Governments’ Management of Private Prisons

Grant # 98-CE-VX-0002

September 15, 2003

Prepared for
National Institute of Justice
810 Seventh Street, N.W.
Washington, DC 20531

Prepared by
Douglas McDonald, Ph.D.
Carl Patten, Jr., Esq.

With the assistance of
Elizabeth Fournier
Stephen Crawford

Abt Associates Inc.
55 Wheeler Street
Cambridge, Massachusetts 02138
## Contents

**Foreword** ................................................................. i

**Summary** ......................................................................... iii

**Introduction** ................................................................. xix

- One View: The Market is Most Efficient .......................... xix
- A Contrary View ......................................................... xx
- Failures at Privately Operated Prisons: Who Gets Blamed? ...... xxi
- Exercising “Buying Power” Strategically ............................ xxv
- The Challenge of Developing New Methods of Managing Mixed Public and Private Organizations .......................... xxvi

- What This Report Is About .............................................. xxvii
- Data Sources ............................................................... xxvii

- A Roadmap to This Report .............................................. xxx

1. **Why Contract? Governments’ Objectives in Turning to Private Imprisonment Firms** ........................................... 1

- Turning to the Private Sector to Acquire Needed Resources Expedi tiously ..................................................... 1
- Two Private Prisons Markets ............................................. 5

2. **The Contractual Structure: Selected Issues** ...................... 11

- Facility Ownership and the Risks of Entrenchment .............. 11
- Payment Structures ......................................................... 14

- Designing Performance Requirements ............................. 18

- The “Making Government Accountable” Movement and Its Implications for Contracting ........................................... 19

- Performance Standards in Criminal Justice Agencies .......... 22

- Performance-Based Contracting for Criminal Justice Services 24

- Operational and Non-Operational Goals in Contracts .......... 25

3. **Monitoring Contractors’ Performance** .............................. 29

- How Closely are Facilities Monitored? ............................. 29

- The Purpose of Monitoring and the Monitors’ Role .............. 31

- Monitoring Outcomes .................................................... 34

- Designating Outcomes to be Monitored ........................... 34

- Exactly How is Such Performance Measured and Monitored? 39

- Assessing Achievement of Strategic Objectives .................. 40

- Comparing Costs of Government Operation to Contracting . 40

- Comparing Performance .................................................. 43

4. **Texas: Going Private to Expand Capacity Quickly** ............... 45

- The Legislature Decides to Contract for New Prisons .......... 46

- The Legislature Defines Its Objectives for Privatization ....... 48

- Implementing the Privatization Program .......................... 51

- Structuring What Texas Seeks in the Market: The RFP .......... 53
Operations, Not Ownership ........................................ 54
Defining the Contractors’ Obligations: Striking a Balance Between
  Specificity and Flexibility ........................................ 54
Daily Living Conditions ........................................... 55
Healthcare ............................................................. 56
Safety, Security and Discipline .................................... 57
Personnel Requirements ............................................. 59
Promoting Prisoner Rehabilitation .................................. 60
Selecting Contractors ................................................. 62
Monitoring Performance ............................................ 63
Did Texas Achieve Its Objectives in Privatizing Prisons? ........ 63
  Cost Savings? .......................................................... 64

5. Florida: Seeking More Cost-Effective Performance ............... 67
The Legislature’s First Try .......................................... 67
The Legislature Tries Again ......................................... 69
  The Legislature’s Objectives ....................................... 70
  Specifying How the DOC and the CPC and Private Firms Are to Cooperate 71
  Establishing the Chain of Accountability ......................... 73
Translating Policy Objectives into Action in the RFP and the Contract .... 74
  Lower Costs .............................................................. 74
  Obtaining Capable Partners ........................................ 76
  Effective Programming ............................................ 77
  Writing the Contract ................................................ 78
Determining If Objectives Were Achieved ........................... 80
  Were Savings Achieved? ............................................ 80
  Did Privatization Result in Less Criminality? ..................... 81
Have the Private Firms Introduced Innovations into the State’s 83
  Prison System? ........................................................ 83

6. Oklahoma: Managing the Risks of Dependence ..................... 85
Too Many Prisoners and Not Enough Money ......................... 85
Finding Rather than Building Prison Beds .......................... 87
A Private Prisons Industry Emerges in Oklahoma .................... 88
Costs ................................................................ 96
Contracting Strategies to Manage Risk ............................... 96
  Protection of The State’s Bargaining Power Through Regulation .... 94
  Sharing the Risks Associated with Under-Use ..................... 97
  Ensuring Adequate Quality and Performance ...................... 98
  Statutory Checkpoints .............................................. 98
  Liquidated Damages Clause ...................................... 99
  Monitoring ............................................................. 101
Conclusion ............................................................. 102
  Has the Privatization Program Met Its Objectives? ............... 102
Foreword

This is the report of a project supported by grant number 98-CX-VX-002 awarded by the National Institute of Justice, Office of Justice Programs, U.S. Department of Justice. Points of view in this document are those of the authors and do not necessarily represent the official position or policies of the U.S. Department of Justice. Nor do they represent the position or policies of Abt Associates Inc. Abt Associates is a non-partisan research corporation that takes no position as a corporation on the matters examined here.

Voncile Gowdy, Ph.D. served as the monitor for this grant at the Institute, and Ronald Everett, Ph.D. assumed this responsibility following Dr. Gowdy’s retirement. We appreciate their support and assistance.

