



American Correctional Association



# Monograph:

## Overview of Privatization in Juvenile Corrections

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Office of Juvenile Justice and Delinquency Prevention  
Office of Justice Programs  
U.S. Department of Justice

**OJJDP**

## MONOGRAPH

# OVERVIEW OF PRIVATIZATION IN JUVENILE CORRECTIONS

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U.S. Department of Justice  
National Institute of Justice

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## **INTRODUCTION**

This monograph provides an overview of privatization in the United States. All levels of government have given this issue increasing attention in recent years. This is especially true when it comes to juvenile corrections. With shrinking budgets and ever increasing numbers in the system, juvenile justice professionals are scrambling to find new ways of doing more with less.

Privatization's role in American government is not new. Precedent for this delegation of tasks exists in many areas of public service. One of the many areas in which private sector management has found acceptance over the past few decades is juvenile corrections. The debate has recently increased in the area of private sector management and operation of entire secure juvenile residential facilities.

In any jurisdiction, certain issues involved with contracting with the private sector for juvenile justice services will affect the decision-making process. The issues can vary from state to state, but one who has a grasp of the basis of all of the issues will make the most informed decision. This monograph briefly discusses some of the most pressing areas of concern when privatizing juvenile services and facilities.

Any successful effort to privatize must include certain elements to ensure a comprehensive and effective agreement. The final contract is a direct result of the processes that preceded it. Each step is essential to a productive relationship between the issuing agency and the private provider. The privatization process includes: a study to determine feasibility of conversion, RFP development, proposal review, contract development, and contract evaluation and monitoring. Another element that, although not necessary, can be quite helpful to directors of state juvenile corrections systems is the advisory group. This group can take the form of a community advisory board or a public/private partnership.

An understanding of the basics of privatization - its history, significant issues and major elements - is vital to the proper use of the private sector for the provision of public services. This monograph provides an overview of these topics to enable state juvenile justice systems to make informed decisions and choices about the private sector and its role in juvenile corrections.

## HISTORY OF PRIVATIZATION

Contracting with the private sector for juvenile services and facilities is not new. The private sector has operated private juvenile justice facilities in the United States since the 19th century. Historically there has been minimal controversy about these facilities. At the present time, private contracting for juvenile services and residential facilities is a common and apparently successful option in a number of states.

Early jails, which also housed juveniles, were operated by citizens who ran them for profit. Private jailers charged their inmates for food and clothing and were often abusive toward them. Bribery and graft were common place. Government's entry into direct operation of correctional facilities was, in part, in response to those abuses.

Government, with the capability to establish standards and closely monitor performance to insure adequate and humane treatment of confined individuals, seemed the only choice at the time. Today the private sector has greater skills and resources to offer in a cooperative relationship with the state than during the days when inmate labor was exploited.

Citing the need to reduce government spending and streamline operations, recent national administrations have advocated a greater role for the private sector in providing social services traditionally offered by state and local governments. Federal policy, stated in OMB Circular A-76 is to:

- **Achieve Economy and Enhance Productivity.** Competition enhances quality, economy and productivity. According to this Circular and its Supplement, whenever privatization is permissible, there will be a comparison of the cost of contracting and the cost of in-house performance to decide who will do the work.
- **Retain Governmental Function In House.** Certain responsibilities are so intimately related to the public interest that they mandate federal operation. These functions are not commercial in nature; therefore, they shall be handled by government employees.
- **Rely on the Commercial Sector.** The Federal Government shall rely on commercially available sources to provide commercial products and services. According to the provisions of this Circular, the government shall not provide a commercial product or service if the product or service can be procured more economically from a commercial source.

Some say that privatization is progress; others regard it as a fad or an attempt to do away with government jobs.

Private providers are again being considered for an increased role in juvenile corrections, but this time the motivation is different. Today they often bring with them management skills, advanced technologies, and information management systems that have the potential to improve correctional functions and reduce government costs. For some time private enterprise has focused on criminal and juvenile justice agencies as markets for high technology. The private sector has made available advanced word processing equipment, computers, and more recently, innovative electronic monitoring devices. Private entrepreneurs are now successfully providing the administration and management of entire secure juvenile institutions.

The debate that has risen out of the privatization issue has little or nothing to do with providing *supportive services*. The controversy centers on issues involved in the total management and operation of secure facilities. The critical points involve constitutional concerns including privacy and personal freedom decisions. People on both sides of the debate have solid agreements to support their opinions. In order to understand the issues and form one's own opinion, one must look more closely at the pros and cons cited by both sides.



