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Privatization of State Services

Volume II: Corrections

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by

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PREFACE

1. Page 10 of the report "Privatization of State Services, VOL. II: Corrections" mentioned a study of privatization by the federal Bureau of Prisons. At the time that the privatization report was required to be published, results of that study were not available. These results are now available and this addendum contains a summary of the findings of that study. They reveal a continued conservative position on the part of the Bureau that appears to override recommendations from the President's Commission on Privatization and the General Accounting Office and their own finding that the Bureau should be the major source of the evaluative studies which the states require before making major decisions regarding privatization.

2. The above referenced Bureau of Prisons study makes a number of references to Office of Management and Budget Circular, No. A-76. It had been decided not to reference that document in the original report on privatization because OMB has had the reputation in the last decade of taking quite partisan positions and because the circular was not specific to prisons. However, because of the importance of the Bureau of Prisons' position, the relationship of the OMB document to it and the important exception later made to that document as described in number 4 below, a summary of the OMB document is present herein.

Basically, the OMB document furthers the pro-privatization position of all federal agencies, except Prisons, as cited in the original privatization report.

3. In 1987 the President issued Executive Order which essentially reinforced the OMB circular.

4. However, a 1990 United States House of Representatives Conference Report stated that OMB circular A-76 is not to apply to the Bureau of Prisons.¹

Details on items 1 through 3 follow. Item 4 is merely as stated in this preface.

¹ 101st Congress, 2nd Session, House of Representatives, Conference Report 101-909 to HR 5021, Oct. 20, 1990

DETAILED REPORTS

I. Bureau of Prisons, 1991²

This Bureau of Prisons' report recommended the following:

Guiding Principles for Contract Confinement

PRINCIPLE #1 - IDEALLY, THE BOP SHOULD OPERATE ALL FACILITIES NECESSARY FOR CONFINEMENT OF INMATES FOR WHICH IT IS RESPONSIBLE.

Comment: Reality, however, differs from the ideal. The BOP is in need of confinement space in a very large number of locations and for a variety of inmates. The need in many locations is small in number, making BOP operation impractical. Further, certain inmate populations are sufficiently specialized (e.g. juveniles, certain management cases, inmates with special program needs, etc.) that they cannot be successfully integrated into a typical BOP facility.

PRINCIPLE #2 - IT IS IN THE INTEREST OF THE GOVERNMENT AND THE BOP TO CONTRACT FOR CONFINEMENT OF CERTAIN SENTENCED INMATES.

Comment: Due to what they describe as their well managed and efficient organization, the BOP has substantially less to gain from such contracting than many other government agencies, including state and local correctional operations. At the same time, BOP's cumulative experience and reputation for excellence provide them with both the opportunity and the obligation to identify those situations in which contracting for jail and prison services may be advantageous.

PRINCIPLE #3 - THE PRIMARY REASON FOR CONTRACTING FOR CONFINEMENT IS THE FLEXIBILITY IT AFFORDS.

Comment: Flexibility includes the ability to activate or deactivate an operation quickly, to avoid the application of cumbersome federal rules and procedures, the ability to meet a short-term population increase without a long-term capital project, etc. Given BOP's mission, they believe that evaluating a potential contract confinement situation principally from a cost savings perspective is inappropriate.

² Stevens Schwartz, Northeast Regional Office, Bureau of Prisons, Report of the Contract for Prisons/Jail Services Task Force, March 1, 1991, pp. 3-5, 8, 10 and 11

PRINCIPLE #4 - THE HOUSING OF THOSE INMATES DEEMED TO CONSTITUTE A THREAT TO PUBLIC SAFETY SHOULD NOT BE CONTRACTED TO A NON-GOVERNMENTAL ENTITY.

Comment: HOWEVER, THE POTENTIAL USE OF FORCE ON INMATES, INCLUDING DEADLY FORCE, SHOULD NOT PRECLUDE THEIR CONSIDERATION FOR A PRIVATE CONTRACT.

PRINCIPLE #5 - CONTRACTING FOR INTERIM BEDSPACE FOR GENERAL POPULATION INMATES SHOULD BE PURSUED

Comment: BOP believes that such contracts should be pursued with private providers for housing lowest security inmates who have no designation limitations or public safety considerations.

II. Office of Management & Budget

It is the policy of the United States Government to:

a. Achieve Economy and Enhance Productivity. Competition enhances quality, economy, and productivity. Whenever commercial section performance of a Government operated commercial activity is permissible, in accordance with this Circular and its Supplement, comparison of the cost of contracting and the cost of in-house performance shall be performed to determine who will do the work.

b. Retain Governmental Functions In-House. Certain functions are inherently Governmental in nature, being so intimately related to the public interest as to mandate performance only by Federal employees. These functions are not in competition with the commercial sector. Therefore, these functions shall be performed by Government employees.

A Government function is a function which is so intimately related to the public interest as to mandate performance by Government employees. These functions include those activities which require either the exercise of discretion in applying Government authority or the use of value judgment in making decisions for the Government. Services or products in support of Governmental functions are commercial activities and are normally subject to this Circular.

Governmental functions normally involve the act of governing; i.e., the discretionary exercise of Government authority. Examples include criminal investigations, prosecutions and other judicial functions; management of Government programs requiring value judgments, as in direction of the national defense; management and direction of the Armed Services; activities performed exclusively by military personnel who are subject to deployment in a combat, combat support or combat service support role; conduct of foreign relations; selection of program priorities; direction of Federal employees; regulation of the use of space, oceans, navigable rivers and other natural resources; direction of intelligence and counter-intelligence operations; and regulation of industry and commerce, including food and drugs.

c. Rely on the Commercial Sector. The Federal Government shall rely on commercially available sources to provide commercial products and services. In accordance with the provisions of this Circular, the Government shall not start or carry on any activity to provide a commercial product or service if the product or service can be procured more economically from a commercial source.

No later than March 15 of each year, agencies shall submit to the Office of Federal procurement Policy a report on the implementation of OMB Circular No. A-76, in accordance with instructions in Part I, Chapter 4 of the Supplement.

III. Executive Order³

The head of each Executive department and agency shall:

(a) Identify by April 29, 1988, all commercial activities currently performed by government;

(b) Schedule, by June 30, 1988, all commercial activities identified pursuant to subsection (a) for study to determine whether they could be performed more economically by private industry; and

(c) Include in each annual budget proposal to the Office of Management and Budget estimates of expected yearly budget savings from the privatization or commercial activities projected to be accomplished following the completion of scheduled studies.

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³ Executive Order 12615, Nov. 19, 1987