

MONOGRAPH

ON PRIVATE SECTOR OPTIONS FOR JUVENILE CORRECTIONS

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MONOGRAPH

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Introduction

This monograph is a summary of the issues raised by proponents and critics of the privatization of Juvenile Detention Centers. Since its first appearance in 1990, there have been many changes in both the scope and view of juvenile providers.

Private sector contracting is not a cure-all to problems within state juvenile facilities; it is a complex and, at times, controversial choice. Before a government director of juvenile corrections decides to initiate or extend private sector contracting, there are many basic issues he or she must examine.

NEEDS

During the latter part of the 1990's, the idea to contract with the private sector had generally been a response to budget problems or necessary service improvements in the juvenile justice system. Before making any decisions as comprehensive as trusting state and/or local juveniles to private vendors, responsible agency staff need to analyze their system to define their real needs.

MOTIVATIONS

When agency staff examine all their options, they must ask why they are considering each one. It's crucial that state or local directors look carefully at their motivation to contract with the private sector. Perhaps one of the most important factors is objectivity. Contract only when it's clear that the private sector can do a more effective or efficient job than the state or local agency.

ISSUES

Once motives are examined and private sector contracting seems appropriate, the next step is to consider the issues involved in contracting out state or local juvenile services. The issues or concerns could be legal, emotional, practical, economic, or of another nature. Issues are much easier to deal with if they've been considered ahead of time.

The Private Sector as Contractor

Contracting to the private sector for juvenile services and facilities is not new. In fact, the private sector has operated private juvenile facilities in the United States since the 19th century.

Early jails, which also housed juveniles, were operated by citizens who ran them for profit. These private jailers charged their inmates for food and clothing and were often abusive toward them. Bribery and graft were commonplace. It was partly in response to these abuses that the government began to operate correctional facilities directly.

Today, private sector companies often bring with them management skills, advanced technologies, and information management systems that have the potential to *improve* correctional functions and reduce government costs.

Citing the need to reduce government spending and streamline operations, recent national administrators have advocated a greater role for the private sector in providing social services. Additionally, federal policy, as stated in MOB Circular A-76, specifically advises the government about which areas belong in the government's domain and which areas belong in the private sector. Three major mandates include:

- x Achieving economy and enhancing productivity
- x Retaining government functions in house
- x Relying on the commercial sector.

PRIVATIZATION DEBATE

The debate over privatization has heated up in recent years because of citizen demands that the juvenile justice system confront the problem of serious offenders more aggressively than ever before. Consequently, the system has to do more with less.

The controversy about privatization in juvenile corrections has little to do with purchasing supportive services from the private sector. The debate mainly centers on private sector management and operation of juvenile residential facilities that traditionally were managed and staffed by public agencies. Some see it as a threat of a "private takeover" of government interests.

Those who favor privatization argue that the private sector has more freedom and flexibility to start programs quickly and operate them more cost effectively. Proponents conclude that privatization of juvenile residential facilities and juvenile services can produce more effective services that better meet the needs of young clients.

Table 2.1: Pros and Cons of Privatization

REASONS TO PRIVATIZE	REASONS NOT TO PRIVATIZE
Private operators can provide construction financing options that allow the government client to pay only for capacity as needed in place of encumbering long term debt.	There are certain responsibilities that only the government should provide, such as public safety and environmental protection. Major constitutional issues revolve around discipline, deprivation of liberty, and preserving the rights of juveniles.
Private companies offer state-of-the-art correctional facility designs that are staff efficient and built based on value engineer specifications.	There are few companies available from which to choose.
Private operators typically design and construct a new correctional facility in half the time that a comparable government construction project would take.	Private operator inexperience with the key correction issues.
Private vendors provide government clients with the convenience and accountability of one entity for all compliance issues.	The operator may become a monopoly because of political ingratiation, favoritism, etc.
Private corrections management companies are able to mobilize rapidly and to specialize in unique facility missions.	Government may lose the capability to perform the privatized function over time.
Private corrections management companies provide economic development opportunities by hiring locally and to the extent possible, purchasing locally.	The profit motive will inhibit the proper performance of duties. Private facilities have financial incentives to cut corners.
Government can reduce or share its liability exposure by contracting with private corrections companies.	The procurement process is slow, inefficient and open to risks
The government can retain flexibility by limiting the contract duration and by specifying the facility mission.	Creating a good, clear contract is a daunting task.
Adding other service providers injects competition among the parties, both public and private organizations alike.	The lack of enforcement remedies in contracts leaves only termination or lawsuits as recourse.

Opponents of privatization argue that the private sector cannot ensure or provide a consistent level of service. They conclude that private sector involvement will lead to a lack of coordinated services and ultimately a decrease in financial and political support.

PRIVATIZATION FACTS

For anyone who is considering privatization, there are certain basic principles that are important to understand. Public sector does what it does because the private citizens of that jurisdiction mandate it to.

The private sector has resources of talent and technology not always available or affordable in government service. In addition to its resources, the private sector operates under a competitive system that is different from the operations of most government agencies. Public sector agencies tend to be more attentive to matters of cost and effectiveness when they measure their success against other potential providers of the same services.

