

Let the Rookies Up to Bat: Re-evaluating Legislation and Agency Practices in the Procurement of Private Prison Management Services

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Flawed procurement processes can be a stifling hindrance to competition and innovation in the provision of services across many industries. When used inappropriately, narrow procurement indicia such as fixed cost savings and past performance act as barriers to entry to otherwise worthy candidates who offer value beyond cost or are simply new to the market. In the context of private prisons, these barriers are especially damaging as failure to innovate yields negative social costs beyond simple financial inefficiencies. Unfortunately, in the procurement of private prison management services, federal and state agencies typically use ill-suited procurement processes guided by poorly crafted legislation. This Note proposes changes to the law and the procurement process which aim to mitigate these barriers to entry, to stimulate innovation in private prison services, and to facilitate the entry of new competition for private prison management contracts.

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I. INTRODUCTION

The use of private firms to operate correctional facilities has seen rapid growth in the United States since the very first private prison contracts in the 1980s.¹ Despite this increase in the utilization of the private sector to meet correctional needs, the number of firms that seem able to win large private prison management contracts on the state and federal level is small.² Three corporations presently operate the vast majority of such private prisons: the Corrections Corporation of America (CCA), the GEO Group (GEO), and the Management and Training Corporation (MTC).³ In comparison, a more diverse group of firms serve as the operators of community-correctional and re-entry facilities, such as halfway houses (CC-RE Facilities).⁴ Although operating a CC-RE Facility is not a perfect credential toward successfully operating a secure correctional or detention facility,⁵ having experience in the operation of CC-RE Facilities is exactly how the first private prison operators were able to win their first contracts in the birth of prison privatization.⁶ The wall that seems to exist now between firms that are permitted to operate private prisons and those that can only operate private CC-RE Facilities, then, appears to be a non-essential and anti-competitive development in the private prison industry.

1. See WILLIAM COLLINS, ASSOCIATION OF STATE CORRECTIONAL ADMINISTRATORS, CONTRACTING FOR CORRECTIONAL SERVICES PROVIDED BY PRIVATE FIRMS 1 (2000), http://www.asca.net/system/assets/attachments/2083/Contracting_for_Corr_Services-2.pdf?1296151908 [<http://perma.cc/9BLJ-SCG7>] (describing the birth and momentum of private prisons from non-existent in the early 1980s to comprising a total rated capacity of 122,000 beds in private secure adult correctional facilities in operation or under construction by 1999); J. MICHAEL QUINLAN, CHARLES W. THOMAS & SHERRIL GAUTREAU, THE PRIVATIZATION OF CORRECTIONAL FACILITIES § 10.01 (2000) (“As recently as the early 1980’s any suggestion that public policy choices in corrections might come to include government agencies’ contracting with private firms for the full-scale management of jails or prisons would have been dismissed out of hand. No jurisdiction in the United States had entered into such a contract. . . . By the end of 1999, twenty-eight states had enacted legislation expressly authorizing the full-scale privatization of prisons; another ten states had taken the position that pre-existing statutes could be interpreted broadly enough to provide legal authority for management contracts to be awarded; thirty-two states, the District of Columbia, Puerto Rico, and each of the three federal agencies that have prisoner custody responsibilities had contracted for the housing of prisoners in privatized facilities; the number of private correctional and detention facilities in operation or under construction in the United States had reached 155; and American facilities had an aggregate design capacity sufficient to house nearly 123,206 prisoners.”); LAUREN E. GLAZE & DANIELLE KAEBLE, BUREAU OF JUST. STAT., CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2013 12 app. tbl.2 (Dec. 2014), <http://www.bjs.gov/content/pub/pdf/cpus13.pdf> [<http://perma.cc/HP36-L49A>] (demonstrating the growth in private prisoner population

A large factor in the consolidation of correctional contracts to CCA, GEO and MTC is that these three firms were the first to provide large-scale correctional services in the United States.⁷

levels between 2000 and 2012); PICO NAT'L NETWORK & PUB. CAMPAIGN, UNHOLY ALLIANCE: HOW THE PRIVATE PRISON INDUSTRY IS CORRUPTING OUR DEMOCRACY AND PROMOTING MASS INCARCERATION 4 (Nov. 15, 2011), http://publiccampaign.org/sites/default/files/PICO_Report_Private_Prisons_Final.pdf [<http://perma.cc/WU7R-D7ZW>] (demonstrating that between 1990 and 2009, the total state and federal prison population grew 209% (773,919 to 1,613,740) while the private prison population grew 1664% (7,771 to 129,336)).

2. See Exhibit B: Private Prison Operators, [<https://perma.cc/6JXL-AC43>] (last visited April 23, 2016) (demonstrating that very few firms operate private prisons for the Bureau of Prisons and State Departments of Corrections). The result cannot be blamed solely on a lack of other firms trying to win the relevant contracts. See, e.g., Holly Sow, *Prison Bids Are In; Emerald Corrections Bids to Build in Globe*, ARIZ. SILVER BELT (Mar. 4, 2011), http://www.silverbelt.com/v2_news_articles.php?heading=0&story_id=2442&page=72 [<http://perma.cc/8YWZ-EEQN>] (demonstrating firms other than CCA, GEO and MTC bidding on private prison contracts).

3. See Exhibit B: Private Prison Operators, *supra* note 2 (demonstrating that the vast majority of private prisons contracted by the Bureau of Prisons and State Departments of Corrections are CCA, GEO and MTC).

4. See, e.g., FED. BUREAU OF PRISONS, RRC CONTACT DIRECTORY, http://www.bop.gov/business/rrc_directory.jsp [<http://perma.cc/6FDM-FJTU>] (last visited Feb. 26, 2016) (a directory of firms contracted by the Bureau of Prisons to operate CC-RE Facilities exhibiting a much more diverse set of firms than those contracted to operate its secure corrections and detention facilities); PA. DEP'T OF CORRECTIONS, REGION I FACILITIES, http://www.cor.pa.gov/Facilities/CommunityCorrections/Pages/Region-I-Facilities.aspx#.VODg3fnF_DY [<http://perma.cc/294J-TAV6>] (last visited Feb. 26, 2016) (a directory of firms contracted by the Pennsylvania Department of Corrections to operate CC-RE Facilities exhibiting the same level of diversity at the State level); TEX. DEP'T OF CRIM. JUST., PRIVATE FACILITY CONTRACT MONITORING/OVERSIGHT DIVISION, http://www.tdcj.state.tx.us/divisions/pf/pf_unit_list.html [<https://perma.cc/3YDT-SLYQ>] [<http://perma.cc/H35N-NCGU>] (last visited Feb. 26, 2016) (a directory of firms contracted by the Texas Department of Corrections, showing greater diversity outside private correctional or jail facilities). See also Exhibit B: Private Prison Operators, *supra* note 2 (demonstrating more CC-RE facilities that have operators that are not one of CCA, GEO or MTC).

5. This Note will refer to secure correction or detention facilities as prisons.

6. DOUGLAS McDONALD & CARL PATTEN, GOVERNMENTS' MANAGEMENT OF PRIVATE PRISONS 1–2 (Sept. 15, 2003), <https://www.ncjrs.gov/pdffiles1/nij/grants/203968.pdf> [<http://perma.cc/6FZE-UXC7>] (“With little notice, correctional agencies had began, during the late 1960s, to enlist small, generally not-for-profit, organizations to operate halfway houses, work release facilities, and other ‘community based’ facilities. In 1979, the U.S. Immigration and Naturalization Service began to contract with private organizations to house illegal aliens being detained for deportation hearings. From this seedbed emerged the contemporary private prison industry, and several of the most important players got their start there. . . . Community-based organizations had the resources to provide to correctional departments. . .”).

7. See QUINLAN ET AL., *supra* note 1, §§ 10.03(1)–(2) (The privatization alternative began to “attract serious attention” after the nation’s first large-scale awards, which were made to CCA and GEO, then known as Wackenhut Corrections Corporation. Some of the early advantage was also due to consolidations that occurred in this time, notably CCA’s acquisition of U.S. Corrections Corporation.); COLLINS, *supra* note 1, at 1 (“[P]rivatization’

Although simply being first to enter a market generally bestows some first-mover advantage to a firm, being first in an industry where federal and state legislation have given past performance disproportionately great weight bestows an amplified advantage.⁸ This legislation hinders the agency procurement process,⁹ leading to the award of contracts to the same few private firms.¹⁰ The general lack of diversity is certainly not for lack of other private prison management corporations trying to win these large contracts.¹¹ Without reform to the legislation defining the procurement processes used by the federal and state governments, the trend of favoring the same few private prison firms can be expected to continue into the future.

This Note argues that the present state of legislation and regulation controlling procurement in the private prison industry, and the procurement processes of the agencies themselves, is harmfully anti-competitive and past due for reform. This Note does not discuss the various arguments for or against the use of private prisons as a political or moral matter.¹² Instead, the fo-

in the form of state departments of corrections contracting for prison beds operated by large for-profit corporations suddenly burst upon the corrections scene. These companies offered to design, build and operate large prisons.”); MGMT. & TRAINING CORP., CORRECTIONS OVERVIEW, <http://www.mtctrains.com/corrections/corrections-overview> [<http://perma.cc/AW4Q-KGQM>] (last visited Feb. 26, 2016) (MTC has operated private correctional facilities since 1987).

8. See Exhibit A: Private Prison Legislation, [<https://perma.cc/M99K-6ZMU>] (last visited April 23, 2016) (demonstrating the widespread requirement of using past performance measures); QUINLAN ET AL., *supra* note 1, § 10.03(3) n.18 (discussing the problems and inevitability of favoritism of the large firms in the private prison procurement and contracting process).

9. See Exhibit C: Private Prison RFPs, [<https://perma.cc/RYN4-NVCF>] (last visited April 23, 2016) (demonstrating the procurement evaluation criteria that strongly favor older, more established firms to the point of effectively debarring newer firms).

10. Exhibit B: Private Prison Operators, *supra* note 2 (demonstrating the lack of firm diversity in the operation of private prisons).

11. See Craig Harris, *Private Prison Company Facing Sex Harassment Suit Wins State Contract*, ARIZ. REPUBLIC (Oct. 27, 2015, 6:53 PM), <http://www.azcentral.com/story/news/arizona/investigations/2015/10/27/arizona-awards-private-prison-contract-geo-group/74697314> [<http://perma.cc/878X-AY9Z>] (demonstrating that GEO and CCA were the only finalists out of a total five companies in a 2015 RFP in Arizona and GEO eventually won the contract — the other bidders were LaSalle, Emerald and Community Education Centers). See also *Two Bow Out of Bid Decision Officials Own Stock in Firms Competing to Build Private Prison*, SPOKESMAN-REV. (Sept. 8, 1997), <http://m.spokesman.com/stories/1997/sep/08/two-bow-out-of-bid-decision-officials-own-stock/> [<http://perma.cc/FXG2-CJW7>] (demonstrating that nine private prison corporations submitted bids to a 1997 RFP in Idaho).

12. For a discussion regarding the political or moral implications of the use of private prisons, see, e.g., AMERICAN CIVIL LIBERTIES UNION, *BANKING ON BONDAGE: PRIVATE*

cus will be on the economic development of the market for private prison contracts and the state of that market today. Part II explains the basic types of procurement processes, outlines their various costs and benefits and highlights the dangers inherent in each. Part III discusses the growth of the private prison industry at both the federal and state levels and the profitable opportunity that contracts for the operation of private prisons present to those who wish to enter the market. Part IV identifies the problematic federal and state legislation that has contributed to the oligopolistic state of the market for private prison management services. Part V demonstrates the inherent favoritism toward established providers that is present in the procurement documents used in the solicitation of bidders to manage private prisons. Part VI proposes solutions to the aforementioned problems in federal and state legislation and agency procurement processes.

II. THE PROCUREMENT PROCESS

Various types of procurement methods are commonly used by governments to solicit and evaluate bidders offering private prison management services. The entity that solicits bidders through a procurement document is also known as the “issuer” — for the purposes of this Note, the important issuers are the federal and state agencies responsible for incarceration and detention. Part II.A briefly explains the importance of the issuer’s choice between the common procurement methods. Part II.B outlines the advantages and disadvantages of each of these common procurement methods, and analyzes the situations in which a method is most or least appropriately used. This basic analysis of the common procurement methods provides background for evaluating the problems in the agency practices and legislation that affect the procurement of private prison management services.

A. IMPORTANCE OF THE PROCUREMENT METHOD CHOSEN BY ISSUERS

An issuer’s solicitation of bids through its chosen procurement method is the start of a process that leads to a final contract be-

PRISON AND MASS INCARCERATION (2011), <https://www.aclu.org/banking-bondage-private-prisons-and-mass-incarceration> [<https://perma.cc/6R36-8JKE>].

tween it and a goods or services provider (unless, of course, the bid is cancelled).¹³ In order to ensure a successful procurement, the issuer must design its procurement process well.¹⁴ The specific procurement method chosen by the issuer is paramount as it has a significant impact on the development of all later events in the bidding process, in the eventual selection of the contract's winner, and even in the terms and conditions of the contract itself.¹⁵ It is at this critical stage that governments can, "[a]s consumers . . . exercise power over the kind and level of services to be provided and at what cost."¹⁶ The government is an especially powerful consumer in the correctional context because the private prison market approaches a monopsony — only the state and federal governments, with their sovereign police powers of detention, are buying. As "a competitive industry affords consumers . . . greater leverage over suppliers and . . . greater power to buy at more advantageous prices," the federal and state governments must be mindful of the ways in which they buy private prison management services; failure to properly exercise this consumer power may "inhibit the longer-term development of a competitive industry."¹⁷ Thus, the government should design its procurement processes for private prison management services to promote competitiveness.¹⁸

13. QUINLAN ET AL., *supra* note 1, § 10.04(3) (discussing the procurement process generally).

14. *Id.* at § 10.04 (discussing the various blunders of various procurement attempts).

