The State of South Carolina

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Dear Mr. Batson:

You have asked whether Article XII, § 9 of the South Carolina Constitution precludes a private corporation from participating in the management of a State correctional facility through a contract with the Board of Corrections. It is our opinion that the referenced constitutional provision would not absolutely prohibit such an agreement, nor would other relevant provisions of the State Constitution. We would caution, however, that considerable care should be taken in the drafting and preparation of such a contract to avoid the potential constitutional and statutory problems set forth below. Moreover, since the issues considered herein are novel, it may be well for the Board of Corrections to develop the posture of a case or controversy whereby a court could, by a declaratory judgment action, review any proposed plan of operation.

INTRODUCTION

Article XII, § 9 of the State Constitution provides as follows:

> The Penitentiary and the convicts thereto sentenced shall forever be under the supervision and control of officers employed by the State; and in case any convicts are hired or farmed out, as may be provided by law, their maintenance, support, medical attendance and discipline shall be under the direction of officers detailed for those duties by the authorities of the Penitentiary. Provided, however, that the General Assembly may authorize the Department of Corrections

> to transfer inmates to correctional institutions of other states or the federal government for confinement, treatment or rehabilitation when such transfers are deemed to be in the best interest of the inmate concerned.

There are no cases directly commenting upon this provision. By your letter however, it is suggested that this provision might be read as prohibiting the type of contract referenced above.

When the wording of a constitutional provision is doubtful, the intent of the framers and the people should be ascertained. In determining intent, courts may consider the history of the times when the amendment was adopted as well as the object sought to be accomplished and the legislative interpretation of the provision. Reese v. Talbert, 237 S.C. 356, 117 S.E.2d 375 (1961). It is clear that the purpose of Article XII, § 9 was to discourage the State's practice of "farming out" its prisoners to private entities.

HISTORY OF ARTICLE XII, § 9

The system of "farming out" convicts was prevalent in the turbulent financial period following the Civil War and Reconstruction. This method of utilizing convict labor has been described as follows:

> Salient features of "farming out" convicts ... were a savings to the taxpayers of the cost of maintaining the convicts ... and a furnishing of labor force for other private corporations. The convicts were required to labor until their sentences expired or until the contract of lease or "farming out" terminated, and then they were returned to the appropriate authority. It seems the county and State authorities had little or no discretion as to which convicts would be farmed out except those prohibited [by law] to be farmed out. The convicts received no compensation for their services, and the State received very little other than its loss of responsibility for maintaining the convicts. Under this "farming out" program, State control of the convicts for all practical purposes ended... . (Emphasis added.)

In re Advisory Opinion to the Governor, 152 S.E.2d 225, 227 (N.C. 1966). The problems connected with this system of convict leasing are more fully documented in 5 Journal Criminal Law 241 (1914). It is clear from this study that one of the major problems associated with the "farming out" system, and one which led to its ultimate demise, was the complete lack of governmental control over the custody and care of prisoners.

Without question, these problems were also prevalent with respect to South Carolina's prison system during the late 19th century. Consequently, Article XII, § 9 was adopted as part of our 1895 Constitution. One scholar has written, with regard to the adoption of Article XII, § 9:

> Eventually, state officials became increasingly concerned about ... the need for prison staff members to have more direct control over the inmates. Probably as a result of this sentiment, the state constitution of 1895 permanently abolished the traditional use of convict labor by outside parties.

Thomas, The Development of "An Institution": The Establishment and First Years of The South Carolina Penitentiary, 1795-1881 (Master's Thesis, 1983), p. 144. Another has similarly written of the basic purpose of Article XII, § 9:

> Although the leasing of convicts by the penitentiary was not prohibited by the constitution, one of its sections [required] ... that the leasing convicts should remain under the control of officers detailed by the penitentiary... [I]t was ... impractical to work ... [convicts] ... under this provision of the constitution.

Oliphant, "The Evolution of the Penal System of South Carolina From 1866 to 1916", p. 11 (1916).

