



## **TDCJ WHITE PAPER PRIVATIZATION OF TDCJ FACILITIES**

The Texas Department of Criminal Justice and its predecessor agencies have been engaged in a partnership with private vendors since 1976, when the first parole contracts for halfway house facilities were established. Today the agency contracts for about 18,700 beds in a variety of facility-types, to include prisons, state jails, pre-parole transfer, intermediate sanction, work program and halfway house facilities. Most of these contracts are for secure facilities, putting Texas among the leaders in the use of privately-operated facilities for housing the offender population.

This agency values this successful partnership with private vendors and sees opportunities for expansion in the future. Projections of offender population growth prepared by the Criminal Justice Policy Council indicate the number of offenders in the system will once again grow rapidly. There is immediate evidence to that effect in the growing number of admissions to TDCJ in recent months. Prior to construction of additional state prisons the agency would strongly recommend consideration of expanded contract capacity.

However, discussions today focus on the possible conversion of existing facilities to private operation in hope of achieving cost savings. Whereas the agency foresees opportunities and benefits in regards to contracting for additional capacity, the issues are far more complicated regarding conversion.

Several issues are clearly first and foremost in any analysis involving conversion of state-operated facilities. The necessity of valid cost comparisons cannot be over-emphasized.

### **COST COMPARISON**

Particular attention should be paid to achieving an “apples-to-apples” comparison when comparing costs. For example, recent discussion has focused on the costs cited in the Criminal Justice Policy report entitled, *Mangos to Mangos, Comparing the Operational Costs of Juvenile and Adult Correctional Programs*. That report shows the average cost of publicly-operated state jails at \$37.35, while the average per diem paid to private vendors is \$30.13. However, comparisons between the system-wide average and a vendor per diem are problematic for several reasons:

- The state cost is a system-wide average that includes offenders with serious medical, mental health and security issues, while the privately operated facilities house healthier and lower risk offenders.

- The state cost includes other expenses, such as transportation and classification, which are excluded from the private sector per diem.
- The system-wide average represents an allocation of mainly fixed costs, therefore the declining number of offenders in state-operated facilities during FY 2001 and FY 2002 inflated the state's average cost. Conversely, TDCJ maintained the population of the privately-operated facilities at a higher level in order to minimize the fiscal impact on private vendors.
- A system-wide average cost differs dramatically from the marginal cost of housing additional offenders, but is identical for per diem under existing contracts. For example, the Department is currently adding offenders to state jail facilities at a negligible cost via the HB 124 process.

It may be helpful to provide further elaboration on several of these points, but in the interest of time a more detailed analysis will be limited to the critical issue of medical care. Currently there is a pre-screening that excludes assignment of offenders with serious medical or mental health considerations to privately operated facilities. Also, most initial intake and health care evaluations are provided by TDCJ-operated facilities which initially limits private vendor medical costs, while the "48-hour rule" further limits their exposure to medical costs related to hospitalization and results in the transfer of any offender patients with serious medical or mental health issues back to TDCJ-operated facilities. Furthermore, current law allows the co-mingling of offenders within State Jail Division (SJD) with ID offenders for serious medical and mental health needs. This co-mingling provision affords TDCJ and the correctional managed health care (CMHC) program the ability to consolidate costly medical care services in fewer and more efficient locations. Taken collectively, these provisions, by design, minimize the health care risk borne by the private vendors.

The TDCJ cost per offender per day for State Jails is \$37.35 as shown in *Mangos to Mangos*. Of this amount, \$6.85 is an allocation of health care costs (medical and mental health) calculated against the entire TDCJ system. This allocation includes costs for all the system including a variety of fixed and specialized care costs including operation of Hospital Galveston, three psychiatric inpatient facilities, two dialysis facilities, the statewide pharmacy system, utilization management programs, administrative costs and other such expenses.

Based on a review of correctional managed health care's direct operating costs for the state jail facilities, CMHC staff estimates that the health care costs involved in providing direct health care services to offenders in those facilities is approximately \$3.42 per offender per day. These costs are lower than the overall allocated average cost because the offenders confined in state jail facilities generally place a lower demand on the system for the use of health care resources as evidenced by:

- Lower age. The average age in the state jail system is 31.5 years compared to 36.0 years in ID. Only 1.2% of the state jail population is age 55 and older,

compared to over 5% of the ID population. Offenders age 55 and older access health care resources 4-5 times more often than younger offenders.

