

IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT, IN AND
FOR LEON COUNTY, FLORIDA

JAMES BAIARDI, JOHN MCKENNA,
SHANEA MAYCOCK, and
FLORIDA POLICE BENEVOLENT
ASSOCIATION, INC.,

Plaintiffs,

CASE NO.: 2011 CA 1838

v.

KENNETH S. TUCKER, in his capacity
as THE SECRETARY OF THE FLORIDA
DEPARTMENT OF CORRECTIONS,

Defendant.

FINAL DECLARATORY AND INJUNCTIVE JUDGMENT

THIS CAUSE came on for hearing on September 29, 2011, on the parties' cross Motions for Summary Judgment. There are no disputed issues of fact and thus this Court need only address pure issues of law. The Court having considered the pleadings, evidence, written and oral arguments of the parties, and being otherwise fully advised in the premises, finds that there are no genuine issues of material fact, and further finds and rules as follows:

At the outset the Court makes clear that the issue before it is not whether the prisons in Florida may be privatized. The answer to that question is yes, and was already answered by the enactment of Section 944.105, Florida Statutes, which gives the Department of Corrections ("DOC") the authority to initiate and enter into contracts with private vendors for the operation and maintenance of correctional facilities and the supervision of inmates. Under existing substantive law, a specific legislative appropriation must be made for a proposed privatization contract after a decision to outsource is made and evaluated by DOC for feasibility, cost

effectiveness, and efficiency, before DOC proceeds with any outsourcing of services. See Florida Statutes Sections 944.105, 287.057(b)(1), 287.0571, 287.001, 216.023, 216.023(4)(a), and 216.023(4)(b) (2010).

The sole issue before this Court is whether the Legislature's use of the Appropriations Act to mandate that DOC privately contract for the operation and maintenance of some 29 existing state correctional facilities in South Florida is constitutional. Based on the record before it, this Court concludes that if it is the will of the Legislature to itself initiate privatization of Florida prisons, as opposed to DOC, the Legislature must do so by general law, rather than "using the hidden recesses of the General Appropriations Act." *Dickinson v. Stone*, 251 So.2d 268 at 273 (Fla. 1971).

General Appropriations Act, Chapter 2011-69, Section 4

The title to Ch. 2011-69 reads:

An act making appropriations; providing moneys for the annual period beginning July 1, 2011 and ending June 30, 2012, to pay salaries and other expenses, capital outlay-building, improvements and for other specified purposes of the various agencies of state government, providing an effective date.

The title does not indicate the appropriation act will change statutory processes or standards as a condition for privatizing state correctional facilities.

The Proviso contained in the General Appropriation Act, Chapter 2011-69 directs the department in pertinent part as follows:

From the funds in Specific Appropriations 570 through 759, the [DOC] shall issue a request for proposal [sic], or multiple requests for proposal [sic] ..., for the management and operation of the correctional facilities and assigned correctional units, including annexes, work camps, road prisons and work release centers currently operated by the [DOC] in Manatee, Hardee, Indian River, Okeechobee, Highlands, St. Lucie, DeSoto, Sarasota, Charlotte, Glades, Martin, Palm Beach, Hendry, Lee, Collier, Broward, Miami-Dade and Monroe counties ... The request for proposal [sic] shall provide for a contract commencement date of no later than

January 1, 2012 * * *

The proviso directs specific contract terms including performance measures, and then concludes:

If after engaging in the competitive solicitation process, the [DOC] determines that the process has yielded responses that meet all current statutory requirements, the [DOC] shall develop and remit a transition plan and recommended revisions to its operating budget to the Legislative Budget Commission by December 1, 2011. The [DOC] also must submit a cost-benefit analysis which delineates [its] current costs of providing the services and the savings that would be generated by the transition plan yielding a minimum actual savings of 7 percent. Upon approval by the commission, the [DOC] may award the contract. Additional budget amendments may be submitted during the 2011-12 fiscal year as necessary for the proper alignment of budget and positions.¹