PRIVATIZATION INQUIRY

In 1999 the American Correctional Association conducted an extensive survey on Juvenile Privatizations. Fifty-seven replies were received from 41 different jurisdictions—including Puerto Rico and the Federal Bureau of Prisons. Of the total number of jurisdictions, 46 (81%) indicated that they had at least one currently active Private Sector (PS) contract. This group has been contracting with the Private Sector for an average of 14.2 years—maximum 40—minimum 2 years. California reported the longest experience with private service contracting—40+ years. The number of contracts per jurisdiction (see table 2.2) ranged from 1 to 373, averaging 58.1 PS contracts.

Overall, the largest proportion of jurisdictions that responded (66%) expended an average of 24.4% of their contract funds for operations and programs. This was followed by 56% of the respondents who spent an average of 20.9% of their contract funds for community-based programs. The area for which the fewest respondents expended contract funds was Facility Maintenance, while the smallest proportion of funds was spent for Food—1.2%.

The main reason the survey respondents gave for contracting was that the private sector vendors could provide services and expertise that the jurisdiction lacked—mentioned by 33 (80%) of the respondents. Second most popular reason was that the private sector could offer services that were cheaper and more efficient—22 (54%) of the respondents. Provide flexibility/diversity of services was endorsed by 18 (44%) of those that replied; all together there were 29 different replies.

Table 2.3: Types of Services contracted for—% of Budget Spent

TYPES OF CONTRACT SERVICE	AVERAGE % OF BUDGET
Operations & Programs	24.4%
Community-based	20.9%
Specialized	10.3%
Maintenance	2.6%
Medical	2.4%
Clinical/Mental Health	2.2%
Education	1.6%
Food Services	1.2%

The conclusions reached from this recent ACA/OJJDP survey reflects a strong continuing interest in contracting with the private sector for correctional programs and services for juveniles. Overall, in the eight years since the previous assessment, there has been an increase in the use of For-Profit Contractors—from 60% in 1991 to 80% in 1999. Further, it appears as if the trend will continue into the future.

QUESTIONS MOST OFTEN ASKED ABOUT PRIVATIZATION

1. *What about the concerns of public employee labor unions and other public employee groups about job security?*

It's a reality that correctional services, as currently practiced, are labor intensive functions. Obviously, savings are realized if four workers can accomplish what six workers are currently doing through the introduction of more efficient management technology. There are practical ways of mitigating the threat felt by public employees, however. 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." Corporations do, in fact, routinely draw the majority of their project employees from displaced civil service workers. Agencies often place staffing considerations for existing employees a criterion for selection of a contractor.

2. *Won't the cost of private sector services be higher than the cost of public agency performance?*

This question is realistic. After all, aren't there two new costs (profits and contract monitoring) being added to the existing costs? These new costs exist, but offsetting them could be other major elements, such as:

Table 2.2: Type/Number of Private Sector Contracts

TYPE AGENCY (N)	NUMBER	MEAN	MINIMUM	MAXIMUM
(35) private NOT FOR PROFIT ¹	1197	34.2	1	123
(31) solely owner FOR-PROFIT	732	23.6	1	240
(20) NOT-FOR-PROFIT public	208	10.4	1	164
(11) FOR-PROFIT public	107	9.7	1	55
(8) Other	138	17.3	1	100
(41) Overall	2382	58.1	1	373

(n) = Number of jurisdictions

1. Contracts fall into the following groupings:

FOR-PROFIT

Private—A corporation or business whose objective is to gain a return of funds greater than those expended to deliver specified service

Public—A government entity whose objective is to gain a return of funds in excess of those expended to deliver a specified service

NOT-FOR-PROFIT

Private—A privately owned business whose objective is to deliver a service

Public—a charity whose objective is to deliver a specified service

- X *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.
- X *Different incentive structures:* The delivery of service by a public agency is essentially a monopolistic activity. Government agencies need not worry that others 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 might outbid it.
- X *Different managerial styles:* The unspoken driving force of a public agency might often be to increase its budget and to add new employees. An administrator in a private sector company might perceive his or her priorities to be the efficient performance of a particular range of services with as few employees as possible for the company.

3. *Once the private vendor is established, is there a danger that private sector costs will escalate unduly in ensuing years?*

Critics of privatization argue that a private firm could offer a lower price the first time around 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 capabilities. To safeguard against this, the jurisdiction, for example, must ensure truly competitive bidding conditions in subsequent years so that other firms have a fair and reasonable chance to seek the contract.

4. *Is it proper to shift the provision of social control to private providers?*

It's an ideological question that evokes emotion for many people and is grounds for lively debate. It seems, according to existing research, that the majority of corrections functions are contractible. In the final analysis, the debate can be resolved only by carefully defining both private and public sector roles and by determining the limits, if any, which are to be placed on contracted functions.