**PRIVATIZATION ISSUES**

**LEGAL AUTHORITY**

The state director of juvenile corrections should know if the applicable legislative body has specifically authorized or prohibited such contracting. However, the analysis of the state's legal authority to contract out juvenile correctional services is complex and is better left to the state's legal counsel.

Issues surrounding the legal authority to privatize can be subtle. For example, one jurisdiction has no direct prohibition against a county government contracting out for privately provided juvenile correctional services. The problem is that the county cannot use a juvenile correctional facility until it has been approved by the state agency, but the state agency has no authority to inspect private facilities. As a result there are no privately operated juvenile correctional facilities in the state, despite the fact that the state has the authority to contract for the service.

Another issue that affects legal authority is whether the law permits contracts with for-profit organizations. One state legislature recently passed a new law authorizing the state agency to contract for juvenile correctional services but limited eligible providers to non-profit agencies. Such a limitation may reduce the number of qualified providers to compete for the contract.

**IS PRIVATE PROVISION OF PUBLIC SERVICE PROPER?**

This question is closely linked to the issue of statutory authority. It is raised on the basis of the "propriety" of such action rather than with respect to "legality." It is an ideological question that many people feel strongly about. There are those who argue that some functions are the "raison d'être" of government and cannot or should not be delegated; among these functions are all legislative and judicial activities involved in all stages of the juvenile and criminal justice process. With equal vigor, others argue that there is a legitimate and necessary role for private enterprise in the management of juvenile corrections, which in no way constitutes an abrogation of the essential role of government in formulating policy.

<b>QUALITY OF SERVICE</b>
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The desire to improve the quality of a service that is currently publicly provided is often a significant reason for contracting that service to the private sector. At times, the private sector has a greater potential for innovation and efficiency due to its ability to be more flexible than government regarding personnel and resources. The private sector is also less burdened with bureaucracy and "red tape."

A significant problem that must be considered is how quality is measured. What is the standard used to measure quality? What are the characteristics of quality programs?

Quality in any juvenile correctional program must begin with the establishment of positive and trusting relationships between juveniles and program staff. Staff in quality programs adhere to the highest levels of professional excellence and are positive, caring, well-trained, competent and humane in their approach to working with the juveniles in the program. Other elements of quality juvenile justice programs include:

- services designed to promote the human dignity, self-esteem, and self-respect of juveniles in the program;
- a group life atmosphere in which juveniles are supportive and helpful with each other;
- the normalization of living and working environments that are safe and clean; all persons in the program, whether residential or non-residential, must be free from fear in the conduct of their activities;
- opportunities for juvenile decision-making that foster a sense of participation, significance, and competence;
- individualized approaches to meeting treatment and services needs;
- a clear and predictable path of progression for juveniles through the program;
- continuous case management that ensures coordination, service delivery and accountability; and
- a reporting system that measures progress and outcomes.

Using these characteristics, or any others that are relevant to the program or service under review, the existing level of quality can be measured.

It would be wrong to assume that the private sector will always provide a higher quality of service than that of the public sector. The private sector can be as wasteful, inefficient, and corrupt as any government agency. There is nothing uniquely inherent in the private sector that assures it will always do the job better.

Another issue to consider is whether it is possible to improve the present quality of service. What are the obstacles to improving the public operation, and will those obstacles be obviated or overcome if the service is privately provided? Does it make sense to continue the publicly provided service or to contract out to the private sector?

These are difficult and complex issues. One approach is to assess the quality of the delivery process, as well as the outcome. This approach begins with looking at staff and the potential of staff to improve the quality of services through increased training and program resources. Another component of the process is to look at physical plant and the ability of staff to improve the quality of services in the particular facility. The state's ability to improve staff and the physical plant, as opposed to privatizing the service, must be decided.

Another area to consider is the message a decision to privatize sends to staff who will continue to publicly provide other related services. Poorly handled, a precipitous decision to privatize could result in lowered morale and productivity among remaining public employees. On the other hand, a reasoned decision that is understood and shared by other employees could actually increase morale and productivity.

## ACCOUNTABILITY

It is critical to note that, while the state agency relinquishes responsibility for *performing* a service by contracting it out, it in no way relinquishes responsibility for *monitoring* the private providers. A clear definition of public/private roles and responsibilities must be documented in the contract. The state remains accountable, through detailed monitoring procedures, for all contracted services.

