

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Budget Committee

BILL: CS/SB 2038

INTRODUCER: Rules Committee

SUBJECT: Privatization of Correctional Facilities

DATE: January 23, 2012      REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Sneed</u>	<u>Phelps</u>	_____	<b>Fav/CS</b>
2.	<u>Sneed</u>	<u>Rhodes</u>	_____	<b>Pre-Meeting</b>
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

**Please see Section VIII. for Additional Information:**

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|------------------------------|-------------------------------------|---|
| A. COMMITTEE SUBSTITUTE..... | <input checked="" type="checkbox"/> | Statement of Substantial Changes        |
| B. AMENDMENTS.....           | <input type="checkbox"/>            | Technical amendments were recommended   |
|                              | <input type="checkbox"/>            | Amendments were recommended             |
|                              | <input type="checkbox"/>            | Significant amendments were recommended |

**I. Summary:**

This bill directs the Department of Corrections (DOC or department) to competitively procure the services of a contractor(s) for the management and operation of all correctional facilities and satellite facilities currently operated by the department in 18 counties located in the Southern Florida Region of the state (formerly Region IV). The bill requires DOC to issue one or multiple requests for proposals (RFP) within a specified timeframe. The bill directs the department to include certain requirements in the RFP(s), including a cost savings requirement of at least 7 percent for the first year of the contract(s) and contractor performance measures. The bill states that the cost savings requirement in the bid specifications is not subject to challenge in any protest of the specifications of the RFP. The bill requires that DOC, after awarding a contract(s) and resolving any bid disputes and negotiating a proposed contract, submit a budget amendment to the Legislative Budget Commission (LBC) which revises the department's operating budget and demonstrates the required 7 percent savings. DOC shall enter into a contract(s) with the successful vendor or vendors after approval by the Legislative Budget Commission. Any contract resulting from the RFP must comply with all federal, state, and local laws and all rules of the Department of Corrections.

This bill creates s. 744.7115 and repeals s. 944.719(1), Florida Statutes.

This bill would create by general law a requirement for the privatization of existing correctional facilities similar to the proviso in the 2011-2012 General Appropriations Act (Chapter 2011-69, Laws of Florida) which was declared unconstitutional in Baiardi v. Tucker, (Fla. 2<sup>nd</sup> Circ Ct), Case No. 2011-CA-68 (2011).

## II. Present Situation:

The Florida Department of Corrections (DOC or department) operates the third largest state prison system in the nation. DOC, with a budget of \$2.18 billion for the 2011-2012 fiscal year and 27,589 full-time equivalent positions, three-quarters of which are certified correctional officers and probation officers, is one of Florida's largest state agencies.

The department is responsible for providing care and custody for nearly 101,000 inmates and another 112,800 offenders on active community supervision. During incarceration, medical care and other health and welfare services are provided to inmates. DOC inmates are also involved in work assignments, as well as education, training, and substance abuse treatment to promote employability, literacy, sobriety, and accountability to crime victims.

The state's inmate population on January 1, 2012, totaled 100,606. DOC operates 62 major prison facilities, including 7 privately operated facilities, 46 work or forestry camps, 33 work release centers, a medical treatment center, and 5 road prisons. A total of 10,128 inmates, or 10 percent of DOC's population, are housed in private prisons.<sup>1</sup>

### **Correctional Facilities in Region IV (operated by the Department of Corrections)**

During the months of July through September, 2011, DOC consolidated its four regional administrative offices into two regions. Prior to this realignment, the department's Region IV included correctional facilities in Manatee, Hardee, Indian River, Okeechobee, Highlands, St. Lucie, Desoto, Sarasota, Charlotte, Glades, Martin, Palm Beach, Hendry, Lee, Collier, Broward, Miami-Dade, and Monroe Counties. These counties and facilities are now part of the department's Southern Florida Region.

DOC operates 29 correctional facilities, housing more than 14,500 inmates, including 11 major institutions, work camps, reentry centers and road prisons in the region formerly referred to as Region IV. The DOC has approximately 3,800 employees in this region, with total operating costs of about \$268 million per year.<sup>2</sup> Each facility in Region IV is listed below, together with the type of inmates housed in each, the general custody level served, and the 2010-2011 reported average inmate population for each facility.<sup>3</sup>

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<sup>1</sup> State of Florida correctional facilities constructed and operated by vendors are generally referred to as "private prisons" and operated under contracts between the Department of Management Services (DMS) and private providers.