The sources of information used for this report were several. A mail survey was sent to directors of correction in state and federal governments to inquire about several aspects of contracting practices as of the end of 1997. Additional information was collected by means of telephone interviews with selected directors in several states, which were conducted by Tom Rolfs, the retired director of the Washington State Department of Corrections’ Institutional Division. Mr. Rolfs served as a consultant to this project. Richard Crane, an attorney and an expert in legal and contracting issues surrounding privatization, also served as a consultant to the study. He advised us on various aspects of contracting.

Carl Patten, Jr., an Abt Associates staff member at the time, also conducted on-site visits to prisons, public officials, and private prison administrators in Texas, Oklahoma, and Florida. These trips were taken to develop detailed information about contracting for prison operations in each of these states. Many persons were generous with their time. These included, in Texas: Former State Senator Ray Farabee, now Vice Chancellor and General Counsel, The University of Texas System; Craig Washington, Former Texas State Senator and U.S. Representative; Ron Champion, Assistant Director, Texas Department of Criminal Justice, State Jail Division, now of Wackenhut Corrections Corporation; Terri Wilson, Administrator of Contract Facility Operations for the Institutional Division of the TDCJ; Frank Inmon, Assistant Director, Purchasing and Leases, Contracts Branch; and Sharon Keelin, Assistant Director for Operational Support, Texas Department of Criminal Justice. We are also grateful to Elaine Cummins, who wrote her dissertation on Texas privatization, for advising us about whom to interview.

In Oklahoma, those interviewed included James Saffel, Director, Oklahoma Department of Corrections; Dennis Cunningham, Administrator, Private Prisons Administration, Oklahoma Department of Corrections; Cal Hobson, Oklahoma State Senator (District 16); Richard W. Kirby, Deputy General Counsel to Governor Frank Keating; and Linda Allen, Contract Monitor, State of Oklahoma Department of Correction. In Florida, they included James Biddy, Deputy Assistant Secretary, Florida Department of Corrections; Damon Smith,
Partner; Mirabella, Smith & McKinnon, Inc.; C. Mark Hodges, Executive Director, Florida Correctional Privatization Commission; David McIntyre, Contract Monitor; Florida Correctional Privatization Commission; and La’Tera D. Osborne, Operations Coordinator at the Commission.

In addition to the information developed in the course of interviewing these persons, a number of others have contributed to this in ways not always visible, as they have been valuable colleagues to Douglas McDonald on other studies of privately operated prisons. These include Gerald Gaes, Director of the Federal Bureau of Prisons’ Office of Research and Evaluation; Scott Camp, of the same office; Julianne Nelson, an economist who consults with the Bureau on privatization issues, and Malcolm Russell-Einhorn of Abt Associates. The senior author is also indebted to Mary Levick Owens, formerly of Abt Associates, who conducted with him another earlier study of contracting practices in selected states.

Several staff at Abt Associates were engaged in this project. These included Elizabeth Fournier and Stephen Crawford, both of whom assisted in the mail survey of correctional officials, in the development of the databases containing responses to the survey, and in the analyses of these data. Joan Gilbert also assisted in the administration of the mail survey and in other clerical tasks. Mary-Ellen Perry assumed clerical responsibilities at the end of the project.

Two reviewers commission by the National Institute of Justice read the final report to this project and made a number of excellent suggestions, some of which have been incorporated into this revised and now final version.

I am grateful to all of these persons who contributed to this report.

Douglas McDonald
Cambridge, Massachusetts
September 2003
Summary

This report examines state and federal governments' practices of contracting with private firms to manage prisons, including prisons owned by state and federal governments and those owned by private firms. Its focus is on contracting for imprisonment services in secure facilities, rather than for low-security or non-secure community-based facilities. Focus is also limited to facilities for convicted adult offenders, rather than facilities that serve as local jails or immigrant detention facilities.

Several aspects on the contracting process are examined: reasons for deciding to contract, the structure of the solicitations and contracts, and the procedures for monitoring the performance of contractors. This contracting process is important because it is the link between public agencies and private firms that do the public’s work. The performance of these privately operated prisons depends in large part upon how governments structure their contracting programs and how they manage private firms through the contract procurement and administration processes.

When governments turn to the private sector for prison beds, they are consumers in a marketplace. As consumers, they can exercise power over the kind and level of services to be provided and at what cost. Contract procurement and administrative procedures can either strengthen the government's hand in accomplishing its ultimate goals or weaken it. The challenge is to devise effective procedures for contracting with private firms. The state’s strategic objectives will most likely be achieved if the reasons for contracting are reinforced by the design of the work to be delivered under contract, how financial incentives are structured, how risks are distributed among contractor and government agency, how bids are evaluated and winners selected, how contract compliance is monitored, and how good performance by the contractor is encouraged and rewarded.

Data Sources

Information was obtained for this study from three principal sources. These included:

- A mail survey of correctional agencies in all states governments, the Federal Bureau of Prisons, the District of Columbia, the Commonwealth of Puerto Rico, and the U.S. Virgin Islands. This was undertaken to get information about each agency’s practices and experience with contracting for privately delivered imprisonment as if December 31, 1997. The first inquired about the agencies’ practices and plans regarding privatization as of December 31, 1997. The second section was designed to obtain
information about each contract, its administration, and monitoring. Of the 55 surveyed government agencies, all but two responded to the survey.

