

**Immigration and Customs
Enforcement Did Not
Follow Federal Procurement
Guidelines When Contracting
for Detention Services**





DHS OIG HIGHLIGHTS

Immigration and Customs Enforcement Did Not Follow Federal Procurement Guidelines When Contracting for Detention Services

February 21, 2018

Why We Did This Audit

U.S. Senator Claire McCaskill asked us to review ICE's modification of its intergovernmental service agreement (IGSA) with the City of Eloy in Arizona to procure family detention space in Dilley, Texas. We also reviewed other selected IGSA's to determine whether they complied with applicable laws and regulations.

What We Recommend

ICE should 1) establish procedures for IGSA's that implement Federal purchasing guidelines; and 2) discontinue modifying the Eloy IGSA to procure family detention space at the South Texas Family Residential Center.

For Further Information:

Contact our Office of Public Affairs at (202) 254-4100, or email us at DHS-OIG.OfficePublicAffairs@oig.dhs.gov

What We Found

U.S. Immigration and Customs Enforcement (ICE) is responsible for the detention of removable aliens. ICE commonly uses a type of agreement called an IGSA to reserve space at detention facilities owned or operated by state or local governments.

In September 2014, ICE improperly modified an existing IGSA with the City of Eloy (Eloy) in Arizona to establish the 2,400-bed South Texas Family Residential Center in Dilley, Texas, more than 900 miles away. Although ICE could have contracted directly with the private company that operates the South Texas Family Residential Center, CCA, it instead created an unnecessary "middleman" by modifying its existing IGSA with Eloy. Eloy's sole function under the modification is to act as the middleman between ICE and CCA; Eloy collects about \$438,000 in annual fees for this service.

In addition, ICE's policies and procedures for negotiating, executing, and modifying IGSA's are insufficient and lack specific guidance for the appropriate use of IGSA's. Consequently, ICE may have overpaid for detention services at the South Texas Family Residential Center, as well as other detention facilities. Moreover, ICE has no assurance that it executed detention center contracts in the best interest of the Federal Government, taxpayers, or detainees.

ICE Response

ICE concurred with recommendation 1 and non-concurred with recommendation 2. ICE will undertake an effort to ensure its written procedures implement Federal guidelines. ICE believes that its modification of the City of Eloy IGSA was proper and therefore future modifications also would be proper.




OFFICE OF INSPECTOR GENERAL

Department of Homeland Security

Washington, DC 20528 / www.oig.dhs.gov

FEB 21 2018

MEMORANDUM FOR: Thomas D. Homan
Acting Director
Immigration and Customs Enforcement

FROM: John V. Kelly 
Acting Inspector General

SUBJECT: *Immigration and Customs Enforcement Did Not Follow
Federal Procurement Guidelines When Contracting for
Detention Services*

For your action is our final report, *Immigration and Customs Enforcement Did Not Follow Federal Procurement Guidelines When Contracting for Detention Services*. We incorporated the formal comments from your office in the final report. The report contains two recommendations aimed at improving DHS' processes for detention center contracting. DHS concurred with the first recommendation and non-concurred with the second. Based on information provided in your response to the draft report, we consider the first recommendation resolved and open and the second recommendation unresolved and open. Once your office has fully implemented the recommendation, please submit a formal closeout letter to us within 30 days so that we may close the recommendation. The memorandum should be accompanied by evidence of completion of agreed-upon corrective actions and of the disposition of any monetary amounts. Please send your closure request to OIGAuditsFollowup@oig.dhs.gov.

Consistent with our responsibility under the *Inspector General Act*, we will provide copies of our report to congressional committees with oversight and appropriation responsibility over the Department of Homeland Security. We will post the report on our website for public dissemination.

Please call me with any questions, or your staff may contact Donald Bumgardner, Deputy Assistant Inspector General for Audits, at (202) 254-4100, or Lisa Vonder Haar, Audit Director at (202) 254-4143.



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Background

U.S. Immigration and Customs Enforcement (ICE) promotes homeland security and public safety by enforcing Federal laws governing border control, customs, trade, and immigration. ICE’s responsibilities include the detention of removable aliens¹ who present a flight risk, a threat to public safety, or fall within mandatory detention requirements.

In fiscal year 2016, ICE received about \$2.3 billion to house detainees at 203 detention facilities nationwide. ICE owns and operates five of these detention facilities. It secured the remainder by contracting directly with private companies, establishing intergovernmental agreements with the U.S. Marshal Service, or negotiating intergovernmental service agreements (IGSA)² with state and local governments. IGSAs enable ICE to use bed space in city, county, or state detention facilities. The state and local governments may manage the facilities and detention services directly or use subcontractors. As with other types of agreements, ICE may renegotiate or “modify” IGSAs to meet changing needs for detention space.

In 2014, a surge of families and unaccompanied minors crossing the Southwest border created an urgent need for family detention space. To help meet this need, ICE modified an existing IGSA for adult detention with the City of Eloy (Eloy) in Arizona to create the South Texas Family Residential Center in Dilley, Texas (South Texas Modification). The resulting residential center —now the largest ICE detention facility in the Nation — is more than 900 miles from Eloy.

Location of Eloy, Arizona, and Dilley, Texas



Source: Google Maps

U.S. Senator Claire McCaskill asked us to review the South Texas Modification. We also reviewed other selected IGSAs to determine whether they complied with applicable laws, regulations, and agreements.

¹ A person who is subject to removal as specified in the *Immigration and Naturalization Act*. This includes any alien illegally in the United States, regardless of whether the alien entered the country by fraud, misrepresentation, or other illegal means; or entered legally but subsequently violated the terms of his or her nonimmigrant status classification.

² ICE staff also use the acronym “IGSA” as a general term to describe some detention facilities. In this report, “IGSA” refers to the specific procurement agreement.



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Results of Audit

ICE improperly modified its IGSA with the City of Eloy in Arizona to include the South Texas Family Residential Center in Dilley, Texas. In addition, ICE's policies and procedures for negotiating, executing, and modifying IGSA's are insufficient and lack specific guidance for the appropriate use of IGSA's. Consequently, ICE may have overpaid for detention services at the South Texas Family Residential Center, as well as other detention facilities. Moreover, ICE has no assurance that it executed detention center contracts in the best interest of the Federal Government, taxpayers, or detainees.

ICE Improperly Modified an Existing IGSA to Provide New Family Detention Facilities

Although ICE should have contracted directly with the private company that operates the South Texas Family Residential Center, CCA,³ it instead created an unnecessary "middleman" by modifying its existing IGSA with Eloy. The modification was improper for two reasons: 1) the terms of the IGSA were negotiated directly with Eloy's existing subcontractor, CCA, instead of the party legally responsible for the agreement (Eloy); and 2) the addition of family detention services was outside the scope of the original IGSA.

In 2006, ICE executed the original IGSA with Eloy to provide housing for up to 1,500 adult immigration detainees at the Eloy Detention Center in Eloy, Arizona. Eloy subcontracted with CCA, which owns and operates the facility, to house male and female detainees at a mix of minimum and medium security levels.

In July 2014, following a surge of families and unaccompanied minors crossing the Southwest border, ICE's Office of Acquisition asked two private companies to submit proposals for family detention facilities in southern Texas, with a 2,000- to 4,000-bed capacity. One of the companies declined to submit a proposal. The other, CCA, presented a proposal and entered into negotiations with ICE to construct and operate the South Texas Family Residential Center through a modification of the Eloy IGSA. ICE worked directly with CCA to develop the requirements for the facility; Eloy did not participate in developing the requirements or any other aspect of the negotiations with ICE.