<sup>2</sup> Total operating costs excludes inmate medical and pharmaceutical costs and DOC classification costs. Total operating costs have been further reduced for a 3 percent state employee retirement contribution. Additional adjustments in total operating costs may be necessary if any correctional facilities are closed in this region. DOC has issued a request for proposals to privatize inmate medical services statewide.

<sup>3</sup> Inmate population totals changed in the 2011-12 fiscal year. Two examples include the 3,000+ inmate transfers that resulted from closing Hendry Correctional Institution in June 30, 2011 and Glades Correctional Institution in Dec 1, 2011.

**Correctional Institutions (includes annexes)**

- Broward Correctional Institution (female; close custody; 701 inmates)
- Charlotte Correctional Institution (male; close custody; 838 inmates)
- Dade Correctional Institution (male; close custody; 1,526 inmates)
- Desoto Correctional Institution (male; close custody; 1,844 inmates)
- Everglades Correctional Institution (male; close custody; 1,593 inmates)
- Hardee Correctional Institution (male; close custody; 1,889 inmates)
- Homestead Correctional Institution (female; close custody; 672 inmates)
- Indian River Correctional Institution (male youth; close custody; 489 inmates)
- Martin Correctional Institution (male; close custody; 1,496 inmates)
- Okeechobee Correctional Institution (male; close custody; 1,619 inmates)

**Reception Centers**

- South Florida Reception Center (male; close custody; 1,398 inmates)
- South Florida Reception Center South Unit (elderly male; close custody; 665 inmates)

**Work Release Centers**

- Atlantic WRC (female youth; community custody; 43 inmates)
- Ft. Pierce WRC (male youth; community custody; 81 inmates)
- Hollywood WRC (female pre-release; community custody; 115 inmates)
- Miami North WRC (male youth; community custody; 179 inmates)
- Opa Locka WRC (male youth; community custody; 140 inmates)
- West Palm Beach WRC (male youth; community custody; 146 inmates)

**Re-Entry Centers**

- Sago Palm Re-Entry Center (male; medium security; 384 inmates)

**Other Correctional Facilities**

- Arcadia Road Prison (male; minimum custody; 68 inmates)
- Big Pine Key Road Prison (male; minimum custody; 45 inmates)
- Desoto Work Camp (male; medium custody; 196 inmates)
- Ft. Myers Work Camp (male; minimum custody; 78 inmates)
- Glades Work Camp (male; medium custody; 196 inmates)
- Hardee Work Camp (male; medium custody; 196 inmates)
- Hendry Work Camp (male; medium custody; 192 inmates)
- Loxahatchee Road Prison (male; minimum custody; 62 inmates)
- Martin Work Camp (male; medium custody; 180 inmates)
- Martin Unit Treatment Center (male; minimum custody, 80 inmates)

### **Privately Operated Prisons (overseen by the Department of Management Services)**

The Florida Legislature first authorized the construction and operation of privately operated correctional facilities in 1989. Bay Correctional Institution opened in March 1995. Today, Chapter 957, Florida Statutes, charges the Bureau of Private Prison Monitoring in the Department of Management Services (DMS) with the responsibility for entering into contracts for the design, construction, and operation of privately-operated correctional facilities. Section 957.07, F.S., requires DMS to determine that a contract for a private facility will result in a cost savings to the state of at least 7 percent over similar public facility costs before DMS can enter into such a contract. DMS currently oversees the prison management/operations contracts for the 7 following correctional facilities:

- Bay Correctional Institution (male; medium custody; 985 inmates)
- Blackwater Correctional Institution (male; medium custody; 2,000 inmates)
- Gadsden Correctional Institution (female; medium custody; 1,520 inmates)
- Graceville Correctional Institution (male; medium custody; 1,884 inmates)
- Lake City Correctional Institution (male youth; medium custody; 893 inmates)
- Moore Haven Correctional Institution (male; medium custody; 985 inmates)
- South Bay Correctional Institution (male; close custody; 1,861 inmates)

