

The background of the cover is a photograph of a prison building, heavily tinted with a dark blue color. The building has several windows and is partially obscured by multiple layers of barbed wire in the foreground. The overall mood is somber and institutional.

**ESSENTIAL**

# Public Interest Protections

for Prison Privatization Contracts

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**T**he privatization of prison facilities is fraught with risks. When a state contracts with a private prison company to operate a correctional facility, it is handing over control of an important and sensitive public function to a company that may have different goals and priorities than the government and public. Many weaknesses with privatized prisons that have been documented are due to the profit-driven nature of the private entities that take over the facilities. For example, private companies seek to minimize operating expenses, including employee salaries, leading to high employee turnover rates and insufficient training. At the same time, companies ensure maximum revenues by demanding contract provisions that require prisons be filled to capacity. These conditions directly contribute to the decreased security and higher incidence of violence found at privatized prisons.<sup>1</sup>

However, while private prisons cut costs at the staff level, they pay multi-million dollar compensation to their executives and they pay profits to shareholders. That is why, all things considered, and despite industry claims, there is little evidence that private prisons actually save governments money. For example, a recent state audit in Arizona found that privately-run prisons resulted in higher costs to the state compared to publicly-run facilities.<sup>2</sup>

Privatization contracts represent a long term investment (typically 20 years) in a business relationship with a corporation. Once the state enters into a prison privatization contract, it can be extremely difficult to nullify or amend the contract, even when the contractor is shown to be grossly negligent or abusive. Many states turn to privatization due to



<sup>1</sup> For example, George Washington University found that private prisons had a 50% higher incidence of inmate on staff assaults and 66% higher incidence of inmate on inmate assaults than publicly-run prisons. See ACLU Ohio's report, "Prison for Profit: A look at prison privatization, for noteworthy research and statistics documenting the decreased security and higher levels of violence at private prisons" ([http://www.acluohio.org/issues/criminaljustice/PrisonsForProfit2011\\_04.pdf](http://www.acluohio.org/issues/criminaljustice/PrisonsForProfit2011_04.pdf)).

<sup>2</sup> See: <http://tucsoncitizen.com/cell-out-arizona/2012/07/24/cell-out-arizona-exclusive-documents-show-arizona-officials-knew-private-prisons-werent-saving-money/> and [http://www.azcorrections.gov/adf/reports/ADC\\_FY2010\\_PerCapitaRep.pdf](http://www.azcorrections.gov/adf/reports/ADC_FY2010_PerCapitaRep.pdf)

overcrowding. Unfortunately, states do not always have the option of cancelling a contract because they have nowhere else to house inmates. Facilities are often sited in small, economically depressed towns, where there are few jobs. These towns can become dependent on the income generated by the prison, which makes local officials reluctant to “rock the boat” by reporting problems in the facility. Indeed, local officials may put political pressure on departments of correction or state officials to keep facilities open, even when serious violations occur for which the state may be liable. These are important items to consider before going down the long and often treacherous road of prison privatization. Given these risks, it is important to understand what public protections should be included in contracts when a state considers prison privatization. While these provisions will not completely mitigate the risks of prison privatization, if explicitly included in prison privatization contracts and swiftly and thoroughly enforced, they can potentially prevent problems and protect the state from costly contract mistakes. Drawing from the experiences of states that have attempted prison privatization, *In The Public Interest* has developed a list of protections that should be considered when negotiating and designing contracts with private prison companies. We also include best practices that states can implement to better monitor and enforce these contract provisions.



## Costs

The contract should account for all costs, including new and unexpected costs, and clearly delineate between contractor and state responsibilities. It should be noted that certain costs, such as the costs associated with the bidding process, or transitional costs, like those associated with moving equipment or sensitive data from the state to a contractor, contractor training, or personnel costs like accrued leave for former public staff who lost their jobs in the privatization effort, can significantly add up. These costs, while usually not included in the contract, are important costs that the state must incur and should be taken into careful consideration before moving forward with any privatization initiative.



Some costs are difficult to quantify but also should be considered; for example, the cost of local law enforcement to investigate crimes at private prisons (including Prison Rape Elimination Act incidents), and the cost of local prosecutors to prosecute crimes that occur at private prisons. These ancillary costs are usually borne by the county or municipality where the private prison is located, not by the contractor.