15. *Id.* at § 10.04(3) ("Some attorneys inexperienced in the privatization process hold the view that the critical phase of a procurement process comes only when he or she sits down to draft the contract. This view is mistaken and can lead to unsatisfactory results. The better view is that the final contract that links a public agency to an independent contractor should be the logical outcome of a process that began with the selection of the appropriate procurement method, had as its intermediate step the submission by prospective independent contractors of detailed proposals, and ended with the execution of a contract containing little more of substance than what was contained in the procurement document and the chosen vendor's response to that document."); COLLINS, *supra* note 1, at 3 ("A successful privatization contract begins with a well-drafted contract, which in turn begins with a comprehensive, well-drafted Request for Proposal. . . .").

16. McDonald & Patten, *supra* note 6, at xxv.

17. *Id.*

18. *See id.* at 11 (explaining that competition is the essential foundation from which the benefits of prison privatization arise, as increased competition gives the government issuers more control over the cost and quality because of the existence of more options from which to select the best value provider; however, lack of competition constricts the government issuer's freedom, which can lead to over-dependence on a few sources and perhaps even a sole source).

B. BENEFITS AND FLAWS OF THE COMMON PROCUREMENT METHODS

The methods of competitive procurement commonly used to solicit bids for a public contract award include the Invitation to Bid (ITB), the Request for Qualifications (RFQ) (not to be confused with a Request for Quotations), and the Request for Proposals (RFP).¹⁹ The basic difference between these three methods of procurement is the primary criterion used to distinguish between bidders: the ITB uses price as the primary factor; the RFQ uses the qualifications of the bidders as the primary factor; and the RFP uses issuer-fashioned, bespoke selection criteria.²⁰ The differing points of focus for each of the common procurement methods give them varying strengths, but also distinct flaws, which can make them unsuitable in certain circumstances. This Part explores the benefits and flaws inherent in each of the competitive procurement methods in order to elucidate the dangers of misusing them.

1. *The Invitation to Bid*

The ITB is designed to focus on price as the sole criterion in the selection of a winning bidder.²¹ It is most appropriate where the issuer's procurement contemplates a true 'apples-to-apples' comparison of bidders because the issuer's requirements approach exact specificity.²² In other words, the issuer must have already laid out the exact contractual terms that will apply to the winning bidder and have precisely communicated its desired product or service. Leaving no blanks in the process except price makes the agency capable of objectively selecting the best provider based on price alone. Using price as the deciding factor also makes the ITB a cheap, efficient tool to compare and select

19. QUINLAN ET AL., *supra* note 1, § 10.04(2) (“[T]he most common procurement models include invitations to bid (ITBs), requests for qualifications (RFQs), and requests for proposals (RFPs).”).

20. See Eileen R. Youens, *The ABCs of IFBs, ITBs, RFPs, RFQs, and RFIs*, COATES' CANONS: NC LOC. GOV'T L. (Sept. 1, 2010), <http://canons.sog.unc.edu/?p=3098> [<http://perma.cc/395V-6MM4>].

21. *Id.*

22. QUINLAN ET AL., *supra* note 1, § 10.04(2) n.10 (“The ITB model is viable . . . when the procurement objective is the purchase of goods or commodities the nature of which is subject to being described in an ITB in such highly specific terms that the only remaining relevant variable is price.”).

amongst bidders: the issuer need only compare a single variable, price, and select the lowest number. In addition, since the sole selection criterion (i.e., lowest price) is completely objective, this procurement method is generally not subject to the dangers of subjective scoring and evaluation which enable favoritism or corruption in procurement.

The ITB limits bidders to offering the product or service specifically defined by the issuer.²³ Due to its inflexible nature, this process is inappropriate for the procurement of professional services.²⁴ Since private prison management services are a form of professional service (as opposed to physical goods), the value of the service itself will fundamentally differ based on the idiosyncratic qualities of each provider.²⁵ Thus, using an ITB to compare between private prison operators would improperly compare ‘apples’ to ‘oranges’ on the basis of price alone. Moreover, the ITB’s structure, which requires great specificity in describing the product or service sought, can intrinsically disable firms from offering the issuer bidder-specific cost efficiencies.²⁶ Ironically, under an ITB, which seeks the lowest price, the bidding private prison operators may be barred from bringing their cost-saving potential to bear because the scope and manner of their activities have been fixed poorly by the issuer.

The ITB also leaves little room for innovative approaches due to its rigid specificity. For example, if an agency issues an ITB to provide 10 Apple computers, contractors will not be able to explain to the agency why Windows computers, even at the same or at a lower price, would suit the agency’s needs better. Thus, the same precision and rigidity that makes the ITB so efficient also limits its ability to procure innovative solutions. While the ITB can be successfully employed in the private prison context in cer-

23. As discussed in this Part, the ITB relies on great specificity as to the issuer’s needs in order to narrow down the only remaining variable to price.

24. QUINLAN ET AL., *supra* note 1, § 10.04 n.10 (“It is in the nature of professional services contracts that such specificity is impossible and often experience, qualifications, expertise, and the ability to provide innovative solutions have a high priority.”).

25. *See id.*

26. MCDONALD & PATTEN, *supra* note 6, at xxv (“[P]ublic agencies may elect to contract in hopes of saving money, but then issue statements of work in solicitations that specify in great precision exactly how the private firm must deliver the service or require bidders to follow precisely the same rules and procedures that prevail in the government-run prisons of that jurisdiction. This procurement approach may work against the strategic objective of contracting to save money or to improve cost effectiveness.”).

tain circumstances,²⁷ it is inappropriate in most contexts. Although the process has been considered for use in the privatization of correctional facilities, it has never actually been used.²⁸ Despite these problems, procurement documents that emulate the flaws of an ITB are in common use.²⁹

2. *The Request for Qualifications*

The RFQ focuses on bidder qualifications,³⁰ which allows the evaluation criteria to account for bidder-based, idiosyncratic value. It is typically useful where selection of the best bidder can be achieved based on a comparison of bidder qualifications alone.³¹ For example, the RFQ is well-suited to situations where “the government agency hopes to solve a fairly complex problem by forming a working partnership with a particularly experienced management firm. . . .”³² In the context of a complex problem, it saves the issuer time and resources to forego a broader or more comprehensive procurement process. This is especially the case where a solicitation document would be unable to convey all the nuances of the problem the issuer seeks to address and would consequently return unhelpful proposals — a frustrating endeavor for both bidder and issuer.³³ Alternatively, the RFQ can also be useful as a cost- and time-efficient mechanism to narrow the field of prospective bidders to a final few before proceeding to evaluate final bids or move to a more intensive phase of the procurement.³⁴

27. See COLLINS, *supra* note 1, at 9 (indicating that a highly specific procurement process can be used to produce a “mirror” institution, but such specificity can “stifle . . . flexibility and innovation. . .”).

28. QUINLAN ET AL., *supra* note 1, § 10.04(2) (“Only one jurisdiction, Florida, has ever seriously considered selecting an ITB format for a correctional privatization project. Even that single ITB-based initiative never resulted in an actual procurement effort.”).

29. See *infra* Part V.

30. See Youens, *supra* note 20.

31. See QUINLAN ET AL., *supra* note 1, § 10.04(2) (discussing certain circumstances that suggest using an RFQ over an RFP approach).

32. *Id.*

33. See 1-7 CORPORATE COMPLIANCE PRACTICE GUIDE § 7.07(2) (discussing common problems that “result in derailed RFP processes and wasted time by all parties”).

34. See Peter Samuel, *Abertis/Citi Selected in \$12.8 Billion Bid for Pennsylvania Turnpike Lease*, TOLL ROADS NEWS (May 19, 2008), <http://tollroadsnews.com/news/abertisciti-selected-in-128-billion-bid-for-pennsylvania-turnpike-lease> [http://perma.cc/SVL5-C8GV] (explaining that in the proposed [and ultimately failed] privatization of the Pennsylvania Turnpike, an RFQ was used to narrow the field of bidders to a select group of three (Abertis/Citi, Transurban/Goldman Sachs, Cintra/Macquarie) before proceeding to

The structure of an RFQ enables bidders to use ‘innovative approaches’, as the procurement method can give rise to a collaboratively designed solution in which the contract terms are developed by both the issuer and bidder after the winning bidder has been selected.³⁵ As opposed to a procurement method like the ITB, which presents bidders with a pre-formulated contract with specific terms already fixed by the issuer, the RFQ enables the parties to come to a more flexibly negotiated agreement. Limiting the selection criteria to the bidders’ qualifications selects for the expertise the bidder would bring to a jointly devised endeavor, hopefully leading to better outcomes.

While the RFQ method promotes innovation on its face, the RFQ’s primary selection criteria, qualifications, can be detrimental to that potential. For example, favoring qualifications in the form of past performance over otherwise demonstrable expertise could bar newer, yet better-suited, market innovators from winning any contracts.³⁶ Additionally, incomplete past performance records could prejudice bidders.³⁷ In effect, prioritizing experience over quality would result in a procurement method that prevents the innovative potential of new providers to benefit the issuer.³⁸ Although past performance can be a useful, objective indicator of a bidder’s ability to successfully fulfill the issu-

a final bidding and negotiating phase); IN THE PUB. INT., A GUIDE TO EVALUATING PUBLIC ASSET PRIVATIZATION 3 (Jan. 2011), http://www.inthepublicinterest.org/wp-content/uploads/privatization_guide_ONLINE.pdf [<http://perma.cc/Y76S-2ZLL>] (“The purpose of the RFQ is to identify potential ‘qualified’ bidders who then can negotiate with the governmental entity regarding all the parameters of the contract. . . . After the basic contract has been worked out with the eligible bidders identified in the RFQ process, the governmental entity can issue a Request for Proposals based on the draft contract. The responses to the RFP will contain any proposed modifications to the contract and the ‘Bid’ (amount of money offered for the lease).”).

35. QUINLAN ET AL., *supra* note 1, § 10.04(2) (“[A] carefully crafted RFQ can allow [the issuer] to identify the most qualified provider and then to negotiate the terms and conditions of a mutually agreeable contract.”).

36. COLLINS, *supra* note 1, at 21 (“There is . . . a dilemma created by heavy reliance on experience in that the more experience counts in evaluation of a proposal, the more difficult it will become for new companies to enter the field. If competition for contracts evolves down to only two or three major companies, the benefits which competition in the marketplace is supposed to bring may be lost.”).

37. See William W. Goodrich, Jr., *Past Performance as an Evaluation Factor in Public Contract Source Selection*, 47 AM. U.L. REV. 1539 (1998) (noting problems associated with the evaluation of past performance).

38. See *id.* at 1541–42 (discussing evaluative criteria and factors which can contribute to de facto debarment of certain contractors).

er's needs,³⁹ proxies that replicate the value it provides as a measure of competence should also be used to mitigate its potential harm to the RFQ.

In addition, even if past performance is not the only qualification measured, its inclusion amongst other factors can still be problematic if it is given substantial weight.⁴⁰ Thus, in order to preserve its innovation-seeking potential, an RFQ should measure a bidder's current expertise and competence, not only its historical performance.⁴¹ Unfortunately, procurement documents for private prison management services have weighed past performance heavily.⁴²

3. *The Request for Proposals*

The RFP method is useful where the issuer has multiple important requirements of varied weight or is amenable to varied solutions due to its flexible nature.⁴³ The initial RFP document "communicate[s] government requirements to prospective contractors and . . . solicit[s] proposals from them."⁴⁴ In turn, these proposals are evaluated by the agency issuer according to predetermined and clearly stated standards in order to select a winner.⁴⁵ At the end of the process, "the nature and content of the

39. See *id.* at 1542 (noting the value that the Office of Federal Procurement Policy places in the evaluation of past performance as a scoring criterion for contract awards).

40. Although not its sole criterion for qualifications, the Bureau of Prisons still places a significant weight on the past performance measure and, unsurprisingly, all of its private prison contractors are one of CCA, GEO and MTC. FED. BUREAU OF PRISONS, P 4100.04, PROGRAM STATEMENT: BUREAU OF PRISONS ACQUISITION POLICY pt.15.304 (May 19, 2004), https://www.bop.gov/policy/progstat/4100_004.pdf [<http://perma.cc/522A-WLRX>].

41. The alternative could result in an RFQ process that demands a fixed number of years in order to adequately demonstrate past performance to the agency issuer. This hypothetical RFQ would narrow the field of qualified bidders by eliminating all those firms that could not demonstrate a specified term of years of handling the contract work being bid on, effectively barring any firm that is younger than the specified term of years from ever winning a contract. This result has actually followed in the private prison market. See *infra* Part V.B.

42. See Exhibit C: Private Prison RFPs, *supra* note 9.

43. See QUINLAN ET AL., *supra* note 1, §§ 10.04(2)–(3) (discussing the malleability of RFPs and important considerations that arise because of such flexibility).

44. Dan Briest, *It's "RFQ-Quote" Rather Than "RFP-Offer" When Talking About Orders Against Schedules (FAR 8.4)*, GSA INTERACT (Feb. 6, 2011, 10:24 AM), <https://interact.gsa.gov/wiki/its-rfq-quote-rather-rfp-offer-when-talking-about-orders-against-schedules-far-84> [<http://perma.cc/68NK-SK9N>].

45. See, e.g., JOHN COSGROVE MCBRIDE & THOMAS J. TOUHEY, 1B-9 GOVERNMENT CONTRACTS: LAW, ADMIN & PROC. § 9.30(2)(a) (2001) ("In order to ensure that all offerors are competing on equal footing, the agency must follow the stated evaluation criteria in evaluating proposals."); 41 U.S.C.A. § 3701(a) (West 2015) ("An executive agency shall

proposals received . . . define the contents of the contract.”⁴⁶ A proposal in response to an RFP is an actual offer and the price proposed is binding upon the bidder. This makes the RFP method useful in contexts where price is an important, but not all-important, factor.⁴⁷

To illustrate the process, a government issuer may distribute an RFP document stating a need for a swimming pool. In response, the government may receive varying technical proposals offering to fulfill the government issuer’s needs: these technical proposals could vary between a rectangular pool, a circular pool, and a triangular pool. Further, each proposal will carry a firm price that the government can unequivocally depend on. Each of these bidder proposals, then, becomes an offer made to the government. The government may accept, reject or further negotiate the offer. Given the right evaluative criteria, the government issuer will be free to select the style of pool that best fits its needs within a permissible range of acceptable prices. Thus, the rectangular pool at \$100 could win over the circular pool at \$80, provided that the technical score of the rectangular pool was sufficiently greater than the technical score of the circular pool, such that it exceeded the differential in the cost score between \$100 and \$80.⁴⁸ This result could even follow if the firm that proposed the rectangular pool was only one year old while the firm that proposed the circular pool was ten years old, provided the technical score of the rectangular pool over the circular pool exceeded the difference in both the cost score (\$100 vs. \$80) and the qualification score (1 year vs. 10 years).

