing may or may not be less expensive than purchasing a facility outright; the most significant advantage is the ability to evade debt limits, and to pose alternatives to general obligation bonding (which requires voter approval) when voters will not approve bonds and prison facilities are at or above capacity. Alaska has used a lease/purchase agreement with the City of Seward in construction of the new Seward correctional facility.

* * * *

This memorandum is intended to provide a brief review of a very broad topic. Please let us know if you would like more information on any aspect of this subject.

KH

Attachments

Even though the committee several times called MDOC "irresponsible" and said the department had violated the law, it added that "it is also only fair to note that the MDOC has had to deal with a severely overcrowded system, for which we all share a portion of the responsibility." The committee's findings "should not be viewed as a total indictment of the MDOC," it said. Nevertheless, it concluded that MDOC policies have "severely compromised the integrity of their early-release programs."

Compared to the committee's harsh critique, Director Brown's response sounded restrained. He said that nearly all of the committee's recommendations "will have a financial impact," and that many of them will require even more prison housing than already planned in a major construction program. "The Governor and legislature can make the decisions on what programs and changes can and should be supported. Naturally we will abide by whatever decisions are made," Brown said.

PRIVATIZATION DOES NOT EASE STATE'S LIABILITY, PANEL TOLD

Government agencies that allow private companies to assume authority for construction and day-to-day operation of prisons cannot escape responsibility for ensuring that prisoners receive Constitutional treatment, according to a law professor who conducted a study of case law on the subject.

Speaking at a Congressional oversight hearing on privatization, Professor Ira P. Robbins of the American University's Washington College of Law said that "government will not be able to eliminate or reduce its liability to inmates by delegating to private entities the operation of detention or correctional facilities." Robbins detailed his study of privatization cases before the House Judiciary Committee's Subcommittee on Courts, Civil Liberties and the Administration of Justice, which called a hearing November 6 not to consider any legislation but to consider the privatization movement as it affects the U.S. Bureau of Prisons.

Government can reduce its potential financial liability to aggrieved inmates at the time it signs a contract with the corrections company, simply by agreeing to language that declares the company liable, according to testimony by Richard Crane, vice president for legal affairs for the Corrections Corporation of America, the nation's largest private corrections firm. "CCA and other companies [have] guaranteed to indemnify government at all levels should lawsuits be filed," Crane testified. "This simply means that if there is a suit regarding the operation of a privately run facility, the contractor will be responsible for the payment of damages and costs."

Robbins, however, said that case law indicates that such contractual agreements do not relieve government of the burden of liability. The Federal Civil Rights Act, under which most prison-condition litigation is brought, can be applied to private parties such as corrections companies if it

can be shown that the private party acts "under color of state law," Robbins said.

Courts have used three criteria to determine whether activities of private companies meet the test of "state action," Robbins said: the "public function test" (whether the private company provides a service traditionally provided by government); the "close nexus test" (whether there is a close connection between the state and the private company's action); and the "state compulsion test" (whether the government has a clear duty to provide the services in question).

The government may be held liable if any one of the three criteria is met, Robbins said. "I believe that, in the private prison context, each of these tests for state action is satisfied," he concluded after studying cases involving inmates and detainees.

The most pertinent case in corrections, Robbins said, is *Medina v. O'Neill*, a 1984 case involving an illegal immigrant detention center in Houston operated by a private company for the U.S. Immigration and Naturalization Service (INS). Sixteen detainees were confined to a cell designed for six, according to court papers. And a private security guard who was untrained in the use of firearms shot and killed one detainee and seriously injured another during an escape attempt.

Inmates sued both the company and INS under the federal civil rights act. Chief Judge John Singleton of the U.S. District Court in Houston found that the INS could not delegate its responsibility for the illegal immigrants. "Because both immigration and detention are traditionally the exclusive prerogative of the state, it is evident that the actions of [the INS and the private company] were state action . . ." Judge Singleton wrote.

After concluding that government cannot escape legal liability if inmates win lawsuits over unconstitutional prison conditions, Robbins went further, questioning whether delegation of the prison operations to private entities is itself unconstitutional. On this broader question Robbins reached no firm conclusion: it is "a very difficult question, without any good, clear, recent help from the case law," he said.

"Even if such a delegation is Constitutional, however, that does not necessarily mean that it is wise to transfer this most basic function of government—the doing of justice—to private hands," Robbins said.

Crane of CCA dismissed the question of Constitutionality as "absurd." CCA has "spared no expense in researching the question," he said, and "neither our research nor that of anyone else has indicated that there is any Constitutional impediment to such contracts." Crane cited provisions of the U.S. Code which allow the Attorney General to confine federal prisoners at "any available, suitable, and appropriate institution or facility, whether maintained by the federal government or otherwise." In addressing the question of liability, Crane did not mention the *Medina* decision.

Crane noted that the federal government already has many contracts with private companies for housing of offenders. "It's true that most of these are community treatment centers, but if anyone thinks that this doesn't amount to 'custody,' I would suggest they give it a try for a week or two," he said.

The third witness before the House subcommittee was Sheriff M. Wayne Huggins of Fairfax County, Virginia, representing the National Sheriffs' Association. The sheriffs' group is "unalterably opposed" to privatization of jails, Huggins said. Private companies will not be able to reduce the cost of running jails, Huggins said, because the major areas of expense—salaries and training—are already at "pitiful" levels. The average starting salary for sheriffs' deputies is approximately \$13,000 per year, Huggins said. "What caliber of employees could they attract for cheaper salaries?" he asked.

County governments should operate jails in a cost-effective manner with no profit, Huggins said. If bureaucratic "red tape" increases costs, it should be done away with, not circumvented through privatization, he said.

LAW ENFORCEMENT

800 MIAMI POLICE EMPLOYEES TESTED FOR DRUG USE; 1 TESTS POSITIVE

The Miami Police Department, hoping to put an end to bad publicity over increasing allegations of drug use among its employees, has given urinalysis drug tests to more than 800 officers and civilian employees. Only one patrolman tested positive, the department said; that officer faces dismissal from the force.

The drug testing was strictly a volunteer program, and was begun at the request of a group of officers who wanted to clean up the police department's image following several cases of alleged drug use by department employees, according to department spokesman Officer Mike Stewart. Of the department's approximately 1,350 civilian and uniformed employees, 816 volunteered to take the drug test, Stewart said, and "815 tested negative."

If there are significant numbers of drug users at the Miami Police Department, presumably they were among the 500 who declined to participate in the drug testing. Nevertheless, Stewart said the testing has helped prove to the community that sensational news headlines suggesting that the police force is "drug-ridden" are false.