Thus it is clear that the purpose of Article XII, § 9 was to remedy problems connected with the State's system of leasing its convicts. The constitutional provision sought specifically to correct a system of convict labor which had resulted in the State's transfer of all control over the "maintenance, support, medical attendance and discipline" of its prison population.

Such a convict leasing system, of course, has not been used for decades. 1/

In other words, the problem presented by your question is very much unlike the one with which Article XII, § 9 was originally concerned. In the situation you pose, we understand the State would not be emptying its prisons simply to sell or lease convict labor to the highest bidder. Instead, the State would be contracting with a private entity to assist it in its constitutionally mandated role of operating a centralized correctional facility. Unlike the convict lease system where the State completely abdicated control, the State does not contemplate transferring its legal responsibility to oversee the prison system, but merely desires assistance in carrying out its responsibility. In view of the specific and limited purpose of Article XII, § 9, the contemplated contract would not be invalidated by that constitutional provision, absent a clear prohibition in the wording of the provision. Accordingly, we turn to an examination of the specific wording of Article XII, § 9.

WORDING OF ARTICLE XII, § 9

Article XII, § 9 is structurally divided into two parts. The second part deals expressly with the "farming out" situation discussed above. If convicts are "farmed out" or leased, the provision mandates that "their maintenance, support, medical attendance and discipline shall be under the direction of offices detailed for those duties by the authorities of the Penitentiary." (Emphasis added.) This portion of the provision thus requires that any prisoner hired out remain "directly under the control of officers and guards appointed by the Superintendent. ..." Op. Atty. Gen., October 26, 1900. As stated earlier, it was squarely aimed at a problem which is inapplicable to the situation presented.

1/ In 1967, the Committee established to revise the South Carolina Constitution referred to Article XII, § 9 and other provisions contained in Article XII as "outdated" and not applying "to modern conditions"; the Committee thus recommended that this particular provision, among others contained in Article XII, be deleted. See, Final Report of The Committee To Make A Study of The South Carolina Constitution of 1895.

By contrast, the first part of Article XII, § 9 is written much more generally. It succinctly states that "[t]he Penitentiary and the convicts thereto sentenced shall forever remain under the supervision and control of officers employed by the State." (Emphasis added.) It is evident from the words used and the historical background surrounding the convict lease system, that the framers sought in this part to insure that the State never again relinquish general control of its prison system.

First, the words "supervision and control" connote overall direction and oversight. As has been stated,

> To "supervise" is to oversee, to have oversight of, to superintend the execution of or the performance of a thing, or the movement or work of a person; to inspect ... and direct the work of others.

40A Words and Phrases, p. 354. Likewise, "control" is "[t]he power or authority to manage, direct, superintend, govern, administer or oversee." 9 A Words and Phrases, p. 4 ("Control"). The concept of "control" is not limited to physical control, supra at 5, and to "supervise does not mean to do the work in detail but to see that it is done. It means to oversee with power of direction." Egner v. State Realty Co., 223 Minn. 365, 26 N.W.2d 964, 471, 170 A.L.R. 500 (1947). Thus, use of the words "supervision and control" in Article XII, § 9 itself evinces an intent that the State must maintain direction and oversight over the State's prisons and its prisoners.

This intent is reinforced by the fact that, in the specific context of prison administration, the terms "supervision and control" have often connoted general oversight, rather than immediate physical custody and direction. For example in 1899, the Attorney General concluded that the county supervisor possessed exclusive "control" of county chain gangs and could employ them in the opening of new roads. 1899 Ops. Atty. Gen., 198. In subsequent opinions, the Attorney General concluded that the "control" of convicts rested with the county supervisor. See, 1921 Op. Atty. Gen. 100; 1926 Op. Atty. Gen. 108. Indeed, in a resolution which was apparently a predecessor to Article XII, § 9, the author desired that the "supervision and control" of convicts who were farmed out should remain under the Penitentiary Board or other responsible officers. See, Minutes of Constitutional Convention of 1895, p. 119. Of course, in none of these instances did the supervising official have actual physical control over the prisoners but instead possessed the

authority of general oversight and direction. Thus, contemporaneous with the time Article XII, § 9 was adopted, the terms "supervision and control" in this context usually meant legal custody or general oversight and management, See also, Mahaffey v. State (Ida.), 392 P.2d 279, 281 (1964).