After reviewing CCA's proposal, ICE's Commercial and Administrative Law Division (CALD) within the Office of the Principal Legal Advisor issued a

³ CCA was formerly known as Corrections Corporation of America. In late 2016, it rebranded its corporate enterprise as "CoreCivic," but continues to use the acronym "CCA."



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memorandum⁴ warning the Director and Head of Contracting that the South Texas Modification was not legally advisable. The memorandum also stated, “...needed detention services can be procured expeditiously using available procurement tools.” Furthermore, CALD concluded that the proposed modification of the Eloy IGSA was likely outside the scope of the original IGSA because it would include “work at a facility that is 900 miles away by a subcontractor (CCA) over whom Eloy will exercise minimal operational control.” The contracted service requirements for housing children and families at the South Texas Family Residential Center in Dilley are also beyond the scope of the original IGSA. The original IGSA called for Eloy to operate a detention facility that housed adults. We believe that the care of children and families included in the modification is substantially different.

Eloy Detention Center



South Texas Family Residential Center



Source: Defense Video Imagery Distribution System Photos by Charles Reed

Nevertheless, ICE continued negotiating exclusively with CCA, establishing the housing layout and pricing schedule, without input from Eloy. Then, on September 22, 2014, CCA officials attended Eloy's City Council meeting to request the City modify its IGSA with ICE to include the South Texas Family Residential Center; Eloy agreed. The next day, ICE executed the South Texas Modification and Eloy subsequently contracted with CCA to provide the actual detention services for up to 48 months. Eloy's sole function under the modification is to act as the middleman between ICE and CCA; Eloy collects about \$438,000 in annual fees for this service. ICE pays for each of the 2,400 beds in the South Texas Family Residential Center whether they are occupied or not. As of September 2016, ICE paid about \$261 million to house families and unaccompanied minors in the South Texas facility.

According to ICE's Office of Acquisition staff, it was more expedient to modify the Eloy IGSA than contract directly with CCA. In addition, ICE program and

⁴ “Review of Discussed Courses of Action for an Intergovernmental Services Agreement in Carrizo Springs and Dilley, Texas,” dated July 30, 2014.
www.oig.dhs.gov



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acquisition officials said that IGSA's offered them much greater flexibility than a traditional procurement agreement.

In August 2016, Office of Acquisition staff said that ICE would not fund the South Texas modification beyond September 2016. However, in October 2016, ICE modified the Eloy IGSA to extend its use of the South Texas Family Residential Center until 2021, 3 years longer than the original agreement. Although the October 2016 modification eliminated early termination fees, we believe ICE should have executed a new agreement directly with CCA. The October 2016 modification is improper for the same reasons as the September 2014 modification. Appendix B contains a timeline of the events related to the South Texas Modification.

ICE Does Not Have Sufficient Policies or Guidance for IGSA's

There are three types of procurement instruments available to Federal executive agencies for obtaining supplies and services — grants, cooperative agreements, and procurement contracts. IGSA's are not grants. However, ICE has not formally defined IGSA's as cooperative agreements or procurement contracts, and does not follow Office of Management and Budget's uniform administrative requirements for Federal awards (2 Code of Federal Regulation (CFR) Part 200) or Federal Acquisition Regulations (FAR) for procurement contracts. In the absence of Federal guidelines, ICE should have developed policies and procedures for negotiating, executing, and modifying IGSA's.

Without standard operating procedures for IGSA's, ICE cannot ensure it executes IGSA's properly, consistently, or efficiently. For example, in one IGSA we reviewed, a retiring contracting officer did not maintain any documentation to support awarding the IGSA because ICE did not have a standard for document retention. As a result, the new contracting officer needed to repeat all the pre-award actions.

Additionally, ICE is not in compliance with the Office of Management and Budget's Circular A-123, *Management's Responsibility for Enterprise Risk Management and Internal Control*, which requires Federal agencies to establish and maintain controls (policies and procedures) related to operations, reporting, and compliance with relevant laws and regulations.



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Conclusion

In general, ICE has no assurance that it executed detention center contracts in the best interest of the Federal Government, taxpayers, or detainees. It appears that ICE deliberately circumvented FAR provisions by modifying its IGSA with Eloy, rather than contracting directly with CCA. Because ICE's agreement and legal relationship is with the City of Eloy, CCA's performance is effectively insulated from government scrutiny. As such, ICE has no assurance that the South Texas Modification was in the best interest of the Federal Government, taxpayers, or detainees.

Recommendations

Recommendation 1. We recommend that the Deputy Director of ICE establish and communicate specific written procedures for IGSAs implementing Federal guidelines that include:

- a definition of an IGSA and determination of whether it is a cooperative agreement or procurement contract,
- administrative requirements for the solicitation and award of IGSAs,
- post-award requirements,
- guidelines for modifications, and
- allowable cost structure.

Recommendation 2. We recommend that ICE discontinue modifying the Eloy IGSA to procure family detention space at the South Texas Family Residential Center and use the procedures developed in recommendation 1 to procure necessary housing for family detention.

Management Comments and OIG Analysis

ICE concurred with recommendation 1 and non-concurred with recommendation 2. In addition to its response to our recommendations, ICE included a cover letter disputing the findings in our report. A summary of ICE's comments and our analysis follows. Appendix A is ICE's verbatim response to this report, and our analysis of ICE's general comments is presented in appendix C. ICE also provided technical comments to the draft report, which we incorporated, as appropriate.

ICE officials believe the modification to the Eloy IGSA was proper because 8 United States Code (U.S.C.) § 1103(a)(11)(A) authorizes them to use IGSAs for detention services. ICE believes IGSAs are exempt from the Competition in Contracting Act and FAR. ICE further believes the services provided at the South Texas Residential Facility are within the scope of the original City of Eloy



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IGSA. Additionally, ICE contends that the contracting officer's actions ensured that it obtained a reasonable price and executed the IGSA in the best interest of the Federal Government, taxpayers, and detainees.

OIG did not question ICE's authority to use IGSA's or its continuing need to use the South Texas Family Residential Center. We believe the modification of the IGSA with the City of Eloy was improper, as discussed in the report. Eloy's sole function under the modification is to act as the middleman, for which it collects about \$438,000 in annual fees.

ICE Comments to Recommendation 1

ICE concurred with this recommendation. ICE said its Office of Acquisition has established specific written procedures for negotiating, establishing, and administering IGSA's. ICE agreed to undertake an effort to ensure the procedures address the bulleted list of items in recommendation 1, which ICE labeled a-e. ICE also stated the ICE Contract and Acquisition Procedures (ICECAP) 07.08 provided a definition of IGSA's and established standard IGSA templates for solicitations, post-award requirements, and modifications.

OIG Analysis of ICE Comments

The development and implementation of written policy and procedures that incorporate the bulleted list of items in recommendation 1, which ICE labeled a-e, would meet the intent of the recommendation. ICE stated its contract and acquisition procedures, specifically ICECAP 07.08, established policy governing IGSA's. However, according to ICE's Deputy Assistant Director for Acquisition Policy and Procedures, ICE is not using ICECAPs, including ICECAP 07.08, and ICE was in the process of developing procurement policies. In addition, ICE should clearly communicate to staff its current and enforceable policies (templates and checklists are not adequate policy documents). This recommendation is resolved and open.

