Jean Clark,
Arizona State Procurement Administrator
ADOA Building
100 N. 15th Ave., Suite 201
Phoenix, AZ 85007

Denel Pickering, Chief Procurement Officer,
Arizona Department of Corrections
1601 W. Jefferson
Phoenix, AZ 85007

February 27, 2012

Dear Ms. Clark:

This letter comes to you as a formal protest under Chapter 23, Article 9 of the Arizona Procurement Code, **R2-7-A901 Protest of Solicitations and Contract Awards.** The Claimants include:

The American Friends Service Committee
Caroline Isaacs, Program Director
103 N. Park Ave., Ste. 111
Tucson, Arizona 85719
Phone: 520.623.9141

The NAACP of Maricopa County
Rev. Oscar Tillman, President
1818 South 16th Street
Phoenix, AZ 85034
Phone: 602.252.4064

The claimants protest the Arizona Department of Corrections solicitation for 2,000 medium security private, for-profit prison beds. Solicitation number: ADOC12-00001388 / ADC No. 120088DC.

As it is outlined in the Procurement Code under the Purpose (4), the steps outlined are to "*Provide for increased public confidence in the procedures followed in public procurement.*" Further, the purpose of the Procurement Code is to (6) "*Provide increased economy in state procurement activities and maximize to the fullest extent practicable in purchasing value of public monies of this state.*" That is precisely why we taxpayers of Arizona who are the beneficiaries of the procurement procedures are filing this protest. See also: *Bunkers Glass Co. v. Pilkington* PLC, 206 Ariz. 9, 75 P.3d 99 (¶12, 2003).

The grounds for this protest include the following:

Issue I. Additional prison beds (public or private) are not needed in Arizona.
The state prison population has dropped dramatically, and this decline is expected to continue. The Arizona Auditor General has reported that Arizona's prison population grew by only 65 prisoners (net) in

2010 and declined by 296 prisoners in FY 2011—the two lowest growth rates on record (dating back to 1973).[1]

The Arizona Department of Corrections projects zero growth in the adult prison population for Fiscal Years 2012 and 2013.[2] Therefore no new prison beds are needed and the expenditure would be a waste of taxpayer monies.

Issue II. The state of Arizona cannot afford more private, for profit prison contracts.
Therefore, to do so would be a violation of the Arizona Procurement Code, which stipulates that an agency chief procurement officer shall not award a contract unless the state has sufficient availability of funds.

> **R2-7-A301 Source Selection Method: Determination Factors:**
>
> *The agency chief procurement officer shall not award a contract or incur an obligation on behalf of the state unless sufficient funds are available for the procurement, consistent with A.R.S. § 35-154. If it is reasonable to believe that sufficient funds will become available for a procurement, the agency chief procurement officer may issue a notice with the solicitation indicating that funds are not currently available and that any contract awarded will be conditioned upon the availability of funds.*

It is clear from the budget struggles last year and again this year that the state does not have sufficient funds to incur this long lasting and unnecessary debt. Furthermore, the state legislature has not yet approved the expenditure of funds for this RFP. There is currently disagreement between the Governor and the state legislative leadership about the 2013 budget,[3] which are unlikely to be resolved before the due date of this solicitation, which is March 6.

> **AD9-010-A3 –Uniform Terms and Conditions** 4.4 – if no funds are available, contract is void.

Issue III. Existing state contracted private, for-profit prisons are in violation of ARS 41-1609.01 (G):

> *"A proposal shall not be accepted unless the proposal offers cost savings to this state. Cost savings shall be determined based upon the standard cost comparison model for privatization established by the director."*

Cost comparison studies by the Arizona Department of Corrections clearly show that some private, for-profit prison units cost more than equivalent units operated by the state. And, overall, Arizona is overpaying for private for-profit prison beds. Between 2008 and 2010, Arizona over-paid for private

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[1] Arizona Department of Corrections, "Fiscal Year 2011 ADC Data and Information," www.azcorrections.gov/data_info_081111.pdf

[2] Janice K Brewer, Executive Budget Summary, Fiscal Year 2012. January 2012. www.azospb.gov/documents/2012/FY2013-ExecutiveBudget-Summary.pdf

