



**THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE INSPECTOR GENERAL**

**Lease-Purchase Financing of a Design-Build Project:
The Plymouth County Correctional Facility**

**Robert A. Cerasoli
Inspector General
July 1997**



ROBERT A. CERASOLI
INSPECTOR GENERAL

The Commonwealth of Massachusetts
Office of the Inspector General

JOHN W. MCCORMACK
STATE OFFICE BUILDING
ROOM 1311
TEL: 727-9140
FAX: 723-2334

MAILING ADDRESS:
STATE HOUSE STATION
P. O. BOX 270
BOSTON, MA 02133

July 1997

His Excellency the Governor

The Honorable President of the Senate

The Honorable Speaker of the House of Representatives

The Honorable Chairman of the Senate Ways and Means Committee

The Honorable Chairman of the House Ways and Means Committee

The Honorable Chairman of the House Post Audit and Oversight Committee

The Directors of the Legislative Post Audit Committee

The Secretary of Administration and Finance

Members of the General Court

Omnibus ad quos praesentes literae pervenerint, salutem.

I am today releasing a report concerning the Plymouth County correctional facility, which was financed and built using nontraditional methods authorized by special legislation enacted in 1991. My Office's review focused on the project's financial structure, management, and results. I appreciate the cooperation provided to my Office by the many former and current public officials, private firms, and individuals contacted during the course of this review.

Although the \$115 million Plymouth facility project was financed through the private sale of certificates of participation, the Commonwealth's taxpayers are

obligated to pay the entire project financing cost over 30 years. The project's noncompetitive contracting arrangements and lack of oversight by the Commonwealth have proven wasteful and risky. It is my hope that this report will focus attention on the need to identify the full costs and risks of "innovative" financing and construction projects before obligating the public to fund such projects in the future.

Sincerely,

Robert A. Cerasoli
Inspector General

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Executive Summary

The 1,140-bed Plymouth County correctional facility, which began operations in June 1994, was financed and built through a complex series of noncompetitive contracting arrangements authorized by special legislation waiving the statutory rules that normally govern publicly funded capital facility projects in Massachusetts. Project publicity has characterized this \$115 million project as "a unique public/private partnership" that entails "virtually no risk to the taxpayers." The project's use of lease-purchase financing and design-build construction has been touted as an innovative, entrepreneurial approach enabling rapid construction of a state-of-the-art correctional facility yielding taxpayer savings of \$426 million over the 30-year project financing period.

The enactment in December 1991 of special legislation authorizing the project was the culmination of years of effort on the part of Plymouth County officials and the private development team, a group of private firms that had invested substantial time and capital to promote the development project that became the Plymouth County correctional facility. The original development project had not included the Commonwealth at all: the private development team had spent more than a year negotiating a plan with the United States Marshals Service to build a federal detention facility on Plymouth County land. When these negotiations failed in mid-1991, the team's efforts focused on involving the Commonwealth as well as the federal government.

The participants represented a wide range of disparate institutional interests and objectives. The private development team members wanted to reap the financial benefits of their unpaid years of effort. Plymouth County wanted to raise money to defray its operating deficit by developing the parcel of land used for the project and to replace the antiquated Plymouth County Jail and House of Correction with a larger, state-of-the-art facility. The Commonwealth and the federal government wanted access to prison beds for state and federal inmates housed in overcrowded

facilities. This project was viewed by the participants as a vehicle for meeting all of these objectives. These objectives appear to have been met.

Although the project was promoted by the participants as a privately financed venture entailing no risk to taxpayers, this characterization was misleading. The Commonwealth's taxpayers are paying for the Plymouth facility. Private investors would not have loaned the project more than \$110 million without the Commonwealth's financial commitment to make payments sufficient to repay the loan. Taxpayers will also foot the bill for operating costs, maintenance costs, and capital repairs to the facility.

The financial structure of the project did not adequately protect the interests of the Commonwealth's taxpayers. The private investors' interests were protected by the terms of the Trust Agreement, which spelled out the rules for spending project funds. At the project closing, the private development team members recouped their investments in developing and promoting the failed federal detention facility proposal as well as the Plymouth facility project. Plymouth County officials, who had always viewed the project as a means of raising cash, maximized the payments to the County from project funds.

But the Commonwealth -- which assumed financial responsibility for the cost of all closing fees, payments to Plymouth County, and other project expenditures -- failed to make effective use of its leverage. In effect, the Commonwealth agreed to make lease payments covering the full project financing cost and allowed the Plymouth County officials and the private firms handling the financing to decide how to spend the borrowed funds. Including interest earned on these funds, project expenditures have exceeded \$115 million. The Commonwealth's exposure to risk was heightened by Plymouth County's creation of a "special-purpose corporation" to manage the project finances. The Plymouth County officials serving as Corporation directors while the Plymouth facility was under construction did not comply with the rules mandating public accountability and

disclosure: their meetings were not open to the public, nor did they view the project records as public records. By forfeiting the opportunity to mitigate and control the risks inherent in this project, the Commonwealth opened the door to many of the problems documented in this report.

The lease-purchase method of financing the project enabled the construction of new state and county correctional beds to alleviate prison overcrowding at a time when the Commonwealth's ability to issue general obligation debt to finance new prison construction projects was severely restricted. But this method of financing the Plymouth facility was costly. In comparison with general obligation financing, lease-purchase financing of construction projects requires a higher overall loan amount (to pay for capitalized interest and debt service reserve requirements), carries a higher interest rate, and entails substantially higher issuance costs. The issuance costs for the Plymouth facility included an exorbitant \$5 million ground lease payment to Plymouth County and questionable fees to some private development team members.

The Plymouth facility's small size and use of modular construction techniques were conducive to lower construction costs. However, the Commonwealth had no authority to oversee or approve the design-builder's work, and the fast-track design-build process used by the design-builder restricted public access to key project information. Shortly after the Plymouth facility began operations, Plymouth County officials concluded that the facility's administrative space was inadequate. Three years later, construction defects at the facility remained unresolved.

The fast-track design-build method of delivering the Plymouth facility has been promoted as a contracting innovation that enabled more rapid delivery of a completed facility at a lower cost than the Commonwealth could achieve. The evidence does not support this claim. During the same period in which the Plymouth facility was designed and built, the Commonwealth built a new, 1,260-

bed Hampden County Jail and House of Correction, using modular construction techniques, at a lower construction cost per square foot than the Plymouth facility and on a more rapid construction schedule than the Plymouth facility. Moreover, the Commonwealth achieved these results without waiving requirements for planning, competition, and oversight.

The methods used to finance and build the Plymouth are inherently more risky than the conventional financing and construction methods used by the Commonwealth for public construction projects. Because they entail higher risks, these methods require increased safeguards. The Plymouth case illustrates the consequences of employing these methods on a publicly funded project without strong, effective safeguards that protect taxpayer interests.

A complete list of the report's findings is provided after the recommendations that follow.

Recommendations

To reduce the costs and risks associated with the Plymouth facility, the Inspector General offers the following recommendations to the Commonwealth, Plymouth County, the Plymouth County Correctional Facility Corporation, and the Legislature:

1. Plymouth County should recalculate and renegotiate the per diem rate charged to the United States Marshals Service to include the full debt service cost of the taxable certificates of participation.
2. The Executive Office for Administration and Finance should analyze the feasibility and cost-effectiveness of refinancing the Plymouth facility project with general obligation debt.
3. The Executive Office for Administration and Finance, the Executive Office of Public Safety, and Plymouth County should amend the Memorandum of Agreement to ensure that all interest earnings on project funds be spent on the Plymouth facility.
4. The Executive Office for Administration and Finance should pursue with Plymouth County amendments to the Trust Agreement that would require that all surplus project funds revert to the Commonwealth at refinancing or at the end of the financing period.
5. The Corporation should transfer any remaining balances in the Construction and Acquisition Fund and the Administrative Expense Fund to the Capital Repair and Replacement Fund, as required by the Trust Agreement.
6. The Corporation should ensure its full compliance with the open meeting law, the public records law, and other applicable rules mandating public accountability and disclosure.
7. The Legislature should amend Chapter 425 of the Acts of 1991 to clarify that the statutory exemptions from advertising and bidding applied only to the initial construction of the Plymouth facility.

List of Report Findings

Finding 1. The Commonwealth is contractually obligated to pay the entire cost of financing the construction of the Plymouth facility over 30 years.

Finding 2. The Commonwealth is subsidizing the federal government's cost of housing federal inmates at the Plymouth facility.

Finding 3. Project publicity has not provided full or accurate information regarding the Plymouth facility's future financial impact on state taxpayers.

Finding 4. Plymouth County will receive at least \$17 million in project funds and interest earnings from project funds during and after the 30-year financing period.

Finding 5. The project issuance costs included questionable fees to private development team members.

Finding 6. Project expenditure controls were weak.

Finding 7. The Commonwealth had no authority to oversee or approve the program, design, or construction of the Plymouth facility.

Finding 8. The fast-track design-build process used by Brown & Root restricted the Corporation's access to key project information.

Finding 9. Project timelines provided to the Legislature omitted 16 months of project design work that preceded the design-build contract.

Finding 10. Shortly after the Plymouth facility began operations, the Corporation and the Sheriff concluded that the facility's administrative space was inadequate.

Finding 11. Construction defects at the Plymouth facility remained unresolved three years after substantial completion of the facility.

Finding 12. The Capital Repair and Replacement Fund established by the Trust Agreement has never been funded.

Finding 13. The special legislation authorizing the Plymouth facility project contained weak project oversight provisions.

Finding 14. The technical representative for the Plymouth facility provided more extensive project oversight services than the special legislation required.

Finding 15. The contract certifications by the technical representative did not ensure the fairness and competitiveness of contracts over \$100,000.

Finding 16. The Corporation directors inaccurately claimed that the Corporation was not subject to state laws mandating public disclosure and accountability.

Finding 17. The widely publicized claim that the Plymouth facility represents \$426 million in savings to taxpayers over 30 years was not supported by the facts.

Finding 18. The method used to finance the Plymouth facility was costly relative to Commonwealth-backed general obligation debt.

Finding 19. The Plymouth facility's program, design, and use of modular construction techniques were conducive to lower construction costs, although administrative space is reportedly inadequate.

Finding 20. Information provided to the Legislature by Plymouth County showed that the state's construction schedule was actually shorter than the design-build schedule for the Plymouth facility.

Introduction

Chapter 425 of the Acts of 1991, "An Act Facilitating the Financing and Development of a New Criminal Detention Facility in Plymouth County," was signed into law on December 29, 1991. The legislation, which had been filed late in the legislative session and had advanced rapidly through the legislative process, authorized Plymouth County to enter into a long-term financing lease for a 1,140-bed correctional facility. The legislation exempted all contracts relating directly or indirectly to the design, construction, development, financing, leasing, or leaseback of the facility from the state's designer selection law, construction bid laws, and all other laws and regulations requiring advertising or bidding.

In subsequent years, this Office opposed legislative proposals, modeled on the special legislation for Plymouth County, to authorize Berkshire and Middlesex Counties to enter into long-term financing leases for correctional facilities. This Office argued that the proposed contracting arrangements posed unacceptably high financial risks to the public and contained inadequate design and construction safeguards. The Administration also opposed these proposals, which did not become law. In 1995 this Office advised a Massachusetts municipality against pursuing a proposal to finance and construct a school building using the Plymouth County model.

Since the enactment of the Plymouth County legislation, legislators and other public officials have urged the Inspector General to review the Plymouth County correctional facility project. This Office initiated a review of the project in October 1995, at which time this Office's staff toured the facility. Over the ensuing 21 months, this Office reviewed hundreds of documents obtained from the following sources: the Plymouth County Correctional Facility Corporation, the Plymouth County Commissioners, the Plymouth County Treasurer, the Executive Office for Administration and Finance, the Executive Office of Public Safety, the Department

of Correction, the Department of Revenue, the Division of Capital Planning and Operations, the U.S. Marshals Service, the Massachusetts Development Finance Agency (formerly the Massachusetts Industrial Finance Agency), Dillon Read & Company, TBA Architects, and State Street Bank. This Office conducted interviews with current and former Plymouth County officials, current and former Administration officials, a former official of Dillon Read, officials of TBA Architects, and officials of State Street Bank. The Inspector General appreciates the assistance and cooperation provided by all of those contacted by this Office.

In conducting the review of the Plymouth facility project, this Office focused on the project's financial structure, management, and results. This report summarizes this Office's findings, conclusions, and recommendations. A draft of this report was provided to the directors of the Plymouth County Correctional Facility Corporation, the Plymouth County Commissioners, and the Secretary of Administration and Finance. This Office received written responses from two Corporation directors (the Plymouth County Treasurer and the Plymouth County Sheriff) and the Secretary of Administration and Finance. Their responses are included in Appendix A of this report.

Project Planning, Development, and Promotion

Background

In 1985, the Plymouth County Jail and House of Correction housed more than 230 inmates in an aging facility whose rated capacity was 177 beds.¹ By 1987, the inmate population exceeded 300. Although two modular housing units were installed at the facility in 1988, increasing its rated capacity to 327, the inmate population continued its rapid expansion. Within two years, the facility housed 480 inmates, and an inmate class action suit protesting the "conditions of confinement" at the facility had been filed in U.S. District Court. By March 1991, the Plymouth County Jail and House of Correction housed 525 inmates -- 160 percent of its rated capacity. The correctional crisis in Plymouth County reflected a systemic problem: county correctional facilities throughout Massachusetts were operating, on average, at 140 percent of their rated capacity.

The correctional crisis in Plymouth County coincided with tightened capital spending controls at the state level. Between fiscal year 1987 and fiscal year 1989, capital spending in state bond funds had increased from \$600 million to \$971 million.² After the Executive Office for Administration and Finance established an administrative limit of \$925 million for capital spending in state bond funds in late

¹The original facility had been built in 1910, and a second building had been added in 1966. The statistical information in this section is drawn from Massachusetts Department of Correction reports and from the May 1991 Operational and Architectural Program of the Master Plan for the Plymouth County Jail and House of Correction prepared by Curtiss Pulitzer & Associates, Inc., with CityDesign Collaborative, Inc., under contract to the Massachusetts Division of Capital Planning and Operations.

²The information in this section regarding the Commonwealth's financial status was drawn from the *Information Statement* furnished by the Commonwealth of Massachusetts in connection with the sale of certificates of participation for the Plymouth County correctional facility project, May 11, 1992.

1988, capital spending declined to \$936 million in fiscal year 1990. In January 1990, legislation was enacted to limit the Commonwealth's debt service payments on general obligation debt.³

In the meantime, Plymouth County was exploring the feasibility of developing a parcel of County-owned land adjacent to Route 3 in Plymouth to address the County's own precarious financial circumstances.⁴ In late 1989, the Plymouth County Commissioners contracted with an architectural firm, TBA Architects, Inc., to conduct a \$36,000 "development feasibility analysis" of the 65-acre parcel. The objective of this analysis was to identify the most appropriate option that would generate long-term income for Plymouth County.

With the permission of Plymouth County, TBA Architects contacted a private consortium seeking land for construction of a privately owned and operated correctional facility for the United States Marshals Service (USMS). The consortium, Becon Construction Company and Concept Incorporated ("Becon/Concept"), planned to respond to a December 1989 request for proposals issued by the USMS for the private construction, financing, and operation of a 220-bed facility that could be expanded to 440 beds. In early 1990, Plymouth County executed a letter of understanding with Becon Construction regarding the County land. Becon/Concept subsequently submitted a proposal to the USMS under which Plymouth County would convey the proposed site to Becon/Concept for \$3 million for the new federal detention facility to be designed and built by Becon Construction and operated by Concept Incorporated.

³M.G.L. c.29, §60B.

⁴The following narrative is based on records obtained from the U.S. Marshals Service, Plymouth County, the Plymouth County Correctional Facility Corporation, the Massachusetts Industrial Finance Agency, and the Executive Office of Public Safety, as well as the recollections of former and current public officials and private development team members interviewed by this Office.

The USMS selected the Becon/Concept proposal in June 1990. However, three months later, the USMS cancelled its request for proposals in favor of a plan to contract for a privately owned, publicly operated facility. A new development proposal was offered, under which the Plymouth County Sheriff would operate the proposed USMS facility in place of Concept Incorporated. The Massachusetts Industrial Finance Agency (MIFA)⁵ would finance the facility with lease revenue bonds to be underwritten by the firm of Bear, Stearns & Co. and would oversee construction of the facility.

TBA Architects (representing Plymouth County), Becon Construction, Bear Stearns, and MIFA,⁶ entered into negotiations with the USMS. Over the ensuing months, the Becon Construction official on the original development team, David Cornell, left Becon Construction and founded the Texas-based firm of Cornell Cox Group with Norman Cox, a corrections specialist who had evaluated Becon/Concept's proposal under contract to the USMS. Cornell Cox brought in the Texas firm of Brown & Root Building Company to replace Becon Construction as the design-builder for the USMS facility. (Brown & Root's architect for the project, Durrant Flickinger, had been part of the original team proposed to the USMS by Becon/Concept.) The Bear Stearns official on the original development team left Bear Stearns to join the firm of Dillon Read, and Dillon Read replaced Bear Stearns on the private development team. MIFA brought in the Washington, D.C. law firm of Jones, Day, Reavis & Pogue. TBA Architects was paid by Plymouth County; the other private development team members worked "on speculation" -- i.e., each firm invested time and resources in planning and promoting the project, with the expectation that its investment would be recouped if and when the project was successfully financed.⁷

⁵MIFA, whose name has since been changed to the Massachusetts Development Finance Agency, was a public authority that provided economic development financing for public and private projects in Massachusetts.

⁶The initial development team also included the Canadian Imperial Bank of Commerce, whose involvement ended in early 1991.

⁷According to the former Vice President of Dillon Read, Dillon Read's venture capital group invested in Cornell Cox Associates during this period.

By early 1991, the USMS had agreed to execute an Intergovernmental Agreement (IGA) to lease correctional bed space from Plymouth County. During the IGA negotiations, the private development team had sought an arrangement under which the USMS would pay the full construction and operating costs of the proposed facility. According to a January 1991 memorandum from TBA Architects to the Plymouth County Commissioners, any extra bed space would be made available to the Commonwealth and Plymouth County at no charge:

[T]he USMS will guarantee a minimum payment sufficient to offset operations and capital costs. Thus, should any beds become available, the Sheriff can use them for County and/or State needs at no cost to the County. [Emphasis added.]

However, the final IGA between the USMS and Plymouth County, executed in April 1991, did not commit the USMS to a minimum occupancy level nor a minimum payment. Under the IGA, the USMS could terminate the agreement after providing written notice only 30 days in advance of termination. The IGA thus did not provide prospective investors in the Plymouth facility with any assurance that the per diem payments made by the USMS would be sufficient to repay the debt to private investors. Recognizing that the proposal to finance and build a federal detention facility was not viable, the team of private firms and Plymouth County officials decided on a new development strategy requiring the financial participation of the Commonwealth.

The Commonwealth's Role

While Plymouth County and the private development team were developing the project described above, the Commonwealth was continuing to plan for a replacement Plymouth County Jail and House of Correction. The state's Division of Capital Planning and Operations (DCPO) had been working since 1989 to develop

a master plan for replacing and expanding the existing overcrowded facility. Although the need for new correctional space in Plymouth County was acute, the near-term prospects for general obligation bond financing of the planned replacement facility were poor. Thus, the Commonwealth was receptive to the arrangement proposed by Plymouth County and the private development team. Under this arrangement, the Commonwealth -- like the USMS -- would lease prison beds at the MIFA-financed facility rather than building a replacement facility. By leasing prison space rather than building it, the Commonwealth would be able to mitigate the prison overcrowding problem without issuing general obligation debt.

Based on assurances from the Executive Office of Public Safety (EOPS) that the EOPS would agree to house state inmates in the proposed facility, Plymouth County and the private development team reformulated the project in January 1991. Instead of a 220- to 440-bed facility to house USMS inmates, the project would consist of a 1,140-bed facility to house federal, state, and county inmates.⁸ The Plymouth facility was to be funded by three separate revenue streams: federal funds paid on a per diem basis to house USMS inmates, state funds paid on a per diem basis to house state inmates, and state funds paid to Plymouth County for county correctional expenses.⁹ Bolstered by the Commonwealth's agreement to use and pay for 820 state and county beds, the project was deemed financeable by Dillon Read.

Throughout 1991, DCPO and the private development team were working on independent, parallel tracks to plan new correctional facilities for Plymouth County. By May 1991, DCPO had completed the architectural and operational program for a new, 950-bed replacement facility to be financed, designed and built by the

⁸In the interest of brevity, this report consistently uses the term "inmates" to refer to pre-trial detainees as well as individuals who have been convicted and sentenced. All federal inmates at the Plymouth facility have been pre-trial detainees.

⁹The Commonwealth funds all county correctional expenses, including those associated with the Plymouth facility.

Commonwealth. Using this program, Brown & Root's project architect, Durrant Flickinger, began work on a conceptual design for the 1,140-bed facility to be financed and built by MIFA. Based on Dillon Read's commitment to purchase the lease-revenue bonds from MIFA, Plymouth County borrowed \$3 million from State Street Bank to defray its operating deficit.¹⁰

In August 1991, Brown & Root provided the Plymouth County Sheriff with conceptual design documents, including a project statement, outline specifications, and an early set of drawings. A design-build contract between MIFA and Brown & Root was drawn up, and a detailed policy and procedure manual outlining the construction process was drafted under MIFA's direction. In September 1991, Plymouth County executed a ground lease with MIFA under which MIFA agreed to pay Plymouth County \$3 million from the sale of the lease-revenue bonds for the County-owned property on which the 1,140-bed facility would later be constructed.

But MIFA withdrew from the project shortly thereafter.¹¹ In late 1991, the decision was made to seek legislative authorization for Plymouth County to enter into a "financing lease," or lease-purchase contract, with a nonprofit, special-purpose corporation created by Plymouth County to finance, design, and construct the project. Under the new scenario, the special-purpose corporation would sell certificates of participation (COPs)¹² to private investors and use the proceeds to

¹⁰Plymouth County's \$3 million loan was cited in the Independent Auditors' Report on General Purpose Financial Statements prepared for Plymouth County by Thevenin & Company, P.C. for the year ending June 30, 1991. The auditors noted: "The \$3,000,0000 will not alone be sufficient to fund the operating deficits of the County. Without an infusion of new revenues and reduction in future operating budgets, there is a substantial doubt as to the County's ability to meet its obligations."

¹¹According to private development team members interviewed by this Office, the team did not become aware until this point in the planning process that MIFA would require legislative authorization to undertake a design-build construction project. Although special legislation to authorize the project was drafted and filed, MIFA was not written into the special legislation.

¹²Private investors purchase the COPS, each of which represents a proportionate

construct the facility. Dillon Read would underwrite the COPs, Brown & Root would design and construct the facility, and TBA Architects would serve as the "technical representative," assisting the special-purpose corporation with contract negotiations and reviewing the final contracts and project design. Cornell Cox would continue to coordinate the private development team. Plymouth County would make lease payments to the special-purpose corporation, using the funds paid by the USMS and the Commonwealth, until the COPs were repaid.

The special legislation authorizing the 1,140-bed Plymouth facility project was filed late in the legislative session with the support of Plymouth County officials, legislators from Plymouth County, and the Administration. The legislation, drafted by the law firm of Hale & Dorr, authorized Plymouth County to enter into a long-term financing lease for a 1,140-bed facility and exempted all contracts relating directly or indirectly to the design, construction, development, financing, leasing, or leaseback of the facility from the state's designer selection law, construction bid laws, and all other laws and regulations requiring advertising or bidding. The legislation required the County to contract with a "technical representative"¹³ and to submit an annual report on the project to the Legislature; it also provided that the Commonwealth would use one-third of the 1,140 beds and that the existing Plymouth County Jail and House of Correction would be closed within 90 days of the opening of the new facility. The legislation did not spell out the Commonwealth's financial obligations, nor did it reference the special-purpose corporation. Chapter 425 of the Acts of 1991, "An Act Facilitating the Financing and Development of a New Criminal Detention Facility in Plymouth County," was enacted and signed into law on December 29, 1991, at the end of the 1991 legislative session.

share of the lease payments required under the lease-purchase contract. Appendix C to this report lists sources of information concerning lease-purchase financing and COPs.

