HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCB JUAS 12-05 Correctional Privatization
SPONSOR(S): Justice Appropriations Subcommittee
TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Justice Appropriations Subcommittee	10 Y, 5 N	McAuliffe	Jones Darity

SUMMARY ANALYSIS

The Fiscal Year 2011-2012 General Appropriations Act contained proviso to privatize all Department of Corrections (DOC) facilities in South Florida. The proviso required the DOC to issue a request for proposals (RFP) for the operation of those facilities and bring the successful bid before the Legislative Budget Commission for approval of the contract. The proviso was subsequently challenged in court.

On September 30, 2011, the circuit court ruled that the proviso relating to privatization to be unconstitutional in violation of Article III, Sections 6 and 12 of the Florida Constitution. The court held that the proviso changed the statutory process for privatizing prison facilities set forth in s. 944.105, F.S. and other sections of statute. The order enjoined the department "from taking further steps to contract under the proviso or otherwise implement the privatization of the state correctional facilities in the 18 counties pursuant to proviso or otherwise." On October 31, 2011, the Attorney General filed a Notice of Appeal. The bill:

- Requires the Department of Management Services to competitively procure by single or multiple solicitations for the operation of correctional facilities and assigned correctional units 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, and provides that the contract must require a seven percent savings compared to Fiscal Year 2011-2012 costs. The procurement may not include inmate health services, the South Florida Reception Center (SFRC) and the SFRC South Unit. The procurement does include all other SFRC satellite facilities.
- Requires the Department of Management Services to issue the competitive solicitation no later than 60 days after the effective date of this act, and that proposals must be submitted no later than 60 days after the issuance of the solicitation.
- Includes numerous performance measures which must be included in the solicitation documents.
- Requires DOC to develop and remit a transition plan and recommended revisions to its operating budget to the Legislative Budget Commission. DOC also must submit a cost-benefit analysis which delineates their current costs of providing the services and the savings that would be generated by the transition plan yielding a minimum annual savings of seven percent.
- Requires that any contract between DMS and a contractor for the operation of prisons in South Florida must specifically provide that the contract is contingent upon approval of the Legislative Budget Commission.
- Requires the Auditor General to review DOC's 2011-2012 fiscal year expenditures and certify the savings prior to DMS issuing an intent to award. The contract may commence only after the Auditor General certification and the contract has been approved by the Legislative Budget Commission.
- Provides that current DOC employees affected by the privatization must be given first preference for employment by the selected contractor, and DOC must make reasonable efforts to find suitable job placements for those employees that wish to continue to be employed by the state.

This bill provides any contract awarded must include pricing that achieves no less than a seven percent savings for all operations and maintenance of each correctional facility and assigned correctional units, excluding inmate health services, from the 2011-2012 fiscal year expenditures for such facility or facilities. The total cost savings from privatization cannot be determined definitively until the Auditor General certifies that the bid demonstrates at least a seven percent savings compared to DOC's Fiscal Year 2011-2012 expenditures. See "FISCAL COMMENTS."

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

<u>Background</u>

South Florida Region

DOC currently operates 11 major institutions as well as six work camps, one reentry center, and three road prisons in South Florida, formerly referred to as Region IV. The DOC has approximately 3,800 employees in this region, with total operating costs of $418.7 million for Fiscal Year 2010-2011. Each major institution in this region 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. 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)
- South Florida Reception Center (male; close custody; 2,235)

The DOC plans on closing Broward and Indian River Correctional Institutions as part of the department's prison consolidation plan.

Department of Management Services

Chapter 957, F.S., charges the Department of Management Services, Bureau of Private Prison Monitoring (Bureau) with issuing contracts, establishing operating standards, and monitoring compliance of the state's private prisons. The Bureau is responsible for entering into contracts for the design, construction, and operation of privately operated correctional facilities. The Bureau may not enter into a contract unless it determines that the contract or series of contracts in total for the facility will result in cost savings to the state of at least seven percent under the DOC's costs. Once the savings is determined, the Bureau enters into a contract with a private vendor to operate the facility for an agreed daily per diem. The per diem includes the cost of all facility operations and the cost of the contract manager employed by DMS. The Bureau currently oversees the operational contracts for seven facilities: Bay, Blackwater River, Gadsden, Graceville, Lake City, Moore Haven, and South Bay correctional facilities.

