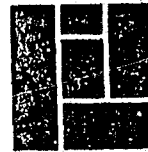


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ISSUES IN CONTRACTING FOR THE PRIVATE
OPERATION OF PRISONS AND JAILS: EXECUTIVE SUMMARY

EXECUTIVE SUMMARY



THE URBAN INSTITUTE

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While the report is very much the product of all members of the research team, we acknowledge the following primary authors: Chapter II: Trends in State Contracting by Keon Chi; Chapter III: Legal Issues by Edward Feigenbaum; Chapter IV: Policy and Program Issues by Robert Levinson; and Chapters V & VI: Contracting, Monitoring and Evaluation by Harry Hatry. Joan Allen's hard work in preparing extensive reviews of the literature and providing issue-specific references is also gratefully acknowledged. Team members each reviewed and commented upon all sections, making valuable contributions to each from their own perspectives.

The reader is invited to use this work as a preliminary analysis, a place to begin, and to learn from of other's experiences. Each issue could be the subject of in-depth research, and is not intended to be an exhaustive treatment of the subject. We thank the states and local government officials who will read this report, learn from it, and become the future innovators.

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ISSUES IN CONTRACTING FOR THE PRIVATE OPERATION OF PRISONS AND JAILS

I. ARGUMENTS FOR AND AGAINST

Debate over contracting for the operation of correctional facilities has been heating up at all levels of government during the past two years. Legislative hearings have been held in state capitals as well as in the U.S. Congress.^{1/} National organizations of state officials have sponsored conferences on contracting for corrections.^{2/} National organizations of lawyers and criminal justice planners have also expressed their concern, while government employee unions announced their opposition to the contracting trend being boosted by private firms.^{3/}

State officials have heard testimony from private vendors about the advantages of contracting for the operation of correctional facilities: cost savings, flexibility, quick facilitation, better management, and the like. Bills have been introduced into legislatures in several states to allow contracting, but states have tended to be extremely cautious in making their decisions. Bills in some states have been tabled or defeated; at least one state, Pennsylvania, placed a moratorium on contracting for private prison operations for one year.

The American Bar Association also called for a moratorium on contracting for prisons and jails until the legal issues were resolved. These were issues that arose when a state delegated "to private companies one of government's most basic responsibilities, controlling the lives and living conditions of those whose freedom has been taken in the name of the government and the people." The American Civil Liberties Union (ACLU), while not taking a clear position on the contracting issue, raised a pertinent question: "Do we wish to establish a system whereby those interested in profit margins are given an incentive to influence and control public policy with respect to crucial criminal justice issues?" ACLU also raised a series of questions about the possibility of violations of prisoners' civil liberties by private entities.

Footnotes

1. U.S. Congress, House Committee on the Judiciary, Concerning Privatization of Corrections: Hearings before a Subcommittee on Courts, Civil Liberties and the Administration of Justice, November 13, 1985.

U.S. Congress, House Committee on the Judiciary, Concerning Privatization of Corrections: Hearings before a Subcommittee on the Federal Prison System, March 18, 1986.

2. The National Conference of State Legislatures, "Privatization of Prisons," Conference, San Francisco, California, August 5-9, 1985.

The Council of State Governments, "Contracting for Services," Conference, Atlanta, Georgia, April 24, 25, 1986.

3. Martin Tolchin, "Experts Forsee Adverse Effects From Private Control of Prisons," New York Times, September 17, 1986.

In February 1985, the National Governors' Association (NGA) gave a limited endorsement to contracting for prison operations. NGA's policy statement said, "States may wish to explore the option of contracting out the operation of prisons or other correctional programs. Private enterprise would be expected to run prisons in an approach similar to the way it now operates hospitals, drug and alcohol treatment programs, or job-training programs for government." The statement also said, "States should approach this option with great care and forethought. The private sector must not be viewed as any easy means for dealing with the difficult problem of prison crowding."

Reasons for Contracting

Reasons for considering contracting may be grouped under six subheadings: cost-savings, rapid mobilization, capital expenditures, flexibility, management and political considerations.

Cost Savings:

- o Private contractors may be able to construct new facilities or rent space less expensively than government, or may happen to have inexpensive space available that can later be used for another purpose.
- o Fewer levels of management may allow private companies to provide a comparable level of correctional services at lower costs.
- o Private purchasing procedures and negotiations may save money while avoiding rigid government procurement procedures. More short-term purchasing may be possible in the private sector than in the public sector.
- o Private firms can bring economies of scale to the operation and private firms with contracts for multiple facilities can amortize expenditures.