- Lower pharmaceutical costs. State jail population drug costs run about \$0.50 per offender per day, whereas the ID population drug costs average twice that amount or about \$1.00 per offender per day.
- Fewer offenders with multiple system diseases requiring enrollment in two or more chronic disease clinics. Only about 0.7% of state jail offenders are enrolled in 2 or more chronic disease clinics, while about 3.6% (five times more) ID offenders are in multiple chronic disease clinics.
- Lesser need for special health care access provisions. Due to the lower security requirements of this population, less than 1% of state jail offenders are segregated and therefore require special attention by the health care system to insure access to health care needs. Standards require that health care staff visit segregated offenders at least three times weekly. By contrast, about 7% of the ID population is segregated and require health care staff to provide specialized access.

This closer examination of medical costs identifies a critical issue for cost comparisons, and an excellent example of the complexities to be resolved as other identified items are subject to similar review. If the proper allocation of health care costs to state jail felons is \$3.42, as estimated by CMHCC, then the \$7.22 difference between state and private vendor costs (\$37.35 v. \$30.13) shrinks to \$3.79 (Note: This adjustment is only related to medical costs. Other operational adjustments will shrink it further). Furthermore, the remaining portion of the allocated funding is not available for per diem payments to contractors because that funding is utilized to cover a number of fixed costs necessary to support the remaining offenders served by the correctional health care program, including Hospital Galveston, the inpatient psychiatric facilities and specialty care needs. In other words, this dollar amount cannot be included in estimated cost savings, assuming existing contract requirements for medical care.

Although the following alternatives for contracting do not resolve the above issues related to cost comparison, they do provide some specific options for contract modifications related to health care:

- (1) Separate health care services from the services to be provided by the private vendors and contract with the CMHC program to provide all health care services.
- (2) Keep health care costs separately identified in the RFP process, thereby allowing TDCJ the option of having services provided through the CMHC.
- (3) Delete/modify the 48 hour rule and the adverse selection process, requiring the vendors to accept any offenders sent to them, to assume full health care risk and either provide services themselves or pay for the services provided to their assigned offenders by the CMHC system.

Also, it should be noted that anticipated savings from privatization would primarily be achieved by reducing the appropriations of agencies other than TDCJ. For example, of the \$37.35 cited as the average cost of publicly operated state jails, only \$30.80 is included in the agency's appropriation. After excluding the allocation of fixed agency costs, only \$28.73 in direct unit operating and a system wide allocation of medical costs remain. (Attachment 1)

### **IMPACT ON THE CURRENT WORKFORCE**

For most state employees, the conversion of a state-operated facility to a contract facility would result in a substantial decrease in salary and benefits as well as negatively impacting their retirement. Although the Department lacks definitive data regarding all private vendors' wage and benefit packages, based on available information we estimate most employees would receive a salary reduction of 33 to 45%. There is insufficient information to determine whether there is a comparable reduction in benefits. Obtaining information to better evaluate the salary differential might be one important task for the work group.

The impact on the current workforce of salary/benefit reductions is self-evident. Other related issues include:

- The salary and benefit differential could provide an impetus for many employees to seek employment at state facilities, which could potentially negate the cost savings anticipated from reduced employee benefits (resulting from a decrease in the number of state employees).
- The reduction in benefits, and the potential impetus for transfer to state-operated facilities, may be a significant management challenge for vendors.
- Communities may not support privatization of a local facility because of the impact on current employees.

### **STATUTORY CHANGES**

The Department has no recommendations for statutory changes relating to privatization. However, the following issues should be considered as amendments are discussed.

- Chapter 495 Government Code, which includes caps on the size of a privately-operated facility, a cap on the total number of beds operated by private vendors, and numerous other provisions governing privatization, only applies to conventional prisons in the Institutional Division. Chapter 495 does not apply to other types of facilities such as state jails, transfer facilities, contract transfer facilities or parole facilities.

- Contingent upon further study and work group recommendations, it may be appropriate to repeal all or part of Chapter 495.008 Government Code as added by HB 776, 78<sup>th</sup> Legislature. This section relates to enhanced contract monitoring and oversight.
- In any contract, the responsibilities, obligations and duties imposed on two parties entering into a contract will be different and sometimes mutually exclusive. It is important that any proposed statutory changes intended to promote equality of contract conditions (in order to facilitate apples-to-apples comparison between private and public sector operations) not conflict with this basic principle of contracting.