¹³The technical representative's responsibilities under the special legislation are discussed in the "Project Oversight" section of this report.

The Special-Purpose Corporation

In January 1992, the nonprofit Plymouth County Correctional Facility Corporation ("the Corporation") was incorporated. The Corporation's Board of Directors consisted of the Chairman of the Plymouth County Commissioners, the Plymouth County Treasurer, and the Plymouth County Sheriff. The following month, Plymouth County executed a technical representative service agreement with TBA Architects. This agreement with TBA Architects was then assumed by the newly created Corporation. MIFA also assigned the ground lease for the Plymouth County property to the Corporation.

In May 1992, the Corporation executed a design-build contract with Brown & Root,¹⁴ the Commonwealth executed a Memorandum of Agreement with Plymouth County to house 380 state inmates at the new facility, Plymouth County executed a lease-purchase contract with the Corporation for the Plymouth facility, and various other legal and financial documents relating to the COP sale were finalized. The \$110,535,000 financing of the Plymouth County correctional facility project was completed on May 18, 1992.

In summary:

- Plymouth County and a team of private firms began project planning and development for a new correctional facility on Plymouth County land at least 18 months before special legislation authorizing the financing and development of the Plymouth facility was enacted.
- Although a 1990 request for proposals issued by the U.S. Marshals Service (USMS) was the initial impetus for the Plymouth facility, Plymouth County's 1991 agreement with the USMS did not commit the USMS to using or paying for the Plymouth facility. The

¹⁴By the time the design-build contract was executed, Brown & Root's architect (Durrant Flickinger) had completed revisions to the August 1991 conceptual design and begun to prepare construction documents.

Commonwealth's participation and financial commitment to the project were essential to its viability.

- The special legislation authorizing the lease-purchase financing and design-build construction of the Plymouth facility was enacted at a time when debt limitations restricted the Commonwealth's ability to issue general obligation bonds for critically needed prison construction projects.
- The special legislation contained no provisions defining the Commonwealth's financial commitment to the project or referencing the special-purpose corporation.

Finding 1.

The Commonwealth is contractually obligated to pay the entire cost of financing the construction of the Plymouth facility over 30 years.

On May 18, 1992 -- the date on which the \$110,535,000 COPs were issued -- the Executive Office of Public Safety (EOPS) and the Department of Correction executed a 30-year Memorandum of Agreement for Additional Housing Units (MOA) with Plymouth County. Under the MOA, the Plymouth County Sheriff was required to provide sufficient housing units and program space for 380 state inmates -- 33 percent of the 1,140-bed capacity of the new facility¹⁵ -- and the Commonwealth was required to pay for these inmates at an unspecified "per inmate day rate." The per inmate day rate, according to the MOA, was to be based on:

(a) an agreed to and approved annual operating budget, and (b) the funding required to pay the lease payments with respect to the Facility. . . .

Under the MOA, the EOPS was required to make advance payments for the 380 inmates, based on the per inmate day rate at the beginning of each quarter of the

¹⁵Section 8 of Chapter 425 of the Acts of 1991 requires that 33 percent of the

fiscal year. The MOA further provided that the Commonwealth's per diem payments to the Corporation for the 380 state inmates housed at the new Plymouth facility would cover the entire debt service payment on the COPs. The MOA stated:

The sum of the quarterly advances paid under this paragraph in each year shall be **not less than the lease payments with respect to the Facility due in such year under a Lease Purchase Agreement** dated April 1, 1992 between the County and Plymouth County Correctional Facility Corporation (the "Lease"). [Emphasis added.]¹⁶

The lease-purchase contract between Plymouth County and the Corporation (which was dated May 1, 1992, rather than April 1, 1992) obligated Plymouth County to pay the principal and interest payments on the \$110,535,000 debt to the COP holders through the year 2022.

The Official Statement prepared in conjunction with the COP sale described the Commonwealth's obligation under the MOA as follows:

The Commonwealth, acting through the EOPS and the DOC, has entered into the MOA with the County, acting through the County Sheriff, under which the County Sheriff has agreed to accept 380 state prisoners in the Project and EOPS has agreed to include in its annual operating budget requests during the term of the MOA an amount sufficient to carry out its obligations under the MOA. The term of the MOA is 30 years commencing on the Closing Date. **The Commonwealth, through the EOPS and the DOC, has**

capacity of the Plymouth facility be used to accommodate state inmates.

¹⁶In 1993, before construction of the Plymouth facility was completed, the Commonwealth consolidated payments to Plymouth County for housing state and county inmates into a single appropriation. Thus, while the Commonwealth's correctional payments to Plymouth County are based in part on the number of state and county inmates housed at the Plymouth facility, the Commonwealth does not base these payments on an agreed-upon per diem rate for state inmates, as required by the MOA with Plymouth County.

covenanted to make payments to the County pursuant to the MOA at least equal to the Lease Payments due under the Lease.
[Emphasis added.]

Over the 30-year financing period, these lease payments will cost taxpayers more than \$303 million.

Although the Commonwealth's MOA with Plymouth County is not legally defined as debt, the Commonwealth's failure to fund the MOA payments could affect the Commonwealth's credit.

The cover page of the Official Statement for the Plymouth County COPs clearly stated that the MOA did not constitute a general obligation or pledge of credit on the part of the Commonwealth:

NEITHER THE CERTIFICATES NOR THE OBLIGATION TO MAKE LEASE PAYMENTS PURSUANT TO THE LEASE CONSTITUTES A DEBT OR A LIABILITY OF THE COMMONWEALTH. THE EOPS' OBLIGATION TO MAKE PAYMENTS UNDER THE MOA IS SUBJECT TO APPROPRIATION OF FUNDS BY THE COMMONWEALTH. THE OBLIGATION OF THE COUNTY TO MAKE LEASE PAYMENTS OR ANY OTHER PAYMENTS TO OR FOR THE BENEFIT OF THE OWNERS OF THE CERTIFICATES IS NOT A GENERAL OBLIGATION OF THE COUNTY. [Capitalization in the original.]

However, the COP rating assigned by Standard & Poor's was tied to the Commonwealth's own bond rating. In April 1992, before the COPs were issued, a Standard & Poor's Creditwatch news release announced the provisional triple "B" minus rating given to the COPs and noted:

Although Plymouth County is the lessee under the lease contract securing the certificates, **the rating is based on the creditworthiness of the Commonwealth of Massachusetts.**

Through special legislation and a memorandum of agreement, the commonwealth has agreed to make payments to the lease trustee which will cover debt service on the certificates. . . .

The investment grade rating on the certificate reflects the commonwealth's financial ability to make the annual appropriations to utilize space at the prison, the essentiality of this project to state corrections operations, and the commonwealth's contractual obligation to make payments, subject to annual appropriation, under the memorandum of agreement. [Emphasis added.]

In October 1992, Standard & Poor's changed the rating for the Plymouth County COPs from BBB- to BBB. In a letter to the Plymouth County Sheriff, Standard & Poor's noted that the upgraded rating was a reflection of the Commonwealth's ability to pay for the Plymouth facility:

The rating was changed primarily because of improved general creditworthiness of the Commonwealth of Massachusetts which is contractually obligated to make debt service payments on the bonds.

Hale & Dorr, which had drafted the special legislation authorizing lease-purchase financing for the Plymouth facility and served as counsel to the Corporation, provided a more extensive explanation of the MOA's significance in a January 1993 memorandum to the Sheriff of Berkshire County regarding the Plymouth County financing. The memorandum stated:

[The special legislation] authorized a type of financing using certificates of participation ("COP's") issued by a special purpose corporation (the "Corporation"), the interest and principal of which are to be paid from federal, state, and county revenues. . . .

As the Plymouth project developed, however, it became clear that mere passage of the legislation in itself was insufficient to accomplish the objective of financing the project. Investors in the COP's were concerned about the ability of the Corporation and the County to service the debt. Massachusetts counties have little independent financial ability to raise funds and thus to reassure investors. Accordingly, it was necessary for the Commonwealth, acting through the Secretary of Public Safety, to enter into a Memorandum of Agreement with the County and the Corporation to guarantee state payments on account of inmates representing a specified percentage of the total beds. These payments, pursuant to that Memorandum of Agreement and subject to legislative appropriation, will be paid directly to a trustee and the COP's holders will have the first claim on those revenues for the payment of principal and interest. **Based on my experience with the Plymouth transaction, it is my view that unless and until the Secretary of Public Safety commits to a Memorandum of Agreement regarding state payments on account of state prisoners, the project cannot be financed and would not go forward.**

In addition, the investment community looked upon the Plymouth County project, as it properly would look upon a project in Berkshire County, as essentially underpinned by the Commonwealth of Massachusetts. [Emphasis added.]

Project participants interviewed by this Office, including the former Dillon Read official participating on the private development team and former A&F officials, confirmed the view that private investors would not have provided financing for the Plymouth facility if the Commonwealth had not agreed to pay for the debt service on the COPs. Although the MOA payments are subject to annual appropriation -- and, thus, are not legally considered debt -- the Commonwealth's failure to appropriate funds for the payments required by the MOA could endanger the Commonwealth's fiscal reputation in the financial markets.

Finding 2.

The Commonwealth is subsidizing the federal government's cost of housing federal inmates at the Plymouth facility.

The April 1991 IGA between Plymouth County and the USMS permitted the USMS to house an estimated 320 federal inmates at the Plymouth facility at a negotiated per diem rate. However, the IGA did not commit the USMS to using a minimum number of beds at the Plymouth facility, nor did it guarantee Plymouth County a minimum payment for the beds used by federal inmates. The Official Statement for the Plymouth County COPs made it clear to prospective investors that the USMS had no financial commitment to the project:

Although it is contemplated that approximately 320 of the Inmates to be housed in the Project will be housed under the IGA, the federal government is not obligated to house any minimum or particular numbers of federal pre-sentence detainees at the Project. **Therefore, there can be no assurance as to the actual number of federal pre-sentence detainees that will be housed and, correspondingly, the level of funds, if any, that will be available to the County under the IGA.** [Emphasis added.]

The IGA set a preliminary per diem rate of \$71.00 per day but provided that this rate would be renegotiated after the new facility began operations. Although the IGA stated that the per diem rate would be based on the "actual operational costs for the facility," it did not specify the allowable costs that would be included in the calculation of the per diem rate. In short, the IGA contained no assurances that the USMS would pay the full cost of constructing and operating the portion of the Plymouth facility to be occupied by federal inmates or that the USMS would continue to house federal inmates at the facility throughout the 30-year financing period.

When the Plymouth facility opened in 1994, Plymouth County requested that the per diem rate allowed by the IGA be increased from \$71.00 to \$80.76. The proposed rate of \$80.76 was calculated by dividing the projected daily operating and debt service cost for the new facility for the period of July 1994 through June 1995 by the total number of inmates to be housed in the facility.

However, the debt service costs associated with the USMS inmates were higher than the financing costs associated with the state and county inmates. This disparity related to U.S. Internal Revenue Service tax rules. The following is a very brief explanation of the effect of IRS rules on the COP issue for the Plymouth facility.

According to the former Dillon Read official who participated on the private development team, the construction cost attributable to housing federal inmates was not eligible for tax-exempt financing under federal tax rules. An exhibit to the Arbitrage and Tax Compliance Certificate for the sale of the COPs contained an analysis by Brown & Root of the portions of the Plymouth facility to be utilized by the USMS and the estimated construction costs associated with the projected 320 USMS inmates. Brown & Root's analysis indicated that the cost allocations had been based on discussions with the Plymouth County Sheriff and others involved with the project design and use.

Based on the assumption that the 320 USMS inmates would occupy three specific housing units, Brown & Root's analysis allocated 34.5 percent of the projected design-build cost to the 320 USMS inmates. The final breakdown of the COPs was as follows: \$41,550,000, or 37.6 percent, of the \$110,535,000 COP issue was determined to be taxable and the remaining \$69,985,000, or 62.4 percent, of the COP issue was determined to be tax-exempt. Brown & Root's analysis had assumed that the federal beds would cost proportionately more to construct than

the state and county beds.¹⁷ Thus, the ratio of taxable to tax-exempt COPs (37.6 percent: 62.4 percent) was significantly higher than the ratio of federal inmates to state and county inmates to be housed at the facility (28 percent : 72 percent). The taxable COPs carried a 10.58 percent interest rate -- substantially higher than the 7.13 percent interest rate carried by the tax-exempt COPs.¹⁸ If the Plymouth facility had been built exclusively for state and county inmates, the entire project could have been financed through tax-exempt COPs that carried the lower 7.13 percent interest rate.

But the per diem rate paid by the USMS has never reflected the higher interest rate the Corporation would pay on the COPs. Instead, the per diem rate charged to the USMS has been calculated on the basis of the combined interest rate of 8.46 percent for the taxable and tax-exempt COPs. The practical effect of this arrangement is that the per diem payments made by the USMS have been lower than the actual cost of federal participation in the project. In effect, the Commonwealth's taxpayers are subsidizing the federal government's cost of housing federal inmates at the Plymouth facility. If the proportion of USMS inmates at the facility were to remain at 28 percent for 30 years, as anticipated when the IGA with the USMS was signed, the subsidy provided to the federal government by the Commonwealth's taxpayers would exceed \$19 million. As of May 1997, USMS inmates accounted for approximately 13 percent of the total inmate population. If the proportion of USMS inmates were to remain at 13 percent throughout the 30-year financing period, the subsidy provided to the federal government by the Commonwealth's taxpayers would exceed \$23 million.

¹⁷Brown & Root's analysis noted that Brown & Root had based all cost allocations on the proposed use of the project as presented to Brown & Root in discussions with the Plymouth County Sheriff and others.

¹⁸The interest rates cited in this report were computed by the project underwriter, Dillon Read. They represent the internal rates of return or "true interest costs" of the COPs.

Finding 3.

Project publicity has not provided full or accurate information regarding the Plymouth facility's future financial impact on state taxpayers.

Project publicity distributed to the Legislature and the public in 1991, before the special legislation for the Plymouth facility was enacted, misleadingly implied that the Commonwealth would not be obligated to pay for the new Plymouth facility. In November 1991, a "Fact Sheet" was distributed by the Plymouth County Sheriff's Department in support of the special legislation. According to the "Fact Sheet," the benefits offered by the proposal included the following:

Private financing: **no obligation of public funds**; private financing has no impact on State bond authorization limits.

Over \$1 million in private investment already made to advance the project to this point[.]

Eliminates the need for State financed jail for Plymouth County: \$80 million savings to the taxpayers, with facility to revert to public after bond retirement[.]

State capacity expanded by 300 beds at no capital cost; County capacity expanded to 445 and made state of the art. [Emphasis added.]

Attached to the "Fact Sheet" was an article from *Plymouth County Business Review* entitled "Plymouth County as entrepreneur." The article stated:

The new 1200-bed facility, to be constructed on county-owned land in Plymouth, will be built **at no cost to the taxpayers** and will provide income for the county and for the Town of Plymouth. . . . These efforts . . . show government at its entrepreneurial best. [Emphasis added.]

As the highlighted statements illustrate, the "Fact Sheet" and accompanying article suggested that the proposed Plymouth facility would provide the Commonwealth with new correctional beds at no cost to state taxpayers. The reality was that the success of the financing plan hinged on the Commonwealth's agreement to pay for the new facility over the next 30 years.

In contrast to the project publicity, a letter from the Plymouth County Sheriff to Hale & Dorr highlighted the magnitude of the financial obligation to be assumed by the Commonwealth. In the March 1992 letter -- written three months after the enactment of the special legislation for the Plymouth facility -- the Plymouth County Sheriff noted that the project would be financed initially by private investors but that taxpayers would ultimately fund both the construction and long-term operating costs of the facility:

As we discussed in our telephone conversation of late yesterday afternoon, we both agree that the project to construct a new Plymouth County correctional facility is unique and sensitive. **Although "private" in that construction is being financed through private investment, both the construction and operating costs will ultimately be paid by tax dollars.** [Emphasis added.]

Two months later, the Commonwealth executed the MOA committing state taxpayers to paying the full financing cost of the Plymouth facility over the next 30 years.

But two years after the MOA was executed, publicity disseminated by the project participants continued to claim that the project posed no risks to taxpayers.¹⁹ A 1994 pamphlet produced by the project developer, the Cornell Cox Group, and

¹⁹Prior to the 1994 opening of the Plymouth facility, *Engineering News-Record* published a profile, "Plymouth County: Cutting Costs Without Cutting Corners," stating that the Plymouth County Sheriff was "getting a brand new facility out of the relationship at virtually no cost to the taxpayers."

distributed by Plymouth County officials provided the following description of the project:

Eight months before it is scheduled to open, the project has already received nationwide praise not only for its design, but also for the unique public/private partnership that will allow the facility to be built on time, operate efficiently and **at virtually no risk to the taxpayers.** [Emphasis added.]

In fact, the project has exposed taxpayers to significant financial risk. The following sections of this report discuss these risks in greater detail.

Project Finances

According to public officials and private development team members interviewed by this Office, the final decision to issue COPs in the amount of \$110,535,000 resulted from an informal process, instituted by the private development team, whereby each project participant notified Dillon Read of its fees, expenses, or other costs to be paid out of the project proceeds. According to the former Dillon Read official who participated on the private development team, Dillon Read then assembled the fees and expenses submitted by each participant.

As of 1997, project expenditures from the proceeds of the COP sale and interest earned on these proceeds totaled approximately \$115.3 million. Table A shows the uses of these funds. It should be noted that the project expenditures of \$115.3 million from the funds borrowed from private investors do not include \$11.5 million in future mitigation payments to the Town of Plymouth. Under a Memorandum of Understanding among Plymouth County, the Corporation, and the Town of Plymouth executed in 1992, the Town of Plymouth received inflation-adjusted payments of \$200,000 per year from project funds during the construction period. The Town has also received \$400,000 per year upon completion of construction; the latter payments are funded by project operating revenues -- i.e., public funds received by the Plymouth County Sheriff's Department from the Commonwealth and the USMS -- rather than by the proceeds from the project financing. Over 30 years, the total value of these mitigation payments to the Town of Plymouth will be \$11.9 million plus inflation adjustments.

The project expenditures listed in Table A also exclude a \$340,000 early completion bonus paid by the Corporation to Brown & Root from project income, and \$1.4 million in project interest earnings paid to Plymouth County by the Corporation.

Table A
PLYMOUTH FACILITY PROJECT EXPENDITURES FROM COP FUNDS

Issuance and Closing Costs		\$ 4,054,093
Ground Lease Payment to Plymouth County		5,000,000
Design-build contract with Brown & Root	\$69,039,204*	
Other construction expenses	<u>3,322,526</u>	
Design and Construction Expenses		72,361,730
Professional services (including technical Representative services provided by TBA)	2,733,479	
Payments to the Town of Plymouth	1,170,853**	
Transition expenses	1,232,260	
Other land and facility expenses	<u>392,870</u>	
Administrative Expenses		5,529,462
Capitalized Interest Payments		23,251,989
Debt Service Reserve		<u>5,129,455</u>
Total Project Expenditures from COP Proceeds (Incl. Interest)		\$115,326,729***

*The design-build contract amount of \$69,039,204 does not include the \$340,000 early completion bonus paid to Brown & Root from state and federal income received by the Plymouth County Sheriff's Department.

**The payments to the Town of Plymouth of \$1,170,853 include only mitigation payments and fees paid to the Town of Plymouth from COP proceeds. Until the year 2022, the Town will be paid an additional \$400,000 per year, adjusted for inflation, from state and federal income received by the Plymouth County Sheriff's Department.

***The total project expenditures of \$115,376,729 include approximately \$560,000 remaining in the Construction and Acquisition Fund as of May 1997. These funds include retainage withheld from Brown & Root and additional funds to be used for remedial construction work, including work to repair the facility roof and replace the facility's kitchen floor. The total project expenditures of \$115,376,729 do not include \$1.4 million in project interest earnings transferred to Plymouth County.

Sources: Project records and information provided by TBA Architects.

The procedures and requirements for expending and accounting for project funds were spelled out in the May 1992 Trust Agreement executed by Plymouth County, the Corporation, and State Street Bank (the Trustee). The primary objective of the Trust Agreement was to protect the interests of COP holders by ensuring, for

example, that the Corporation maintained sufficient funds to pay the interest and principal on the COPs. The Trust Agreement also contained provisions permitting Plymouth County to receive millions of dollars in project funds. Although the Commonwealth had assumed responsibility for repaying the debt owed to the private investors, the Commonwealth did not review the Trust Agreement to ensure that taxpayer interests were protected.

Finding 4.

Plymouth County will receive at least \$17 million in project funds and interest earnings from project funds during and after the 30-year financing period.

The \$110,535,000 borrowing financed a \$5 million ground lease payment to Plymouth County for 33 acres of County-owned land.

Before the size of the planned Plymouth facility was expanded to include state inmates in mid-1991, the private development team's plans to build a correctional facility for the USMS had called for a \$3 million lease payment to Plymouth County for 20 acres of County-owned land. Project records indicate that the proposed lease price of \$150,000 per acre was approximately three times the market value. A 1989 appraisal commissioned by Plymouth County had valued the 64.53-acre parcel (that included the 20 acres to be used for the USMS facility) at \$3.2 million, or \$50,000 per acre, assuming a "highest and best" industrial use of the property.

A "Questions & Answers" publicity sheet explaining the proposal to build a USMS correctional facility emphasized the benefits to Plymouth County of the proposed \$150,000 per acre lease price:

Is \$3 million a good deal for the County? What would be the value of the land if it were sold?

Land in the Plymouth Industrial Park, with existing roads and utilities, typically sells for \$50,000 to \$80,000 per acre. The 20-acre County parcel, with no frontage on existing roadways, is being leased for \$150,000 per acre. [Emphasis in the original.]

Project records show that the USMS continually raised objections to the proposed \$3 million lease payment to Plymouth County. In a March 1991 letter to the USMS, the Plymouth County Sheriff argued that the lease payment was justified because Plymouth County stood to gain no benefit from the construction of a USMS facility on County land:

The Facility is entirely programmed for use by the USMS and as such provides no benefit to Plymouth County in its own governmental programs or operations. The cost of land is therefore not being allocated to the County for its own simultaneous benefit. . . .

The land is appropriately valued at \$150,000 per acre, consistent with an appraisal provided to the County by the owner of an adjacent parcel.²⁰

When the negotiations with the USMS proved unsuccessful, the proposed project was expanded to 1,140 beds. Although the size of the County parcel to be leased was increased from 20 acres to 33 acres, project records show that the negotiated ground lease payment to be paid to Plymouth County for the 33 acres of land was \$3 million. A September 1991 internal memorandum prepared by MIFA, which was to finance and build the 1,140-bed facility, noted that the \$3 million lease payment to Plymouth County would eliminate Plymouth County's operating deficit:

At closing, the county will receive a one-time, \$3,000,000 lease payment from MIFA. The payment will, of course, be paid solely from the proceeds of the transaction. Coincidentally, Plymouth County is now carrying an approximate \$3,000,000 operating deficit for the 1991 fiscal year.

²⁰Project files contain no record of this appraisal.

But in late 1991, the plan to finance the project through MIFA was abandoned in favor of a plan under which Plymouth County would issue COPs. In early 1992, after the special legislation authorizing the Plymouth facility project had been enacted, the negotiated ground lease payment to Plymouth County was increased from \$3 million to \$5 million.