- Site visits and interviews were conducted by Abt Associates staff in Texas, Florida, and Oklahoma to examine contracting practices. These particular states conduct a disproportionately large amount of the prison privatization business in this country. At the end of 1997, there were 37,651 prisoners housed in privately operated facilities for state or federal departments of correction. Forty-two percent of these, or approximately 15,700 persons, were sent there by these three states. These agencies are also among those that house the largest percentage of their prisoners in privately operated facilities. Texas had the second-largest number of their prisoners in privately operated facilities—7,223, or five percent of its total population at year-end 1997 (the Federal Bureau of Prisons had the largest number: 9,951). Oklahoma reported having 4,588 prisoners in contract facilities, or 23 percent of its total state prisoner population—the highest proportion in the country. Florida had 3,877 in such facilities.

- Information was also obtained from review of statutory laws, requests for proposals, contracts, evaluations and other assessments of contracting.

**Structure of the Report**

The report has two parts. The first three chapters examine selected issues pertaining to contracting for imprisonment services in all jurisdictions. The second part includes three separate case studies of contracting experiences in Texas, Florida, and Oklahoma. These are not meant to be exhaustive accounts but rather focused examinations of why the states chose to engage the private imprisonment industry and how it has implemented this choice. Attention is also given to assessing, briefly, the extent to which the state has achieved its objectives.

**The Prevalence of Contracting**

Twenty-three states reported having contracts with private firms on December 31, 1997, to house prisoners, as did the District of Columbia, the Federal Bureau of Prisons, and the Commonwealth of Puerto Rico. Two other states reported placing prisoners in private facilities located in other states through an agreement between two public agencies (hereafter, an "intergovernmental agency agreement" or "IGA"). These were reported by the two respondents as equivalent to contracts, and we have included them in our analysis. These 28 jurisdictions reported having a total of 91 active contracts on that date, with 84 different

---

1 Two agencies contract for private prisons in Florida: the state Department of Corrections and the Florida Privatization Commission. Both responded to the survey.
private facilities. (The number of contracts exceeded the number of private facilities because some facilities contracted with more than one political jurisdiction.) These 84 facilities held a total of 37,651 prisoners at year-end 1997, or 4.3 percent of the nation’s 1.2 million prisoners held by state or federal correctional agencies.

Two Markets

Contracting with private prisons in this country has followed two different dynamics, and each poses different challenges to managing prison privatization. The dominant mode is for a government agency to decide to contract for some of its needed state prison beds, and then to seek a contractor willing to provide these beds in-state. In some instances, the state owns the facility and signs a contract with a private firm to manage and operate it, while in other instances the government elects to contract out the design, construction and operation of a new facility. The most usual result, regardless of who owns the facility, is the creation of one-to-one relationship between prison operator and the state prison system. That is, the state prison system is the contractor’s sole client at the facility; the only prisoners held in the facility are those under the jurisdiction of the client state agency. Moreover, the prison is in the same state as the publicly operated prisons, which creates at least some of the conditions supportive of a close integration between the publicly operated facilities and the privately operated prisons.

The second general pattern of contracting for prison beds poses different challenges for state management. Rather than waiting for the states to issue a call for service, some private firms take the risk of building facilities without first being assured of any prisoners from a particular correctional department. (These are often called “spec” prisons, built as speculative ventures by private correctional firms.) Once built and staffed, they advertise their availability to correctional and law enforcement agencies anywhere in the country that are in need of prison beds. Not all firms succeed in attracting prisoners. Those that do may hold prisoners from a variety of different agencies, both out-of-state as well as from the state in which they are located. As such, these facilities are oriented to what is essentially a national market, in contrast to those facilities that are brought into being as a result of a state or federal government’s issuance of a request for proposals and subsequent awards of contracts. Many of these facilities that are oriented to the national market may not have any prisoners at all from the correctional agencies in the states in which they are located. Indeed, they may have no relationship with the state governments in these states, other than an obligation to pay corporate income taxes. Owners of private property do not need licenses from state correctional agencies to build and operate imprisonment facilities and, until recently, most state legislatures have not established regulatory systems to govern private prison operations.

Of the 84 facilities having some sort of contractual or quasi-contractual relationship with state and federal governments on December 31, 1997, 15 were not in the same state as the contracting government and served the national market. There were probably other out-of-
state or in-state facilities in this latter category which were not identified by survey respondents because the questionnaire asked about all contracts with private firms, which was read by at least some respondents as not encompassing intergovernmental transfers or interagency agreements that resulted in prisoners being housed ultimately in privately operated facilities.

The national and local in-state markets differed in a number of significant ways. Two-thirds of the agreements between state governments and nationally-oriented facilities were non-competitive interagency agreements authorizing prisoner transfers. The rest resulted from competitive bidding. In contrast, 70 percent of the contractual agreements between state governments and privately operated prisons located within their states’ boundaries involved competitive bidding. None of the agreements with the nationally-oriented facilities specified whether inmates shall be housed in single-bed or double-bunked facilities, whereas half of the agreements with in-state facilities did so. Moreover, half of these nationally-oriented facilities were smaller and held fewer than 200 inmates; the rest held between 201-600 inmates. In contrast, only 20 percent of the facilities serving their host state governments had few than 200 inmates, and a third had more than 600. The majority of agreements between states and out-of-state facilities had terms of two years or less, where most of the contracts between state governments and in-state facilities were longer—between two and five years, and some longer. The per diem rates paid for out-of-state facilities were also higher than for in-state contracts. All agreements between state governments and out-of-state facilities that sold services on the national market specified payment rates in excess of $35 a day, whereas 55 percent of the contracts between states and in-state facilities specified lower per diem rates. Nationally-oriented facilities having agreements with more than one client government sometimes charged different per diem rates to each client. There were also significant differences in how states monitored out-of-state and in-state facilities, discussed below.

