



CORRECTIONAL CONTRACTING

A Guide to Successful Experiences

**Nature and Extent of the Practice
Detailed Procedures and Checklists
Legal Issues and Suggestions
and of Special Interest,
Total Prison Facility Contracting**

CJI

Criminal Justice Institute, Inc.

GUIDELINES FOR CORRECTIONAL CONTRACTING

A Manual for Correctional Administrators

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The National Institute of Corrections conceived the idea and funded the work, enabling the Criminal Justice Institute to conduct the study. In particular, Aaron Brown added much to the project in his capacity as NIC's grant manager.

The major source of information was the corrections community. In addition to the time taken by the vast majority of adult and juvenile correctional agencies to complete the survey questionnaire, eleven correctional agencies contributed a significant amount of staff time and effort to respond to our questions during the course of lengthy interviews about their contracting process. We are very appreciative of their help. Those contributing agencies were the:

Alabama Department of Corrections
California Department of Corrections
California Youth Authority
Federal Bureau of Prisons
Florida Department of Corrections
Florida Department of Health and Rehabilitative Service
Jefferson County, Colorado, County Commissioners
Illinois Department of Corrections
Maryland Department of Health and Mental Hygiene -
 Juvenile Services Administration
Massachusetts Department of Youth Services
Washington Department of Corrections

Many of the ideas contained in this manual were refined during the course of presentations made by the authors at several training programs on Contracting for Correctional Services and Prison Industries Management sponsored by the National Institute of Corrections and held at the Training Academy in Boulder, Colorado. The exchange of ideas with the participants at these five programs sharpened the focus of the work. Representatives of approximately forty correctional agencies added their comments and suggestions. We are most thankful for their willingness to share their ideas.

A great deal of work was done by Criminal Justice Institute staff to bring this project to a successful conclusion. Researchers assisted in the data coding and analysis, as well as in the preparation of the final report. The typesetting and production of this manual is due to the energy and dedication of Patricia Hulber, who spent many hours putting it into its final form. Her effort and concern are most warmly appreciated.

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PREFACE

Correctional management issues today differ significantly from those in the past. As recently as fifteen years ago, correctional administrators were normally generalists, directing all operations and systems in relatively manageable-sized prisons, and providing a rather limited array of services to inmates. Contracts, if used, consisted of interagency agreements to provide prison labor and products in exchange for state or county generated services and products like laundry, utilities, dairy products, etc. Since that time, prison populations have risen, budgets have become tighter, and quality of service has become more and more scrutinized by federal courts and legislatures. Consequently, prison administrators have been forced to become creative and to look to alternative methods of operating and providing services more professionally and efficiently both in terms of cost and performance.

Creative and efficient management has enjoyed a surging interest in the last decade, but has brought with it new problems. Technologies that have important applications in prisons have been tapped, and their accompanying systems have often reached beyond the understanding and control of the traditionally trained or groomed warden or director. Mandates to construct more prison beds have not always been accompanied by necessary funds, and the need to develop creative financing, as well as the responsibility for overseeing multimillion dollar construction projects, have left administrators frustrated and looking for help. Some of that help has been found in the private sector, and has been accessed through contracting.

Contracting has become an integral part of the move from self-contained management to creative coordination of agency, interagency, and private resources directed toward improved quality and efficiency in corrections at realistic costs. But the pressure to change management modes, to meet geometric increases in population and consequent expansion, has come too fast for most administrators to get geared up and moving in a systematic way. Many are not equipped with a system to get the job done, but more are not sure about whether or not contracting is a legal or even efficient way to move. Some states entered contracting on the ground floor and have workable systems in place. Other systems are still learning from mistakes. A few actually have overdeveloped their procedures into bureaucratic obstacle courses, causing more problems.

THE STATE OF KNOWLEDGE ABOUT CORRECTIONAL, CONTRACTING

Little research has been conducted about privatization, or correctional contracting. In 1984, the Criminal Justice Institute (CJI) conducted a survey funded by the National Institute of Corrections to ascertain the nature, extent and issues surrounding private sector correctional contracting. A survey was also completed by Abt Associates in 1984, for the National Institute of Justice, that focused on privatization issues and practices. Journal and newspaper articles describe the phenomenon generally, usually taking a pro or con position from a philosophical point of view, but without substantial contribution to the pool of available information.

Even less knowledge is available nationally about the contracting process. The American Bar Association has developed a model procurement code for federal use that may or may not

meet the needs of state and local agencies since laws and regulations differ considerably from jurisdiction to jurisdiction. The state-of-the-art of contracting nation-wide varies with extremes in both directions. Most administrators recognize needs for developing workable contracting processes, but many do not know exactly what is needed or how to go about tailoring a process to their needs when they find out what they are. There had been no body of knowledge to look to for guidance until this guide was completed.

PURPOSE OF THIS MANUAL

Knowing that correctional administrators are the decision-makers in this new era of management that is using the contract more and more as an alternative management tool, the National Institute of Corrections funded this guide to correctional contracting for use by agency and institution officials considering or pursuing contracting for correctional services. Its purposes include reducing the confusion about when contracting can be useful and how the decision to contract can be arrived at objectively and sensibly. The practical is emphasized and information about what other agencies are doing, along with their success and failure stories, are included to assist managers make informed decisions about contracting. Guidelines for developing a contracting process, as well as methods for building in accountability, are presented as a means of ensuring a successful contracting situation. This guide intends to make that knowledge available to correctional administrators, wardens, program managers and agency contracting officials.

The contracting process that is presented here is a comprehensive one that does not limit itself to the “how to’s” of solicitation and contract writing, but focuses on decision-making about contracting from the correctional manager’s point of view. The activities and processes that should occur in deciding whether or not to contract, the strategies that can be used in developing an RFP, optional means of dealing with bidders and bidding procedures, the effective methods for selecting a provider, ways to negotiate parameters, essential administrative activities during the contract period, successful evaluation techniques, and strategies involved in renewal and termination of contracts are all addressed in detail. The guide also emphasizes options, since systems vary widely and there is frequently more than one sound way to address a situation or resolve a problem.

This guide is the result of a year’s study of 44 adult and 33 juvenile agencies who responded to questionnaires sent to all federal and state correctional agencies in the USA. Ten state agencies and one large urban agency were selected for in-depth analysis of their contracting processes by means of site visits. Prepared interview formats, satisfaction scales, and checklists were used to gather the data. Copies of all data collection instruments are included in the Appendices. Drafts of the guide were also used as “texts” in two NIC sponsored training programs on contracting, with valuable input from the participants providing valuable feedback which is incorporated into this final version of the manual.

Correctional management analysis was conducted with the aid of computer by the principals of CJI, and legal analysis was conducted by a leading law firm in New York City. The guide is intended to be a practical and understandable contracting manual that will serve as an aid and reference tool for years to come to the entire field of corrections.

CHAPTER I

CURRENT STATUS OF PRIVATE SECTOR CONTRACTING

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| Characteristics of Contracting Agencies | 10 |
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UPDATE OF NIC'S 1984 STUDY

The 1984 CJI study revealed the great extent to which both state adult and juvenile correctional agencies contract for a wide range of services, and the vast amount of money that is spent to purchase these services. Reasons for contracting, variations in the degree and mode of contracting, degrees of satisfaction with contracting, problems encountered, and recommendations for avoiding pitfalls were also presented.

As part of this sequel to the first study, updated information on the nature and extent of contracting in corrections is provided. It is presented with the intention of serving as a backdrop to the materials in the remainder of the manual and as a frame of reference and potential source of additional information for those who might be considering contracting for a particular service.

THE EXTENT OF CONTRACTING WITH THE PRIVATE SECTOR

Seventy state agencies reported 6,093 current service contracts with the private sector. On average there were 87 contracts per agency. The cost of those contracts to the agencies was \$326,407,000 -- an average of \$4,662,000 per state agency. The cost of the average contract was \$53,571 and the agency average cost for a contract was \$218,850. Table 1. presents these figures along with comparable figures for adult only agencies, juvenile only agencies, and adult and juvenile combined agencies.

Table 1.
The Extent of Contracting

| | <u>Types of Agencies</u> | | | |
|--------------------|--------------------------|-----------------|-----------------|----------------|
| | <u>Adult</u> | <u>Juvenile</u> | <u>Combined</u> | All |
| Agencies | 32 | 26 | 12 | 70 |
| Contracts | 2,758 | 2,082 | 1,253 | 6,093 |
| Amount (1,000) | \$169,944 | \$112,285 | \$44,178 | \$326,407 |
| <u>Averages</u> | | | | |
| Contracts/agency | 86 | 80 | 104 | 87 |
| Amt (1,000)/Agency | \$5,310 | \$4,319 | \$3,682 | \$4,662 |
| Amount/Contract | \$61,619 | \$53,931 | \$35,258 | \$53,571 |

The pattern that emerges indicates that combined agencies tend to have the most contracts in force, but at the smallest dollar value, that adult agencies tend to have the highest dollar value per contract. and that on average they have more contracts in force than do juvenile agencies.

The ten agencies with the largest number of contracts, the most dollars spent, on contracting, and the most expended per contract are listed in Tables 2., 3. and 4.

Table 2.
Agencies with Largest Numbers of Contracts

| <u>Agency</u> | <u>Annual Contracts</u> |
|---------------------------|-----------------------------|
| California (Adult) | 900 |
| Maryland (Juvenile) | 535 |
| Illinois (Combined) | 400 |
| Virginia (Combined) | 317 |
| Pennsylvania (Combined) | 300 |
| California (Juvenile) | 289 |
| South Carolina (Juvenile) | 280 |
| Washington (Adult) | 250 |
| Federal Prisons (Adult) | 216 |
| Arizona (Combined) | 200 |

Table 3.
Agencies with Largest Amounts Spent on Contracting

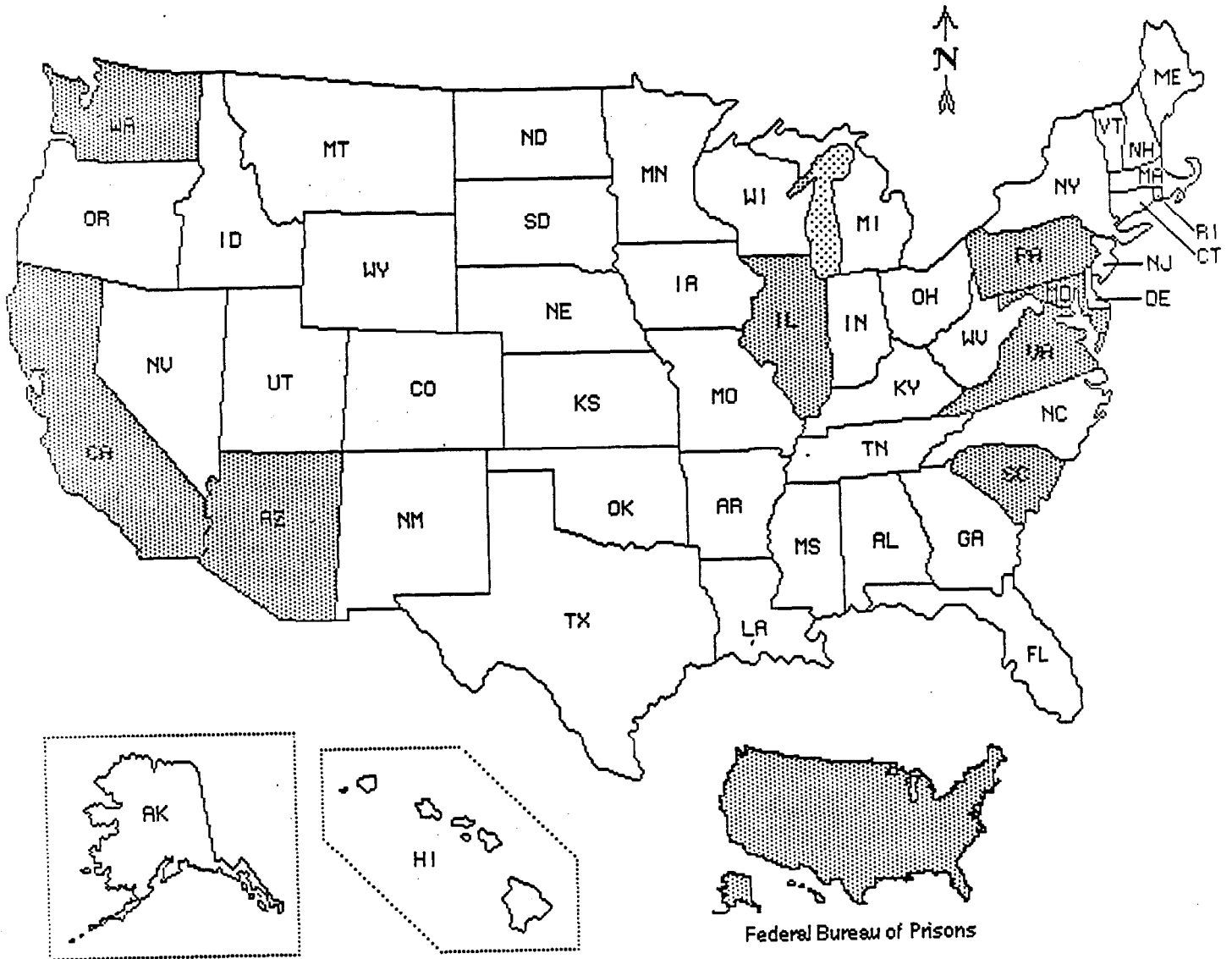
| <u>Agency</u> | <u>Annual Contract Expenditures</u> |
|--------------------------|---|
| California (Adult) | \$30,000,000 |
| Washington (Adult) | 28,500,000 |
| Massachusetts (Juvenile) | 24,500,000 |
| Federal Prisons (Adult) | 24,000,000 |
| Illinois (Combined) | 22,152,000 |
| Florida (Adult) | 17,000,000 |
| Florida (Juvenile) | 16,976,000 |
| Maryland (Adult) | 15,477,000 |
| Maryland (Juvenile) | 13,500,000 |
| Michigan (Adult) | 8,000,000 |

Table 4.
Agencies with Largest Average Amount Per Contract

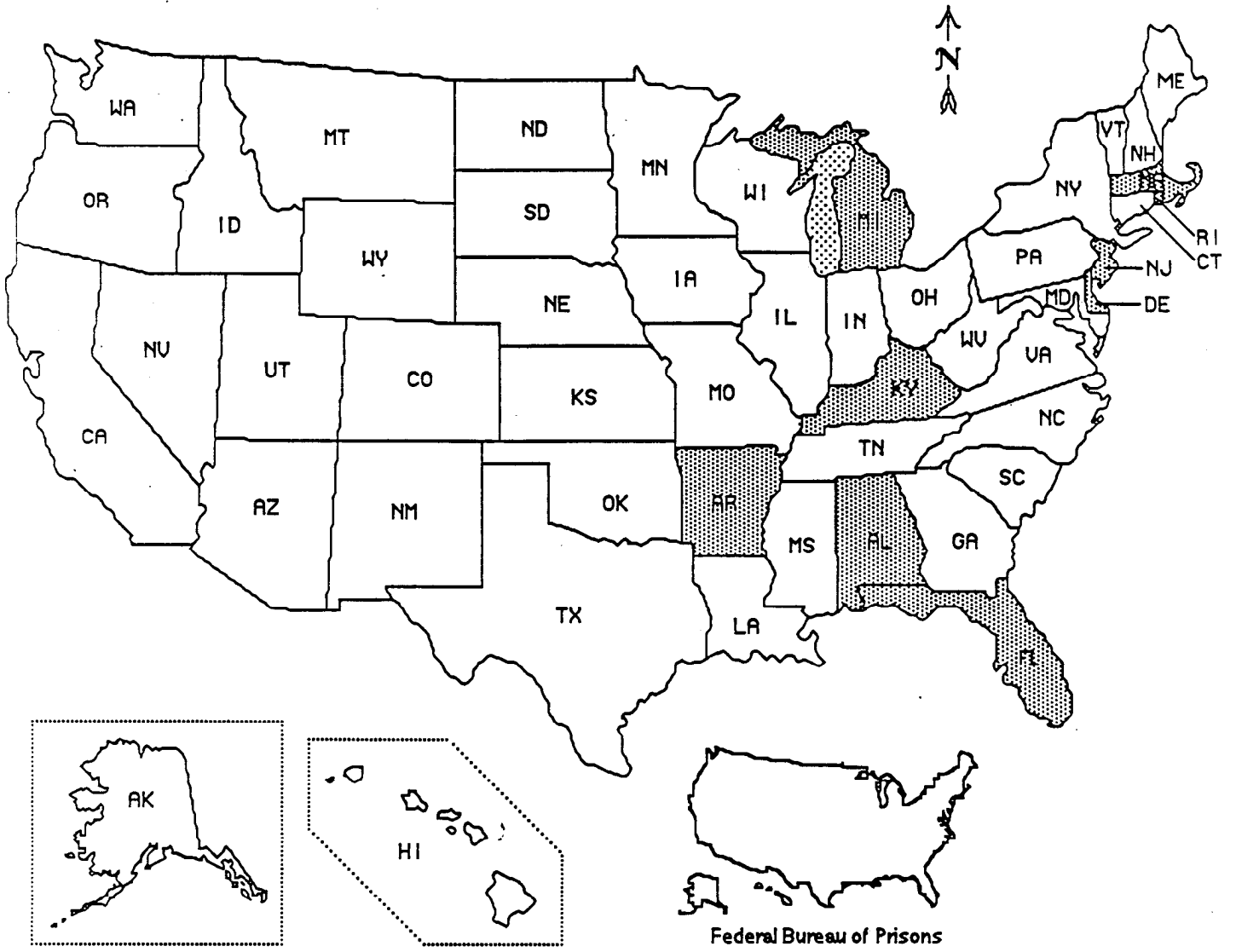
| <u>Agency</u> | <u>Average Amount of Agency Contract</u> |
|--------------------------|--|
| Alabama (Adult) | \$7,000,000 |
| Florida (Juvenile) | 2,425,140 |
| Delaware (Adult) | 421,000 |
| Rhode Island (Juvenile) | 400,000 |
| Florida (Adult) | 340,000 |
| Michigan (Adult) | 307,690 |
| Arkansas (Adult) | 303,300 |
| New Jersey (Combined) | 273,330 |
| Massachusetts (Juvenile) | 245,000 |
| Kentucky (Adult) | 200,200 |

Five agencies - California (Adult), Maryland (Juvenile), Illinois (Combined), Washington (Adult), and the Federal Bureau of Prisons (Adult) - are among both the top ten in number of contracts and the amount of contracting dollars. Four other agencies - Massachusetts (Juvenile), Florida (Juvenile), Florida (Adult), and Michigan (Adult) - are among the top ten in the amount spent on contracting and the amount spent per contract. The remaining agencies appear only once. A complete listing of all agencies in each category is included in the Appendices. (See maps, beginning on p. 6)

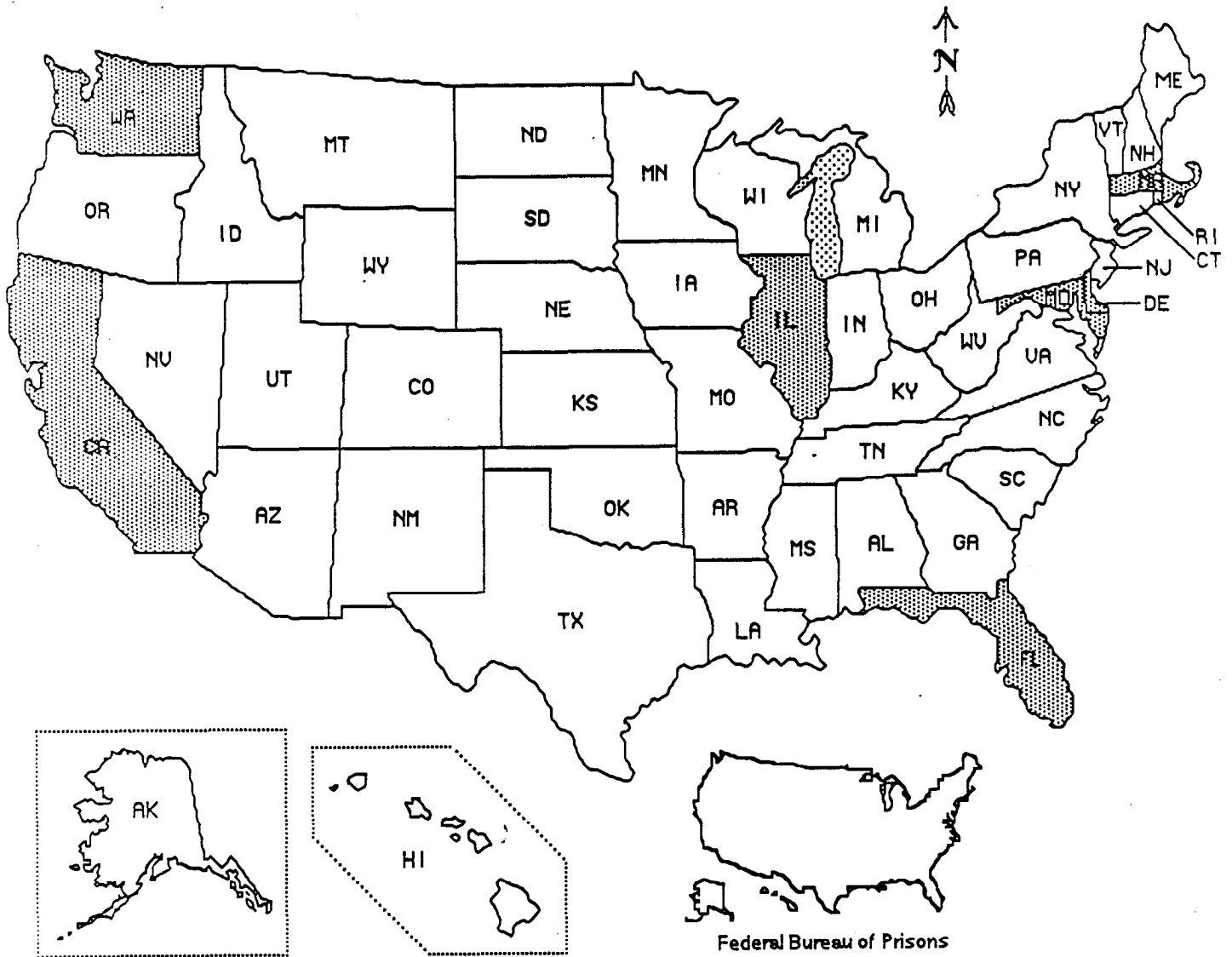
Agencies With Largest Numbers of Contracts



Agencies With Largest Average Amount Per Contract



Agencies With largest Amounts of Money Spent on Contracts



Agencies contract with both individuals and organizations for a variety of services. Assessing the degree to which an agency contracts with one as opposed to the other was possible in only a limited number of cases. For the 17 agencies on whom this information was available, 57 percent of the contracts and 84 percent of the contracting dollars were with organizations as opposed to individuals, such as a psychiatrist, dentist, chaplain, etc. Charts 1. and 2. illustrate these relationships. Table 5. presents the frequencies and dollars in these categories for the 17 agencies for whom comparative data was available.

Chart 1.

Percent of Contracts with Individuals and Organizations

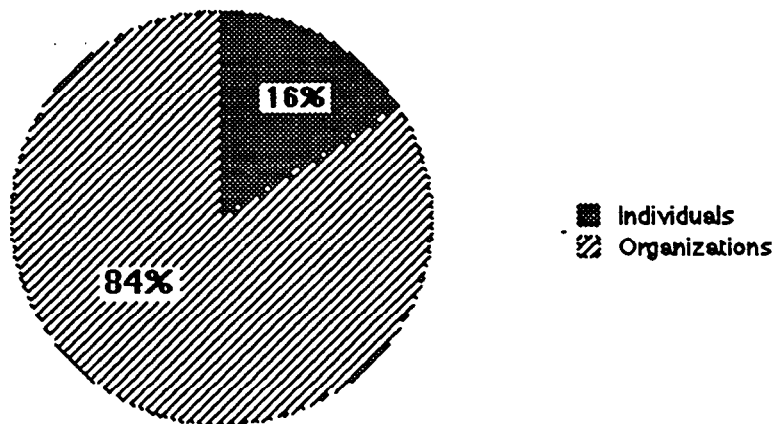
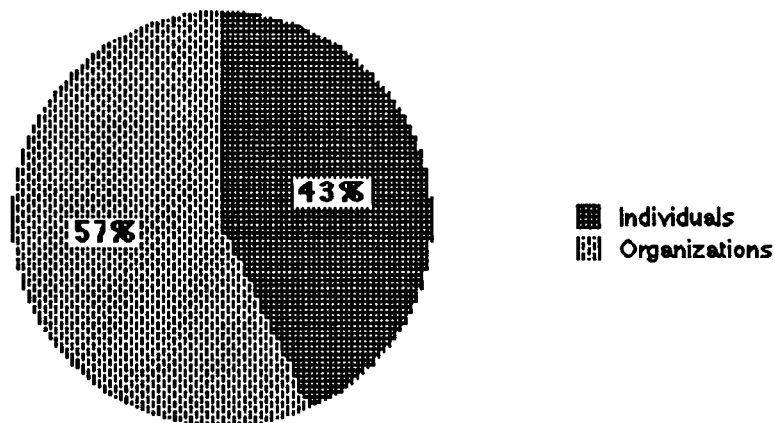


Chart 2.

**Percent of Dollars Spent on Contracts with
Individuals and Organizations**



**Table 5.
Relationship Between Individual and Organization Contracting**

| <u>Jurisdiction</u> | <u>Type</u> | <u>Contracts</u> | | <u>Amounts (\$1,000)</u> | |
|---------------------|-----------------|------------------|---------------|--------------------------|---------------|
| | | <u>Ind.</u> | <u>Organ.</u> | <u>Ind.</u> | <u>Organ.</u> |
| Alabama | Juvenile | 6 | 13 | 10 | 1,723 |
| California | Adult | 250 | 650 | | 30,000 |
| Connecticut | A d u l t | 43 | 34 | | |
| Delaware | Adult | 0 | 0 | 6 | 2,526 |
| Federal | Adult | 0 | 216 | 0 | 24,000 |
| Georgia | Juvenile | 87 | 11 | 1,195 | 2,568 |
| Kentucky | Juvenile | 6 | 3 | 42 | 191 |
| Louisiana | Juvenile | 0 | 11 | 0 | 2,022 |
| Maryland | Adult | 24 | 113 | 458 | 15,019 |
| Maryland | J u v e n i l e | 460 | 75 | | |
| Massachusetts | Juvenile | 30 | 70 | 3,000 | 21,500 |
| Nevada | Juvenile | 13 | 5 | | |
| North Carolina | Juvenile | 15 | 8 | 200 | 3,400 |
| Ohio | Juvenile | 69 | 53 | 662 | 2,624 |
| Oklahoma | Adult | 19 | 38 | 193 | 1,314 |
| Pennsylvania | Adult | 125 | 275 | 1,350 | 2,300 |
| Utah | Juvenile | 5 | 22 | 50 | 4,000 |
| Washington | Adult | 100 | 250 | 2,620 | 6,900 |
| Totals | | 1,252 | 1,653 | \$23,354,000 | \$120,087,000 |

CHARACTERISTICS OF AGENCIES INVOLVED IN CONTRACTING

The extent to which agencies contract, as measured by either the number of contracts or the amount of money spent on contracting, bears little relationship to a series of agency characteristics. The factors selected were the Average Daily Population, the Number of Institutions, Rated Capacity of the System, the Degree of Crowding, the Agency's Operating Budget, the Total Number of Agency Employees and the Percent of the Operating Budget Spent on Contracting. Analysis of the relationships was undertaken, based on data from adult and combined agencies' data on these variables.

If these factors are not good indicators of the level of contracting within an agency, then perhaps other variables may play a more important role in the process. One such area is the management style and leadership characteristics of those agency officials who are most closely involved in agency planning activities and in the decision-making process that may lead to contracting. Section III of the Manual introduces the important role management philosophy has on the decision to contract, as well as on other decisions.