Consistent with this idea is the placement of the words in the first portion of Article XII, § 9. The phrase "[t]he Penitentiary and the convicts thereto sentenced" is juxtaposed to the words "supervision and control". Moreover, the term "the Penitentiary" is written conjunctively with "the convicts thereto sentenced", indicating a single phrase was intended. From this, it is apparent that the framers contemplated general oversight by supervisory officers having charge of the prison system, because otherwise the provision could be read as giving guards and subordinate employees charge over "the Penitentiary and the convicts thereto sentenced...." (Emphasis added.) While alternative readings of the provision might be available, 2/ we believe the framers meant that the State should maintain general supervision and control over its prison system. This reading is particularly persuasive in view of the limited and specific purpose for which Article XII, § 9 was adopted. 3/

2/ It might be argued alternatively that the provision means that each and every officer and employee of the Penitentiary must be a state official. However, if intended, such would have likely been stated in much more precise terms. Compare the phrase "under the direction of officers detailed for those duties...." (Emphasis added.)

3/ We do not see that Article XII, § 9's use of the term "employed by the State" changes this conclusion. First, the emphasis of the provision is simply upon State supervision and control. Moreover, the term "employed" is often used even in the context of high ranking officers and is not necessarily limited to "employees" in the legal sense. See, Op. Atty. Gen., October 29, 1984. Further, since the provision makes reference to "the Penitentiary", it is evident that those who administer the State's prison system [i.e. Corrections Board, etc.] were intended to be included within the phrase "officers employed by the State." Without question, these officials are State officers. Thus, for the reasons set forth above, we do not believe that the first sentence of Article XII, § 9 was intended to mean any more than the prison system must remain under the "supervision and control" of those supervisory State officials.

LEGISLATIVE INTERPRETATION OF ARTICLE XII, § 9

Subsequent legislative interpretation is also consistent with our reading of Article XII, § 9. This constitutional provision should be read in conjunction with Article XII, § 2, the latter which provides:

> The General Assembly shall establish institutions for the confinement of all persons convicted of such crimes as may designated by law, and shall provide for the custody, maintenance, health, welfare, education and rehabilitation of the inmates.

The Legislature has, of course, provided for the establishment of a correctional system in Title 24 of the Code. Of particular relevance are Sections 24-1-10 et seq. wherein is established the State Department of Corrections and its governing board, the State Board of Corrections. Authority is placed in the State Board to "employ a general Commissioner of the prison system...." See, §§ 24-1-30; -40; and -100. Pursuant to § 24-1-130, the Board, together with the Commissioner is vested with the "exclusive management and control of the prison system...." More specifically, the Board is

> ... responsible for the management of the affairs of the prison system and for the proper care, treatment, feeding, clothing and management of the prisoners confined therein. The Board shall manage and control the prison system through the Commissioner selected by it, and it shall be the duty of The Commissioner to carry out the policies of the Board. The Board shall delegate to the Commissioner authority to manage the affairs of the prison system, subject to its control and supervision.

Thus, pursuant to the mandates of Article XII, § 9 and Article XII, § 2, the General Assembly has insured that the supervision and control of the State's prison system remain in the hands of the State. Clearly, these constitutional and statutory provisions expressly prohibit the State from abdicating such supervision and control.

However, nowhere in the wording or intent of the above cited constitutional or statutory provisions is there a prohibition upon the State's receiving assistance from another entity

in carrying out the details of running the State's prison system. To the contrary, as will be seen, the General Assembly has authorized and contemplated such assistance.