The massive testing was voluntary, but testing in several earlier cases was mandatory, and those who tested positive or refused to be tested have been arrested, relieved of duty or have left the force voluntarily, Stewart said. The department ordered testing in certain cases after it received tips or other cause for suspicion, Stewart said, and the department reserves the right to continue to order tests in such cases. If

the employee refuses, he faces disciplinary action for refusing to act on a direct order from his commanding officer, Stewart said.

In addition, Police Chief Clarence Dickson is considering proposals for regular testing of all employees, Stewart said. A "department operational order" for mandatory drug testing is "in the works," he said. Depending on the final outlines of the program, tests would be ordered either as a part of officers' annual physical examinations or on a random "lottery-type" basis, Stewart said—5 or 10 officers every day.

The details of any new drug testing program will be subject to negotiation with the police officers' union. The department and union currently are in the midst of working out a new contract, and drug testing rules are one item on the table, according to Robert Klausner, an attorney for the Fraternal Order of Police in Miami. Drug testing procedures must be written down in specific language in order to prevent their use as a form of harassment against officers who are out of favor with management, Klausner said.

The one Miami officer who was said to test positive for marijuana use during voluntary testing, Jerry Wheat, faces dismissal for "disgraceful conduct" and failing to abide by department rules. He was relieved of duty with pay, pending appeal to a disciplinary review board. Wheat, a 12-year veteran who was a motorcycle patrolman at the time he was relieved of duty, maintained that he has not used any illegal drugs.

NEW YORK CITY OFFICERS ACQUITTED OF BRUTALITY CHARGES

Amid cheers by police officers and heckling by protesters, a case of alleged police brutality in New York City has ended with acquittal of six officers on all charges of criminally negligent homicide, assault and perjury. The case involved Michael Stewart, a 25-year-old black man who, arrested for writing graffiti in a subway station, lapsed into a coma while in the custody of the city's Transit Police Department and died 13 days later.

The five-month trial received heavy publicity for several reasons. Stewart's family contended that the officers, all of whom are white, had beaten Stewart to death out of racism. The city's chief medical examiner, Dr. Elliot M. Gross, was himself investigated following allegations that in the Stewart case and others, he altered or misrepresented the results of autopsies to protect the police. (Gross initially attributed Stewart's death to cardiac arrest, but later cited a spinal-cord injury as the cause.)

And the case was unusual in that prosecutors were testing an unusual "omission theory" of police liability. Stewart had extensive bruises when he reached the hospital, and more than 20 persons testified that they had seen a struggle between officers and Stewart. But no witness was able to identify particular officers who may have administered blows.

Jails Run by Private Company Force It to Face Question of Accountability

By MARTIN TOLCHIN

The growing trend toward privately operated jails has led to new questions about accountability and prisoners' rights that are being addressed every day by the Corrections Corporation of America, which operates detention facilities in Texas, Tennessee and North Carolina.

The privately held company cares for more prisoners than any other non-public concern. Put together in 1983 by the Massey Birch Investment group of Nashville, which also provided financing for the Hospital Corporation of America, C.C.A. has become a target for critics of private prisons and a model for other operators.

With prisons severely crowded in the early 1980's, several companies moved to own or operate correctional facilities. Today about two dozen detention centers, including the four run by C.C.A., are privately operated. That trend will be the subject of a three-day conference to begin in Washington tomorrow under the auspices of the National Institute of Justice.

A dispute at the company's alien detention center in Houston exemplifies what critics say is one growing problem for the privately operated correctional facilities: who is accountable for the welfare of the incarcerated?

Proposal for a Library

The Rev. Roberto Flores of the Houston Center for Immigrants was concerned that aliens held in the detention center grew increasingly depressed as they idled away weeks and sometimes months. He suggested providing a library, and he said others proposed counseling and English lessons.

But whenever they pressed for an official response, Father Flores said, they were shunted between the Corrections Corporation of America, which owns and runs the 350-bed center, and the Immigration and Naturalization Service, which detained the aliens and oversees the institution.

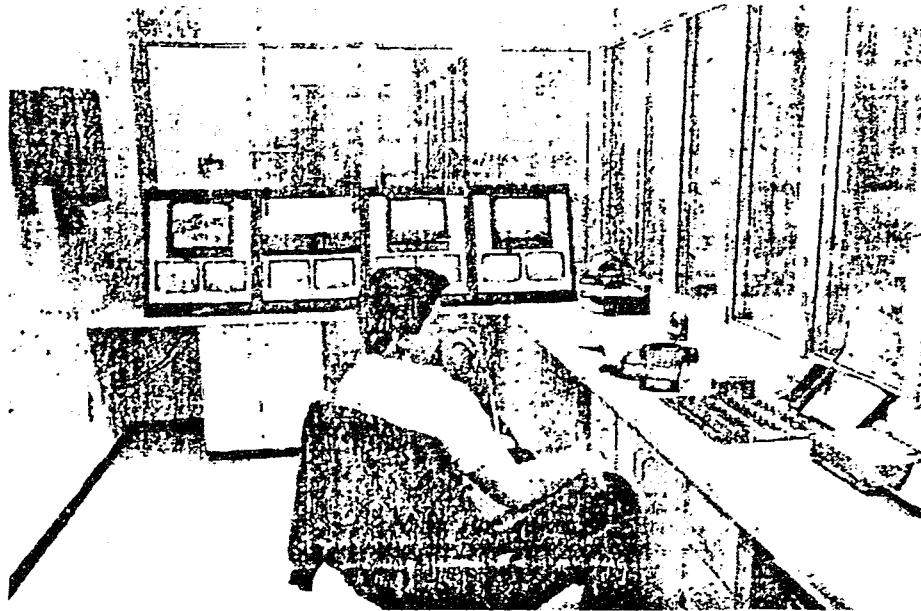
Although officials finally set aside a room as a library, there is no librarian, and the few donated books have disappeared. None of the other suggestions have been put into effect.

"Whenever we have a problem, I.N.S. tells us to go to C.C.A., and C.C.A. tells us to go to I.N.S.," Father Flores said.

John S. Robinson, a C.C.A. employee who administers the facility, said, "We have certain requirements under the contract that we have to abide by."

In addition to its Houston facility, C.C.A. is building a new immigration service center in Laredo, Tex., and it runs a multipurpose facility in Chattanooga, Tenn., a juvenile facility in Memphis and a 30-bed facility for the Federal Bureau of Prisons in Fayetteville, N.C.