TYPES OF CONTRACTED SERVICES

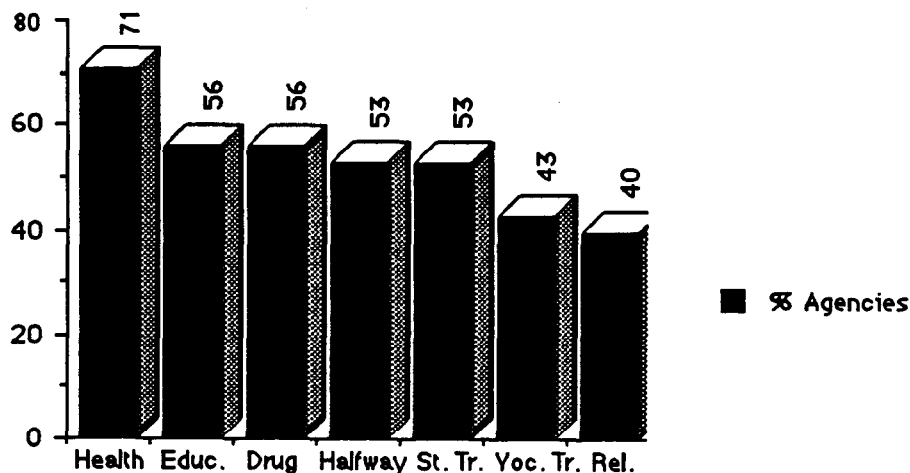
Correctional agencies currently contract for more than 30 different types of services. The most frequently mentioned contracted services are for Mental Health, Physicians, and Health. Next in frequency and closely grouped are Educational Programs. Construction services, Half-way Houses, and Staff Training Programs. Rounding out the ten most frequently contracted services are Vocational Training Programs and Religious Programs. Table 6. lists the ten most frequently contracted services and the percentage of agencies contracting for them.

Table 6.
The Ten Most Frequently Contracted Services
By Correctional Agencies

| <u>Service</u> | <u>Frequency</u> | <u>Percent</u> |
|-------------------------|------------------|----------------|
| Mental Health | 50 | 71 |
| Physicians | 50 | 71 |
| Health | 49 | 70 |
| Educational | 39 | 56 |
| Drug Treatment | 39 | 56 |
| Construction Services | 38 | 54 |
| Half-way Houses | 37 | 53 |
| Staff Training Programs | 37 | 53 |
| Vocational Training | 30 | 43 |
| Religious | 28 | 40 |

Some of the other services contracted by agencies were Transportation (20%), Laundry (23%), Food Service (20%), Industry (14%), Security, supervision of inmates (14%) and Commissary (4%), Chart 3. graphically illustrates the frequency with which these services are contracted. A complete listing of all services and the frequency with which each is contracted is presented in Appendix A.

Chart 3. Percent of Correctional Agencies Contracting for Particular Services



THE NUMBER OF SERVICES CONTRACTED BY AGENCIES

The 70 agencies contract for an average of 10 services. The range in number of services was from a high of 23 in Utah (Adult) to a low of 0 in Mississippi (Juvenile). The ten agencies reporting the most services under contract are listed in Table 7.

**Table 7.
The Ten Agencies with the Largest Number
of Service Areas Under Contract**

| <u>Agency</u> | <u>Type</u> | <u>Service Areas</u> |
|-----------------|-------------|--------------------------|
| Utah | Adult | 23 |
| Florida | Adult | 22 |
| Federal Prisons | Adult | 21 |
| Minnesota | Combined | 19 |
| Illinois | Combined | 18 |
| Massachusetts | Juvenile | 17 |
| Washington | Adult | 17 |
| California | Juvenile | 16 |
| Michigan | Juvenile | 16 |
| Montana | Adult | 16 |

CONDITIONS GENERALLY PRESENT PRIOR TO CONTRACTING

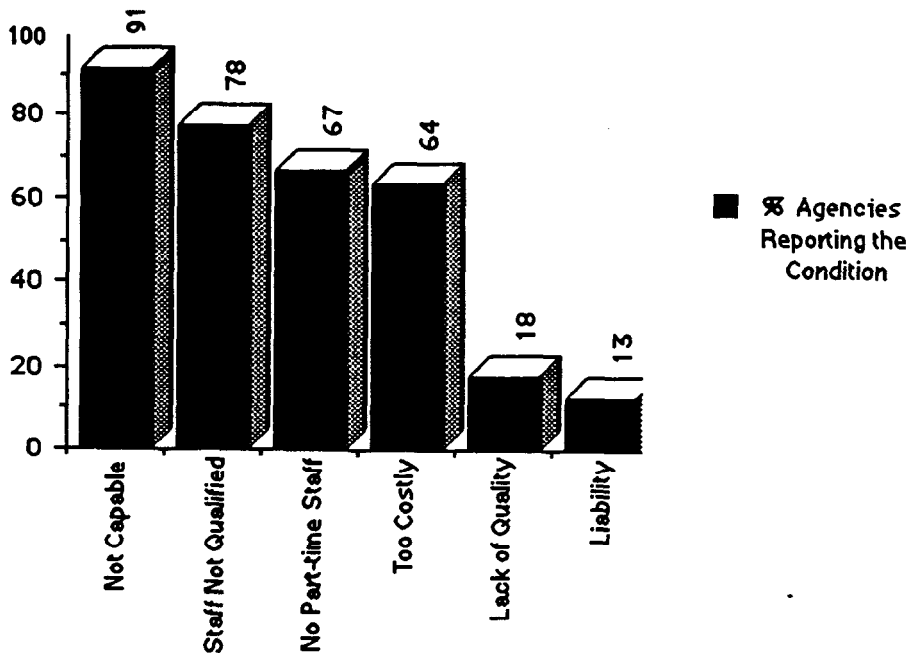
Almost all agencies said that prior to contracting, the service was “beyond the agency’s ability to provide.” More specifically, staffing problems - in terms of the lack of qualified staff or part-time professionals - were viewed as the most prevalent conditions. The next most frequently present condition concerned the issue of cost. For the agency to provide the service would have cost more than if a private provider were hired. Thirdly, agencies were dissatisfied with their ability to deliver a service of acceptable quality. Lastly, in a few cases agencies desired to reduce their liability exposure as the direct service provider. Table 8. presents the percentage of agencies noting the presence of these conditions.

**Table 8.
Percent of Agencies Reporting the Presence of
Certain Conditions Prior to Contracting (N = 70)**

| <u>Conditions</u> | <u>Percent</u> |
|----------------------|----------------|
| Unable to Provide | 91 |
| No Qualified Staff | 78 |
| No Part-time Staff | 67 |
| Too Costly | 64 |
| Quality Dissatisfied | 18 |
| Liability Risks | 13 |
| Other | 16 |

Chart 4. graphically portrays these percentages.

**Chart 4. Conditions Leading to Contracting
As Reported by Correctional Agencies**



It was not possible to determine the extent to which each of these conditions was present prior to contracting for individual services discussed in this section of the Manual. However, in other sections, discussions of the conditions present in specific agencies prior to, and as the decision was made to contract for services, will be presented.

FUTURE OF CONTRACTING

The factors and forces that have contributed to the past expansion of contracting in corrections show no sign of diminishing. More prisoners are likely to be in confinement than ever before. Public demands for greater efficiency shows no sign of lessening. Judicial mandates for essential services (medical, food, sanitation, safety, etc.) will remain ever present. Technological advances in the delivery of 'such services will continue to be developed and applied by businesses concentrating in such service areas.

For all of these reasons and because for the most part correctional managers are satisfied with the performance of contractors, the future of contracting for correctional services appears to be one in which more institutions will contract for more services. Agency officials indicate that this is the direction they are most likely to pursue, as opposed to providing the service themselves.

At this point, the only factor that could reverse this trend would be poor performances by the contractors themselves. While that is always a possibility, the likelihood of it occurring may be reduced by the correctional agency through the systematic application of a sound contracting process. This manual addresses the key elements of such a contracting process.

CHAPTER II

THE CORRECTIONAL CONTRACTING PROCESS

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INTRODUCTION

The contracting process is determined by agency officials. It is what they want it to be. While it may seem to be a rather straightforward procedural process, it is actually more than that because the values and goals of the people making decisions about contracting affect the nature and outcome of the process. Secondly, the process may be viewed as a component of the agency's planning process. The nature of that planning process is reflected in the contracting process. For these reasons an examination of the correctional agency leader's perspectives and the influence they have on the planning and contracting process is valuable.

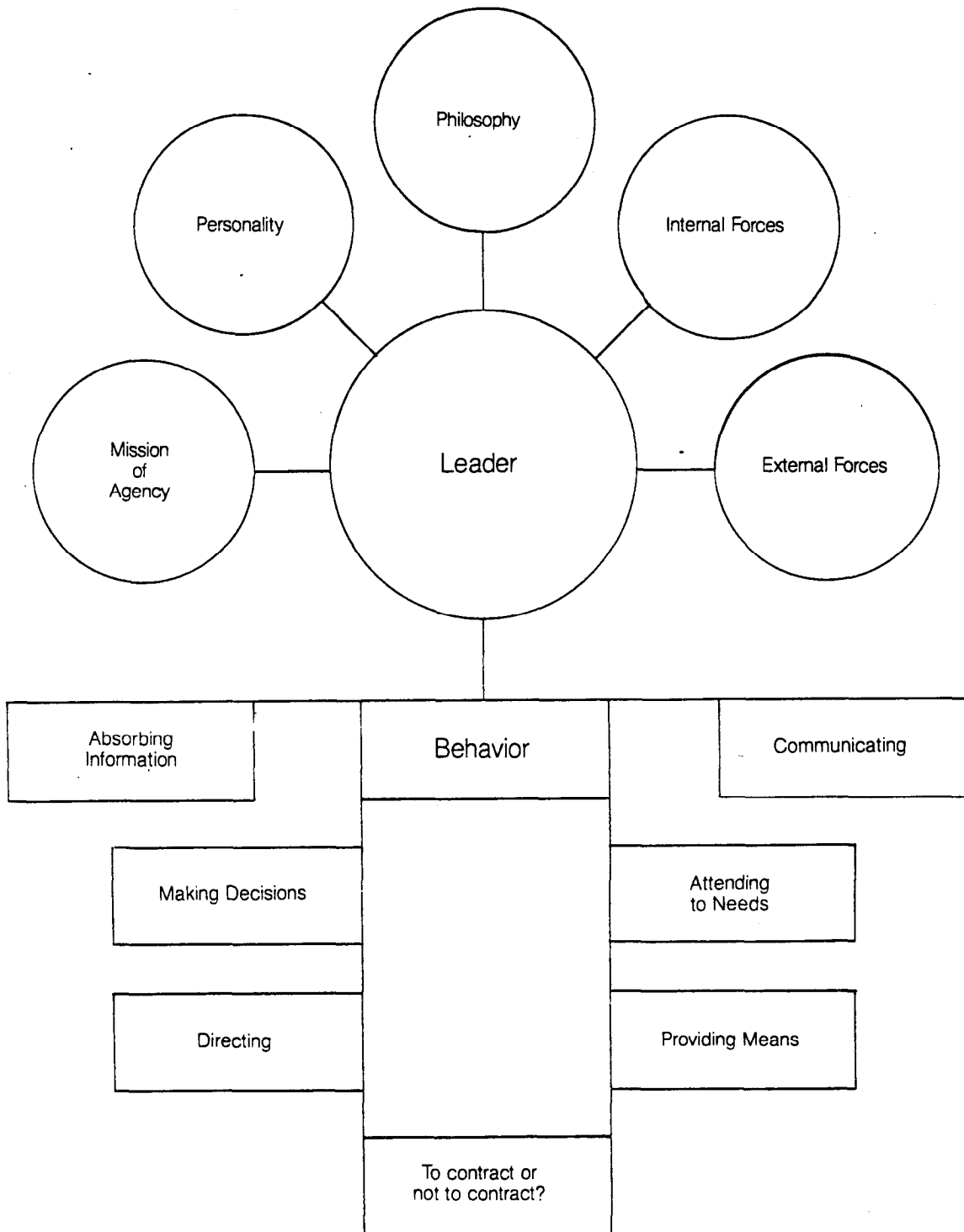
OVERVIEW OF THE CONTRACTING PROCESS

1. Contracting, like many other areas of correctional administration, reflects an agency leader's philosophy, personality, responsibility to the mission of the agency, and the internal and external forces brought to bear on system-wide issues. All of these determinants translate into the leader's behavior as he/she directs the agency. (See Diagram 1. Importance of the Leader in Contracting. next page.)

For example, when the administrator's philosophy is conservative: experimentation with new types of contracting is unlikely. When his/her philosophy is liberal, new contracting scenarios will be tried to keep up with technology, trends, etc. If the mission of the agency is to incarcerate at minimal cost, contracting processes will focus on low bids and enhancement of security. If the mission is to reduce inmate idleness by providing quality programs, with available resources, for offenders the contracting process will focus on getting the most workable program for the dollar, even if that bid is not the lowest. External forces like an interagency Procurement Office (usually part of a General Services agency) and internal forces (such as lack of fiscal staff to operate an elaborate process) can affect the kind of contracting process an agency has. Finally, the personality of the leader/decision-maker can influence the way a contracting process operates.

2. A contracting process serves the purpose of hiring an individual or organization to do quality work at the most reasonable price. In other words, in order for an agency to use contracting to get what it wants within economic reason, it needs a sound set of procedures that are detailed enough to cover contingencies, streamlined enough not to be burdensome, and fair enough to prospective bidders to stand up in court if challenged. In systems where management is such that attention is not given to these qualities, contracting is not likely to be successful.

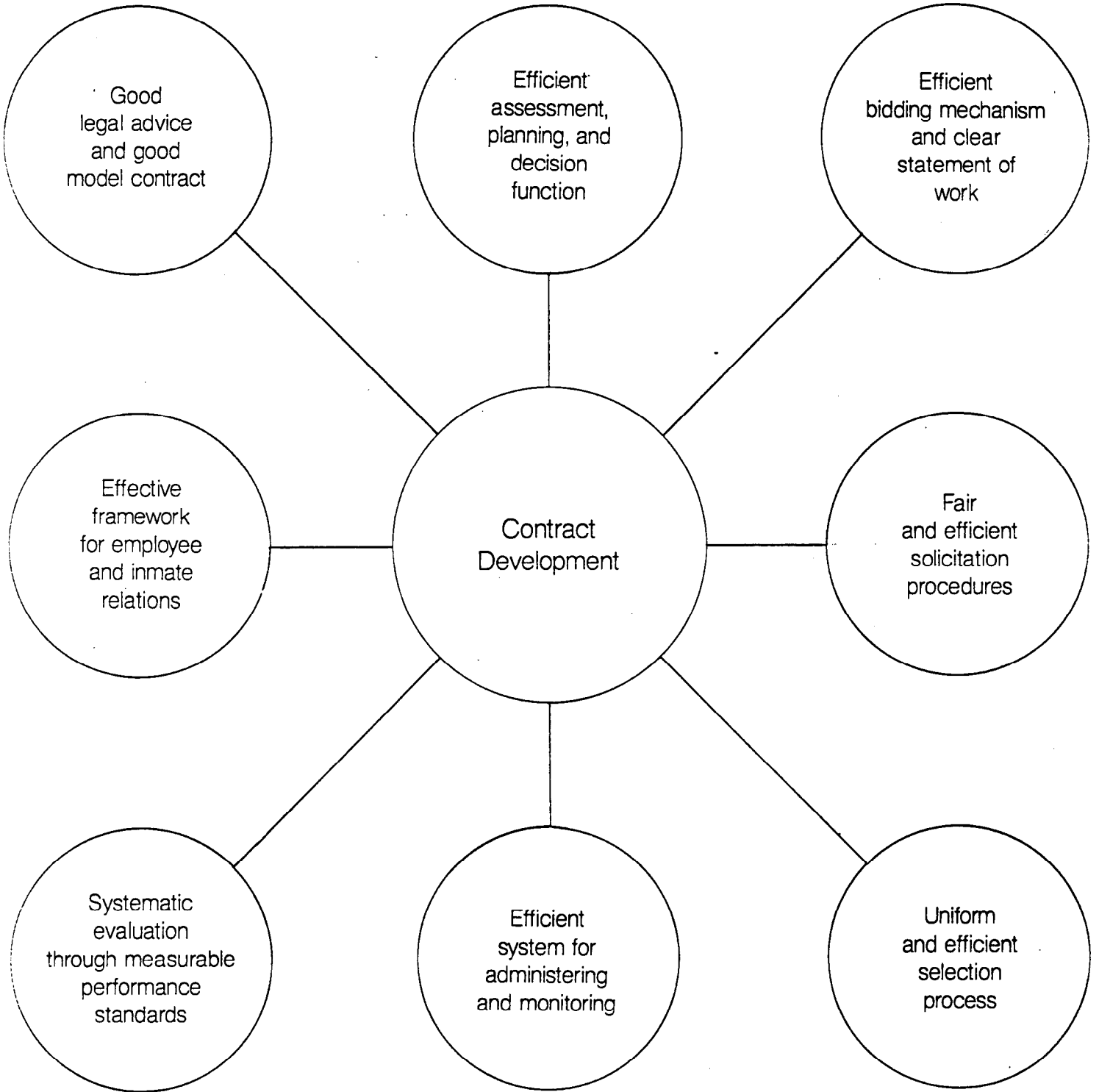
The Importance of the Leader in Contracting



A global picture of the essential ingredients of a viable contracting process is shown in Diagram 2 (Essentials of Contract Development). Contracting Essentials are listed below.

- o An efficient assessment, planning and decision-making function assures that the system knows what it needs and wants, and how best to achieve it.
 - o Good legal advice and a good model contract keep the agency out of trouble with the courts and the legislature.
 - o An effective framework for employee and inmate dialogue with the administration helps to ensure that the potential contract and its ramifications are discussed and that consensus is reached.
 - o Efficient bidding mechanisms and a clear statement of work requirements ensure responses from prospective providers who are qualified and capable of doing the job.
 - o Fair and efficient solicitation procedures produce responses from a wide pool of providers as well as from those who are known by the agency as proficient.
 - o Uniform and efficient selection procedures ensure that the agency gets the best service for the most reasonable price.
 - o An efficient system for administering and monitoring contract activities gives the agency an ongoing knowledge of how the contract is progressing and helps prevent as well as solve problems.
 - o Systematic evaluation through measurable performance standards makes the agency aware of how effective the contract is.
3. Before getting into the details of an ideal contracting process, the following are a few words of general advice from administrators across the country about developing any contract:
- a. Let contracting flow from a plan, preferably a long-range one. Don't rush into it.
 - b. Be sure you know what you want a contract to do and why it is the best means of doing it, before launching into the contracting process.
 - c. Be sure your contracting process is sound legally and procedurally to ensure fairness to all prospective providers and to protect yourself in the event of litigation. Be sure also that the process works for you, not against you.
 - d. Be patient with the complexity and length of the process, but keep it as simple as you can. Once the process is in place, follow it.
 - e. Be prepared to follow through. Maximize the chances for the contract's success in your organization by staying abreast of the contract's progress. Anticipate problems and take appropriate action to maintain acceptable service.

The Essentials of Contract Development



MAKING THE DECISION TO CONTRACT

The Role of the Leader

Decision-making in a large organization is not just a matter of getting the facts and deciding what to do. People make decisions and, as we discussed before, the decision-makers/leaders behave under influences, the dominant ones of which are their personalities and their philosophies which govern their planning postures or attitudes.

Russell Ackoff, of the University of Pennsylvania, has identified four basic planning postures that determine decision-making (Ackoff 1973). Understanding these postures is germane to the understanding of how correctional administrators decide to contract correctional activities. They are the INACTIVE, REACTIVE, PRACTIVE, and INTERACTIVE planning postures. They all appear in some mix and in differential proportions in an individual or organization, but in most instances one dominates the others. Let us examine each.

Inactivism, or, the do-nothing posture. Inactivists are conservatives who are satisfied with the status quo and are afraid of change that will “rock the boat.” To make sure that nothing gets done, they make all decisions, react only to crisis, and set up committee and study obstacle courses for “eager beavers.” Not to change is to survive. Planning has no gain.

Reactivism, or, the back to the good old days posture. Reactivists are reactionaries who are dissatisfied with the present and want to change back to past methods of doing things. Negativistic, by nature, they dislike progress, technology, and modern management techniques, and prefer “muddling through” situations. Depending on “hard knocks” experience as authority, their planning consists of budgeting and thereby preventing progress with statements such as “it’s not in the budget.”

Preactivism, or the predict and prepare posture. Preactivists are liberals who observe the changing world as opportunities for growth, and who focus on the future for which they must be prepared. Planning emphasis is on research (logic, science, and experimentation) which will predict and therefore indicate courses of action that will control the effects of the future on them. They foster change within the system, but do not try to change the system.

Interactivism, or, the make it happen posture. Interactivists are radicals who believe they can redesign and change systems, thereby creating opportunities and preventing problems. They are idealizers who set forth long-term goals that are continuously reformulated in order to maximize ability to learn and adapt. All innovations are experiments that are tested for effectiveness. Planning is ongoing with continuous redesign and experimentation.

Ackoff uses the ocean’s tide as a metaphorical clarifier. The inactivist rides the tide: the reactivist tries to hold a fixed position against the tide: the preactivist tries to ride in front of the tide: and the interactivist tries to control the tide.

These stereotypes are important in understanding what posture your agency takes in terms of planning. They should bring to mind particular managers you know whose dominant postures are readily evident. None of these postures are ever found in their purest forms, and none of them are all bad or good. Each one is appropriate for particular circumstances.

Inactivism is appropriate when the state and direction of an organization is satisfactory (one would not want to interrupt a ten-year building program just to redesign the whole program, if it is going well). Reactivism is appropriate when the effected change is going in the wrong direction, and the former direction was satisfactory (one might return to a locking system that works if the new electronic one does not). Preactivism is appropriate when change is too slow to keep up with the trend (one must plan beds according to population projections). Interactivism is appropriate when the organization's direction is counterproductive and another direction is desired (one must intervene when the organization is decentralizing while the management is centralizing).

The types of administrative styles are even more important since the planning posture of your agency is a key to successful contracting. Note that only the preactivists and interactivists engage in any real planning. You must have noticed also that the interactive planning posture has been set forth as the progressive way to manage systems. We will be calling upon some interactive methods as well as others as we describe the planning involved in developing contracts and contract processes.

Motivations For Contracting

Deciding to use contracting as an alternative management tool can have far-reaching implications in an organization. Administrators should look at their motivations for contracting and guard against misdirected ones.

Contracting should never be chosen as an option just because it is a fad. Recent "hype" about private sector involvement in corrections seems to have everyone in the field thinking that if they don't contract, they're not "with it." If doing what is in vogue is the major motivation, another review of the situation is in order.

Contracting should not be forced. In some jurisdictions, administrators are mandated to contract when possible in order to feed tax dollars back into private enterprise. While that concept may have merit, it should not be abused so that correctional agencies are rushing into contracts without proper planning and preparation. In many cases, contracting may be ill-advised in light of the total organization's needs and direction.

Contracting should not be whimsical, nor approached just because there doesn't seem to be a readily available solution to an existing problem. Neither should it be done to please or impress superiors and others with progressive leadership. It cannot be stressed enough that the only basis for contracting should be objective. In other words, contracting should be used only when an agency cannot provide the service more efficiently and at a more reasonable cost than can the private sector.

Contracting Conditions and Environments

Sometimes it is helpful to look at the best and worst conditions when confusion prevails about whether or not to contract a service or operation. By comparing one's own peculiar situation with extreme situations, one may be able to see where his own leans. Let us look first at the optimum climate.

a. The Optimum Climate for Contracting

- (1) Support for contracting from the governing authority and key figures in the law-making body whenever it is the best and most cost-effective means of service delivery.
- (2) An agency planning posture that takes into account the total agency plan of which contracting is integral.
- (3) Supportive key staff.
- (4) Access to legal advice, and skill for negotiation.
- (5) Good labor relations and ability to negotiate, with labor leaders, innovations that affect the labor force.
- (6) An innovative environment where progress and experimentation are encouraged by authority figures.
- (7) Good public relations with community groups and the press.
- (8) A planning process that explores thoroughly the impact of possible decisions on other parts of the organization, and one that takes advantage of evaluations of similarly completed implementations in other jurisdictions.
- (9) A contracting process that is fair, promotes healthy competition, and can adapt itself to a variety of contracting situations.
- (10) A provider development program, run by the agency, that educates and grooms prospective private sector providers to serve the needs of corrections by conducting orientation classes and providing materials and information that will assist potential providers in presenting well-thought-out proposals to provide services to the agency.
- (11) Excellent agency leadership.

The other extreme is somewhat pessimistic, but real in some jurisdictions to one degree or another.

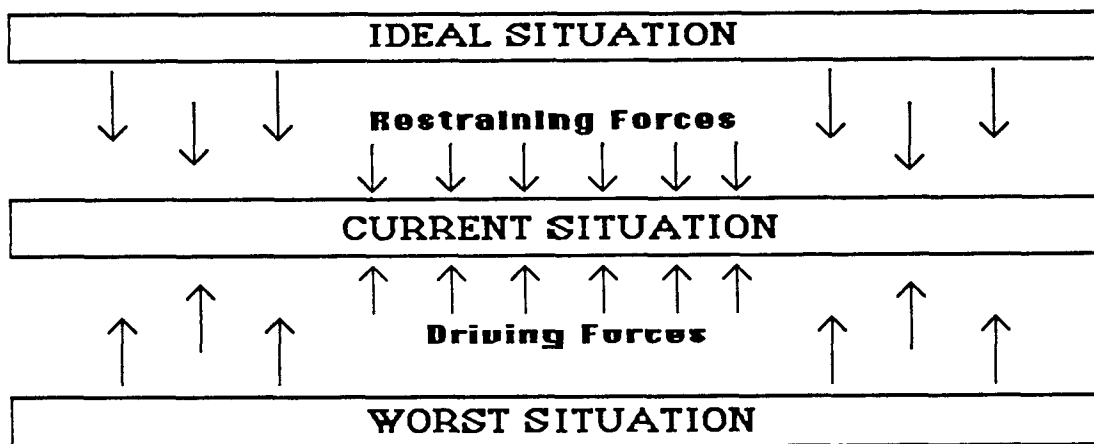
b. The Worst Climate for Contracting

- (1) Community groups and/or news media who are critical of corrections. especially innovations.
- (2) Clear attitudes of disfavor toward contracting from the governing authority and/or key lawmakers of the state.
- (3) Legal prohibition of contracting or of contracting particular services that are being considered.
- (4) The lack of a planning body in the agency.
- (5) Poor. disjointed agency leadership.
- (6) The lack of any providers available that can perform the service or that have the necessary experience to perform the service.
- (7) No viable contracting process in place to manage the contracting situation.
- (8) Little or no access to a contract law attorney.
- (9) Strong. organized labor opposed to any services being provided by other than union staff.

c. Looking at Your Contracting Situation

Here is an exercise that is designed to help you analyze the contracting climate in your agency. A widely accepted management tool. the Force Field Analysis can assist in analyzing and clarifying problem situations.

The Force Field Analysis is based on the theory that any phenomenon is the result of forces acting on it. Driving forces push toward and develop the best possible outcome (the ideal situation). and restraining forces push toward and develop the worst condition.



The object of the exercise is to identify the two opposing sets of forces at work in a given situation. to think of ways to reduce the power and number of as many of the restraining forces as possible. to increase the power and number of as many of the driving forces as possible. and thereby to manage the situation so that there is significant movement toward the desired situation.

Following is an example of the exercise. using food service. a familiar topic. as the situation. Read the narrative of the situation on pages 26 and 27 (Food Service Contract YES or NO). Now turn to the completed worksheet on page 28 and note that the forces in the situation have been entered either on the restraining or driving side so that one can clearly see the positives and negatives of the issue. Notice that the driving forces are written in the bottom half of the sheet. moving up against the current situation toward the ideal. The restraining forces are entered in the top half of the sheet, moving down against the current situation toward the worst situation.

Look now at the Action sheet (pages 29-32). where plans for decreasing the restraining forces and increasing the driving forces have been outlined. You will notice that two possible action plans have been developed - one that solves the problem from within the agency. and another that explores contracting as a solution.

FOOD SERVICE CONTRACT - YES OR NO

The Commissioner of a medium-sized correctional agency has been confronted with a major problem in the largest of the state's 12 institutions. A class action suit is in progress on conditions of confinement, addressing a variety of issues, but at present the focus is on food services. Particular emphasis is on quality of food and sanitation. There is a great deal of pressure from all sides on the issue. The inmates have staged four disturbances protesting bad food over the past 9 months. The legislature, now in session, is deliberating over the potential impact of the suit as well as the department's budget. The press has published a series of damaging articles from the inmates perspective. The State Attorney General has urged the Commissioner to present to the court a plan for correcting food service deficiencies.

The Commissioner has asked the agency's fiscal officer and the Warden of the institution (who delegated the responsibility to the Deputy Warden for Operations) to conduct an investigation of the food service operation. The report produced the following:

1. The Food Service Supervisor's professional experience is limited. He was an Army cook for two years.
2. The farm manager is at maximum production of meat, vegetables, and dairy products to support the operation.
3. Several correctional officers are doing extra duty in the food service area to keep the lid on.
4. There is no dietician to consult, no cycle menus and no controls on nutritional requirements.
5. Inmate employees are refusing to work in the kitchen.
6. Food grievances outnumber all other types of complaints.
7. It is the third quarter, and the food service budget is in the red, requiring bringing up fourth quarter funds.
8. Media exposes have included sanitation violations from health department reports.
9. The staff attrition rate in food service is higher than in any other institution department.
10. There is no in-service training for food service staff and none have vocational certificates.