Section 957.04(1) and (2), F.S., provides that all contracts entered into for the operation of private correctional facilities must maximize the cost savings of such facilities and also must:

- Be negotiated with the firm found most qualified.
- Indemnify the state and the department, including their officials and agents, against any and all liability, including, but not limited to, civil rights liability.
- Require that the contractor seek, obtain, and maintain accreditation by the American Correctional Association for the facility under that contract.
- Require that the proposed facilities and the management plans for the inmates meet applicable American Correctional Association standards and the requirements of all applicable court orders and state law.
- Establish operations standards for correctional facilities subject to the contract.

- Require the contractor to be responsible for a range of dental, medical, and psychological services; diet; education; and work programs at least equal to those provided by the department in comparable facilities.
- Require the selection and appointment of a full-time contract monitor. The contract monitor must be appointed and supervised by the Department of Management Services. The contractor is required to reimburse the Department of Management Services for the salary and expenses of the contract monitor.
- Be for a period of three years and may be renewed for successive two-year periods thereafter. However, the state is not obligated for any payments to the contractor beyond current annual appropriations.

Section 957.05, F.S., provides that each contractor operating private correctional facilities is liable in tort with respect to the care and custody of inmates under its supervision and for any breach of contract, and sovereign immunity may not be raised by a contractor.

The section also provides that employees of such contractors must meet or exceed the requirements for DOC employees or the training requirement of the American Correctional Association. Correctional officers employed by DOC are all certified by the Criminal Justice Standards and Training Commission.

OPPAGA Private Prison Review

Florida's seven existing private prisons contracts and former contracts were procured for their ability to achieve and maintain costs at least seven 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. 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.

In a study conducted by OPPAGA in 2010[1] 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[2] 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.

2011-2012 Privatization of Region IV

[1] Office of Program Policy Analysis and Government Accountability Research Memorandum: Private Prisons Exceed Savings Requirements, April 20, 2010.
[2] 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.

The Fiscal Year 2011-2012 General Appropriations Act contained proviso to privatize all Department of Corrections (DOC) facilities in South Florida. The proviso required:

- Adherence to all applicable federal, state and local laws and DOC rules;
- DOC to continue to classify inmates;
- Each facility's average daily population and medical and psychological grade population percentages will remain the same as 2009-10;
- A contract commencement date of January 1, 2012;
- The contract to specify performance measures and levels of expected performance by the contractor;
- DOC to remit a transition plan and recommended revisions to its operating budget to the Legislative Budget Commission by December 1, 2011;
- DOC to submit a cost-benefit analysis showing a savings of at least seven percent.

The proviso provided that upon approval by the Legislative Budget Commission DOC could award the contract.

On July 13, 2011 a complaint for declaratory judgment and injunctive relief was filed in the Second Judicial Circuit. [3] The complaint alleged that the proviso relating to privatization violated Article III, Section 12 of the Florida Constitution which provides that "[l]aws making appropriations for salaries of public officers and other current expenses of the state shall contain provisions on no other subject." According to the complaint, "[c]ontrary to Florida Constitutional prohibitions against the enactment and change of substantive law by way of an appropriations act, the subject proviso language attempts to enact or alter substantive law and legal standards that control or should control the privatization of any state correctional facility."

On September 30, 2011, the court issued a final declaratory and injunctive judgment which declared the proviso relating to privatization to be unconstitutional in violation of Article III, Sections 6[4] and 12 of the Florida Constitution. The court held that the proviso changed the statutory process for privatizing prison facilities set forth in s. 944.105, F.S. and other sections of statute. The order enjoined the department "from taking further steps to contract under the proviso or otherwise implement the privatization of the state correctional facilities in the 18 counties pursuant to proviso or otherwise." On October 31, 2011, the Attorney General filed a Notice of Appeal.