The level of control that the state exerts over its providers is directly related to how well the agency structured the RFP and the final contract. If privatization is to be successful, the modified Golden Rule must apply - those who have the gold make the rules. These rules must assure that the state maintains its interest in the services for which it is ultimately responsible.

The shift from operating public services to monitoring the provision of public services requires a clear analysis of the state's ability to oversee and evaluate performance. The monitoring agency must be in a position to require and enforce high standards of quality from its contractors. The incorporation of high, but achievable, performance standards into the contract is basic to proper public accountability and clarifies the roles of public and private managers in the contract arrangement.

<b>LIABILITY</b>
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The ultimate responsibility for the delivery of juvenile correctional services lies with the state. As the Supreme Court made clear in the case of West v. Atkins, 487 U.S. 42 (1988), contracting does not and cannot completely absolve government of this responsibility. The legal rights of confined juveniles do not diminish simply because they are confined in a privately rather than publicly managed facility. Properly drafted contracts, however, oblige private providers of juvenile correctional services to indemnify state agencies against the broad range of liability exposure they confront when they deliver juvenile correctional services themselves. These indemnification clauses include but are not limited to guarantees that the private firms will be responsible for all costs - including legal defense costs, settlement costs, and damage awards - associated with legal action brought under 42 U.S.C. Section 1983.

Privatization's ability to lessen the state's liability exposure is one of the important reasons that privatization has proven to be attractive for both juvenile and adult corrections. This is perhaps especially true for local levels of government. Following the decision of the Supreme Court in the case of Monell v. Department of Social Services, 436 U.S. 658 (1978), it became possible for local units of government to be held liable for monetary damages in Section 1983 suits. State officials who are sued in their individual capacities can be held liable for monetary damages. However, a combination of the Eleventh Amendment and interpretations of the scope of Section 1983 precludes state and state agencies from the same liability (e.g., Will v. Michigan Department of State Police, 109 S.Ct. 2304 (1989), and Howlett v. Rose, 110 S.Ct 2430 (1990)). Despite this limitation, privatization can significantly reduce the liability exposure of state agencies by, for example, covering the significant legal defense costs associated with Section 1983 suits and the liability that is related to tort law.

## **RIGHTS AND DUE PROCESS**

One of the earliest arguments against privatizing juvenile corrections was the threat it posed to the constitutional rights of the juveniles in the program. Since private firms are not generally subject to constitutional restraints, some feared that juveniles placed in privately operated programs would have no recourse to challenge the conditions of their custody.

The courts have consistently held that the rights of juveniles in correctional programs and the due process to which they are entitled are not diminished in any way by virtue of being placed in a program operated by a private provider. A classic example may be found in the Florida system that operates two secure training schools, one state operated and the other privately operated (since 1982).

There has not been one judicial decision that resulted in the juveniles in either training school being treated differently. Both populations are arrested, adjudicated and committed by the state's constitutional judicial authority, and both receive the same protections regardless of where they are held.

Nevertheless, there are practical issues that could infringe on a juvenile's rights. For example, a provider's efforts to reduce costs in the areas of food services, medical services, utilities and clothing can have an unintended impact on a juvenile's rights. Cost reductions that compromise the safety of juveniles and staff can lead to increased liability exposure. Ultimately, it is the state agency's ability to manage, monitor and control these issues that will determine whether privatization is appropriate.

## **SECURITY AND SAFETY**

Effectively operated private correctional programs are as secure and safe as their publicly operated counterparts. There is nothing inherent in a publicly operated program that makes it better in terms of security and safety than one that is privately operated.

Problems have arisen, however, regarding the authority of private providers as compared to the public sector. It is important to determine whether the employees of a private provider are authorized by state law to take and hold juveniles in their care. Some state statutes never envisioned private juvenile corrections providers and specifically limit arrest authority to sworn public law enforcement personnel and other public officials.

State officials should consult the appropriate attorney in the state agency or the Attorney General's Office for an opinion in this regard. If the state statute is not clear, legal counsel should be asked whether a provision in the contract authorizing the provider to take and hold in custody would be lawful.

Another area to investigate is whether state law regarding escape includes leaving a privately operated juvenile program. There have been instances where law enforcement refused to arrest juveniles who walked away from private programs because it may not have been clear that any state law had been violated, i.e., the law defined escape as an unauthorized leaving from a "public" facility.

