

ATTORNEY GENERAL OPINION
No. 83-5

OPINION
OF
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Attorney General

To: REPRESENTATIVE SAMUEL F. VIGIL
Drawer K
Las Vegas, New Mexico 87701

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FACTS

San Miguel, Guadalupe and Mora Counties are investigating the possibility of contracting with a private individual to design and build a private jail facility to serve all three counties. The facility will be located in San Miguel County. Following completion of the jail facility, a business owned and/or controlled by the same private individual will staff and operate the jail, charging the appropriate county a daily rate, set by contract, for each prisoner housed in the facility. Both adult and juvenile prisoners will be jailed in the facility.

The proposed contract, submitted in draft form with your request for an opinion, is for an initial term of twenty-five years. During that twenty-five year term, the contract requires the signatory counties to incarcerate all their prisoners solely and exclusively in the private facility. Apparently, this requirement would include both juvenile and adult prisoners. In addition, the contractor may provide detention services to other governmental entities if unused capacity exists after each of the counties' detention needs are met.

The draft contract requires the contractor to operate the jail facility in accordance with American Correctional

Association standards set forth in Standards For Adult Correctional Facilities 2d Ed. The county commissioners are to inspect the jail periodically for the purpose, among others, of determining whether the ACA standards are being observed and to notify contractor if, in their opinion, they are not.

Responsibility for maintaining order in the jail facility is placed on the San Miguel County Sheriff. The draft contract requires the San Miguel County Sheriff to specially deputize at least ten of contractor's jail employees. Employees so deputized are required to obtain whatever training is necessary to qualify as special deputies, at contractor's expense:

The county commissions are required to establish a "good time" policy, and contractor is to "keep a record" and report each prisoner's good behavior and industry to the sheriff. The sheriff may grant the prisoner good time with the judge's consent. Similarly, contractor will keep a record of disciplinary violations to submit to the sheriff.

Charges for incarcerating prisoners are based on a flat charge per prisoner per day, as established in a schedule made part of the contract. Beginning in 1985, the schedule charges are to be adjusted, as often as twice annually, based upon changes in the Revised Consumer Price Index-Cities, but subject to certain limitations on the amount of the adjustment. In addition to the flat rate charge, the counties will be charged for all off-premises medical treatment of prisoners at cost plus fifteen percent. A day, for purposes of charges, begins at 12:01 a.m. and finishes at 12:00 midnight. (Thus, a prisoner admitted at 9:00 p.m. and discharged the following morning would incur charges for two full days). The contract also specifies a formula for passing through property tax increases, if any, to the counties.

In order to provide a fund from which to pay the fees, the contract requires each county to make a twelve thousand dollar deposit to pay charges under the contract and to replenish said deposit periodically. Charges are to be paid on a monthly basis.

Contractor agrees to indemnify and hold harmless the counties, their officers, employees and agents from all claims, suits and liabilities "by reason of or arising out of any act or omission" of contractor, its officers, employees or agents "in providing custodial services within the Facility." However, the contract specifically disclaims responsibility for acts or omissions of the counties, their officers, employees or agents "in arresting, detaining, charging or transporting persons outside the Facility."

The contract grants the counties an option to buy the facility beginning eight years after completion and commencement of operation. After twenty-five years (i.e., at the termination of the contract) the private individual who built the facility may sell the jail facility to the counties for \$250,000.00, at his sole option. The remaining value, if any, is donated and, according to the contract, will be tax deductible.

Disputes under the contract are to be arbitrated according to a procedure set forth in the contract.

The contractor may terminate the contract if the counties breach in any manner, if all or any portion of the facility is destroyed or if the cost of complying with any new jail standards mandated by state or federal law exceeds \$25,000.00 for federal "requests" and \$25,000.00 for state "requirements." The counties may terminate the contract one hundred eighty days after they notify contractor of a breach amounting to failure to adhere to or to perform any of the contract terms.

Upon destruction of all or any part of the jail and contractor's determination not to rebuild or restore it, attended with a termination of the contract, the counties may purchase the facility for its "replacement value."

The contractor may assign the contract, subject to the counties' approval, but such approval may not be "unreasonably withheld".

Although the contract contains a section entitled "Remedies," there is in fact no provision in the contract relating to remedies for breach, other than the right of termination.

