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# **OVERSIGHT OF INTERGOVERNMENTAL AGREEMENTS BY THE UNITED STATES MARSHALS SERVICE AND THE OFFICE OF THE FEDERAL DETENTION TRUSTEE**

U.S. Department of Justice  
Office of the Inspector General  
Audit Division

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# OVERSIGHT OF INTERGOVERNMENTAL AGREEMENTS BY THE UNITED STATES MARSHALS SERVICE AND THE OFFICE OF THE FEDERAL DETENTION TRUSTEE

## EXECUTIVE SUMMARY\*

Two Department of Justice (DOJ) components have key roles in the detention of federal detainees – the Office of the Federal Detention Trustee (OFDT) and the United States Marshals Service (USMS). The OFDT manages DOJ's detention resource allocations, and coordinates DOJ's detention activities with the Department of Homeland Security (DHS), Bureau of Immigration and Customs Enforcement (ICE).<sup>1</sup> The USMS is responsible for housing and transporting federal detainees from the time they are brought into federal custody until they are either acquitted or incarcerated.<sup>2</sup>

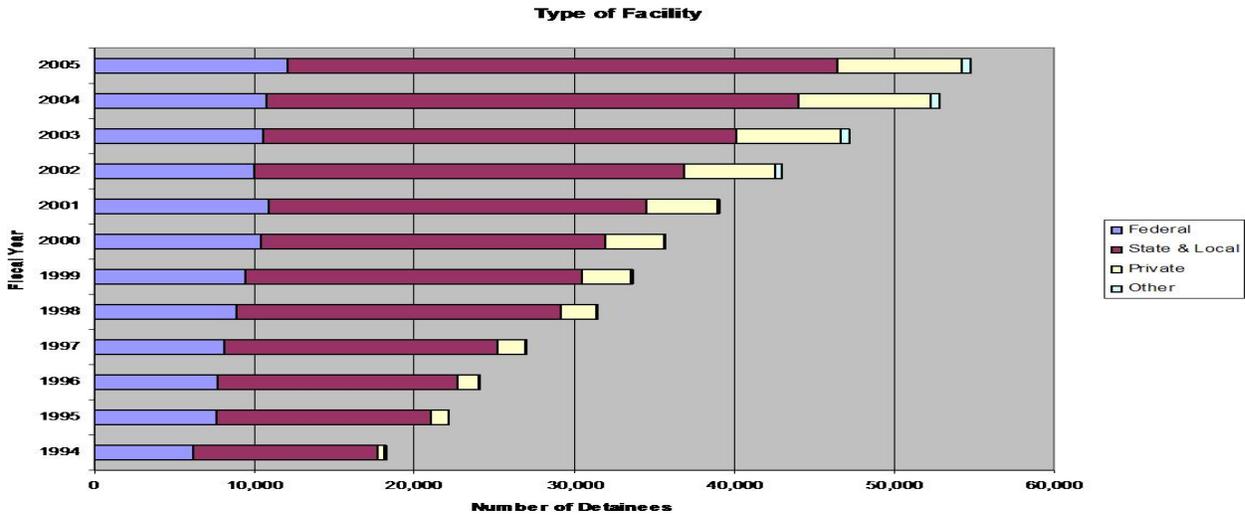
As shown in the following graph, due to the severe shortage of federally owned detention space, the USMS heavily depends on state and local governments to provide detention space and services:

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<sup>1</sup> Historically, federal detention in the DOJ was the responsibility of both the USMS and the Immigration and Naturalization Service (INS). As directed by Congress, the initial objective of the OFDT was to centralize responsibility for detention in order to better manage and plan for needed detention resources without unwanted duplication of effort or competition with other DOJ components. In March 2003, the INS was transferred into DHS. Much of the INS detention responsibilities were included in DHS's ICE. Although the OFDT has an Interagency Agreement with ICE, the OFDT stated that ICE infrequently uses OFDT's services (e.g., negotiate and manage contracts for private detention beds). According to the OFDT, it has no leverage to force ICE to use its services.

<sup>2</sup> Federal detainees are generally individuals housed in jails while awaiting trial or sentencing. In contrast, federal prison inmates are generally individuals serving a sentence of imprisonment after conviction for a violation of the federal criminal code. The Federal Bureau of Prisons (BOP) is responsible for federal prison inmates.

\*THE FULL VERSION OF THIS REPORT INCLUDED INFORMATION THAT THE OFFICE OF THE FEDERAL DETENTION TRUSTEE CONSIDERED TO BE PROCUREMENT SENSITIVE INFORMATION WHICH, IF DISTRIBUTED WIDELY, COULD COMPROMISE ITS GOAL OF OBTAINING BEDSPACE AT ECONOMICAL RATES. TO CREATE THIS PUBLIC VERSION OF THE REPORT, THE OIG REDACTED (WHITED OUT) THE PORTIONS OF THE FULL REPORT THAT WERE CONSIDERED SENSITIVE BY THE OFDT. WHERE SUCH INFORMATION WAS REDACTED IS NOTED IN THE REPORT.



Source: OFDT

To meet its need for detention space, the USMS has entered into Intergovernmental Agreements (IGA) with an increasing number of state and local detention facilities. IGAs are formal agreements between the USMS and a state or local government in which the state or local government agrees to house federal detainees at an agreed-upon daily rate (a “jail-day rate”). As of February 2006, the USMS had approximately 1,600 active IGAs with state and local governments to rent jail space. In fiscal year (FY) 2005, DOJ spent \$750 million of its \$1 billion detention budget on IGAs.

In our judgment, given the rising federal detainee population and increasing expense of housing federal detainees, it is critically important that the USMS has a system in place to ensure that it obtains needed detention space without overpaying for it.

### Funding Detention Growth

A significant challenge presented by rising detention populations is DOJ’s ability to obtain affordable bed space for individuals housed in non-federal facilities. The cost of detention has been rising rapidly, and during FYs 2003 – 2005 the funds budgeted for the detention of federal detainees fell short of the amount needed to fully fund detention activities. DOJ officials attributed the shortfalls to significantly inaccurate budget projections by the USMS and OFDT. According to these officials, new law enforcement initiatives, policies, and laws caused an increased number of arrests, which exceeded the forecasts used to calculate budget requests.

According to the OFDT, its efforts to reduce detention costs have focused on decreasing the amount of time individuals spend in detention after sentencing while awaiting transfer to the BOP. However, we believe that the OFDT and USMS could realize significant additional cost savings if they addressed deficiencies in how prices are set in individual IGAs established with state and local law enforcement agencies for detention bed space.

### **Audit Approach**

The objective of the audit was to determine if the USMS and OFDT employed an effective monitoring and oversight process for IGAs. Appendix I contains more information on our objective, scope, and methodology.

Our report contains three main findings. The first discusses a disagreement between the OFDT and the Office of the Inspector General (OIG) regarding the recoverability of overpayments identified in past OIG audits. The second finding concerns the OFDT's revamping of IGA pricing through an econometric statistical pricing model. The third finding discusses needed improvements in the policies and procedures, training, and defining responsibilities for establishing and monitoring IGAs.

### **First Finding: Dispute Over Detention Space Overpayments**

Since 1995, the OIG has audited 31 individual IGAs between the USMS and state and local governments for detention space. These audits often concluded that the USMS had paid state and local governments significantly more than the actual and allowable costs for this space. In total, the OIG reported dollar-related findings of almost \$60 million from these 31 IGA audits. The following are examples of findings from three of these audits:

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- **[SENSITIVE INFORMATION REDACTED]**. Our audit revealed that the [SENSITIVE INFORMATION REDACTED] Sheriff's Office was not required to prepare a cost sheet to support its jail-day rate.<sup>3</sup> Further, the audit concluded that [SENSITIVE INFORMATION REDACTED] Sheriff's Office had costs to support a jail-day rate that was about \$17 less per day than the rate paid, resulting in overpayments of almost \$1.8 million during calendar years 2000 and 2001.
- **[SENSITIVE INFORMATION REDACTED]**. Our audit concluded that the [SENSITIVE INFORMATION REDACTED] Jail's FY 2003 allowable costs supported a jail-day rate of \$30.62, resulting in overpayments of more than \$2.8 million during FYs 2003 and 2004.
- **[SENSITIVE INFORMATION REDACTED]**. Our review of the costs and inmate population listed on the cost sheet supported a \$52.26 jail-day rate, while the USMS paid the [SENSITIVE INFORMATION REDACTED] Jail \$65 per jail day, resulting in overpayments totaling almost \$2.9 million for FYs 2004 and 2005.

However, on March 17, 2006, the OFDT advised the USMS to refrain from seeking reimbursement of overpayments identified in OIG audits of individual IGAs.<sup>4</sup> As discussed below, the OFDT reasoned that because, in its view, the audited IGAs were negotiated fixed-price contracts not based solely on costs, the USMS could not recoup these overpayments. In contrast, the OIG believes that actual and allowable costs formed the basis for the jail-day rates contained in the agreements, and that even if the IGAs are fixed-price agreements as the OFDT contends, it may still be appropriate to recover overpayments, based on the circumstances of each case. Accordingly, the OIG believes that the DOJ should individually address each of the OIG's prior audits to determine if action on the payments above cost is appropriate.

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<sup>3</sup> See Appendix III for an example of a cost sheet form and instructions. According to the USMS Intergovernmental Agreement Program Policies and Procedures Manual (IGA Manual), if a detention facility is interested in housing federal detainees, it must complete a Form USM-243 "Cost Sheet for Detention Services" (cost sheet) as part of the application process. A jail-day rate is the amount paid to a detention facility to house one person detained for one day and begins on the date of arrival, but does not include the date of departure.

<sup>4</sup> See Appendix VI for a copy of the current Detention Trustee's memorandum, dated March 17, 2006.

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*Negotiated Fixed-Price Contracts (OFDT Position)*

According to the OFDT's argument, the IGAs at issue were fixed price agreements that were not specifically limited to the repayment of actual costs incurred by the contracting state or local government. The OFDT believes that although cost data provided by a state or local government was one factor used in reaching the agreed-upon jail-day rate, the USMS ultimately agreed to a fixed rate and cannot now seek to recover any payments it may have made above costs.

To support this conclusion, the OFDT points to a December 2002 legal opinion from the DOJ's Office of Legal Counsel (OLC). This opinion concluded that Section 119 of Public Law 106-553 (also known as the 2001 Department of Justice Appropriation Act) confers authority on the Attorney General to enter into fixed price detention agreements. Section 119 provides:

*Notwithstanding any other provision of law, including section 4(d) of the Service Contract Act of 1965 (41 U.S.C. 353(d)), the Attorney General hereafter may enter into contracts and other agreements, of any reasonable duration, for detention or incarceration space or facilities, including related services, on any reasonable basis.*

The OFDT therefore concluded that the IGAs do not limit state or local governments to the reimbursement of costs only. The OFDT further stated that because the IGAs we audited typically describe the unit price the federal government will pay as a "fixed rate," and costs were only one factor considered in determining this rate, the overpayments identified by the OIG audits are not recoverable.

As a result, in its March 17, 2006, memorandum the OFDT "advised the USMS to refrain from seeking reimbursement of overpayments" found by the OIG audits. Recently, OFDT obtained an opinion from the General Counsel of the Justice Management Division stating that the IGAs are "fixed price agreements that do not contain a basis for the Department to seek retroactive price adjustment" as a matter of contract law.

*Cost-Based Agreements (OIG Position)*

The OIG disagrees with the OFDT's and JMD's conclusion that the IGAs at issue are fixed-rate agreements based on factors other than cost. We do not dispute that, at least since the passage of Section 119, the USMS has the authority to enter into IGAs based on other factors, and that accordingly profit may be included in the calculation of the IGA rate. However, the OIG does not agree that the USMS exercised its authority to do so for past IGAs, including the 31 that were the subject of the OIG's audits.<sup>5</sup> Indeed, even the OLC opinion on which the OFDT relies describes the IGAs that pre-dated passage of Section 119 as having "typically set compensation for these services at the cost actually incurred by the provider." In addition, the OIG believes that the term "fixed rate" described the unit price to be paid in IGAs, but that it was calculated based on the state or local government providing an accurate description of its allowable costs. For example, in negotiations for the IGAs the local governments were informed that the rate was based on allowable costs, not any profit, and that the local governments would be held accountable for any overpayment or audit disallowance. As we describe below, support for our view is found in: (1) the language of the agreements, (2) a memorandum, dated August 1, 2002, from the prior Detention Trustee, and (3) the USMS' own past practice.

Language of the Agreements

The cost sheet instructions that were given to state and local governments when they sought the IGAs defined an IGA as a formal written agreement between the USMS and a state or local government to house federal detainees at a jail-day rate based on actual and allowable costs for the same level of service provided to state or local prisoners in a specific facility. The cost sheet instructions also informed the preparer of the following:

- A jail-day rate will be computed on the basis of actual and allowable costs associated with the operation of the facility that benefit federal detainees during the most recent accounting period.<sup>6</sup>

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<sup>5</sup> In a memorandum dated June 6, 2006, the OIG discussed the basis for its disagreement with the OFDT. See Appendix VII for a copy of the memorandum.

<sup>6</sup> Actual costs refer to costs incurred by a detention facility. According to OMB Circular A-87, for actual IGA costs to be allowable costs must be: (1) necessary and reasonable; (2) authorized or not prohibited under state or local laws or regulations; (3) in conformity with laws, regulations, and terms and conditions of the award; (4) accorded consistent treatment; (5) in accordance with generally accepted accounting principles; (6) net of all applicable credits; and (7) adequately documented.

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- “Local Governments shall only request the reimbursement of costs to the extent provided for in the latest revision of OMB Circular No. A-87.”<sup>7</sup>

The cost sheet also contained a certification statement that the Comptroller or Chief Financial Officer of the local government was required to sign attesting to the fact that the cost sheet does not include any costs prohibited by the Circular. According to the cost sheet instructions, Office of Management and Budget (OMB) Circular A-87 is the criteria used by the USMS in evaluating whether IGA costs are allowable.

The USMS IGA Manual states that an IGA analyst at USMS headquarters is supposed to review the cost sheet for cost allowability and the accuracy of capacity and average daily population figures. Based on the cost sheet information, the IGA analyst then calculated a jail-day rate using the following formula:

Jail-Day Rate Calculation			
256		365	93,440
	X	=	
Average Daily Population		Days Per Year	Jail-Days
<hr/>			
\$5,088,716		93,440	\$54.46
	÷	=	
Total Operating Cost		Jail Days	Jail-Day Rate

Source: USMS IGA Manual

As detailed in the table, a facility with an average daily population of 256 would equate to 93,440 annual jail days. If the facility’s total annual operating costs were \$5,088,716, this amount would be divided by the 93,440 annual jail days to arrive at a jail-day rate of \$54.46. In this example, the USMS would pay the state or local facility \$54.46 to house one of its federal detainees for one day.<sup>8</sup>

<sup>7</sup> OMB Circular A-87 establishes the principles and standards for determining allowable costs associated with agreements for goods and services obtained by the federal government from state, local, and federally recognized Indian tribal governments.

<sup>8</sup> An IGA is usually indefinite in term until it is terminated by either the detention facility or the USMS.

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The IGA Manual also states that the USMS IGA analyst will then discuss the jail-day rate with the appropriate local official, and prepare a Record of Negotiation documenting the rationale for the jail-day rate. The IGAs state that the local governments are responsible for complying with OMB Circular A-87, and inform the local governments that they will be held accountable for any overpayment, audit disallowance, or breach of the agreement that results in a debt owed to the federal government.

### Prior Detention Trustee Memorandum

In a memorandum to the Deputy Attorney General dated August 1, 2002, the prior Detention Trustee agreed with our position.<sup>9</sup> The prior Detention Trustee noted that most if not all IGAs limited reimbursement to actual costs or to the same daily costs that state and local authorities incur to hold their own prisoners. Further, these IGAs did not allow for a payment of profit to state and local governments. Accordingly, the prior Detention Trustee concluded:

*[T]he issue of whether the Department may or may not pay a profit or fee should not be a contentious item in these audits, since the audits were conducted on IGAs where both the departmental components and the state or local governmental entity agreed to reimbursement of actual costs.*

The prior Detention Trustee therefore drafted a policy that required the USMS to submit written justification to the OFDT and obtain its written approval prior to entering into fixed-price IGAs based on factors other than cost under Section 119. During our audits of the 31 IGAs, we did not identify any justifications or prior written approvals by the Detention Trustee that fixed-price detention services were acquired.

### USMS Past Practice

We also noted that from 1997 to 2005 the USMS IGA Audit Branch performed its audits in the same manner as the OIG (that is, to determine if IGA jail-day rates were based on actual and allowable costs). For example, in a January 1998 audit of the [SENSITIVE INFORMATION REDACTED] Jail in [SENSITIVE INFORMATION REDACTED], the USMS IGA Audit Branch determined that a \$65 temporary jail-day rate was not supported and that the operating costs only supported a \$37.95 jail-day rate. The USMS Audit

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<sup>9</sup> See Appendix VIII for a copy of the memorandum. The OIG's response to the memorandum is contained in Appendix IX.

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Branch recommended that the USMS “negotiate a revised jail-day rate based on the information contained in this report and actual cost and prisoner population data” and “remedy the \$3,883,433 in questioned costs.” Similarly, in an October 1999 audit of the [SENSITIVE INFORMATION REDACTED] City Jail, the USMS IGA Audit Branch reported that the supportable jail-day rate was \$4.22 less per prisoner than the rate that was in effect and concluded that the USMS had incurred \$127,874 in additional costs during FY 1998. Although no recommendations were developed, the report stated that the information was provided for use in any future rate negotiations and any collection efforts deemed appropriate.<sup>10</sup>

In addition, we noted that the USMS has recovered overpayments identified in previous OIG audit reports. For example, the USMS recovered \$156,000 in overpayments from the [SENSITIVE INFORMATION REDACTED] Sheriff’s Office over an extended period – September 2000 through August 2004 – by reducing the jail-day rate of \$32.97 by \$1.17, until the \$156,963 in overpayments was recouped. Similarly, as a result of our audit report on the USMS’s IGA with [SENSITIVE INFORMATION REDACTED], the USMS negotiated a 5-year repayment schedule over which the jail repaid over \$1 million. In addition, the USMS negotiated a reduced future rate.

### Resolution of Remaining OIG Open Audits

As discussed above, the OFDT believes that the IGAs at issue are fixed-rate contracts and that, accordingly, there is no basis in the agreements to force the audited facilities to repay the overpayments identified by the OIG. The OFDT therefore instructed the USMS not to seek to recover these overpayments. However, the OIG believes that even if one accepts the OFDT’s argument, its instruction not to seek the recovery of any overpayment was overbroad and incorrect. Rather, we believe that the USMS should address each audit individually and should remedy the questioned costs identified by the OIG by either collecting overpaid funds; providing documentation to support the existing IGA rate; adjusting the IGA rate and offsetting future payments over a reasonable time; or administratively waiving the questioned costs on a case-by-case basis, based on the inability to collect the funds or other exigencies such as a lack of other viable location, security problems, or significantly greater costs that would result from changing facilities. In addition, the USMS should consider whether, based on the audit findings, jail-day rates should be reduced prospectively.

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<sup>10</sup> The USMS significantly decreased the number of audits it performed in 2005 due to staffing shortages.

## Second Finding: Revamping the IGA Process

Although this dispute over past IGAs remains unresolved, the OFDT is now in the process of revising how IGA rates are calculated on the basis of “price reasonableness” rather than costs. We describe in this section the OFDT’s new IGA process, called eIGA.

In April 2005, the OFDT formed an interagency working group to review the costs associated with the use of state and local detention facilities, and to standardize the process of entering into IGAs in an attempt to ensure that the jail-day rates paid by the federal government were fixed, fair, and reasonable, and would no longer be subject to adjustments based on the actual costs of providing the service. According to the OFDT, fixing the price for detention services would also “flatten out” budget predictions by locking in rate adjustments at a set time, and would provide incentives for jails to control costs. As a result of the working group’s efforts, the OFDT has been pursuing changes to the IGA process by developing what it calls the eIGA system.

According to the OFDT, eIGA is an attempt to “e-gov” the IGA application process.<sup>11</sup> The OFDT stated that it believes that eIGA will improve the process of establishing IGAs by providing an automated system that establishes [SENSITIVE INFORMATION REDACTED] pricing for detention space and services provided by state and local facilities. The core of eIGA is an econometric statistical pricing model for determining a fixed-price [SENSITIVE INFORMATION REDACTED]. The model starts with a [SENSITIVE INFORMATION REDACTED] core jail-day rate that was calculated using December 2003 IGA rates.<sup>12</sup> That core rate is adjusted based on various factors to arrive at an adjusted core rate (also known as the “should

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<sup>11</sup> The President’s management agenda includes an initiative to expand Electronic Government (e-gov). The purpose of e-gov is to use internet-based technology to make it easier for citizens and businesses to interact with the government.

<sup>12</sup> As shown in Appendices VII and X, we have expressed concern with the [SENSITIVE INFORMATION REDACTED] core rate because our individual IGA audits often note significant variances between [SENSITIVE INFORMATION REDACTED] and the rates supported by the detention facilities’ allowable costs and average daily populations. According to the OFDT, the [SENSITIVE INFORMATION REDACTED] rate was used because it was based on an entire year of data [SENSITIVE INFORMATION REDACTED]. The OFDT acknowledged that the [SENSITIVE INFORMATION REDACTED] may not accurately reflect each facility’s costs, but said it is the best data it has available. The OFDT also stated that the core rate will be assessed and adjusted, if necessary, as eIGA is populated with expense information.

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cost" rate). The adjusted core rate is provided to the USMS analyst, with [SENSITIVE INFORMATION REDACTED], as shown in the following screen shot:

**Screen Shot of Rate Comparison<sup>13</sup>**

SUMMARY		Request Date: 10/26/2006 4:57:49 PM	
Rates		Total Capacity	Total FTEs
Proposed:	\$65.00	230	60
Current:	\$0.00		
Guard Rate:	\$18.00		
RATE COMPARISON			
[SENSITIVE INFORMATION REDACTED]			

Source: OFDT

According to the OFDT, once eIGA is operational, detention facilities will electronically apply for an IGA by completing a short application that describes the facility's capacity and staffing, jail operating expense information, services to be provided, oversight and accreditations, health care policies, and a proposed IGA rate.

A major change in this new approach is that unlike cost sheet data that has been used historically to compute jail-day rates, jail-day rates established using eIGA will not be based on a detention facility's cost information. Rather, the award will be determined by "price reasonableness," which will be calculated by comparing a detention facility's proposed rate to the adjusted core rate [SENSITIVE INFORMATION REDACTED] generated by the eIGA model and the established rates of similar facilities.

According to OFDT, cost sheet data was not always reliable and did not address whether a price paid in a geographical area was reasonable compared to other facilities. For example, OFDT noted that some facility administrators may pay salaries to individual employees in excess of the norm for the facility, the county, or salaries generally paid in the correctional field for such positions.<sup>14</sup> Under the process historically used to establish IGAs, the actual cost of the salaries, even if they are unreasonable in

<sup>13</sup> In this screen shot, the core rate is presented after adjustments, also known as the adjusted core rate.

<sup>14</sup> For purposes of establishing an adjusted core rate, the OFDT said it uses [SENSITIVE INFORMATION REDACTED].

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comparison to other county or correctional salaries in the regional area, would be allowable on an IGA.

In addition, according to the OFDT, under the eIGA process, if a jail proposes a rate that far exceeds the adjusted core rate and the rate of similar facilities, a USMS IGA analyst could "drill down" into the jail operating expense information and compare salaries or overtime usage to that of similar local facilities to determine the possible causes for the excessive proposed rate. The OFDT believes that comparing proposed rates to the rates of similar facilities will promote cost efficiencies.

Under eIGA, although the USMS will negotiate jail-day rates with individual jails, OFDT will review and approve each jail-day rate before any rate is finalized. The OFDT intends for a complete record of the negotiation, including a market comparison of jail rates and life cycle of each IGA, to be documented in eIGA instead of the USMS's current paper files.

In addition, according to OFDT, jail-day rates established through eIGA will be fixed for 36 months. Historically, jails were allowed to seek increases to the jail-day rate after 1 year. Therefore, under eIGA jails will have an incentive to control costs because they will not be allowed to request a rate increase prior to 36 months unless there were major operational changes with respect to the USMS's use of the jail. After 36 months, a jail seeking a rate increase would have to reapply through eIGA.

### *OIG Concerns with eIGA*

According to the OFDT, the primary benefit of using the new process is that an IGA analyst can compare the proposed and adjusted core rates to the rates of similar facilities. The OFDT stated that in determining what is a similar facility, emphasis will be placed on the relationship of a jail's expense information to that of other jails in the area (or within the state) that have a similar population, security level, size, staffing, and correctional programs offered. Additionally, when appropriate, a comparison to private and federal jail-day rates will be performed.

We believe that the eIGA concept is a positive step to improving the process historically used to establish jail-day rates. As discussed further in Finding III of this report, we identified significant deficiencies with how jail-day rates were established and monitored in the past. However, because eIGA is not yet operational, we were unable to test how jail-day rates will be established using eIGA. In addition, the OFDT has not issued guidance on how jail-day rates will be established using eIGA. According to OFDT, it

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intends to develop a 16-hour training course and handbook on how to use the system and perform a price analysis. As a result of these factors, it is difficult to predict how successful eIGA will be once it is operational.

During the course of this audit, the OIG had expressed concern that the OFDT's initial eIGA plan not to require state and local jails to submit detailed cost information constituted a serious flaw in the OFDT's revised process.<sup>15</sup> As a result of our concerns, and to adequately address the applicability of the Service Contract Act, the OFDT added the jail operating expense information to eIGA.<sup>16</sup> With the addition of the jail operating expense information, eIGA captures many cost sheet categories including salaries and benefits, consultant and contract services, medical care and treatment, facility and office, safety and sanitation, and insurance. However, eIGA does not capture a jail's average daily population, indirect costs, or revenue generated from a detention facility's operation (also known as credits).

We believe that the OFDT can improve eIGA to ensure that the USMS is negotiating the best possible jail-day rates that will help control rising detention costs by modifying the jail operating expense information to capture a jail's average daily population, indirect costs, and credits. In turn, this information should be used to calculate a jail-day rate, based on costs, that is presented to the IGA analysts as an additional field in the following summary screen shot:

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<sup>15</sup> In prior memoranda, the OIG identified its specific concerns with the OFDT's proposed plans for revamping the process for establishing jail-day rates. See Appendices VII and X for a copies of the memoranda.

<sup>16</sup> The Service Contract Act requires contractors and subcontractors performing services on prime contracts in excess of \$2,500 to pay service employees in various classes no less than the wage rates and fringe benefits found prevailing in the locality, or the rates (including prospective increases) contained in a predecessor contractor's collective bargaining agreement. The Department of Labor issues wage determinations on a contract-by-contract basis in response to specific requests from contracting agencies. These determinations are incorporated into the contract.

Summary Screen Shot of Negotiated Rate

SUMMARY		Request Date: 10/26/2006 4:57:49 PM	
Rates		Total Capacity	Total FTEs
Proposed:	\$65.00	Current:	\$0.00
Guard Rate:	\$18.00		230
			60
RATE COMPARISON			
[SENSITIVE INFORMATION REDACTED]			
Negotiated Rate:		\$64.50	Difference (%):

Source: OFDT

The OFDT stated that these will not be cost-based agreements, and that cost and average daily population data change daily. As discussed in Finding I, we recognize that OFDT and USMS may negotiate fixed-price IGAs not based on costs. However, we believe the true measure of eIGA's success will be to compare the rates negotiated through eIGA to a detention facility's actual and allowable costs. Presenting the information captured in the jail operating expense information portion of eIGA as a single rate will give the USMS more evidence and leverage in its negotiations, and will help ensure that negotiated jail-day rates are fair and reasonable. Presenting this data is not difficult, can assist in reducing the jail-day rate paid by the USMS, and could provide an important check on the price reasonableness model as demonstrated in our review of jail-day rates that were established using the eIGA pilot program.

In addition, as shown by the above screen shot, the [SENSITIVE INFORMATION REDACTED]. A detention facility potentially could earn [SENSITIVE INFORMATION REDACTED]. This is possible because detention facilities could [SENSITIVE INFORMATION REDACTED].

*Piloting the Model for Establishing IGAs*

In September 2005, the OFDT and USMS began using the new eIGA pricing model as part of a pilot process for awarding IGAs. However, because the eIGA system is not operational, jails have continued applying for jail-day rates using cost sheets, and the USMS has requested from OFDT an adjusted core rate, similar to the eIGA rate, that is calculated manually for each facility.

USMS IGA analysts then determined price reasonableness by comparing a requesting jail's proposed rate to the adjusted core rate provided by OFDT. Although USMS IGA analysts could have used the cost

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sheets submitted by the jails as part of their analysis in determining price reasonableness, we found that a cost sheet analysis by the USMS was not always performed. Further, unlike the planned process for eIGA, a comparison of proposed rates to similar facilities was not performed during the pilot. The USMS has also continued to use the standard IGA language it has used for years (that jail-day rates are established based on actual and allowable costs associated with operating the facility).

As of June 2006, the OFDT and USMS had used the model to award approximately 90 IGAs as part of a pilot project. We judgmentally selected 11 of the 90 IGAs awarded and reviewed detailed documentation from OFDT and the USMS to determine how the awarded rates compared to the cost-based rate previously used in awarding IGAs. The following table shows our results on how the awarded rate compared to the cost sheet rate, the adjusted core rate, and the [SENSITIVE INFORMATION REDACTED]:

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**Sampled IGAs Awarded Using the Model<sup>17</sup>**

Facility Name	Requested Rate	Cost Sheet Rate <sup>18</sup>	[SENSITIVE INFORMATION REDACTED]	[SENSITIVE INFORMATION REDACTED]	[SENSITIVE INFORMATION REDACTED]	Awarded Rate
<b>[SENSITIVE INFORMATION REDACTED]</b>						
[SENSITIVE INFORMATION REDACTED]	\$64.32	\$64.32	[SENSITIVE INFORMATION REDACTED]	[SENSITIVE INFORMATION REDACTED]	[SENSITIVE INFORMATION REDACTED]	\$64.32
[SENSITIVE INFORMATION REDACTED]	\$88.25	\$85.52	[SENSITIVE INFORMATION REDACTED]	[SENSITIVE INFORMATION REDACTED]	[SENSITIVE INFORMATION REDACTED]	\$85.52
[SENSITIVE INFORMATION REDACTED]	\$75.00	\$79.67	[SENSITIVE INFORMATION REDACTED]	[SENSITIVE INFORMATION REDACTED]	[SENSITIVE INFORMATION REDACTED]	\$70.00
[SENSITIVE INFORMATION REDACTED]	\$78.06	\$68.46	[SENSITIVE INFORMATION REDACTED]	[SENSITIVE INFORMATION REDACTED]	[SENSITIVE INFORMATION REDACTED]	\$65.00
<b>[SENSITIVE INFORMATION REDACTED]</b>						
[SENSITIVE INFORMATION REDACTED]	\$80.00	\$76.68	[SENSITIVE INFORMATION REDACTED]	[SENSITIVE INFORMATION REDACTED]	[SENSITIVE INFORMATION REDACTED]	\$80.00
[SENSITIVE INFORMATION REDACTED]	\$61.42	\$54.13	[SENSITIVE INFORMATION REDACTED]	[SENSITIVE INFORMATION REDACTED]	[SENSITIVE INFORMATION REDACTED]	\$54.13
[SENSITIVE INFORMATION REDACTED]	\$60.46	\$56.28	[SENSITIVE INFORMATION REDACTED]	[SENSITIVE INFORMATION REDACTED]	[SENSITIVE INFORMATION REDACTED]	\$51.16
[SENSITIVE INFORMATION REDACTED]	\$50.00	\$38.22	[SENSITIVE INFORMATION REDACTED]	[SENSITIVE INFORMATION REDACTED]	[SENSITIVE INFORMATION REDACTED]	\$45.00
<b>[SENSITIVE INFORMATION REDACTED]</b>						
[SENSITIVE INFORMATION REDACTED]	\$85.00	\$102.12	[SENSITIVE INFORMATION REDACTED]	[SENSITIVE INFORMATION REDACTED]	[SENSITIVE INFORMATION REDACTED]	\$82.00
[SENSITIVE INFORMATION REDACTED]	\$53.00	\$54.28	[SENSITIVE INFORMATION REDACTED]	[SENSITIVE INFORMATION REDACTED]	[SENSITIVE INFORMATION REDACTED]	\$44.97
[SENSITIVE INFORMATION REDACTED]	\$77.34	\$77.55	[SENSITIVE INFORMATION REDACTED]	[SENSITIVE INFORMATION REDACTED]	[SENSITIVE INFORMATION REDACTED]	\$86.00

Source: OFDT and USMS

<sup>17</sup> As a result of OFDT calculating the adjusted core rates incorrectly, the USMS believed it was establishing jail-day rates that [SENSITIVE INFORMATION REDACTED] for the facilities in our sample.