### **ECONOMIC EFFICIENCY**

One could ask why any public service could be performed at less cost by the private sector. After all, aren't there two new costs (profits and contract monitoring) being added to the existing costs? These new costs exist -- no question about it. But, offsetting them could be other major elements, such as:

**Economies of Scale:** A single provider can serve several counties (or states), thus spreading its overhead among all of them, resulting in significant cost reductions. Overall costs of management and administration, data processing, fiscal activities, and a host of other bureaucratic functions can be centralized and costed out proportionately.

**Different Incentive Structures:** An obvious difference between the public and private sectors is their different incentive structures. The delivery of a service by a public agency is essentially a monopolistic activity. A state department of juvenile services, for instance, does not have to worry that another agency will come in and take away its "business." A private sector department, on the other hand, has no guaranteed revenues, and lives with the very real possibility that another business will come in and outbid it.

**Different Managerial Styles:** Another difference between the public and the private sectors is the managerial style of its executives. An administrator in a public agency will perceive his or her priorities as performing a particular range of services within a pre-set budget, while avoiding negative political fallout. The administrator will often spend money just because it's there, knowing that if the department shows unspent money at the close of the fiscal year, cost-cutting legislatures or boards of supervisors will likely reduce the department's succeeding budget by at least that amount. In addition, a government executive will often measure professional status by the size of the agency, measured both in size of budget and numbers of employees. The unspoken driving force of a public sector agency can often be to increase its budget and to add new employees.

An administrator in a private sector company should perceive his or her priorities to be the efficient performance of a particular range of services with as few employees as possible and to generate as large a profit as possible for the company. One should relentlessly seek innovative ways to cut costs and increase employee productivity while delivering the highest quality of services. The more unspent money (profits) the department can accrue at the end of a fiscal year, the more valuable the administrator will be to the company. Professional status is more likely to be measured by the size of the profits, not the size of the corporation. It is up to the state's monitoring and evaluations to make certain the profit motive does not diminish services to the juveniles.

### **ESCALATING COSTS**

Critics of privatization argue that a private firm could offer a lower price the first time around in order to win a contract then raise costs during the ensuing years, particularly if the community has created a point of no return by dismantling its own service delivery capability. This is a reasonable concern. There are safeguards that should be established. For example, the jurisdiction must ensure truly competitive bidding conditions in subsequent years so that other firms have a fair and reasonable chance to seek the contract.

### **JOB SECURITY FOR PUBLIC EMPLOYEES**

It is a reality that correctional services, as currently practiced, are labor intensive functions. Obviously, there is a savings if four or five workers can accomplish what six workers are currently doing by introducing more efficient management and technology. The principal decision for policy makers and guardians of the public purse is whether more efficient and cost-effective correctional services can be achieved through privatization, thereby serving the public good.

There are practical ways of mitigating the threat felt by public employees. Experience has shown that where private corporations have replaced services that were previously performed by the federal government, their executives have been well versed in the "right of first refusal," which gives employees of a current operation the right to first choice -- or refusal -- of employment with the new provider. This "right" was proclaimed for federal conversions as a requirement of OMB Circular A-76. It gives the "right of first refusal" to *federal* employees displaced as a result of conversion. Similar administrative provisions are also frequently used at the state and local level. Experience from the field indicates that corporations do, in fact, routinely draw the majority of their project employees from displaced civil service workers. Regardless of what is done to help safeguard the jobs of current public employees, this issue is a difficult one to resolve, and organized labor can be expected to take a strong position on it.

## **POLITICAL ENVIRONMENT**

In an era of decreasing confidence in and increasing suspicion of government institutions at all levels, some believe in privatization as both a solution and a panacea. Managers of government programs have sometimes looked at privatization less for its cost savings than for its impact on reducing the power of public employee unions. Motive plays a major role in the decision whether to privatize.

Privatization can also be very symbolic. The public's disenchantment with government in general and its traditionally high regard for the values of private enterprise may make the decision to privatize, for whatever legitimate reason, a popular one politically.

Privatization causes change, and change affects people. Contracting out a service that has been traditionally provided by government means that public employees will be impacted in some, often threatening, way. Resistance to privatization, not surprisingly, generally comes from public employees and their representatives.

These fears and resistance by public employees are compounded by the fact that corrections has become an important career path for minorities in this country. Some states report that the proportion of minorities in their overall corrections systems is twice that of the general business community. In an economy that is offering fewer opportunities for economic security, the potential loss of jobs to a private provider is a significant event with equally significant political implications. Although recent studies indicate that the hiring practices of public and private agencies regarding minorities are virtually the same, the fact that private providers generally pay lower wages and benefits for comparable public employment causes many to continue to resist privatization.

