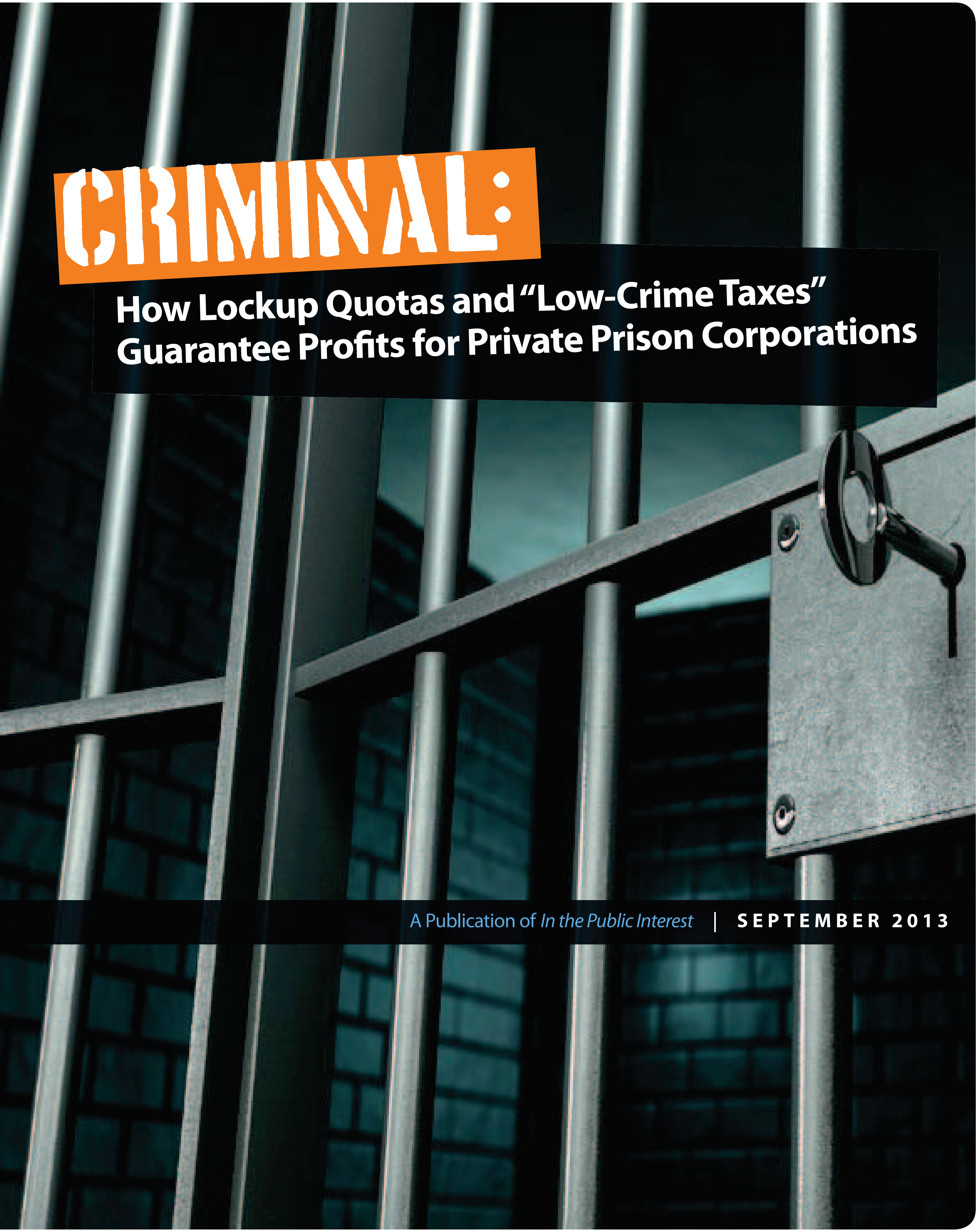
CRIMINAL:

How Lockup Quotas and "Low-Crime Taxes" Guarantee Profits for Private Prison Corporations



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Major Findings

- **65 percent of the private prison contracts** ITPI received and analyzed included occupancy guarantees in the form of quotas or required payments for empty prison cells (a "low-crime tax"). These quotas and low-crime taxes put taxpayers on the hook for guaranteeing profits for private prison corporations.
- **Occupancy guarantee clauses** in private prison contracts range between 80% and 100%, with 90% as the most frequent occupancy guarantee requirement.
- **Arizona, Louisiana, Oklahoma and Virginia** are locked in contracts with the highest occupancy guarantee requirements, with all quotas requiring between 95% and 100% occupancy.

State-specific Findings:

- **Colorado:** Though crime has dropped by a third in the past decade, an occupancy requirement covering three for-profit prisons has forced taxpayers to pay an additional $2 million.
- **Arizona:** Three Arizona for-profit prison contracts have a staggering 100% quota, even though a 2012 analysis from Tucson Citizen shows that the company's per-day charge for each prisoner has increased an average of 13.9% over the life of the contracts.
- **Ohio:** A 20-year deal to privately operate the Lake Erie Correctional Institution includes a 90% quota, and has contributed to cutting corners on safety, including overcrowding, areas without secure doors and an increase in crime both inside the prison and the surrounding community.

Introduction

In 2012, Corrections Corporation of America (CCA), the largest for-profit private prison company in the country, sent a letter to 48 state governors offering to buy their public prisons. CCA offered to buy and operate a state's prison in exchange for a 20-year contract, which would include a 90 percent occupancy rate guarantee for the entire term.[1] Essentially, the state would have to guarantee that its prison would be 90 percent filled for the next 20 years (a quota), or pay the company for unused prison beds if the number of inmates dipped below 90 percent capacity at any point during the contract term (a "low-crime tax" that essentially penalizes taxpayers when prison incarceration rates fall). Fortunately, no state took CCA up on its outrageous offer. But many private prison companies have been successful at inserting occupancy guarantee provisions into prison privatization contracts, requiring states to maintain high occupancy levels in their private prisons.