**Governments’ Strategic Objectives for Contracting**

Even though questions about costs and savings associated with contracting appear paramount with analysts who have compared private and government-operated prisons, a review of recent history suggests that these considerations have been of secondary importance to legislators’ and correctional administrators’ interests in obtaining needed beds quickly. This is not to say that the prospects or, at least, hopes for savings have been insignificant. Claims and belief about the cost-effectiveness of privately delivered services have certainly provided important ideological supports for decisions to turn to the private sector rather than meeting the increased demand for prisons with more government-run facilities. But contracting offers other advantages, and may serve governments’ interests regardless of whether taxpayers’ monies are saved in the process.

Correctional administrators who had active contracts with private imprisonment firms at year-end 1997 were asked to report their government’s objectives for contracting and to rank the relative importance of these objectives. According to them, it is clear that contracting
was undertaken in most states primarily to reduce overcrowding and to acquire beds quickly. (An important dynamic was the demand of federal courts to improve conditions of confinement in the public facilities.) Lowering the cost of operations or construction was reportedly of secondary importance in all but eight states. (In these eight states, cost savings were paramount.) In all, 86 percent of the 28 responding jurisdictions cited reduction of overcrowding as an objective of any rank, whereas about half (57 percent) cited hopes of cost savings. Improving service quality by contracting was given as the most important reason in only one state, although nearly half (43 percent) of the contracting jurisdictions reported interests in improving service quality, even though this objective was ranked most often as being somewhere between the fifth and ninth most important reason.

The survey recorded the correctional directors’ representations of the reasons, and these may not correspond precisely with answers that legislators or governors would have given to the question. How legislators and governors would have answered the question is especially relevant, because these were reportedly the most active initiators of efforts to contract for private imprisonment. The Abt Associates survey of state and federal correctional administrators asked who initiated the decision to contract for private imprisonment services in their jurisdiction. In jurisdictions that contracted for the management and operations of entire prisons, the initiatives to do so were most often taken by legislatures or governors, and not by correctional administrators. That is, of the 28 jurisdictions that had active contracts in the closing days of 1997, the legislature was reportedly the source of the initiative in 11 jurisdictions and the governor in five. Correctional administrators were identified as the initiating agents in seven, but this may not be a true reflection of their role. In at least one jurisdiction where the chief executive initiated privatization, the director of the correctional agency took credit for the initiative to contract out. In three states, the federal courts were identified as the source of the initiative, but this was probably not an accurate depiction of how contracting came about there. The courts had found conditions in these states’ prisons to be in violation of constitutional standards, but judges do not typically determine the means by which these are to be remedied.

**Does Contracting with Privately Owned Facilities Risk Entrenchment and Dependence Upon the Private Firm?**

Contracting relationships differ considerable in what is being purchased. Of the 91 different contracts that were active on December 31, 1997, 41 were with facilities owned by private firms rather than the contracting government. In theory, at least, there is reason to suspect that facility ownership gives a contractor an upper hand in subsequent competitions and may therefore serve to restrict competitiveness.

Among these 91 contracts, only 17 had been recompeted—awarded following expiration of a previous contract. The remainder were either still under the first contract signed, or were procured using non-competitive means (e.g., sole source procurement). Of the 17, incumbency provided an overwhelming advantage: all but one were awarded to the
incumbents. (The single contract that was not awarded to an incumbent was one where the facility was publicly owned, where eight different firms competed, and the award went to the lowest bidder.) Whether the contracts were awarded to the lowest bidder was known by respondents for 13 of the competitions. Incumbents won 12 of the 13, and submitted the lowest price bid in all but one. This indicates that incumbency itself is a powerful advantage.

There was no evidence that private ownership of the facilities made any difference in the outcomes of these procurements. Only four of the facilities were privately owned; all four firms won new contracts. Only two of these clearly resulted from competitive procurements following issuance of requests for proposals, however. The others resulted from unspecified other forms of procurement.

**Payment Structures**

Several different contractual arrangements exist to compensate private prison operators, which are discussed briefly here. Each strikes a different balance between the contractor’s interest and the government’s. These include, at one end, indefinite delivery/indefinite quantity contracts that permit the government to pay only for those beds used and, at the other end, fixed price contracts whereby the government pays the contractor a specified amount regardless of how many prisoners it sends to the facility. There exist several variants of these arrangements designed to allocate different financial risks.