Rapid Mobilization:

- o Private contractors may be able to make facilities available more quickly by raising private capital.
- o Private firms with existing facilities may be able to relieve overcrowding faster than government could build a new facility.

Capital Expenditures:

- o It may not be necessary for government to increase its capital budget if a private firm builds a correctional facility.
- o State government can avoid large amounts of capital expenditures by letting private firms build and run its correctional facilities.

Flexibility:

- o Private prisons may have increased flexibility to deal with changes in the size of the prison population and special needs prisoners.
- o By contracting with a number of jurisdictions, private firms may be able to achieve greater specialization than a single government.
- o Private firms may deal more easily with a temporary increase in inmates without long-term commitment of facility space and/or more staff.

Management:

- o A fresh infusion of ideas and energy from private firms may bring some positive changes in the corrections field.
- o Private firms may have more efficient management systems than government because they are in competition, which government is not.
- o Private entrepreneurs may be more creative in employee management, hiring and promotion procedures, thus reducing employee turnover rate and increasing morale.
- o Private firms are free to innovate and use the latest technology and management techniques as is any profit-motivated service industry.
- o Private firms can design a facility to hire fewer highly motivated and highly trained people at a greater wage than the public sector may be able to.
- o Private firms may provide better programs for counseling and training.

Political Considerations:

- o State agencies can justify contracting as a new alternative to prison overcrowding.
- o Contracting may involve the private sector in sharing responsibility for corrections problems.

Arguments Against Contracting

Reasons for not considering contracting may be grouped under five subheadings: philosophical/legal, higher costs, lack of accountability, management and political considerations.

Philosophical/Legal Questions:

- o Profit-motivated employees may lose perspective on the mission of public agency in the interest of expediency.
- o The contractor's first loyalty may be to his firm, and this may conflict with the goal of the public good.
- o Government incentives to pursue alternatives to incarceration may be weakened if new institutions are more quickly and easily available through the private sector.
- o A firm's self-interest may encourage further or extended incarceration.
- o Private industry can lobby for tougher law enforcement and longer prison sentences to keep institutions at maximum occupancy.
- o The government has remanded individuals to the prison-system and private firms should not be given responsibility to carry out their punishment.

Higher Costs:

- o Privately contracted prisons may cost more because of the necessity of government contract administration and monitoring.
- o Private firms may lower employee wage and benefit levels.
- o Private firms may "buy-in" or "lowball" a bid to get their first contract and then greatly increase their costs in future years.
- o There might be hidden costs in contracts.
- o It may be in the interest of the contractor to keep prisons full if contracts are on a per diem basis.
- o Contractors may incarcerate prisoners longer than they need to in order to collect per diem fees, thus costing taxpayers more.
- o In the absence of true competition among qualified private firms, contracted prisons may cost more.

Lack of Accountability:

- o Contracting for prison operation and management may decrease public input into the delivery of correctional services.
- o Corrections is one of a small number of public services which may best be managed by the public sector, because it involves the legally sanctioned exercise of coercion by some citizens over others.

- o Private firms may be less accountable to the public than government because of the profit motive, lack of legal mandate to provide service, and reduced public input.

Management and Services:

- o Privately-managed prisons may compromise correctional standards.
- o Prisoners in privately-managed facilities may be denied as much human contact as they now receive because there might not be as many correctional officers under private management.
- o There is the possibility of bankruptcy in a private firm.
- o The public may be more worried about safety and security if a prison is privately managed.
- o Private firms may skim the market and then leave the more difficult prisoners for the publicly-run institutions.
- o Private firms can reduce or eliminate unprofitable services even though they may still be needed, but not legally protected.

Political Considerations:

- o Contracting proposals may face inevitable resistance from many interest groups, including employee organizations.
- o Contracting proposals can be an unpopular issue in election campaigns.
- o Potential opposition from the community may be severe.

RECOMMENDATIONS

State policymakers should consider the issues of cost, management, timeliness, and accountability before making a decision about contracting with a private firm to manage and operate a correctional facility. A careful analysis of the advantages and disadvantages, opportunities for input from all sectors, and an assessment of past relationships with contracting will all lead to a better final decision.