Whereas an ITB would have strictly limited the type of pool to be furnished and simply selected for price and whereas an RFQ would have prematurely eliminated a less facially qualified bid-

evaluate sealed bids and competitive proposals, and award a contract, based solely on the factors specified in the solicitation.”).

46. COLLINS, *supra* note 1, at 6 (“The RFP defines the nature and content of the proposals received and in turn define the contents of the contract.”).

47. QUINLAN ET AL., *supra* note 1, § 10.04 n.11 (discussing the characteristics of an RFP); COLLINS, *supra* note 1, at 12 (“There is a uniform belief that the RFP evaluation process should be structured to avoid price driving the selection process. While price is obviously an important factor, it should not be the sole determining factor, lest an agency find itself compelled to accept what could be a low-ball bid from a would-be contractor who will either provide low quality services and/or almost immediately begin wheedling for increases in the contract price.”).

48. See Exhibit C: Private Prison RFPs, *supra* note 9 (providing examples of various scoring criteria in private prison RFPs).

der who may have proposed the pool best-suited to the government's needs, the RFP opens the field for innovation. Since bidders can respond freely with technical proposals to an RFP, within the limits of certain hard requirements (the bidder must propose a pool and not a jet plane), the process has the potential to draw out otherwise unforeseen and innovative solutions.

The RFP procurement method heavily burdens the issuer with carefully fashioning and issuing an RFP document that appropriately guides all later steps of the process to a positive outcome.⁴⁹ A poorly drafted RFP document will often yield poorly tailored proposals and fundamentally undermine the entire procurement process.⁵⁰ As a result, the "typical [RFP] and selection process takes considerable time and effort on the part of both the customer and the service provider."⁵¹ The issuer must provide enough clarity and specificity in its RFP document in order to ensure actionable proposals are generated.⁵² In addition, the RFP method must also carefully balance inflexible, hard requirements with flexible openness so as not to stifle the bidders' innovativeness in providing goods or services at better quality or lower costs.⁵³

49. COLLINS, *supra* note 1, at 3–4, 6 ("If important issues are overlooked in drafting the RFP, it may be difficult to insert them later. . . . [S]ome jurisdictions literally import the contents of the RFP into the contracts as the primary statement of work.").

50. See QUINLAN ET AL., *supra* note 1, § 10.04(2) (discussing the various ways in which a government issuer can misuse the RFP and fundamentally disrupt its own procurement process).

51. JASON D. KRIESER & SHAWN C. HELMS, *OUTSOURCING: LAW & BUSINESS* § 15.03(1) (2016).

52. COLLINS, *supra* note 1, at 6, 9 ("Precision in the RFP avoids misunderstandings and provides the basis for an equally precise contract. . . . [A]sking for a '500-bed medium custody facility meeting [American Correctional Association] physical plant standards' could conceivably result in a 'wood frame building with a single 10 foot fence around it."); QUINLAN ET AL., *supra* note 1, § 10.04(a) ("Service requirements should be as clear, as precise, and when possible as quantitative as they can be made to be . . . It is not sufficient, for example, to mandate such things as 'adequate staffing,' 'suitable educations and vocational training programs,' [etc.] . . .").

53. See KRIESER & HELMS, *supra* note 51, § 15.03(1) (discussing the negative impact of inflexible RFP processes); QUINLAN ET AL., *supra* note 1, § 10.04 (Criticizing the practice of issuing "procurement documents and contracts that seek to guarantee that an independent contractor would discharge its obligations in a manner almost precisely identical to pre-existing government agency practices even though such rigid adherence to 'business as usual' strategy thoroughly undermines the ability of an independent contractor to implement innovative and more cost effective means of delivering services."); COLLINS, *supra* note 1, at 9 ("Under the mirror model, the RFP is very detailed, and asks that the contractor adopt and follow [Department of Corrections] policies and procedures to the letter. . . . The advantage of the mirror process is that it tends to produce a prison that replicates other institutions in the agency. Its disadvantage is that it tends to stifle any flexibility and innovation that the contractor might bring to the operation of a prison, benefits the private prison operator might arguably offer.").

These delicate balancing points make the RFP relatively expensive to issue and require detailed proposals that make it expensive to respond to.⁵⁴

The flexibility of the RFP, which is the great strength of this particular procurement method, is also its most significant risk. The RFP can be tailored in such a way that it ceases to be a flexible and innovation-seeking mechanism and instead becomes more like an ITB⁵⁵ or an RFQ.⁵⁶ Given the drawbacks inherent in both the ITB and the RFQ, these outcomes should be avoided in order to preserve the beneficial outcomes that the RFP makes possible. Further, unlike an ITB or an RFQ, which have separate and distinct flaws inherent in their respective processes and do not contain the flaws of the other, an RFP can present with the flaws of both due to its flexibility. Unfortunately, as discussed in Parts III, IV and V, private prison RFPs tend to operate very similarly to a hybrid between an ITB and RFQ, rather than an innovation-promoting RFP.

III. THE PRIVATE PRISON CONTEXT

The historical and current data regarding the private prison industry in the United States reflect the damage caused by the improper usage of anti-competitive procurement processes. However, the value present in the private prison industry still presents ample opportunity for new market entrants. Properly utilized, this ‘carrot’ can serve to introduce competition and innovation in the private prison market, leading to improved and more

54. See, e.g., Krishna, *RFPs May Increase Risk and Cost*, THOUGHT CLUSTERS (Nov. 30, 2008), <http://www.thoughtclusters.com/2008/11/rfps-may-increase-risk-and-costs> [<http://perma.cc/HRQ4-YK9T>]. In the context of private prison procurement, where older more established firms have demonstrably captured private prison contracts, such low likelihood of winning exists for firms that wish to compete. See Exhibit B: Private Prison Operators, *supra* note 2; Exhibit C: Private Prison RFPs, *supra* note 9.

55. QUINLAN ET AL., *supra* note 1, § 1.04(2) n.11 (“Because cost savings is such a common objective of a competitive procurement process that relies on an RFP model, agencies are often tempted to assign an excessive percentage of the total evaluation points to cost proposals. One effect of this can be the transformation of an RFP into a procurement document that is too similar to an ITB, which is simply inappropriate when professional services are the object of a procurement process. An equally negative effect of over-weighting price proposals in evaluation models is that it unintentionally invites ‘low-ball bids.’”).

56. *Id.* at § 10.04(2) (“[T]he evaluation format an agency develops for ranking responses to an RFP can assign such a heavy weight to vendors’ qualifications, credentials, and experience and such a modest weight to vendors’ price proposals, that the result is very similar to an RFQ.”).

cost-effective services for the federal and state agencies relying on private prisons. Part III.A reviews the birth of the private prison industry and its early development. Part III.B presents data on recent growth in the private prison industry at the federal level, while Part III.C presents parallel data at the state level. Part III.D analyzes the value present in the private prison market and the opportunities available for new and existing private prison service providers.

A. BACKGROUND

The modern market for prison privatization contracts traces its roots to numerous small contracts for auxiliary prison needs handled by private entities in the late 1960s.⁵⁷ Those contracts were issued by various state departments of corrections (DOCs), and typically involved “halfway house type beds,” operated by small not-for-profit organizations.⁵⁸ The operation of large correctional facilities by for-profit corporations began in the mid-1980s with the first county-level and federal contract awards to the Corrections Corporation of America (CCA) and the first state-level award to the U.S. Corrections Corporation (which was later acquired by CCA).⁵⁹ The GEO Group (GEO), which also had a significant early presence in the market,⁶⁰ and CCA quickly expanded their market shares; by 1999, CCA held 53.8% of the total private prison population while the GEO Group held 27.4%.⁶¹ This early lead is one that CCA and GEO have not surrendered,⁶²

57. See COLLINS, *supra* note 1, at 1. See MCDONALD & PATTEN, *supra* note 6.

58. COLLINS, *supra* note 1, at 1.

59. See *id.*; QUINLAN ET AL., *supra* note 1, §§ 10.01, 10.03(1).

60. QUINLAN ET AL., *supra* note 1, § 10.03(1) (“Although informed commentators might differ in their judgments as to when the tide began to turn in favor of privatization, the key influence was quite probably the 1987 decision of the Texas Department of Criminal Justice to award two 500-bed facility contracts to [CCA] and two 500-bed contracts to [GEO]. . .”).

61. SCOTT D. CAMP AND GERALD G. GAES, FEDERAL BUREAU OF PRISONS, GROWTH AND QUALITY OF U.S. PRIVATE PRISONS: EVIDENCE FROM A NATIONAL SURVEY 4 (Sept. 21, 2001), https://www.bop.gov/resources/research_projects/published_reports/pub_vs_priv/orepres_note.pdf [<http://perma.cc/6W5G-SCAP>].

62. See Corr. Corp. of Am., Annual Report (Form 10-K) 5 (Feb. 25, 2016), <https://www.sec.gov/Archives/edgar/data/1070985/000119312516477634/d121974d10k.htm> [<http://perma.cc/NS2B-355J>] (CCA is “the nation’s largest owner of privatized correctional and detention facilities and one of the largest prison operators in the United States.” At the end of 2015, CCA “owned or controlled 66 correctional and detention facilities and managed an additional 11 facilities” owned by the government, for a total of “approximately 88,500 beds. . .”); GEO Group, Inc., Annual Report (Form 10-K) 3, 11 (Feb. 26, 2016),

or perhaps could not help but keep due to the state of legislation and agency practices in private prison procurement.⁶³ The consolidation of private prison management services to two or three favored firms should especially excite the need for reform in the private prison context.⁶⁴

B. FEDERAL PRIVATE PRISON GROWTH

Federal prisoners are held by various Department of Justice (DOJ) agencies including “the U.S. Marshals Service (USMS), [the Immigration and Customs Enforcement (ICE),] and the Federal Bureau of Prisons (BOP).”⁶⁵ While the DOJ agencies have their own prisons or partner with state and local governments for use of their prisons, due to the unavailability of prisons “in areas where more federal bed space is needed, [the] DOJ has increasingly had to rely on the private sector.”⁶⁶ With respect to the

<https://www.sec.gov/Archives/edgar/data/923796/000119312516478864/d43877d10k.htm> [<https://perma.cc/XX9C-LRC4>] (GEO Group is the “sixth largest correctional system in the United States by number of beds, including the federal government and all 50 states.”); *The Department of Justice’s Reliance on Private Contractors for Prison Services*, U.S. DEP’T OF JUSTICE OFF. OF THE INSPECTOR GEN. 3, <http://www.justice.gov/oig/reports/plus/a0116/final.pdf> [<http://perma.cc/CU84-4DMB>] (last visited Feb. 27, 2016) (explaining that a study taken between January and March of 2001 showed that CCA, GEO [then Wackenhut Corrections Corporation] and Cornell Corrections accounted for 91% of the DOJ’s private prison population).

63. See Exhibit A: Private Prison Legislation, *supra* note 8; Exhibit C: Private Prison RFPs, *supra* note 9.

64. McDONALD & PATTEN, *supra* note 6, at 11 (“Many of the purported benefits of contracting depend upon the competitiveness of the private imprisonment market. To the extent that firms compete with one another for contracts, there will be a more pronounced tendency toward cost control, and buyers in his [sic] marketplace (i.e., governments) will have more options for picking the most attractive and advantageous bid. . . . On the other hand, if monopoly conditions prevail or if a single provider is entrenched in a particular state, the government will lose freedom of action and may become excessively dependent upon the private provider. The ostensible advantages of privatization may thereby evaporate. . . . This suggests that how governments structure the privatization program, and decisions they make about allocating ownership and management responsibilities, have an effect on the competitiveness of the marketplace and, by extension, the government’s leverage over future suppliers.”).

65. *The Department of Justice’s Reliance on Private Contractors for Prison Services*, *supra* note 62, at 1. See Corr. Corp. of Am., *supra* note 62, at 10. This Note will focus on the private prisons contracted by the BOP.

66. *United States Marshals Service FY 2014 Performance Budget President’s Budget Submission — Federal Prisoner Detention Appropriation*, U.S. DEP’T OF JUST. 16 (Apr. 2013), <http://www.justice.gov/sites/default/files/jmd/legacy/2014/03/21/fpd-justification.pdf> [<http://perma.cc/3WBP-GV3B>]; *Fact Sheet: U.S. Marshals Service Prison Operations*, U.S. MARSHALS SERV. (Feb. 19, 2015), http://www.usmarshals.gov/duties/factsheets/prisoner_ops.pdf [<http://perma.cc/C6FK-RWB3>] (“The [USMS] does not own or operate detention facilities but partners with state and local governments . . . to house . . . prison-

DOJ's reliance on the private sector, "[m]ost private prison space is provided to the DOJ by [CCA and GEO]."⁶⁷ It has not escaped the DOJ's notice that such heavy reliance on so few contractors poses considerable "concerns" about the impact that the failure of even one of the firms would have.⁶⁸ For example, the failure of one large firm could disrupt the management of a significant percentage of the private prison population and leave a large servicing gap in its wake.

At the time of writing, the BOP contracts for 13 private prisons, designated as "CI — Private Correctional Institutions."⁶⁹ Among all of the BOP's private correctional facilities, only three private firms are represented; seven facilities are operated by the GEO Group, four are operated by CCA, and two are operated by the Management and Training Corporation (MTC).⁷⁰ Thus, the

ers. . . . In addition, the agency contracts with 15 private facilities to house . . . prisoners."); *List of BOP Locations*, FED. BUREAU OF PRISONS, <http://www.bop.gov/locations/list.jsp> [<http://perma.cc/3LAP-QNY7>] (last visited Feb. 27, 2016) (demonstrating the BOP's use of private operators in addition to their own facilities).