### **Benefits of Privatization**

In addition to Florida, other states have found that prison privatization has resulted in cost savings. For example, the Texas Legislative Budget Board's (LBB) biannual cost comparison study of public and private sector prison operations demonstrated that average per diem costs in state operated prisons have ranged been between 7 percent to 26 percent higher than the average costs of private facility operation since 1997, or approximately 15 percent per year on average. According to the LBB analysis, the average daily cost of operation in privately operated prisons has never exceeded the average costs in government-run prisons since 1997. In 2010, operating costs per inmate per day in public and private sector prisons in Texas were \$44.12 and \$37.47, respectively, representing cost savings of over 15 percent that year in private facilities.<sup>4</sup>

A 2002 Reason Foundation study reviewed 28 academic and government studies on privatization and found that private corrections companies saved up to 23 percent in daily operating costs over comparable government-run systems. The studies reviewed support a conservative estimate that private facilities offer cost savings of between 10 percent and 15 percent over their public sector counterparts. A 2009 Avondale Partners survey of 30 state correctional agencies found that in states currently using private sector services, the average daily savings for partnership prisons was 28 percent.<sup>5</sup>

Florida's 7 existing private prisons contracts and former contracts were procured for their ability to achieve and maintain costs at least 7 percent below DOC's average per diem cost. Florida law requires the Office of Program Policy Analysis and Government Accountability (OPPAGA) to evaluate private vendors' performance in operating the state's privately operated prisons. The

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<sup>4</sup> The Reason Foundation. *Annual Privatization Report 2010: Corrections*, March 2011.

<sup>5</sup> *Id*

inclusion of private prisons within Florida's correctional system provides a comparison for evaluations of the quality and cost of public corrections.

For those vendors contracted by DMS, s. 957.11, F.S., directs OPPAGA to evaluate the performance of the private contractor at the end of the contract, and make recommendations to the Legislature on whether to continue the contract.

By comparison, s. 944.714, F.S., sets no specified percentage, but requires facilities contracted by the Department of Corrections to be operated at a "substantial savings." Similarly, for those vendors contracted by the Department of Corrections, s. 944.719, F.S., requires OPPAGA to conduct a performance audit of the private vendor and report to the Legislature the third year following the contract award.

In a study conducted by OPPAGA in 2010<sup>6</sup> on the performance of the contracts for Bay, Moore Haven, Graceville, and Gadsden private prisons, each with contract terms expiring on June 30, 2010, OPPAGA noted the following cost savings:

- Bay Correctional Institution – 7.5 percent
- Moore Haven Correctional Institution – 12.8 percent
- Graceville Correctional Institution – 22.1 percent
- Gadsden Correctional Institution – 28.3 percent

In the OPPAGA study conducted in 2009<sup>7</sup> on contract performance for South Bay and Lake City private prisons, the following cost savings were reported:

- South Bay Correctional Institution – 14 percent
- Lake City Correctional Institution – 11 percent

In each of the OPPAGA studies on the private prisons, contract performance was determined to be satisfactory. Both reports noted three areas that contributed to the cost savings achieved by the private prisons: reduced retirement benefits paid to private correctional officers, lower administrative costs, and lower costs for inmate rehabilitative programs such as adult education, vocational training and substance abuse treatment.

### **General Requirements for Bid Proposals and Contracts for Privatization**

Section 287.057, F.S., describes the process for agencies to procure commodities or contractual services in excess of \$35,000. It requires the use of competitive solicitation processes as described in the section, provides exceptions to their use, and details other requirements relating to contracting.

*Types of competitive solicitations:* The preferred method of competitive solicitation under s. 287.057, F.S., is the invitation to bid (ITB). An ITB must be used when the agency can specifically define the scope of work for which the service.

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<sup>6</sup> Office of Program Policy Analysis and Government Accountability *Research Memorandum: Private Prisons Exceed Savings Requirements*, April 20, 2010.

<sup>7</sup> Office of Program Policy Analysis and Government Accountability *Research Memorandum: Private Prisons Exceed Savings Requirements; Need to Improve Prison Security and Inmate Family Contact Practices*, April 17, 2009.

If it is not practicable to use an ITB, an agency can issue a request for proposals (RFP) to procure the commodity or service. The agency must use an RFP if the purposes and uses for which the commodity or service being sought can be specifically defined and necessary deliverables can be identified. Unlike an ITB, vendors responding to an RFP may propose various combinations or versions of commodities or services to meet the requested specifications. All RFPs must include a description of the contractual services sought. The relative importance of price and other evaluation criteria, and a statement that the agency contemplates renewal if applicable.<sup>8</sup> Criteria for evaluation of proposals must include the bidder's price for the base contract, its price for each year of any contemplated renewals, and the total cost for each year including renewals.