<sup>18</sup> To arrive at a cost sheet rate, we reviewed the cost sheets and records of negotiation that were prepared by the USMS IGA analysts. We further adjusted the total allowable costs as appropriate and divided by the average daily population. In some cases, the information presented did not provide us with enough information to evaluate the allowability of costs contained on the cost sheets. Therefore, our calculation could vary from a jail's actual and allowable costs.

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Although eIGA will collect a jail's cost information that will be used in analyzing the proposed jail-day rate, the OFDT does not plan on presenting this information to the IGA analysts as a single rate for comparison to the proposed rate, adjusted core rate, and the rates of similar facilities. Our review, however, revealed the benefits of presenting the cost information as a rate to help establish a reasonable jail-day rate.

- [SENSITIVE INFORMATION REDACTED] - The USMS IGA analyst used the cost sheet as the basis for negotiations with the Center. The cost sheet supported a jail-day rate of \$54.13, which was the rate offered to and accepted by the Center. The rate [SENSITIVE INFORMATION REDACTED] the OFDT provided adjusted core rate of [SENSITIVE INFORMATION REDACTED]. The Center had originally requested a jail-day rate of \$61.42, which [SENSITIVE INFORMATION REDACTED] the adjusted core rate. However, the cost sheet provided by the Center only supported a rate of \$54.13. Using this cost information, the USMS negotiated that rate. Without cost information, the USMS may have accepted the original rate of \$61.42 as reasonable, based on the eIGA model, at an extra estimated cost to the taxpayer of almost \$270,000 per year.

However, it was not clear to us whether the USMS always analyzed cost sheets or considered in negotiations for the jail-day rate both the cost and the model-generated rate, as shown in the following example:

- [SENSITIVE INFORMATION REDACTED] - The USMS IGA analyst offered the [SENSITIVE INFORMATION REDACTED] \$45 because it "[SENSITIVE INFORMATION REDACTED] 'should cost' rate." There was no indication in the file that the IGA analyst reviewed the cost sheet. Our review of the cost sheet revealed that allowable costs only supported a rate of \$41.64. In addition, the [SENSITIVE INFORMATION REDACTED] represented on the cost sheet that its average daily population was 660 inmates. However, we noted that [SENSITIVE INFORMATION REDACTED] presents an average daily jail population on its web site of 719. If the average daily population of 719 was used to calculate a jail-day rate, the jail-day rate would be \$38.22, or 15 percent lower than the \$45 jail-day rate that was awarded, resulting in possible additional costs to the USMS of about \$148,000 per year.

### Third Finding: Improvements Needed in IGA Oversight

As part of our audit, we also reviewed 34 additional IGAs that were utilized by the USMS in establishing jail-day rates prior to the piloting of the eIGA model. For each selected IGA, we reviewed cost sheets, records of negotiations, and available cost and average daily population data utilized by the USMS in establishing jail-day rates. For the IGAs we sampled, we found that USMS IGA analysts generally reviewed cost sheets and documented their analysis of the costs in establishing jail-day rates. Additionally, the USMS IGA Audit Branch sometimes performed detailed pre-award reviews of the detention center's costs that were used by the USMS IGA analysts to establish jail-day rates based on actual and allowable costs. For example, the [SENSITIVE INFORMATION REDACTED] submitted a cost sheet to the USMS on March 1, 2000, based on FY 1999 costs, requesting a rate of \$103.27. The USMS conducted an audit of the cost sheet and developed an audited rate of \$84.39, which the USMS used in the IGA awarded to [SENSITIVE INFORMATION REDACTED] in September 2000.

The USMS pre-award audits also allowed the USMS to identify unallowable costs and establish jail-day rates based on actual and allowable costs. However, according to the USMS, a pre-award audit of new IGAs or rate changes to existing IGAs is not always possible due to staffing and budget constraints. But in the absence of pre-award audits, we often found unallowable costs such as transportation salaries and interest; cost sheets that contained cost and average daily population that did not support the requested rate; and understated average daily population numbers.

An example of an IGA that resulted in a jail-day rate that exceeded allowable costs is [SENSITIVE INFORMATION REDACTED]. The USMS provided a temporary rate increase to the [SENSITIVE INFORMATION REDACTED] for \$49.84 effective February 1, 2003, pending the results of a planned USMS audit.<sup>19</sup> On May 23, 2003, the USMS issued an audit report that supported a lower rate of \$40.49. Although a lower rate was recommended, a modification to lower the rate was not implemented until May 2, 2005. According to the IGA Manual, temporary rates can be in effect for up to 12 months pending receipt and review of actual cost data. However, this temporary rate was in effect for 27 months.

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<sup>19</sup> A temporary rate is established when a facility does not have a prior cost history.

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USMS officials told us that the lower rate was not immediately implemented because of a backlog of IGA actions. Further, an IGA analyst told us that the modification was not immediately implemented because the U.S. Marshal in this district did not want the lower rate implemented. Based on the USMS's use of this jail since the effective date of the rate increase, we estimate that the USMS may have paid an additional \$590,892 for bed space for FYs 2003 through 2005.

According to USMS officials we interviewed, detention facilities fight for every penny when entering into an IGA, especially if they know there is a limited supply of bed space in their geographical area. Further, a USMS official stated that the USMS competes with ICE and state governments for the same bed space, and that ICE pays more and guarantees the use of its bed space, while the USMS does not. As a result, detention facilities often give priority to ICE detainees. According to the USMS, jail-day rates that exceed allowable costs are occasionally established to appease the local detention officials. Moreover, due to the shortage of federal detention space, the USMS is under pressure to obtain detention space from state or local facilities near federal courthouses. Paying a nearby detention facility a higher rate may appear preferable to the operational and logistical costs of using a more distant but less expensive facility. However, we believe that allowing payment for services to appease a state or local jail keeper will result in similar demands for payment from other localities that in the past agreed to be reimbursed on the basis of actual costs.

We recognize that OFDT is revamping the process for procuring detention space, as described above in the eIGA section. However, we believe that continued improvements are needed in policies and procedures, training, and defining responsibilities for establishing and monitoring IGAs, regardless of the implementation of the new system, for the reasons described below.

### *Policies and Procedures*

The guidance available to the IGA analysts and district personnel for reviewing IGAs include the USMS IGA Manual, the USMS Directives, the instructions that are provided with the cost sheet, OMB Circular A-87, and an OFDT memorandum to the Deputy Attorney General on implementing Section 119, dated August 1, 2002. In our judgment, the OFDT's and USMS's policies and procedures must be an integral part of their financial and business practices for awarding and monitoring IGAs. They must contain measures for: (1) protecting resources against waste, fraud, and

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inefficiency; (2) ensuring accuracy and reliability in financial and operating data; (3) securing compliance with policies; and (4) evaluating performance.

Our review found that the OFDT has not yet issued any policies and procedures related to the new eIGA process. Because the new process involves significant changes from past practices, we believe that the OFDT should issue detailed guidance on awarding IGAs through eIGA before it becomes operational.

Our review also found that the USMS did not always adequately document its decisions for establishing jail-day rates. Without adequate documentation of how a jail-day rate was established, neither the USMS, OFDT, nor the OIG can determine whether the USMS paid a reasonable jail-day rate. For example, the IGA Manual does not address how non-cost factors such as a need to alleviate a critical shortage of jail space in a district should be valued in establishing jail-day rates.

We believe the new policies and procedures should include clear guidance on the following:

- how to negotiate with detention facilities;
- clearly documenting the basis for negotiated jail-day rates;
- evaluating cost and non-cost factors;
- when it is appropriate to deviate from the model and how deviations will be documented;
- defining, evaluating, and documenting the analysis of established rates of similar facilities in justifying a jail-day rate; and
- limitations on profit that should be included in IGAs.

### *Training*

Although IGA analysts collectively commit the USMS to pay state and local detention facilities hundreds of millions of dollars annually, most of the USMS IGA analysts told us their training was not adequate for their level of responsibility. USMS IGA analysts play an important role in ensuring that detention space is obtained at the best jail-day rate possible, and we believe annual training plans should be developed for them to provide appropriate

procurement competencies, such as those outlined by the Federal Acquisition Institute (FAI).<sup>20</sup>

*Defining Responsibilities for Establishing and Monitoring IGAs*

USMS District personnel and the Programs and Assistance Branch (PAB) at USMS headquarters share responsibility for establishing and monitoring IGAs. We found that the oversight of IGAs by USMS Districts and USMS Headquarters was deficient.

District Responsibilities

The USMS Directives state that each U.S. Marshal will review the cost sheets for completeness and accuracy of information (particularly staffing levels and types of services provided). We interviewed personnel from the USMS districts of Eastern Virginia, Northern Georgia, Western Texas, Nevada, and Western North Carolina, and found that four of these five district offices performed no review of the cost sheets. District officials from Northern Georgia told us that they reviewed cost sheets, but qualified their response by saying that they only review the cost sheets for "obvious errors."

In addition, we found that none of the five districts performed post-award monitoring of detention center costs or expiration dates. As a result, we queried the USMS's "*Prisoners*" database for expired IGAs.<sup>21</sup> We identified 451 IGAs that had expiration dates, of which 330 had expired as of January 31, 2006. Of the 330 expired IGAs, we identified 157, 216, and 300 IGAs that were expired as of the end of FY 2003, 2004, and 2005, respectively. We estimated that the USMS made over \$175 million in payments on the expired IGAs during FYs 2003 through 2005.

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<sup>20</sup> In 1976, Congress established FAI under the Office of Federal Procurement Policy. The General Services Administration acts as its executive agent, providing funding and support for FAI. The mission of FAI is to foster and promote the development of a professional acquisition workforce. The FAI details a blueprint for training and development of skills for procurement officials, such as developing, negotiating, and managing business deals, communicating effectively, and analyzing and understanding the marketplace.

<sup>21</sup> "*Prisoners*" is an Access database that the USMS maintains on detention facilities used to house detainees. The database includes IGA agreements, private contracts for prisoner bed space, and federal detention centers.

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### Programs and Assistance Branch Responsibilities

The Programs and Assistance Branch (PAB) is the USMS headquarters section responsible for awarding and overseeing IGAs. Despite the increasing need for detainee bed space, staff reductions in the USMS's PAB has significantly limited the USMS's ability to review and follow up on IGA issues. We reviewed PAB staffing reports from 1999 through 2006 and found that authorized staff levels dropped from 11 full-time equivalents (FTEs) with 2 vacancies in 1999 to 6 FTEs with 3 vacancies in 2006. Further, the number of audits performed by the USMS IGA Audit Branch decreased from 29 audits in 2003, to 16 in 2004, to 1 audit in 2005. While the PAB was not the only division to lose FTEs due to USMS budget cut backs, the decline in the number of audits performed by the Audit Branch placed an increasing burden on IGA analysts to identify unallowable costs prior to the establishment of a jail-day rate.

With limited staffing, the PAB had not conducted sufficient post-award IGA monitoring. According to PAB officials, once an IGA is in place, it usually remains in place at the initial jail-day rate until the detention center requests an increase in the rate. As a result, there was no monitoring of IGAs after award, and an IGA could remain in place indefinitely without the USMS knowing if a rate change was warranted. Yet, after an IGA is awarded, conditions may change that warrant a reduction in a jail-day rate. For example, in our audit of the [SENSITIVE INFORMATION REDACTED], the original FY 1996 cost sheet was based on an average daily population of 244.<sup>22</sup> However, in FY 2004, the average daily population was 877, an increase of 260 percent. This resulted in an audited rate that was \$17 less than the rate paid by the USMS, for total unallowable and unsupported costs of over \$5 million for 2 years.

Although PAB officials suggested to us that each district is in the best position to monitor IGAs, they also told us that districts may not report issues that could result in the IGA rate decreasing, especially if they believe the issue may result in the cancellation of an IGA. If a detention center cancels an IGA, the USM would have to find a new facility to house detainees, which may be less convenient than the detention center being used. PAB officials told us that the USMS districts do not want to "stir up the pot," especially if they need the bed space.

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<sup>22</sup> Department of Justice, Office of the Inspector General. Audit Report Number GR-60-06-002, *The United States Marshals Service Intergovernmental Agreement for Detention Services with the* [SENSITIVE INFORMATION REDACTED].

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We recognize that monitoring IGAs to ensure that the cost and average daily population continue to reflect an appropriate jail-day rate will no longer be an issue if all future IGAs are awarded under the eIGA process. However, districts will continue to play an important role in identifying detention facilities that meet USMS standards and can support the district's detention requirements. We believe district and PAB responsibilities need clarification on the new process, especially those pertaining to the policies and procedures for establishing rates and monitoring expiration.

### **Conclusion**

Rising detention population and costs presents a challenge to the DOJ's ability to obtain affordable bed space for individuals not housed in federal facilities. We recognize that there are significant pressures on the USMS to obtain detention space through state and local facilities. However, allowing payment for services that far exceed costs, without adequately analyzing and documenting price reasonableness and cost, could exacerbate the continuing escalation in detention costs nationwide. Because DOJ's current detention budget exceeds \$1 billion, the long-term budget implications of IGA policies are substantial.

The OFDT and USMS are moving away from their past policy of reimbursing state and local jails at a rate based on their allowable costs to a system that will set a fixed jail-day rate that allows for payments to state and locals above their allowable costs. To help in setting the new fixed rates, the OFDT has developed a pricing model that takes into account certain cost variables. The OFDT stated that the primary benefit of using the new process is that an IGA analyst will compare the proposed and adjusted core rates to the rates of similar facilities. We believe that the eIGA concept is a positive step to improving the process previously used to establish jail-day rates. Yet, we believe that OFDT can improve eIGA to ensure that USMS negotiations help control rising detention costs. Although eIGA will capture many of the cost sheet categories, it will not capture a jail's average daily population, indirect costs, or credits, which are needed to compute a detention facility's costs. We believe that the OFDT should modify eIGA to capture this information, and present this information to the IGA analysts as a cost-based rate because the true measure of eIGA's success will be to compare the rates negotiated through eIGA to a detention facility's actual and allowable costs. Presenting the cost information as a single rate will give the USMS more evidence and leverage in its negotiations, and will help IGA analysts establish fair and reasonable jail-day rates.

## **Recommendations**

As a result of our review, we make 10 recommendations regarding the OFDT's and the USMS's oversight of IGAs. The recommendations include addressing each open recommendation from prior OIG audits of IGAs, which collectively contains dollar-related findings of \$37 million; modifying eIGA so that it presents a jail-day rate to the IGA analysts based on the actual and allowable costs of the jail; developing guidance and training on how jail-day rates will be established using eIGA; developing guidance that limits the amount of profit a state or local jail can earn for housing federal prisoners; and developing annual training plans for IGA analysts that will provide appropriate procurement core competencies.

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## INTRODUCTION

The Department of Justice (DOJ) is responsible for confining federal detainees awaiting trial and sentencing. Federal detainees are generally individuals housed in jails while awaiting trial or sentencing. In contrast, federal prison inmates are generally individuals serving a sentence of imprisonment after conviction for a violation of the federal criminal code. According to the DOJ strategic plan, two strategies to achieve DOJ's confinement responsibilities are to:

- Acquire needed detention space through a multi-pronged approach that includes agreements with state and local governments, contracts with private vendors, construction and operation of federal detention facilities, and the use of alternatives to detention; and
- Improve management of detention resources through more accurate forecasting of detention needs, better coordination, strengthened oversight, and other means.

Two DOJ components have key roles in the detention of federal detainees – the Office of the Federal Detention Trustee (OFDT) and the United States Marshals Service (USMS).

### Role of OFDT

Historically, federal detention within DOJ was the responsibility of both the USMS and the Immigration and Naturalization Service (INS). The OFDT was created in fiscal year (FY) 2001 to manage DOJ's detention resources and coordinate its detention activities.<sup>23</sup> In March 2003, the INS was transferred into the Department of Homeland Security (DHS). Much of the INS detention responsibilities were included in DHS's Bureau of Immigration and Customs Enforcement (ICE). As directed by Congress, the initial objective of the OFDT was to centralize responsibility for detention in order to better manage and plan for needed detention resources without unwanted duplication of effort or competition with other DOJ components.

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<sup>23</sup> The OFDT is authorized 21 employees who are responsible for budget formulation and execution, information technology, procurement, detention standards, legal advice, and management and administration. See Appendix II for more information on the OFDT's six functional areas.

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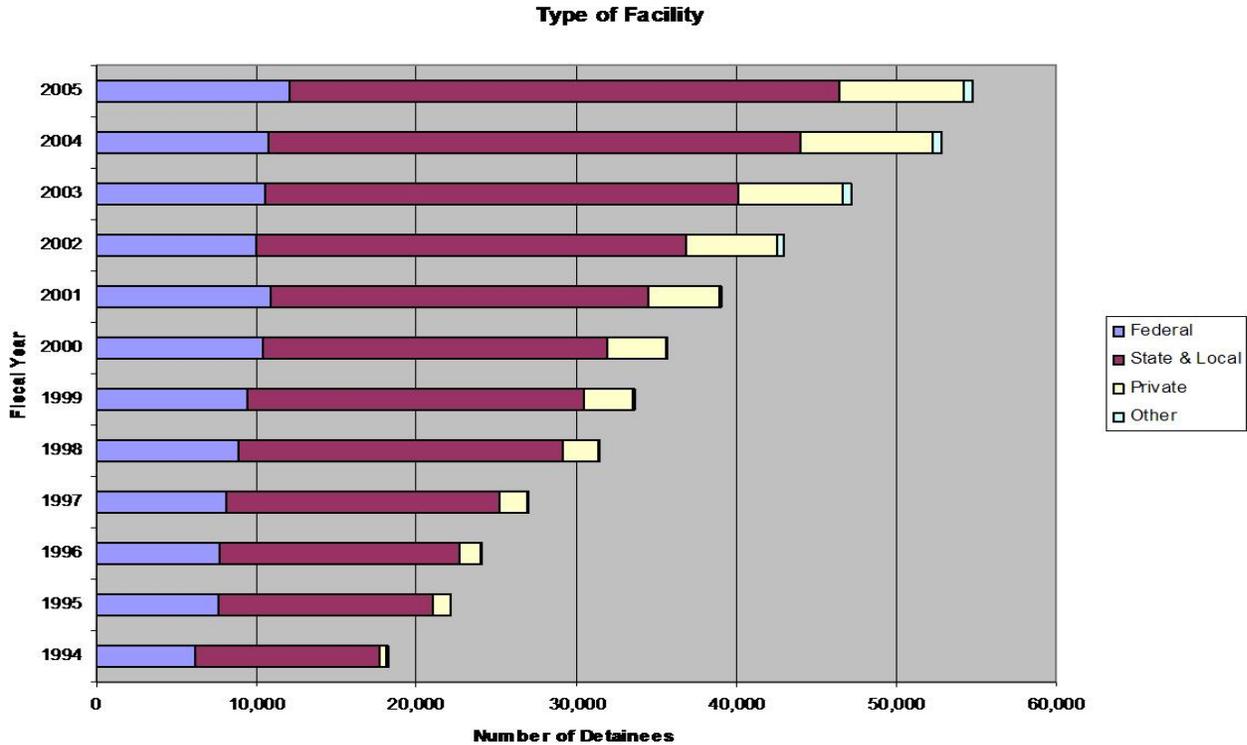
Beginning in the spring of 2003, OFDT and ICE officials met to discuss centralized oversight of detention by the OFDT through the formation of an Interagency Agreement (IAA), but they could not agree on the terms. Consequently, in September 2003 the Office of Management and Budget helped with the negotiations, and in November directed ICE to sign an IAA. Although the OFDT has an IAA with ICE, the OFDT stated that ICE infrequently uses OFDT's services (e.g., negotiate and manage contracts for private detention beds). According to the OFDT, it has no leverage to force ICE to use its services.

### **Role of the USMS**

The USMS is responsible for housing and transporting federal detainees from the time they are brought into federal custody until they are either acquitted or incarcerated.<sup>24</sup> As shown in the following graph, due to the shortage of federally owned detention space, the USMS heavily depends on state and local governments to provide detention space and services:

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<sup>24</sup> The Federal Bureau of Prisons (BOP) plays a supporting role by housing a portion of the federal detainee population in BOP detention centers and in detention units in other correctional facilities. The BOP's primary responsibility is incarceration of inmates serving a sentence of imprisonment after conviction for a violation of the federal criminal code. Detention differs markedly from incarceration in terms of population stability. Detention is temporary in nature and requires the frequent movement of detainees in and out of facilities, while incarceration is more long-term and involves less movement of individuals.



Source: OFDT

As of February 2006 the USMS had approximately 1,600 active Intergovernmental Agreements (IGA) with state and local governments to rent jail space.

### Funding Detention Growth

A significant challenge presented by rising detention populations is DOJ’s ability to obtain affordable bed space for individuals housed in non-federal facilities. The cost of detention has been rising rapidly, and during FYs 2003 – 2005 the funds budgeted for detention fell short of the amount needed to fully fund the DOJ’s detention activities. DOJ officials attributed the shortfalls to significantly inaccurate budget projections. According to these officials, new law enforcement initiatives, policies, and laws caused an increased number of arrests, which exceeded the forecasts used to calculate budget requests. The following table compares the detention budget and average daily population from FY 2002 to FY 2006.<sup>25</sup>

<sup>25</sup> Detainee housing and subsistence constitute most of the program costs.

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**Comparison of Detention Funding and Average Daily Population**

Fiscal Year	Initial Budget (in millions)	Additional Funding (in millions)	Total Budget (in millions)	Percent of Initial Budget Increase/(Decrease) over Previous FY Total Budget	Average Daily Population (all Detention) <sup>26</sup>	Rate of Population Increase
2002	\$706		\$706		40,114	
2003	\$773	\$40	\$813	9	43,984	10
2004	\$805	\$109	\$914	(1)	49,405	12
2005	\$874	\$184	\$1.058	(4)	53,446	8
2006	\$1.16		\$1.16	10	57,000	7

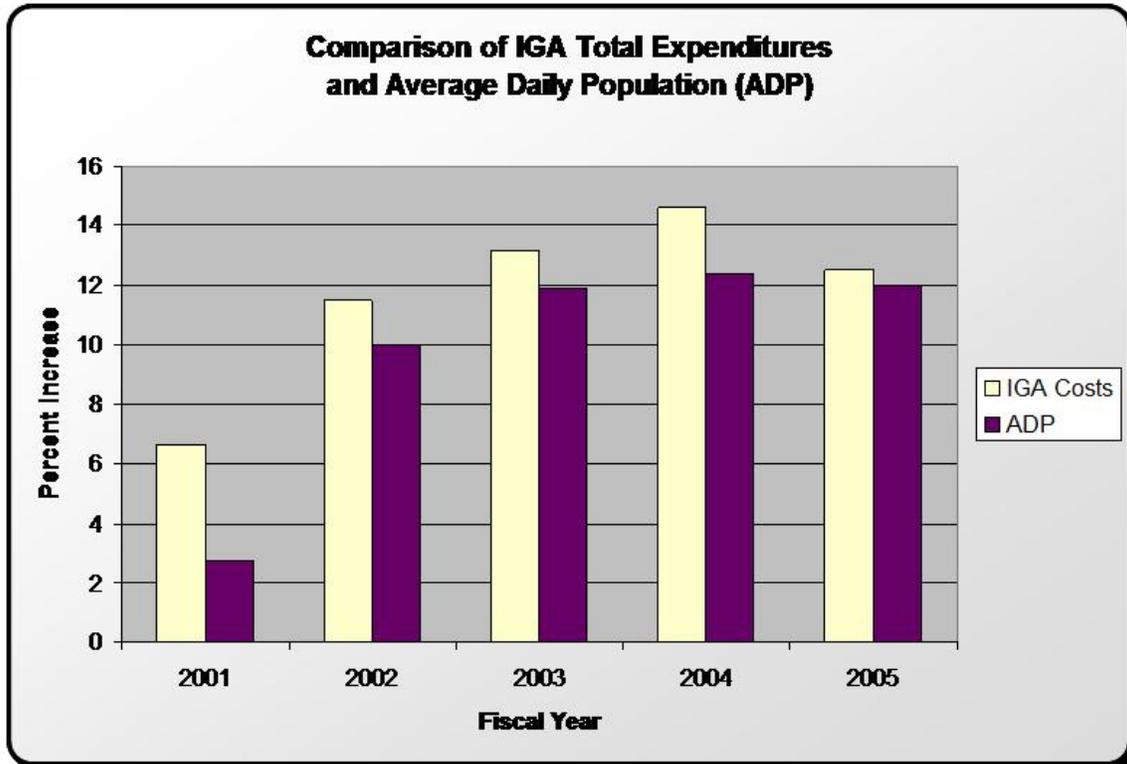
Source: OFDT

The table shows that while the detention budget and average daily population increased at about the same rate from FY 2002 to FY 2003, \$40 million in supplemental funding was needed to rectify the shortfall. From FY 2003 to FY 2004, the average daily population increased 12 percent, while the detention budget was initially funded at \$8 million less than the previous year's budget including the supplemental funding. As a result, in FY 2004 \$109 million had to be reprogrammed from other Department accounts to fund the detention shortfall. In FY 2005, the average daily population increased 8 percent, while the initial detention budget decreased 4 percent from total FY 2004 funding. In an effort to manage the shortfall, the OFDT imposed a temporary moratorium on new IGAs and on rate increases on February 4, 2005. The OFDT lifted the moratorium in June 2005, when the FY 2005 shortfall was eliminated with the receipt of \$184 million in supplemental funding. In FY 2006, the detention budget was funded at \$1.16 billion, which was a 10 percent increase over the total FY 2005 funding.

Almost 75 percent of the DOJ's detention budget is spent on IGAs. As shown in the following chart, IGA costs rose at a faster rate than the average daily population during FYs 2001 – 2004, but slowed during FY 2005 in part due to the OFDT's moratorium.

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<sup>26</sup> The average daily population (all detention) represents detainees housed in state and local facilities using IGAs, private contractor facilities, and BOP facilities.



Source: OFDT

According to the OFDT, its efforts to reduce detention costs focused on decreasing the amount of time individuals spend in detention after sentencing. As discussed in this report, we also believe that the OFDT and USMS could realize significant additional cost savings if they addressed deficiencies in how prices are set in individual IGAs established with state and local law enforcement agencies for detention bed space.

### Establishing an IGA

IGAs are initiated by a USMS district office based on the district's need for detainee bed space.<sup>27</sup> According to a USMS Detention Facility Contracting Policies and Procedures Directive, each United States Marshal (USM) should assess their district detention requirements and: (1) identify potential state or local detention facilities that meet USMS prisoner detention standards and are willing to support the district's detention requirements; (2) coordinate with the BOP, the Department of Homeland Security (DHS) Bureau of Immigration and Customs Enforcement (ICE), and other USMS districts to

<sup>27</sup> The geographical structure of the USMS mirrors the 94 federal judicial districts of the United States, including at least one district in each state, the District of Columbia, the Commonwealth of Puerto Rico, and three territories of the United States – the Virgin Islands, Guam, and the Northern Mariana Islands.

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see if they have prisoner detention bed space within the district; and (3) contact facilities by location, capability, and types of detention services to determine if they are interested in housing federal detainees.

If a state or local detention facility is interested in housing federal detainees, the USM will conduct an initial on-site inspection of the facility to determine compliance with USMS detention standards.<sup>28</sup> In addition, the USM will provide the detention facility with a sample IGA for review, an instruction booklet on how to complete a Form USM-243 "Cost Sheet for Detention Services" (cost sheet), and a cost sheet form.<sup>29</sup> The USMS also provides the detention facility with Office of Management and Budget (OMB) Circular A-87.<sup>30</sup> As discussed in Finding II, however, the OFDT is in the process of developing an automated system known as eIGA that will be used by state and local governments to apply for an IGA. Using the new system, state and local governments will no longer apply for an IGA using a cost sheet.

According to the current USMS Intergovernmental Agreement Program Policies and Procedures Manual (IGA Manual), a detention facility interested in housing federal detainees is supposed to complete a cost sheet as part of the application process. A cost sheet requests information on actual cost, prisoner population, the detention facility's proposed rate (also known as a jail-day rate), a local government contact, and certification statements. A jail-day rate is the equivalent of one person detained for one day and begins on the date of arrival, but does not include the date of departure.

Once the cost sheet is completed, the detention facility forwards it to the USMS district office for review. The district office will then submit an IGA package, which includes a completed Request for Detention Space

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<sup>28</sup> The USMS prisoner detention standards require that the detention facility have 24-hour staffing at the facility, adequate meals, medical coverage, fire and emergency plans, security, sanitation and hygiene services, and suicide prevention programs.

<sup>29</sup> See Appendix III for an example of a cost sheet form and instructions.

<sup>30</sup> OMB Circular A-87 establishes the principles and standards for determining allowable costs associated with cost-reimbursement contracts and other agreements for goods and services obtained by the federal government from state, local, and federally recognized Indian tribal governments. As discussed further in Finding I, the cost sheet instructions and the IGAs state that OMB Circular A-87 is the criteria used in evaluating whether IGA costs are allowable and reasonable. In order to obtain needed detention space, DOJ received an OMB exemption from the Federal Acquisition Regulation (the policies and procedures for acquisitions by all executive agencies). The exemption covered only the reimbursement of costs for detention services subject to OMB Circular A-87.

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(USM-242), a Detention Facility Inspection Report (USM-218), and the completed cost sheet (USM-243), to the Programs and Assistance Branch (PAB) at USMS headquarters for evaluation of costs and average daily population.

At the PAB, an IGA analyst reviews the cost sheet for cost allowability, and accuracy of capacity and average daily population figures. Based on the cost sheet information, the IGA analyst will then discuss a jail-day rate with a detention facility official. An IGA is usually indefinite in term until it is terminated by either the detention facility or the USMS.

According to a PAB official, however, detention facilities hold out for higher jail-day rates if they know there is a limited supply of bed space in their geographical area. Further, this PAB official stated that the USMS competes with ICE and state governments for the same bed space, and that ICE pays more and guarantees the use of its bed space, whereas the USMS does not. This PAB official also stated that detention facilities often give priority to ICE detainees, and the operational factors do not always lend to setting rates based on costs.

### Prior Audits

Since 1995, the Office of the Inspector General (OIG) has audited 31 individual IGAs. These audits often concluded that the USMS had significantly overpaid state and local governments. In total, the OIG reported dollar-related findings of almost \$60 million in these 31 audits. The following are examples of findings from some of our prior audit work:

- **[SENSITIVE INFORMATION REDACTED]**. Our audit revealed that the [SENSITIVE INFORMATION REDACTED] had not prepared a cost sheet to support its jail-day rate. Further, the audit concluded that [SENSITIVE INFORMATION REDACTED] had costs to support a jail-day rate that was about \$17 less per day than the paid rate, resulting in overpayments of almost \$1.8 million during calendar years 2000 and 2001.
- **[SENSITIVE INFORMATION REDACTED]**. Although the USMS paid the [SENSITIVE INFORMATION REDACTED] a jail-day rate of \$50, our audit of [SENSITIVE INFORMATION REDACTED] costs revealed that the [SENSITIVE INFORMATION REDACTED] FY 2003 allowable costs supported a jail-day rate of \$30.62, resulting in overpayments of more than \$2.8 million during FYs 2003 and 2004.

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- **[SENSITIVE INFORMATION REDACTED]**. Our review of the costs and inmate population listed on the cost sheet concluded that a \$52.26 jail-day rate was supported, while the USMS paid the [SENSITIVE INFORMATION REDACTED] \$65 per jail day, resulting in overpayments totaling almost \$2.9 million for FYs 2004 and 2005.