67. *The Department of Justice's Reliance on Private Contractors for Prison Services*, *supra* note 62, at 1, 4 (exhibiting a graph showing that, as of 2001, CCA accounted for 53% of federal prisoners in private facilities, GEO accounted for 24%, Cornell Corrections accounted for 14% and all other providers accounted for a mere 9%).

68. *Id.* at 1, 5 (According to the 2001 study, "USMS, INS, and BOP officials acknowledged that they lacked an overall plan for addressing a long-term loss of private contractor's services.").

69. *See List of BOP Locations*, *supra* note 66. This information is as reported in the BOP website. Recently, the BOP has decided to both open an additional CI and allow one CI contract to lapse. The BOP concluded an RFP on December 29, 2014, and the winner, GEO Group, Inc., will re-open a former CI facility in Oklahoma, the Great Plains Correctional Facility. *See CAR XV-RFP-PCC-0022*, FED. BUS. OPPORTUNITIES (June 26, 2013), https://www.fbo.gov/index?s=opportunity&mode=form&id=bc600d2e153e8fee026cfc3f0a73603b&tab=core&_cview=1 [<http://perma.cc/M474-WG5N>]. On the same day, the BOP also announced that it will not renew an existing contract with CCA to operate the Northeast Ohio Correctional Center, which was set to expire on May 31, 2015. *See Federal Bureau of Prisons Elects Not to Renew Contract at the Northeast Ohio Correctional Center*, CCA — INV. REL. (Dec. 29, 2014), <http://phx.corporate-ir.net/phoenix.zhtml?c=117983&p=irol-newsArticle&ID=2002220> [<https://perma.cc/2UBC-QEBU>]. At the time of this writing, the population of this facility is zero. *See List of BOP Locations*, *supra* note 66.

70. *CI Adams County*, FED. BUREAU OF PRISONS, <http://www.bop.gov/locations/ci/acc> [<http://perma.cc/WE9S-DSQX>] (last visited Feb. 27, 2016); *CI Big Spring*, FED. BUREAU OF PRISONS, <http://www.bop.gov/locations/ci/bsc> [<https://perma.cc/9QR6-A42T>] (last visited Feb. 28, 2016); *CI Cibola County*, FED. BUREAU OF PRISONS, <http://www.bop.gov/locations/ci/cib> [<https://perma.cc/RT5N-VULU>] (last visited Feb. 28, 2016); *CI D. Ray James*, FED. BUREAU OF PRISONS, <http://www.bop.gov/locations/ci/drj> [<https://perma.cc/LTF8-BT3L>] (last visited Feb. 28, 2016); *CI Eden*, FED. BUREAU OF PRISONS, <http://www.bop.gov/locations/ci/edn> [<https://perma.cc/CA96-M9WQ>] (last visited Feb. 28, 2016); *CI Giles W. Dalby*, FED. BUREAU OF PRISONS, <http://www.bop.gov/locations/ci/dal> [<https://perma.cc/C9ZT-XQ7Z>] (last visited Feb. 28, 2016); *CI Great Plains*, FED. BUREAU OF PRISONS, <https://www.bop.gov/locations/ci/gpc> [<https://perma.cc/45H2-GMNM>] (last visited March

BOP relies on three firms to handle all of its private prison management services. The USMS also uses private prisons to hold a portion of its prisoners, which contributes to the overall federal reliance on private prisons.⁷¹ In total, the USMS reports that it contracts for 17 different private facilities.⁷² It appears that USMS relies upon only two private firms to handle all of its private prison management services.⁷³ Compared to the great di-

21, 2016); *CI McRae*, FED. BUREAU OF PRISONS, <http://www.bop.gov/locations/ci/mca> [<https://perma.cc/82YC-5FP5>] (last visited Feb. 28, 2016); *CI Moshannon Valley*, FED. BUREAU OF PRISONS, <http://www.bop.gov/locations/ci/mvc> [<https://perma.cc/E4C3-ZQ9G>] (last visited Feb. 28, 2016); *CI Reeves I & II*, FED. BUREAU OF PRISONS, <http://www.bop.gov/locations/ci/ree> [<https://perma.cc/J6ZH-U6QT>] (last visited Feb. 28, 2016); *CI Reeves III*, FED. BUREAU OF PRISONS, <http://www.bop.gov/locations/ci/rvs> [<https://perma.cc/F4KE-F8J5>] (last visited Feb. 28, 2016); *CI Rivers*, FED. BUREAU OF PRISONS, <http://www.bop.gov/locations/ci/riv> [<https://perma.cc/D6UN-Q9KK>] (last visited Feb. 28, 2016); *CI Taft*, FED. BUREAU OF PRISONS, <http://www.bop.gov/locations/ci/taf> [<https://perma.cc/6Y6C-UKJZ>] (last visited Feb. 28, 2016); *CAR XV-RFP-PCC-0022*, *supra* note 69.

71. Out of a total 55,330 average daily detention population in Fiscal Year 2014, 11,164, or 20.18% of the total population were kept in private facilities. See *Fact Sheet: Prisoner Operations*, U.S. MARSHALS SERV. (Feb. 19, 2015), http://www.usmarshals.gov/duties/factsheets/prisoner_ops.pdf [<https://perma.cc/EJQ5-87RQ>]. Continued growth in private prison reliance is projected for the future. See *United States Marshals Service FY 2014 Performance Budget President's Budget Submission — Federal Prisoner Detention Appropriation*, *supra* note 66, at 21. An additional 10,647 prisoners were kept by the BOP in unspecified facilities, which may have included BOP-contracted private facilities.

72. See *Fact Sheet: Facts and Figures 2016*, U.S. MARSHALS SERV. (Mar. 11, 2016), <http://www.usmarshals.gov/duties/factsheets/facts.pdf> [<https://perma.cc/Z3N7-WEYT>]. Based on the most recent publicly available annual reports, CCA provides USMS with 7 facilities while GEO provides USMS with 13, for a total of 20 facilities as opposed to the 17 “contracts with privately managed detention facilities” reported by USMS Corr. Corp. of Am., *supra* note 62, at 14–17 (CCA facilities contracted to USMS include: Central Arizona Detention Center; Florence Correctional Center; Leavenworth Detention Center; Torrance County Detention Facility; Northeast Ohio Correction Center; West Tennessee Detention Facility; Webb County Detention Center.); GEO Group, Inc., *supra* note 62, at 11–14 (GEO facilities contracted to USMS include: Alhambra City Jail; Aurora/ICE Processing Center; Western Region Detention Facility; Brooks County Detention Center; Central Texas Detention Facility; Coastal Bend Detention Center; East Hildago Detention Center; Joe Corley Detention Facility; Karnes Correction Center; Rio Grande Detention Center; Val Verde Correction Facility; Queens Private Detention Facility; Robert A. Deyton Detention Facility.).

73. The difference in reported numbers of private prison facilities provided to the USMS (16 to 15) indicates that CCA or GEO has lost at least one contract with USMS, as the USMS report is more recent. It is unclear whether CCA or GEO have lost more than one contract, thereby leading to the possibility of another private firm stepping in to service USMS’ private prison needs. Without an unambiguous declaration from the USMS identifying the private firms it uses for the management of the 15 private facilities it reports using, it is unclear whether only CCA and GEO provide prison management services to USMS. The various confusions present in the conflicting number of private facilities reported in publicly available data suggest that, as a general matter, there needs to be a better overall reporting system to keep track of federal dependence on private prisons and the private firms providing those private prison services.

iversity of private firms operating federal community-corrections and re-entry facilities,⁷⁴ there is very little diversity in the operators of federal private prisons, at least within the BOP and USMS systems.⁷⁵

Between 2000 and 2012, the federal prison population grew 49.79%, an increase of 72,399 people.⁷⁶ During the same period, the federal prison population held in private prisons grew 235.11%, an increase of 22,100 people.⁷⁷ The population changes over this period demonstrate that private prisons handled 30.5% of the federal prison system's growth in population between 2000 and 2012.⁷⁸ As a percentage of all federal prisoners, private prisons went from handling 7.0% to 15.1% in the period.⁷⁹ Thus, the data reveals that the federal government's level of reliance on private prisons has been steadily increasing over time.

The more recent data regarding the federal government's dependence on private prisons demonstrates a precipitous rise in the past few years. Between 2011 and 2012, the federal prison population increased by 1,453 prisoners.⁸⁰ In that same period, the population of federal prisoners in private facilities increased

74. See FED. BUREAU OF PRISONS, RRC CONTACT DIRECTORY, *supra* note 4 (listing ten different CC-RE operators on the first page alone and comprising of ten total pages of operators).

75. See Exhibit B: Private Prison Operators, *supra* note 2.

76. The population grew from 145,416 to 217,815. See LAUREN GALIK, LEONARD GILROY & ALEXANDER VOLOKH, REASON FOUND., ANNUAL PRIVATIZATION REPORT 2014 CRIMINAL JUSTICE AND CORRECTIONS 2 (June 2014), <http://reason.org/files/apr-2014-criminal-justice.pdf> [<http://perma.cc/46HY-M829>]. See also E. Ann Carson & Daniela Golinelli, *Prisoners in 2012: Trends in Admissions and Releases, 1991–2012*, BUREAU OF JUST. STAT. app. at 39 tbl.6 (Sept. 2, 2014), <http://www.bjs.gov/content/pub/pdf/p12tar9112.pdf> [<http://perma.cc/ZB7F-G984>]. The 145,416 population for 2000 is stated to be 140,100 in the 2013 BJS publication. The 217,815 population for 2012 is stated to be 216,900 in the 2013 BJS publication. The change in population, then, according to the 2013 BJS publication would be 76,800. GLAZE & KAEBLE, *supra* note 1, app. at 12 tbl.2. The more conservative growth calculation of 72,399 has been used for purposes of this Note.

77. The federal prison population held in private facilities grew from 9,400 to 31,500. GLAZE & KAEBLE, *supra* note 1, app. at 12 tbl.2.

78. The private prison population growth of 22,100 divided by the total federal prison population growth of 72,399 yields 30.5%. This calculation does not measure the percentage of newly incarcerated individuals who were sentenced to private correctional facilities, but rather the percentage of the increase in federal prisoners that is being handled by private prisons. The growth in private prison population results from new prisoners as well transfers of already incarcerated individuals.

79. GLAZE & KAEBLE, *supra* note 1, app. at 12 tbl.2.

80. The 2011 population was 216,362 and the 2012 population was 217,815. GALIK ET AL., *supra* note 76, at 2.

by 1,900 prisoners.⁸¹ These numbers suggest that private prisons handled 100% of the increase in the federal prison population and further depended on them to handle an additional 447 prisoners.⁸² Between 2012 and 2013, the federal prison population shrank by 1,900.⁸³ Despite this decrease in the total federal prison population, the number of prisoners in private facilities increased by 400.⁸⁴ Compared to the historical average of shouldering 34.4% of the federal prison system's growth, noted above, these more recent figures show that the growth in the private prison population is now outpacing the growth of the number of incarcerated federal prisoners as a whole, even when there is a reduction in the total population held in federal public prisons.

C. STATE PRIVATE PRISON GROWTH

The lack of diversity in state private prison operators contracted by the various departments of corrections, or parallel agencies,⁸⁵ of the states (collectively, DOCs) is similar to the homogeneity of federal private prison operators shown above.⁸⁶ Based on information reported by the state DOCs on their websites,⁸⁷ CCA, GEO and MTC operate a majority of the private correctional facilities contracted with state DOCs.⁸⁸ Compared to

81. The 2011 population was 38,546 and the 2012 population was 40,446. Carson & Golinelli, *supra* note 76, app. at 40 tbl.7.

82. The population growth of 1900 in private prisons accounts for the entire growth of the federal prison population of 1453 and yields a total of 447 additional prisoners.

83. GLAZE & KAEBLE, *supra* note 1, app. at 12 tbl.2 (explaining that the population shrank from 216,900 in 2012 to 215,000 in 2013).

84. GLAZE & KAEBLE, *supra* note 1, app. at 12 tbl.2 (explaining that the population shrank from 31,500 in 2012 to 31,900 in 2013).

85. Some states slightly vary the name of the relevant agency that I include in the umbrella term "DOC." For example, California calls their department of corrections the California Department of Corrections and Rehabilitation. See CAL. DEP'T OF CORRECTIONS AND REHABILITATION, <http://www.cdcr.ca.gov/> [<http://perma.cc/X2EM-D3ZP>] (last visited Feb. 28, 2016).

86. Private prison contracts involving regional or local state authorities and state contracts for CC-RE Facilities are excluded.

87. See Exhibit B: Private Prison Operators, *supra* note 2. State DOC's often keep disorganized data and intermingle community-based facilities or youth facilities with true correctional/detention facilities. Similarly, they often do not distinguish between state-run facilities and privately-run facilities, making the data for state dependence on private prisons difficult to discern. Further, not all the information reported by state DOCs regarding their dependence on private prisons is consistent with private firms' claims to service them.

88. The only non-CCA, non-GEO and non-MTC operators were Community Education Centers in Pennsylvania operating the George W. Hill Correctional Facility, and Community Education Centers in Virginia operating the Indian Creek Correctional Center. For

the greater diversity of operators present in CC-RE Facilities,⁸⁹ there is little diversity in the operators of correctional facilities chosen by state DOCs.⁹⁰ As a general matter, an accurate and detailed reporting system for state use of private prisons is lacking;⁹¹ therefore any account of private prison use is necessarily imperfect.

