



COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

GREGORY D. STUMBO
ATTORNEY GENERAL

CAPITOL BUILDING, SUITE 118
700 CAPITOL AVENUE
FRANKFORT, KY 40601-3449
(502) 696-5300
FAX: (502) 664-2894

OAG 04-013

December 7, 2004

Subject: Privatization of Adult Correctional Facility

Requested by: Hon. Rocky Adkins, House Floor Majority Leader

Written by: Pierce Whites, Deputy Attorney General

Syllabus: An adult correctional facility may be operated by a private provider only where statutory requirements for resident law enforcement personnel are met. All statutory elements must be met before privatization of a prison may be accomplished.

Statutes construed: KRS 45A.551; KRS 197.505.

Opinion of the Attorney General

On October 7, 2004 the Majority Floor Leader of the Kentucky House of Representatives, Mr. Rocky Adkins, submitted an opinion request to the Attorney General as to whether the Commonwealth of Kentucky may enter into a contract with a private provider to operate and maintain an Elliott County correctional facility constructed and owned by the Commonwealth of Kentucky. In particular, the opinion request concerns the legality of the issuance of a Request For Proposal ("RFP"), pursuant to KRS Chapter 197, for the management

OAG 04-013
Page 2

and operation of the Little Sandy Correctional Complex in Elliot County. KRS

197.505 provides as follows:

Privatization of prisons - Maintenance of designated security level of the facility - Locations restricted.

- (1) The state may enter into contracts with a private provider to establish, operate, and manage adult correctional facilities. In all such contracts the state shall retain clear supervisory and monitoring powers over the operation and management of the adult correctional facility to insure that the inmates are properly cared for and that the employees of the facility and the public are adequately protected.
- (2) Any adult correctional facility operated by a private provider under this section shall ensure that all inmates housed in the facility, including those inmates housed under contract with another state, shall meet classification requirements as set forth by the department for the designated security level of the facility.
- (3) Any adult correctional facility contracted for pursuant to this section shall be constructed only in a county with an established Kentucky State Police post or in a county in which at least two (2) State Police officers reside as a result of a duty assignment or in a county with a full-time police department.

Id., emphasis supplied.

Clearly this statute permits the Commonwealth to contract privately for the establishment, operation and management of adult correctional facilities as is evidenced by the private development and management of the Lee Adjustment

OAG 04-013

Page 3

Center and Marion Adjustment Center in Beattyville, Kentucky and Lebanon, Kentucky, respectively, which are both facilities which contract with the state for the housing of state inmates. The question is whether this statute permits the Commonwealth to construct an adult correctional facility at taxpayer expense in Elliott County, and then contract with a private provider for its operation and management.

A Private Provider May Not Operate
an Adult Correctional Facility in Elliott County

As an initial matter, it must be noted that Elliott County does not have a full time police department, an established Kentucky State Police post, or any state police officers residing in this county as a result of duty assignment or otherwise. Elliott County therefore clearly falls within the "locations restricted" portion of the controlling statute. KRS 197.505(3). The law plainly forbids any contracting with a private provider where the requisite presence of law enforcement personnel is lacking.

This restriction on contracting with a private provider is clearly motivated by concern for the public welfare. Where the state relinquishes its central role in the operation of a correctional facility, it is absolutely required that specified law enforcement personnel be on duty within the affected county. The wisdom of

OAG 04-013
Page 4

this statutory directive is underscored by the recent riot at the privately run Lee Adjustment Center, which resulted in the imposition of civil fines upon the private provider for the failure to maintain, organize, equip, and train an adequate emergency response squad. The public protection mandated by KRS 197.505(3) will not permit a private contractor to operate a correctional facility in Elliott County.

Particular Statutory Requirements Prevail Over General Requirements

KRS 45A.551 establishes "Procedures for State Agency Privatization Contracts" and states, in part, as follows:

- (1) Upon approval of the Finance and Administration Cabinet, a state agency may enter into a privatization contract.
- (2) Before a state agency recommends to the Finance and Administration Cabinet that it enter into a privatization contract, the state agency shall determine and set forth in writing:
 - (a) The necessity for the service and the intended goals of the service;
 - (b) Problems and inefficiencies existing with the current governmental operation of the service; and
 - (c) Whether the service can efficiently be provided by the agency.

