

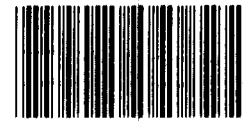
GAO

Report to the Chairman, Subcommittee
on Regulation, Business Opportunities
and Energy, Committee on Small
Business, House of Representatives

February 1991

PRIVATE PRISONS

Cost Savings and BOP's Statutory Authority Need to Be Resolved



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The Honorable Ron Wyden
Chairman, Subcommittee on Regulation,
Business Opportunities and Energy
Committee on Small Business
House of Representatives

Dear Mr. Chairman:

In response to the Subcommittee's request, this report provides information on the use of privately operated prisons and jails by federal, state, and local governments. The report highlights the legal and operational issues that should be resolved before considering further privatization in the federal prison system.

As arranged with the Subcommittee, we plan no further distribution of this report until 30 days after the date of this letter, unless you publicly announce its contents earlier. At that time, we will send copies to the other appropriate congressional committees, the Attorney General, the director of the Bureau of Prisons, the director of the U.S. Marshals Service, the Commissioner of the Immigration and Naturalization Service, and other interested organizations and parties.

Major contributors are listed in appendix III. If you have any questions on this report, please call me on (202) 275-8389.

Sincerely yours,

Lowell Dodge
Director, Administration
of Justice Issues

Executive Summary

Purpose

Our nation's prison systems are experiencing unprecedented crowding. Experts believe the war on drugs and harsher sentences for all types of offenders have caused prison populations to more than double since 1980, and even more dramatic increases are projected for the future. Federal and state construction programs are increasing prison capacities, but budget and other constraints limit the number of prisons that can be built.

Correctional agencies are considering innovative solutions for dealing with crowding in our nation's prisons. One alternative is privatization, which in this report refers to contracting with the private sector for the management and operation of a prison. The Chairman of the Subcommittee on Regulation, Business Opportunities and Energy, House Committee on Small Business, asked GAO to (1) identify the extent to which private prisons and jails are being used, (2) determine if the federal Bureau of Prisons has the authority to use privatization, and (3) determine if privatization could help reduce federal prison overcrowding and costs.

Background

Federal prisons are filled well beyond their stated capacities. In August 1990, the Bureau of Prisons reported that the federal prison system was operating at 172 percent of capacity. State prison systems face similar crowding problems. The Bureau plans to expand capacity by 47,000 beds by late 1995, a 167-percent increase over its 1988 capacity. State systems plan to add 214,000 beds, a 46-percent increase over 1988 capacities. With nationwide prison construction costs averaging \$50,000 per bed and annual operating costs averaging \$25,000 per inmate and with staggering prison population increases projected for the 1990s, governments are looking for economical alternatives for dealing with the costly and growing overcrowding problem.

One alternative for acquiring prison space is privatization. Historically, federal, state, and local correctional agencies have routinely entered into contracts with the private sector to provide services such as food preparation and medical care. They have also contracted certain prerelease programs and halfway houses for adults and certain facilities for juveniles. However, the Bureau has not used private prisons for the general adult inmate population. At the state level, California, Louisiana, Michigan, Oklahoma, and Texas had privately operated prisons at one time or another between 1850 and 1950, but these were phased out amid charges of inmate abuse.

More recently, during the 1980s, growing prison populations and increasing prison costs have resulted in some states using privately managed prisons again. A central question about prison privatization is whether private contractors can incarcerate convicted offenders at a lower cost than the public sector while maintaining quality of service, physical security, and inmate programs.

Results in Brief

Four states have already opened privately operated state prisons. One state is soliciting proposals for a privately operated state prison. In addition, 16 local governments have opened or plan to open private jails. At the federal level, use of privatization has been limited to specialized groups of offenders such as certain aliens and some unsentenced offenders.

After reviewing the relevant statutory language and legislative history, GAO has concluded that the Bureau does not have sufficient statutory authority to use private prisons for the general adult inmate population. The Bureau's enabling legislation prescribes specific measures that may be used to obtain prisoner housing. Contracts for privately operated correctional facilities are not one of these measures.

Officials of state governments that have recently used privatization say that it has demonstrated potential as a way to expand prison capacity quickly and economically. Further, they say it has generally provided the same level of service at a lower cost. However, existing empirical studies on service and cost are inconclusive; thus, more research and testing is needed. If granted authority to do so, the Bureau should test privatization to help resolve these questions at the federal level.

GAO's Analysis

Status of Privatization in Our Prison Systems

Privatization by state and local governments is becoming more widespread. To encourage financial benefits and efficient service, some of the states using private prisons have clauses specifying cost savings built into the contracts. Those governments using privatization said they were able to add prison space quickly, and, in general, believe they receive the same level of service for equal or lower cost. Some of those declining to use privatization are waiting for better evidence on cost savings.

At the federal level, the Bureau has not had any direct experience with private prisons although it has three contracts to house convicted adult aliens with local governments that use private prisons. The Bureau believes more experience is needed before the benefits and limitations of privatization can be fully determined but is considering contracting directly for private prison space to house convicted aliens. (See p. 18.)

Two other federal agencies, the Immigration and Naturalization Service and the U.S. Marshals Service, use privately managed and operated facilities for detaining short-term federal prisoners. These agencies use private facilities to satisfy an urgent need for space and are generally pleased with the results to date.

The Bureau Does Not Have Sufficient Authority to Privatize

The Bureau does not have sufficient authority to contract with the private sector to house the adult general inmate population. The Bureau's enabling legislation prescribes specific measures that may be used to obtain prisoner housing—contracts with state and local governments for such housing or the construction of federal facilities. GAO believes the inclusion of these specific measures implicitly precludes contracts for the confinement of prisoners in privately run facilities. Although the Bureau believes it has other sources of authority for privatization, neither the provision in its enabling legislation allowing it to designate places of prisoner confinement nor general principles of procurement law grant the Bureau the authority to contract with private companies for the operation of adult secure facilities. (See pp. 22-24 and app. II.)

More Research on Cost and Service Is Needed

Prison privatization is a public policy issue under debate. Opponents contend that operating prisons is a governmental responsibility that should not be delegated. Proponents contend that private contractors can be used responsibly to help carry out this function as long as the government maintains effective control and oversight. Better information on the advantages and disadvantages of privatization would enhance the public policy debate.

Unfortunately, available research on the cost benefits of privatization has been inconclusive. Depending upon the factors that were considered, private prisons were found to be from 10 percent more expensive to 8 percent less expensive than public prisons. Moreover, this research generally suffered from methodological limitations. For example, one research study compared the cost of private correctional facilities with

dissimilar public facilities, and another study used estimated cost data to project for comparison purposes. (See pp. 25-26.)

More research and testing is needed on the benefits, limitations, and best applications of privatization. The Bureau's testing of privatization could be a useful way to determine its advantages, disadvantages, and what role, if any, the concept could play in addressing the federal prison overcrowding problem. However, given GAO's conclusion that the Bureau currently does not have sufficient authority to use private contractors for the total operation of a prison, any such use of contractors on a demonstration basis would require authorizing legislation. The Department of Justice's National Institute of Justice, the Department's research arm, could assist the Bureau in studying the cost and service issues.

Recommendations

GAO recommends that Congress grant the Bureau the explicit authority to contract for privately operated prisons for purposes of running demonstration programs and projects that fully test and evaluate the benefits and limitations of privatization. Should Congress grant the Bureau privatization authority, GAO believes that such legislation should, among other concerns, specifically address the need for adequate controls in contracts to preserve the rights of federal offenders in private facilities, ensure contractor accountability, and provide for effective government oversight.

Should Congress give the Bureau authority to operate private prisons, GAO also recommends that the Attorney General direct the National Institute of Justice to assist the Bureau in testing and evaluating the benefits and limitations of privatization.

Agency Comments

GAO discussed the information contained in the report with officials from the Bureau, the National Institute of Justice, and state correctional agencies. These officials generally agreed with the facts in the report. However, the Bureau disagreed with GAO's conclusion that the Bureau lacks authority to contract for the provision of prison space by private concerns. GAO did not find the Bureau's rationale convincing.

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Abbreviations

ACA	American Correctional Association
ACLU	American Civil Liberties Union
AFSCME	American Federation of State, County, and Municipal Employees
BOP	Bureau of Prisons
CCA	Corrections Corporation of America
INS	Immigration and Naturalization Service
NGA	National Governors' Association
NIJ	National Institute of Justice
NSA	National Sheriffs' Association
USMS	United States Marshals Service
WCC	Wackenhut Corrections Corporation

Introduction

Our nation's prison systems are experiencing unprecedented crowding. Experts believe the war on drugs and a general "get tough" attitude toward crime have caused the prison population to more than double since 1980. Overcrowding has degraded the conditions of confinement, resulting in court orders to improve conditions or reduce inmate populations. Federal and state prison construction programs are increasing capacities, but prison populations are expected to grow even faster in the years ahead, and prison construction and operating costs are continuing to escalate.

Severe overcrowding, staggering prison population projections, and tight budget constraints have spawned various ideas for dealing with the costly prison problem. One such idea is privatization. In this report, the term privatization refers to contracting with the private sector for the overall management and operation of a prison.

Prison Overcrowding Is a Growing and Costly Problem

The federal prison system is getting more crowded.¹ The Comprehensive Crime Control Act of 1984 (Public Law 98-473), the Anti-Drug Abuse Acts of 1986 and 1988 (Public Law 99-570 and Public Law 100-690), and the sentencing guidelines established in 1987 by the U.S. Sentencing Commission have resulted in more offenders being incarcerated and some types of offenders serving longer sentences. According to Federal Bureau of Prisons (BOP) statistics, between January 1981 and August 1990, the federal prison population increased from 23,783 inmates to 57,688 inmates. In August 1990, BOP reported that the federal prison system was operating at 172 percent of its stated capacity. Of its 66 facilities, 18 were operating at 200 percent or more of capacity.