**Performance-Oriented Contracts**

In principle, a distinction can be drawn between two different types of performance objectives for contractors (or any other agency). On one hand, desired performance can be defined as compliance with procedures and standards—essentially, conforming to specified processes or activities. Or performance objectives can be defined as the outcomes that a particular service aims to accomplish (such as improved prisoner or staff safety, or improved public safety, or prisoner rehabilitation, or improvements in prisoners’ health status). Most state and federal governments adopt the former approach and ask that private contractors perform like their public sector counterparts. Contractual statements of work generally specify that compliance will be required with the same procedural rules, regulations, and standards that are in force in the public facilities. For example, correctional administrators reported that 57 of the 91 contracts in force at the end of 1997 required that facilities achieve ACA accreditation within a specified time. In addition, administrators reported that 61 contracts explicitly required compliance with conditions established in consent decrees or other court-mandated standards.

Achieving ACA accreditation is not an outcomes-based performance goal. Rather, ACA standards primarily prescribe procedures. The great majority of ACA standards are written in this form: “The facility shall have written policies and procedures on . . . .” The standards emphasize the important benefits of procedural regularity and effective administrative control.
that flow from written procedures, and careful documentation of practices and events. But, for the most part, the standards prescribe neither the goals that ought to be achieved nor the indicators that would let officials know if they are making progress toward those goals over time.

An alternative orientation is to establish performance objectives that focus on outcomes to be achieved other than simple compliance with procedures and standards. This orientation is encouraged by initiatives in the federal and some state governments to emphasize and evaluate the performance of public services on the basis of outcomes rather than procedural compliance. This is consistent with the broader movement in public administration circles (but not yet in correctional circles) to develop performance-based contracts. For example, the Federal Acquisition Regulations, supplemented by guidance provided by the Office of Federal Procurement Policy, encourage the use of performance-based statements of work. OFPP states in its best practices guide for performance-based service contracting that “performance-based service contracting emphasizes that all aspects of an acquisition be structured around the purpose of the work to be performed as opposed to the manner in which the work is to be performed or through broad, imprecise statements of work which preclude an objective assessment of contractor performance.”

Examination of selected contracts for private imprisonment indicates that such outcomes-oriented performance objectives are rare. An exception is the contract between the Federal Bureau of Prisons and the Wackenhut Corrections Corporation at the Taft Correctional Institution. This contract gives the contractor substantial freedom in structuring its own procedures but requires that particular outcomes be achieved. Procedures to monitor progress toward such achievement have been created, and financial incentives to accomplish the objectives are built into the contract. Twice a year, a special review is conducted to determine the extent to which the contractor has performed above and beyond strict compliance with contractual requirements. Accomplishing the stated performance objectives can earn the firm an award fee amounting to a maximum of five percent of total payments. The effectiveness of such contractual structures in corrections has not yet been studied, other than a current study by Abt Associates of the Taft Correctional Institution.

Monitoring Performance

Governments’ practices of monitoring privately operated facilities vary widely. Nearly all contracts active on the last day of 1997 reportedly received some oversight from the contracting agency. There were significant differences in how governments monitored in-state as opposed to out-of-state facilities that served the national market. Ninety-percent of the contracts/ intergovernmental agreements with these nationally-oriented and mostly out-of-state facilities were monitored fewer than 20 hours per month. The other ten percent were

---

monitored at the rate of between 20 and 80 hours per month. This contrasts sharply with the monitoring of in-state facilities having (nearly always) exclusive contracts with the government in the state where they are located. Fifty-two percent of those contracts or agreements were monitored more than 80 hours per month. Indeed, almost half (48 percent) had full-time contract monitors, compared to fewer than 10 percent of the “national” facilities. States that contracted with facilities in-state were much more likely to employ staff especially trained for the task of monitoring. Sixty-three percent of the contracts with in-state facilities employed trained monitors, compared with only 14 percent of the contracts/agreements with out-of-state facilities.

Not surprisingly, the most publicly visible troubles in privately operated prisons have occurred most often in these arrangements whereby governments contract with out-of-state facilities to hold prisoners. State contract administrators and monitors rated their performance below that observed at in-state facilities with which states had (mostly) exclusive relationships. In 38 percent of all contracts or agreements with out-of-state facilities, the monitors or administrators rated the quality of the service as below that of comparable facilities in their own department of correction, compared with 7 percent of the contracts with in-state facilities.

Assessing Whether or Not the State’s Strategic Objectives in Contracting Are Achieved

Beyond monitoring contractor performance is the question of whether the privatization initiative taken as a whole—including both the government’s decisions and the contractor’s performance—are accomplishing the state’s strategic objectives for contracting. Most governments have not sought such assessments (although Texas and Florida, as discussed in this report, require them by law). Those that have done so have generally focused on comparing costs of contracting with the cost of the government operating the facility in question. Very few have compared the performance of the privately operated facilities (Florida is the exception, as it commissions studies of post-release recidivism to estimate the extent to which privately operated facilities improve prisoner rehabilitation). Most assessments of performance rely on the contract officers’ judgments regarding contract compliance. There are a number of methodological issues that must be resolved when assessing whether or not objectives are being achieved. These apply to assessments of costs and savings and to assessments of performance, and are discussed briefly.

