

WI Legislative Fiscal Bureau Report (January 2001)

In March, 1998, Corrections began contracting with the Corrections Corporation of America (CCA) for prison beds at two privately-administered facilities in Whiteville, Tennessee. In June, 1998, CCA's facility in Sayre, Oklahoma, was also included in the contract. In December, 1999, additional CCA facilities in Mason, Tennessee, Tallahatchie, Mississippi, and Appleton, Minnesota were included in the contract. The contract between Corrections and CCA is divided into six sections (articles) with an introductory clause.

Contract Introduction. The purpose of the contract is stated: to provide housing and care for Wisconsin inmates. The current contract was approved by the Joint Committee on Finance in December, 1999, and revised in December, 2000.

Article 1 --Definitions. This article defines the terms of the contract. The terms include: (a) American Correctional Association (ACA); (b) ACA standards; (c) contract administrator; (d) facilities; (e) inmate; (f) manday; (g) service commencement date; (h) state; (i) unforeseen circumstances; and (j) serious medical condition.

The facilities identified are:

- *Hardeman Correctional Facility* and the *Whiteville Correctional Facility* in Whiteville, Tennessee (approximately 45 miles east of Memphis);
- *Tallahatchie Correctional Facility* in Tutwiler, Mississippi (approximately 75 miles south southwest of Memphis);
- *West Tennessee Detention Facility* in Mason, Tennessee (approximately 30 northeast of Memphis);
- *North Fork Correctional Facility* in Sayre, Oklahoma (120 miles west of Oklahoma City); and
- *Prairie Correctional Facility* in Appleton, Minnesota (120 miles west northwest of Minneapolis).

Article 2 --Term of the Contract. The contract is effective for one year from the date both parties sign and may be renewed for two, one-year terms by mutual consent of Corrections and CCA. Corrections may cancel the contract, in whole or in part, without penalty if funding is not appropriated or if CCA fails to comply with the contract. The original contract became effective December 23, 1999, and was extended for one year, to December 21, 2001, as authorized by the Joint Committee on Finance at its December, 2000, s. 13.10 meeting. In article 6.3 of the contract, it is reiterated that the contract may not be altered except by mutual constant of all appropriate parties. Even if Corrections and CCA mutually agree, however, statutes require that the Joint Committee on Finance approve any modification of the terms of the contract at a s. 13.10 meeting. This approval includes not only substantive changes, but also the correction of typographical errors or other minor modifications.

Article 3 --Inmates. Under the CCA contract, as amended in December, 2000, the

company will house up to 4,833 male inmates from Wisconsin in its six facilities identified in Article 1 at a rate of \$44 per day per inmate. The contract further states that the Department will not transfer inmates to the facilities who have a serious medical condition. The December, 2000, amendment to the contract specifies that CCA may not transfer any inmates to a facility not listed without the prior approval of the Joint Committee on Finance through a modification of the contract.

Article 4 --Employees. The contract specifies that CCA is an independent contractor and, as such, is not considered an agent of the state. Likewise, state employees are not considered agents of CCA. In a 1997 U. S. Supreme Court case (Richardson and Walker v. McKnight), it was held that prison guards in a private contract facility are not entitled to qualified immunity from a law suit because of the fact that they are guarding state prisoners.

Article 5 --Contract Compliance. Article 5 addresses breach of contract issues for both parties to the contract and each individually. The contract indicates that a breach has occurred if either party:

- fails to perform in accordance with the contract;
- partially performs any term or provision of the contract; or
- performs any act prohibited or restricted by the contract.

CCA is deemed to be in breach of the contract if any of the following occurs:

- failure to completely and timely perform any term or provision of the contract; or
- performance or occurrence of any act or condition prohibited or restricted by the contract.

In the event of a CCA breach, the Department may exercise any of the following remedies:

- seek actual damages and any other remedy available at law or equity; and/ or
- partially withhold the Department's performance under the contract; and/ or
- terminate the contract. Corrections is deemed in breach of contract if CCA is unable to perform its obligations under the contract because of the persistent or repeated failure or refusal by the Department to substantially fulfill any of its obligations, unless
 - justified by force majeure (acts beyond either party's control),
 - waived by CCA or
 - excused by CCA default.

In the event of a breach by the Department, CCA is required to notify the Department in writing within 30 days after it becomes aware of the breach. The Department is then allowed a 45-day period in which to effect a cure or in which to take reasonable steps to effect a cure. If any cure is commenced within the time permitted that will take more than the time allotted, the Department is allowed the additional time as mutually agreed to by

the parties. In no event, however, does a breach on the part of the Department excuse CCA from full performance under the contract.