II. THE COUNCIL OF STATE GOVERNMENTS/URBAN INSTITUTE STUDY

This study presents an analysis of the policy and program implications of one of the more controversial applications of the private contracting method to public services: contracting with the private sector for the operation and management of correctional facilities. The authors have examined the experiences to date of state and local governments that have chosen the contracting option, and provide suggestions for other public officials to aid their consideration of contracting option.

No attempt was made to evaluate the merits of various contractors, nor does the report prescribe a method which all public entities should follow. Nor did this study attempt to conduct a cost-effectiveness analysis of these early efforts, since very few data are available.

The presentation allows readers to distinguish the various aspects of the contracting decision, learn from the experiences of other public entities, and clarify the issues in their own situation. Recommendations are provided when the authors found agreement among experiences of government officials, strong advantages or disadvantages of a certain approach, or clear-cut legal precedents.

A research team composed of staff of the Council of State Governments, the Urban Institute, and a consultant experienced in criminal justice matters conducted this review of the issues. The Council of State Governments is a policy research and information agency of the 50 state governments whose team members brought experience in contract management, program design, legal research, and privatization analysis. The Urban Institute is a Washington-based policy research organization whose team members brought experience in local government privatization research, evaluation research, and contract analysis.

The research methodology involved an extensive review of the literature, including both scholarly research and the popular press. We also reviewed studies on contracting correctional services from 22 states. Documents, such as contracts, requests for proposals (RFPs), and inspection reports provided much information about the initial contracting efforts. A final source of data for the study was interviews conducted with corrections agency personnel, contractor personnel, purchasing officials, legislators and legislative staff. The interviews were conducted both in-person and by telephone and provided the anecdotal data used by the research team in preparing this report.

States and local governments have considerable experience in contracting with private firms for various correctional services such as training, medical care or even halfway-house operation. However, state and local experience in contracting for the entire operation and management of a secure adult institution is quite limited.

Documents on contracting correctional services were available from twenty-two states: Alabama, Alaska, Arizona, California, Connecticut, Florida, Illinois, Iowa, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New Mexico, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, Virginia, Wisconsin.

We also examined experiences in contracting adult, and some juvenile, secure facilities in both state and local government. These included a State of Kentucky minimum security institution for adult males; Florida, Massachusetts, Pennsylvania and Shelby County, Tennessee, facilities for severely delinquent youth; an adult facility in Dade County, Florida (not secure); the Bay County, Florida jail; a Ramsey County, Minnesota facility for adult females; and a workhouse in Hamilton County, Tennessee. Both government officials and private vendor staff were contacted. Corporate officials in each of four private, for-profit companies managing corrections facilities were interviewed:

- o Corrections Corporation of America
- o U.S. Corrections Corporation
- o RCA Services, Inc.
- o National Corrections Management, Inc.

THE ISSUES

An initial list of issues was established by the research team and refined during the course of the project. The decision areas addressed in detail in the report is provided below.

Prison Privatization:

The Legal Issues in Contracting for State Correctional Facilities

Legal Issues (Chapter III)

- #1 What are the legal issues in contracting?
- #2 What liability protection will a government agency and contractor need?
- #3 How should the responsibility and authority for security be divided between the contracting agency and private operator?
- #4 What provision is there for protecting inmates' rights, including mechanisms for inmates to appeal decisions affecting them?

Policy and Program Issues Before Deciding to Contract (Chapter IV)

- #5 What specific pre-analysis should a state undertake prior to the contract decision? (e.g. cost analysis, legal issues analysis.)
- #6 What are the reasons for considering or not considering contracting prison operation with private enterprise, particularly with for-profit firms?
- #7 How should publicity regarding a change to private operations be handled? (e.g. agency, media, public.)
- #8 Should contracting be done for a) existing facilities; b) a new institution, replacing an existing facility; and/or c) new institution not replacing an existing facility?

- #9 What level of offender should be assigned to the contracted facility? What are the differences in attempting to contract minimum versus medium versus maximum security facilities? Are there different considerations for contracting facilities for specific populations? (i.e. service vs. geography, protective custody, mentally ill, women, deathrow, mothers, and children.)
- #10 How many inmates should the contractor be expected to house? What provisions should be made for fluctuations in that number? What control does the contractor actually have over the number of inmates? Should minimum and/or maximums be established in the contract?
- #11 How will inmates be selected? Will the private organization be able to refuse certain inmates? (e.g. AIDS victims, psychologically disturbed offenders.)
- #12 What authority and responsibility should a private contractor have for discipline and for affecting the release date of inmates? What will be the relationship of these decisions to the State Board of Parole?