ICE Comments to Recommendation 2

ICE non-concurred with this recommendation. ICE responded that it modified its IGSA with the City of Eloy in accordance with the terms and conditions of the existing IGSA with Eloy. ICE further cites its statutory authority to use IGSA's and asserts it has written procedures and guidance for negotiating, establishing, and administering IGSA's. ICE requested that the Office of Inspector General (OIG) consider this recommendation resolved and closed.



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OIG Analysis of ICE Comments

We consider ICE's response to recommendation 2 unresponsive. OIG did not question ICE's authority to use IGSA's or a continuing need to use the South Texas Family Residential Center. We believe the modification of the IGSA with the City of Eloy was improper as discussed in this report. ICE also states it has written procedures and guidance for negotiating, establishing, and administering IGSA's. However, as noted previously, we do not consider templates and checklists sufficient. This recommendation is unresolved and open.

Objective, Scope, and Methodology

The Department of Homeland Security Office of Inspector General was established by the *Homeland Security Act of 2002* (Public Law 107-296) by amendment to the *Inspector General Act of 1978*.

Our objective was to determine whether the modification and management of ICE's contract with the City of Eloy, Arizona, as well as other selected detention center contracts, comply with applicable laws, regulations, and agreements. To achieve our objective, we reviewed documents included in the contract files for the selected sample. This included pre-award documentation, the IGSA, modifications, and oversight of performance.

We reviewed a judgmental sample of 10 IGSA's for detention services selected from ICE's "facilities list." We performed data reliability tests on the facilities list provided by ICE and identified discrepancies with the data. We determined the discrepancies did not affect our judgmental sample and the number of IGSA's was sufficient for our review. We based our conclusions on the documentation and records we analyzed from ICE.

We interviewed ICE personnel from Office of Acquisition, Office of Acquisition Policy and Oversight, Office of Custody Management, Office of the Principal Legal Advisor, Office of Financial Management, Office of Budget Policy and Performance, and Office of Detention Policy and Planning. We reviewed applicable Federal laws, regulations, codes, and minimum requirements pertaining to ICE detention center contracts. We also completed a review of departmental and component policies, procedures, and internal directives established by DHS and ICE to ensure they meet specified requirements.

We assessed ICE's control structure, policies, procedures, and practices applicable to IGSA's. Our assessment would not necessarily disclose all material weaknesses in this control structure; however, it disclosed



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weaknesses in ICE's internal policies and procedures governing IGSA's. These weaknesses are discussed in the body of this report.

We conducted this performance audit between October 2015 and November 2016 pursuant to the *Inspector General Act of 1978*, as amended, and according to generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based upon our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based upon our audit objectives.

The Office of Audits major contributors to this report are Lisa Vonder Haar, Director; Karen J. Gardner, Audit Manager; Duane Albert, Program Analyst; Thomas J. Bobrowski, Program Analyst; Douglas Bozeman, Program Analyst; Elizabeth Finn, Program Analyst; Kevin Dolloson, Communications Analyst; and Adam Buro, Independent Referencer.



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Appendix A
ICE Comments to the Draft Report

Office of the Director
U.S. Department of Homeland Security
500 12th Street, SW
Washington, D.C. 20536



**U.S. Immigration
and Customs
Enforcement**

January 8, 2018

MEMORANDUM FOR: John V. Kelly
Acting Inspector General

FROM: Thomas D. Homan
Deputy Director and
Senior Official Performing the Duties of the Director
U.S. Immigration and Customs Enforcement

SUBJECT: Management Response to Draft Report "Immigration and Customs
Enforcement Did Not Follow Federal Procurement Guidelines when
Contracting for Detention Services" (Project No. 15-124-AUD-ICE)

Thank you for the opportunity to review and comment on this draft report. U.S. Immigration and Customs Service (ICE) appreciates the work of the Office of Inspector General (OIG) in planning and conducting its review and issuing this report.

ICE disagrees with certain findings and conclusions made by OIG. In particular, we believe the report inaccurately describes the legal basis for ICE's Intergovernmental Service Agreement (IGSA) authority and does not acknowledge the unique circumstances and challenges ICE faced in responding to the 2014 surge of families crossing the border, an unprecedented situation which persists to this day. ICE acknowledges that issues surrounding our unique IGSA authority are technically complex, but the report's suggestion that ICE can only procure detention beds through Federal Acquisition Regulation (FAR)-based contracting is simply incorrect. In fact ICE regularly uses its IGSA authority to acquire detention beds, as this unique statutory authority allows ICE to acquire beds quickly and in remote locations where much of our enforcement actions occur. While the acquisition of beds for family detention through an IGSA may not be well understood outside the immigration enforcement community, it is by no means improper or illegal.

As the draft report correctly notes: (1) ICE is responsible for the detention of removable aliens; and (2) ICE faced a major surge of families and unaccompanied minors crossing the Southwest border during 2014, which created an *urgent and compelling* need for family detention space. The resolution of this crisis became a Secretary of Homeland Security priority, and the ICE Office of Acquisition Management (OAM) used the contractual flexibilities afforded by its broad IGSA authority to meet this need.



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ICE Management Response to Recommendations Contained in 15-124-AUD-ICE
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ICE's IGSA authority is codified at 8 U.S.C. § 1103(a)(11)(A), which provides that the U.S. Department of Homeland Security (DHS) may enter into agreements with a State, or its subdivisions, "for necessary clothing, medical care, necessary guard hire, and the housing, care, and security of persons detained by [ICE] pursuant to Federal law . . ." ICE relies on this authority for a significant number of its detention contracts. Given this express authorization provided under federal immigration law, ICE has no legal requirement to compete the award of an IGSA because 8 U.S.C. § 1103(a)(11)(A) serves as an exception to the Competition in Contracting Act (CICA) requirement for full and open competition. CICA provides that its competition requirements do not apply when "a statute expressly authorizes or requires that the procurement be made through another [executive] agency or from a specified source." 41 U.S.C. § 3301(a)(1). Further, unlike the IGSA authority of the Department of Defense (DoD), 10 U.S.C. § 2679(a)(4), neither ICE nor the IGSA holder is required to competitively award any contracts or subcontracts awarded under the IGSA.¹ Like DoD, ICE's IGSA's are not generally required to follow the Federal Acquisition Regulation (FAR).²

In addition, an IGSA is not a cooperative agreement.³ A cooperative agreement is used to transfer a thing of value to a State, local government or other entity, whereas a procurement contract is used when the principal purpose is to obtain services or property, by purchase, lease or barter, for the direct benefit or use of the United States.⁴ Despite the OIG's conclusion ICE has never defined IGSA's nor followed the FAR and or federal contracting guidelines contained in part 200 of Title 2 of the Code of Federal Regulations, both ICE OAQ and the Office of the Principal Legal Advisor (OPLA) have long taken the position that an IGSA is a type of procurement rather than a cooperative agreement.⁵

The draft report cites two reasons why the OIG believes ICE improperly modified its IGSA with the City of Eloy, in Arizona: (1) the terms of the IGSA were negotiated directly with Eloy's

¹ Major Erik J. Zoll, *Intergovernmental Support Agreements: A Primer for the Field*, The Army Lawyer, (June 2017), at 43 (discussing how the DoD IGSA's are exempt from CICA); Michael J. Davidson, *CICA's Uncle Sam Exception*, 53 The Procurement Lawyer, 3, and 5-6 (Fall 2017) (discussing ICE IGSA authority and exemption from CICA).