For example, three privately-run prisons in Arizona are governed by contracts that contain 100 percent inmate quotas.[2] The state of Arizona is contractually obligated to keep these prisons filled to 100 percent capacity, or pay the private company for any unused beds.

These contract clauses incentivize keeping prison beds filled, which runs counter to many states' public policy goals of reducing the prison population and increasing efforts for inmate rehabilitation. When policymakers received the 2012 CCA letter, some worried the terms of CCA's offer would encourage criminal justice officials to seek harsher sentences to maintain the occupancy rates required by a contract.[3] Policy decisions should be based on creating and maintaining a just criminal justice system that protects the public interest, not ensuring corporate profits.

Bed guarantee provisions are also costly for state and local governments. As examples in the report show, these clauses can force corrections departments to pay thousands, sometimes millions, for unused beds — a "low-crime tax" that penalizes taxpayers when they achieve what should be a desired goal of lower incarceration rates. The private prison industry often claims that prison privatization saves states money. Numerous studies and audits have shown these claims of cost savings to be illusory[4], and bed occupancy requirements are one way that private prison companies lock in inflated costs after the contract is signed.

"You don't want a prison system operating with the goal of maximizing profits…The only thing worse is that this seeks to take advantage of some states' troubled financial position."

— TEXAS STATE SEN. JOHN WHITMIRE
in response to the CCA letter

1 Chris Kirkham, "Private Prison Corporation Offers Cash in Exchange for State Prisons," Huffington Post, February 14, 2012. http://www.huffingtonpost.com/2012/02/14/private-prisons-buying-state-prisons_n_1272143.html

2 American Friends Service Committee of Arizona, Cell-Out Arizona Exclusive, "Part II: Arizona For-Profit Prison Costs Rose 14%; Now Guarantee 100% Occupancy," August 3, 2012. http://tucsoncitizen.com/cell-out-arizona/2012/08/03/cell-out-arizona-exclusive-part-ii-arizona-for-profit-prison-costs-rose14-now-guarantee-100-occupancy/

3 Kevin Johnson, "Private purchasing of prisons locks in occupancy rates," March 8, 2012. http://usatoday30.usatoday.com/news/nation/story/2012-03-01/buying-prisons-require-high-occupancy/53402894/1

4 A Sept. 2010 report by Arizona's Office of the Auditor General found that privately-operated prisons housing minimum-security state prisoners actually cost $.33 per diem more than state prisons ($46.81 per diem in state prisons vs. $47.14 in private prisons), while private prisons that house medium-security state prisoners cost $7.76 per diem more than state facilities ($48.13 per diem in state prisons vs. $55.89 in private prisons), after adjusting for comparable costs. See: http://www.azauditor.gov/Reports/State_Agencies/Agencies/Corrections_Department_of/Performance/10-08/10-08.pdf

This Report

This report will discuss the use of prison bed occupancy guarantee clauses in prison privatization contracts and explore how bed occupancy guarantees undermine criminal justice policy and democratic, accountable government. Section 1 explains the for-profit private prison industry's reliance on high prison populations, and how these occupancy guarantee provisions directly benefit its bottom line. Section 2 discusses the prevalence of bed guarantee clauses, drawing on a set of contracts that ITPI obtained through state open records requests. Section 3 describes how occupancy guarantees have harmed states, focusing on the experiences of Arizona, Colorado, and Ohio — three states that have agreed to these provisions to detrimental consequences. Lastly, Section 4 will discuss our recommendation that governments can and should reject prison occupancy guarantees.

SECTION 1:
Why quotas are important to the for-profit private prison company business model

The private prison industry has promoted policies and practices that increase the number of people who enter and stay in prison. It is no surprise that the two major private prison companies, CCA and GEO Group, have had a hand in shaping and pushing for criminal justice policies such as mandatory minimum sentences that favor increased incarceration. In the past, they have supported laws like California's three-strikes law, and policies aimed at continuing the War on Drugs.[5] More recently, in an effort to increase the number of detainees in privately-run federal immigration detention centers, they contributed to legislation, like Arizona Senate Bill 1070, requiring law enforcement to arrest anyone who cannot prove they entered the country legally when asked.[6] The industry's reliance on a harsh criminal justice system is summed up in a statement from CCA's 2010 annual report: *"The demand for our facilities and services could be adversely affected by the relaxation of enforcement efforts, leniency in conviction or parole standards and sentencing practices or through the decriminalization of certain activities that are currently proscribed by our criminal laws."*[7]

> *"Historically, we have been successful in substantially filling our inventory of available beds and the beds that we have constructed. Filling these available beds would provide substantial growth in revenues, cash flow, and earnings per share."*
>
> — CCA 2010 Annual Report

[5] Dina Rasor, "Prison Industries: Don't Let Society Improve or We Lost Business," Truthout, April 26, 2013. https://truth-out.org/news/item/8731-prison-industries-dont-let-society-improve-or-we-lose-business-part-i

[6] Laura Sullivan, "Prison Economics Help Drive Ariz. Immigration Law," National Public Radio, October 28, 2010. http://www.npr.org/2010/10/28/130833741/prison-economics-help-drive-ariz-immigration-law

[7] CCA's 2010 Annual Report on Form 10-K

These companies also spend large amounts of money to lobby federal and state lawmakers to advance policies that protect their bottom line and keep pro-privatization lawmakers in office. The Center for Responsive Politics reports that CCA spent $17.4 million in lobbying expenditures from 2002 through 2012,[8] while GEO Group spent $2.5 million from 2004 to 2012.[9] Similarly, CCA spent $1.9 million in political contributions from 2003 to 2012,[10] and Geo Group spent $2.9 million during the same time period.[11]

While the for-profit prison industry works hard to ensure harsh criminal laws and elect policymakers that support its agenda, bed guarantee contract provisions are an even more direct way that private prison companies ensure that prison beds are filled. These companies rely on occupancy guarantee clauses in government contracts to guarantee profits and reduce their financial risk, since the ability of private prison companies to ensure prison beds are filled generates steady revenues. These contract requirements are an important tool in private prison corporations' efforts to maximize profits. Private prison companies have negotiated these clauses in both older existing contracts and newer amendments. They have even lobbied lawmakers to impose bed guarantees on prison facilities, as the below example from Colorado shows. Private prison companies make no secret that high occupancy rates are critical to the success of their business. During a 2013 first quarter conference call, GEO Group boasted that the company continues to have "solid occupancy rates in mid to high 90s."[12]

By contractually requiring states to guarantee payment for a large percentage of prison beds, the prison companies are able to protect themselves against fluctuations in the prison population. These provisions guarantee prison companies a consistent and regular revenue stream, insulating them from ordinary business risks. The financial risks are borne by the public, while the private corporations are guaranteed profits from taxpayer dollars.