Case Studies of Texas, Florida, and Oklahoma Privatization Experiences

These three states have among the longest and most extensive experience with contracting for privately operated imprisonment. The states’ objectives for engaging the private sector have varied, as have the states’ approaches to contracting. Three case studies examine why the state governments chose to contract, what objectives they sought, what kinds of contracting procedures they developed, and how successful they were in accomplishing their objectives.
Texas: Going Private to Expand Capacity Quickly

When the State of Texas contracted out the management and operation of four 500-bed prisons in 1989, it initiated what was at the time the most expansive prison privatization project in the nation, moving beyond specialized niches to big medium security facilities and facilities in the State Jails Division (which house convicted felons) and in the Parole Division (which are prisons for parole violators). By mid 2,000, 14,339 Texas state prisoners were being held in private facilities, by far more inmates and private facilities than any other state (even though other states held a larger proportion of its prisoners in privately operated prisons). This program was initiated by the state’s legislature principally to expand prison system capacity quickly and to improve correctional performance. This was needed to avert heavy fines that could be imposed by a federal court that had declared the conditions and overcrowding in Texas prisons to be unconstitutional. To carry out these objectives, the state’s government undertook its privatization initiative by writing comprehensive legislation, developing detailed contracts and assigning ample staff to oversee and monitor them, and assigned an independent commission the task of determining if the initiative achieved the financial objectives that the legislature and the executive branch sought (a secondary objective of privatization was to deliver equivalent services with at least a 10 percent savings to the state).

Although state officials initially sought to rely on private firms to construct and to operate new facilities, they ultimately determined that their objectives would be better served by owning the facilities and contracting only for operation. This was thought to strengthen the state’s hand in the event of contractor failure to comply with contractual obligations and by reducing the risks of entrenchment. To increase the likelihood that the facilities would operate according to the state’s mandates and the federal court’s demands, contracts were written that blended mandatory requirements with performance objectives and incentives that left some discretion to the contractor in some areas. The state did not take the approach that private firms should be given wide latitude in determining how the service was delivered. Requirements and specific performance objectives were spelled out for all aspects of prison administration—an approach that mirrored in many respects the approach that the federal court had taken in forcing the state to comply with its orders. This included requirements for daily living conditions, health care, safety, security, disciplinary procedures, personnel requirements, including training, and requirements for prisoner rehabilitation programming, with corresponding performance objectives.

The state sought to improve the likelihood of good performance by allowing competition at time of bidding while restricting the playing field to capable players. To be allowed to bid, firms had first to demonstrate substantial experience and capacity. Procedures for evaluating bids were designed to favor the bidder proposing not the least costly service but the one offering the best operational plan—especially the best plans for rehabilitation programming (again, one of the federal court’s principal concerns).
Contracts also built in strong provisions for monitoring to determine if conditions complied with contractual requirements and to determine if performance objectives were being met. As of December 31, 1997, monitors of ten of the 20 facilities were on site full-time. Four of these facilities were state jails and six were institutional units. The TDCJ reported that monitors spent approximately 25 hours, or less, of their time monitoring five of the 20 privately operated facilities.

The most elaborate of the performance measurement procedures were erected to determine if the required 10 percent savings objective was achieved with each of the contracts. The task of determining this was given to the Sunset Advisory Commission. The statute specified that the commission should analyze the cost and quality of services in the private prisons as compared to the cost and quality of any similar state services. However, as the commission noted in its 1991 report, the development of a cost estimate was complicated by the fact that the TDCJ did not operate a comparable facility. The commission ultimately overcame this challenge and developed an estimation approach, concluding that contracting saved the state 14–15 percent—more than the required 10 percent. This computation involved some unusual accounting assumptions. However, the commission counted payments by each of the firms to local governments in amounts that approximated the property taxes the firms would have paid if the prisons were privately owned. Because the state owned the facilities, and the firms contracted only to operate them, the firms were not legally liable for any such taxes. Nor was the state liable for such taxes. Consequently, these “payments in lieu of taxes” appear to be no more than a fee paid by the private firms to governments so that the net cost of contracting to Texas exceeds the 10 percent threshold. Not counting these payments, private operation appears to cost the state 8.8 or 9.7 percent less than direct TDCJ operation, depending upon the facility—or slightly less than the savings required by statute.

In short: the evidence from Texas suggests that the private firms are delivering a service that would cost the government approximately 9–10 percent more if the state’s corrections department operated the facilities directly. This assumes that the estimates of the department’s costs of direct operation are accurate, of course. Lacking more information about how these costs were estimated, it is not possible to evaluate them.

**Florida: Seeking More Cost-Effective Performance**

Florida’s correctional privatization program did not bloom in an atmosphere of governmental cooperation, as the legislature and the state’s correctional agency were not in agreement about what was needed. Legislative authorization to contract out prison operations had been on the books since 1985, but the Department of Corrections’ leaders felt fully competent to manage any needed prisons. Consequently, in 1993, the legislature passed a second law, the Correctional Privatization Act, which created a separate agency, the Florida Privatization Commission, to carry out its privatization directives. This is the only such agency in the nation dedicated to privatization that is independent of a department of corrections.
commission adopted a more aggressive stance regarding privatization, in accordance with its mission, and undertook to contract for several prisons. By the end of 1998, the state had 3,877 of its prisoners held in five privately operated prisons, including South Bay Correctional Facility, which held the highest proportion of maximum-security inmates of any privately operated facility in the country.

Establishing a separate agency to expedite privatization may have solved some of the legislature’s problems, but it created others. The CPC was not given executive authority to run the state’s prisons, and the courts could not remand convicted offenders directly or indirectly to the commission’s custody. The CPC and the DOC were going to have to coordinate their activities if privatization was to work in Florida. The law was therefore written in such a way to bind the DOC to utilize any privately operated facility that the CPC brings under contract.