- **Clearly delineate between contractor and state responsibilities and costs:** Does the contract clearly delineate between contractor and state responsibilities regarding costs? For example, are there provisions that clearly define responsibility for costs related to monitoring and enforcement of the contract, such as on-site monitors, or local law enforcement time used to quell a riot or search for escapees, or transporting prisoners to and from the private prison? Are these costs appropriately allocated between the state and contractor, and does the contract specify a time frame in which such expenses are to be paid by the contractor?
- **Avoid occupancy guarantees:** Does the contract require a minimum inmate occupancy rate? Private prison companies have been successful in getting minimum occupancy provisions in contracts, usually requiring at least 90% and in some cases even 100% of prison beds to be filled.<sup>3</sup> This allows the company a guaranteed minimum level of revenues. Unfortunately, this has had the effect in many states of encouraging increased incarceration, even when it is in the public's best interest to enact policies that help reduce the prison population. Also, when the minimum occupancy rates are not met, the state still must pay for empty private prison beds. This results in decreased flexibility for the state in responding to population changes or serious incidents in the facility. ***In Practice:** One state, after a serious escape revealed major security flaws, removed prisoners from the unit until the problems were fixed. The contractor threatened to sue for breach of contract, and the state was forced to pay millions in per diem payments for empty beds.*

<sup>3</sup> For example, recent open records requests by the American Friends Service Committee in Arizona showed that the state amended several contracts with private prison operators to guarantee 100% inmate occupancy rates. See: <http://tucsoncitizen.com/cell-out-arizona/2012/08/03/cell-out-arizona-exclusive-part-ii-arizona-for-profit-prison-costs-rose14-now-guarantee-100-occupancy/>

- **Ensure reasonable per diem rates:** How is the per diem rate in the contract calculated? The per diem rate can vary widely from state to state even in contracts involving the same contractor. While operating costs may vary in each state, it is critical to understand what per diem rate other states are paying private prison operators, to ensure a competitive rate.
- **Required cost savings:** If your state has a statute that requires a private prison contractor to provide a certain percentage of savings to the state, does the statute or contract describe in detail how that calculation will be made and what baseline the state will use to determine compliance? It is important to understand how this calculation will be made to ensure that private prison companies do not simply lower wages or quality of services in order to achieve required savings. It also may not make sense for the savings requirement to simply compare per diem costs in the privatized facility with average per diem costs in the state's entire prison system. The comparison should be based on comparable facilities in similar geographic regions with similar inmate populations. The state system usually houses higher security inmates and those with serious medical or mental health issues, who are more expensive to incarcerate. This does not allow for a true apples-to-apples cost comparison between privatized and state-run facilities. If necessary, an alternative calculation should be included in the contract. Also, the contract should require regular financial audits to ensure the private prison is achieving the required cost savings. See the following report from the Florida Center for Economic and Fiscal Policy for a discussion on common problems with determining per diem rates and purported contractor savings: <http://www.fcfe.org/attachments/20100409--Private%20Prisons>
- **Require minimum labor standards:** Does the contract provide guidelines for minimum private prison staff wages and benefits? Low wages and benefits tend to increase the likelihood of poor quality staff and high employee turnover rates, which lead to institutional instability. If a private prison company contracts to operate an existing state prison, are there provisions for a hiring preference for existing employees at the facility, or requirements to retain existing employees hired by the contractor at minimum wage levels and with credit for existing accrued sick leave, vacation days, etc.? Are private prison employees allowed to unionize?
- **Disposition of facility income:** Most prisons generate income from inmate telephone services, commissary services, interest on inmate trust fund accounts, or prison industry programs (i.e., room and board deductions in Prison Industry Enhancement programs). The contract should specify that the disposition of such income generated at private prisons should be credited to the state or to inmate accounts. Additionally, charges, such as telephone rates, should be reasonably related to private sector rates.

## Safety and Monitoring

Maintaining order and safety in a correctional facility is one of the most important responsibilities of the prison operator. It should be noted that even the most well-written and thought-out contract by itself cannot completely control contractor behavior and decisions. An agency must have a strong monitoring component to ensure that private prison contractors are consistently abiding by all laws and required policies, procedures and contractual requirements.