[3] Arizona Capitol Times, "Line in the Sand," February 27, 2012. http://azcapitoltimes.com/news/2012/02/27/line-in-the-sand-republican-governor-and-gop-legislature-are-digging-in-for-long-budget-fight/?utm_source=WhatCounts%20Publicaster%20Edition&utm_medium=email&utm_campaign=Capitol%20Times%20February%2027%20Morning%20Edition&utm_content=Line+in+the+sand%3a+Republican+governor+and+GOP+Legislature+are+digging+in+for+long+budget+fight+

prisons by $10 million. These cost comparison reports are available on the Arizona Department of Corrections website:

2006: http://www.azcorrections.gov/adc/reports/ADC_FY2006_ComparisonRpt.pdf
2007: http://www.azcorrections.gov/adc/reports/ADC_FY2007_cost_comparison.pdf
2008: http://www.azcorrections.gov/adc/reports/ADC_FY2008_PerCapitaRep.pdf
2009: http://www.azcorrections.gov/adc/reports/ADC_FY2009_PerCapitaRep_revised.pdf
2010: http://www.azcorrections.gov/adc/reports/ADC_FY2010_PerCapitaRep.pdf

Since the existing private, for-profit prisons do not offer cost savings, the Department of Corrections would be in violation of the statute to accept a proposal from any of the existing vendors or any new vendors.

Issue IV. Management and Training Corporation and GEO Group are currently in violation of contract provisions requiring cost savings.

Contract No. 020049DC, with GEO Group for management of ASP Florence-West:

> *2.5.1.1 In accordance with A.R.S. §41-1609.01, K and L and upon receipt of the first inmate by the private prison Contractor, the Department shall direct the gathering of information related to the performance of the private prison Contractor. The information shall be used to compare the performance of the private prison Contractor and the State in providing similar services. The results of monitoring activities shall be used in determining if the Contract will be renewed as permitted by law. In order to renew the Contract, the private prison Contractor must be providing services at a cost savings to the State. In making this determination the Director shall consider the following factors: security, inmate management and control, inmate programs and services, facility safety and sanitation, administration, food service, personnel practices and training, inmate health services, inmate discipline, other matters related to services as determined by the director.*
>
> *2.9.1 In accordance with A.R.S. §41-1609.01, G., Offerors must demonstrate in their proposals a cost savings to the State of Arizona which reflects a level and quality of "functional service" which is at least equal to the service provided by the State of Arizona.*
>
> *2.9.1.1 For the purpose of the above requirement, "functional service" shall be interpreted to mean ALL services contributing to, or supporting institutional operation, e.g., physical plant maintenance, inmate management services, to include security and programs.*
>
> *2.9.4.3 Offerors must show a cost savings to the State for all contractual periods. An offeror that does not show the required statutory savings to the State shall not receive consideration.*

Contract No. ADC-PO-PRIV-00/10-6914 with Management and Training Corporation for management of the Marana Community Correctional Treatment Facility:

> *7.5 If it is determined that MTC continues to meet cost savings requirements as shown by the comparison studies described 7.3 and 7.4 above, and if it is determined by the Director that the option to renew the Contract shall be exercised, negotiations for cost or price adjustments may be conducted by the Department with MTC relative to the provision of contracted services superior in quality to those provided by the State at essentially the same cost as the State.*

Contract No. 010039DC with Correctional Services Corporation (now GEO Group) for management of ASP Phoenix West:

> *7.7 The performance of CSC shall be compared to the performance of this State in operating similar facilities, as provided in A.R.S. §41.1609.01. The Department shall conduct, a biennial (occurring every two years) comparison of the services provided by CSC for the purpose of comparing private versus public provision of services. The comparison of services shall be based on professional correctional standards specified by the Director and incorporated herein to determine if CSC is providing at least the same quality of service as this State at a lower cost, or if CSC is providing services superior in quality to those provided by this State at essentially the same cost.*
>
> *7.8 In accordance with A.R.S. §41-1609.01, the Director shall conduct a cost comparison of the private prison every five (5) years.*

The offerors have breached their contractual duty by not providing services at lower cost or comparable services at higher quality. As stated in the contracts, an offer that does not show the required statutory savings SHALL NOT RECEIVE CONSIDERATION. Since none of the offerors have consistently shown those savings, none of their offers should receive consideration.