The contract does not specify any requirements for property of liability insurance.

The contract does not state in terms that the contractor is an independent contractor, is not a public entity or that contractor's officers, employees and agents are not public employees.

The contract does not make any representation in connection with the possibility of a conflict of interest, nor does it specify what law applies to it.

QUESTION:

1. May several counties cooperate and agree to provide jail services in the same facility?

2. May one or more counties contract with a private independent contractor to provide and operate a county jail?

3. May a county contract with a private independent contractor to provide and operate a county jail for periods of time extending past the life of the current board of county commissioners?

4. May a county delegate authority to a private independent contractor to operate and maintain order in a county jail?

5. If a county contracts with a private independent contractor to provide and operate a county jail, may the county be held legally liable on any basis for the jail?

6. Is the proposed contract to provide and operate a county jail subject to the requirements of the Public Purchases Act?

7. Will you please provide us with comments on the specific draft contract proposed between the contractor and the three counties, as described above?

CONCLUSIONS:

1. Yes.
2. No.
3. No.
4. See analysis.
5. Yes.
6. Yes.
7. Please refer to separate letter discussing the proposed contract in detail.

ANALYSIS:

Background.

Early in American history, jails achieved their modern administrative and political scheme. In 1642, the Virginia General Assembly directed each of the Virginia shires (counties) to construct a jail. The enactment even contained a rudimentary form of standards, in that it specified that the jail should be made of timbers and should have iron grates. H. Burns, Jr., Orgin and Development of Jails in America, p. 9. Subsequent developments have simply reinforced this pattern of county responsibility for providing and maintaining a jail. What has fluctuated over time is the purpose of the jail. In England, a jail was

originally used to house persons accused of crimes prior to trial. Eventually, others, including persons convicted of crimes, mentally disturbed persons, juveniles, vagrants, drunks and others found themselves in the same local institution. Attempts over several centuries, in both England and America, to bring the jail back to its original purpose of housing only pre-trial detainees have proved futile. In New Mexico, the Criminal Code specifically provides that misdemeanants (i.e., convicted criminals) shall serve out their sentences in the county jail. Section 31-19-1 NMSA 1978. The county jail today is much as it has been for well over a hundred years in both New Mexico and nationwide: a mixture of hardened criminals and first-time suspects, misdemeanants and felons, adults, juveniles and the occasional mentally disturbed person.

Precedent.

There is at least some precedent for the concept of a jail privately operated under public auspices. Some of the earliest examples are English jails, which at one time typically were run by a keeper under contract with the sheriff. The keeper more often than not received no salary; his income was derived from the fact that necessities, amenities and services in the jail were charged for and provided only upon payment by the prisoner. There were even fees levied upon admission and discharge, notwithstanding that the discharged party was found innocent. The amount of the fees and charges varied widely, and was influenced by such factors as the seriousness of the prisoner's offense and even his social station. B. Wayson, et al., Local Jails: The New Correctional Dilemma, p.1. In this sense, then, the early English jail very much involved private enterprise.

In America, too, there is precedent for the private enterprise concept in connection with imprisonment. In at least one state, it has been held that the legislature may authorize a board

or official to lease a penitentiary or prison, including the premises, equipment and labor of the prisoners residing in the institution. State v. Holcomb, 46 Neb. 612, 65 N.W. 873 (1896). Such leases are necessarily of limited scope, however. (It should be noted that the New Mexico Constitution, Article XX, Section 18 prohibits the leasing of convict labor). In addition, there is precedent for sentencing convicted criminals to various types of work farms or other correctional programs operated on a charitable basis by private organizations. See, e.g., Trevett v. Prison Association of Virginia, 98 Va. 332, 36 S.E. 373 (1900). These precedents are old. Even today, though, private charitable organizations and programs continue to exist to deal with prisoners. "Halfway houses," substance abuse programs, such as Synanon, and privately operated juvenile homes are examples that come readily to mind. The Texas Legislature recently enacted Title 81, Section 5115d of the Texas Revised Statutes which authorizes counties to contract with private independent contractors for minimum security detention services. It is also our understanding that there is at least one privately operated juvenile incarceration facility in Florida.