² Zoll, *supra* note 1, at 42-43; Davidson, *supra* note 1, at 3, 5. See also *Board of County Commissioners of the County of Bernalillo v. United States*, 93 Fed. Cl. 228, 234 (2010) (detention services in an intergovernmental contract between the office of the Federal Detention Trustee and Bernalillo County was not subject to the FAR); ICE Contracting and Acquisition Procedures (ICECAP) 07.08, *Inter-Governmental Service Agreements (IGSA)* ¶2(a) (Aug. 28, 2007). Although not FAR-based, IGSA's are governed by law and regulations concerning the obligation and expenditure of appropriated funds and hence subject to the DHS Acquisition Manual and OMB Circular A-87, *Cost Principles for State, Local and Indian Tribal Governments*, codified at 2 C.F.R. part 225, which ICE OAQ uses when determining a bed-day rate.

³ A July 30, 2014 unsigned memorandum from Song Kim, Acting Chief, Commercial and Administrative Law Division (CALD), OPLA, ICE, to Bill Weinberg, Director and Head of Contracting Activity, OAQ, ICE, does not represent the longstanding views of OAQ and the OPLA that IGSA's are statutorily authorized as a contract vehicle available for acquiring detention services in support of the ICE immigration enforcement mission.

⁴ See *Assisted Housing Services Corp. et al.*, B-406738, et seq., 2012 CPD ¶ 236 (Aug. 15, 2010).

⁵ See memorandum from Michael J. Davidson, Chief, CALD, OPLA, ICE, to William C. Randolph, Director and Head of Contracting Activity, OAQ, ICE, *Funding Intergovernmental Service Agreements* 1 n.1 (Feb. 7, 2013); ICECAP 07.08, *supra* note 2, at ¶ 2(a) ("IGSA's are not grants or cooperative agreements").



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existing subcontractor CCA, instead of the party legally responsible for the agreement (Eloy); and (2) the addition of family detention services was outside the scope of the original IGSA.

ICE contends that the modification to the Eloy IGSA was proper. ICE is statutorily authorized to utilize IGSA for detention services, and IGSA are exempt from both the CICA and the FAR. Assuming the IGSA contracting partner consents, ICE is unaware of any legal prohibition against negotiating contractual terms with an IGSA subcontractor. Further, given the non-applicability of CICA and the FAR, ICE is free to take advantage of the broad flexibilities afforded by its IGSA authority to modify the terms of the original agreement. At the time of the IGSA modification, ICE was neither under a legal obligation to compete the detention contract within the commercial marketplace nor subject to the normal CICA/FAR requirements on modifications of contracts. Therefore, ICE has authority to noncompetitively enter into an IGSA for detention services and to negotiate the IGSA terms directly with Eloy's subcontractor, CCA. Further, the addition of family detention services was consistent with the scope, intent, and framework of the original IGSA.

As far back as 1999, the former Immigration and Naturalization Service (INS) utilized established acquisition procedures for entering into IGSA for the same detention services.⁶ These foundational guidelines continue to serve as an important part of the groundwork for the current ICE IGSA acquisition procedures outside of the FAR framework. As explained in Immigration and Naturalization Service Acquisition Procedures (INSAP) 04-02, in 1982 the Office of Management and Budget recognized the unique nature of the federal detention marketplace, and issued a memorandum to the Department of Justice authorizing the INS, the Bureau of Prisons, and the U.S. Marshals Service (USMS), to process jail agreements outside of the FAR. The INS relied on this memorandum until 1996, when statutory language was added to the Illegal Immigration Reform and Immigrant Responsibility Act of 1996,⁷ authorizing the use of IGSA for immigration detention. The ICE Contract and Acquisition Procedures (ICECAP) replaced INSAP, and on May 25, 2010, ICE issued ICECAP 10.08 R1, establishing updated policy and procedures for establishing IGSA.⁸

By their very nature, detention center requirements are unpredictable and often urgent and compelling, and ICE's use of its unique IGSA authority to procure detention space operates differently from traditional FAR-based procurements. The scope of the detention center IGSA vehicle may be broad and/or in flux as requirements change, but the rigorous contracting procedures and leadership oversight applied to these procurements remain steadfast. To that end, ICE is always receptive to improving its acquisition procedures. ICE OAQ acquisition policies are contained in its legacy ICECAPs and the ICE Contracting Supplement. ICECAP 10.08 R1, *Inter-Governmental Service Agreements*, outlines the policies and procedures for negotiating and awarding an IGSA and is available as a guide for ICE OAQ employees to follow when negotiating an IGSA. As outlined in ICECAP 10.08 R1, ICE OAQ has a standard IGSA package for new IGSA awards that includes: the Jail Services Cost Statement (JSCS), Performance Work Statement, Quality Assurance and Surveillance Plan, DHS Prison Rape Elimination Act, security

⁶ INSAP-04-02, Acquisition Procedures for Inter-Governmental Service (Jail) Agreements (May 3, 1999).

⁷ Pub. L. No. 104-208, 1120 Stat. 3009-546.

⁸ The ICECAP was not applicable to Inter-Governmental Agreements awarded by the U.S. Marshals Service.



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requirements, multiple medical requirements, and the basic IGSA statement of work. The service provider is responsible for filling out the JSCS and submitting it to ICE to substantiate costs associated with providing detention services. The JSCS captures total personnel costs, total personnel benefits, total consultant and contract services, other direct operating costs, indirect costs, equipment depreciation costs, and building depreciation costs of the service provider for a given fiscal year. A formula within the JSCS then calculates the proposed bed day rate based on those costs. The completed JSCS is evaluated by the Contracting Officer in conjunction with the ICE/ERO Detention Planning and Acquisition Unit (DPAU) to determine allowable and unallowable costs and ultimately to decide whether the bed-day rate proposed is fair and reasonable based on the cost data supplied.

ICE OAQ executes detention center contracts and IGSA's in the best interest of the Federal Government, taxpayers, and detainees. Before an IGSA is awarded, ICE must conduct an analysis of possible detention space alternatives. This includes identifying whether any state or local detention facilities as well as any existing ICE IGSA or USMS Inter-Governmental Agreement, is available. The requirements are vetted and refined through multiple program offices within ICE before it reaches OAQ. After the requirement reaches OAQ, extensive negotiations occur between OAQ and the service provider until an acceptable agreement is reached. The service provider is required to submit documentation to the government to allow for input from the government's technical experts. This includes representatives from ICE's Enforcement and Removal Operations, including the DPAU and ICE Health Service Corps, and the ICE Office of the Chief Financial Officer, including the Office of Budget and Program Performance to ensure that ICE is obtaining services that represent the best value to the government, taxpayers and detainees. For this particular modification to the City of Eloy IGSA, several discussions were held with senior-level contracting leadership and ICE senior leadership to discuss concerns, assess risk, and identify the best path forward for this procurement.

The initial scope of the IGSA with the City of Eloy was for the housing, care, and security of persons detained by ICE, which aligns with ICE's statutory IGSA authority. The modification adding family detention services (Modification P00010) was well within the scope of the Eloy IGSA. The only difference is that Modification P00010 would provide for the care of families (women and children) in accordance with the Family Residential Standards. Thus, Modification P00010 was a bi-lateral modification that expanded the population that would be detained from all males to include families, still within the initial scope of the Eloy IGSA. Even assuming Modification P00010 was deemed out-of-scope, the flexibilities associated with ICE's IGSA authority would have still permitted such a modification.