The \$2 million increase reportedly resulted from an informal negotiation between a County Commissioner and Dillon Read. According to the former Chairman of the County Commissioners, who served as the first President of the Corporation, he requested that Dillon Read increase the lease payment to Plymouth County from \$3 million to \$5 million, and Dillon Read agreed to do so. In an interview with this Office, the former Chairman confirmed that the \$5 million lease payment, which amounted to approximately \$150,000 per acre, did not correspond to the market value of the property. Rather, according to the former Chairman, he requested the \$5 million lease payment to address Plymouth County's \$4.5 million operating deficit.

In an interview with this Office, the former Dillon Read official confirmed that she had approved the increase from \$3 million to \$5 million. She stated that, from the perspective of the financial markets, the lease payment did not need to reflect the exact market value as long as it fell within a reasonable range of the market value.

In July 1992, two months after Plymouth County received \$5 million for the 33-acre Plymouth facility parcel, the Corporation purchased a 10.3-acre parcel of land adjacent to the facility for the price of \$380,000. In a memorandum certifying that the purchase price was fair and reasonable, TBA Architects contrasted the price of \$36,893 per buildable acre with the price of \$202,840 per buildable acre received by Plymouth County from project funds:

The land leased for construction of the project is 32.75 acres containing approximately 8.1 acres of wetlands and their buffer areas,

equalling 24.65 buildable acres. This parcel is being financed by a five million dollar (\$5,000,000.) initial lease payment, or two hundred two thousand eight hundred forty dollars (\$202,840.) per buildable acre.

We believe this [\$380,000 acquisition price for the 10.3-acre parcel] to represent a very attractive price for the land.

Two years later, in June 1994, an official of the Executive Office for Administration and Finance (EOAF) prepared an internal memorandum analyzing the financing cost of the Plymouth facility.²¹ The memorandum noted that the \$5 million ground lease payment to Plymouth County had been paid by the County-owned Corporation comprised of Plymouth County officials:

For the Plymouth Jail Project the County received a \$5 million lump sum payment from the County-created non-profit corporation which leases the Plymouth County Jail, effectively receiving \$5 million from the Jail's financing for general County purposes.

On June 28, 1994, TBA Architects prepared a memorandum to County officials responding to EOAF criticisms of the project. TBA Architects defended the \$5 million payment on the grounds that the Commonwealth had failed to provide sufficient funds for Plymouth County operations in the past and that the lease payment constituted an innovative mechanism of eliminating Plymouth County's operating deficit:

Plymouth County is an elected level of government and monies received by the County advance a public purpose. The deficit paid off by the ground lease proceeds originated in part from state actions,

²¹The EOAF analysis was prepared in response to a proposal by the Plymouth County Commissioners to construct new courthouses in Brockton and Plymouth with private financing secured by long-term leases with the Commonwealth. The Administration ultimately decided not to support the proposal, which was modeled on the financing scheme for the Plymouth facility.

including failure of the judicial department and EOPS [Executive Office of Public Safety] to fully fund operations for courts and jails. At the time of project closing, all counties were negotiating the resolution of their deficits with the state, with two possible outcomes: either the state was to have paid the deficit or it would have allowed the counties to raise sufficient funds to pay for it. By eliminating its deficit through this innovative project, Plymouth County advanced the recent successful resolution of this long standing statewide issue.

Even if it were true that the Commonwealth would have paid for Plymouth County's operating deficit, having the Commonwealth finance the \$5 million cost over 30 years without conducting a detailed examination of the factors contributing to Plymouth County's deficit was not optimal from the perspective of the Commonwealth's taxpayers. According to officials from the Department of Correction and Division of Capital Planning and Operations, the Commonwealth does not typically pay county governments for county-owned land to be used for county facilities. For example, the Plymouth County Commissioners had issued an order in January 1990 to convey the parcel of land housing the old Plymouth County Jail and House of Correction to the Commonwealth "for the express and only purpose of building a new jail or expansion of the existing facility for the inhabitants of Plymouth County." More recently, Plymouth County granted 7.67 acres of land to the Commonwealth for \$1.00 to construct a new Plymouth County Court Complex fronting the access drive to the Plymouth facility.²²

Because the Plymouth facility was designed to house up to 380 state inmates as well as at least 440 county inmates, some compensation to Plymouth County for a portion of the land may have been justified. However, any such compensation would have been far lower than \$5 million. The \$5 million ground lease payment to Plymouth County will cost the Commonwealth's taxpayers approximately \$15 million in principal and interest expenses over 30 years.

²²This information was reported in the 1995 report to the Legislature submitted by the Plymouth County Commissioners and Sheriff's Department.

Plymouth County will receive millions of dollars in project interest earnings over the 30-year financing period.

The Trust Agreement established six trust funds, each containing multiple accounts: a Construction and Acquisition Fund, an Administrative Expense Fund, a Lease Payment Fund, a Reserve Fund, a Revenue Fund, and a Capital Repair and Replacement Fund. Under the terms of the Trust Agreement, Plymouth County is entitled to all interest earned on the Reserve Fund and all interest earned on the Revenue Fund in excess of the interest needed for the semiannual principal and interest payments to the COP holders.²³ As of late 1996, Plymouth County had already received more than \$1.4 million in interest generated by these two funds. Over 30 years, the \$5.1 million Reserve Fund will generate an estimated \$6 million to \$9 million²⁴ in interest payable to Plymouth County; the Revenue Fund -- whose balance fluctuates -- can be expected to generate at least \$1 million to \$3 million.²⁵

The flow of project interest earnings from the Corporation accounts to Plymouth County accounts has coincided with shortfalls in the operating revenues received

²³In September 1992, four months after the COPs were issued, the Trust Agreement was amended by the Plymouth County Commissioners, the Corporation, the Plymouth County Sheriff's Department, and State Street Bank, the Trustee. The amendment required the interest on the reserve fund to be transferred to the construction and acquisition fund until the final acceptance of the project was achieved, at which point these funds were paid to Plymouth County. The amendment also altered the requirements for guaranteed investment agreements by, for example, changing the required one-day notification period for withdrawing invested project funds without penalty to seven days, retroactive to May 1992.

²⁴This range was derived by adding Plymouth County's actual interest earnings on the debt service reserve fund of \$1.3 million between 1992 and 1997 to projected interest earnings on the fund of \$5.1 to \$7.7 million over a 25-year period, assuming interest rates of four to six percent.

²⁵Plymouth County received \$130,000 in interest earned on the revenue fund over the 18-month period between June 1994, when the facility opened, and December 1995. At this earnings rate, Plymouth County would receive more than \$2.5 million over the 30-year financing period.

by the Plymouth facility. In January 1995, seven months after the facility opened, a new Plymouth County Sheriff assumed office.²⁶ In July 1996, the new Plymouth County Sheriff sent a letter to the Secretary of Administration and Finance that raised serious concerns about the financial viability of the project. The Sheriff pointed out that the USMS had not housed the anticipated number of federal inmates at the Plymouth facility in the 1996 fiscal year and that revenues from the USMS had dropped accordingly, thereby creating a serious revenue shortfall. The Sheriff's letter pointed out that additional state funding would be required in order to avert the risk of default:

The problem with the Marshal's I.G.A. [Intergovernmental Agreement] is that it is an agreement on per-diem charges for each federal detainee. It does not bind the Marshal's Service either to a minimum total payment or a minimum number of detainees. . . . This loss of federal detainees has left me with a shortfall in federal income. Coming at the end of the fiscal year, this loss of federal income has resulted in a deficit for the year.

Our operating budget assumes a predictable level of federal income. Indeed, the facility was approved by the state and built on an assumption that the Marshal's Service would be a dependable third-party source of revenue. Those assumptions have just been shattered. . . .

This obviously means that the state needs to increase its funding to us, both for the FY '96 deficit and what we can expect to be a FY '97 shortfall. But there is a more serious concern for the state. Debt service is paid through our operating budget. When we face a deficit or serious cash flow problem we run the risk of defaulting on the bonds issued by the Special Purpose Corporation. This project is an indirect obligation of the Commonwealth so a default would have serious consequences for the state.

²⁶His predecessor, who had planned, promoted, and presided over the construction of the Plymouth County facility, resigned in September 1994, three months after the facility began operations.

The Trust Agreement authorized Plymouth County to receive millions of dollars in project earnings and to use these funds for noncorrectional purposes. The flow of interest payments from the project to Plymouth County has deprived the project of funds that could be used to offset the Commonwealth's costs. At the same time, reduced revenues from the USMS have made the task of budgeting for project operations and maintenance more difficult.

Plymouth County will receive a minimum of \$5.1 million in surplus project funds at the end of the 30-year financing period.

The Trust Agreement provides that all surplus project funds not needed to pay COP holders or the Trustee will revert to Plymouth County at the end of the 30-year financing period. At a minimum, Plymouth County stands to receive the \$5.1 million that must be held for the entire 30-year period in the Reserve Fund.²⁷ As in the case of the \$5 million ground lease payment to Plymouth County, the \$5.1 million Reserve Fund will cost the Commonwealth's taxpayers approximately \$15 million in principal and interest expenses over 30 years.

²⁷The Reserve Fund contains one semi-annual payment of full principal and interest on the amount borrowed.

Finding 5.

The project issuance costs included questionable fees to private development team members.

As discussed earlier, a private development team that included TBA Architects, Dillon Read, Cornell Cox Group, Hale & Dorr, and several other law firms had developed and promoted the project to finance and build the Plymouth facility. The November 1991 "Fact Sheet" distributed to the Legislature in support of the special legislation authorizing the Plymouth facility project cited as a project benefit the investment by private development team members of over \$1 million dollars. When the COPs were sold in May 1992, eight private firms and public entities were paid or reimbursed from the COP proceeds for the expenses they had incurred in connection with the project financing. (See Table B.) The special legislation authorizing the Plymouth facility project exempted all contracts directly or indirectly related to the Plymouth facility from all statutory requirements requiring advertising or bidding, thereby enabling the project participants to devise their own rules for procuring and paying for project-related services.

There is no evidence that any public official representing the Commonwealth or Plymouth County conducted a comprehensive review of the payment requests submitted by the private development team members. Project files contain a March 1992 letter from the Plymouth County Sheriff to Hale & Dorr, requesting that Hale & Dorr evaluate the project issuance costs and advise the Sheriff of their appropriateness. Hale & Dorr had drafted the special project legislation and subsequently served as counsel to the Corporation. Project records contain no correspondence or other documentation from Hale & Dorr regarding the issuance costs, which included a \$175,000 payment to Hale & Dorr.

Table B

**PLYMOUTH FACILITY
PROJECT ISSUANCE COSTS**

Underwriter's Discount	\$1,453,532
Original Issue Discount	936,695
Plymouth County	401,046
Jones, Day, Reavis & Pogue	450,000
Dillon Read	331,605
Hale & Dorr	175,000
MIFA	124,891
Brown, Rudnick, Freed & Gesmer	50,000
TBA Architects	81,324
State Street Bank	10,000
Printing	<u>40,000</u>
Total Issuance Costs	\$4,054,093

Source: Project payment records

The fees paid to private development team members included payments for development work performed on speculation long before the Commonwealth's involvement.

This report has described the private development team's failed negotiations with the U.S. Marshals Service (USMS) to develop a 220- to 440-bed federal detention facility in Plymouth. The documentation submitted by the private development team members in support of their closing fees for the state-funded 1,140-bed Plymouth facility showed that these firms were reimbursed from the COP proceeds for the time and expenses they had invested in the earlier USMS project.

For example, the documentation submitted by TBA Architects in support of the \$81,324 fee paid to TBA Architects from the COP proceeds showed that TBA Architects had billed Plymouth County a total of \$398,422 between October 12, 1989 and May 1, 1992. Plymouth County had paid TBA Architects \$317,099, for

which Plymouth County was reimbursed from the COP proceeds.²⁸ The \$81,324 fee paid to TBA Architects constituted the remainder owed by Plymouth County for work dating back to 1989.

Dillon Read's compensation from the COP proceeds included both an underwriting fee and a project development fee. In a letter to the officers of the Corporation, the Senior Vice President of Dillon Read set forth the basis for Dillon Read's requested project development fee of approximately \$880,000:

The original proposal to the County, as adopted by the County Commissioners in July 1990, consisted of a Design/Build/Finance approach. By that time as you know, we had been working with the U.S. Marshal Service for over 6 months negotiating for a contract and a financial structure which was recognized by USMS in the award to our team in June 1990.

This project has taken many twists and turns since then. On the attached Schedule of Project Development, I have attempted to highlight the benchmark events related to project development for which it was intended that we be compensated out of the total fees. This portion of the fees \$8.00/\$1,000 of the par amount, together with the sales and underwriting component brings the total compensation to \$21.18/\$1,000, which includes an allocation for expenses of \$300,000.

The schedule attached to Dillon Read's letter outlined Dillon Read's project development efforts beginning with the development of a financing plan for the request for proposals issued by the USMS in December 1989 -- 18 months before the plan to build a 1,140-bed facility was formulated.

²⁸According to a May 1992 memorandum from TBA Architects to State Street Bank, Plymouth County's payment represented reimbursement for "out of pocket expenses incurred by Plymouth County associated with the start up of the project." Of the \$401,046 payment, \$317,099 reflected fees paid by Plymouth County to TBA Architects; the remaining expenses included legal, advertising, appraisal, and

In an interview with this Office, the former Dillon Read official who authored the letter cited above explained that Dillon Read had negotiated the project development fee of \$8.00 per \$1,000 with the project developer, David Cornell.²⁹ In other words, the private development team members had decided among themselves that they would be paid at the project closing for all of the services they had provided and the costs they had incurred since Becon/Concept first decided to submit a proposal in response to the 1990 RFP issued by the USMS for a federal detention facility.

This decision was also reflected in the 32-page invoice prepared by the law firm of Jones, Day, Reavis & Pogue, which served as bond counsel for the COP sale, in support of its \$450,000 closing fee. The invoice listed tasks such as meetings, telephone conferences, and preparation of materials completed by the firm between June and August 1990 in connection with a MIFA-financed correctional facility in Plymouth County that was to be constructed for the USMS, with no involvement of the Commonwealth. Although this facility was never constructed, and MIFA did not finance the Plymouth County Correctional Facility, Jones, Day billed the project for the 1990 work as well as work performed in 1991 and 1992 (discussed below). In a letter to the Plymouth County Sheriff, Jones, Day, Reavis & Pogue provided the following explanation of the charges for work done in conjunction with earlier, unsuccessful transactions:

As you know, we began work on this financing in June of 1990, almost two years ago. At that time the financing was to be a federal financing involving the construction of a pre-sentence detention facility for the United States Marshals Service, without any state or local component. We began drafting documents on that basis, but the transaction languished and no further work was done at that time.

CPA services.

²⁹As will be discussed, Dillon Read's project development fee was reduced by \$550,000 after a state official raised objections to the higher fee.

In July of 1991, we were asked to commence work again on the correctional facility, this time with financing to be provided by the Massachusetts Industrial Finance Agency ("MIFA"). The facility was to include federal, state and local prisoners and detainees.

Discussions with MIFA and other prospective parties to the financing ensued, including a bank which was considering issuing its letter of credit for the financing, and we were directed to draft documents on an expedited basis, which we proceeded to do. At the same time we conducted an extensive legal review of the proposed method of financing which had been presented to us and concluded that it would not serve all of the objectives of the parties. We were asked to develop an alternative approach which, after further legal research and discussions with the various parties, we presented. The approach we suggested involved a non-profit corporation, but still involved a MIFA bond issue.

It was further determined at this point that a financing could not proceed without special legislation from the Commonwealth, and we participated in the development of the language of the legislation. At this time, the financing further evolved into a certificates of participation format, a departure from all of the other prior proposed structures and we were again, for the third time, asked to redraft documents to fit this new format. . . .

This transaction is the first of its kind in Massachusetts and, with the participation by the County, the Commonwealth and the federal government, may be a first of its kind in the country. Both the documents and the legal analysis required to consummate the transaction have been and are complex and have required considerably more time and creativity than would normally be required for a county financing.

The \$124,891 fee paid to MIFA, which played no role in financing or constructing the 1,140-bed Plymouth facility, also illustrates the inadequacy of the financial controls over the closing fees. MIFA's March 1992 invoice to the Plymouth County Sheriff indicated that this payment consisted of a \$100,000 fee to MIFA, a \$16,500 payment for "MIFA Counsel Fee and Expenses," and a \$8,391 payment for "Special Counsel Fee and Expenses. As discussed earlier in this report, the private development team had originally planned to finance the construction of the federal detention facility through MIFA, which was to issue lease revenue bonds and then

contract with Brown & Root to construct the facility. The initial plans for the 1,140-bed facility included MIFA financing; from late 1991, the project proceeded without MIFA's participation.

Private and public officials interviewed by this Office confirmed that the fees charged by the members of the private development team reflected their time and expenses incurred in 1990 and 1991 in connection with the team's unsuccessful efforts to reach agreement with the U.S. Marshals Service for a detention facility containing 220 to 440 beds. Those interviewed stated that the unsuccessful USMS development project was viewed, for purposes of billing by the private development team members, as an early version of the successful Plymouth facility project, despite the obvious differences in the facility size and contractual arrangements among the participants. In defense of these billings, one private development team member pointed out that private sector firms would have no incentive to initiate deals such as the Plymouth facility financing deal if they were barred from receiving compensation for their previous, unsuccessful development efforts.

The closing fees and expenses -- which are part of the Commonwealth's long-term financial obligation -- thus included payments for work performed and expenses incurred long before the Commonwealth's involvement in the project. They also included retroactive payments to private development team members for their 16 months of work that preceded the May 1992 project financing. After plans to construct a detention facility for USMS inmates were abandoned, the private development team members spent at least a year planning, developing, and promoting the 1,140-bed facility for federal, state, and county inmates before the COPs were issued in May 1992. With the exception of TBA Architects, the private development team members worked without contractual arrangements authorizing payment for their work. (TBA Architects was paid nearly \$400,000 under agreements with Plymouth County for planning and development services; Plymouth County was later reimbursed for these payments from the COP

proceeds.) In the absence of such contractual arrangements, private development team members could devise their own billing rates and rules.

For example, Hale & Dorr's payment request for \$175,000 was accompanied by two invoices: an invoice for \$10,000 for legal services rendered as special disclosure counsel to the Commonwealth in connection with the COPs, and an invoice for \$165,000 for legal services rendered as special counsel to the Corporation in connection with the creation of the Corporation, the drafting of special legislation on behalf of the Corporation,³⁰ the issuance of COPs for the benefit of the Corporation, and "the negotiation of certain contracts, together with disbursements related to the foregoing services." The invoices provided no detail regarding the dates on which the services were provided or the time billed on each date. Under these circumstances, the accuracy of these invoices would have been impossible to assess.

As a general principle, paying vendors retroactively for work that was not performed under contract poses obvious financial risks to the payor. This method of procuring professional services lacks all of the safeguards that normally protect public agencies against these risks, such as advertised competition, preparation of a written scope of services, an agreement on the fees to be paid or rates to be charged, and execution of a written contract containing public protections. The high issuance costs for the Plymouth facility later proved controversial, as explained in the "Project Evaluation" section of this report.

The Commonwealth negotiated a \$550,000 reduction in the special investment banking fee paid to Dillon Read, but failed to conduct a detailed review of the other issuance fees.

³⁰As discussed earlier, the Corporation was not created until after the enactment of the special legislation drafted by Hale & Dorr.

Although the Commonwealth did not negotiate or review all of the fees to be paid at the project closing, an official from the EOAF did raise objections to the project development fee of more than \$880,000 to be charged by Dillon Read. Correspondence on file at the Corporation indicates, and interviews with project participants confirm, that Dillon Read reduced this fee to \$331,605 after the Commonwealth's intervention. In May 1992, the Plymouth County Sheriff wrote to the responsible EOAF official, stating: "I am pleased that the negotiated settlement represents fair and appropriate fees." There is no evidence that the Commonwealth subjected the other issuance fees to a similar level of scrutiny prior to the sale of the COPs.

Finding 6.

Project expenditure controls were weak.

Within the confines of the Trust Agreement, the Corporation had wide latitude to spend project funds.³¹ As noted earlier, the Corporation's expenditures were not subject to review or oversight by the Commonwealth.

In some instances, the Corporation spent project funds on services that were unrelated or only tangentially related to the Plymouth facility. For example, the Corporation spent \$23,000 on a no-bid change order in August 1994 to repave, recurb, and restripe the parking lot of Plymouth County's Public Safety Building, which was not part of the Plymouth facility construction project. The former Corporation President who authorized the change order provided this Office with the following written explanation of this expenditure:

³¹Although the Trust Agreement required the Trustee, State Street Bank, to issue all checks from the project proceeds, the Corporation made arrangements to issue its own checks for certain expenditures. This arrangement saved the project the \$50 administrative fee charged by the Trustee for each check. Corporation bank records indicate that the value of the checks issued by the Corporation in this manner exceeded \$7 million.

All initial staff training for the new facility was held at Obery Street Administration Building and we required expanded parking capacity to accommodate the additional staff.

Regardless of whether or not the County parking lot needed to be repaved, the Corporation's use of project funds for this work illustrates the Corporation's broad expenditure authority.

The Corporation also paid TBA Architects more than \$2,000 from project funds during 1995 for a study relating to the use of Plymouth County land for a state courthouse -- a project whose relationship to the Plymouth facility was even more tenuous than the paving work cited above. According to the former Corporation President who authorized this expenditure:

The County's offer of land to the state was a product of planning to assure the optimum land development. This involved many factors including shared utilities, site parking and possibly underground physical connection to the Correctional Facility. TBA was completely informed about the site conditions and we saw this analysis as part of the project.

While an expenditure of County funds may have been justifiable for this purpose, the Corporation's ability to spend project funds for this purpose underscores the lax expenditure controls governing the use of project funds.

Project Design and Construction

Note on Design-Build Construction

Under Massachusetts law, design and construction of public buildings must be undertaken sequentially: a competitively selected designer prepares detailed construction plans and specifications that are advertised and bid. Major subcontracts are also advertised under a system known as "filed subbidding." The construction contract is awarded to the qualified contractor offering the lowest price.

By contrast, a design-build project is both designed and constructed by a single design-build team consisting of a designer and a contractor. Design-build contracts, which are often competitively procured through a request for proposals process, are based on conceptual plans whose level of completion can vary from five percent to 50 percent.³² Design-build proponents argue that design-build accelerates construction schedules and reduces project costs by allowing the design and construction phases to overlap, eliminating the time required to solicit competitive construction bids, facilitating communication and coordination between the designer and the contractor, and allowing the design-build team flexibility to select the construction materials and methods that will best meet the requirements set forth in the conceptual plans.

The risks of design-build stem from the changed role of the designer and the incomplete design documents underpinning the design-build contract. In a conventional project, the designer often monitors the progress of construction on behalf of the owner to ensure that the final product comports with the detailed plans and specifications for the project. In a design-build project, however, the designer is a member of the contractor's team. Under this contractual arrangement, the

³²See Gurry, William, "Documenting Design-Build," *Civil Engineering*, September 1995. The appendix to this report contains other sources of information on design-

designer does not necessarily represent the owner's interests in designing the project, nor can the owner rely on the designer to detect and report construction defects.

Cost escalation is also a major risk. In the absence of complete plans and specifications, the design-builder's price often includes a large contingency as protection against future disputes with the owner. The owner may also be vulnerable to further price increases stemming from disputes with the design-builder over the final building systems and materials.

Overview of the Plymouth Facility Project

Design-Build Contract Cost

The Corporation executed a design-build contract with Brown & Root Building Company for the Plymouth facility in May 1992. The \$69,322,000, fixed-price contract with Brown & Root contained a provision for payment of an early completion bonus, the amount of which depended upon the date by which the project achieved substantial completion.³³

In principle, contracting with a single entity for both design and construction offers the potential for a more streamlined and cost-effective contracting process than the conventional model of executing separate contracts for design and construction services. However, the Corporation's contractual relationship with Brown & Root contained more intermediaries than many conventional construction contracts. Although Brown & Root was responsible for designing and building the Plymouth facility, Brown & Root did not furnish either of these

build.