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8 Center for Responsive Politics, http://www.opensecrets.org/lobby/clientsum.php?id=D000021940&year=2002

9 Center for Responsive Politics, http://www.opensecrets.org/lobby/clientsum.php?id=D000022003&year=2004

10 National Institute on Money in State Politics, http://www.followthemoney.org/database/topcontributor.phtml?u=695&y=0

11 National Institute on Money in State Politics, http://www.followthemoney.org/database/topcontributor.phtml?u=1096&y=0

12 Nicole Flatow, "Private Prison Profits Skyrocket, As Executives Assure Investors Of 'Growing Offender Population,'" Think Progress, May 9, 2013. http://thinkprogress.org/justice/2013/05/09/1990331/private-prison-profits-skyrocket-as-executives-assure-investors-of-growing-offender-population/

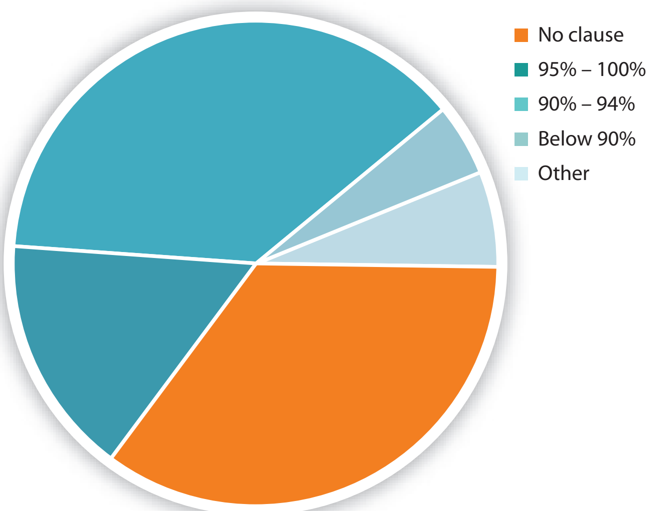
SECTION 2:

The Prevalence of Quotas in Contracts

To understand the prevalence of prison occupancy guarantee provisions in prison privatization contracts, In the Public Interest (ITPI) analyzed numerous contracts between states and local jurisdictions and private prison companies. ITPI identified 77 county and state-level private facilities nationwide and collected and analyzed 62 contracts from these facilities. These contracts each relate to the operation of an individual facility within the state or locality. The contracts that we collected were either given to us by state-level organizations that already had the contracts in their possession, or we utilized the open records request process with state and local governments. ITPI is currently following up with states to collect additional information.

Of the contracts that we reviewed, 41 (65 percent) contained quotas. These occupancy requirements were between 80 percent and 100 percent, with many around 90 percent. The highest bed guarantee requirements were from Arizona, Louisiana, Oklahoma, and Virginia. As mentioned above, Arizona has three contracts that contain 100 percent occupancy guarantee clauses. Oklahoma has three contracts with a 98 percent occupancy guarantee provision, while a couple of Louisiana's contracts contain occupancy requirements at 96 percent, and Virginia has one at 95 percent. All major prison companies, CCA, GEO Group, and Management and Training Corporation (MTC), have been successful in negotiating prison quotas in contracts.

Occupancy Guarantee Provision



Interestingly, prison companies have also been successful at winning bed guarantee promises even after a contract that contains no such provision is executed. Many of these bed guarantee clauses were added after the initial contract was signed, usually in a contract amendment. This is consistent with the prison industry's approach to revenue growth. In CCA's 2010 Annual Report, the company explicitly cites "enhancing the terms of our existing contracts" as one of the approaches it uses to develop its business.[13] Additionally, bed guarantee clauses may be imposed completely outside the contracting process. As discussed in more detail in the next section, CCA was able to insert a bed guarantee requirement for private facilities into the Colorado fiscal year 2013 state budget, completely circumventing the contract amendment process.[14] The percentage of facilities that actually have bed guarantee requirements may be higher than an analysis of their contracts alone indicate.

[13] CCA's 2010 Annual Report on Form 10-K, page 10

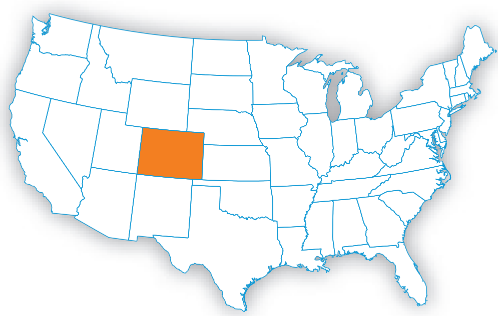
[14] Colorado WINS, "Imprisoned by Profit: Breaking Colorado's Dependency on For-Profit Prisons, February, 27, 2013. http://coloradowins.org/2013/02/27/imprisoned-by-profit-breaking-colorados-dependence-on-for-profit-prisons/

SECTION 3:

Impacts of Prison Quotas

Bed guarantee clauses can have measureable impacts on a state's criminal justice policy, the state budget, the functioning of a specific facility, and the community. This section focuses on the experiences of Colorado, Arizona, and Ohio and describes the specific impacts that bed guarantee clauses have had on their states. All three states have prison facilities operated by private prison companies with occupancy guarantees in their contracts, and all three states have suffered detrimental consequences as a result.