As a penal institution, "the Penitentiary" no longer exists. By Act No. 72 of 1975, it is provided that wherever reference is made to the State Penitentiary, "it shall mean the Department of Corrections or an institution of the Department of Corrections ...." More specifically, § 24-3-30 of the Code now provides the Board of Corrections broad authority with regard to the placement of prisoners. That Section provides in pertinent part:

> Notwithstanding the provisions of § 24-3-10 of the 1976 Code or any other provision of law, any person convicted of an offense against the State shall be in the custody of the Board of Corrections of the State, and the Board shall designate the place of confinement where the sentence shall be served. The Board may designate as a place of confinement any available, suitable and appropriate institution or facility, including but not limited to a county jail or work camp whether maintained by the State Department of Corrections or otherwise, but the consent of the officials in charge of the county institutions so designated shall be first obtained... . (Emphasis added.)

Based upon this broad discretion given the Board, this Office has concluded that prisoners may be placed by the Board in the custody of a county prison facility. While the county maintains immediate physical control and supervision over such prisoners, the State maintains ultimate supervision and control through a contract between the County and the Corrections Board. See, 1974 Op. Atty. Gen., No. 3855, p. 267; see also, Op. Atty. Gen., June 10, 1980. Thus, consistent with our interpretation of Article XII, § 9 examined above, implicitly the General Assembly has interpreted this constitutional provision as requiring that the State maintain general supervision and control over its prison system and prisoners. Accordingly, prison officials are permitted to place prisoners in the immediate custody of other entities so long as the State maintains ultimate control over them. As was stated by this Office in interpreting § 24-3-30:

> The ultimate result of this statute makes the Director of the Department of Corrections the responsible authority for the incarceration of all persons convicted of an offense against the State whose sentence exceeds three (3) months. He is responsible in every respect including the maintenance of records concerning the prisoner. When the board designates, as the place of confinement, a county facility which is not maintained by the Department, the Director may delegate to those in charge of the facility authority to act as his agent. However, the ultimate responsibility remains with the Director. (Emphasis added.)

1974 Op. No. 3855, supra.

MAINTENANCE OF STATE SUPERVISION AND CONTROL BY CONTRACT

It is well established that the State may properly maintain supervision and control through the use of a contract. As a general matter, any employment contract contemplates supervision and control by the employer over his employee. More specifically, a private corporation "may be employed to carry a law into effect." 16 C.J.S., Constitutional Law, § 137. As stated in Amer. Soc. P.C.A. v. City of N.Y., 199 N.Y.S. 728, 738 (1933),

> While it is true that strictly governmental powers cannot be conferred upon a corporation or individual ... still it has been held by a long line of decisions that such corporations may function in a purely administrative capacity or manner.

While "an administrative body cannot delegate quasi judicial functions, it can delegate the performance of administrative and ministerial duties... ." Krug v. Lincoln Nat. Life Ins. Co., 245 F.2d 848, 853 (5th Cir. 1957); see also, 73 C.J.S., Public Adm. Law and Procedure, § 53; McQuillin, Municipal Corporations, § 29.08, n. 6. This is consistent with the law in South Carolina. See, Green v. City of Rock Hill, 149 S.C. 234, 270, 147 S.E. 346 (1929) (contract between a city and private company for the control, management and operation of waterworks plant is valid).

This law has been applied to analogous situations such as the administration of hospitals. In Robinson v. City of Phil., 400 Pa. 80, 161 A.2d 1 (1960), for example, the Supreme Court of

Pennsylvania upheld a contractual agreement between a municipality and two private universities relating to the operation, management and control of the city's general hospital. Reviewing the contract in detail, the Court concluded:

> It will suffice us to say that our study of the contract convinces us that neither the city of Philadelphia nor the Board of Trustees of Philadelphia General Hospital has unlawfully delegated their powers and responsibilities in and by the above mentioned contract.