The third type of competitive solicitation described in s. 287.057, F.S., is the invitation to negotiate (ITN). An ITN is used by an agency to determine the best method for achieving a specific goal or solving a particular problem. In using an ITN, the agency identifies one or more vendors with which it can negotiate for the best value. An ITN cannot be used if unless it is not practicable to use either an ITB or an RFP.

An agency may negotiate on the best terms and conditions if less than two responsive bids, proposals, or replies to a solicitation are received.<sup>9</sup>

*Extensions and renewals:* A contract can be renewed for the longer of 3 years or the length of the original contract, subject to the same terms and conditions as the original contract.<sup>10</sup> An agency must submit a written report concerning contract performance to the Governor, the President of the Senate, and the Speaker of the House of Representatives at least 90 days before execution of the renewal or amendment to a contract that has an original term value of more than \$10 million for the outsourcing of a service or activity, if a contract amendment resulted in a longer term or increased payments.<sup>11</sup>

*Other requirements:* Section 287.057 also sets forth a number of other requirements including minority business enterprise participation goals;<sup>12</sup> appointment of contract managers and contract administrators;<sup>13</sup> designation of and qualifications for personnel conducting evaluations and negotiations for contracts in excess of \$195,000;<sup>14</sup> avoidance of conflicts of interest;<sup>15</sup> and prohibition of unauthorized contact by a vendor with any employee or officer of the executive or legislative branch concerning any aspect of the solicitation during the procurement process.<sup>16</sup>

### **Specific Requirements for Privatization of Corrections Activities**

Chapter 944, F.S., has a number of provisions concerning contracts with private vendors for the operation of correctional facilities.

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<sup>8</sup> Section 287.057(1)(b)2., F.S.

<sup>9</sup> Section 287.057(5), F.S.

<sup>10</sup> Section 287.057(12), F.S.

<sup>11</sup> Section 287.057(13), F.S.

<sup>12</sup> Sections 287.057(5) – (8) and (11), F.S.

<sup>13</sup> Sections 287.057(14) and (15), F.S.

<sup>14</sup> Section 287.057(16), F.S.

<sup>15</sup> Sections 287.057(17) and (19), F.S.

<sup>16</sup> Section 287.057(23), F.S.

Section 944.105, F.S., authorizes the Department of Corrections to enter contracts with private vendors for the operation and maintenance of correctional facilities and includes the following:

- A prohibition against entering into such a contract unless it:
  1. Offers a substantial savings to the department, as determined by the department in consultation with the Auditor General. The cost savings calculation must include all cost components that contribute to the inmate per diem, including administrative costs associated with central and regional office administration;
  2. Provides for the same quality of services as that offered by the department; and,
  3. The legislature has made a specific appropriation for the contract.<sup>17</sup>
- A requirement that the contractor be liable in tort with respect to the care and custody of inmates under its supervision. Section 944.713, F.S., requires the contractor to carry adequate liability insurance.<sup>18</sup>
- A provision that an inmate's willful failure to remain within the supervisory control of the private contractor constitutes an escape punishable under s. 944.40, F.S.,<sup>19</sup> which prohibits escape of prisoners. This provision is also incorporated in s. 944.40, F.S., itself.
- Provisions regarding authorized use of force, training in the use of force and use of firearms, and qualifications and certification of private correctional officers.<sup>20</sup>
- A requirement for the department to comply with s. 216.311, F.S., concerning unauthorized contracts in excess of appropriations, and with s. 287.057, F.S..<sup>21</sup>
- A requirement for the department to promulgate rules pursuant to Chapter 120 specifying criteria for such contractual arrangements.<sup>22</sup>

Sections 944.712 through 944.718, F.S., prohibit DOC from awarding a contract to a private contractor that fails to meet any of the following requirements:

- Possession of the qualifications, management experience, and financial ability to carry out the terms of the contract.<sup>23</sup>
- Provision for adequate liability insurance, including liability for violations of an inmate's civil rights. The contractor must indemnify the state for all claims, and is responsible for paying any claim or judgment up to \$100,000 per individual or \$200,000 per occurrence.<sup>24</sup>
- Provision of a level and quality of programs that is at least equal to programs provided at similar facilities operated by DOC for similar types of inmates, and that are provided at a cost that offers substantial savings for the state.<sup>25</sup>
- Employment of private correctional officers who are certified at the contractor's expense as having met the minimum qualifications for correctional officers set forth in s. 943.13, F.S..<sup>26</sup>
- Operation of the correctional facility in accordance with or higher than standards established by the American Correctional Association and approved by the department at the time of the

<sup>17</sup> Section 944.105(1), F.S.

