WEST VIRGINIA CODE CHAPTER 25 ARTICLE 5

WV Legislature

§25-5-1. Short title.

This article shall be known as "The Private Prison Enabling and Contracting Act."

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§25-5-2. Legislative findings and purpose.

The Legislature hereby finds that adequate and modern prison facilities are essential to the safety and welfare of the people of this state and other states, and that contracting for portions of governmental services is a viable alternative for this state and its political subdivisions.

Further, the Legislature finds that allowing for the establishment of private prison facilities is an economic development opportunity for local communities and will augment the General Revenue Fund.

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§25-5-3. Definitions.

As used in this article, unless the context clearly requires a different meaning, the term:

(a) "Commissioner" means the commissioner of the Division of Corrections.

(b) "Contracting agency" means the appropriate governmental agency with the authority to enter into a contract with a prison vendor for correctional services. A contracting agency shall include, but not be limited to, the State of West Virginia and its political subdivisions, the federal government, any federal agency, one or more of the remaining United States, or a political subdivision of one or more of the remaining United States.

(c) "Correctional services" means the following functions, services and activities, when provided within a prison or otherwise:

(1) Design and modification or construction of prison facilities;

(2) Education, training and jobs programs;

(3) Development and implementation of systems for the classification of inmates and management information systems or other information systems or services;

(4) Food services, commissary, medical services, transportation, sanitation or other ancillary services;

(5) Counseling, special treatment programs or other programs for special needs;

(6) Recreational, religious or other activities; and

(7) Operation of correctional facilities, including management, custody of inmates, and providing security.

(d) "Division" means the Division of Corrections of the department of public safety of West Virginia.

(e) "Foreign" in the context of a foreign state or other unit of government means any state or political subdivision or the District of Columbia or the federal government or a federal agency other than the State of West Virginia and its political subdivisions.

(f) "Inmate" means an individual sentenced to incarceration by a court or contracting agency.

(g) "Prison contractor" or "contractor" or "prison vendor" means any individual, partnership, corporation, unincorporated association or any other nongovernmental entity which is licensed to do business in the State of West Virginia and which has or will enter into a contractual agreement with a contracting agency to provide correctional services.

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(h) "Prison" or "prison facility" or "facility" means any minimum or medium or maximum adult correctional institution operated under the authority of the division or of a political subdivision of this state, whether obtained by purchase, lease, construction, reconstruction, restoration, improvement, alteration, repair, or other means.

(i) "Private correctional officer" means any full-time or part-time employee of a prison vendor whose primary responsibility is the supervision, protection, care and control of inmates within a private correctional facility.

(j) "Regional jail authority" means the West Virginia Regional Jail and Correctional Facility Authority created by article twenty, chapter thirty-one of this code.

(k) "Secretary" means the secretary of the department of public safety.

(l) "State" means the State of West Virginia.

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§25-5-4. Authority of the commissioner of the Division of Corrections; authority of secretary of department of public safety.

(a) The commissioner of the Division of Corrections shall promulgate rules, in accordance with chapter twenty-nine-a of this code, to implement the provisions of this article.

(b) The commissioner shall have the authority to recommend or to not recommend to the secretary that a prison vendor be granted the privilege of operating a prison facility in this state.

(c) The commissioner shall have the authority to issue notices of violations, assess penalties and proceed in the collection of money due the state by private contractors.

(d) The secretary of the department of public safety may, upon the recommendation of the commissioner, grant approval for a prison vendor to operate a private prison in this state.

(e) The commissioner shall have the authority to accept the custody of and to confine inmates from sentencing authorities located outside the State of West Virginia.

(f) The commissioner shall have the authority to expend funds contained in the private prison fund, established pursuant to subdivision (2), subsection (g), section eleven of this article, to cover any and all expenses incurred because of private prison operations within the state.

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§25-5-5. Prohibition of constructing or operating a correctional facility; exceptions.

(a) No person may operate a private prison facility or provide correctional services in this state without first obtaining the written approval of the secretary.

(b) No person may construct, modify, lease, or otherwise alter a private prison facility without first obtaining the written approval of the Regional Jail Authority.

(c) Nothing in this section shall impair the right of the state or its political subdivisions to operate a prison facility or provide correctional services.

(d) No private contractor may operate a correctional facility in this state for the confinement of maximum security inmates sentenced to a term of incarceration by a foreign court.