Sensitivity to these types of political issues may be more important in the long run than making a factual case in favor of privatization. The analysis of whether to privatize should include considerations of whether appropriate accommodations can be made to protect affected public employees. For example, a provider could be directed to first consider affected staff in hiring for the new program. This approach has been successful in several instances. Another approach is to provide affected staff sufficient lead time and assistance in seeking other government positions.

Consideration must also be given to how contracting out a particular program or service may affect the influence a provider may have over the nature and provision of the contracted service. It is only natural that private providers, especially those that are for-profit, have a vested financial interest in continuing and even expanding the need for their services. Having a contract with a public agency often places the provider in a position to engage in various activities, such as meeting with key government officials, to promote public policy decisions that favor the provider's interests.



**COMMUNITY ATTITUDES**

Whenever or wherever the juvenile correctional program or service to be privatized involves a community or neighborhood, it is important to assess how key members of the community view the issue. This is especially important whenever a community based program is considered. The neighborhood may have developed considerable confidence in the ability of the publicly operated program to assure safety in the community. The program administration may be very responsive to community involvement. Contracting such a program to a private provider unknown to the community may cause anxiety and opposition.

Civic and business organizations, neighborhood groups, and influential citizens in the affected community should be contacted. They should be told of the state agency's plans and asked for their opinions. The local and state politicians who represent the area should be contacted for their opinions as well.

### **ELEMENTS OF PRIVATIZATION**

The first task for any state juvenile corrections agency considering private sector contracting is to decide if privatization is the most appropriate course of action. If the decision is to initiate a procurement effort, the agency can then go on to preparing a Request for Proposals (RFP).

The agency will receive proposals up to the last minute of the deadline. All eligible proposals must be reviewed and objectively rated in order to choose a contractor. This presupposes that at least one proposal meets the agency's requirements.

The agency must then draw up a contract with the successful bidder for the work detailed in the RFP. Once the contract has been signed, service should begin on a mutually acceptable date.

Since the state agency still retains ultimate responsibility for juvenile corrections, it must monitor and evaluate the contractor's performance of the tasks and services according to the contract. This aspect of privatization is crucial since it is the best opportunity to guard the interests of the juveniles, the public and the agency itself.

One last element of privatization is the role of advisory groups throughout the process. Community Advisory Boards and Public/Private Partnerships can contribute a great deal of advice and assistance at any point in the process. They can be a great asset to the efforts of the agency and its director.

### **FEASIBILITY OF CONVERSION**

The decision to convert publicly operated juvenile residential facilities and/or community services to the private sector must be reasoned and deliberate. It is important that the decision is not driven by a narrow consideration of cost savings alone. The state's responsibility to its juvenile offenders requires that a decision be based on a balanced, comprehensive feasibility assessment.

The feasibility assessment should include consideration of the following issues and concerns:

- **Legal authority:** What are the legal precedents or barriers to privatization in your state? Are there specific legal restrictions such as type of contractor or length of contract?
- **Public policy goals:** Does privatization fit in with the goals of the state juvenile corrections agency? Will it enhance what already exists in the way of public services?
- **Quality of service:** Does the private sector have the ability to substantially improve the quality of currently available services?
- **Economic efficiency:** Privatization does not necessarily guarantee cost savings. How can operational costs be compared and evaluated?
- **Liability:** Privatization does not completely relieve the state from its liability where juvenile corrections is concerned. It may reduce liability depending on the situation. What steps can the state take to lessen its liability in the event of an incident?
- **Rights and due process:** Juveniles in private facilities are entitled to the same rights as any other confined juvenile. There are special considerations in a private facility that must be controlled through effective monitoring by the state agency.
- **Security and safety:** Private facilities are as safe as public facilities. The problems arise with issues of authority. What authority do law enforcement officials have to pursue escapees from private facilities? What are the laws regarding escapes from private facilities?
- **Control and accountability:** To what degree does government lose control over the operations of a privately managed facility? How can state directors retain control over these operations effectively?
- **Political environment:** What is the motive for choosing privatization in your agency? At times, political issues can play a larger role in the decision to privatize than practical issues. Agencies should always examine their motives for privatizing before making any final decisions.

- **Community attitudes:** How do the affected members of the community feel about privatizing the facility or program? Local citizens should be informed of the agency's plans and asked for their opinions throughout the privatization process.