Colorado



Colorado has experienced a sizable reduction in its prison population. In the past decade, the crime rate has dropped by a third, and since 2009, five prisons have been closed. The state projects that two to ten additional prisons could close in the near future, depending on the size of the facilities chosen.[15] This decrease in prison population propelled CCA, which operates three private prisons in the state, to take action. Last year, CCA negotiated the insertion of a bed guarantee provision in the state budget for all three of its facilities for the 2013 fiscal year. Even though all three contracts for these facilities include explicit language specifying that "the state does not guarantee any minimum number of offenders will be assigned to the contractors' facility," the company was able to circumvent the contracting process and mandate occupancy guarantees long after the contract was negotiated and signed.

In 2012, the state began a utilization study to analyze which facilities made the most sense to close, but did not want any to shut down any facilities until the formal analysis was complete. In response to these preliminary discussions, CCA threatened to close one of its private facilities. Behind closed doors and without any public hearings, CCA and the Governor's Office and the Joint Budget Committee negotiated a deal.[16] In exchange for keeping the facility open, the state agreed to a bed guarantee, which required Colorado to keep at least 3,300 prisoners in the three CCA facilities, at an annual rate of $20,000 per inmate for the 2013 fiscal year.[17]

Instead of using empty bed space in its state-run facilities, the Colorado Department of Corrections housed inmates in CCA's facilities to ensure they met the occupancy requirement. Colorado taxpayers must pay for the vacant state prison beds and for the per diem rate for inmates redirected to the CCA facility to fulfill the bed guarantee.[18] The Colorado Criminal Justice Reform Coalition estimates that the deal cost the state at least $2 million.[19] The Colorado Springs Gazette notes that the figure could be even higher. As of March 2013, the state already had 1,000 empty beds in various state prisons and that number was projected to increase by almost 100 beds per month.[20] Legislators predicted that the inmate

15 Ann Imse, "State pays millions as prison populations sink," Colorado Springs Gazette, March 9, 2013. http://gazette.com/state-pays-millions-as-prison-populations-sink/article/152065

16 Ibid.

17 Ibid.

18 Colorado Criminal Justice Reform Coalition, "Prison population update and overview," December 3, 2012.

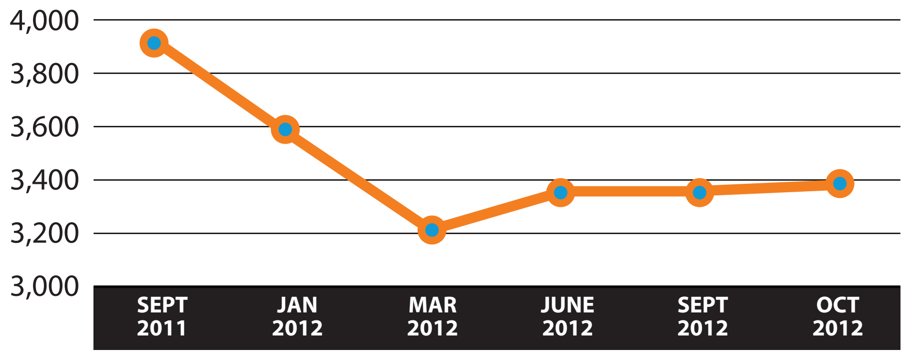
19 Ann Imse, "State pays millions as prison populations sink," Colorado Springs Gazette, March 9, 2013. http://gazette.com/state-pays-millions-as-prison-populations-sink/article/152065

20 Ann Imse, "State pays millions as prison populations sink," Colorado Springs Gazette, March 9, 2013. http://gazette.com/state-pays-millions-as-prison-populations-sink/article/152065

population would drop between 160 to 1,256 people by June 2013, but by February 2013, the total had already fallen by 1,700 inmates.[21] The occupancy requirement not only ensured that CCA continued to receive a guaranteed level of revenue each month despite the decrease in inmates, but also had the effect of diverting inmates away from available public prison beds. Colorado originally intended its private prisons to be used for overflow purposes, but the bed guarantee provisions allowed it to become the first priority for placement.

The below chart shows how the inmate population in CCA facilities decreased as state prison population also decreased until 2012, when the CCA inmate population increased, as a result of the bed guarantee deal.

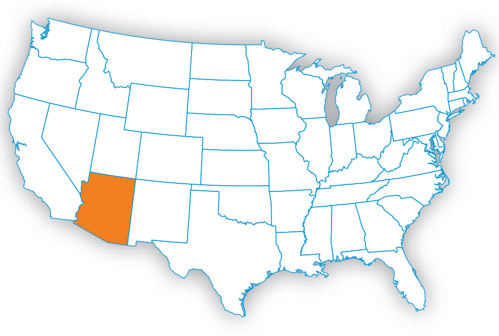
CCA Colorado Total Inmate Population



Source: Colorado Criminal Justice Reform Coalition, CO DOC monthly population reports

Arizona

100% Bed Guarantees at Three Facilities



Private prison companies were successful in inserting the highest prison bed guarantee into contract amendments for the three oldest private prison facilities in Arizona: Arizona State Prison – Phoenix West and Arizona State Prison — Florence West, both operated by the GEO group; and the Marana Community Correctional Treatment Facility, operated by Management and Training Corporation (MTC). All three contracts require the state to fill or compensate the company for every available bed. The bed guarantee provisions were the result of an agreement between the Arizona Department of Corrections (ADC) and the private prison companies in 2008. In this "deal," the corporations agreed to lower rates for emergency beds meant to temporarily house an overflow of prisoners, in exchange for the state accepting a 100 percent occupancy guarantee for all regularly-rated beds in all three facilities. Even with the addition of the 100 percent bed guarantee clauses, an August 2012 analysis from Tucson Citizen shows that the per-prisoner, per-day rates for the three facilities have increased by an average of 13.9 percent since the contracts were first awarded. [22]

[21] Ann Imse, "State pays millions as prison populations sink," Colorado Springs Gazette, March 9, 2013. http://gazette.com/state-pays-millions-as-prison-populations-sink/article/152065

[22] American Friends Service Committee of Arizona, Cell-Out Arizona Exclusive, "Part II: Arizona For-Profit Prison Costs Rose 14%; Now Guarantee 100% Occupancy," August 3, 2012. http://tucsoncitizen.com/cell-out-arizona/2012/08/03/cell-out-arizona-exclusive-part-ii-arizona-for-profit-prison-costs-rose14-now-guarantee-100-occupancy/