³³According to the contract, the maximum bonus to which Brown & Root was entitled was \$880,000, if the project reached substantial completion by January 1994.

services directly. Brown & Root contracted these services out to Durrant Flickinger, which provided design services, and to Morganti, Incorporated, which provided general contractor services. Brown & Root also paid the project developer, Cornell Cox Group, from the design-build fee. Thus, the design-build contract price for the Plymouth facility included fees to "middle men" -- i.e., Brown & Root and Cornell Cox Associates -- in addition to the designer and the contractor.

The Plymouth facility achieved substantial completion on May 27, 1994. The Corporation had approved 38 change orders, one of which had deducted approximately \$1.7 million budgeted for furniture, fixtures, and equipment (FF&E) from Brown & Root's contract. (These FF&E funds were transferred to the Plymouth County Sheriff's Department, which purchased the budgeted FF&E items.) The final design-build contract price was \$69,039,204.³⁴ Brown & Root's \$340,000 early completion bonus was paid from the Plymouth facility's income from the Commonwealth and the USMS, and thus was not reflected in the final construction contract price.

Total Design and Construction Cost

The total design and construction cost of the Plymouth facility was \$72,710,730.³⁵ Some construction work on the Plymouth facility was not performed by Brown & Root. The total design and construction cost for the project thus includes the

³⁴The 1995 report to the Legislature by the Plymouth County Commissioners and Sheriff's Department reported that the design-build contract was completed at 0.4 percent "under budget." This calculation appears to have been based on the differential between the initial and final design-build contract price. It did not account for the FF&E funds transferred from the design-build contract to the Sheriff's Department, although these funds were spent on FF&E items originally included in Brown & Root's contract. Accounting for the transferred FF&E funds, the design-build contract with Brown & Root was completed at two percent over budget.

Corporation's expenditures on construction-related contracts for roadwork, soils cleanup, and upgrading of the Town of Plymouth's wastewater treatment plant³⁶ in addition to the payments to Brown & Root, the transferred FF&E funds, and the early completion bonus. The total design and construction cost does not include more than \$2 million in project funds paid to TBA Architects for project oversight throughout the design-build contract period.

Design

The Plymouth facility houses inmates in a series of two-story "pod" units constructed along a central corridor. Each pod contains single, double, and four-person cells. Most inmate services, such as food, recreation, and visitation, are delivered within the pods. The Plymouth facility has no central dining area, no central recreation yard, and limited program space. The design reflects the concept of "direct supervision," an inmate management approach that calls for correctional officers to be stationed inside housing units rather than separating correctional officers from inmates with security barriers.³⁷ The Commonwealth has incorporated the direct supervision model into the design of state and county correctional facilities for many years.³⁸ Indeed, the Commonwealth's 1991 master plan for the planned replacement Plymouth County Jail and House of Correction provided for direct supervision of all inmates.

³⁵This figure reflects construction cost information compiled by TBA Architects.

³⁶The project funded improvements to the Town of Plymouth's central wastewater treatment plant and under-street delivery system to enable service to the Plymouth facility.

³⁷A detailed examination of the direct supervision concept is provided in a July 1988 *National Institute of Justice Construction Bulletin* entitled "Cost Savings in New Generation Jails: The Direct Supervision Approach," written by W. Raymond Nelson and published by the U.S. Department of Justice, Washington, D.C.

³⁸According to DCPO, nine state and county correctional facilities built by the Commonwealth used the direct supervision approach as of mid-1997.

The 1995 report to the Legislature by the Plymouth County Commissioners and Sheriff's Department suggested that the Plymouth facility's use of the direct supervision concept offered cost advantages. While this may be the case, the principal cost advantages of the Plymouth facility stemmed from its small size and simple design.³⁹

Construction

The construction site of the Plymouth facility was a large, mostly flat, open area. Although some wetlands mitigation had to be done, the site was highly favorable in other respects. The deep sand and gravel at the site provided excellent conditions for foundation construction while minimizing drainage problems. By providing sufficient space for construction storage, the site aided the contractor's construction schedule.

Approximately three-quarters of the Plymouth facility was constructed using modular precast concrete units. Morganti, Inc., the general contractor hired by Brown & Root, had previously used modular construction techniques on two correctional projects for the Commonwealth.⁴⁰ Use of modular precast concrete units was an established technique for saving time and money.⁴¹ The precast concrete unit manufacturer, the Worcester-based firm of Pomco, Inc., filed for bankruptcy while the Plymouth facility was still under construction. However, this Office found no evidence that Pomco's bankruptcy affected the quality of the project.

³⁹As will be discussed, the Plymouth facility's inadequate administrative space has generated proposals by the Corporation for construction of new administrative facilities at the project site.

⁴⁰This information is drawn from an *Engineering News-Record* article: "Plymouth County: Cutting Costs Without Cutting Corners."

⁴¹See, for example, "Florida Sets Example With Use of Concrete Modules," by Charles B. DeWitt, published in the March 1986 *National Institute of Justice Construction Bulletin*, U.S. Department of Justice, Washington, D.C.

Finding 7.

The Commonwealth had no authority to oversee or approve the program, design, or construction of the Plymouth facility.

Under the special legislation, the Plymouth facility project was exempt from statutory provisions for supervision, oversight, approval, and control of state-funded construction projects by the Division of Capital Planning and Operations (DCPO), the state's professional construction and property management agency. The November 1991 project fact sheet distributed by the Plymouth County Sheriff in support of the special legislation stated that the schematic design of the facility had been "reviewed and approved by federal, state and county corrections authorities"; however, this appears to have been an overstatement. According to a January 1991 letter from the USMS to the Plymouth County Commissioners:

It is not the practice of the USMS to sign or approve architectural plans or documents for a local facility. The USMS has no role in the actual construction of local facilities. . . . Finally, the USMS cannot agree to accept the facility until it is completed and inspected.

Records from the Corporation, the EOPS, the DOC, and the DCPO contained no written approvals of the Plymouth facility schematic design by any state agency.

The special legislation apparently anticipated that the agreements with Plymouth County executed by the Commonwealth and the U.S. Marshals Service (USMS) would establish design criteria to be met by the Plymouth facility. Under Section 6 of the special legislation, Plymouth County and the Plymouth County Sheriff's Department were required to obtain written findings from the technical

representative before approving certain project contracts (discussed later in this report). The written findings had to certify that:

(a) the terms of any contracts covered by the foregoing provision are fair and competitive; (b) the contracting parties have the necessary qualifications to perform their contractual obligations in a timely and satisfactory manner; **(c) the design of the project would satisfy the criteria established under any agreements then in effect providing for the use of the project as a criminal detention facility by the United States, the county, the commonwealth or any political subdivision thereof;** and (d) the materials, if any, to be used in the performance of the contract are appropriate for their intended use. [Emphasis added.]⁴²

However, neither the Intergovernmental Agreement (IGA) with the USMS nor the Memorandum of Agreement (MOA) between the Commonwealth and Plymouth County established any design criteria for the Plymouth facility.

Moreover, the Commonwealth -- which is obligated to house state inmates at the facility and to pay the debt service on the project -- had no authority to approve or veto decisions relating to the programming, design, or construction of the facility. In a letter to DOC officials sent soon after the project was financed in May 1992, TBA Architects noted that the Corporation's construction and financing contracts allowed for no oversight by the Commonwealth.

In many important respects, the design and construction process envisioned in these [project] documents is unlike the state's method for generating design build construction projects. Much in the project has been established in the contract exhibits. Review and approval will be on an extremely fast track and much of the coordination responsibility is shared by various members of the project team. Most importantly, the funds for the project are absolutely limited.

⁴²These contract certification requirements are discussed in more detail in the "Project Oversight" section of this report.

Construction contingencies have been held to a minimum; there is little room for owner generated change orders.

I mention all of this to you so as to make clear the context for our work. We see DOC as the Sheriff's client: one of the agencies that will be using his department's services. We see you and your staff as the DOC's technical staff, informing the Commissioner of Corrections as to the appropriateness of our building for its use. It will not be possible, however, for you to have a "line" responsibility on the project. **The construction and financing agreements do not accommodate any approval by client agencies.** [Emphasis added.]

In early 1993, the Corporation began to plan construction of a second phase of the Plymouth facility consisting of 750 beds, with an on-site wastewater treatment plant. The estimated construction cost of this expansion project was approximately \$60 million. The expansion was to be paid for by refunding⁴³ the taxable COPs used to construct the original 1,140-bed facility with tax-exempt COPs, as well as issuing new COPs. In order to comply with federal tax rules, the refunding plan would require that the beds leased to the USMS represent no more than 10 percent of the total construction cost

Although construction of the 1,140-bed facility had been underway for more than six months and the Corporation was planning a major expansion of the Plymouth facility,⁴⁴ the Commonwealth was unable to obtain basic information concerning the size of the Plymouth facility components during this period. In February 1993, DCPO's Deputy Director of Programming requested information from Durrant

⁴³According to *The Guidebook to Municipal Bonds*, "refunding" is "the underwriting of a new bond issue whose proceeds are used to redeem an outstanding issue." (Marlin, George J. and Mysak, Joe, *The Guidebook to Municipal Bonds*, The American Banker/The Bond Buyer, 1991, p. 215.)

⁴⁴Legislation to amend Chapter 425 of the Acts of 1991 to permit construction of up to 970 additional beds at the Plymouth facility was filed in 1993 and refiled in 1994; however, it was never enacted. The Corporation paid TBA \$6,375 from project funds for services relating to the legislative proposal.

Flickinger's Project Architect on the square footages corresponding to the areas listed in the 1992 contract documents:

My office is now gathering information on the various facilities in our system in terms of program (net and gross square footage), costs, site development, and other issues in order to have as broad a planning context as possible. For example, in terms of gross square footage per inmate, Plymouth is probably one of the most compact facilities in the system. There is a lot we can learn from that.

What I would like to get from your firm, if possible, is square footages to go along with the list of spaces that are on the contract documents (I believe the majority of this is fairly repetitive). Ideally this information would also include gross square footages for "pods" or other easily definable building chunks.

Two weeks later, Durrant Flickinger's Project Architect informed DCPO that the "project team" had decided not to release this information:

I presented your request for more detailed information on the programming of this facility to the project team. Unfortunately, our client determined that the release of that information at this time would be premature.

Finding 8.

The fast-track design-build process used by Brown & Root restricted the Corporation's access to key project information.

Under the May 1992 contract between Brown & Root and the Corporation, Brown & Root was required to

cause to be performed, all architectural, engineering and construction services to describe, detail, and construct the Project in accordance

with the Conceptual Design Documents and the Plans and Specifications.

The August 1991 conceptual design documents,⁴⁵ which Brown & Root had prepared in anticipation of the design-build contract, were attached as an exhibit to the contract.

Typically, state-funded correctional facilities and other building projects require completion of a study defining the scope and requirements of the project before the project is designed. Defining these requirements is especially important for a design-build project because of the lack of detailed plans and specifications describing the facility to be designed and constructed. However, under the special legislation authorizing the Plymouth facility project, the project was exempt from the study requirement. Although Brown & Root made use of the programming documents prepared by the Commonwealth's consultants for the unfunded replacement Plymouth County Jail and House of Correction,⁴⁶ the design-build contract with Brown & Root did not contain or incorporate by reference any study or planning documents specifying the space requirements to be met by the Plymouth facility.

The August 1991 conceptual design documents, on which the Corporation's design-build contract with Brown & Root was based, provided little detailed information regarding the facility for which the Corporation had agreed to pay more than \$69 million. Although the 15 sheets of plans were drawn to scale, they did not specify the square footages of each room or area shown on the plans. They

⁴⁵A notation on the cover of the August 1991 conceptual design indicated that it had been revised in January 1992.

⁴⁶In the 1993 report to the Legislature, the Plymouth County Commissioners and Sheriff's Department acknowledged that the DCPO study had expedited Brown & Root's design work: "Programming [of the Plymouth facility] was significantly advanced by a draft study for expansion of the Plymouth County Jail and House of Correction, provided by the state Division of Capital Planning and Operations."

contained no architectural detail regarding the roof, walls, or ceilings of the new facility. They contained no mechanical detail regarding the plumbing, heating, ventilation, or air conditioning systems. While design-build contracts are typically based on incomplete design documents, they often incorporate programs or planning documents specifying the functional requirements the facility must fulfill. The design-build contract for the Plymouth facility did not. Brown & Root thus had maximum flexibility to decide on the final design of the Plymouth facility as well as the materials and construction systems to be used. Indeed, Brown & Root's promotional literature described the contract for the Plymouth facility as "a negotiated turnkey building contract."⁴⁷

The shop drawings prepared by Brown & Root for major construction tasks provided detailed documentation of Brown & Root's ongoing work. However, project records indicate that Brown & Root often failed to provide the Corporation's technical representative with shop drawings for the ongoing construction work. For example, in October 1992, the Corporation President sent a letter to Brown & Root complaining about Brown & Root's handling of shop drawings:

While the Technical Representative does not have an approval right over the [shop] drawings, he is to be given copies of the drawings in advance so that any concerns of the Corporation can be expressed prior to installation. These procedures protect both the Corporation and the Design/Builder and serve the Project as a whole. We have reason to believe that subcontractors of [the] Design/Builder have been ordering materials in advance of the required approval of shop drawings and, in some cases, have installed materials prior to or simultaneously with the required approval.

The Corporation President's letter went on to cite a case in which polyvinyl chloride (PVC) piping was purchased and installed before the technical

⁴⁷A "turnkey" contract is a type of design-build contract under which the design-builder has maximum control over project design and construction; the owner often does not inspect the project until it is complete and turnkey-ready.

representative had reviewed the shop drawings; although TBA Architects subsequently reported to Brown & Root that the gauge of the PVC piping was too thin, Brown & Root had "disregarded" TBA Architects's observations.

The minutes from a Corporation meeting held in May 1993 indicate that Brown & Root may have dispensed with shop drawings altogether in some instances:

[TBA Architects] stated that Brown & Root Company is doing things for which there are no drawings. That issue is under discussion, we need to know what they have added and what has been subtracted from the original plans.

The problem continued into November 1993, according to a memorandum from TBA Architects's clerk of the works to Brown & Root:

It has come to our attention that we have not been receiving field shop drawings for various aspects of construction in a timely manner. The most recent example being the steel and joist erection at the warehouse. . . .

The steel erection is approximately 95% erected including steel decking, and as of this date we do not have a steel deck drawing (JE1) to check the deck attachment.

The design-build contract's sketchy design requirements also rendered the project vulnerable to cost increases. For example, in a May 1993 memorandum from TBA Architects to Brown & Root, TBA Architects took issue with Brown & Root's contention that installation of a specific gym flooring material called "Mondo-flex" would require approval of a \$34,980 change order to Brown & Root's contract. The memorandum indicated that Brown & Root had planned to install a painted concrete floor in the gymnasium of the facility. As the following excerpt from TBA Architects's memorandum makes clear, the conceptual design documents upon

which Brown & Root's contract was based did not specify the type of flooring material to be used in the gymnasium:

The conceptual documents do not indicate a particular flooring material and rather were specified as "special coating." The question arises as to the definition of this term. You have represented to us that "special coating" means a paint on concrete, and have suggested that such a treatment of the gym floor was made necessary by the need for cost reduction. As we see it, "special coating" means a coating specially manufactured for the intended purpose. . . .

We feel that paint on concrete, if installed, would be quite inconsistent with the general level of quality of this facility. Nowhere else to my knowledge does such a manifestly inferior material appear. Painted concrete on a gym is not typical and certainly not consistent with the long life cycle, state-of-the-art character of the Plymouth County Correctional Facility. Nowhere could I find any evidence that the owner directed such a change; I know TBA did not. [Emphasis added.]

Notwithstanding these arguments, the vagueness of the conceptual design documents apparently worked in Brown & Root's favor. In September 1993, the Corporation approved a \$37,491 change order to Brown & Root's contract for the "Mondo-flex" gym flooring.

A June 1994 letter from the Project Director of Durrant Flickinger to the Senior Project Manager of Brown & Root suggested that it was permissible for Brown & Root to deviate from the construction documents because of the "flexible" nature of the design-build process. The letter, written as construction of the facility was nearing completion, stated:

Durrant Flickinger, Inc., in conjunction with its electrical consultants, Durrant Engineers, finds that the service entrance equipment reviewed and approved in [the] shop drawing review process is an appropriate and equivalent type of equipment to the system shown on construction documents. . . . **The flexible selection of construction components or methods is an industry accepted**

practice associated with the Design-Build process, depending of course on thorough professional review by the Engineer of Record. [Emphasis added.]

Even after the project reached substantial completion in May 1994, the Corporation was unable to obtain the "as-built" drawings for the Plymouth facility. In November 1994, TBA Architects wrote a letter to David Cornell of Cornell Cox, the developer paid by Brown & Root, setting forth a series of major construction matters that needed to be resolved prior to final acceptance of the facility and noting that the drawings had not yet been delivered:

TBA is still awaiting delivery of corrected drawings from the civil, electrical, and mechanical sets as well as the "record" specifications. . . . [T]he substantial changes from original mechanical system design have been documented and submitted to us only to a limited extent.

The pattern of these contracting problems highlights some of the risks of design-build. A 1995 article in *Construction Business Review* summarizes these risks as follows:

Design-build is another delivery system that has gained recent favor with certain owners who want a single source of owner contractual responsibility, and require an aggressively fast-tracked project. Although this system offers the simplicity of a single source and can most readily fast-track a project if required, it seems to suffer from many drawbacks, especially a lack of checks and balances between a design firm and a construction firm. Furthermore, true value engineering is frequently lacking in the project, and the design quality may be subordinate to construction cost.

Because of the risk the design/build contractor assumes, the owner loses some of the advocacy gained in the traditional CM [construction management] role. The owner also loses some project control, as cost and schedule become prime drivers in the project. The owner may not achieve desired functional design or required quality for the same reasons.⁴⁸

⁴⁸Potter, Alfred K. II, "Construction Management: Delivery System of Choice,"

Finding 9.

Project timelines provided to the Legislature omitted 16 months of project design work that preceded the design-build contract.

According to officials of TBA Architects interviewed by this Office, Brown & Root began work on the Plymouth facility design in January 1991.⁴⁹ Working on speculation, Brown & Root completed the conceptual design for the Plymouth facility in August 1991 and advanced the design over the ensuing nine months. However, project timelines provided to the Legislature did not include the design work performed on speculation by Brown & Root throughout 1991 and early 1992. As a result, the timelines understated the project schedule for the Plymouth facility by at least 16 months. Nevertheless, the 1993 report to the Legislature stated:

[T]he highlights of the schedule shown here illustrate just how quickly the county, through its special purpose corporation, is completing the work.

In their 1993, 1994, and 1995 reports to the Legislature on the status of the Plymouth facility, the Plymouth County Commissioners and Sheriff's Department contrasted the Plymouth facility project timeline with a hypothetical state timeline for designing and constructing a replacement for the old Plymouth County Jail and House of Correction. Each timeline was labeled with the dates of key preconstruction activities under each scenario. (The italicized events shown in Figure 1 were omitted from the report timelines.)

Construction Business Review, November/December 1995.

⁴⁹The 1993, 1994, and 1995 reports to the Legislature by the Plymouth County Commissioners and Sheriff each contained a project chronology listing January 1991 as the date when the project was reformulated from a smaller federal detention facility housing a maximum of 440 federal inmates to a larger correctional facility housing 1,140 federal, state, and county inmates.

Figure 1
Timeline Omissions
PLYMOUTH COUNTY CORRECTIONAL FACILITY
DESIGN / CONSTRUCTION TIMETABLE

STATE TIMETABLE	PCCFC TIMETABLE
Sheriff's Request for New Facility	Dec-82
Preliminary Study	Dec-87
State Study Begins	Apr-89
	Jan-91 <i>Design Begins</i>
<i>State Operational & Architectural Program Completed</i>	Apr-91 IGA Signed
	May-91
	Aug-91 <i>Conceptual Design Completed</i>
	Oct-91 Land Lease / MOA Signed
State Study Completed	Dec-91 Legislation Signed
Advertise A/E	Apr-92
	May-92 Project Financing Closes
Award A/E	Jun-92 Groundbreaking
A/E Complete, State Appropriation	Jun-93
Advertise Construction	Aug-93
Award Construction	Oct-93
Groundbreaking	Nov-93
	May-94 Construction Complete
Construction Complete	May-95

Also:
Design-Build Contract Executed
\$75,000 Design-Build Change Order Approved
\$5 million Design-Build Payment Issued

Source: Corporation records; OIG annotations in italics.

The timeline for the replacement jail planned and designed by the Commonwealth showed that the 1991 master plan commissioned by DCPO had taken two and one-half years to complete; it also provided a hypothetical design schedule allowing 14 months from advertisement to completion of the final design contract. The timeline did not list the May 1991 completion of the operational and architectural program for the replacement facility, although Brown & Root's design work was -- according to the text of the 1993 report to the Legislature -- "significantly advanced" by the DCPO planning documents.

The preconstruction timeline for the Plymouth facility listed only three events for 1991: the April 1991 IGA with the USMS; the October 1991⁵⁰ execution of a land lease between Plymouth County and MIFA, which assigned the lease to the Corporation in February 1992; and the December 1991 approval by the Governor of the special legislation. The first design-build activity shown on the bar chart was the June 1992 project groundbreaking, which took place more than a year after Brown & Root's design work began. The timeline did not list the January 1991 date on which Brown & Root began to program the Plymouth facility design, nor the August 1991 date on which Brown & Root completed the Plymouth facility conceptual design that became the basis for the Corporation's May 1992 design-build contract with Brown & Root.⁵¹

⁵⁰The 1993, 1994, and 1994 reports to the Legislature also indicated that the memorandum of agreement (MOA) with the Commonwealth was signed in October 1991; in fact, the MOA was not signed until May 1992.

⁵¹The text of the 1993 report stated that the design-build team had developed "concept plans" prior to the May 1992 project closing, and that "the final contract set" was signed on August 28, 1991, by the Chairman of the County Commissioners, the Plymouth County Sheriff, the technical representative, the design-builder, and the architect. However, Plymouth County did not contract with TBA for technical representative services until February 1992, and the Corporation did not contract with Brown & Root until May 1992. "Final contract set" was an apparent reference to contracts involving the Massachusetts Industrial Finance Agency (MIFA) and the private development team members under a project financing and construction scenario that was later discarded in favor of the

The 1994 report to the Legislature stated that the Plymouth facility project was initiated in May 1992, when the COPs were issued:

Final Closing marked the actual commencement of the project. It put in place the construction and permanent financing, enabling all development activities.

Similarly, the appendices to the 1994 and 1995 reports to the Legislature contained graphic depictions of the project schedule showing that design activities had begun at the end of May 1992. This information was potentially misleading. By the May 1992 closing date, design work on the Plymouth facility had been underway for more than a year; moreover, Brown & Root had already negotiated the first change order to the May 1992 design-build contract. Project records contain a memorandum to Brown & Root from Durrant Flickinger, the architectural firm under contract to Brown & Root, dated April 23, 1992, discussing modifications proposed by TBA Architects to the plans Durrant Flickinger had prepared for the Plymouth facility. According to Durrant Flickinger's memorandum, the changes proposed by TBA Architects to the facility site configuration and kitchen floor plan would require Durrant Flickinger to redo 39 drawing sheets. The memorandum stated that the cost of redoing the drawings -- under the design-build contract that had not yet been executed -- would be \$155,000 and that the new work would extend the architectural services timeline by four weeks. The revisions were ultimately incorporated into a \$75,000 change order approved by the Corporation on May 26, 1992, less than a month after the design-build contract with Brown & Root was executed.

The Corporation paid Brown & Root \$5 million in May 1992 for services provided prior to the May 1992 design-build contract.

arrangements detailed in this report.