Article 6 --Miscellaneous. The final article of the contract addresses the following miscellaneous contract provisions:

- invalidity and severability of the contract (the contract is severable);
- venue (the contract will be interpreted under Wisconsin law);
- release of the Department from further obligation once the contract is concluded;
- the amendment of the contract by mutual consent;
- the contract incorporates Corrections' August 6, 1999, request for proposals (RFP), CCA's September 2, 1999, response and all written exchanges between CCA and Corrections;
- force majeure (acts of God);
- prohibition on third party beneficiaries;
- specification that any successor to the contract is bound by the contract;
- specification that the contract does not affect the internal relations of either of the parties;
- the names of the contact persons in Corrections and at CCA;
- specification that the contract does not supersede the lawful powers or duties of either party; and
- judicial actions (all judicial actions regarding the contract will be held in Dane County circuit court; CCA waives the right to a jury trial in connection with any actions arising from contract disputes; and Corrections will receive copies of all civil and criminal pleadings by inmates that CCA determines are not frivolous).

The contract specifies that any disputes between the parties as to the meaning of the agreement between the parties shall be resolved by referring first to the contract and then to other documents in the following order: (a) the RFP; (b) CCA's response to the RFP; and (c) other written agreements.

Article 6.4 of the contract indicates that the request for proposal Corrections used to procure correctional contract beds (# C-519) is considered part of the contract. The RFP contains the following sections:

- sections 1 and 2 provide general information regarding the proposal and how to prepare and submit a proposal;
- section 3 identifies the evaluation, selection and award process, and includes sections on the termination of the contract and liquidated damages;
- section 4 identifies the requirements of proposals including video conferencing and inmate phone services;
- section 5 identifies technical requirements of the proposal;
- section 6 indicates the requirements associated with the cost proposal; and
- the attachments to the RFP provide detailed information regarding Corrections' policies and procedures with which bidders are expected to comply.

The RFP contains the following major provisions:

- If CCA commits a breach of the contract, Corrections will be able to collect damages (liquidated damages) on a per day basis, based on a formula which assesses the relative severity of the breach. These amounts will be withheld from Corrections' payment to the contractor if the contractor does not rectify the cause of the breach. The liquidated damages are in addition to any amounts the contractor may owe Corrections as part of the agreement.
- If inmate property is damaged during transportation, the contractor is required to compensate the inmate based on Corrections' standard repayments.
- Minimum technical standards are established for video conferencing and visiting. These standards are intended to provide a uniform format for video communications between Corrections and CCA.
- Inmate telephone services at contracted facilities are specified to require collect calls billed to third parties at a rate no greater than those paid by called parties accepting intra-LATA calls originating from Wisconsin prisons. The RFP indicates that the maximum charges are a call set-up fee of \$3 and a per minute rate of \$0.35.
- Inmates classified as minimum security may be held and placed in contracted facilities.
- CCA is required to provide residential alcohol and other drug abuse treatment for inmates. Residential programs are intensive programs targeted to offenders with specific educational, medical or mental health needs.
- With regard to medical records, the RFP requires contractors to keep such records confidential as required under Wisconsin law. Further, the RFP specifies that:
 - inmates may request release of medical records as under Wisconsin law;
 - inmates will sign a confidential release of information form;
 - inmates do not need to sign a release form if going to a medical provider as directed by the contractor's health care staff; and
 - inmates who review their medical records will do so in the presence of the proper health care staff.
- Inmates in contracted facilities are required to pay a medical co-pay, as are inmates held in Wisconsin facilities. Under current law, Corrections is required to collect not less than \$2.50 for each inmate-requested medical, dental or nursing service received. The RFP indicates that the co-pay will be credited to Corrections, less the CCA's administrative costs.
- CCA may seek reimbursement only for hospital charges (not separate physician or other provider charges) for 60% of costs over \$60,000. It also specifies that the costs of transplants are included. However, transplant claims are reimbursed only at the Medicaid rate in the state where the service was provided. Inmates considered for transplants must be approved by Corrections and the Department may return such an inmate.
- CCA is required to provide a "summary of inmate custody status, grievances filed/ processed, disciplinary actions, urinalysis results, vocational/ academic activities, inmate treatment involvement, etc. The number of PRC's [program review committee evaluations] completed during the quarter is also required to be

reported. In addition, the report shall contain information regarding overall institution climate, and any serious and unusual incidents..." CCA is also required to immediately verbally report any serious and unusual incidents to Corrections.

- Inmates in contracted facilities are required to receive the same compensation as inmates in state correctional facilities. Wisconsin institutions pay inmates from \$0.08 per hour to \$0.47 per hour depending on the work or program assignment and experience.
- CCA is required to keep proper and complete books, records and accounts, and allow for inspection by Corrections, including video tapes of all use of force incidents. CCA is required to provide a copy of that tape to Corrections.
- CCA may use deadly force but only in accordance with federal law and consistent with Wisconsin Department of Corrections policy.
- CCA is required to provide adequate, confidential facilities for attorney/ client visits and/ or telephone conferences.
- CCA may not assign any interest in the agreement to any other party without the approval of Corrections and no part of the contract or any services associated with the contract may be subcontracted without the approval of Corrections.
- CCA is required to conduct routine, random drug testing on a minimum of 5% of the inmate population each month.