11. Staff refuse to eat in the staff mess.
12. Waste is not weighed or inventoried. but it was observed to be high. and consumption is estimated at 40 %.
13. Equipment is outdated and needs repair.

Recommendation was that either the whole operation be r-e-designed and re-staffed from scratch. or that the service be contracted.

The Commissioner has called a meeting to get as many inputs as possible from a variety of agency roles so that he/she can make a decision and make a move toward correcting the situation. He/she is using the Force Field Analysis as a tool to assist in decision-making and problem solving. See the completed Force Field to find out what was discovered as a result of the analysis. See also the Action Planning Sheet to find out how the problem will be attacked.

FORCE FIELD SHEET

Ideal Situation: Breaking even on food; out from under suit

| | | | | | | | |
|--|---------------------------------------|---|--|--------------------------------|---|-----------------|---------------------------------------|
| Inmates don't want to work in Food Service | Poor health regulations | | Corrections Board not interested | | No nutritionist | | High rate of waste |
| | Food Service manager inept & disliked | Inmates upset - 20 grievances per month on food | | Staff refuse to eat in kitchen | Poor Food Service staff salaries & qualifications | | |
| Farm can produce no more food than present | Lack of trained personnel | No Food Service training offered | Low Food Service staff morale - high absenteeism | | | No cyclic menus | Rising cost of food-budget in the red |
| | | | | Expose in Newspaper | | | |

Current Situation: Substandard - food service part of class action suit and losing money on food

| | | | | | | | |
|--|---|----------------------------------|---|---|-------------------------------|--|--|
| Chairman of Judiciary Committee interested | Several Corr. Officers are concerned - doing extra in kitchen | | Leftover money in maintenance line | | New Kitchen in budget request | | |
| | | Bus. Mgr trying to control costs | | State health regulations up for review in Legislature | | | |
| Vacancy savings available | Director interested in Accreditation | | Private food service inquiring - worked in neighboring agency | | | Inmate Pay Plan being reviewed at Central Office | |
| Dairy Mgr. is producing well | | | | | | | |

Worst Situation: receivership, money loss, and further embarrassment

GOAL: Upgrading of Food Service by Internal Steps

| ACTION STEP | WHY DONE? (specific outcome expected) | WHO IS INVOLVED | WHEN DONE? (when completed) | WHAT RESOURCES NEEDED |
|---|--|---|--|---|
| 1. Request that inmate food service workers' pay grade be increased | to make food service inmate jobs more attractive to qualified workers | commissioner and inmate Pay Plan Committee Chairman | when new Inmate Pay Plan finalized | Inmate Pay Budget line |
| 2. Provide input to legislative committee reviewing state health regulations and inspections | to upgrade sanitation standards against which the kitchen will be held accountable | Commissioner Sanitarian | Schedule for next hearing of the committee | Time to write some recommendations, contracted sanitarian |
| 3. Terminate present Food Service Mgr. and recruit qualified manager. rewrite position qualifications | to provide adequate leadership in Food Service | Warden | as soon as can find interim director | cooperation from other Wardens |
| 4. Study produce prices for most economical sources | control costs | business office, purchasing | 1 week | time |
| 5. Address food grievances vigorously | to defuse angry inmate population show interest | Warden and subordinates | over 2 weeks | time and effort |
| 6. Develop training module for Food Service workers & inmate workers; use expert | to implement acceptable food preparation procedures | T r a i n i n g Director | 1 month | nutritionist |
| 7. Meet with Corrections Board to gain support and leverage with Legislature | to improve chances of increased funding support | Commissioner, Warden, Deputy Warden of Operations | 1 month | time, list of deficiencies and needs |

| ACTION STEP | WHY DONE? (specific outcome expected) | WHO IS INVOLVED | WHEN DONE? (when completed) | WHAT RESOURCES NEEDED |
|--|---|--|--------------------------------|---|
| 8. Meet with appropriate legislative committee chairmen to explain and solicit support | to gain funding and support | Commissioner, Warden, Deputy Warden of Operations | 2 weeks | time, list of deficiencies |
| 9. Encourage staff to try kitchen again - use incentives if possible | to demonstrate willingness to participate in the problem and its solution | Warden | 2 weeks | time and memorandum and face-to-face contacts |
| 10. Request upgrade in Food Service salaries from Personnel and Appropriations Committee | to attract better quality workers | Commissioner legislative liaison with Appropriations Committee | 2 weeks | time, written document |
| 11. Request FTE for full-time nutritionist; or contract with one, or use vacancy savings. Also hire Food Service Manager | to have expert to plan and oversee Food Service operations | Personnel Director | 2 weeks | time, approvals, advertising |
| 12. Develop and implement cyclic RDA menus | Reduce monotony of diet and insure nutrient offerings | Nutritionist | 2 months and ongoing | position; time |
| 13. Meet with press privately to outline some efforts | to gain good will and demonstrate good faith | Commissioner | 1 month | time |
| 14. Run survey of inmates and preferred foods and and styles of preparation | To discover what food will be palatable to most of population served | Warden | 1 month and once a year | time, computation; paper |
| 15. initiate practice of weighing waste | To monitor wastefulness and thereby improve service by changing method or preparation | Deputy Warden of Operations | 1 week and | weighing device; written procedure |

| | | | | |
|---|--|---|-------------|----------------------|
| 16. Monitor food costs by category | To ascertain where cost overruns are so can plan for reducing them | Business Manager Acting Food Service Manager | 1 month and | time; record systems |
| 17. Move leftover maintenance money to Food Service line | To fill in voids in Food Service budget | Business Manager | 1 month | time |
| 18. Write commendations to officers and workers who are doing well; also Dairy Mgr. for fine production | To provide incentives during changes | Warden or Deputy Warden | immediately | time |
| 19. Review ACA Food Service standards and evaluate deficiencies; develop plan to remedy | To meet nationally re-organized standards | Deputy Warden of Operations | 1 month | time |

GOAL: Upgrading of Food Service by Contract

| ACTION STEP | WHY DONE? (specific outcome expected) | WHO IS INVOLVED | WHEN DONE (when completed) | WHAT RESOURCES NEEDED |
|---|--|---|-------------------------------|---------------------------------|
| 1. Inquire into legality of contracting Food Service | To determine if service can be contracted and if not, what can be done to enable | Commissioner; legal | 2 weeks | time |
| 2. Speak with Governor, Chairman of appropriate legislative committees about | To determine what support there is for contracting | Commissioner | 2 weeks | time |
| 3. Conduct market study of available Food Service vendors and costs | To determine who might be interested at what costs | Fiscal officer and Contracts Administrator | 2 weeks | time; telephone; correspondence |
| 4. Conduct survey of agencies who have tried contracted Food Service to determine satisfaction with which vendors | To benefit from others' experience in similar situations and to learn what track records are for leading vendors | Commissioner; Contracts Administrator | 1 month | time; telephone correspondence |
| 5. Conduct in-depth needs assessment | To determine what is required | Business Manager to upgrade Food Service Food Service Acting Manager | 1 month Deputy Warden | time |
| 6. Conduct budget analysis to determine reasonable cost/meal | To determine what range of bids may be expected | Business Manager Fiscal Officer | 1 1/2 months | time |
| 7. Appoint one staff person to be responsible for following the contracting possibility; to write work statement | To be sure that one staff person is accountable for the conduct of the contracting situation | Deputy Warden of Operations | 1 month | time |
| 8. Initiate the process for contracting Food Service | To get the contract moving if decision has been made | Contracts Administrator | 1 month | time |
| 9. Write up and submit this plan to the attorneys | For use in court | Deputy Warden Warden | 1 month | time |

Think for a few moments about your agency situation, and preferably a situation that you might be considering for contract. In using this exercise, you might think of contracting as a driving force, a restraining force, or perhaps as a strategy to use to reduce restraining forces or to strengthen driving forces. Contracting may not occur as an alternative at all. The exercise is a good decision-making tool after you have attained an awareness of the facts around a situation that might be contracted.

Using the blank worksheet on page 34 follow these steps:

- o The first task is to clarify the current situation of interest. (Enter a brief statement of the current situation in the appropriate area on the worksheet).
- o Next, the ideal or desired situation is projected. (Enter a brief statement of the ideal situation at the top of the worksheet)
- o Then, the worst possible situation that could develop is projected. (Enter an abbreviation of the worst situation at the bottom of the worksheet.)

Having expressed the current, ideal and worst situations, we are now ready to identify the forces.

Think of all of the forces that contribute to the worst possible situation and enter them in the “restraining forces” area of the worksheet. Think of all of the forces that can contribute to the ideal situation and enter them in the “driving forces” area of the worksheet.

For each of the restraining forces, think of ways to reduce their power or remove them. For each of the driving forces, think of ways to increase their power or add to them. As you work on action steps for each force, use the Action Planning Sheet on page 35 and its instructions to clarify why and how each course of action will be taken. You may be surprised at how this procedure will clarify and organize your ideas in formulating solutions to problems.

Use this exercise to your advantage in developing creative improvements in situations, both in situations where contracting may be considered as a possibility, and in other situations that may have nothing to do with contracting.

FORCE FIELD SHEET

Ideal Situation:

Current Situation:

Worst Situation:

| | | GOAL: | | |
|-------------|--|-----------------|---------------------------------|----------------|
| Action Step | Why Done? (specific outcome expected) | Who is Involved | When Done? (When completed?) | What Resources |
| | | | | |

The Importance of Correctional Planning in Contracting

Planning is critical to the success of any organization. Anyone who has ever worked in an agency or taken a course in management can tell you that. The leader is the critical force in planning, because the best plans in an organization are no better than the leader's commitment to them. Also, the kind of planning that goes on in an agency is almost universally a reflection of the leader's perceptions of what the agency's mission is, his/her philosophy of corrections and management style, and what the external and internal limits and enablements are. (See the Pre-Contracting Process diagram on page 37, upper left quadrant).

Recall for a moment the four types of planning postures, or management philosophies discussed earlier in this Chapter. If the leader of your agency is predominantly inactive or reactive, planning is not a priority and will probably not relate to a contracting decision. Only as a result of crisis or by default will such a leader utilize contracting to solve a problem, and under these circumstances the success of the contract is more likely to be a product of chance. More likely than not, problems will occur, since the lack of efficient planning, begets unexpected reactions to change. In agencies where such leaders exist one can only hope for a change in leadership where planning **is** a priority in order for the guidelines presented here to be used effectively. For the purpose of this manual, we will assume that either preactive or interactive leadership postures are dominant, since both such leaders are likely to be effective planners.

a. Becoming aware of a problem and stating the need

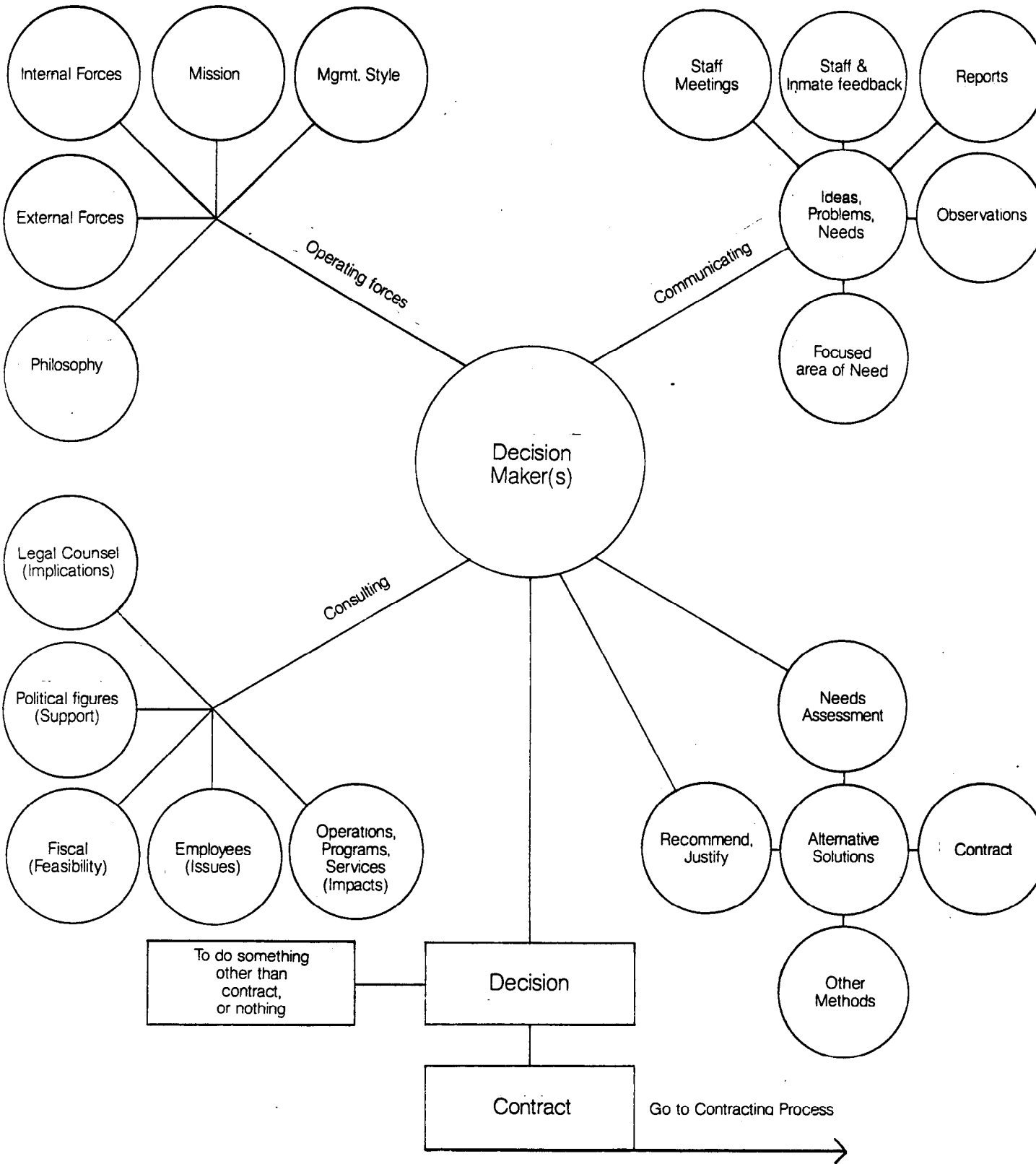
In agencies where planning is important, managers are constantly gathering information by communicating with staff and inmates. Through this activity they become aware of problems. Staff meetings, systematic reports, feedback from individuals, and direct observation give the manager perspective on the total organization. A system should be in place whereby managers, planners, and others make sense of all of the gathered information, explore innovative ideas, establish new directions and goals, and pursue methods of achieving objectives according to established priorities. (See Pre-Contracting Process diagram on page 37, upper right quadrant.)

b. Focusing on a particular need as part of the agency plan

During the course of planning, managers focus on a particular need as it comes up on the list of priorities. A clear and precise statement of that need forms the **basis** for further action. investigation of the need (a needs assessment) is conducted, a list of all resources required to meet the need is formulated, the results to be achieved by taking action are articulated, and as many methods as can be produced are discussed as ways to meet the need. Not always, but on some occasions, a possible solution may be found outside the agency's own resources. (See Pre-Contracting Process diagram on page 37, lower right quadrant.)

The decision-maker(s) may decide that nothing should be done. If the need warrants action, he/she may decide on any of a number of methods. If the solution indicated is contracting, then there are some definite tasks that **should** be performed before that decision becomes final.

Pre-Contracting Process



c. Weighing the pros and cons of meeting the need by contracting

There are two obvious avenues one may pursue to meet the agency's need. The service under consideration may be provided by either the agency itself or by an outside contractor.

First, the planners must look to in-house resources to see whether or not enough exist or can be acquired to meet the need within the time designated. Such resources may include money, staff, equipment, and facilities, as well as expertise required to deliver the service.

Next, the planner explores external resources. An ongoing list of providers, experienced and qualified in a wide range of service areas is valuable. Cost estimates, capabilities, services and methods of delivery available, and other relevant variables are gleaned from a variety of vendors so that comparisons can be made with in-house capabilities.

Careful analysis of both cost and non-cost issues of providing the service in-house or from outside is conducted, weighing the advantages and disadvantages of both. If the conclusion should be that contracting is preferable, that option along with the rationale for it is communicated to the decision-maker. Some commonly used rationale include: the agency does not have the required service capability; the agency does not have the expertise; the need is too urgent to wait to develop capability; a new approach is desirable.

d. Anticipating the consequences of contracting the service (See Pre-Contracting Process diagram on page 37, lower left quadrant.)

Contracting does not occur in a vacuum. Part of the decision-maker's attention is focused on the impact the decision to contract will have on the total environment in which the agency operates, as well as on internal aspects of the agency. The value of contracting is assessed against these internal and external consequences.

Internally, the manager will want to touch base with a cross-section of employees and, when present, union representatives. When the planned service will have great impact on the inmate population, it is also valuable to elicit comment from potentially affected staff and inmates. The effect that the contracted service will have on other programs and operations is not to be overlooked. Solving one problem through contracting may create others.

A decision to contract should not be made without consulting your financial officer. Allocating, or even finding, resources to purchase the service may present significant obstacles. Now is a good time to have the financial staff compute the real costs of providing the service, being careful to include not only items from the agency budget, but also the resources from other agencies within the jurisdiction. Contractors may not have access to those resources and will have to charge you for those extra costs. You will need these real costs when evaluating proposed prices. They also may come in handy during budget hearings.

You will need legal counsel to tell you if you can legally contract the service or what you must do to make it legal. New legislation may be required. Possible liability issues should also be discussed.

Consulting with key legislators is a must, since political actors do not normally like surprises, and since they can also be very helpful and supportive. Occasionally civic groups and even the press can be enlisted as supporters.

e. Making the decision

Assuming that the results anticipated are favorable and the rationale for contracting the service is acceptable, the decision-maker can now be expected to make a decision to contract. At this point, approvals are granted for the statement of need and statement of purpose to be used to develop a statement of work, and the decision to contract is committed to writing.

It may be interesting to look at which of these planning steps have been followed by a variety of administrators from across the country. A recent study was conducted of 24 contracts that represent a variety of types from a variety of agencies. Administrators indicated whether or not they had completed particular planning steps before deciding to contract. Of the 24:

- in 92%, a legal review was conducted:
- in 71%, the need was objectively established:
- in 63%, cost variables were identified:
- in 54%, a cost-effectiveness analysis was conducted:
- in 50%, public relations work was done:
- in 46%, political support was obtained:
- in 33%, the labor situation was evaluated: and
- in 25%, a market study was conducted:
- in 21%, an impact study was completed.

f. Setting up for the process

It is wise to appoint a contract manager or technical representative, for each potential contract. This person is not to be confused with the contract administrator who coordinates all agency contracting activities. The contract manager, or technical representative, has direct involvement with the areas of service delivery as a part of his regular duties and is appointed for this special duty because of his expertise. The contract manager will serve as a partner to the contract administrator during the entire process. Some administrators also appoint several other employees from related areas to advise and assist in the selection process.

After obtaining the appropriate approvals the contract administrator sets up files for this contract including the statement of need, the statement of purpose, the decision to contract, the contracting manager assignment, any checklists used thus far, and all paperwork that has been generated on the need (needs assessment) up to this point. Well-organized documentation is of critical importance.

Before the process officially begins, the contract administrator and contract manager should sit down and develop a preliminary schedule of activities and a division of labor. At this point, there should be some brainstorming about any anticipated problems in the upcoming process.

g. Checklist for pre-contracting process

You may find the accompanying checklist of pre-contracting activities on page 41 helpful as you develop your own procedures or add to existing ones.

CONTRACT PLANNING CHECKLIST

Contract Area Under Consideration _____

A. Determine Needs and Resources

| | <u>Date</u> | <u>initials</u> |
|---|-------------|-----------------|
| Identify project/service requirements | _____ | _____ |
| State requirements needed | _____ | _____ |
| Describe needed services | _____ | _____ |
| Review in-house resources | _____ | _____ |
| Determine staff availability | _____ | _____ |
| Determine facilities and equipment availability | _____ | _____ |
| Estimate in-house costs | _____ | _____ |
| Determine budget and cash availability | _____ | _____ |
| Review potential vendor resources | _____ | _____ |
| Identify potential vendors | _____ | _____ |
| Determine availability of vendor resources | _____ | _____ |
| Estimate vendor costs | _____ | _____ |
| Consider other alternatives | _____ | _____ |
| Contact other agencies for assistance/advice | _____ | _____ |
| Consider resources available in Governor's Office: i.e., technical assistance, management review, and/or program evaluation | _____ | _____ |

| | D a t e | <u>I n i t i a l s</u> |
|---|---------|------------------------|
| Analyze requirements and resources available | _____ | _____ |
| Perform comparative analysis | _____ | _____ |
| Document relationship between in-house resources, vendor resources or other resources | _____ | _____ |
| B. Anticipation of Consequences (for decision-maker) | | |
| Consult legal counsel for legality and liability issues | _____ | _____ |
| Consult financial officer for available funds and cost formulas | _____ | _____ |
| Consult key legislators | _____ | _____ |
| Gain support of civic groups and other community leaders | _____ | _____ |
| C. Decide to Contract | | |
| Evaluate Findings | _____ | _____ |
| Review analysis for cost effectiveness and potential for service satisfaction | _____ | _____ |
| Consider the impacts: | | |
| - on other programs and options | _____ | _____ |
| - on staff and inmates | _____ | _____ |
| - on employee groups | _____ | _____ |
| Make decision | _____ | _____ |

| | Date | <u>Initials</u> |
|--|-------|-----------------|
| D. Select the Contract Team | | |
| Appoint selection process team | _____ | _____ |
| Determine contract administrator | _____ | _____ |
| Determine contract manager | _____ | _____ |
| Ensure contract manager is familiar with the contracting process | _____ | _____ |
| E. Document and Plan the Contract | | |
| Develop initial contract file | _____ | _____ |
| File the needs statement | _____ | _____ |
| Secure comparative analysis between needs and resources | _____ | _____ |
| File the decision to contract | _____ | _____ |
| Include contract team assignments | _____ | _____ |
| File contract plan and timetable | _____ | _____ |
| File checklists | _____ | _____ |
| Develop selection plan | _____ | _____ |
| Identify key steps in plan | _____ | _____ |
| Assign individual responsibilities | _____ | _____ |
| Prepare a time schedule | _____ | _____ |
| Identify potential problems that could delay process | _____ | _____ |

THE FORMAL CONTRACTING PROCESS

What has happened thus far:

- I. The correctional need that warranted attention has been researched along with its relationship to the total agency operation.
2. Planning has resulted in a decision to use the contract to deal with the situation.
3. The agency's staff person who manages the contracting procedures (Contracts Administrator) and the recently appointed contract manager have formed a partnership for the purposes of a contract.

The smooth and successful conduct of the formal contracting process depends in large part on the existing procurement structure with which the Contracts Administrator will work. Presented here will be an ideal contracting structure that has all the attractive qualities and provisions one might desire. Certainly all systems do not have all of them. The idea is to demonstrate the ideal so that ideas may be incorporated into existing processes. The graphic presentation of the contracting process on the following page should be helpful in following the discussion.

Choosing an Appropriate Contracting Mechanism

a. Types of Contracting Mechanisms

The task now is to find the most satisfactory way to attract providers and to structure the contractual relationship. Most agencies have three basic means of achieving this result.

- 1) Small purchase discretionary contracting is used for purchase of service up to a certain dollar limit (usually \$5,000 - \$10,000 and the trend is for this figure to become smaller). This method gives the contract administrator a small degree of latitude and some means for avoiding a tedious process for small amounts of service. This method is not widely used, since administrators usually want to avoid an appearance of conflict of interest, and because there is relatively little work or service that can be accomplished with such small amounts of money.

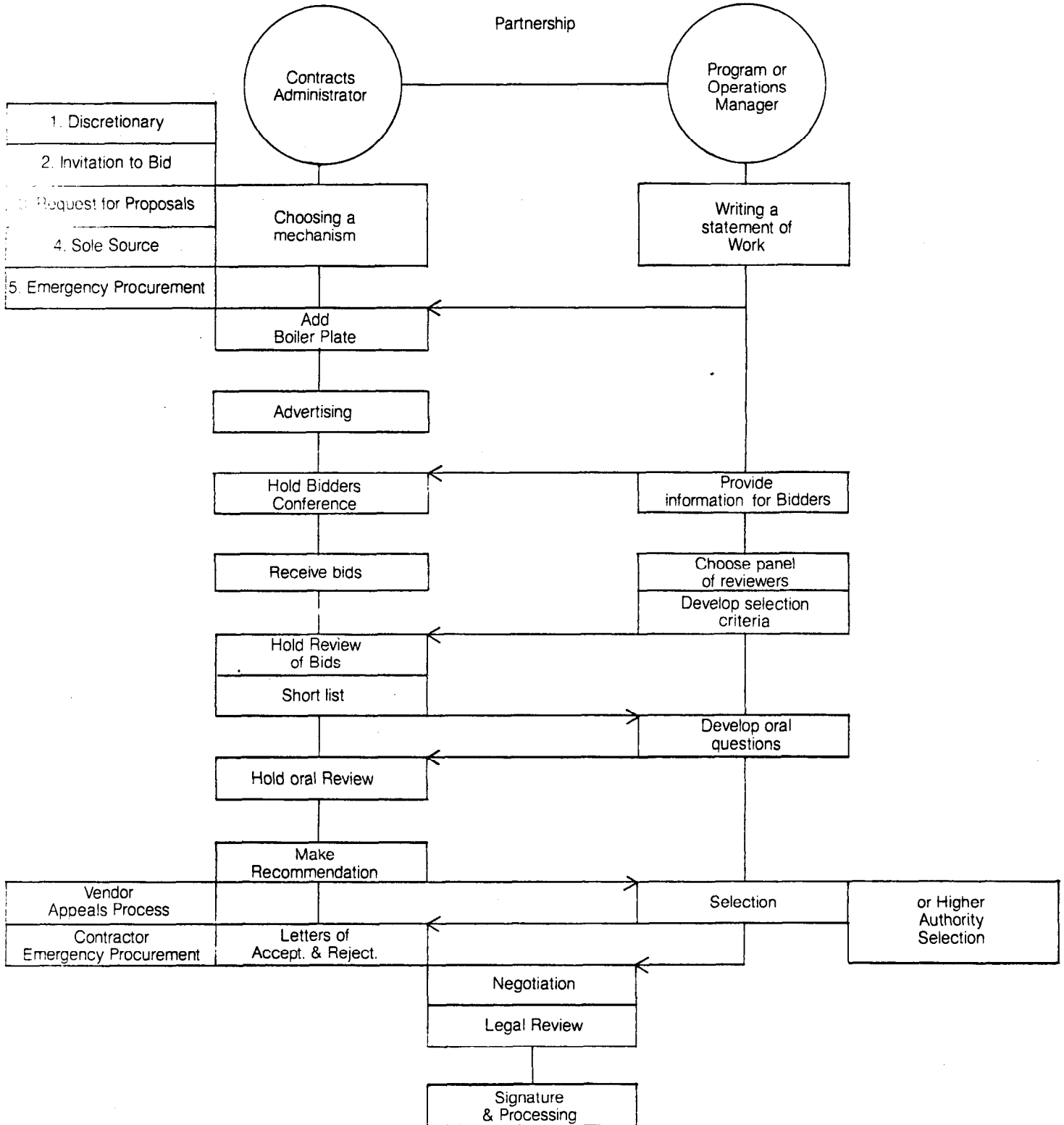
- 2) Competitive Solicitation Procedures

Competitive bidding is normally required for any contract above the limit set for small purchase discretionary contracts. There are usually two bidding mechanisms, the invitation to Bid and the Request for Proposals.

- a) The Invitation to Bid (also called Request for Bids and Request for Qualifications) is a highly specific instrument used mainly to purchase units of service or property at a fixed price. This instrument serves the purpose of

Contracting Process

Cooperative partner model



revealing prospective providers' past performance records and the competitiveness of their prices. The bids that it produces do not present approaches to problems or needs, and there are no negotiations involved. References and qualifications are checked and weighed against the ranking of the bidder based on their price, and decisions are made accordingly. Thorough justification must be offered for a choice other than the lowest bidder.

- b) The Request for Proposals is a bid instrument that is flexible and can be tailored to the desires of the administrator. It gives the potential providers an articulation of the, scope and level of the work required, and asks interested providers to show in writing how they will perform the work and at what price or rate. It searches for the prospective provider's creativity, and the competition is geared toward the most reasonable, economical and effective method of providing a service.