The details of the contract for the Marana facility reveal an even worse deal for Arizona taxpayers. Amendment 14, signed in June 2011, refers to a dispute between ADC and private prison company, MTC, in which the company claimed that the 5-year contract renewal was not performed in a timely manner. ADC maintained it was. The settlement for this dispute included ADC paying the company for 500 beds, including 50 which were identified as reduced-rate emergency beds, at the full per diem rate with the 100 percent guaranteed occupancy requirement. Incredibly, this agreement was applied retroactively, effectively erasing all but three months of the reduced rate for the emergency beds. The settlement results in an additional $2,659,390 in revenue to MTC through the remainder of the contract, which expires in October 2013.[23]

Despite MTC's guaranteed revenue, the Marana facility has been plagued by safety problems. In a security review in August 2010, state inspectors found broken security cameras, swamp coolers out of commission, insecure doors and windows on housing units, inadequate perimeter lighting, and broken control panels that failed to alert staff when inmates opened exterior doors. When inspectors returned in March 2011 to perform the annual audit, problems persisted, including broken security cameras and control panels.[24]

Arizona State Prison — Kingman

The Kingman facility, a prison with a 97 percent bed guarantee clause, has been troubled with pervasive safety issues, ultimately leading to the escape of three prisoners in July 2010 and the murder of a New Mexico couple. Among the security issues identified at the MTC-operated facility that allowed for the escape were: a broken alarm, burned-out perimeter lights, broken security equipment, and a lackadaisical approach to safety by the private prison staff, including ignoring alarms, leaving their patrol posts, and leaving doors open and unwatched.[25] After the escape, the state pulled 238 high-risk prisoners out of the facility and refused to send any additional prisoners to Kingman until MTC fixed the identified problems. It took MTC eleven months to address the issues, during which time ADC refused to pay the 97 percent bed guarantee. In January 2011, MTC filed a claim against ADC, complaining about the decrease in profits caused by the state's refusal to cover the empty beds. They asked for nearly $10 million to cover their losses. In another poor deal for Arizonans, ADC agreed to return to paying the 97 percent rate on May 1, 2011, even though the empty beds would not yet be filled, in exchange for MTC dropping its claim. ADC ended up paying over $3 million for the empty beds.[26]

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23 American Friends Service Committee of Arizona, Cell-Out Arizona Exclusive, "Part II: Arizona For-Profit Prison Costs Rose 14%; Now Guarantee 100% Occupancy," August 3, 2012. http://tucsoncitizen.com/cell-out-arizona/2012/08/03/cell-out-arizona-exclusive-part-ii-arizona-for-profit-prison-costs-rose14-now-guarantee-100-occupancy/.

24 Bob Ortega, "2010 escape at Kingman an issue for MTC's bid," The Arizona Republic, August 11, 2011. http://www.azcentral.com/news/articles/2011/08/11/20110811MTC-bid-issue-2010-escape-at-kingman.html

25 Bob Ortega, "Arizona prisons slow to fix flaws in wake of Kingman escape," The Arizona Republic, June 26, 2011. http://www.azcentral.com/news/articles/2011/06/26/20110626arizona-prison-safety-improvements.html

26 Bob Ortega, "Arizona prison oversight lacking for private facilities: state weighs expansion even as costs run high," The Arizona Republic, August 7 ,2011. http://www.azcentral.com/news/articles/20110807arizona-prison-private-oversight.html

Ohio

Ohio's experiences with prison privatization are plagued with stories of mismanagement, violence, and unexpected costs. Though crime rates in the state have been decreasing, the private prison industry continues to ensure that prisons remain as full as possible. In both the Lake Erie Correctional Institution and the North Coast Correctional Treatment Facility, bed guarantees have helped protect the private prison industry's profits.

Lake Erie Correctional Institution

The 2011 sale of the Lake Erie Correctional Institution in Conneaut, Ohio, to CCA was lauded by the private prison industry as an innovative cost-cutting move that would save the state of Ohio money, while improving the quality of services provided to inmates. A look at prison operations after the sale tells a very different story.

Bundled with the sale of the facility was a 20-year contract between the Ohio Department of Rehabilitation and Correction and CCA for operation of the prison. This contract includes a 90 percent bed guarantee clause, which holds Ohio, and ultimately its taxpayers, accountable for ensuring that 1,530 of the 1,700 available beds in the prison are occupied, or for compensating for unused beds. After purchasing the prison, CCA squeezed in an additional 300 beds, even converting an area where prisoner re-entry classes were held into sleeping space.[27] A November 2012 government audit found that the addition of the 300 beds brought the facility out of compliance with minimum square footage per inmate requirements.[28] The high occupancy requirement, especially when applied to a facility not originally designed for the additional 300 converted beds, has contributed to overcrowding, and the deplorable conditions and safety issues that persist in the facility. [29]

Multiple examples of unacceptable living conditions are described in a troubling government audit from September 2012.[30] The report describes a chronically overcrowded facility, with numerous cases of triple bunking, cramming three inmates into a cell designed for two, which left inmates sleeping on the floor, some without mattresses. Recreation areas without secure doors were used for housing inmates and minimum square footage per inmate requirements were not observed. Numerous other health and safety conditions were noted in the audit as well. The overcrowding and mismanagement of the Lake Erie Correctional Institution has led to numerous safety issues, including a rise in violent incidents and disturbances. Both staff and inmates interviewed for the audit reported that personal safety was at risk, and that "assaults, fights, disturbances, and uses of force have all increased in comparison to prior years."[31] Even the city of Conneaut has seen increased crime related to the issues at the prison, as drugs and other contraband materials thrown

27 Chris Kirkham, "Lake Erie Prison Plagued by Violence and Drugs After Corporate Takeover," Huffington Post, March 22, 2013. http://www.huffingtonpost.com/2013/03/22/lake-erie-prison-violence_n_2925151.html

28 Ohio Department of Rehabilitation and Correction, 2012 Full Internal Management Audit Report, September 25, 2012. http://www.inthepublicinterest.org/sites/default/files/prison-audit-report%20OHIO.pdf

29 The ACLU Ohio continues to monitor the conditions at the Lake Erie Correctional Institution. In May 2013, they released a timeline chronicling problems at the facility, which can be found at http://www.acluohio.org/crisis-in-conneaut-timeline.