<u>Effect of the Bill</u>

The bill provides that the Department of Management Services (DMS) in consultation with the Department of Corrections must competitively procure by single or multiple solicitations, the management and operation, exclusive of inmate health services[5], of the correctional facilities and assigned correctional units, including annexes, work camps, road prisons and work release centers currently operated by the Department of Corrections 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 excluding any correctional facility or assigned correctional unit that has been closed or scheduled for closure before June 30, 2012. The procurement will exclude the South Florida Reception Center (SFRC) and the SFRC South Unit; however, the procurement will include all satellite facilities associated with the SFRC. The DOC will continue to operate the SFRC and the SFRC South Unit.

The bill requires DMS to issue competitive procurement or competitive procurements no later than 60 days after the effective date of this act which is July 1, 2012. DMS must require that any proposal submitted in response to a such procurements must be submitted no later than 60 days after the issuance of the competitive procurement.

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[3] James Baiardi, John McKenna, Shanea Maycock and Florida Police Benevolent Association, Inc. v. Edwin Buss, In His Capacity as The Secretary of the Department of Corrections. Case No: 2011-CA-1838

[4] Article III, Section 6 provides in part that "[e]very law shall embrace but one subject and matter properly connected therewith".

[5] DOC has issued a request for proposals to privatize inmate medical services statewide including Region IV.

The bill provides that, notwithstanding s. 957.07, F.S.,[6] any contract awarded must include pricing that achieves no less than a seven percent savings for all operations and maintenance of each correctional facility and assigned correctional units, excluding inmate health services, from the 2011-2012 fiscal year expenditures for such facility or facilities. Prior to issuing an intent to award, the Auditor General must certify that the successful bidder or bidders have achieved at least seven percent savings from DOC's 2011-2012 fiscal year expenditures. The bill provides a contract may not be awarded without the Auditor General's certification. The total costs to be incurred by the state in the second or subsequent years of the contract resulting from the procurements may increase by not more than the percentage increase in the per diem of state operated facilities; however, any such increase is contingent upon appropriation by the Legislature.

At a minimum, the contract must require adherence to all applicable federal, state and local laws, as well as all rules adopted by DOC. The contract must also specifically provide that the contract is contingent upon approval of the Legislative Budget Commission.

The bill provides the privatized facilities must continue to operate at capacities set forth in s. 944.023, F.S.[7] Funds received for these institutions from canteens, subsistence payments, and any other participation accounts will continue to be remitted to the General Revenue Fund. All activities regarding the classification of inmates will remain under the Department of Correction's supervision and direction as required by current law. Each facility's medical and psychological grade population percentages must remain substantially unchanged from those calculated for Fiscal Year 2011-2012.

The bill includes numerous performance measures which must be included in the procurement documents, and requires 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 term of the contract, in the format specified by the department.

If after engaging in the competitive solicitation process, DMS determines that the process has yielded responses that meet all the requirements of the bill, DMS may execute the contract, which is contingent upon approval of the Legislative Budget Commission. The contract may commence only after the Auditor General has certified the savings and the contract has been reviewed and approved by the Legislative Budget Commission.

The bill also provides DOC must develop and remit a transition plan and recommended revisions to its operating budget to the Legislative Budget Commission. The department also must submit a cost-benefit analysis which delineates the department's current costs of providing the services and the savings that would be generated by the transition plan yielding a minimum annual savings of seven percent. Additional budget amendments may be submitted during the 2012-2013 fiscal year as necessary for the proper alignment of budget and positions.

The bill provides that current employees of the DOC affected by the privatization must be given first preference for employment by the selected contractor, and DOC must make reasonable efforts to find suitable job placements for those employees that wish to continue to be employed by the state.

B. SECTION DIRECTORY:

Section 1. Provides for the privatization of prisons in certain South Florida Counties.

Section 2. Provides an effective date of July 1, 2012.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

[6] Section 957.07, F.S., provides that contracts for the private operation of a prison must save at least seven percent over the public provision of a similar facility, and such savings must be certified by the Auditor General. The bill requires the Auditor General to certify the savings related to actual 2011-2012 expenditures, which would not apply to the requirements of s. 957.07, F.S.

[7] Section 944.023, F.S., provides detailed design capacity factors that DOC must comply with.