The Houston facility is also used by the Federal Bureau of Prisons to incarcerate aliens convicted of crimes. They are kept separate from those the Immigration Service suspects of being in this country illegally.



A security guard watching monitors in the control booth at the Houston detention center owned and operated by the Corrections Corporation of America. The 350-bed facility was built in six months at a cost of \$4 million.

Critics consider corrections facilities an integral part of the criminal justice system and question whether profits should be made from incarceration. In addition to raising questions of accountability, they fear an assault on prisoners' constitutional rights.

In a brochure, C.C.A. touts the benefits in efficiency to be reaped by governments that do business with the company. "Other benefits include reduced pressure from the courts for reform and upgrading," it adds.

Model of Cleanliness

Is C.C.A. suggesting that it can help governments circumvent court-ordered improvements in correctional facilities? "Most courts ask for a demonstration of good faith that a state or county will correct the problems," said Thomas Beasley, the company's president. That demonstration of faith occurs, he said, when a government signs a contract with his company.

The company's Houston facility, which opened in April, is a one-story model of spaciousness and cleanliness. Men live in 50-bed dormitories. The company built the center in six months at a cost of \$4 million. Immigration officials say the Federal Government would have needed up to five years to build a similar center because of competitive bidding and other regulations.

"Our facilities don't begin to approach this one," said Paul O'Brien, district director of the Immigration Service.

Travis Snellings, vice president for marketing of C.C.A., said the quality of the facilities helped reduce personnel costs. "Miserable working conditions, low pay and low self-esteem produce worker absenteeism," he said. "We don't have nearly the turnover, absenteeism or overtime that plagues the public sector."

The Federal Government spends \$28.45 a day for each resident at its own immigration detention centers. C.C.A. charges the Government \$23.84.

Corrections officers hired by the company start at \$14,500 a year, as against \$15,000 for those at the Immigration Service. Fringe benefits for the private officers are far more meager, as is their training.

Immigration officers spend six weeks at the Federal Law Enforcement Training Center at Glynn, Ga., for a total of 240 hours.

By comparison, C.C.A. says it gives its corrections officers 40 hours of training, half of it in on-the-job settings, before they begin work, and an additional 120 hours the first year. At the Houston facility, however, only 40 percent of the staff has had the additional 120 hours' training in the 10 months since it opened.

"I'm the Supreme Court"

Mr. Robinson's job includes overseeing disciplinary cases that arise from fighting or other infractions at the Houston facility. The cases are heard by company employees. Penalties

range from restriction to a dormitory to 72 hours in isolation. "I review every disciplinary action," Mr. Robinson said. "I'm the Supreme Court."

The case of a depressed 17-year-old woman who was sent to Mr. Robinson's facility is related by Father Flores, the Rev. Thomas Sheehy, assigned by the Roman Catholic Diocese of Galveston-Houston to handle liaison with the Im-

migration detention center, and Sister Carla Maria Crabtree, diocesan director of Hispanic ministries.

The alien, a native of El Salvador, was apprehended in July and placed in a county facility. In September she was transferred to the C.C.A. facility, where she worked in the kitchen and earned the customary \$3 a day. Her friends, disturbed by her depression sought vainly to alert the company to the problem, but not until Thanksgiving, when she was catatonic, was she seen by a psychiatrist and taken to Ben Taub Hospital in Houston. Ultimately, Father Sheehy took her to Reynosa, Mexico, to be with family members.

"They certainly did not act on it right away," Father Sheehy said. "If they had a psychotherapist, I'm sure they would have picked it up sooner."

Budget Problems Cited

The facility has no room for a psychotherapist in its budget, however, according to both company and immigration officials. Immigration officials said that in Federal facilities, inmates with obvious emotional problems were routinely seen by psychiatrists of the United States Public Health Service.

The company also runs a medium-security adult facility in Chattanooga. Dalton Roberts, the Hamilton County Executive, cited cost and efficiency as the main reasons for turning to private operation. "Their research showed that they could run it a little cheaper," Mr. Roberts said. "Also, it was taking a toll on my entire administrative staff, and on me. Since they've run it, I haven't spent one-tenth the time on it."

C.C.A. charges \$21 an inmate a day, \$1 a day less than it cost the county. The company took over the 325-bed facility in October and offered to hire all the county employees who had worked there. Most joined the company.

For some time, many small juvenile facilities have been run by private companies. C.C.A. runs Tall Trees, a

facility in Memphis for 35 youths. Shelby County pays \$33.25 a day for each youth, less than half the cost at the state training school.

The youths attend the public schools. But about a dozen inmates spent one recent morning in the day room, silently watching television. Tim Magugan, administrator of the facility, said that counselors did not arrive until after school, and youths who did not attend school were left to fend for themselves.

"We have a small staff," Mr. Magugan said. "We don't have any fat."

Tall Trees has a five-step program that rewards the youths for keeping appointments, performing chores and working with peers and staff.

A more ambitious juvenile treatment center, the Weaversville Intensive Treatment Unit, outside Allentown, Pa., was established by the RCA Corporation in 1978.

"We deal with the serious chronic offender," said Henry J. Gursky, the project manager. "It's a dangerous business. The worst possible scenarios do occur."

Each of the 22 inmates, 14 to 18 years old, has either committed a violent felony, such as armed robbery, rape or arson, or a string of lesser crimes, such as burglaries or assaults. About 85 percent have drug-related problems.

The building resembles a college dormitory. The residents have keys to their own carpeted rooms.

"Physically, this is better than most of their homes," Mr. Gursky said. "But what isn't cushy is that we see their every move. Emotionally, it's very tense."

Newer private operators, such as the Corrections Corporation of America, are optimistic as they begin to build their track records. In the nine years the Weaversville facility has been operating, Mr. Gursky says, 5 youths went on to college and 10 went into the military.

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The Privatization of Corrections

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The relatively short term of confinement is another condition typical of both INS and juvenile facilities. Programming concerns are absolutely minimal at the INS centers, where the average stay is just a few days. Even at the juvenile level, where confinement can range up to six months or more, the special problems of long-term commitments are avoided. In addition, the juvenile and INS facilities are specialized in their focus—one treatment-oriented, the other aimed at simple detention.

Finally, the political climate surrounding use of INS and juvenile facilities is a consideration which should not be overlooked. Private operation of juvenile and INS facilities is not a new idea, although operating large and relatively secure institutions like the Okeechobee facility is certainly an innovative extension of an old concept. Though proposals for the establishment of private juvenile and INS facilities have faced significant opposition in some cases, private contractors in these fields have a fair amount of experience in overcoming opposition from employees, corrections system management, and the community.