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§25-5-6. Authority of the state and its political subdivisions to contract for correctional services.

A contracting agency of this state, its political subdivisions or their designee may contract with a prison contractor for the construction, lease, acquisition, improvement, operation, and management of correctional facilities and services.

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§25-5-7. Granting private contractor ability to contract with foreign contracting agencies.

A private contractor upon the approval of the secretary and the Regional Jail Authority may contract for correctional services with foreign contracting agencies provided such contract meets the minimal requirements contained in section nine of this article. Upon approval the facility may receive inmates sentenced to confinement by a foreign authority.

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§25-5-8. Reporting requirements.

The contractor shall prepare the following information and submit it to the commissioner, as applicable:

(1) The prison vendor shall develop and implement a plan for the dissemination of information about the facility to the public, government agencies and the media. This information shall be made available to all persons. All documents and records, except financial records, inmate records and personnel records, maintained by the prison vendor, shall be deemed public records.

(2) The facility shall comply with all applicable laws and regulations of the local and state government regarding sanitation, food service, safety and health. Copies of inspections completed by the appropriate authorities shall be sent by the contractor to the division.

(3) The facility shall report for investigation all crimes in connection with the facility to the division of public safety and all other political subdivisions' law-enforcement agencies having jurisdiction where the prison is located. A written report shall be made of all extraordinary or unusual occurrences and forwarded to the commissioner. Extraordinary or unusual occurrences shall include, but not be limited to:

(A) Death of an inmate or staff member;

(B) Attempted suicide or suicide;

(C) Serious injury, whether accidental or self-inflicted;

(D) Attempted escape or escape from confinement;

(E) Fire;

(F) Riot;

(G) Battery, whether by a staff member or inmate;

(H) Sexual assaults; and

(I) Occurrence of contagious diseases.

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§25-5-9. Terms of contract.

Contracts awarded under the provisions of this article shall:

(1) Provide for internal and perimeter security to protect the public, staff members and inmates.

(2) Impose discipline on inmates only in accordance with the rules promulgated by the commissioner.

(3) Provide for proper food, clothing, housing, and medical care for inmates.

(4) Require that a contractor shall adhere to the rules promulgated by the commissioner.

(5) Require that the contractor and the contracting agency shall indemnify, defend and hold harmless the state, its agencies, political subdivisions, and the employees and other contractors of the state, its agencies and political subdivisions from any claim or cause of action which arises from any act or omission by the contractor or any of the contractor's employees or subcontractors.

(6) Require the contractor to indemnify the state or its political subdivisions for any moneys the state or its political subdivisions may expend for claims against the state or its political subdivisions pursuant to section seventeen of this article.

(7) Require a foreign contracting agency to transport an inmate back to the contracting agency's state for parole, furlough or release.

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§25-5-10. Site selection.

The Regional Jail Authority shall approve the site for the proposed facility. Approval shall be in accordance with legislative rules promulgated in accordance with chapter twenty-nine-a of this code. One such legislative rule shall establish criteria for identifying and evaluating potential sites for private prisons and shall provide for a public hearing or hearings to allow reasonable participation in the selection process by the citizens of the area to be affected by the construction and operation of a private prison.

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§25-5-11. Standards of operation; violations.

(a) The facility shall be staffed at all times. The staffing pattern shall be adequate to ensure intense supervision of inmates and maintenance of security within the facility. The staffing pattern shall address the facility's operations and programs, transportation and security needs. In determining security need, considerations shall include, but not be limited to, the proximity of the facility to neighborhoods and schools.

(b) The facility shall provide the following services and programs which shall be consistent with the standards of the jail and correctional facilities standards commission:

(1) Health and medical services;

(2) Food services;

(3) Mail, telephone use, and visitation;

(4) Access to legal services and legal materials;

(5) Vocational training;

(6) Educational programs;

(7) Counseling services including personal counseling;

(8) Drug and alcohol counseling; and

(9) Sanitation services.

(c) In addition to the requirements of subsections (a) and (b) of this section, all facilities governed by this article shall be designed, constructed and at all times maintained and operated in accordance with standards and rules of the jail and correctional facility standards commission pursuant to section nine, article twenty, chapter thirty-one of the Code of West Virginia, as amended: Provided, That any more stringent requirements mandated by the commissioner shall be complied with.