State prison systems face a similar problem. According to the Department of Justice, state prison systems had about 577,500 inmates at the end of 1988 and were operating at 123 percent of their capacities. Justice also reported that state prison populations continued to grow during 1989, increasing by about 13 percent to 650,703. The American Civil Liberties Union's (ACLU) National Prison Project reported in January 1990 that 41 states and the District of Columbia were under court order or consent decree for overcrowding and conditions of confinement at one or more of their prisons.

¹Key issues relating to existing and expected federal prison populations, crowding, costs, and expansion plans are discussed in *Prison Crowding: Issues Facing the Nation's Prison Systems* (GAO/ GGD-90-1BR, Nov. 2, 1989).

Federal and state prison populations are expected to grow to staggering levels. BOP projects that the federal inmate population will increase from about 58,000 in August 1990 to over 100,000 by 1995—over a 70 percent increase. Some states' prison populations are expected to grow even faster. For example, Virginia projects its prison population will more than double within the decade from 14,000 in 1990 to 35,000. California expects to have over 136,000 prisoners by 1994—an increase of 156 percent. Florida projects that prison space will need to triple by 1994 to keep convicted offenders off the streets. Reasons given for this anticipated growth include the trend toward mandatory prison sentences for more criminals, longer prison sentences, and more arrests and convictions for drug law violations.

The federal and state prison systems are planning massive expansions to provide additional prison space. BOP plans to increase prison capacity by 47,000 beds from about 28,100 to about 75,100 during the period of October 1988 to October 1995. This represents an increase of 167 percent over BOP's 1988 capacity. If BOP's inmate projection proves accurate, this expansion would still result in the federal prison system operating at 133 percent of stated capacity. In his May 1989 message on violent crime, the President stated that the states are building or plan to expand their existing prison capacity by about 214,000 beds—a 46 percent increase over the lowest capacity figures they reported to the Bureau of Justice Statistics for the end of 1988.

The cost of expanding and operating federal and state prison systems is substantial. The federal government plans to spend about \$2.9 billion by 1995 on prison construction and renovation. Of this amount, about \$2.4 billion has already been authorized. During the useful life of the new prisons, operating costs will exceed construction costs several times over. The states face a similar situation. In December 1989, the National Council on Crime and Delinquency, a nationally recognized private research group, reported that with average operating costs of \$25,000 per inmate per year and a construction cost of \$50,000 per bed, states will require at least an additional \$35 billion to build and operate their prisons over the next 5 years. These construction and operating costs could strain already tight federal and state budgets.

Using the Private Sector to Provide Needed Prison Space and Services

Prison overcrowding, court orders to reduce it, and budget considerations have generated debate on ways to cut prison costs and possible alternatives to traditional prisons. These alternatives include converting surplus military facilities into prisons, making greater use of community-based programs like halfway houses and house arrest with electronic monitoring, and adopting innovative approaches like prison boot camps. Another alternative is privatization, which this report defines as contracting for the management and operation of a prison. It also can include the construction and private ownership of that facility.

The private sector often contracts to provide prison services such as food preparation, medical care, education programs, and facilities to house and treat certain offenders (e.g., juveniles and prisoners deemed suitable for halfway houses). Staffing ceilings and shortages, the availability of expertise in a specific need area, and lower cost are reasons used to justify these contracts with the private sector. But using the private sector to operate and manage general adult population prisons has spawned debate among interested nationally recognized private organizations, government policymakers, and criminal justice professionals about the propriety and desirability of such an arrangement. Proponents say the private sector can operate prisons more cheaply than, and just as effectively as, a government agency. Opponents question the cost-savings claims and express concerns about relinquishing the government's responsibility for conditions of confinement.

Several states have used private prisons in the past. California, Louisiana, Michigan, Oklahoma, and Texas had privately operated prisons at one time or another between 1850 and 1950. The inmates were typically employed by the private sector administrators as personal servants or in businesses operated by these administrators. The revenues derived from inmate labor helped support the correctional systems. By 1950, privately managed prisons had come to an end after legislative inquiries and investigative journalists revealed inmate abuses under the system.

During the 1980's, growing prison populations, pressures from the courts to quickly add prison space, and increasing prison costs rekindled interest in using privately managed prisons. A number of companies have formed to meet the growing demand for private sector prison management. According to data collected primarily at the University of Florida and presented in appendix I, as of November 1990, private sector firms were responsible for managing and operating 38 prisons or jails in 12 states.

As of November 1990, 66 percent of the 11,161 private adult correctional facilities beds were managed by two firms—Corrections Corporation of America (CCA) and Wackenhut Corrections Corporation (WCC). At the time of this report, CCA, a firm based in Nashville, Tennessee, operated in five states and controlled about 41 percent of the private adult bed space. It employed approximately 1,650 staff, and reported revenue of about \$37 million for 1989. The second largest provider of adult correctional facilities was WCC. WCC, based in Coral Gables, Florida, operated private adult facilities in six states and controlled about 25 percent of the private adult prison capacity. It had approximately 800 employees, and reported revenues of \$33 million for 1989.

Interested Organizations' Views on Private Prisons Differ

The emergence of private prisons has prompted a number of organizations to take different positions on the issue. We did not identify any nationally recognized organizations that fully endorsed privatization. However, we found two national organizations that gave privatization a limited endorsement and three national organizations that opposed the concept.

The two national organizations giving the privatization concept a limited endorsement are the American Correctional Association (ACA), which has members from the public and private sectors, and the National Governors' Association (NGA). In 1985, ACA voted to accept the concept of private sector involvement in the corrections field but cautioned that private prison programs must meet professional standards, provide necessary public safety, provide services equal to or better than the government's, and be cost effective compared to well-managed governmental operations. In 1989, NGA adopted a strategy that supported the exploration of greater private sector involvement in corrections. However, the NGA resolution warned against a premature conclusion that privatization is the solution to the prison overcrowding problem.

On the other hand, the ACLU, the National Sheriffs' Association (NSA), and the American Federation of State, County, and Municipal Employees (AFSCME) are opposed to private prisons. The ACLU is opposed to privatization on the grounds that the rights of inmates may not be adequately protected. It also is concerned that contract terms and wording might not hold private contractors responsible for their actions in the same way that government authorities can be held accountable under current law.

In 1984, NSA passed a resolution opposing the private operation of local adult detention facilities. NSA said it believes the profit motive will interfere with professional corrections practice, primarily in the areas of employee pay and training, staffing levels, inmate care, and adherence to prescribed standards. AFSCME, which represents about 50,000 correctional officers, also opposes privatization. AFSCME is concerned whether governments can relinquish the legal responsibility for the incarceration of inmates and whether reducing operating costs of correctional facilities will reduce the number of staff, salaries, and benefits of correctional staff. In 1985, AFSCME withdrew from the ACA to protest ACA's support of privatization.

Objectives, Scope, and Methodology

The Chairman of the Subcommittee on Regulation, Business Opportunities and Energy, House Committee on Small Business, requested that we examine the issue of the use of private prisons by BOP. Specifically, as agreed with the Subcommittee, our objectives were to (1) identify the extent to which private prisons and jails were being used both at the federal and state levels, (2) determine if BOP has the authority to use privatization, and (3) determine if privatization could help reduce prison overcrowding and costs.

While federal and state governments use both privately managed prisons and jails to incarcerate offenders, this report primarily addresses privatization of prison facilities. Generally speaking, prisons house offenders who have been sentenced to more than 1 year, whereas jails are used to house offenders awaiting trial or sentencing, or whose total sentence is 1 year or less. Another distinction is that prisons generally offer various classroom and vocational education programs to inmates, while jails offer few or no programs. Information on jails is included in the report when it is associated with prison privatization.

To identify the extent to which private prisons and jails were being used, we interviewed officials and reviewed documents discussing privatization at the Washington, D.C., headquarter offices of BOP and other relevant Department of Justice agencies—the Immigration and Naturalization Service (INS), the U.S. Marshals Service (USMS), the Bureau of Justice Assistance, the National Institute of Justice (NIJ), and BOP's National Institute of Corrections. We interviewed a professor and reviewed documents from the Center for Studies in Criminology and Law of the University of Florida regarding private sector involvement with building and operating correctional facilities. To identify private prisons and jails

and obtain views on privatization, we also interviewed officials in the Washington, D.C., area representing ACA, AFSCME, ACLU, NSA, and NGA.

We also reviewed state documents, including contracts and request for proposals, and interviewed state officials who had experience with privately operated prisons. We contacted state corrections agencies from the six states (California, Florida, Kentucky, Louisiana, New Mexico, and Texas) that had, or were planning at the time of our review, at least one privately operated adult secure facility. We also interviewed a Butler County, Pennsylvania, official about that county's decision to discontinue use of private prisons.

We reviewed documents and interviewed officials from CCA, WCC, and U.S. Corrections Corporation of Louisville, Kentucky, to obtain their views and perspectives on privatization. These companies managed the largest number of adult secure beds at the time of our review. We also visited two privately operated prisons in Texas and one in Kentucky, as well as the privately operated BOP detention center in Eden, Texas, to observe and obtain first-hand information on the operation of private prisons.

To render an opinion on BOP's authority to use privatization, we analyzed BOP's enabling legislation and other pertinent authorities. We also reviewed BOP memoranda setting forth its legal positions on the privatization issue.

To determine if privatization could help reduce prison overcrowding and costs, we identified and reviewed empirical studies relating to the cost and service quality issues in using private prisons. We considered comparing the costs and services of public and private prisons to determine relative benefits and limitations. However, because of the newness of private prisons and the lack of similar federal and private facilities, we could not do an empirical study methodologically rigorous enough to significantly add to existing data on the cost and service issues. The methodological comparability problem could be solved in the near future as more private prisons are put into service.