The Corporation approved a \$5,084,706 payment to Brown & Root on May 18, 1992. Project records contain a schedule of values, provided to TBA Architects by Brown & Root two months before Brown & Root's contract was executed, showing the breakdown of the \$5,084,706 payment. The schedule of values showed that the \$5 million payment covered the following services provided prior to May 1992 (less \$88,085 in retainage):

- \$2,324,809 for "development fees," defined in Brown & Root's letter as the costs associated with "public relations, real estate consulting, community support and site selection, program consulting, legal services, financial services, developer services and management services."
- \$950,000 for "architectural/engineering preconstruction services."
- \$880,854 for "preconstruction," defined in Brown & Root's letter as the costs associated with "preconstruction activities of Brown & Root such as estimating, travel, precast plant start up, contract document preparation, alternative scenario pricing, preliminary design development."
- \$242,128 for "design/builder fees."
- \$775,000 for bonds and insurance.

The "development fees" of \$2,324,809 were especially noteworthy. In the public sector, a contractor or design-builder would be unlikely to receive such a substantial payment under a construction or design-build contract for services unrelated to design and construction, such as public relations, legal services, and real estate consulting. The method by which the development fees charged by Brown & Root were calculated cannot be assessed, since Brown & Root did not itemize the tasks completed or time spent on these nondesign-build services. (Although the Cornell Cox Group, the private developer who had assembled the private development team several years earlier, was reportedly paid by Brown & Root from the design-build contract payments, project records contain no documentation of this fee arrangement.) Moreover, the issuance costs for the Plymouth facility had included fees to other private development team members for legal services, real estate consulting, and other development-related services.

Like many of the closing fees, the initial \$5 million payment to Brown & Root represented reimbursement for the time and funds Brown & Root had invested on speculation before May 1992. Like other private development team members, Brown & Root billed the project for services that had not been contracted for. Based on the general service descriptions and lump-sum fees contained in Brown & Root's first design-build payment request, the Corporation paid Brown & Root more than \$5 million in project funds less than a month after the design-build contract with Brown & Root was executed.

Finding 10.

Shortly after the Plymouth facility began operations, the Corporation and the Sheriff concluded that the facility's administrative space was inadequate.

Shortly after the Plymouth facility began operations in June 1994, the Plymouth County Sheriff and the Corporation determined that the newly constructed facility did not contain sufficient administrative space to enable the facility to operate efficiently and cost-effectively. In July 1994, the Corporation contracted with TBA Architects to provide project management, planning, and design services to the Corporation for construction of a new Sheriff's Department administration building adjacent to the Plymouth facility, at a lump-sum fee of \$76,750 plus reimbursable expenses, to be paid from project funds. Project construction was to be funded by issuing new COPs at a lower interest rate and refunding the original COPs. According to an October 1994 estimate provided to the Plymouth County Treasurer by Dillon Read, refunding the original issue of COPs would yield savings with a net present value of \$5.1 million.

A project summary prepared by the Plymouth County Sheriff's Office in October 1994 provided the following explanation of the proposed addition. Under the existing arrangement, the Sheriff's Department was (and is) located in a building

adjacent to the former jail and house of correction, but remote from the new Plymouth facility. According to the Sheriff's project summary, the proposed construction of new administrative space would bring the Plymouth facility into line with other county correctional facilities recently constructed by the Commonwealth :

The proposed organization, with the Office of the Sheriff made integral to the detention center, is conventional. **In fact, all recently constructed county correctional facilities in the Commonwealth include these departmental [correctional administration and training] divisions as part of the detention facility or, as planned here, as part of a campus complex.** In the view of the Sheriff, the structures are necessary to meet the increased demands on the Sheriff's Department in light of its considerable growth and to assure the proper administration of the detention center. [Emphasis added.]

Also in October 1994, TBA Architects wrote two memoranda to the Corporation Treasurer regarding the Corporation's planned expansion of the Plymouth facility's administrative capacity. One memorandum cited a series of problems, including "avoidable transportation and administration costs" and "a compromised internal configuration," associated with the existing arrangement:

This alternative [keeping the Sheriff's Department offices at the existing location] preserves the current bifurcation of the Sheriff's Department, however, requiring remote oversight of the new Correctional Facility. **Such a physical organization perpetuates avoidable transportation and administration costs and results in a compromised internal configuration for the affected divisions within the Sheriff's Department.** [Emphasis added.]

The memorandum indicated that if new administrative space were constructed at the site of the Plymouth facility, the Corporation planned to move the County Commissioners' and Treasurer's offices from their existing location in the

Plymouth County office building to the Public Safety Building vacated by the Sheriff's Department.

The other memorandum spelled out the proposed program and schedule for constructing new administrative space at the Plymouth facility. The new administrative space was to consist of a main building and an "ancillary structure." These buildings would house four Sheriff's Department divisions: the Office of the Sheriff, the Training Division, the Communications Division, and portions of the Security Division. The preliminary schedule contained in the memorandum anticipated a competitive selection process for the design-builder: the schedule called for advance refunding in December 1994, issuance of a design-build request for proposals in February 1995, selection of a design-build firm in April 1995, commencement of construction in June 1995, and substantial completion in July 1996.

In November 1994, the Corporation Treasurer wrote to an official of the Executive Office for Administration and Finance to provide the official with information he had requested on these projected savings. The Treasurer's letter noted that these savings could be used to reduce the Commonwealth's financial obligation but argued that constructing administrative facilities at the site of the new facility would enable "advances in public safety":

According to Dillon Read figures the present value of the savings is currently \$5.1 million. If the savings were to be taken in over the life of the debt issue, the savings would equate to a reduction of \$0.96 in the per diem rate applicable to both Federal and State inmates based on an occupancy of 1,140 beds. . . .

[W]e are providing a building program and timetable prepared by TBA outlining the type of facility proposed. **In the view of the Sheriff this building will enable the Plymouth County Sheriff's Department to more efficiently manage the new correctional facility and improve timing of training of its correctional officers.** These advances in public safety can be accomplished at no cost to the

Commonwealth. In addition, this building will be so located as to serve as a focal point connecting the existing jail with any possible future jail on the site. [Emphasis added.]

Between September 1994 and July 1995, the Corporation paid TBA Architects \$84,465 from project funds for its work on the administration building plans. However, the refunding and construction of the administrative space did not take place.

As discussed earlier in this section, the Corporation's design-build contract with Brown & Root did not contain or reference any program or planning document specifying the functional requirements to be met by the facility design. Since Brown & Root's contract did not specify the amount and type of administrative space required by the Sheriff's Department, Brown & Root was able to limit the amount of administrative space at the Plymouth facility, thereby minimizing the facility's construction schedule and cost. These savings must be weighed against the long-term costs of failing to construct sufficient administrative space. The former Plymouth County Sheriff deemed the administrative space inadequate to operate a 1,140-bed facility. According to the current Plymouth County Sheriff, the operational problems posed by the inadequate administrative space at the Plymouth facility have been exacerbated as the facility's population has expanded in recent years. By May 1997, the Plymouth facility housed more than 1,300 inmates.

Finding 11.

Construction defects at the Plymouth facility remained unresolved three years after substantial completion of the facility.

The Corporation, at the recommendation of TBA Architects, certified that the Plymouth facility had reached "substantial completion" in May 1994. "Substantial completion" was defined in the Corporation's design-build contract with Brown & Root as follows:

Substantial Completion" means, with respect to the Project, the date jointly certified by A/E [Durrant Flickinger] and Design/Builder [Brown & Root] and agreed to by Owner . . . when an unconditional certificate of occupancy has been obtained for the entire Project and when construction is so sufficiently complete in accordance with the Contract Documents that the entire Project may be utilized for its intended use. . . . [Emphasis in the original.]

Upon substantial completion, the Plymouth County Sheriff took possession of the facility and, approximately one week after substantial completion, moved inmates from the old Plymouth Jail and House of Correction into the new facility. Brown & Root continued work on punchlist items to be completed as a condition of "final acceptance" -- i.e., the Corporation's determination that Brown & Root had completed the facility in accordance with code and contract requirements.

In October 1995, 18 months after substantial completion, the Corporation notified Brown & Root that the Corporation had agreed to approve final acceptance of the facility. In that letter, the Corporation also informed Brown & Root that the Corporation did not intend to pay Brown & Root the full amount remaining under the contract or the unpaid portion of the early completion bonus, as requested by Brown & Root. The Corporation's letter cited "deficiencies and warranty repairs that have not been addressed despite repeated notifications and requests for remedy," including the following deficiencies:

- failure of emergency generator stack,
- failure of recreation deck resurfacing,⁵²
- roof leaks,
- deterioration of kitchen dishwasher belt, and
- installation of accessible door hardware.

Project records also contain an October 1995 memorandum from TBA Architects to the Highlands Insurance Group, Brown & Root's insurance company, notifying the company that the Corporation had informed Brown & Root on October 11, 1995, that the Corporation concurred with Brown & Root's application for final acceptance. The memorandum went on:

However, certain construction items had not been completed to the Owner's satisfaction. The Owner is therefore withholding \$206,600 from the contract amount and will resolve all outstanding items from these funds.

As of June 1997, three years after substantial completion, the Corporation was continuing to seek resolution of construction defects at the Plymouth facility. The roof leaks and recreation deck surface failure cited by TBA Architects in October 1995 had not yet been remedied, and the kitchen floor was chipped and peeling.⁵³

⁵²The original Brown & Root design had called for a sharp aggregate surface, which Brown & Root had subsequently laminated. According to the Corporation's letter, at least one exterior recreation deck had delaminated.

⁵³According to the current Plymouth County Sheriff, who serves as Corporation Clerk, the roof work and replacement of the kitchen floor were to be completed in July 1997.

Finding 12.

The Capital Repair and Replacement Fund established by the Trust Agreement has never been funded.

According to the Official Statement for the Plymouth County COPs, a Capital Repair and Replacement Fund was to be funded from any excess funds in the Construction and Acquisition Fund and the Administrative Expense Fund after all transfers and withdrawals were made pursuant to the Trust Agreement, and from the casualty insurance and condemnation award proceeds not required for repair or replacement of the insured property. The purpose of the Capital Repair and Replacement Fund, according to the Official Statement, was to pay for

the cost of major repairs to the Project and the replacement of all or any portion of the Project as a result of normal wear and tear or casualty. . . .

In a June 1994 memorandum responding to criticisms of the project by the EOAF, TBA Architects pointed to the advantages offered by the "unique" project fund reserved for project repair and replacement expenditures:

This [capital repair and replacement] reserve fund is in the public interest in that it allows the operator to make repairs without the months or years of delay required by the state process. This results in less maintenance expense because timely attention to repair lessens the damage and/or loss of efficiency caused by delay.

Although the Corporation voted to approve final acceptance of the Plymouth facility in October 1995, no funds had been deposited in the Capital Repair and Replacement Fund more than a year after final acceptance. As of June 1997, the Administrative Expense Fund had been closed out and the Construction and Acquisition Fund had a balance of approximately \$560,000. These funds included

retainage of approximately \$200,000 withheld from Brown & Root, pending resolution of the construction defects cited above. The question of whether Brown & Root would be paid all or a portion of the additional \$120,000 in early completion bonus funds withheld from Brown & Root by the Corporation in 1995 was also unresolved. As of June 1997, it was unclear how much money (if any) would be available, after resolving these construction issues, for deposit into the Capital Repair and Replacement Fund. Over the next 25 years, the Commonwealth will bear the cost of major capital repairs to the Plymouth facility not funded by the Capital Repair and Replacement Fund.

Project Oversight

Effective project oversight is an essential protection against fraud, waste, and abuse as well as substandard work on any construction project. In contrast to many conventional design-bid-build projects, the project architect on a design-build project does not monitor the construction contractor's work on behalf of the owner. To address the risks of substandard work and cost escalation, owners often contract with an independent designer or project manager to ensure the quality and control the cost throughout the design and construction phases of the design-build project.

Finding 13.

The special legislation authorizing the Plymouth facility project contained weak project oversight provisions.

Under the special legislation, Plymouth County was required to contract with a technical representative. Section 6 of the special legislation outlined the role of the technical representative as follows:

The county and the [Sheriff's] department shall contract with a qualified individual or firm hereinafter called the technical representative to (1) assist in the negotiation of all contracts for the design, construction and development of the project and (2) perform the functions hereinafter described. Neither the county nor the department shall approve any contracts in excess of one hundred thousand dollars until it receives from the technical representative written findings that (a) the terms of any contracts covered by the foregoing provision are fair and competitive; (b) the contracting parties have the necessary qualifications to perform their contractual obligations in a timely and satisfactory manner; (c) the design of the project would satisfy the criteria established under any agreements then in effect providing for the use of the project as a criminal detention facility by the United States, the county, the commonwealth

or any political subdivision thereof; and (d) the materials, if any, to be used in the performance of the contract are appropriate for their intended use.

The November 1991 Fact Sheet distributed by the Plymouth County Sheriff's Department in support of the legislation emphasized the "rigorous review" to be conducted by the technical representative. However, the provisions for project oversight contained in Section 6 were hardly rigorous. Although the special legislation called for a "qualified individual or firm" to serve as technical representative, the special legislation failed to specify any minimum or desirable qualifications for the role. Other provisions requiring the technical representative to ensure that the contracting parties were qualified, that the design would satisfy the criteria established by the USMS and the Commonwealth, and that the materials used to construct the facility were "appropriate for their intended use," merely called for the Plymouth facility to meet minimum standards for acceptability. Under the special legislation, the technical representative had no responsibility for reviewing the cost-effectiveness of the design, monitoring the quality of construction, or reviewing design-build contract change orders. The technical representative role defined by the special legislation thus constituted a weak mechanism for protecting the public interest in high-quality design and safe, cost-effective construction.

Finding 14.

The technical representative for the Plymouth facility provided more effective project oversight services than the special legislation required.

On February 4, 1992, the Plymouth County Commissioners and Plymouth County Sheriff's Department executed a technical representative services contract with TBA Architects. As discussed in the first section of this report, TBA Architects had participated in planning, developing, and promoting the project on behalf of Plymouth County. (Plymouth County had paid TBA Architects more than \$350,000

between 1989 and 1992 to provide development services in connection with the land used for the facility, and TBA Architects had received an additional \$81,324 from the proceeds of the certificates as reimbursement for the work performed by TBA Architects on speculation between 1989 and 1992.) The Corporation's noncompetitive selection of TBA Architects to provide technical representative services was, therefore, the outgrowth of the firm's years of work in developing and promoting the project.

On the day that Plymouth County executed the contract with TBA Architects, the Chairman of the Plymouth County Commissioners, who was also Chairman of the Corporation, signed the following statement that was apparently intended to transfer responsibility to the Corporation for the technical representative services contract.

The undersigned hereby agrees to assume and perform all of the obligations of the Plymouth County Commissioners and Plymouth County Sheriff's Department under the foregoing Technical Representative Services Agreement.

Thereafter, according to project records, the Corporation retained exclusive control over the technical representative services contract with TBA Architects.

The February 1992 technical representative services contract with TBA Architects had two components.⁵⁴ The "basic services" component specified a series of project management, design review, and construction representation tasks to be performed by TBA Architects over a 26-month period at a fixed fee of \$1,464,500,

⁵⁴Like many other project documents, the contract with TBA Architects had been drafted in 1991, well before the enactment of the special legislation. Indeed, the scope of services contained in Plymouth County's February 1992 contract with TBA Architects was dated August 30, 1991, and contained several references to the MIFA: for example, the contract called for TBA Architects to perform a design review "[o]f all technical documents generated by design-build team under MIFA contract."

to be paid in monthly increments according to a payment schedule attached to the contract.⁵⁵ The basic services fee did not include review of contract change orders or other major changes to the project: according to officials of TBA Architects, change order review was excluded from the scope of the basic services contract because the fixed-fee arrangement would have created a financial disincentive for TBA Architects to conduct thorough change order reviews. The second component of the contract, "additional services," consisted of 12 services -- including review and processing of contract change orders -- to be paid for in addition to the fixed fee for the basic services. As discussed earlier in this report, the design-build process afforded the Corporation and its technical representative limited technical input.

Project records show that TBA Architects conducted thorough and well-documented reviews of Brown & Root's design and construction work at every stage of the design-build process. The project oversight services provided by TBA Architects thus exceeded the inadequate requirements of the special legislation and helped to protect the interests of the public and the COP holders.

The Corporation paid TBA Architects more than \$2 million in project funds between February 1992, when the contract for technical representative services was executed, and July 1996. Table C shows the amount TBA Architects received by task. As the table shows, the Corporation paid TBA Architects approximately \$1.75 million for basic technical representative services, including overtime payments, reimbursable expenses, and administrative overhead.

⁵⁵The original, February 1992 contract with TBA was for a 30-month period at a fixed fee of \$1,570,500. The contract was amended in March 1992 to reduce the contract period to 26 weeks, with a corresponding reduction in the fee.

Table C

PAYMENTS TO TBA ARCHITECTS FROM PROJECT FUNDS

Service	Payment
Basic technical representative services	\$1,614,213
Overtime	51,804
Reimbursable and overhead expenses	<u>83,635</u>
Total - basic technical representative services	\$1,749,652
Administration building proposal	84,465
Construction deficiencies	34,425
Warranty work	32,400
Change order review	22,437
Cracked precast	19,575
Miscellaneous issues	18,989
Sewers and wastewater treatment plant	14,108
Air quality monitoring	12,093
Financial planning	8,231
Reuse of former prison property	7,262
Phase II expansion study	6,375
Town police station	4,162
Fixtures, furniture and equipment issues	3,112
Contaminated soil removal	2,806
Closure of old facility	2,503
County courthouse land study	2,161
Extended warranty work	2,100
Transfer station road	1,894
Long Pond Road improvements	1,706
Supplier lawsuit	919
Retaining wall survey	900
Force majeure	525
Off-site land planning	262
Substitutions	187
Land certifications	<u>75</u>
Total	\$2,033,324

Source: Project payment records

The remaining payments were billed by TBA Architects as additional services under the technical representative services contract or billed under other contracts with TBA Architects executed by the Corporation. For example, the Corporation paid TBA Architects \$84,465 from project funds under a July 1994 contract to provide project management, planning, and design services for construction of a new Sheriff's Department administration building adjacent to the Plymouth facility.

Finding 15.

The contract certifications by the technical representative did not ensure the fairness and competitiveness of contracts over \$100,000.

As noted above, the special legislation required TBA Architects to certify that the terms of any contracts over \$100,000 were "fair and competitive," although the special legislation had exempted these same contracts from all general or special laws and regulations requiring advertising and bidding. The special legislation provided no indication of the standards TBA Architects was to employ in assessing the fairness and competitiveness of a no-bid, negotiated contract.

This Office located written certifications prepared by TBA Architects for only three project contracts among the documents on file at the Corporation and Plymouth County. One certification evaluated the fairness and competitiveness of the contract terms based on the competitive procedures used to select the contractor. The other two certifications relied on other, less persuasive measures of fairness and competitiveness.

TBA Architects prepared a written certification in May 1994 for a telephone systems contract with Nynex Corporation.⁵⁶ This certification cited the competitive

⁵⁶Nynex's contract, the value of which exceeded \$100,000, provided Nynex with a percentage of the revenues generated by the inmate telephone system.

procedures the Corporation had used to select Nynex in support of the conclusion that the contract was fair and competitive:

This contract was procured through a Request for Proposal (RFP) administered under the provisions of the procurement statutes of the Commonwealth for services and equipment of this type. We have reviewed the RFP and find it to be thorough, well written, and that its administrative and technical provisions are appropriately competitive. We have also reviewed the analysis of responses and find that the award was made in a manner consistent with the criteria established in the RFP. The procedures followed in this procurement therefore assure a fair and competitive outcome.

But the written certification for the Corporation's \$69,322,000 design-build contract with Brown & Root did not discuss the unadvertised, noncompetitive process used to select Brown & Root. (Cornell Cox Group had selected Brown & Root, which later compensated Cornell Cox Group from the design-build fees paid by the Corporation.) At the time that the special legislation was drafted, the MIFA had already negotiated the design-build contract with Brown & Root that became the basis for the Corporation's contract with Brown & Root. Indeed, Brown & Root had already prepared a schematic design and an early set of plans for the Plymouth facility. The Plymouth County officials and private development team members who had developed and promoted the special legislation were therefore under no illusion that the design-build contract would be awarded under a fair, open, competitive process.

In certifying that the terms of the design-build contract with Brown & Root were fair, TBA Architects provided the following explanation:

In that the contract was freely negotiated between all involved parties and that the terms contained therein are within keeping with those typically used for other projects of this nature we can attest to the [contract] documents fairness.

The certification described a cost analysis,⁵⁷ performed by TBA Architects, of 50 larger correctional facilities of similar security levels using "pod" construction located throughout the United States, including Massachusetts. The analysis excluded all costs associated with architectural/engineering and development fees (such as those included in the initial \$5 million payment to Brown & Root discussed in the previous section).

The analysis indicated that the Plymouth County facility would cost less than the national average on a per inmate basis and more than the national average on a per square foot basis. The certification attributed the Plymouth facility's higher cost per square foot to the prevailing wage requirements contained in the Brown & Root contract and noted that these requirements were "not universally required in contracts of this sort."

The certification concluded:

We therefore consider the cost of the design/build contract to be competitive with similar types and sizes of construction commissioned in other localities.

Although the certification requirement may have been intended to ensure that a negotiated contract price was no worse than the price of a competitively procured contract, the certification prepared for the Brown & Root contract highlights the methodological difficulty of establishing useful and meaningful contract price comparisons.

Project files contained a third certification, prepared by TBA Architects in July 1992, concerning the Corporation's acquisition of a 10.3-acre parcel of land adjacent to the facility for the price of \$380,000. TBA Architects certified that the acquisition

⁵⁷The analysis was not included in the certification, which stated that TBA would make the analysis available to the Corporation directors on request.

was appropriate for the purpose of furthering the development of the Plymouth facility and that the acquisition price was fair. As discussed in the "Project Planning, Development, and Promotion" section of this report, the certification prepared by TBA Architects contrasted the acquisition price of \$36,893 per buildable acre with the lease price received by the County from the project proceeds for the 33-acre parcel provided by the County for construction of the Plymouth facility. TBA Architects noted:

The land leased for construction of the project is 32.75 acres containing approximately 8.1 acres of wetlands and their buffer areas, equalling 24.65 buildable acres. This parcel is being financed by a five million dollar (\$5,000,000.) initial lease payment, or two hundred two thousand eight hundred forty dollars (\$202,840) per buildable acre.

We believe this [\$380,000 acquisition price for the 10.3-acre parcel] to represent a very attractive price for the land.

While the \$380,000 payment to the Weymouth Savings Bank may have been reasonable, the comparison with the \$5 million lease payment to the County -- a price arrived at in pre-closing negotiations between the then-Chairman of the Plymouth County Commissioners and the private development team -- was not. According to the former Chairman of the Plymouth County Commissioners, the basis for the \$5 million lease price was the County's operating deficit, not the market value of the property.

This Office was unable to locate any certifications prepared by TBA Architects other than the three cited above. However, project funds were spent on at least nine other contracts; the total value of each exceeded \$100,000. For the most part, these contracts fell into two categories for which TBA Architects did not prepare certifications.

TBA Architects did not certify the fairness and competitiveness of contracts exceeding \$100,000 awarded by the Sheriff's Department.

In April 1994, the Corporation approved a change order to transfer \$1,271,993 from Brown & Root's contract to the Sheriff's Department. The change order contained the following rationale for transferring these funds, which were budgeted for furniture, fixtures, and equipment (FF&E):

The Plymouth County Correctional Facility Corporation (the Corporation) wishes to remove certain miscellaneous FF&E (Furniture, Fixtures and Equipment) from the Design/Builders (Brown & Root) contract scope so as to facilitate the Corporations purchase order processing. Items removed will be purchased and installed under the Plymouth County Sheriff's Department procurement procedures and funded directly by the Corporation.