5. *Are there adequate, reasonable controls which will safeguard against possible abuses, such as cost overruns and political manipulations?*

Correctional professionals are worried that some companies will try to manipulate state and local politics to secure contracts. Proponents of this view fear that the private sector will politicize corrections.

6. *Are profit making and public services compatible concepts?*

Some people sincerely find it distasteful that anyone should profit by supplying the vital needs of others. This attitude often comes from the idea that for-profit companies are not "dedicated" or "idealistic" enough for this type of work, while non-profit agencies are. Ultimately, these

objectives can be countered by pointing out that even government and non-profit agencies have expenses, budgets to balance, and payrolls to meet. Dedicated, principled professionals exist everywhere, not just in government service. The competitive provider, working free of governmental, bureaucratic restrictions, often finds it easier to alter staffing patterns and change problems in management systems and service delivery. There is significant monetary incentive to deliver high quality juvenile services in a competitive market.

7. *Does contracting out juvenile corrections weaken accountability to the public?*

It should be noted that, while a governmental unit relinquishes responsibility for performing a service by contracting it out, it in no way relinquishes responsibility for monitoring the private providers. Government remains accountable, through detailed monitoring procedures, for all contracted services.

Performance standards for juvenile corrections have already been developed by the ACA, the American Bar Association, and the National Advisory Committee of Juvenile Justice and Delinquency Prevention.

8. *Are there private sector suppliers who are experienced and able to perform correctional services?*

This is an important question. There are firms, some of them new and some of them old and well established, with the interest and the capability to manage and operate juvenile justice services. Caution should be exercised, however, because although many responsible for-profit firms may be interested, a move to contracting corrections services must be thoroughly thought out and organized.

The Feasibility of Conversion_____

The question of feasibility is an important and complex one, and one which many agencies will need assistance with. The instances when public agencies should consider this possibility include, but are not limited to:

- X A desire to restructure, expand, or improve the continuum of care and service.
- X A desire for innovative ways to increase program efficiency.
- X The need to expand capacity quickly to relive crowding.
- X A need for capital construction funds and a cap on bonding authority
- X Reductions in appropriations that require reductions in the work force.

Before contracting with the private sector, however, a state should undertake a systematic, detailed analysis to determine if, and under what conditions, contracting is likely to be feasible.

FEASIBILITY ASSESSMENT:

Legal Authority. The expenditure of public funds is controlled by law and rule.

Generally, provided established procedures are followed, public agencies may purchase or contract out for goods and services. Contracting out for juvenile correctional services also is not new. Many states and local jurisdiction have relied on the private sector to provide a variety of residential and non-residential services. Despite this history, however, most juvenile correctional services, especially secure detention and secure training facilities, continue to be publicly operated.

One of the reasons that the move toward more privatization has been slow is a question about whether the traditionally public correctional function may be lawfully delegated to the private sector. Issues of legal authority and other similar concerns are complex, and their analysis is best left to legal counsel.

Public Policy Goals. Government has the responsibility of defining public policy goals for juvenile corrections. These goals usually focus on serving the public which is the primary motivation of government at all levels.

Some states begin by examining the nature of their juvenile corrections continuum of services. Ideally, a juvenile justice system should include an array of programs and services which adequately address both the juvenile's risk to public safety and his or her treatment needs. The reality of juvenile corrections budgets which have decreased in the face of increased referrals has often prevented the development of a full continuum in most jurisdictions.

Privatization is a possible strategy to establish or restore a comprehensive continuum of care. Using fiscal incentives and disincentives, administrative reorganization approaches and program capacity limits, state and local juvenile corrections directors have created the opportunity for private providers to design and implement new programs at the state and local level.

A common immediate goal for many jurisdictions is to respond quickly to a court order. Existing laws and regulations controlling areas like capital expenditures and personnel often present obstacles to establishing an immediate, publicly operated response. A number of states and local jurisdictions, therefore, have turned to the private sector to respond to litigation successfully.

Quality of Service. At times, the private sector has a greater potential for innovation and efficiency primarily due to its ability to be more flexible than government about personnel and resources. A significant issue that needs to be considered, however, is how this quality is measured.

Quality in any juvenile correctional program must begin with establishing positive and trusting relationships between juveniles and program staff. Other elements of quality juvenile justice programs include:

- X Services designed to promote the human dignity, self-esteem, and self respect of juveniles in the program
- X A group life atmosphere in which juveniles are supportive and helpful with each other
- X Juveniles need living and working relationships that are safe and clean
- X Methods of supervision and control that teach juveniles about the consequences of their behavior, both positive and negative, and help them to identify and learn responsible ways to meet their needs
- X Opportunities for juvenile decision-making that foster a sense of participation, significance, and competence
- X Individualized approaches to meeting treatment and service needs
- X Continuous case management that ensures coordination, service delivery, and accountability

- X A reporting system that measures progress and outcomes

Economic Efficiency. From the beginning, cost savings have been one of the primary motivating factors for contracting out traditional public services. There are numerous examples of cost savings as the result of contracting out governmental services. These successes are most common in service areas in which the private sector is already greatly involved, such as garbage collection, food services, and office cleaning.