...

The legislative history to this privatization statute indicates it was enacted as an amendment to Kentucky's procurement law during the 1998 Regular Session of the General Assembly. This statute states the general policy of the

OAG 04-013

Page 5

Commonwealth which permits a state agency to enter into a privatization contract provided the state agency determines the service cannot efficiently be provided by the agency. This statute of general applicability, however, must be construed in light of the prior and more specific enactments beginning in 1988 regarding prison privatization under KRS 197.

Reconciliation of KRS 197.505 and KRS 45A must be guided by accepted principles of statutory construction. Pursuant to KRS 446.080, all words and phrases are to be construed according to the common and approved usage of language and are to be liberally construed with a view to promote their objects and carry out the intent of the legislature. Simple words must be given their ordinary meaning and cannot be given a strained interpretation for the purpose of affecting a result not contemplated by the General Assembly. Inter-County Rural Electric Co-Op. v. Reeves, 171 SW2d 978 (Ky. App. 1943).

Of particular note is the settled principle of construction reflected in a line of cases holding that the provisions of a statute as it relates to a specific subject controls over enactments of general applicability. Hughs v. Commonwealth, 875 SW2d 99 (Ky. 1994). The specific provisions of KRS Chapter 197 cannot be controlled by the general KRS 45A privatization statute. The language found in KRS Chapter 197 reflects the intent of the legislature that private providers of corrections services may enter into contracts with the Commonwealth "to estab-

OAG 04-013
Page 6

lish, operate, and manage adult correctional facilities." The specific grant of authority under KRS 197.505 indicates the intent of the Legislature to require all three elements of the statute, i.e. establishment, maintenance and operation of a correctional facility, in order for a contract to be awarded.

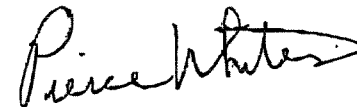
Although there is an instance in KRS 197.520 where the disjunctive word "or" is stated in the experience requirements that a private provider must establish to enter into a contract with the state "for the establishment, operation or management of an adult correctional facility", Kentucky courts have held that to justify interchanging the word "or" for "and" in a statute it must be obvious that the intent of the Legislature would be thwarted if the change were not made. Boron Oil Co. v. Cathedral Foundation, Inc., 434 SW2d 640 (Ky. 1968); Duncan v. Wiseman Baking Co., 357 SW2d 694 (Ky. 1961); Overnite Transportation Co. v. Gaddis, 793 SW2d 129 (Ky. App. 1990). Further, it is clear this section of the statute was enacted after the privatization criteria set forth under KRS 197.505 and should therefore be interpreted as providing the state flexibility in renewing at four year intervals a contract for management and operational services at prison facilities. To interpret this section as requiring "establishment" of a facility at contract renewal dates would yield an absurd result, which is disallowed under Kentucky's rules of statutory construction. Com., Central State Hospital v. Gray, 880 SW2d 557 (Ky. 1994).

OAG 04-013

Page 7

Similarly persuasive is a line of Kentucky cases that have repeatedly held that when a legislative body adopts a statute it is deemed to have been aware of prior enactments relating to the subject matter. Miller v. Jones, 658 SW2d 888 (Ky. App. 1983). Under this rule, it is presumed that the legislature is acquainted with the law on subjects upon which it legislates and "is informed of previous legislation and the construction it has previously received". Bogard v. Commonwealth, 687 SW2d 533 (Ky. App. 1984). Where, as here, the General Assembly has enacted a general provision permitting privatization of state services it is presumed to have been aware of the existing requirements in contracting for prison facilities regarding the establishment, maintenance and operation of such facilities. The adult correctional facility in Elliott County, not having been established by private provider, may therefore not be operated by a private provider.

GREGORY D. STUMBO
ATTORNEY GENERAL



Pierce Whites
Deputy Attorney General

#476