161 A.2d at 4. In Government and Civic Emp. Etc. v. Cook Co. School of Nursing, 350 Ill.App. 274, 112 N.E.2d 736 (1953), the Court upheld a contract between a county and a nonprofit corporation which required the corporation to "furnish, direct and perform the nursing services required for the proper care and nursing of all patients in the County Hospital... ." 112 N.E.2d at 737. And in Bolt v. Cobb, 225 S.C. 408, 415, 82 S.E.2d 789 (1954), our own Supreme Court upheld a contract between a county and a private entity for the "performance of a public, corporate function", i.e. medical services in the form of a hospital. Only recently, in S.C. Farm Bureau Marketing Assoc. v. S.C. State Ports Auth., 278 S.C. 198, 293 S.E.2d 854 (1982), our Court found a contract between a private association and the State for the management and operation of a grain elevator and storage facilities to be constitutionally valid. As mentioned earlier, our Court has upheld a contract between a city and a private corporation for the management of a water plant. Green v. City of Rock Hill, supra. See also, 16 C.J.S., Constitutional Law, § 137 (a State may validly use a private corporation as an agent for the treatment of inebriates). See also, Murrow Indian Orphans Home v. Children, 171 P.2d 600 (Okl. 1946). In these instances, the governmental entity maintained supervision and control over the corporation by virtue of a contractual agreement.

Moreover, a governmental body frequently employs both public and private entities in the administration of its penal institutions. Here too, principles of agency and contract serve to maintain adequate supervision and control by the governmental entity. As stated in 60 Am.Jur.2d, Penal and Correctional Institutions, § 22:

> Many correctional institutions are not of a strictly public character, but are private institutions... . It has been held that such an institution is an agent of the State because it exercises one of the

> functions of government which the State may exercise, and which it may delegate to charitable institutions created under its laws.

As described by the Court in Paige v. State, 269 N.Y. 352, 199 N.E. 617, 618 (1936), in the context of a private institution for the confinement of delinquent children, "[t]here is no misuse of language in saying that the State employed the institution." (Emphasis added.) See also, Corbett v. St. Vincent's Industrial School of Utica, 68 N.E. 997 (N.Y. 1903). And it is recognized that "[t]he state may also establish a state asylum intrusting the management thereof to a private corporation organized for such purposes." 7 C.J.S., Asylums, § 3. See also, The Shepherd's Fold v. Mayor, 96 N.Y. 137 (1884); St. Louis Hosp. Assn. v. St. Louis, 15 Mo. 592 (1852); Kennedy v. Meara, 56 S.E. 243 (Ga. 1906).

Further, other case authorities support the idea that, historically, governmental entities have often contracted with private entities to assist in the operation and maintenance of penal institutions. For example, in Trevett v. Prison Assn. of Virginia, 36 S.E. 373 (Va. 1900), it was noted by the Court that a private benevolent association had as its purpose the improvement of the government, discipline, and general management of prisons within [the] ... state [and] ... for its services in this behalf receives a reasonable compensation...." 36 S.E. at 374. The corporation in question established "a school for the confinement of youthful criminals" and to which the State committed these individuals. In State ex rel. Henderson et al. v. Board of State Prison Commrs., 96 P. 736 (Mont. 1908), the Court reviewed a contract made, by the board of prison commissioners with private individuals for "the care, custody, and maintenance of all prisoners confined in the state prison at Deer Lodge for the period of two years... ." 96 P. at 736-737. And it was stated by the Court in State v. Holcomb, 46 Neb. 612, 65 N.W. 873 (1896):

> The board of public lands and buildings is composed of the executive officers of the state, who serve, in addition to their ordinary duties, as members of various other boards, each claiming a considerable portion of their time and attention. For them to personally direct the management, in detail, of the dozen different state institutions

> is, as we well know, impossible. Hence, they must, from the necessity of the case, transact much of the business pertaining to such institution through agents of their own creation.

The Court went on to conclude in Holcomb that it had no "doubt of the power of the board ... to provide by contract" for the care of the prisoners. See also, St. Hedwig's Ind. School for Girls v. Cook County, 289 Ill. 432, 124 N.E. 629. Thus, States have traditionally utilized private entities in the performance of the duty to maintain custody and control of prisoners. And, as discussed earlier, contractual agreements provide State supervision and control when the Board of Corrections places prisoners under the immediate control of county facilities. See, 1974 Op. No. 3855, supra; Op. Atty. Gen., May 23, 1977. Thus, it would seem to comport with the language and intent of Article XII, § 9 for the State to maintain "supervision and control" over the prison system and its prisoners through a contract with a private entity for the building, staffing and management of a correctional facility. 4/ While this constitutional provision clearly requires the State to maintain ultimate supervision and control, it does not prohibit the State's employing another entity, such as a private corporation,

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4/ Of course, the Department of Corrections presently makes great use of services performed by private entities and individuals, such as medical and food services, in running the prison system. There is little question that the Board and the Department possesses the general authority to contract by the recognized procurement procedures. See, § 11-35-10 et seq.