But government often underestimates the actual costs. Because private providers tend to include both direct and indirect costs, their estimates are often higher. The determination of direct costs is usually accurate; indirect and administrative costs, however, vary so much that the government usually encounters estimating problems.

The determination of cost must also include the price of government's continuing involvement with the service, including bid development, contract monitoring, and accounting and program oversight.

A practice that interferes with the cost savings equation is "low balling" or underestimating cost. Private providers occasionally submit a low bid for a program or service. The danger in this practice is that the private provider might find it necessary to cut corners to balance the bottom line. The result may either create the need to give the provider additional funds or an agreement to cut back on services.

Government agencies also need to have reasonable expectations about the cost savings that they may realize through contracting out to the private sector.

Liability. At one time, government believed that it could drop its liability for operating correctional programs by contracting the service to a private entity that would assume the liability. This issue was settled in 1988 by the U.S. Supreme Court in *West v. Atkins*, 487 U.S. 42, that held that government does not absolve itself from liability by contracting out its constitutional duties.

The most effective safeguard against increased litigation is to require the private provider to insulate the government through reasonable indemnification for costs which may be incurred as the result of litigation. An additional safeguard that reduces exposure to litigation is accreditation from an applicable national organization such as the American Medical Association or the American Correctional Association.

Rights and Due Process. One of the earliest arguments against privatizing juvenile corrections was the threat it posed to the constitutional rights of juveniles in the program.

The courts have consistently held that the rights of juveniles in correctional programs and the due process to which they were entitled are not

diminished in any way by virtue of being placed in a program operated by a private provider.

Nevertheless, there are practical issues that could impinge on a juvenile's rights. A provider's efforts to reduce costs in the areas of food services, utility costs, and clothing, for example, can have an unintended impact on a juvenile's rights. Ultimately, it is the state or local agency's ability to manage, monitor, and control these issues that will determine whether privatization is appropriate.

Security and Safety. 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, about the authority of private providers as compared to government. It is important to determine whether the employees of a private provider are authorized by state or local law to take and hold juveniles in their care.

Control and Accountability. One of the most consistent criticisms of privatization is that it results in the loss of control by government over functions for which it is ultimately responsible and accountable.

In determining whether to privatize, government must assess whether it will be capable of retaining system-wide control of the delivery of services by a private provider. Key elements of this control include determining program admission and release criteria, the ability to monitor closely and affect on-going operations, the will to terminate the contract for cause, if necessary.

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 cure-all.

But contracting out a service which has traditionally been provided by the government means that public employees will be impacted in some way. Resistance to privatization, not surprisingly, generally comes from public employees and their representatives.

Consideration must also be given to how contracting out a particular program or service may affect the influence a potential provider may have over the nature and provision of the contracted service. Having a contract with a public agency often gives a provider an opportunity to engage in various activities, such as meeting with key government officials or promoting certain public policy positions that favor the provider's interests. Recent history should be reviewed.

Community Attitudes. Whenever or wherever the juvenile correctional program or service to be contracted out involves a community or a neighborhood, it's important to assess how key members of the community view the program.

Contracting out such a program to a private provider who is not known to the community may cause anxiety and opposition.

Civic and business organizations, neighborhood groups, and influential citizens in the affected communities should be told of any privatization plans and asked for their opinions on the matter.

Developing a Request for Proposals and a Proposal Review Process_____

Most experts would agree that no single aspect of the contracting process plays a more consequential role than does the *Requests for Proposals* (RFP). Each request for proposals is unique. Each one focuses on the particular needs a contracting agency confronts at any particular time. Each one is shaped by state or local statutes and regulations. Despite the differences in RFPs, There are many common denominators in their logic, structure, and content.

THE BASIC LOGIC AND PHILOSOPHY OF CONTRACTING

When preparing a request for proposals for the first time, there are two temptations that one must avoid. The first is to imagine that the task is too complex and technical. The second temptation is to move immediately to drafting the request for proposals without the necessary background information.

What is a request for proposals? A request for proposals is the document that a contracting agency uses to launch the process of private sector contracting. An RFP is ordinarily used when a state or local agency:

- X Is legally obligated to use a competitive procurement process
- X Has concluded that a competitive bidding process will best serve its interests
- X Is unable to define specifically the scope of work for which the contractual service is required

THE GENERAL STRUCTURE OF A REQUEST FOR PROPOSALS

The structure and content of a sound request for proposals varies from jurisdiction to jurisdiction. Staff responsible for preparing an RFP should familiarize

themselves with applicable provisions of law as well as with any relevant state or local regulations, and work closely with their legal and procurement staff at each step of the procurement process.

In an RFP, the state or local department of juvenile services:

- X Identifies the statutory authority that permits it to contract
- X Describes the needs it wants to meet
- X Solicits the competitive responses from qualified for-profit and/or non-profit private organizations
- X Specifies the documentation that potential providers must furnish in their response
- X Sets a deadline for responses
- X Describes the manner in which responses will be received.

THE SCOPE OF CONTRACTING INITIATIVE

Contracting with the private sector for juvenile correctional services can result in either of two general forms of privatization: *partial* and *complete*.