Between 2000 and 2012, the state prison population grew 8.31%, an increase of 103,767 people.⁹² During the same period, the state private prison population grew 27.20%, an increase of 20,700 people.⁹³ The population changes over this period demonstrate that private prisons handled, on average, 19.95% of the state prison system's growth in population between 2000 and 2012.⁹⁴ This period also reflected an increase in the percent of state prisoners held in private facilities from 6.5% to 7.6%.⁹⁵ The foregoing state data reveals an increasing dependence on private prison facilities by state governments over the 12 year period.⁹⁶

The most recent data demonstrates no strong growth in the dependence of state governments on private prisons in the short

purposes of this claim, the author omitted facilities contracted with local jail authorities, community-based or re-entry type facilities, and counted only private correctional facilities contracted with state DOCs as reported on their respective websites. See Exhibit B: Private Prison Operators, *supra* note 2.

89. See, e.g., PA. DEPT OF CORRECTIONS, REGION I FACILITIES, *supra* note 4.

90. See Exhibit B: Private Prison Operators, *supra* note 2.

91. The Bureau of Justice Statistics has aggregate data of state prison population held in private facilities, derived from questionnaires sent each year. However, its questionnaire form asks only "how many inmates under your jurisdiction were housed in a privately-operated correctional facility," which solicits reports of population numbers only. See *National Prisoner Statistics Prisoner Population Reports Midyear Counts 2010*, BUREAU OF JUST. STAT. 3 (May 14, 2010), http://www.bjs.gov/content/pub/pdf/nps1a_10.pdf [<http://perma.cc/X5ZZ-9PWA>]; *National Prisoner Statistics Advance Year-end Counts 2004*, BUREAU OF JUST. STAT. 3 (Apr. 28, 2004), http://www.bjs.gov/content/pub/pdf/quest_archive/nps1b_04.pdf [<http://perma.cc/G67J-NQHU>]. Such surveys will not report how many private facilities are under the jurisdiction of the state or who the operator is.

92. The state prison population grew from 1,248,815 to 1,352,582. GALIK ET AL., *supra* note 76, at 2. See also Carson & Golinelli, *supra* note 76, app. at 39 tbl.6. The 1,248,815 population for 2000 is stated to be 1,177,200 in the 2013 BJS publication. The 1,352,582 population for 2012 is stated to be 1,267,000 in the 2013 BJS publication. The change in population then, according to the 2013 BJS publication, would be 89,800. GLAZE & KAEBLE, *supra* note 1, app. at 12 tbl.2. The more aggressive growth calculation of 103,767 has been used for purposes of this Note.

93. The state private prison population grew from 76,100 to 96,800. GLAZE & KAEBLE, *supra* note 1, app. at 12 tbl.2.

94. The private prison population growth of 20,700 divided by the total federal prison population growth of 103,767 yields 29.3%.

95. GLAZE & KAEBLE, *supra* note 1, app. at 12 tbl.2.

96. This is considering the aggregate data collected from all states and not of the states individually.

term, as opposed to the more astonishing federal prison data. The aggregate state data shows a fluctuating level of dependence on private correctional facilities in the past few years. Between 2011 and 2012, the state prison population decreased by 30,024.⁹⁷ Despite the decrease, the population of state prisoners in private facilities increased by 3,944.⁹⁸ On the other hand, between 2010–2011 and 2012–2013, the state prison population held in private facilities declined.⁹⁹ Notwithstanding these two one-year anomalies, the data supports the conclusion that state government dependence on private prisons is increasing over time in the long term.¹⁰⁰

D. PROFITABLE OPPORTUNITY IN THE PRIVATE PRISON MARKET

The foregoing figures suggest that the market for private prisons is active and growing in order to meet the growing dependence of federal and state governments on private prisons. The value associated with this expanding market is significant: in 2014 and 2015, GEO Group reported over \$1 billion each year in revenues from private prison management, while CCA reported approximately \$1.7 billion in these years.¹⁰¹ Over the same periods, GEO Group reported approximately \$270 million in operating income and CCA reported an approximate average of \$260 million in operating income.¹⁰² MTC has stated it received \$735

97. GALIK ET AL., *supra* note 76, at 2; Carson & Golinelli, *supra* note 76, app. at 39 tbl.6. The state prison population decreased from 1,382,606 in 2011 to 1,352,582 in 2012.

98. GALIK ET AL., *supra* note 76, at 2. The population of state prisoners in private facilities increased from 101,730 in 2011 to 105,674 in 2012. Carson & Golinelli, *supra* note 76, app. at 40 tbl.7 (The 2012 BJS publication states the numbers to be 92,426 in 2011 and 96,774 in 2012. The former source attributes the difference to the BJS data excluding California private prison data.).

99. GALIK ET AL., *supra* note 76, at 2. The state prison population held in private facilities declined from 104,361 in 2010 to 101,730 in 2011. GLAZE & KAEBLE, *supra* note 1, app. at 12 tbl.2. The state prison population held in private facilities declined from 96,800 in 2012 to 92,100 in 2013.

100. See GLAZE & KAEBLE, *supra* note 1, app. at 12 tbl.2.

101. GEO Group, Inc., *supra* note 62, at 59. The GEO Group revenue figures are stated to reflect U.S. Corrections & Detention services only, excluding GEO Community Services, International Services and Facility Construction & Design; Corr. Corp. of Am., *supra* note 62, at 61. The CCA figures include only the revenues and operating income from the management and ownership of facilities, but appear to make no distinction between private prisons and CC-RE facilities and include rental revenue generated from leased facilities.

102. GEO Group, Inc., *supra* note 62, at 138 (In 2014, operating income was \$263,027,000. In 2015, operating income was \$281,945,000). Corr. Corp. of Am., *supra*

million in revenues for 2013.¹⁰³ The future value proposition of the private prison market is bolstered by the continuing inability of correctional agencies to adequately manage and house their prison populations.¹⁰⁴ For example, lack of adequate funding has caused many state and federal prisons to continue to use inefficient and unsuitable facilities.¹⁰⁵ For this reason, the private prison market can be expected to grow further in the future, presenting valuable opportunities to firms that are able to win contracts.

Further, despite the strong presence and dominant market share of CCA, GEO and MTC, their collective grasp on the market is functionally contingent on a year-to-year basis.¹⁰⁶ CCA

note 62, at 52 (In 2014, operating income was \$240,296,000. In 2015, operating income was \$280,554,000).

103. See *MTC At-A-Glance*, MGMT. & TRAINING CORP. (Nov. 2014), <http://www.mtc trains.com/sites/default/files/MTC-At-A-Glance.pdf> [<http://perma.cc/N9E9-RPP3>]. However, MTC's revenues are not reported with great detail and the proportion of the revenues attributable to correctional and detention facilities in the United States as opposed to overall operations internationally cannot be determined.

104. See *supra* Part III.B; Corr. Corp. of Am., Annual Report (Form 10-K) 22 (Feb. 27, 2014), <http://www.sec.gov/Archives/edgar/data/1070985/000119312514072723/d664216d10k.htm> [<https://perma.cc/9NSX-JR7X>] (“According to the Department of Justice’s fiscal year 2014 budget justification, the biggest challenge facing the federal prison system is ‘managing the ever increasing federal inmate population and providing for their care and safety, while maintaining appropriately safe and secure prisons . . .’ The budget justification states further that ‘. . . it is projected that the population will continue to outpace available bed space in future years. Therefore, adding new capacity to accommodate the increasing population is crucial to reducing overcrowding and effectively managing federal inmates.’ However since fiscal year 2009, the federal prison system has received no funding that could be used to begin construction on several proposed new government-owned prison facilities. Capital expenditures for new construction, renovations, and major repairs have decreased at the state level as well. According to a Bureau of Justice Statistics report issued December 11, 2013, between 1992 and 2001, capital outlays varied between \$2.7 billion and \$4.0 billion, comprising between 5.0% and 10.3% of total corrections expenditures during those years. Between these same years, 32 states spent at least 20% of their total corrections expenditures on capital outlays. From 2002 to 2010, capital outlays made up \$2.3 billion or less each year and less than 5% of state correctional expenditures. Between these same years, only two states spent at least 20% of their total corrections expenditures on capital outlays.”). Essentially, the spending in states and federal systems for capital outlays has declined or stopped, leaving a huge market need for private correctional facilities.

105. *Id.* at 23 (“According to the Bureau of Justice Statistics ‘Census of State and Federal Correctional Facilities’ published in 2008, there are approximately 290,000 state and federal prison beds in operation in public facilities that are more than 50 years old and almost 100,000 prison beds more than 100 years old. Prison facilities that are older are typically more inefficient to staff and are more expensive to operate, including higher capital expenditures for maintenance.”).

106. Corr. Corp. of Am., *supra* note 62, at 63–64 (indicating that CCA’s private prison contracts are periodically up for renewal and potential re-bidding); GEO Group, Inc., *su-*

typically enters into private prison management contracts with governmental entities “for terms of up to five years, with additional renewal periods at the option of the contracting governmental agency.”¹⁰⁷ Similarly, GEO contracts for terms of one to five years, with optional renewal years.¹⁰⁸ These term contracts necessarily result in future opportunities to compete for the underlying facilities.

These periodic renewals and re-bidding requirements present opportunities for other contractors to enter the private prison market. For example, CCA will be subject to competitive re-bids on 34 of its facilities contracts on or before December 31, 2016.¹⁰⁹ GEO also has numerous contracts up for re-bid: in 2016, 8 contracts are up for competitive re-bid; in 2017, 12 contracts are up for re-bid; in 2018, an additional 12 contracts are up for re-bid; in 2019, 8 contracts are up for re-bid; and in 2020, 6 contracts are up for re-bid.¹¹⁰ Due to the nature of the private prison management contracts, which require re-bidding, opportunities for new market entrants to take over contracts, facilities and beds are constantly available.¹¹¹

pra note 62, at 19 (indicating that GEO’s private prison contracts are periodically up for renewal and potential re-bidding).

107. Corr. Corp. of Am., *supra* note 62, at 29.

108. *Id.* at 6.

109. Corr. Corp. of Am., *supra* note 62, at 29.

110. GEO Group, Inc., *supra* note 62, at 20.

111. One caveat to the opportunity available to other operators to take over facilities with contracts up for renewal or renegotiation is that the incumbent operator may own the facility in question, which may tilt cost and other factors in favor of existing private prison operators. See *CAR XV-RFP-PCC-0022*, *supra* note 69 (requiring that the bidder “must be ready to accept inmates at an existing facility within 150 days after contract award, or no later than April 1, 2016. . .”). On its face, this RFP eliminates any bidder without the ability to furnish an existing facility. Although a new provider could attempt to take over an existing facility and successfully bid on this RFP, the odds are strongly against it. Both contracts were won by GEO at two of its existing facilities, Moshannon Valley Correctional Center and Great Plains Correctional Facility. Additionally, the BOP has previously sought for private prison operators on grounds similarly favoring incumbents. See *CAR-RFP-PCC-0021*, FED. BUS. OPPORTUNITIES (Aug. 3, 2012), https://www.fbo.gov/?s=opportunity&mode=form&id=d2f08fb6938da2fce131250e73d343eb&tab=core&_cview=1 [<http://perma.cc/Z27D-3PY3>] (“The Federal Bureau of Prisons (BOP) has a requirement for the management and operation of a contractor-owned/contractor-leased, contractor-operated correctional facility. . . . An offeror awarded a contract must be ready to accept inmates at an existing facility within 150 days after contract award, or no later than September 1, 2013. . .”). The solicitation was ultimately cancelled. In the state context, Alaska has also similarly sought private prison services from already existing out-of-state facilities. See *Request for Proposals RFP # 2010-200-8617*, ST. OF ALASKA DEPT OF CORRECTIONS § 1.02 (Apr. 27, 2009), <http://aws.state.ak.us/OnlinePublicNotices/Notices/Attachment.aspx?id=74505> [<http://perma.cc/F7HM-XRL5>]. This trend is expected by the author to be replicated in any state whose private prison reliance is mostly based on out-

However, different circumstances regarding the ownership of the underlying facilities between the private firms and the agencies they serve pose varying degrees of difficulty in procuring new operators.¹¹² For example, because GEO and CCA own a significant number of the facilities in which they provide private prison services,¹¹³ they may benefit from a heightened entrenchment effect.¹¹⁴ Incumbent operators in these contractor-owned, contractor-operated facilities have had documented success in winning subsequent re-bids.¹¹⁵ Given that a prison facility is a substantial asset and is not easily redeployed (it cannot be moved), operators who also own the underlying facility may have developed dependence, over a period of entrenchment, in the agencies they serve.¹¹⁶ Despite these ‘home-field’ advantages, there is evi-

of-state private facilities, due to the reduced capital cost of sending prisoners to an already existing facility, rather than establishing a new one.

112. MCDONALD & PATTEN, *supra* note 6, at 12 (“There is substantial variation in how governments have structured the overall contracting arrangement with respect both to ownership of the facility and to the obligations to manage and operate it. The narrowest contracts are for selected services. . . . Governments also contract for full-service management and operation, but retain ownership of the facility. Another approach is to contract for beds in facilities operated by private firms and owned by entities other than the client government. . . . Still another approach is for a government to contract with a firm to finance, construct, and operate a facility that will exist for the (largely) exclusive use of that government. . . . Another approach is for a government to create a private corporation that exists entirely to serve the interests of that government, and which assumes responsibility for financing and constructing a correctional facility.”).

113. See GEO Group, Inc., *supra* note 62, at 11–14 (showing that GEO owns 36 correctional facilities in the United States as of December 31, 2015); Corr. Corp. of Am., *supra* note 62, at 13, 59 (showing that CCA owned or controlled 66 correctional facilities in the United States as of December 31, 2015).

114. MCDONALD & PATTEN, *supra* note 6, at 13 (“Ownership of the needed asset may pose a barrier to entry to other potential bidders. . . . Buyers may thereby become more dependent upon the original contractor and may find it more difficult to exit in the event of inadequate performance. In these circumstances, it is hypothesized that the power of the buyer is reduced, the cost to the buyer of ending the contractual relationship increases, and the supplier’s ability to exact higher fees for its services is consequently strengthened.”).