30 Ohio Department of Rehabilitation and Correction, LaECI Audit Reinspection, November 15, 2012. http://big.assets.huffingtonpost.com/ccareinspection.pdf

31 Gregory Geisler, Correctional Institution Inspection Committee Report on the Inspection and Evaluation of the Lake Erin Correctional Institution, January 22-23, 2013. http://big.assets.huffingtonpost.com/lakeeriereport.pdf

over the fence for inmates to retrieve have been reported.[32] The occupancy requirement not only creates perverse incentives to encourage the facility to keep as many "heads in beds," but does so at the expense of the health and safety of the inmates and the larger Conneaut community.

North Coast Correctional Treatment Facility

The privatization experiment at the North Coast Correctional Treatment Facility in Grafton, Ohio also suffered as a result of bed guarantee requirements in its contract. In a 2000 contract between the OHDRC and the private prison company CiviGenics (now part of private prison company Community Education Centers), a 95 percent bed guarantee risked the safety of the facility. Originally intended to house primarily drunk-driving offenders, the bed guarantee ensured that even if the state of Ohio did not convict 665 persons of felony drunk driving offenses, they would pay CiviGenics for that level of operation in their 700-person facility. In an effort to fill North Coast to 95 percent capacity, the state sent inmates who had been convicted of more serious crimes, including sexual battery, assault, arson, manslaughter, and robbery, when it could not fill the facility with drunken-driving offenders.[33] The facility, designed to hold only felony drunken-driving and nonviolent drug offenders, was not properly equipped for these changes in the inmate population, and the facility suffered from riots, safety problems, and other contract violations, as well as unstable staffing, including four different people serving as warden.[34] Ultimately, the contract was taken from CiviGenics and given to another private prison company, Management Training Corporation, and later combined with the Grafton Correctional Institution and returned to public control.

As the three case studies show, these small contract clauses can have enormous ramifications. Bed guarantee clauses bind the state to pay for beds that they may not need or use at the time of contract signing or at any point in the future. Some prison contracts last for up to 20 years. It is virtually impossible for states to predict prison population trends for a few years forward, let alone decades into the future. The state loses flexibility to deal with changing circumstances that a public facility would afford. Furthermore, states may enact policies or engage in practices that keep prison facilities full, in an effort to fulfill bed occupancy guarantees. As the Ohio experience above shows, this can lead to facilities holding more dangerous inmates than they are designed to house. Or prisons may be filled beyond capacity, leaving a facility overcrowded and a breeding ground for violence. The cities in which these facilities are located may feel the effects of the increased violence, as drug use and gang activity overtake prisons and seep into the community.

If the state decides not to keep prison beds filled, bed guarantee clauses can wreak havoc on state budgets. Numerous examples show that these provisions can cost states millions of dollars. At a time when government budgets are shrinking, cities and states cannot afford the financial risk of prison privatization. In the long-term, governments, taxpayers, and communities cannot afford the damage that these provisions cause to the very foundations of our criminal justice system.

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32 Chris Kirkham, "Lake Erie Prison Plagued by Violence and Drugs After Corporate Takeover," Huffington Post, March 22, 2013. http://www.huffingtonpost.com/2013/03/22/lake-erie-prison-violence_n_2925151.html

33 ACLU Ohio, "Prisons for Profit: A Look at Prison Privatization." http://www.acluohio.org/assets/issues/CriminalJustice/PrisonsForProfit2011_04.pdf

34 Policy Matters Ohio, "Selective Celling: Inmate Population in Ohio's Private Prisons" May 2001. http://www.policymattersohio.org/selective-celling-inmate-population-in-ohios-private-prisons

SECTION 4:
Recommendations

Bed guarantee clauses can have broad negative implications for government entities, even beyond obvious financial concerns. As discussed in the report., these clauses can result in dangerously unsafe conditions, and tie the hands of lawmakers and correctional agencies. Our analysis leads to one clear conclusion: bed guarantee clauses should be prohibited in any private prison contract. We offer the following recommendations on ways to avoid the pitfalls that come with bed guarantees.

Governments Can and Should Reject Bed Guarantee Clauses

As ITPI's analysis shows, there are a number of private prison contracts without bed guarantee clauses. In our review of many Texas private prison contracts, we found that no contract contained a bed guarantee clause. The state's contracts with private prisons specifically state that the payment schedule is based on occupancy levels determined by the official count of the number of inmates who are present at the facility at the end of each day calculated at midnight (what Texas refers to as the "The Midnight Strength Report"). State and local governments should not agree to bed guarantee provisions during the initial contract signing or any subsequent amendment. Instead payments to the contractor should be based on the actual daily count of the number of inmates housed in a facility. Enacting state legislation that prohibits occupancy guarantee clauses allows the government contracting agency to take the discussion of these provisions out of the negotiating process, and reject them based on state law.

Prison occupancy quotas require the government to spend public dollars on housing and supervision of a certain number of inmates, whether a prison is empty or full. With governmental priorities pulling public funds in so many different directions, it makes no financial sense for taxpayers to fund empty prison beds. From a financial standpoint, bed guarantee clauses are insupportable for government entities.

Private prison companies often attempt to lure governments into agreements with bed guarantee clauses by promising a lower per diem cost. However, bed guarantees do not secure jurisdictions lower per diem rates, as evidenced by Arizona's experience of per diem rates rising 13.9 percent even after the bed guarantee was added to the contracts.[35] With better understanding of the per diem rates in private prison contracts in similar facilities in other jurisdictions, governments can negotiate reasonable per diem rates without resorting to bed guarantees.