(d) All facilities governed by this article shall at all times comply with all applicable federal and state Constitutional standards, all applicable federal laws and rules and regulations, state laws and rules and local ordinances, building, safety and health codes.

(e) If any of the requirements of subsection (d) of this section have not been complied with, the commissioner may cause a notice of violation to be served upon the contractor or his duly authorized agent. A copy of the notice shall be handed to the contractor or his duly authorized agent in person or served by United States certified mail, return receipt requested, addressed to the contractor at the permanent address shown on the application for approval to operate a prison facility. The notice shall specify in what respects the

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contractor has failed to comply with subsection (d) and shall specify a reasonable time for abatement of the violation not to exceed fifteen days. If the contractor has not abated the violation within the time specified in the notice, or any reasonable extension thereof, which extension is not to exceed seventy-five days, the commissioner shall assess a penalty as hereinafter provided. If a violation is not abated within the time specified or any extension thereof, a mandatory civil penalty of not less than $500 per day per violation shall be assessed until the violation is abated.

(f) Any contractor who violates any part of subsection (d) may also be assessed an additional civil penalty in the discretion of the commissioner. The penalty shall not exceed $500 per day. Each day of continuing violation may be deemed a separate violation for purposes of penalty assessments. In determining the amount of the penalty, the commissioner shall consider the contractor's history of previous violations at the particular facility, the seriousness of the violation, including any hazard to the health or safety of the public, whether the contractor was negligent, and the demonstrated good faith of the contractor in attempting to achieve timely compliance after notification of the violation.

(g)(1) Upon the issuance of a notice or order pursuant to this section, the commissioner shall, within thirty days, set a proposed penalty assessment and notify the contractor in writing of such proposed penalty assessment. The proposed penalty assessment must be paid in full within thirty days of receipt thereof or, if the contractor desires to contest the violation, an informal conference with the commissioner may be requested within fifteen days or a formal hearing before three members of the Regional Jail Authority, who are appointed by the secretary to hear cases pursuant to this article, may be requested within thirty days. The notice of proposed penalty assessment shall advise the contractor of the right to an informal conference or a formal hearing pursuant to this section. When an informal conference is requested, the contractor shall have fifteen days from receipt of the commissioner's decision resulting therefrom to request a formal hearing before three members of the Regional Jail Authority.

(A) When an informal conference is held, the commissioner shall have authority to affirm, modify or vacate the notice, order or proposed penalty assessment.

(B) Formal hearings shall be subject to the provisions of article five, chapter twenty-nine-a of this code. Following the hearing, the three Regional Jail Authority members may affirm, modify or vacate the notice, order or proposed penalty assessment and, when appropriate, incorporate an assessment order requiring that the assessment and costs of the proceedings be paid.

(2) Civil penalties under this section may be recovered by the commissioner in the circuit court in the county where the facility is located or in the circuit court of Kanawha County. Civil penalties collected under this article shall be deposited with the state Treasurer to the credit of the Division of Corrections in a special revenue fund to be known as the "Private Prison Fund," which is hereby created.

§25-5-12. Access by contracting agency, commissioner; reimbursement of expenses; report by commissioner.

(a) The commissioner shall cause to be made such inspections of prison facilities as are necessary to effectively enforce the requirements of this article. The commissioner or his authorized representative or a contracting agency shall have access to all areas of the facility and to inmates and staff at all times. The contractor shall provide to the commissioner any and all data, reports, and other materials that the commissioner determines are necessary to carry out inspections pursuant to this article.

(b) The contractor shall reimburse the Division of Corrections for expenses incurred for inspections. Such reimbursement shall be payable to the Division of Corrections.

(c) The commissioner shall report on the performance of contractors operating within this state, no less frequently than annually, until the year one thousand nine hundred ninety-three and thereafter as requested by either the Speaker of the House of Delegates, the President of the Senate, the Regional Jail Authority or the Governor. Upon such request, the report shall be submitted to the Speaker of the House of Delegates, to the President of the Senate, to the Regional Jail Authority and to the Governor.

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§25-5-13. Sovereign immunity.

The sovereign immunity of the state shall not extend to the contractor or its insurer.

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§25-5-14. Powers and duties not delegable to contractor.