In the case of the family detention IGSA with the City of Eloy, ICE OAQ has documented the negotiations and determined that the price was fair and reasonable using, as a guideline, the established contracting procedures of FAR Part 15 principles. As with any IGSA, the Contracting Officer made a determination of "fair and reasonable" price (which is a price that is fair to both the buyer and seller, given the requirement and current conditions). As the draft report recognizes, the contract was negotiated at a time when DHS was responding to an unprecedented border surge and ICE had an urgent need for additional detention services. ICE was able to obtain a reasonable price through negotiations with the vendor. Through four weeks of negotiations prior to award, ICE achieved price reductions and was able to eliminate some elements of risk. Although risk remained at the initiation of this contract due to circumstances



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surrounding large-scale border crossings at the time, as the risk has decreased over time OAQ has continued to explore opportunities for cost savings at this facility. In fact, a later bi-lateral modification (P00027) reduced the monthly firm-fixed price for 2,400 beds significantly. Given the unique conditions and requirements for family detention, the price ICE is paying for use of beds at this facility is fair and reasonable.

The Contracting Officer's Memorandum to File documents the background and rationale for modifying the existing IGSA with the City of Eloy to add family detention services at Dilley, Texas. In July 2014, OAQ issued a request for proposals to two vendors, GEO and CCA, for an up-to-2,000-bed facility to detain illegal alien families in ICE custody. Only CCA responded, offering a proposal to modify the IGSA with the City of Eloy. Under the Eloy IGSA, CCA is the service provider and responsible for providing the facility and detention services at the Eloy Detention Center. CCA operates as a sub-contractor on the Eloy IGSA and has a separate agreement with Eloy outlining its relationship with Eloy. The City of Eloy authorized CCA to speak with ICE on behalf of Eloy as it relates to detention services provided under the IGSA. After reviewing all the alternatives and discussions with OPLA, the Contracting Officer determined that modifying the Eloy IGSA to provide family detention services in Dilley, Texas, was not statutorily prohibited.

The draft report contained two recommendations, one with which ICE concurs and one with which it non-concurs. Attached find our detailed response to each recommendation. Technical comments were previously provided under separate cover.

Thank you again for the opportunity to comment on this draft report. Please feel free to contact me if you have any questions. We look forward to working with you again in the future.

Attachment

- ICE Management Response to Recommendations Contained in 15-124-AUD-ICE



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Attachment: U.S. Immigration and Customs Enforcement (ICE) Management Response to Recommendations Contained in 15-124-AUD-ICE

OIG recommended that:

Recommendation 1: The Deputy Director of ICE establish and communicate specific written procedures for Intergovernmental Service Agreements (IGSAs) implementing Federal guidelines that include:

- a. A definition of an IGSA and determination of whether it is a cooperative agreement or procurement contract;
- b. Administrative requirements for the solicitation and award of IGSAs;
- c. Post-award requirements;
- d. Guidelines for modifications, and;
- e. Allowable cost structure.

Response: Concur. ICE's Office of Acquisition Management (OAQ) has established specific written procedures for negotiating, establishing, and administering IGSAs, but agrees that it will undertake an effort to ensure the procedures address each of the areas outlined in this recommendation, as appropriate.

It is important to recognize, however, that ICE Contracting and Acquisition Procedure (ICECAP) 07.08 defines an IGSA and discusses in detail ICE's authority to enter into IGSAs with non-federal government entities to house immigration detainees. This guidance clearly states that an IGSA is not a cooperative agreement and makes it clear that IGSAs are not acquisitions governed by the FAR. Rather, IGSAs function as a form of fixed-price, indefinite quantity, indefinite delivery type contract, some of which include a monthly guaranteed minimum.

In addition, ICECAP 07.08 states the IGSAs are not usually competed; rather, ICE identifies an available non-federal government entity that could provide detention services, negotiates terms and a price for the services, and then enters into an IGSA. It is the legal opinion of the ICE Office of the Principal Legal Advisor that IGSAs are exempt from the competition requirements of the Competition in Contracting Act (CICA) and the Federal Acquisition Regulation (FAR).

ICE has also established standard templates for IGSA solicitations including a streamlined Jail Services Cost Statement (JSCS) to ensure payment of a fair and reasonable price. The process for handling post-award requirements and modifications are included in the language of the standard IGSA template.

Further, ICECAP 07.08 states that IGSAs are subject to OMB Circular A-87, *Cost Principles for State, Local and Indian Tribal Governments*, codified at 2 C.F.R. § 225. The JSCS, previously discussed, calculates a bed-day rate based on allowable costs in a given fiscal year based on cost data supplied by the IGSA contracting partner. The JSCS template supplied to vendors also includes a certification statement acknowledging that costs prohibited by OMB Circular A-87 are not allowed to be charged.

Estimated Completion Date: April 30, 2018.



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ICE Management Response to Recommendations Contained in 15-124-AUD-ICE
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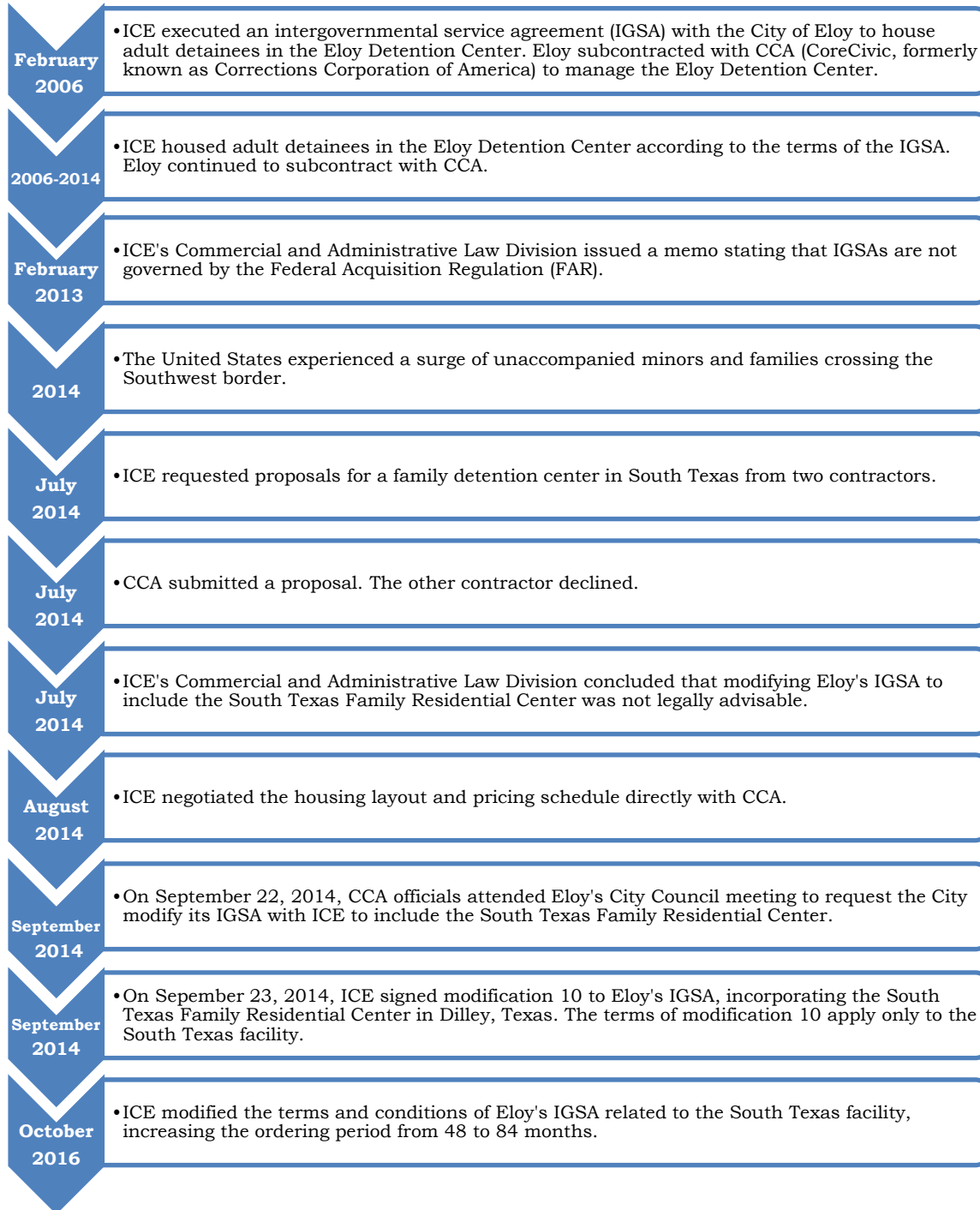
Recommendation 2: ICE discontinue modifying the Eloy IGSA to procure family detention space at the South Texas Family Residential Center and use the procedures developed in Recommendation 1 to procure necessary housing for family detention.