In addition, the OIG conducted an audit of the OFDT in December 2004 which found that, although the OFDT had been in place for almost 4 years, it had not completed the goal of centralizing and overseeing DOJ's detention activities.<sup>31</sup> The former INS's transfer to the DHS in March 2003 and leadership vacancies had complicated the OFDT's ability to build a firm foundation with a clearly defined organizational purpose. The OIG report made 11 recommendations to OFDT to assist in improving its management of detention activities. Eight of the recommendations are closed, while corrective action is still in process for the remaining three.<sup>32</sup>

### **Audit Approach**

The objective of this audit was to determine if the USMS and OFDT employed an effective monitoring and oversight process for IGAs. Appendix I contains more information on our objectives, scope, and methodology.

Our report contains three main findings. The first discusses a dispute between the OFDT and the OIG regarding past OIG audits that found overpayments made to state and local jails for detention space. The second finding concerns the OFDT's revamping of IGA pricing through an econometric statistical pricing model. The third finding discusses needed improvements in the areas of policies and procedures, training, and defining responsibilities for establishing and monitoring IGAs.

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<sup>31</sup> Department of Justice, Office of the Inspector General. Audit Report Number 05-04, *Audit of the Department of Justice Office of the Federal Detention Trustee*, December 2004.

<sup>32</sup> The recommendations to DOJ and OFDT that are still open include clearly identifying the OFDT's mission and responsibilities, examining the policies and practices regarding IGAs to develop additional areas in which detention costs can be reduced, and developing a plan for reviewing and verifying the allowability of costs associated with individual IGAs.

## FINDINGS AND RECOMMENDATIONS

### I. DISPUTE OVER DETENTION SPACE OVERPAYMENTS

We believe the OFDT and USMS should individually address each of the OIG's prior audits to determine if the overpayments identified by the OIG can be recovered or offset against future payments. The OIG has completed 31 individual IGA audits since 1995 and reported overpayments totaling almost \$60 million, of which \$37 million remains unaddressed by the USMS. In March 2006, the OFDT advised the USMS to not seek the recovery of significant overpayments identified by these OIG audits. The OFDT's position is that the IGAs audited by the OIG were negotiated using fixed-price contracts that do not have to be based solely on costs. In contrast, the OIG concluded the audited IGAs were agreements based on actual and allowable costs, and that even if the IGAs are fixed-price agreements as the OFDT contends, it may still be appropriate to recover overpayments based on the circumstances of each case. Accordingly, the OIG believes that the OFDT's instruction to the USMS not to do so was overbroad and incorrect.

The main objectives of the 31 prior IGA audits conducted by the OIG were to determine whether: (1) information contained in the cost sheet for detention services was accurate, complete, and supported by adequate documentation; and (2) the jail-day rate was supported by adequate documentation and was based on actual and allowable costs in accordance with applicable laws, regulations, guidelines, and terms and conditions of the IGA.

For the IGAs reviewed in these 31 audits, the USMS paid over \$182 million to state and local officials to house federal detainees. Our audits identified approximately \$38 million in either unallowable or unsupported costs, and recommended that about \$22 million be put to a better use. Of these amounts, \$37 million remains unaddressed by the USMS.<sup>33</sup>

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<sup>33</sup> Appendix IV presents our schedule of our dollar-related findings and highlights the specific audits that remain unaddressed by the USMS. Our presentation of prior audit results is generally limited to the findings and recommendations pertaining to the USMS. In addition to the USMS, our individual audits contained an additional \$20 million in dollar-related findings related to the former INS and BOP. Appendix V provides a summary of each IGA report issued by the OIG.

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However, on March 17, 2006, the OFDT advised the USMS to refrain from seeking reimbursement of the overpayments identified in our audits.<sup>34</sup> In this section of the audit report, we present the issues involved in the disagreement between OFDT and the OIG. As discussed below, the OFDT believes the audited IGAs were negotiated fixed-price contracts that did not have to be based solely on costs. The OIG believes the audited IGAs were agreements based on actual and allowable costs and that, even if they are considered fixed-price contracts, it may be appropriate to recover the overpayments based on the circumstances of each case.

### OFDT Position

According to the OFDT, the USMS negotiated fixed jail-day rates that do not limit the state or local government to the reimbursement of actual costs. The OFDT believes that although cost data provided by a state or local government was used as the basis for price negotiation, once the USMS accepted jail-day rates, even if they exceeded costs or resulted in profits for the state or local government, the fixed rate was established and should not be recovered based on subsequent audits.

The OFDT bases its determination that the USMS IGAs are fixed-price contracts on a legal opinion from the DOJ's Office of Legal Counsel (OLC). This opinion concluded that Section 119 of Public Law 106-553 (also known as the 2001 Department of Justice Appropriation Act) confers authority on the Attorney General to enter into fixed price detention agreements. Section 119 provides:

*Notwithstanding any other provision of law, including section 4(d) of the Service Contract Act of 1965 (41 U.S.C. 353(d)), the Attorney General hereafter may enter into contracts and other agreements, of any reasonable duration, for detention or incarceration space or facilities, including related services, on any reasonable basis.*

With OLC clarification of the issue, the OFDT concluded that the IGAs now in place do not limit state or local governments to the reimbursement of costs. The OFDT further stated that because the IGAs we audited typically describe the unit price the federal government will pay as a "fixed rate," and costs were only one factor considered in determining this rate, the overpayments identified by the OIG audits are not recoverable. As a result,

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<sup>34</sup> See Appendix VI for a copy of the current Detention Trustee's memorandum, dated March 17, 2006.

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in the May 17, 2006, memorandum the OFDT “advised the USMS to refrain from seeking reimbursement of overpayments.” In a subsequent memorandum to the USMS, dated April 26, 2006, the OFDT reiterated its position that the USMS should refrain from collecting any overpayments unless the detention facility engaged in fraudulent conduct. In addition, the OFDT has “directed the USMS to immediately negotiate with the jails to incorporate core rates which recently have been established as part of an initiative to implement an indexed fixed-price method for obtaining jail beds from state and local governments.”

Recently, in response to a request from the OFDT, the General Counsel for the Justice Management Division (JMD) reviewed the IGAs audited by the OIG and issued a legal opinion stating that the IGAs are “fixed price agreements that do not contain a basis for the Department to seek retroactive price adjustment. . . .” as a matter of contract law. However, the JMD General Counsel acknowledged that depending on the circumstances of each case, the Department may have a legal remedy for recovering overpayments where a state submitted inaccurate cost information during the IGA formation process. In addition, he noted that nothing in the agreements prohibits the DOJ from seeking a prospective rate adjustment.

### **OIG Position**

The OIG disagrees with the OFDT’s and JMD’s conclusion that the IGAs at issue are fixed-rate agreements based on factors other than cost. We do not dispute that, at least since the passage of Section 119, the USMS has the authority to enter into IGAs based on other factors, and that profit may be included in the calculation of the IGA rate. However, the OIG does not agree that the USMS exercised its authority to do so for past IGAs, including the 31 that were the subject of the OIG audits.<sup>35</sup> Indeed, even the OLC opinion on which the OFDT relies describes the IGAs that pre-date passage of Section 119 as having “typically set compensation for these services at the cost actually incurred by the provider.” The OIG believes that the term “fixed rate” described the unit price to be paid in IGAs, but that it was calculated based on the state or local government providing an accurate description of its allowable costs. Moreover, the term was used in the agreements well before passage of Section 119, and its meaning must be considered in light of the entire agreement.<sup>36</sup> As we describe below, support

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<sup>35</sup> In a memorandum dated June 6, 2006, the OIG discussed its disagreement with the OFDT. See Appendix VII for a copy of the memorandum.

<sup>36</sup> For example, the 1984 IGA with the Orleans Parish, Louisiana, Criminal Sheriff’s Office used the term “fixed rate” to describe the unit price paid.

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for our view is found in: (1) the language of the agreements, (2) a memorandum, dated August 1, 2002, from the prior Detention Trustee, and (3) and the USMS' own past practice.

Moreover, regardless of whether one considers the agreements we have audited to be fixed-rate vehicles based on factors in addition to cost as asserted by OFDT, or cost-based agreements as we believe, the OIG disagrees that the USMS can seek the recovery of overpayments only if "fraudulent conduct" can be proved, as stated in the OFDT's April 26, 2006, memo. Not all legal remedies require a showing of fraudulent conduct. For example, the False Claims Act requires no more than a showing of deliberate ignorance or reckless disregard for the truth or falsity of information presented to the government. As a result, if the state or local government presented inaccurate cost information to the USMS that formed the basis for the jail-day rate established, the USMS may be able to recover overpayments even in the absence of "fraudulent conduct" by the state or local government.

In addition, the USMS is not limited to strict legal remedies for recouping overpayments. Rather, it may utilize such methods as offsetting overpayments against future payments for detention services or negotiating reduced rates in subsequent years. Indeed, the USMS IGA Manual section 9, instructs IGA analysts upon receiving an OIG or USMS audit report to determine the revised amount of the over or underpayment, reduce the over or underpayment to a revised jail-day rate, negotiate the adjusted jail-day rate, discuss and agree upon a repayment method, and prepare a modification showing the adjusted jail-day rate, estimated jail days, and an estimated pay-off time or repayment schedule. Moreover, as discussed in more detail below, the USMS has in fact recovered overpayments identified in past OIG audits using just such means.

### *Language of the Agreements*

The cost sheet instructions that were given to state and local governments when they sought the IGAs defined an IGA as a formal written agreement between the USMS and a state or local government to house federal detainees at a jail-day rate based on actual and allowable costs for the same level of service provided to state or local prisoners in a specific facility.<sup>37</sup> The cost sheet instructions informed the preparer of the following:

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<sup>37</sup> See Appendix III for an example of a cost sheet form and instructions.

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- A jail-day rate will be computed on the basis of actual and allowable costs associated with the operation of the facility that benefit federal detainees during the most recent accounting period.<sup>38</sup>
- "Local Governments shall only request the reimbursement of costs to the extent provided for in the latest revision of OMB Circular No. A-87."

The cost sheet also contained the following certification statement that the Comptroller or Chief Financial Officer of the local government was required to sign attesting to the fact that the cost sheet does not include any costs prohibited by the Circular:

<b>Section VI - Certification Statement</b>	
<i>This is to certify that, to the best of my knowledge and belief the data furnished in Schedules B through G are accurate, complete and current, and do not include any unallocable, or unallowable, or unallowable costs prohibited by OMB Circular No. A-87 (Cost Principles for State and Local Governments) or any cost not related to the jail facility as discussed on Form USM-243 (Cost Sheet for Detention Services). The records of this agency area available for review and audit by the authorized representative of the U.S. Government to verify any jail per diem rate negotiated.</i>	
Signature _____	Date _____
Name _____	Title _____
Page 2 of 10	
Form USM-243 (Revised 1/97) Automated 01/01	

The USMS IGA Manual states that an IGA analyst at USMS headquarters is supposed to review the cost sheet for cost allowability and the accuracy of capacity and average daily population figures.

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<sup>38</sup> Actual costs refer to costs incurred by a detention facility. According to OMB Circular A-87, for actual IGA costs to be allowable, costs must be: (1) necessary and reasonable; (2) authorized or not prohibited under state or local laws or regulations; (3) in conformity with laws, regulations, and terms and conditions of the award; (4) accorded consistent treatment; (5) in accordance with generally accepted accounting principles; (6) net of all applicable credits; and (7) adequately documented.

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Based on the cost sheet information, the IGA analyst then calculated a jail-day rate using the following formula:

Jail-Day Rate Calculation		
256	365	93,440
	X	=
Average Daily Population	Days Per Year	Jail-Days
<hr/>		
\$5,088,716	93,440	\$54.46
	÷	=
Total Operating Cost	Jail Days	Jail-Day Rate

Source: USMS IGA Manual

As detailed in the table, a facility with an average daily population of 256 would equate to 93,440 annual jail days. If the facility's total annual operating costs were \$5,088,716, this amount would be divided by the 93,440 annual jail days to arrive at a jail-day rate of \$54.46. In this example, the USMS would pay the state or local facility \$54.46 to house one of its prisoners for one day.

In addition, the IGAs state that the local governments are responsible for complying with OMB Circular A-87. The agreements inform the local governments that they will be held accountable for any overpayment, audit disallowance, or breach of the agreement that results in a debt owed to the federal government.

*Prior Detention Trustee Memorandum*

In a memorandum to the Deputy Attorney General dated August 1, 2002, the prior Detention Trustee agreed with the OIG's position.<sup>39</sup> The prior Detention Trustee noted that most if not all IGAs limited reimbursement to actual costs or to the same daily costs that state and local authorities incur to hold their own prisoners. Further, these IGAs did not allow for a payment of profit or fee to state and local governments. Accordingly, he concluded the following:

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<sup>39</sup> See Appendix VIII for a copy of the memorandum. The OIG's response to the memorandum is contained in Appendix IX.

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*[T]he issue of whether the Department may or may not pay a profit or fee should not be a contentious item in these audits, since the audits were conducted on IGAs where both the departmental component and the state or local governmental entity agreed to reimbursement of actual costs.*

As part of the August 2002 memorandum, the prior Detention Trustee attached a policy that required the USMS to submit written justification to the OFDT seeking prior approval and providing the basis for entering into fixed-price IGAs under Section 119. During our audit of the 31 IGAs, we did not identify any justifications or prior written approvals by the Detention Trustee that fixed-price detention services were acquired. As discussed in Finding II, the OFDT and USMS plan on exercising their Section 119 authority as part of the revamping of the IGA process.

### *USMS Past Practice*

We also noted that from 1997 to 2005 the USMS Program and Review Team (IGA Audit Branch) performed its audits in the same manner as the OIG (i.e., to determine if IGA jail-day rates were based on actual and allowable costs). For example, in a January 1998 audit of the [SENSITIVE INFORMATION REDACTED], the USMS IGA Audit Branch determined that a \$65 temporary jail-day rate was not supported and that the operating costs only supported a \$37.95 rate. The USMS Audit Branch recommended that the USMS “negotiate a revised jail-day rate based on the information contained in this report and actual cost and prisoner population data” and “remedy the \$3,883,433 in questioned costs.”<sup>40</sup> Similarly, in an October 1999 audit of the [SENSITIVE INFORMATION REDACTED], the USMS IGA Audit Branch reported that the supportable jail-day rate was \$4.22 less per prisoner than the rate that was in effect and concluded that the USMS had incurred \$127,874 in additional costs during FY 1998. Although no recommendations were developed, the report stated that the information was provided for use in any future rate negotiations and any collection efforts deemed appropriate.

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<sup>40</sup> As follow-up to the audit, the USMS revised the jail-day rate to \$41.65 based on the average daily population for FY 1996. In response to the recommendations for the [SENSITIVE INFORMATION REDACTED], the Eastern District’s Chief Deputy USM signed a *Request for Detention Services* to reduce the jail-day rate to \$41.65. However, the revised jail-day rate was never implemented. PAB officials could not tell us why the questioned costs were not recovered or resolved, or why the jail-day rate was not reduced.

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In addition, we noted that the USMS has in fact recovered overpayments identified in previous OIG audit reports. For example, the USMS recovered \$156,000 in overpayments from the [SENSITIVE INFORMATION REDACTED] Sheriff's Office over an extended period – September 2000 through August 2004 – by reducing the jail-day rate of \$32.97 by \$1.17, until the \$156,963 in overpayments was recouped. Similarly, as a result of our audit report on the USMS's IGA with [SENSITIVE INFORMATION REDACTED], the USMS negotiated a 5-year repayment schedule over which the jail repaid over \$1 million, as well as negotiated a reduced future rate.

### Conclusion

In the past, the USMS required detention facilities interested in housing federal detainees to submit a cost sheet as part of the application process. The USMS cost sheet requested financial and prisoner population information, and informed the preparer that the jail-day rate would be computed on the basis of actual, allowable, and allocable costs associated with the operation of the facility that benefit federal detainees during the most recent accounting period. Prior OIG audits often noted jail-day rates that exceeded the rate supported by a detention facility's allowable costs and average daily population.

The OIG recognizes that there are significant pressures on the USMS to obtain detention space. From the USMS perspective, not seeking recovery of overpayments may appear preferable to the operational and logistical costs of negotiating new jail-day rates and repayment plans or the risk of having to use a more distant facility because a facility will not accept a reduced jail-day rate or agree to a repayment plan. However, we believe the jail-day rates the OIG audited were based on an accurate submission of allowable costs, and that the USMS should remedy the questioned costs identified by the OIG by either collecting overpaid funds; providing documentation to support the existing IGA rate; adjusting the IGA rate and offsetting future payments over a reasonable time; or administratively waiving the questioned costs on a case-by-case basis, based on the inability to collect the funds or other exigencies such as a lack of other viable location, security problems, or significantly greater costs that would result from changing facilities. In addition, the USMS should consider whether, based on the audit findings, jail-day rates should be reduced prospectively.

**Recommendation**

We recommend that the USMS:

1. Address each open audit recommendation from prior OIG audits of IGAs, which collectively contain dollar-related findings of \$37 million.

## II. OFDT'S NEW IGA PRICING PROCESS

The OFDT is revamping the process for procuring detention space using IGAs. At the center of this overhaul is a new pricing model for determining the price reasonableness of a jail-day rate called eIGA. The pricing model starts with a [SENSITIVE INFORMATION REDACTED] core jail-day rate that was calculated based on [SENSITIVE INFORMATION REDACTED]. The rate is then adjusted, based on data describing various factors such as [SENSITIVE INFORMATION REDACTED], to arrive at an adjusted core rate. To assist IGA analysts in negotiating jail-day rates, the adjusted core rate is then compared to the state or local jail's proposed jail-day rate and to the rates of similar facilities. We believe that eIGA is a positive step to improving the process historically used to establish jail-day rates. However, we believe the OFDT should modify eIGA to capture a jail's average daily population, indirect costs, and revenue generated from a detention facility's operation (also known as credits). In turn, this information should be used to calculate a jail-day rate, based on costs, that is presented to the IGA analysts. We believe that presenting cost information as a single rate will give the USMS more evidence and leverage in its negotiations, and will help ensure that the Department negotiates reasonable jail-day rates.

### Revamping the Process for Procuring Detention Space

In our December 2004 audit of the OFDT, we recommended that the OFDT examine its policies and practices regarding IGAs to develop additional areas in which detention costs could be reduced, and develop a plan for reviewing and verifying the allowability of costs associated with individual IGAs.<sup>41</sup>

In addition, one of DOJ's strategies in its strategic plan for improving the management of detention resources relies on more accurate forecasting of detention needs, better coordination with ICE, and strengthened oversight. OMB Circular A-87 provides federal agencies latitude to work with states and localities for testing alternatives to cost reimbursement practices.

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<sup>41</sup> Department of Justice, Office of the Inspector General. Audit Report Number 05-04, *Audit of the Department of Justice Office of the Federal Detention Trustee*, December 2004.

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In April 2005, the OFDT formed an interagency working group consisting of representatives from the USMS, BOP, and ICE to review the costs associated with the use of state and local detention facilities. According to the OFDT, the working group also sought to standardize the process of entering into IGAs to ensure that the jail-day rates paid by the federal government were “fixed, fair, and reasonable” and would no longer be subject to unscheduled, possibly yearly, adjustments based on updated cost information.<sup>42</sup> The OFDT stated that it requested this review because of previous labor and data intensive process for establishing cost-based jail-day rates, disparate jail-day rates for similar detention centers, the difficulty in explaining the causes for disparity in jail-day rates between detention centers, and the concern that jail-day rates based on historical cost data may not reflect the current costs of running the detention center. As a result of the working group’s efforts, the OFDT is developing eIGA.

*e/IGA*

According to the OFDT, eIGA is an attempt to “e-gov” the IGA application process.<sup>43</sup> The OFDT believes that eIGA will improve the process of establishing IGAs by providing an automated system that establishes [SENSITIVE INFORMATION REDACTED] standard pricing for detention space and services provided by state and local facilities. Within eIGA is an econometric statistical pricing model for determining a fixed-price range for jail beds. The model starts with a [SENSITIVE INFORMATION REDACTED] base or core jail-day rate that was calculated using [SENSITIVE

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<sup>42</sup> According to OMB-87, a cost is reasonable if it does not exceed that which would be incurred by a prudent person, under the circumstances prevailing at the time the decision was made, to incur the cost. In determining reasonableness of a given cost, consideration should be given to: (a) whether the type of cost is necessary for the operation of the governmental unit or the performance of the federal award; (b) the restraints or requirement imposed by such factors as sound business practices; arms length bargaining; federal, state and other laws and regulations; and terms and conditions of the award; (c) market prices for comparable goods or services; (d) whether the individual concerned acted with prudence in the circumstances considering their responsibilities to the governmental unit, its employees, the public at large, and the federal government; (e) significant deviations from the established practices of the governmental unit which may unjustifiably increase the federal award’s cost.

<sup>43</sup> The President’s management agenda includes an initiative to expand Electronic Government (e-gov). The purpose of e-gov is to use internet-based technology to make it easier for citizens and businesses to interact with the government.

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INFORMATION REDACTED].<sup>44</sup> [SENSITIVE INFORMATION REDACTED].<sup>45</sup> According to OFDT, each of these factors had a statistically significant impact on the jail-day rate. A schedule of adjustments was developed assigning values to each factor to aggregate with the [SENSITIVE INFORMATION REDACTED] core rate, as shown in the samples below:

Adjustments for Determining the Applicable Core Per Diem Rate			
Characteristic	[SENSITIVE INFORMATION REDACTED]	[SENSITIVE INFORMATION REDACTED]	[SENSITIVE INFORMATION REDACTED]
Core Rate	[SENSITIVE INFORMATION REDACTED]		
[SENSITIVE INFORMATION REDACTED]			
Actual Jail-Day Rate	\$ 59.00	\$ 60.00	\$ 52.00

Source: OFDT

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<sup>44</sup> As shown in Appendices VII and X, we have expressed concern with the [SENSITIVE INFORMATION REDACTED] core rate because our individual IGA audits often note significant variances between [SENSITIVE INFORMATION REDACTED] and the rates supported by the detention facilities' allowable costs and average daily populations. According to the OFDT, [SENSITIVE INFORMATION REDACTED]. The OFDT also stated that the core rate will be assessed and adjusted, if necessary, as eIGA is populated with expense information.

<sup>45</sup> According to the OFDT, it uses [SENSITIVE INFORMATION REDACTED] [SENSITIVE INFORMATION REDACTED] for the following reasons: [SENSITIVE INFORMATION REDACTED]. We discuss the concerns with using [SENSITIVE INFORMATION REDACTED] further in the Establishing IGAs with eIGA section of this report.

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The model-generated rate, known as the adjusted core rate or the “should cost” rate, will be provided to the IGA analyst, with [SENSITIVE INFORMATION REDACTED], as shown in the screen shot below:<sup>46</sup>

**Screen Shot of Rate Comparison<sup>47</sup>**

SUMMARY		Request Date: 10/26/2006 4:57:49 PM	
Rates		Total Capacity	Total FTEs
Proposed:	\$65.00	230	60
Current:	\$0.00		
Guard Rate:	\$18.00		
RATE COMPARISON			
[SENSITIVE INFORMATION REDACTED]			

Source: OFDT

*Assessing Model Results*

The OFDT assessed the reliability of the model by comparing a sample of the adjusted core rates determined through the application of the model to rates based on actual and allowable costs. The OFDT defined an adjusted core rate as acceptable if it [SENSITIVE INFORMATION REDACTED] of a jail-day rate based on actual and allowable costs.

The OFDT’s assessment revealed that the sampled adjusted core rates [SENSITIVE INFORMATION REDACTED] for 41 percent of the facilities. For 32 percent of the facilities, the adjusted core rates exceeded by more than [SENSITIVE INFORMATION REDACTED] jail-day rates based on actual and allowable costs. For 27 percent of the facilities, the adjusted core rates were [SENSITIVE INFORMATION REDACTED] less than the rates based on actual and allowable costs.

According to the OFDT, departures from the model may be warranted when the schedule of adjustments do not adequately reflect the facility characteristics or specialized services provided by the facility. For example, in some cases a proposed rate may include full medical or transportation services that the adjusted core rate would not cover. The OFDT stated that

<sup>46</sup> The [SENSITIVE INFORMATION REDACTED] was derived from regulations formerly included in the Federal Acquisition Regulation [SENSITIVE INFORMATION REDACTED].

<sup>47</sup> In this screen shot, the core rate is presented after adjustments.

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departures from the model would be made on a case-by-case basis. In addition, the OFDT concluded that departures from the model may also be warranted when discontinuing the use of the facility would substantially disrupt the operations of the USMS, result in added costs for using alternative facilities, or otherwise have a substantial programmatic impact on field operations.

An example of a justified departure from the adjusted core rate is the [SENSITIVE INFORMATION REDACTED]. The adjusted core rate for the [SENSITIVE INFORMATION REDACTED] is \$64.22. However, our January 2005 IGA audit of the [SENSITIVE INFORMATION REDACTED] revealed that the jail-day rate of \$93.92 was supported by its actual and allowable costs. According to the OFDT, the [SENSITIVE INFORMATION REDACTED] provides a "special mission" that justifies a rate higher than the adjusted core rate. Specifically, the [SENSITIVE INFORMATION REDACTED] housed [SENSITIVE INFORMATION REDACTED]. Accordingly, the [SENSITIVE INFORMATION REDACTED] sometimes incurs extraordinary expenses in security and overtime [SENSITIVE INFORMATION REDACTED].

### **Establishing IGAs with eIGA**

The OFDT procurement division and IT division are working on and testing the automation of the eIGA process. According to the OFDT, the eIGA system is set to be implemented in the first quarter of FY 2007.

Once eIGA is operational, detention facilities will electronically apply for an IGA by completing a short application that captures information on capacity and staffing, jail operating expense information, services provided, oversight and accreditations, health care policies, and a proposed jail-day rate.<sup>48</sup> The OFDT has incorporated into eIGA a series of help buttons and said that it will establish a help desk that jails can telephone if they need assistance completing the application.

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<sup>48</sup> The eIGA's jail operating expense information includes many of the cost categories captured on a cost sheet including a jail's actual and projected expenses on personnel salaries and benefits, consultant and contract services, medical care and treatment, facility and office, safety and sanitation, and insurance. Unlike the cost sheet, however, the jail operating expense information will not capture average daily population, indirect costs, or revenue generated from a detention facility's operation (also known as credits). In addition, under eIGA a jail will not have to certify that the expense information provided is accurate as it is currently required to do under the traditional process for establishing jail-day rates. As discussed later in this report, we are concerned about how USMS IGA analysts will use the jail operating expense information.

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After completing the application, the jail will transmit it to OFDT for a preliminary review. An OFDT analyst has the option to either forward the application to the USMS for negotiation or reject the application if it is not complete or the jail's proposed rate is excessive. Although the OFDT believes that very few applications will be rejected upon submission by the jail, a comment box is available for the OFDT to highlight areas of concern for the USMS to address during its negotiations.

Unlike the process historically used to compute jail-day rates, cost data will not be the basis for awarding IGAs. Rather, the award will be determined by "price reasonableness," which will be calculated by comparing a detention facility's proposed rate to the adjusted core rate range generated by the eIGA model and the established rates of similar facilities. According to OFDT, cost sheet data was not always reliable and did not address whether a price paid in a geographical area was reasonable compared to other facilities. For example, OFDT notes that some facility administrators may pay salaries to individual employees in excess of the norm for the facility, the county, or salaries generally paid in the correctional field for such positions. Under the process historically used to establish IGAs, the actual cost of the salaries, even if it is unreasonable in comparison to other county or correctional salaries in the regional area, would be allowable on an IGA. According to the OFDT, under the eIGA process, if a jail proposes a rate that far exceeds the adjusted core rate and the rate of similar facilities, a USMS IGA analyst could "drill down" into the jail operating expense information and compare salaries or overtime usage to that of similar local facilities to determine the possible causes for the excessive proposed rate. The OFDT believes that comparing proposed rates to the rates of similar facilities will promote cost efficiencies.

Although the USMS will negotiate jail-day rates with individual jails, OFDT will review and approve each jail-day rate before any rate is finalized. A complete record of the negotiation, including a market comparison of jail rates and life cycle of each IGA, will be documented in eIGA instead of the USMS's current paper files.

In addition, according to OFDT, jail-day rates established through eIGA will be fixed for 36 months. Historically, jails were allowed to seek increases to the jail-day rate after 1 year. Therefore, under eIGA jails will have an incentive to control costs because they will not be allowed to request a rate increase prior to 36 months unless there were major operational changes with respect the USMS's use of the jail. After 36 months, a jail seeking a rate increase will have to reapply through eIGA.

## OIG Concerns with eIGA

According to the OFDT, eIGA offers a number of benefits for improving how jail-day rates are established and monitored. For example, the eIGA initiative will replace the cumbersome paper-based process historically used by the USMS; collect actual and projected expense information, while the cost sheet only captures actual cost information for a single year; USMS IGA analysts will be able to quickly search the eIGA database and compare jail rate and expense information; control costs because IGA analysts will analyze the market of comparable jail-day rates and lock-in fixed jail-day rates for 3 years; and identify jails that are eligible for rate increases.

The OFDT stated that the primary benefit of using the new process is that an IGA analyst will compare the proposed and adjusted core rates to the rates of similar facilities. According to the OFDT, in determining what is a similar facility, emphasis will be placed on the relationship of a jail's expense information to that of other jails in the area (or within the state) that have a similar population, security level, size, staffing, and correctional programs offered. Additionally, when appropriate, a comparison to private and federal jail-day rates will be performed.

We received two demonstrations of the OFDT's plans for how IGAs will be established using eIGA. Based on these demonstrations, we believe that the eIGA concept is a positive step to improving the process historically used to establish jail-day rates. However, as discussed further in Finding III of this report, we identified significant deficiencies with how jail-day rates have been established and monitored in the past. Because eIGA is not yet operational, we were unable to test how jail-day rates will be established using eIGA. In addition, the OFDT has neither issued guidance nor trained IGA analysts on how jail-day rates will be established using eIGA. Therefore, it is difficult to predict how successful eIGA will be once operational.

During the course of this audit, the OIG expressed concern that the OFDT's initial eIGA plan not to require state and local jails to submit detailed cost information constituted a serious flaw in the OFDT's revised process.<sup>49</sup> As a result of our concerns, and to adequately address the applicability of the Service Contract Act, the OFDT added the jail operating expense

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<sup>49</sup> In prior memoranda, the OIG identified its specific concerns with the OFDT's proposed plans for revamping the process for establishing jail-day rates. See Appendices VII and X for a copies of the memoranda.

information to eIGA.<sup>50</sup> With the addition of the jail operating expense information, eIGA captures many cost sheet categories, including salaries and benefits, consultant and contract services, medical care and treatment, facility and office, safety and sanitation, and insurance. However, eIGA does not capture a jail's average daily population, indirect costs, or credits from a detention facility's operations.

We believe that the OFDT can improve eIGA to ensure that USMS negotiations help control rising detention costs by modifying the jail operating expense information to capture a jail's average daily population, indirect costs, and credits. In turn, this information should be used to calculate a jail-day rate, based on costs, that is presented to the IGA analysts as an additional field in the following summary screen shot:

**Summary Screen Shot of Negotiated Rate**

SUMMARY		Request Date: 10/26/2006 4:57:49 PM	
<b>Rates</b>		<b>Total Capacity</b>	<b>Total FTEs</b>
Proposed:	\$65.00	230	60
Current:	\$0.00		
Guard Rate:	\$18.00		
<b>RATE COMPARISON</b>			
[SENSITIVE INFORMATION REDACTED]			
Negotiated Rate:		\$64.50	Difference (%):

Source: OFDT

The OFDT stated that these will not be cost-based agreements, and that cost and average daily population data change daily. As discussed in Finding I, we recognize that OFDT and USMS may negotiate fixed-price IGAs not based on costs. However, we believe the true measure of eIGA's success will be to compare the rates negotiated through eIGA to a detention facility's actual and allowable cost. In our judgment, reducing the information captured in the jail operating expense information portion of eIGA to a single rate will give the USMS more evidence and leverage in its negotiations, and will help ensure fair and reasonable jail-day rates. Presenting this data is not difficult, can assist in reducing the jail-day rate paid by the USMS, and could provide an important check on the price

<sup>50</sup> The Service Contract Act requires contractors and subcontractors performing services on prime contracts in excess of \$2,500 to pay service employees in various classes no less than the wage rates and fringe benefits found prevailing in the locality, or the rates (including prospective increases) contained in a predecessor contractor's collective bargaining agreement. The Department of Labor issues wage determinations on a contract-by-contract basis in response to specific requests from contracting agencies. These determinations are incorporated into the contract.

reasonableness model as demonstrated in our review of jail-day rates that were established using the eIGA pilot program.