(a) No contract for correctional services may authorize, allow or imply a delegation of the authority or responsibility of the contracting agency to a prison contractor for any of the following:

(1) Developing or implementing procedures for calculating inmate release and parole eligibility dates;

(2) Developing or implementing procedures for calculating and awarding good time;

(3) Approving inmates for work release;

(4) Approving the type of work inmates may perform and the wages or good time, if any, which may be given to inmates engaging in such work;

(5) Granting, denying or revoking good time; and

(6) Recommending that the contracting state's parole authority either deny or grant parole, although the contractor may submit written reports that have been prepared in the ordinary course of business.

(b) Notwithstanding the provisions of subsection (a) of this section, the contractor may use inmates for community service upon the request and approval of the political subdivision where the prison is located.

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§25-5-15. Bonding requirements.

A contractor shall give a performance bond payable to the State of West Virginia, in a form satisfactory to the commissioner, executed by a surety company qualified to do business in this state and in the penal sum, as determined by the commissioner, in an amount not less than $100,000. The bond shall be conditioned on the contractor performing all the requirements of this article and the rules promulgated hereunder.

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§25-5-16. Insurance.

(a) The contractor shall provide an adequate policy of insurance specifically including insurance for civil rights claims as determined by a risk management or actuarial firm with demonstrated experience in public liability for state governments. In determining the adequacy of the policy, such risk management or actuarial firm shall determine whether:

(1) The insurance is adequate to protect the state, its political subdivisions or other contracting agencies from actions by a third party against the contractor;

(2) The insurance is adequate to protect the state, its political subdivisions or contracting agencies against claims arising as a result of any occurrence; and

(3) The insurance is adequate to satisfy other requirements specified by the risk management or actuarial firm.

(b) The insurance contract shall contain a provision that the state, its political subdivisions and contracting agencies are named insureds, and that the state, its political subdivisions and contracting agencies shall be sent any notice of cancellation.

(c) The contractor shall not self-insure.

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§25-5-17. Liability; indemnification.

A contractor which has been approved to operate a facility pursuant to this article shall indemnify, defend and hold harmless the state, its officers, agents, and employees, and any local government entity in the state having jurisdiction over the facility or ownership of the facility from:

(1) Any claims or losses for services rendered by the contractor or person performing or supplying services in connection with the performance of the contract;

(2) Any claims or losses to any person injured or damaged by the willful or negligent acts of the contractor, its officers or employees in the operation of a private prison or in the performance of the contract;

(3) Any claims or losses resulting to any person injured or damaged by the private contractor, its officers or employees by the publication, translation, reproduction, delivery, performance, use or disposition of any data processed under the contract in a manner not authorized by the contract, or by federal or state regulations or statutes;

(4) Any failure of the contractor, its officers or employees to adhere to West Virginia laws, including, but not limited to, labor laws and minimum wage laws;

(5) Any Constitutional, federal, state or civil rights claim brought against the state related to the prison facility;

(6) Any claims, losses, demands or causes of action arising out of the contractor's activities in this state; and

(7) Any attorney's fees or court costs arising from any habeas corpus actions or other inmate suits which may arise, including, but not limited to, attorney's fees for the state's representation as well as for any court appointed representation of any inmate as well as the costs of any special judge who may be appointed to hear such actions.

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§25-5-18. Firearms; capture of escapees; nonresident private correctional officers.

(a) Private correctional officers of a private contractor shall be authorized to carry and use firearms in the course of their employment only after completing a training course, approved by the commissioner, in the use of firearms in accordance with rules promulgated by the division.

(b) Upon notification by the contractor of an escape from the facility or a disturbance at the facility, the state shall use all reasonable means to recapture escapees or quell any disturbance.

(c) When acting within the scope of their normal employment at the private prison facility, nonresident private correctional officers shall be deemed residents for purposes of section eleven, article six, chapter sixty-one of this code.

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§25-5-19. Employee training requirements; preference.

(a) All employees of a facility operated pursuant to this article shall receive training in a program approved by the commissioner. All training expenses shall be the responsibility of the contractor.

(b) West Virginia residents shall be given a hiring preference for positions at the facilities permitted to operate in accordance with this article.

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§25-5-20. Reimbursement to state and its subdivisions.

Any cost incurred by the state or its political subdivisions relating to the apprehension of an escapee or the quelling of a disturbance at the facility shall be chargeable to and borne by the contractor. The contractor shall also reimburse the state or its political subdivisions for all reasonable costs incurred relating to the temporary detention of the escapee following recapture.

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