3) Non-Competitive Contracting

A means of contracting above the discretionary limit without competition, non-competitive contracting is best described as "exceptional", since there must be some special circumstance that warrants soliciting a proposal from a single source, and since elaborate justifications are usually required.

- a) The Sole Source contract is used when there is only one provider available who has the qualifications required to perform the service that is to be contracted, or when only one or no bids were received after solicitation. It may also be used when disruption of the services of an existing contract would have an adverse effect on clients. Sole source contracts require comprehensive justification for avoiding the bidding process and a host of approvals.
- b) The Emergency Procurement contract is usually the result of an acute crisis where the delay caused by the competitive process would endanger the health and safety of the public and/or clients. It is also sometimes used when there is a 'protest against selection in the regular process, but when there is a pressing need to go ahead with the work per the selected provider until the dispute can be settled in an appeals process. This method also requires much justification and approval.

b. Matching the Mechanism to the Situation

To give a better idea of how different approaches are used, listed below are a variety of contracting situations. Choose the appropriate mechanism from the descriptions above. The most appropriate responses appear at the end of this section, on page 65.

Situations:

1. The institutional kitchen burned to the ground last night.
2. A security post analysis of one institution needs to be done by an objective party. It can be done for \$2000.

3. The institution needs maintenance on its electronic perimeter security system .
4. The agency needs to have a study done of its classification system and explore new methods of classifying inmates. A new system will be designed on the basis of what is found in the initial study.
5. The agency would like to go to contracted food service operation.
6. The director would like to have a consultant to give a one-day seminar on stress management to top-level staff.
7. The agency finds doing its own medical laboratory work too expensive and wishes to contract it out.
8. The agency has \$350 million for capital improvements, but not enough staff to get the jobs going. A capital improvements program management firm should be handling the work.
9. There is a dispute brought by an unsuccessful bidder on a contract for medical services. The previous contract has expired, and unless a contract is let to somebody, there will be no medical services at the institution.
10. There is suspicion that toxic waste is present in the stream where the dairy cows are watered. There is only one expert on toxic waste in this area. It is important to remember that the information necessary to determine the appropriate solicitation process includes:
 - a) The type of service that will be contracted
 - b) The amount of money to be spent
 - c) The type of provider needed
 - d) The way the agency intends to pay for the service.

c. Competitive Bidding Procedures

1) The essentials of a bidding mechanism

Regardless of whether the bidding mechanism is an Invitation to Bid or a Request for Proposals, certain ingredients should be present, and include:

- o statement of need and purpose
- o statement of the work to be performed
- o level of the work required
- o minimum qualifications to perform the work
- o contracting process instructions and rules
- o request for references and/or resumes and job descriptions of prospective players
- o criteria for evaluating proposals with weights

- o schedule for the contract's process (with deadlines)
- o general information that will give perspective to new bidders
- o provisions for monitoring provider's performance
- o applicable laws and regulations
- o criteria to be used for cost and price analyses
- o name of agency staff liaison for further information
- o standard (model) contract terms and conditions

Each requirement has an important role to play and should not be overlooked. The essentials are relatively straightforward and are easily included. Many agencies have "boiler plate" packages that are used for all RFPs and ITBs, with just a few "fill in the blanks" for individual circumstances. The information and instruction they will bring to the provider/contractor will assure that the transactions between the parties are clearly understood from the beginning. The part of the bidding mechanism that is not routine is the statement of the need and objective, and the all-important statement of the work to be performed.

2) Importance of the statement of work

The single most critical element of a bidding mechanism is the statement of work. The nature of the work determines whether the bidding mechanism is an RFP or an ITB. The statement determines in large part the quality and appropriateness of the potential provider's responses and performance if selected. It should be prepared by a knowledgeable person who has been involved in the planning process and who will thoroughly address all requirements.

Most agencies prefer to keep the process as simple as possible. Since the Invitation To Bid provides a short and simple process, if there is any way that the services to be provided can be reduced to units of service that have a fixed price, contract administrators encourage the writer of the statement of work to tailor it toward definitive units of service. Many times this is not possible because the agency wants to buy an approach to service delivery along with the service, and different providers will offer an array of approaches from which to choose. The simple ITB process gets ruled out, and an RFP becomes a preferred mechanism, even though its processing is much more lengthy and complex.

It is the statement of work that defines the results you want to achieve and the kind(s) of service(s) to be provided. It is a guide for potential providers to use as they gather together their resources and prepare to perform for you. It should tell them exactly what is expected. A poor statement of work will produce poor proposals/bids and perhaps an even poorer performance from the selected provider. Disputes may arise when parties have different opinions about what was expected, resulting in litigation and total failure of the project. The potential provider cannot be held accountable for proposing or providing any more than the statement of work details, nor can selection of a provider be based on an requirements (or offerings) other than those in the statement.

The planning process discussed earlier should have made the formulation and writing of the statement of work a straightforward task. The contract manager or technical representative (who was selected earlier as the staff person from the program or operations area to oversee and participate in the entire contract scenario from beginning to end) is usually the best person to do the writing. Better than anyone else, he/she should be able to prepare a statement that is clear, unambiguous and complete.

Preparation of the statement of work can follow a format that includes:

- o Use the statement of need and the statement of purpose (objective) established during the planning process as a basis.
- o Detail the results to be achieved in measurable terms.
- o Specify the services to be provided,
- o State conditions under which the work is to be performed.
- o Establish time parameters for services to be delivered.
- o Include standards that will be used to evaluate performance.
- o Itemize resources and qualifications sought of provider.

3) When the nature of the work calls for an Invitation to Bid

Recall that the Invitation To Bid deals with a fixed-price contract where the services can be broken down into units of service, and selection of the provider is based primarily on price. There are some distinct advantages to this instrument:

- o It saves time during evaluation because only assessing prices and qualifications: there is no negotiation required.
- o It screens out those who can't perform the work up front since the statement of work is so specific as to requirements.

The disadvantages of the Invitation To Bid are:

- o It precludes innovation by providers.
- o It makes specifications appear to be directed toward particular vendors.

Emphasis during preparation of the Invitation To Bid is a statement of work that is very specific and very exact. Not only must every aspect of the services be detailed, but also how it is to be provided. Nothing can be left to the imagination. Much and time are required to write it.

Invitation To Bid cost guidelines are usually prescribed. The method of cost presentation is cost-per-unit-of- service and the method of payment will be based on a fixed-price.

The criteria for judging bids are close-ended, objective statements that require Yes-No answers at evaluation time.

4) When the nature of the work calls for a Request For Proposals

Recall that the Request For Proposals is applicable when the agency does not want to contract for services strictly on the basis of cost, since the approach to services is being purchased along with the services themselves. Again, the advantages and disadvantages of this approach are:

Advantages of the Request For Proposals

- o offers more flexibility than the Invitation To Bid in that it allows for a variety of options in dealing with issues
- o elicits creativity and ingenuity
- o encourages healthy competition among potential providers at finding better and more efficient methods
- o provides opportunity to look at the provider's style and approach to a task
- o reveals the extent of the provider's knowledge of corrections
- o educates the agency as to what is available (state of the art) in specialized and professional areas
- o does not put strict limits on the amount and kind of service(s) for the dollar
- o lays the burden of specifics on the potential providers

Disadvantages of the Request For Proposals

- o provides a much slower process than the Invitation To Bid, sometimes taking up to six months to allow for proposal preparation, evaluations, oral presentations, etc,
- o requires more subjective selection criteria that leave the agency open for attack by unsuccessful bidders
- o Disgruntled unsuccessful bidders often claim they could have provided the same service as the selected provider if the statement of work had specifically asked for it,

Preparation of a good Request For Proposals involves a well-organized, elaborate description of the services involved without specifying the methodology to be used by the provider. One can "get by" with generalities, but will pay later when the

questions arise from prospective bidders who are trying to write responsive proposals, and when proposals arrive that have clearly missed the point.

RFPs deal with money issues in a more flexible fashion. Funding sources may be identified, but the amount available for the project is not usually given. Allowable cost parameters are included. Providers are instructed as to how to present their projected costs, e.g. in terms of a line item budget or unit of service, depending upon the specified method of reimbursement - fixed-cost or cost-plus.

It is important with an RFP to specify the schedule for a rather lengthy process, to include deadlines for proposals, bidders' conferences, evaluation completion deadlines, oral presentations, projected date of award notice, execution dates, beginning and ending dates, report dates, etc. Some agencies also include a recommended format for a proposal for the provider to follow.

d. Non-Competitive Mechanism Procedure

When it is necessary to contract for services with a single source without going out bid because of acute crisis or unavailability of more than one such provider, two procedures are always required in some depth. They are:

- 1) Justification of the exact reason(s) for the single source contract and documentation that all other avenues have been ruled out.
- 2) A series of approvals from a variety of authority figures including the head of the agency or his/her designee, the head of the contracting component of the agency, and that counterpart in the General Services Department (or its equivalent), etc.

Another form of non-competitive negotiation is the provision for regulated exceptions to the bidding process. Certain specified services are not considered by agencies to be contractual services and are thereby exempt from competitive bidding. Examples of these are health services, legal services, and auditing services. While they are exempt, agencies may find competitive solicitation advantageous, and it is recommended whenever practicable.

Two other exceptions to competitive bidding are noted. When the law prescribes with whom the agency must contract, competition is precluded. Finally, when the legislature establishes the contract and sets the rate of payment during the appropriations process, no competition is required.

e. Avoiding Pitfalls

- 1) Take time and care to write an adequate statement of work and avoid misunderstanding, unending questions and irrelevant proposals. Some mistakes in writing the document can result in having to repeat the whole process after the selection process.

- 2) Never have a prospective bidder write the statement of work unless you are prepared to go to court to defend charges that the contract provider was chosen prior to the bidding process.
- 3) Don't try to use an ITB when you need an RFP or vice versa. You won't get what you want.
- 4) Don't misuse Emergency Procurement or Sole Source contracts by using them as shortcuts. You will only arouse suspicion and invite disapproval when you have a legitimate need for them.
- 5) Make sure that your contract manager is not just a substitute staff person to go through the motions. This person is critical to producing an adequate statement of work and a smooth contracting process. Good writing ability is also a necessity in the preparation of a statement of work.

f. Checklist for Contracting Mechanism

The following checklist of tasks may be helpful in ensuring that all steps are when dealing with the contracting mechanism. You may want to use it as a guide in establishing such a checklist for your own contracting process.

CONTRACTING MECHANISM CHECKLIST

| | <u>Date Completed</u> | <u>Staff Responsible</u> |
|--|---------------------------|------------------------------|
| If the contract is for less than the minimum amount for competitive proposals, proceed to agency rules for such contracting | _____ | _____ |
| Establish a section on general information | _____ | _____ |
| Establish due date, time, person and place for submitting a proposal | _____ | _____ |
| Identify standard terms and conditions | _____ | _____ |
| Identify the timetable used in processing the proposals Specify where and who will answer questions about the proposal | _____ _____ | _____ _____ |
| Review the statement of needs and purpose | _____ | _____ |
| Develop Statement of Work | _____ | _____ |
| Identify, the objectives of the proposed contract in specific measurable terms | _____ | _____ |
| Identify the services to be rendered by the prospective vendor | _____ | _____ |
| Establish a time schedule including target dates | _____ | _____ |
| Establish performance standards | _____ | _____ |
| Identify specific criteria that must be met by the vendor including qualifications of personnel, equipment, references, prior experience, etc. | _____ | _____ |

| | <u>Date Completed</u> | <u>Staff Responsible</u> |
|--|---------------------------|------------------------------|
| Develop proposed instructions and rules Specify proposal format and topics including technical qualifications, understanding of the work, approach taken, etc. | _____ | _____ |
| Request statement on adherence to laws, rules, etc. | _____ | _____ |
| Prepare plan for monitoring provider's performance | _____ | _____ |
| Establish special terms of the contract: i.e., licensing requirements, bonding, etc. | _____ | _____ |
| Identify information that must be supplied by the vendor; i.e., financial and statistical reports, progress reports, etc. | _____ | _____ |
| Identify cost information requirements | _____ | _____ |
| Establish the requirements for cost information to be submitted by prospective vendors | _____ | _____ |
| Determine if the bid is to be on a fixed-price, cost reimbursement, line item or other basis | _____ | _____ |
| Describe the detail and formation of costs to be submitted | _____ | _____ |
| Establish method for evaluating bids | _____ | _____ |
| Inform potential vendors of the selection process including method of selection | _____ | _____ |
| Select criteria for evaluating the proposal | _____ | _____ |
| Establish weighing factors to be applied to each criterion selected | _____ | _____ |

| | <u>Date Completed</u> | <u>Staff Responsible</u> |
|---|---------------------------|------------------------------|
| Complete the Request for Proposal | _____ | _____ |
| Prepare review checklist | _____ | _____ |
| Prepare transmittal letters to prospective bidders | _____ | _____ |
| Finalize statement of work, general information, rules and instructions, cost information, and the evaluation sections of the RFP | _____ | _____ |
| and other needed documents with appropriate staff | _____ | _____ |

Appropriate Responses to Situation Examples
(from Exercise on p. 47)

1. Emergency
2. Small purchase. Most agencies' ceilings are at least \$2,500.
3. Sole source. Electronic security systems are peculiar to the company that makes them, and maintenance contracts are most wisely let to that company.
4. Request for Proposals. Different consultants do this work in different ways. It is advantageous to know how the work will be done. Neither can the work be reduced to units of service readily.
5. Invitation to Bid. This could possibly also be an RFP, but food service lends itself to cost-per-meal-per-inmate.
6. Small purchase. This job could be done for a maximum of \$700.
7. Invitation to Bid. Lab work is contracted by units of service.
8. Request for Proposals. The method of running a capital improvements program can vary, and the agency would certainly want to see competition in terms of approach.
9. Emergency. The agency would have to go ahead and let the contract to the successful bidder on an emergency contract pending the outcome of the dispute. Inmates cannot be deprived of medical services.
10. Sole Source. Obviously, this consultant is the only provider of the service available and he/she is needed.

Advertising, or Reaching the Pool of Prospective Bidders

a. Approaches that may be used

If you want to publicize that work is available in your agency, you can take one of two approaches:

- o the shotgun approach, whereby you enter a short advertisement in publications;
- o the targeted approach, where you notify a predetermined list of potential bidders, usually by direct mail;
- o or a combination of both, which should reach both “old hands” and newcomers.

b. Advertising in publications can include:

- o trade and professional journals, e.g.. Commerce Business Daily
- o government publications
- o local and state newspapers
- o in some jurisdictions, vendors’ subscription journals

Advertisements should include, at a minimum, a short description of the work, its purpose, the agency staff contact and address, a deadline date for submitting a letter of intention and/or a proposal or bid. Be sure to give enough lead time to get good and appropriate responses. Advertising, used exclusively for reaching bidders, presumes that when work is available, it is the responsibility of those seeking work to find it. It also assumes that everyone you want to respond will read an advertisement.

c. Using a bidders’ list

Pre-planning for a viable contracting process pays off at this point. By compiling a list of qualified bidders according to the specific skills and services, you can ensure that potential providers with the most appropriate skills and track records to meeting your needs are invited to respond. Compiling and maintaining a good list require a lot of start-up time and plenty of attention to developing providers. The list should include the name of the vendor, their offerings, and references with notations of remarks when inquiries are made. Some highly organized agencies go so far as to register providers and require registration before work can be awarded.

Potential providers, from a list, are normally notified by mail. Some states certify the mailing for documentation when competition is stiff, and some even keep a log of letters sent to providers. Some jurisdictions make sure that special groups such as minority providers, small businesses, etc., get notifications. Care must be taken to ensure that the letter sent to providers is identical in substance to any published advertisement and that it is sent out simultaneously in the interest of fairness to all prospective providers.

Using this targeting approach presumes that the agency has a responsibility to reach out to providers in the particular area of service to be contracted in order to maximize quality responses.

d. Using a combination of approaches

Using a combination of both the advertisement and the bidders' list serves both the purpose of fairness, by making the work known as widely as possible, and the purpose of efficiency, by targeting the providers most likely to have the qualifications to get the job done.

e. Checklist of advertising activities

Included here is a checklist of tasks that might be included in the contract advertising process. You may want to use it as a guide in establishing a checklist of your own advertising activities.

ADVERTISING TO POTENTIAL COMPETITIVE BIDDERS

| | <u>Date Completed</u> | <u>Staff Responsible</u> |
|--|---------------------------|------------------------------|
| Develop the advertisement | | |
| Write a short description of the work and its purpose | _____ | _____ |
| List agency contact, address, and telephone number | _____ | _____ |
| Include deadline date and time for notification of intent to bid | _____ | _____ |
| Send to publications | | |
| trade and professional journals | _____ | _____ |
| government publications | _____ | _____ |
| local and state newspapers | _____ | _____ |
| vendors' subscription journals | _____ | _____ |
| Using a bidders list | | |
| Compile and/or maintain complete listing of available vendors | _____ | _____ |
| Choose vendors for the service category of the contract | _____ | _____ |
| Send vendors same advertisement used for publications | _____ | _____ |
| Mail letters: certified if appropriate | _____ | _____ |
| Document all distribution | _____ | _____ |

Pre-Bid Activities

The activities between the time the work is advertised and the time the proposals/bids are received can make or break the success of the particular contract that is being developed. During this time, the process should focus on clarifying the work to be performed and making sure that all interested parties have access to all information generated from inquiries.

a. Distributing the bid instrument

When interest is demonstrated by potential providers, either by letter of intent (required in some jurisdictions), telephone contact or visit, a copy of the bid instrument is distributed and a list is kept of all who receive it.

b. Inviting and responding to questions

The RFP/ITB should inform potential providers of the process for handling questions and concerns. There are three customary means of clarifying any areas of misunderstanding or ambiguity.

- 1) Written inquiries. The Contract Manager should be responsible for receiving and documenting written inquiries, preparing responses to the inquiries and (if the information would assist all bidders) distributing any newly generated information to all parties on the list of bidders who have demonstrated intention to compete for the work.
- 2) Telephone inquiries. The Contract Manager should be responsible for receiving, documenting, and responding to telephone inquiries, using the same procedure as with written inquiries.
- 3) Bidders' conference. Most bid instruments include the time and date of a bidders' conference, if one is held. If the bid instrument has not specified the particulars, a date, time and place should be selected and notification should be sent to all potential providers who have demonstrated intent to bid or make a proposal. A general agenda of events should be planned, e.g. statement of work, rate and payment issues, contracting issues, and process issues. A list of attendees should be kept as well. The Contracts Administrator should be responsible for the preparation and conduct of the meeting. Again, The Contract Manager should be responsible for all responses to questions to ensure that all providers get the same information. Minutes should be taken so that not only can the Contracts Administrator keep documentation of the questions asked and information given, but also so those who could not attend can get a copy, as well as those who did attend.

c. Other means of disseminating information

- 1) On occasion. some jurisdictions also provide potential providers with the opportunity to visit/tour the area of the agency where the work will be done and such tours have in some instances been mandatory. In other instances, site visits are specifically excluded, because the agency thinks it is not necessary or helpful.
- 2) Orientation to providers who are new to corrections takes time and effort, but in situations where the service is brand-new, and where all of the potential providers will, in all probability, have to create a system of service delivery in a profession where they are strangers, it's worth doing.

d. Bid guarantees

At this point, in the case of the ITB, and when the size of the potential contract is substantial, some agencies require potential providers to put up bond guarantees to ensure that the provider is serious, so that there is no danger of awarding the contract to a provider who is not both committed to and capable of delivering the service.

e. Certification of no conflicts of interest

Now is also a good time to collect statements from potential providers certifying that no conflicts exist. For example, what relationships exist between potential providers and agency officials, particularly those who will play a role in deciding which provider is awarded the contract. Ensuring an "arms-length" distance between the agency and the potential provider is critical in ensuring that the decision making process is based on merit and past performance and not on personal ties between the parties.

Are current agency employees former employees of a potential provider? Do they still have an interest in the provider's success? Even if they do not, the appearance of a conflict may prove as embarrassing to the agency as the existence of an actual conflict of interest. Checking out possible problems early can avoid difficulties later, either after the proposal has been written, or the contract signed. Attaching the provider's statement of "no conflict of interest" to the contract is recommended.

f. Problems

- 1) Anxious bidders - Constant calls from bidders can be annoying. Further, they may make you suspicious that they may be incompetent. The only way to deal with them is to hold them to the procedures and be patient with them.
- 2) Bidders who want private conferences for even more information - Should they be given an audience that others are not given? It shouldn't be done unless you're prepared to document and disseminate all additional information given during the private conference to all prospective bidders. You should also be ready to defend your actions in court.

- 3) Questions directed to other than the questioner/answerer - Instruct staff not to give out information, but to refer all questions to the Contract Manager. This process will help ensure uniformity and fairness.
- 4) Politics - Subtle and sometimes not-so-subtle pressure may be exerted at this point in the process. If an unethical request is made or implied, agency officials should politely but firmly refer to the rules of the process. All such inquiries should go to the head of the agency for further action. These situations can be terribly difficult, but if handled properly are likely to occur less frequently in the future.

g. Check list of pre-bid activities

As a means of ensuring that all pre-bid activities are completed, a check list is provided on the next page. Each agency may wish to modify it according to its own specific regulations and conditions.

PRE-BID ACTIVITIES

| | <u>Date Completed</u> | <u>Staff Responsible</u> |
|---|-----------------------|--------------------------|
| Distributing the bid instrument | | |
| Send to all inquirers | _____ | _____ |
| Keep list of bidders receiving | _____ | _____ |
| Responding to inquiries | | |
| Written inquiries | | |
| Prepare response | _____ | _____ |
| Distribute to all bidders (if new information) | _____ | _____ |
| Document | _____ | _____ |
| Telephone inquiries | _____ | _____ |
| Document | _____ | _____ |
| Distribute any new info. to others as appropriate | _____ | _____ |
| Bidders' Conference | _____ | _____ |
| Notify all of time | _____ | _____ |
| Prepare agenda | _____ | _____ |
| Document attendees | _____ | _____ |
| Keep minutes | _____ | _____ |
| Send copies of minutes to all bidders | _____ | _____ |
| Arrange site visits (if appropriate) | _____ | _____ |
| Orientation to Corrections (optional) | _____ | _____ |
| Collect, document and secure bid guarantees (if appropriate) | _____ | _____ |
| Collect certification of no conflict(s) of interest | _____ | _____ |
| Document irregular bidder activities (if any) | _____ | _____ |

Planning Ahead for Selection Activities

While waiting for the bids/proposals to come in, the Contract Manager and the Contracts Administrator will want to work ahead of the process and lay the groundwork for what will happen after the bids/proposals are opened. There are a few things that definitely must be done, and others that are preferred to do. Here is a list in priority order:

- a. Review the selection criteria that were written for the bid instrument and that will be applied consistently to all bids/proposals. With bids,
 - 1) a creditable track record (good references) and
 - 2) the lowest bid

suffice, unless there is some exceptional criterion related to the particular project. With proposals, there are usually many criteria, some of which are subjective, but most of which are objective and measurable. Examples of criteria might include:

- o Are all service components in the RFP addressed?
- o Is the approach sound? Has it been done successfully before?
- o Does the provider include enough staff/resources to get the job done?
- o Is there a clear understanding of the need, situation and/or problem?
- o Is there a solid experience track record'?
- o Have sufficient resources been allocated to get the job done?
- o Is the price reasonable?

Has the information used by potential bidders been supplemented since the bid instrument was distributed'? Has any of the original information been changed, with notification to all potential providers'? Will any additions or alterations necessitate changes in the selection criteria? (Does this mean going back out to bid so that others who weren't interested might now be?) Any action to be taken about these matters should be taken now. If there are no substantive changes in the criteria that might affect the integrity of the process, then the selection criteria are ready for use in the evaluation process.

If there are going to be oral presentations, now is a good time to prepare structured questions so that they will be ready. A rating schedule should also be prepared to ensure that presentations are judged based on predetermined criteria on identical scales. These questions can be altered later to make them optimally appropriate without jeopardizing the fairness of the procedure.

- b. Decide who will do the evaluating. With bids, it is relatively easy to appoint as evaluators staff persons who understand financing, can gather reference material, and have a basic knowledge of the service delivery. With proposals, evaluators should have more expertise (experience and knowledge) in the program areas and service requirements for which the contractual services are sought. Some agencies use agency staff that are familiar with both the financial and the operational/program issues.

For reasons of objectivity and fairness, others prefer to use persons outside the agency who have enough familiarity with the service to make a good judgment. Others use both in-house and external persons to evaluate. Still others prefer to hire consultants who are experts in the service area to evaluate.

- c. Decide how many will evaluate and whether or not to have review panels. In agencies where contracting represents a major effort, panels are used. The normal and recommended number of reviewers is three, to avoid ties in decisions. Normally there is only one panel, but in a few states, the first panel's decision is reviewed by a second panel to make sure that the decision is sound.
- d. Whatever the method, it is important that the Contracts Administrator, with the aid of the Contract Manager, prepare for the actual review before the opening of bids/proposals so there will not be a delay in the process. Persons who will serve must be appointed. It is wise to have them sign a "no conflict of interest" statement that lists potential conflicts which they must certify they do not have. Time and place for the review must be scheduled.
- e. Hold a conference with the evaluators (reviewers). Discuss with them the selection criteria. If there are questions, answer them. In the event that they are not familiar with the rules of the contracting process, provide them with orientation.

Receiving and Handling Bids/Proposals

"Bid" usually refers to the responses received pursuant to an Invitation to Bid, while "Proposal" refers to the responses to a Request for Proposals. Bids/Proposals are handled very carefully in most jurisdictions. Here are a few of the practices that seem to have merit:

- a. Deadlines for the receipt of bids/proposals should be observed religiously. Some agencies use a date-and-time stamping as part of a logging-in procedure. Agencies do not accept bids/proposals for evaluation after the deadline, and return bids/proposals that arrive late.
- b. Bids are normally required to be sealed, and are not opened until a specified opening date and time. At that time, some agencies have a public opening so that they can demonstrate the impartiality with which they proceeded. If there has been a lot of media attention or controversy concerning the particular contract's development, some agencies invite the press to bid openings. Regardless of how they are opened, they should then be turned over to the Contract Manager. Proposals are not usually handled so delicately, except that some agencies separate the narrative approach proposed from the pricing proposed so that reviewers will focus on the approach prior to looking at the cost. When all bids/proposals have been opened, it is time to have them evaluated.

Selection Activities

During the following procedures, much care must be taken to document all events and keep them on file. If there are going to be protests, they will more than likely arise from these activities.

- a. With responses to Invitations to Bid, selection activities are rather straightforward.
 - o The track record of the bidders is thoroughly checked, and
 - o The bid prices for the work to be performed are compared and analyzed.
 - o The lowest bid is taken unless a problem arises with investigation of performance quality and capability, in which case the next lowest bid of a well-referenced and competent provider is taken.
 - o Any time the low bid is not taken, it is wise to document the reason(s), and in many agencies, it is a requirement.
 - o The person(s) with the selection responsibility will also be well advised to discuss any problems with superiors and legal counsel before committing recommendations to writing.

- b. The selection process is usually more complex with proposals. More has to be evaluated than proven performance and price, although both of these are heavily weighed in evaluating proposals.
 - o The review panel or selection team will review all of the proposals according to the selection criteria. Some agencies have the panel look at the technical and substantive issues in the approach before looking at the price, so that the approach can be judged on its own merits. In a proposal, cost issues are not fixed costs, and a balance is sought between the approach proposed and the cost entailed.
 - o Normally the team will be given an evaluation sheet with all criteria listed and with instructions as to how to weigh and evaluate.
 - o More often than not there is a point system used whereby a range of grading can be applied and the appropriate score assigned to a given criterion, with totals tallied for all criteria.
 - o Reviewers then rank the proposals and submit a list of the top (three to five) providers to the Contract Manager.
 - o Now it is time to conduct a thorough background and reference check on the potential providers. References, credit ratings, and even calls to agencies that have done business with a potential provider, although not listed as references, are in order and could also be contacted. Thorough assessment of the provider's track record is one of the most important parts of selection.

- o At this point, in some agencies, the decision-maker reviews the top-ranked proposals and makes a decision based on the ranking and consideration of which bidder's offer is most advantageous to the agency.
- o In other agencies, and especially when the stakes are high, the top-ranked proposals (short list) are considered further at a series of oral presentations where the providers talk with the reviewers face-to-face. All providers are asked the same basic questions. This procedure almost always gives the reviewers a better idea of what the providers have to offer, because it provides a forum for questions and answers, and because requiring the provider to answer without preparation can be revealing. The results of the oral presentation - quantified rankings of the responses as rated by the panel - are given to the Contract Manager who forwards them to the decision maker.
- o Recommendations from the reviewers are considered by the decision maker who will now make a final determination. Decision-makers almost never go against the findings of the review panels, and there is no evidence from this study that it happens other than very infrequently. When it does occur, the primary reasons are last minute discovery of poor past performance or existence of a conflict of interest.
- o Finally, letters of acceptance and rejection must be written to all providers who entered into the competition (certified to prove they were sent). Always include in rejection letters the reason that a bidder was not awarded the contract and the reason the winner was successful. Sometimes doing this takes a lot of time and thought, but it can defuse angry non-selected proposers, and help providers learn from their mistakes and from others' successes.