In interviews with this Office, officials of TBA Architects stated that the firm did not prepare certifications for FF&E contracts of more than \$100,000 awarded by the Sheriff's Department. They stated that their decision not to prepare these certifications was based on their understanding that such contracts would be awarded following the competitive procedures of M.G.L. c.30B, the Uniform Procurement Act.

However, the special legislation contained no waiver of the certification requirement for contracts awarded in accordance with competitive bid laws. Moreover, the special legislation exempted all contracts relating directly or indirectly to the Plymouth facility from all laws requiring advertising and bidding, including M.G.L. c.30B. Project records show, and interviews with Sheriff's Department personnel confirm, that the Sheriff's Department did not routinely follow the competitive requirements of M.G.L. c.30B in awarding FF&E contracts, including those exceeding \$100,000. According to Sheriff's Department personnel, some FF&E

contracts were advertised, some were procured from the Commonwealth's blanket contract, and some were negotiated with selected vendors.

The certification requirement did not apply to contracts awarded for less than \$100,000 whose final value exceeded \$100,000.

The special legislation did not require TBA Architects to certify the fairness and competitiveness of project contracts awarded for \$100,000 or less. In some instances, the final value of these contracts exceeded \$100,000. For example:

Contractor/Purpose	Initial contract value	Total payments
Civil Designs <i>design and construction of transfer station drive</i>	\$16,500	\$109,285
I.W. Harding Construction Co. <i>relocation of transfer station roadway and repaving of Public Safety Building parking lot</i>	\$98,459	\$121,309
The Point Group <i>computer consulting services</i>	\$37,500 per year	\$139,571

To the extent that the certification requirement was intended to provide some assurance that large project contracts were not significantly overpriced, this assurance was lacking altogether for every large contract whose initial value was less than \$100,000.

The Special-Purpose Corporation

The 1993 report to the Legislature from the Plymouth County Commissioners and Sheriff's Department cited the special enabling legislation for the project as the basis for the creation of the Corporation:

Acting under the provisions of the special legislation (Chapter 425 of the Acts of 1991), the Plymouth County Commissioners created the Plymouth County Correctional Facility Corporation (PCCFC) to develop the new correctional facility.

In interviews with this Office, the private development team members who participated in planning, promoting, and implementing the project to finance and construct the Plymouth facility stated that the creation of a special-purpose corporation was long regarded as essential to the project financing. According to the former Vice President of Dillon Read, Plymouth County's precarious financial circumstances precluded the option of having Plymouth County issue the certificates of participation (COPs) directly. To protect the interests of private investors, it was necessary to create a "bankruptcy-remote" special-purpose corporation whose finances would be entirely separate from those of Plymouth County.

Finding 16.

The Corporation directors inaccurately claimed that the Corporation was not subject to state laws mandating public disclosure and accountability.

The special legislation authorized a financing lease by Plymouth County,

acting through its duly elected commissioners or other duly authorized representatives, or any governmental unit or body succeeding to the rights, properties, powers, duties and responsibilities of such county. [Emphasis added.]

Neither the special legislation nor the November 1991 "Fact Sheet" distributed by the Plymouth County Sheriff's Department in support of the legislation contained any reference to the creation of a special-purpose corporation.

In January 1992, the Corporation adopted by-laws and filed Articles of Organization with the Massachusetts Secretary of State as a nonprofit corporation. The Corporation's Board of Directors consisted of three ex officio County officials: Chairman of the Plymouth County Commissioners, the Plymouth County Treasurer, and the Plymouth County Sheriff.⁵⁸ The Articles of Organization listed the principal office of the Corporation as the Plymouth County Commissioners' office in Plymouth.

The Official Statement for the Plymouth County COPs advised prospective investors that the Corporation was not a public entity:

The Corporation has no assets other than those which have been assigned to the Trustee, **is not a governmental instrumentality**, and has no taxing power. [Emphasis added.]

The Corporation directors also maintained publicly that the Corporation was a private entity. In July 1993, the County Government Finance Review Board wrote to the Plymouth County Sheriff expressing concern over the Corporation's plan to grant funds to Plymouth County to be used to pay supplemental compensation for County officials and employees in connection with the new

⁵⁸In the event of resignation or removal for cause of any director, the remaining directors may designate a replacement director. Thus, the successor to the first Corporation Chairman was a County Commissioner but was not the Chairman of

Plymouth facility. The Board's position, according to the letter, was that no county receiving aid from the state supplemental budget should grant salary increases.

In an August 1993 letter responding to the Board, the Plymouth County Sheriff expressed the view that the Corporation's financial decisions were unrelated to Plymouth County's supplemental budget

The financial health of a **private, non-profit corporation** and its relatively minor payments to those serving it should, I submit, have no bearing on your decisions concerning the portion of a supplemental budget allocation to Plymouth County.⁵⁹ [Emphasis added.]

But the following year, the Corporation successfully persuaded the U.S. Internal Revenue Service that the Corporation was owned by a political subdivision. In March 1993, the Corporation Treasurer sought a legal opinion from Hale & Dorr, the law firm that had drafted the special legislation, on the question of whether the tax-exempt Corporation was required to file U.S. Internal Revenue Service (IRS) Form 990 each year. In response, Hale & Dorr advised the Corporation Treasurer that the Corporation would be likely to qualify for an exemption from this filing requirement:

Form 990 must be filed unless PCCFC's [the Corporation's] income is excluded from gross income pursuant to Section 115 of the Internal Revenue Code. Section 115 generally excludes from gross income amounts earned by a corporation that is owned by a state or political subdivision of the state, provided that the amounts are generated from the exercise of an essential governmental function.

the County Commissioners.

⁵⁹Ultimately, the Corporation directors decided not to accept supplemental compensation, and the State Ethics Commission did not issue an opinion regarding the applicability of the conflict of interest law to the Corporation, according to Corporation meeting minutes.

Here, it is clear that PCCFC is owned by a political subdivision of the state. Moreover, there is a presumption that if a corporation is wholly-owned by a political subdivision, the corporation is deemed to be performing essential governmental functions. [Emphasis added.]

In a June 1994 letter to the IRS, the Corporation Treasurer argued the Corporation's case in accordance with Hale & Dorr's opinion:

This corporation is a wholly-owned instrumentality under the jurisdiction of the County of Plymouth, Massachusetts. The corporation was formed as a non-profit corporation for the sole purpose of assisting the County in facilitating the design, construction and equipping, development, financing, leasing and leaseback of a criminal detention facility. The directors and officers of the corporation are the Chairman of the County Commissioners, the County Treasurer and the County Sheriff. No private organizations or individuals have an ownership interest in the corporation.

The corporation is performing a governmental function on behalf of the County. Control and supervision of the corporation is vested in the entitled elected officials of the County. Any operating funds once the detention facility becomes operational are closely connected with the finances of the County as such funds are used for debt service for the facility and ongoing operational costs. The revenues cannot be diverted to any non-public entity or purpose.

Based on the foregoing data and the fact that **the corporation satisfies the provisions of Section 115 as a political subdivision (instrumentality)**, we restate our belief in the exemption from filing. [Emphasis added.]

The IRS concurred with the Corporation's position, and the Corporation was exempted from the requirement to file IRS Form 990.

Nevertheless, the Corporation continued to issue public statements claiming that the Corporation was a private entity that was not subject to the open meeting

law⁶⁰ or the public records law,⁶¹ both of which apply to Plymouth County. The open meeting law requires all meetings of a governmental body to be open to the public. When asked by this Office whether the Corporation had complied with the open meeting law and if not, why not, the former Corporation President serving from 1993 through 1996 provided the following written response:

The PCCFC is a private nonprofit corporation and as such was not subject to the open meeting law. Our records were available to the public.

However, the Corporation publicly claimed that the public records law did not apply to Corporation records. In April 1994, a newspaper reporter wrote to the Corporation directors requesting access to and copies of information and documents pertaining to the Plymouth facility construction project. In a letter of response, the Corporation directors rejected the proposition that the Corporation was a governmental body subject to the public records law:

[W]hile your letter is addressed to us as members of "the corporation," you nevertheless invoke the public record law as you seek access to documents. We hoped you would have drawn from that conversation [with the Sheriff] about the corporation that **it is a highly creative vehicle that enables us to get things done without the red tape associated with government bodies and therefore would have inferred that it might not be subject to such laws as G.L. c.4, §7, c.26. Indeed, we were advised by counsel last August that we were not covered by it,** subject to the caveat that a particular matter then pending in the Supreme Judicial Court might cause him to reverse his view. The case

⁶⁰M.G.L. c. 34, §9G, requires all meetings of a governmental body to be open to the public.

⁶¹Under M.G.L. c. 66, §10, public records must be open to public inspection. M.G.L. c. 4, §7 defines public records as "all books, papers, . . . made or received by any officer or employee of any agency, executive office, department, board, commission, bureau, division or authority of the commonwealth, or of any political subdivision thereof, or of any authority established by the general court to serve a public purpose. . . ."

(Globe Newspaper Company v. MBTA Retirement Board) was decided in November, but it came out against the Globe. In light of that case we are prepared to say that the corporation is not subject to the public records law, but we hope that will be unnecessary.

Instead of getting hung up on whether the law does or does not apply, we propose the following alternatives. . . . If neither approach is acceptable to you, we are willing to entertain any counter proposal you might make. **We are not willing, however, to act as if the corporation is a governmental body subject to all the red tape (public records law included) that has made it impossible to build adequate jails in this state. If we were to do that for you, we would find ourselves doing it for everyone.** [Emphasis added.]

It is the opinion of this Office that the Corporation was and is subject to both the open meeting law and the public records law, and that this Office's opinion is supported by the court case cited in the Corporation President's letter. The basis for this Office's opinion is briefly summarized in Appendix B of this report.

Project Evaluation

Project publicity generated by the Plymouth facility participants has claimed that the Plymouth facility has produced substantial cost and schedule savings in comparison with correctional projects managed by the Commonwealth. This section of the report analyzes the data and assumptions underlying these claims and provides a general evaluation of the facility's financing costs, construction costs, operating costs, and schedule performance.

Finding 17.

The widely publicized claim that the Plymouth facility represents \$426 million in savings to taxpayers over 30 years was not supported by the facts.

In their 1993 report to the Legislature, the Plymouth County Commissioners and Sheriff stated that the Plymouth facility represented \$426 million in taxpayer savings despite the higher costs associated with the financing method for the Plymouth facility:

The question of total financial benefit to the Commonwealth, given the higher interest rates necessary for the corporation's certificates of participation is addressed by examining the total scheduled payments for the state and county beds over the thirty year term of the financing, combined with the total projected costs of operation by the county (not including any inflation for the period). . . . [T]he project's total debt service is significantly lower at the COPs borrowing rate than the state's debt service, despite the lower interest rate on the general obligation bonds. **The Plymouth County Correctional Facility, operated by the Plymouth County Sheriff's Department, represents a savings of \$426,000,000 -- over thirty-seven cents on every taxpayer dollar!** [Emphasis in the original.]

Subsequent project publicity also contained the \$426 million taxpayer savings claim, including the 1994 report to the Legislature, a pamphlet mailed to the public by the Plymouth County Sheriff's Department in the spring of 1994, and a brochure prepared in 1994 by Cornell Cox Associates and distributed by Plymouth County.

Dillon Read and TBA Architects provided this Office with the analysis used to derive the \$426 million savings estimate, including the calculations and assumptions underlying the calculations. The \$426 million savings estimate for the Plymouth facility had two components: (1) a \$161 million construction cost savings estimate and (2) a \$265 million operating cost savings estimate.

The \$161 million construction cost savings estimate

The \$161 million construction cost savings estimate relied on a cost comparison of the Plymouth facility and the correctional facility that was planned for Plymouth County by the Commonwealth but never designed or built. The estimated construction cost of the latter was drawn from the draft master plan prepared by DCPO in 1991 for a new facility (referred to in the following discussion as "the planned replacement jail") to replace the existing Plymouth County Jail and House of Correction.

To fairly evaluate the significance of the construction cost comparisons underlying the construction cost savings estimate, it is important to understand the differences between the facilities being compared. The 960-bed planned replacement jail depicted in the 1991 master plan prepared by DCPO was to be a campus-style correctional facility consisting of five housing units, each consisting of 30,000 to 50,000 square feet; a 40,000 square foot administration building; and a 106,000 square foot central services building as well as an on-site

sewer system. The facility was to use centralized heating, ventilating, and air conditioning systems located in a basement below the central services building. Steam piping would be connected to the buildings, each of which would have its own mechanical room with 1,000 gallons of domestic hot water. Air handling equipment located in the mechanical rooms and rooftop penthouses would provide fresh air.

By contrast, the 1,140-bed Plymouth facility constructed by the Corporation consisted of a single building with seven 40,000 square foot housing pods, a 57,100 administration/library/gymnasium/kitchen area, and a 14,400 square foot warehouse/garage. The administrative functions supporting the facility are housed in the pre-existing Public Safety Building at the site of the old Plymouth County Jail and House of Correction as well as in the new facility. The facility, which is hooked up to the town sewer system, uses rooftop heating, air conditioning, and ventilation systems rather than a centralized heating and cooling plant. The gas-fired rooftop units are relatively inexpensive but will require replacement at more frequent intervals than a centralized plant would require.

Table D contrasts the size of the planned replacement jail with the actual size of the Plymouth facility. As the table shows, the planned replacement jail was to be 74,000 square feet larger than the actual Plymouth facility. The planned replacement jail would have provided 135 more square feet of floor space per inmate than the Plymouth facility provides. Overall, the planned replacement jail to be designed and built by the Commonwealth was to be significantly larger and contain significantly more program and administrative space than the Plymouth facility that was designed and built by Brown & Root under contract to the Corporation.

Table D

**COMPARISON OF PLANNED REPLACEMENT PLYMOUTH COUNTY JAIL/
HOUSE OF CORRECTION AND PLYMOUTH FACILITY**

	Planned Replacement Jail/HOC	Plymouth Facility
Beds	960	1,140
Area (square feet)	425,605	351,537
Area (square feet) per inmate bed	443	308

Sources: DCPO Master Plan for the Plymouth County Jail and House of Correction and Brown & Root conceptual design documents for the Plymouth County correctional facility

To derive the \$161 million construction cost savings estimate, the analysis used a budget allocation figure rather than the actual construction cost. The analysis first reduced the \$110.5 million projected cost of the Plymouth facility to \$79 million by excluding the funds borrowed for capitalized interest, debt service reserve, and issuance costs. The \$79 million figure was further reduced to \$42.7 million, a figure purporting to represent state taxpayers' share of the construction cost of the facility -- i.e., the cost of the approximately 800 beds available for state and county inmates. To this amount were added dollar figures purporting to represent state taxpayers' share of the capitalized interest cost, contingency costs, the payment to MIFA, and services provided to the Town of Plymouth. The bottom-line Plymouth facility construction cost to state taxpayers was thus calculated to be \$51.5 million.

The \$51.5 million figure for the Plymouth facility was contrasted with the estimated construction cost of the replacement Plymouth County Jail and House of Correction depicted in the 1991 master plan prepared by DCPO. The figure used for this comparison was prorated to \$84.5 million to reflect the cost of 800 beds and then increased by \$8.5 million to include \$500,000 for DCPO's study and \$8 million for mitigation payments to the host community. The total estimated construction cost for this unbuilt project was shown as \$92.9 million.

The analysis then calculated financing costs based on these two figures: \$51.5 million and \$92.9 million. For the Plymouth facility figure of \$51.5 million, the analysis used the interest rate on the tax-exempt COPs issued by the Corporation in May 1992. For the planned replacement jail figure of \$92.9 million, the analysis used the interest rate for general obligation bonds at the time the COPs were issued.

The methodology for computing the construction cost savings of \$161 million misrepresented the financial structure of the project.

The calculations of the construction costs to state taxpayers were based on inaccurate assumptions and distorted cost comparisons. For example:

The analysis understated the share of the construction cost borne by state taxpayers by more than \$28 million. The figure of \$42.7 million -- which the analysis used as the prorated construction cost for 800 state and county beds -- represents only those project funds that were allocated, at the outset of the project, from the sale of tax-exempt COPs to pay Brown & Root for design-build services at the outset of the project. An additional \$22.4 million from the sale of taxable COPs was also allocated, at the outset of the project, to pay Brown & Root. Thus, project funds allocated to the design-build account from both types

of COPs totaled \$65.1 million. However, the price of the design-build contract executed with Brown & Root in May 1992 was \$69,322,000 -- \$4 million higher than the project funds allocated at the outset of the project.⁶² The actual construction cost of the Plymouth facility totaled \$72.7 million.

By using the figure of \$42.7 million as state taxpayers' share of the total construction cost of the project, the analysis assumed that state taxpayers are obligated to pay only the share of the project cost financed with tax-exempt COPs, and that the federal government -- i.e., the USMS -- will pay the share financed by taxable COPs. However, the financial arrangement implied by the analysis does not comport with the actual financial structure of the Plymouth project. In fact, state taxpayers are paying a significantly larger share of the project cost than the analysis indicated. As explained earlier in this report, the USMS pays a per diem rate for its usage of beds at the Plymouth facility, and state taxpayers fund all costs not covered by the USMS payments. The dollar amount of the USMS payments bears no relationship to the ratio of tax-exempt COP funds to taxable COP funds, nor to the proceeds of either type of COP allocated to pay Brown & Root. Rather, the dollar amount of the USMS payment is calculated on the basis of the number of beds used by USMS inmates.

It was anticipated that the USMS would use 320 beds, or 28 percent of the total design capacity of the Plymouth facility. If the USMS had consistently used and paid for all 320 beds, the state's share of the actual \$72.7 million cost would be at least \$52 million, not \$42 million. But as of May 1997, USMS inmates accounted for only 13 percent of the total inmates housed at the facility. Based on the actual ratio of USMS inmates to state and county inmates in May 1997, the state's share of the actual \$72.7 million construction cost used in the analysis

⁶²This \$4 million discrepancy is accounted for by project interest generated and used exclusively for payments to Brown & Root for design-build services.

would be at least \$63 million -- \$21 million more than the figure used in the analysis.

The interest rate used in the analysis to calculate the Plymouth facility debt service costs to state taxpayers was lower than the actual interest rate paid by state taxpayers. The analysis calculated the financing costs for 800 beds of the Plymouth facility using the 7.13 percent interest rate on the tax-exempt COPs. This calculation therefore assumed that the interest rate paid by state taxpayers over the 30-year financing period will be 7.13 percent (and that the federal payments would cover the higher interest payments on the taxable COPs). In fact, the federal per diem payments are not -- and never have been -- calculated on the basis of the 10.58 percent interest rate for taxable COPs. Rather, these payments reflect a combined interest rate of 8.46 percent -- the same combined interest rate that state taxpayers will pay until the year 2022, when the private investors have been repaid.

The cost comparisons contained a \$29 million distortion. The analysis excluded \$15 million from the project cost estimate for the Plymouth facility while adding \$14 million in directly comparable costs to the construction cost estimate for the replacement jail. Specifically:

- The analysis included an \$8 million line-item for mitigation payments to the host community in the Commonwealth's construction cost estimate, but omitted the Plymouth facility's mitigation-related payments to the Town of Plymouth of \$13 million over the 30-year financing period. Under the terms of the Trust Agreement, the Town of Plymouth was entitled to receive \$200,000 per year during the construction period and \$400,000 per year, adjusted for inflation, for the remainder of the 30-year financing period. The Corporation also spent \$1.3 million on mitigation-related services for the Town of Plymouth during the construction period. These expenses, which will total more than \$13 million over 30 years, represent a direct project cost, most of which will be borne by state taxpayers. (See Table E.)

- The analysis included a \$6.2 million line-item for furniture, fixtures, and equipment (FF&E) in the Commonwealth's construction cost estimate for the planned replacement jail, but omitted the \$2.1 million budgeted and expended from project funds for FF&E for the Plymouth facility.

On the basis of the inaccurate assumptions and biased methodology detailed above, the analysis erroneously concluded that construction cost savings associated with the Plymouth facility would save state taxpayers an estimated \$161 million over 30 years.

Table E

**SUMMARY OF PROJECT MITIGATION PAYMENTS AND BENEFITS
TO THE TOWN OF PLYMOUTH**

Semi-annual payments to the Town	\$11,900,000
Sewer permit fee	670,000
Sewer upgrades engineering and construction	512,996
Transfer station roadway relocation	160,675
Nook Road sewer improvements	30,000
Obery Street Land Use Study Committee – TBA work	7,262
TBA work on new police station construction	<u>3,638</u>
Total	\$13,284,571*

*Note: This total does not include the value of 5.109 acres of Plymouth County land transferred to the Town of Plymouth for the new Town police station.

Sources: Project payment records and reports to the Legislature by the Plymouth County Commissioners and Sheriff

The \$265 million operating cost savings estimate

To derive the \$265 million operating cost savings estimate, the analysis first compared the projected operating costs of the Plymouth facility with operating costs calculated using information reported by the state Department of Correction (DOC).⁶³ For the Plymouth facility, the analysis used an annual operating cost per inmate of \$19,354, or \$53.02 per day. For county and state correctional operations, the analysis used DOC information to compute annual operating costs of \$28,393 (\$77.79 per day) and \$30,133 (\$82.56 per day), respectively.⁶⁴ The analysis multiplied these annual per inmate operating cost figures by 820 (the state and county beds planned for the Plymouth facility). The resulting figure was then multiplied by 30 years to produce an operating cost savings estimate for the Plymouth facility over 30 years of \$265 million.

Two major factors underlie the finding of a lower Plymouth facility operating cost per inmate in comparison with the operating costs per inmate of existing state and county correctional facilities in Massachusetts.⁶⁵ First, these state and county correctional facilities include facilities that are much older and less efficient than the Plymouth facility. Thus, any new facility -- whether built by the Commonwealth or by the Corporation -- would cost less to operate on a per inmate basis than some of the antiquated facilities still in use. Comparing the compact new Plymouth facility with the average operating cost of all existing

⁶³According to TBA Architects, the 1993 statewide average operating cost was calculated by dividing the DOC's total reported budget for each correctional facility by the average population of the facility, using 1993 data.

⁶⁴An internal DCPO memorandum prepared in November 1993 reported that the average annual correctional operating cost for state inmates was \$25,246 per inmate rather than the figure of \$30,133 per inmate calculated by TBA Architects. This Office has not attempted to reconcile this discrepancy.

⁶⁵An internal DCPO memorandum prepared in November 1993 reflected this view: "Given the stripped down space program at Plymouth, limited inmate movement, fewer inmate services, and it's [*sic*] reliance on electronic surveillance of corridors, it is reasonable to assume that operating costs, primarily staff costs, will be lower

facilities, irrespective of age or size, is a questionable method of calculating "savings." For example, the operating cost per inmate of the Hampden County Jail and House of Correction, which was constructed in 1992 and houses 1,732 inmates, is significantly lower than the average operating cost per inmate for all county correctional facilities.

Second, the newer facilities designed to house a comparable number of inmates to the 1,140-bed Plymouth facility, such as the Hampden County Jail and House of Correction, contain significantly more administrative, program, and housing space than the Plymouth facility. The Plymouth facility's relatively low operating cost per inmate is thus a reflection of the policy decision to reduce the total amount of space as well as the amount of space allocated to each inmate in comparison to other county correctional facilities in Massachusetts.⁶⁶

It should also be noted that actual operating costs for the Plymouth facility currently exceed by 17 percent the 30-year projected operating costs used in the analysis. The analysis relied on an estimated annual operating cost for the Plymouth facility of \$19,354 per inmate. According to TBA Architects, this operating cost projection was developed by the Plymouth County Sheriff's Department in 1993. However, when the facility began operations in June 1994, the operating cost paid by the Commonwealth was \$20,487.⁶⁷ By January 1996, it had increased to \$22,732⁶⁸ -- a 17 percent increase over the figure used in the analysis. By contrast, the average operating cost reported by the DOC for all

[than the operating cost for other state-constructed correctional facilities]."