Ultimately, the decision to privatize juvenile correctional programs should be determined by whether it serves the best interests of the juveniles and the citizens. Private sector programs may offer many opportunities to maximize limited resources and provide quality services to delinquent juveniles. This is especially true with respect to juveniles with special needs.

Privatization should not be chosen lightly. It remains the state's responsibility to assure the safety of the public and this important duty should not be compromised by decisions or actions that are politically expedient or popular at the time.

### **RFP DEVELOPMENT**

If the agency conducts the feasibility study and determines that conversion to the private sector is the best decision, the next step is to develop a request for proposals. A request for proposals is the document that a state agency uses to launch the process of private sector contracting.

An RFP is ordinarily used when a state agency:

- is legally obliged to use a competitive procurement process; or
- has concluded that a competitive procurement process will best serve its interests; and
- is unable to specifically define the scope of work for which the contractual service is required.

In an RFP the state agency:

- identifies the statutory authority that permits it to contract;
- describes the need it wishes to meet;
- solicits competitive responses from qualified for-profit and/or non-profit private organizations;
- specifies the documentation that potential providers must furnish in response;
- sets a deadline for responses; and
- describes the manner in which responses will be reviewed.

**PROPOSAL REVIEW AND SELECTION**

Reviewing proposals requires careful planning and consideration to give each bidder a fair rating. The RFP should provide the relevant information about the review process and the weights assigned to various aspects of proposals. It is most important to maintain the fairness and integrity of the entire review process.

At a minimum, issuing agencies should assure that:

- each provider is eligible to submit a proposal (i.e., that the potential provider has not been placed on a possible list of ineligible vendors or determined to be ineligible for some other reason);
- the minimum standards that potential providers' proposals must meet are clear;
- the state reserves the right to consider proposals that are incomplete in one or more non-essential elements;
- the "mix" of subject matter and technical expertise on the review committee is fairly represented;
- all members of the review committee will be available during the proposal review process;
- no member of the review committee has, or in the recent past has had, any personal or business relationship with any potential provider;
- no member of the review committee is opposed to contracting for the service or services detailed in the RFP;
- no member of the review committee is predisposed to favor any particular strategy or method of service delivery; and
- no member of the review committee has a significant financial interest in the success of any potential provider (e.g., ownership of a significant number of shares of stock in a publicly traded firm).

The issuing agency must also formulate a clear set of selection criteria. The agency must assign weight to each criterion based on the objectives of the specific procurement effort. All members of the review committee must use the weights in the same way to ensure that the selection process is fair.

The particular weights are not as important as the overall strategy they reflect. The heaviest weights should be on the elements that are most important to the mission of the procurement effort and the lightest weights should be on the less important areas. Regardless of what kinds of things are most and least important, the process must be very clearly understood by all members of the review committee before proposals are screened.

State agencies should accept the responsibility for meeting with unsuccessful bidders and offering constructive criticisms of their proposals. Every responsible agency desires to create and to maintain a positive reputation among potential providers.

### **DEVELOPING A CONTRACT**

The final and most formal step that completes a partnership between the public and private sectors involves preparing a contract. A contract is the binding agreement between the parties to act in accordance with the terms and conditions of the agreement.

There is a close relationship between the RFP and the resulting contract for services. The terms and conditions of a contract are the legal formalization of the requirements in an agency's request for proposals. They also include the plan from the provider's proposal. If there are any major obstacles during contract negotiations, they can usually be traced back to the previous steps in the process. If the previous steps were well thought out and well handled, the likelihood of surprises surfacing during contract negotiations should be minimal.

There are a number of common denominators that should be included in all contracts for services. These issues are applicable to nearly every situation and therefore bear mentioning.

- **Negotiable and Non-negotiable Issues** - Contract negotiators must make a distinction between issues that are and are not subject to the give and take of normal contract negotiations. In order to make this distinction, one must have a very clear understanding of the agency's goals. These issues must be settled and shared with the other party before negotiations begin.

