

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 893 Correctional Privatization

**SPONSOR(S):** Richardson and others

**TIED BILLS:** IDEN./SIM. **BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	7 Y, 6 N	Merlin	White
2) Appropriations Committee			
3) Judiciary Committee			

### SUMMARY ANALYSIS

Chapter 944, F.S., assigns legal custody of all Florida inmates in state and private prisons to the Florida Department of Corrections (FDC). As such, FDC makes all decisions that affect inmate discipline, gain-time, and release, as well as routine audits in both public and private prisons.

The Florida Department of Management Services (DMS) provides administrative support services to state agencies and to state employees. As part of its responsibilities, DMS has the authority under s. 287.042(17), F.S., and ch. 957, F.S., to procure and manage private prison contracts. Currently, the responsibility for procuring, entering into, and managing contracts is with DMS.

The bill amends s. 287.042(17), F.S., to remove the express authority for DMS to enter into, manage, and enforce private prison contracts.

In addition, the bill amends several sections of ch. 957, F.S., to delete the statutory references to DMS so that the duties for procuring contracts and the administration and management of private prisons are transferred from DMS to FDC. The bill also amends s. 945.215(2)(a), F.S., to remove the reference to DMS in the "Privately Operated Institutions Inmate Welfare Trust Fund."

FDC and DMS estimate that there will be a fiscal impact on state expenditures and revenues, as funds would need to be transferred from one trust fund to another. Further, funds and full-time employee positions currently appropriated to DMS for private prison monitoring would need to be transferred to FDC. Please see "FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT," *infra*.

The bill provides an effective date of July 1, 2017.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### Present Situation

##### Department of Corrections

As of the 2010 Census, there are 2.3 million prisoners in the United States and 1,800 state and federal correctional facilities.<sup>1</sup> Of those numbers, “[t]he Florida Department of Corrections (FDC) is the third largest state prison system in the country with a budget of \$2.4 billion [and] approximately 98,000 inmates incarcerated and nearly 140,000 offenders on active community supervision.”<sup>2</sup> FDC has 149 facilities statewide.<sup>3</sup>

Currently, chapter 944, F.S., assigns legal custody of all Florida inmates in state and private prisons to FDC.<sup>4</sup> As such, FDC makes all decisions that affect inmate discipline, gain-time,<sup>5</sup> and release.<sup>6</sup> FDC also conducts routine security, infirmary, and contraband audits in both public and private prisons.<sup>7</sup>

##### Department of Management Services and Private Prison Monitoring

The Florida Department of Management Services (DMS) provides administrative support services to state agencies and to state employees.<sup>8</sup> As part of its responsibilities, DMS has the authority under s. 287.042(17), F.S., and ch. 957, F.S., to procure and manage private prison contracts. Florida law provides that DMS has the following powers, duties, and functions:

- To enter into contracts pursuant to ch. 957, F.S., for the designing, financing, acquiring, leasing, constructing, or operating of private correctional facilities. DMS shall enter into a contract or contracts with one contractor per facility for the designing, acquiring, financing, leasing, constructing, and operating of that facility or may, if specifically authorized by the Legislature, separately contract for any such services.<sup>9</sup>
- To manage and enforce compliance with existing or future contracts entered into pursuant to chapter 957.<sup>10</sup>

##### Correctional Privatization Act

Chapter 957, F.S., known as the “Correctional Privatization Act,”<sup>11</sup> charges DMS’s Bureau of Private Prison Monitoring (Bureau) with issuing contracts, establishing operating standards, and monitoring compliance of the state’s private prisons.<sup>12</sup> The Bureau is responsible for entering into contracts for the design, construction, and operation of privately operated correctional facilities.<sup>13</sup> The Bureau may not

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<sup>1</sup> Christopher Ingraham, *The U.S. Has More Jails Than Colleges. Here’s a Map of Where Those Prisoners Live*, THE WASHINGTON POST, Jan. 6, 2015, available at [https://www.washingtonpost.com/news/wonk/wp/2015/01/06/the-u-s-has-more-jails-than-colleges-heres-a-map-of-where-those-prisoners-live/?utm\\_term=.5cdca432d68d](https://www.washingtonpost.com/news/wonk/wp/2015/01/06/the-u-s-has-more-jails-than-colleges-heres-a-map-of-where-those-prisoners-live/?utm_term=.5cdca432d68d) (last viewed Mar. 24, 2017).

<sup>2</sup> Florida Department of Corrections (FDC), *About the Florida Department of Corrections* (“Corrections Overview”), available at <http://www.dc.state.fl.us/about.html> (last viewed Mar. 24, 2017).