Requests for Proposals and Contract Issues (Chapter V)

- #13 Should contracting be competitive or non-competitive? Are there enough suppliers to provide real competition? What are the relative merits of for-profit and non-profit organizations as prison operators?
- #14 What criteria should be used to evaluate private proposals? (e.g. percentages for cost and quality of service.)
- #15 How should the contract price be established and on what basis? (e.g. single fixed-price, fixed unit-price award, cost plus.) What should be excluded in the contract price? (e.g. unit costs, provisions for price increases or decreases, extent of government control for total costs annually, performance and incentive contracting.)
- #16 What provisions should be made to reduce service interruption? (e.g. problems with transition periods, defaults by contractors, work stoppages, fallback provisions.) Should there be provisions to protect the private contractor? (e.g. government obligations.)
- #17 What standards should be required in RFPs and contracts?
- #18 What should be the duration of the contract and provisions for renewal?
- #19 What provisions are needed for monitoring in the RFP and the contract?

#20 What provisions should be made to address concerns of public correctional agency employees? (e.g. disposition of laid-off public employees after private takeover.)

Contract Monitoring and Evaluation (Chapter VI)

#21 How and to what extent should contractor performance be monitored?

#22 What results can be expected from contracting? (e.g. cost, service effectiveness and quality, work stoppages, illegal activity, timing of the alleviation of overcrowding, effects on other prisons in system.)

#23 How should government evaluate the results of contracting?

The resulting examination of the many decisions faced by public officials provides sound guidance without prescribing any single answer to the question: Should we contract? However, the research resulted in many recommendations on policy and procedure that are based on the experiences of government officials, and has been reviewed and commended by many.

III. RECENT STATE EXPERIENCES WITH PRIVATELY-OPERATED CORRECTIONAL FACILITIES

To date, state experiences in contracting for private management of adult inmates in secure facilities are very limited. Private firms managed juvenile facilities in at least 12 states: Florida, Massachusetts, Michigan, New Mexico, New Jersey, Oklahoma, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, and Washington. Two states, Florida and Kentucky, recently contracted with for-profit private firms for the operation and management of minimum security correctional facilities for adult inmates. Illinois and Wisconsin used not-for-profit organizations to manage community adult correctional centers. In Alaska, a restitution center is operated by a private firm, while California uses private beds to alleviate prison overcrowding. The Tennessee Department of Corrections a request-for-proposal (RFP) for a medium security prison for adult inmates, but receiving no responsive proposals, is, as of this writing, considering a revision and reissue of the RFP.

Florida

In Florida (in October 1985) a private firm, National Corrections Management, Inc., assumed the operation of the Beckham Hall Community Correctional Center, a minimum security work release facility under direct state jurisdiction. Since Beckham Hall operates a non-supervised work release program, it is not secure. The Center with a capacity of 158 adult inmates is currently housed in facilities leased under a use permit from Dade County for \$1 per year. The term of the contract is for a three-year period; the rate of payment for the first year of the contract is \$20.81 per inmate, per day. The Beckham Hall contract was a result of Florida's attempts to find new alternatives in dealing with prison overcrowding. The Florida Department of Corrections is currently evaluating the performance record of the privately-run correctional facility.

Kentucky

In October 1985 Kentucky awarded a contract for an adult facility to a private firm, Bannum Enterprises, Inc. Under this proposal, the private firm was expected to convert an existing facility, International Harvester Administration Complex in Louisville, to a 200-bed minimum security prison. However, the site was not available for use as a prison. In December a contingency contract was signed with another private firm, U.S. Corrections Corporation, for a private prison at another site. This contract became effective in January, 1986, and the private firm now operates the 200-bed facility known as Marion Adjustment Center in Marion County. The state's Cabinet contracted out the facility as a result of the recommendations of the Governor's Task Force on Prison Options. Kentucky's Corrections Cabinet is monitoring private management of the minimum security correctional facility.

The Florida and Kentucky examples offer considerable information on decisions state policymakers need to make before contracting out management of secure, adult correctional facilities for state prisoners. However, a careful review of the examples raises the question: How different are these two examples from privately-run halfway houses and various types of community correctional or work release centers in many other states?