Response: Non-concur. ICE disagrees with the recommendation to discontinue modifying the Eloy IGSA for family detention services at the STFRC. ICE modified its IGSA with the City of Eloy to provide care and housing of families in ICE custody at the STFRC in Dilley, Texas, in accordance with the terms and conditions of its existing IGSA with Eloy. ICE has statutory authority at 8 U.S.C. § 1103(a)(11)(A) to procure detention services through IGSAs. IGSAs are not governed by the FAR or subject to the full and open competition requirements under CICA. In addition, ICE has written procedures and guidance about how to negotiate, establish and administer IGSAs, which were followed and are currently being reviewed and updated (in response to Recommendation 1), as appropriate. We request that OIG consider this recommendation resolved and closed.



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Appendix B
South Texas Modification Timeline



Source: OIG derived from ICE documents



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Appendix C
ICE Comments to Draft Report with OIG Rebuttal

January 8, 2018

MEMORANDUM FOR: John V. Kelly
Acting Inspector General

FROM: Thomas D. Homan
Deputy Director and
Senior Official Performing the Duties of the Director
U.S. Immigration and Customs Enforcement

SUBJECT: Management Response to Draft Report “Immigration
and Customs Enforcement Did Not Follow Federal
Procurement Guidelines when Contracting for
Detention Services” (Project No. 15-124-AUD-ICE)

Thank you for the opportunity to review and comment on this draft report. U.S. Immigration and Customs Service (ICE) appreciates the work of the Office of Inspector General (OIG) in planning and conducting its review and issuing this report.

ICE disagrees with certain findings and conclusions made by OIG. In particular, we believe the report inaccurately describes the legal basis for ICE’s Intergovernmental Service Agreement (IGSA) authority and does not acknowledge the unique circumstances and challenges ICE faced in responding to the 2014 surge of families crossing the border, an unprecedented situation which persists to this day. ICE acknowledges that issues surrounding our unique IGSA authority are technically complex, but the report’s suggestion that ICE can only procure detention beds through Federal Acquisition Regulation (FAR)-based contracting is simply incorrect. In fact ICE regularly uses its IGSA authority to acquire detention beds, as this unique statutory authority allows ICE to acquire beds quickly and in remote locations where much of our enforcement actions occur. While the acquisition of beds for family detention through an IGSA may not be well understood outside the immigration enforcement community, it is by no means improper or illegal.

OIG Rebuttal: We do not dispute ICE’s general authority to use IGSA’s to obtain beds in detention centers and did not suggest that only standard FAR-based contracts be used to procure detention beds. Additionally, we did not categorize all IGSA’s as improper or illegal. However, given the confusion within ICE over how to categorize IGSA’s, ICE should have developed policies and procedures for negotiating, executing, and modifying them.



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As the draft report correctly notes: (1) ICE is responsible for the detention of removable aliens; and (2) ICE faced a major surge of families and unaccompanied minors crossing the Southwest border during 2014, which created an *urgent and compelling* need for family detention space. The resolution of this crisis became a Secretary of Homeland Security priority, and the ICE Office of Acquisition Management (OAQ) used the contractual flexibilities afforded by its broad IGSA authority to meet this need.

ICE's IGSA authority is codified at 8 U.S.C. § 1103(a)(11)(A), which provides that the U.S. Department of Homeland Security (DHS) may enter into agreements with a State, or its subdivisions, "for necessary clothing, medical care, necessary guard hire, and the housing, care, and security of persons detained by [ICE] pursuant to Federal law" ICE relies on this authority for a significant number of its detention contracts. Given this express authorization provided under federal immigration law, ICE has no legal requirement to compete the award of an IGSA because 8 U.S.C. § 1103(a)(11)(A) serves as an exception to the Competition in Contracting Act (CICA) requirement for full and open competition. CICA provides that its competition requirements do not apply when "a statute expressly authorizes or requires that the procurement be made through another [executive] agency or from a specified source." 41 U.S.C. § 3301(a)(1). Further, unlike the IGSA authority of the Department of Defense (DoD), 10 U.S.C. § 2679(a)(4), neither ICE nor the IGSA holder is required to competitively award any contracts or subcontracts awarded under the IGSA.⁵ Like DoD, ICE's IGSA's are not generally required to follow the Federal Acquisition Regulation (FAR).⁶

In addition, an IGSA is not a cooperative agreement.⁷ A cooperative agreement is used to transfer a thing of value to a State, local government or other entity, whereas a procurement contract is used when the principal purpose is to obtain services or property, by purchase, lease or barter, for the direct benefit

⁵ Major Erik J. Zoll, *Intergovernmental Support Agreements: A Primer for the Field*, The Army Lawyer, (June 2017), at 43 (discussing how the DoD IGSA's are exempt from CICA); Michael J. Davidson, *CICA's Uncle Sam Exception*, 53 The Procurement Lawyer, 3, and 5-6 (Fall 2017) (discussing ICE IGSA authority and exemption from CICA).

⁶ Zoll, *supra* note 1, at 42-43; Davidson, *supra* note 1, at 3, 5. See also *Board of County Commissioners of the County of Bernalillo v. United States*, 93 Fed. Cl. 228, 234 (2010) (detention services in an intergovernmental contract between the office of the Federal Detention Trustee and Bernalillo County was not subject to the FAR); ICE Contracting and Acquisition Procedures (ICECAP) 07.08, *Inter-Governmental Service Agreements (IGSA)* ¶2(a) (Aug. 28, 2007). Although not FAR-based, IGSA's are governed by law and regulations concerning the obligation and expenditure of appropriated funds and hence subject to the DHS Acquisition Manual and OMB Circular A-87, *Cost Principles for State, Local and Indian Tribal Governments*, codified at 2 C.F.R. part 225, which ICE OAQ uses when determining a bed-day rate.

⁷ A July 30, 2014 unsigned memorandum from Song Kim, Acting Chief, Commercial and Administrative Law Division (CALD), OPLA, ICE, to Bill Weinberg, Director and Head of Contracting Activity, OAQ, ICE, does not represent the longstanding views of OAQ and the OPLA that IGSA's are statutorily authorized as a contract vehicle available for acquiring detention services in support of the ICE immigration enforcement mission.