In regards to the latter point, specific examples of differing obligations in the current contracts include: indemnification (vendors are required to indemnify the state); termination (TDCJ may terminate based on failure to receive legislative appropriations and for convenience); awards of good time (TDCJ makes all decision regarding the award of forfeiture of good time); and vacant positions (funds for the salaries of vacant vendor positions are returned to the state once the position is vacant for more than 45 – 60 days).

### **CONTRACT CHANGES**

After reviewing possible changes in contract terms pursuant to your request, the Department will eliminate “caps” on overtime. The salaries for positions left vacant will not be subject to being withheld if those funds are used to fill those positions through the use of overtime. Funds for positions not filled within 45 – 60 days and not filled through overtime will continue to be withheld, consistent with the basic principle that vendors will not be paid for services not received. Unlike state agencies, the determination of the budgets for privately operated facilities is not predicated on the assumption of vacant positions or lapsed salaries.

It should be noted that current contracts requirements have not inflated vendor per diems relative to those paid in other states. Although the agency knows of no nationwide surveys on the subject, available information suggests vendor per diems in Texas are among the lowest if not the lowest in the nation.

### **PROCUREMENT**

In regards to procurement issues, the Department must emphasize that an accelerated timeline for a new or substantially revised RFP will confront many obstacles. Rewriting the existing RFPs would in itself be challenging, but if new facilities are included, information such as floor plans, Major-Work-Requests, historical utility usage and rates, inventories of state owned equipment and historical populations must be gathered and made available to vendors. Potential vendors should also be allowed site visits to each new facility.

Also note that the actual evaluation of proposals and awarding of contracts requires several months.

### **MONITORING AND OVERSIGHT**

The Department has reviewed our internal oversight mechanisms and proposes no changes at this time. Within the last several years TDCJ has centralized contract monitoring and oversight functions into the Private Facilities Division, and implemented enhanced monitoring procedures in response to SB 177, 76<sup>th</sup> Legislature, and HB 776, 78<sup>th</sup> Legislature. Currently the Private Facilities Division monitors compliance with contract terms through on-site monitoring.

The State Jail Division does not monitor contract compliance and has no on-site personnel. The SJD staff fulfill other functions regarding privately-operated facilities (the same functions they perform for state operated facilities), to include security audits, operational reviews, serious incident reviews, emergency responses and management responsibilities.

### **CONTRACT RESOLUTION**

Private vendors operating contracting with TDCJ for the operation of secure facilities are legally entitled to the same options for dispute resolution as are vendors contracting with other state agencies. Chapter 2259 of the Government Code requires, among other things, that agencies incorporate a remedies schedule, a graduated sanctions schedule, or both, for vendor breaches or substandard performance. Chapter 2260 of the Government Code provides in great detail the resolution of most contract claims against the state, including the use of the State Office of Administrative Hearings in lieu of allowing suit in district court against the state. The Board of Criminal Justice adopted a “model” rule developed through interagency collaboration, providing for the application of Ch. 2260 to TDCJ contracts (See Title 37, Texas Administrative Code, §155.31).

In addition, during 2001 the Legislature added a new §495.008 in the TDCJ privatization statutes which specifically entitles a private prison vendor (but no other TDCJ vendor) to bring a contractual dispute to the Board of Criminal Justice for a “final determination” of the dispute. It has not been invoked by a vendor, which may reflect the efforts TDCJ staff make to arrive at conflict resolution.

The agency considers the methods for conflict resolution described above to be sufficient, and has no recommendations for statutory or policy changes in the area.

### **CONCLUSION**

The Department has no doubt that reviewing various issues related to privatization will ultimately be of tremendous benefit; no system is perfect, and TDCJ can learn from the expertise of others. Furthermore, the rationale for this review and similar scrutiny of

state agency operations, TDCJ or otherwise, is compelling. The state's budget situation demands that all options be explored in order to make the best use of limited resources. But as privatization of state-operated facilities and related issues dealing with contracts, procurements and oversight are examined, one primary consideration should be that the state—specifically TDCJ—ultimately remains responsible for the safe, secure and constitutional operation of vendor-operated facilities, to include the prevention of escapes, assaults and other serious incidents. The agency must continue to fulfill that statutory obligation through adequate contract terms and monitoring.