Also, include in rejection letters information on how to file a protest, along with the deadline required, after which the matter will be closed. The time frame is usually 72 hours.

c. When things go wrong.

Occasionally, even when the finest procedures are used, things don't go as planned. The agency should be prepared to deal with the unforeseen.

- o When there is only one or no response to an Invitation to Bid or Request for Proposals, the agency might choose to use a single source contract with the only bidder, or search for a provider with whom to enter into a sole source contract.
- o On occasion, the selectors may review the bids and decide to reject all of them (if, for example, the bids are all too high or if none of the providers seem capable), but that option should be made clear in the bid instrument. When it is exercised, it should be justified in writing. A statement should be issued to the providers involved that all bids are rejected and for what reason. The statement should also include whether or not it is the agency's intention to send out another ITB or RFP at a later date.

Dealing with Unsuccessful Bidders/Proposers

Occasionally unsuccessful bidders/proposers will call or write to express their dismay at losing the contract, and some will want to discuss how they can improve their chances for success. Less often an angry bidder/proposer will file a protest. At this point the agency's legal staff should be contacted.

- a. Reasons for protest. Normally issues that are raised include the reasonableness, necessity, or competitiveness of the terms and conditions of an Invitation to Bid or a Request for Proposal. Sometimes bidders/proposers protest adverse effects on them due to the agency's decision about a contract award. Others may cite that specific selection criteria on which they were rated lower than the successful bidder are not germane to the successful delivery of the service. In other cases, unfair advantage issues may be raised. In such instances they may claim that the current contractor had an unfair advantage in that they had access to information that the other providers did not.
- b. Procedure for protest. After the initial protest is made, usually within 72 hours by regulation, the protestor has ten days to file a formal written notice of protest describing all the particulars.
- c. Attempt at mutual agreement. After a proper protest is received, the Contract Manager should make every attempt to resolve any misunderstanding informally, and come to a mutual agreement with the protestor. During this process, it can be determined if there is any factual basis to the protest.
- d. Emergency procurement. If there is a health and safety matter at stake, or if the contract is not let to the successful bidder/proposer because of protest delays, the agency can sometimes justify in writing an emergency procurement, award the contract, and make it final.
- e. Formal hearings. If there can be no mutual agreement and there is no emergency, some agencies will hold procedural hearings to look at disputed issues, or will turn the matter over to a sister agency that specializes in such disputes. Normally the agency's legal counsel, armed with contract files and key players, will handle such hearings for the agency.
- f. Litigation. Rarely do disputes go to court, but in the event that they do, all of that documentation and an experienced contract attorney will be invaluable now.

Negotiating with the Successful Bidder

Several issues arise at this point surrounding the change in role from bidder/proposer to contractor. The contract is the document that formalizes the relationship between the agency and the contractor. Up until this point the agency has been dealing with a proposer, and proposers usually have different agenda than do contractors. It is

critically important for the agency to be aware of these differences and to adapt accordingly. It is the negotiating process that marks this transition and that makes the final imprint on the contract. The degree to which negotiation is appropriate will vary, but some general guidelines and comments are in order.

- a. Issues that are negotiable at this point should be those that were predetermined to be negotiable in the RFP. Raising issues or allowing the successful bidder/proposer to raise other issues can invite challenges from unsuccessful bidders/providers. Here again the importance of the RFP is demonstrated. By planning ahead and anticipating the sequence of events, the agency can structure the process and a great deal of the substance by laying out the procedures to be followed by both the agency and the eventual contractor.
- b. In the event circumstances arise that necessitate a change in course, then negotiations with the successful bidder may be appropriate in order to meet the agency's needs. However, should those circumstances dictate a substantial change in direction, it may be preferable and necessary to rebid the service. Unsuccessful bidders may claim that had they been given the opportunity to respond to these new conditions, their proposed services would have been significantly less expensive and of a higher quality than those of the bidder with whom the agency negotiated the contract. Care must be taken to limit negotiations to those items and issues that are properly negotiable at this stage in the process. It is not only a case of fairness, but also one of avoiding unnecessary complaints and litigation.
- c. Items and issues that may be determined at this step in the contracting process include:
 - 1) Standards of performance - spelling out the criteria to be used in assessing the contractor's performance.
 - 2) Reporting requirements - discussing the frequency and extensiveness, as well as other such considerations, of reporting.
 - 3) Amendment procedures - detailing the conditions under which the contract may be altered.
 - 4) Evaluation procedures - determining the scope and approach to be used in evaluation and the selection of the evaluator.
 - 5) Pricing - negotiating, in some instances, the actual cost of the services.
 - 6) Rate-setting - establishing a rate is sometimes accomplished during contract negotiations.
 - 7) Contract period - specifying the schedule of work may entail extending or shortening the service delivery period.

- 8) Personnel requirements - ensuring that the contractor employs appropriately qualified personnel may be accomplished through specific experience requirements.
- 9) Legal provisions - inserting language to cover jurisdictional law and rules, as well as to protect the parties, is an appropriate and important part of negotiations.

Notwithstanding the many reasons to limit negotiations, agency officials as well as contractors should not hesitate to raise issues that they believe need further discussion or amendments so as to pave the way for a smoother contracting experience, even if it means a rebidding. It is preferable to place an issue on the table for discussion and be told that is not negotiable than not to have made your point. Raising issues and concerns should never be thwarted, while at the same time, raising an issue does not ensure a resolution that satisfies you totally.

Writing the Final Contract

The contents of the contract specify the roles, responsibilities, and obligations of the parties. These terms and conditions are the substance of the contract and must be expressed in clear, precise, and understandable language. The contract itself must contain several essential items. They include a narrative description of the service to be provided, when and how it will be delivered, the conditions for and method of payment, the time period of the contract, and termination conditions. How the contract is written is equally as important as what is written into it.

To ensure that the content includes everything that should be in the contract, and that it is properly explained and clearly understood, take your time in preparing it. Be sure that a thorough legal and fiscal review has been completed. A checklist is helpful at this point and should be used to minimize omissions or errors. This checklist will have been developed based on the particular requirements of your agency, but generally the following must be included:

- a. The statement of work has been discussed extensively in prior sections. Further comment is not necessary other than to say that it should be restated clearly and concisely.
- b. The payment method should include the amount or amounts to be paid, by whom and to whom, as well as the frequency of such payments. The requirements for billing the agency should also be spelled out, as should the record-keeping requirements, to ensure that all documents are properly retained for any later audit efforts.
- c. The inclusion of termination conditions is a must. The agency will want to protect itself in the event funds are not available for payment of services, the contractor does not perform as agreed to, or some unforeseen events make it in the agency's and/or the contractor's best interest to terminate the contract. Further, there may be statutory or regulatory requirements for the inclusion of specific termination language.

- d. The duration of the contract should be specified.
- e. The proposal that was selected should be included in its entirety. It is the very best proof of what the contractor promised to do.
- f. Each jurisdiction will normally have a set of administrative requirements (usually contained in the boiler plate portion of the contract) that set out the statutory and regulatory requirements by which the contractor must abide. In the event a jurisdiction does not have such mandated requirements, it is in the agency's interest to add them to the contract anyway.

Such items usually include requirements that the contractor maintain and retain financial and non-financial records for a specified period of time after the contract period is concluded, ensure agency access to such records for monitoring and auditing purposes, acquire and maintain specified levels of insurance coverage, and abide by civil rights and other applicable standards and regulations while doing business, as well as abiding by subcontracting requirements.

Depending upon the nature of the contracted service and the jurisdiction itself, other significant requirements may also be included. Thorough legal review will ensure that the proper provisions are not overlooked.

Final Reviews and Execution.

The Contract Manager, having completed the preparation of the contract document, should submit it to the Contracts Administrator for initial review. At this point the Contracts Administrator normally becomes responsible for ensuring that all other reviews and approvals are obtained. Once these steps are completed, the reviewed and commented-upon contract is resubmitted to the Contract Manager to ensure acknowledgement of and agreement with any changes.

The contract then returns to the Contracts Administrator for execution. The appropriate number of copies of the contract, at least three - the original and two copies - is submitted first to the contractor for signature, and then returned to the agency for signing by the designated official(s).

Care should be taken to ensure that the person(s) signing for the contractor are empowered by the contractor to execute such agreements. Once the agency completes the signature process, an executed copy is delivered to the contractor, or mailed to the sender via certified mail.

Checklist of Selection Activities

To assist the agency as it moves through this phase of the contracting process, a checklist of Selection Activities is presented on the following page.

SELECTION ACTIVITIES CHECKLIST

| <u>Items</u> | <u>Date Completed</u> | <u>Staff Responsible</u> |
|--|-----------------------|--------------------------|
| Develop selection criteria | _____ | _____ |
| Prepare questions for oral interviews | _____ | _____ |
| Select evaluation team members | _____ | _____ |
| Decide on review panel members | _____ | _____ |
| Conflict of interest clearance | _____ | _____ |
| Orient and prepare evaluators/ reviewers | _____ | _____ |
| Ensure timeliness of bids/proposals | _____ | _____ |
| Document bid/proposal opening | _____ | _____ |
| Complete background check on bidders | _____ | _____ |
| References of bidder contacted | _____ | _____ |
| Document selection team meeting, rankings and proceedings | _____ | _____ |
| Develop oral interview schedule | _____ | _____ |
| Contact bidder/proposer for interviews | _____ | _____ |
| Document oral interviews and rankings | _____ | _____ |
| Transmit recommendation to approving authority | _____ | _____ |
| Notify awardee and competitors by mail | _____ | _____ |
| Involve legal counsel if award is challenged | _____ | _____ |
| Negotiate with successful bidder | _____ | _____ |
| Prepare contract document | _____ | _____ |
| Final reviews | _____ | _____ |
| Transmit to contractor for signature | _____ | _____ |
| Agency approvals and signatures | _____ | _____ |
| File contract | _____ | _____ |
| Send copy to contractor | _____ | _____ |

Post-Contracting Process - Administer&/Monitoring the Contract

After all of the intricacies of the pre-contracting planning and decision-making, and the even more intricate solicitation and selection procedures, there is a common tendency to assume that the agency's responsibility is finished and that now the contractor is responsible for making the contract work. Administrators cannot abdicate responsibility for overseeing the activities in their agencies, and the contractor must be viewed as another employee performing a function of the agency. The contractor needs a special kind of supervision that is described herein in its ideal form.

1. Start-up and development of a monitoring system.

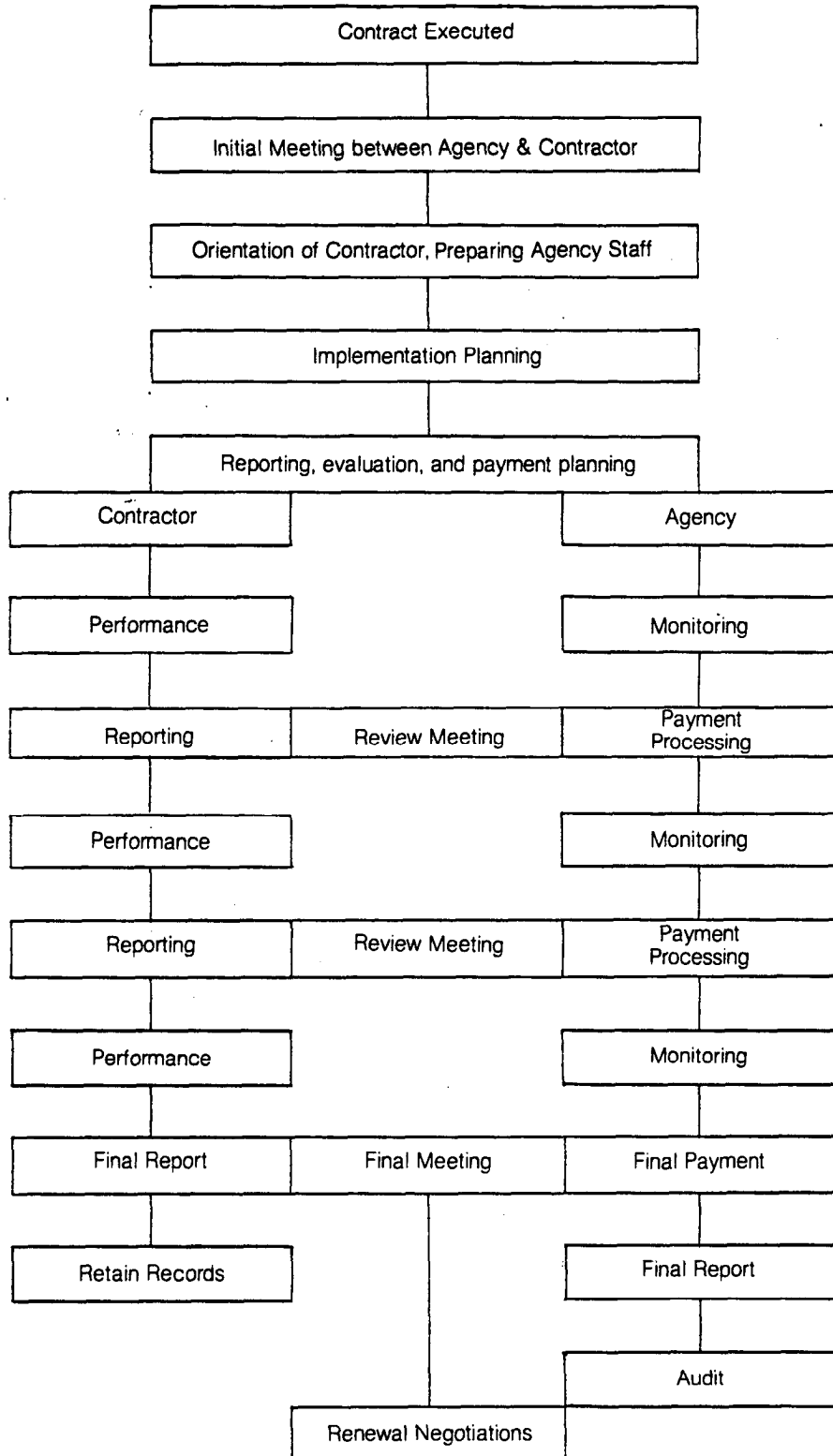
Once the contract is executed, the Contract Manager should have a series of meetings with the contractor as soon as possible. Several issues have to be handled before the contractor should begin work. (The diagram on page 74 should be helpful in clarifying the following discussion.)

- a. If orientation is needed, the Contract Manager should present an overview of the agency and the service area to the contractor and explain pertinent policy and procedure. Touring is most important now, since the work has become real and there will be many questions and explanations.
- b. Some staff will already be familiar with the contract and the impact it will have on operations, but others may not, so now is a good time to meet with staff and discuss what changes are in store and how they will affect individuals. There will probably be many questions, and each should be answered.
- c. Methodology is the next issue. Using the statement of work, the Contract Manager and the contractor/provider should go over the work, detail by detail, listing all of the tasks that are necessary to start up the work. No implementation detail should be left to speculation or assumption. Many of the tasks will be completed by agency staff at start-up, so affected staff should be present. If possible, the provider should have other key staff present as well. Not only does implementation get organized here, but also relationships between agency and private provider begin.

Not only start-up, but also tasks that should be done throughout the contract period, and the roles that will be taken by the agency and the provider, should be discussed thoroughly. It is a good idea to chart the responsibilities that will be assumed by particular persons and keep the paper handy as a reminder.

- d. Transition problems should be explored as much as possible ahead of time. For example, moving from an agency provided food service to a contractor provided food service necessitates careful planning and execution. Reassuring staff and inmates that there will be no lowering of the quality of that service while alerting them to potential "glitches" is critical. Involving staff in the transition process and keeping them informed all along the way will ease everyone through the transition period, which may last up to a year. Some brainstorming now, followed by action where possible, will prevent problems later, or at least reduce them.

Post Contracting Process



- e. Now is also the time to pull out the performance standards that have been listed in the bid instrument (ACA standards are recommended since they cover every area of prison operations). The contractor has probably read them many times, but they should be reviewed once again. If they have been written in measurable terms, the manager can now tell the contractor/provider how evaluations will be conducted to measure compliance with the standards. Whatever the measures, they should be decided now. Another wise move is to take a reading of what the status of the need area is before the start date so that before and after studies will have meaning.
 - f. The reporting system that will be used will then be discussed. It is wise to make the reports part of the evaluation system, i.e. measures of performance should be reported regularly. Intervals should be determined, as well as deadlines for reports. Contractors should be made aware of the importance of documentation in a public agency. Many are not, so it should be stressed.
 - g. Whatever the payment procedure that is the agency's practice should be reviewed with the contractor/provider, along with any provisions peculiar to the agreement. It is wise to stress that the Contract Manager will be reviewing and approving all invoices, and that payment is contingent upon up-to-date reports and continued satisfactory performance.
 - h. Complete documentation of meetings and discussions should be kept by the agency and written communication of these events and expectations shared with the contractor.
2. Routine Administering/Monitoring of the Contract.

Day-to-day monitoring of the contract is the responsibility of the Contract Manager. The contract cannot be left alone. It must be supervised as though it were an employee. The roles, responsibilities, and procedures of the Contract Manager during the post-contracting phase are many and varied.

- a. Serves as liaison between the contractor and the agency/institution on formal matters.
- b. Conducts problem-solving conferences on a regular basis and on an as-needed basis. Bigger problems can be prevented and potential ones can be avoided completely.

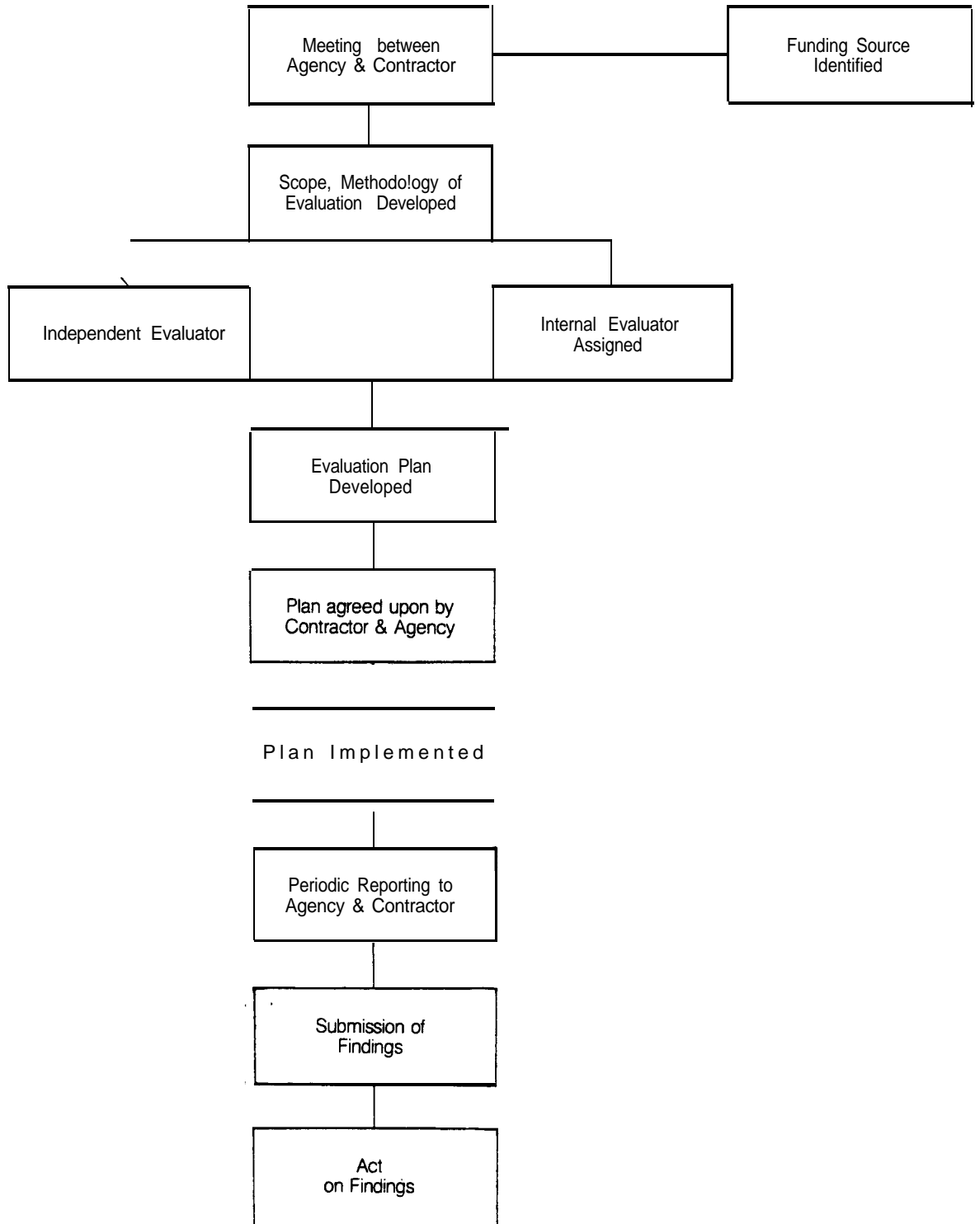
It's also important to keep a dialogue going, so that misunderstandings don't have time to fester.
- c. If conferences indicate that there should be an amendment to the contract, initiates and follows through on additions, deletions, or changes in the contract.
- d. Makes regular visits to the contracted site to observe, talk with clients, trouble-shoot, and record progress toward objectives. If goods or equipment are involved, they/it should be checked to ensure that they meet specifications/requirements.

- e. Reviews and analyzes reports from the contractor. Any items that cause concern should be discussed with the contractor immediately.
- f. Approves invoices or requests for payment after checking expenditures against the budget and resolving discrepancies.
- g. Reviews compliance with policy and procedure, administrative and management functions.
- h. Has outside, objective evaluations performed if part of the contract. Be careful to get qualified experts who can use the measurable standards in an adequate research design.
- i. When performance, administrative or financial problems arise, holds conferences with the contractor, works out how deficiencies may be corrected, and develops time frames for corrections. Follows up with visits to ensure that corrective action has been taken.
- j- When problems of a serious nature occur, confers with agency authority for guidance and/or confers with legal counsel for advice.
- k. If necessary, stops payment to contractor for failure to perform, etc., or takes other disciplinary action as necessary and appropriate if gross violations have been discovered - such as misappropriation of funds or fraud.
- l. Handles termination of contract, whether it be for cause or because the contract time is up.
- m. Initiates renewal of contract as necessary and appropriate.
- n. Performs an exit evaluation of the contract experience, using the measurable standards, and sharing the results not only with top management, but also with the contractor. This information should be valuable for future agency planning and contracting.

3. Formal Evaluations.

It is a good practice, and especially when the contractor does not agree with the assessments of the Contract Manager, to call in an expert from the outside to conduct a formal evaluation. On other occasions, an internal evaluation may suffice. In either case clearly defined and agreed-upon evaluation criteria should be developed, along with a suitable and appropriate methodology and an experienced evaluator to conduct the evaluation. (The diagram on page 77 depicts the evaluation process.) Agreement between the contractor and agency on these three key issues should be sought and gained. If the effectiveness of the service is being measured, sufficient time should be allowed to assess the impact after the service was provided. Pre-contract service measures will be compared with these post-contract measures to assess changes in specific variables. Other types of evaluations may stress assessments of the service delivery process as opposed to service delivery outcomes. Both types of evaluations are valuable.

Contract Evaluation



- a. External evaluations are most appropriate when the contract involves either a large investment in dollars or time, or represents a significant departure from the way in which the service is normally delivered. The absence of one or more of these conditions should not preclude such an evaluation. Each contract situation should be assessed according to its specific need for an outside objective third-party evaluation.

The advantages of the external evaluation are that issues of bias in reporting on the contract are more likely to be minimized because the contract is being assessed by an independent party - independent of the contractor and independent of the agency. To ensure even greater independence of the evaluator, it is sometimes preferable to have the evaluator paid by a party other than the agency, and of course never by the contractor. The use of federal grants or foundation support may be considered as possible funding sources.

There are, of course, disadvantages. The primary disadvantage is that the cost of such evaluations is considerably greater than that of in-house evaluations. The unavailability of such money frequently precludes the pursuit of such evaluations even though there is strong justification for them. Other potential disadvantages include the likelihood that it will take a longer time to initiate and complete the external evaluation because of difficulties in locating and selecting an evaluator, as well as the time necessary to design and execute a formal external evaluation. Frequently, such evaluations are included as part of the original RFP and/or are contained in legislation or appropriation language that dictate the course of such evaluations. In any event the critical point is to gain consensus between the agency and the contractor as to the purpose, method, criteria and evaluator's selection as early as possible in the contracting process. When the availability of funds is a problem, agencies may wish to consider having a university professor, or other research institute, conduct the evaluation at no cost to the agency. Such arrangements may be advantageous to the researcher as they provide access to information that would not normally be available.

- b. Internal evaluations should be reserved for contracts that represent less of a radical departure from service delivery, ones toward which agency staff are more likely to remain objective, and ones where claims of lack of objectivity are less likely to be harmful. Such evaluations are advantageous because they increase ease of access to the data, ensure that the evaluator is knowledgeable of the system, are less costly and may be scheduled well in advance to ensure the capture of pre-contract data. The major disadvantage is that reporting biases are more likely to appear, and even if they do not, the question is almost impossible to refute successfully.
- c. In conclusion, some form of a formal evaluation is desirable under any conditions. Even the shortest and simplest of evaluation efforts have more value than no such effort. Formally documenting the degree to which the contractor has successfully and satisfactorily delivered the service may also serve as the basis upon which decisions are made to renew the contract, or even to terminate it.

Thinking through the issues and clearly defining the objectives are essential ingredients of any evaluation process. Just going through the process itself will increase the likelihood that the contracting agency and the contractor will stay on target and thereby improve on their service delivery performance.

4. Contract renewals may be advantageous to the agency, given the existence of certain conditions. Provision for such renewals should be included in the contract document. Assuming that the agency desires the contractor to continue to provide the service beyond the initial contract period, renewal may be accomplished either with or without going through the bid/proposal process. If the process must be reinitiated in its entirety, then the preceding steps are retraced.

On the other hand, if the contract, and hopefully also the original RFP, provided for renewals at the agency's discretion, then those provisions would be triggered. Normally, one or two renewal periods may be included as part of the original contract. Public sector contracts, including those in Corrections, are generally limited in their duration by the ability of the agency to provide funding for the service. Such funding is normally only available a year at a time, in keeping with the jurisdiction's appropriation and budgeting cycle.