<sup>3</sup> *Id.*

<sup>4</sup> Office of Program Policy Analysis and Government Accountability, No. 08-71, *While DMS Has Improved Monitoring, It Needs to Strengthen Private Prison Oversight and Contracts*, at 2 (“2008 OPPAGA Report”), Dec. 2008, available at <http://www.oppaga.state.fl.us/reports/pdf/0871rpt.pdf> (last viewed Mar. 24, 2017).

<sup>5</sup> ss. 944.275-944.291, F.S.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> Website for the Department of Management Services (DMS), available at [www.dms.myflorida.com/](http://www.dms.myflorida.com/) (last viewed Mar. 24, 2017).

<sup>9</sup> s. 287.042(17)(a), F.S.

<sup>10</sup> s. 287.042(17)(b), F.S.

<sup>11</sup> s. 957.01, F.S.

<sup>12</sup> DMS Website, *Business Operations, Private Prison Monitoring* (“Private Prison Overview”), available at [http://www.dms.myflorida.com/business\\_operations/private\\_prison\\_monitoring](http://www.dms.myflorida.com/business_operations/private_prison_monitoring) (last viewed Mar. 24, 2017); see also 2008 OPPAGA Report at 2.

<sup>13</sup> s. 957.04(1)(a)2., F.S.

enter into a contract unless it determines that the contract or series of contracts in total for the facility will result in cost savings to the state of at least seven percent over the public provision of a similar facility by FDC.<sup>14</sup> Once the savings is determined, the Bureau may enter into a contract with a private vendor to operate the facility for an agreed daily per diem calculated by FDC.<sup>15</sup> The per diem includes the cost of all facility operations and the cost of the contract monitors employed by DMS. The Bureau currently oversees the operational contracts for seven facilities:<sup>16</sup>

- Bay Correctional Facility;
- Blackwater River Correctional Facility;
- Gadsden Correctional Facility;
- Graceville Correctional Facility;
- Lake City Youthful Offender Facility;
- Moore Haven Correctional Facility; and
- South Bay Correctional Facility.<sup>17, 18</sup>

#### Cost Savings and Other Requirements

Florida law governs the specific circumstances under which DMS can contract. Section 957.04(1), F.S., provides that a contract entered under ch. 957, F.S., by DMS for the operation of private correctional facilities shall maximize the cost savings of such facilities and shall comply with additional requirements such as:

- Negotiating with the most qualified firm;<sup>19</sup>
- Indemnifying the state and the department, including their officials and agents, against any and all liability, including, but not limited to civil rights liability;<sup>20</sup>
- Establishing operations standards for correctional facilities subject to the contract;<sup>21</sup> and
- Requiring the selection of and appointment of a full-time contract monitor.<sup>22</sup>

Section 957.04(2)(c), F.S., provides that each contract entered into for the design and construction of a private correctional facility or juvenile commitment facility must include a specific provision requiring the contractor, and not DMS, to obtain the financing required to design and construct the private correctional facility or juvenile commitment facility built under ch. 957, F.S.

Section 957.04(5), F.S., provides that each contract entered into by DMS must include substantial minority participation unless demonstrated by evidence, after a good faith effort, as impractical and must also include any other requirements DMS considers necessary and appropriate for carrying out the purposes of ch. 957, F.S. Sections 957.04(6) and (7), F.S., in turn, discuss lease-purchases, appraisals, and related negotiations.

Section 957.06(2), F.S., provides that a contract entered into under ch. 957, F.S., does not authorize, allow, or imply a delegation of authority to the contractor to choose the facility to which an inmate is initially assigned or subsequently transferred. The contractor may request, in writing, that an inmate be transferred to a facility operated by FDC. DMS, the contractor, and FDC are required to develop and

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<sup>14</sup> s. 957.07(1), F.S.

<sup>15</sup> *Id.* (noting that “[t]he Department of Corrections shall calculate all of the cost components that determine the inmate per diem in correctional facilities of a substantially similar size, type, and location that are operated by the Department of Corrections, including administrative costs associated with central administration. Services that are provided to the Department of Corrections by other governmental agencies at no direct cost to the department shall be assigned an equivalent cost and included in the per diem.”).

<sup>16</sup> As of February 28, 2017, there are 10,176 inmates in the seven private correctional facilities. See FDC website at <http://www.dc.state.fl.us/pub/pop/facility/index.html> (last viewed Mar. 24, 2017).

<sup>17</sup> Private Prison Overview, *supra* note 12.

<sup>18</sup> FDC Website, *Introduction to Information on Florida State Prison Facilities*, available at <http://www.dc.state.fl.us/facilities/ciindex.html> (last viewed Mar. 24, 2017).

