

The State of South Carolina



Office of the Attorney General

Opinion No. 25-12
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January 23, 1986

Kenneth D'Vant Long, Project Director
Jail/Prison Overcrowding Project
State Reorganization Commission
P. O. Box 11488
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Dear Mr. Long:

You have asked whether a municipality or county could contract with a private corporation to assist in the management of a municipal or county correctional facility. Enclosed is an opinion of this Office, issued August 8, 1985, which sets forth the general legal principles applicable to your questions. I would advise that the general law concerning delegation of authority by a governmental body and the precautions related thereto which were expressed in the August 8 opinion would be controlling as to your questions.

In the August 8 opinion, we concluded that no constitutional or statutory provision absolutely prohibited the State Board of Corrections from contracting with a private corporation to assist in the management and operation of a prison facility. We further noted that the relevant statutes contemplated employing other entities to assist in the operation of the state prison system. However, in reaching this conclusion we urged that the Board should nevertheless exercise considerable caution in this regard. We noted that constitutional constraints concerning the delegation of governmental power "make it clear that the State cannot simply 'turn over' to a private corporation the operation of a prison facility...." Instead, there must be "ample guidelines for such operation or a suitable reporting and monitoring system." Op. at 16. We further cautioned:

If the State chooses to enter into such a contract ... the State must maintain adequate supervision and control by virtue

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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.

Op. at 18.

Likewise, these principles would be applicable in the operation of a county or city jail or correctional facility. Section 24-5-10 places responsibility for the county jail in the hands of the Sheriff. See, Roton v. Sparks, 270 S.C. 637, 244 S.E.2d 214 (1978). The Section authorizes the Sheriff to

... have custody of the jail in his county and if he appoint a jailer to keep it, the Sheriff shall be liable for such jailer and the sheriff or jailer shall receive and safely keep in prison any person delivered or committed to either of them, according to law.

See, § 24-5-10 et seq. See also, 4-9-30 (5). In addition, municipal jails and correctional facilities are placed under the control of municipal authorities. See, § 24-7-120; § 24-7-10 et seq. See also, § 5-27-130; § 24-9-10. Thus, just as the State Board of Corrections must maintain close supervision and control over the operation of its prison facilities, so too must county^{1/} and municipal authorities maintain supervision

^{1/} We would mention that pursuant to § 4-9-30 (5), if there is any reorganization or restructuring of the Sheriff's department, or if any appropriation relative to police protection which would limit the duties of the sheriff or would provide for police protection duplicating the duties and functions presently being performed by the Sheriff, such is not effective until "the qualified electors of the county shall first approve the appropriation by referendum called by the governing body of the county." Therefore, the Home Rule Act leaves the powers of the Sheriff as jailer unaffected at least until such referendum is held. Roton v. Sparks, supra.

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and control over county and city jails and detention centers.

To our knowledge, no provision of law absolutely prohibits counties or municipalities from contracting with private companies to assist in the operation of a jail or prison facility. See, Article VIII, § 17 (powers of local governments to be broadly construed). As pointed out in the August 8 opinion, a governmental body may contract with private entities to assist it in performing administrative or ministerial functions. See, Op. at 9-13; see also, Green v. Rock Hill, 149 S.C. 234, 147 S.E. 346 (1929); Workmen's Comp. Etc. v. Commonwealth Ins. Dept. 364 A.2d 976, 978 (Pa. 1976); Frank v. Wabash R. R. Co., 295 S.W.2d 16 (Mo. 1956) [a city may supplement police protection by authorizing, under certain circumstances, private persons to perform police functions]; Smith v. Bd. of Commrs. of Roads and Revenues, 259 S.E.2d 74 (Ga. 1979); DiLoreto v. Firemen's Fund Ins. Co., 418 N.E.2d 612, 614 (Mass. 1981); State ex rel. K. C. Ins. Agents' Assn. v. K. C. 4 S.W.2d 427 (Mo. 1928) [municipality may contract with private association for fire protection]; Rodriguez v. N. J. Sports and Exposition Auth., 472 A.2d 146 (N.J. 1983) [police protection]; 16 C.J.S., Constitutional Law, § 141; 9 McQuillin, Municipal Corporations, § 24.41; 10 McQuillin, Municipal Corporations, § 29.08 ["a city may enter into contracts in aid of its public duties."]; 73 C.J.S. Public Administrative Law and Procedure, § 56. Liebman, "Delegation to Private Parties In American Constitutional Law", 50 Indiana Law Journal 650 (1975). Moreover, there is authority which concludes that where a governmental body, such as a county, possesses jurisdiction over a particular subject matter, the further power to contract with a private entity in order to carry out its duties may be implied. Smith v. Bd. of Commrs., supra [a county possesses authority to contract with a private company for fire protection services].

However, as clearly stated in the August 8 opinion, where a governmental entity is given responsibility for the operation of a prison, it may not simply turn over that responsibility to a private corporation. As our Supreme Court stated in Sammons v. City of Bft., 225 S.C. 490, 83 S.E.2d 153 (1954),

It is a fundamental principle of constitutional law that no legislative body may part with its right to exercise the police power nor may a municipality to which such power has been delegated divest itself of same by contract or otherwise. It is a continuing power which may be exercised as often as required in the public interest and must always remain fluid.

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See also, G. Curtis Martin Inv. Trust v. Clay, 274 S.C. 608, 266 S.E.2d 82 (1980); Douglas v. City Council of Greenville, 92 S.C. 374, 75 S.E. 687 (1912); Willis v. Town of Woodruff, 200 S.C. 266, 20 S.E.2d 699 (1940); Houston v. West Greenville, 126 S.C. 484, 120 S.E. 236, 239 (1923); 9 McQuillin, Municipal Corporations, § 24.41. See also, 73 C.J.S., § 56; supra. Thus, because the statutory responsibilities for the operation of city and county jails have been placed upon municipal and county authorities, the various limitations expressed in the August 8 opinion would be equally applicable to the situations you have presented. 2/ Accordingly, while we can find no constitutional provision or statute absolutely prohibiting a county or municipality from contracting with a private corporation to assist in the operation of a prison facility, the county (or county officials such as the Sheriff) or municipality must maintain adequate supervision and control by virtue of such contract. In other words, as emphasized in the August 8 opinion, 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 county (or county officers) or the municipality maintains over it. Moreover, since the issues considered here are novel, it may be well for the county or municipality to develop the posture of a case or controversy whereby a court could, by a declaratory judgment action, review any proposed plan of operation.

One final comment is in order. While in both the August 8 opinion and herein, we have outlined the various legal considerations involved, we would again stress that we indicate no position as to whether such a contract should be undertaken. As we stated earlier, "important policy considerations would underlie the legal questions involved." Op. at 16. Such

2/ We would also point out that in the situation addressed in the August 8 opinion, the relevant statutes clearly contemplated that other entities would be employed to assist the State in the operation of its prison facilities. See, Op. August 8, at 7-9. However the relevant statutes pertaining to the operation of city and county jails do not appear to be as broad. But see, § 24-5-150 (industrial corporations authorized to provide prisons). Because of the absence here of a statute clearly contemplating the use of other entities in the operation of municipal and county penal facilities, caution is again advised.

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considerations and decisions would remain in the hands of the county or city council or other officials such as the Sheriff.

If we can be of further assistance, please let us know.
With kindest personal regards, I remain

Very truly yours,



Robert D. Cook
Executive Assistant for Opinions

RDC/an

Enclosure