<sup>18</sup> Section 944.105(2), F.S.

<sup>19</sup> Section 944.105(3), F.S.

<sup>20</sup> Sections 944.105(4), (5) and (7), F.S.

<sup>21</sup> Section 944.105(6), F.S.

<sup>22</sup> Ibid.

<sup>23</sup> Section 944.712, F.S.

<sup>24</sup> Section 944.713, F.S.

<sup>25</sup> Section 944.714(1), F.S.

<sup>26</sup> Section 944.714(2), F.S.

contract, or any higher standard mandated in the settlement of litigation challenging the constitutional conditions of confinement to which the department is a named defendant. The contractor must also comply with all federal and state constitutional requirements, federal, state, and local laws, department rules, and all court orders.<sup>27</sup>

- Incarceration of all inmates assigned by the department as specified in the contract, with all inmates remaining in the legal custody of the department. The department is prohibited from exceeding the maximum capacity designated for the facility in the contract.<sup>28</sup>
- Providing the department with a detailed plan for assuming control of the facility upon termination of the contract or in the event of bankruptcy or financial insolvency.<sup>29</sup>

Section 944.717, F.S., prohibits conflicts of interest by the contractor and solicitation of a benefit from the contractor by employees or agents of the department or any other agency that exercises any functions or responsibilities in the review or approval of a private correctional facility contract or the operation of a private correctional facility

Section 944.718, F.S., permits the department to withdraw a request for proposals to privatize operations of corrections facilities at any time and for any reason.

Section 944.719, F.S., requires the department to adopt rules for contracting for and operating private correctional facilities. It also requires the appointment of contract monitors by the department and provides for the contractor to allocate a work area for the contract monitor and provide access to necessary documents and materials. Finally, it requires OPPAGA to conduct a performance audit and to review the financial audit of the private entity and report its findings to the legislature by February 1 of the third year following the contract award.

### **Requirements for a Business Case**

Section 287.0571(4), F.S., requires an agency to complete a business case for any outsourcing or privatization project that has an expected cost in excess of \$10 million within a single fiscal year and lists the components that need to be included the business case for outsourcing or privatizing services. The business case must be included as supporting documentation for the agency's legislative budget request (LBR) for the proposed privatization and be made available as part of the solicitation, but is not subject to challenge. The statute requires a number of components to be contained in the business case, including the following:

- A description of the service to be outsourced and any supporting legal authority for outsourcing.
- A description and analysis of the agency's current performance, if the agency is currently performing the service or activity.
- The desired goals to be achieved by outsourcing and the rationale for those goals.
- Citation to existing or proposed legal authorization for the outsourcing.

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<sup>27</sup> Section 944.714(3), F.S.

<sup>28</sup> Section 944.715, F.S.

<sup>29</sup> Section 944.716, F.S.

- Options for achieving the desired goals or objectives along with the advantages or disadvantages of each, including at least one option for the agency to continue providing the service.
- A description of the current market for the services to be outsourced.
- A cost-benefit analysis.
- Current and expected performance standards.
- Key benchmarks and timeframes.
- A contingency plan in the event of contractor nonperformance.
- An agency transition plan.

Section 287.0571(5), F.S., provides specific elements that must be addressed in a contract with a vendor for an outsourcing or privatization, including:

- Each of the services and deliverables.
- Quantifiable service requirements and performance objectives.
- Provisions to identify costs, payment terms and schedules.
- A transition plan.
- Performance standards.
- Monitoring and reporting requirements.
- Any penalties for failure to meet performance standards.

### **Legislative Budget Request Requirements**

Section 216.023, F.S., outlines the processes each agency must follow in developing its LBR. The law requires the LBR to include, among other items, information on expenditures for three fiscal years, details on trust funds and fees, and an issue narrative justifying changes in amounts and positions requested. In addition, the LBR must include supporting information, including applicable cost-benefit analyses, business case analyses, performance contracting procedures, service comparisons, and impacts on performance standards for any request to outsource or privatize agency functions. The cost-benefit and business case analyses must include an assessment of the impact on each affected activity.