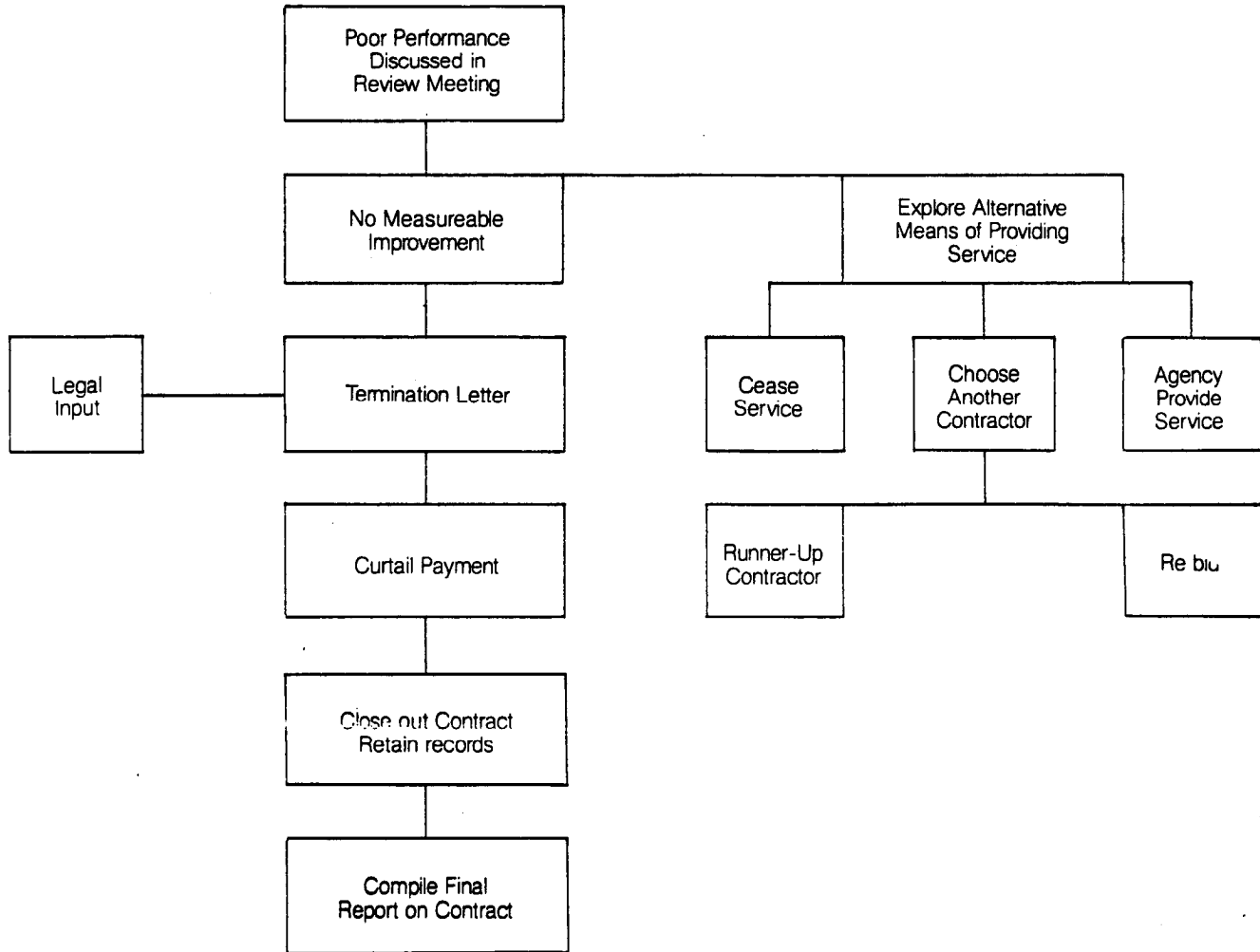
At the same time, agencies recognize that one year, the maximum period that most contracts are funded, is not sufficient time to permit the contractor to become fully proficient and cost-effective. Therefore, renewal provisions are generally advantageous both to the contractor and to the agency, and may be structured by the agency, and negotiated with the contractor, to meet the needs of both without compromising either.

Care should be taken to ensure that all legal requirements are met for extending the life of the contract through the renewal process. This precaution is important, as it may avoid challenges from unsuccessful bidders or from those providers who might be interested in submitting new proposals to the agency. Thorough documentation of the contractor's performance is essential both for determining the reasonableness of deciding upon renewing the contract and for defending the course of action taken in renewing the contract, should challenges arise later.

5. Terminating the contract is not a desired eventuality, but it must be anticipated, and steps must be built into the contracting process for implementing, should it become necessary. (It may be helpful to follow the diagram depicting the termination process on page 80 during the following discussion.) The reasons for terminating a contract must be clearly spelled out before entering into the contract and must be included as part of the contract document.

Prior to proceeding with a formal termination process, the agency should have had extensive documented discussions with the contractor relative to the issues of concern. Terminating the contract for reasons of poor performance should have been thoroughly documented and every reasonable attempt made to get the contractor to correct the situation.

Termination of an Unsatisfactory Contract



In some instances it will not have been possible to discuss the issue with the contractor prior to the formal notification. For instance, if funds are unexpectedly unavailable, or if some form of illegality on the contractor's part is revealed, the opportunity to correct the situation, or the agency's desire for the contractor to correct and continue, may not be present.

Termination may be initiated by either the contractor or the agency. Generally, it is the agency that desires to terminate the arrangement. When it does, the agency must give timely notice of its intent - that is, it must notify the contractor in accordance with the provisions for termination, as specified in the contract, of its intent to terminate. It must be done in writing and should include the reasons it is invoking for the termination. The precise language employed should be drafted and/or finalized by the agency's legal arm to ensure its correctness, and, of course, to minimize the risk of successful legal challenges on the part of the terminated contractor.

Terminating the contract triggers a number of other steps that the agency must take or consider taking. First, the payment of any future invoices from the contractor must be carefully reviewed to ensure that only payments authorized under the termination stipulations are made. The contractor's records and reports must be secured as necessary for any subsequent audit or other agency requirements.

A complete report on the need for invoking the termination provisions and an accounting of the closeout of the contract must be made and placed in the appropriate files. Agency fiscal and legal staff, along with the Contract Administrator and Contract Manager, should each prepare written reports on those aspects and contract issues that relate to their responsibilities. The final consolidated report should be prepared by a senior agency official and submitted to the agency director for acknowledgement.

POST-CONTRACTING ACTIVITIES CHECKLIST

| <u>Items</u> | <u>Date Completed</u> | <u>Staff Responsible</u> |
|---|-----------------------|--------------------------|
| Review contract and implementation schedule with contractor | _____ | _____ |
| Draft monitoring plan | _____ | _____ |
| Develop orientation program for contractor | _____ | _____ |
| Notify all agency staff involved | _____ | _____ |
| Inform inmates | _____ | _____ |
| Determine evaluation plan and standards to be used | _____ | _____ |
| Finalize reporting mechanism and procedures | _____ | _____ |
| Review payment arrangements and distribute forms | _____ | _____ |
| Ensure documentation and agency file maintenance | _____ | _____ |
| Periodic meetings with contractor to review agency monitoring, reports, contractor's reports, document progress, and correct deficiencies | _____ | _____ |
| Amendment procedures available, if needed | _____ | _____ |
| Renewal procedures prepared | _____ | _____ |
| Termination plan available, if needed | _____ | _____ |
| Post-evaluation of contractor's performance | _____ | _____ |
| Written documentation on file | _____ | _____ |

CONTRACTING PROCESS APPLICATION EXERCISE

This exercise should provide practice in thinking through the contracting process issues. It can also be of benefit to an administrator as he/she thinks through real situations that have potential for contracting.

Read the following scenarios (pps. 83 to 85) of potential contracting situations in corrections. Choose one that interests you most. Using the cues on pages 86 to 88, think through the Pre-Contracting, Contracting and Post-Contracting Processes, noting for each cue what would be required to assist in the process.

INDUSTRIES CONTRACTING SCENARIO

The director of the corrections agency senses the need to respond to heightened criticism of inmate idleness and annual deficits in the prison industry operation. Sales of prison made goods have increased while the balance sheet shows only red ink.

The governor's staff is pressing the director to improve the industry operation. A few prominent business leaders have suggested quite strongly to the governor that the private sector could do a much better job of running the prison's industrial operations. The director is being criticized publicly.

A "blue ribbon" commission was appointed by the governor to study these issues and to report on their findings and recommendations. That commission examined the agency's policies and procedures, legal and fiscal constraints, and the prison industry operations in several other jurisdictions. They concluded that the option most likely to improve the existing situation entailed the contracting of prison industries to a private sector corporation which would actually run prison industries for the agency.

The director has contacted several businessmen and is looking at several companies to run the industries.

TOTAL FACILITY SCENARIO

The Department of Corrections is looking for new ways to improve its operations and delivery of services.

The department has had to deal with a rapidly increasing inmate population, a court ordered population cap in its largest institution, and stiff community resistance to siting new facilities.

An in-depth study of the situation has validated the need for additional housing, the extreme unlikelihood of finding more space in existing facilities, the continuation of community opposition in blocking new prison siting, and the availability of private sector operators willing and able to confine up to 1,000 prisoners within 12 months. Staff recommended to the director that contracting for the confinement of up to 1,000 prisoners be pursued. There will be no funds for programming or industries however, and idleness is anticipated as an initial overwhelming problem that may produce management and violence problems.

The consequences of contracting for this purpose was given a qualified OK by legal counsel. Key legislators and executive staff thought the issue worth pursuing and that funds could be made available. Several key legislators on the Judiciary committees in the House and Senate suggested that if a contract is let for the facility, the department should entertain proposals from industrial corporations interested in running a prison/factory with inmate labor, taking on the entire operation of the facility as well. After some press in regards to the new idea, stiff organized labor opposition was found. Careful consideration of the needs and consequences resulted in the director's decision to request for private sector proposals for the confinement of 1,000 prisoners.

MEDICAL SCENARIO

The agency is interested in experimentation with new and cost effective service delivery methods. The Commissioner believes in competition and accountability. The Governor and the legislature are supportive.

The Commissioner has noticed a rise in health costs, but also a rise in inmate complaints, with lawsuit in two major institutions that are in relatively remote areas. Existing medical staff are poorly qualified and few speak English. Medication controls are poor. There have been two deaths due to questionable medical practice.

A three-month needs assessment documents poor conditions, management and operations of the health services unit. The commissioner studied the report and suggested that maybe a contract might work, but wanted more data to weigh. Cost analyses, market studies, and comparative costs were obtained. Several solutions were offered, one of which was contracting, and it seemed the most attractive.

The Commissioner's office touched base with its lawyer who gave the go ahead. The Business Manager said the existing medical budget could be converted to contract money. The unions were initially upset at possible loss of positions, but compromise was effected. A change in service was found to have little impact on other operations, and the inmates seemed favorable enough. Political leaders were quite favorable as long as costs could be controlled. The decision was made to contract.

CAPITAL PROGRAM MANAGEMENT SCENARIO

Misuse and mismanagement of funds in the design and construction division of the agency has resulted in a series of legislative inquiries. had press. and the conviction of three employees. Key political figures are calling for the governor to place the responsibility for this function in the hands of another agency. Other agencies are not enthusiastic and suggest that an independent contractor be hired to perform these services.

The commissioner accepts these recommendations and decides to contract for these services after verifying the availability of funds from the legislature for such a contract and confirming that the legal enablements are in place.

A contractor is selected by the commissioner in conjunction with legislative leaders. The governor has directed the commissioner to begin the Capital Program.

CUES FOR PRE-CONTRACTING ACTIVITY

(Who? or What? or How? and Why?)

Verification of Need/Problem

Identification of Requirements to Meet Need or Solve Problem

Review of Internal Resources

Review of Contractual Resources

Consideration of other Alternatives

Comparative Analysis

Legal Issues

Political Issues

Operational Impact

Employee Issues

Evaluation of All Factors

Decision-making

Justification

CUES FOR CONTRACTING ACTIVITY

(Who? or What? or How? and Why?)

Appoint Contract Manager

Choose a Bidding Mechanism

Elements of a Statement of Work

Measurable Objectives

Services to be Rendered

Special Conditions

Target Dates

Performance Standards

Requirements of Provider

(Qualifications. equipment. personnel. references. etc.)

Assembling RFP Components

Mode of Advertising

Mode of Bid Mechanism Distribution

Mode of Answering Proposers' Questions

Mode of Review & Who'?

Selection Criteria

Short List?

Orals? or Further Review?

Final Selection

Protests from Unsuccessful Proposers

CUES FOR POST-CONTRACTING ACTIVITY

(Who? or What? or How? and Why?)

Announcements (Press. Staff. Inmates)

Startup Planning Elements

Necessary Training

Coordination/Liaison

Monitor

Monitoring Responsibilities

Kinds of Documentation Kept

Progress Meetings

Payment Arrangements

Amendment(s)

Evaluation Components

Evaluator

Use of Evaluation

Renewal Terms

Termination Terms

Post-termination Activity

CHAPTER III

CONTRACTING SATISFACTION, EXPERIENCE, AND ADVICE

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INTRODUCTION

Reporting the experiences agencies and institutions have had with contracting should prove useful to those who are contemplating contracting. For that reason an assessment of these experiences was made and is reported in this chapter. In addition, the contractor's view of the relationship is also reported because such information is valuable to administrators in planning further contracting work.

CONTRACTING SATISFACTION

Scales of satisfaction

How satisfied are correctional agencies with their contractors/ providers? And how satisfied are contractors/providers with correctional agencies? A sampling of 24 correctional agency contracts revealed that providers were slightly more satisfied with their own performance than the agencies were. On a scale of 1 to 7 where 7 indicated the highest degree of satisfaction and 1 indicated the lowest degree, agencies and providers rated one another on 21 different variables. The highest and lowest degrees of satisfaction are listed below.

Highest Degree of Agency Satisfaction with Providers/Services

| | |
|--|-----|
| Knowledge of agency operation | 5.8 |
| Comfort with their role in the institution | 5.7 |
| Follow-through on commitments | 5.7 |
| Quality and timelessness of reports | 5.7 |

Lowest Degree of Agency Satisfaction with Providers/Services

| | |
|--|-----|
| Initial adjustment to the institution | 4.9 |
| Relationship to the institution | 5.1 |
| Staff response to the service provider | 5.1 |

Highest Degree of Provider Satisfaction with Contract Situation

| | |
|---|-----|
| Authority to enforce their regulations with inmates | 6.6 |
| Authority to supervise inmates within Institution's regulations | 6.5 |
| Their company's support of their efforts | 6.5 |
| Their roles in corrections | 6.5 |

Lowest Degree of Provider Satisfaction with Contract Situation

| | |
|---|-----|
| Level funding available | 4.9 |
| Time frames allowed to meet contract requirements | 4.9 |
| Initial adjustment to the institution | 4.9 |

Some highlights of the results are rather interesting. Agencies were most satisfied with providers, knowledge of agency operations (5.8). their comfort with their roles in the institutions (5.7). their follow-through on contractual commitments (5.7), and the quality and timeliness of their reports (5.7). Providers were most satisfied with the authority they have to enforce their own regulations with inmates (6.6), the authority to supervise inmates within the institutions' regulations (6.5), their companies, support of their efforts, and their roles in Corrections.

Agencies expressed lowest degrees of satisfaction with providers' initial adjustments to the institutions (4.9). staff responses to the service provided (5.1). providers' relationships to the institutions (5.1). and the political support they felt for contracting the services (5.1). Providers expressed lowest degrees of satisfaction with the levels of funding available to provide effective service (4.9). time frames allowed to meet contract requirements (4.9). and their initial adjustments to the institutions (4.9).

The greatest disparity between agency and provider satisfaction with contracts was relative to the supervision of inmates. While the providers were quite satisfied both with their authority to enforce their own regulations (6.6) and to supervise inmates within the institutions' regulations, the agencies showed less satisfaction (5.3 and 5.4 respectively). It is also interesting that the providers feel more support from their companies (6.4) than the agencies feel from political circles (5.1).

Agencies and providers agreed most about the providers' initial adjustments to the institutions (4.9 for both), about the agencies' bidding processes (5.3 for both), and about the legal provisions in the contracts.

A good contracting situation

Administrators offered some attributes of a good situation:

- o When the provider's service matches the agency's needs at a reasonable price:
- o When the provider has a cost advantage over the agency in terms of salaries, materials, networking, etc.:
- o When there is much competition between prospective providers:
- o When the provider is willing to do more than is required for the same price and the same quality.

A good provider

Administrators from eleven agencies offered the following characteristics of a good provider:

- o is committed to carry out the contract
- o has a good track record
- o has a clear understanding of the service
- o has quality leadership
- o is able to write a good proposal
- o has a good knowledge of the bureaucracy

- o has adequate expertise in service-area
- o possesses unquestionable capability
- o is able to recruit quality personnel
- o is willing to do more than the minimum
- o possesses integrity and accountability
- o maintains high standards of performance

A poor provider

Administrators also described the poor provider.

- o has inadequate capability to deliver the service
- o has argumentative personalities in organization: poor public relations
- o makes service changes without contract amendment
- o does poor job of documenting work
- o ignores contract provisions
- o does not follow through
- o is careless with use of funds
- o does not develop agency relationship
- o does not understand or work well in a bureaucracy

ADVICE FROM EXPERIENCE

During the course of the study from which this manual is derived, administrators offered some tips and suggestions that warrant mention. The cataloguing of advice that follows is not to be misconstrued as a step-by-step process, but is meant to be a somewhat organized review of some special points for consideration.

General comments

Administrators warn others to avoid political intervention into the contracting process. They encourage objective planning for such ventures. Good leadership is a must. While most advise others to keep the contracting process as simple as possible, they also advocate the use of detailed checklists to ensure that all parts of the process are completed.

A good piece of advice is to refrain from “bureaucratizing” private sector contractors. There is a tendency for staff who are administering the contract to gradually inflict upon the provider the same restraints that had prevented the agency (bureaucracy) from delivering the service efficiently before the decision was made to contract the service. Agencies must take care to preserve the freedom of enterprise for their providers.

Some practical pieces of advice about the process are

1. Make use of a computer database for drafting, processing and reviewing the contracts in the agency.

2. Train institutional staff about the principles of contracting so that they will understand what the undertaking is all about.
3. Train providers on how to deal with the bureaucratic process.
4. Write the procedures so that there are differentiated processes according to the size of the contract.

Pre-contracting activities

1. Looking at Alternatives for Meeting Needs

- a. Develop good and reliable needs-assessment instruments to ensure that the decision to contract is solidly based.
- b. When considering contracting for a service that has not been contracted before, invite a group of known providers of the service to brainstorm what would be involved and how and at what costs.
- c. Use the planning process as a means to explore innovative approaches to providing correctional services.
- d. Always rule out the agency's ability to provide the service as well as the private sector can.

2. The Decision to Contract

- a. Anticipate potential court challenges when approaching a contracting possibility, and plan the situation so that possible challenges are met.
- b. Delay the decision to contract a service at a variety of facilities until a pilot project can validate such a decision.
- c. Make a case for cost-effectiveness before making a decision to contract in order to be prepared for questioning of judgment.
- d. When possible, verify a cost advantage to be achieved by contracting.
- e. Be sure that there are qualified providers before deciding to contract.

Contracting Procedures

I. Preparing to go out to bid.

- a. Include in the bid instrument measurable outcomes expected. The practice produces better proposals, makes review of proposals more clearcut, makes the final

contract tighter, gives sound guidelines for administering (monitoring, managing) the contract, and provides the basis for meaningful evaluations.

- b. Be precise when writing the bid instrument (RFP). Don't be too sketchy, but don't pad with irrelevancies that confuse providers.
- c. When personnel are required for the service, always include a minimum staffing level in the RFP to prevent providers from making up shortages by eliminating adequate staff.
- d. Assign the writing of the bid instrument to a responsible person in the service area who is most knowledgeable about the service that is needed. An authority high in the organization should approve the instrument.
- e. Include the model contract in the RFP. This will screen out prospective bidders who are not prepared to live with the agency's contractual requirements.
- f. Write into the RFP the kind of rate setting parameters that will provide the most incentive to the prospective provider.
- g. Always consult legal counsel before issuing the bid instrument.

2. Advertising

- a. Whatever the method, get the announcement to the widest possible audience to ensure the best possible competition among the broadest variety of approaches from the available providers. Doing so also precludes accusations that only selected vendors were approached to do the work.
- b. Develop a categorized bidders' list to whom announcements are sent to ensure that qualified providers get the news of work. Also, if you have the resources, a certification of approved providers targets the desired audience most effectively.

3. Bidding procedures

- a. Require letters of intent prior to receiving proposals, which allows the agency to know who is serious and helps in organizing a bidders' conference.
- b. Insist on a Performance Bond, especially for large contracts.
- c. Require the proposal approach to be submitted separate from the financing proposal so that the approach can be judged on its own merits.
- d. Always give all newly generated information on the work to all bidders.
- e. When providers are new to the agency, give them orientation to the bureaucracy as well as to the work of the agency.

- f. Provide as much information to bidders as possible. The more they know, the better the proposals.
4. Selection procedures
- a. Avoid even the appearance of evil. Do not socialize with bidders.
 - b. Set up advisory boards as well as review boards to handle deliberations on very large contracts.
 - c. Check out all references and probe for as much information as possible about serious contenders for the contract.
 - d. Always investigate the backgrounds and business relationships of serious contenders to rule out conflicts of interest. Signed statements denying such conflicts can be helpful.
 - e. Never underestimate the value of oral presentations to reveal the real substance of a proposal.
 - f. Have an appeals process available for unsuccessful bidders.
5. Negotiation
- a. Some say to negotiate as little as possible. Changes in the requirements, etc., after selection, can open the possibility of having to rebid the entire project.
 - b. Others advise to use the negotiating period to tailor the contract to the agency's needs even more than the RFP delineated.
 - c. In any case, make sure all negotiations are legal. Have counsel present during negotiations.
6. Preparing the final contract
- a. Avoid legal nitpicking. Most of the legal considerations should have been taken care of during the writing and assembling of the RFP, or at least during the negotiations.
 - b. Review checklist to be sure all steps have been completed.
 - c. Be sure authorized agency person signs the contract.

Post-Contracting Procedures

1. Managing (administering) the contract

- a. When appropriate, take measures of conditions (related to the standards of performance that should be in the RFP) in the service delivery area before start-up of the contract.
- b. Coordinate all institutional and staff roles.
- c. Establish and maintain a schedule.
- d. Establish and maintain tight fiscal controls.
- e. Keep the accounting as simple as possible.
- f. Maintain authority and possession of the inmates.
- g. Allow time and patience for transition problems to be ironed out. Be actively involved in problem-solving.
- h. Foster positive relationships between institutional staff and provider staff.
- i. Meet often with the provider at the site of the service delivery.
- j. Separate monitoring of program and fiscal performance.

2. Evaluating contract performance

- a. Plan evaluations far in advance of performance.
- b. Combine external and internal evaluations.
- c. Use contract performance standards as measures of success or failure.
- d. American Correctional Association standards are good evaluation tools if they can be built into the statement of work in the RFP.
- e. Give the provider feedback on all evaluative activity, and discipline promptly when applicable.

3. Renewals and Terminations

- a. When possible, deal in multiple-year contracts. Very little can be done in one year, even though funds cannot be promised that have not been appropriated. Make refunding and performance contingencies for each year's contract renewal.
- b. Provide for termination at either party's discretion with a reasonable time frame for replacement.

- c. Renew only on the basis of performance.
- d. Establish a hearing procedure for providers who want to appeal terminations for cause.

SMALL BUT PERSISTENT PROBLEMS

Administrators cited several “pet peeves” often encountered in the contracting process. They are worth mentioning since they are practical problems that may well become part of an administrator’s contracting reality.

Administrators, especially contract administrators, often become annoyed with the legal nitpicking of their own lawyers, even though they realize that the legal considerations are important. They complain that matters that seem of no consequence become unsurpassable obstacles to their legal counsel. They see this nitpicking as an unnecessary delay that jeopardizes their relationships with contractors and complicates coordination of start-up.

Contract administrators find it not only irritating but also complicated when, out of necessity, the contracted service must begin before the contract is signed. Legal neatness is sacrificed and there is a situation where almost anything can happen beyond the control of the agency.

Some administrators find themselves in the dilemma of being restrained from the use of the single source option, or at least reluctant to use it because of a history of being turned down by a sister agency that oversees contracting for the jurisdiction, due to poor justifications for single source. Some have lost the option when auditors have reported abuse of the mechanism as a shortcut to or circumvention of the regular process. When the single source mechanism is associated with poor management at best and corruption at worst, most administrators become shy of its use and lose a valuable contracting option that is perfectly legitimate and appropriate for its designed purposes.

Perspective differences and semantic differences between fiscal staff and programs/operations staff sometimes may make their interfacing during the course of a contract almost impossible. For that reason, many agencies have separated fiscal aspects of contracts from the service aspects. Even then, the contractor may find himself in the position of having to deal with agency staff holding two apparently different positions regarding his role and performance. Care should be taken to avoid such confusion by closely overseeing the work of those in direct contact with the contractor.

The time consumption of the contracting process is staggering, and close to 100 percent of the administrators complained about it, although they all acknowledged it as a necessary evil. Some say the processes have become too cumbersome and full of red tape, and that they need to be streamlined.

Many administrators complained that good needs assessments are difficult to achieve, and many expressed the need to develop reliable instruments for measuring and evaluating

legitimate needs. A good needs statement is, of course, critical to a successful contracting process and a viable contract.

Administrators complain that there are far too many levels of review for contracts. In some agencies, not only do the contracts have to go through five to six internal offices, but they must also go to the Attorney General's Office, the Department of Administration (General Services), and sometimes other watchdog agencies.

Both administrators and providers complain that there is as much red tape for simple and small contracts as there is for large and complex contracts. Some advocate having two contracting processes that reflect those differences, thereby making it easier both for the provider and the agency.

THE PROVIDER'S PERSPECTIVE

1. We can do it better!

Without exception the provider's point of view is that his/her company can deliver the service in question more efficiently than the agency can. A sampling of their claims includes:

- o We have more flexibility so we can do things quicker and better.
- o We can provide the same service at a lower cost.
- o We are free from bureaucratic red tape so we can be more efficient with personnel and purchasing.
- o We are experts at our profession. We know how to run our profession better.
- o We are more creative.
- o we are more committed because we have more investment than state employees.
- o We are more experienced.
- o We can pay a competitive wage.
- o We have more credibility with the inmates because we are not their keepers.
- o We attract a more secure employee who is not looking for a safe, permanent state job.
- o We do not take our raises for granted.
- o We set higher standards of performance.
- o We have less trouble with unions.

2. The bureaucracy gives us a few problems.

Providers were reluctant to “bite the hand that feeds” by being critical, but they did offer a few complaints about governmental bureaucracies.

- a. The contracting process sometimes seems like an obstacle course or perseverance test because of its lengthy red tape.
- b. Once the contract is signed, the agency wants the service now and does not give us enough time to prepare for start-up. We waited for their lengthy process, but they are not willing to wait for us to prepare.
- c. Government payment is slow. It considers no one and makes no apologies for failure to pay on time.
- d. A one-year contract gives us hardly enough time to get started before we are having to make another competitive proposal. It's almost not worth getting involved. Some states actually enforce the rule instead of writing a three-year contract in one-year increments contingent upon appropriation.
- e. Agency legal people sometimes do not get involved until the last minute and then they want to change all the rules in the middle of the game. They should get involved early to avoid hangups at the last minute.
- f. Some bureaucratic rules prevent contractors/providers from practicing good common sense. It almost seems as if they want us to be bureaucrats, too. If that is true, then there is not much advantage in contracting with the private sector, because the red tape that they wanted to eliminate is right back.

3. We like this work and we will continue.

In spite of problems, contractors expressed overall satisfaction with their arrangements. Forty percent said that they were making a profit, and seventy percent said they had planned to expand their operations either in the size of their present contracts or in the number of contracts with Corrections.

ADVICE FROM LAWYERS IN THE FIELD

The most classic piece of advice from the lawyers who were interviewed during the site visits was “Don't wait to identify the problem from the muzzle flash of the guns being fired at you.” There were many other hits of advice offered, some general and some detailed.

1. General advice

- a. Make sure legal responsibilities are clear in the written contracting process and in the actual contract.

- b. Put the contracting function under the legal counsel.
- c. Train the provider to deal with the bureaucracy.
- d. Use fairly tightly drawn contracts.
- e. Have a clear understanding of both parties' roles and responsibilities.
- f. Get input from line operators on all contracts.
- g. Maintain uniform procedures.
- h. Train staff in contracting procedures.

2. Particular pieces of advice

- a. If reimbursement is based on the number of inmates being provided a service, be sure to spell out exactly how that figure is to be determined. For instance, if an average is to be used, will it be an average daily or an average monthly inmate population? If it is related to current costs per inmate for providing that service, be sure that the specific cost elements that make up that cost figure are precisely defined and that the inmate population in question is defined numerically.
- b. Use a uniform formula for computing average daily population and inmate **per diem**.
- c. Provide for renegotiation for decreases and increases in costs.
- d. Be clear about equipment and do not lease it.
- e. Have a central contract writer.
- f. Be certain of adequate insurance.
- g. Be certain that the vendor is financially stable.
- h. Be sure the company is an independent contractor.
- i. Be sure the state is held harmless.
- j. Don't assume the contracted service will be cheaper.

CONCLUSION

This chapter has highlighted and discussed in detail the critical issues and necessary steps to ensure a successful contracting experience. Each part of the process forms a foundation for the succeeding portions. None should be overlooked. The experience of those correctional administrators who have already undertaken significant contracting of correctional services demonstrates the value of systematically and thoughtfully approaching and carrying out contracting work. Contracting for correctional services has proved to be a successful option, and it appears that it will be even more frequently undertaken in the future. These guidelines should help to make that experience worthwhile to the agency, contractor, inmate and public alike.

CHAPTER IV
CONTRACT LAW

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INTRODUCTION

Legal issues are having more and more of an impact on correctional decisions. Contracting for correctional services is no exception. Further, the contract itself is a legal document. Because the consequences of contracting may also have legal ramifications, it is important to examine the nature of these issues and allow correctional managers greater insight into the legal aspects of contracting.

This section is not intended to turn correctional administrators into attorneys. It is intended to provide them with sufficient knowledge to ensure that they will have a fuller understanding of the role their legal representatives should be playing. By asking the appropriate questions of their attorneys, correctional managers may be more assured that legal surprises do not occur in the future.

