

Opinion No. 87-68

November 12, 1987

OPINION OF: HAL STRATTON, Attorney General

BY: Scott Spencer, Assistant Attorney General

TO: O.L. McCotter, Secretary, Department of Corrections, State of New Mexico, 1422 Paseo De Peralta, Santa Fe, New Mexico 87503

QUESTIONS

- (1) Whether Section 33-1-17 NMSA (1987 Repl.) precludes the Department of Corrections from contracting for the private operation of correctional facilities, other than those classified as minimum security?
- (2) Whether the privatization provided for under Section 33-1-17 is limited to existing minimum security facilities?
- (3) If a contractor had his own facility, does Section 33-1-17 permit the Department to place inmates in that facility?
- (4) Does Section 33-1-17 permit a contractor to add on to an existing minimum facility?
- (5) Does Section 33-1-17 permit a contractor to add minimum [security] housing units adjacent to an existing minimum [security] facility?
- (6) Does language in the 1987 Appropriations Act expand the ability of the Department to privatize beyond Section 33-1-17?

CONCLUSIONS

- (1) Yes.
- (2) No.
- (3) No.
- (4) No.
- (5) No.
- (6) No.

ANALYSIS

Section 33-1-17 NMSA (1987 Repl.) provides:

A. The governor or the legislature may direct that the corrections department cease operation of any minimum security facility and contract for the operation of the facility with a person in the business of providing correctional and jail services to government entities. The department shall solicit bids and award the contract in accordance with the provisions of the Procurement Code [13-1-28 to 13-1-199 NMSA 1978]. The contract shall include such terms and conditions as the department may require after consultation with the general services department; provided that the terms and conditions shall include provisions:

- (1) setting forth comprehensive standards for conditions of incarceration;
- (2) that the contractor assumes all liability caused by or arising out of all aspects of the provision and operation of the facility;
- (3) for liability insurance covering the contractor and its officers, employees and agents in an amount sufficient to cover all liability caused by or arising out of all aspects of the provision and operation of the facility;
- (4) for termination for cause upon ninety days' notice to the contractor for failure to meet contract provisions when such failure seriously affects the operation of the facility;
- (5) that venue for the enforcement of the contract shall be in the district court for Santa Fe county; and
- (6) that continuation of the contract is subject to the availability of funds.

B. When the contractor begins operation of the facility, his employees performing the functions of correctional officers shall be deemed correctional officers for the purposes of Section [Sections] 33-1-10 and 33-1-11 NMSA 1978 but for no other purpose of state law, unless specifically stated.

(1) Section 33-1-17 authorizes the Governor or the Legislature to direct the Department of Corrections ("Department") to contract with a person engaged in the business of providing correctional or jail services to government entities for the operation of a minimum security facility. In the absence of any legislative intent to the contrary, a statute should be read and given effect as written. *Southern Union Gas Co. v. New Mexico Public Service Commission* 82 N.M. 405, 407, 482 P.2d 913, 915 (1971); *Gonzales v. Oil Workers Int'l Union* 77 N.M. 61, 68, 419 P.2d 257, 262 (1966). The plain language of section 33-1-17 indicates that the legislature intended that only minimum security facilities be subject to contract for private operation.

While the Secretary of Corrections has general powers to operate the Department under Sections 9-3-5 and 33-1-6 NMSA 1978, such powers cannot properly be construed to authorize him to contract with private entities for the operation of

correctional facilities except as authorized under Section 33-1-17. Moreover, Section 33-1-17 specifically provides that the Department may cease operation of a "minimum security facility" and then contract for its operation. When a statute identifies a specific class, the legislature is presumed to have had no other kind in mind. *Cardinal Fence Co. v. Commissioner of Bureau of Revenue*, 84 N.M. 314, 317, 502 P.2d 1004, 1007 (Ct. App. 1972); 1957-58 Op. Att'y Gen. No. 57-279. It is therefore our opinion that the Department may not contract for the private operation of facilities other than minimum security correctional facilities.

(2) Section 33-1-17 provides for the Governor or Legislature to direct the Department to contract for the private operation of "any" minimum security facility and does not limit such facilities to those in existence on the effective date of this statutory provision. It is therefore our opinion that Section 33-1-17 applies to minimum security facilities in existence on the effective date of this provision, as well as any correctional facility that is classified as minimum security subsequent thereto.