115. MCDONALD & PATTEN, *supra* note 6, at vii–viii (“Of the 91 different contracts that were active on December 31, 1997, 41 were with facilities owned by private firms rather than the contracting government. . . . Among these 91 contracts, only 17 had been recompeted. . . . Of the 17, incumbency provided an overwhelming advantage: all but one were awarded to the incumbents. (The single contract that was not awarded to an incumbent was one where the facility was publicly owned, where eight different firms competed, and the award went to the lowest bidder.”).

116. *Id.* (“In theory, at least, there is reason to suspect that facility ownership gives a contractor an upper hand in subsequent competitions and may therefore serve to restrict competitiveness.”); MCDONALD & PATTEN, *supra* note 6, at 13 (“In theory, at least, contracting with entities that own facilities as well as operate them may run the risk of allowing the contractor to become entrenched and thereby minimize or eliminate subsequent competitions. Economist Oliver Williamson has theorized that when services are provided

dence that mere ownership of the underlying facility does not guarantee a firm an operation and management contract.¹¹⁷ Thus, management contracts in contractor-owned, contractor-operated facilities can be seen as opportunities for new market entrants.

Aside from the competition for contractor-owned, contractor-operated facilities, government-owned, contractor-operated facilities, and other facilities not owned by the contractor, present opportunities for new market entrants.¹¹⁸ Since these facilities are owned by the government, they should not present, to the same degree, the entrenchment difficulties discussed above. In other circumstances, granting management contracts to a new private firm does not necessarily require the ousting of a current, entrenched operator. For example, contractor-owned but idle facilities have no operator and provide additional opportunity for new market entrants.¹¹⁹ Since idle facilities are more likely to be used for future increases in private prison demand, as opposed to building out new facilities entirely,¹²⁰ departing from an inclina-

through contractual arrangements, competition among providers is severely constrained if the assets specific to a contractual relationship are substantial and not easily redeployed.”)

117. For examples of private firms owning the underlying facilities which other private firms manage, see *Corr. Corp. of Am.*, *supra* note 62, at 17 (CCA owns the Bridgeport Pre-Parole Transfer Facility, but it is leased to MTC).

118. In addition, there are numerous facilities that are merely leased by the operators or are not even leased and merely managed by the operators. GEO Group, Inc., *supra* note 72, at 11–14 (listing 24 facilities managed, but not owned, by GEO); *Corr. Corp. of Am.*, *supra* note 62, at 13 (CCA “managed 11 correctional and detention facilities owned by government agencies.”). Effecting a shift to a new operator will be less troublesome in these facilities, given the absence of facility ownership considerations.

119. *Corr. Corp. of Am.*, *supra* note 62, at 55 (explaining that CCA owns 7 idle core facilities, 5 of which are explicitly correctional, and that the carrying values of these idle facilities totaled \$200,718,000 in 2015); GEO Group, Inc., *supra* note 62, at 11–14, 31 (explaining that GEO is marketing beds in 4 idle facilities and that the carrying costs of these idle facilities are expected to be \$12.7 million in 2016). A contract involving these idle facilities can cover the expected recovery of capital costs incurred by CCA and GEO for carrying the assets even if another firm manages the facility. Cost recovery can otherwise be recovered by leasing the underlying facilities to the third-party operator.

120. *Corr. Corp. of Am.*, *supra* note 104, at 54 (“Our evaluations . . . take into consideration our historical experience in securing new management contracts to utilize facilities that had been previously idled for periods comparable to or in excess of the periods that our currently idle facilities have been idle. Such previously idled facilities are currently being operated under contracts. . . . Notwithstanding the effects the current economy has had on our customers’ demand for prison beds in the short term which has led to our decision to idle certain facilities, we believe the long-term trends favor an increase in the utilization of our correctional facilities and management services.”); GEO Group, Inc., *supra* note 62, at 98 (“Notwithstanding the effects the current economy has had on [GEO’s] customers’ demand for prison beds in the short term which has led to its decision to idle cer-

tion to award management contracts to the owners of these facilities will be valuable to new market entrants.

The market has the essential ingredients to draw out entrepreneurs and innovators: money — provided by the federal and state governments in need of private prison services; experts with the know-how to run private prisons — currently employed by federal or state agencies or by existing private firms; contracts to win — available at new facilities, existing facilities up for renewal, and idle facilities; and profit margins to compete within — as shown by the profitability of private prison contract work.¹²¹

While the opportunity created by these factors is facially available to the market as a whole, presently only few firms have successfully capitalized on this opportunity as a practical matter.¹²² The relative insignificance of the private prison corporations that are not one of CCA, GEO or MTC is clearly stated in CCA's recent 10-K: CCA only names two other firms, GEO Group and MTC, as distinct risks to its business, covering the remainder of the private prison operating firms in boilerplate disclosures of potential risks.¹²³

tain facilities, [the Company] believes the long-term trends favor an increase in the utilization of its idle correctional facilities. This belief is also based on [GEO's] experience in working with governmental agencies faced with significant budgetary challenges which is a primary contributing factor to the lack of appropriated funding to build new bed capacity by federal and state agencies.”).

121. As discussed in this Part, the revenues and operating income of GEO, CCA and MTC show that the operation of a private prison is a profitable enterprise.

122. See *infra* Parts IV and V (generally discussing the lack of operator diversity in private prison management).

123. Corr. Corp. of Am., *supra* note 62, at 27 (“The correctional and detention facilities we own, operate, or manage, as well as those facilities we own but are managed by other operators, are subject to competition for inmates from other private prison managers. We compete primarily on the basis of bed availability, cost, the quality and range of services offered, our experience in the design, construction, and management of correctional and detention facilities, and our reputation. We compete with government agencies that are responsible for correctional facilities and a number of privatized correctional service companies, including, but not limited to, The GEO Group, Inc., Inc. and Management and Training Corporation. We also compete in some markets with small local companies that may have a better knowledge of the local conditions and may be better able to gain political and public acceptance.”); GEO Group, Inc., *supra* note 62, at 20. (The GEO Group lists more competitors in the “U.S. Corrections & Detention and International Services business” including: CCA; MTC; “Emerald Companies; Community Education Centers; LaSalle Southwest Corrections; Group 4 Securicor; Sodexo Justice Services (formerly Kaylx); and Serco.”) The expanded list of competitors, however, speaks primarily to competition in the sector of community corrections or other alternative-type facilities. Aside from CCA and MTC, GEO also faces no other significant competition in the private correctional facility market.

IV. THE LAW AND AGENCY PRACTICES IN THE FEDERAL CONTEXT

The highly consolidated state of the federal private prison market is compounded by the procurement processes implemented by the BOP. However, the federal law which guides the BOP does not require that result. Part IV.A analyzes the federal law that guides the procurement of federal private prison management services, and Part IV.B reviews the actual RFP documents used by the BOP.

A. FEDERAL LAW

The procurement processes of the federal agencies, including the Bureau of Prisons, are largely controlled by the Federal Acquisition Regulation (FAR) and by certain, agency-specific deviations it permits.¹²⁴ As one of its guiding principles, the FAR seeks to promote full and open competition in the solicitation and award of government contracts.¹²⁵ Overall, the language of the FAR is well-suited to that principle. This Part identifies provisions in the FAR containing RFQ- and ITB-like characteristics and demonstrates how the FAR's various exceptions and qualifiers can mitigate the problems those provisions would otherwise cause in procurement processes.

1. *Harmful RFQ-Like Elements in the FAR*

The FAR includes some RFQ-like qualities in its guidance, but it also includes provisions that mitigate the harmful effects these qualities would otherwise cause. The FAR establishes a principle to use “contractors who have a track record of successful past performance or who demonstrate a current superior ability to perform. . . .”¹²⁶ The disjunctive ‘or’ in this guiding principle preserves the ability of agencies laboring under the FAR to look beyond past performance in the selection of contractors. Compare, for example, a guiding principle that requires an evaluation of

124. 48 C.F.R. § 1.101 (2014) (“The Federal Acquisition Regulations System is established for the codification and publication of uniform policies and procedures for acquisition by all executive agencies.”); 48 C.F.R. § 1.402 (2014) (The FAR allows certain deviations “when necessary to meet the specific needs and requirements of each agency.”).

125. 48 C.F.R. § 1.102(b)(1)(iii) (2014); 48 C.F.R. § 6.101 (2014).

126. 48 C.F.R. § 1.102(b)(1)(ii) (2014).

past performance without allowing an evaluation of a superior ability to perform to be used in the alternative. The result would be an anti-competitive and constrictive regime that inherently damages the ability of new contractors, having no past performance, to win contracts.

That result actually follows, in a limited fashion, from the FAR: for contracts expected to exceed \$150,000, the evaluation of past performance is required without permitting a ‘demonstrated superior ability to perform’ as a substitute measure.¹²⁷ On the other hand, a saving exception provides that the strict past performance requirement may be omitted in limited circumstances where it would not be appropriate.¹²⁸ Further, the FAR also states that bidders with no relevant past performance “may not be evaluated favorably or unfavorably on past performance.”¹²⁹ This neutral treatment theoretically results in greater, but not ideal, parity between new firms and established firms. The quality which past performance evaluates — competence — is a worthy criterion to consider, especially in view of the importance of selecting a competent prison operator.¹³⁰ However, the use of an alternative measure, rather than neutral treatment, would provide a more tangible benefit to new market entrants. For example, if past performance commands 25 points out of a total 100 points on an RFP, it is unclear what ‘neither favorable nor unfavorable’ treatment looks like. Thus, the FAR provides limited guidance to mitigate the harmful effects its RFQ-like provisions

127. 48 C.F.R. § 15.304(c)(3)(i) (2014) (“Except as set forth in paragraph (c)(3)(iii) of this section, past performance shall be evaluated in all source selections for negotiated competitive acquisitions expected to exceed the simplified acquisition threshold.”); 48 C.F.R. § 2.101 (2014) (“‘Simplified acquisition threshold’ means \$150,000, except for acquisitions of supplies or services that, as determined by the head of the agency, are to be used to support a contingency operation or to facilitate defense against or recovery from nuclear, biological, chemical, or radiological attack. . .”).

128. 48 C.F.R. § 15.304(c)(3)(iii) (2014) (“Past performance need not be evaluated if the contracting officer documents the reason past performance is not an appropriate evaluation factor for the acquisition.”).

129. 48 C.F.R. § 15.305(a)(2)(ii) (2014) (instructing issuers to establish procedures for evaluating bidders with no relevant performance history); 48 C.F.R. § 15.305(a)(2)(iii) (2014) (expanding past performance to include “predecessor companies, key personnel who have relevant experience, or subcontractors that will perform major or critical aspects of the requirement when such information is relevant to the [contract being bid on]”); 48 C.F.R. § 15.305(a)(2)(iv) (2014) (requiring neutral treatment of bidders with no relevant or available past performance records).

130. See MCDONALD & PATTEN, *supra* note 6, at xxi–xxv (providing a history of the various scandals and failures of private prisons).

would otherwise have, but does not totally eliminate these harmful effects.

The FAR also provides that “no purchase or award shall be made unless the contracting officer makes an affirmative determination of responsibility.”¹³¹ The responsibility determination is a separate evaluation of the bidders’ general qualifications including its “financial resources” and its “organization, experience, accounting and operational controls, and technical skills. . . .”¹³² The responsibility determination also involves multiple criteria which effectively act as measures of past performance;¹³³ for example, two of the criteria measure whether the bidder has “a satisfactory performance record” and “a satisfactory record of integrity and business ethics. . . .”¹³⁴ The FAR again provides a saving exception, providing that a ‘lack of relevant performance history’ generally cannot be the sole reason to determine that a bidder is not responsible.¹³⁵ Although ‘lack of relevant performance history’ can become determinative under a ‘special standards’ test, such a test is permitted only in limited circumstances.¹³⁶ Thus, past performance measures are included in the responsibility determination, but are also mitigated to protect procurement processes from the measures’ potentially harmful effects.

131. 48 C.F.R. § 9.103(b) (2014).

132. 48 C.F.R. § 9.104-1 (2014).

133. KATE M. MANUEL, CONG. RESEARCH SERV., R40633, RESPONSIBILITY DETERMINATIONS UNDER THE FEDERAL ACQUISITION REGULATION: LEGAL STANDARDS AND PROCEDURES 6–8 (2013) (“For prospective contractors to be determined responsible, they must satisfy seven criteria. . . . [1] Have adequate financial resources to perform the contract, or the ability to obtain them. . . . [2] Be able to comply with the required or proposed delivery or performance schedule. . . . [3] Have a satisfactory performance record. . . . [4] Have a satisfactory record of integrity and business ethics. . . . [5] Have the necessary organization, experience, accounting and operational controls, and technical skills, or the ability to obtain them. . . . [6] Have the necessary production, construction, and technical equipment and facilities, or the ability to obtain them. . . . [7] Be otherwise qualified and eligible to receive an award under applicable laws and regulations.”).

134. 48 C.F.R. § 9.104-1(c)–(d) (2014). MANUEL, *supra* note 133, at 6–8.

135. 48 C.F.R. § 9.104-1(c) (2014) (prohibiting a prospective contractor to be determined responsible or nonresponsible solely on the basis of lack of relevant performance history except where special standards are warranted).

136. 48 C.F.R. § 9.104-2 (2014) (outlining the requirements to invoke special standards).

2. *Harmful ITB-Like Elements in the FAR*

The FAR also contains ITB-like provisions, but limits the impact these provisions have on the procurement processes designed under it. The FAR explicitly contemplates situations in which cost and price have diminished importance relative to other factors in the selection process.¹³⁷ Further, the agency issuers are given freedom to pursue “best value in negotiated acquisitions by using any one or a combination of source selection approaches,”¹³⁸ allowing agencies to decide what weight to assign to cost concerns. The FAR contemplates two major types of selection processes from which the agency can choose: the ‘lowest price technically acceptable’ source selection, which mimics an ITB’s focus on price after a threshold of technical quality has been crossed,¹³⁹ and the ‘tradeoff’ source selection process, which resembles an RFP’s flexibility in balancing cost to non-cost factors.¹⁴⁰ Thus, the FAR does not require that its ITB-like provisions be used, but merely makes them available for appropriate circumstances.