We did our work between July 1989 and September 1990 in accordance with generally accepted government auditing standards. We discussed the contents of the report with BOP and NIJ officials and officials from correctional agencies at the state level.

The Status of Privatization in Our Nation's Prison Systems

Some correctional systems in different parts of the country are using privatization as a means of quickly and economically addressing prison crowding problems. State and local governments are leading in this regard. As of November 1990, 24 governmental agencies contracted or planned to contract with the private sector for prison or jail space for their general adult inmate populations. Those we contacted using privatization said they were able to add prison space quickly, and, in general, said they received the same level of service for equal or lower cost. Some of those not using privatization were waiting for better evidence on cost savings.

At the federal level, use of privatization has been limited to specialized groups and unsentenced offenders. Because of unanswered operational and public policy questions, BOP has limited its use of privatization. BOP has not contracted directly for private prisons but has three contracts with local governments that are using private prison space to house convicted aliens. BOP believes more testing and experience are needed before the benefits of privatization can be demonstrated. Two other federal agencies, INS and USMS, use some privately managed and operated facilities for detaining short-term federal prisoners. These agencies have been generally pleased with the results.

Some State and Local Governments Are Using Private Facilities

A small but growing number of state and local governments are using privately managed and operated prisons and jails to supplement the public systems. Four states have already opened and one state is soliciting proposals for privately operated state prisons to incarcerate relatively small portions of their general adult inmate populations. Kentucky opened the first of these private adult prisons in 1986. Since that time, three more states have opened private adult facilities. In 1989, Texas opened four private adult prisons, and New Mexico opened a private adult state facility for women. In March 1990, Louisiana opened a private adult prison. Kentucky opened an adult female private prison in July 1990, and in September 1990 it opened an adult male private prison. Louisiana plans to open another private prison and Florida is in the process of contracting for a private adult prison. The privately operated facilities of the Texas Board of Pardons and Parole and the California Department of Corrections were not included because they house parole violators.

None of these private prisons were previously operated by the government. Two of the adult private prisons in Kentucky were located in buildings that were converted to prison use. The Louisiana prison was

built by the state specifically for private sector management. The other private prisons were built by the contractors who now manage them.

Most of the private adult prisons under contract to the states house minimum and medium security inmates who are within 2 years of their parole date. The private adult prison planned in Florida will be an exception, as it will house medium and maximum security adult male inmates. The New Mexico facility houses women at every security level. Table 2.1 shows the states that use or plan to use private prisons, the number of facilities being operated or planned for contract, the inmate security levels for the state's private prisons, the inmate capacities or planned capacities of the private prisons, the inmate capacities of all state prisons, and the percentage that is privatized.

Table 2.1: Data on State Adult Private Prisons

State	Number of facilities	Security level	Private capacity	Total capacity	Percent private
Florida	1 ^a	medium/ maximum	1,000	39,999	2.5
Kentucky	3	minimum	1,000	8,289	12.1
Louisiana	2 ^a	medium	1,220	17,257	7.1
New Mexico	1	all	200	3,034	6.6
Texas	4	minimum/ medium	2,000	40,789	4.9
Total	11		5,420	109,368	

^aIncludes requests for proposals for privately operated facilities.

Sources: Center for Studies in Criminology and Law, University of Florida; and state corrections agencies.

A growing number of local governments are turning to the private sector to increase jail capacity. As of November 1990, 16 local governments had opened or planned for private jails. The first of these private jails was opened in October 1984 in Hamilton County, Tennessee (Chattanooga). At the time of our review, the city of Detroit had the largest local private facility with a rated capacity of 400 beds, while Hamilton County, Tennessee, had the smallest local private facility with a rated capacity of 117 beds. To provide perspective on the use of private prisons and jails, appendix I presents information on the contractors, locations, types and capacities of facilities, and costs. We did not verify the accuracy or completeness of the data or whether cost comparisons of private and public facilities met the same operational standards.

**States Using Privatization
 Cite Quick and Economical
 Expansion**

At the time of our review, state correctional officials were generally pleased with the operation of their private prisons. State government officials cited two primary benefits of turning to the private sector to manage and operate prisons and jails. First and foremost was the ability to provide additional capacity quickly in response to court orders to reduce overcrowding. Of the 41 states and the District of Columbia reported by the ACLU as being under court order or consent decree for overcrowding and conditions of confinement, 5 now contract or are about to contract for private prisons. Corrections officials from Texas, Kentucky, and New Mexico told us they went to the private sector because private prisons can become operational in less time than public prisons. For example, a New Mexico corrections official told us that it took the contractor about 9 months to build its private women's prison, but it would have taken the state government about 3 years to build it because of the various studies required and the lengthy appropriations process.

Another benefit cited by state officials was that contractors seem to be able to provide prison space at a lower cost. Some evidence appears to support this point. According to the University of Florida's Center for Studies in Criminology and Law, and as shown in table 2.2, eight state private prisons for which all necessary cost data were available appear to be operating at a lower per prisoner per diem cost than the estimated costs for state prisons. We did not verify the accuracy or completeness of this cost data or whether the private and state prisons met the same operational standards.

**Table 2.2: Comparison of State
 Government and Private Contractor Per
 Diem Costs**

Private facility	Estimated government per prisoner per diem	Contractor per prisoner per diem
St. Mary's, KY	\$28.00	\$26.89
Beattyville, KY	32.00	26.89
Owensboro, KY	n/a	27.50
Grants, NM	80.00	69.75
Winnfield, LA	29.50	26.00
Cleveland, TX	42.53	35.25
Venus, TX	42.53	35.25
Kyle, TX	42.53	34.79
Bridgeport, TX	42.53	34.79

^aThis figure is an estimate.

Source: Center for Studies in Criminology and Law, University of Florida.

To ensure that the government benefits financially from privately managed and operated prisons, three of the five states we contacted required cost savings in the contract or request for proposal. Texas, Louisiana, and Florida included a clause in their contracts or request for proposals that requires the contractor to provide services for 10 percent less than it would have cost the government. Some cost increases could occur but the 10-percent savings must be maintained. A Louisiana corrections official told us the state expects to save \$5.9 million over a 5-year period because of the per diem savings required by the contract. According to a New Mexico correctional official, the state's private prison operates at a 10-percent or more cost savings, although the contract or request for proposal did not require such savings. Kentucky corrections officials said their private minimum security pre-release facility operates at about the same or lower cost as the state operated facilities. Because of the newness of the facilities, the cost savings, although required in some contracts, have not been evaluated.

Some Want Better Evidence Before Using Private Prisons

Our review disclosed that several state and local governments were reluctant to or decided not to use private prisons or jails. One reason was that they believed the benefits of privatization had not yet been proven. For example, in a 1985 AFSCME publication, the former Commissioner of New York's Department of Correctional Services questions whether private corporations can operate correctional facilities cheaper or more humanely than the state government. California Department of Corrections officials said they had examined the privatization of individual prison functions and had not found it cost effective. However, California does use the private sector to operate six correctional facilities for parole violators. An NIJ official said that South Carolina corrections officials researched using private prisons and found that it would not be cost effective.

Another reason some states gave for not using private prisons was skepticism about the motives of some private contractors. According to a 1988 study by the Economic Policy Institute of Washington, D.C., officials in Pennsylvania were concerned about one private prison that imported 55 federal inmates to its Butler County, Pennsylvania, facility so that it could earn a higher per diem rate offered by the federal government than was being paid by the county government. Pennsylvania protested and obtained a court order sending back the out-of-state prisoners. The study said that the incident caused fears in Pennsylvania about the state becoming a repository for outside criminals. Early in 1986, the state legislature voted in favor of restrictions on the practice

of importing prisoners for two existing private jails and imposed a moratorium on new privately operated correctional facilities.

BOP's Experience With Private Prisons Is Limited

Public policy and operational questions have combined to limit BOP's experience with privatization. Currently, BOP has contracts with three local governments that are using private prisons to house minimum and medium security deportable adult male alien offenders who generally have 2 years or less remaining in their sentences. BOP officials said it uses contract space for this type of offender to keep its own space free for the general adult population. The officials added that this type of offender does not require the training and education programs that are offered to other types of offenders. Specifically, BOP has contracted with the city governments in Eden and Big Spring, Texas, and Reeves County, Texas, who have contracts with private firms to house these offenders. Table 2.3 profiles these three privately managed and operated facilities.

Table 2.3: A Profile of BOP's Privately Operated Facilities

Facility	Contractor	Contracting agency	Number of beds	Per diem per inmate	Type of inmate	Security level
Eden Detention Center, Eden, TX	Eden Detention Center, Inc.	Eden, Texas	326	\$32.14	Male aliens	Minimum/medium
Reeves County Law Enforcement Center, Pecos, TX	Corrections Corporation of America (CCA)	Reeves County, Texas	336	31.00	Male aliens	Minimum
Big Spring, TX	Mid-Tex Corrections Inc.	Big Spring, Texas	350	33.75	Male aliens	Minimum

Source: BOP officials and reports; and Center for Studies in Criminology and Law, University of Florida.

BOP has plans to contract directly for the housing of illegal aliens. Although BOP had no written plan or proposal at the time of our review, BOP officials told us that they are planning to contract with the private sector to construct, staff, and manage a minimum security facility to house short-term alien prisoners. The 1,000-bed facility would be a joint venture between BOP and INS, with each agency having 500 beds. BOP will be responsible for inmates while they serve their sentences. INS will be responsible for them before sentencing and during deportation proceedings after they serve their sentences. A large area in the southwestern region of the United States has been identified for the facility's location. The request for proposal is expected to be issued in March 1991.

BOP does not endorse the use of private prisons for its general adult inmate population. Although BOP believes that privatization may provide another option for dealing with the rapidly increasing inmate population, it believes that more testing and experience are needed before operational questions about the benefits of privatization can be answered. BOP has not done any evaluations to compare BOP and privately operated facilities.