Issue V. Existing state contracted private, for-profit prisons are in violation of ARS 41-1609.01 (H):

> *"A proposal shall not be accepted unless the proposal offers a level and quality of services that are at least functionally equal to those that would be provided by this state."*

1. **None of the private, for-profit prisons contracting with the state of Arizona measure or report recidivism rates.** If the purpose of incarceration is to reduce crime or rehabilitate prisoners, the only means available to measure how well a prison is performing in this area is its recidivism rate. Yet, there is no evidence that the contracted prison operators are functioning equal to or better to the state because the contractors refuse to provide it.

   The **AD9-010-A3, Uniform Terms and Conditions, requires evidence based security practices, inmate program services, outcomes related to literacy, sobriety, employability and successful re-entry (2.1) In 2.2.1.40 the Uniform Terms and Conditions requires outcome measures and specify recidivism.** Yet the private, for-profit prisons claim they do not keep these measures in clear violation of the law and of their contracts.

2. **State contracted private, for-profit prisons have serious safety problems.** Security assessments performed for all the private prisons housing Arizona prisoners in 2010 found patterns of safety problems including: malfunctioning lights, cameras, or alarms; holes in fencing, hard packed soil or other problems with perimeter areas; failures to follow safety protocols including missing or miscounted weapons and tools; lack of consistent enforcement of Department Orders or other policies; improper, inconsistent, or insufficient searches of guards at entry and exit from the facility.
   AD9-010-A3, Uniform Terms and Conditions clearly requires that the materials must meet high quality (7.2) and be fit for use (7.3). Yet the security equipment used in many private prisons is clearly faulty.

The evidence of these problems can be found in the attached documents:

- Kingman Security Inspection
- Cure Notice to MTC
- Private Prison Security Inspection

In addition, the state Auditor General found **157 findings of fault** in its first Green-Amber-Red (GAR) inspection in 2011. These findings included the failure to properly search the personal property or verify the identity of persons entering the prison unit, to store tools, to inventory keys, to document security device inspections, and to ensure inoperative security devices are repaired in a timely manner.[4]

For example, at one private prison, contract monitoring staff reported that the control room panel indicator lights, which indicate whether inmate doors leading to the recreation yard are unsecure or ajar, had been nonfunctional for several months. At another private, for-profit prison, contract monitoring staff reported that work crew supervisors coming to pick up inmates routinely gained access through gates prior to any staff member checking the identity of the drivers or searching their vehicles. At a third private prison, contract monitoring staff reported that private prison staff were not thoroughly pat searching inmates, a procedure used to detect hidden contraband.[5]

An offeror is in default of the contract terms if they do not maintain a secure facility.

Issue VI. GEO Group is in violation of contract provisions requiring it to maintain safe facilities.

1. **Contract No. 020049DC for management of ASP Florence West (GEO) requires Contract Default for the following:**

1.31—A material failure to keep, observe, perform, meet or comply with any covenant, agreement, term, or provision of the contract, court order or administrative or department rule, financial procedure or guideline.

1.31.1.3 – A failure to maintain the secure prison, related infrastructure and support systems in compliance with all Federal and State codes, rules and regulations.

1.31.1.4 – Failure to provide adequate water, utilities, heating and cooling, etc., to meet the needs of the secure private prison, or the assigned inmate population.

GEO Group has clearly breached provision 1.31 of the contract via the aforementioned violations of ARS 41-1609.01 (G). See **Issue III**, above.