⁶⁶As discussed earlier in this report, the Plymouth facility's administrative space was deemed inadequate by the Corporation and the Plymouth County Sheriff soon after the facility began operations. If Plymouth County's plan to build additional administrative facilities had been implemented, the operating cost of the Plymouth facility would, of course, be higher.

⁶⁷The daily cost per inmate was \$80.76, including \$24.63 in debt service costs. The remaining \$56.13 in operating costs multiplied by 365 = \$20,487.

⁶⁸The daily cost per inmate was \$86.91, including \$24.63 in debt service costs. The remaining \$62.28 in operating costs multiplied by 365 = \$22,732.

county correctional facilities in fiscal year 1996 was \$27,592 -- three percent lower than the 1993 operating cost for county correctional facilities used in the analysis.

The calculations underlying the \$426 million cost savings estimate omitted \$43 million in project costs, most of which will be paid by state taxpayers.

Although the foregoing discussion has identified methodological flaws in the computation of construction cost savings associated with the Plymouth facility, the claim that the Plymouth facility cost less to construct than the planned replacement jail for Plymouth would have cost was reasonable. The replacement Plymouth County Jail and House of Correction planned by the Commonwealth in 1991 would have been significantly larger and contained far more program and administrative space than the Plymouth facility that was built. Thus, an accurate comparison of the construction costs of the two projects would be likely to show a lower construction cost for the smaller and more compact Plymouth facility. Similarly, although the operating cost comparisons used in the analysis were questionable, the claim that the Plymouth facility's operating costs are comparatively low was credible.

However, the methodology used in the analysis failed to account for major project costs associated with the Plymouth facility that would have been substantially lower, or would not have been incurred at all, for a correctional facility designed, built, and financed by the Commonwealth. The major project costs omitted by the analysis included the following:

- Capitalized interest payments of \$23.2 million.
- Debt service reserve fund of \$5.1 million.
- Ground lease payment to Plymouth County of \$5 million.
- Closing fees and expenses of \$4 million.

- Administrative expenses of \$5.5 million.

All of these expenditures represent actual costs of the Plymouth facility project, but all of these costs were omitted from the analysis. The comparable costs for the planned replacement jail would have been significantly lower. For example, although the Commonwealth is required to make payments on general obligation bonds during the construction period, the cost of financing these payments during construction would not approach the cost of financing \$23.2 million -- the capitalized interest fund required for the Plymouth financing⁶⁹ -- for 30 years. Similarly, the Commonwealth might have paid Plymouth County for a portion of the County property used for the Plymouth facility (as discussed earlier in this report), but any such payment would have been far lower than the \$5 million lease payment received by Plymouth County from project funds. The previous sections of this report have suggested that issuance costs and administrative costs would have been lower for a project financed and managed by the Commonwealth. Finally, the Commonwealth would not have had to borrow an extra \$5.1 million for a debt service reserve fund, as required by the financing method used for the Plymouth facility. The project financing costs are discussed in more detail below.

Finding 18.

The method used to finance the Plymouth facility was costly relative to Commonwealth-backed general obligation debt.

A 1994 analysis prepared by the Executive Office for Administration and Finance (EOAF) compared the costs of general obligation financing and lease-purchase financing for a hypothetical \$50 million tax-exempt project. The EOAF analysis concluded that lease-purchase financing, as of 1994, was 7.4 percent more

⁶⁹The project had to borrow these funds to cover project interest payments to COP

expensive than conventional general obligation financing. The analysis showed that the interest costs for lease-purchase financing were four to five percent higher than the interest costs for a general obligation financing at that time, and noted:

It is important to understand that lease-financing is simply another form of debt. It may not technically be part of a bond cap, but the rating houses watch it closely and actually provide a lease rating similar to a bond rating. That lease rating would be several steps below the Commonwealth's bond rating, leading to higher interest costs described above.

The EOAF analysis also showed that the issuance costs for lease-purchase financing were triple those associated with general obligation financing. The issuance costs for the Plymouth facility totaled approximately \$4 million. The high closing fees illustrate that complex financial transactions entail higher fees than simple financial transactions. Moreover, as this report has discussed, some project closing fees and costs were questionable.

In a memorandum to County officials dated June 28, 1994, TBA Architects defended the high issuance costs associated with the Plymouth facility on the basis of the project's "innovative" character. However, TBA Architects also assured County officials that the fees charged by the private development team members on future lease-purchase financed projects would be lower:

[EOAF]'s cost of issuance estimates are based on past project experience. This is of course based on the information available to him but is a bad predictor of the cost of issuance for subsequent projects. The Plymouth project was innovative and the issuance costs reflect the time spent "inventing the wheel." Now that this has been done, the issuance premiums will be reduced. The County Commissioners have made preliminary inquiries to the various firms involved in the initial project and established that the present value differential would be 0.51% rather than the 2.44% estimate.

holders during the project development period.

In other words, using the same private development team would lower the issuance costs; using a different team of private vendors might not.

The third factor contributing to the higher cost of lease-purchase financing is the higher borrowing necessitated by the capitalized interest and debt service reserve requirements. As discussed earlier, the capitalized interest fund must be sufficient to offset the interest payments owed to private investors during the construction period. The debt service reserve fund contains one semi-annual payment of full principal and interest on the amount borrowed, to be used to pay COP holders if the available funds from the Commonwealth and the federal government are insufficient.

Finding 19.

The Plymouth facility's program, design, and use of modular construction techniques were conducive to lower construction costs, although administrative space is reportedly inadequate.

The \$72.7 million cost of designing and constructing the Plymouth facility compared favorably to the cost of many other correctional facilities built by the Commonwealth. The Plymouth facility's program, design, and construction components appear to have been key factors in holding down its construction cost.

According to the 1995 report to the Legislature by the Plymouth County Commissioners and Sheriff, the "direct supervision concept" reflected in the program and design of the Plymouth facility lowered its construction cost in comparison with traditional correctional facilities by reducing the amount of program space and maximum security housing. In planning and designing correctional facilities, the Commonwealth faces the policy question of how to

balance the tradeoff between size and cost. The adequacy of the Plymouth facility's program and design has been the subject of debate: as discussed earlier in this report, the Corporation pursued strategies for constructing significantly increased administrative space at the facility before construction was completed.⁷⁰ Nevertheless, the link between program and design, on the one hand, and construction cost, on the other, is important to any discussion of correctional facility costs. In general, larger and more complex facilities cost more to construct than smaller, less complex facilities.

The use of precast concrete elements also reduced the construction cost of the Plymouth facility. The Plymouth facility was constructed with a precast concrete superstructure and numerous precast concrete elements. The 1991 master plan for the replacement Plymouth County Jail and House of Correction did not anticipate use of modular construction. Since 1991, however, DCPO has increasingly used modular construction techniques on state construction projects,⁷¹ including the Hampden County Jail and House of Correction completed in 1992.

During the same period in which the Plymouth facility was designed and built, DCPO built the new Hampden County Jail and House of Correction at a lower construction cost per square foot than the Plymouth facility.

Both DCPO and TBA Architects have generated cost comparisons of the Plymouth facility and the Hampden County correctional facility. While their methodology and precise cost figures differed, DCPO and TBA Architects both

⁷⁰According to the current Plymouth County Sheriff and Plymouth County Treasurer, the institution of double-bunking in 1996 has created a shortage of program space. As of May 1997, the total inmate population exceeded 1300.

⁷¹Morganti, Inc., the general contractor hired by Brown & Root to construct the Plymouth facility, had previously worked on two state correctional projects that used modular construction methods.

concluded that the Hampden County facility cost less to build on a per square foot basis than the Plymouth facility. DCPO's figures listed the construction cost of the Hampden facility as \$173 per square foot and that of the Plymouth facility as \$260 per square foot -- 50 percent higher than the Hampden County facility. The figures prepared by TBA Architects, which had been adjusted by TBA to account for cost differentials based on facility location and inflation, showed the Hampden County Jail and House of Correction to have the lowest construction cost per square foot -- \$163.07 -- of seven state-constructed correctional facilities in Massachusetts. Next was the Plymouth facility, at \$181.38 -- 10 percent higher than the Hampden County facility.⁷² The remaining facilities ranged from \$206.42 to \$239.14.⁷³ The memorandum concluded:

As is apparent from these figures, Plymouth is not the lowest project on a square foot basis but it is well within the general range for other projects and is significantly below the state average for design/build projects.

Regarding the comparative costs of the Hampden County and Plymouth County facilities, TBA Architects has taken the position that the life cycle of the Plymouth facility's precast concrete and concrete frame is longer than that of portions of the Hampden facility. TBA Architects has stated that the Plymouth facility will have a 50- to 60-year life cycle, whereas the portion of the Hampden facility that was constructed with metal buildings (approximately 40 percent) will have a 15-year

⁷²TBA's memorandum offered an explanation for the discrepancy between the square footage calculations prepared by DCPO and TBA Architects: DCPO does not include the "interstitial space," or space devoted exclusively to utilities, in the calculation of a facility's total square footage; TBA's calculation for the Plymouth facility did include interstitial space.

⁷³The highest construction cost per square foot was listed for the Suffolk County Jail, a design-build project undertaken by the Commonwealth on an experimental basis pursuant to Chapter 396 of the Acts of 1986. A report issued in March 1988 by the Office of the Inspector General analyzed the relationship between the design-build method and the higher-than-anticipated costs of the Suffolk County Jail project.

life cycle. (The remaining 60 percent of the Hampden County facility was constructed using concrete modular units similar to those used for the Plymouth facility.) However, the DCPO's view is that the metal buildings will have a life cycle of 30 years or more. This Office concurs with DCPO's view.

Finding 20.

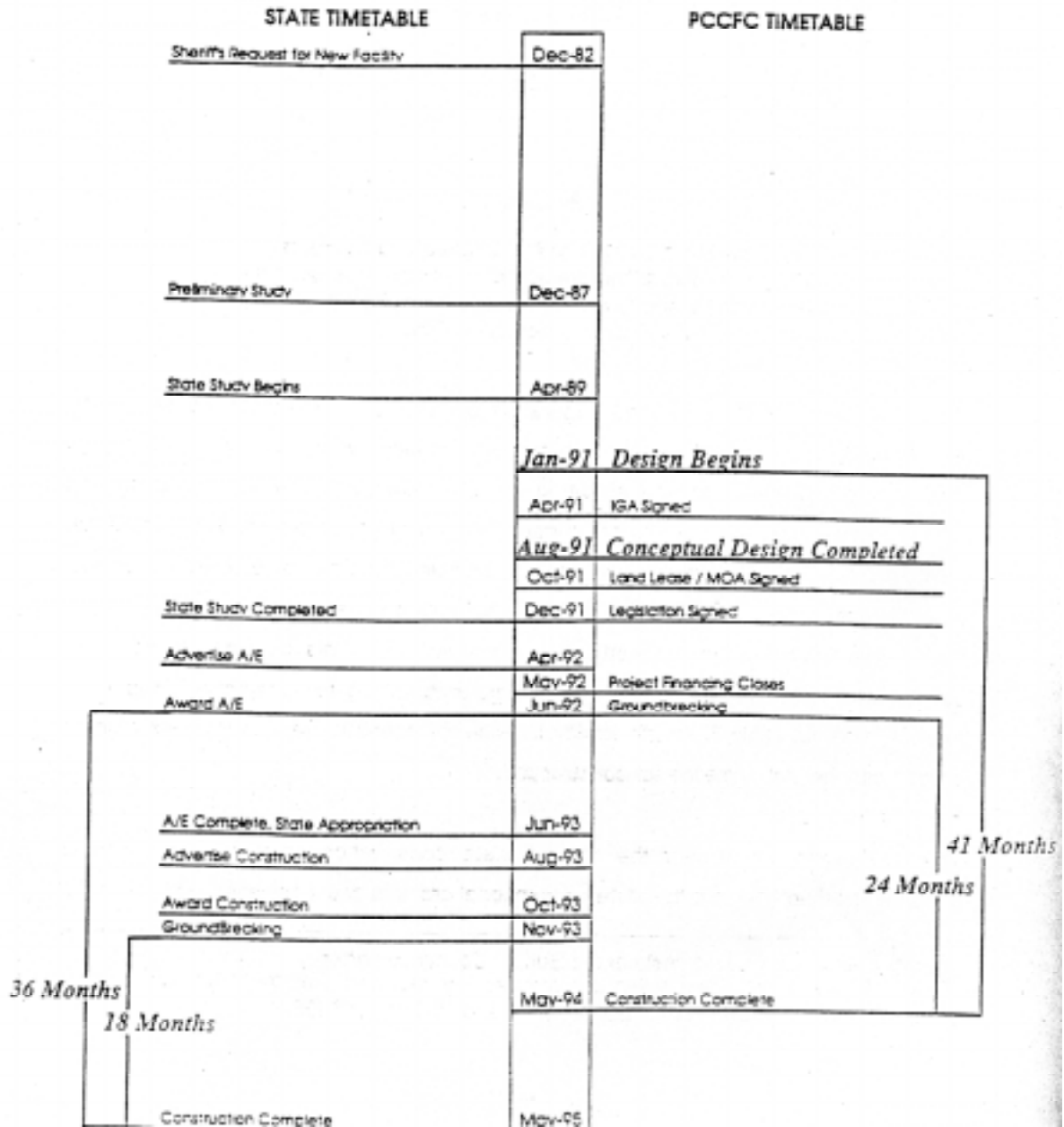
Information provided to the Legislature by Plymouth County showed that the state's construction schedule was actually shorter than the design-build schedule for the Plymouth facility.

The 1994 and 1995 reports to the Legislature compared the Plymouth facility timeline with a state project timeline through substantial completion of construction. (See Figure 2.) The state project timeline allocated three months for construction bidding and contract award, and 18 months for construction (from groundbreaking to substantial completion). The Plymouth facility timeline allocated no time for bidding or contract award -- a reasonable omission, since Brown & Root had been selected by the private development team without advertising or competition. This timeline showed that construction of the Plymouth facility, from groundbreaking to substantial completion, took 24 months. The Plymouth facility timeline for construction was thus six months longer than the state timeline for construction.⁷⁴

The 1995 report described the shorter state construction timeline as "the most compressed timetable that the state conventional process could achieve." In

⁷⁴The 1995 report to the Legislature erroneously reported that the Plymouth project achieved final acceptance in August 1995 instead of October 1995.

Figure 2
Design and Construction Timeline Comparison
PLYMOUTH COUNTY CORRECTIONAL FACILITY
 DESIGN / CONSTRUCTION TIMETABLE



Source: Corporation records; OIG annotations in italics.

interviews, officials of TBA Architects stated that the state construction timeline shown in the report reflected the actual construction schedule for the modular Hampden County Jail and House of Correction constructed by DCPO in 1992. Even with three additional months for the competitive award of the state contract, the Hampden County construction schedule was still shorter than the Plymouth County construction schedule.

As Figure 2 shows, the state timeline was also shorter than the Plymouth facility timeline when the design phase of each project is included in the schedule comparison. The state timeline depicted a combined design and construction period of 36 months, including the three months allocated to advertising and bidding the construction contract. Even without construction bidding, and with the alleged schedule benefits of the design-build process, the design and construction of the Plymouth facility project took 41 months.

Conclusion and Recommendations

The Plymouth County correctional facility was financed and built through a complex series of nontraditional, noncompetitive contracting arrangements authorized by special legislation waiving the statutory rules that normally govern publicly funded capital facility projects in Massachusetts. Project publicity has characterized the project as "a unique public/private partnership" that entails "virtually no risk to the taxpayers." The project's use of lease-purchase financing and design/build construction has been touted as an innovative, entrepreneurial approach enabling rapid construction of a state-of-the-art correctional facility yielding taxpayer savings of \$426 million over the 30-year project financing period.

The enactment in December 1991 of special legislation authorizing the project was the culmination of years of effort on the part of Plymouth County officials and the private development team, a group of private firms that had invested substantial time and capital to promote the development project that became the Plymouth County correctional facility. The original development project had not included the Commonwealth at all: the private development team had spent more than a year negotiating a plan with the United States Marshals Service to build a federal detention facility on Plymouth County land. When these negotiations failed in mid-1991, the team's efforts focused on involving the Commonwealth as well as the federal government.

The participants represented a wide range of disparate institutional interests and objectives. The private development team members wanted to reap the financial benefits of their unpaid years of effort. Plymouth County wanted to raise money to defray its operating deficit by developing the parcel of land used for the project, and to replace the antiquated Plymouth County Jail and House of

Correction with a larger, state-of-the-art facility. The Commonwealth and the federal government wanted access to prison beds for state and federal inmates housed in overcrowded facilities. The Plymouth facility project was viewed by the participants as a vehicle for meeting all of these objectives.

The objectives of the participants appear to have been met. The lease-purchase method of financing the project enabled the construction of new state and county correctional beds at a time when prison overcrowding had reached crisis proportions and the Commonwealth's ability to issue general obligation debt to finance new prison construction projects was severely restricted. The overall construction quality of the Plymouth facility appears adequate.

But the project must also be evaluated from a broader, public-interest perspective. Who bore the financial risk? Who were its principal beneficiaries? Did the project represent a sound investment of tax dollars? Was the public interest adequately protected? Should the methods used to finance and construct the Plymouth facility be replicated for other tax-funded capital projects in Massachusetts?

The findings presented in the preceding pages of this report are not reassuring. Although the project was promoted by the participants as a privately financed deal entailing no risk to taxpayers, this characterization was misleading. The Plymouth facility is being funded by the Commonwealth's taxpayers. Private investors would not have loaned the project more than \$110 million without the Commonwealth's financial commitment to make payments sufficient to repay the loan. Taxpayers will also foot the bill for operating costs, maintenance costs, and capital repairs to the facility.

The Commonwealth assumed financial responsibility for a project that the Commonwealth would not oversee or control. The project design and

construction were not approved by either the Department of Correction, which is contractually obligated to house state and county inmates at the Plymouth facility, or the Division of Capital Planning and Operations, the state's professional construction and property management agency. Instead, this oversight was provided by Plymouth County, aided by a "technical representative." The Commonwealth has had no authority to approve project expenditures; that authority was also assigned to Plymouth County. Since state laws mandating advertised competition were waived for this project, Plymouth County has had wide latitude to negotiate no-bid project contracts for construction, supplies, services, and real property with the funds to be repaid with tax dollars. Indeed, the special legislation could be construed to exempt all future project-related procurements – including any renovation and repair work – from advertising and bidding.

Those responsible for structuring the financial arrangements underpinning the project ensured that their institutional interests were protected. The private investors' interests were protected by the terms of the Trust Agreement. At the project closing, the private development team members recouped their investments in developing and promoting the failed federal detention facility proposal as well as the Plymouth facility project. Plymouth County officials -- who had always viewed the project as a means of raising cash -- maximized the payments to the County from project funds. The income to Plymouth County from project funds includes an exorbitant \$5 million ground lease payment for 33 acres of County land, paid at the project closing; millions of dollars in project interest earnings over the 30-year financing period; and at least \$5 million in surplus project funds at the end of the 30 years. Plymouth County stands to reap at least \$17 million from this project.

But the Commonwealth -- which assumed financial responsibility for the cost of all closing fees, payments to Plymouth County, and other project expenditures --

failed to make effective use of its leverage. Although the underwriter's project development fee was lowered by half a million dollars at the insistence of a state official, the Commonwealth did not subject the other project fees and expenses to the same scrutiny and pressure, nor did the Commonwealth review the all-important Trust Agreement. In effect, the Commonwealth agreed to make lease payments covering the cost of borrowing more than \$110 million, and left the details to Plymouth County officials and the private firms handling the financing. By forfeiting the opportunity to mitigate and control the risks inherent in this project, the Commonwealth opened the door to many of the problems documented in this report.

The Commonwealth's exposure to risk was heightened by the creation by Plymouth County of a "special-purpose corporation" to manage the project finances. The Plymouth County officials serving as Corporation directors while the Plymouth facility was under construction did not comply with state laws mandating public accountability and disclosure: their meetings were not open to the public, nor did they view the project records as public records. From a public policy perspective, the notion that a governmental entity undertaking a publicly funded project would create a shell corporation and then attempt to shield its operations from public view is alarming. A "unique public-private partnership" that operates in secrecy is a bad bargain for the public.

Although it may be tempting to blame the unconventional methods used to finance and build the Plymouth facility for the Commonwealth's predicament, this explanation is too simplistic. There is nothing innovative or entrepreneurial about lax financial controls and no-bid contracts. Lease-purchase financing deals can include requirements for advertised competition, cost controls, and financial oversight. Similarly, fast-track, design-build construction projects can require price competition and sign-offs by the funding and user agencies. Because the risks inherent in these methods are higher, public projects undertaken using

these methods require increased safeguards. The findings detailed in this report illustrate the consequences of employing these methods on a publicly funded project without strong, effective safeguards that protect taxpayer interests.

Although the Plymouth facility cost \$72.7 million to design and build, the total funds used for this project amounted to more than \$115 million (including interest earnings on the project funds). Much of this additional cost can be attributed to the method by which the project was financed. In comparison with general obligation financing, lease-purchase financing of construction projects entails substantially higher closing costs and requires a higher overall loan amount (to pay for capitalized interest and debt service reserve requirements); it also carries a higher interest rate than general obligation debt.

Because lease-purchase obligations are subject to annual appropriation, they are not generally included in governmental debt limit calculations. The financial markets, however, consider lease-purchase agreements in evaluating a jurisdiction's creditworthiness. Failure to appropriate sufficient funds to meet the obligation created by a lease-purchase agreement could have serious ramifications for the jurisdiction's bond rating. Lease-purchase financing thus allows jurisdictions to assume long-term financial obligations that have the practical effect of debt without comparable financial accountability.

For most projects, a competitive general obligation bond sale is likely to produce the lowest financing costs. In general, there is no cost justification for using lease-purchase financing for a project that can be financed using general obligation debt. Even with effective safeguards, lease-purchase financing of public construction projects should be regarded as an option of last resort.

As with most service procurements, competition is key to cost-effective design-build contracting. The design-builder for the Plymouth facility was chosen

without advertising or competition: instead, the project developer selected the design-builder, who then compensated the project developer from the design-build fees paid from project funds. If the service providers for the Plymouth facility had been competitively selected on the basis of the quality and price of their services -- rather than on the strength of their business connections with each other -- the cost of these services could have been reduced with no sacrifice in service quality.

However, project management costs can be significant for design-build projects because the project designer does not work for or on behalf of the owner. In the case of the Plymouth facility, the "technical representative" who oversaw the design-build contract for the Plymouth facility on behalf of Plymouth County was paid more than \$2 million from project funds. Without intensive project oversight, design-build projects are highly vulnerable to cost escalation as well as defective design and construction.

The fast-track design-build method of delivering the Plymouth facility has been promoted as a contracting innovation that has enabled more rapid delivery of a completed facility at a lower cost than the Commonwealth could achieve. The evidence does not support this claim. During the same period in which the Plymouth facility was designed and built, the Commonwealth built a new, 1,260-bed Hampden County Jail and House of Correction, using precast concrete methods, at a lower construction cost per square foot than the Plymouth facility and on a more rapid construction schedule than the Plymouth facility. Moreover, the Commonwealth achieved these results without waiving requirements for planning, competition, and oversight.

The Plymouth facility contains less space per inmate than the Hampden facility, a difference that accounts for the lower construction cost per inmate of the Plymouth facility. The inadequate administrative space at the Plymouth facility

has prompted Plymouth County officials to plan additional project-related construction. Nevertheless, the Plymouth facility does indicate the cost-saving potential of constructing smaller correctional facilities.

One of the most troubling aspects of this case is the inaccurate and misleading publicity developed by the private development team members and disseminated by the public officials responsible for the project. The most egregious example is the claim that the Plymouth facility represents savings to state taxpayers of \$426 million. As this report has detailed, the methodology for computing these savings relied on calculations that misrepresented the actual financial structure of the project. Substantial project costs borne by state taxpayers were not reflected in the \$426 million savings estimate that has been widely publicized by Plymouth County in reports to the Legislature, a flyer mailed to Plymouth residents, and a developer-funded brochure distributed by Plymouth County.