With these precedents in mind, it is clear that the concept of a privately operated correctional facility is neither totally new nor unfamiliar, either historically or in contemporary terms. Historically, even the concept of a jail privately operated for profit has its precedent.

Questions 1 and 2.

Neither the New Mexico Constitution nor state law specifically forbids a privately owned and operated county jail. However, counties have only such authority as they are specifically granted by law, plus such powers as must necessarily be implied to carry out such express authority. El Dorado at Santa Fe v. Board

of County Commissioners, 89 N.M. 313, 551 P.2d 1360 (1976). It is not enough, therefore, to say that the concept of a privately owned and operated jail is not forbidden. Specific statutory authority for such a jail must exist. Furthermore, once the Legislature has specified a particular method of carrying out county duties, that method is exclusive, even though general powers to contract may exist. El Dorado at Santa Fe v. Board of County Commissioners, supra; Fancher v. Board of Commissioners of Grant County, 28 N.M. 179, 210 P. 237 (1922).

County authority relating to county jails is found in Chapter 33, Article 3 NMSA 1978. Section 33-3-1 NMSA 1978 provides:

The common jails shall be under the control of the respective sheriffs or jail administrators hired by the board of county commissioners pursuant to a joint powers agreement pursuant to Section 33-3-2 NMSA 1978 of each county, and the same shall be used as prisons in the respective counties.

This section, which is the basic authorization for county jails, does not authorize counties to contract with private independent contractors for jail services. On the contrary, the section squarely places authority over jails in either the sheriff or a jail administrator "hired" by the county commissioners. "Hire" denotes that the jail administrator is an employee, rather than an independent contractor. Furthermore, a reading of Article 3 in its entirety reveals that the jail administrator is just that: a single person hired to run a jail. Confirmation of this fact is found in Section 4-44 19A NMSA 1978, which defines a jail administrator as "the person... who supervises the entire operation of the [multi-county] jail and reports directly

to the administrative head of the local governmental entity or local governing body." Thus, Section 33-3-1 does not authorize anyone other than a sheriff or hired jail administrator to control a county jail.

Section 33-3-2 NMSA 1978 provides:

A. Notwithstanding the provisions of Section 33-3-1 NMSA 1978, the board of county commissioners of a county may enter into an agreement with other counties and municipalities to provide for the construction, maintenance or operation of one or more jails, correctional or detention facilities for confinement of persons charged with crimes, violations of municipal or county ordinances or committed to jail.

B. The agreement authorized in Subsection A of this section may provide for the control of the indicated facilities by the sheriff of the county or by other qualified individuals, and the agreement shall state the manner in which the person in control shall be selected if it is other than the sheriff.

C. No agreement or an amendment to an agreement authorized by this section is effective until it is approved by the local government division of the department of finance and administration.

The clear intent of the foregoing section is to authorize joint operation of jails by and for several counties and municipalities. Subsection B states that the agreement among the participating counties and municipalities may provide for control of the jail "by the sheriff of the county or by other qualified individuals...."

[Emphasis added]. However, we think that, in the context of the original enactment, the "other qualified individuals" would have to be public officers or employees, not private persons acting as independent contractors. We admit to some uncertainty on this point, in view of the fact that the 1983 Legislature comprehensively amended Article 3 to allow jails to be controlled and operated by jail administrators as well as county sheriffs, and failed to amend out this particular reference to "other qualified individuals." On the other hand, we can think of no reason whatsoever that the Legislature would have limited operation of a jail serving a single county to the sheriff or hired jail administrator, but authorized a multi-county facility to be operated by a private independent contractor. Our opinion is that, if the Legislature had intended to authorize a concept as innovative as private ownership and operation of county jails, it would have done so in clear and unambiguous terms. This single reference in Section 33-3-2 NMSA 1978, limited to multi-county jails, simply does not rise to that level of clarity.

In conclusion, with regard to your first question, it is clear that Section 33-3-2 NMSA 1978 authorizes counties and municipalities to enter into joint powers agreements for the joint operation of jails. With regard to your second question, counties lack authority to contract with private independent contractors for the provision and operation of county jails.

Question 3.

Two bodies of law bear upon whether a county commission may contract so as to bind future county commissions. The first of these involves specific state constitutional and statutory provisions. The second of these involves well-established general principles of law.