In addition, as shown by the above screen shot, [SENSITIVE INFORMATION REDACTED]. A detention facility potentially could earn at least a [SENSITIVE INFORMATION REDACTED] profit if its costs are [SENSITIVE INFORMATION REDACTED] and the jail-day rate is established at [SENSITIVE INFORMATION REDACTED]. This is possible because detention facilities could [SENSITIVE INFORMATION REDACTED].

### **Piloting the Model for Establishing IGAs**

In September 2005, the OFDT and USMS began using the eIGA model as part of a pilot process for awarding IGAs. However, because the eIGA system is not operational, jails applying for jail-day rates have continued to submit cost sheets, and the USMS requested from OFDT a “should cost” rate for a specific facility based on a manual eIGA process. The OFDT manually calculated the adjusted core rate and provided it to the USMS.

USMS IGA analysts then determined price reasonableness by comparing a requesting jail's proposed rate to the adjusted core rate provided by OFDT. Although USMS IGA analysts could have used the cost sheets submitted by the jails as part of its analysis in determining price reasonableness, we found that a cost sheet analysis by the USMS was not always performed. Further, unlike the planned process for eIGA, a comparison of proposed rates to similar facilities was not performed. The USMS has also continued to use the standard IGA language it has used for years (that jail-day rates are established based on actual and allowable costs associated with operating the facility).

As of June 2006, the OFDT and USMS had used the model to award approximately 90 IGAs as part of a pilot project. We judgmentally selected 11 of the 90 IGAs awarded and reviewed detailed documentation from OFDT and the USMS to determine how the awarded rates compared to the cost-based rate previously used in awarding IGAs. The following table shows our results on how the awarded rate compared to the cost sheet rate, the adjusted core rate, and the [SENSITIVE INFORMATION REDACTED]:

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**Sampled IGAs Awarded Using the Model<sup>51</sup>**

Facility Name	Requested Rate	Cost Sheet Rate <sup>52</sup>	[SENSITIVE INFORMATION REDACTED]	[SENSITIVE INFORMATION REDACTED]	[SENSITIVE INFORMATION REDACTED]	Awarded Rate
<b>[SENSITIVE INFORMATION REDACTED]</b>						
[SENSITIVE INFORMATION REDACTED]	\$64.32	\$64.32	[SENSITIVE INFORMATION REDACTED]	[SENSITIVE INFORMATION REDACTED]	[SENSITIVE INFORMATION REDACTED]	\$64.32
[SENSITIVE INFORMATION REDACTED]	\$88.25	\$85.52	[SENSITIVE INFORMATION REDACTED]	[SENSITIVE INFORMATION REDACTED]	[SENSITIVE INFORMATION REDACTED]	\$85.52
[SENSITIVE INFORMATION REDACTED]	\$75.00	\$79.67	[SENSITIVE INFORMATION REDACTED]	[SENSITIVE INFORMATION REDACTED]	[SENSITIVE INFORMATION REDACTED]	\$70.00
[SENSITIVE INFORMATION REDACTED]	\$78.06	\$68.46	[SENSITIVE INFORMATION REDACTED]	[SENSITIVE INFORMATION REDACTED]	[SENSITIVE INFORMATION REDACTED]	\$65.00
<b>[SENSITIVE INFORMATION REDACTED]</b>						
[SENSITIVE INFORMATION REDACTED]	\$80.00	\$76.68	[SENSITIVE INFORMATION REDACTED]	[SENSITIVE INFORMATION REDACTED]	[SENSITIVE INFORMATION REDACTED]	\$80.00
[SENSITIVE INFORMATION REDACTED]	\$61.42	\$54.13	[SENSITIVE INFORMATION REDACTED]	[SENSITIVE INFORMATION REDACTED]	[SENSITIVE INFORMATION REDACTED]	\$54.13
[SENSITIVE INFORMATION REDACTED]	\$60.46	\$56.28	[SENSITIVE INFORMATION REDACTED]	[SENSITIVE INFORMATION REDACTED]	[SENSITIVE INFORMATION REDACTED]	\$51.16
[SENSITIVE INFORMATION REDACTED]	\$50.00	\$38.22	[SENSITIVE INFORMATION REDACTED]	[SENSITIVE INFORMATION REDACTED]	[SENSITIVE INFORMATION REDACTED]	\$45.00
<b>[SENSITIVE INFORMATION REDACTED]</b>						
[SENSITIVE INFORMATION REDACTED]	\$85.00	\$102.12	[SENSITIVE INFORMATION REDACTED]	[SENSITIVE INFORMATION REDACTED]	[SENSITIVE INFORMATION REDACTED]	\$82.00
[SENSITIVE INFORMATION REDACTED]	\$53.00	\$54.28	[SENSITIVE INFORMATION REDACTED]	[SENSITIVE INFORMATION REDACTED]	[SENSITIVE INFORMATION REDACTED]	\$44.97
[SENSITIVE INFORMATION REDACTED]	\$77.34	\$77.55	[SENSITIVE INFORMATION REDACTED]	[SENSITIVE INFORMATION REDACTED]	[SENSITIVE INFORMATION REDACTED]	\$86.00

Source: OFDT and USMS

<sup>51</sup> As a result of OFDT calculating the adjusted core rates incorrectly, the USMS believed it was establishing jail-day rates that [SENSITIVE INFORMATION REDACTED] for the facilities in our sample.

<sup>52</sup> To arrive at a cost sheet rate, we reviewed the cost sheets and records of negotiation that were prepared by the USMS IGA analysts. We further adjusted the total allowable costs as appropriate and divided by the average daily population. In some cases, the information presented did not provide us with enough information to evaluate the allowability of costs contained on the cost sheets. Therefore, our calculation could vary from a jail's actual and allowable costs.

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Although eIGA will collect a jail's expense information that will be used in analyzing the proposed jail-day rate, the OFDT does not plan on presenting this information to the IGA analysts as a single rate for comparison to the proposed rate, adjusted core rate, and the rates of similar facilities. Our review, however, revealed the benefits of presenting the cost information as a rate to help establish a reasonable jail-day rate.

- [SENSITIVE INFORMATION REDACTED] - The USMS IGA analyst used the cost sheet as the basis for negotiations with the Center. The cost sheet supported a jail-day rate of \$54.13, which was the rate offered to and accepted by the Center. The rate [SENSITIVE INFORMATION REDACTED]. The Center originally requested a jail-day rate of \$61.42, which [SENSITIVE INFORMATION REDACTED]. However, the cost sheet provided by the Center only supported a rate of \$54.13. Using this cost information, the USMS negotiated that rate. Without the cost sheet information, the USMS may have accepted the original rate of \$61.42 as reasonable based on the model, at an extra estimated cost to the taxpayer of almost \$270,000 per year.

However, it was not clear to us whether the USMS always analyzed cost sheets or considered in negotiations for the jail-day rate both the cost and the model-generated rate, as shown in the following example:

- [SENSITIVE INFORMATION REDACTED] - The USMS IGA analyst offered the [SENSITIVE INFORMATION REDACTED] \$45 because, according to the record of negotiation, it "[SENSITIVE INFORMATION REDACTED] 'should cost rate'." There was no indication in the file that the IGA analyst reviewed the cost sheet. Our review of the cost sheet revealed that allowable costs divided by the average daily population only supported a rate of \$41.64. In addition, the [SENSITIVE INFORMATION REDACTED] represented on the cost sheet that its average daily population was 660 inmates. However, we noted that [SENSITIVE INFORMATION REDACTED] presents an average daily jail population on its web site of 719. If the average daily population of 719 was used to calculate a jail-day rate, the jail-day rate would be \$38.22, or 15 percent lower than the \$45 jail-day rate that was awarded, resulting in possible additional costs to the USMS of about \$148,000 per single year.

## Conclusion

In FY 2006, the DOJ budgeted more than \$1 billion on the housing and subsistence of federal detainees, about 75 percent of which is spent on IGAs. At a time of rising detention costs, it is critical that the OFDT and USMS control the amount of profit earned by state and local detention facilities that house federal detainees. The DOJ is moving away from its past policy of reimbursing state and local jails at a rate based on their actual and allowable costs to a system, called eIGA, which will negotiate a fixed jail-day rate based on an adjusted core rate and the jail-day rates of similar facilities.

Because eIGA is not yet operational, we were unable to test how jail-day rates will be established using the new system. In addition, the OFDT has not issued guidance on how jail-day rates will be established using eIGA. As a result, it is difficult to predict how successful eIGA will be once operational.

We believe that the eIGA concept is a positive step to improving the process previously used to establish jail-day rates. However, in our judgment, the OFDT can improve eIGA to ensure that USMS negotiations help control rising detention costs. The OFDT stated that the primary benefit of using the new process is that an IGA analyst will compare the proposed and adjusted core rates to the rates of similar facilities. Although eIGA will capture many of the cost sheet categories, it will not capture a jail's average daily population, indirect costs, or credits, which are needed to compute a detention facilities costs. We believe that the OFDT should modify eIGA to capture this information, and present this information to the IGA analysts as a cost-based rate because the true measure of eIGA's success will be to compare the rates negotiated through eIGA to a detention facility's actual and allowable costs. Presenting the cost information as a single rate will give the USMS more evidence and leverage in its negotiations, and will help IGA analysts establish fair and reasonable jail-day rates. Presenting this data is not difficult, can assist in reducing the jail-day rate paid by the USMS, and could provide an important check on the price reasonableness model as demonstrated in our review of jail-day rates that were established using the eIGA model.

**Recommendations**

We recommend that the OFDT:

2. Modify eIGA so that it captures average daily population, indirect costs, and credits as part of its Jail Operating Expense Information.
3. Modify eIGA so that it presents a jail-day rate to the IGA analysts based on the actual and allowable costs of the jail.
4. Develop procedures for re-examining the [SENSITIVE INFORMATION REDACTED] core rate to ensure that it accurately reflects the [SENSITIVE INFORMATION REDACTED] based on actual and allowable costs.

### III. IMPROVEMENTS NEEDED IN IGA OVERSIGHT

Consistent with our prior IGA audits, our review of 34 sampled IGAs during this audit identified jail-day rates that lacked adequate supporting documentation. As a result, the USMS did not have assurance that the established jail-day rates were supported and reasonable. Although the OFDT is revamping the process for procuring detention space through eIGA, we believe that improvements on the part of the USMS are still needed in policies and procedures on awarding IGAs through eIGA, training of IGA analysts, and defining responsibilities for establishing and monitoring IGAs.

#### Unsupported Jail-Day Rates

In the sample of 34 IGAs that we reviewed in connection with this audit, we found that USMS IGA analysts generally reviewed cost sheets and documented their analysis of the costs in establishing jail-day rates. Additionally, the USMS IGA Audit Branch sometimes performed detailed pre-award reviews of the detention center's costs that were used by the USMS IGA analysts to establish jail-day rates based on actual and allowable costs. For example, the [SENSITIVE INFORMATION REDACTED] submitted a cost sheet to the USMS on March 1, 2000, based on FY 1999 costs, requesting a jail-day rate of \$103.27. The USMS conducted an audit of the cost sheet and developed an audited rate of \$84.39, which the USMS used in the IGA awarded to [SENSITIVE INFORMATION REDACTED] in September 2000.

The USMS pre-award audits allowed the USMS to identify unallowable costs and establish jail-day rates based on actual and allowable costs. However, in the absence of pre-award audits we often found during OIG audits unallowable costs such as transportation salaries and interest; cost sheets that contained cost and average daily population that did not support the requested rate; and understated average daily population numbers. According to the USMS, pre-award audits of new IGAs or rate changes to existing IGAs are declining due to staffing and budget constraints.<sup>53</sup>

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<sup>53</sup> For example, the [SENSITIVE INFORMATION REDACTED] Jail requested a jail-day rate increase from \$52 to \$94.15 based on its FY 2003 cost sheet. The \$52 jail-day rate was a temporary rate based on FY 2001 costs. The USMS initially planned to audit [SENSITIVE INFORMATION REDACTED] request for a rate increase, but after providing a temporary rate increase from \$52 to \$80, the audit was cancelled. In March 2004, the jail-day rate was increased to \$93.30.

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Our review of 34 IGAs also revealed jail-day rates that lacked adequate supporting documentation, as described below, and that were set at rates far above actual costs.<sup>54</sup> According to a USMS official, detention facilities fight for every penny they request, and sometimes jail-day rates that exceed allowable costs are established to appease them.

*[SENSITIVE INFORMATION REDACTED]*

In a letter to the USMS dated July 31, 1992, the [SENSITIVE INFORMATION REDACTED] Superintendent expressed an interest in entering into an IGA at a rate of \$65 per jail day. The Superintendent submitted a preliminary jail budget since the jail had only been operating during that month and did not have actual cost data to evaluate.

In November 1992, the USMS established a temporary jail-day rate with the [SENSITIVE INFORMATION REDACTED] to house federal detainees at \$65.<sup>55</sup> However, the [SENSITIVE INFORMATION REDACTED] budgeted cost data only supported a jail-day rate of \$49. According to the USMS, it established a rate of \$65 based on anticipated savings in transportation and personnel costs due to the close proximity of the [SENSITIVE INFORMATION REDACTED] to the federal courthouse, a need to alleviate a critical shortage of jail space in [SENSITIVE INFORMATION REDACTED], and a comparison of jail-day rates to house detainees in the SENSITIVE INFORMATION REDACTED]. The USMS documented that it was paying jail-day rates to house detainees ranging from \$23 to \$85 at the 20 jails located in [SENSITIVE INFORMATION REDACTED]. However, only two of [SENSITIVE INFORMATION REDACTED] 20 jails had jail-day rates of \$85, and those two jails were located in the high-cost areas of [SENSITIVE INFORMATION REDACTED]. The jail-day rate charged by two other detention facilities in the [SENSITIVE INFORMATION REDACTED] area, where [SENSITIVE INFORMATION REDACTED] is located, averaged \$47.

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<sup>54</sup> In addition to the examples provided, we noted deficiencies with the following IGAs: Floyd County Detention Center, Georgia; Yolo County Jail, California; Orleans Parish Criminal Sheriff's Office, Louisiana; and the Albany County Correctional Facility in New York.

<sup>55</sup> A temporary rate agreement can be effective for up to 12 months pending receipt and review of actual cost data. It is negotiated when a facility does not have prior cost history. The [SENSITIVE INFORMATION REDACTED] temporary rate was only effective for 9 months, at which time the [SENSITIVE INFORMATION REDACTED] was to submit a cost sheet.

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In October 1998, the [SENSITIVE INFORMATION REDACTED] submitted a cost sheet requesting a jail-day rate of \$55. Our review of the costs and inmate population listed on the cost sheet only supported a \$52.26 jail-day rate. Despite the revised cost sheet, the USMS continued to pay the [SENSITIVE INFORMATION REDACTED] \$65 per jail day, resulting in overpayments totaling almost \$2.9 million for FYs 2004 and 2005.

*[SENSITIVE INFORMATION REDACTED]*

In April 2003, the [SENSITIVE INFORMATION REDACTED] submitted a cost sheet based on FY 2002 costs and requested a jail-day rate of \$59. Based on its desk review, the PAB determined that the cost sheet only supported a rate of \$43.92, and established a temporary IGA rate of \$44 for 4 months beginning June 1, 2003.

As a result of a limited cost review by the USMS audit team, the PAB issued a modification to increase the temporary jail-day rate to \$45.61, with an expiration date of November 30, 2003. This temporary agreement was extended twice through February 29, 2004, and subsequently lapsed. On June 1, 2004, the temporary rate was reinstated and increased to \$51.35. The increase was made retroactive to June 1, 2003 (the effective date of the temporary IGA increase). As of February 2006, the temporary rate was still in effect.

As discussed later in this report, the USMS's policies are contradictory with the respect to the retroactive application of rate increases. The USMS IGA Manual states that retroactive jail-day rates can be approved, but only under extraordinary circumstances (such as a rate increase request being delayed due to USMS headquarters backlog or as a result of an audit). However, USMS Directive 9.26 simply states that rate increases will not be applied retroactively. In any case, there was no documentation to support the temporary jail-day rate increase to \$51.35, or the retroactive application of the increase. USMS officials could not provide us with any justification for the rate increase or for its retroactive application. Additionally, this temporary rate exceeded the 12-month limit established in the IGA Manual. Based on the USMS's use of this jail since the effective date of this rate increase, we estimate that the USMS may have overpaid \$304,668 for prisoner bed space for FYs 2003 through 2005.

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*[SENSITIVE INFORMATION REDACTED]*

The [SENSITIVE INFORMATION REDACTED] submitted a cost sheet on June 22, 2004, requesting a rate increase to \$60. However, the costs identified on the cost sheet only supported a rate of \$35.23. The USMS made the temporary rate of \$45 permanent on September 1, 2004, even though the costs identified on the cost sheet did not support the \$45 rate.

Our review of the cost sheet also revealed the following deficiencies:

- Total operating costs divided by the average daily population equaled \$35.23, not the proposed \$60 rate;
- Salaries for transportation officers were identified as personnel costs, even though the USMS was paying separately for transportation; and
- Four years of depreciation were included on the cost sheet, although only 1 year is allowed.

Despite the cost sheet deficiencies, the USMS IGA analyst recommended a permanent rate of \$45. According to PAB officials [SENSITIVE INFORMATION REDACTED] is an example of a case where the USMS set the temporary rate too high and the detention center refused to accept a lower rate. Additionally, upon closer review of the cost sheet and the corresponding support, we noted interest expense and depreciation costs were included in allowable costs twice, as both direct and indirect costs on the cost sheet. We determined that the cost sheet only supported a \$32.50 jail-day rate, rather than \$45. Based on the USMS's use of this jail since the effective date of the rate increase, we estimate that the USMS may have paid an additional \$264,350 for prisoner bed space for FYs 2004 and 2005.

*[SENSITIVE INFORMATION REDACTED]*

The USMS provided a temporary rate increase to the [SENSITIVE INFORMATION REDACTED] from \$42 to \$49.39, effective February 1, 2003, pending the results of a planned USMS audit. On May 23, 2003, the USMS issued an audit report that supported a lower rate of \$40.49. Although the lower rate was recommended, a modification to lower the rate was not implemented until May 2, 2005. According to the IGA Manual, temporary rates can be in effect for up to 12 months pending receipt and review of actual cost data. However, this temporary rate was in effect for 27 months.

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PAB officials told us that the lower rate was not immediately implemented because of a backlog of IGA actions, which is discussed later in this report.<sup>56</sup> Further, an IGA analyst told us that the modification was not immediately implemented because the USM in this district did not want the lower rate implemented. Based on the USMS's use of this jail since the effective date of the rate increase, we estimate that the USMS may have paid an additional \$590,892 for bed space for FYs 2003 through 2005.

*[SENSITIVE INFORMATION REDACTED]*

The USMS provided a temporary rate increase from \$75 to \$80 on September 1, 2002, to the [SENSITIVE INFORMATION REDACTED]. The temporary rate was provided pending the results of a planned USMS audit. On November 5, 2002, the USMS issued an audit report that supported a lower IGA rate of \$73.11. However, rather than reduce the IGA rate, the \$80 rate was extended five times through January 31, 2004 (17 months), to allow the locality to submit new cost data. A new cost sheet was subsequently submitted and the PAB analysis of this cost sheet supported a jail-day rate of \$78.48. Despite this analysis, the temporary rate of \$80 was made permanent on February 1, 2004.

The Acting PAB Chief said that [SENSITIVE INFORMATION REDACTED] was "fighting for every penny," and the sheriff would not sign the IGA agreement for less than the rate he requested; therefore, the temporary rate was extended even though the USMS audit identified a lower supported rate. [SENSITIVE INFORMATION REDACTED] was allowed to submit more current cost data to try to support the higher requested rate. The Acting Chief also told us that the USMS had "leverage" over this facility to provide bed space at the lower rate because [SENSITIVE INFORMATION REDACTED] received funds under the Cooperative Agreement Program (CAP), but the USMS did not exercise this leverage.<sup>57</sup> Based on the USMS's use of this jail since the effective date of this rate increase, we estimate that the USMS may have overpaid \$461,127 for bed space for FYs 2003 and 2004.

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<sup>56</sup> IGA actions include establishing a new IGA, revising the jail-day rate; and establishing a limited or temporary use IGA.

<sup>57</sup> In locations where detention space is scarce, the USMS provides state and local governments with funds under the CAP to improve local jail facilities and to expand jail capacities. In return, the USMS receives guaranteed detention bed space for its federal detainees. Use of the bed space under a CAP agreement also requires an IGA between the USMS and the facility. When the USMS uses the bed space guaranteed by the CAP, it pays a jail-day rate to the facility for each detainee as established through the IGA. The CAPs state that recipients shall accept a jail-day rate that is supported by actual and allowable jail operating costs.

## Policies and Procedures

The guidance available to the IGA analysts and district personnel for reviewing IGAs include the IGA Manual, the USMS Directives, the instructions that are provided with the cost sheet, OMB Circular A-87, and an OFDT memorandum to the Deputy Attorney General on implementing Section 119, dated August 1, 2002. The OFDT's and USMS's policies and procedures must be an integral part of their financial and business practices for awarding and monitoring IGAs. They must contain measures for: (1) protecting resources against waste, fraud, and inefficiency; (2) ensuring accuracy and reliability in financial and operating data; (3) securing compliance with policies; and (4) evaluating performance.

Our review of the available guidance found that significant improvements in the guidance provided to IGA analysts are needed as part of the revamping of the IGA award process. The IGA Manual provides a general framework of the responsibilities and actions required for the processing of IGAs. For example, the IGA Manual requires an IGA analyst to review the cost sheet, calculate a potential jail-day rate, and prepare a record of negotiation documenting the discussions and rationale for the established jail-day rate. The USMS Directives provide additional guidance, but only with respect to district level responsibilities. However, neither the IGA Manual nor the USMS Directives incorporate the provisions of Section 119 of the 2001 Department of Justice Appropriation Act nor addresses how non-cost factors, such as a need to alleviate a critical shortage of jail space in a district, should be considered and valued in establishing jail-day rates.

The example Record of Negotiation included in the IGA Manual is for a jail-day rate based only on allowable costs and average daily population and does not give any guidance on how to consider non-cost factors in establishing the jail-day rate. The example identifies unallowable costs and adjustments made to the cost sheet. However, an example for addressing other factors or awarding a jail-day rate that deviates from the cost sheet is not provided.

As stated in 18 U.S.C. § 4013 (a)(4)(C), the jail-day rate charged for housing federal detainees shall not exceed the allowable costs or "*other conditions*" specified in the contract or cooperative agreement. As previously discussed, the USMS did not always document the basis for its decisions for establishing jail-day rates that exceeded allowable costs identified on the cost sheet. Without adequate documentation of how the jail-day rate was established, we were unable to determine whether the USMS paid a reasonable jail-day rate. If the USMS considers other

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conditions, it should specify the other conditions either in the IGAs or record of negotiation.

The guidance also does not identify specific types of information USMS IGA analysts should request to verify cost sheet data. Since IGA analysts are responsible for verifying cost data in connection with IGAs, we believe precise instructions should be provided on how to review costs, what constitutes acceptable documentation to support costs, and when to request additional information. Without precise instructions, IGA analysts must rely on their own judgment to determine the types of information to request and the types of expenditures to question.

The IGA Manual also specifies that retroactive jail-day rates can be approved, but only under extraordinary circumstances (such as a rate increase request being delayed due to USMS headquarters backlog or as a result of an audit). However, this portion of the IGA Manual appears to conflict with USMS Directive 9.26, which states that rate increases will not be applied retroactively. In any case, this policy should be clarified. During our audit, we identified a jail-day rate increase that was applied retroactively without a documented reason.<sup>58</sup>

As previously discussed, the OFDT is revamping the process for procuring detention space with the implementation of eIGA. While we recognize that the law allows the USMS to consider factors other than actual cost, we believe that the USMS should document the factors that were considered, and provide an economic analysis of those factors. In addition, the OFDT should issue guidance that places some reasonable limitation on the amount of profit allowed. In prior OIG audits, we found profit rates of 63 percent for the [SENSITIVE INFORMATION REDACTED] and 74 percent for [SENSITIVE INFORMATION REDACTED]. Additionally, during this audit, we found [SENSITIVE INFORMATION REDACTED] receiving a profit rate of

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<sup>58</sup> As stated earlier, the reasons for the IGA rate increases and the retroactive application of the rate increases for the [SENSITIVE INFORMATION REDACTED] were not documented.

38 percent.<sup>59</sup> Clearly documenting the factors considered in establishing a jail-day rate, including the intended profit rate, is a prudent and necessary practice for establishing the reasonableness of a jail-day rate.

As discussed in Finding II, the OFDT has not yet issued guidance related to its revamping of the IGA process using eIGA. Because the new IGA process involves significant changes from past practices, we believe that the OFDT should expeditiously issue guidance on awarding IGAs through eIGA before it becomes operational. The policies should include clear guidance on the following:

- how to negotiate with detention facilities;
- clearly documenting the basis for negotiated jail-day rates;
- evaluating cost and non-cost factors;
- when it is appropriate to deviate from the model and how deviations will be documented;
- defining, evaluating, and documenting the analysis of established rates of similar facilities in justifying a jail-day rate; and
- limitations on profit that should be included in IGAs.

## **Training**

Although IGA analysts collectively commit the USMS to pay detention facilities hundreds of millions of dollars annually, most of the USMS IGA analysts told us that training was not adequate for their level of responsibility. IGA analysts were provided only a 2-day training session by the IGA Audit Branch and took a course on OMB Circular A-87. Further, a USMS procurement official told us that the IGA analysts on the PAB staff are

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<sup>59</sup> Based on our audit of [SENSITIVE INFORMATION REDACTED], we determined the jail-day rate based on actual and allowable cost to be \$30.62, while the jail-day rate paid to [SENSITIVE INFORMATION REDACTED] was \$50.00 resulting in a profit of \$19.38 or 63 percent. In the [SENSITIVE INFORMATION REDACTED] audit, we determined the jail-day rate based on actual and allowable cost to be \$37.36, while the jail-day rate paid to [SENSITIVE INFORMATION REDACTED] was \$65, resulting in a profit of \$27.64 or 74 percent. In our current audit, we performed a review of the [SENSITIVE INFORMATION REDACTED] cost sheet and identified deficiencies. Based on the limited review we determined the jail-day rate based on actual and allowable cost to be \$32.50, while the jail day rate paid to [SENSITIVE INFORMATION REDACTED] was \$45.00, resulting in a profit of \$12.50 or 38 percent.

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no longer a part of the USMS Procurement Branch. This official stated that the entire process needs improvement because the number of PAB staff is limited, and the staff lacks procurement qualifications and formal training.

The USMS also does not have a formal training program or required training for its auditors. One auditor indicated that he had annual training to comply with his Certified Public Accountant license training requirements, but the other auditors had not received any training. PAB officials told us that they consider the audit staff to be experienced and therefore may not need training. However, district personnel responsible for soliciting and reviewing IGA requests indicated that the bulk of the training they received was on jail inspections and they received no training on what costs are allowable on USMS cost sheets when developing an IGA.

The IGA analysts perform an important function in the acquisition of detention space, and help ensure that IGAs provide the services the government needs at a reasonable rate.<sup>60</sup> With the conversion to establishing IGAs through eIGA, the OFDT intends to develop a 16-hour training course and handbook on how to establish fair and reasonable jail-day rates using eIGA. In light of this, we believe the USMS should take additional steps to improve IGA analyst training. The Federal Acquisition Institute (FAI) details a blueprint for training and development of procurement officials, as articulated in Section d(3) of the Office of Federal Procurement Policy Letter No. 97-01.<sup>61</sup> The blueprint provides the foundation for all contract specialist training and developmental activities to ensure consistency in acquisition activities across federal agencies and departments. The acquisition career model, as articulated by the FAI, offers advice on how to develop the skills and capabilities necessary for effective performance of acquisition roles, including the contract specialist role.

While all the competencies outlined in the blueprint may not directly relate to IGAs, the information provides a framework for IGA reviews and a better understanding of the important role the USMS IGA analyst has in the procurement process. Further, some of the competencies and training may

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<sup>60</sup> Although the PAB identifies staff as IGA analysts, the IGA Manual still uses the contract specialist title because IGA analysts were previously considered contract specialists. Whether staff are identified as contract specialists or IGA analysts, both job descriptions have similar roles in the acquisition process.

<sup>61</sup> In 1976, Congress established FAI under the Office of Federal Procurement Policy. The General Services Administration acts as its executive agent, providing funding and support for FAI. The mission of FAI is to foster and promote the development of a professional acquisition workforce into effective business leaders.

directly relate to IGA awards, such as: (1) acquisition planning, (2) price analysis and negotiations, (3) applying non-price factors, (4) communications and fact-finding, and (5) conducting discussions/negotiations.

### **Defining Responsibilities for Establishing and Monitoring IGA Costs**

As discussed in the Introduction to this report, USMS district personnel and the PAB share responsibility for establishing and monitoring IGA costs. We found that the oversight of IGAs by the Districts and USMS Headquarters was deficient.

#### *District Responsibilities*

The USMS Directives state that each United States Marshal (USM) will review the cost sheets for completeness and accuracy of information (particularly staffing levels and types of services provided). Since each district is responsible for identifying and coordinating its detention needs and submitting to the Prisoner Service Division (PSD) cost sheets as part of the IGA package, the PAB, a branch of the PSD, believes the districts are in a better position to identify and correct deficient cost sheets.

However, we interviewed personnel from the USMS districts of Eastern Virginia, Northern Georgia, Western Texas, Nevada, and Western North Carolina and determined that four of the five district offices performed no review of the cost sheets. Instead, district level employees only provided the cost sheet and a point of contact at USMS headquarters for assistance in helping with cost sheets. District officials from Northern Georgia told us that they reviewed cost sheets, but qualified their review by saying that they only review the cost sheets for "obvious errors."

In addition, officials at all five districts told us that they are not involved in the post-award monitoring of detention center costs other than billing reviews and annual jail inspections. Personnel in two districts (Western Texas and Northern Georgia) told us that they monitor IGA expiration dates. In Western Texas, a district representative stated that his district monitors expiration dates on temporary agreements, but most if not all of their IGAs do not include expiration dates and have been in effect for 20 years. However, we found that 12 of the 62 active IGAs in Western Texas had expiration dates, and 5 of the 12 had already expired. Additionally, in the Northern District of Georgia, the Deputy USM told us that the district monitors IGA expiration dates on a regular basis and that recently he noted an agreement was going to expire and started the process

to establish a new agreement. However, when we visited the facility with the expiring IGA, the facility had not begun the process to secure a new rate even though the current IGA was set to expire in a month.

From our review of 34 sampled IGAs, we determined that 6 either had expired or lapsed for 3 years before being reinstated.<sup>62</sup> According to PAB officials, these IGAs expired because the local governments were not timely in submitting their cost sheets or other data as required, and districts were not monitoring expiration dates.

Based on our review of the 34 IGAs, we queried the USMS's "Prisoners" database for additional expired IGAs and identified 451 IGAs that had expiration dates.<sup>63</sup> As of January 31, 2006, 330 of the 451 IGAs had expired. Of the 330 expired IGAs, we identified 157, 216, and 300 IGAs that were expired as of the end of FY 2003, 2004, and 2005, respectively. We estimate that the USMS paid over \$175 million on the expired IGAs during FYs 2003-2005.

#### *Programs and Assistance Branch Responsibilities*

At the Programs and Assistance Branch (PAB), IGA analysts review cost sheets for cost allowability and accuracy of capacity and average daily population. Despite the increasing need for prisoner bed space, reductions in PAB staff limited the USMS's ability to follow up on cost sheets and temporary rates and monitor IGAs after rates were established. We reviewed PAB staffing reports from 1999 through 2006 and found that staffing levels dropped by approximately 50 percent since 1999 as shown in the following table:

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<sup>62</sup> The six IGAs that either expired or lapsed were: LaSalle County Regional Jail, Texas; Randolph County Jail, North Carolina; Allegany County Jail, Maryland; Yolo County Jail, California; Connecticut Department of Corrections, Connecticut; and Western Tidewater Regional Jail, Virginia.

<sup>63</sup> "Prisoners" is an Access database that the USMS maintains on detention facilities used to house detainees. The database includes IGA agreements, private contracts for prisoner bed space, and federal detention centers.