This case suggests that project participants with a stake in the project's success may not always provide full and accurate information for evaluation purposes. It thus seems reasonable to conclude that experimental public projects conducted outside the normal framework of governmental controls require special provisions for independent evaluation. Policy makers must have access to full, accurate project data and information in order to make responsible decisions in the public interest.

In recent years, at least one Massachusetts municipality has been approached by private development team members proposing to replicate the Plymouth facility project's fast-track design-build, lease-purchase model for municipal school construction. Such vendor-sponsored proposals will no doubt continue to proliferate at the state and local level as the increasingly competitive financial services industry develops new strategies for attracting public dollars. As the Plymouth case demonstrates, the inflated sales pitches for such proposals often

camouflage the real costs and risks to the public. Identifying and minimizing these costs and risks is the responsibility and obligation of public managers and policy makers at every level of government.

Until recently, the Administration had opposed proposals to replicate the Plymouth facility financing and construction model for other state-funded capital projects. In the 1997 legislative session, however, the Administration filed a bill, House No. 4583, that would allow the Commonwealth to sell a state office building to MIFA, which would then lease the building back to the Commonwealth for 30 years. The proposed sale-leaseback financing method contained similarities to the lease-purchase financing method used for the Plymouth facility. Under the proposed legislation, MIFA and the Commonwealth would select a developer who would contract for and oversee extensive building renovations financed by the sale of MIFA bonds. The entire project would be exempt from public bidding and real property laws. Competitive selection procedures and state oversight of the work performed by the developer's contractor would be optional, not required. In a letter dated June 25, 1997, the Inspector General strongly opposed the bill on the grounds that it would expose taxpayers to unacceptably high risks.

To reduce the costs and risks associated with the Plymouth facility, the Inspector General offers the following recommendations to the Commonwealth, Plymouth County, the Plymouth County Correctional Facility Corporation, and the Legislature:

- 1. Plymouth County should recalculate and renegotiate the per diem rate charged to the United States Marshals Service to include the full debt service cost of the taxable certificates of participation.** The per diem rate paid by the USMS should cover the full cost of constructing and financing the portion of the Plymouth facility intended to accommodate federal inmates.

2. **The Executive Office for Administration and Finance should analyze the feasibility and cost-effectiveness of refinancing the Plymouth facility project with general obligation debt.** Implementing this option could substantially reduce the long-term cost of financing this project; it would also eliminate the need for the Corporation.
3. **The Executive Office for Administration and Finance, the Executive Office of Public Safety, and Plymouth County should amend the Memorandum of Agreement to ensure that all interest earnings on project funds be spent on the Plymouth facility.** For example, Plymouth County could be required to deposit the interest earnings to which it is entitled under the Trust Agreement in a special project fund, such as the unfunded Capital Repair and Replacement Fund, and to report all fund transactions to the Commonwealth on a quarterly basis.
4. **The Executive Office for Administration and Finance should pursue with Plymouth County amendments to the Trust Agreement that would require that all surplus project funds revert to the Commonwealth at refinancing or at the end of the financing period.**
5. **The Corporation should transfer any remaining balances in the Construction and Acquisition Fund and the Administrative Expense Fund to the Capital Repair and Replacement Fund, as required by the Trust Agreement.**
6. **The Corporation should ensure its full compliance with the open meeting law, the public records law, and other applicable rules mandating public accountability and disclosure.**
7. **The Legislature should amend Chapter 425 of the Acts of 1991 to clarify that the statutory exemptions from advertising and bidding applied only to the initial construction of the Plymouth facility.** The amendment should ensure that all current and future project-related procurements comply with all procurement statutes applicable to Plymouth County.

Appendix A: Responses to Draft Report

A draft of this report was provided to the directors of the Plymouth County Correctional Facility Corporation, the Plymouth County Commissioners, and the Secretary of Administration and Finance. This Office received written responses from two Corporation directors (the Plymouth County Treasurer and the Plymouth County Sheriff) and the Secretary of Administration and Finance.⁷⁵ Based on the responses of the two Corporation directors, the draft report was amended to clarify that the institution of double-bunking in 1996 has created a shortage of program space at the Plymouth facility. Technical corrections in response to items (6) and (15) listed in the Plymouth County Treasurer's letter were also incorporated into the final report.

⁷⁵ The original response letters have been scanned and reformatted for electronic publishing. However, the text of the letters has not changed.

*Plymouth County Correctional Facility Corporation
Plymouth County Public Safety Building*

OBERY STREET
PLYMOUTH, MASSACHUSETTS 02360
TELEPHONE: (508) 746-0610
FAX: (508) 830-0182

*Commonwealth
of Massachusetts*

PATRCIA A. LAWTON
PRESIDENT

JOHN F. MCLELLAN
TREASURER

PETER FORMAN
CLERK

June 26, 1997

Robert A. Cerasoli, Inspector General
Office of the Inspector General
One Ashburton Place, Room 1311
Boston, MA 02108

Dear Mr. Cerasoli:

I am in receipt of the draft report pertaining to the Plymouth County Correctional Facility project. My comments relative to its content are contained herein.

1. Page 12 - As of this date the Commonwealth has failed to live up to the terms of the MOA relative to the required quarterly advances, the method of payment nor an agreed-upon per diem note.
2. Page 22 - The payment to the Town of Plymouth in the form of mitigation funded through operating revenues does not differ from any mitigation payments by the Commonwealth on any other governmental facility.
3. Pages 24-28 - The criticism of the amount of land lease payment is unfounded. The payment of \$5,000,000 represents a one-time payment of rent for a term of 30 years of approximately \$5,050 per acre/per year. The facility is not merely a county facility but also houses state and DYS inmates together with Federal detainees.
4. Pages 29-30 - The reduction in Federal detainees has made additional space available for State inmates. With the increased census there has been no comparable increase in state funding for the additional state prisoners.
5. Pages 31-37 - The issue of payments to various members of the development team was disclosed to all parties either prior to or at the time *of* closing. The practice of making payments for work performed "on speculation" is not uncommon in the private sector. The practice is also followed by lawyers when taking a case on contingency.

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6. Page 38 - While certain payments were made directly by Corporation check, it was necessary to provide the Trustee Bank with a detailed accounting prior to the Trustee releasing funds to the Corporation. In any instances where the Trustee had questions, adequate explanation was provided to satisfy the Trustee.
7. Pages 44-54 - The generalized comments in your report relative to any construction problems or deficiencies support the close monitoring of the project by the technical representative. Whenever necessary the technical representative pursued the general contractor to provide appropriate documentation for the entire construction process.
8. Pages 57 & 58 - The initial payment to the design-build contractor is an accepted business practice in the private sector of the business world.
9. Pages 58-62 - Expanded administrative space was not included in the original project as a cost savings. With the reduction in interest rates following the original COP issue, discussions commenced relative to the feasibility of the administrative facility. At the request of state administration, no further action was taken until the appointment of a new sheriff who basically vetoed the concept.
10. Pages 64-65 - The Capital Repair and Replacement Fund will be funded with whatever funds remain available in the Construction and Administrative accounts after all deficiencies are corrected.
11. Pages 67-70 - The additional payments to the technical representative were considered to be appropriate due to some of the additional duties required due to certain construction deficiencies and other unanticipated issues.
12. Page 96 - The content of Footnote 69 relative to the shortage of program space is unwarranted as the facility was designed and construction for 1,140 inmates, not 1,300 as housed in May, 1997. The additional inmate population is due, in part, to the transfer of additional inmates by the Commonwealth, for which no supplemental funding has been provided.
13. Page 103 - The innuendo of the special purpose corporation operated in secrecy is unfounded as it was required that annual comprehensive reports be filed with the legislature. The corporation exceeded its requirement by also filing with other pertinent agencies. At no time was any criticism voiced as to the content of these reports or the actions of the corporation to complete the project.

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14. Page 107 - The subject of refinancing the debt has previously been reviewed by the Executive office for Administration and Finance. The discussions end to the conclusion that the concept was not viable at this time unless the proceeds were to be used for a project related purpose.

An amendment to the Memorandum of Agreement could not supersede the provisions of the Trust Agreement without the express consent of the debt holders and possible reduction in their security position.

15. Appendix B, Item 4 - The statement that the salary of the Corporation President and Treasurer are paid by the Corporation is false. The President and Treasurer serve the Corporation without compensation. The President is compensated by the County in the capacity of County Commissioner. The Treasurer of the Corporation receives compensation from the County in his capacity as County Treasurer.

After you have had an opportunity to review the various comments contained herein, it is respectfully requested that various sections be revised or corrected to reflect more accurately the benefit of the project.

Yours very truly,

John F. McLellan
Treasurer

JFM/bd

THE COMMONWEALTH OF MASSACHUSETTS
County of Plymouth
OFFICE OF THE SHERIFF

OBERY STREET · PLYMOUTH, MASSACHUSETTS 02360
TELEPHONE (508) 746-0610 · (508) 830-6200

July 9, 1997

Honorable Robert A. Cerasoli
Inspector General
One Ashburton Place, Room 1311
Boston, MA 02108

Dear Mr. Cerasoli:

I want to congratulate your office on a thorough study of the Plymouth County Correctional Facility.

Your analysis on the state subsidy of federal beds was eye-opening. To some extent our operation is almost dependent on the relationship with the U. S. Marshal's Service. The Administration and Legislature build their appropriation around the federal money they assume we will have each year. It is time to re-evaluate the relationship with the Marshal's Service. Based on your findings, I hope to re-negotiate the agreement with the Marshal's Service so that the state is no longer subsidizing the federal beds. If I am unsuccessful in reaching a better agreement, it may be time for the state and my office to reconsider the number of federal detainees we keep at this facility.

Your report states that there was no expectation that there would be competitive bidding or oversight on this project. This is not correct. I was in the Legislature when the special legislation for this project was approved. The proponents and consultants gave me just the opposite impression. Their argument for the exemptions from oversight of the state was that the federal Marshal's Service would be overseeing this project using federal guidelines for construction. The perception was created that this would be a federal project financed primarily through the federal contract with the U. S. Marshal. State oversight would become duplicative or of such insignificant difference from federal rules that the only result would be additional paper and costs with no additional protection to taxpayers. I assume other legislators were under similar impressions.

The new facility is clean, safe, secure and well run. It is a vast improvement over older facilities. Nevertheless, there are operational concerns created by the design of the facility. The facility simply does not have adequate space for the administrative work of this department. That is not critical right now because we continue to use buildings at the Obery Street site. If the farm on Obery Street closes or the county tries to limit our use of this property, we will have a large modern complex that holds only inmates without space for the managers.

Robert A. Cerasoli

Page 2

July 9, 1997

A more serious concern for the safe running of the prison is the lack of space for inmate programs and education. Regardless of one's views on prison education and counseling programs as rehabilitative, there is no disagreement among corrections professionals about the value of these programs in controlling inmate behavior inside the prison. The lack of counseling/education space becomes more serious as the number of inmates increases. The higher numbers and crowded conditions creates tension among inmates. At the same time there is less ability to reduce that tension through programs.

The report identifies past and present issues associated with the design and financing of the facility. There are many lessons to learn from this when projects based on this model are proposed in the future. But I am concerned about the future of this facility. If we ever face a major maintenance issue it is unclear how it will be handled. If the corporation is responsible for a major project will it again be allowed to perform major construction without traditional state oversight? Will there be enough money reserved in the repair/maintenance account to pay for a major project? If there is not enough money in those accounts will the state simply pay for it? What is the future of the corporation if county government is changed? These are difficult questions but I hope the Administration and Legislature will begin thinking about them now rather than wait until the roof falls in.

Again, thank you for a thorough report.

Sincerely,

PETER FORMAN
Sheriff

/jms

THE COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE FOR
ADMINISTRATION AND FINANCE
STATE HOUSE · ROOM 373
BOSTON, MA 02133

TEL: (617) 727-2040
FAX: (617) 727-2779

WILLIAM F. WELD
GOVERNOR

ARGEO PAUL CELLUCCI
LIEUTENANT-GOVERNOR

CHARLES D BAKER
SECRETARY

July 10, 1997

The Honorable Robert A. Cerasoli
Inspector General
One Ashburton Place
Room 1311
Boston, MA 02108

Dear Inspector General Cerasoli:

Thanks very much for giving us a chance to review a draft of your report on the Plymouth County Correctional Facility transaction. It was thorough and informative.

As a result of the findings and recommendations contained in your report, we are prepared to do the following:

- Analyze the feasibility and cost-effectiveness of refinancing the Plymouth project;
- Develop and pursue amendments to the existing Memorandum of Understanding to ensure that all interest earnings on project funds be spent on the Plymouth facility;
- Develop and pursue amendments to the Trust Agreement that would require that all surplus project funds revert to the Commonwealth if any re-financing takes place.

Again, thank-you for the opportunity to review your report. As someone who thinks lease-financing does make sense under certain circumstances and with appropriate safeguards, I found your findings extremely valuable.

Sincerely,

Charles D. Baker
Secretary

Appendix B: Applicability of the Public Records Law and the Open Meeting Law to the Plymouth County Correctional Facility Corporation

The Plymouth County Correctional Facility Corporation (Corporation) is subject to the public records law and the open meeting law based on the Supreme Judicial Court's analysis in Massachusetts Bay Transp. Auth. Retirement Bd. v. State Ethics Comm'n., 414 Mass. 582 (1993) and Globe Newspaper Co. v. Massachusetts Bay Transp. Auth. Retirement Bd., 416 Mass. 1007 (1993).

Public Records Law

The Massachusetts Public Records Law, M.G.L. c. 66, §10, requires that public records be open to public inspection. "Public records" include books and papers "made or received by any officer or employee of any agency, executive office, department, board, commission, bureau, division or authority of the commonwealth, or of any political subdivision thereof, or of any authority established by the general court to serve a public purpose. . . ." M.G.L. c. 4, §7. The Corporation, as a separately incorporated entity, does not fit neatly into one of these enumerated bodies. However, the question remains whether the Corporation is essentially an alter-ego of the County and, as such, subject to the public records law.

In Globe Newspaper Co., the Court addressed a similar issue regarding the applicability of the public records law to the Massachusetts Bay Transportation Authority Retirement Board (Board). To determine whether the Board was subject to the public records law, the Court used a test set forth in another case involving the Board, Massachusetts Bay Transp. Auth. Retirement Bd.. In both Massachusetts Bay Transp. Auth. Retirement Bd. and Globe Newspaper Co., the Court adopted an approach that focused on the method of formation, operation, and purpose of the entity in order to give the statutes a reasonable construction.

In Massachusetts Bay Transp. Auth. Retirement Bd., the Court considered whether the Board was a "state agency," within the meaning of the state conflict of interest law, M.G.L. c. 268A. Included within the conflict of interest law's definition of "state agency" are "department[s] of state government" and "independent state instrumentalit[ies]." M.G.L. c. 268A, §1(p). Since the Board was not within any department of the state, the Court addressed the question of whether it was an independent state instrumentality. The Court noted that the term "instrumentality," not defined within the statute, is a term susceptible to multiple interpretations. Id. at 588. In seeking to determine whether the Board was an instrumentality subject to M.G.L. c. 268A, the Court set forth the following four factors to consider:

1. the means by which the entity was created;
2. whether the entity performs some essentially governmental function;
3. whether the entity receives or expends public funds and the involvement of private interests; and
4. the extent of control and supervision exercised by government officials or agencies over the entity.

Id. at 588-89. After analyzing and balancing these factors, the Court determined that the Board was not an instrumentality for purposes of M.G.L. c. 268A. In Globe Newspaper Co., the Court applied this same test to determine that the Board was also exempt from the public records law. The Court's findings in Massachusetts Bay Transp. Auth. Retirement Bd. and Globe Newspaper Co. can be applied to the Corporation's situation to determine whether the Corporation is subject to the public records law.

1. Means by which the entity was created.

In Massachusetts Bay Transp. Auth. Retirement Bd., the Court noted that the Board was created pursuant to a collective bargaining agreement between the MTA, the MBTA's predecessor, and the local union. The court observed that:

[n]otably absent from the creation of the board is any action by the Commonwealth. There is no statute, regulation, or executive order which addresses the establishment of the fund or the board.

Id. at 589. Furthermore, the court found no "legislative underpinning" for the creation of the Board. Id. at 590.

In contrast, the Corporation was created by Plymouth County after the passage of Chapter 425 of the Acts of 1991, An Act Facilitating the Financing and Development of a New Criminal Detention Facility in Plymouth County (the "Act"). While the Act makes no mention of a special purpose corporation generally, or the Corporation specifically, the Act was passed to facilitate the County's financing and development of a new criminal detention facility and the Corporation's sole purpose is to assist the County in this endeavor. Additionally, the Act, by its own terms, applies to any entity succeeding to the rights, duties, powers and responsibilities of the County or its sheriff's department.⁷⁶

2. Whether the entity performs some essentially governmental function.

The Court in Massachusetts Bay Transp. Auth. Retirement Bd. found that the Board's function was to administer a pension plan for MBTA employees and manage fund assets. The Court noted that "these functions, which are fiducial in nature and performed most often by private entities, are not 'essentially governmental' functions." Id. at 590. In contrast, the Corporation has stepped into the shoes of the County in the

⁷⁶Section 1 of Chapter 425 of the Acts of 1991 provides:

[a]s used in this Act, the following words shall have the following meanings:-

"County", Plymouth County, acting through its duly elected commissioners or other duly authorized representatives, or any governmental unit or body succeeding to the rights, properties, powers, duties and responsibilities of such county.

"Department", the Plymouth county sheriff's department, or any successor to the rights, powers, duties and responsibilities thereof.

performance of one of its governmental functions, namely, the Corporation has assumed all of the County's obligations under the County's agreement with the technical representative, a contract mandated by the Act.

Furthermore, the Corporation itself argued that it performs an essentially governmental function when, in 1994, it sought and received an exemption from the Internal Revenue Service (IRS) from the requirement to file an annual Form 990. In March 1993, the Corporation's counsel advised the Corporation in a written opinion that the Corporation was probably exempt from the requirement because:

it is clear that PCCFC is owned by a political subdivision of the state. Moreover, there is a presumption that if a corporation is wholly-owned by a political subdivision, the corporation is deemed to be performing essential governmental functions.

(Letter from Hale & Dorr to the Corporation Treasurer, dated March 30, 1993)

In a letter to the IRS dated June 22, 1994, the Corporation's Treasurer made this same argument, stating:

This corporation is a wholly-owned instrumentality under the jurisdiction of the County of Plymouth, Massachusetts. . . . The corporation is performing a governmental function on behalf of the County.

3. Whether the entity receives or expends public funds and the involvement of private interests.

As many nongovernmental entities receive public funds, the Court in Massachusetts Bay Transp. Auth. Retirement Bd. emphasized that "[t]he analysis of this factor . . . should focus on the use of the public funds received by the entity in question, taking into consideration the private interests involved." Id. at 591. The Court noted that the MBTA's contributions to the fund each year were determined by negotiation between the MBTA and the union, and these contributions, once made, were irrevocable.

Neither the state nor the MBTA had a proprietary interest in the pension fund. The fund's assets, including contributions and investment income, had to be used for the exclusive benefit of the fund members and their beneficiaries. The Court concluded that "[t]he significant private interests of the pension fund members, and their beneficiaries, far outweigh any public or governmental interest in the funds contributed by the MBTA." Id. at 591.

In contrast, the Corporation is owned by the County, the Corporation's and the County's finances are closely linked, and "[n]o private organizations or individuals have an ownership interest in the corporation." (Letter from the Corporation Treasurer to IRS, dated June 22, 1994.) Plymouth County, on behalf of the Corporation, issued the certificates of participation (COPs) which are backed by a contractual obligation of the Commonwealth to pay the debt service. The COPs' rating is linked to the Commonwealth's rating. Federal and state per diem payments paid to the County are turned over to the Corporation, pursuant to the trust agreement between the County, the Corporation, and the trustee bank. Out of this revenue fund, payments are made to COP holders, and funds flow back to the County to pay the salaries of County correctional employees. Interest on the revenue fund, and interest on a separate debt service reserve fund, also flow back to the County for general County expenses. It is clear that the finances of the County and the Corporation are, for all intents and purposes, one and the same.

4. The extent of control and supervision exercised by government officials or agencies over the entity.

In Massachusetts Bay Transp. Auth. Retirement Bd., the Court examined the extent of government control and supervision of the Board. The Court noted that the Board did not receive office space, furniture, or equipment from the MBTA, but rented its own private offices. The Board was operated on a day-to-day basis by non-MBTA employees. These employees were never supervised or paid by the MBTA, were not covered by the state's group insurance plan, and did not participate in the state retirement system. The Court also took note that the voting structure of the Board gave

both MBTA appointees and employee appointees veto power over board actions.⁷⁷ Furthermore, the Court stated:

the issue of control must be considered in the context of each board member's role as a fiduciary under the trust. As trustees, the board members owe their primary loyalty to the members and beneficiaries of the fund, and not to the MBTA.

Id. at 592.

Unlike the Board, the Corporation's officers and directors, who are the Corporation's only employees, are all County employees. The President of the Corporation is the Chairman of the Plymouth County Commissioners, the Treasurer is the Plymouth County Treasurer, and Clerk is the Plymouth County Sheriff. The Corporation's by-laws require that these three officers hold these three County positions. The Corporation has no separate location; its letterhead lists the Plymouth County Public Safety Building address, telephone, and fax numbers and bears the County's seal.

A comparison of the Court's findings in Massachusetts Bay Transp. Auth. Retirement Bd. with the Corporation's situation indicates that the Corporation is subject to the public records law.

Open Meeting Law

M.G.L. c. 34, §9G provides that "[a]ll meetings of a governmental body shall be open to the public. . . ." M.G.L. c. 34, §9F defines "governmental body" as "a county board, commission, committee and subcommittee."

⁷⁷The Board's membership consisted of seven members: three MBTA appointees, two union appointees, one person elected by a vote of members of the fund who were not members of the union but were either management employees or members of other unions, and one "honorary" or neutral member.

There are no reported cases interpreting either M.G.L. c. 34, §9F or §G. A court would likely apply the test set forth in Massachusetts Bay Transp. Auth. Retirement Bd. to determine whether the Corporation is really an extension of the County and so subject to M.G.L. c. 34, §9G. Under this analysis, the Corporation is subject to the open meeting law for the same reasons discussed above.

Appendix C: Sources of Additional Information

Bunch, Beverly S., "The Evolution of Lease-Purchase Guidelines in the State of Texas," *Public Budgeting & Finance*, Winter 1996.

DeWitt, Charles B., "Florida Sets Example With Use of Concrete Modules," *National Institute of Justice Construction Bulletin*, U.S. Department of Justice, March 1986

DeWitt, Charles B., "Ohio's New Approach to Prison and Jail Financing," *National Institute of Justice Construction Bulletin*, U.S. Department of Justice, November 1986

Gurry, William W., "Documenting Design-Build," *Civil Engineering*, September 1995.

Hobbs, James D., "CM Delivery Systems," *Construction Business Review*, November/December 1995.

Johnson, Craig, and Mikesell, John, "Certificates of Participation and Capital Markets: Lessons from Brevard County and Richmond Unified School District," *Public Budgeting & Finance*, Fall 1994.

Lemov, Penelope, "The Brave New World of Public Finance," *Governing*, September 1992.

Marlin, George J. and Mysak, Joe, *The Guidebook to Municipal Bonds*, *The American Banker/The Bond Buyer*, 1991.

Nelson, W. Raymond, "Cost Savings in New Generation Jails: The Direct Supervision Approach," *National Institute of Justice Construction Bulletin*, U.S. Department of Justice, July 1988.

Potter, Alfred K. II, "Construction Management: Delivery System of Choice," *Construction Business Review*, November/December 1995.

Wallison, Frieda, "A Guide to Leasing in the Public Sector," *Governing*, September 1996.