As in many other states, Florida’s legislators sought to engage private firms to improve the cost effectiveness of imprisonment in the state. Written into the law is a provisions that any contract with a private imprisonment firm must “result in a cost savings to the state of at least 7 percent over the public provision of a similar facility.” The law also requires that contractors provide “for the same quality of services as that offered by the department.” What sets Florida’s law apart from others, however is the explicit goal of reducing recidivism: it requires that “work and education programs must be designed to reduce recidivism.” As part of its annual review of the commission and the privatization program, the commission is directed to compare recidivism rates of the private and public facilities. Also distinctive is the legislature’s explicitly stated goal of turning to private contractors to spur “innovation.”

In accord with the legislature’s intent, the commission designs its RFPs to obtain bids from firms that: (1) are well qualified to deliver the service based on their prior experience, and which offer a capable management team; (2) offer plans for effective educational, training and substance abuse programs; and (3) offer the state an opportunity to reduce expenditures for imprisonment. To facilitate bidder’s meeting the financial savings targets set by law, the CPC’s approach is to tell bidders what the cost of state operations would be and, by extension, what the bid price would have to be in order to produce the minimum necessary savings to the state. To determine if contracting has actually achieved these savings, Florida law mandates that an independent oversight agency, the Auditor General’s Office of Program Policy Analysis and Government Accountability (OPPAGA), review the actual performance of all privately operated correctional facilities under contract with either the CPC or the DOC.
The CPC’s approach, consistent with the legislature’s interest in innovation, is to allow firms a good deal of freedom to design their procedures for delivering imprisonment services. Private firms are also not bound to follow procedures prevailing in the state’s publicly operated facilities. Moreover, the CPC’s RFPs request that the bidders take advantage of this freedom and design a regimen that will improve offenders’ chances of doing well and conforming to the law when they leave prison.

To assure that private firms deliver education, training and work programs, CPC contracts set a daily per inmate spending target for these programs that must be met. To encourage private firms to design and deliver rehabilitative programming, the CPC has designed its proposal evaluation procedures to reward bidders that offer good rehabilitative programming.

Has Florida’s privatization program accomplished the legislature’s objectives? With respect to financial savings, the answer has been the subject of considerable controversy. In a 1998 report, OPPAGA reviewed the actual performance of all privately operated correctional facilities under contract with either the CPC or the DOC and compared costs at two privately operated facilities—the Bay and Moore Haven Correctional Facilities, operated by CCA and Wackenhut, respectively—with a similarly sized public facility, the Lawtey Correctional Institution. It concluded that the Moore Haven facility was more expensive than Lawtey to operate, and that the Bay facility was marginally less expensive (0.2 percent) than Lawtey. Both therefore failed to produce the minimum seven percent savings required by law.

The CPC and the two management firms took exception to several accounting assumptions that were made by OPPAGA analysts and produced their own analyses, which showed that these two privately operated facilities saved the state money. Moreover, in yet another analysis, the DOC found that both facilities were more expensive than state-run facilities.

Some of the differences in findings stem from the choice of comparison facilities. The DOC did not chose a single publicly run facility for the comparison but rather averaged the cost of nine other public facilities. This biased the case against the private facilities because all but one of these facilities were larger than both of the privately operated ones. (Larger prisons are generally less costly to operate because of economies related to scale.) The OPPAGA study made a more reasonable decision, electing to compare the two privates to Lawtey, which was about the same size and of the similar security level.

The studies also differed in how certain categories of costs were treated. These categories included costs associated with monitoring, taxes paid and not paid to the state, credits for revenues from inmate medical co-payments retained by the private firms, and retirement fund surcharges. The comparability of medical expenditures was also disputed. The CPC and the contractors argued that medical spending at the two private facilities and at Lawtey were not comparable because the prisoners at Lawtey had significantly different medical needs (an assertion rejected by OPPAGA).
This indicates how the seemingly simple comparison of costs to the state of either direct operation or of contracting is not a straightforward matter. What matters here, however, is that the legislature established a system for monitoring the performance of its privatization program that included an assessment of whether it hit its intended targets.

To determine if privately operated facilities produced more law abiding persons than the publicly operated prisons, the CPC commissioned a study by independent analysts. The first such study, released in 1998, compared recidivism rates of inmates released from prisons operated by the Florida Department of Corrections to those of inmates released from one prison operated by the Corrections Corporation of America—the Bay Correctional Facility—and another operated by Wackenhut Corrections Corporation, the Moore Haven Correctional Facility. The study concluded that a smaller proportion (17 percent) of the sample of releases from the privately operated facilities had recidivated within twelve months of their release, compared to a sample of releases from public facilities (24 percent).

However, studies of the rehabilitative effects of different prisons, or different prison programs, nearly always face significant difficulties that frustrate one’s ability to draw strong conclusions from the comparisons. Unless prisoners are assigned randomly to the various prisons under study, it is difficult to sort out the possible effects attributable to differences in prisons or prison programs from differences in the groups of prisoners that are created by purposive selection. For example, the RFP for at least one of the private facilities (Bay Correctional Facility) permits private prison administrators to request that prisoners be transferred to public facilities if they are “considered by the chief health officer to be medically, physically or mentally incapable of participating in the programmatic activities (which have been specifically designed to reduce recidivism) for greater than two weeks.” If the facility administrators exercised this right, it would result in collecting at this facility a group having stronger odds of success, regardless of what programming they ultimately received.