- **Simplification by Incorporation** - Documents that are important to the terms of the contract can be identified in the body of the contract. Language that automatically incorporates the requirements of those documents into the contract can be inserted. This incorporation simplifies the body of the contract.
- **Preservation of Flexibility** - A good contract is dynamic instead of static. The longer the term of the contract, the more important it is to maintain flexibility. A typical contract will authorize amendments when they are mutually agreed to in writing by all parties to the contract. Amendments may also become necessary by something other than mutual agreement. For example, legislative and judicial rulings may mandate an amendment when neither party actually wants to change the contract. A sound contract will be drafted in such a way as to permit such adjustments.
- **Specificity Regarding Administrative Requirements** - Agency personnel must make a good faith effort to be as specific as possible in this area of the contract. Providers are often not as familiar with an agency's standards and common practices. An important goal of contract negotiations and contracts is to assure that providers fully understand the administrative requirements with which they will be required to comply.
- **Specificity Regarding Service Delivery Requirements** - It is prudent to avoid becoming so specific in the contract language that an independent contractor is left with no flexibility. Just as a good agency encourages its employees to be innovative in the discharge of their responsibilities, an agency that contracts for services should encourage independent contractors to be innovative so long as they do so within certain limits. Sometimes this can be accomplished without any adjustment to the terms in the contract. If a change is appropriate, the contract should be adjusted in advance of any action being authorized or taken by the provider or the state agency.
- **Preservation of Independent Contractor Status** - Most contracts for juvenile correctional services contain a clause establishing the status of a provider as an independent contractor. In the sample contract, for example, the language is as follows: "The Contractor will be an independent contractor and neither the Contractor nor its employees, agents or representatives will be considered employees, agents or representatives of the Department." This language ensures that the provider will not be considered a state employee, which is important for legal as well as operational reasons.

- **Termination Conditions** - Provisions for contract termination should be as broad as possible to include any eventuality, even if at the time it seems improbable. This makes things much clearer and simpler if anything should come up. One should avoid "all or nothing" scenarios in termination clauses. It makes much more sense to allow the offending party time to correct the non-compliance instead of immediately terminating the contract. The exception to that is if the non-compliance threatens the vital interests of the juveniles or the public.

### **MONITORING AND EVALUATING A CONTRACT**

The public and private sectors must collaborate in order to make privatization work. Successful contract management and monitoring requires a mutual commitment to achieving the goals of the contract.

The most important aspect of contract monitoring is assuring that the provider is in compliance with the specific terms and conditions of the contract. One approach that is useful is to establish measurable performance outcomes for each element of the contracted program or service (e.g., Administration, Finance, Education, Counseling, etc.)

One good measure of success is the objective progress the juvenile achieves in the program. Some significant measures of change are achievement tests that measure the juvenile's skill level in Math, English, Social Studies, vocational skills, etc. Skill levels are usually measured upon entering the program and at pre-determined intervals during the juvenile's stay in the program. Other measures of progress are:

- behavior;
- logs;
- incident report reduction;
- progress in a point system;
- participation in group sessions;
- participation in specialized counseling; and
- attendance in a 12-step program.



It is important that the state agency identify both a contract monitor and a contract manager before the start of the contract. The provider should identify a person available to the monitor on a daily basis, as well as a responsible supervisor. Although the contract monitoring and managing functions can be served by one individual, it is usually better not to combine these roles. Having a level of decision-making beyond the contract monitor provides a *de facto* appeal whenever the contract monitor and the private provider representative are unable to reconcile a difference.

The contract should also contain a structured grievance procedure to ensure that unresolved issues are fairly addressed. One approach is to use the established procedure from the jurisdiction. If this procedure is too time consuming, expensive, or the procedure could interrupt the delivery of services, a less formal process could be agreed to and included in the contract. As a first step, a less formal procedure may require that the highest administrative levels of both the agency and the private provider review areas of disagreement and propose a resolution. Another approach would be to refer grievances to a mutually selected panel of impartial experts and citizens. Such a panel could recommend solutions to both parties concerning a resolution of the issues.

A specific monitoring schedule should be determined by the agency and the provider prior to contract implementation. Critical to developing this plan is the understanding that monitoring involves more than site visits. Implementing the plan involves written and verbal communication, as well as site visits.

The monitoring plan must be reasonable in its scope and sequence. If a contract warrants, a specific topic may be monitored during one visit and another during the next visit. This is an alternative to the "shotgun" approach where in one visit a monitor tries to look at everything on the surface and nothing in depth.

The monitoring plan should be designed to assure that monitoring activities are scheduled in a way that results in the least disruption of daily operations. It must be understood that monitoring is an intrusive process by nature. It involves an "outsider" who may be seen by staff and juveniles as a distraction or threat. Daily schedules may be altered, causing further disruption.

There are six areas of concern regarding a juvenile correctional program that should be the focus of the contract monitor's preparation and visit. These six areas include:

- safety and health;
- program climate;
- staffing;
- behavior management and control;
- physical plant; and
- case management.