In addition to the unanswered operational questions about privatization, public policy questions also exist. In March 1988, the President's Commission on Privatization recommended that BOP contract for private sector operation of a medium or maximum security prison as a basis for comparison with a similar facility operated by BOP. The Commission intended the "pilot project" to test the benefits and limitations of private prisons. In response to the recommendation, BOP submitted in its fiscal year 1989 budget request a proposal to use private contractors to build and operate a minimum security facility.

The Senate Committee on Appropriations denied BOP's request. In the 1989 Senate Appropriations report (Report 100-388), the Committee noted that using private sector detention firms for specialized inmate populations may be appropriate, but said the budget proposals affecting a federal minimum security facility signaled the first step in the privatization of the federal prison system and opposed such a move on public policy grounds.

Public policy questions concerning whether and to what extent the government should contract for the management and operation of prisons are not easy to resolve. Opponents of private prisons assert that only government has the right to administer justice and that the responsibility for operating prisons and jails should not be delegated. Proponents contend that private prisons can be used responsibly as long as the government agency maintains effective control and oversight, preserves prisoner rights, and ensures contractor accountability. While it is clear that the government is ultimately responsible for imprisoning convicted offenders, some federal, state, and local correctional agencies have the authority to, and actually do, use private contractors to help carry out this function. In these cases, private prisons were used to supplement existing capacity in the face of severe overcrowding and not to replace the public system.

BOP is experimenting with using the private sector to carry out some of its functions. BOP is involved in one pilot project authorized by Congress

in Oklahoma City to use private contractors to finance and construct a prison that BOP personnel would manage and operate. BOP officials said that private contractors do not have to follow the same time-consuming procurement procedures and environmental analyses that governments do. In addition, the President's Commission on Privatization recommended that BOP test the use of private contractors to operate prison industries. This test is planned for the near future and BOP will not endorse further implementation until the results are evaluated.

INS and USMS Are Using Private Facilities

INS and USMS use private sector facilities to house individuals within their jurisdiction. INS uses privately managed and operated jails for detaining federal prisoners and is the largest single federal user of contracted facilities. Seven of the 14 INS detention facilities are operated by private contractors. These seven facilities have 873 beds and represent 26 percent of INS' total rated capacity¹. Because INS is responsible for excluding and deporting illegal aliens as quickly as possible, the term of confinement is relatively short. According to INS, the average stay of Mexican detainees is 7 days, while non-Mexicans average about 26 days.

USMS also uses privately managed and operated jails for detaining federal prisoners. USMS uses the private sector to house some unsentenced offenders, because it is finding it increasingly difficult to locate appropriate temporary space for federal offenders in state and local jails. USMS has contracted with nine local jurisdictions who in turn contracted with private firms to detain federal prisoners.

In addition, six USMS direct private sector detention contracts have been authorized, and a pilot testing program has been established. However, USMS has not yet agreed to financial terms with a contractor(s) or located appropriate sites. In the meantime, USMS is considering expanding its agreements with state and local governments for prison space. It is possible that these governments might turn to the private sector for the needed prison space.

INS and USMS officials told us they use private facilities primarily to quickly ease overcrowding. INS endorses privatization as a means to house federal offenders, while USMS prefers the traditional methods of housing federal detainees and only considers private facilities as a last resort. Both agencies have reported generally positive experiences.

¹The number of beds (873) does not agree with the sum of the capacity for these seven facilities as listed in appendix 1 because sometimes other agencies are included.

Conclusions

The use of privately managed and operated adult correctional facilities, while still not widespread, is growing. Four states have already opened and one state is soliciting proposals for privately operated prisons. In addition, 16 local governments have opened or plan to open private jails. At the federal level, use of privately operated adult secure facilities has been limited to specialized groups of offenders such as certain aliens and, on a temporary basis, some unsentenced offenders. In states where privatization has been used, corrections officials believe it has demonstrated its potential as a way to quickly and economically expand prison capacity. And those correctional officials are generally pleased with privatization's results and believe that it has provided a similar level of service for lower cost.

Unanswered operational and public policy questions have limited the use of privatization for BOP. While BOP has limited experience with private prisons, it believes that privatization may provide an option to alleviate its overcrowding problem. It and several states also believe that the benefits of privatization have not yet been proven. Public policy questions concerning whether and to what extent the government should contract for the management and operation of prisons remain. We believe that if the use of private prisons at the federal level were expanded, controls on contracting should be established to preserve prisoner rights, ensure contractor accountability, and provide for effective government oversight.

Key Legal and Operational Issues Need to Be Resolved Before Privatizing Federal Prisons

Reports about the benefits of privatization at the state and local levels have increased federal policymakers' interest in the concept of federal prisons. Before BOP can explore privatization's benefits, however, a key legal question needs to be addressed—does BOP have sufficient authority to use private prisons. It is our legal opinion that BOP currently does not have sufficient statutory authority to contract with the private sector for the operation of prisons.

Key operational issues also need to be resolved. The main operational issue is whether private prisons cost less for the same level of service. Some of those using privatization believe significant cost savings are possible, while others that do not use it doubt such assertions. Existing empirical research on privatization is inconclusive and has methodological weaknesses. The Department of Justice is in a position to help resolve questions about the relative benefits and limitations of privatization for the federal prison system.

BOP Lacks Sufficient Statutory Authority to Use Private Prisons

BOP believes it has the authority to contract with the private sector to house the adult general inmate population. BOP takes this position on the basis of (1) a provision in its enabling legislation allowing it to designate places of prisoner confinement and (2) general principles of federal procurement law that allow agencies to procure goods and services from the private sector. However, for the reasons explained in appendix II and summarized below, we believe that BOP does not have the requisite authority to use privatized prisons for the general adult inmate population.

BOP's enabling legislation prescribes only two courses of action that may be used to obtain incarceration facilities for BOP: (1) the Attorney General may contract with state and local governments under specific terms and conditions or (2) if such contracts cannot be made, new federal facilities may be constructed. (18 U.S.C. sections 4002 and 4003.) Since BOP's enabling legislation prescribes specific measures the federal government may use in order to incarcerate federal prisoners, the clear inference is that Congress intended to preclude any other measure not expressly authorized. Therefore, it is our opinion that BOP's enabling legislation implicitly precludes contracts for the detention of federal prisoners in privately run adult facilities.

BOP officials have suggested, however, that BOP has independent authority to contract with the private sector for adult incarceration facilities under another provision of its enabling legislation, 18 U.S.C.

section 3621(b). That provision authorizes BOP to designate as a place of confinement any facility “that meets minimum standards of health and habitability established by the Bureau, whether maintained by the Federal government or otherwise. . . .” If the phrase in this statute allowing BOP to designate as places of confinement facilities maintained by the federal government “or otherwise” was the only provision in Title 18 referring to available places of incarceration, BOP would appear to have open-ended authority to place federal prisoners in any type of nonfederal facility that met BOP’s health and habitability standards. However, as indicated above, other provisions in Title 18 specify the arrangements the government may make to obtain incarceration facilities and allow the use of only one category of nonfederal facilities—those which state and local governments furnish to the federal government by way of contract.

Furthermore, the legislative history of the provision allowing BOP to designate places of confinement, as originally enacted in 1930, indicates that the provision had a limited objective. Specifically, the legislative history indicates that the provision was intended only to clarify that the Attorney General would have the power to choose the places prisoners would be confined, which at that time were limited to federal or state and local institutions.

While there has been a series of amendments to the provision allowing BOP to designate places of prisoner confinement, none of them has expanded the scope of the section to permit BOP to contract with the private sector for adult secure facilities. BOP has suggested, however, that Congress recognized such contracting authority in connection with a 1965 amendment to the provision that allowed BOP to place prisoners in halfway houses. According to BOP, Congress’ recommendation in a committee report that BOP model the new halfway house program on the juvenile halfway house program it was then administering—which included a halfway house contract with a nongovernmental organization—constituted recognition that BOP already had and was using general authority to make private contracts for prisoner confinement. However, BOP’s legal authority to use private facilities for the housing of juveniles was not based on the statutory provisions that generally govern the confinement of federal prisoners. Instead, statutory provisions in effect since 1938 have explicitly authorized the government to use private as well as public facilities for the care and custody of juvenile offenders.

Finally, BOP officials have also suggested that BOP may contract for the operation of adult incarceration facilities under the same authority by which agencies generally procure goods and services from the private sector. Principles of procurement law do allow BOP to contract out a number of its activities. However, agencies may not use contracts to perform an activity if contracting is expressly prohibited or if it would be at variance with statutory procedures or requirements. Since BOP's enabling legislation describes with specificity the courses of action the government may use to obtain incarceration facilities, BOP's use of contracts to obtain facilities in a manner that is not specifically authorized would be inconsistent with that legislation.

As mentioned in chapter 2, BOP has contracts with three local governments that use private sector facilities to house convicted aliens. BOP has authority to contract with local governments for prison facilities under 18 U.S.C. section 4002, which provides that the Attorney General may contract with state and local governments for "the imprisonment, subsistence, care, and proper employment" of federal prisoners under terms and conditions specified in the statute. Any determination whether the three contracts BOP has made with local governments are the type authorized in the statute would require not only a detailed review of each contract and the circumstances under which it was made, but also an evaluation of the procedures and practices each local government is using to carry out the contract. An in-depth evaluation of BOP's contracts with the three local governments was outside the scope of our review.

Because BOP did not have any written plans or proposals that we could review, we could not render an opinion on BOP's authority to contract with the private sector for the management of a 1,000-bed facility (see p. 18). A legal analysis of INS' and USMS' statutory authority for their arrangements for private sector facilities was outside the scope of this review and would require further study of the details of the arrangements.