This chapter includes discussions of oral contracts, the role of counsel, legal impediments to contracting, responsibilities of counsel and the legal procedural aspects of contracting. Examples are provided to illustrate key points.

PREPARING FOR THE CONTRACTING PROCESS

Legal Aspects of the Decision to Contract

An institution, agency or department which is capable of generating all of the goods and services it requires with its own staff and at an adequate level, has no need to enter into contractual arrangements with third parties. However, the impracticability or impossibility of providing all needed goods and services may require turning to outside third parties in order to obtain certain goods and services. In such cases, the administrator who has responsibility for their procurement may consider whether these needs can be met by the occasional use of existing resources available to the general public. For example, an institution may purchase fresh vegetables from a retail market or send uniforms to be laundered to a local cleaner. More likely, the required goods or services may need to be supplied in such quantities, at such specified times or in accordance with such legally mandated guidelines that they cannot be met except by entering into formal agreements with providers of goods or services. Once the decision is made to contract for the provision of goods or services, the administrator responsible will be faced with the legal aspects of the contracting process and consequences which may result from the choices made.

“Inadvertent” Contracting - The Battle of the Forms

The contracting process may begin by both parties seeking to use existing and familiar forms of agreements. Vendors and suppliers in particular prefer to use their own forms which can be expected to include provisions promotive to their interests. The administrator may also have available forms which have been used previously. The preparation of printed forms of contracts designed to give advantage to the drafter has

been termed by attorneys as the “battle of the forms.” Thus each party to the contracting process may send to the other a rival form of contract containing conflicting provisions. In common law, such a process may have resulted in the failure to form a contract.

For example, the rule was that if the person who received an offer made, in its acceptance, even trivial changes to the terms, the acceptance was ineffective and could at most constitute a rejection and counter-offer. This common-law rule has been modified by more flexible interpretations, and with respect to the sale of goods, the Uniform Commercial Code (“UCC”) now provides the applicable rules in almost all jurisdictions.

Under such rules, if, for example, one party sends its form of agreement to the other who responds not by signing it but rather by sending its own form in confirmation containing some provisions differing from those set forth in the original offer, a binding contract may nevertheless have been formed. In such cases, the terms of the particular contract would consist of those terms on which the writings of both parties agree, and in certain cases, depending upon the later conduct of the parties, even responsive provisions of the second “form” which are in contrast with provisions in the first. To avoid such “inadvertent” contracting which may fail to include in the contract all of the provisions considered desirable or necessary, it is important to consult legal counsel before engaging in a “battle of the forms.”

Legal Impediments to Contracting

In making the determination to enter into the contracting process, the administrator must also consider the legal aspects of the power to enter into a contract. Applicable Federal, state and local laws may govern the kinds of contracts that may be entered into and who is authorized to enter into a contract on behalf of the department, agency or institution in question. In the case of goods and services, there may be legal bidding requirements that must be followed.

The power to enter into a contract on -behalf of an institution or agency may be subject to approvals by departmental oversight staffs or the Attorney General. There may also be impediments with respect to the kinds of persons or entities that are eligible to be granted contracts. For example, conflicts of interest rules may be applicable to persons or entities that are state employees or are affiliated with state employees.

Selecting Counsel

In seeking the assistance of counsel in the contracting process, the administrator should consider the role or roles such counsel will be expected to fulfill.

1. Role of Counsel

Legal counsel can *service* correctional agencies in a variety of roles, whether as advocate, advisor or in another capacity. In the contracting process, the chief roles are:

Draftsperson - preparing the contract:

Advisor - advising with respect to legal procedures and issues involved in the contracting process:

Negotiator - participating with the administrator or on his behalf in negotiations with the other contracting party or parties: and

Arbitrator - assisting the administrator or acting on his behalf in resolving disputes that have arisen in the contracting process.

2. Types of Counsel

In selecting counsel, consideration must first be given to the sources of available legal staff experienced in contract law to assist in the contracting process:

“Inside” Counsel - the agency, institution or department may have adequate resources in legal personnel to provide the required assistance with the contracting process. For others, the legal department of a related agency, the Attorney General’s office and others serving in similar capacities in the public sector would be another resource:

“Outside” Counsel - the pressures of time and the heavy work load of “inside” counsel and the special contract law expertise of attorneys in the private sector who have prior experience in preparing similar contracts, and who have skilled drafting and research staffs available, may lead the administrator to consider retaining a private law firm or independent practitioner.

3. Compensation Arrangements with Counsel

Unlike staff attorneys who are salaried employees, outside counsel will be an independent contractor. Once the determination is made to seek outside services, it will be necessary to arrive at compensation arrangements with such counsel:

Fixed Fee - pursuant to such an arrangement a predetermined fee is negotiated with respect to the specific contract to be entered into which the parties believe will reflect the nature of the work involved and the lawyer’s time required to complete the contracting process:

Hourly Fee - a standard practice of law firms is to charge fees based on the number of hours of lawyer time required to complete an assignment and to bill such time at a fixed hourly rate. The hourly rates for partners and associates of law firms will vary, depending on seniority, skills and experience.

Contingent Fee - in certain limited circumstances an attorney or law firm will agree to be retained on a contingent fee basis. Although the contingency usually relates to the outcome of litigation, it could relate to other matters.

There are, however, restrictions on contingent fee arrangements permissible under codes of professional responsibility applicable to lawyers, particularly with respect to the attorney's agreement to pay any costs and expenses incurred. In addition, the laws and regulations applicable to the institution, agency or department may prohibit contingent fee arrangements with any party:

Group Legal Services - in contracting for or with group legal services, it will be necessary to consider the special features of such arrangements.

4. Legal 'Responsibility and Liability of Counsel

The conduct of attorneys is governed by the Code of Professional Responsibility (the "Code of Professional Responsibility") adopted by the American Bar Association, as well as by the rules of professional conduct of the state in which the attorney is licensed to practice. Such codes or rules of professional responsibility include both mandatory disciplinary rules and recommended ethical considerations.

Standard of Performance - an attorney may be expected to be bound by the recognized standards of his profession and may be liable for negligence or misconduct in the performance of his duties. The Code of Professional Responsibility prohibits attempts to limit liability to a client for personal malpractice.

Insurance - professional liability insurance for lawyers typically insures lawyers against liability (and claims of liability) by reason of any act, error or omission in professional services rendered or which should have been rendered by the insured, his employees or by others for which he is liable, in the conduct of the insured's profession as an attorney. Generally, such policies exclude coverage for dishonest, fraudulent or malicious acts and omissions and for certain specific areas of law.

PROCEDURAL CONSIDERATIONS

Drafting - The Merits and Demerits of Seizing the Initiative

Once the decision has been made to enter into a contract and whether to use Staff Counsel or outside counsel, it will be necessary to determine who will be responsible for preparing the initial draft of the contract. The obvious advantage in so doing is to determine the form the contract will take and to include substantive provisions that are considered desirable. The other contracting party (and its counsel) will then have a more limited role in reviewing and negotiating the drafted agreement. On the other hand, if the other party prepares the initial draft, there may be savings in the expenditure of time and legal fees by limiting counsel's role to reviewing, revising and assisting in negotiations.

Source Materials

In commencing the drafting process, the draftsman will need to consider the available resources and the use that may be made of each:

State Regulations - existing contracting rules and regulations form the framework within which the process works and serve as a primary guide.

Other Agreements - contracts which have been previously entered into by the institution or agency and which may be used for guidance with respect to both specific provisions and overall standards of practice and applicable legal requirements:

Printed Forms - forms of agreement already in use by the institution or agency, which may be appropriate if these adequately reflect the situation presented by the particular drafting task. Printed forms provided by the other contracting party or parties should be scrutinized with care. See "Preparing for the Contracting Process -- Item 2" above.

Communications - The Rules Applicable to Communications among the Parties and Their Counsel.

Consider the following scenario:

A Warden calls his lawyer and says:

"I understand there's a fellow in town who's the president of an outfit called FAST FOOD, INC., which for a fee will come in and run the inmate commissary. I think that would be great for us. I would like you to call him up and discuss the possibility and tell him our terms."

The lawyer says "Fine," and does just that.

Months later, after the Warden, his lawyer, the president of FAST FOOD, INC., and his lawyer have had several negotiating sessions together, the Warden calls his lawyer again

"Please call the president of FAST FOOD, INC. and tell him that I'd like a three-year instead of a two-year deal."

The lawyer replies: "I'm sorry, Warden, you'll have to do that yourself."

Is the attorney bored with the project, fed up with the Warden or just generally having a bad day?

Not necessarily. He is just following one of the basic rules of his profession which dictates that after a lawyer knows that his client's adversary also has a lawyer, it is improper for him to communicate directly with the adversary without the adversary's lawyer being involved. In this case, it's perfectly all right for the Warden to talk to the

president, for the attorney to talk to the president's lawyer or for all four to meet and talk together. However, the attorney should not talk directly to the president, or meet with the president (regardless of whether or not the Warden comes along) unless the president's lawyer is also there.

The reason for this rule, stated somewhat cynically, is that going to school trains one to take advantage of those that haven't. The presence of the second lawyer, however, neutralizes the advantage and restores both parties to an equal footing. The reason why the attorney was willing to make the first call was that he had no way of knowing whether FAST FOOD, INC. had a lawyer or not. Once he knew, however, he was constrained by the above rule.

This same concern for the unprotected layman may prompt a lawyer to suggest that his client's opposite number also get a lawyer. This should not be interpreted as an act of client disloyalty in favor of a fellow bar man who may need a job, but rather as a sensible precaution against a later charge that the final contract is tainted by the fact that one of the parties was taken advantage of in its formation by not being represented by counsel.

Once this gesture has been made, however, there is no reason why a lawyer cannot continue working on the deal even though the other side does not get its own lawyer. Nor do concerns for parity of position get involved with whether one side's lawyer is as good as the other side's, However, be prepared for your lawyer to say, in effect:

“The potential contractor should be advised of his right to counsel, and once the right is exercised. I must always deal through the lawyer.”

Methods of Closing

Once the parties and their counsel have agreed on the definitive form of the contract, putting the contract into legal effect requires additional steps. Such matters range from determining who is authorized to execute the contract on behalf of each party; the need for attestation by witnesses: approvals to be received after review of the contract by other administrative entities, evidence of the authorization of the contracting parties to enter into the agreement, whether in the form of certified resolutions of the board of directors of a corporation or in the form of authorization required of a public agency under applicable regulations. Parties may be unable to be in one location for the signing and may wish to provide for counterpart copies to be executed which will together constitute the contract.

SUBSTANTIVE CONSIDERATIONS OF CONTRACT LAW

The following sets forth a checklist which may be consulted in connection with the preparation and/or review of a contract. Each item on the checklist is accompanied by sample model provisions which may be included in a contract.

Identification of Parties

The opening paragraph of a written contract will usually indicate that that which is being set forth is an agreement and will state the names of the parties. The names of the parties may be abbreviated for convenience of reference in the rest of the agreement, or the parties may be designated as "Seller," "Purchaser," "Contractor," "Vendor," "Employer," "Employee," "Consultant," indicating each party's role in the contract, as appropriate. If a party of an agreement is a corporation or a partnership, this will usually be indicated together with a reference to its state of incorporation or formation. Often the name of each party will be followed by its address (and under some state laws this may be a requirement).

SAMPLE CLAUSES:

- (1) This agreement dated this _____ day of _____, 19____ by and between John Doe, residing at [address] (hereinafter referred to "Consultant"), and XYZ Corporation, a _____ corporation [indicate state of incorporation], having an office at [address] (hereinafter referred to as the "Company").
- (2) Agreement dated as of _____, 19____ by and between XYZ Company, a New York partnership, having its principal place of business at [address] ("Employer"), and Jane Doe, residing-at [address] ("Employee").
- (3) Purchase Agreement (this "Agreement ") dated _____ 19____ by and between Manufacturing, Inc., a Delaware Corporation ("Seller"), and _____ Correctional Institute ("Purchaser").
- (4) Agreement date _____, 19____ by and among XYZ Corporation ("XYZ"), incorporated under the laws of _____, ABC Company ("ABC"), a partnership formed under the laws of _____, and John Doe ("Mr. Doe").

Recitals

Recitals are generally used to indicate such matters as the purpose of the contract and special circumstances, if any, in which the contract is being entered into, or to explain briefly provisions which follow in the body of the agreement. The accepted practice today is to keep recitals brief. If more than one recital is used, each generally commences with a new paragraph.

SAMPLE CLAUSES:

- (1) WHEREAS, the Agency wishes to purchase _____ and the Vendor wishes to sell _____ to the Agency.
- (2) WHEREAS, the Agency and the Consultant desire to enter into an agreement providing for the Agency's retention of the Consultant's services; and
- (3) WHEREAS, the Agency further wishes to retain the Consultant's services on an exclusive basis during the term of this Agreement.

Recitals may include a recital of consideration. Generally, the mutual promises of the parties will reflect the existence of consideration. The specific terms, for example, of payment for services rendered will be set forth in the body of the contract.

SAMPLE CLAUSES

- (1) NOW, THEREFORE, in consideration of the mutual covenants and agreements herein contained, the parties hereto hereby agree as follows:
- (2) In consideration of the sum of \$ _____ and other good and valuable consideration, the receipt of which is hereby acknowledged, the parties hereto hereby agree *as follows*:

Description of Services

The objective of the provisions of a contract describing the services that are being contracted for should be to indicate briefly and precisely what each party expects the other(s) to perform. For example, a consultant may be retained to establish a halfway-house training program: an employee may be hired as assistant director of an agency or department: a company may be expected to produce and/or deliver certain goods or services adequately so that the parties' intentions can be discerned from the language of the contract and any exhibits or schedules which may be annexed to the contract.

SAMPLE CLAUSES

- (1) The Agency hereby employs the Employee as [title], Employee's responsibilities, duties and authority as [title] shall be as set forth in Exhibit A annexed to this Agreement.

(2)

The Department hereby retains the Consultant. The duties of the Consultant shall include the supervision and direction of Department personnel in the preparation of the training program described in Section _____ of this Agreement.

(3)

The Lessor hereby agrees to lease to the Lessee, subject to the terms and conditions of this Agreement, the Equipment described in Schedule I attached hereto and made a part hereof.

Compensation for Services

Provision for payment for the services to be provided may take various forms. A fixed annual salary for an employee may be payable at weekly, monthly or other predetermined intervals in accordance with standard practices of the institution, agency or department. Payment may be made in the form of a lump sum or a fixed price over the life of a contract pursuant to which a consultant, for example, will render services. Payment provisions may also be governed by applicable regulations or procedures. Special requirements may also be applicable to legal services. See "Preparing for the Contracting Process" Item 4(c) above. Payment for goods will generally be governed by the provisions of the Uniform Commercial Code. Where appropriate in the case of consultant and/or employment agreements, express provisions should be included regarding medical benefits, pension plans, vacation pay and other similar compensation arrangements.

SAMPLE CLAUSES

(1)

Employer agrees to pay to Employee for all services rendered by Employee hereunder, and Employee agrees to accept as compensation therefore, an annual salary of _____ (\$ _____) Dollars, payable on the last business day of each (week/month) during the term hereof.

(2)

The Agency shall make payment to the Provider for all costs of performing the services which are incurred in accordance with the terms and conditions hereof, Maximum payment hereunder shall not exceed _____ (\$ _____). The source of funds hereunder shall be Appropriation Account Number _____

(3)

No later than thirty (30) days after the close of each calendar month hereunder. Consultant shall submit an invoice, in a form approved by the Department, for the costs incurred in providing the services hereunder rendered during the month just ended. The Department shall use its best efforts to forward each properly completed invoice to _____ within _____ days of receipt and to assure payment thereon within _____ days of receipt.

Standards of Performance

General. A contract may by its own terms set forth the requirements for the standard of performance expected of the provider of goods or services. For example, the contract may provide that equipment to be provided must meet certain specifications. or it may obligate the provider of services to establish standards of performance in accordance with certain guidelines.

Warranties and Representations. A party to a contract may wish to have the other party or parties make representations and warranties with respect to such matters as due authorization to enter into the contract. legal power to do so, conflicts with other agreements and other matters of fact related to the contract. These are statements of fact or undertakings that a fact regarding the subject matter of the contract is or will be as it is expressly or impliedly declared or promised to be. Breach of such an undertaking makes the party who made the representation and warranty liable for damages.

SAMPLE CLAUSES:

- (1) The Purchaser has the legal capacity to enter into and perform this Agreement. This Agreement has been duly executed and delivered by the purchaser and is valid and binding upon, and enforceable against, the Purchaser in accordance with its terms.
- (2) Neither the execution and delivery of this agreement nor the consummation of the transactions contemplated hereby will: (i) conflict with or result in the breach of any of the terms or conditions of any material agreement, mortgage, note, bond, indenture, license or other instrument or obligation to which the Provider is a party or by which he or any of his properties or assets may be bound: (ii) violate or conflict with any material order, writ, injunction, decree, rule or regulation of any court, administrative agency or governmental body applicable to the Provider or any of his proper-ties or assets.
- (3) No consent or approval by, or filing with, any governmental authority, is required in connection with the execution and delivery of this Agreement by the Seller or the performance by the Seller of its obligations hereunder.
- (4) The Company is duly organized, validly existing and in good standing under the laws of the State of Delaware.
- (5) Supplier warrants that, at the commencement of the warranty period as hereinafter defined, the Equipment shall be free from defects in material and workmanship and will conform to the specifications forming a part of this Agreement.

(6)

The work undertaken by the Contractor shall be performed in accordance with the terms of this Contract and the generally accepted standards and practices of the industry in a first class, professional manner.

Disclaimers

A contract may include provisions disclaiming responsibility or renouncing legal, liability as to certain matters by one or more of the contracting parties. It is to be expected that in the contracting process, one party may seek to limit its liabilities in a manner which will not be consistent with the best interests of the other party. The administrator involved in the contracting process on behalf of an institution should be aware of the legal aspects of such limitations and disclaimers. The contracting parties must then reach an agreement as to the extent and nature of such disclaimers consistently with applicable legal requirements. For example, in the appropriate circumstances, a consultant that is not a manufacturer and does not supply or install equipment, and that contracts with respect to the training of personnel in the use of a computer program, may disclaim liability for warranties as to the hardware on which such program is to be used:

SAMPLE CLAUSES:

(1)
CONTRACTOR IS NOT THE MANUFACTURER OF THE EQUIPMENT AND HAS NOT MADE AND DOES NOT MAKE ANY REPRESENTATION OR WARRANTY, EITHER EXPRESS OR IMPLIED, AS TO THE EQUIPMENT, AND EXPRESSLY DISCLAIMS ALL IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR ANY PARTICULAR PURPOSE.

Limitation or Exclusion of Remedies

In addition to disclaimers, a contract may include provisions which are intended to limit the liabilities of one or another party or to preclude one party or all parties from resorting to certain legal remedies which might otherwise be available. For example, in appropriate circumstances, the parties might agree to give up the right to seek enforcement in a court of law in the case of a breach of the agreement in favor of binding arbitration. See "Resolution of Disputes" below. The parties might agree that no claims may be made against one another until damages to the claimant have reached a certain minimum threshold amount. Parties might agree that damages in certain circumstances will be uncertain and difficult to compute, and therefore, agree in advance on a specific amount which will represent liquidated damages. Legal standard would require such damages to be in a reasonable amount.

SAMPLE CLAUSES:

(1)
The total cumulative liability of Contractor with respect to any obligation of Contractor under this Agreement, whether express or implied, shall not exceed percent (%) of the, license fees actually paid to and received by Contractor as provided in Article hereof.

(2)

In no event shall the Agency be liable under this Agreement for any special, incidental, indirect or consequential damages of any nature such as, but not limited to, loss of production, unavailability of the equipment, loss of anticipated profits or interest on investments, loss of use of revenue, increased expense of operation, irrespective of whether any such claims or damages are based on contract, negligence, strict liability in tort or otherwise.

Guarantees and Indemnities

A contract may provide for specific remedies such as indemnification, or for additional security for the performance of a party's obligations by means of a guaranty by a third party. For example, a party might wish to be held harmless against costs, expenses, losses, or other damages caused by a breach of another party's representations and warranties. It may also wish to ensure that if a contracting party does not perform its obligations, a guarantor will undertake to complete the performance.

SAMPLE CLAUSES:

(1)

For valuable consideration, receipt of which is hereby acknowledged, the Company hereby unconditionally guarantees the performance by Contractor, its wholly owned subsidiary, of its obligations to deliver Equipment to the Department in accordance with the terms of this Agreement.

(2)

From and after the date hereof, Contractor shall indemnify, defend and hold the Agency harmless against and in respect of any and all claims, demands, costs, expenses, demands and liabilities of the Agency arising out of or in connection with any breach of a representation or warranty made by the Contractor to the Agency in this Agreement.

Excuses for Non-Performance,

Because of applicable legal requirements, it may be necessary for one party or another to a contract to provide that in certain circumstances it will be excused from the performance of all or some of its obligations. For example, an agreement that the term of the contract shall be for two years may have to be qualified by a further provision that continuation of the contract beyond its initial twelve-month period will be subject to the annual appropriation of funds by the legislature or other public body concerned. A party's ability to perform its obligations may be made impossible by circumstances beyond its control, such as those generally described by the term "force majeure." Such eventualities may be provided for by appropriate language in the agreement excusing performance under certain conditions or upon the occurrence of certain events.

SAMPLE CLAUSES:

(1)

Delay in or failure to carry out the duties imposed upon either party under the Agreement shall not be deemed a breach of this Agreement, if such delay or failure results from fire, explosion, labor disputes, casualty or accidents, cyclone, flood, drought, or by reason of war, declared or undeclared, revolution civil commotion, acts of public enemies, blockade, embargo, or by reason of any law, proclamation, regulation, ordinance, demand or requirement of any government or by reason of any cause whatsoever, whether similar or dissimilar to those enumerated, beyond the control of the party involved. The failing party shall promptly notify the other party in writing and both parties shall use their best efforts to minimize such delays.

Term and Renewals

Whether by express or implied terms, a contract will provide for the term during which it is in effect. Where appropriate, a contract may also provide for its renewal for another term or terms. The term may be for a fixed period or may continue until the performance of certain obligations has been completed. Provisions for renewal can include automatic extensions of the term or allow for contingencies which must be satisfied prior to such renewal.

SAMPLE CLAUSES:

(1)

Performance hereunder shall commence on the _____ day of _____, 19____ in accordance with a prior written notice to proceed from the Agency to the Provider which specifies the date on which services are to commence. Said notice shall be considered a part of this Agreement. Performance shall continue until the _____ day of _____, 19____

(2)

This Agreement shall be effective on _____, 19____ and shall continue in effect until _____, 19____. Should either party to conform to all material conditions provided herein and applicable to such party, the other party may at its option cancel this Agreement upon 30 days' written notice.

(3)

The term of this Agreement shall be for a period of _____ years commencing on the date hereof.

(4)

The term of this Agreement shall be for a period of two (2) years commencing with the date hereof and may be renewed for an additional period of twelve months unless 45 days prior to the date of expiration of the initial term either party gives written notice to the other of its intent to terminate this Agreement at the end of such initial period.

Assignment

In the absence of an applicable provision in a contract, a party may generally assign its rights to such agreement. If it is intended to limit such assignability, or if applicable laws or regulations so require, the contract should provide accordingly.

SAMPLE CLAUSES:

- (1) This Agreement may be assigned by either party upon prior written notice to the other.
- (2) This Agreement may not be assigned by the Consultant without the prior written consent of the Department.
- (3) The Vendor may assign its rights to payment hereunder only upon the prior written consent of the Agency, which shall not be unreasonably refused.

Choice of Law

Except with respect to certain matters (such as the granting of a security interest in property located in a certain jurisdiction as to which the law of such state will apply), the parties to a contract may generally specify the law of the jurisdiction by which they intend the contract to be governed. Courts will generally uphold the choice of the parties, In the case of a public authority, it may be necessary to specify that the law of its state will govern. Choice of law provisions may include an additional provision excluding from the applicable State's law its choice of law provisions in order to prevent circularity of reference from one body of law to another.

SAMPLE CLAUSES:

- (1) This Agreement shall he governed by and construed in accordance with the laws of the State of New York.
- (2) This Agreement shall be governed by the laws of the State of Maryland excluding therefrom that portion which refers to the choice of law or conflicts of law.

Resolution of Disputes

Parties to an agreement may find it desirable or, in certain circumstances necessary, to provide for the appropriate form for the resolution of disputes regarding the contract. In the absence of relevant provisions, a breach of the agreement may generally be brought in a court or in an appropriate administrative proceeding. To avoid lengthy trials and the costs of litigation or the complications required in the presentation of evidence in a

formal trial, parties may agree to bring any disputes under an agreement to arbitration. A provision for arbitration may specify who will be the arbitrators, the rules of arbitration which will apply and other terms. If the contract is to be enforced by judicial proceedings, the parties may wish to agree to the jurisdiction in the courts of which an action may be brought, whether for the sake of convenience or the ability to gain jurisdiction over another party, or because of legal requirements.

SAMPLE CLAUSES:

(1) Should any dispute arise as to the interpretation of this Agreement, it shall be decided by arbitration as follows:

(a) The Employer and the Employee shall each select an arbitrator and those arbitrators shall select a third arbitrator.

(b) The question or questions in dispute, shall be committed to writing, separately stated and numbered, he signed in triplicate by both parties, and the answers shall be inscribed below the several questions, and after copies are inscribed by the parties at the foot thereof, one copy shall be retained by each of the parties thereto and a third copy shall be furnished to the arbitrators.

(c) The fees and expenses of the arbitrators shall be borne by the parties hereto in proportion to the questions answered adversely to their several contentions or interpretations, and the parties agree that the findings of majority of such three arbitrators shall be conclusive on them, their heirs, successors and assigns.

(2) Any judicial proceeding brought against the Consultant with respect to this Agreement may be brought in any court of competent jurisdiction in the State of New York, and, by execution and delivery of this Agreement, the Consultant accepts, generally and unconditionally, the nonexclusive jurisdiction of such courts, and irrevocably agrees to be bound by any judgment rendered thereby in connection with this Agreement. The Consultant hereby waives personal service of process and consents that service of process upon it may be made by certified or registered mail, return receipt requested, at its address specified or determined in accordance with the provisions of Section _____ of this Agreement. Nothing herein shall affect the right to serve process in any other manner permitted by law or shall limit the right of _____ to bring proceedings against the Consultant in the courts of any other jurisdiction judicial proceeding by the Consultant, against _____ involving, directly or indirectly, any matter in any way arising out of, related to, or connected with this Agreement shall be brought only in a court located in the City and State of New York.

Standard Legally-Mandated Provisions

Pursuant to applicable requirements of law and/or administrative regulations or executive orders, a contract may be required to set forth or incorporate by reference provisions with respect to such matters as nondiscrimination in employment, sunshine laws or freedom

of information or public information acts, conflicts of interest, nonappropriation of funds or reductions thereof, record-keeping and auditing. It is essential to determine with the advice of counsel all such applicable requirements which should be reflected in the contract.

SAMPLE CLAUSES:

(1) Vendors and Contractors providing materials, equipment, supplies or services to the State of _____ herewith agree to comply with Article _____ of the Code of _____ which requires that every business that enters into contracts, leases or other agreements with the State and receives in the aggregate \$100,000 or more during a calendar year shall, within 30 days of the time when the \$100,000 is reached, file with the Secretary of State a list containing the names and addresses of its resident agent, each of its officers, and any individual who is a beneficial owner of 5 percent or more of the contracting business.

(2) Contractors should give specific attention to the identification of information furnished to the Department under this contract which they deem confidential, proprietary information or trade secrets and provide any justification of why this information should not be disclosed under the _____ Public Information Act. Article _____ through _____ of the _____ Code. Contractors are advised that, upon request from third party, the Department is required to make an independent determination as to whether the information may or must be divulged to that party.

(3) This contract is invalid without the approval as to form and legal sufficiency by an Assistant Attorney General. If the maximum payments to the Contractor under this contract are \$100,000 or more, it is not effective until approved by the Department of Budget and Fiscal Planning and the _____ Board of Public Works.

(4) If the [State Legislature] fails to appropriate funds or if the funds are not otherwise made available for continued performance of the contract for any fiscal period of the contract succeeding the first fiscal period, the contract shall be automatically canceled as of the beginning of the fiscal year for which funds were not appropriated or otherwise made available: however, this will not affect either the Department's rights or the Contractor's rights under any termination clause in the contract. The effect of termination of the contract will be to discharge both the Contractor and the Department from future performance of the contract, but not from their obligation existing at the time of termination. The Contractor shall be reimbursed for the reasonable value of any nonrecurring costs incurred, but not amortized in the price of the services delivered under the contract. The Department shall notify the Contractor within 90 days prior to the commencement of each fiscal period or as soon thereafter as possible, if it has knowledge that the funds are not available for the continuation of the contract for- such succeeding fiscal period.