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or use of the United States.⁸ Despite the OIG's conclusion ICE has never defined IGSA's nor followed the FAR and or federal contracting guidelines contained in part 200 of Title 2 of the Code of Federal Regulations, both ICE OAQ and the Office of the Principal Legal Advisor (OPLA) have long taken the position that an IGSA is a type of procurement rather than a cooperative agreement.⁹

OIG Rebuttal: No part of the report addresses the applicability of the Competition in Contracting (CICA) to IGSA's. In any event, ICE can decide whether to address the relationship between CICA and IGSA's as it develops policies and procedures for negotiating, executing, and modifying IGSA's.

The draft report cites two reasons why the OIG believes ICE improperly modified its IGSA with the City of Eloy, in Arizona: (1) the terms of the IGSA were negotiated directly with Eloy's existing subcontractor CCA, instead of the party legally responsible for the agreement (Eloy); and (2) the addition of family detention services was outside the scope of the original IGSA.

ICE contends that the modification to the Eloy IGSA was proper. ICE is statutorily authorized to utilize IGSA's for detention services, and IGSA's are exempt from both the CICA and the FAR. Assuming the IGSA contracting partner consents, ICE is unaware of any legal prohibition against negotiating contractual terms with an IGSA subcontractor. Further, given the non-applicability of CICA and the FAR, ICE is free to take advantage of the broad flexibilities afforded by its IGSA authority to modify the terms of the original agreement. At the time of the IGSA modification, ICE was neither under a legal obligation to compete the detention contract within the commercial marketplace nor subject to the normal CICA/FAR requirements on modifications of contracts. Therefore, ICE has authority to noncompetitively enter into an IGSA for detention services and to negotiate the IGSA terms directly with Eloy's subcontractor, CCA. Further, the addition of family detention services was consistent with the scope, intent, and framework of the original IGSA.

⁸ See *Assisted Housing Services Corp. et al.*, B-406738, et seq., 2012 CPD ¶ 236 (Aug. 15, 2010).

⁹ See memorandum from Michael J. Davidson, Chief, CALD, OPLA, ICE, to William C. Randolph, Director and Head of Contracting Activity, OAQ, ICE, *Funding Intergovernmental Service Agreements* 1 n.1 (Feb. 7, 2013); ICECAP 07.08, *supra* note 2, at ¶ 2(a) ("IGSA's are not grants or cooperative agreements").



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OIG Rebuttal: We do not dispute ICE’s authority to solicit proposals for the South Texas Family Residential Facility or ICE’s general authority to enter into agreements for the care and housing of detainees. However, we do contend that the South Texas Modification would not have qualified under 8 U.S.C. § 1103(a)(11)(A) because it was, in practical terms, an agreement made with a private company (CCA), not with a state, local, or tribal government. A contracting officer’s memorandum to the file documents that ICE asked private companies, not the City of Eloy, to provide proposals for the South Texas facility. Any delegation of negotiation authority by the City of Eloy, located in another state, came after CCA was selected to meet ICE’s need for additional detention beds. The City’s meeting minutes demonstrate that the city was acting merely as a “fiscal agent” (i.e., middleman) for CCA.

As far back as 1999, the former Immigration and Naturalization Service (INS) utilized established acquisition procedures for entering into IGSA for the same detention services.¹⁰ These foundational guidelines continue to serve as an important part of the groundwork for the current ICE IGSA acquisition procedures outside of the FAR framework. As explained in Immigration and Naturalization Service Acquisition Procedures (INSAP) 04-02, in 1982 the Office of Management and Budget recognized the unique nature of the federal detention marketplace, and issued a memorandum to the Department of Justice authorizing the INS, the Bureau of Prisons, and the U.S. Marshals Service (USMS), to process jail agreements outside of the FAR. The INS relied on this memorandum until 1996, when statutory language was added to the Illegal Immigration Reform and Immigrant Responsibility Act of 1996,¹¹ authorizing the use of IGSA for immigration detention. The ICE Contract and Acquisition Procedures (ICECAP) replaced INSAP, and on May 25, 2010, ICE issued ICECAP 10.08 R1, establishing updated policy and procedures for establishing IGSA.¹²

By their very nature, detention center requirements are unpredictable and often urgent and compelling, and ICE’s use of its unique IGSA authority to procure detention space operates differently from traditional FAR-based procurements. The scope of the detention center IGSA vehicle may be broad and/or in flux as requirements change, but the rigorous contracting procedures and leadership oversight applied to these procurements remain steadfast. To that end, ICE is always receptive to improving its acquisition procedures. ICE OAQ acquisition policies are contained in its legacy ICECAPs and the ICE Contracting Supplement. ICECAP 10.08 R1, *Inter-Governmental Service Agreements*, outlines the policies and procedures for negotiating and awarding an IGSA and is available as a guide for ICE OAQ employees to follow when negotiating an IGSA. As outlined in ICECAP 10.08 R1, ICE OAQ has a standard IGSA package for new IGSA awards that includes: the Jail Services

¹⁰ INSAP-04-02, Acquisition Procedures for Inter-Governmental Service (Jail) Agreements (May 3, 1999).

¹¹ Pub. L. No. 104-208, 1120 Stat. 3009-546.

¹² The ICECAP was not applicable to Inter-Governmental Agreements awarded by the U.S. Marshals Service.



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Cost Statement (JSCS), Performance Work Statement, Quality Assurance and Surveillance Plan, DHS Prison Rape Elimination Act, security requirements, multiple medical requirements, and the basic IGSA statement of work. The service provider is responsible for filling out the JSCS and submitting it to ICE to substantiate costs associated with providing detention services. The JSCS captures total personnel costs, total personnel benefits, total consultant and contract services, other direct operating costs, indirect costs, equipment depreciation costs, and building depreciation costs of the service provider for a given fiscal year. A formula within the JSCS then calculates the proposed bed day rate based on those costs. The completed JSCS is evaluated by the Contracting Officer in conjunction with the ICE/ERO Detention Planning and Acquisition Unit (DPAU) to determine allowable and unallowable costs and ultimately to decide whether the bed-day rate proposed is fair and reasonable based on the cost data supplied.

OIG Rebuttal: We do not dispute ICE's need to respond to changing and sometimes unpredictable requirements. However, when asked for its policies on IGSA's, ICE personnel provided templates and checklists. When we specifically asked for the latest version of ICECAP 07.08 *Intergovernmental Service Agreements (IGSAs)*, ICE's Deputy Assistant Director for Acquisition Policy & Procedures said the ICECAPs were no longer ICE policy. Templates and checklists are not an adequate substitution for current written policy and procedures.

ICE OAQ executes detention center contracts and IGSA's in the best interest of the Federal Government, taxpayers, and detainees. Before an IGSA is awarded, ICE must conduct an analysis of possible detention space alternatives. This includes identifying whether any state or local detention facilities as well as any existing ICE IGSA or USMS Inter-Governmental Agreement, is available. The requirements are vetted and refined through multiple program offices within ICE before it reaches OAQ. After the requirement reaches OAQ, extensive negotiations occur between OAQ and the service provider until an acceptable agreement is reached. The service provider is required to submit documentation to the government to allow for input from the government's technical experts. This includes representatives from ICE's Enforcement and Removal Operations, including the DPAU and ICE Health Service Corps, and the ICE Office of the Chief Financial Officer, including the Office of Budget and Program Performance to ensure that ICE is obtaining services that represent the best value to the government, taxpayers and detainees. For this particular modification to the City of Eloy IGSA, several discussions were held with senior-level contracting leadership and ICE senior leadership to discuss concerns, assess risk, and identify the best path forward for this procurement.