More Research Is Needed on the Benefits of Private Prisons

With our nation's prison systems facing unprecedented overcrowding and with prison populations expected to increase in the near future, is privatization a way to solve these problems? Can private prisons save money and provide services equal to those in government prisons? Currently, there is not enough empirical evidence to conclusively demonstrate the advantages, disadvantages, and conditions for greatest potential of privatization.

Additional cost and service data are needed for federal policymakers to make informed decisions on the benefits and limitations of private prisons. If given the authority, BOP could test privatization at the federal level to determine what role, if any, the concept should have in its prison expansion strategy. Also, the National Institute of Justice (NIJ) is in a good position to assist BOP in studying these issues.

Research on Cost and Service Is Limited and Inconclusive

Privatized adult general population prisons and jails are few and relatively new. Officials we spoke with from the states using private prisons were generally pleased and did not cite any significant problems. State and government officials using privatization, in general, believed the private prisons provide the same level of service for lower or equal cost. Three of five state governments have included a 10 percent cost savings clause in their contracts or request for proposal to ensure that they benefit financially from privatization (see p. 17). However, as of August 1990, contractor performance and costs had not yet been evaluated. Texas and Louisiana corrections departments plan full evaluations over the next several years that will examine cost and other operational issues.

BOP said there are several important issues, such as cost and quality, that must be resolved before considering the use of contract private prisons for the federal adult inmate population. Given the sensitivity surrounding the deprivation of personal liberty through incarceration, BOP believes that the benefits and limitations of privatization should be demonstrated before it moves ahead with such change.

We identified and reviewed two detailed empirical studies that evaluated the overall cost and service quality of privatized correctional facilities. These NIJ-funded studies compared public and private prison costs for the adult general inmate population. One of these studies also examined service quality issues in some detail.

The first study is by Charles Logan and Bill McGriff, "Comparing Costs of Public and Private Prisons: A Case Study," and was published in NIJ Reports, September/October 1989. This study identified both direct and indirect costs of public and private prison management for an adult minimum to medium security county penal farm that was turned over to a contractor. Direct costs included such items as salary and related expenses, food, medical supplies, utilities, uniforms, and equipment. Indirect costs included capital, finance, and opportunity costs; liability and property insurance costs; and external administrative and oversight

costs. The study then compared the actual costs of these items under private management with estimated costs of the same prison as if it had remained under public management. The authors estimate that private contracting of prison management was associated with annual savings of at least 4 to 8 percent compared with estimated costs of public management.

We believe several factors limit the usefulness of this study. One is that the study focuses on a single case, so that findings cannot be generalized to other penal farms or other types of facilities. A single case study is not sufficient to draw general conclusions about other prisons because the extent to which the given prison is representative of others cannot be determined. Another factor limiting its usefulness was the method used to compare actual expenditure data under private operation with estimated cost data supposing public management. Although this method ensures comparability between the public and private prisons—since the prison is compared in effect with itself—like all projection methods, it makes certain untestable assumptions. In this study the method assumes no unanticipated changes in staffing levels, no changes in salary and nonsalary routine expenses, and no extraordinary expenses. While such assumptions may be reasonable, they are untested. An error in one or more could result in different cost estimates, changing the size or even the direction of estimated differences in public versus private management costs.

The other NIJ study, done by the Urban Institute and released in August 1989, is titled “Comparison of Privately and Publicly Operated Corrections Facilities in Kentucky and Massachusetts.” This study examined three pairs of public and private facilities located in two states, to assess cost and service quality/effectiveness differences in public versus private facilities. Using data from January 1987 through June 1988 and a variety of data collection methods, the study concluded that the private facilities were 1 percent and 10 percent more costly to operate in the two states examined. The report also provides data that indicate that privately run facilities provide slightly higher quality services compared with the public institutions.

We believe this study represents a major effort toward the use of sound research methods to provide reliable empirical data on the issue. However, our analysis of the study’s methodology found certain qualifications that limit the applicability of this research. With only three pairs for comparison, the findings cannot be generalized beyond the specific facilities studied. There is also a question of the comparability of the

paired facilities. Ideally, the members of each pair should be equivalent in all respects except public or private management, so that differences would be clearly attributable to type of management alone. However, within-pair comparability between the Kentucky prisons is questionable due to differences in prison size and type of inmates (i.e., dangerousness). In the Massachusetts facilities, differences existed in unionization of employees and types of inmates (i.e., time left to serve and level of violence). These factors might affect operating costs so that cost differences between public and private institutions may be caused by factors other than differences in type of operation. For the Kentucky pair, this problem is made worse by the inclusion of some unspecified amount of capital costs in the private prison cost calculations but no capital costs in the public prison data. This might explain, at least partially, why privatization seemed to increase costs by 10 percent in Kentucky.

Taken together, these two NIJ studies are inconclusive on cost and service issues. Depending upon factors being considered, private prisons may be anywhere from 10 percent more expensive to 8 percent less expensive than publicly managed prisons. One of the NIJ studies has systematically examined service quality differences, finding a slight advantage for privatization. In our opinion, more studies of sufficient methodological rigor are needed before reaching definitive conclusions. This is not a criticism of the methods used in the two studies, but a reflection of limitations which are inevitable given the small numbers of private prisons currently in use and available for study.

The Department of Justice Is in a Position to Resolve Key Issues

Privatization is much debated, but little evidence exists on its benefits and limitations. BOP could, once given the authority, test the concept in the federal system. Such testing should seek to determine whether privatization could provide, at a minimum, the same level of service at lower costs than like federal facilities. NIJ could assist BOP in studying the benefits and limitations of privatization and help assure that the test is made with appropriate methodological rigor. Taken together, these efforts would help develop reliable information and evaluate the relative merits of privatization.

BOP could do more to resolve key issues in the privatization debate if it could undertake demonstration projects involving the operation of prisons by private contractors. As noted above, however, we believe that BOP currently does not have sufficient authority to use private contractors for the total operation of a prison, and therefore any such use

of contractors on a demonstration basis would require authorizing legislation. If given the authority to undertake privatization on a demonstration basis, BOP could test privatization by contracting for the private operation of general adult population prisons or prisons designed to house special inmate populations and compare the results with those of government-run prisons. If the results are positive, BOP could arrange for the management and operation of those specific types of prisons. If not, BOP could back away from the arrangement. Either way, the results would expand the knowledge of privatization's benefits and limitations and help determine what role, if any, privatization could have in BOP's prison expansion strategy.

As previously mentioned, BOP requested funds to test privatization in the general inmate population in response to a recommendation by the President's Commission on Privatization. That request was denied in the appropriations process. We believe that demonstration projects should be permitted to test the merits of this alternative. Given a rapidly increasing prison population and the growth of types of inmates such as aliens, women, the mentally ill, and the elderly, it is important that BOP understand whether and how privatization could help address prison overcrowding problems effectively and economically.

In addition, NIJ could assist BOP in demonstrating the benefits and limitations of privatization. NIJ, organized within the Office of Justice Programs, is the primary federal sponsor of research on crime and its control and is a central resource for information on innovative approaches in criminal justice. As mandated by the Justice Assistance Act of 1984, NIJ sponsors and conducts research, evaluates policies and practices, demonstrates promising new approaches, provides training and technical assistance, assesses new technology for criminal justice, and disseminates its findings to state and local practitioners and policy-makers. NIJ has sponsored research and issued reports on various aspects of privately operated prisons.

If BOP were given the authority, we believe NIJ could help BOP resolve the cost savings and service issues. NIJ could help design and build into BOP's tests a research component that would allow for empirical evaluations to demonstrate privatization's advantages, disadvantages, and conditions for greatest potential. Sound evidence could add to the existing body of knowledge on the benefits and limitations of privatization.

In addressing the possible cost savings associated with privatization, this research effort should involve careful attention to the various factors that might lead to cost differences between public and private prisons. As we noted previously, existing data do not support a definite conclusion on the comparative costs of public and private systems.

The most straightforward reason for expecting that private prisons might prove cheaper is that private for-profit organizations have incentives to reduce costs that the public sector does not have. Incentives to reduce costs are not, however, an unqualified virtue. Some conceivable cost reduction moves—skimping on food, using fewer or less well-trained guards—would involve precisely the sorts of abuses that concern opponents of private prisons.

Through appropriate contract provisions and administrative oversight, BOP may be able to ensure that reduction efforts do not result in such abuses. However, a valid cost comparison between public and private systems must recognize the costs of developing and enforcing the appropriate safeguards to protect the public interest in the way prisons are operated.

Other issues requiring careful treatment in a cost comparison are taxes and legal liability. To the extent that private prisons pay taxes or accept liability that would otherwise be borne by the government, the budgetary costs incurred to pay for private prison operations are not comparable to the direct budgetary costs of a public system. The full budgetary impact of privatization, including tax receipt changes and possible damage awards, should be estimated.

Conclusions

Privatization could help BOP expand its prison capacity to address prison overcrowding. However, key legal and operational issues need to be resolved before privatization should be considered in the federal prison system. Our legal opinion is that BOP lacks sufficient authority to contract with private companies to manage adult secure facilities. On the operational side, few empirical studies have been done to demonstrate the benefits and limitations of using private prisons, and these studies, which did not address federal prisons, have methodological weaknesses that limit their usefulness.

Additional studies are needed to show whether private prisons can provide equal or better service at lower cost. If given the authority to do so BOP could test privatization in the federal prison system to determine

whether the concept is viable and what role, if any, privatization would fulfill in its overall prison expansion plans. NIJ can provide technical assistance to help BOP resolve questions surrounding possible privatization at the federal level.

Recommendations to Congress

We recommend that Congress grant BOP the explicit statutory authority to design and implement demonstration programs and projects to fully test and evaluate the benefits and limitations of privatization. Such legislation should specifically authorize BOP to contract for privately operated prisons for demonstration purposes and, among other concerns, should address the need for adequate controls in these contracts to preserve the rights of federal prisoners, ensure contractor accountability, and provide for effective government oversight.