[4] Arizona Auditor General, Performance Audit, "Department of Corrections: Oversight of Security Operations." September 2011. Report No. 11-07: http://afsc.org/document/audit-arizona-department-correction-oversight-security-operations

[5] Arizona Auditor General, Performance Audit, "Department of Corrections: Oversight of Security Operations." September 2011. Report No. 11-07: http://afsc.org/document/audit-arizona-department-correction-oversight-security-operations

A security inspection conducted during the week of August 16, 2010 noted the following security failures, in violation of contract provision 1.31.1.3:

1. Lacked administrative review and follow up for security device tracking. The assessment noted that 11 security device deficiencies that required work orders were not reported in the log.
2. Inmates in detention status were allowed to recreate freely with the door open between the detention pod and the recreation enclosure. The inmates' cell doors remained open during this period.
3. Inmates were allowed in the Housing Officer Work Station, where a control panel that opens the emergency doors was not disabled while the prisoners were present.
4. The sand traps lack a consistent degree of attention. In some areas, the dirt is hard packed and does not show footprints.
5. Routine inventories of the weapons in the armory were not being conducted as often as required by ADC policy, and the inventories were outdated, some dating back to January or April 2008.
6. Searches of staff entering and leaving the facility were not up to par. Staff lacked control of the area, boots were not checked if removed to clear the scanner, not all cell phones were checked to ensure they were state issue, and the process was not organized at all.
7. Searches of prisoners' cells were not conducted in a systematic or consistent fashion. Inmates were not searched prior to their living area being searched. Televisions were not searched and most of the clothing items were merely squeezed and set aside. The bunks themselves were not checked for any tampering or examined at all.
8. There were no pat searches being conducted, nor was there evidence of any searches of the common areas
9. The emergency response plan does not meet ADC requirements[6]

Issue VII. Private, for-profit prisons are in violation of AD9-010-A3, Uniform Terms and Conditions, section 2.11.2 and 4.14. These facilities have higher staff vacancy and turnover rates than equivalent state operated prison units.

High vacancy and turnover rates can lead to having inexperienced guards who are not adequately trained to handle serious incidents. Security audits found that 80% of the staff at the Kingman prison prior to the 2010 escapes were new or newly promoted. [7]

AD9-010-A3, Uniform Terms and Conditions, section 2.11.2 mandates that the private, for-profit institution submit a staffing pattern capable of adequate coverage. In fact, under AD9 -010-A3 Contract Amendment, 1(d) failure to fill vacancies may cause the Department of Corrections to declare the contracts in default.

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[6] Shelly Sonberg, *Security Assessment—MTC: Marana and GEO: Phoenix West, Florence West, and CACF,* memo to Robert Patton, September 22, 2011

[7] Charles Ryan, Cure Notice" to MTC, memo, December 29, 2010.

This is also a violation of **AD9-010-A3 –Uniform Terms and Conditions** 4.14– failure to fill security officer post is a default of the contract. A contractor is in default if they do not maintain the required staffing levels for security jobs.

In the Department of Corrections' 2011 Biennial Comparison Review of public and private prisons, all five state contracted private, for-profit prisons were found to have higher turnover rates and vacancy rates than equivalent state-operated units, and their guards frequently scored lower on core competency tests. In GEO Group's Phoenix West facility, the turnover rate was 61%--the highest rate by far of any facility and well above the 11% turnover rate for the comparison state unit (Catalina Unit in the Tucson Complex).[8]

Both Contract No. ADC-PO-PRIV-00/10-6914 with Management and Training Corporation for management of the Marana Community Correctional Treatment Facility and Contract No. 010039DC with Correctional Services Corporation (now GEO Group) for management of ASP- Phoenix West, section 4.13 state that failure to fill mandated security officer positions constitutes a default.

Both for-profit prison corporations currently holding contracts with the state of Arizona have been fined for failing to maintain adequate staffing. The *Arizona Republic* reported that in FY2011 (through June) the state has withheld $844,000 from MTC for staff vacancies at Kingman and $54,000 for vacancies at Marana. In addition, GEO Group has been fined around $6,000 for vacancies in its Arizona-contracted facilities.[9] The Director of the Department of Corrections is given discretion as to the penalties for a default of this aspect of the contract. He may fine the corporation or he may declare them in default of the contract. Thus far, it appears that Director Ryan has chosen to impose fines. However, the evidence of the default clearly demonstrates the bad faith and poor performance of these corporations and should render them ineligible for new contract awards.

Issue VIII. There is evidence to suggest that Corrections Corporation of America has violated its contracts with other states.