The initial scope of the IGSA with the City of Eloy was for the housing, care, and security of persons detained by ICE, which aligns with ICE's statutory IGSA authority. The modification adding family detention services (Modification P00010) was well within the scope of the Eloy IGSA. The only



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difference is that Modification P00010 would provide for the care of families (women and children) in accordance with the Family Residential Standards. Thus, Modification P00010 was a bi-lateral modification that expanded the population that would be detained from all males to include families, still within the initial scope of the Eloy IGSA. Even assuming Modification P00010 was deemed out-of-scope, the flexibilities associated with ICE's IGSA authority would have still permitted such a modification.

OIG Rebuttal: ICE had options, other than modifying the Eloy IGSA, such as a sole-source contract with CCA, executing a new IGSA with a locality closer to the facility, or modifying the IGSA of a closer locality. ICE did not justify its elimination of these options. We also contend that the modification was improper as it was outside the scope of the initial agreement both in form and in substance. Eloy has practically no oversight over a facility that was constructed 900 miles away.

In the case of the family detention IGSA with the City of Eloy, ICE OAQ has documented the negotiations and determined that the price was fair and reasonable using, as a guideline, the established contracting procedures of FAR Part 15 principles. As with any IGSA, the Contracting Officer made a determination of "fair and reasonable" price (which is a price that is fair to both the buyer and seller, given the requirement and current conditions). As the draft report recognizes, the contract was negotiated at a time when DHS was responding to an unprecedented border surge and ICE had an urgent need for additional detention services. ICE was able to obtain a reasonable price through negotiations with the vendor. Through four weeks of negotiations prior to award, ICE achieved price reductions and was able to eliminate some elements of risk. Although risk remained at the initiation of this contract due to circumstances surrounding large-scale border crossings at the time, as the risk has decreased over time OAQ has continued to explore opportunities for cost savings at this facility. In fact, a later bi-lateral modification (P00027) reduced the monthly firm-fixed price for 2,400 beds significantly. Given the unique conditions and requirements for family detention, the price ICE is paying for use of beds at this facility is fair and reasonable.

OIG Rebuttal: Unless ICE discontinues its current practice and establishes and communicates specific written procedures for IGSAs, ICE risks overpaying for detention services.

The Contracting Officer's Memorandum to File documents the background and rationale for modifying the existing IGSA with the City of Eloy to add family detention services at Dilley, Texas. In July 2014, OAQ issued a request for proposals to two vendors, GEO and CCA, for an up-to-2,000-bed facility to detain illegal alien families in ICE custody. Only CCA responded, offering a proposal to modify the IGSA with the City of Eloy. Under the Eloy IGSA, CCA is the service provider and responsible for providing the facility and detention services at the Eloy Detention Center. CCA operates as a sub-contractor on



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the Eloy IGSA and has a separate agreement with Eloy outlining its relationship with Eloy. The City of Eloy authorized CCA to speak with ICE on behalf of Eloy as it relates to detention services provided under the IGSA. After reviewing all the alternatives and discussions with OPLA, the Contracting Officer determined that modifying the Eloy IGSA to provide family detention services in Dilley, Texas, was not statutorily prohibited.

OIG Rebuttal: The contracting officer's memorandum to the file does not provide a rationale for ICE's actions; rather, it simply documents events that took place. We do not dispute ICE's authority to solicit proposals for the South Texas Family Residential Facility or ICE's general authority to enter into agreements for the care and housing of detainees. However, we do contend that the South Texas Modification would not have qualified under 8 U.S.C. § 1103(a)(11)(A) because it was, in practical terms, an agreement made with a private company (CCA), not with a state, local, or tribal government. Despite the fact that the agreement was signed by a representative for the City of Eloy, the City's meeting minutes demonstrate that the city was acting merely as a "fiscal agent" for CCA. In its response to this report, ICE acknowledged that CCA was selected to provide detention services in south Texas **before** the Eloy IGSA was identified for modification.

The draft report contained two recommendations, one with which ICE concurs and one with which it non-concurs. Attached find our detailed response to each recommendation. Technical comments were previously provided under separate cover.

Thank you again for the opportunity to comment on this draft report. Please feel free to contact me if you have any questions. We look forward to working with you again in the future.

Attachment

- ICE Management Response to Recommendations Contained in 15-124-AUD-ICE



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**Attachment: U.S. Immigration and Customs Enforcement (ICE)
Management Response to Recommendations Contained in 15-
124-AUD-ICE**

OIG recommended that:

Recommendation 1: The Deputy Director of ICE establish and communicate specific written procedures for Intergovernmental Service Agreements (IGSAs) implementing Federal guidelines that include:

- a. A definition of an IGSA and determination of whether it is a cooperative agreement or procurement contract;
- b. Administrative requirements for the solicitation and award of IGSAs;
- c. Post-award requirements;
- d. Guidelines for modifications, and;
- e. Allowable cost structure.

Response: Concur. ICE's Office of Acquisition Management (OAQ) has established specific written procedures for negotiating, establishing, and administering IGSAs, but agrees that it will undertake an effort to ensure the procedures address each of the areas outlined in this recommendation, as appropriate.

It is important to recognize, however, that ICE Contracting and Acquisition Procedure (ICECAP) 07.08 defines an IGSA and discusses in detail ICE's authority to enter into IGSAs with non-federal government entities to house immigration detainees. This guidance clearly states that an IGSA is not a cooperative agreement and makes it clear that IGSA are not acquisitions governed by the FAR. Rather, IGSAs function as a form of fixed-price, indefinite quantity, indefinite delivery type contract, some of which include a monthly guaranteed minimum.

In addition, ICECAP 07.08 states the IGSAs are not usually competed; rather, ICE identifies an available non-federal government entity that could provide detention services, negotiates terms and a price for the services, and then enters into an IGSA. It is the legal opinion of the ICE Office of the Principal Legal Advisor that IGSAs are exempt from the competition requirements of the Competition in Contracting Act (CICA) and the Federal Acquisition Regulation (FAR).

ICE has also established standard templates for IGSA solicitations including a streamlined Jail Services Cost Statement (JSCS) to ensure payment of a fair



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and reasonable price. The process for handling post-award requirements and modifications are included in the language of the standard IGSA template.

Further, ICECAP 07.08 states that IGSA's are subject to OMB Circular A-87, *Cost Principles for State, Local and Indian Tribal Governments*, codified at 2 C.F.R. § 225. The JSCS, previously discussed, calculates a bed-day rate based on allowable costs in a given fiscal year based on cost data supplied by the IGSA contracting partner. The JSCS template supplied to vendors also includes a certification statement acknowledging that costs prohibited by OMB Circular A-87 are not allowed to be charged.

Estimated Completion Date: April 30, 2018.

Recommendation 2: ICE discontinue modifying the Eloy IGSA to procure family detention space at the South Texas Family Residential Center and use the procedures developed in Recommendation 1 to procure necessary housing for family detention.

Response: Non-concur. ICE disagrees with the recommendation to discontinue modifying the Eloy IGSA for family detention services at the STFRC. ICE modified its IGSA with the City of Eloy to provide care and housing of families in ICE custody at the STFRC in Dilley, Texas, in accordance with the terms and conditions of its existing IGSA with Eloy. ICE has statutory authority at 8 U.S.C. § 1103(a)(11)(A) to procure detention services through IGSA's. IGSA's are not governed by the FAR or subject to the full and open competition requirements under CICA. In addition, ICE has written procedures and guidance about how to negotiate, establish and administer IGSA's, which were followed and are currently being reviewed and updated (in response to Recommendation 1), as appropriate. We request that OIG consider this recommendation resolved and closed.



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Appendix D
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