Partial privatization involves government contracting for one or more services. The government retains overall responsibility for the delivery of the primary service, but contracts for food services, education, etc.

In complete privatization, government contracts for the full-scale management of the same facility and might even authorize it to subcontract with other private firms for specific services subject to prior approval from the state or local agency.

THE EFFECT OF CONTRACTING AND THE PROPER ROLE OF GOVERNMENT

Those who prepare RFPs must pass a balancing test. On one side of the scale is the need to be specific about many of the terms and conditions a successful provider will be required to satisfy. On the other side of the scale is an equally important need to guarantee that potential providers have the greatest possible flexibility in proposing innovative means to satisfy the agency's needs.

PREPARING A SOUND REQUEST FOR PROPOSALS

The core components of the RFP are preparation, release, and review.

Preparing to draft the RFP. A good deal of work including the relevant analysis, planning, and preparation must be completed before the first draft of an RFP is written.

General drafting considerations: What should an ideal RFP look like? Without statutes, administrative regulations, or agency policies that mandate a specific model for preparing an RFP, no one formula guarantees a sound final product. At the very least, all RFPs must include three sections: The qualifications the agency

expects the soliciting company to have, the program they want for the juveniles, and the costs of that program.

TYPICAL ELEMENTS OF A WELL-PREPARED REQUEST FOR PROPOSALS

Authors have broad latitude when organizing an RFP. What is crucial is that the RFP clearly informs potential providers about the needs of an agency, the information they need to develop a proposal, the way that proposals will be evaluated and how the contracts will be monitored and evaluated.

A checklist of the areas to be covered in an RFP should be prepared. Items in the checklist might include:

- x The proposal title*
- x The identity of the issuing agency*
- x Legal authority for contracting*
- x Agency commitment to potential providers: At a minimum, the RFP should express that the issuance of a request for proposals does not:*
 - x Make the agency responsible for any costs that potential providers may incur in preparing or submitting their proposals; or*
 - x Oblige the agency to award a contract to any potential provider*
- x Limitations on potential providers*
- x Amendments to or withdrawal of the request for proposals: Despite the best efforts of the author of an RFP, it's impossible to anticipate the need for amendments and possible withdrawal of the RFP.*
- x Financial parameters for proposals*
- x Proposal disclosure policies: Jurisdictions vary about whether responses to an RFP are treated as public documents and are thus subject to disclosure at the close of the contracting process. Whatever the applicable disclosure standard may be, it should be made clear in the RFP.*
- x Pre-submission conference: No amount of care will be sufficient to answer each and every legitimate question that potential providers will have once they review an RFP. Thus, everyone's interests are generally best served when a formal conference date is established and included in the RFP.*
- x Deadline(s) for proposal submissions*
- x Oral presentations: Following the submission and evaluation of proposals, the state or local department of juvenile services may schedule formal presentations by potential providers.*
- x Best and final offer: The best and final offer is not necessarily about cost. The agency may want to make a change in its requirements, such as a specific program for the juveniles, and they will allow the private providers time to make changes in their proposals.*
- x Selection deadline*

- X *Potential provider's commitment:* Submit proposals in good faith, and reflect a firm commitment to provide the proposed services at the proposed cost.
- X *Date for commencement of services*
- X *Affirmative action policy:* All potential providers should be placed on notice about the need for the preparation and submission of a suitable affirmative action plan that addresses all relevant features of their personnel selection, promotion, retention, and compensation policies.
- X *Notice of intent to respond:* It's advisable to require that all persons or firms that intend to respond to an RFP notify the contracting agency no later than a specific date and time.
- X *Definition of terms:* A useful section of an RFP is one that clarifies and defines the terms that will be used. Such a section can serve several purposes. It eliminates the need to use the same title or phrase repeatedly [e.g., "Department" shall mean the District of Columbia Department of Youth Services, etc.] Another purpose of the section is to clarify terms that are unusual or have a special meaning.

TERMS AND CONDITIONS

To protect the legitimate interests of the issuing agency as well as to inform potential providers, RFPs should be as explicit as possible about the key terms and conditions of the procurement. A typical RFP would contain, but not necessarily be limited to:

- X Identification of contract type
- X Contract term and renewability
- X Method and basis of payment
- X Method and basis of payment adjustments
- X Contract amendments
- X Contract termination
- X Subcontracts
- X Insurance and indemnification
- X Performance bond

STATEMENT OF WORK

The statement of work is the core procurement effort. It's objective is to communicate the goals and requirements of the state or local agency to all potential providers. The statement of work should include, but not be limited to, the following elements:

- X Background information
- X Contracting objectives

- X Client characteristics and eligibility criteria
- X Service requirements
- X Special requirements
- X Reporting and records

PROPOSAL REQUIREMENTS

Potential providers need reasonable guidelines for preparing proposals. Evaluating proposals is easier when they all follow the same basic format. Budget costs should be broken down and compared with corresponding components.