<sup>19</sup> s. 957.04(1)(a), F.S.

<sup>20</sup> s. 957.04(1)(b), F.S.

<sup>21</sup> s. 957.04(1)(e), F.S.

<sup>22</sup> s. 957.04(1)(g), F.S.

implement a cooperative agreement for transferring inmates between a correctional facility operated by FDC and a private correctional facility. FDC, DMS, and the contractor must comply with the cooperative agreement.

Section 957.07(1), F.S., provides that DMS cannot enter into a contract unless there is a determination that the contract will result in cost savings, as noted above. Section 957.07(5)(d), F.S., provides that if a private vendor chooses not to renew the contract at the appropriated level, DMS shall terminate the contract.

Section 957.08, F.S., provides that FDC shall transfer and assign prisoners to each private correctional facility opened pursuant to ch. 957, F.S., in an amount not less than 90 percent or more than 100 percent of the capacity of the facility pursuant to the contract with DMS. The prisoners transferred by FDC shall represent a cross-section of the general inmate population, based on the grade of custody or the offense of conviction, at the most comparable facility operated by the FDC.

Section 957.14, F.S., provides for control of a private correctional facility upon termination of a contract, due to material deficiencies, bankruptcy, and insolvency. Section 957.15, F.S., pertains to the funding of contracts for operation, maintenance, and lease-purchases of private correctional facilities. Finally, section 957.16, F.S., provides that DMS may modify and execute agreements with private contractors to expand up to the total capacity of contracted correctional facilities.

FDC has similar authority regarding private prison contracts as set forth in s. 944.105, F.S., and ss. 944.710-944.72, F.S. Section 944.105(1), F.S., provides that FDC is authorized to enter into contracts with private vendors for the provision of the operation and maintenance of correctional facilities and the supervision of inmates. However, no such contract shall be entered into or renewed unless:

- The contract offers a substantial savings to FDC, as determined by FDC. In determining the cost savings, FDC, after consultation with the Auditor General, shall calculate all the cost components that contribute to the inmate per diem, including all administrative costs associated with central and regional office administration. Services which are provided to FDC by other government agencies without any direct cost to FDC shall be assigned an equivalent cost and included in the per diem. The private firm shall be assessed the total annual cost to the state of monitoring the contract;
- The contract provides for the same quality of services as that offered by FDC; and
- The Legislature has given specific appropriation for the contract.

Presently, private prisons in Florida are managed by DMS under its statutory authority.<sup>23</sup> DMS has exercised management and oversight of private prisons since 2004.<sup>24</sup> Although chapter 957, F.S., does contain certain provisions involving FDC, these provisions are limited.<sup>25</sup> “Some examples are FDC’s calculation of the actual costs needed for determining private prison costs savings when the contract is being procured,<sup>26</sup> and the transfer of inmates<sup>27</sup> to and from private prisons.<sup>28</sup> However, the responsibility for procuring, entering into, and managing contracts is with DMS.<sup>29</sup>”

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<sup>23</sup> 2017 Florida Department of Corrections Agency Analysis for HB 893, at 2 (“2017 FDC Agency Analysis”), Mar. 23, 2017 (on file with the Florida House Subcommittee on Criminal Justice).

<sup>24</sup> 2017 Florida Department of Management Services Agency Analysis for HB 893 (“2017 DMS Agency Analysis”), at 2, Mar. 23, 2017 (on file with the Florida House Subcommittee on Criminal Justice). The DMS analysis noted that from 1993-2004, this function resided with the Correctional Privatization Commission (CPC). *Id.* The CPC was an independent budget entity administratively housed, but independent from, DMS; *see also* 2008 OPPAGA Report, at 1. The duties of the CPC were set forth in s. 957.03, F.S., but this statute was repealed by s. 12, ch. 2004-248 effective July 1, 2005, and by s. 19, ch. 2006-2, effective July 4, 2006.

<sup>25</sup> FDC Agency Analysis, *supra* note 19.

<sup>26</sup> s. 957.01, F.S.

<sup>27</sup> s. 957.06, F.S.

<sup>28</sup> 2017 FDC Agency Analysis, at 2, *supra* note 19.

<sup>29</sup> *Id.*

### Inmate Welfare Trust Fund

Section 945.215, F.S., is the statute governing the “Inmate Welfare Trust Fund.” This fund consists primarily of sales revenue obtained from FDC’s commissaries (called canteens) and commissions paid to FDC by telephone companies whose service is used by inmates at the Department’s correctional facilities. Trust Fund profits have typically been used to fund selected prison programs and activities not funded by Florida taxpayers.<sup>30</sup>

Section 945.215(2), F.S., pertains to the “Privately Operated Institutions Inmate Welfare Trust Fund” at privately operated institutions or private correctional facilities. Section 945.215(2)(a), F.S., provides that for purposes of that subsection, privately operated institutions or private correctional facilities are those correctional facilities under contract with FDC pursuant to ch. 944 or DMS under ch. 957.