This list is not exhaustive, nor will it be necessary to review each area in every monitoring visit. The contract monitor and the provider's representative should prepare a customized list for every contract being monitored.

Interviews with juveniles and staff in the program are a critical part of the monitoring visit. During individual interviews with staff, juveniles or others, it is important that the monitor have a standard set of questions designed to elicit specific information. Questions may be added during the interview as needed.

Although the states are able to conduct unannounced monitoring visits, they may be counterproductive. They may convey a message that the state agency does not consider the provider to be professional, honest, or even competent. This does not preclude other types of visits. An agency representative should feel free to visit any program at any time. However, the visit should be just a visit, without any attempt to monitor the contract. If the visitor notices something out the ordinary, the contract monitor should be alerted for follow-up.

Other than site visits, documents are a major part of the monitoring process. The most effective way to approach documentation is to identify the necessary documents in the contract and agree to full disclosure of that information. The methods of recordkeeping, as well as formats and schedules, can be set forth in the contract also.

The most effective approach to addressing problems with contract performance is to give the provider the responsibility of recommending a corrective action plan. While the public agency must approve the final corrective action plan and can offer help in developing it, this assures that the provider will be committed to its implementation.

Ultimately, it may be necessary to terminate a contract for non-compliance. Given the legal and financial implications, the contract monitor must be precise in adhering to the termination provisions of the contract and must have sufficient documentation to support the decision or recommendation.

## **ADVISORY GROUPS**

State directors face crucial decisions, media attention and public opinion on a daily basis. State agencies often need help making decisions and dealing with outside interests. Often, an agency will turn to a Community Advisory Board or a Public/Private Partnership for help. These groups may already be in place, or they may be specially organized for a specific purpose. Either way, advisory groups can be of great assistance in many different areas. Advisory Boards and Public/Private Partnerships can be whatever the agency wants them to be - they will do as much or as little as the state director wants or allows.

A Community Advisory Board is a group representing a cross-section of citizens and interest groups that offers advice and assistance to a state director. This type of group can do many things for a state agency, including:

- establish philosophy and mission;
- act as a communications link with the community;
- provide consultation and advice;
- provide support and encouragement;
- act as lobbying and political action arm; and
- conduct special advisory board projects.

The Community Advisory Board represents citizens, interest groups and local businesses. The types of businesses that would be included in a Community Advisory Board are: banks, utilities, developers, the state chamber of commerce, etc. Juvenile justice practitioners should be included on an as needed basis. In addition, the views of the members should be balanced, with the majority of people holding a moderate position on most issues. All membership should be contingent upon completing a training program that could include topics such as daily operations of the agency and/or operating effectively as a board. With knowledge of the facility's mission and philosophy, the problems and dangers of the juveniles, and realistic expectations of what can be done, the board can be a valuable resource to the director.

A Public/Private Partnership is specialized advisory group, an alliance of business leaders with a public agency. Business representatives and public administrators are joined in a collaborative effort to assist in examining a critical issue facing a state agency. If privatization is the issue, all involved businesses are completely removed from the list of potential providers.

An important characteristic of the Public/Private Partnership is its task-oriented and time-phased nature. The Partnership should disband once an issue is resolved. The temporary nature of a Partnership is a key element of its success since busy professionals are often more receptive to a temporary rather than indefinite commitment. The Public/Private Partnership is especially well-suited for a special project. Due to the time restraints on most business people, ad-hoc committee projects are usually the most successful.

The difference between a Community Advisory Board and a Partnership is that the Public/Private Partnership has more of an emphasis on the business community than the community at-large. Public sector members would include people such as:

- the state director of juvenile corrections;
- a representative of the state director;
- the state financial officer; and
- the director of human services.

Key individuals from state and local branches of national corporations should be recruited. Any influential corporate executives who are interested in improving juvenile corrections should also be recruited.

## CONCLUSION

Although the historical precedent for privatization exists, recent years have seen the development of a new debate. The controversy centers on private delivery of total juvenile facility management and operation. State directors must examine all of the issues involved in privatization of juvenile services and facilities in order to make an educated choice.

The different elements of privatization, the steps in the process, are also important to understand in order to make a decision. Each step is essential to a successful contract and a productive working relationship between the state agency and the provider.

This monograph has provided information privatization's historical background, central issues, and essential elements. By understanding each of these areas, a state director of juvenile corrections can make an informed choice about what is appropriate for his/her juvenile system.



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