- **Explicitly require compliance with departmental policies:** Does the contract specify that the prison operator must follow all departmental policies, including use of force standards, incident reporting, operating standards, minimum staffing ratios, medical standards, emergency protocols, Prison Rape Elimination Act standards and others? States should include copies of these policies in an appendix to the contract. If state correctional officers are required to be certified or have minimum training requirements, then private prison officers likewise should be required to have the same certification and minimum training requirements.
- **Maintain physical structures and equipment:** The contractor should be required to maintain the physical structure and equipment in good repair at its own expense. The contractor should ensure that the facility is in compliance with all applicable standards of fire, safety, health, etc., with liquidated damages required for failure to pass inspections.
- **Ensure unlimited access to facilities:** Does the contract allow the state full and unimpeded access to all areas of facilities and appropriate documents and records contained at the facility at any time, including the ability to view facility cameras from a remote site? ***In Practice:*** *One state director of corrections that we interviewed noted that the ability to remotely view camera footage in real time from private prison facilities has been a major enhancement in the state's ability to provide effective monitoring of the contractor.* Industry standards typically only keep footage on tape for several weeks, but the department should ensure that footage, especially video recording of any incidents, remains in the state's possession for several years. This ensures that the state has a visual record of the contractor's performance and any incidents that may be called into question at that time or in the future.





- **Allow for surprise visits:** Does the contract allow for the state to conduct surprise visits of privately-run facilities? *In Practice:* Information obtained by remote viewing of surveillance cameras can also inform the state of where and when to conduct surprise visits. It is important to strategically use surprise visits as an effective monitoring tactic, to prevent private prison companies from manipulating staffing ratios or other measures of compliance during scheduled visits.
- **Require regular monitoring:** Aside from surprise visits, does the contract require regular monitoring and inspections from state staff? For example, a state might want to require that state staff visit the facilities on a regular basis and that the contractor must provide weekly reports detailing activities occurring at the facility. The contract may also require the state to conduct a monthly assessment, and quarterly and annual audits focused on large-scale compliance with all contract terms, policies and procedures, and American Correctional Association (ACA) standards if applicable. If the state uses on-site monitors, there should be provisions for the regular rotation of monitors so they do not become dependent on the private prison staff. The state should ensure regular review of the monitor's reports, including follow-up action to address any reported contract violations or deficiencies.
- **Allow for third party review:** Does the contract allow for third party review during or after a serious incident? Are these costs appropriately allocated between the state and contractor?
- **Require the company to maintain thorough records related to prison operations and inmates, and provide regular reports to the agency:** Does the contract require regular reporting of prison operations, including detailed records for each inmate, and documentation related to compliance with departmental policies, state statutes, and contract provisions? The contract should require the contractor to maintain detailed records and self-report important measures of compliance. For example, there should be specified time frames for the contractor to report escapes, deaths, riots and other serious incidents.
- **Address criteria and conditions for out-of-state inmates:** If the private prison houses inmates from other states, the contract should address where and how inmates will be released after completing their sentences. Additionally, the state should specify criteria for acceptable out-of-state inmates; for example, based on security classification.

## Other Services

In many contracts, the prison operator is given responsibility for important services, such as the provision of meals and inmate healthcare. The contract should include specific provisions about how these services will be operated.

- **Healthy food:** Does the contract require the company to follow state master food menus? States' experience shows that if the contract allows the contractor to choose the menu, the menu is typically less nutritious and includes less protein, fewer vegetables, and more starch than the state plan.
- **Quality clothing:** Does the state require the company to purchase inmate clothing from the state's preferred vendors? Including this requirement in the contract will ensure that the contractor does not attempt to lower their operation costs by purchasing lower quality clothing.
- **Buy local:** Does the contract contain a provision requiring the company to purchase other incidentals from in-state vendors? If the state normally makes an effort to purchase goods from state-based companies, including this requirement in the contract will help ensure that money the contractor must spend on goods to operate the prison stays in the local economy.
- **Effective educational and vocational programming:** Does the contract specify contractor requirements related to educational and vocational training programs for inmates, including the minimum number of hours, required instructional personnel, student/teacher ratios, and necessary equipment and supplies? Does the contract provide for an evaluation process for such programs, such as tracking GED graduation rates? Is there any provision to track recidivism rates for inmates released from private prisons, to compare with public prison recidivism rates?
- **Quality medical care:** Does the contract set a ceiling for medical costs that the contractor is responsible for? If so, is this ceiling reasonable or does it create incentives for the contractor to skimp on inmate health care? It is important for the state to remember that it will be responsible for costs above the contract threshold. Does the contract specify what types of medical care the contractor is responsible for providing? For example, companies have been successful in negotiating in some prison privatization contracts that they are not responsible for any HIV-related expenses or dialysis treatment, shifting the full burden of those costs to the state.
- **Sentence calculation and good time:** Private prison contractors should not be allowed to make any decisions that impact the length of time that inmates must serve — such as sentence calculation, good time calculation, parole decisions or denial of good time credits as a disciplinary sanction. Some states require that such decisions (e.g., denial of good time credits) be approved by the state monitor or by state prison officials. Similarly, security classification decisions that impact the amount of good time an inmate earns should be reserved to the state or require approval by the state. To the extent that this results in costs to the state, in terms of staff time and resources for sentence calculation, good time calculation, security classification and disciplinary sanctions, such costs should be taken into consideration when calculating the per diem rate provided in the contract.