(3) Section 33-1-17 expressly provides that the Department must cease operation of minimum security facility before contracting for its operation. The language of this section implies that the facility is operated by the Department and is owned by the state before the contract is made. Absent a clear legislative expression to do otherwise, a statute is to be read as written. See *Tafoya v. New Mexico State Police Bd.*, 81 N.M. 710, 712, 472 P.2d 973, 977 (1970); *Gonzales v. Oil Workers Int'l Union*, 77 N.M. 61, 68, 419 P.2d 257, 262 (1966). Thus, the Department would not be permitted to place inmates in a minimum security facility that the private contractor owns.

(4) & (5) Section 33-1-17 authorizes the private operation of a minimum security facility. It does not specifically authorize the contractor to make additions to the facility or add housing units adjacent to the facility. We therefore must look to other statutory provisions to determine the manner in which such improvements may be made.

Section 15-3-2 NMSA (1978) provides that the Property Control Division of the General Services Department has control over all state lands and buildings not expressly excepted thereunder. Correctional facilities are not excepted. Long-term improvements such as additions or housing units adjacent to an existing minimum security facility, are a "Capital Outlay Project" as defined in Section 15-3-22 NMSA 1978. Such projects are funded from the Capital Program Fund, as authorized and specified by the legislature pursuant to Section 15-3-23 NMSA 1978.

If the private contractor bears the cost of additions to the minimum security facility or adjacent housing units, then it is our opinion that it would be necessary only for the Department and Property Control Division to give their approval. See Sections 15-3-2 and 33-1-6 NMSA 1978. Public funds, however, could be expended for such improvements only if the legislature specifically authorized the project and appropriated the funds. The requirement of legislative approval is found in Sections 15-3-23 and 33-2-6 NMSA 1978. Section 33-2-6 reads, in pertinent part:

The corrections division [corrections department] shall decide what improvements shall be made in the penitentiary and on property owned by the penitentiary, whether the same shall be enlarged, or the erection of the extension of the prison or prison walls, the erection of workshops or other buildings or improvements shall be made; provided that the correctional division [corrections department] shall not make any improvements that will require an expenditure of money in excess of the appropriations made by the legislature for this purpose....

In enacting statutes, the New Mexico legislature is presumed to be reasonable and well informed of the state's existing laws. Statutes therefore are to be interpreted in accordance with existing laws and with common sense. *Sandoval v. Rodriguez*, 77 N.M. 160, 163, 420 P.2d 308, 310 (1966). It thus must be assumed that the legislature did not intend to authorize such additions under section 33-1-17, knowing that long-term improvements to state-owned property are accomplished through a specific authorization and commitment of funds.

(6) We could find no language in the 1987 Appropriations Act "expanding" the authority of the Department to privatize beyond that provided in Section 33-1-17. Section 4G of 1987 N.M. Laws, chapter 355, contains the following language:

Notwithstanding any other provision of state law, in the event any of the correctional facilities are leased or sold to the federal government or to any person contracting with the federal government, any lease rentals or sales proceeds may be used by the corrections department, or on its behalf, to construct additional correctional facilities that can be operated in a more cost-effective manner than the current operation of the facility that is leased or sold.

This provision follows the appropriations made to the various correctional facilities. As written, it permits the Department to apply money derived from the lease or sale of correctional facilities to the federal government to the construction of additional correctional facilities that are more cost-effective than those sold or leased. It does not permit the Department to use those proceeds for contracts authorized in Section 33-1-17.

Moreover, while matters directly relating to an appropriation such as the details of expending the money may be included in such an appropriation, such a provision is only applicable, to the specific appropriation and is not to be regarded as substantive law. Article IV, Section 16 of the New Mexico Constitution, 1961-62 Op. Att'y Gen. No. 62-88. *State ex rel. Holmes v. State Board of Finance*, 69 N.M. 430, 435 367 P.2d 925 (1961).

We therefore conclude that the 1987 Appropriations Act does not expand the Department's authority to contract for the operation of correctional facilities beyond that granted in Section 33-1-17.

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