Count I

The proviso, which mandates that DOC privatize numerous facilities in a single procurement, is unconstitutional under Art. III, Sections 6 and 12 of the Florida Constitution. The proviso changes the statutory process for privatizing prison facilities and directs DOC to replace state employees at particular prisons with private operators, and is not rationally related to the appropriations for DOC generally. *See Brown v. Firestone*, 382 So.2d 654, 663-64 (Fla. 1980) (appropriation provisos are invalid if they either alter substantive law or address subjects not directly and rationally related to the specific appropriation item or are not a major motivating factor for the appropriation). *See also Dickinson v. Stone*, 251 So.2d 268 (Fla. 1971) (a proviso transferring a data processing program from one state department to another was invalid, as changing substantive law that had assigned the data processing to the former department); *Dep't of Admin. v. Horne*, 269 So.2d 659, 662 (Fla. 1972) (the Legislature cannot, under the guise of an appropriation, insert designations that establish new agencies or projects incidental to the

¹ There is no dispute that if the Legislature makes the appropriation, DOC must enter into the contract for privatization.

appropriation, without the benefit of vital independent consideration by legislative committees and the general body as to the validity and need for such agencies that may extend beyond the fiscal year in question, noting that "such indirect enactment of law is contrary to our principles of representative government."); *Florida Defenders of Environment, Inc. v. Graham*, 481 So.2d 1196 (Fla. 1985) (a proviso to fund a land purchase without compliance with statutory procedure for selecting lands to be purchased, tacitly amends statute and is invalid); *Dep't of Education v. Lewis*, 416 So.2d 455, 459-61 (Fla. 1982) (a proviso conditioning state funds for education institutions on the institution providing no support for particular organizations or viewpoints conflicted with statutes that allowed institutional direction, and was invalid); *Chiles v. Milligan*, 659 So.2d 1055 (Fla. 1995) (proviso creating incentive for school districts to cut administrative personnel and hire more classroom teachers is policy decision and is invalid).

Count II

Plaintiffs allege in Count II that DOC is proceeding unlawfully as not in compliance with the above cited statutes. DOC admits that it is proceeding under the proviso rather than under the statutory process for contracting with private providers. As such, the Legislature has bypassed the very safeguards it built into the process that DOC is required to follow when DOC initiates privatization pursuant to substantive law.

In particular, DOC has not prepared any cost comparison study, cost-benefit analysis, or business case analysis. It has not consulted the Auditor General. It did not include a business case analysis with the RFP. The RFP describes the advantages and disadvantages of outsourcing with the designation "n/a," for "not applicable." DOC did not study or consider other options. Its RFP, issued on July 25, 2011, seeks one contract for a private operator for all 29 facilities, rather than offering options to operate individual facilities or groups of facilities, which limits the

number of viable competitors, and potentially increases the state's risks and limits cost savings. The decision to issue only one RFP and only one contract for all 29 prison facilities was based on convenience and speed, to meet the proviso deadlines, rather than on any demonstrated savings or benefit advantage. In addition, the very manner in which DOC must attempt to calculate the savings to be realized from privatization appears flawed in several respects and is not likely to provide an accurate measure that will have any meaning to DOC, the Legislature, or the general public.

From the record, it appears that the rush to meet the deadlines in the proviso has resulted in many shortcomings in the evaluation of whether privatization is in the best public interest as it relates to cost savings and effective service. DOC did not follow the statutorily required process to study and analyze the realistic expectation of any existing facility, much less for 29 such facilities, under Sections 944.105, 287.057, 287.0571, and 216.023, Florida Statutes, so the solicitation is unlawful and invalid.

Conclusion and Relief

In so ruling, the Court reiterates that DOC could have privatized the prisons under existing law, so long as DOC acted consistent with existing law, or the Legislature could have passed a new law permitting privatization. This Court merely reaches the simple conclusion that the Legislature may not change existing substantive law by a proviso in an appropriations act.

Plaintiffs are entitled to declaratory relief, and have no adequate remedy at law if the DOC solicitation process is allowed to continue and the contract is awarded. It is therefore

ORDERED and ADJUDGED that the material facts are not in dispute, and Plaintiff's are entitled to final summary judgment on both Count I and Count II as a matter of law. The subject proviso is hereby declared to be unconstitutional in violation of Fla. Const. Art. III, Sections 6

and 12. Defendant has proceeded without statutory authority and contrary to statutory authority in implementing the proviso. Actions taken to date are declared illegal and without authority in violation of law.

It is FURTHER ORDERED and ADJUDGED that Defendant and his officers and agents are enjoined from taking further steps to contract under the proviso or otherwise implement the privatization of the state correctional facilities in the 18 counties pursuant to proviso or otherwise.

DONE and ORDERED this 30th day of September, 2011, at Tallahassee, Leon County, Florida.



JACKIE E. FULFORD
Circuit Judge

Copies furnished to:
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