For projects that exceed \$10 million in total cost, the LBR must include the statutory reference for the existing policy or the proposed substantive policy that establishes and defines the project's governance structure, planned scope, main business objectives that must be achieved, and estimated completion timeframes.

### **2011 Privatization Efforts**

On May 26, 2011, Governor Scott signed into law the 2011-2012 General Appropriations Act Appropriations Act (Chapter 2011-69, Laws of Florida), which included proviso language requiring DOC to issue one or more RFPs for the management and operation of the correctional facilities and assigned correctional units, including annexes, work camps, road prisons and work release centers operated by the department, in Region IV. Two Region IV facilities, Glades Correctional Institution and Hendry Correctional Institution were designated for closure, and therefore excluded from the procurement.

The department released the RFP on July 25, 2011. Although the proviso required a contract commencement date of no later than January 1, 2012, several events affected the RFP timeline.

Prior to the RFP's release, the Florida Police Benevolent Association (FPBA) and several correctional officers filed a complaint for declarative judgment and injunctive relief in the Second Judicial Circuit<sup>30</sup>. The complaint sought to stop the department from proceeding with the procurement process. Generally, the plaintiffs alleged that the proviso required DOC to conduct the procurement process to privatize the operation and maintenance of correctional facilities in Region IV in violation of existing statutes. The plaintiffs further maintained that the Florida Constitution requires such direction to be given through passage of a general law, rather than by means of proviso in an appropriations act.

On September 8, 2011, the plaintiffs filed a motion for summary judgment.<sup>31</sup> The circuit court held a hearing on the motion, and subsequently entered a judgment declaring the proviso to be unconstitutional under Article III, Section 6 (which limits all laws to a single subject) and Article III, Section 12 (which prohibits amendments or changes to substantive law on subjects unrelated to appropriations) of the Florida Constitution. In doing so, the court noted that the proviso:

[C] hanges the statutory process for privatizing prison facilities and directs DOC to replace state employees at particular prisons with private operators, and is not rationally related to the appropriations for DOC generally.

The circuit court made it clear at the outset that:

[T] he issue before it is not whether the prisons in Florida may be privatized. The answer to that question is yes, and was already answered by the enactment of Section 944.105, F.S., which gives the Department of Corrections (DOC) the authority to initiate and enter into contracts with private vendors for the operation and maintenance of correctional facilities and the supervision of inmates.

The court, citing *Dickinson v. Stone*, 251 So.2d 268 at 273 (Fla. 1971), also noted that:

[I] f it is the will of the Legislature to itself initiate privatization of Florida prisons, as opposed to DOC, the Legislature must do so by general law, rather than 'using the hidden recesses of the General Appropriations Act.

The Attorney General filed a Notice of Appeal on October 31, 2011, which had the effect of automatically staying the circuit court's order.<sup>32</sup> The department resumed the procurement process. However, the circuit judge issued an order vacating the automatic stay on November 5, and required DOC to discontinue any further procurement activities relating to Region IV

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<sup>30</sup> *Baiardi v. Tucker*, Case No. 2011-CA-68 (Fla 2<sup>nd</sup> Circ. Ct.) (2011).

<sup>31</sup> A motion for summary judgment must be granted if the court determines that "the pleadings and summary judgment evidence on file show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 1.510(c), Florida Rules of Civil Procedure.

<sup>32</sup> Rule 9.310(b)(2), Florida Rules of Appellate Procedure.

pursuant to the provisions in the General Appropriations Act. At present, the appeal of the order declaring the proviso unconstitutional is pending in the First District Court of Appeals.

### **III. Effect of Proposed Changes:**

SPB 7172 creates a new s. 944.7115, F.S., that requires the department to issue one or more requests for proposals (RFP) to privatize the management and operation of all correctional facilities that are operated by the department in the 18 southernmost counties within the DOC's Southern Florida Region. The designated area includes Manatee, Hardee, Indian River, Okeechobee, Highlands, St. Lucie, Desoto, Sarasota, Charlotte, Glades, Martin, Palm Beach, Hendry, Lee, Collier, Broward, Miami-Dade, and Monroe counties. The requirement does not include any correctional facilities within the area that are already privately operated, and also excludes any facility that has been closed or scheduled for closure before June 30, 2012.