Bed guarantee clauses can also tie the hands of lawmakers. If lawmakers determine that there are more effective ways of dealing with specific criminal offenses than prison time, bed guarantee clauses may restrict their options. If lawmakers pass rules that have the effect of decreasing the prison population, if law enforcement officials take action that results in a reduced prison population, or if the crime rate simply drops, the government might be responsible for funding empty prison beds. In the words of Roger Werholtz, former Kansas secretary of corrections, "My concern would be that our state would be obligated to maintain these (occupancy) rates and subtle pressure would be applied to make sentencing laws more severe with a clear intent to drive up the population."[36]

Furthermore, private corporations interested in running public prisons should be forced to run a competitive business in

[35] American Friends Service Committee of Arizona, Cell-Out Arizona Exclusive, "Part II: Arizona For-Profit Prison Costs Rose 14%; Now Guarantee 100% Occupancy," August 3, 2012. http://tucsoncitizen.com/cell-out-arizona/2012/08/03/cell-out-arizona-exclusive-part-ii-arizona-for-profit-prison-costs-rose14-now-guarantee-100-occupancy/

[36] Kevin Johnson, "Private purchasing of prisons locks in occupancy rates," March 8, 2012. http://usatoday30.usatoday.com/news/nation/story/2012-03-01/buying-prisons-require-high-occupancy/53402894/1

the open market. When entering a contract to operate a prison, a private company should be required to take on some risk. If the company fails to perform well, a bed guarantee clause should not serve as the company's financial safety net. In many cases, private prison beds were intended to be a safety valve to address demand that exceeded public capacity. It was never intended that taxpayers would be the safety valve to ensure private prison companies' profits.

Elimination of bed guarantee clauses will allow lawmakers to enact policies that are in the public interest, not in a private prison corporation's financial interest. Corrections agencies should not be forced to direct prisoners to certain private facilities because of bed guarantee clauses. Criminal justice policy and programs should be guided by our public goals, such as reducing the number of people in prison. Rejecting bed guarantee clauses allows public officials to make the best decisions in the public's interest.

For additional information about public interest protections in prison privatization contracts, please see In the Public Interest's October 2012 publication titled "Essential Public Interest Protections for Prison Privatization Contracts" at: http://www.inthepublicinterest.org/sites/default/files/Prison_Privatization_FINAL.pdf.

In the Public Interest also recently released a set of legislative proposals, called the Taxpayer Empowerment Agenda. Among other important responsible contracting provisions, this agenda encourages lawmakers to ban contract language that guarantees company profits, including provisions such as occupancy guarantees. You can find the full Taxpayer Empowerment Agenda at: http://www.inthepublicinterest.org/sites/default/files/ITPI-The-Taxpayer-Empowerment-Agenda.pdf.

Appendix

The below chart documents the privatized facilities identified by In the Public Interest, and includes information about which contracts ITPI received and which contracts contained occupancy guarantee clauses.

Facility	Company	Location	Customer	Have Contract?	Expiration Date (if known)	Occupancy Guarantee?
Hudson Correctional Facility	GEO	Hudson, CO	AK	Current	September 2013	Section 4.01 — 80% with exceptions for ramp-up or ramp-down or transportation dates
Arizona State Prison — Florence West	GEO	Florence, AZ	AZ		October 2017	100%
Arizona State Prison — Phoenix West	GEO	Phoenix, AZ	AZ	Current	July 2017	Amendments 7, 9, 11: 100% for emergency/ temporary beds
Central Arizona Correctional Facility	GEO	Florence, AZ	AZ		December 2016	
Arizona State Prison — Kingman	MTC	Kingman, AZ	AZ	Current		97% according to AFSC AZ, Amendment 2 — 90%
Marana Community Correctional Treatment Facility	MTC	Marana, AZ	AZ	Current		Amendment 9 — 100% for specified period
La Palma Correctional Center	CCA	Eloy, AZ	CA	Current	June 2013	Section 3.01 — 90%
North Fork Correctional Facility	CCA	Sayre, OK	CA	Current	June 2013	Section 3.01 — 90%
Tallahatchie County Correctional Facility	CCA	Tutwiler, MS	CA	Current	June 2013	Section 3.01 — 90%
Central Valley Modified Community Correctional Facility	GEO	McFarland, CA	CA	2012		Exhibit 6.14, Amendment 9 — 90%
Desert View Community Correctional Facility	GEO	Adelanto, CA	CA	2012		Exhibit A, G.7, Amendment 9 — 90%
Golden State Medium Community Correctional Facility	GEO	McFarland, CA	CA	Current	June 2016	Exhibit 6.14 — 90%
McFarland Community Correctional Facility	GEO	McFarland, CA	CA	2010		Exhibit B, 1.C — 70%
Red Rock Correctional Center	CCA	Eloy, AZ	CA/HI	Current CA portion	January 2024	Section 3.01 — 90%
Bent County Correctional Facility	CCA	Las Animas, CO	CO	Outdated	June 2013	Included in 2012/2013 budget, guarantee for 3,300 beds for all CCA facilities Contract: 2.1.1. "The State does not guarantee any minimum number of Offenders will be assigned to Contractor's Facility."
Crowley Correctional Facility	CCA	Olney Springs, CO	CO	Current	June 2013	Included in 2012/2013 budget, guarantee for 3,300 beds for all CCA facilities Contract: 2.1.1. "The State does not guarantee any minimum number of Offenders will be assigned to Contractor's Facility."
Correctional Treatment Facility	CCA	Washington, DC	DC			
Bay Correctional Facility	CCA	Panama City, FL	FL	Current	July 2013	p. 93, Section 7.1 — 90%
Graceville Correctional Facility	CCA	Graceville, FL	FL	Current	September 2013	Section 7.1 — 90%
Lake City Correctional Facility	CCA	Lake City, FL	FL	2009	Indefinite	Original contract, section 7 — 90%
Moore Haven Correctional Facility	CCA	Moore Haven, FL	FL	Current	July 2013	Section 7.1 — 90%
Citrus County Detention Facility	CCA	Lecanto, FL	Citrus County, FL	Current	September 2015	
Blackwater River Correctional Facility	GEO	Milton , FL	FL	Current	April 2013	Section 7.1 — 90%
South Bay Correctional Facility	GEO	South Bay, FL	FL	2009	July 2014	Article 7 — 90%
Gadsden Correctional Institution	MTC	Gadsden, FL	FL	Current		p. 98, 7.1 — 90%