To the extent that adult facilities can mirror these same conditions, it is conceivable that privately operated institutions will face no more difficulty than the existing juvenile and INS facilities. However, with the exception of some small minimum security institutions or community-based adult correctional centers, it seems unlikely that state or local facilities for adults will be operating with minimal security requirements, short terms of confinement, specialized functions, and few public or governmental roadblocks to private involvement. What, then, are the kinds of considerations likely to be faced by private operators and governments when adult correctional facilities are contracted? The next section considers the variety of political, legal, administrative, and financial issues that may arise as states consider contracting the operations of primary facilities for sentenced adults.

Issues in Contracting for Adult Corrections Facilities Operations

Figure 4.1 outlines the key issues to be considered in planning the development of proprietary institutions. Some of these issues have been revealed through the experiences of the INS and juvenile facility contracts described above. Others simply reflect an effort to anticipate what might be the

issues of consequence if larger, more secure facilities for less transient populations were operated by private vendors.

The Political Issues of Private Facility Operations

—Delegating Social Control Functions to the Private Sector

The most fundamental issue in the political debate touches on a core question of political philosophy. Correctional facilities represent a powerful exercise of state power, as they are the means used to deprive persons in custody of liberties otherwise granted to all citizens (the most notable of which is freedom of movement). The delegation of this authority to private providers raises issues not encountered in contracting for more mundane services such as bus transportation or solid waste disposal. In a facility entirely operated by the private sector, a range of management functions involving the classification and control of inmates (including the use of deadly force) might be delegated to the private contractor. Quite apart from any legal constraints on the delegation of these functions, some observers have questioned the fundamental propriety of such a shift.

In considering the use of privately commissioned pre-sentence reports, a recent article in Federal Probation argues that the private sector has no legitimate role in such a "quasi-judicial function as sentencing recommendations." The point is made by analogy to police services: "It is one thing for the private sector to maintain the fleet of police cars; it is another where private practitioners start making arrests." According to the author, because the administration of justice relies on social value judgments, not scientific prognoses, it is not an appropriate market for economic enterprise.⁶⁷

Arguably, the discretion available to corrections practitioners is far more circumscribed than that available to arresting and sentencing authorities. There are, nonetheless, parallel opportunities to exercise social controls. The most obvious arise in considering the order maintenance functions of institutional personnel—specifically their authority to administer discipline and prohibit escape through the exercise of police power. Some have suggested that any arguments regarding the legitimacy of contracting these functions are resolved if custodial personnel within private institutions are retained state employees. This may, however, merely satisfy

the letter and not necessarily the spirit of the objection, at the same time diminishing the management control and efficiency of the contractor, and inciting friction between private and public employees.

A second area where corrections decisions have an even broader "quasi-judicial" flavor is the area of classification and parole release. As a crucial determinant of time served, parole release is an integral part of the sentencing process in most states. Classification procedures are less intimately connected to the duration of confinement but still play a role in providing inmates with access to greater degrees of freedom and in accelerating or constraining final release. "Good time" decisions made by the contractor could also have a significant impact on the time served, and might be more difficult for the state to retain control over than general classifications and/or parole release decisions.

Regardless of the strategies employed to minimize or eliminate contractor involvement in the actual decisionmaking, some argue that any rigorous separation is a practical impossibility, and even an indirect private sector role is inappropriate. In the final analysis, the issue is grounds for lively ideological debate that can only be settled with reference to state values and preferences. There are those who argue that some functions are the raison d'être of government and cannot or should not be delegated. In this view, "the administration of justice" is one of these defining functions and it applies not only to legislative and judicial activities but to decisions made at many other stages in the criminal justice process. With equal vigor, others argue that there is a legitimate and necessary role for private enterprise in corrections management and the level of individual decisions that may be required to manage the flow of inmates through a facility hardly constitutes an abrogation of the broader role of government in forming system policy.

-The Political Power of the Private Sector

There is consensus in the general literature on the privatization of public services that contracting increases the political power of the private sector. Unlike government personnel who are prohibited from lobbying, private organizations with large interests in public sources of support have often developed considerable lobbying skills. Those who

fear this new political influence point to the ease with which it might be used to continue unneeded or excessively costly programs. Others see advantages in expanding the political power of the private sector--particularly in the corrections field. As one author has commented, "Probably one of the greatest contributions of private organizations is the political influence they can bring to bear in a field generally devoid of political advantage in appropriations, program improvement and resources."⁶⁸ Depending on the circumstances, either position may have logical merit. To realize the best possibilities, contracting agencies can only rely on judicious contractor selection and monitoring procedures.

-Private Sector Influence on Public Policy

Another level of conceptual, political issues relates to the general concern that privatization may have unintended effects on public policy. The ability of private contractors to lobby for the continuation of marginal programs is one expression of the more general concern that the interests of self-preservation or profit maximization may conflict with the interests of public policy. The opportunities for conflict can take a number of forms:

"Skimming" the Market. Some analysts have pointed to the tendency of correctional agencies to become dependent on a limited number of contractors who are simply more effective in responding to requests for proposals or able to deliver high quality services due to experience or economies of scale. In this context, the ability of government to cancel a contract or even to shift its emphasis may be severely constrained, and contractors may virtually dictate policies such as intake and termination criteria. The resulting tendency to skim off the "cream of the crop" has been seen in many community corrections endeavors where private providers (in all good faith) are able to restrict eligibility standards and to terminate or violate any cases who may subsequently pose performance problems. As Lloyd Ohlin of Harvard Law School has observed, this has the unfortunate consequence of leaving the public correctional system with "the dregs" refused by the private sector.⁶⁹ The problem is parallel to that noted in the privatization of health care facilities and programs where critics have suggested that "private health care practitioners funnel off the relatively healthy cases for whom minimal treatment can be profitably provided; but the less profitable chronically ill cases are left for the

public sector."⁷⁰ Care in defining admission criteria and restraining the discretion of private providers in making transfer decisions may be the best defense available to contracting correctional agencies.