Recommendations to the Attorney General

Should Congress grant BOP authority to test privately operated prisons, we recommend that the Attorney General direct NIJ to assist BOP in determining the benefits and limitations of privatization. In this regard, NIJ should help design and build into BOP's tests a research component that would allow for empirical evaluations to demonstrate privatization's advantages, disadvantages, and conditions for greatest potential.

Agency Comments

We discussed this report with BOP and NIJ officials and officials from state correctional agencies. These officials generally agreed with the facts in the report. However, BOP disagreed with our legal analysis and pointed to the legislative history of an amendment to a provision in its enabling legislation that it believed is evidence of congressional recognition that BOP has authority to make private contracts for prisons. We reviewed the legislative history referred to by BOP and found nothing to provide a basis for changing our conclusion.

Data on Private Corrections Adult Secure Facilities, November 1990

Table I.1: Summary of Contractors and Their Capacities

Contractor	Total rated capacity
CCA	4,821 ^a
Concepts, Inc.	600 ^a
Detention Systems, Inc.	726 ^a
Dismas Charities Inc.	100
Eclectic Communications, Inc.	570 ^a
Eden Detention Center, Inc.	326
Esmor, Inc.	68
Management and Training, Inc.	200
Mid-Tex Correction, Inc.	350
Pricor	3,077 ^a
Texas Detention Management	440 ^a
Transitional Housing	200 ^a
U.S. Corrections Corporation	1,220
Wackenhut Corrections Corporation	2,789
Gary White and Associates	200
Total	15,687

^aIncludes prison beds scheduled to open at a later date.

This appendix provides perspective on privatization of correctional facilities by presenting information on the contractors, locations, types and capacities of facilities, and costs. Most of the information in this appendix was compiled by Charles W. Thomas, Center for Studies in Criminology and Law, University of Florida, Gainesville, Florida. In several instances, GAO updated the information on the basis of conversations with federal and state officials. We did not verify the accuracy or completeness of this information or whether cost comparisons of private and public facilities met the same operational standards.

Appendix I
Data on Private Corrections Adult Secure
Facilities, November 1990

Table I.2: Private Adult Secure Facilities
Currently Operating and Planned

	CCA	CCA	CCA
Contractor	CCA	CCA	CCA
Location	Panama City, Florida	Panama City, Florida	Estancia, New Mexico
Date operational	Oct. 1985	Apr. 1986	Est. Fall 1990
Contracting agency	Bay County, U.S. Marshals Service	Bay County	U.S. Marshals Service
New facility vs. takeover	Takeover	New	New
Rated capacity	204	257	256
Inmate sex	Male	Male	Male
Security classification	Minimum, medium, maximum	Minimum, medium	Minimum
Original per diem cost	\$29.52	\$29.52	Not available
Current per diem cost	^a	^a	Not applicable
Est. government per diem	\$42.00	Not available	Not available
Initial cost savings	29.71%	Not possible to compute	Not possible to compute

^aContract includes two Panama City, Florida, facilities. County rates vary with occupancy. 0-350 (guaranteed): \$34.42; 351-370: \$23.72; 371-452: \$8.57; over 452: \$23.72. Regardless of occupancy level, U.S. Marshals Service per diem is \$41.47.

	CAA	CAA	CAA
Contractor	CAA	CAA	CAA
Location	Cleveland, Texas	Brooksville, Florida	Houston, Texas
Date operational	Sept. 1989	Oct. 1988	Apr. 1984
Contracting agency	Texas, Department of Corrections	Hernando County, U.S. Marshals Service	INS, Texas Board of Pardons & Paroles
New facility vs. takeover	New	Takeover	New
Rated capacity	500	252	350
Inmate sex	Male	Male & female	Male
Security classification	Minimum	Minimum, medium, maximum	Minimum
Original per diem cost	\$34.79	\$28.47	\$23.84
Current per diem cost	\$35.25	^b	^c
Est. government per diem	\$42.53	Not available	Not available
Initial cost savings	18.20%	Not possible to compute	Not possible to compute

^bCounty per diem is \$29.72 (160 beds guaranteed). U.S. Marshals Service per diem is \$40.50.

^cINS per diem is \$31.10. Texas Board of Pardons & Paroles per diem is \$33.00.

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Data on Private Corrections Adult Secure
Facilities, November 1990**

Contractor	CAA	CAA	CAA
Location	Laredo, Texas	Grants, New Mexico	Mason, Tennessee
Date operational	Mar. 1985	June 1989	Oct. 1990
Contracting agency	INS, BOP (juveniles)	New Mexico, Department of Corrections	U.S. Marshals Service
New facility vs. takeover	New	New	New
Rated capacity	208	200	256
Inmate sex	Male & female	Female	Male
Security classification	Minimum	Minimum, medium, maximum	Minimum, medium
Original per diem cost	\$29.00	\$69.75 ^d	Not available
Current per diem cost	^e	\$69.75	\$45.00
Est. government per diem	Not available	\$80.00	Not available
Initial cost savings	Not possible to compute	12.81%	Not possible to compute

^d150 beds guaranteed.

^eINS per diem is \$23.46. Per diem for federal BOP juveniles is \$47.00.

**Appendix I
Data on Private Corrections Adult Secure
Facilities, November 1990**

Contractor	CAA	CAA	CAA
Location	Reeves County, Pecos, Texas	Santa Fe, New Mexico	Chattanooga, Tennessee
Date operational	Sept. 1988	Aug. 1986	Oct. 1984
Contracting agency	BOP, U.S. Marshals Service	Santa Fe County, BOP (juveniles), U.S. Marshals Service	Hamilton County U.S. Marshals Service
New facility vs. takeover	Takeover	Takeover	Takeover
Rated capacity	535 (336 BOP)	256	320
Inmate sex	Male	Male & female; adult & juvenile	Male
Security classification	Minimum	Minimum, medium, maximum	Minimum, medium, maximum
Original per diem cost	Not available	\$44.90	\$21.00
Current per diem cost	^f	^g	\$22.66 ^h
Est. government per diem	Not available	\$94.00	\$28.00
Initial cost savings	Not possible to compute	52.23%	25.00%

^fRate is \$36,200 per month plus 30 percent of \$30 per diem over 480 inmates.

^gCounty per diem is \$48.75. Per diem for BOP juveniles and U.S. Marshals Service is \$62.00.

^hU.S. Marshals Service per diem is \$18.00.

**Appendix I
Data on Private Corrections Adult Secure
Facilities, November 1990**

Contractor	CAA	CAA	CAA
Location	Chattanooga, Tennessee	Venus, Texas	Winnfield, Louisiana
Date operational	Oct. 1984	Aug. 1989	Mar. 1990
Contracting agency	Hamilton County, U.S. Marshals Service	Texas, Department of Corrections	State of Louisiana
New facility vs. takeover	Takeover	New	New
Rated capacity	117	500	610
Inmate sex	Female	Male	Male
Security classification	Minimum, medium, maximum	Minimum	Medium
Original per diem cost	\$21.00	\$34.79	Not available
Current per diem cost	\$22.66 ⁱ	\$35.25	Est. \$26.00
Est. government per diem	\$28.00	\$42.53	\$29.50
Initial cost savings	25.00%	18.20%	Not possible to compute

ⁱU.S. Marshals Service per diem is \$18.00.

Contractor	Concepts, Inc.	Concepts, Inc.	Detention Systems, Inc.
Location	Mineral Wells, Texas	Bridgeport, Texas	Zavala County, Texas
Date operational	Not available	Not available	Feb. 1989
Contracting agency	Texas Board of Pardons & Paroles	Texas Board of Pardons & Paroles	Zavala County, Texas
New facility vs. takeover	Not available	Not available	New
Rated capacity	500	100	226
Inmate sex	Male	Female	Male
Security classification	Minimum	Minimum	Minimum, medium
Original per diem cost	Not available	\$34.79	\$46.50
Current per diem cost	Not available	\$34.79	\$46.50
Est. government per diem	Not available	\$42.53	Not available
Initial cost savings	Not possible to compute	18.20%	Not possible to compute

**Appendix I
Data on Private Corrections Adult Secure
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Contractor	Detention Systems, Inc.	Dismas Charities, Inc. ¹	Eclectic Communications, Inc
Location	Limestone County, Texas	Owensboro, Kentucky	Baker, California
Date operational	Spring 1991	July 1990	Aug. 1987
Contracting agency	Limestone County, Texas	Kentucky, Department of Corrections	California, Department of Corrections
New facility vs. takeover	New	New	New
Rated capacity	500	100	200
Inmate sex	Male	Female	Male
Security classification	Minimum, medium	Minimum	Minimum
Original per diem cost	Est. \$46.50	\$27.50	\$36.86
Current per diem cost	Not available	\$27.50	\$38.70
Est. government per diem	Not available	Not available	Not available
Initial cost savings	Not possible to compute	Not possible to compute	Not possible to compute

¹Dismas Charities Inc. is a nonprofit corporation.

Appendix I
Data on Private Corrections Adult Secure
Facilities, November 1990

Contractor	Eclectic Communications, Inc.	Eclectic Communications, Inc.	Eclectic Communications, Inc. ^k
Location	La Honda, California	Live Oak, California	El Centro, California
Date operational	Jan. 1986	Aug. 1988	Not available
Contracting agency	California, Department of Corrections	California, Department of Corrections	INS
New facility vs. takeover	New	New	New
Rated capacity	120	220	30
Inmate sex	Male	Female	Not available
Security classification	Minimum	Minimum	Not available
Original per diem cost	\$44.86	\$42.93	\$90.47
Current per diem cost		^m	Not available
Est. government per diem	Not available	Not available	Not available
Initial cost savings	Not possible to compute	Not possible to compute	Not possible to compute

^kInformation provided by GAO based on data obtained from INS.