Other examples where the state utilizes private entities in the performance of governmental functions may be found. For example, private security agencies possess law enforcement authority, see, § 40-17-10 et seq. And the civil commitment of mentally ill patients may be made to private hospitals. See, Act No. 512 of 1984, Part II, § 19.

to assist it in administering the prison facilities under its control. 5/

STATUTORY AUTHORITY TO DELEGATE BY CONTRACT TO PRIVATE CORPORATION

It is well recognized that there must exist statutory authority for an administrative officer or agency to subdelegate any portion of the authority which has been delegated to him by statute. 73 C.J.S., Public Administrative Law and Procedure, § 56. However, if it is reasonable to imply the authority to subdelegate, such an implication may legally be made. State v. Imperatore, 92 N.J. Super. 347, 223 A.2d 498 (1966); 73 C.J.S., Public Administrative Law and Procedure, supra. Thus, the question remains whether the Legislature has, by statute, permitted the Board of Corrections to contract with a private corporation in the manner indicated. We believe the relevant statutes do not absolutely prohibit such a contract.

5/ Our conclusion here should be distinguished from a recent opinion which concluded that a public official could not contract with private individuals for the performance of his duties. Op. Atty. Gen., April 11, 1985. The authorities cited therein clearly distinguish that situation from the one where a governmental entity employs a private corporation to assist it in the performance of a governmental function. McQuillin, supra at § 29.08, n. 6. McQuillin recognizes that the former situation is against public policy, but the latter is not necessarily invalid.

Our reading of Article XII, § 9 should also be distinguished from the situation addressed in the proviso contained in this provision. Such proviso authorizes the General Assembly to delegate to the Department of Corrections authority to transfer inmates to correctional institutions of other States or the federal government. Of course, in that circumstance, the State has no means of effective supervision and control over other sovereign entities, even by contract. Each sovereign controls its own prison system; obstacles such as foreign courts and lack of physical presence of the prisoners in the State would make effective supervision and control by this State virtually an impossibility. Thus, a constitutional amendment was deemed necessary for the State to relinquish general supervision and control in that limited context. See, Cobb v. State, Op. No. 2234 (July 2, 1985).

Again, precedents from other jurisdictions are useful. In Robinson v. City of Philadelphia, supra, the question was raised as to whether the City of Philadelphia possessed the authority to contract with private entities for the performance of certain functions relating to the "operation, management and control" of Philadelphia General Hospital. Pursuant to the relevant statutory provisions, the Philadelphia Department of Public Health possessed the responsibility for the "care, management, administration, and operation of city activities relating to public health, including hospitals." Within the Department of Public Health, the Board of Trustees of Philadelphia General Hospital possessed the authority for the "direction and control of ... [the] management" of the hospital. Of course, these provisions are worded similarly to the constitutional and statutory provisions relative to the Board and the Department of Corrections. Compare, § 24-1-10 et seq.

The contract in question in Robinson provided that the private colleges would provide "all medical and related services not provided directly by Philadelphia General Hospital for the proper and efficient operation of the division assigned to each university, including medical care and supervision in accordance with standards established by the Board of Trustees of Philadelphia General Hospital...." The Court concluded that such a contract was within the authority of the City of Philadelphia and that it did not unlawfully delegate the duties and responsibilities of the city with regard to the management and control of the hospital. 161 A.2d at 3. Moreover, in subsequent decisions, the court's holding in Robinson was reiterated and expanded. Preston v. City of Phil., 362 A.2d 452 (Pa. 1976). Thus, other jurisdictions have concluded that governmental entities which have the legal responsibility for the supervision and management of institutions performing governmental functions, possess the authority to contract with other entities to assist in the performance of their duties.