The "Hilton Inn Mentality." What is known in the health care field as the "Hilton Inn Mentality" (referring to the pressure to maintain high occupancy rates) is also applicable to the business of providing correctional services. Since privately operated institutions may be reimbursed by means of per diem fees, their financial interest lies in maintaining maximum population levels. This may, however, conflict with the state's interest in maximizing parole or pre-release opportunities. Once again, the role to be assumed by the private contractor in making release and transfer decisions is clearly an important implementation issue. In the health care field, efforts to avoid contractor tendencies "to keep beds full when patient care demand may not justify census capacity" have generally rested on contracts that provide incentives for reduced costs and less than 100 percent occupancy.⁷¹ Even if private corrections contracts have no formal role in inmate release and transfer decisions, similar incentives may be useful to mediate any indirect influence they may bring to bear on the movement of inmates across or out of state institutions.

A Better Class of Institutions? While private contractors may have an incentive to keep their institutions at maximum capacity, there are visible disincentives for them to allow population levels to rise substantially in excess of capacity. In public corrections facilities, the latter practice has all too frequently resulted in prison disorders, media investigations of prison conditions, external inspections and federal court intervention--risks unlikely to be welcomed by a private contractor. In this respect, the influence of privatization on public policy may be extremely positive in the long term. If private institutions operate under contracts that define capacity limits and specify minimum standards governing the conditions of confinement, sooner or later it may become clear that public institutions must do the same if they are to avoid legal and managerial chaos. The problem in the short run is, of course, that the conditions of confinement among facilities that remain in the public sector may deteriorate as long as they have no comparable rules governing capacity and conditions. Just as those facilities may be forced to deal with the

tougher cases, they may also be left with a disproportionate share of any crowding burden. In that case, there will be two classes of institutions—one based on rational management principles, the other operating at the mercy of the courts.

Political Corruption. The problems of graft and corruption are ethical issues frequently raised in the privatization debate:

The Defense Department, and more recently, the Environmental Protection Agency, have had numerous scandals concerning officials who have used the revolving door to the private sector and profited from their government service, sometimes apparently exploiting the public trust. . . Clearly, the appearance of impropriety is as damaging as actual misconduct.⁷²

According to this argument, the risks of political corruption should certainly lead to caution in contracting. As one account has suggested, corrections professionals "are worried that companies will begin meddling in state and local politics in order to secure contracts," citing a Texas law authorizing counties to contract for private jails that has been termed strictly "a 'private-interest' bill put through by former lawmen interested in getting into business."⁷³ Others have suggested that the solution is more careful and scrupulous monitoring of government action across the board, and not a diminution of legitimate efforts to stimulate free enterprise. In fact, should the movement to privatize corrections facilities gain momentum, one might expect—even hope—to see any number of corrections professionals joining the ranks of private organizations to provide a more knowledgeable perspective on the nature of the corrections business. Constraining the "revolving door" syndrome is probably best accomplished by the typical means of conflict-of-interest provisions attached to public employment, openly competitive procurement procedures, and broadly composed contractor selection committees.

Public Participation. The effects of privatization on the visibility of corrections is another issue of political concern. Some have argued that privatization will decrease public input into the delivery of correctional services and will shift accountability to faceless private providers. Others suggest that the system will become more accountable to the public. Michael Keating, Special Master of Rhode Island's state facilities, has observed that the use of private providers "opens up the process to outside

ers," offering more opportunities to bring facility operations closer to public view. On balance, it is entirely likely that private institutions will receive fairly intense scrutiny, in the short term. The concept is relatively new, and there are both high expectations and deep reservations in many quarters. Certainly in the near term, then, any developments will be closely watched. Whether this interest will be sustained in the long term remains unclear.

--Attitudes of Public Employee Unions

Another potentially volatile political issue that may accompany efforts to convert facilities to private sector management involves the reduced power of public employee unions. The American Federation of State, County and Municipal Employees (AFSCME), which represents a large number of corrections employees, argues that contracting "means fewer and poorer quality services for the sake of profits." In 1976, AFSCME passed a resolution condemning contracts for services. In 1977, the union produced a book entitled Government for Sale that attempts to document the dangers of privatization.⁷⁴ While corrections commentators have noted that considerable privatization of juvenile corrections has occurred in some states without significant union opposition, this may reflect the longer tradition of contracting for services in the juvenile area. As the privatization movement enters newer territories, stronger opposition may be encountered. As noted above, a proposed contract for the operations of a juvenile facility in California was effectively blocked when state employees protested the takeover. Public employee resentment also led to difficulties in implementing the Okeechobee takeover in Florida. To avoid these problems one respondent suggested that private management only be considered for new facilities. At the very least, if a takeover is planned, it is certain to require carefully planning for the transition, thoroughly calculating and communicating the anticipated benefits to the state, and actively lobbying to diffuse this source of opposition.

--Attitudes of Corrections Management

Corrections management may not be uniformly supportive of private operations that may threaten a loss of agency control. As a recent survey by the National Institute of Corrections has noted, "loss of turf" may, in fact, be more of an inhibitor to expanding the role of the private sector than the

actual loss of employment for state workers.⁷⁵ Once again, careful planning and communication are the keys to overcoming the objections of public corrections manager to private facility operation.

--Public Attitudes

Finally, general public attitudes may also constrain the development of private facilities. Fear about their security may combine with traditional public reluctance to host a corrections facility in the community, whether publicly or privately operated. Without the override powers of a government agency, private contractors must face the delays, costs, and possibly unsuccessful results of efforts to secure local zoning approval. Providers often emphasized the critical need to counter public resistance with systematic attention to public relations activities.

Administrative Issues of Private Facility Operations

Issues of quality, accountability, and flexibility dominate discussions of the managerial consequences of privatization.

--Public vs. Private Quality of Service

For a number of reasons, many contend that the quality of privately provided services is likely to be superior—once again, at least in the short term. The elimination of civil service restrictions allows the private provider to control performance and to tailor staff to changing program needs. Independence from the bureaucracy also gives the private provider greater freedom to innovate and to deal more rapidly with problems in the management or delivery of services. Finally, unlike government providers, the private sector is under competitive pressure to perform—pressure that can provide a significant incentive to deliver high quality services.

The long-term prospects for improvement are more uncertain. If the ability to respond to corrections needs becomes concentrated in a small number of corporate providers (as many believe it will be), the danger exists that reduced competitive pressures may erode any short-term gains in quality, as private providers come to resemble the monopolies they have replaced. This concern suggests that the market for correctional services may be unable to support a sufficient number of providers to realize the benefits of active market competition. In many

respects, it tends to be a difficult and somewhat unattractive market; it is also relatively small (since states now seem unlikely to relinquish the dominant share of their responsibility for operating institutions); and many of its needs (for relatively large capital reserves, sufficient cash flow, substantial insurance coverage, and access to specialized support personnel), favor the aggregation of services in a few large providers. Thus, despite the current surge of interest from the private sector, a real market test may be infeasible in the short term.