In requiring the department to conduct the procurement through use of the RFP process, the bill exempts the department from the requirement in s. 287.057(1)(b)1., F.S., that requires an agency to determine and specify in writing the reasons that procurement by invitation to bid is not practicable; the remaining provisions of s. 287.057, F.S., would apply.

The bill specifies it is effective upon becoming a law and requires the department to issue the RFP or RFPs within 30 days after the effective date. Responsive proposals must be submitted no later than 30 days after issuance of the RFP or RFPs.

#### **Requirement for Cost Savings**

Any RFP issued pursuant to the bill must include a requirement that the total cost of a responsive proposal during the first year of the contract must result in actual savings of 7 percent or more to the state over the costs that were incurred by the state for provision of services at the included correctional facilities during Fiscal Year 2010-2011. The department must determine the baseline costs by using the average daily population (ADP) and the direct and distributed inmate per diem cost for each correctional facility and assigned correctional unit during FY 2010-2011. However, the bill provides that this number must be adjusted to remove the following components:

- The amount of the 3 percent retirement contribution that is now required of state employees under Chapter 121, F.S. The state was required to pay that amount during FY 2010-2011, but would not be required to do so if it continued to operate the facilities.
- Inmate medical costs, because inmate medical services are to be provided pursuant to a separate contract.
- Direct and personnel costs associated with inmate classification, because the bill requires activities relating to classification to remain under the department's supervision and direction as required by law.

This requirement for a 7 percent cost savings is more specific than the current requirement for "substantial savings" that is currently required by s. 944.105(1)(a), F.S. However, it is consistent with the 7 percent savings requirement in s. 957.07, F.S., that is required of private facilities that are operated under contract with the Department of Management Services and the proviso in the 2011-2012 General Appropriations Act pertaining to the privatization of facilities in Region IV. Also, s. 944.714, F.S., still requires that the level and quality of programs provided by a privately

operated correctional facility must be at least equal to programs offered by the department at a similar facility, and that it must offer a substantial savings as determined by a private accounting firm selected by the department.

The bill permits the department to include a provision for an increase in the total cost in subsequent years of the contract of not more than the percentage increase in the Consumer Price Index, contingent upon legislative appropriation. The bill also provides that provisions of the RFP relating to the cost savings required by the bill are not subject to challenge in a protest of the RFP specifications, notwithstanding the provisions of s. 120.57(3), F.S., regarding bid protests.

Each selected contractor must operate each correctional facility and assigned correctional unit at capacities set forth in s. 944.023, F.S., which is an existing statute that includes certain space and occupational requirements. Furthermore, each facility's ADP and medical and psychological grade population percentages are to remain substantially unchanged from the ADP for FY 2010-2011.

The bill requires the department to prepare and submit proposed budget revisions demonstrating the required 7% savings to the Legislative Budget Commission after the department has issued its notice of intent to award a contract, resolved any bid protests, and concluded negotiation of a contract with the successful bidder or bidders. After approval by the Legislative Budget Commission, the department must enter into a contract with the winning bidder or bidders.

The department is not required to comply with s. 216.023, F.S., which relates to LBRs, until after it is required to submit its LBR for the first fiscal year that begins after the privatization required by the bill is completely implemented. This exemption only applies with respect to services required to be privatized by the bill.

The bill provides that funds from canteens, subsistence payments, and other participating accounts at the correctional facilities must be remitted to the General Revenue Fund. This is the existing process for facilities that are operated by the department. However, in currently operating private facilities, these funds are required to be remitted to the Privately Operated Institutions Inmate Welfare Trust Fund pursuant to ss. 944.72 and 945.215, F.S. The bill specifies that those statutes will not apply to facilities operated pursuant to the requirements of the bill.

### **Additional Exceptions to Current Statutes**

In addition to the exceptions previously addressed in this analysis, the bill makes the following existing statutes inapplicable to the RFP or RFPs or any contract that is authorized by its provisions:

- Section 944.105(1), F.S., authorizes the Department of Corrections to enter contracts with private vendors for the operation and maintenance of correctional facilities. This statute provides that contracts with private vendors for the operation and maintenance of correctional facilities must:
  - (a) Offer a substantial savings as determined by the department, with the calculation determined by certain factors set forth in the statute and calculated by the department in

consultation with the Auditor General. As previously discussed, the bill requires a 7 percent cost savings and specifies the basis for calculating costs.