Kentucky's Marion Adjustment Center has a number of similarities with privately operated halfway houses in the state. Inmates in the Center serve a longer term, which is three years or under, compared to that of one year or less in halfway houses. The Center has tighter restrictions and a self-contained correctional programs. Inmates remain on the grounds. Marion Adjustment Center is located in a rural county with no perimeter fence, while all the halfway houses are located in urban areas in the state. Kentucky's Corrections Cabinet places the Center on a continuum between privately-run halfway houses and other minimum security prisons in the state.

Illinois

Illinois was one of the first states to use private organizations to operate community correctional centers for felons, as well as for parolees. The state's Department of Corrections has been involved in contractual arrangements with not-for-profit organizations since 1975. The state currently has five contractual correctional community centers and ten state-operate correctional centers. The privately-run correctional centers must abide by the same rules and regulations, directives and procedures required of the state operated facilities. In fiscal 1986 the state appropriated \$3.5 million for contracts to provide housing and services to 252 inmates. In 1983 the Governor's Task Force on Prison Overcrowding recommended that the state "consider the private sector for correctional facilities and services where fiscally cost-effective and administratively feasible. Such contracting shall include community center placements, as well as prison facilities and services."

Wisconsin

Despite legislation passed in the 1986 legislative session allowing the state corrections agency to contract for operation of community correctional centers by private firms, Wisconsin's only privately-run facility was closed in January 1986 for budgetary reasons. For eight years, Baker House Pre-Release Center in Milwaukee (capacity of 26 beds) housed adult state inmates. One of the 15 state minimum security facilities, Baker House was operated by a non-profit corporation, the Wisconsin Correctional Services. The private correctional facility had placed heavy emphasis on work release, job training, and extensive counseling services.

Alaska

Contracting with private firms has received considerable review in Alaska. In 1985, legislation was passed authorizing the state Department of Corrections to contract for adult correctional restitution center services. In November the department contracted with a private agency for the operation of a 75-bed correctional restitution center in Anchorage. Alaska plans to expand this to other areas of the state. The purpose of the center is "to provide certain nonviolent offenders with rehabilitation through community services and employment - while protecting the community through partial incarceration of the offender, and to create a means to provide restitution to victims of crimes."

California

The California Department of Corrections has used, on a limited basis, privately-operated correctional programs to house selected state inmates to alleviate prison overcrowding. In fiscal 1986 the Corrections Department was budgeted for 1,700 private beds. By December 1985 the department had 1,000 beds under contract and had issued requests for proposals for an additional 734 private beds for three programs: private re-entry work furlough, private community treatment, and private return-to-custody.

Tennessee

The Tennessee Department of Corrections issued a request for proposal to operate a medium security prison. A new state law allows the state corrections department to contract with a private firm to manage the state-built medium security 180-bed work camp in Carter County. Under the law, the private firm is required to operate the facility at a cost of 5 percent less than the probable cost to the state of providing the same services. The cost of monitoring the contract is to be added to the vendor's price for determining the cost of private operation.

In a November 1985 special session, Tennessee Governor Lamar Alexander proposed to let a private company build and operate a state prison. The legislature also considered a proposal by the Corrections Corporation of America for the "franchise" to operate Tennessee's entire prison system for up to 99 years. Neither proposal passed before the special session recessed. The session of the 1986 legislature passed the private prison contracting act in April, and the governor signed the bill into law in May 1986. The enabling law, however, is applicable only to the Carter County facility.

IV. MAJOR CONCLUSIONS

Liability

It is evident that private prison contractors will not be able to escape liability under Section 1983 of the Civil Rights Act, and that the contracting government entity will be unable to protect itself from suits resulting from the wrongful acts of the operator it selects, but it may reduce its exposure.

Type and Size of Facility

States that have decided to use private contractors would avoid a series of problems if they limit contracting to additional minimum security beds. "Special needs" prisons also seem relatively well-suited to the contracting option.

Contracts should set maximum and minimum inmate population levels and specify the consequences if these are exceeded. A tiered price structure stating per diem costs for vacant as well as occupied beds is advisable. Finally, the contract should establish a mechanism for resolving disputes.