If this is true, it suggests that contracts in the corrections field may best be used when a government simply lacks the capability to satisfy a particular need—not because commercially motivated services will necessarily produce qualitative improvement. Only time will tell how much credence can be attached to this speculation. It is entirely possible that there are simply greater natural incentives to "satisfy the customer" built into the work ethic of private enterprise—in contrast to government service, where pleasing the customer can be a highly political exercise. As long as there is even a single alternative, the fact that the private organization's reputation is on the line may motivate continued performance.

—Monitoring and Staffing Issues

In contracting for facility operations, the government relinquishes the burden of providing direct services and assumes the responsibility for monitoring private providers. As preceding sections have implied, the importance and the difficulties of the monitoring function cannot be overestimated. Even where a structure for monitoring public institutions is already available, substantial re-direction is likely to be needed. Quality control is inherently more difficult when the government is dealing with an independent provider and can only exert indirect control. Efforts to strengthen public control can, in turn, lead to the development of two parallel bureaucracies (the government monitoring apparatus and the management structure of the private agency), an arrangement that may serve more to diffuse than to clarify public vs. private missions. Unless care is taken to define the respective roles of public and private managers, two organizations are responsible, but neither may be clearly accountable.

Adding to the administrative burden of the state is the possibility that the management problems of publicly operated institutions may increase if the state can only distribute any excess or problem prisoners among publicly operated institutions. In addition to the general strain on resources, the relations between public and private corrections staff may become an issue if private staff are perceived as higher-salaried, less-burdened employees.

Shifting government responsibility from operations to oversight also means a shift in the government's capabilities. The state's own capacity to operate facilities will shrink, making it more difficult to revert to public management or limiting the personnel pool available to meet future corrections management needs. Private operation of selected facilities may also reduce the opportunities to shift staff among facilities or to use the less secure, privately managed facilities as a training ground for public corrections employees.

The degree to which any of these issues may constrain corrections management will obviously depend on the particular jurisdiction and organization of the corrections function. If any generalization can be offered, it is only that even short-range plans for the private management of a single facility may have longer-range, system-wide implications, and therefore should be considered in the context of future corrections management needs.

—Short-Term Flexibility vs. Longer-Term Constraints

Just as there may be different short- and long-range implications for the quality of service, facility contracting may provide the government with an ability to move quickly in the short term at the possible cost of constraints on the ability to change course over the long term. The immediacy of the crowding problem lends a great deal of appeal to any strategy that will permit state government to avoid the delays involved in getting a new public facility on-line. At the same time, because the facility is contracted, any long-term obligations are, at least in theory, avoided.

In practice, if population pressures ease, and the facility is no longer needed to house inmates, operations can indeed be suspended—probably with more ease than would be the case if the facility remained under public management. And, if the private

provider is responsible for the property, that vendor--and not the state--will be left with the burden of converting the facility to another use. This scenario is obviously highly advantageous to the state. While closure may involve some--even substantial--negotiated costs, these may be gladly incurred when viewed against future operating costs. It is probably also true that there is a great deal of inertia built into state-owned facilities that may stay on-line merely because they exist and no other state use is compelling. In short, if a government believes that its need for additional space is likely to be short-lived, private contracts generally offer more flexibility than government operations.

If, on the other hand, the government wishes only to change contractors and not to shut down the facility, it may be significantly constrained. Transferring a contract for a support service can be relatively simple. Transferring the operations of an entire facility can be a costly, disruptive break in the continuity of service. Moreover, if the scenario outlined in the previous point holds true, there may not be a ready supply of qualified bidders; institutional operations cannot simply be suspended or put on hold while the search is underway; and if the current contractor's performance has been less than satisfactory, it may only get worse in the process.

Any effort to reduce this risk to the government is likely to increase the contractor's risk to a degree that might virtually eliminate private sector participation or increase its cost to an unaffordable level. Once again, the only reasonable defense appears to be extremely careful contractor selection and monitoring, and perhaps some consideration of performance incentives in the contract itself.

Legal Issues in Contracting for Facility Operations

Turning to the more technical matters, at least four legal issues require careful consideration in the course of planning the development of proprietary facilities: authority, liability, security, and contract specificity.

—Legal Authority to Contract

The first legal issue to be considered is whether states and counties have specific statutory authority to contract with private firms. While states may authorize contracting of various forms, contracts for facility management may be implicitly prohibited or, in the more likely case, merely ex-

cluded by omission. Many states, for instance, authorize service contracting, but it may not be clear that an entire service function can be managed by a private provider. Similarly, a few states have laws requiring the use of private vendors for community-based corrections. Even here, however, amendments may be required to permit contracts for primary facility operations. A state law that directs counties to provide and operate jail facilities is an example of an implicit prohibition that would require amendment. In some states specific statutory language may also be needed to open contracting opportunities to for-profit organizations.

Because the concept of privatization is relatively new, it is not yet clear whether proposals to remove any of these legal barriers will stimulate aggressive debate. While the National Sheriffs' Association has passed a resolution expressing its "disapproval and opposition to the concept of the private sector operating and managing jail facilities for profit,"⁷⁶ the American Correctional Association is apparently supportive of private operations. This division of opinion seems to characterize much of the early reaction to the concept in the field. Thus, it is only clear at this point that contracting for facility operations is not an option that could be exercised in most states without advance planning.

—Liability of Contractors and Contracting Agencies

To what extent does contracting transfer the government's liability to the private vendor? The area of law controlling tort liability for injury or death is highly complex. Cases will often turn on their facts, existing contract provisions, state statutes, and case law. Because private facility management contracts are a recent innovation, no body of case law has yet emerged to clarify the respective liabilities of public and private agencies. There is, however, no legal principle to support the premise that public agencies will be able to avoid or diminish their liability merely because services have been delegated to a private vendor. Liability will be limited only to the extent that it might already be constrained by the (rapidly disappearing) defense of sovereign immunity or statutes establishing specific monetary limits on claims against the state. By itself, private contracting offers no new protections. Just as juveniles are wards of the court, inmates can be considered wards of the state, and a private contractor essentially acts as an extension

of the state. Thus, if the contractor errs, the state has retained its authority and may share the liability.