Moreover, as stated earlier, § 24-3-30 of the Code vests the Board of Corrections with broad authority to determine where prisoners within its custody shall be placed. Prior to amendment by Act No. 181 of 1981, this Office interpreted § 24-3-30 as follows:

> The Board of the Department of Corrections is authorized and required to designate the

> facility where the sentence is to be served and expressly may designate any facility in the State whether maintained by the Department or not. (Emphasis added.)

1974 Op. Atty. Gen., No. 3855, supra. While there may have been some question prior to the 1981 amendment as to whether the Board was limited in its placement to county facilities only, the amendment laid all such doubts to rest. The title to Act No. 181 of 1981 clearly stated that the amendment's purpose was "To Provide That The Board Shall Not Be Limited To The County Jail or Work Camp As Confinement Facilities." And, as amended, § 24-3-30 authorized the Board to "designate any available, suitable and appropriate institution or facility, including but not limited to a county jail or work camp whether maintained by the State Department of Corrections or otherwise...." (Emphasis added.) Of course, the word "facility" simply means "[s]omething that is built or installed to perform some particular function", see, Black's Law Dictionary at p. 531 (5th ed.); in an analogous contexts, courts have concluded that similar words include private, as well as public facilities. See, County of San Diego v. Gibson, 133 Cal.App.2d 519, 284 P.2d 501, 504 (1955) [words "suitable facility" include private foundation contracted with by the county to provide hospital services]. Thus, § 24-3-30 contains no express limitation upon the Board of Corrections' authority to place prisoners in a privately managed facility. If, pursuant to § 24-3-30, the Board may, by contract, delegate authority to a county facility for the immediate control of prisoners within the legal custody of the Board, we believe that, consistent with the foregoing case law, and the language of § 24-3-30, it has similar authority to contract with a private company for the same purpose. 6/

STATE MUST MAINTAIN SUPERVISION AND CONTROL

Of course, as expressly noted in 1974 Op. Atty. Gen., No. 3855 the State, through its prison officials must maintain supervision and control over its prisons and the prisoners sentenced thereto. Consistent with this is the general constitutional principle that

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6/ While we believe the authority contained in § 24-3-30 is sufficiently broad, it is, of course, always prudent to remove any possible question by express statutory clarification.

> [t]he State's power to contract is subject to the further limitation that a state cannot by contract divest itself of the essential attributes of sovereignty and its governmental powers.

81 C.J.S., States, § 155. In essence, no governmental agency can by contract or otherwise suspend its governmental functions. Nairn v. Bean, 48 S.W.2d 584 (Tex. 1932). Without doubt, the operation of the State's prison system is a governmental function. Cooper v. Cominn, 298 S.E.2d 781 (W.Va. 1981).

These authorities, as well as the express language of Article XII, § 9, make it clear that the State cannot simply "turn over" to a private corporation the operation of a prison facility without ample guidelines for such operation or a suitable reporting and monitoring system. See also, Farmer v. City of St. Paul, 67 N.W. 990, 993 (Minn. 1896) ["neither the place where the convicts are to be imprisoned nor the managers thereof are in any manner subject to the control of public authority."]. Recent cases decided by our Supreme Court indicate the Court's particular concern with regard to any unlawful delegation of authority to a private corporation. See, Gold v. South Carolina Bd. of Chiropractic Examiners, 271 S.C. 74, 245 S.E.2d 117 (1978); Toussaint v. S.C. Bd. of Med. Examiners, 329 S.E.2d 433 (1965); Eastern Fed. Corp. v. Wasson, 281 S.C. 450, 316 S.E.2d 373 (1984). Undoubtedly, the State would have to be assured that, among other things, constitutional requirements regarding the custody of prisoners were met, adequate measures to avoid escapes were taken and the State would be properly indemnified in case of legal liability. The area of prison security would be particularly subject to close scrutiny by the courts, because that function embraces the very essence of governmental power. The validity of any specific contract is in large measure dependent upon the particular duties delegated to the corporation and the degree of control which the State maintains over it. Important policy considerations would underlie the legal questions involved.