Contracting

Thus far, most state and local government agencies have not used fully competitive procedures when contracting for the operation of correctional facilities. This lack of competition does not appear to have been a major obstacle to obtaining good service, costs or quality. Over the long run, however, it is not the best contracting practice and could lead to major problems. The one state-level secure adult institution contract, the Kentucky's Marion Adjustment Center did involve fully competitive contracting.

At present, few vendors are experienced in operating secure correctional institutions. And there are few government agencies with experience in contracting for the operation of these facilities. Efforts thus far should be characterized as "experimental."

Monitoring and Evaluation

The state's method for monitoring the contract should be specifically stated and should, for larger (e.g., 150-inmate or more) institutions, include an on-site staff member. Costs to house this individual should be agreed to and documented in the contract.

All the contract efforts we examined were weak when detailing provisions for monitoring vendor performance. This applied both to provisions in the contracts (where little was said) and to the agency's subsequent monitoring procedures (which were not well-formulated). Formal performance criteria were usually vague while procedures for conducting the monitoring were limited. Standards included in the contracts dealt with process, but paid little attention to specifying outcomes.

We found only one systematic, in-depth evaluation of any of these contracting efforts. This was an evaluation of the State of Florida's Okeechobee school for severely delinquent male youth, funded by the federal government. Nor did we find plans for in-depth assessments of the contract effort in any of the other jurisdictions studied. However, on occasion there were plans, especially at the state level, for periodic reviews of the contractor's performance. The State of Tennessee's Legislature, as part of its May 1986 authorization of a trial contract effort for a medium-security facility, is requiring that an evaluation of comparative costs and service quality be done after the first two years. Evaluation is a prerequisite to renewing the contract for an additional two years. These examples are all primarily experimental efforts; there is little past experience to go by anywhere in the country. Since the number of private firms available to undertake these efforts were few, some new organizations were formed to bid on and operate the secure correctional facilities.

Impacts

While based on limited information, our observations indicate that initial contract operations have been reasonably successful--at least in the opinion of the government officials. It is not, however, clear that they have been successful from the perspective of profitability for the private firms. Vendor organizations appear to have made major efforts to do the job correctly.

In only one case, the Okeechobee School for Boys in Florida, was there evidence that major problems existed early in the effort. Even there, a follow-up visit indicated that many, if not most, of the problems had been corrected. A county workhouse that changed from public to private management initially had substantial staff turnover problems (Hamilton County, Tennessee), but this apparently did not result in major reductions in service quality. This special effort to do a good job is probably due to the private organizations finding themselves in the national limelight, and their desire to expand the market.

Avoiding Future Problems

Although a lack of full competitive bidding and careful monitoring of performance may be understandable for the initial trials, second phase efforts will require more attention to establishing: (a) more credible competitions and (b) comprehensive, formal monitoring requirements and procedures. This applies to future contracts for current providers as well as new private efforts.

Government agencies need greater assurance -- for themselves, for elected officials, and for the public -- that contracting activities will be administered in a fully appropriate, cost-effective and accountable manner. A strengthened contracting process should not be offensive to the private organizations themselves. Most of the officials of these firms supported full monitoring of their work.

V. RECOMMENDATIONS

Contract Goals

1. Before contracting, states should undertake a systematic, detailed pre-analysis to determine if, and under what conditions, contracting is likely to be helpful to the corrections system. This analysis should include an examination of whether statutory authority exists, of current state prison costs, crowding, performance, legal issues involved, availability of suppliers, ways to reduce the likelihood and consequences of contractor defaults, and the attitudes of various interest groups. (Issue #5)

2. If a governments' goal in contracting is to obtain new beds quickly, the private sector offers an attractive alternative. However, if the government seeks a more economical operation, the minimal evidence available to date suggests that contracting does not necessarily save a significant amount of money. (Issues #6 and #22)

Protection of Inmates/States

3. Careful attention must be devoted to ensure that each contractual component provides adequate protection of the inmate's rights and protects the state from unjust liability claims. (Issues #2 & #4)

4. The government can reduce but not eliminate, its vulnerability to lawsuits when contracting by specifying in the contract that the government be indemnified against any damage award and for the cost of litigation. (Issue #1)

5. The government should consider requiring that a significant performance bond be posted or a trust fund established in order to indemnify it in the event of contractor financial, or other, problems. The agency should, however, determine whether the protection is worth the cost of the bond. (Issue #16)

Contracting Process

6. Governments should use a competitive bidding process if they decide to contract. This will avoid accusations of cronyism, fraud, and the like. To maximize the number of bidders, the government can:

- o Advertise in major state newspapers and national correctional journals;
- o Develop and maintain a list of potential bidders;
- o Permit both in-state and out-of-state private non-profit and for-profit organizations to bid. (Issue #13)

7. Governments should include information about the bid evaluation process in the RFP. Suggested evaluation criteria include, but are not limited to:

- o Firm's experience and past success in similar undertakings;
- o Staff qualifications;
- o Proposed programs;
- o Firm's financial condition and references;
- o Cost.