continued

Facility	Company	Location	Customer	Have Contract?	Expiration Date (if known)	Occupancy Guarantee?
Coffee Correctional Facility	CCA	Nicholls, GA	GA	Current	June 2013	2011 amendment — 90%
Jenkins Correctional Center	CCA	Millen, GA	GA	Current		Original contract, p. 2, part 2B & 2013 amendment — 90%,
Wheeler Correctional Facility	CCA	Alamo, GA	GA	Current	June 2013	2011, 2012, 2013 amendments — 90%
Riverbend Correctional Facility	GEO	Milledgeville, GA	GA	Current	July 2013	Section — 90% guarantee
Saguaro Correctional Center	CCA	Eloy, AZ	HI		June 2014	
Idaho Correctional Center	CCA	Kuna, ID	ID	Current	June 2014	
Kit Carson Correctional Center	CCA	Burlington, CO	ID	Current	July 2014	Included in 2012-2013 budget, guarantee for 3,300 beds for all CCA facilities. Contract: 2.1.1. "The State does not guarantee any minimum number of Offenders will be assigned to Contractor's Facility."
Idaho Capp Facility	MTC	Kuna, ID	ID	Current		Section 3.2 — No guarantee for the first 6 months and then 80% (320/400 beds)
Marion County Jail II	CCA	Indianapolis, IN	IN		December 2017	
New Castle Correctional Facility	GEO	New Castle, IN	IN	Current	January 2015	Amendment 4 — 90%, also fixed monthly payments for annex
Plainfield Indiana STOP Facility	GEO	Plainfield, IN	IN	Current	March 2015	
Marion Adjustment Center	CCA	St. Mary, KY	KY		June 2013	
Winn Correctional Center	CCA	Winnfield, LA	LA	Current	June 2020	Section 3.1 — 96%
Allen Correctional Center	GEO	Kinder, LA	LA	Current	July 2020	Section 3.1 — 96%
Wilkinson County Correctional Facility	CCA	Woodville, MS	MS		June 2013	
East Mississippi Correctional Facility	MTC	Meridian, MS	MS			
Marshall County Correctional Facility	MTC	Holly Springs, MS	MS			
Walnut Grove Correctional Facility	MTC	Walnut Grove, MS	MS			
Crossroad Correctional Facility	CCA	Shelby, MT	MT		August 2013	
New Mexico Women's Correctional Facility	CCA	Grants, NM	NM	Current	June 2013	Section 4.1 — 580/611 (95%)
Guadalupe County Correctional Facility	GEO	Santa Rosa, NM	NM	Current		Section 4.1 — 90%
Lea County Correctional Facility	GEO	Hobbes, NM	NM	Current		Section 4.1 — 90%
Northeast New Mexico Detention Facility	GEO	Clayton, NM	NM	Current	August 2013	Daily credit for unoccupied beds during initial 60-day ramp-up period
Lake Erie Correctional Institution	CCA	Conneaut, OH	OH	Current	June 2032	Original contract w/ MTC, page 12 — 95%, more recent w/ CCA, noted in attachment 7, cost summary —90%
North Central Correctional Complex	MTC	Marion, OH	OH			
Cimarron Correctional Facility	CCA	Cushing, OK	OK	Current	June 2014	Original contract, Article 7, amndmt 5 & 6 — 98%
Davis Correctional Facility	CCA	Holdenville, OK	OK	Current	June 2014	Original contract, article 7, amndmts 5 & 6 — 98%
Lawton Correctional Facility	GEO	Lawton, OK	OK	Current	June 2013	Amendments 1 & 2, Article 7 — 98%

continued

Facility	Company	Location	Customer	Have Contract?	Expiration Date (if known)	Occupancy Guarantee?
Hardeman County Correctional Center	CCA	Whiteville, TN	TN		May 2015	
South Central Correctional Center	CCA	Clifton, TN	TN	2007		
Whiteville Correctional Facility	CCA	Whiteville, TN	TN		June 2016	
Metro-Davidson County Detention Facility	CCA	Nashville, TN	Davidson County, TN	Current	July 2014	Section 6.1 — 90%
Silverdale Detention Facilities	CCA	Chattanooga, TN	Hamilton County, TN			
Bartlett State Jail	CCA	Bartlett, TX	TX	Current	August 2013	
Bradshaw State Jail	CCA	Henderson, TX	TX	Current	August 2013	
Bridgeport Pre-Parole Transfer Facility	CCA	Bridgeport, TX	TX	Current	August 2013	
Dawson State Jail	CCA	Dallas, TX	TX	Current	August 2013	
Mineral Wells Pre-Parole Transfer Facility	CCA	Mineral Wells, TX	TX	Current	August 2013	
Willacy County State Jail	CCA	Raymondville, TX	TX	Current	August 2013	
Cleveland Correctional Center	GEO	Cleveland, TX	TX	Current	January 2014	
Lockhart Work Program Facility	GEO	Lockhart, TX	TX	2005	January 2013	
Lindsey State Jail	CCA	Jacksboro, TX	TX	Current	August 2013	
Billy Moore Correctional Center	MTC	Overton, TX	TX	Current		
Bridgeport Correctional Center	MTC	Bridgeport, TX	TX	Current		
Diboll Correctional Center	MTC	Diboll, TX	TX	2008		
East Texas Treatment Facility	MTC	Henderson, TX	TX	2005		
Kyle Correctional Center	MTC	Kyle, TX	TX	Current		
Sanders Estes Unit	MTC	Venus, TX	TX	2009		
South Texas Intermediate Sanction Facility	MTC	Houston, TX	TX	Current		
West Texas Intermediate Sanction Facility	MTC	Brownfield, TX	TX	Current		
Lawrenceville Correctional Center	GEO	Lawrenceville, VA	VA	Current		Original contract, Article.6.1.c —1495 out of 1500 beds, 95%
Lee Adjustment Center	CCA	Beattyville, KY	VT	Current	June 2013	

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