The FAR need not be amended to achieve greater openness to competition and innovation in the private prison context. Although it contains various RFQ-like and ITB-like provisions, it sufficiently limits those provisions. Thus, the FAR has the potential to improve the state of the federal private prison market in its current form due to its many provisions providing exceptions and deviations from its requirements. For example, the interpreting agency can simply determine that past performance is not an appropriate evaluative factor in the procurement of private

137. 48 C.F.R. § 15.101 (2014) (“In different types of acquisitions, the relative importance of cost or price may vary. For example, in acquisitions where the requirement is clearly definable and the risk of unsuccessful contract performance is minimal, cost or price may play a dominant role in source selection. The less definitive the requirement, the more development work required, or the greater the performance risk, the more technical or past performance considerations may play a dominant role in source selection.”).

138. *Id.*

139. *See* 48 C.F.R. § 15.101-2 (2014) (detailing that the government issuer will select the proposal with the lowest cost that meets or exceeds a set of non-price minimum requirements, which act as the specificity required to reduce the only relevant remaining variable to price).

140. *See* 48 C.F.R. § 15.101-1 (2014) (detailing that the government issuer is free to select a proposal other than the one with lowest cost or the highest technically rated based on customizable non-price evaluation factors of varying weights which may be significantly more important, approximately equal to or significantly less important than cost).

prison operators.¹⁴¹ Alternatively, the agency can treat firms without past performance in a neutral fashion through the use of alternative measures. Thus, without amendment, the FAR could be used to produce private prison RFPs without problematic RFQ- or ITB-like provisions.

B. FEDERAL PRIVATE PRISON RFPs

Currently, it appears that federal private prison RFPs issued by the BOP employ an anti-competitive blend of RFQ-like provisions.¹⁴² This result is expressly not required under the FAR.¹⁴³ Without changes to the BOP's execution of the FAR's guidance in private prison RFP documents, the current top firms have reason to be confident in their likelihood to retain dominant market shares of the federal private prison market.¹⁴⁴

To its credit, the BOP's RFP does not opt into the ITB-like 'lowest price technically acceptable' format permitted by the FAR, favoring instead the RFP-like tradeoff format.¹⁴⁵ The BOP specifically "reserves the right to award a contract to an offeror other than the offeror proposing the lowest price when [its] evaluation determines a proposal is significantly superior from a non-price standpoint and warrants payment by [it] of a premium."¹⁴⁶ Only when the non-price evaluative factors are "substantially equal," does price become a "major" factor as a tie-breaker. Thus, the BOP's RFP, like the FAR, does not inappropriately cast private prison RFPs as ITBs.

However, the BOP has developed its own variation of the FAR in the Bureau of Prisons Acquisition Policy (BPAP),¹⁴⁷ which does

141. 48 C.F.R. § 15.304(c)(3)(iii) (2014).

142. See Exhibit C: Private Prison RFPs, *supra* note 9; Exhibit B: Private Prison Operators, *supra* note 2.

143. See *supra* Part IV.A.1.

144. *Federal Bureau of Prisons Announces Intent to Issue Request for Proposal*, CCA (Mar. 22, 2006, 12:00 PM), <https://www.cca.com/press-releases/federal-bureau-of-prisons-announces-intent-to-issue-request-for-proposal> [<http://perma.cc/7X3X-AHLW>] (In anticipation of a large BOP RFP, CCA issued a very confident press release of its candidacy: "As stated in many BOP requirements, past performance and experience will be significant factors in the evaluation process. Based on CCA's long standing relationship with the Federal Bureau of Prisons, the quality service we have provided to the BOP and the limited number of prison beds available in this region, we believe [CCA] is well positioned to enter into a direct contract with the BOP for the continued utilization of the Eden Detention Center.").

145. See *CAR XV-RFP-PCC-0022*, *supra* note 69.

146. See *CAR XV-RFP-PCC-0022*, *supra* note 69.

147. See FED. BUREAU OF PRISONS, P 4100.04, *supra* note 40.

not share the virtues of the FAR's well-crafted provisions. For example, the BPAP states, in relevant part:

Past Performance will be listed as a significant evaluation in all competitively negotiated procurements when considering price and other non-cost evaluation factors. The weight assigned to Past Performance shall be at least 25% of the total evaluation or equal to the other non-cost evaluation factors.¹⁴⁸

True to the BPAP policy, past performance is the most important non-price evaluation criteria in the BOP's RFP.¹⁴⁹ Further, the non-price evaluation factors are collectively more important than price, which undermines the ability of new market entrants to compete on price.¹⁵⁰ While the BPAP contemplates a procedure to waive past performance as an evaluation factor,¹⁵¹ the RFPs issued by the BOP do not indicate that the theoretical accommodation has any practical value to bidders.¹⁵² Furthermore, although the RFP states that bidders without relevant past performance "will not be evaluated favorably or unfavorably," it does not indicate how it accomplishes that neutral treatment.¹⁵³

The BOP's RFP accordingly uses extensive, mandatory past performance evaluative criteria.¹⁵⁴ Evaluation of past performance includes review of the bidders' "Management of Key Personnel . . . Business Relations . . . Timeliness of Performance . . . and Quality of Service," which are weighted "relative to the size and complexity of the procurement under consideration."¹⁵⁵ While the requirement permits operators to submit past contract

148. *Id.* at pt.15.304(a).

149. *See CAR XV-RFP-PCC-0022, supra* note 69 ("The non-price evaluation criteria are listed below in descending order of importance with Environmental and Small Disadvantaged Business Utilization equal in order of importance: 1. Past Performance 2. Technical Proposal 3. Environmental 4. Small Disadvantaged Business Utilization. . .").

150. *See CAR XV-RFP-PCC-0022, supra* note 69 ("The non-price evaluation factors, when combined, are significantly more important than price. However, price becomes a major factor in award selection when other criteria are substantially equal.").

151. FED. BUREAU OF PRISONS, P 4100.04, *supra* note 40, at pt.15.304(b) ("Requests for waivers to eliminate past performance as an evaluation factor when considering other than price shall be submitted by the Chief of the Contracting Office to the BOP Procurement Executive for approval.").

152. *See CAR XV-RFP-PCC-0022, supra* note 69 (expressly using the past performance measure).

153. *See CAR XV-RFP-PCC-0022, supra* note 69.

154. *See id.*

155. *Id.*

experience with federal, state or local government customers (as opposed to solely federal contract experience), it limits relevant contracts to “secure correction/detention services completed during the past three years.”¹⁵⁶ Further, it alludes to a dampening of any such experience that does not reflect the “size and complexity” of the current procurement.¹⁵⁷ These factors essentially eliminate the potential for past performance in CC-RE Facilities to carry much, if any, weight. Given the documented lack of diversity in private management of corrections and detention facilities, the RFPs perpetuate an insurmountable barrier to entry for new innovators; any bidder without past performance in managing private prisons loses out on the most important non-price evaluative criteria, which in turn are more important than price. Thus, the RFPs for federal private prison management contracts implement the problematic provisions of the FAR without its redeeming exceptions.

V. THE LAW AND AGENCY PRACTICES IN THE STATE CONTEXT

Although the various states have taken differing approaches on the use of private prisons, those states that permit their DOCs to contract with private prison operators tend to use language that exacerbate the problems seen at the federal level. Consequently, the RFPs issued by the various state DOCs also tend to be flawed. Part IV.A analyzes state laws governing the procurement of private prison management services, and Part IV.B reviews the actual RFP documents used by a selection of those states.

A. STATE LAWS

The legislation of various states has permitted the harmful characteristics of RFQs and ITBs to permeate the procurement of private prison management services. Unlike the FAR, however, which employs the use of a web of exceptions and deviations to alleviate some of the burdensome requirements it lays out, the

156. *Id.* (“Offerors shall submit a list of all contracts and subcontracts related to secure corrections/detention services completed during the past three years and all contracts currently in progress. Contracts listed shall include those entered into with the federal government, agencies of state and local governments’ customers.”).

157. *See id.*

statutes of many states do not contain such flexibility.¹⁵⁸ Instead, the state legislatures invoked anti-competitive and anti-innovative measures without providing for recourse.¹⁵⁹ Thus, these state legislatures have locked the state private prison market in an environment that can only be improved through statutory amendment.

1. *Harmful RFQ-Like Elements in State Legislation*

Numerous states have legislation which requires private prison operators to demonstrate two separate and redundant performance measures (Double-Measure Legislation). State legislatures that have enacted Double-Measure Legislation generally use language requiring (1) “qualifications, experience, and management personnel necessary to carry out the terms of the contract” and (2) “[e]vidence of past performance of similar contracts. . . .”¹⁶⁰ While the term ‘similar contracts’ may be broad enough to include experience in CC-RE facilities, some states use a more restrictive past performance measure: “demonstrated history of successful operation and management of other correction facilities”¹⁶¹ or of “other secure facilities.”¹⁶² Thus, Double-Measure Legislation distinguishes past performance from other general qualifications and then requires that both be demonstrated. In effect, the state legislatures took the disjunctive ‘or’ provision from the FAR, which required selecting “contractors who have a track record of successful past performance or who demonstrate a current superior ability to perform,”¹⁶³ and turned it into a conjunctive ‘and’. In this way, the state legislatures have fixed their competitive procurement processes for private prison management services into RFQs, essentially locking in the current players in the market and preventing the entry of new firms.

Other states have legislation that requires just the former, general measure of qualifications without a separate past per-

158. See Exhibit A: Private Prison Legislation, *supra* note 8.

159. See Exhibit A: Private Prison Legislation, *supra* note 8.

160. ARK. CODE ANN. § 12-50-106(c)(1), (3) (West 2015). Other states that employ the Double-Measure Legislation include: Louisiana, Mississippi, Nebraska, Tennessee, and Virginia. See Exhibit A: Private Prison Legislation, *supra* note 8.

161. MISS. CODE ANN. § 47-5-1211(1)(d) (West 2015).

162. ARIZ. REV. STAT. ANN. § 41-1609.01(B)(3) (West 2015).

163. 48 C.F.R. § 1.102(b)(1)(ii) (2014).

formance requirement (Single-Measure Legislation).¹⁶⁴ The states that employ Single-Measure Legislation theoretically allow a sufficiently well-qualified firm to demonstrate capability without past performance. However, that potential does not appear to have materialized for the benefit of new market entrants, and even Single-Measure Legislation states show the same, homogeneous representation of private firms winning contracts to operate private prisons.¹⁶⁵

2. *Harmful ITB-Like Elements in State Legislation*

In addition, some states also require that the private prison contractor provide a minimum cost savings to the state.¹⁶⁶ For example, Mississippi and Michigan statutes permit the use of private prison facilities only if the provider offers at least ten percent in cost savings to the state.¹⁶⁷ Florida statutes state a broad requirement that private prison contracts must “maximize the cost savings of [private correctional] facilities”¹⁶⁸ and present at least seven percent in cost savings to the state.¹⁶⁹ In these ways, the legislation shapes the private prison procurement process to resemble an ITB, wherein price is a dispositive factor in source-selection (at least up to the mandated cost savings). An ITB-like procurement process prevents the issuer from realizing improvements in a cost-benefit sense (increased quality of service or capacity for the same price currently paid by the states). Although the state statutes do not go so far as to say that the ‘lowest-cost’ proposal must be awarded the contract,¹⁷⁰ the de facto cost-savings requirement inherently introduces some of the ITBs flaws into the private prison procurement process. Thus, the states that implement a minimum cost savings requirement do not enjoy a value-maximizing choice similar to the FAR’s amelio-

164. See e.g., FLA. STAT. ANN. § 957.04(1)(a)(1) (West 2015). Other states that employ the Single-Measure Legislation include: Colorado, Idaho, Kentucky, Montana, Texas, and Utah. See Exhibit A: Private Prison Legislation, *supra* note 8.

165. See Exhibit B: Private Prison Operators, *supra* note 2.

166. See Exhibit A: Private Prison Legislation, *supra* note 8; MISS. CODE ANN. § 47-4-1(5) (West 2015); MICH. COMP. LAWS ANN. § 791.220j(20j)(1) (West 2015); FLA. STAT. ANN. § 957.07(1) (West 2015).

167. See MISS. CODE ANN. § 47-4-1(5) (West 2015); MICH. COMP. LAWS ANN. § 791.220j(20j)(1) (West 2015).

168. FLA. STAT. ANN. § 957.04(1) (West 2015).

169. FLA. STAT. ANN. § 957.07(1) (West 2015).

170. See Exhibit A: Private Prison Legislation, *supra* note 8.

rative option between the ‘lowest price technically acceptable’ format and the ‘tradeoff’ format.

B. STATE PRIVATE PRISON RFPs

The RFPs issued by many state DOCs contain provisions that act to debar newer firms from the private prison market.¹⁷¹ For example, the state DOCs tend to use similar, inflexible language requiring bidding firms to demonstrate that they have provided private prison services for a fixed term of years.¹⁷² This requirement acts as a de facto age debarment; either the bidding firm has existed for the specified period of years, and has operated secure correctional facilities of a minimum size for a minimum number of years, or it cannot hope to win the bid. Although DOCs under Double-Measure Legislation regimes are required to evaluate past performance, the practice of using age as a de facto bar, rather than simply assigning firms with less past performance a lower score, goes above and beyond the legislative text and implements a more anti-competitive regime than required. Thus, the state DOCs have implemented an unduly severe form of past performance evaluation in excess of the already problematic state legislation they are guided by.

171. See Exhibit C: Private Prison RFPs, *supra* note 9 (generally placing great weight on the past performance measure); COLLINS, *supra* note 1, at 6 (discussing the alarming fact that many agencies contracting for private prison management services developed their own RFPs from scratch without looking towards precedent or seeking professional consulting).