## Contractor Non-Compliance

If a contractor does not comply with contract provisions or performance expectations, the contract should explicitly lay out consequences for non-compliance.

- Clear and adequate consequences for non-compliance:** Does the contract explicitly and concretely lay out penalties for non-compliance, including fines for staff vacancies, high staff turnover rates, losses of control or other security breaches? What about damages associated with sub-par food services or medical services, such as delays in providing health care or intake screenings? Private prison companies may try to minimize their expenses by delaying medical care for inmates, even when an inmate's health may be at serious risk. Laying out specific financial penalties for these types of compliance issues can discourage the private contractor from trying to game the system. Where there is objective criteria for contractual non-compliance, such as failure to meet specified staffing requirements, *mandatory* fines can be required. Contracts should provide for graduated sanctions and the ability of the state to remedy non-compliance if necessary, at the contractor's expense.
- Plan ahead for possible litigation:** Does the contract specify how costs of litigation resulting from contractor problems or procurement problems will be handled? Are these costs appropriately allocated between the state and contractor? What if the state is sued for actions taken by the contractor? What if the state is a co-defendant with the company in a lawsuit? How do you reconcile different goals of the parties, and how are the costs divided? These types of issues should be negotiated and determined ahead of time, instead of when litigation is filed.

## Contract Cancellation

What happens if the contract does not work out? The state should guarantee maximum flexibility with regard to canceling a prison privatization contract.

- Allow the state maximum flexibility with regard to contract cancellation:** Does the contract contain a clause that allows the state to cancel the contract at any time without cause with a minimum amount of notice? This is important because it allows the state to quickly and easily make important decisions regarding the contractual relationship if any problems arise.
- Limit Contract Length:** The contract term should be limited to a reasonable amount of time, to ensure the contract can be re-bid at regular intervals if necessary. For example, some private prison companies want to enter into 20-year contracts, which are to their benefit but do not benefit the state. Twenty year contracts are too long to foresee shifts in population levels, and provide too much assurance of continuity to private contractors, regardless of performance.
- Plan ahead for financial ramifications of contract cancellation:** Does the contract specify how the costs related to contract cancellation will be handled? Is the state's financial responsibility in cases of contract cancellation reasonable and clearly identified?
- Plan ahead for logistical ramifications of contract cancellation:** Does the contract contain provisions that guide the transfer of duties back to the state? Does the state have sufficient capacity to absorb prisoners transferred out of contract facilities? If the state is unable for practical reasons to cancel the contract, the contractor has less incentive to perform.



## Transparency

- **Ensure the fullest access to contractor records and inmate information:** Does the contract allow the state to have full access to records related to prison operations and financial accounts? Are these records available to the public as required by the state's open records laws? One important area of concern is the lack of accessible data on inmates. Contracts should ensure that private prison companies are required to report on inmates housed in their facilities, and make this data easily accessible to the agency and any prison monitors. Monitors' reports, cost reports, recidivism data and other measurements of outcomes should also be publicly available. If your state does not already have strong and enforceable transparency laws specifically aimed at government contractors, it is essential to spell out expectations, policies, and reporting requirements in the contract. Contracts should specify that private prison records are to be available to the public to the same extent as records at state-operated facilities.

This guide provides general guidance regarding protections and provisions that should be included in contracts between a state and a private prison contractor to ensure the public's interest. For additional information and resources, please contact *In The Public Interest* at [info@inthepublicinterest.org](mailto:info@inthepublicinterest.org) or 202-739-1160.

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