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<b>PAB Authorized Positions and Vacancies</b>		
<b>Fiscal Year</b>	<b>Authorized Positions</b>	<b>Vacancies</b>
1999	11	2
2000	9	1
2001	9	1
2002	9	1
2003	7	2
2004	6	1
2005	6	1
2006	6	3

Source: PAB Staffing Reports

We found that the reduced staffing resulted in a backlog of IGA actions, such as the establishment of temporary or new jail-day rates, which needed to be reviewed.

The PAB uses a report entitled "Request for Detention Space (RDS)" to track IGA actions.<sup>64</sup> We reviewed the June 2005 RDS report and identified 251 backlogged IGA actions, some of which went as far back as FY 2002.

Further, we noted that the number of audits performed by the USMS IGA Audit Branch decreased from 29 audits in 2003, to 16 in 2004, to 1 audit in 2005. The decline in the number of audits put an increasing burden on IGA analysts to identify unallowable costs prior to the establishment of a jail-day rate.

With limited staffing and a backlog of IGA actions, the PAB performed limited post-award IGA monitoring. For example, as previously discussed, the IGA Manual indicates that a temporary rate should only be effective for up to 12 months pending receipt and review of actual cost data. However, the USMS established temporary rates that extended well beyond 12 months for the [SENSITIVE INFORMATION REDACTED].

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<sup>64</sup> RDS refers to the USM Form-243, "Request for Detention Space," which is prepared by the district and submitted to PAB along with the cost sheet and other supporting materials.

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According to PAB officials, once an IGA is in place it usually remains in effect at the initial jail-day rate until the detention center requests a change. Because we found limited monitoring of IGAs after an award, an IGA could remain in place indefinitely without the USMS knowing if a rate change is warranted. Yet, after an IGA is awarded, conditions may change that require an IGA to be revised and warrant a reduction in a jail-day rate. For example, in our audit of the [SENSITIVE INFORMATION REDACTED], the original FY 1996 cost sheet was based on an average daily population of 244.<sup>65</sup> However, in FY 2004 the average daily population was 877, an increase of 260 percent. This resulted in an audited rate that was \$17 less than the rate paid by the USMS, for total unallowable and unsupported costs of over \$5 million for 2 years.

Although PAB officials indicated that each district is in the best position to monitor IGAs, they also told us that districts may not report issues, especially if they believe the issue could result in the cancellation of an IGA. If a detention center cancels an IGA, the USMS would have to find a new facility to house detainees, which may be less convenient than the detention center being used. PAB officials told us that the USMS districts do not want to "stir up the pot," especially if they need the bed space.

Monitoring IGAs to ensure that the cost and average daily population continue to reflect an appropriate jail-day rate may no longer be an issue if all future IGAs are awarded under the revamped process discussed in Finding II. However, districts will continue to play an important role in identifying detention facilities that meet USMS standards. We believe district and PAB responsibilities need clarification, even under the new process, especially those pertaining to establishing rates and monitoring expiration.

### Conclusion

Consistent with our prior IGA audits, our review of 34 IGAs as part of this audit identified jail-day rates that lacked adequate supporting documentation. Although the OFDT and USMS are pursuing the implementation of eIGA, as of July 2006 it has remained a pilot program, and the OFDT has not issued any policies and procedures related to the new process.

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<sup>65</sup> Department of Justice, Office of the Inspector General. Audit Report Number GR-60-06-002, *The United States Marshals Service Intergovernmental Service Agreement for Detention Services with the* [SENSITIVE INFORMATION REDACTED].

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The IGA Manual currently does not address how non-cost factors should be considered and valued in establishing jail-day rates. Further, the USMS generally did not document its decisions for establishing jail-day rates that exceeded allowable costs identified on the cost sheet. Without adequate documentation of how jail-day rates were established, we were unable to assess the appropriateness of the jail-day rate paid by the USMS. If the USMS considered conditions other than cost, it should be required to specify the conditions either in the IGAs or the record of negotiation.

In addition, although IGA analysts collectively commit the USMS to pay detention facilities hundreds of millions of dollars annually, most of the IGA analysts told us that the training they received was not adequate for their level of responsibility. We believe annual training plans should be developed that will provide them procurement core competencies such as those outlined by FAI.

Finally, despite the increasing need for detention bed space, staff reductions in the USMS's PAB has significantly limited the USMS's ability to review and follow up on inadequate cost sheets and USMS audits. We reviewed PAB staffing reports from 1999 through 2006 and found that authorized staff levels dropped from 11 full-time equivalents (FTEs) in 1999 to 6 FTEs in 2005. Further, we noted that the number of audits performed by the USMS IGA Audit Branch decreased from 29 audits in 2003, to 16 in 2004, to 1 in 2005. In our judgment, the decline in the number of audits performed by the Audit Branch put an increasing burden on IGA analysts to identify unallowable costs prior to the establishment of a jail-day rate, and also undermines an important check on rising detention costs.

## **Recommendations**

We recommend that the OFDT:

5. Develop guidance and training for the USMS on how jail-day rates will be established using eIGA. The guidance and training should include how to negotiate with detention facilities, clearly documenting the basis for negotiated jail-day rates, evaluating cost and non-cost factors, when it is appropriate to deviate from the scheduled adjustments to the core rate, how deviations should be documented, defining what constitutes an appropriate facility to compare jail-day rates, evaluating and documenting the analysis of established jail-day rates of similar facilities in justifying a jail-day rate, documenting the rationale for any retroactive increase or extension of temporary agreements, and ensuring that follow-up on temporary jail-day rates is timely.
6. Develop guidance that limits the amount of profit a state or local jail can earn for housing federal prisoners.

We recommend that the USMS:

7. Develop annual training plans for IGA analysts that will provide appropriate procurement core competencies such as those outlined by the Federal Acquisition Institute.
8. Update policies that clearly describe PAB and USMS responsibilities for establishing and monitoring IGAs.
9. Review all IGAs to ensure that the agreements are current, and prepare new agreements for those that have expired.
10. Ensure adequate resources are provided to oversee IGAs. This includes adequate staffing for the review and approval of IGA actions, and for the audit of IGAs.

## STATEMENT ON INTERNAL CONTROLS

In planning and performing the audit of the USMS's and OFDT's Oversight of IGAs, we considered the internal control structure for the award and monitoring of IGAs and payments under those agreements. We focused on the internal controls related to the determination of the IGA jail-day rate, amounts and types of payments made to state and local facilities, and compliance with internal policies concerning IGAs.

This evaluation was not made for the purpose of providing assurance on the internal controls over IGAs as a whole. However, we noted certain matters involving the internal controls that we considered to be reportable conditions under the *Government Auditing Standards*. Reportable conditions involve matters coming to our attention relating to significant deficiencies in the design or operation of the internal control structure that, in our judgment, could adversely affect the ability of the USMS and OFDT to use funds efficiently and effectively. We found that the system for awarding and monitoring IGAs need vast improvements (see Findings II and III).

Because we are not expressing an opinion on the USMS's and OFDT's controls over IGAs as a whole, this statement is intended solely for the information and use of USMS and OFDT management in monitoring the IGA program. This restriction is not intended to limit the distribution of this report.

## STATEMENT ON COMPLIANCE WITH LAWS AND REGULATIONS

This audit assessed USMS and OFDT's monitoring and oversight process for IGAS. In connection with the audit, as required by *Government Auditing Standards*, we reviewed management processes and records to obtain reasonable assurance concerning the USMS's and OFDT's compliance with laws and regulations that, if not complied with, in our judgment, could have a material effect on USMS and OFDT operations. Compliance with laws and regulations applicable to the monitoring and oversight of IGAs is the responsibility of USMS and OFDT's management.

Our audit included examining evidence about laws and regulations. Specifically, we conducted our review against relevant portions of the OMB A-87. Our audit identified areas where the USMS and OFDT were not in compliance with OMB A-87.

APPENDIX I

**OBJECTIVES, SCOPE, AND METHODOLOGY**

The objective of the audit was to determine if the USMS and OFDT employed an effective monitoring and oversight process for IGAs. We conducted our audit in accordance with *Government Auditing Standards* and included such tests as were considered necessary to accomplish our objective. Our audit concentrated on but was not limited to FYs 2001-2005.

We obtained an understanding of the process to establish an IGA by interviewing pertinent personnel from the OFDT and USMS staff involved with finance, budgeting, procurement, auditing, and the prisoner services group. We also reviewed the policies and procedures used to establish an IGA, including the USM-243 – Cost Sheet instructions found at the USMS web site, the USMS Publication number 108 *Instructions for Completing United States Marshals Service Cost Sheet for Detention Services (USM-243)* otherwise known as the “green book” (March 2000), USMS Directives 9.25 – *Housing Prisoners in USMS Custody* (October 2003), USMS Directive 9.26 *Detention Facility Contracting Policies and Procedures* (October 2003), the *USMS Intergovernmental Services Agreement Program Policies and Procedures Manual*, and OMB Circular A-87.

As part of our audit, we relied on the USMS's “*Prisoners*” database to arrive at the universe of IGAs. “*Prisoners*” is an Access database that the USMS maintains on detention facilities used to house detainees. *Prisoners* includes IGA facilities, private contract facilities, federal detention centers, and no-contract facilities. However, it was not always clear to us which were IGA facilities. The database also contained IGAs using different numbering formats that hindered our ability to secure information about a specific IGA since the current IGA number may not be in the database.

Using the RDS report, we judgmentally selected the following 34 IGA files for review:

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**Sampled IGA Files**

<b>Note</b>	<b>USM District</b>	<b>Facility Name</b>	<b>IGA Number</b>	<b>Payments FY 2001-2005</b>
	S/TX	LaSalle County Regional Jail, Texas	79-04-0043	2,474,365
	M/FL	Charlotte County Jail, Florida	18-02-0069	4,670,076
	SD	Winner City Jail, South Dakota	73-03-0060	623,050
	M/NC	Randolph County Jail, North Carolina	57-04-0026	989,050
	MD	Allegany County Jail, Maryland	37-01-0020	1,627,130
	M/FL	Hillsborough County Jail, Florida	18-04-0008	25,394,220
	MT	Crossroads Correctional Center, Montana	46-03-0043	2,593,969
	MN	Arrowhead Juvenile Detention Center, Minnesota	41-02-0070	1,134
	N/NY	Washington County Jail, New York	52-04-0033	523,385
	OR	Lane County Adult Correctional Facility, Oregon	65-02-0033	7,951,994
	N/CA	Santa Rita Jail, California	11-03-0047	13,584,609
	E/CA	Yolo County Jail, California	97-00-0002	1,351,558
	S/TX	LaSalle County Jail, LaSalle	79-02-0093	12,701,247
	S/TX	Nueces County Jail, Texas	79-03-0009	20,237,768
	E/LA	St Tammany Parish Jail, Louisiana	34-03-0013	1,537,852
	MD	Charles County Detention Center, Maryland	37-95-0047	6,387,318
	OR	Clackamas County Jail, Oregon	65-99-0193	1,672
	E/TX	Hunt County Jail, Texas	78-03-0054	1,431,772
	N/NY	Albany County Jail, New York	52-03-0023	7,418,714
	CT	Connecticut Department of Corrections	14-03-0046	10,429,552
	MN	Tri-County Community Corrections, Minnesota	41-04-0037	114
	MN	Sherburne County Jail, Minnesota	41-99-0129	22,496,766
	S/IL	Alton Law Enforcement Center, Illinois	25-04-0041	142,016
A	DC	D.C. Department of Corrections	16-00-0016	71,089,111
B	E/VA	Western Tidewater Regional Jail, Virginia	83-92-0082	9,658,732
C	E/LA	Orleans Parish Community Corrections Center, Louisiana	J-D34-M-083	12,133,980
D	W/NC	Mecklenburg County Regional Jail, North Carolina	58-00-0067	60,420,733

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D	W/NC	Caldwell Detention Center, North Carolina	58-99-0210	2,502,315
D	N/GA	South Fulton Regional Jail, Georgia	19-01-0006	12,713,773
D	N/GA	Floyd County Regional Jail, Georgia	19-04-0003	789,007
D	W/TX	Crystal City Corrections Center, Texas	80-04-0005	28,627,496
D	W/TX	Wilson County Justice Center, Texas	80-00-0028	6,038,955
D	NV	Las Vegas City Jail, Nevada	48-99-0084	15,733,308
D	NV	Washoe County Jail, Nevada	48-00-0136	8,156,347

- A - We concurrently audited this IGA, [SENSITIVE INFORMATION REDACTED]
- B - We concurrently audited this IGA, [SENSITIVE INFORMATION REDACTED].
- C - We issued a report in [SENSITIVE INFORMATION REDACTED]. During our audit, the USMS was in the process of following up on our report.
- D - We performed field work at these five USMS districts and eight detention facilities.

Our sample included different types of IGA actions that were processed by the USMS (e.g., establishing a new IGA or increasing an existing IGA rate) from each USMS IGA analyst (to the extent that each IGA analyst processed a specific action). Except as noted in the previous table, we did not select IGAs that the OIG previously audited. For each action selected, we reviewed the entire IGA file at USMS headquarters to determine the history of the IGA including the initial award process and the review process for any subsequent modifications. We reviewed cost sheets, records of negotiations, and available cost and average daily population data utilized by the USMS in establishing jail-day rates.

For eight of the IGAs located in five USMS district offices, as noted in the table, we interviewed the United States Marshals or their representative to discuss the IGA monitoring process at that district, and any concerns they had relative to the specific facilities we would be visiting or the IGA process in general. We also selected a judgmental sample of high-dollar or high-risk cost items listed on the state or local cost sheet and verified them to supporting records located at the detention facility. In addition, we selected a judgmental sample of USMS payments to tie back to billing statements and supporting documentation.

As part of our follow up on the OFDT’s instruction to the USMS and the revamping of the IGA process, we interviewed personnel from the OFDT and USMS. We discussed the disagreement and the revamping of the IGA process through the eIGA system. The OFDT gave us a demonstration of the eIGA system, and we reviewed documentation pertaining to the econometric statistical pricing model that the system is based on. However, we did not audit the appropriateness of the schedule of adjustments, and do

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not provide assurance that the factors and values used to arrive at the adjusted core rate are appropriate.

As of June 2006, the OFDT and USMS used the model to award about 90 IGAs as part of a pilot of the model. We reviewed detailed documentation from OFDT and the USMS for 11 judgmentally selected IGAs to determine: (1) whether the awarded rates were within the model's [SENSITIVE INFORMATION REDACTED], and (2) how the awarded rates compared to the cost-based rate previously used in awarding IGAs.

As a part of the annual financial statement audit, the USMS financial management systems are reviewed to determine their compliance with the federal financial management systems requirements, applicable federal accounting standards, and the United States General Ledger. The FY 2005 independent auditor's report on compliance reported that the USMS's financial management systems did not substantially comply with the requirements of the Federal Financial Management Improvement Act (FFMIA) of 1996. Nevertheless, we believe that the data used for our sampling and testing purposes was reliable to the extent needed.

APPENDIX II

OFDT FUNCTIONAL AREAS

<i>Budget, Finance and Forecasting</i>	<i>Information Technology</i>	<i>Procurement</i>	<i>Detention Standards and Compliance</i>	<i>General Counsel</i>	<i>Office of Management &amp; Administration</i>
<ul style="list-style-type: none"> <li>• OFDT budget formulation and execution</li> <li>• Detention budget formulation and execution</li> <li>• Cost estimation</li> <li>• Modeling and forecasting</li> <li>• Research and analysis of detention statistical data</li> <li>• Component cost estimates and billing</li> </ul>	<ul style="list-style-type: none"> <li>• Develop and implement enterprise IT solutions</li> <li>• Maintain and support legacy systems</li> <li>• Lead, participate in, or collaborate with DOJ and other detention agency components on information sharing activities</li> <li>• Manage OFDT IT infrastructure and programs</li> </ul>	<ul style="list-style-type: none"> <li>• OFDT procurement and oversight and strategic planning</li> <li>• Acquisition management</li> <li>• DOJ component procurement support</li> <li>• DHS/ICE procurement support</li> <li>• Contract development, negotiation, and administration</li> </ul>	<ul style="list-style-type: none"> <li>• Review, maintain and coordinate detention standards</li> <li>• Facility review and compliance</li> <li>• Identify and disseminate best practices</li> <li>• Apply performance-based contracting standards</li> <li>• Subject matter experts - field interface data collection</li> </ul>	<ul style="list-style-type: none"> <li>• Provide legal advice and counsel</li> <li>• Provide opinion, review, and legal interpretation with respect to detention operations and legislation</li> <li>• FOIA activities</li> <li>• Development of OFDT regulations and policies</li> </ul>	<ul style="list-style-type: none"> <li>• Strategic planning (DOJ, OFDT, JPATS)</li> <li>• OFDT project and business action plans</li> <li>• External communications</li> <li>• Legislative affairs</li> <li>• OFDT GPRA requirements including PART</li> <li>• OFDT administrative operations, travel, office budget execution, personnel, training, property management, supplies, purchasing, calendar and schedules</li> <li>• Correspondence</li> </ul>

**APPENDIX III**

**IGA-RELATED USMS FORMS**

The following pages contain examples of each form listed below.

USM-243 – Cost Sheet for Detention Services

USM-243 Instructions

Instructions

U.S. Department of Justice
United States Marshals Service

COST SHEET FOR DETENTION SERVICES

SCHEDULE A

Instructions: This should be completed and submitted to the U.S. Marshal by the local government for the acquisition of detention services for federal prisoners. The cost information contained in this form will be reviewed by a representative from the U.S. Marshals Service Headquarters. Upon request, additional supporting data in addition to that included as part of this cost sheet may be requested. The individual designated in Section V will be contacted by a U.S. Marshals Service representative to negotiate a jail per them rate and its effective date. Upon completion of negotiations, and Intergovernmental Service Agreement (ICTA) will be issued by the U.S. Marshals Service Headquarters and forwarded to the local government for review and signature. Local Governments shall only request the reimbursement of costs to the extent provided for in the latest revision of OMB Circular No. A-87. OMB Circular No. A-87 sets forth the principles and standards for determining costs for federal awards carried out through agreements with state and local governments. If additional guidance is required, please contact U.S. Marshals Service Headquarters, Prisoner Services Division (202) 307-5100.

Section I - General Information

Name of Facility: Physical Address of Facility:
Phone Number : ( )

Section II - Financial Data Summary

TOTAL OPERATING COST FOR JAIL:

A. Time Frame (Fiscal Year): FROM: (Month/Year) TO: (Month/Year)

ANNUAL COST

(Auto-calculated from figures on following pages)

B. Total Personnel Costs (Schedule B - Part I)
C. Total Personnel Benefits (Schedule B - Part II)
D. Total Consultants and Contract Service (Schedule C)
E. Other Direct Operating Costs (Schedule D)
F. Indirect Costs (Schedule E)\*
G. Equipment Depreciation Costs (Schedule F)
H. Building Depreciation Costs (Schedule G)
I. Total Operating Costs (Schedule B-G)
TOTAL ACTUAL OPERATING COST FOR PRIOR FISCAL YEAR

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United States Marshals Service

Section III - Prisoner Population Information

Time frame of Prisoner Information  
(Must correspond with timeframe on previous page)

FROM: \_\_\_\_\_ TO: \_\_\_\_\_  
(Month/Year) (Month/Year)

Inmate Capacity of Jail:

Male	Female	Juvenile	TOTAL

Average Daily Population:

Type of Prisoner	Male	Female	Juvenile	TOTAL
Federal				
Local				
State				
TOTAL				

Section IV - Per Diem

Proposed Per Diem Rate for Federal Prisoners: \$ \_\_\_\_\_

State Prisoner Per Diem (if applicable): \$ \_\_\_\_\_

Section V - Local Government Contact

Please provide the name of the individual authorized to represent and to act for the Local Government in jail day rate negotiations.

Name \_\_\_\_\_ Department/Office \_\_\_\_\_  
Title \_\_\_\_\_ Street \_\_\_\_\_  
Phone ( ) \_\_\_\_\_ FAX ( ) \_\_\_\_\_ City \_\_\_\_\_ State \_\_\_\_\_ ZIP \_\_\_\_\_

Section VI - Certification Statement

*This is to certify that, to the best of my knowledge and belief the data furnished in Schedules B through G are accurate, complete and current, and do not include any unallocable, or unallowable, or unallowable costs prohibited by OMB Circular No. A-87 (Cost Principles for State and Local Governments) or any cost not related to the jail facility as discussed on Form USM-243 (Cost Sheet for Detention Services). The records of this agency area available for review and audit by the authorized representative of the U.S. Government to verify any jail per diem rate negotiated.*

Signature \_\_\_\_\_ Date \_\_\_\_\_  
Name \_\_\_\_\_ Title \_\_\_\_\_



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**SCHEDULE B PART II -  
PERSONNEL BENEFITS**

Direct Costs-Personnel Supporting Detention Facility

**Instructions:** Provide name of retirement plans (i.e., N.Y.S. employees retirement system), insurance plans (i.e., Blue Cross/Blue Shield), or unemployment insurance contribution plans for positions listed in Schedule B - Part 1).

	Number of Employees Participating	Total Salary Base \$	Employer Contribution	Annual Cost \$
<b>1. RETIREMENT PROGRAM(S)</b>				
a.	Full-time:		%	
b.	Part-time:		%	
<b>2. INSURANCE PROGRAM(S)</b>				
a. Name:	Full-time:		%	
	Part-time:		%	
b. Name:	Full-time:		%	
	Part-time:		%	
<b>3. OTHER EMPLOYER CONTRIBUTION PLANS (i.e. unemployment, worker's compensation)</b>				
a.	Full-time:		%	
	Part-time:		%	
b.	Full-time:		%	
	Part-time:		%	
c.	Full-time:		%	
	Part-time:		%	

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**SCHEDULE C  
CONSULTANTS AND CONTRACT SERVICES**

**Instructions:** List only those positions directly involved in jail operations and benefiting federal prisoners. Provide a detailed "description of service".

Type of Service	Description of Service	No. of Contract Employees	Annual Cost \$
1. MEDICAL:			
2. DENTAL:			
3. OTHER:			
4. OTHER:			
5. OTHER:			

**Total Consultants and Contract Services**

\$

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**SCHEDULE D - OTHER DIRECT JAIL OPERATING COSTS**

**Instructions:** List only those costs associated with the operation of the jail that directly benefit federal prisoners. Costs associated with local court and law enforcement activities are not allowable costs for the purpose of determining facility operating costs.

Cost category	Description	Annual Cost \$
Food & Kitchen Supplies		
Clothing (Prisoner)		
Medical Care Supplies		
Bedding & Linens		
Toiletries		
Recreation and Education		
Utilities		
Uniforms (Jail Staff Only)		
Safety & Sanitation		
Maintenance Supplies		
Office Supplies & Postage		
Telephone & Communications		
Equipment <b>under \$5,000</b> (Please use Schedule F for equipment over \$5,000.)		
Credits (e.g. telephone credits, insurance rebates, recoveries or indemnities on losses commissary income)		(                    )
Other		
<b>Total Other Direct Costs</b>		

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**CERTIFICATE OF COST ALLOCATION PLAN**

This is to certify that I have reviewed the cost allocation plan submitted herewith and to the best of my knowledge and belief:

(1) All costs included in this proposal [identify date] to establish cost allocations or billings for [identify period covered by plan] are allowable in accordance with the requirements of OMB Circular A-87, "Cost Principles for State and Local Governments," and the Federal award(s) to which they apply. Unallowable costs have been adjusted for in allocating costs as indicated in the cost allocation plan.

(2) All costs included in this proposal are properly allocable to Federal awards on the bases of a beneficial or casual relationship between the expenses incurred and the awards to which they are allocated in accordance with applicable requirements. Further, the same costs that have been treated as indirect costs have not been claimed as direct costs. Similar types of costs have been accounted for consistently.

I declare that the foregoing is true and correct.

Governmental Unit: \_\_\_\_\_

Signature: \_\_\_\_\_

Name of Official: \_\_\_\_\_

Title: \_\_\_\_\_

Date of Execution: \_\_\_\_\_





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**SCHEDULE G - BUILDING DEPRECIATION**

**Instructions:** Provide an explanation of method used by state, county or city to depreciate buildings. Show date of construction-, cost of construction (cost of land/site is not allowable)-, number of years in depreciation cycle. Note that federal assistance revenues used for building construction are considered offsetting revenues and are to be subtracted from cost of construction. In lieu of building depreciation an annual use allowance of 2% of acquisition cost may be substituted. Treatment of these costs must be consistent with local government's method. If claiming debt service arising from construction or renovation of a facility, please specify in "other" below.

**Part I - Depreciation Computation**

Facility	Year of Construction	Original Construction Cost	Annual Depreciation Claimed *
Main Building			
Addition(s)			
Annex			
Other (Please specify):			
<b>Subtotal</b>			
Less Federal Assistance Revenues or Grants including awards under Cooperative Agreement Program			
<b>Total</b>			

\*Generally 2% of original construction cost

**Part II - Method of calculating depreciation used by state, county or city** (i.e., specify depreciation method if 2% depreciation allowance is not utilized by the state, county, or city)

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Instructions for USM-243  
USM-243: *Cost Sheet for Detention Services*

Information on how to fill out the form, download the form, and assist local detention facility officials in completing the form:

Click the links below to go to instructions for filling out [Form USM-243](#):

Form USM-243:							
<a href="#">SCHEDULE A</a>	<a href="#">SCHEDULE B - Part I</a>	<a href="#">SCHEDULE B - Part II</a>	<a href="#">SCHEDULE C</a>	<a href="#">SCHEDULE D</a>	<a href="#">SCHEDULE E</a>	<a href="#">SCHEDULE F</a>	<a href="#">SCHEDULE G</a>
Summary	(Personnel Costs)	(Personnel Benefits)	Consultants and Contract Services	Other Direct Jail Operating Costs	Cost Allocation Plans/Indirect Cost Proposals	Equipment (Depreciation) Costs	Building Depreciation

**What is it?**

The Marshals Service is dependent upon state or local governments for the provision of detention space and services for federal prisoners.

In support of this requirement, Intergovernmental Agreements (IGAs) are established with those local and state governments willing to provide detention space for federal prisoners in return for a mutually acceptable fixed per diem rate based on actual and allowable costs.

To request a per diem rate or an increase to the current per diem rate, the USMS requires the local governments to complete and submit a Form USM-243, *Cost Sheet for Detention Services*, to the local United States Marshal's office. The local USMS office will forward the cost sheet to the Prisoner Services Division for review, evaluation, and approval.

**BACKGROUND**

Title 18, United States Code (U.S.C.) 4013(a), authorizes the Attorney General to make payments from the Federal Prisoner Detention Appropriation for the necessary clothing, medical care, guard services, housing, care, and security of prisoners held in custody of a United States Marshal pursuant to federal law, under agreements with state or local units of government.

The United States Marshals Service (USMS) recognizes that the Federal Government is dependent upon state or local governments for the provision of detention space and services for federal prisoners held for court appearances or for transport to a designated facility for service of sentence.

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In support of this requirement, Intergovernmental Agreements (IGAs) are established with those local and state governments willing to provide detention space for federal prisoners in return for a mutually acceptable fixed per diem rate based on actual and allowable costs.

An IGA is a formal written agreement between the USMS and a state or local government to house federal prisoners at a fixed per diem rate based on actual and allowable costs for the same level of service provided to state or local prisoners in a specific facility. To request a per diem rate or an increase to the current per diem rate, the USMS requires the local governments to complete and submit a Form USM-243, *Cost Sheet for Detention Services*, to the local United States Marshal's office. The local USMS office will forward the cost sheet to the Prisoner Services Division for review, evaluation, and approval.

Transportation services of prisoners to and from court and medical facilities, as well as medical guard services are allowable as a separate line item to the IGA. Other Department of Justice user components are the Immigration and Naturalization Service and the Bureau of Prisons.

### PURPOSE

The purpose of this guide is to provide clear and consistent guidance for preparation of Form USM-243, *Cost Sheet for Detention Services*. Criteria used to evaluate fixed per diem rates based on actual and allowable costs will be in accordance with the Office of Management and Budget ([OMB Circular A-87, Cost Principles for State, Local, and Indian Tribal Governments](#)). OMB Circular A-87 establishes principles and standards to provide a uniform approach for determining costs and will be strictly adhered to.

### BASIC GUIDELINES

The fixed per diem rate will be computed on the basis of actual, allowable, and allocable direct and indirect costs associated with the operation of the facility and that benefit federal prisoners during the most recent accounting period. Accurate prisoner population data must be submitted for the same accounting period as the cost data submitted.

The IGAs issued by the USMS are fixed rate, fixed term, and cannot be adjusted until the rate has been in effect for a period of at least 12 months from the effective date of the agreement.

The state or local government will submit a written request at least 60 days before the intended

effective date of any proposed rate changes. Further, the state or local government must understand that the rate may increase, decrease or remain the same as the previous IGA rate. Submission of a budget statement by the state or local government in lieu of the Form USM-243 is not acceptable.

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To be allowable, costs must be:

- authorized or prohibited under State or local laws or regulations;
- in accordance with generally accepted accounting principles;
- net of all applicable credits; and
- adequately documented.

In determining reasonableness of a given cost, consideration will be given to whether the cost is generally recognized as ordinary, necessary, and allocable to the federal award.

- A determination will be made whether specific costs benefit federal prisoners. If the costs do not benefit federal prisoners, they cannot be claimed on the Cost Sheet. Costs not benefiting federal prisoners are identified as individual line items throughout this document. Some examples of unallowable costs are:
  - Work Release Program or similar program costs, since USMS prisoners do not participate in this program. If the U.S. Bureau of Prisons houses prisoners at the detention facility as a user-agency and those prisoners participate in the Work Release Program, then the related costs may be allowable;
  - Off-site medical care costs and prescription costs for local inmates and USMS prisoners. when the USMS is billed and pays separately to the medical facility; and
  - Costs to operate other local detention facilities where no USMS prisoners are housed. Prisoner population data for the other facilities must not be included in Schedule A, Section III.

### CREDITS AND OFFSETS TO REPORTED COSTS

Federal grants, services generating revenues, and credits must be offset against the costs submitted on the Form USM-243. See Schedule D for specific items requiring offsetting against operational costs.

### REQUIRED ADJUSTMENTS TO REPORTED COSTS

Adjustments are required to certain cost categories based on the procedural and physical operations of the detention facility. Specific items requiring adjustment are identified throughout this document, and because of their importance, are also listed below:

If non-detention staff of the sheriff/police department provides services to the detention facility or if the detention staff provides services to functions of the sheriff department, their salary and benefit costs of those employees will be prorated based on the time expended in support of the detention facility. Those costs must be reasonable and allocable to a cost center. Staff of the sheriff/police department used to provide transportation/guard services is not to be included in the operating costs. Guard/transportation services is shown as a separate line item on the IGA. The composition of cost is based on the average salary and benefits of the staff that will be used to perform guard/transportation services. The costs are to be provided on a sheet of letterhead and attached to the costs data.

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If the sheriff/police chief allocates their time between the detention facility and other law enforcement functions of the department, salary and benefit costs must be prorated based on the amount of time expended in support of the detention facility;

If the detention facility is co-occupied by the sheriff/police department, local courts, probation or other local government departments, the costs of utilities, insurance, maintenance, interest and depreciation/use allowance must be prorated based upon the space occupied by each entity to the total space of the detention facility; and

If there is idle or unused space within the detention facility, the costs of utilities, insurance, maintenance, interest and depreciation/use allowance must be prorated based upon the percentage of the idle/unused space to the total space of the detention facility.

### **COST SHEET FOR DETENTION SERVICES (FORM USM-243)**

The following instructions are provided as a guide to assist in the preparation of the Form USM-243 and should be used in conjunction with OMB Circular A-87.

#### **SCHEDULE A - Summary**

##### Section I - General Information

Enter the name, phone number, and address of the detention facility in the appropriate spaces.

##### Section II - Financial Data Summary

Line A. Time Frame (fiscal year). Enter the most recently concluded fiscal year that corresponds to the accounting period of the cost submission.

Lines B-H. Enter the computed totals from Schedules B through G.

Line I. Total Operating Costs (Sum of Schedules B-G). Enter the total of Lines B through H.

Total Actual Operating Costs from Prior Fiscal Year. For the categories reported on the Cost Sheet, enter the comparable operating costs for the prior fiscal year.

##### Section III - Prisoner Population Information

Prisoner population data must be submitted for the same accounting period as the cost data submitted. Enter the total inmate capacity of the detention facility and the average prisoner population by prisoner type in the appropriate blocks. The average daily prisoner population data should be verifiable to daily count logs or similar control documents.