(b) Provide for the same quality of services as that offered by the department.

Section 944.714(1), F.S., which would still be applicable, requires that the services must be at least equal to those provided by the department.

(c) Have a specific appropriation from the legislature.

- Section 944.105(6), F.S., which:

(a) Specifies that the provisions of ss. 216.311 and 287.057, F.S. apply to all contracts between the department and any private vendor operating and managing correctional facilities. It is not necessary to state that these statutes apply because they apply to all procurements and contracts entered into by state agencies unless a specific exemption applies.

(b) Requires the department to promulgate rules pursuant to chapter 120 specifying criteria for such contracts. The bill gives the department the authority to make rules that are necessary to administer the provisions of the bill, but the department retains the discretion to determine whether its existing rules are adequate. In accordance with this approach, Section 2 of the bill repeals s. 944.719(1), F.S., which requires the department to adopt rules relating to privately operated correctional institutions.

- Section 944.105(7), F.S., which relates to the certification and qualifications of correctional officers at privately operated correctional institutions. However, s. 944.714(2), F.S., would apply and requires all private correctional officers employed by a private vendor to be certified at the vendor's expense as having met the minimum qualifications for correctional officers that are set forth in s. 943.13, F.S.

### **Specified Contract Terms**

The bill specifies certain terms that must be included in any contract resulting from the RFP.

These are:

- A requirement for compliance with all applicable federal, state, and local laws and all rules adopted by the department.
- The requirement for 7% cost savings.
- Performance measures and levels of expected performance for the contractor. These are set forth in the bill, are the same as those currently used by the department for evaluation of its own operations and the same as the performance measures included in the proviso in the 2011-2012 General Appropriations Act. The contract must require the contractor to provide the department with information concerning each performance measure for each separate correctional facility and assigned correctional unit for each month, calendar quarter, and year during the contract term, in a format specified by the department. The bill includes performance measures that apply to all facilities, and specific, additional performance measures applicable only to work release centers. Also, the department can add other performance measures to those specified in the bill.

### **Additional Requirements**

The bill requires the department to provide reports regarding contractor performance to the chairs of the legislative appropriations committees.

The bill also requires that current DOC employees at the correctional facilities being privatized be given first preference for continued employment by the contractor(s) selected as a result of the RFP(s) and the DOC must make reasonable efforts to find suitable job placements for those employees who wish to continue to be employed by the state. A similar provision is included in s. 287.0571(5), which applies to the privatization proposed in the bill and applied under the proviso contained in the 2011-2012 General Appropriations Act.

#### **IV. Constitutional Issues:**

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

#### **V. Fiscal Impact Statement:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Approximately 3,800 correctional officers and other staff are employed by DOC in Region IV. As these facilities are turned over to a private company, it is likely that many of these employees will be hired by the company(s) awarded the contract(s). However, these positions are unlikely to have the same level of benefits as the current state positions. Correctional officers that seek to remain state employees may have opportunities to be reassigned to positions in other regions of the state.

C. Government Sector Impact:

The annual operating costs for the Region IV correctional facilities total approximately \$268 million. A 7 percent annual cost savings would generate over \$18 million in annual recurring savings. However, based on reported savings on the State's other private prison contracts, savings could be greater.

#### **VI. Technical Deficiencies:**

Lines 170 and 172 each include an extraneous "are" that should be deleted.

Lines 205-206 establish a performance measure for compliance by individuals “without contact orders.” This should be reworded to indicate that it measures compliance by individuals with “no-contact orders”.

**VII. Related Issues:**

None.

**VIII. Additional Information:**

- A. Committee Substitute – Statement of Substantial Changes:  
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

**CS by the Rules Committee on January 23, 2012:**

The committee substitute makes the following changes when compared to the bill as filed:

- Requires certification by FDLE of private correctional officers at the contractor’s expense under s. 943.1395, F.S., in accordance with the minimum qualifications for corrections officers established in s. 943.13, F.S. In addition, this change requires that all other employees of the contractor receive same quality and quantity of training provided to employees at state operated correctional facilities and that the training be provided at the contractor’s expense. This amendment inserts the text of s. 944.105(7), F.S., as a requirement for the contract between a private contractor and DOC.
- Corrects grammar with respect to several of the performance measures required to be included in a contract between the DOC and a contractor.
- Corrects technical deficiencies.

- B. Amendments:

None.