There are no basic rules for this, but legal requirements and agency regulations may require more information. A few general guidelines, however, certainly deserve consideration.

- X The potential provider's commitments should be clearly stated and not vague.
- X Potential providers should be informed that information not directly relevant to the specific requirements of the RFP should not be submitted. The proposal needs to be thorough, but it also needs to be concise.
- X The purpose of an RFP is to encourage competition and creativity among qualified providers of services. It's important that the competition be as fair and as impartial as possible. Agencies can ensure impartiality by writing proposal submission standard.
- X The state or local agency should specify the number of copies that must be submitted.

TECHNICAL PROPOSAL

For the purposes of this work, the assumption is that the proposal requirements call for the technical information to be submitted separately from the business or cost information. The primary elements of the technical proposal include the:

- X Statement of the scope of work required
- X Proposed approach
- X Management plan
- X Potential provider qualifications

BUSINESS PROPOSAL

The business proposal should establish the cost for the requested services given the approach, the management plan, and other various costs that may be associated with additional RFP requirements (e.g., insurance costs, travel and per diem costs, etc.).

When an agency reviews this aspect of an RFP for completeness and when proposals are being reviewed, they might consider a few additional guidelines:

- X A separate category in business proposals should deal with the profit a potential provider can realize.
- X As a general rule, it's not advisable to impose a minimum or maximum allowable cost for any item in the business proposal unless required by law (e.g., minimum wage requirements) or is essential for some reason independent of law (e.g., a legislative "cap" on the appropriation for facility construction or renovation costs). The true issue is not whether private sector salary schedules are similar to those of the contracting agency. The true issue is whether proposals provide persuasive evidence of the ability to meet the obligations of the anticipated contract.
- X Often, an agency does require that qualified potential providers submit cost proposals that assure it of a cost saving equal to or greater than some announced percentage.
- X Finally, it's customary to require that potential providers include a statement that guarantees the contracting agency that all information presented was determined by the provider and did not involve any agreement, collusion, communication, and/or consultation with any competitor. The penalty for any breach of this guarantee should be clear.

PROPOSAL ATTACHMENTS

Information that would assist potential providers in understanding the needs of the agency should be attached to the RFP. These and other documents may not be easily accessible to potential providers but might enhance their understanding of the procurement process, the problems a contracting agency is confronting, and how it hopes to attack those problems.

RELEASING THE RFP

Whether expressed in state or local statutes or agency regulations, procurement requirements generally impose obligations on agencies issuing RFPs to assure:

- X That information on the release of RFPs is available to a broad range of potential providers and
- X That potential providers have a reasonable amount of time to draft their proposals.

Developing a Contract for the Private Delivery of Correctional Services

The final and most formal step that completes a partnership between the public and private sectors involves the preparation, negotiation, and execution of a contract. A contract is a binding agreement between two or more parties that imposes a legal obligation on these parties to act in accordance with the terms and conditions of the agreement.

First, the terms and conditions of a contract for juvenile correctional services are a logical extension and legal formalization of (a) the requirements an agency expressed in an RFP and (b) the manner in which a provider proposed to meet those requirements in its response to the RFP.

The second key point is that the time, effort, and attention to detail in a sound RFP pay substantial dividends when contract negotiations begin. Blessed with a comprehensive RFP, quality proposals and a sound proposal review process, the task confronting all parties to a contract negotiation should be relatively simple.

PRELIMINARY CONSIDERATIONS

The drafting and negotiating of a contract is seldom or never a task that can or should be imposed on a single person or even a single office in an agency. Thus, although the primary responsibility for the drafting and negotiating of a contract for correctional services is like to fall on the desk of one agency representative, the success of the efforts of that person will depend heavily on that person's ability to focus the skills of a diverse group of people on the task at hand.

KEY CONCERNS IN DRAFTING AND NEGOTIATING CONTRACTS FOR SERVICES

Like requests for proposals, contracts flow from a complex set of circumstances. Those circumstances include the:

- × Procurement and statutory requirements of a jurisdiction
- × The state agency's regulations and policies
- × Court order and/or consent decrees
- × The specifics of the needs a state agency hopes to meet through contracting
- × The limitations and requirements a contracting agency established in the request for proposals.

NEGOTIABLE VS. NON-NEGOTIABLE ISSUES

Procurement efforts that are driven by an RFP must have a "backward-looking" as well as a "forward-looking" character.

A sound RFP is likely to contain a fairly broad array of specifications related to such issues as:

- × Type of contract
- × Duration of contract
- × Renewability of the contract
- × Funding availability and so on

SIMPLIFICATION BY INCORPORATION

The parties to a contract are legally bound by the terms and conditions of the contract they enter into. The obvious importance of contractual terms should alert those who draft contracts to the need to verify that any and all terms and conditions are put forward somewhere in the contracts they prepare. However, serving this important need does not require reinventing the wheel time and time again. Although it is not improper, and it may even be necessary for a contract to re-state terms and conditions that may exist in other relevant documents (e.g. statutes, regulations, RFPs, proposals, etc.), the goal of simplification can be served by inserting language into a contract that identifies and then incorporates the relevant documents. "Incorporation by reference" makes the incorporated documents a part of the contract just as though the relevant language in those documents had been written into the basic document.