^lState pays \$49.02 per diem for 1st 88 inmates; \$32.88 per diem above 88.

^mState pays \$42.93 per diem for 1st 100 inmates and \$32.88 thereafter.

**Appendix I
Data on Private Corrections Adult Secure
Facilities, November 1990**

Contractor	Eden Detention	Esmor, Inc.	Management and Training, Inc.
Location	Eden, Texas	Seattle, Washington	Desert Center, California
Date operational	Oct. 1985	July 1989	Sept. 1988
Contracting agency	BOP	INS	California Department of Corrections
New facility vs. takeover	New	New	New
Rated capacity	326	68	200 ⁿ
Inmate sex	Male	Male & female	Male
Security classification	Minimum, medium	Minimum	Minimum
Original per diem cost	\$27.00	\$84.98	\$34.63
Current per diem cost	\$32.14	\$84.98	\$36.72 ^o
Est. government per diem	Not available	Not available	Not available
Initial cost savings	Not possible to compute	Not possible to compute	Not possible to compute

ⁿExpansion to 400 beds by December 1990.

^oState per diem cost after expansion will be \$32.08.

Contractor	Mid-Tex Corrections, Inc.	Pricor	Pricor
Location	Big Spring, Texas	Tuscaloosa, Alabama	Houston, Texas
Date operational	Aug. 1989	June 1986	June 1987
Contracting agency	BOP	Tuscaloosa County	Texas Board of Pardons & Paroles
New facility vs. takeover	New	New	New
Rated capacity	350	144	223
Inmate sex	Male	Male	Male
Security classification	Minimum	Minimum	Minimum
Original per diem cost	Not available	Not available	Not available
Current per diem cost	\$33.75	\$86,867 (per month)	\$32.50
Est. government per diem	Not available	Est. \$86,867 (per month)	Not available
Initial cost savings	Not possible to compute	Not possible to compute	Not possible to compute

**Appendix I
Data on Private Corrections Adult Secure
Facilities, November 1990**

Contractor	Pricor	Pricor	Pricor
Location	Sweetwater, Texas	Pecos County, Texas	San Saba County, Texas
Date operational	July 1989	Est. Fall 1990	Est. Fall 1990
Contracting agency	Texas Board of Pardons & Paroles	Pecos County, Texas	San Saba County, Texas
New facility vs. takeover	New	New	New
Rated capacity	210	500	500
Inmate sex	Male	Male	Male
Security classification	Minimum	Minimum, medium	Minimum, medium
Original per diem cost	Not available	Not available	Not available
Current per diem cost	\$33.00	P	P
Est. government per diem	Not available	Not available	Not available
Initial cost savings	Not possible to compute	Not possible to compute	Not possible to compute

^PCounty rate varies with occupancy. Up to 85 percent occupancy: \$31/day; 85-90 percent: \$30/day; 91 percent and over: \$29/day. Minimum cost per facility per month: \$283,000.

Contractor	Pricor	Pricor	Pricor
Location	Swisher County, Texas	Angelina County, Texas	LaSalle County, Texas
Date operational	Est. Fall 1990	Est. Fall 1990	Est. Fall 1990
Contracting agency	Swisher County, Texas	Angelina County, Texas	LaSalle County, Texas
New facility vs. takeover	New	New	New
Rated capacity	500	500	500
Inmate sex	Male	Male	Male
Security classification	Minimum, medium	Minimum, medium	Minimum, medium
Original per diem cost	Not available	Not available	Not available
Current per diem cost	P	P	P
Est. government per diem	Not available	Not available	Not available
Initial cost savings	Not possible to compute	Not possible to compute	Not possible to compute

^PCounty rate varies with occupancy. Up to 85 percent occupancy: \$31/day; 85-90 percent: \$30/day; 91 percent and over: \$29/day. Minimum cost per facility per month: \$283,000.

**Appendix I
Data on Private Corrections Adult Secure
Facilities, November 1990**

Contractor	Texas Detention Management, Inc.	Transitional Housing ^a	U.S. Corrections Corporation
Location	Newton County, Texas	Los Angeles, California	St. Marys, Kentucky
Date operational	Est. Spring 1991	Not available	Jan. 1986
Contracting agency	Newton County, Texas	INS	Kentucky Department of Corrections
New facility vs. takeover	New	New	New
Rated capacity	440	200	500
Inmate sex	Male	Not available	Male
Security classification	Minimum, medium, maximum	Not available	Minimum
Original per diem cost	Not available	Not available	\$25.00
Current per diem cost	Not available	\$42.13	\$26.89
Est. government per diem	Not available	Not available	\$28.00
Initial cost savings	Not possible to compute	Not possible to compute	10.71%

^aInformation provided by GAO is based on information from INS.

**Appendix I
Data on Private Corrections Adult Secure
Facilities, November 1990**

Contractor	U.S. Corrections Corporation	U.S. Corrections Corporation	Wackenhut Corrections Corporation
Location	Louisville, Kentucky	Beattyville, Kentucky	San Antonio, Bexar County, Texas
Date operational	Jan. 1990	Sept. 1990	April 1988
Contracting agency	Jefferson County	Kentucky Department of Corrections	Texas Board of Pardons & Parole, U.S. Marshals Service
New facility vs. takeover	New	New	Takeover
Rated capacity	320	400	619
Inmate sex	Male	Male	Male & female
Security classification	Minimum	Minimum	All levels
Original per diem cost	\$27.50	\$26.89	\$21.50 ¹
Current per diem cost	\$27.50	\$26.89	\$22.50
Est. government	\$45.00	\$32.00	Not available
Initial cost savings	38.89%	15.97%	Not possible to compute

¹U.S. Marshals Service per diem is \$50.00.

**Appendix I
Data on Private Corrections Adult Secure
Facilities, November 1990**

Contractor	Wackenhut Corrections Corporation	Wackenhut Corrections Corporation	Wackenhut Corrections Corporation
Location	Kyle, Texas	Bridgeport, Texas	McFarland, California
Date operational	June 1989	Aug. 1989	Jan. 1989
Contracting agency	Texas Department of Corrections	Texas Department of Corrections	California Department of Corrections
New facility vs. takeover	New	New	New
Rated capacity	500	500	200
Inmate sex	Male	Male	Male & female
Security classification	Minimum, medium	Minimum, medium	Minimum, medium
Original per diem cost	\$34.79 ^s	\$34.79 ^s	\$31.55 ^s
Current per diem cost	\$34.79 ^s	\$34.79 ^s	\$31.55 ^s
Est. government	\$42.53	\$42.53	Not available
Initial cost savings	18.20%	18.20%	Not possible to compute

^sIncludes debt service.

Contractor	Wackenhut Corrections Corporation	Wackenhut Corrections Corporation	Wackenhut Corrections Corporation
Location	Denver, Colorado	New York, New York	Detroit, Michigan
Date operational	May 1987	Oct. 1989	Apr. 1987
Contracting agency	INS	INS	City of Detroit
New facility vs. takeover	New	Takeover	Takeover
Rated capacity	150	100	400 (no overnight beds)
Inmate sex	Male & female	Male & female; adult & juvenile	Male & female
Security classification	Minimum, medium	Minimum	Minimum, medium, maximum
Original per diem cost	\$34.90 ^s	\$139.99 ^s	Not available
Current per diem cost	\$36.69 ^s	\$95.45 ^s	\$11.65
Est. government	Not available	Not available	Not available
Initial cost savings	Not possible to compute	Not possible to compute	Not possible to compute

^sIncludes debt service.

**Appendix I
Data on Private Corrections Adult Secure
Facilities, November 1990**

Contractor	Wackenhut Corrections Corporation	Gary White and Associates
Location	Monroe County, Florida	Bakersfield, California
Date operational	Feb. 1990	Apr. 1989
Contracting agency	Monroe County	California Department of Corrections
New facility vs. takeover	Takeover	New
Rated capacity	320	200 ¹
Inmate sex	Male & female; adult & juvenile	Male
Security classification	All classes	Minimum
Original per diem cost	\$47.60	\$32.76
Current per diem cost	\$47.60 ^u	\$32.76
Est. government	Not available	Not available
Initial cost savings	Not possible to compute	Not possible to compute

¹Present capacity of 200 will rise to 340 by December 1990.

^uCounty rate varies with occupancy. 1 to 266 prisoners: \$47.60; thereafter per diem reduced to \$5 per day.

Analysis of the Bureau of Prisons' Authority to Conduct Privatization Initiatives

Under the concept of prison privatization, the Bureau of Prisons (BOP) would contract with private entities for the operation of adult secure facilities. The prison privatization concept is fundamentally different from the situation in which the federal government maintains control of the operations of an institution but contracts out for various services, such as medical treatment and food services. In essence, the idea behind privatization is to place federal prisoners in privately run institutions with minimal government involvement in the day-to-day operations of the institution. To date, BOP has not contracted directly with the private sector for the operation of adult secure facilities.

The policy and legal implications of such contracting by the federal government have been subject to major debate.¹ One of the fundamental legal questions is whether BOP currently has statutory authority to engage in privatization initiatives.

At least one legal scholar has taken the position that BOP currently does not have sufficient statutory authority to contract for the secure confinement of adult prisoners.² BOP, however, has expressed the view that it does have the authority to make such contracts because: (1) it has broadly worded authority under its enabling legislation to designate places of prisoner confinement and (2) general principles of procurement law allow BOP to carry out its functions by way of contract with the private sector.³

As explained previously and in the following discussion, we conclude that BOP currently does not have sufficient authority to contract with the private sector for the complete operation of adult secure facilities. BOP's enabling legislation prescribes specific measures that may be used to obtain incarceration facilities—contracts with state and local institutions for prisoner housing or the construction of federal facilities—and therefore, we believe, implicitly precludes contracts for the confinement of prisoners in privately run facilities. Neither the provision in BOP's enabling legislation specifying that it has the authority to designate places of prisoner confinement nor general principles of procurement

¹See *Privatization of Corrections: Hearings Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 99th Cong., 1st and 2d Sess. (1985-1986)*.