In light of these principles, it is imperative that any contemplated contract be carefully and precisely drafted to insure that the State and its officials do not unlawfully delegate the State's constitutional and statutory responsibility to "supervise and control" the prison system or the operation of prison facilities within that system. In this regard, no precise line of demarcation which would cover each and every situation can possibly be set forth in an opinion. Officials should, however, probably err on the side of caution.

NOVEL QUESTION

One further caveat is in order. As far as case law authorizing the type of contract you envision is concerned, the legal question is novel not only in this State, but in others as well. While the idea of private corporations assisting in the operation of prisons is apparently developing around the country, we are unaware of any case commenting upon the idea. We understand the Attorney General of Tennessee has issued an opinion involving a somewhat similar situation and has found it to be legal under Tennessee law; but of course, such laws are not necessarily the same as our own. And as in Tennessee, our opinion is only advisory. Thus, while we believe Article XII, § 9 and other relevant constitutional 7/ and statutory provisions do not absolutely prohibit such contract, so long as State officials maintain adequate supervision and control our Court has never so held. Thus, before large expenditures of public funds are made, buildings constructed and contracts let, it may be well for the Board of Corrections to develop the posture of a case or controversy whereby a court could, by a declaratory judgment

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7/ One other possible constitutional objection to the contemplated contract is that public funds would be used for the benefit of a private corporation or to further a private purpose. See, Article X, § 11 of the State Constitution. See also 10 McQuillin, supra at § 29.06. However, it is clear that the administration of the prison system constitutes an unmistakeable public purpose. See above. Moreover, it is fundamental that "... a fair exchange by the state of value for value does not offend the prohibition as to a loan, pledge or gift of state credit." 81A C.J.S., States, § 210; see also, McKinney v. City of Greenville, 262 S.C. 227, 203 S.E.2d 680 (1974); Gould v. Barton, 256 S.C. 175, 181 S.E.2d 662 (1971). So long as the State receives adequate consideration for any public funds expended, such would not contravene Article X, § 11 or other provisions of the Constitution forbidding the expenditure of public funds for a private purpose. See, Murrow Indian Orphan's Home v. Childers, supra. However, since any contemplated contract would most probably be with a profit, as opposed to a nonprofit corporation, great care must be taken to insure that the consideration is adequate. See, Op. Atty. Gen., March 19, 1985.

action, review any final plan of operation. Of course, no comment is intended here as to the legal availability of a declaratory judgment in a particular situation.

Finally, this opinion addresses only the constitutional and statutory provisions relevant to the question of whether the contemplated contract is legally authorized. It does not comment in any way upon the question of how such a proposal or any other might be funded or financed if authorized. See, e.g. Section 185 of the 1985-86 Appropriations Act; see also, § 11-35-2030; H.2888 (1985). Nor does this opinion comment upon lease-purchase arrangements for the financing or construction of prison facilities.

CONCLUSION

In summary, while the issue you have presented is novel in this State and only a court can conclusively resolve it, this Office is able to find no constitutional provision or statute absolutely prohibiting the Board of Corrections from contracting with a private corporation to assist in the operation of a prison facility. This conclusion is consistent with the Board's statutory authority to designate as a place of confinement any available, suitable and appropriate institution or facility, whether maintained by the Board of Corrections or otherwise. Section 24-3-20. If the State chooses to enter into such a contract, however, the State must maintain adequate supervision and control by virtue of such contract. Thus, considerable care should be taken in the drafting and preparation of such contract to avoid potential constitutional and statutory problems. The validity of any specific contract is, in large measure, dependent upon the particular duties delegated to the corporation and the degree of control which the State maintains over it. Moreover, since the issues considered here are novel, it may be well for the Board of Corrections to develop the posture of a case or controversy whereby a court could, by a declaratory judgment action, review any proposed plan of operation.

Sincerely,

Robert D. Cook
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