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   See FISCAL COMMENTS.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

This bill will create opportunities for private prison providers to expand their current business in Florida.

D. FISCAL COMMENTS:

Operating costs in Fiscal Year 2010-2011 for DOC, currently the most up-to-date figures available for DOC's expenditures, in the affected South Florida Counties was $418.7 million. However, that number has not been adjusted for prison closures, inmate health services procurement, state employee retirement contributions, and reductions to DOC's budget that have occurred since 2010.

Savings from privatization of the South Florida region can only be determined using the true costs of DOC to operate those facilities. In order to have operational costs that reflect the costs for DOC, the regions proportional share of the state employee retirement contribution, and the 2011-2012 reductions to DOC's budget would have to be determined. In the 2010-2011 fiscal year, DOC closed three prisons (Glades, Hendry and Brevard) in the region, and plans to close more this fiscal year (Broward and Indian River). Further, DOC is currently in the process of accepting bids from vendors to provide inmate health services in the South Florida Region (in addition to the rest of the state prison system). Until that procurement is concluded, the vendors bidding on the operation of the facilities in that region must provide a bid that does not include providing inmate health services. Therefore, the operating budget for the region will have to be adjusted to back out the costs of providing inmate health services.

This bill provides any contract awarded must include pricing that achieves no less than a seven percent savings for all operations and maintenance of each correctional facility and assigned correctional units, excluding inmate health services, from the 2011-2012 fiscal year expenditures for such facility or facilities.

The following is an estimation of the Fiscal Year 2011-2012 costs of DOC to operate the South Florida region:

2010-2011 DOC South Florida Operation Costs	$ 418,713,514	
Deductions		Comments
Health Services Costs	(89,712,272)	Actual Health Services costs for the region
Retirement Contribution	(11,679,672)	Actual 3% Retirement Contribution from the region
Classification in Region 4	(3,515,561)	Actual DOC costs for classification for the region
South Florida Reception Center	(40,083,073)	Actual operating costs for SFRC. The bill provides DOC will continue to operate.
Brevard	(12,948,955)	Actual facility operating costs for closed or closing facilities
Hendry	(7,672,730)	
Glades	(23,437,641)	
Indian River	(8,027,931)	
Broward	(2,523,371)	
Proportional Share of 11-12 DOC Reductions	(12,541,920)	Estimation of the regions share of 2011-12 reductions, less health services. The Region represent 22% of state operation costs. This calculation is 22% of the relevent reductions. This is an estimate that will need to be refined.
Adjusted Operation Costs	**$ 206,570,388**	

These calculations are only an approximation of the adjusted costs for operating the South Florida region facilities for Fiscal Year 2011-2012 and will need to be refined. The effective date of this bill will allow the actual expenditures for Fiscal Year 2011-2012 to be calculated. This bill requires the Auditor General to review DOC’s 2011-2012 fiscal year expenditures and certify the savings prior to DMS issuing an intent to award. Using the above approximation, seven percent saving to the state would be $14.5 million. The total cost savings from privatization cannot be determined definitively until the Auditor General certifies that the bid is at least a seven percent savings compared to DOC’s Fiscal Year 2011-2012 expenditures.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

V. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On January 24, 2012, the Justice Appropriations Subcommittee adopted three amendments and reported the bill favorably as a committee substitute. The amendments provide:

1. The procurement for the operation of the South Florida institutions will exclude the South Florida Reception Center (SFRC) and the SFRC South Unit; however, the procurement will include all satellite facilities associated with the SFRC.
2. Any contract awarded must include pricing that achieves no less than a seven percent savings for all operations and maintenance of each correctional facility and assigned correctional units, excluding inmate health services, from the 2011-2012 fiscal year expenditures for such facility or facilities. Prior to issuing an intent to award, the Auditor General must certify that the successful bidder or bidders have achieved at least seven percent savings from DOC's 2011-2012 fiscal year expenditures. The amendment provides a contract may not be awarded without the Auditor General's certification.
3. Removes the requirement from the bill that each facility's average daily population must remain substantially unchanged from the average daily population calculated for Fiscal Year 2010-2011.

This analysis is drafted to the committee substitute as passed by the Justice Appropriations Subcommittee.