172. OFFICE OF THE COMM’R, ALA. DEP’T OF CORR., REQUEST FOR PROPOSAL NO. 2014-3, WETUMPKA WOMEN’S FACILITY 20 (Aug. 14, 2014), <http://www.doc.alabama.gov/docs/RFP/2014/Wetumpka%20Women%27s%20Facility.doc> [<http://perma.cc/3MM9-RZCH>] (“Vendors must . . . have at least five (5) years of experience providing the type of services requested in this RFP to a daily population of at least four hundred (450) [sic] Inmates. . . .”); ARIZ. DEP’T OF CORR., NOTICE OF REQUEST FOR PROPOSAL NO. ADOC13-00002734 § 1.7.1 (Apr. 19, 2013), <https://procure.az.gov/bso/external/bidDetail.sdo?bidId=ADOC13-00002734&parentUrl=activeBids> (“[o]fferors shall demonstrate in their proposals that they are qualified to operate secure prisons and/or correctional facilities and shall have a minimum of five (5) years of experience within the last ten (10) years managing inmates in a secure prison and/or correctional facility in the United States.”) (a link to download the document cited is available on the web page provided). See N.H. DEP’T OF CORR., RFP 1356-12, MALE PRISON FACILITY 20 (Nov. 15, 2011), <http://www.admin.state.nh.us/purchasing/RFP%201356-12.pdf> [<http://perma.cc/YT83-ZRES>] (effectively requiring a minimum of 10 years of experience, given that experience must be shown from 2001 and the RFP was issued in 2011). See also *Contract Information — Idaho Offenders at Kit Carson Correctional Center Contract*, IDAHO DEP’T OF CORRECTIONS § 2.5, http://www.idoc.idaho.gov/content/document/kccc_contract [<http://perma.cc/MJ8T-LZBZ>] (last visited Feb. 28, 2016) (“Proposers must have been established and operating for a minimum of two (2) years upon the issue date of this RFP.”).

Even without the strict age requirement, some other forms of qualification evaluation implemented by state DOCs seem inappropriate. For example, a provision contained in a recent Florida DOC RFP evaluated an operator's experience and ability to perform based upon, in part, the "[a]ge of the company evidenced by Articles of Incorporation or business license in order to transact business. . . ."¹⁷³ Aside from being an unhelpful measure at its core, this measure would, theoretically, permit a wholly unqualified firm to 'purchase' age by combining with an old firm and would punish a new firm based solely on the date of its incorporation. Measures such as these can be amended at the agency level by re-evaluating how DOCs interpret and execute the controlling legislation.

State DOCs also execute ITB-like requirements in their RFPs, as dictated by their respective controlling legislation. For example, the Florida DOC's RFP includes language requiring "substantial savings" to the State, which is interpreted to mean 7% savings.¹⁷⁴ Unlike the hard age requirement implemented by State DOCs, which is the creation of agency discretion in evaluating the statutorily required past performance requirement, RFP provisions which dutifully enforce minimum cost savings as stated in a statute would require amendment at the legislative level to cure. ITB-like requirements further distort the private prison procurement process where they command too much weight in total scoring of bidders.¹⁷⁵

VI. ALTERNATIVES AND REFORMS

Part VI proposes a series of complementary, but independent, reforms that can be applied to the procurement process for private prison management services. Part VI.A proposes changes to the RFQ-like portions of private prison RFPs and legislation. Section Part VI.B proposes changes to the ITB-like portions of private prison RFPs and legislation. These proposals are intend-

173. See FLA. DEP'T OF CORR., REQUEST FOR PROPOSAL NO. 11-DC-8296, CONTRACT FOR THE MGMT. & OPERATION OF S. FLA. CORR. INSTS. & ASSIGNED SATELLITE FACILITIES 5, 21-22 (July 25, 2011), http://www.myflorida.com/apps/vbs/adc/F15146_RFP8296PartnerPrisonsFINAL.pdf [<http://perma.cc/4RA3-742Q>].

174. See *id.*

175. See Exhibit C: Private Prison RFPs, *supra* note 9 (showing Alaska used an RFP which allocated 50% of the total possible scoring to the cost proposal).

ed to be illustrative, not exhaustive, of the range of solutions that can be employed to improve the private prison market.

A. REFORMING THE RFQ-LIKE REQUIREMENTS

Only very slight changes are needed to diminish the harmful RFQ-like qualities in the procurement processes for private prison management services. As discussed in Part II, the RFQ can inappropriately eliminate technically superior bidders whose only fault is being younger than the others. Part VI.A.1 suggests a solution for the problems arising from the narrow scope of the activities which qualify as past performance. Part VI.A.2 suggests a solution for the problems that arise from the distinction between, and requirement of, both firm and personnel qualifications. These two proposals exist as separate but compatible solutions that can be alternatively or complementarily employed.

1. *Reforming the Measure of Past Performance*

In light of the problems discussed above, the obvious solution to the past performance problem would be simply to eliminate it as a mandatory evaluative criteria in federal and state laws and from corresponding agency-issued RFPs. This change would involve amending Double-Measure Legislation to Single-Measure Legislation regimes. Such a reform would correct part of the RFQ-based flaws currently present in private prison procurement documents. However, pushing for the removal of past performance as a barrier to entry is not without significant potential consequences.¹⁷⁶ In essence, the past performance requirement acting as a barrier to entry may, in fact, be responsible for the very existence of firms willing to provide private prison management services and may be incentivizing them to innovate and im-

176. For a discussion of the possible benefits of barriers to entry, see Victor P. Goldberg, *Regulation and Administered Contracts*, 7 BELL. J. OF ECON. 426, 435 (1976) (“Restrictions on entry by firms with identical or competing technologies provide a (possibly beneficial) haven from the Schumpeterian gale of creative destruction. Schumpeter put the point eloquently: ‘. . . restrictions . . . are, in the conditions of the perennial gale, unavoidable incidents, of a long-run process of expansion which they protect rather than impede. There is no more of a paradox in this than there is in saying that motorcars are traveling faster than they otherwise would *because* they are provided with brakes.”) (emphasis in original).

prove their services.¹⁷⁷ If switching to Single-Measure Legislation proves too difficult to effect, states could implement solutions which relax and provide alternatives for, but do not remove, the qualification-based evaluative criteria in private prison RFPs, thus blunting some of the RFQ-based flaws they present.

In addition, slightly expanding the scope of experience that is 'credited' to past performance in private prison RFPs could break the 'closed-circle'¹⁷⁸ of eligible private prison operators that exist in the marketplace without totally exposing the existing firms to unduly wide competition. Ideally, the reformulated past performance requirement would 'count' certain other operational experience, such as experience operating CC-RE Facilities. This reform would recreate some of the competitive environment that existed during the birth of the private prison industry. For example, awarding private prison contracts to operators of facilities primarily used in niche markets or for special populations would mirror the process in which the first correctional facility operators were given their first 'chance at bat'.¹⁷⁹ Meanwhile, the reform would insulate the enlarged pool of competitors from truly unqualified market entrants. Thus, these other firms would provide the market with much needed diversity and competition without deluging the market with unqualified and potentially incompetent operators.

Furthermore, this reform would be wholly compatible with both Single-Measure Legislation and Double-Measure Legislation

177. *Id.* ("Would the firm have come into the market initially without some protection from competition? Would it have come in on terms as favorable as it did? What will be the rate of supply of innovations in the future if potential suppliers realize they will not be protected by the regulator? That is, if we view the protection afforded by the regulatory agent as *forward looking*, we can see it as a goad to innovation rather than a hindrance.") (emphasis in original).

178. For example, if RFPs continue to demand a minimum of, say, five years of past experience, the only private prison operators that will ever exist are the ones that exist now and have been operating for at least five years.

179. QUINLAN ET AL., *supra* note 1, § 10.01(3) ("The early years of correctional privatization found management firms contracting for the operation of small facilities housing prisoners with minimum security classifications . . . contracting primarily for 'niche' facilities housing such special offender populations as parole violators, pre-release prisoners, and women . . . involved government contracting with private management firms that were small, lacking in proven experience, and almost always constrained with regard to their financial resources . . . government contracting out only for the design, construction, and management of correctional facilities, with government itself providing the necessary construction capital and owning the real property assets . . ."). Compared to this early environment, the character of government contracting for private correctional services today is unrecognizable.

regimes. In the Single-Measure Legislation regime, the general qualifications measure would include experience of the firm in operating CC-RE Facilities. In the Double-Measure Legislation regime, the past performance measure would expand to include the years that bidding firms operated CC-RE Facilities. In addition, the reform is amenable to more precise targeting. For example, a state DOC or federal agency may decide that bidding firms' years of experience in operating comparably less secure CC-RE Facilities will be discounted by a fraction to account for the experience being somewhat less relevant before being applied to the past performance requirement.

2. *Separating Firm from Personnel Past Performance*

Measuring for the expertise possessed by the aggregate management and staff of a bidder could be used to measure practical, instead of formal, past performance and thereby improve the private prison RFP process. Allowing individuals with past performance experience to stand-in for the past performance of the firm would look past the corporate entity to measure the general capability of the firm's employees to manage a private prison. This reform resolves two absurdities: (1) the ability of an old firm with 100% new management and staff to score highly on past performance and (2) the inability of private prison experts comprising 100% of the management and staff of a new firm to score highly on past performance.

The importance of a firm's personnel in evaluating a bidder's ability to perform has not gone unnoticed and is measured in the RFP process.¹⁸⁰ Thus, private prison RFPs can move away from requiring past performance by alternatively measuring, scoring and selecting the higher of (1) firm past performance and (2) management and staff past performance. Since both criteria are already being measured, this change requires no additional cost

180. Exhibit A: Private Prison Legislation, *supra* note 8 (exhibiting that statutes generally include the measure of experienced personnel and management); *Contract Information — Idaho Offenders at Kit Carson Correctional Center*, *supra* note 172, at § 5.2.1.1 ("The Proposer shall include a description of its senior management staff's experience in the operation and management of adult correctional services that qualifies it to provide the services required in this RFP. The Proposer shall possess organizational qualifications that include one (1) or more senior management staff with at least two (2) years of experience in the operation and management of one (1) or more Offender correctional services contracts for Offender populations similar in scope to that described in this RFP.").

or procedure to the RFP process already in place. This alteration would not affect other evaluative criteria relating to the firm that appropriately measures ability to perform such as the firm's financial soundness.

B. REFORMING THE ITB-LIKE REQUIREMENTS

The problems many state RFPs exhibit have arisen from the implementation of a pseudo-'lowest price technically acceptable' regime instead of a 'tradeoff' regime such as the one provided in the FAR.¹⁸¹ Generally, a minimum cost savings requirement in legislation forces agencies to issue RFPs which contain some of the overly price-centric flaws of ITBs, distorting the procurement process.¹⁸² Even without legislation requiring minimum cost savings, agency issuers can replicate ITB-like qualities in their RFPs by weighting cost factors too heavily.¹⁸³ Further, the states could adopt the FAR's 'tradeoff' process by permitting firms to justify their premium prices with demonstrable improvement in private prison quality.¹⁸⁴

Replacing the measure of fixed-cost savings in favor of a cost-benefit improvement would mitigate the harms of the ITB-like provisions currently used in the states. By considering cost savings holistically through measures such as cost-benefit ratios, instead of just direct governmental outlays, the ITB's limitations can be largely overcome. The legislature in Nebraska has captured that exact result by requiring "a cost benefit to the State of Nebraska when compared to the level and quality of programs provided by state correction facilities. . . ."¹⁸⁵ Following this model, the definition of Florida's 7% cost-savings could be altered to mean (1) no more expensive (in the sense of direct outlays) than current prison management by the State and (2) offering at least a 7% cost-benefit improvement. Under this revised statute, a proposal which would provide 200% value at 150% cost would be eliminated due to its failure to pursue the State's goal of saving

181. See Part IV.A.2. The discussion in this Part does not apply to the federal procurement process, which does not exhibit gravely harmful ITB-like provisions. See Part IV.A.2.

182. See Part II.B.2.

183. See Exhibit C: Private Prison RFPs, *supra* note 9.

184. For the relevant description of the tradeoff process, see 48 C.F.R. § 15.101-1 (2014).

185. NEB. REV. STAT. ANN. § 47-803(4)(e) (West 2015).

money (or at least not spending more money). On the other hand, a proposal which would provide 107% value at 100% cost would be acceptable. Further, a proposal which would provide 106% value at 99% cost best illustrates the potential this reform has; each taxpayer dollar is spent more efficiently, prisoners benefit from improved services, and the government has achieved cost savings. Thus, opting for a cost-benefit ratio instead of a minimum cost savings statute would avoid the harmful ITB-like requirement in the procurement of private prison management services.

Alternatively, states could use both a cost-benefit measure and a cost-savings measure in conjunction with one another. For example, the cost score could be distributed between the two in reasonable proportions, which would not predominantly favor cost savings. Dividing the cost score between cost savings and the cost-benefit ratio in a fixed proportion (1:1 or another reasonable ratio the legislature or agency decides upon) can reduce the ITB-like nature of private prison RFPs. The result would be a scoring mechanism which would prevent firms that present the lowest cost bid but at a disproportionately lower cost-benefit from taking the highest cost proposal score. In addition, firms that offer proportionately greater cost-benefit for their services will be appropriately rewarded with a higher cost proposal score. Meanwhile, pure cost savings, which is the state's prerogative to pursue, will still be considered in calculating the final cost proposal score. Thus, the private prison procurement process will benefit from both value-maximizing and price-reducing incentives. This alternative would simultaneously correct the perverse incentives in spending less for our prisons for correspondingly worse services for prisoners, while also correcting the potential for RFPs to weigh cost too heavily.

VII. CONCLUSION

Presently, an anti-competitive market prevails in the procurement of private prison management contracts. With proper changes to the procurement process, competition, and its various benefits, can return to the private prison market. For example, federal and state governments can soften the RFQ-like past performance measures they use by expanding the definition of past performance or using alternative measures of competence. Fur-

ther, the governments can eliminate the ITB-like, minimum cost saving requirements they use in favor of cost-benefit measures or hybrid cost scores that measure both. Through these changes, the governments will improve the competitive procurement processes it uses in the private prison market. Increased competition will, in turn, permit the governments to more potently wield its power as a consumer in the marketplace and be able to demand higher quality services at lower cost. Ultimately, the consumers of private prison services — including the government, the taxpayer and the prisoner — will reap the benefits currently being captured by private firms due to inefficient competition in the market.