With regard to specific New Mexico constitutional and statutory

provisions, no constitutional provision appears to bar a county commission from binding future county commissions. N.M. Const. Art. IX, Section 10 relates to county indebtedness. This section relates to borrowing money by pledging the full faith and credit of the county for payment. Such does not appear to be the situation here, in that no money is being borrowed.

A more serious problem involves the so-called "Bateman Act," compiled as Sections 6-6-11 through 6-6-18 NMSA 1978. The Act declares it unlawful for any board of county commissioners to become indebted or to contract any debts during any current year which are not and cannot be paid out of money collected and belonging to that year. The Act declares that all other indebtedness is void.

The purpose of the Bateman Act is to require local governments to live within their annual incomes. City of Hobbs v. State ex rel. Reynolds, 82 N.M. 102, 476 P.2d 500 (1970). In this regard, it might be argued that the proposed twenty-five year jail services contract does not violate the Act in that it does not obligate the counties to pay for services prior to the time they are rendered. In this sense, the proposed arrangement is different from the typical Bateman Act situation, in which the entire consideration--say, a car--is received in one year, and it is proposed to pay for it over several years. See, A.G. Op. 65-53. However, the Bateman Act also prohibits unconditional obligations to expend money in the future. For example, it has been stated that a two-year contract for school yearbooks violates the Act in that collections for each year's yearbook were to be made only in the year each yearbook was to be issued. Thus, the school district would be obligating itself unconditionally to pay money in the future, out of collections to be made in a future year. A.G. Op. 69-17. Obviously, the proposed draft contract for jail service unconditionally obligates

payment of money in future years for services to be rendered in those years, in much the same manner as the yearbook contract.

Specific exemptions from the Bateman Act restrictions are found in Section 6-6-12 NMSA 1978. Exempted from the Act's provisions are insurance contracts for not to exceed to five years, lease purchase agreements and lease agreements. The exempted items are also declared not to constitute the creation of debt. Insurance contracts bear some similarity to the proposed jail services contract, in that future payment for future services is agreed to by a mutual present promise.

It is our opinion that the proposed jail services contract violates the Bateman Act, in that it presently obligates unconditional future payments of money for future services to be rendered. If insurance contracts require a special exemption to avoid the limitations of the Act, the proposed jail services contract requires a similar exemption, and for the same reasons. However, no such exemption is found in the Act.

Even if the Bateman Act presented no obstacle, general principles of law would bar the county commission from entering into the proposed contract for longer than the current commissioners' terms of office. The general rule is that where a contract relates to legislative or governmental functions or involves matters of discretion, a county commission cannot bind future commissions unless statute specifically so authorizes. 70 A.L.R. 794, *supp.* 149 A.L.R. 336; Commission ex rel. Fortney v. Bartol, 342 Pa. 172, 20 A.2d 313 (1941). Some jurisdictions make an exception to this rule in the case of employment contracts. 70 A.L.R. 794 A.L.R. 336. However, no such exception is made where the employment contract involves

a governmental function, such as hiring a city manager. Morin v. Foster, 45 N.Y.2d 287, 380 N.E.2d 217 (1978). Similarly, where the nature of the office or employment is such as to require a county or municipal board or officer to exercise a supervisory control over the officer or employee, together with the power of removal, the contract is treated as involving a governmental function, and future boards and commissions cannot be bound. 10 McQuillan, Municipal Corporations, 3d ed. rev., Section 29.101.

There can be no doubt that the operation of a jail is a governmental as opposed to a proprietary, function. 18 McQuillan, Municipal Corporations, 3d ed. rev., Section 53.94; 60 Am. Jur.2d, "Penal and Correctional Institutions," Section 3; also see, State v. Rhea, 94 N.M. 168, 608 P.2d 144 (1980). Under the proposed twenty-five year contract for jail service, the county commissioners are to monitor the contractor for compliance with the contract terms and standards and may terminate the contract for non-compliance. Thus, under general law principles outlined above, any attempt to bind future county commissions would be improper, in the absence of legislation specifically authorizing such a long-term agreement binding future county commissions.