Corrections Corporation of America (CCA) operates six prisons that are located in the state of Arizona but do not hold contracts with the Arizona Department of Corrections. They accept prisoners from other states, including California and Hawaii, and from the federal government. Arizona has virtually no oversight over these facilities, and as a result, it is very difficult to assess their performance.

CCA has bid on the previous RFP's for 5,000 beds and it is likely that they will bid on the current RFP for 2,000. Therefore, it is important to note that there have been concerns raised about the corporation by other states' Corrections departments.

1. **California.** During December 2010, California's Inspector General found serious security flaws and improper treatment of California inmates held in three CCA prisons in Arizona – the La Palma, Red Rock, and Florence Correctional Centers. Inspectors found flaws with the incident alarm-response systems at the three prisons because there was no audible alarm. La Palma and Florence were found to have malfunctioning and out-of-focus security cameras.

[8] Arizona Department of Corrections, Biennial Comparison of Private versus Public Provision of Services ARS 41-1609.01 (K)(M), December 21, 2011

[9] Arizona Republic, "Prison oversight lacking for private facilities," August 7, 2011

The inspectors raised concerns over poor security practices, noting that inmates were able to easily get around metal detectors at La Palma because CCA didn't have adequate staff on hand when it was moving inmates. Many inmates at Red Rock had no ID cards, or damaged ID cards, which makes it more difficult for officers to identify when a prisoner is missing. At all three prisons, inmates had unsupervised access to secure areas.

At Florence, cell searches weren't well-documented. And at Red Rock, inspectors found no evidence that 31 significant incidents from January to May 2010 were investigated for wrongdoing. Procedures governing the proper storage of evidence for investigations were not being followed.

The report also states that "[California Department of Corrections and Rehabilitation (CDCR)] has never approved of CCA's use-of-force policy, even though the contract terms require the policy's approval prior to inmate occupancy." As a result, CCA guards may not be trained in the proper procedures for handling serious incidents. CCA currently has no CDCR-approved policy for whether guards in the perimeter towers can use deadly force in the event of a riot.

Inspectors also flagged the possibility that security level IV prisoners may be held in out-of-state facilities, a possible violation of the California Code of Regulations, which mandates that only inmates in levels I-III be sent out of state. Inspectors further noted that "CCA facilities do not meet the California Code of Regulation's Level IV security requirements for internal armed coverage."[10]

2. **Hawaii.** A 2010 management audit of the Hawaii Department of Public Safety's (DPS) contracts with CCA found that there were flaws in the methodology the DPS used to calculate costs of housing inmates which gave the appearance that housing prisoners out of state in CCA facilities was less expensive than housing them in Hawaii. The Auditor states, *"we found that these cost estimates are based on a flawed methodology designed around what is easiest for the department to report, or, as one PSD official characterized, "quick and dirty" numbers... In one analysis, we found errors in 28.4 percent of the tracking system's reports."*[11]

   The report also accuses the DPS of circumventing the law, taking advantage of an exception in the state procurement code that allows Intergovernmental Agreements (IGA's) to avoid the requirement for competitive procurement methods. The Auditor found that:

   > *"...in the department's IGA with Eloy, the department actually conducts all transactions directly with CCA. We found no evidence that Eloy sub-contracted inmate services to CCA, nor is the city compensated for its role in the agreement. In the State chief procurement officer's opinion, such a contract inappropriately used the IGA exemption and is circumventing the law. Through this misuse of the exemption, the department was able to secure CCA as its preferred provider. In addition, we found that the IGA does not contain safeguards that protect the State's interests in the event of a dispute or if funds are not appropriated or available to pay CCA, so the State is exposed to a liability risk."*[12]

[10] David R. Shaw, Inspector General, Out-Of-State Facility Inspection Results. Enclosure—OIG Areas of Concern with CDCR Out-of-State Facilities. December 2, 2010

[11] State Auditor of Hawaii, "Management Audit of the Department of Public Safety's Contracting for Prison Beds and Services," December 2010.

[12] State Auditor of Hawaii, "Management Audit of the Department of Public Safety's Contracting for Prison Beds and Services," December 2010.

A copy of the audit is included with this packet.