In this context, it becomes crucial for public agencies to ensure that contractors observe appropriate staff selection and training standards, as well as adequately maintain the facilities and observe the necessary security precautions. The contractor can insure against problems of legal liability by purchasing a comprehensive insurance package to cover such eventualities.⁷⁷

—Security Considerations

Related to the liability issue is the question of facility security. In jail operations, for example, maximum security conditions are generally required, since the facility is likely to hold both serious and non-serious offenders. State adult facilities—even those at the minimum security level—are characterized by strict perimeter security and armed guards, while at higher levels of security there must be at least the capability for lockdowns and other measures for inmate control. These requirements raise a number of potential concerns for the government and the contractor alike.

Can a government delegate its authority to use force if necessary to maintain public safety? Provided the contractor meets any standards adopted to regulate the performance of public correctional officers, there are no apparent constraints to the use of private employees in this role. Private citizens have limited arrest powers, and any private citizen who meets state and local regulatory requirements may carry a weapon. To diminish the contractor's liability for discharging that weapon (or, in the more likely case, using restraining force) while performing the duties of a correctional officer, a state might permit "deputization," or the delegation of special police powers to corrections employees. If applied to a private contractor, this would essentially provide private corrections employees with the same qualified protection from civil action granted to police officers. The alternative is, of course, an adequately insured contractor.

While security can be contracted, whether and how to contract for this function may be more pertinent questions. Some contractors attempt to deal with security by mixing private employees with publicly paid guards or by hiring ex-correctional staff as

security consultants. In the absence of any practical experience, it remains unclear whether these practices are sufficient, whether states and localities should retain the security function, or whether they can establish criteria that will yield the same level of experience enjoyed by the public sector in supervising an uncooperative clientele.

—Specific Contract Provisions

Compliance with standards has long been an issue in the field of adult corrections, based both on pressures brought about by litigation and federal court involvement and the recent moves toward correctional accreditation. While contractors and the government itself may have some justifiable concern about the potential costs of imposing correctional standards as part of a contracting agreement, the benefits of this practice are likely to be substantial. Governments may gain a new and welcome ability to enforce correctional standards, since they can hold the contractor accountable for deterioration in prison operations or conditions. Private vendors may also benefit: it is certainly no more than sound business judgment to make sure that all requirements and conditions for performance are stated explicitly in the contract itself, thus protecting the vendor from changes in requirements and liability from lawsuits. Finally, explicit statements of expectations allow for more accurate costing of services—another advantage for government and contractor alike.

What are the issues to be considered in developing the solicitation and subsequent contract between the government and the private vendor? Six general issues are mentioned below; others will undoubtedly emerge as states gain more experience in drafting confinement service contracts.

(1) One of the most basic is the duration of the contract. In counties and states, contract length is usually constrained by statute to one to three years so that an existing government does not bind a future one or funds are not obligated beyond a state's fiscal period. This also provides the government with the flexibility to change vendors and to renegotiate contracts to reflect changing needs. Not surprisingly, the absence of long-term contract commitments poses considerable risks to the private vendor, making it difficult to plan revenues, retain qualified staff, and maintain competitive costs. To some extent this may constrain private sector participation in government markets or force pri-

vate vendors to increase costs to cover the risk of non-renewal. These, however, may be tolerable alternatives to the difficulties involved in trying to exempt large facilities operations from statutory constraints.

(2) Appropriate payment provisions are another key contracting issue. Most of the facilities reviewed above operate under per diem arrangements. Because the per diem rate is fixed, the government faces little risk of cost overruns. It also allows the government to pay only for space it has used in a given month (although the rate will generally include the fixed costs of all space). While per diem arrangements pose some risk to the contractor if its occupancy projections are in error (and it has established a rate that cannot cover costs during periods of low occupancy), at least one respondent commented that the risk "should not be too great if the company has done its homework."

(3) While government-operated facilities frequently operate with no maximum capacity constraints, it is hard to see how a contract with a private vendor could avoid setting both minimum and maximum occupancy levels. The former provides some minimal guarantee to the contractor operating on a per diem basis; the latter gives the government assurance that a certain amount of capacity will be available and protects the contractor from the liabilities of crowding.

(4) The types of inmates who will be eligible for placement in the facility will need to be established, as well as procedures defining the contractor's role in making transfer and release decisions. As preceding sections have indicated, this is a sensitive issue that deserves careful consideration, since contractors may be naturally inclined to avoid troublesome cases, and if payment is conditioned on occupancy, may also face a conflict of interest in discharging any granted release authority.

(5) To protect both parties, standards of performance must also be established. Without explicit standards, the goals of profit maximization may well conflict with the state's interest in avoiding litigation and maintaining safe, secure, humane facilities. The private vendor is also protected from ad hoc changes in requirements without comparable budget adjustments. Unlike the standards that exist for many schools and hospitals, no states have enacted specific laws governing the operation of prison and jail facilities. The standards of the

Commission on Accreditation can, however, provide a useful point of reference in drafting this aspect of the contract. Among the areas to be considered are personnel selection and conduct standards; standards governing the allocation of space and staff; safety and sanitation requirements; procedures for security and control; supervisory and disciplinary practices; food and medical service requirements; as well as standards governing the availability and structure of vocational, educational, and recreational programs and the use of inmate labor. In addition to standards governing the provision of confinement services, as in any contracted operation, administrative rules and monitoring and reporting provisions are also essential.

(6) In developing appropriate standards of performance, a related question that may be considered is whether performance incentives should be incorporated in the contract and, if so, whether penalty clauses for non-performance may also be appropriate.

Again, this list of potential contracting issues is not exhaustive, but merely illustrative of the types of decisions to be addressed in developing contracts to govern facility operations.

Financial Issues in Contracting for Facility Operations

Last, but among the foremost issues of technical concern, are questions regarding the efficiency, profitability, and cost visibility of privately operated facilities.

—Private vs. Public Cost Efficiency

The relative costs of private vs. public management of public service functions are a highly controversial aspect of the privatization debate. Advocates suggest that private vendors can operate equivalent facilities at lower cost than public agencies due largely to the greater staffing efficiencies that may be realized in the absence of civil service regulation, lower private sector pension and benefits costs, and greater market incentives to increase productivity. Less enthusiastic observers suggest that costs will rise as soon as private providers become established in a facility and begin to negotiate add-ons for services that were overlooked in the effort to establish a competitive advantage. In this more pessimistic view, costs will also escalate as the expenses of monitoring private providers

grow to offset any savings that might have been realized by transferring direct service responsibilities to the private sector.

In the corrections field, no rigorous cost analyses have yet emerged from the experiences reported above, and the available anecdotal evidence is incomplete. Table 4.3 displays the approximate per diem costs of confinement reported by the private agencies contracted in the course of our assessment. Given the different locations, population, and service expectations represented by these figures, comparisons among facilities are clearly inappropriate. Comparing these figures with the costs of publicly provided services is equally difficult.