PRESERVATION OF FLEXIBILITY

A good contract is dynamic rather than static, especially when dealing with contracts for services. Thus, the terms of any sound contract will include the possibility for the initial terms of the contract to be modified.

Importantly, the amendment mechanism generally should not presuppose and agreement between the parties regarding the nature of the contract amendment. To be sure, a typical contract will authorize contract amendments when they are

mutually agreed upon in writing by all parties. Various circumstances other than mutual agreement, may dictate a need for amendment even when one or more parties to the contract would prefer no amendment. A sound contract will prepare for unforeseeable circumstances.

SPECIFICITY REGARDING ADMINISTRATIVE REQUIREMENTS

There are at least two areas of a contract within which a good faith effort must be made to be as specific as is reasonably possible. One of these involves what might be defined as administrative requirements of the state agency.

Agency personnel may be quite comfortable with their agency standards in such areas as the maintenance of files, the preparations of administrative reports, and the submission and processing of invoices. Independent contractors are likely to have their own corporate standards for these matters. Thus, an important goal of contract negotiations and of contracts is to assure that independent contractors fully understand and appreciate the administrative requirements with which they will be obliged to comply.

SPECIFICITY REGARDING SERVICE DELIVERY REQUIREMENTS

Contract negotiations and contracts must be as specific as is reasonably possible regarding the general nature of the services the independent contractor is obliged to perform.

However, it is prudent to not become so specific that an independent contractor is left with no flexibility. If a departure from contractual terms seems appropriate, the contract terms should be adjusted in advance of any action being authorized by either the independent contractor or the agency.

PRESERVATION OF INDEPENDENT CONTRACTOR STATUS

Most contracts for juvenile correctional services contain a clause aimed at establishing the status of a contractor as an independent contractor. The contract could include in its language, for example: "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."

A government agency is generally not legally responsible for the torts of its independent contractors. However, the "boiler plate" of a contract is meaningless if a contracting agency says that the independent contractors are not "employees, agents, or representatives," and then in fact deals with them as if they were "employees, agents, or representatives." Despite the careful definitions in contracts regarding this issue, the courts are inclined to ignore contractual terms when everyday practice suggests that the nature and scope of the agency's control was so pervasive that the independent contractor was, in effect, turned into an agent.

CONTRACT DURATION AND TERMINATION

Contracts for the operation of secure juvenile and adult correctional facilities range in duration from one to 32 years. Normally, county and state contracts are limited by statutes to one to three years duration. Others maintain that most facility operations contracts range from three to five years.

Establishing a term for a contract involves a trade off between stability and the benefits of competition. The longer the term, the greater the program stability. However, in long-term contracts there is a reduced opportunity for market competition and the potential for more cost-effective programming.

In search of the ideal contract term. The contract term should be long enough to allow the contractor to re-coup its front-end capital investments and to become fiscally efficient. It also needs to be long enough to give the program an opportunity to stabilize and show how well it can operate. Further, the contract duration needs to be at least three years to allow for meaningful program assessment. However, the duration should be short enough to encourage contractors to be innovative, perform well, and keep costs down to enhance its chances to be successful on contract renewal or re-bidding; prevent market entrenchment; encourage other vendors to compete; and provide the contracting agency flexibility in addressing changing program needs.

TERMINATION CONDITIONS

The hard reality of contracting for services is that even the best procurement process and the best contract do not guarantee success. Circumstances sometimes arise that require the relationship between a contracting agency and an independent contractor to be terminated. It's essential that those circumstances be reflected fairly and precisely in contracts.

Some care should be taken to avoid "all or nothing" scenarios in which an independent contractor is either in full compliance with each and every term and condition of its contract or at imminent risk of termination for cause.

Common sense recommends a relatively informal effort to achieve compliance with a contractor before a formal effort unless the non-compliance detected by the complaining party involves an act or a failure to act that threatens the interests of the juveniles or the general public. At a minimum, the complaining party to the contract should agree to give the offending party a reasonable period of time during which to remedy the problem.

For cause. This reason for termination is based upon the private vendor not meeting contractual obligations, where such a lack of compliance seriously affects the program's operation. Terminating for cause should be a last resort, however, due to the problems inherent in the contracting agency having to take over the operation of the program or to obtain another vendor.

Contracts should also include a clause stipulating if the contract is terminated due to noncompliance with the terms and conditions of the

contract, any costs incurred by government for termination shall be deducted from any funds due the contractor.

Emergency situation. There may be situations beyond the control of the contractor or agency necessitating termination of the contract. For example, a facility might be destroyed by a flood or fire. Terminating a contract due to an emergency situation should be without penalty to the contracting agency.