Issue IX. There is no urgency to this procurement, and the harm to the state and taxpayers that would be incurred if it is allowed to proceed is greater than any potential harm to the vendors from its withdrawal.

a. **This is the third issuance of this RFP and no performance has begun.** This RFP was originally authorized in 2009, put out to bid in 2010, and withdrawn after the escapes from the Kingman facility and resulting murder of two people in New Mexico at the hands of the escapees. The RFP was then re-issued in January of 2011 and again withdrawn in December of 2011. The length of this process and the willingness of the Department of Corrections to repeatedly cancel the RFP demonstrates that there is no urgency to the procurement.

b. **No one will be prejudiced by halting this RFP because it is not needed.** In the press release announcing the withdrawal, Arizona Department of Corrections Director Charles Ryan stated:

> *Since the original legislation authorizing the 5,000 private prison beds, ADC has worked in unison with the Governor and her staff to ensure continued fiscal responsibility in all activities. This includes annually evaluating inmate population growth and bed needs. In FY 2010 and FY 2011 inmate population growth dramatically declined. ADC's prison population grew by only 65 inmates in FY 2010, and then declined by 296 inmates in FY 2011. FY 2010 and FY 2011 had the two lowest growth rates on record dating back to 1973. Therefore in light of the decline in inmate growth, it was prudent to reassess Arizona's prison bed plan both in terms of the total number of beds and the types of beds.*[13]

At a hearing of the Senate Public Safety and Human Services and House Judiciary Committee of Reference on November 22, 2011, Director of the Department of Corrections, Charles Ryan, was questioned by members of the Committee regarding the report of the state Auditor General that the state prison population was declining. When directly asked whether the state of Arizona needed 5,000 new prison beds, the Director acknowledged that 5,000 beds were not necessary.[14]

Therefore, it is clear that the beds are not needed, no urgency exists, consideration has been given to this issue and it has been determined that the best interest of the state would be to not expend this money for something it does not need.

c. **The cost to the state of issuing the RFP is enormous and not justified by any need** (see above). The Governor has requested $17.9 in FY2014 to construct the facility. The FY2010 cost comparisons completed by the Department of Corrections found that, on average, the daily per capita cost of a medium-security private prison bed was $53.02. For 2,000 beds,

[13] Ryan, Charles. "ADC Bed Needs and Cancellation of 5,000 Bed RFP," December 22, 2011. http://www.azcorrections.gov/adc/news/2011/122211_ADC_Bed_Needs.pdf

[14] Ryan, Charles testimony to Senate Public Safety and Human Services and House Judiciary Committee of Reference, November 22, 2011. http://azleg.granicus.com/MediaPlayer.php?view_id=19&clip_id=9572

that adds up to $106,040 per day, or $38,704,600 per year. By 2014, these costs will likely be much higher. This solicitation is for a 10-year contract with two 5-year renewal options. The long-term costs that would be incurred are not justified and represent a significant burden to Arizona taxpayers.

The parties below have taken every possible step to alert the Department of Corrections that this RFP is faulty and should be halted, including personal contact, public testimony, and legal action. The AFSC has recently released the most comprehensive assessment of private prisons in Arizona compiled to date, which documents the concerns raised in this protest and many more (a copy is included in this packet). Yet the Arizona Department of Corrections continues to hold and expand contracts with private, for-profit prison operators to the detriment of the taxpayer and against the best interest of the state, showing bad faith.

Therefore, the claimants respectfully request the following relief, per Chapter 23, Article 9 of the Arizona Procurement Code:

1. An immediate stay of the procurement process to allow the Administrator sufficient time to review the substance of this protest and make a determination pursuant to **R2-7-A902 Stay of Procurements During the Protest**

2. That the state of Arizona formally and permanently cancel solicitation number ADOC12-00001388 / ADC No. 120088DC and that the Arizona Department of Corrections award no contracts.

We look forward to your response within 14 days pursuant to **R2-7-A903 Resolution of Solicitation and Contract Award Protests**

If you have any questions or require further documentation, please do not hesitate to contact Caroline Isaacs, whose contact information is provided above.

Thank you for your consideration.

Sincerely,

Caroline Isaacs,
Program Director,
American Friends Service Committee, AZ

Dianne Post,
Legal Counsel,
NAACP of Maricopa County

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DOC PURCHASING