If the detention facility houses local prisoners elsewhere for a fee, related costs of such an arrangement are not allowable for IGA rate-computation purposes; therefore, the prisoners boarded out must be excluded from the prisoner population

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data.

### Section IV - Per Diem

Enter the requested per diem day rate to be charged for the housing of federal prisoners. and the per diem rate paid by other local and state governments for housing their prisoners.

### Section V - Local Government Contact

Enter the name of the individual authorized to represent and to act for the local government in jail-day rate negotiations.

### Section VI - Certification Statement

The Form USM-243 may be prepared by an individual who has knowledge of and access to the budget and accounting records for which this cost data is based; however, it must be signed by the Comptroller or Chief Financial Officer of the local government.

### **SCHEDULE B - Part I (Personnel Costs)**

Regular and overtime salaries of personnel by position that work at the detention facility on a full-time and part-time basis are allowable as direct operating costs. If available, a list of these employees (full names, title, and salaries) should be submitted to support Schedule B.

Full-time and part-time salaries for the following personnel on the detention facility's payroll are usually allowable in full:

- jail management officials, except the sheriff's salary is only allowable based on the percentage of time spent managing the detention facility's operations;
- administrative support personnel;
- detention officers and other uniformed personnel assigned to the detention facility;
- maintenance personnel;
- cooks and aides;
- training officers may be claimed as part-time personnel. (If this position is responsible for training the entire sheriff's department, then costs must be prorated and based on a verifiable method, such as the percentage of allowed employees assigned to the detention facility to the sheriff's department's total staffing level.);
- on-site medical personnel, if services are provided to all prisoners;
- religious counselors; and
- transportation officers, if they also perform duties as a detention officer.

Guard/transportation services are shown as a separate line item on the IGA as an hourly rate when the primary duties are to provide guard transportation services.

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Salaries of personnel who perform services that do not benefit federal prisoners are not allowable as follows:

- appointed and elected officials; e.g., mayors, district attorneys, board of supervisors, county judges, etc.;
- public defenders, probation/parole officers, local prisoners' attorneys and other local court personnel;
- commissary personnel, if the costs are reimbursed from commissary profits;
- staff assigned to the Work Release Program or similar programs that USMS prisoners do not participate in. If the U.S. Bureau of Prisons houses prisoners at the detention facility as a user-agency and those prisoners participate in the Work Release Program, then the related costs may be allowable;
- law enforcement personnel assigned to non-detention functions of the sheriff/police department such as patrol officers, detectives, and investigators;
- personnel assigned to local farm operations that support the detention facility and that local prisoners participate in; and
- transportation officer if they do not transport federal prisoners

### **SCHEDULE B - Part II (Personnel Benefits)**

Generally, all related paid personnel benefit costs are allowable for the positions stated above. If salary costs were prorated then the benefits must also be prorated. The following are types of personnel benefits that are allowable:

- retirement plan costs;
- state and federal (FICA) payroll taxes (limited to a maximum of 7.65 percent);
- life, health, and dental insurance plans;
- workman's compensation insurance; and
- employee uniforms, including shoes, if not claimed as a direct operating cost under Schedule D.

### **SCHEDULE C - Consultants and Contract Services**

Costs for consultant and contract services are allowable to the extent that they benefit federal prisoners. The following contract services are usually allowable:

- in-house medical, dental, and mental health care. Medical co-payments charged to local prisoners must be offset against any claimed medical costs. Medical co-payments cannot be charged to federal prisoners or the Federal Government;
- laboratory and x-ray costs provided to federal prisoners if the USMS is not billed separately for these services;
- custodial and maintenance (prorate if building is co-occupied);
- legal services (see unallowable direct costs for exceptions); and nondenominational religious services.
- The following types of contract costs are usually not allowable:
- GED and other educational programs, if the short confinement periods for federal prisoners do not allow adequate participation time;
- prescription/pharmacy, if the USMS is billed separately for such medication;

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- and
- electronic monitoring of prisoners and home detention.

### **SCHEDULE D - Other Direct Jail Operating Costs**

The following are examples of cost categories that can be claimed on the Cost Sheet. Any amounts incurred in support of local court and/or law enforcement activities are not allowable. All direct costs must be reasonable and allowable under OMB Circular A-87 guidelines and supported by paid invoices and transaction listing or general ledger entries. Operating costs of separate detention facilities not utilized by federal prisoners are unallowable costs including work release facilities.

- food and kitchen supplies. Any monies realized from an employee meal program in operation at the detention facility must be offset against the claimed cost;
- inmate clothing;
- medical care supplies;
- bedding and linen;
- toiletries;
- recreation and education. If any costs are reimbursed by the Commissary fund, the reimbursement must be offset against the claimed cost;
- utilities (prorate, if building is co-occupied);
- employee uniforms, including shoes (detention facility staff only, and only if not included as a personnel benefit);
- safety and sanitation supplies and services (prorate if building is co-occupied);
- maintenance supplies (prorate if building is co-occupied);
- office supplies and postage;
- telephone and communication (prorate if building is co-occupied);
- insurance (prorate if building is co-occupied). Any refunds and earnings or investment income on self-insurance reserves must be offset against the claimed cost;
- employee education, conferences, and subscriptions related to the operation of the detention facility;
- travel expenses. 41 CFR 301, Federal Travel Regulation, should be utilized as a guide for evaluating the allowableness of travel expense claims;
- interest as long as the financing costs were paid or incurred on or after September 1, 1995, for new construction, renovation and expansion that was completed on or after October 1, 1980 (prorate if building is co-occupied). Debt services (principle) is unallowable and any earnings on debt service reserve funds and interest earned on the borrowed funds pending payment of expenses must be offset against the claimed cost.
- current year purchases of equipment costing less than \$5,000 (or a lesser amount in accordance with the local government's established equipment capitalization policy). An inventory list of the equipment must be maintained that includes description, date purchased, cost, etc. The cost of equipment claimed here cannot be included on Schedule F - Equipment Cost for the purpose of computing allowable depreciation charges.

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The following direct costs are not allowable:

- fees paid to other local governments for the housing of local prisoners. Prisoners housed at other facilities should not be included in the prisoner population data submitted in Schedule A, Section III, Prisoner Population Information;
- off-site hospital and medical care for local prisoners and USMS prisoners if billed and paid separately by the federal government for similar services;
- costs for transporting and producing local prisoners to local court proceedings;
- alcoholic beverages;
- contributions to a contingency reserve or any similar provision, such as for future vehicle or equipment purchases, or for any other events the occurrence of which cannot be foretold with certainty as to time, or intensity, or with an assurance of their happening;
- contributions and donations, including cash, property, and services, regardless of the recipient;
- membership fees in organizations engaged in lobbying;
- legal expenses for prosecution of claims against the Federal Government and those incurred in connection with any criminal, civil, or administrative proceedings commenced by the United States or a state to the extent provided in 10 U.S.C. 2324(k);
- fines, penalties, damages, and other settlements resulting from violations (or alleged violations) of, or failure of the governmental unit to comply with federal, state, local, or Indian tribal laws and regulations, except when incurred as a result of compliance with specific provisions of the IGA;
- costs for entertainment, including amusement, diversion, and social activities and any costs directly associated with purchase of tickets to shows or sporting events, meals, lodging, rentals, transportation, and gratuities); and
- required repayments of unused grant monies to grantors.

### **SCHEDULE D - "Credits" Line**

All revenue generated from the detention facility's operation must be offset against the direct costs claimed on the Cost Sheet. Examples are:

- commissions earned from prisoners' use of long distance telephone services;
- insurance rebates, recoveries, or indemnities on losses;
- commissary profits, if the funds are not placed in a prisoner's trust account to be used solely for the benefit of prisoners;
- federal school lunch reimbursements;
- employee meal program charges; and
- fees, other than prisoner lodging costs, received from other jurisdictions for services provided.

**SCHEDULE E - Cost Allocation Plans/Indirect Cost Proposals**

Generally, other local units of government provide certain services to the detention facility on a centralized basis. In order for the costs of those units of government to be included in the IGA rate computation, a central service cost allocation plan is needed to identify and assign part of those costs to the detention facility's operation on a reasonable and consistent basis. All costs and other data used to distribute the cost included in the plan should be supported by formal accounting and other records that support the propriety of the cost assignments. To include indirect costs in the IGA rate computation:

- The indirect costs or cost allocation plans must be approved by the Comptroller or Chief Financial Officer;
- The costs must benefit both the IGA and other local government activities, must be distributed to all activities in reasonable proportions to the benefits received, and must be supported by subsidiary records that allow confirmation of the accuracy of the distributions;
- Similar or identical costs cannot be charged as direct costs to the IGA. The following categories require scrutiny to ensure duplicate or unallowable claims are not made: travel expenses, legal expenses, conferences, professional services, and miscellaneous expenses; and
- The pre-allocation cost basis of each category claimed must be verifiable.
- The following are examples of categories of indirect costs, a portion of which may be assigned to the detention facility for inclusion in the IGA rate computation:
  - Motor pool operations, fuel, and maintenance provided mileage is not included as a separate line item on the IGA; and
  - ADP, procurement, personnel, administrative, financial, and accounting support provided by staff of the local government and/or the non-detention operations of the police/sheriffs department.

Local government operating costs not related to the detention facility's operation cannot be included for daily jail rate computation purposes. For example, costs of a water treatment facility would not be allowed if the detention facility is not served by the facility.

**SCHEDULE F - Equipment (Depreciation) Costs**

Equipment is defined as an article of non-expendable, tangible personal property having a useful life of more than 1 year and an acquisition cost which equals the lesser of (a) the capitalization level established by the governmental unit for financial statement purposes, or (b) \$5,000. Cost allowances relating to the use of fixed assets on hand may be made through depreciation or a use-allowance.

If the depreciation method is used, records indicating the amount of depreciation taken each period must be maintained. For either method, charges must be supported by adequate property records, and physical inventories must be taken at least every 2 years (a statistical sampling approach is acceptable) to ensure that assets exist and are in use.

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Without a formalized equipment depreciation policy at the local level, a use-allowance of 6 2/3 percent with a 15-year write-off period is to be used to compute allowable equipment use-allowance charges. The following are allowable when computing equipment depreciation or use-allowance charges allocable to the IGA:

- equipment meeting the local government's established capitalization criteria;
- equipment used in the general operation of the detention facility; and
- equipment used in programs that federal prisoners participate in.
- The following are not allowable when computing equipment depreciation or use-allowance charges allocable to the IGA:
  - payments to cash reserves for acquisitions made or planned after the accounting period of the cost submission;
  - The cost of equipment received from the Federal Government through the Federal Excess Property Program or similar programs, or purchased with funds received from the Federal Government;
  - The cost of equipment contributed by or for the governmental unit, or a related donor organization, in satisfaction of a matching requirement;
  - The cost of vehicles used for prisoner transportation, if the USMS is not provided prisoner transportation services or is billed separately for transportation services;
  - The cost of surplus, idle, fully depreciated, or inappropriate equipment items;
  - The cost of equipment below the established capitalization threshold; and
  - The cost of equipment in use in programs that federal prisoners do not participate in (e.g., detention facility farm operations).

### **SCHEDULE G - Building Depreciation**

A depreciation or use-allowance charge is allowed for all buildings utilized in the performance of the IGA. Without a formal building depreciation policy at the local level, a use-allowance not exceeding 2 percent of acquisition costs should be used to compute the allowable building use-allowance charge.

The following are allowable when computing building depreciation or use-allowance charges allocable to the IGA:

- the cost of building additions, renovations, and improvements; and
- the cost of land improvements, such as paved parking areas, fences and sidewalks.
- The following are not allowable when computing building depreciation or use-allowance charges allocable to the IGA:
  - the cost of land;
  - any portion of the cost of buildings borne by or donated by the Federal Government such as Cooperative Agreement Program (CAP) funding;
  - any portion of the cost of buildings contributed by or for the local governmental unit, or a related donor organization, in satisfaction of a matching requirement;
  - cost assignable to unused or idle space within the facility;

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- cost assignable to space occupied by non-detention functions of the local government; and interest, as long as the financing costs were paid or incurred on or after September 1, 1995, for building acquisition and construction, and the related renovation or remodeling was completed on or after October 1, 1980 (prorate if building is co-occupied). Debt service is unallowable and any earnings on debt service reserve funds and interest earned on the borrowed funds pending payment of expenses must be offset against the claimed cost.

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**APPENDIX IV**

**SCHEDULE OF DOLLAR-RELATED FINDINGS FOR PRIOR AUDIT REPORTS**

Report Title	Report Number	Report Date	Amounts Paid	Questioned Costs <sup>66</sup>	Funds to Better Use <sup>67</sup>
[SENSITIVE INFORMATION REDACTED]	GR-90-95-002	4/3/1995	\$7,800,000	\$ 133,109.00	\$ 74,507.00
[SENSITIVE INFORMATION REDACTED]	GR-40-95-005	5/17/1995	\$3,622,831	\$ 259,241.00	-
[SENSITIVE INFORMATION REDACTED]	GR-30-96-007	4/25/1996	\$6,599,844	\$ 1,860,529.00	-
[SENSITIVE INFORMATION REDACTED]*	GR-30-96-008	4/25/1996	\$6,700,000	\$ 1,996,600.00	-
[SENSITIVE INFORMATION REDACTED]	GR-40-96-002	4/25/1996	\$5,098,238	\$ 425,769.00	\$ 508,810.00
[SENSITIVE INFORMATION REDACTED]	GR-50-96-004	4/25/1996	\$1,400,000	\$ 98,331.00	-
[SENSITIVE INFORMATION REDACTED]	GR-80-96-004	4/29/1996	\$3,071,570	\$ 1,186,800.00	-
[SENSITIVE INFORMATION REDACTED]*	GR-30-96-013	9/30/1996	\$19,200,000	\$ 4,224,365.00	\$ 819,160.00
[SENSITIVE INFORMATION REDACTED]	GR-30-97-002	2/12/1997	-	\$ 1,593,590.00	-
[SENSITIVE INFORMATION REDACTED]	GR-40-97-004	4/23/1997	-	-	\$ 3,029,022.00
[SENSITIVE INFORMATION REDACTED]*	GR-80-97-017	9/4/1997	\$2,690,986	\$ 619,795.00	\$ 619,795.00
[SENSITIVE INFORMATION REDACTED]	GR-50-97-014	9/30/1997	-	\$ 140,667.00	\$ 118,042.00
[SENSITIVE INFORMATION REDACTED]	GR-90-97-015	9/30/1997	\$216,519	\$ 8,307.00	\$ 41,390.00
[SENSITIVE INFORMATION REDACTED]*	GR-90-98-001	10/10/1997	\$11,044,049	\$ 3,705,391.00	\$ 2,587,903.00
[SENSITIVE INFORMATION REDACTED]	GR-80-98-002	10/10/1997	\$700,965	-	\$ 1,395.00
[SENSITIVE INFORMATION REDACTED]	GR-40-98-003	12/5/1997	\$2,174,664	-	\$ 98,350.00

<sup>66</sup> Questioned costs are expenditures that do not comply with legal, regulatory, or contractual requirements, are not supported by adequate documentation at the time of the audit, or are unnecessary or unreasonable.

<sup>67</sup> Funds put to a better use are future funds that could be used more efficiently if management took actions to implement and complete audit recommendations.

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[SENSITIVE INFORMATION REDACTED]	GR-90-98-004	1/1/1998	\$1,889,153	\$	254,857.00	-
[SENSITIVE INFORMATION REDACTED]	GR-70-98-004	3/31/1998	-	-	-	-
[SENSITIVE INFORMATION REDACTED]	GR-50-98-023	7/31/1998	\$559,650	\$	-	245,095.00
[SENSITIVE INFORMATION REDACTED]	GR-40-98-027	9/30/1998	\$920,000	\$	177,934.00	\$ 287,819.00
[SENSITIVE INFORMATION REDACTED]	GR-50-99-001	11/24/1998	\$13,576,344	\$	4,907,437.00	\$ 4,516,035.00
[SENSITIVE INFORMATION REDACTED]*	GR-90-01-006	12/29/2000	\$5,566,351	\$	2,131,214.00	\$ 1,065,115.00
[SENSITIVE INFORMATION REDACTED]	GR-70-01-005	6/25/2001	\$280,050	\$	49,340.00	\$ 54,108.00
[SENSITIVE INFORMATION REDACTED]	GR-60-03-001-R	11/8/2002	\$4,345,110	\$	1,756,532.00	\$ 779,585.00
[SENSITIVE INFORMATION REDACTED]	GR-30-05-002	1/24/2005	\$9,077,291	-	-	-
[SENSITIVE INFORMATION REDACTED]	GR-30-05-004	3/17/2005	\$6,671,600	\$	2,833,937.00	\$ 1,416,969.00
[SENSITIVE INFORMATION REDACTED]	GR-40-05-011	9/1/2005	\$5,458,157	\$	1,231,502.00	\$ 703,196.00
[SENSITIVE INFORMATION REDACTED]	GR-60-06-002	10/18/2005	\$13,822,008	\$	5,231,812.00	\$ 3,237,721.00
[SENSITIVE INFORMATION REDACTED]	GR-30-06-001	12/5/2005	\$17,781,769	\$	2,862,349.00	\$ 1,618,129.00
[SENSITIVE INFORMATION REDACTED]	GR-30-06-002	03/16/2006	\$26,025,630	-	-	-
[SENSITIVE INFORMATION REDACTED]	GR-70-06-007	03/28/2006	\$6,142,702	\$	202,354.00	-
<b>Totals</b>			<b>\$182,702,481</b>		<b>\$37,891,762</b>	<b>\$21,822,146</b>

The highlighted audits are those that remain unaddressed by the USMS.

\* - Denotes audits that were previously referred to the Department of Justice Audit Resolution Committee. The Audit Resolution Committee was established to resolve significant disagreements between the OIG and the Departmental component regarding audit findings and recommendations or corrective actions taken.

SUMMARY OF IGA REPORTS ISSUED BY THE OIG

[SENSITIVE INFORMATION REDACTED]

Report No. GR-90-95-002, April 1995

For the audit period of January 1992 through December 1994, [SENSITIVE INFORMATION REDACTED] billed the USMS for 125,575 jail days at \$61.80 per day for a total of about \$7.8 million. Our audit determined that [SENSITIVE INFORMATION REDACTED] included unallowable costs totaling \$929,147 in its cost sheet for calculating a daily jail rate as follows:

- The rate included 100 percent of the utility expenses (\$243,898) for the sheriff's training academy located adjacent to the [SENSITIVE INFORMATION REDACTED]. If the training academy utility costs were allocated based on departmental payroll costs, as are all other training academy costs, the [SENSITIVE INFORMATION REDACTED] would have been charged only \$87,515. Thus, the proposal contained \$156,383 in unallowable costs (other operating costs).
- Jail staff uniform costs (\$175,670) were double-counted on the cost sheet as other operating costs and employee benefits.
- The building use allowance stated in the cost sheet included \$597,094 charged for idle capacity and is therefore not an allowable cost (Indirect Costs).<sup>68</sup>

As a result of these unallowable costs being included on the cost sheet, the daily jail rate should have been \$60.74 instead of the \$61.80 charged by [SENSITIVE INFORMATION REDACTED]. Therefore, the USMS was overcharged \$133,109.

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<sup>68</sup> OMB Circular A-87 states that depreciation and use allowances are means of allocating the cost of fixed assets to periods benefiting from asset use. Charges for use allowances or depreciation must be supported by adequate property records.

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**[SENSITIVE INFORMATION REDACTED]<sup>69</sup>  
Report No. GR-40-95-005, May 1995**

Our audit disclosed the following unallowable costs were included in the jail-day rate: interest, management fee, donations, contingency accruals, and bad debt write-offs. In addition, the following unallowable indirect costs totaling \$443,806 were also included in the jail-day rate:

- accruals for contingencies and consulting for New Mexico related activity;
- consultant charges for work with the Texas State legislature, consulting firm charges for work with the Louisiana State Department of Education, and consulting charges associated with activities in New Mexico;
- law firm charges for developing marketing opportunities in Texas;
- general entertainment charges and sponsorship of a golf tournament; and
- entertainment expenses, a going away gift for one individual, and cookies in gift packages for at least 100 individuals or organizations.

Our audit determined that for the periods October 1990 through July 1991 and October 1993 through September 1994, the USMS overpaid [SENSITIVE INFORMATION REDACTED] \$259,241. We further determined that the allowable costs only supported a jail-day rate of \$45.23, instead of the \$51.30 rate that the USMS paid.

**[SENSITIVE INFORMATION REDACTED]  
Report No. GR-30-96-007, April 1996**

The USMS established an \$83.64 jail-day rate with the [SENSITIVE INFORMATION REDACTED]. Our audit noted that this rate was based on estimates. On several occasions the USMS requested the [SENSITIVE INFORMATION REDACTED] to provide an operational budget for establishing

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<sup>69</sup> In June 1990, the USM in the Western District of Tennessee requested an IGA be issued to [SENSITIVE INFORMATION REDACTED] for the housing of federal prisoners. In July 1990, [SENSITIVE INFORMATION REDACTED] subcontracted with CCA to provide the detention services. CCA is a private provider of detention and corrections services for federal, state, and local governments.

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a new jail-day rate, although the [SENSITIVE INFORMATION REDACTED] had not complied with the request. The [SENSITIVE INFORMATION REDACTED] continued to use the original preliminary jail-day rate.

Our audit found that the actual allowable costs only supported a jail-day rate of about \$60. We took exception to the following costs:

- accrued salary and fringe benefit expenses in excess of actual (salaries and fringe benefits);
- salary expenses for transportation guards, when the USMS had a separate transportation guard rate in effect (salaries);
- contribution to five guards for their participation in the [SENSITIVE INFORMATION REDACTED] Centennial parade (salaries);
- costs incurred for a change order with North Carolina to house its prisoners (other direct costs);
- costs incurred for corporate meals and entertainment, holiday parties, donations, and contributions (general and administrative); and
- transportation guard rate in excess of actual costs.

As a result of these cost exceptions, we found that USMS overpayments to the [SENSITIVE INFORMATION REDACTED] totaled over \$1.8 million during 1994 and 1995.

**[SENSITIVE INFORMATION REDACTED]  
Report No. GR-30-96-008, April 1996**

Our audit determined that USMS overpaid [SENSITIVE INFORMATION REDACTED] a total of \$1,996,600 during FY 1995. This resulted from [SENSITIVE INFORMATION REDACTED] including in the jail-day rate unallowable salaries, fringe benefits, and costs related to criminal investigators that do not benefit the needs of the USMS. We also took exception to other costs including:

- Outside medical services provided to inmates because these costs were paid directly by the USMS (\$358,035) (contracts);

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- The detention facility entered into a Memorandum of Understanding (MOU) in which it agreed to pay the Town of [SENSITIVE INFORMATION REDACTED] \$400,000 annually for a period of 30 years. The MOU mentioned no service or product for this annual payment. Further, neither the detention facility nor the Town employees were able to identify any service that was provided for this payment (administrative);
- Equipment purchased that should have been depreciated instead of expensed (equipment); and
- Incurred cost totaling over \$9 million to recover the cost of financing the new jail. The USMS did not take issue with the debt service during its review of the cost sheet. However, we reported that the substance of the \$9 million transaction was the recovery of financing, and was unallowable under OMB Circular A-87 (debt service).

**[SENSITIVE INFORMATION REDACTED]  
Report No. GR-40-96-002, April 1996**

Our audit of [SENSITIVE INFORMATION REDACTED] County's actual costs revealed that the jail-day rate included the following unallowable costs:

- Medical costs totaling over \$1 million that did not benefit federal prisoners (consultants and contracts);
- Legal fees pertaining to settlements of claims filed by inmates against the [SENSITIVE INFORMATION REDACTED] County Sheriff's Office (consultants and contracts); and
- Capital costs for an above ground fuel tank improperly classified as an expense. The cost should have been capitalized and depreciated (other direct operating).

As a result, the USMS overpaid [SENSITIVE INFORMATION REDACTED] County \$6.97 a day for its 61,086 jail days, for an overpayment of \$425,769 from May 1, 1995 to February 29, 1996.

**[SENSITIVE INFORMATION REDACTED]  
Report No. GR-50-96-004, April 1996**

Our audit revealed that the cost sheet submitted by the [SENSITIVE INFORMATION REDACTED] County Jail sought an increase in the jail-day rate from \$60.81 to \$68.66. The USMS established a rate of \$67.74. However, our audit revealed that the jail-day rate included the following unallowable costs:

- medical costs totaling over \$4,000 that did not benefit federal prisoners (consultants and contracts),
- routine maintenance of Sheriff's Department motor vehicles totaling over \$11,000 that were not used for USMS prisoners (other direct operating), and
- over \$8,000 for the repair of accident damage to a Sheriff's Department vehicle that was not used for USMS prisoners (other direct operating).

In addition, our audit noted that the jail was given CAP funding for the construction of the jail and this amount was not subtracted from the total construction cost before figuring depreciation (building depreciation costs). Our audit determined that from October 1, 1994 to January 31, 1996, the USMS overpaid the [SENSITIVE INFORMATION REDACTED] County Jail \$98,331. In addition, our audit determined that the [SENSITIVE INFORMATION REDACTED] County Jail only had costs to support a jail-day rate of \$62.93.

**[SENSITIVE INFORMATION REDACTED]  
Report No. GR-80-96-004, April 1996**

In May 1990, the USMS established a temporary rate of \$55 per day with the City of [SENSITIVE INFORMATION REDACTED]. The agreement also included separate off-site guard services at \$18 per hour. In 1994, the City of [SENSITIVE INFORMATION REDACTED] submitted a cost sheet that only supported a rate of \$52.76. However, the City of [SENSITIVE INFORMATION REDACTED] and the USMS negotiated a final jail-day rate of \$55 per day in December 1994.

We determined that the City of [SENSITIVE INFORMATION REDACTED] included unallowable and unsupported costs in calculating the jail-day rate as follows:

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- annual bond debt payments of \$589,398 per year instead of allowable depreciation costs (equipment and building depreciation costs), and
- unsupported indirect costs totaling over \$55,000.

The City of [SENSITIVE INFORMATION REDACTED] also failed to consider telephone revenue in the cost sheet. The jail receives revenue payments from telephone long-distance carriers for collect calls made by inmates using the jail-owned telephone system. OMB Circular A-87 requires that credits that reduce expense items be used to reduce related expenditures in determining the rates or amounts applicable to a given contract.

As a result of our audit, we determined that the City of [SENSITIVE INFORMATION REDACTED] overbilled the USMS \$1,186,800 in FY 1995. In addition, our audit determined that the City of [SENSITIVE INFORMATION REDACTED] Law Enforcement Center Jail only had costs to support a jail-day rate of \$34.26.

**[SENSITIVE INFORMATION REDACTED]  
Report No. GR-30-96-013, September 1996**

During the audit period of January 1, 1993, through December 31, 1995, (fiscal years 1993, 1994 and 1995), [SENSITIVE INFORMATION REDACTED] County billed the USMS \$6.4 million per year, which comprised 83,950 jail days at \$76.60 per day. The IGA was signed in March 1990, and was in effect during the entire audit period.

We determined that [SENSITIVE INFORMATION REDACTED] County included unallowable and unsupported costs in calculating the jail-day rate as follows:

- medical, dental, radiology, and ambulance services billed separately to the USMS (contracts); and
- indirect costs that were unallocable and unallowable per OMB Circular A-87 (indirect costs).

As a result of these unallowable costs being included in the daily jail rate, the USMS overpaid [SENSITIVE INFORMATION REDACTED] County by \$1,598,408 in FY 1993, \$1,475,002 in FY 1994, and \$1,150,955 in FY 1995.

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Our audit also determined that [SENSITIVE INFORMATION REDACTED] County only maintained records of the number of prisoners detained, not the number of jail days per prisoner. As a result of a contract administration oversight, the USMS issued Modification 3 in the form of payment for guaranteed daily bed space. Therefore, [SENSITIVE INFORMATION REDACTED] County billed the USMS for 230 prisoners per day (83,950 prisoners annually) at the daily rate of \$76.60 for each fiscal year. However, [SENSITIVE INFORMATION REDACTED] County housed less than the annual total in FYs 1993 and 1994. This resulted in the USMS expending \$819,160 that could have been better used had the Modification included provisions for [SENSITIVE INFORMATION REDACTED] County being reimbursed for actual prisoner days.

**[SENSITIVE INFORMATION REDACTED]  
Report No. GR-30-97-002, February 1997**

[SENSITIVE INFORMATION REDACTED] County submitted a cost sheet that estimated annual costs based on incurred costs from January 1, 1995, through September 30, 1995, but offered no specific period of performance at that time. The proposed costs resulted in a jail-day rate per inmate of \$185.98. This rate was based on the care and feeding of 1,520 inmates. Although the county based its cost estimate on incurred costs from January 1, 1995, through September 30, 1995, it based its estimate of the average daily prisoner population on the average prisoner population during January and February 1996.

Our audit determined that [SENSITIVE INFORMATION REDACTED] County's expenses used to calculate the jail-day rate were overstated by \$7.7 million, resulting in a supported jail-day rate of \$142.32. In addition, the estimated average daily population increased from 1,520 to 1,838. Therefore, the USMS overpaid [SENSITIVE INFORMATION REDACTED] County by almost \$1.6 million in FY 1996.

**[SENSITIVE INFORMATION REDACTED]  
Report No. GR-40-97-004, April 1997**

On November 7, 1996, the City of [SENSITIVE INFORMATION REDACTED] submitted a proposal to increase the jail-day rate from \$40 to \$49.54. This rate was based on [SENSITIVE INFORMATION REDACTED] computation of operating costs for January 1, 1995, through December 31, 1995.

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Our audit determined that the proposed jail-day rate included the following unallowable costs:

- Employee health insurance costs were double-counted as jail employee benefits and indirect costs (benefits);
- Medicare expenses that were not incurred (benefits);
- Unsupported use allowance for the Annex because the Department of Correction could not provide documentation to support the construction costs (equipment and building depreciation costs); and
- Unallowable indirect costs including a business strip to South Africa, golf and tennis tournaments, and the cost to settle a sexual harassment lawsuit (indirect costs).

The costs claimed that were unallowable or unsupported totaled \$875,944. Also, [SENSITIVE INFORMATION REDACTED] under-reported the average daily population for 1995 by 57 inmates. As a result, [SENSITIVE INFORMATION REDACTED] costs only supported a jail-day rate of \$44.93, which could save the USMS up to \$504,795 annually.

Our audit also determined that [SENSITIVE INFORMATION REDACTED] proposed to recover costs of building the new [SENSITIVE INFORMATION REDACTED] City Detention Center through a capital cost recovery surcharge of \$23.05 per jail day. The City of [SENSITIVE INFORMATION REDACTED] calculated a pro-rata share of the total cost to design, build, and finance 300 bed spaces to replace those provided to the USMS at the Annex under a CAP award. The USMS made no formal agreement to pay for the replacement bed spaces at the new Detention Center. Since the federal prisoners are housed in the Annex, the USMS could save more than \$2.5 million annually by disallowing the surcharge.

### **[SENSITIVE INFORMATION REDACTED] Report No. GR-80-97-017, September 1997**

The USMS awarded [SENSITIVE INFORMATION REDACTED] County an IGA effective December 15, 1990, for the detention of federal prisoners. [SENSITIVE INFORMATION REDACTED] County, in turn, contracted with [SENSITIVE INFORMATION REDACTED] to provide jail services at its [SENSITIVE INFORMATION REDACTED] County Detention Facility. For the calendar year 1996, [SENSITIVE INFORMATION REDACTED] County billed the USMS for 43,303 inmate days, at a rate of \$62 per jail-day, for a total of

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\$2,690,986. After reviewing the direct and indirect costs for the [SENSITIVE INFORMATION REDACTED] facility for 1996, we determined that [SENSITIVE INFORMATION REDACTED] County only had allowable costs to support a rate of \$47.72. Our audit determined that the jail-day rate included the following unallowable costs:

- Interest on funds invested in the [SENSITIVE INFORMATION REDACTED] facility making funds unavailable for other purposes (\$856,079);
- Liability insurance to cover the self-insured retention provision of its insurance policy (\$500,000). The expense was not incurred;<sup>70</sup> and
- Indirect costs (\$18,398) and a management fee (profit) (\$199,513) that was not allocable to the detention facility.

As a result, the USMS paid \$619,795 in unallowable and unsupported costs in FY 1996. If this rate were applied in 1997, assuming the same number of inmate days, the USMS would save an additional \$619,795.