Filing for Bankruptcy, Reorganization, or Liquidation. Another valid reason for terminating a contract is the filing of a petition of bankruptcy, reorganization, or liquidation. The contractor should be required to notify the contracting agency of its intent to file a petition for bankruptcy, reorganization, or liquidation pursuant to the U.S. Bankruptcy Code, at least ten days prior to the petition being filed. The agency could then terminate the contract as it would in terminating for cause, and would not have to wait for actual bankruptcy proceeding. The termination clause should include a ninety-day phase-out or transition period. This time period permits government to make arrangements for the continued operation of the program.

For convenience. Contracts should include a termination for convenience clause. This provision serves as an "escape clause" and is left undefined to provide government flexibility in terminating a contract. For example, the contracting agency may no longer need the contracted services.

Contract Monitoring

Once the contract is finalized and service provision begins, the public agency assumes the responsibility for monitoring the private provider's performance. This responsibility is especially important because the government continues to be held legally accountable for the juvenile correctional function even though the services are privately provided.

INITIATING CONTRACT MONITORING

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.

It's important to keep in mind that the state is the responsible agency and has the ultimate decision-making responsibility. The contractor works for the state. Successful contract monitoring requires foresight. The process actually:

- X Begins during the development of the request for proposals (RFP)
- X Is elaborated on in the successful proposal, and
- X Is finalized during the contract negotiation stage

The basic elements of monitoring—who, what, where, when, and how—must be detailed in the contract.

Some contracting agencies have been using a suppression measure to replace the traditional but less indicative level of recidivism. In effect, suppression measures the severity and chronicity of any unlawful activity by the program participant after he or she leaves the program, as compared to the levels at which they entered the program. Other measures of progress are:

- X Behavior
- X Logs
- X Incident report reduction
- X Progress in a point system

- X Participation in group sessions
- X Participation in specialized counseling
- X Attendance in a 12-step program

APPROACHES TO EFFECTIVE CONTRACT MONITORING

The purpose of contract monitoring is best served by a process of determining what is being done right, identifying what falls short, and working together to improve performance. Ideally, contract monitoring is not a process of finding fault or blame and threatening the provider with penalties. This can be counterproductive, as it prevents the contract monitor from acting as an agent of constructive change.

By the same token, a cooperative relationship should not blur the reality that the primary responsibility of the contract monitor is to assure that the provider is in compliance with all provisions of the contract.

CHARACTERISTICS OF THE EFFECTIVE CONTRACT MONITOR

Effective contract monitors understand the operational and philosophical principles of juvenile corrections in their jurisdictions. Contract monitors should be experienced people with respect and status in the contracting agency. Ideally, they have experience working in juvenile correctional programs. Monitors also must be skilled in developing a monitoring plan, negotiating, conflict resolution, and intervention techniques.

DEVELOPING A MONITORING PLAN

A special monitoring schedule should be mutually determined by the agency and the contractor prior to contract implementation. It is a whole process of reviewing documentation, analyzing data, developing reports, considering specific issues, troubleshooting and conducting interviews, as well as visiting a program site.

It's important that the monitor have sufficient time to devote to a contract. The monitoring plan should detail the anticipated amount of time that will be needed to conduct thorough and thoughtful monitoring. 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.

One approach to increasing both the effectiveness of monitoring and enhancing the monitor's understanding of the provider's performance is to increase the frequency of planned visits. A schedule of several comprehensive site visits (e.g. quarterly monitoring) could be complemented by a number of shorter visits.

Documents constitute a major part of contract monitoring. However, It's counterproductive to request everything produced by the provider. The methods of record keeping, as well as reporting formats and schedules, can also be set forth in the contract.

CONDUCTING A PROGRAM MONITORING VISIT

The key to conducting an effective monitoring visit is preparation. The contract and monitoring plan should detail what is to be monitored. A letter should be sent to the provider confirming the agreed upon date for a visit. An agenda for the visit should be prepared in advance to accompany this letter. The letter should detail what information is being requested in advance, what information is on hand, who should be available for interviewing (e.g., the superintendent, the medical authority, the maintenance mechanic, etc.) and any details concerning time frames.

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

- ✗ Safety and health
- ✗ Program climate
- ✗ Staffing
- ✗ Behavior management and control
- ✗ Physical plant
- ✗ Case management

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

An entrance interview should always be conducted with the provider's representative, program administrators, and other designated by the provider in agreement with the monitor. The entrance interview should be followed by a complete tour of the program.

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's important that the monitor have a standard set of questions designed to elicit specific information.

The next stage of the monitor visit is to review the documentation that has been requested and to conduct the remaining interviews. As the conclusion of the data gathering, the monitor should take sufficient time to prepare for the exit interview. The monitor should summarize and organize his or her findings and comments. Any remaining questions or requests for information should be listed. The exit interview should be an honest, frank, and thorough presentation of the program's perceived strengths and weaknesses, and it should close with a brief discussion of future goals and activities, including working on the issues raised during the visit.

CORRECTIVE ACTION PLANS

The most effective approach to addressing problems with contract performance is to give the provider the responsibility of recommending a corrective action plan. It

allows the provider to recommend creative and efficient ways to address problem areas.

Corrective action plans should not be viewed as consequences for poor performance, but as opportunities to improve the service to be provided.

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

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