In addition, there were systematic differences in the types of prisoners held in the private and public institutions, which may have affected the differences in post-release criminality. Thirty-five percent of the prisoners in the private prison sample spent significant periods of time in the public correctional facilities prior to being transferred to the private facilities. These prisoners were thus exposed to both public and private facilities. And finally, there are significant questions about how the study subjects were selected from among all prisoners released from these facilities for the purpose of matching.

There has been no formal assessment of whether the private firms introduced innovations into the state’s prison system. The legislature may have assumed that any innovation of significance would result in more effective prisons (i.e., lower recidivism) and less costly ones. The existing studies of comparative costs and of comparative recidivism rates to not
support any strong inferences about the state’s obtaining more innovative imprisonment from the private sector.

**Oklahoma: Managing the Risks of Dependence**
As in several other states, Oklahoma turned to privately operated prisons to relieve overcrowding in its state facilities. Oklahoma’s practice is distinctive, however, because it sought to rely entirely on private facilities for the additional beds that it needed. It contracted with out of state facilities and, later, with firms that built prisons “on spec” within the state. As a result, by the late 1990s, it led the nation in the proportion of state prisoners in privately operated facilities. Although the state’s policy makers may not have intended to go further than other governments in developing a hybrid public/private correctional system, various incremental policy decisions had this result. Oklahoma’s management of this hybrid system is of interest, consequently, because the state developed a number of strategies to maximize the benefits of relying heavily upon the private sector while minimizing the risks of dependence.

The state has long had one of the highest incarceration rates in the country, and the demand for prison cells has grown consistently since the mid-1970s. The capacity of the state’s prisons failed to keep pace with the growing numbers of inmates and became overcrowded. The state’s fortunes were tied closely to oil, and the oil revenues collapsed during the 1980s. Oklahomans were averse to their government spending more money for prisons, which made it difficult for the state to build its way out of the crunch. The state first turned to emergency releases of inmates to reduce overcrowding, but public support for these release programs had disappeared by the mid-1990s.

Then-governor Frank Keating hoped that the year-to-year increases in demand for prison cells might be a short-run problem that could be accommodated by means other than prison construction, so he sought to avoid spending money on prisons that might not be needed in the future. Beds in other states’ prisons were in short supply, so the DOC turned to privately operated facilities to house its prisoners. Beginning in 1995, the state began contracting with privately owned and operated facilities, many of which were in neighboring Texas. Entrepreneurially-minded private firms and even public officials of Oklahoma towns and cities saw opportunities in this and began building facilities “on spec” in Oklahoma, betting that Oklahoma correctional officials would ultimately chose to rely on local facilities rather than out-of-state ones. This bet paid off, and the state began contracting with these in-state facilities.

By mid-May, 2000, Oklahoma had 6,204 beds under contract, and 93 percent of those beds were filled. It was contracting with seven facilities—all of which were located in Oklahoma. Prisoners in these privately operated facilities constituted about 28 percent of the total population of state prisoners. This ratio has stayed about the same since then, at least through mid-2003.
Relying so heavily upon privately owned and operated prisons creates certain risks for the state. These are substantially different from the risks borne by correctional departments in Texas, Florida, and elsewhere, which enter into contracts only to manage and operate government-owned facilities. Absent special agreements, they cannot resume control of the facilities in the event of trouble. Like all governments that contract with private firms, they retain responsibility and liability for correctional officers’ performance, but do not have direct control and authority over them. To minimize the negative effects of the department’s dependence upon private suppliers, the legislature amended in 1997 the enabling statute to regulate the state’s relationship with the private prison industry and to protect to the extent possible the state’s position vis-a-vis this industry. Provisions were written to assure competitive procurements; procurements that limit the financial impacts on the state budget; established rights in contract to purchase the facility at a predetermined price so that the state could acquire more prison properties quickly and with minimized disturbance to the inmate population; and provisions for comprehensive liquidated damages to create incentives for contractors to maintain a constitutionally acceptable environment for inmates.

Bringing its inmates back to in-state private facilities has enabled the department to monitor its contractors much more aggressively than was convenient when prisoners were housed in out-of-state facilities. By 1998, contract monitors were spending 60 percent to 80 percent FTE at the in-state facilities. Departmental administrators believed this to be sufficient. The department also conducts regulatory audits.

The principal objectives of Oklahoma’s privatization program have been to reduce overcrowding, to avoid capital investments in prisons, to avoid developing long-term obligations to larger numbers of state government employees, to retain flexibility in obligations in the event of a slackened demand for prison beds, and to do all of these without spending more money than would be spent if the state had expanded its publicly-operated prison system. No requirements were established in law to evaluate these outcomes, but several conclusions can be drawn without complicated study.

- Use of contractor-operated facilities has enabled the state to meet the demand for beds and thereby reduce overcrowding.
- Oklahoma has succeeded in housing substantial numbers of offender in prisons without spending a penny on new facilities. For fiscal year 1998, $0 was allocated to the Department of Corrections' budget for capital construction or debt service.
- By developing a mixed public and private correctional system in the state, the privatization program has allowed the state to expand capacity without increasing proportionately the numbers of state employees and the long-term financial obligations associated with such employees.

---

3 Interview with Dennis December 7, 1998.