**[SENSITIVE INFORMATION REDACTED]  
Report No. GR-50-97-014, September 1997**

The IGA was initially approved in 1984 at a jail-day rate of \$65, and later modified to \$75 per jail day. Since the IGAs inception in 1984, [SENSITIVE INFORMATION REDACTED] County did not submit a cost sheet, or any other cost data to support its rates. Instead, the rates were based solely on [SENSITIVE INFORMATION REDACTED] County Board resolutions.

We reviewed the County's actual jail costs for two fiscal years, 1990 and 1996. We selected 1990 because it was the last full year that the \$65 jail-day rate was in effect, and 1996 because it was the last full year of the \$75 jail-day rate. At the time of our audit, the \$75 jail-day rate was still in effect.

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<sup>70</sup> Each [SENSITIVE INFORMATION REDACTED] facility is covered by one corporate-wide general liability insurance policy. [SENSITIVE INFORMATION REDACTED] allocates a share of the general policy's cost to each facility based on a percentage of its rated capacity to total [SENSITIVE INFORMATION REDACTED] capacity. However, [SENSITIVE INFORMATION REDACTED] also included an annual charge of \$500,000 for this facility to cover the self-insurance provision (i.e., deductible). According to [SENSITIVE INFORMATION REDACTED] officials, in order to comply with the terms of the liability insurance policy, [SENSITIVE INFORMATION REDACTED] must pay the first \$500,000 per claim, per facility, per year.

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After performing tests of selected FY 1990 and 1996 costs, we found that [SENSITIVE INFORMATION REDACTED] County overbilled the USMS a total of \$140,667. For 1990, we determined that the cost data supported a rate of \$57.69, which was \$7.31 less than the rate of \$65 that was being paid at that time. For 1996, we determined that the cost data supported a rate of \$69.20, which was \$5.80 less than the rate of \$75 that was being paid at that time. If the \$69.20 rate was applied in 1997, the USMS could have saved an additional \$118,042.

**[SENSITIVE INFORMATION REDACTED]  
Report No. GR-90-97-015, September 1997**

After analyzing [SENSITIVE INFORMATION REDACTED] County's direct and indirect costs, we determined that direct costs associated with "Victim Notification" (\$40,194) and indirect costs associated with "Victim Notification" (\$12,273) and "Equipment Use Allowance" (\$12,000) were unallowable. [SENSITIVE INFORMATION REDACTED] County's allowable costs only supported a rate of \$58.90 instead of the \$61.25 rate the USMS paid. As a result, the USMS overpaid [SENSITIVE INFORMATION REDACTED] County \$8,307 during FY 1996. If the USMS implemented the \$58.90 rate for FY 1997, the USMS could have saved \$41,390.

**[SENSITIVE INFORMATION REDACTED]  
Report No. GR-90-98-001, October 1997**

The USMS awarded [SENSITIVE INFORMATION REDACTED] County an IGA in April 1994 for the detention of federal prisoners. Effective October 1, 1994, the USMS modified [SENSITIVE INFORMATION REDACTED] County's agreement to include [SENSITIVE INFORMATION REDACTED] facility at a temporary rate of \$61.25 per day per prisoner. In addition, the modified agreement included a provision for transport and guard services to and from medical appointments at a rate of \$13.50 per hour to be reimbursed to the County by the USMS. However, our audit noted that the jail-day rate of \$61.25 already included the transportation and escort services to and from the courthouse for federal prisoners.

Our audit also identified the following unallowable and unsupported costs:

- Interest expense of over \$4.6 million. [SENSITIVE INFORMATION REDACTED] stated that this interest expense was not an out-of-pocket expense, but rather, the cost of [SENSITIVE INFORMATION REDACTED]

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REDACTED] investing its funds in the detention facility, making the funds unavailable for other purposes;

- Liability insurance to cover the self-insured retention provision of its insurance policy (\$500,000). The expense was not incurred;
- Administrative fee of \$884,750 based upon [SENSITIVE INFORMATION REDACTED] contract with [SENSITIVE INFORMATION REDACTED] County. The contract provides that "the county will pay to [SENSITIVE INFORMATION REDACTED] all funds received by the county pursuant to the IGAs, less an administrative fee of \$2.00 per inmate housed per day . . . ." The audit of [SENSITIVE INFORMATION REDACTED] County determined that the county did not claim any expense nor did we identify any expense for the administration of this contract in our audit. In addition, this fee did not in any way benefit the IGA. To the contrary, its effect was to cost the USMS an additional \$2.00 per prisoner for which the USMS received no actual goods or services in return;
- Management fee of \$1,576,729, which [SENSITIVE INFORMATION REDACTED] defined as its profit on the operation of detention facilities;
- Depreciation expense that was overstated by over \$1.3 million; and
- Indirect costs in excess of \$98,000.

For calendar year 1996, [SENSITIVE INFORMATION REDACTED] County billed the USMS for 180,331 jail days, at a temporary rate of \$61.25 per jail day for a total of \$11,044,049. After reviewing the direct and indirect costs, we determined that the USMS overpaid [SENSITIVE INFORMATION REDACTED] by over \$3.7 million. Our audit also determined that if the USMS implemented the audited rate of \$40.70 for 1997, it could save an additional \$2,587,903.

**[SENSITIVE INFORMATION REDACTED]  
Report No. GR-80-98-002, October 1997**

The USMS awarded [SENSITIVE INFORMATION REDACTED] County an IGA that established a jail-day rate of \$45. [SENSITIVE INFORMATION REDACTED] County, in turn, contracted with [SENSITIVE INFORMATION REDACTED] to provide jail services at the [SENSITIVE INFORMATION REDACTED] County Jail/Juvenile Center. Our audit of [SENSITIVE

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INFORMATION REDACTED] County's costs revealed that for 1996, [SENSITIVE INFORMATION REDACTED] County costs supported a rate of \$62.22, despite claiming in its jail-day rate \$626,521 in unallowable and unsupported costs. Unallowable expenditures included gifts, donations, entertainment costs, medical expenses for non-federal prisoners, interest, management fee (profit), and double-counting salaries and benefits of four full-time transportation officers that were billed to the USMS under a separate transportation and guard rate.

**[SENSITIVE INFORMATION REDACTED]  
Report No. GR-40-98-003, December 1997**

In December 1995, the USMS signed an IGA with the [SENSITIVE INFORMATION REDACTED]. The base for the [SENSITIVE INFORMATION REDACTED] cost proposal included \$528,561 in unallowable costs and \$547,572 in unsupported costs, including the following:

- Temporary housing units used prior to the new jail being occupied. These costs were no longer being incurred, and as such, did not benefit the USMS (\$347,867) (consultant and contract services);
- Use allowance of \$40,000 because the base included \$2 million, which the USMS provided toward construction of the jail under a CAP with Forsyth County; and
- Indirect costs of almost \$400,000 that were unsupported.

Our audit determined that the jail-day rate was overstated by \$5.62 per jail day. This overstatement resulted in overpayments of as much as \$184,920 between December 1, 1995 and August 31, 1997. Also, based on actual federal prisoner jail days for September 1996 through August 1997, the USMS could have saved about \$98,350 annually by reducing the jail-day rate by \$5.62.

**[SENSITIVE INFORMATION REDACTED]  
Report No. GR-90-98-004, January 1998**

Two detention facilities were used to satisfy the requirements of this IGA, the [SENSITIVE INFORMATION REDACTED] County Detention Center, and the [SENSITIVE INFORMATION REDACTED]. Our audit determined that the jail-day rates included unallowable and unsupported costs totaling over \$5.6 million, which resulted in the USMS overpaying the [SENSITIVE

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INFORMATION REDACTED] County Sheriff's Office over \$254,000 during FY 1990.

**[SENSITIVE INFORMATION REDACTED]  
Report No. GR-70-98-004, March 1998**

We determined that the negotiated jail-day rate was reasonable and based on allowable and allocable costs.

**[SENSITIVE INFORMATION REDACTED]  
Report Number GR-50-98-023, July 1998**

In January 1997, the [SENSITIVE INFORMATION REDACTED] County Jail requested a jail-day rate increase from \$41.50 to \$50.24 per prisoner. However, upon the USMS's review of the cost sheet, the USMS established a rate of \$52.50.

We determined that the cost sheet supporting the rate increase was improperly completed. The jail did not provide actual costs as required. The IGA modification stipulated that actual costs from the latest accounting period be used to determine the jail-day rate instead of estimates. According to the USMS's negotiation records, 1996 actual costs were used to prepare the cost sheet. However, we determined that various budget estimates were actually used to prepare the cost sheet.

As a result of using budget estimates instead of actual costs, our audit identified unsupported and unallowable costs in the jail-day rate including attorney expenses also claimed as an indirect cost, and more than \$744,000 claimed for housing non-federal inmates in another detention facility. Our audit also revealed that the prisoner days claimed by the jail were understated (439,483 as opposed to the 417,925 jail days claimed). This resulted in a jail-day rate of \$42.92, which is \$9.58 less than the rate of \$52.50. Assuming that the federal government uses about the same amount of jail days in 1998 as it did in 1997, the USMS could have saved about \$245,095.

**[SENSITIVE INFORMATION REDACTED]  
Report No. GR-40-98-027, September 1998**

For the FY 1997, the [SENSITIVE INFORMATION REDACTED] billed the USMS for 23,229 jail days at a rate of \$39.61 per day, for a total of about \$920,000. Our audit determined that the [SENSITIVE INFORMATION REDACTED] included over \$1.4 million in unsupported and unallowable costs

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in its jail-day rate. Unallowable costs included not subtracting from the construction costs CAP funds in calculating the use allowance, and medical expenses for non-federal inmates. As a result, the [SENSITIVE INFORMATION REDACTED] overbilled the USMS \$177,934 during FY 1997.

**[SENSITIVE INFORMATION REDACTED]  
Report No. GR-50-99-001, November 24, 1998**

The USMS and [SENSITIVE INFORMATION REDACTED] were operating under an interim letter contract effective December 29, 1997. Our review of the contract proposal and interim letter contract revealed that [SENSITIVE INFORMATION REDACTED] overstated its quotes. In 1997, [SENSITIVE INFORMATION REDACTED] billed the USMS for 109,855 jail days at an average cost of \$76.40 per day, for a total of \$8,415,334. In addition, through July 31, 1998, [SENSITIVE INFORMATION REDACTED] billed the USMS a total of \$5,161,010 for 64,650 jail days at \$79.83 per day plus an additional \$20,170 for other contracted services. Our audit of the jail-day rate revealed that [SENSITIVE INFORMATION REDACTED] allowable expenses only supported a rate of \$49.13. The original rate accounted for over \$1.9 million in unallowable costs, such as management fees and indirect costs. Consequently, we concluded that the USMS overpaid [SENSITIVE INFORMATION REDACTED] by about \$3 million for detention services in 1997. Also, the USMS overpaid [SENSITIVE INFORMATION REDACTED] about \$1.9 million under the letter contract through July 31, 1998, and could realize savings of about \$4,516,035 for the remainder of 1998 through December 1999 by implementing the revised jail-day rate.

**[SENSITIVE INFORMATION REDACTED]  
Report No. GR-90-01-006, December 2000**

The USMS entered into an IGA with [SENSITIVE INFORMATION REDACTED] Department of Corrections (DOC) to ensure adequate detention space was available.<sup>71</sup> Further, in exchange for guaranteed bed space, the USMS awarded \$3 million in CAP funding. The IGA was modified, effective October 1997, to reduce the jail-day rate from \$130 to \$97.71. The reduction was based upon the result of a USMS audit of costs incurred by the DOC and the total jail days used in FY 1997.

Our audit revealed that the jail-day rate included the following unallowable costs:

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<sup>71</sup> The former Immigration and Naturalization Service (INS) also had an IGA with the DOC, which was included in the scope of our audit. However, for purposes of this report we did not include findings that pertained to INS.

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- salaries and related benefits of personnel in the Parole Services Division, and three federally funded positions in the Forensics Unit (personnel);
- medical services provided off-island to local prisoners that did not benefit federal detainees (medical); and
- food and supplies provided for the Governor's house (food and kitchen supplies);

In addition, we determined that [SENSITIVE INFORMATION REDACTED] received almost \$500,000 in offsetting credits resulting from rental income associated with the prison commissary and federal grants. As a result of our audit, we determined that the USMS overpaid [SENSITIVE INFORMATION REDACTED] \$2,131,214 from October 1, 1998 through September 30, 2000.

**[SENSITIVE INFORMATION REDACTED]  
Report No. GR-70-01-005, June 2001**

During 2000, the USMS paid \$280,050 to house an average of 17 detainees per day. Our audit of [SENSITIVE INFORMATION REDACTED] actual costs and average daily population during this period revealed that the USMS overpaid York \$7.93 a day for its average daily population of 17 detainees, for an overpayment of \$49,340.<sup>72</sup> Our report noted the following exceptions: (1) salaries, fringe benefits, and trailer rent related to an Outmate Program that did not benefit federal prisoners; and (2) revenue accounts for the Outmate Program and food rebates were not offset from total operating costs of the prison.<sup>73</sup> As part of our audit, we also calculated that the USMS could have saved \$54,000 in 2001 by implementing the audited rate.

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<sup>72</sup> The former INS also had an IGA with the [SENSITIVE INFORMATION REDACTED] County Prison, which was included in the scope of our audit. However, for purposes of this report we did not include findings that pertained to INS.

<sup>73</sup> [SENSITIVE INFORMATION REDACTED] Outmate Program permits county prisoners, but not federal detainees, to work full-time through work release.

**[SENSITIVE INFORMATION REDACTED]**

**Report No. GR-60-03-001-R, November 2002**

During 2000 and 2001, the USMS paid the [SENSITIVE INFORMATION REDACTED] \$4.3 million. Our audit revealed that the [SENSITIVE INFORMATION REDACTED] had not prepared a cost sheet to support the current jail-day rate. Our audit of the [SENSITIVE INFORMATION REDACTED] actual costs and average daily population also revealed that the USMS overpaid the [SENSITIVE INFORMATION REDACTED] by about \$17 a day for its average daily population of 6,100 in 2000 and 5,700 in 2001, for an overpayment of \$976,947 in 2000, and \$779,585 in 2001.<sup>74</sup> Our report noted the following exceptions: (1) state-certified deputies earned an additional \$150 per pay period in state supplemental pay, which was not a direct labor cost for the [SENSITIVE INFORMATION REDACTED]; (2) the criminal sheriff was an elected official whose salary was an unallowable expense; (3) salaries and fringe benefits of employees patrolling the [SENSITIVE INFORMATION REDACTED]; (4) employee health insurance and workmen's compensation not paid by the [SENSITIVE INFORMATION REDACTED] were unallowable; (5) salaries related to the Criminal District Court and Clerk of the Court were unallowable; (6) unsupported costs related to legal and legal settlement costs classified as liability and property damage; (7) an extravagant cell phone expense; (8) unallowable costs associated with the Sheriff's travel and the purchase of a Chevrolet Suburban assigned to the Sheriff; and advertising, cabling, video, boat slip rental, drug grant expenses and supplies that were not related to the housing of federal inmates; and (9) capital outlays that should have been depreciated.

**[SENSITIVE INFORMATION REDACTED]**

**Report No. GR-30-05-002, January 2005**

Our audit of actual costs and daily population revealed that the Sheriff's Office's records supported the rate paid by the USMS.

**[SENSITIVE INFORMATION REDACTED]**

**Report No. GR-30-05-004, March 2005**

The USMS established an IGA for detention services with the [SENSITIVE INFORMATION REDACTED] in 1991. In accordance with the IGA, the [SENSITIVE INFORMATION REDACTED] submitted a cost sheet for

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<sup>74</sup> The former INS also had an IGA with the [SENSITIVE INFORMATION REDACTED], which was included in the scope of our audit. However, for purposes of this report we did not include findings that pertained to INS.

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detention services based on estimated FY 1991 costs. Although the cost sheet only supported a rate of \$36.64, the USMS agreed to a \$50 jail-day rate. In 1999, the USMS added a transportation guard rate of \$16.25 per hour plus mileage for transporting federal detainees to court and medical appointments.

At our request, the [SENSITIVE INFORMATION REDACTED] submitted a new cost sheet in August 2004. Although the new cost sheet proposed a jail-day rate of \$55, the cost sheet figures only supported a proposed rate of about \$45. According to the USMS, in order to maintain the relationship with the [SENSITIVE INFORMATION REDACTED], the Assistant Director of the Prisoner Services Branch recommended that the [SENSITIVE INFORMATION REDACTED] withdraw its request for a rate increase, and the USMS would take no action to reduce [SENSITIVE INFORMATION REDACTED] rate.

Our audit of [SENSITIVE INFORMATION REDACTED] costs revealed that the [SENSITIVE INFORMATION REDACTED] FY 2003 allowable costs only supported a jail-day rate of \$30.62. Applying these rates to jail days incurred in FYs 2003 and 2004, we determined that the USMS overpaid [SENSITIVE INFORMATION REDACTED] more than \$2.8 million. Our report noted the following exceptions: (1) the [SENSITIVE INFORMATION REDACTED] included an unallowable accumulated leave liability that included the liability for leave for the past several years – perhaps as far back as 1991 (personnel); (2) salaries for transportation guards that were reimbursed under a separate transportation rate (personnel); (3) capital equipment (equipment with a cost of more than \$5,000) was captured as Other Direct Costs in addition to depreciation being taken on the equipment (other direct costs); (4) unallowable premiums for hospitalization insurance for state and local inmates (other direct costs); (5) unsupported costs due to an error by the [SENSITIVE INFORMATION REDACTED] independent financial auditors (other direct costs); (6) non-capital equipment was captured as Other Direct Costs in addition to depreciation being taken on the equipment (equipment depreciation); and (7) revenue accounts for inmate telephone calls and the commissary were not offset from total operating costs of the prison (credits). In addition, we determined that the USMS could have saved over \$1.4 million by implementing our audited rate in FY 2005.

**[SENSITIVE INFORMATION REDACTED]**  
**Report No. GR-40-05-011, September 2005**

The USMS entered into an IGA Agreement with [SENSITIVE INFORMATION REDACTED] on September 24, 1999, for a temporary jail-day rate of \$45. The temporary rate was made permanent on October 1, 2004, and remains in effect until September 30, 2006. Our audit questioned the following unallowable and unsupported costs:

- salaries of part-time employees and a training supervisor that were not properly supported;
- utility costs that were not properly supported;
- medical costs that either did not benefit USMS detainees or the same types of costs were paid separately by the USMS for its detainees;
- interest costs because the allocation method was not supported; and
- depreciation costs because the base for the depreciation overstated the building's construction costs and included unallowable equipment.

In addition, our audit found that the cost sheet did not reflect all offsetting credits and income as required. For example, commissary income was understated by \$18,685 and revenue from a workers release program was not reported to offset the facility's operating costs. As a result, the USMS overpaid [SENSITIVE INFORMATION REDACTED] County over \$1.2 million from July 1, 2002 through May 30, 2005.

**[SENSITIVE INFORMATION REDACTED]**  
**Report No. GR-60-06-002, October 2005**

Our audit determined that the USMS overpaid the [SENSITIVE INFORMATION REDACTED] by over \$5 million for FYs 2003 and 2004. The USMS established a jail-day rate of \$59.91 with the [SENSITIVE INFORMATION REDACTED]. However, the [SENSITIVE INFORMATION REDACTED] accounting records for FYs 2003 and 2004 did not support this rate. Instead, the records for FY 2003 supported an audited rate of \$42.39, and the records for FY 2004 supported an audited rate of \$32.43. The large discrepancies in the jail-day rates were primarily due to the following:

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- Increases in Occupancy. The original cost sheet, which was prepared in FY 1996, was based on an average daily population of 244, while the average daily population for FY 2004 increased 260 percent to 877.
- Large Offsetting Revenues. Beginning in FY 2004, additional offsetting revenue of over \$2 million for federal reimbursements from the State Criminal Alien Assistance Program (SCAAP) and the Southwest Border Prosecution Initiative (SWBPI) were applied.
- Overall Cost Control by Facility Management. Total allowable operating costs for the cost sheet were calculated at \$5.3 million as compared to \$10.3 million for FY 2004. As of the end of FY 2004, this represented spending increases of about 95 percent, while occupancy increased by 260 percent.

We disallowed inmate medical services because these charges were for services provided outside the facility and were paid for directly by the USMS. In addition, we disallowed care of prisoner costs because these charges were for security related to emergency medical care and court appearance and were addressed separately in the IGA with a fixed hourly rate and mileage rate.

### **[SENSITIVE INFORMATION REDACTED] Report No. GR-30-06-001, December 2005**

In November 1992 the USMS established a temporary IGA with the [SENSITIVE INFORMATION REDACTED] to house federal detainees at a jail-day rate of \$65. Our audit also determined that the [SENSITIVE INFORMATION REDACTED] accounting records for FYs 2004 and 2005 did not support the jail-day rate of \$65. Our audit determined that the USMS paid the WTRJ \$65 even though the most recent cost sheet, dated October 1998, only supported a rate of \$52.26. Further, the cost sheet was based on an average daily population of 353. However, the average daily population for FYs 2004 and 2005 were 667 and 655. The increase in average daily population represents an 89-percent increase for FY 2004 and an 85 percent increase for FY 2005. Salaries and fringe benefits represented the main area where unallowable costs were noted as follows:

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- Five guards are dedicated solely to the work release program. The salaries and fringe benefits of the guards are not allocable to the calculation of the federal jail-day rate because federal detainees do not participate in the program; and
- Transportation costs that were reimbursed under the transportation rate of the IGA were also included in the jail-day rate.

Our audit determined that the USMS overpaid the [SENSITIVE INFORMATION REDACTED] by more than \$2.8 million.

**[SENSITIVE INFORMATION REDACTED]  
Report No. GR-30-06-002, March 2006**

Our audit of actual costs and daily population revealed that the records of the [SENSITIVE INFORMATION REDACTED] Department of Correction supported the rate paid by the USMS.

**[SENSITIVE INFORMATION REDACTED]  
Report No. GR-70-06-007, March 2006**

Our audit determined that while the jail-day rates used by the [SENSITIVE INFORMATION REDACTED] were supported from January to June 2003, the rate was not fully supported from July 2003 through December 2004. As a result, the USMS overpaid [SENSITIVE INFORMATION REDACTED] \$202,354 for housing federal inmates. The jail-day rate was not fully supported for this period due to increases in the prisoner population at the jail. As the prison population increased over the 26 percent, the cost per prisoner decreased, including the cost per federal detainee.

DETENTION TRUSTEE MEMORANDUM TO OIG  
(MARCH 17, 2006)



U. S. Department of Justice

Office of the Federal Detention Trustee

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Washington, D.C. 20530

March 17, 2006

MEMORANDUM FOR GUY K. ZIMMERMAN  
ASSISTANT INSPECTOR GENERAL FOR AUDIT

FROM:

  
Stacia A. Hylton  
Federal Detention Trustee

SUBJECT:

Audits of U.S. Marshals Service Intergovernmental Agreements  
for Detention Facilities

This memorandum pertains to audits conducted by your office of intergovernmental agreements (IGAs) between the United States Marshals Service (USMS) and state or local governments for detention space and services for federal prisoners. Commencing around 2003, your office initiated a number of audits of IGAs and is now in various stages of completing these audits (see Attachment 1, "*OIG Audit Status Report as of March 1, 2006*"). With regard to several of these audits, your office has requested that the USMS recover amounts allegedly overpaid by them. As explained more fully below, the Office of the Federal Detention Trustee (OFDT) views these IGAs as negotiated fixed-price contracts and has advised the USMS not to seek reimbursement.

The issue of the types and pricing of the USMS IGAs has been debated for some time. Initially, the debate centered upon the Federal Procurement Regulations. As a result of the recurring refusal of some state and local governments to enter into the standard procurement contracts (which negatively impacted detention operations), David Stockman, then Director of OMB, issued an exception that allowed the USMS, INS, and BOP to enter into IGAs with state and local governments for the provision of prisoner detention services.<sup>1</sup> Pursuant to 18 U.S.C. § 4002, Congress has since authorized the Attorney General to enter into detention service contracts and agreements with state and local governmental entities at such rates "as will permit and encourage the proper authorities to provide reasonably decent, sanitary, and healthful quarters and subsistence."

More recently, the OIG focused on whether the government may pay a fee above cost under these IGAs. While your office consistently opined that OMB Circular A-87 prohibited the Attorney

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<sup>1</sup> October 4, 1982 letter from David A. Stockman, Director, OMB to Kevin Rooney, Assistant Attorney General for Administration.

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General from entering into an agreement with state and local governments on the basis of any terms other than cost, this reading was repudiated by the USMS, the Justice Management Division General Counsel, the former INS, and even OMB itself. In 2002, then Acting Deputy Attorney General Larry Thompson requested the Office of Legal Counsel (OLC) to provide an opinion as to whether it was permissible for the Department to pay profit under IGAs. On December 31, 2002, the OLC opined that the USMS could agree to a fixed price IGA for detention services and expressly found that Circular A-87 did not preclude IGAs from including a payment of profit or fee in excess of actual costs.<sup>2</sup>

With the OLC clarification of the issue, the USMS believes that the IGAs now in place do not limit reimbursement to actual costs. Regardless of this position, the OIG has conducted subsequent audits to evaluate whether the jail rate was totally supported by actual costs and, in each instance where it was determined that the rate was not totally supported, insisted that the USMS recover the overpayment.

OFDT has reviewed the IGAs and agrees with the USMS that they are fixed-price agreements. Indeed, none of the IGAs currently or recently audited by the OIG are explicitly limited to the repayment of actual costs incurred by the contracting State or local government. As such, they do not limit reimbursement to actual costs. Instead, the USMS negotiated with the state or local government for a "fixed per diem rate" which resulted in a contract amount. The rates are *negotiated*<sup>3</sup> and the cost data provided on Form 243 is used merely as a basis for *price negotiation*. While the cost data was used as a basis for price negotiation, on occasion, the USMS accepted a jail rate proposed by the state or local government based on "anticipated savings in transportation and personnel costs due to the close proximity of [the facility] to the Federal Courthouse" or "a need to alleviate a critical shortage of jail space in the [district]."<sup>4</sup> Thus, the USMS IGAs were not constructed to be cost-reimbursement contracts.<sup>5</sup>

Indeed, just as some state and local governments refused to enter into the standard procurement contract in the early 1980's, some are now not agreeing to IGAs based on reimbursement of

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<sup>2</sup> While the IGAs reference the applicability of Circular A-87, the circular is intended to be used as a guide only and, as the circular itself states, not for the purpose of addressing any "profit or increment above cost." See OMB Circular No. A-87, Cost Principles for State, Local and Indian Tribal Governments ("Provision for profit or other increment above cost is outside the scope of this Circular. . . . These principles do not cover any profit or increment above costs. . . . These principles shall be used as a guide in the pricing of fixed price arrangements where costs are used in determining the appropriate price.")

<sup>3</sup> The audit reports are replete with instances in which the OIG itself uses the term "negotiation" to describe the process by which the USMS enters into IGAs.

<sup>4</sup> See Audit Report No. GR-30-06-001, Final Audit Report of the United States Marshals Service Intergovernmental Service Agreement for Detention Facilities with the

<sup>5</sup> The OIG appears to concede this point when discussing instances in which the USMS rate is less than the rate calculated by the OIG. In those instances, the OIG has not recommended that the USMS seek to reimburse the state or local governments for the amount of the underpayments. See Audit Report No. GR-30-06-001, Final Audit Report of the United States Marshals Service Intergovernmental Service Agreement for Detention Facilities with the  
in which the OIG found that the USMS rate for regular guard duties charged by the facility was less than the calculated average guard rate.

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actual costs because the burden of maintaining systems for cost allocation plans is substantial. Thus, in some areas where there is a critical shortage of jail space, if the USMS were to attempt to incorporate the OIG recommended rate, jails may refuse to house the USMS prisoners and the USMS would be forced to pursue much costlier alternatives located at substantial distances from the Federal Courthouse. This would, again, have a negative impact on detention operations and the detention account.

Accordingly, based upon the OFDT's determination that the USMS IGAs are fixed-price contracts and not cost-reimbursement agreements, the OFDT has advised the USMS to refrain from seeking reimbursement of overpayments. Furthermore, OFDT has directed the USMS to immediately negotiate with the jails to incorporate core rates which recently have been established as part of an initiative to implement an indexed fixed-price method for obtaining jail beds from state and local governments.<sup>6</sup>

We believe that this approach is necessary to resolve the current controversy surrounding the audit of USMS IGAs and that it is the proper approach.

Attachment

cc: Paul J. McNulty  
Acting Deputy Attorney General

John Clark, Acting Director  
United States Marshals Service

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<sup>6</sup> As you are aware, the OFDT has undertaken an initiative to implement an indexed fixed-price method for obtaining jail beds from State and local governments. As it is currently conceived, the initiative uses an econometric statistical model to establish the prices for all USMS IGAs. However, the initiative does not represent a fundamental shift in the manner in which the USMS has obtained jail beds. Rather, it is hoped that, using the new method, the process of awarding fixed-price agreements will be more streamlined and less cumbersome than the current process.

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OIG Audit Status Report As Of March 3, 2006

<b>Audit Site</b>	<b>Start Date</b>	<b>Status</b>	<b>Response Due Date</b>
Tidewater Regional Jail, E/VA	06/13/05	Report issued by OIG on December 5, 2005. Jail has submitted an initial response but requested a 90-day extension to provide a more detailed response. OIG so informed Feb 8, 2006.	
DC Jail, DC	07/12/05	Ongoing	
Multnomah County, OR	02/07/05	Ongoing	
Fresno County, E/CA	11/04/04	Ongoing	
Hamilton County, E/TN	07/11/05	Ongoing	
Hamilton County – Silverdale Penal Farm, E/TN	07/11/05	Ongoing	
Cumberland County, ME	11/07/05	Ongoing	
Orleans Parish, E/LA		Report issued 11/08/02 Revised report issued 06/13/03 Write-off/Compromise request to DOJ pending Director Clark's signature. Memo will be sent week of Feb 20 <sup>th</sup> advising OIG of compromise request and that the USMS established a \$43 fixed price per diem.	01/13/06
Central Virginia Regional Jail (Orange County), W/VA	05/06/04	Report issued 03/17/05. Jail's latest (final) response submitted to OIG on November 21, 2005.	Reqs action by OIG to proceed.
Dona Ana County, NM	06/27/05	Report issued 10/18/05; Initial response by jail referred to OIG Feb 8, 2006. Jail requested an additional 6 months to formally respond.	Reqs action by OIG to proceed.
Blount County, E/TN	01/31/05	Report issued 09/23/05. Response from local officials indicate total disagreement with report. After verbal discussions with local USMS, jail requested 120 days to respond to report. USMS made request to OIG March 2006.	11/15/05 need local response
Management and Oversight of the IGA Program	05/23/05	Ongoing	

Attachment 1

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Cooperative Agreement Program (CAP)	10/01/04	Report issued 05/06/05. USMS Must respond to the final report by Feb 24, 2006. Response submitted to OIG March , 2006. Response stated required action could not be completed by USMS.	05/03/06
Use of Guards	FY 05	Report issued 03/08/05	12/16/05 multi-division
Northern Neck Regional Jail, E/VA	Pending	Background info requested, expected to start "in the next few months."	
Essex County, NJ	Pending	OIG staff stated they may audit this site "in the future." Background info request has not been rec'd.	

APPENDIX VII

OIG RESPONSE TO THE DETENTION TRUSTEE  
(JUNE 6, 2006)



U.S. Department of Justice

Office of the Inspector General

June 6, 2006

MEMORANDUM FOR STACIA A. HYLTON  
TRUSTEE  
OFFICE OF THE FEDERAL DETENTION  
TRUSTEE

FROM:

  
GLENN A. FINE  
INSPECTOR GENERAL

SUBJECT:

Office of the Inspector General  
Audits of Intergovernmental Agreements

This is in response to your April 26, 2006, memorandum to the United States Marshals Service (USMS) summarizing our April 20 meeting regarding Intergovernmental Agreements (IGAs) for detention services. We believe that your memorandum does not fully describe the Office of the Inspector General's (OIG) position, and we want to be clear as to that position. We also want to respond to your March 17, 2006, memorandum in which you indicated that you had instructed the USMS to refrain from recovering overpayments identified by the OIG as a result of our IGA audits. As you are aware, the Department's current detention budget exceeds \$1 billion and consequently, the budget implications surrounding this issue are significant.