### **Effect of the Bill**

The bill amends s. 287.042(17), F.S., to remove the express authority for DMS to enter into, manage, and enforce private prison contracts.

In addition, the bill amends ss. 957.04, 957.06, 975.07, 957.08, 957.14, 957.15, and 957.16, F.S., deleting the statutory references to DMS so that duties for procuring contracts, administration, and management of private prisons are transferred from DMS to FDC.

### *Other Effects of the Bill*

The bill amends s. 945.215(2)(a), F.S., to remove the reference to DMS in the “Privately Operated Institutions Inmate Welfare Trust Fund.”

The bill makes technical changes to incorporate the language and terminology used in the act.

The bill provides an effective date of July 1, 2017.

### **B. SECTION DIRECTORY:**

Section 1. Amends s. 957.04, F.S., relating to contract requirements.

Section 2. Amends s. 957.06, F.S., relating to powers and duties not delegable to contractor.

Section 3. Amends s. 957.07, F.S., relating to cost-saving requirements.

Section 4. Amends s. 957.08, F.S., relating to capacity requirements.

Section 5. Amends s. 957.14, F.S., relating to contract termination and control of a correctional facility by the department.

Section 6. Amends s. 957.15, F.S., relating to funding of contracts for operation, maintenance, and lease-purchase of private correctional facilities.

Section 7. Amends s. 957.16, F.S., relating to expanding capacity.

Section 8. Amends s. 287.042, F.S., relating to powers, duties, and functions.

Section 9. Amends s. 945.215, F.S., relating to inmate welfare and employee benefit trust funds.

Section 10. Provides an effective date of July 1, 2017.

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<sup>30</sup> Office of Program Policy Analysis and Government Accountability, No. 96-46, *Follow-Up Report on the Inmate Welfare Trust Fund and Institution-Based Accounts Administered by the Department of Corrections*, at 1 (“1997 OPPAGA Report”), Feb. 7, 1997, available at <http://www.oppaga.state.fl.us/reports/pdf/9646rpt.pdf> (last viewed Mar. 24, 2017).

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues: Currently, DMS maintains an Operating Trust Fund which contains funds to be used for the purpose of major maintenance and repair of private prisons. These funds would need to be transferred to FDC Administrative Trust Fund to be used for the same purpose.<sup>31</sup>
2. Expenditures: For the Fiscal Year 2016-17, DMS was appropriated \$2,762,402, which included 14 full-time employee (FTE) positions, for private prison monitoring operations. Specifically, DMS reports that approximately \$1.26 million was appropriated for private prison monitoring bureau administration and support and \$1.5 million in Trust Fund spending authority for maintenance and repairs.<sup>32</sup> If the private prison system is transferred from DMS to FDC, FDC estimates the transfer will result in an estimated savings of \$228,021 to the state and eliminate the need for four FTEs.<sup>33</sup> The funds and full time employee positions currently appropriated to DMS for private prison monitoring would need to be transferred to FDC.

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues: The bill does not appear to have a fiscal impact on local government revenues.
2. Expenditures: The bill does not appear to have a fiscal impact on local government expenditures.

### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR: None.

### D. FISCAL COMMENTS: None.

## III. COMMENTS

### A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision: The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, or reduce the percentage of state tax shared with counties or municipalities.

2. Other: None.

### B. RULE-MAKING AUTHORITY: The bill does not appear to create a need for rulemaking or rulemaking authority.

### C. DRAFTING ISSUES OR OTHER COMMENTS: Section 20.06, F.S., requires the executive branch of state government to be reorganized by transferring the specified agencies, programs, and functions to other departments, commissions, or offices. This process may be accomplished by either a type one

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<sup>31</sup> 2017 FDC Agency Analysis, at 4, *supra* note 19.

<sup>32</sup> 2017 DMS Agency Analysis, at 3, *supra* note 20.

<sup>33</sup> 2017 FDC Agency Analysis, at 4, *supra* note 19.

transfer, or a type two transfer. A type one transfer is the transferring intact of an existing agency or department so that the agency or department becomes a unit of another agency or department. A type two transfer is the merging into another agency or department of an existing agency or department, or program, activity, or function thereof. The bill appears to require a type two transfer, as an existing function of DMS is being transferred to FDC.

#### **IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

N/A