- (5) No employee of the State of _____ or any department, commission, agency or branch thereof, whose duties as such employee include matters relating to or affecting the subject matter of this contract shall, while such employee, become or be an employee of the party or parties hereby contracting with said State of _____ or any department, commission, agency or branch thereof.
- (6) It is unlawful for any State officer, employee, or agency to participate personally in his official capacity through decision, approval or disapproval, recommendation, advice, or investigation in any contract or other matter in which he, his spouse, parent, minor child, brother, or sister, had financial interest or to which any firm, corporation, association, or other organization in which he has a financial interest or in which he is serving as an officer, director, trustee, partner, or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, is a part, unless such officer, employee, or agency has previously complied with the provision of Article et seq. of the Annotate Code of _____
- (7) The Contractor shall operate under this Agreement so that no person, otherwise qualified, is denied employment or other benefits on the grounds of race, color, sex, creed, national origin, age, marital status, or physical or mental handicap which would not reasonably preclude the required performance. Except in sub-contracts for standard commercial supplies or raw materials, the Contractor shall include a clause similar to this clause in all sub-contracts. The Contractor and each sub-contractor shall post in conspicuous places, available to employees and applicants for employment, notices setting forth the provisions of this non-discrimination clause.
- (8) The Vendor agrees to permit authorized officials to inspect, at reasonable times, its plant, place of business, job site, or any other location that is related to the performance of the agreement.
- (9) It is understood and agreed that the State of _____ and/or the Department will not provide legal or personal liability protection to any individual or organization working under this agreement.
- (10) If the [State Legislature] or the Federal Government of the United States reduces the funds to be received by the Department, the Department may reduce proportionately any part of the funds passed on to the Vendor: however, this will not affect either the Department's rights or the Vendor's rights under any termination clause in the contract.
- (11) The Contractor agrees that the Department or any of its duly authorized representatives shall have access to and the right to audit any directly pertinent books, documents, papers and records of the Contractor. Any direct cost rates utilized are subject to audit for allowability in accordance with federal regulations.

ADMINISTERING THE CONTRACT -- POST-CLOSING CONSIDERATIONS

Once the contract has been entered into and has become effective pursuant to its terms, it will be necessary for the parties to ensure that its terms are carried out. This may require the delegation of various duties to appropriate persons or administrative divisions.

Performance Monitoring

The performance of the contract in accordance with its terms, whether providing for the supply of goods or services, will require follow-up procedures. The delivery by vendors in accordance with required specifications will need to be verified. Reports may be required from providers of services. Auditing functions may have to be provided for the term of the contract and for appropriate periods after its completion.

Calendaring Key Date or Time Periods

Performance monitoring will require that an appropriate person or administrative division be assigned the responsibility for maintaining a calendar of dates by which certain requirements under the contract must be met.

Estimates - Estimates of requirements may have to be provided by contractor and vendors by dates certain. Estimates of costs and expenses to be incurred by suppliers and consultants may be required to be submitted by certain days in order to permit adequate time for review.

Delivery Requests - Requests for deliveries may have to be submitted in advance in order to ensure that the goods will be available when required and that the conditions to the obligations of the vendor, contractor or supplier have been satisfied.

Exercising Renewal or Other Options - Failure to exercise options for renewal of the contract or to exercise other rights provided may result in the loss of the benefit of such provisions, such as, for example, the right to purchase equipment at a discount by a certain date, or to terminate the services of an unsatisfactory employee through non-renewal of the contract.

Effect on Contract of Major Changes

Major changes in the condition of the business and affairs of party, whether financial or other, changes in law or regulations, or the death or disability of an employee or consultant, may affect or even frustrate the performance of a contract. To the extent reasonably possible, provisions may be included in a contract upon which the occurrence of certain contingencies following the execution of the contract will permit the parties' intention to be modified in a manner satisfactory to the parties. For example, the contract may, as appropriate, include provisions with respect to the death or disability of party, bankruptcy, or the merger or consolidation or sale of all or substantially all of the assets of a company, or, as described above, the failure by a legislative body to appropriate funds.

CHAPTER V

CONTRACTING A TOTAL FACILITY

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INTRODUCTION

Contracting for specific services represents the major involvement of the private sector in corrections. The private sector, under contract to correctional agencies, provides a vast array of these services. Discussion and debate over the value of such services, as compared to agency-provided services continues, but at nowhere near the level of debate that has developed over contracting an entire secure adult correctional facility. Interestingly, it is a debate that persists in the absence of any such contracted facility. There are other types of correctional facilities that are operated by the private sector under contract to a public agency, but none are high security adult state or federal correctional facilities.

While the subject of this manual is contracting for specific services, the interest that has been generated over the subject of contracting for a full range of services in a total facility warrants discussion and comment. Recognizing that there is a limited amount of experience upon which to draw, since contracting an entire secure facility is only being done in a handful of instances, none of which are in secure adult state or federal prisons, only a limited amount of information may be reported.

What can be reported are some of the experiences and the major issues that arise in this debate. The guidelines for contracting correctional services that are presented in this manual are just as applicable to contracting a total facility and should be followed.

CURRENT TOTAL FACILITY CONTRACTING

Juvenile Institutions

Juvenile offenders have been confined and cared for in privately operated institutions going back to the nineteenth century. These facilities, run by religious and charitable organizations, continue in operation today, although most are not considered secure facilities, even though many of the youths confined in them would have been placed in secure state-run facilities had the privately operated ones not been in existence.

Of late, private for profit and non-profit corporations have emerged as small but significant operators of secure juvenile facilities, some of which are relatively large. These providers run such facilities for the juvenile correctional agencies in Florida, Massachusetts, Michigan, Pennsylvania and Rhode Island. For further information on the experiences that each of these states has had with the contracting of a total facility, it is suggested that the reader contact them directly.

Of particular interest is the contractual arrangement between the Florida Department of Health and Human Services and the Eckerd Foundation, which operates a 400-bed secure juvenile facility in Okeechobee, Florida. A formal evaluation of the contractor's success was completed in 1984 by the American Correctional Association under a grant from the National Institute of Corrections. While the facility has been run by the private sector only since 1982, the results of the evaluation do provide significant findings, particularly regarding the difficulties encountered during the transition from state operated to privately operated.

The experience demonstrated that- when a private provider takes over an on-going public sector operation that many aspects of the public sector carry over into the private provider's operation of the facility. Often that carry over reflects different ways of managing the facility. Former public employees who are now working for the private provider will find many of these changes difficult to accept at first. Similarly, inmates are equally as likely to be confused and unsure of how to respond. It takes time, usually a year or more, and effort on the part of the private provider to train and support staff as well as constructive monitoring and guidance by the governmental agency to make the transition work.

Young Adult Institutions

The only young adult facility that is privately operated, is run by the Eclectic Foundation and is located in La Honda, California. Hidden Valley Ranch warrants attention for two reasons. One, it has been until very recently the only privately operated correctional facility for young adults (18 to 26 years old), and secondly, it contracted with the Federal Bureau of Prisons.

While not a secure facility, this 60-bed operation, begun in 1984, represented the first contractual arrangement of its kind for the Federal Bureau of Prisons. The knowledge gained from this experience has added another valuable block in the effort to assess accurately the role of the private sector in the management of an entire facility.

In early 1986 the Federal Bureau of Prisons decided not to renew its contract because the special category offenders who were being sent there were diminishing in number and could be given appropriate care and treatment within federal facilities. While pleased with the services provided at Hidden Valley Ranch, they were no longer justifiable in terms of cost and their own available resources.

At this point the Foundation is negotiating with the California Department of Corrections to house parole violators who have violated the technical terms of their parole as well inmates who are nearing the end of their sentences and who will be going to half-way houses before being released. A total of 80 inmates will occupy the facility.

County Facilities

Privately operated jails are being considered or are being operated in several states, including Florida, Pennsylvania and Tennessee. Enabling legislation has been enacted in New Mexico and Texas.

In Hamilton County (Chattanooga), Tennessee, the Corrections Corporation of America (CCA) operates the County's 325-bed Silverdale Detention Center. The facility was constructed recently by the County, and CCA began operating it under contract in 1984. In as much as both sentenced County and soon-to-be-released sentenced State prisoners are confined in this secure facility, an increasing amount of attention will be paid to the experiences of both the County and the contractor to determine the feasibility of contracting a total facility on the state level.

One issue that has arisen in this contractual arrangement involves the importance of anticipating unexpected events during the life of the contract. In this case the County negotiated a fixed daily reimbursement cost to the provider for each inmate in the facility without taking into account that the average daily population might increase greatly, while the cost to the provider was increasing at a lesser rate. As a result, when the population increased by 100, the County was forced to appropriate additional funds to pay the contractor. Had such an increase been anticipated the County would have negotiated a rate on a sliding scale that would have been acceptable to both parties.

In Bay County (Panama City), Florida, CCA entered into a 20 year contractual arrangement to operate the existing jail and to construct and operate a second facility. The current contract, signed in the fall of 1985, is for \$2.5 million annually and provides for annually increases of up to 5 percent. County officials report that their annual cost to operate the facility was \$3.2 million.

Butler County Pennsylvania, west of Pittsburgh, is the site of another privately operated county jail, Buckingham Security Ltd. of Lewisburg Pennsylvania runs the 100 bed jail under a contract signed with the county commissioners in the fall of 1985. The presence of a strong and outspoken employees union had led many to conclude that the new operators would have a difficult time making their way of managing the jail accepted by the staff. Initial reports indicate a different outcome. There has been a significant degree of acceptance of, Buckingham by the employees as evidenced by the fact that for the first time in a long while the employees agreed to a contract with management without going to arbitration.

Other counties across the country are discussing the issue and debating whether or not to enter into a contractual relationship with a private provider. For example, in Yellowstone County (Billings), Montana, county officials are weighing the benefits and liabilities of contracting the operation of their newly constructed jail. In Delaware County (Media), Pennsylvania, officials are studying a provider's proposal to manage security operations and treatment programs of their 550 bed jail.

Detention Facilities

The Immigration and Naturalization Service (INS) has contracted the total facility care of part of its alien detainee population at several locations over the last few years. Currently seven facilities with a total capacity of 925 beds are being operated by four private providers - Behavioral Systems Southwest (BSS), Corrections Corporation of America (CCA), Eclectic Foundation (EF), and Christ Is The Answer (CITA), Table #9, summarizes this information.

Table #9.
Privately Operated Detention Facilities
Contracted by INS

| <u>Location</u> | <u>Size(Beds)</u> | <u>Provider</u> |
|-----------------|-------------------|-----------------|
| Los Angeles | 115 | BSS |
| Los Angeles | 100 | EF |
| Las Vegas | 40 | EF |
| Denver | 75 | BSS |
| Houston | 300 | CCA |
| Laredo | 175 | CCA |
| El Paso | 120 | CITA |

While these individuals are confined in small minimum security settings for very short periods of time (usually a matter of days or weeks), the contractual relationships the INS has developed represents a significant commitment to this type of arrangement and a high degree of satisfaction with this form of contracting with the private sector. With approximately 925 beds in seven locations, INS now confines about one out three of its average daily population in privately operated facilities as opposed to facilities it operates. Additional privately run sites are contemplated in Phoenix and El Centro (California) pending availability of funds.

Community-Based Facilities

For nearly two decades private not-for-profit groups have been operating community residential facilities (Half-way Houses) throughout the country. These providers have contracted with the Federal Bureau of Prisons and state correctional agencies for the care and treatment of inmates who are about to be released. Such facilities are not operated under a contractual arrangement with a particular agency, but rather the provider contracts with one or more agencies, not all of which may be correctional in nature, for a certain number of inmates to be in their care.

The privately operated community-based facility has grown in scope to include larger semi-secure types of community-based facilities. For example, in Ramsey County (St. Paul), Minnesota, the Volunteers of America (VOA) operates a 30-bed facility which receives sentenced female misdemeanants directly from County and Federal court to serve their sentences. Some are placed on work release while others complete their sentence within the facility, which was leased from the County and which formerly served as a juvenile detention center. VOA plans to continue this pilot effort and develop contracts with other counties in the area.

Secure State Adult Facilities

At this point there are no secure state, or federal, adult prisons that are privately operated under contractual agreement. However, there are indications that one or more such facilities will be operating in the near future. The Kentucky Department of

Corrections is proceeding with plans to contract a 200-bed minimum security community treatment center. It has entered into a contract with the U.S. Corrections Corporation of Frankfort, Kentucky, to operate the facility. The recently acquired site for this facility is a former seminary in Marion County. The first inmates were received in early 1986.

The Missouri Department of Corrections is acting on recently passed legislation that allows the State to contract for a privately built 500 bed medium-maximum security facility on a lease/purchase basis. While the legislation does not call for a private sector provider to operate the prison, such arrangements may eventually lead to the adoption of such contractual arrangements.

In Tennessee, state officials have studied a proposal from CCA to assume responsibility for managing the entire state Department of Corrections. While the legislature and Governor did not decide to contract the system, they did provide funds for the department to construct new facilities including two 500-bed maximum security prisons. Current discussions in Tennessee include the feasibility of contracting the operation of one or both of these prisons to a private provider(s).

Buckingham Security Ltd. is taking a somewhat different approach. Rather than contracting with one agency for the management of an entire secure prison, it is planning to own and operate its own prison and to contract with several correctional agencies for the care and treatment of inmates with special needs. Financial arrangements are being concluded to establish the 600 bed facility in southeastern Idaho. Protective custody inmates are targeted as the group to be served at this facility. The model being pursued is similar to a regional prison model, only the operator will be a private sector provider rather than a public agency. Undoubtedly this firm's efforts and experiences will be followed closely, particularly if they are the first private sector provider to own and operate a secure facility for longer term adult prisoners.

CORRECTIONAL AND SOCIAL FORCES BEHIND THE CONCEPT

Four factors have influenced the direction and intensity of the movement toward private operation of adult correctional facilities. One of the factors falls into a category of general social and political forces, while the other three pertain specifically to corrections. The three correctional forces involve

1. The general low regard in which corrections is held by the general public, particularly when asked to support correctional initiatives with money.
2. Dramatic and continuing increases in inmate population levels, in excess of institutional capacities.
3. Court orders requiring correctional agencies to meet conditions of confinement levels as prescribed by the Constitution.

The one non-correctional factor that plays a critical role is the high degree of political support at the federal level, as well as in several states, for the notion that “that government which governs best, governs least.” Adopting this position has given support to the idea that the private sector could do a better job in managing and operating prisons because it would bring to the job its proven methods of conducting business in a competitive environment where its skills had been perfected. Those skills would make it a more efficient and effective operator of previously run government operations. At the federal level, the Grace Commission Report attempts to demonstrate the extent to which government is wasteful, and provides recommendations from the private sector on how government could become more efficient and effective.

In combination, these four factors provide a supportive environment for the development of private sector initiatives, particularly for the operation of a total facility, because the claim of increased efficiency (more bang for the buck) is appealing to those who desire not to spend more money on corrections. Secondly, the need to increase prison capacities quickly to meet the higher population levels and the court requirements has led administrators to explore the possibility of contracting with private providers for the total care of those inmates. To the extent that these factors continue to be present, it is likely that the privately operated total facility will continue to be explored.

ISSUES

The discussion surrounding the merits of contracting a total facility raises a number of issues. They include the appropriateness of the private sector as a sanctioning agent, the pressures on private providers to keep facilities fully occupied, providers profiting from others misfortune, public employee concerns, quality of services provided, and most importantly the issue of “turf”.

Sanctioning Role of Private Sector

Philosophic issues concerning the appropriateness of the private sector being involved in dispensing sanctions, and the ethics of individuals profiting from other people’s pain, are raised by those who think that it is an appropriate role for governmental agencies to play, but not for the private sector. Whether it is, or is not, may be debated for quite some time. As to what is the proper role of government, some would argue that it is as a regulator, while others view it as a service provider. To the extent that one views government as a provider, and not as a regulator, one will conclude that on philosophic grounds the operation of prisons belongs in the public sector arena.

Self-Interest

The self-interest of the private sector in perpetuating itself is thought by some to be likely to cause the provider to exert its influence to keep inmates longer than they need to be kept confined just to ensure that all the beds are full and a profit is made. Further, concerns are voiced that the private provider of total facility services will form powerful lobbying forces to gain its own ends which may not necessarily be compatible with the public agency’s views, nor in the best interest of the inmates for whom it is providing care.

Others think these concerns are not significant and can be controlled through appropriate contract language pertaining to reimbursement formulae. Secondly, it is their opinion that public sector agencies have never suffered from the lack of lobbying ability: even though individual employees may be prohibited from such activity, it has never thwarted, nor meant to stymie, agency officials in the pursuit of pressing for their goals and objectives with legislative bodies and others.

Profit Motive

The desire for profit, as opposed to meeting the needs of inmates, is thought by some to be a major concern. Will private providers "cut corners" to realize a larger profit? That they might worries some observers. They see such actions as lowering the conditions of confinement within the facility. Others perceive this issue as real, but one that can be controlled and prevented through the contract monitoring process. In addition to the agency's monitoring efforts, external reviews and audits would help to ensure compliance with court decisions, laws, and rules and regulations.

Employee Concerns

Public employee concerns are expressed. The involvement of the private sector in the operation of all aspects of a prison poses questions of job security for existing public employees and is seen as a potential threat to public employee unions. As private sector employees become a larger part of the former public employee-dominated work arena, the potential future membership of the union is reduced, and perhaps its clout as well. Thus, public employee unions have expressed grave concerns about private operators running prisons and adamantly oppose such efforts.

Other issues also arise concerning the differences in salary and fringe benefits that are likely to be paid to private and public employees, who, while not working in the same institution, will be working within the same correctional system. These disparities in compensation could cause employee dissatisfaction resulting in less than adequate job performance.

Quality of Service

The debate over the appropriateness of private sector involvement in the management and operation of a total facility delves into the issue of the quality of the services rendered. Can the private provider in fact do a better job than the public agency? Many believe that the private sector, with its emphasis on eliminating waste, and consumer satisfaction, will result in the delivery of improved services.

Others are concerned that this emphasis on efficiency will result in profits, but at the expense of the institution and inmates. Further, some point to the fact that private sector firms do not always operate profitably and that even some large corporations have sought protection from their creditors under federal bankruptcy laws.

Turf

When all the issues are examined, one stands out as the real issue. That issue is one of maintaining and protecting one's "turf." The threat posed by the private sector's involvement in prison and jail management creates a situation where the public agency officials may lose control, power and prestige. These issues are both political and personal and strike at the heart of the matter.

These turf issues are most apparent when the private sector is assuming responsibility for the sole prison or jail within the jurisdiction. While all the other issues are potentially resolvable within the contracting process, this one lends itself only to accommodations between individuals and organizations. Such mutually agreeable arrangements must be personally satisfying for the players not to feel a sense of loss.

CONSEQUENCES

The advent of total facility contracting has also produced certain consequences for correctional administrators. Since only a limited number of these facilities are in operation, the consequences have not been realized in many cases. However, they may be anticipated and are noted here. They include competition between private and public facilities, use of employee performance contracts for public sector employees, improvements in monitoring public sector programs and operations, a greater emphasis on specifying goals and objectives within correctional agencies, and increased knowledge and experience in transitional issues as the institution moves from a publicly run facility to a private sector operation.

Competition

For the most part, corrections has operated as the "only game in town." Without competition, corrections has not been challenged, nor seriously questioned, except by the Courts, about its own methods and practices. The private sector's entrance into total facility management will provide healthy competition for public sector administrators, as well as offer new and useful approaches to correctional work.

Performance

The contracting process in general and, more so, contracting a total facility, will involve the correctional agency in more evaluations and assessments of the contractor's performance based on contractual agreements and expectations. This experience will be applied as managers evaluate public sector employees and should result in both greater employee satisfaction and more productive work forces.

Monitoring

Frequently, correctional administrators and public officials in general are criticized for their inability to monitor effectively their own employees and programs. This criticism may be justified in a limited number of instances. However, as correctional agencies

become more involved in monitoring the work of contractors who operate total facilities, these skills should improve and be applied to monitoring their own programs and operations. As a consequence, improvements in these areas should also be noted.

Transitions

Total facility contracting may occur in a facility that has never been operated by the contracting agency, or at least is not currently being operated by the agency, or it may occur in a facility that the agency was running right up to the day the contractor takes over the operation. In this latter instance, the results of the shift in operators produce transitional consequences of which both parties should be aware. Among others, these results may include employee unrest, confusion over policy and procedural matters, and testing of rules and regulations on the part of the inmates.

The experience of the Ekerd Foundation, when it assumed the operation of the Okeechobee, Florida facility, is unfortunately a good case study of those transitional problems and issues. Experience taught them and others that it takes at least a year, and maybe longer, for the transitional issues to be resolved so that the contractor can focus on the actual running of the facility and the meeting of inmate needs. Thoughtful anticipation of the consequences of transitional issues should be completed before proceeding with total facility contracting. For this reason, contracting a total facility may be preferable when the contractor operates a facility that the agency has not been running prior to the contractor's arrival.

CREATIVE FINANCING

Because of the public's reluctance to fund prison/jail construction, alternative methods of financing have been found. Rather than seeking voter approval of general obligation bonds, some jurisdictions have sold certificates to private investors through a holding company that retains ownership until the debt is retired, while the agency leases the facility. These jurisdictions will probably pay a higher interest rate for their money, but are assured funds for the facility more quickly. Private investors earn both tax credits and/or tax-exempt income. Financial institutions, including E.F. Hutton, Shearson Lehman, and Merrill Lynch, have entered this creative financing market. More recently, architectural firms and construction companies have joined with such financial institutions to put together complete design, construction and financing packages for agencies to consider.

Jurisdictions using creative methods have expressed satisfaction. Jefferson County's (Colorado) experience exemplifies such arrangements. Officials were stymied by voter reluctance to approve bond issues to finance construction of a new jail which would address Court ordered improvements. As a last resort they sold certificates to private investors to raise funds to build a \$30 million county jail, which is now completed. County officials express a high degree of satisfaction with the arrangements and results. Future private sector financing will depend in part upon tax advantages for investors and taxpayer willingness to incur public debt through general obligation bonds.

CONCLUSIONS

From the knowledge gained in two national studies of the nature and extent of contracting with the private sector, it appears that interest in total facility contracting has not subsided. On the other hand, the number of total facilities under contract to a private provider has increased only slightly. There are more than 600 state and federal prisons, and none with a medium or high security perimeter are contracted to a private provider. Yet a handful of private providers are committed to initiating or expanding their efforts to operating such facilities.

Anticipating the future is based on experience, information, and educated guesses about decisions that correctional administrators and other decision makers will make. Analyzing and assessing passed event and current trends, leads to the conclusion that the efforts of private providers to expand the number of privately operated prisons will continue. To the extent that favorable tax treatment is available to investors in the ownership of such facilities, management and ownership will go hand-in-hand. Total facility contracting is more likely to occur in minimum security settings, on a regional basis (where more than one agency contracts with the provider), and with inmate populations having special confinement requirements (such as those with health needs or who pose management problems, including inmates in protective custody status).

Lastly, the privately operated "industrial" prison may become a reality. The public's attention to and interest in the private sector's work ethic and in the creation of more realistic work settings may lead public agencies to contract for small privately operated prisons, where efforts are devoted to creating and maintaining a productive real-world like work environment. Many elected and appointed officials at all levels of government have voiced support for these values. A few key leaders, including the Chief Justice of the Supreme Court, have vigorously endorsed the concept.

The private sector's claims of being more efficient and productive combined with limited future public resources for corrections would seem to increase the likelihood of future total facility contracting. The degree to which private providers successfully meet the expectations of skeptical public sector officials will determine in part how many privately run prisons and jails are still in operation in the 1990's.

GLOSSARY

Addendum - A clarifying attachment to a contract that expands or more fully explains the terms of a contract, and becomes a part of the contract. An addendum does not in any way change the terms of a contract.

Amendment - A document that is added to a contract that substantially changes the terms of the previously executed contract. Examples are changes in services, time periods, method of payment, etc.

Bidder - An individual or organization that is submitting bids or proposals in response to a distributed bid instrument (Request for Proposals or Invitation to Bid).

Bidders' Conference - A meeting held by the organization or individual who has distributed the bid instrument with interested prospective providers (bidders) for the purpose of answering questions about the proposed contract.

Commodity - A tangible, specific item or product, such as a mophead, mattress, desk, etc.

Competitive bids - Two or more valid responses to a bid instrument.

Contract - A formal written agreement, a purchase order, or informal letter of agreement between a buyer, e.g., Department of Corrections, and an individual or organization, for the procurement of contractual services. A contract must be signed by both parties prior to services being rendered.

Contract Administrator - a staff person who is responsible for assuring that the contracting procedures of the agency are followed in accordance with the governing authority's requirements. Among his/her duties are: keeping and interpreting routinely the agency's contracting policy; providing direction and information during the development of a given contract (the contracting process); maintaining all of the files related to the processing of a contract; ensuring that all components of the contract are in place; and ensuring proper review of the contract prior to execution.

Contract Manager - An individual designated by the decision maker/leader/contract signer to be responsible for the success of the contract in addition to his/her other duties. This person ideally holds a position of authority in the general area where the contracted service is being provided. For large contracts, the contract manager may be assigned solely to a particular contract's development and its subsequent management/monitoring. For small contracts the contract manager may be overseeing a number of contracts, or may be managing the contract in addition to regular duties. Several of the contract manager's duties are: directing and overseeing the preparations for the contract: soliciting and analyzing bids; negotiating the contract: monitoring the provider's performance; approving payment of the provider, etc. The Contract Manager has complete responsibility for the contract.

Contract Signer - The person in authority whose responsibility it is to sign contracts, certifications for emergency procurement and sole source requests for the agency. This person is also referred to as the DECISION MAKER and the LEADER in the text of this manual.

Contractual Services - The rendering by a Provider of its time and effort rather than the furnishing of specific items, or commodities. Examples are: evaluations, consultations, maintenance, accounting, security, educational training, management consulting, research and development studies, technical, professional and social studies.

Cost-Reimbursement - Method of payment when the agency pays the Provider for actual expenditures incurred in accordance with a line-item budget.

Emergency Contract - When a determination is made and certified that an immediate danger to the public health, safety or welfare, or other substantial loss, requires emergency action, procurement of contractual services may proceed without competition. Such contracts will be made with as much competition as possible under the circumstances.

Executed Contract - A contract that has been signed by both parties.

Fixed-Price - Method of payment used when the service provided can be broken down into standard units such as hours, client days, etc., and a specific rate is paid per unit.

Identical (tie) Bids - Two or more bids which are equal with respect to price, quality and service.

Invitation to Bid (ITB) - Invitations to Bid are used for the procurement of contractual services in excess of a ceiling amount (varying across the country from @ \$1,000 to \$10,000) when all services can be described in detail, including the methodology for delivering them. Emphasis is on receiving bids from responsible potential providers at a fixed price for units of service. The contract is awarded to the bidder who conforms to all the conditions of the ITB and quotes the lowest price.

Provider - An organization or individual providing contractual services or materials to the agency in accordance with the terms of a contract.

Purchase - An acquisition by contracting in any manner for contractual services. All such contracts should be in writing.

Renewal - Contracting with the same provider for an additional contract period after the end of the current contract period, only if there have been provisions in the contract for such renewal. Renewals should be in writing, usually on a yearly basis up to a limited number of years, and must be under the same terms and conditions as the previous contract. Renewals are to be contingent upon satisfactory contract performance.

Request for Proposals (RFP) - A bidding mechanism used when the agency is interested in procuring not only services, but also the methodology for delivering the service. The RFP asks for potential providers to produce the most efficient means of delivering the service. It must include a statement of the services desired, contractual terms and conditions, pricing criteria, format for the proposal, criteria used to evaluate proposals, etc.

Sealed Bids - quoted prices from potential providers that are sealed, submitted, and formally opened at a predetermined time according to the agency's contracting procedure. With an ITB, the lowest bid from a responsible bidder is selected. With an RFP, the best proposal is selected contingent upon a reasonable price when the sealed bid is opened.

Selection Team/review Panel - A group of at least three employees designated by the Contract Signer/Decision Maker to review and evaluate the bids submitted.

Small Purchase/Discretionary Contract - a contract that does not require competitive bidding since it is under the dollar amount over which bidding is required. It may be let with a chosen provider, or either oral or written bids can be taken and a choice made.

Sole Source Contract - The purchase of a contractual service that is available from only one source (organization, individual).

Statement of Work - A narrative describing what services are to be provided, how they are to be provided measurable objectives, schedule, etc. The statement of work is a part of the bidding mechanism and becomes a part of the final contract.

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