(Issue #14)

8. A method for resolving any contractual differences that may emerge should be agreed to and be specified in the contract before activation of the facility (Issue #10)

Contract Provisions

9. The requests-for-proposals and subsequent contracts should explicitly specify: (a) who is responsible for what expenditures and (b) what levels of performance are expected (including: compliance with minimum standards as to policies, procedures, and practices; results on such performance indicators as maximum numbers of various "extraordinary occurrences;" and compliance with fire, safety, medical, health, and sanitation standards). The RFPs and contracts should also identify sanctions or penalties that will apply for inadequate performance. (Issues #15 & #19)

10. A tiered fee, or variable cost structure that is fair for both parties should be built into the contract so that there will be no future misunderstandings regarding cost for vacant beds and/or additional inmates beyond the specified ceiling (Issue #15)

11. Rebidding of prison contracts should occur approximately every three years. State laws and regulations should be checked before including this specification, since they may suggest a different maximum contract length. (Issue #18)

12. Governments should include special provisions in their contracts to require that the contractor provide advance notice of the end of a union contract period, the onset of labor difficulties or major worker grievances that could result in a work stoppage or slowdown. (Issues #1 and #16)

New & Existing Facilities

13. Contracting for new or retrofitted institutions entails many fewer problems (such as personnel problems) than turning over an existing facility to a private firm, and thus should be given preference in a government's initial contracting efforts. (Issue #8)

14. Governments contracting to replace existing facilities should take steps to ameliorate personnel problems including:

- o Require contractor to give employment preference to displaced staff;
- o Provide transfer, retraining, and outplacement services to employees not choosing to work for the contractor;
- o Carefully calculate, and make provisions for, disposition of benefits (especially retirement and vacation/sick leave accrual). (Issue #20)

15. Governments establishing a new contracted facility should develop a public relations plan. Good public relation are crucial for community education. The government should fully inform community leaders and should also keep correctional employees fully informed of any contracting deliberations. The media should be made aware of the contracting initiative at an early stage. Once awarded the contract, the private firm should use community resources for operating the facility, whenever possible by, for instance, hiring local people and buying supplies and services locally. (Issue #7)

Selection of Inmates

16. Both the RFP and subsequent contract should be explicit in describing the type and level of offender for which the state is seeking a private contractor and the major architectural features the public agency deems necessary to confine the prisoners appropriately. The contract should be based on the state's current inmate classification policy and its operational definitions of the privileges and level of supervision to be accorded the type of inmates at the proposed contracted-for custody level. (Issue #9)

17. States should contractually obligate the private vendor to accept all prisoners in certain specifically-designed categories (e.g., minimum security) for the duration of the contract period up to the agreed maximum number of inmates to be incarcerated at any given time (provided for in the contract). This would protect the state against the prospect of selective acceptance. (Issue #10)

18. Selection of inmates for placement in a private facility, and decisions about their movement, is the government's responsibility. The bases for these selections should be written into the contract. Criteria should be mutually agreed upon to avoid future misunderstandings. (Issues #10 & 11)

19. The contract should include a provision that permits the state to make the decisions about inmate reassignment or reclassification in the event that contractual capacity is reached. (Issue #10)

20. Both a minimum and maximum prisoner population level should be stated in the contract in order to facilitate planning and cost estimates.