In conclusion, any attempt to contract to bind future county commissions to obtain jail services and to pay for such services under the terms of the proposed contract violates both the Bateman Act as it is currently written and also general principles of law. A statutory exemption from the Bateman Act and specific statutory authority to enter into an agreement binding future boards would be necessary to allow the proposed twenty-five year contract.

Question 4.

It should be noted that in answering this question, we assume that

the lack of authority to contract with a private independent contractor to operate a private jail facility which was discussed in question 2 has been cured. Assuming, then, that authority to contract with a private independent contractor exists, a county commission may not delegate any legislative authority to the private contractor. Such authority would include the power to make rules and regulations for the operation of the jail. Counties, like other local public bodies, derive their legislative authority from the state. Under New Mexico case law it appears that it would be improper for such sovereign power to be delegated to a private person or organization. See, e.g., City of Santa Fe v. Gamble-Skogmo, Inc., 73 N.M. 410, 389 P.2d 13 (1964).

Furthermore, there is case authority for the proposition that a jailer is and must be a public officer. State v. Rhea, *supra*; White v. United States, 164 U.S. 100, 41 L.Ed. 365, 17 S.Ct. 38 (1896); Farmer v. St. Paul, 65 Minn. 176, 67 N.W. 990 (1896).

Finally, we feel that it is not possible to delegate authority to private persons or organizations to act as peace officers in maintaining order through the use of necessary force. We feel that it is imperative that some public officer with such authority be available, probably on the jail premises, given the fact that persons charged with or convicted of dangerous and violent acts may be held in the jail facility. We note that the proposed draft contract solves this problem by providing for the sheriff to specially deputize some of contractor's employees, and further providing that the sheriff is responsible for maintaining order in the facility. In a sense, then, the sheriff remains responsible as the jailer. Needless to say, liability will follow upon such responsibility.

In conclusion, then, there cannot be a complete delegation of all responsibility for a jail to a private independent contractor.

Question 5.

As stated in the answer to question 4, liability attends responsibility. Since it is not possible for the county and the county sheriff, to delegate all responsibility to a private independent contractor for operation of a county jail, some liability will continue to reside with the responsible county commission and sheriff. For example, the county commission will continue to be responsible for rules and regulations relating to the operation of the facility. The county commission will be responsible for selecting an appropriate contractor, with the necessary skill and expertise, as well as the requisite staff and facilities to provide jail services. The county commission has a duty under Section 33-3-4 NMSA 1978, acknowledged in the proposed draft contract, to inspect the jails for their respective counties and to report any violations to the local district court. Again, this is clearly not a duty which is delegable to the private contractor, and therefore any liability arising in connection with failure to carry out this duty adequately will continue to fall on the county commission. The sheriff, since he continues under the proposed draft contract to have responsibility for maintaining order in the jail facility, will continue to be liable for any failure to maintain order. Such liability can arise under both the New Mexico Tort Claims Act and federal law.

In the proposed draft contract, contractor agrees to hold harmless the counties from any liability arising out of acts of contractors not extend, to liability rising out of acts of county officers employees or agents.

In conclusion, the proposed draft contract does not relieve the county of all liability for operation of the county jail.

Question 6.

The Public Purchases Act applies to all county purchases of materials

and services unless a specific exemption applies. Section 13-1-11 NMSA 1978. Exemptions from the Act are found in Section 13-1-24 NMSA 1978. The only exemption which might arguably apply to the proposed draft contract is Section 13-1-24B NMSA 1978. That subsection exempts contracts for technical and professional services.

Although a portion of the services to be provided under this contract might be deemed to be technical or professional services, the large bulk of them are not. The majority of the services to be provided on a day-to-day basis includes such activities as answering phones, providing food and recreation to prisoners, cleaning the facility, maintaining a watch over the condition of the facility and its occupants and so forth. Furthermore, contractor is to build the jail facility itself. None of these services are either technical or professional in nature. If this contract were deemed to involve technical or professional services, we find it hard to imagine any contract for services which could not be so characterized.

In conclusion, it is our opinion that any contract to provide and operate a jail such as is proposed in the draft contract would have to be bid in accordance with the requirements of the Public Purchases Act.

Question 7.

We have reviewed the proposed draft contract you submitted to us, and will comment on it in a letter which will be submitted to you under separate cover.