²See I. Robbins, *The Legal Dimensions of Private Incarceration* pp. 396-413 (American Bar Association 1988).

³BOP first expressed its opinion that it has authority to contract with private firms for adult secure facilities in a 1983 memorandum from BOP's General Counsel to the Director of BOP. The General Counsel reaffirmed this position in a 1988 memorandum.

law grant BOP the authority to contract with the private sector for the operation of adult secure facilities.

Background

The 71st Congress established BOP in 1930 in response to serious problems resulting from large increases in the number of federal prisoners. At that time, federal offenders were housed in overcrowded prisons and state or local institutions that were operating under sub-standard conditions. The Department of Justice entered into contracts with state and local governments for the care and subsistence of federal prisoners, but it exercised little control over the terms and conditions of their confinement. Wardens operated federal prisons independently, reporting to a Superintendent of Wardens whose main job was to inspect jails and prisons. No central federal organization was responsible for the care and treatment of federal prisoners and the management of federal prisons.⁴

Congress responded to these problems in 1930 by enacting BOP's enabling legislation.⁵ Key provisions in the 1930 Act defining BOP's basic responsibilities and providing it with authority over the terms and conditions of prisoner confinement have remained substantially unchanged over the years. The 1930 Act provided that BOP was to

"have charge of the management and regulation of all Federal penal and correctional institutions and be responsible for the safekeeping, care, protection, instruction and discipline of all persons charged with or convicted of offenses against the United States."⁶

Two provisions of the Act, now codified at 18 U.S.C. sections 4002 and 4003, define the incarceration facilities that may be used by BOP. Under section 4002, the Attorney General may contract with state and local governments for "the imprisonment, subsistence, care, and proper employment" of prisoners for a period not exceeding 3 years. Section 4002 further provides that the rates to be paid by the government must be based on the conditions of and quality of subsistence to be provided by the state or local facility, and it imposes limitations on the employment of prisoners at such facilities.

⁴H.R. Rep. No. 106, 71st Cong., 2d Sess. 2 (1930).

⁵Public Law 71-218, 46 Stat. 325 (1930).

⁶Section 2, codified as amended at 18 U.S.C. section 4042.

Section 4003 provides that, if state and local governments are unwilling or unable to enter into contracts to provide facilities for federal prisoners under section 4002 or if suitable facilities are not available at a reasonable cost, the Attorney General may build a "house of detention, workhouse, jail, prison-industries project, or camp, or other place of confinement" for federal prisoners.

There is no language in the statutory provisions dealing with places of prisoner confinement or in provisions dealing with BOP's authority generally, that refers to the use of private sector incarceration facilities.

Analysis

The provisions of 18 U.S.C. sections 4002 and 4003, discussed above, detail two courses of action the federal government may use in order to obtain incarceration facilities: (1) it may contract with state and local governments or (2) if such contracts cannot be made, the government may construct new federal facilities.⁷ In view of the specificity with which Congress has described the arrangements the federal government may make in order to incarcerate federal prisoners, the clear inference is that Congress intended to preclude any arrangement not expressly authorized.⁸

BOP, however, maintains that language in 18 U.S.C. section 3621(b) provides it with independent authority to contract with the private sector for adult secure facilities. This section reads as follows:

"(b) PLACE OF IMPRISONMENT.—The Bureau of Prisons shall designate the place of the prisoner's imprisonment. The Bureau may designate any available penal or correctional facility that meets minimum standards of health and habitability established by the Bureau, whether maintained by the Federal Government or otherwise .

...

"The Bureau may at any time, having regard for the same matters, direct the transfer of a prisoner from one penal or correctional facility to another." (Emphasis added.)

⁷Aside from these provisions of BOP's enabling legislation, there are several other statutes dealing with permissible places of prisoner incarceration. See, e.g., 18 U.S.C. section 4125 (authorizing the Attorney General to establish and maintain prison work camps and to designate them as places of confinement); Public Law 95-624, section 9, 92 Stat. 3463 (1975) (authorizing use of inactive Department of Defense facilities as prisons).

⁸Applying a well settled principle of statutory construction, a statute's designation of specific methods for carrying out a function would imply the exclusion of others. See 2A Sutherland Stat. Const. section 47.23 (4th ed. 1984).

If the phrase in 18 U.S.C. section 3621(b) allowing BOP to designate as places of confinement facilities maintained by the federal government “or otherwise” were the only provision in title 18 referring to available places of incarceration, BOP would appear to have open-ended authority to place federal prisoners in any type of nonfederal facility. However, as discussed above, other provisions in title 18 specify the arrangements the government may make to obtain incarceration facilities and allow the use of only one category of nonfederal facilities—those maintained by state and local governments and furnished to the federal government by way of contract. (See 18 U.S.C. section 4002.) Furthermore, the authorization for contracts with state and local governments includes a limitation on the duration of such contracts, guidelines for the contract rates to be paid, and rules concerning the employment of prisoners. It is unlikely that Congress would in one section expressly authorize with a great deal of detail one type of contract and in another section authorize another type of contract only by implication and without any guidelines at all.

Moreover, the language in 18 U.S.C. section 3621(b) allowing BOP to designate as places of confinement facilities whether “maintained by the Federal Government or otherwise” has remained unchanged since the designation provision was originally enacted. Section 7 of the 1930 Act authorized the Attorney General or his representative to designate as a place of confinement “any available, suitable, and appropriate institutions, whether maintained by the Federal Government or otherwise.” Nothing in the legislative history of this provision suggests that Congress ever contemplated having private parties operate adult secure facilities. Rather, it appears that Congress’ intention in enacting the provision concerning places of confinement was simply to clarify that the Attorney General would have the power to choose the places prisoners would be confined, which at that time were limited to federal or state and local institutions. According to the then Attorney General, such clarification was needed because some courts designated the places of prisoner confinement and existing statutes limited the Attorney General’s ability to transfer prisoners between institutions.⁹

While BOP has further suggested that amendments to the provision concerning places of confinement support a broad reading of its authority to designate places “whether maintained by the Federal Government or otherwise,” none of the amendments to the provision can be read as granting BOP the authority to rely on private contractors to provide

⁹H.R. Rep. No. 106, 71st Cong., 2d Sess. 3 (1930).

secure facilities for adults. A 1965 amendment to the provision, then codified at 18 U.S.C. section 4082, authorized BOP to designate as a place of confinement a "facility" as well as an institution but defined the term "facility" as including a "residential community treatment center."¹⁰ BOP has argued, however, that because the Senate report accompanying this amendment recommended that the new program for adult residential community treatment centers be modeled on the juvenile halfway house program BOP was then administering—and which included a halfway house contract with a university—Congress recognized that BOP already had the authority to contract with nongovernmental units for offender housing. However, BOP's legal authority to use private facilities for the housing of juveniles was not based on the statutes that generally govern the confinement of federal prisoners. Instead, statutory provisions in effect since 1938 have explicitly authorized the government to use private as well as public facilities for the custody and care of juvenile offenders.¹¹

In 1984, an amendment to the provision allowing BOP to designate places of prisoner confinement recodified the provision at 18 U.S.C. section 3621(b) and revised some of the wording.¹² The legislative history of the 1984 amendment indicates that Congress intended to codify in section 3621(b) the provisions of existing law, with the only substantive change being the addition of the requirement that institutions and facilities meet minimum standards of health and habitability.¹³

Furthermore, any interpretation of 18 U.S.C. section 3621(b) as providing BOP with authority to make contracts with the private sector for prisoner confinement is undercut by the fact that other statutes involving the confinement of persons have explicitly authorized the use of private sector facilities for such confinement. As noted above, Congress has since 1938 authorized the Justice Department to use private as well as public facilities for the custody and care of juvenile offenders. Likewise, section 7608(d)(1) of the Anti-Drug Abuse Act of 1988 authorizes the U.S. Marshals Service to enter into "agreements with State or

¹⁰Public Law No. 89-176, 79 Stat. 674 (1965).

¹¹Public Law No. 75-666 section 4, 52 Stat. 764, 765 (1938), currently codified as amended at 18 U.S.C. section 5040.

¹²Public Law No. 98-423, 98 Stat. 2007 (1984).

¹³S. Rep. No. 98-225, 98th Cong., 1st Sess. 141 (1983).

local units of government or contracts with private entities” for the housing, care, and security of persons in their custody.¹⁴

Finally, BOP has expressed the view that it does not need explicit statutory authority to contract with the private sector for adult secure facilities, because it has inherent authority under principles of federal procurement law to contract with the private sector to fulfill its needs, which include the housing of federal prisoners.

Principles of federal procurement law do allow BOP to contract out a number of its activities. As a general proposition, an agency may use contracts to carry out any activity that the agency is authorized to perform under its enabling legislation or other statutory provision without a specific grant of contracting authority.¹⁵ However, it is also a well settled principle of federal procurement law that an agency’s inherent authority to contract is not unlimited: an agency may not use contracts to perform an activity if contracting is expressly prohibited or if it would be at variance with statutory procedures or requirements.¹⁶ Since BOP’s enabling legislation describes with specificity the courses of action the government may use to obtain incarceration facilities, BOP’s use of contracts to obtain facilities in a manner that is not specifically authorized would at best be inconsistent with the statutory scheme.

Conclusion

On the basis of our analysis, we conclude that BOP currently does not have sufficient authority to contract with the private sector for the operation of secure prisons.

¹⁴Public Law No. 100-690, section 7608, 102 Stat. 4181 (1988).

¹⁵R. Nash and J. Cibinic, Federal Procurement Law 4 (3rd ed. 1977).

¹⁶Id. at 5, 10.

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