21. States contracting for large institutions should specify in the RFP and the contract that the selected private vendor can use unit management, that is, can subdivide the the total number of beds into a number of smaller semi-autonomous units. (Issue #15)

Level of Authority

22. Government officials must ensure that disciplinary hearings conducted by the contractor following legally required practices when discipline problems occur. A private firm should adopt the policies and procedures utilized by the unit of government. Significant disciplinary actions should be formally approved. The state should consider permanently stationing one or more of its own staff members at large (e.g., 150 inmates or more) private facilities--or at least provide for frequent visits.. This individual's responsibilities would include participation in all disciplinary hearings concerning major rule infractions, the definition of these having been spelled out in written policy statements. (Issue #12)

23. Private companies given authority over inmates--authority that otherwise would have been that of the governmental entity if the contract did not exist-- should closely adhere to the same type of procedures that the government agency would have normally used. Where possible, private contractor discretionary actions involving inmate rights and discipline should be made in the form of a recommendation to the appropriate government agency or official for ratification. (Issues #3 & #4)

24. In the event of an escape attempt, private prison employees should use reasonable and appropriate restraint in the absence of any other specific statutory or case law. Once an inmate has left the facility's property (unless the private prison employees are in hot pursuit or have been deputized), law enforcement officials should become responsible for the ultimate capture and return of the escapee. (Issue #3)

25. Although individual practices may differ in regard to the degree of involvement of the public correctional agency with release decisions, insofar as the private sector is concerned, its contribution to this process should be limited to a presentation of the facts pertaining to the inmate's level of adjustment during the period of confinement in the private facility. Public officials should make the decision. (Issue #12)

Monitoring

26. The state should plan (before the RFP is issued) and implement (after contract award) an effective system for continuous contract monitoring. This should include:

- (a) regular timely reports (showing tabulations and analyses of extraordinary occurrences and other significant performance indicators and the results of on-site inspections)
- (b) regular on-site inspections, (at least monthly and preferably weekly) using pre-specified checklists, rating categories, and guidelines on how to complete the ratings
- (c) periodic documented fire, safety, health and medical, and sanitation inspections
- (d) provision for regular interviews with samples of inmates to obtain feedback on such performance elements as treatment of prisoners, amount of internal security, drug use, and helpfulness and adequacy of educational, work, and recreational programs
- (e) annual in-depth, on-site inspections by a team of experts, covering the various procedures used and the results of periodic reports on the facility's quality of services based on pre-contract specified outcomes/results indicators
- (f) explicit provision for prompt review by government officials of the written findings from each of the above procedures with prompt written feedback to the contractor, and identification of what needs to be corrected and by when (and subsequent follow-up to determine level of compliance)
- (g) provision for supplying information obtained from the monitoring process by the time contract renewals and rebidding are scheduled--so this material can be used effectively.

The same monitoring procedures should be applied to publicly operated and contractor operated facilities. Governments with comparable facilities can then use the resulting information as a basis for comparisons--and thus, obtain a better perspective on the relative performance of the contractor. (Issue #21)

27. From a state, local and national perspective, it is highly desirable to obtain systematic, comprehensive evaluations of the costs and effectiveness of contracting secured correctional facilities. A government should require that a comprehensive evaluation be made, (within three years of contract award, of the degree of success of its contracting effort. Where possible as compared to its publicly operated facilities. Other than the philosophical issues, most of the debate over prison contracting can be greatly enlightened by empirical field evidence concerning its elements. It is a great waste of resources if innovative trials of prison contracting are undertaken without including appropriate evaluations from which states and local governments, and society, can learn: Does contracting work, and under what conditions? (Issue #23)

ABSTRACT

Issues in Contracting for the Private Operation of Prisons and Jails by Judith C. (Sardo) Hackett, Harry Hatry, Robert Levinson, Joan Allen, Keon Chi and Edward Feigenbaum. (Council of State Governments, Lexington, Ky., 1986)

Prison and jail overcrowding is a priority state legislative agenda item. There has been an increasing interest in the potential of reducing the cost of government and the size of the public payroll through the use of private contracts for the operation of state and local correctional institutions. The authors provide practical recommendations to public officials for their consideration before and after choosing the contracting option.

This research discusses a variety of trends in contracting for state correctional facilities and provides the reader with experiences of other public entities that have made a contracting decision. It also clarifies important issues that have developed in the privatization effort.

The major issue areas involve the legal aspects of contracting, policy and program planning, request-for-proposals and contract agreements, and contract monitoring and evaluation methods.

The study will be a valuable tool to public officials in the decision-making process of contracting, as well as in the planning, implementation and evaluation efforts. Recommendations are provided where there is agreement among the experiences of government officials, where there are strong advantages or disadvantages to certain approaches or where legal precedents have been set.