- The Eckerd Foundation asserts that its yearly budget to run the Okeechobee facility is \$600,000 less than the other training facilities in the state that serve fewer youths. It is difficult to determine, however, whether these facilities are strictly comparable. State HRS staff suggest that, as of late 1984, Okeechobee's costs are comparable with those of other similar training schools in Florida. Also, they point out that the foundation put \$250,000 of its own funds into the school's operations during its first year, and their projected expenses for the second year of operations exceed the appropriated amount by approximately \$300,000. The results of efforts to improve the staffing efficiency of this facility have been mixed. After attempting to operate with fewer staff than the state had, the facility now reportedly employs more. On the other hand, the staff mix has apparently changed in order to permit higher salaries for fewer supervisory personnel, an organizational improvement that has reportedly reduced personnel costs. But, staff salaries have been increased in recent months because of an inability to attract and retain experienced, qualified staff under their original plans to have all counselors live on the premises and work long hours. One potentially significant cost advantage has clearly been realized as a result of Eckerd's status. As the nonprofit foundation of a large drug company, Eckerd was able to obtain substantial donations from outside organizations as well as in-kind contributions from its corporate parent. This advantage makes the Eckerd experience somewhat less comparable to both government operations or the operations of more independent contractors.

- In many respects, the Weaversville facility in Pennsylvania is closer to the model now under consideration in many states, as the organization managing the facility is a self-supporting arm of RCA. Staff salaries at the RCA-operated facility are generally lower than equivalent state positions, and RCA medical and pension benefits are also more modest. Apart from these comparisons, however, it is difficult to relate overall costs to those that might be incurred if the state operated the facility.
- Finally, the current average per diem paid to Behavioral Systems Southwest for holding an illegal alien at its facility in Pasadena, California, is reportedly half of what the Los Angeles County jail charged two years ago. Again, however, the comparison is not exactly relevant, since jails are necessarily designed and equipped to meet broader needs than those posed by illegal aliens.

In fact, most of the examples discussed above did not involve any direct tradeoff between the costs of private and public management, as the appropriate public management resources were generally unavailable. INS has typically used local resources in preference to expanding its own facility network. Here, the use of special purpose contracts was bound to offer an advantage over contracts with the more general-purpose facilities.

In Florida, the state's plans to deinstitutionalize the Okeechobee facility were thwarted by shortfalls in federal funds and state tax revenues which made closing the facility and developing alternatives fiscally impractical. In this case, retaining the existing facility was clearly the least costly option. Similarly, in Pennsylvania, the need to deinstitutionalize the infamous Camp Hill facility and the absence of any viable state alternatives led to the development of the privately managed Weaversville facility. Finally, the Shelbyville, Tennessee juvenile facility was also motivated by laws restricting the confinement of juveniles in local jails, the absence of other local options for juveniles, and the desire of the state to free space in state facilities for adults. In each case, then, comparisons between the costs of government and private operations were not highly relevant, as the government was faced with needs that it simply was not equipped to address.

Table 4.3

COSTS OF CONFINEMENT

FACILITY	PER DIEM RATE	365 CONFINEMENT DAYS
<u>Juvenile Facilities</u> ^a (facility development costs are excluded in each case)		
Okeechobee (FL) ^b	\$ 30.67	\$11,194.55
Weaversville (PA)	110.00	40,150.00
Shelby County (TN)	33.25	12,136.25
<u>INS Facilities</u> ^c (facility costs are included in each case)		
San Diego (CA) ^d	28.00	10,220.00
Pasadena (CA) ^d	23.00	8,395.00
Houston (TX) ^e	23.50	8,577.00

^a Reported by facility personnel in telephone conversations during January- February 1984.

^b Eckerd does not seek reimbursement on a per diem basis but rather has a fixed contract value of \$4,701,363 paid in 12 monthly increments. The average daily population is roughly 420 youths, yielding the per diem rate noted.

^c INS per diem rates represent an average rather than fixed rate. Generally, a fixed per diem rate is established for a certain minimum number of residents. A variable is then charged for each resident over and above the fixed minimum level. The figures cited here combine the fixed and variable rates for each facility to show its average per diem.

^d Reported by INS personnel in telephone conversations during January-February 1984.

^e Figure obtained from "Tennessee Businessman Hopes to Run Prisons for Profit," The Boston Globe, 2 January 1984, p. 21.

The same difficulties are likely to prevail in making appropriate comparisons between private and public operation of state adult facilities. The volume and composition of prison populations is changing rapidly, and governments are unable to respond to the need for alternatives. In this context, the relevant question may not be whether the private sector can do it more efficiently, but whether the public sector can do it at all, given the pressure for immediate action. Once the immediate need is met by the private sector, it is then reasonable to ask whether the same ongoing operation could be managed more efficiently by the public sector. Even if a comparable facility exists, however, cost comparisons can be difficult, since the costs of public facilities are often hard to isolate. A more useful exercise might be to calculate the costs that would be incurred by the government to run the private facility. While these calculations will be necessarily hypothetical, they will certainly reveal any major distinctions in personnel costs and may be useful in highlighting any aspects of the operation that could not have been achieved at any cost.

--Profitability

The question of whether private providers should profit from providing a public service is an issue of both conceptual and financial concern. Some are offended by the concept of corrections as a business enterprise and fear that profit may be taken at the expense of sound corrections practice. Others point to the equivalent financial motivation of nonprofit organizations, the small and highly regulated opportunities for accruing profit, and the management and fiscal advantages of for-profit status. In the final analysis, choosing a private provider is no more or less than a decision to hire additional staff and is best made by evaluating the provider's history of performance, staff competence, and correctional philosophy, rather than its organizational classification.

--Cost Visibility

Governmental accounting systems are generally incapable of isolating the full costs of a public activity or service. For a specific function such as prison security or standards compliance, the direct costs are usually buried in the expenditure records of several agencies, and the indirect costs are particularly elusive. One of the advantages typically ascribed to contracting in other fields is its ability to reveal the true costs of public service.

Corrections is no exception. Under a contract system, the costs of confining particular numbers of clients under specified conditions will be clearly visible and more difficult to avoid through crowding and substandard conditions. While corrections authorities might welcome the opportunity to demonstrate clearly that more prisoners require more resources, it remains unclear whether legislators and voters will be prepared to accept the real costs of confinement practices that meet professional standards.