**Establishing Rates for Audited IGAs**

Since 1995, the OIG has performed about 30 IGA audits that identified approximately \$42 million in either unallowable or unsupported costs and \$24 million of funds that could be put to better use if the USMS renegotiated jail-day rates based on the information reported in the audits. Our audits generally found that the USMS paid jail-day rates that far exceeded the jails' actual and allowable costs.<sup>1</sup> However, the Office of the Federal Detention

<sup>1</sup> Actual costs refer to the costs incurred by a detention facility. According to the OMB, for actual IGA costs to be allowable, costs must be: necessary and reasonable; authorized or not prohibited under state or local laws or regulations; conform with laws, regulations, and terms and conditions of the award; accorded consistent treatment; in accordance with generally accepted accounting principles; net of all applicable credits; and adequately documented.

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Trustee (OFDT) asserts that because the IGAs we audited typically described the unit price the federal government will pay as a “fixed rate,” and because the jails’ actual costs are only one factor considered in determining this rate, overpayments identified by OIG audits are not recoverable.

While the OIG agrees that the USMS has the authority to enter into IGAs based on factors other than cost, we believe it did not do so for the IGAs we audited. In addition, we believe that the term “fixed rate” cannot be applied in isolation but, rather, must be considered in light of the agreements as a whole that, as discussed in more detail below, repeatedly refer to establishing rates on the basis of actual and allowable costs. Support for our view is found in the language of the IGA agreements, documentation provided by the USMS during our audits, USMS policies and procedures, and USMS internal audits.

First, the term “fixed rate” has always been used in IGAs, even when there was no doubt that all parties were proceeding on the assumption that allowable costs were the sole basis for the agreed-upon rate and that the USMS could recover amounts that exceeded the local facility’s actual and allowable costs. Thus, we do not believe that the use of the term alone can be taken as a reliable indicator of the parties’ intention to exclude the recovery of overpayments in those cases where the rate turns out not to have reflected the locality’s actual cost.

Second, the meaning of the term “fixed rate” must be read in light of the language of the agreements as a whole. The IGAs state that the local governments are responsible for complying with OMB Circular A-87, which establishes the principles and standards for determining allowable costs for goods and services obtained by the federal government from state, local, and federally recognized Indian Tribal governments and provides the criteria used in evaluating whether such costs are allowable and reasonable. Moreover, the agreements specifically inform the local governments that they will be held accountable for any overpayment, audit disallowance, or breach of the agreement that results in a debt owed to the federal government.

Similarly, the cost-sheet instructions that the USMS has provided to the local governments inform them that “the fixed per diem rate will be computed on the basis of actual, allowable, and allocable direct and indirect costs associated with the operation of the facility and that benefit federal prisoners during the most recent accounting period.” The cost-sheet instructions further state that “Local Governments shall only request the reimbursement of costs to the extent provided for in the latest revision of OMB Circular No. A-87.” The cost-sheet also contains a certification statement that the Comptroller or Chief Financial Officer of the local government is required to sign attesting to the fact that the cost-sheet does not include any costs prohibited by the Circular. Finally, we have not encountered during our audits documentation indicating that factors other than cost were considered in establishing jail-day rates.

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We also note that the USMS IGA Audit Branch itself has conducted audits to determine if IGA jail-day rates were based on allowable costs. For example, in a January 1998 audit of the \_\_\_\_\_, the USMS IGA Audit Branch determined that a \$65 temporary jail-day rate was not supported and that the operating costs only supported a \$37.95 rate. The Audit Branch recommended that the USMS “negotiate a revised jail-day rate based on the information contained in this report and actual cost and prisoner population data” and “remedy the \$3,883,433 in questioned costs.”

Thus, our position is not, as you described in your memorandum regarding the April 20 meeting, that the USMS “should maintain better records of its negotiations.” Rather, we believe that the available records indicate that cost and population data provided by the state or local governments and represented by those governments to be correct was the sole factor considered in reaching the jail-day rates in the 30 IGAs we audited. We also note that in a memorandum to the Deputy Attorney General, dated August 1, 2002, the prior Detention Trustee apparently agreed, indicating that most if not all IGAs then in effect limited reimbursement to actual cost or the same daily cost that state and local authorities incur to hold their own prisoners and did not allow for a payment of profit or fee to state and local governments. Accordingly, he concluded that “the issue of whether the Department may or may not pay a profit or fee should not be a contentious item in these audits, since the audits were conducted on IGAs where both the departmental components and the state or local governmental entity agreed to reimbursement of actual costs.”

As a result, we believe your instruction to the USMS that it should not seek to recover any of the overpayments identified in our audits was overbroad and incorrect. Rather, we believe that the USMS should address each recommendation to remedy questioned costs by either collecting overpaid funds; providing documentation to support the existing IGA rate; adjusting the IGA rate and offsetting future payments in an amount sufficient to recover questioned costs over a reasonable time; or administratively waiving the questioned costs on a case-by-case decision based on exigencies, such as a lack of other viable location or security problems or significantly greater costs that would result from changing facilities.

In total, almost \$46 million in dollar-related OIG findings remain unaddressed by the USMS. However, by pursuing a policy of not seeking recovery of overpayments, the OFDT is failing to provide needed relief to a limited detention budget and it is also encouraging other jails, which were content to be reimbursed on a cost basis, to seek inflated rates.

Finally, whether one considers the agreements to be fixed-rate vehicles based on factors in addition to cost as you assert, or cost-based agreements as we believe, the OIG disagrees with your assertion that the USMS can seek recovery of overpayments only in those cases of proven “fraudulent conduct.”

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Not all legal remedies require a showing of fraudulent conduct. Even the False Claims Act requires no more than a showing of reckless disregard for the truth or falsity of information presented to the government. In any event, the USMS is not limited to strict legal remedies for recouping overpayments. Rather, it has other methods of recouping overpayments, such as negotiating reduced rates in subsequent years. For example, the USMS recovered \$156,000 in overpayments from the Lexington County, South Carolina Sheriff's Office over an extended period – September 2000 through August 2004 – by reducing the per diem rate of \$32.97 by \$1.17, until the \$156,963 in overpayments was recouped. However, you did not discuss any of these possibilities in either memoranda.

### Establishing Future IGA Rates

We are also concerned that, contrary to OFDT assertions, the automated econometric and statistical pricing system that the OFDT is creating, eIGA, will not resolve the problem of the USMS paying excessive rates for detention services and instead could result in escalation in detention costs nationwide. We are therefore providing the OIG's observations and concerns about the eIGA system, as it has been explained to us by OFDT.

Based on our discussions with you and OFDT staff, we understand that the eIGA pricing model starts with a nationwide core jail-day rate of ' ' that was calculated using ' ' IGA rates and then adjusts that base rate using various factors to arrive at an adjusted core rate, which is referred to as the "should cost" rate. According to the OFDT statistician, the model assumes that the ' ' IGA rates accurately reflect each facility's costs. However, the OFDT did not perform any tests to establish the accuracy of this assumption. This shortcoming is of particular concern because our individual IGA audits often note significant variances between established jail-day rates and the rates supported by the detention facilities' allowable costs and average daily populations.

Further, we believe that even when eIGA is implemented, detailed cost information should continue to be obtained from detention facilities and considered in reaching jail-day rates. Unlike the cost-sheet data relied on in the past, eIGA will not capture cost information broken down by category. Instead, price reasonableness will be determined by comparing a detention facility's proposed rate to the ' ' generated by eIGA and the established rates of similar facilities.

5. In contrast, detailed cost information would permit the USMS to use the lower of the cost or the model-generated rate as a negotiating base. In sum, we believe that cost information would provide an important check on rate reasonableness and therefore help ensure the integrity of the eIGA model.

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The value of this hybrid approach is already evident from the USMS's recent experience in negotiating a jail-day rate with the \_\_\_\_\_ . The Center originally requested a jail-day rate of \$61.42,

However, the cost-sheet provided by the detention center only supported a rate of \$54.13. The USMS used this cost information to negotiate a rate of \$54.13. Without that information, the USMS may have accepted the original rate of \$61.42 as reasonable based on the model at an extra cost to the taxpayer of \$3.5 million in a single year.

**Conclusion**

In sum, given the expense to the taxpayer of housing detainees, it is vital that the USMS ensure that jail-day rates paid pursuant to past IGAs and those to be paid in the future are reasonable and do not include excessive profit. With regard to past agreements, we believe the OFDT should instruct the USMS to address each of the OIG's recommendations in the manner discussed above. Going forward, we agree that the USMS may consider factors other than actual cost, including profit, when negotiating jail-day rates. However, we continue to believe that in doing so the USMS must demonstrate the factors that were considered, provide an economic analysis of those factors, consider cost data, and place some reasonable limitation on the amount of profit allowed. Accordingly, we believe eIGA should be modified to include detailed cost information, and clear guidance and training should be provided to USMS personnel on negotiating reasonable rates.

We recognize that there are significant pressures on the USMS to obtain detention space. For example, not seeking recovery of overpayments may appear preferable to the operational and logistical costs of negotiating new rates and repayment plans or the risk of having to use a more distant facility because a facility will not accept a reduced jail-day rate or agree to a repayment plan. However, allowing payment for services that far exceed allowable costs without analyzing and documenting price reasonableness will inevitably encourage detention facilities to seek inflated rates and could cause a severe escalation in detention costs nationwide. Because the Department's current detention budget exceeds \$1 billion and will only continue to increase, the long-term budget implications on such a policy are substantial.

We hope to continue to work with your office in an effort to reach a resolution to our differences regarding these issues.

cc: John F. Clark  
Director  
United States Marshals Service

APPENDIX VIII

PRIOR DETENTION TRUSTEE MEMORANDUM  
(AUGUST 1, 2002)



U. S. Department of Justice

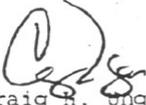
Office of the Detention Trustee

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Washington, D.C. 20530

August 1, 2002

MEMORANDUM FOR LARRY D. THOMPSON  
DEPUTY ATTORNEY GENERAL

FROM:   
Craig R. Unger  
Federal Detention Trustee

SUBJECT: Intergovernmental Agreements

The purpose of this memorandum is to provide the Office of the Deputy Attorney General (ODAG) with the Federal Detention Trustee's (Trustee) recommendation concerning agreements entered into with state and local governments for providing detention services. Specifically, the Trustee was asked to make a recommendation on two issues: (1) the resolution of the Office of the Inspector General (OIG) audits concerning claimed overpayments to state and local governments; and (2) guidance on the issue of whether a fee above cost may be paid concerning such agreements.

The Department of Justice (Department) houses a daily average of approximately 34,000 detainees in state and local facilities. In contrast, approximately 16,000 detainees are housed in federally owned and operated facilities. The relationships established by Intergovernmental Agreements (IGAs) with state and local governments are paramount to carrying out the function of detention. Such arrangements also save on costly capital development of federal facilities.

Since 1982, based on an exception granted by the Office of Management and Budget (OMB)<sup>1</sup>, the Department has acquired a significant portion of detention services from state and local

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<sup>1</sup> October 4, 1982 letter from the David A. Stockman, Director, OMB to Kevin Rooney, Assistant Attorney General for Administration.

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governments through the use of IGAs. By virtue of several separate statutes, Congress has since authorized the Attorney General to enter into contracts and agreements with state and local governmental entities for the provision of acquiring detention services<sup>2</sup>. Such IGAs are negotiated in accordance with OMB Circular A-87, Cost Principles for State, Local, and Indian Tribal Governments. Both the United States Marshals Service (USMS) and the Immigration and Naturalization Service (INS) have policies that reference the applicability of Circular A-87 when acquiring detention services through an IGA.<sup>3</sup>

OMB Circular A-87, as revised, provides the following guidance:

"This circular establishes principles and standards to provide a uniform approach for determining costs and to promote effective program delivery, efficiency, and better relationships between governmental units and the Federal Government. The principles are for determining allowable costs only. They are not intended to identify the circumstances or to dictate the extent of Federal and governmental unit participation in the financing of a particular Federal award. Provision for profit or other increment above cost is outside the scope of this Circular."<sup>4</sup>

Historically, the OIG, as well as the USMS and INS have read the enabling statutes and Circular A-87 to preclude IGAs from including a payment of profit or fee in excess of actual costs. Most, if not all, IGAs in place today limit reimbursement to actual costs or the same daily costs that state and local authorities incur to hold their own prisoners, and do not allow

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<sup>2</sup> The authorizations are at 18 U.S.C. § 4002 (For the purpose of providing suitable quarters for ... all persons held under authority of any enactment of Congress, the Attorney General may contract, for a period of three years, with the proper authorities of any state, territory, or political subdivision thereof, for the imprisonment, subsistence, care, and proper employment of such persons); 18 U.S.C. § 4006 (the Attorney General "shall allow and pay only the reasonable and actual cost" of subsistence of prisoners in the custody of the USMS); 18 U.S.C. § 4013(a)(3)(in support of United States prisoners in non-federal institutions, the Attorney General is authorized to pay for clothing, medical care, guard hire, the housing, care, and security of persons in the custody of USMS under agreements with state or local governmental entities or contracts with private entities); 8 U.S.C. § 1103(a)(9)(the Attorney General may enter into an agreement with a state or political subdivision of a state "for necessary clothing, medical care, necessary guard hire, and the housing, care, and security of persons detained by the [Immigration and Naturalization] service");

<sup>3</sup> See USMS Publication No. 108 and INSAP-04-02.

<sup>4</sup> May 4, 1995 OMB Memorandum to Heads of Executive Departments and Establishments from Alice M. Rivlin, Director

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for a payment of profit or fee.

Recently the INS, USMS, and the Justice Management Division (JMD) have expressed an opinion that they are not limited to reimbursement of actual costs and may enter into fixed-priced IGAs, based on a fair and reasonable price for services rendered.<sup>5</sup> Under such type(s) of arrangements, the price is fixed and is not subject to adjustment on the basis of state or local providers actual costs for providing services. In other words, a pre-determined fixed-price is paid for a base time period whether or not the actual costs are below or above the price agreed upon in the IGA. The OIG has disagreed with the INS, USMS, and JMD opinion regarding this issue.<sup>6</sup>

In March 2002, the OIG raised the issue to the Deputy Attorney General with a request to seek OMB guidance on this matter.<sup>7</sup> The issue on whether a profit or fee is permissible under Circular A-87 has been raised to OMB on another occasion. In March 1999, G. Edward DeSeve, then Deputy Director for Management of OMB, wrote the Department regarding the issue of whether the Federal Government may pay a profit or fee to state and local governments or other sponsored agreements. Deputy Director DeSeve stated:

"OMB Circular A-87, "Cost Principles for State, Local, and Indian Tribal Governments" generally prescribes what cost are allowable under cost-reimbursement contracts and sponsored agreements. Circular A-87 is mandatory for use when determining allowable costs under such agreements, and is also used as a guide for negotiating costs for fixed-price instruments (e.g., contracts) when cost data is used for the basis for price negotiations. By definition, profit or fee is an amount in excess of cost. Therefore, OMB Circular A-87 does not address this issue. In addition, other general Federal regulations that form the basis for establishing or negotiating contracts, grants, or other sponsored agreements similarly do not appear to address this issue (although some agency-specific program regulations may

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<sup>5</sup> See March 25, 2002 Memorandum from James W. Ziglar, Commissioner, INS to Glenn A. Fine, Inspector General; and April 28, 1998 Memorandum from Stuart Frisch, General Counsel, JMD to Janis A. Sposato, Deputy Assistant Attorney General Law and Policy.

<sup>6</sup> April 15, 2002 Memorandum from Glenn A. Fine, Inspector General to James W. Ziglar, Commissioner, INS.

<sup>7</sup> March 12, 2002 Memorandum from Glenn A. Fine, Inspector General to the Deputy Attorney General.

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prohibit these payments). Federal "policy" with respect to this issue generally, seems to vary from agency to agency, depending upon programmatic responsibilities and mission."

The DeSeve letter suggests, with regards to the issue of paying profit or fee, to allow the Department to make such determination and establish "policy" based on programmatic responsibilities and mission. With regards to the negotiating of fixed-price agreements, DeSeve stated:

"With respect to fixed-price contracts that are not priced based on cost (e.g., those that are priced based on competition or when commercially available items and services are being obtained), cost data is not normally used to conduct negotiations, and the provisions of OMB Circular A-87, and/or other Federal cost principles are inapplicable. Therefore, under such fixed-price arrangements, no consideration is given to what profit or fee a particular contractor or recipient may earn or receive. The concept of profit or fee is simply inapplicable to these instruments, since the total contract price is the only basis upon which a fair and reasonable price can be established."

"OMB supports the use of contracting arrangements that minimize total costs to the Government. To test the cost effectiveness of contracting alternatives, OMB recommends that the Department of Justice (Department) pilot the use of fixed-price contract arrangements and compare the overall cost of such arrangements with intergovernmental service agreements currently in use."

Our office has been unable to locate any documentation from JMD, INS, or USMS developing a policy of this nature, nor completing a pilot project recommended by OMB. The approach to entering into IGAs has remained based on the reimbursement of actual costs.

The OIG conducts periodic audits of the Department's IGAs which is required in cost reimbursement arrangements to determine allowable invoiced costs. Recent audits have disclosed instances of overpayments to state or local authorities. The issue of whether the Department may or may not pay a profit or fee should not be a contentious item in these audits, since the audits were conducted on IGAs where both the departmental component and the state or local governmental entity agreed to reimbursement of actual costs.

It is the OFDT's recommendation in the case of these audits that the overpayments should be recovered by the component involved.

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If the component disputes the OIG audit findings, then the policies and procedures outlined in Department of Justice Order 2900.6A, "Audit Follow-Up and Resolution" should be followed. This DOJ Order establishes the Department's specific procedures for resolution of audit findings. Likewise, if the component recommends compromise or termination of debt collection, the Debt Collection Act should be followed.

In April 2002, the OIG, with the concurrence of the ODAG, requested further clarification from OMB on whether an IGA entered into for detention services as governed by Circular A-87 may contain an element of profit in excess of actual costs.<sup>8</sup> However, OMB has not responded as of this date. This office does not believe any OMB clarification will resolve the current audit findings, since the signed IGAs were based solely on the reimbursement of actual costs. OMB clarification, however, will be a key factor in establishing a Department-wide policy for future IGAs. Since clarification on this matter has been sought from OMB, it is recommended the status quo concerning IGAs be maintained until such guidance is received by the Department.

The nature of cost reimbursement agreements is quite dynamic. Changes in population, direct and in-direct costs fluctuate on a daily basis, and can lead to a variance in the agreed upon jail date rate depending upon the date and time of an audit. Further, such arrangements do not provide an environment (nor incentive) for local jailers to maintain a cost efficient operation, their costs are simply passed on to the Department for reimbursement. Therefore, it is our belief that in certain future cases a fixed-price agreement would represent the best value to the Department and the taxpayer. Section 119 of the Department of Justice Appropriations Act for 2001 (Public Law 106-553) allows the Attorney General to enter into contracts and agreements for any reasonable duration and under any reasonable basis and as such, provides the necessary authority to enter into fixed-price arrangements.<sup>9</sup> Additionally, Section 119 language should be used to consolidate the previous authorities granted the Attorney General which the Department uses to enter into IGAs for detention and incarceration services. This authority has since

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<sup>8</sup> April 15, 2002 letter from Glenn A. Fine, Inspector General to Mitchell E. Daniels, Jr., Director of OMB.

<sup>9</sup> Sec. 119. Notwithstanding any other provision of law, including section 4(d) of the Service Contract Act of 1965 (41 U.S.C. 353(d)), the Attorney General hereafter may enter into contracts and other agreements, of any reasonable duration, for detention or incarceration space or facilities, including related services, on any reasonable basis.

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been delegated to the Trustee.<sup>10</sup> Hence, future IGA's will be negotiated and awarded on the basis of benefits to the entire Department of Justice, as opposed to the previous "stovepipe" approach of each individual component.

We propose, in future IGAs where circumstances exist in which the local authority will not agree to reimbursement of actual costs, a fixed-price vehicle should be considered when a benefit is clearly demonstrated to the Department and the taxpayer.

In conclusion, a draft policy has been developed (attached) which would require components to submit a written justification to our office for prior approval, which would provide the basis for entering into such fixed-price IGAs. The justification at minimum would contain:

1. The OMB Circular A-87 costs and data sheets;
2. Historical cost for obtaining the detention service in the geographical area in which the price is being negotiated (to include prices paid to private vendors, cost of existing federally owned and operated space);
3. Cost of alternative performance (i.e. if the agreement was not consummated how would the services be obtained and the associated costs);
4. The term of the agreed negotiated price (i.e. 1 year, 2 years, etc.) with reasonable allowances for price adjustments to be negotiated for subsequent time frames; and
5. Documentation of the price or cost analysis used to determine the reasonableness of price.

Any instance in which DOJ benefit(s) could not be supported and documented, such agreements would be limited to reimbursement of actual costs or at the same daily rate the authority incurs to house its own detainees. We believe this approach would resolve the current controversy, and provide the appropriate controls for cost containment.

I look forward to working with you and the OIG to improve the state of affairs in detention. If you have any questions, please do not hesitate to contact me.

Attachment

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<sup>10</sup> September 26, 2001 Delegation Memorandum from Janis A. Sposato, Acting Assistant Attorney General for Administration to Craig H. Unger, Federal Detention Trustee.

# REDACTED FOR PUBLIC RELEASE

**Office of the Federal Detention Trustee  
Policy Guidance OFDT-02-XXX**

**Subject:** Use of Special Authority for Intergovernmental Agreements for Detention Related Services

The Department of Justice (Department) houses a daily average of approximately 34,000 detainees in state and local facilities. In contrast, approximately 16,000 detainees are housed in federally owned and operated facilities. The relationships established by Intergovernmental Agreements (IGAs) with state and local governments are paramount to carrying out the function of detention. Such arrangements also save on costly capital development of federal facilities.

The purpose of this document is to provide guidance for the use of Section 119 of the Department of Justice Appropriations Act of 2001 (Public Law 106-553) for Acquiring detention services at a fixed price from state or local governments. Section 119 allows the Attorney General to enter into contracts and agreements for any reasonable duration and under any reasonable basis. This authority since has been delegated to the Federal Detention Trustee (Trustee).

This authority may not be used without the written approval of the Trustee. Requests for approval shall be submitted prior to agreement on the price or any other term and condition for the service. The following information shall be included with the approval request:

- Basis for requesting the Authority (reason why agreement can not be reached for reimbursement to actual costs or the same daily costs that state and local authorities incur to hold their own prisoners);
- The term of the agreed negotiated price (i.e. 1 year, 2 years, etc.) with allowances (i.e. annual CPI adjustments, Service Contract Act, etc.) for price adjustments to be negotiated for subsequent time frames;
- Documentation of the price or cost analysis used to determine the reasonableness of price to include OMB Circular A-87 costs and data sheets;
- Historical cost for obtaining the detention service in the geographical area in which the price is being negotiated (to include prices paid to private vendors, cost of existing federally owned and operated space);
- Cost of alternative performance (i.e. if the agreement was not consummated how would the services be obtained and the associated costs); and
- Concurrence of component Procurement Chief;
- Any additional pertinent information.

Please include this document to your collection of policy guidance documents. If you have any questions, please call Scott Stermer at (202) 353-4601.

OIG RESPONSE TO THE PRIOR DETENTION TRUSTEE'S  
MEMORANDUM (SEPTEMBER 18, 2002)



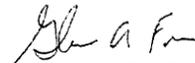
U.S. Department of Justice

Office of the Inspector General

Washington, D.C. 20530

September 18, 2002

MEMORANDUM FOR LARRY D. THOMPSON  
DEPUTY ATTORNEY GENERAL

FROM:   
GLENN A. FINE  
INSPECTOR GENERAL

SUBJECT: OIG Comments on August 1, 2002, Memorandum  
From Craig M. Unger, Federal Detention Trustee,  
Regarding Intergovernmental Agreements

This memorandum is written in response to a memorandum to you, dated August 1, 2002, from Craig Unger, the Federal Detention Trustee, concerning Intergovernmental Agreements (IGAs) with state and local governments for detention services. In this memorandum, we address three issues: (1) the resolution of three Office of the Inspector General (OIG) audits concerning claimed overpayments to state and local governments, (2) the collection of continuing overpayments to state and local governments that have occurred subsequent to the periods covered by OIG audits because of the failure of Department components to adjust rates downward to meet audited rates, and (3) the Department's authority to enter into IGAs that may result in a profit above cost being paid to state and local governments providing detention services. We have previously discussed these issues in memoranda to you dated March 12, 2002, and June 12, 2002. Copies of these memoranda are attached as each as Attachments A and B, respectively.

**1. Recovery of Overpayments Identified in OIG Audits**

The first issue relates to overpayments found by OIG audits of three entities. In an audit issued in December 2000, we found that that the United States Marshals Service (USMS) and the Immigration and Naturalization Service (INS) overpaid Guam \$3.6 million in Fiscal Year (FY) 1999 and FY 2000. In an audit issued in June 2001, we found that the INS and the USMS overpaid DeKalb County, Georgia, \$5.7 million in FY 2000. In an audit issued in June 2001, we found that the INS and the USMS overpaid York County, Pennsylvania, \$6.2 million in FY 2000. Those three audits are included as Attachment C.

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In his August 1 memorandum to you, the Detention Trustee notes that the OIG, the USMS, and the INS "historically" have read the enabling statutes and OMB Circular A-87 to preclude a payment of profit or other fee in excess of actual cost, and that "[t]he audits were conducted on IGAs where both the Department component and the state or local governmental entity agreed to reimbursement of actual and reasonable costs." The Detention Trustee therefore recommends that the overpayments identified in the OIG audits should be recovered.<sup>1</sup> We concur with the Detention Trustee's recommendation to recover the overpayments identified in our audits.

### **2. Recovery of Post-Audit Overpayments**

In addition to the overpayments identified in the OIG audits, the failure of the INS and the USMS to adjust rates downward to conform to the audited rates has resulted in additional overpayments to Guam, York, and DeKalb County.

The OIG recommends that action be initiated immediately to address these overpayments. At the very least, the USMS and the INS should be directed to adjust future payments to meet the audited rates and to avoid additional overpayments.

### **3. The Department's Authority to Enter into IGAs that Exceed Cost**

The OIG's consistent position has been that the Department cannot enter into an IGA that provides for payment beyond cost. A contract that is based on factors other than cost (such as competitive prices) is a procurement vehicle authorized by the Federal Acquisition Regulation (FAR). An IGA is a procurement vehicle authorized by the Director of the Office of Management and Budget (OMB), and we believe that authorization limits payments under an IGA to the reimbursement of cost.

The Detention Trustee correctly notes that there has been a dispute within the Department as to whether the USMS and INS may make payments under IGAs in excess of cost. The Detention Trustee also notes that the OIG requested guidance from the OMB on this issue in April 2002. See Attachment D.

On August 22, 2002, Deputy Comptroller Joseph L. Kull responded to the OIG's letter. See Attachment E. Unfortunately, his response does not provide guidance on the issue presented. Rather, it suggests that the issue be

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<sup>1</sup> The Detention Trustee states that if a component disputes the audit recommendations, it should follow the Department's audit resolution procedures or seek authority to compromise or waive the debt under the Debt Collection Act. The overpayments found in our audits have not been disputed by the USMS or the INS.

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addressed by the Detention Trustee, but does not state how the acquisition process should be structured or whether a profit may be paid under an IGA.

In his memorandum, the Detention Trustee suggested a possible change in "future IGAs where circumstances exist in which the local authority will not agree to reimbursement of costs." The Detention Trustee recommends that the Department adopt a procedure to allow payments above costs for state and local government detention services in certain cases. Specifically, when a local government will not agree to reimbursement under an IGA based on actual cost, the Detention Trustee proposes to use a fixed-price IGA to establish a rate of reimbursement for detention services, although such an agreement may result in payments beyond cost. This would allow the Department to enter into an IGA that is, in effect, a fixed-price contract as contemplated in FAR while avoiding numerous FAR requirements that have been objected to by state and local governments, including those intended to ensure compliance with federal policies.

First, as a practical and budgetary matter, we believe this approach could have severe implications for the amount of money the Department spends for detention services. Once it becomes known that all a provider need do is refuse to agree to a reimbursement based on cost, we believe that most, if not all, state and local governments will reject that basis in favor of one that enables them to obtain a profit. If one state and local government is allowed profit, others will inevitably find out about it and will demand profit as well. This could have staggering implications on the Department's detention services. For example, if the Department allowed a 5 percent profit on each of its current IGA agreements, it would cost the government 80 million additional dollars each year for the detainees that are housed under these agreements.<sup>2</sup>

Second, we still question the legal authority to enter into the IGAs as the Detention Trustee has described. As the authority for allowing a fixed-price IGA with profit, the Detention Trustee points to § 119 of the Department of Justice Appropriations Act for 2001 (P.L. 106-553). For the reasons set forth below, the OIG does not believe that this provision was intended to provide the Department with such authority.

Section 119 of the Department's appropriation for FY 2001, includes the following language:

Notwithstanding any other provision of law, including section 4(d) of the Service Contract Act of 1965 (41 U.S.C. 353(d)), the Attorney General hereafter may enter into contracts and other agreements of any

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<sup>2</sup> This figure is likely to be conservative. York County is currently being paid in excess of 50 percent profit.

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reasonable duration, for detention or incarceration space or facilities, including related services, on any reasonable basis.

(Pub. L. No. 106-553 Appendix B, 114 Stat. 2762A-69.)

The legislative history of the appropriation act demonstrates that this provision was intended to allow multi-year contracts with private entities. In addition, the term “on any reasonable basis” that appears at the end of § 119 was not intended to address the basis of negotiation. Rather, it addressed the type of contract and is shorthand for the term “to acquire such space or facilities on a lease-to-ownership, lease-with-option to purchase, or other reasonable basis.”

Section 119 was not intended to be a legislative grant of authority to depart from cost-based agreements with state and local governments.<sup>3</sup> The Conference Committee, at the request of the Department, agreed to authorize multi-year contracts or agreements with private entities on a lease-to-ownership, lease-with-option to purchase, or other reasonable basis. There is no suggestion in any of the Department’s communications that the Department sought this provision for the purpose of entering into multi-year contracts or agreements with state and local governments on a basis other than cost. Thus, any suggestion that § 119 vests the Department with authority to depart from the long-established practice of basing contracts with state and local governments on the costs of providing the services is unfounded. Indeed, we believe that it is inappropriate for the Department, which justified the adoption of this language based on one set of facts, to argue that the language adopted stands for a proposition that was never presented to Congress for its consideration.

### **Conclusion**

Based on the foregoing analysis, we recommend that the overpayments identified in the OIG audits of state and local agreements for the provision of detention services be collected. Second, we recommend that action be taken to collect or resolve the additional costs incurred because of the failure of Department components to adjust payments to state and local governments to reflect the audited rates. Third, we recommend that future awards to state and local governments under IGAs be limited to the actual cost of providing detention services. Because of the large sums of money involved and the

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<sup>3</sup> Attachment F to this memorandum sets forth relevant legislative history of this provision.

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importance of these issues to the Department, we believe it is imperative that the Department decides these issues expeditiously.

Attachments

cc: Craig M. Unger, Director  
Office of the Detention Trustee

Stuart Levey  
Associate Deputy Attorney General

David Margolis  
Associate Deputy Attorney General

Paul Murphy  
Associate Deputy Attorney General

Robert F. Diegelman  
Acting Assistant Attorney General  
for Administration

MANAGEMENT INFORMATION MEMORANDUM – PROPOSAL  
FOR ACQUISITION OF DETENTION SPACE



U. S. Department of Justice

Office of the Inspector General

JAN 04 2006

MEMORANDUM FOR STACIA A. HYLTON  
FEDERAL DETENTION TRUSTEE

FROM:

*Caryn A. Manske for*  
GUY K. ZIMMERMAN  
ASSISTANT INSPECTOR GENERAL  
FOR AUDIT

SUBJECT:

Management Information Memorandum -  
Proposal for Acquisition of Detention Space

We appreciate you and your staff taking the time to brief members of my staff on the Office of the Federal Detention Trustee's (OFDT) initiative to implement an indexed fixed-price method for obtaining jail beds from state and local governments for the United States Marshals Service's (USMS) detainees. The initiative includes the development of an econometric statistical model to establish the prices for each facility. We recognize that you are still in the development phase and that all of the details of the process have not yet been fully addressed. However, based upon the presentation you made, we would like to take this opportunity to bring the following matters to your attention. Please keep in mind that these are only our initial thoughts and do not represent a comprehensive review or audit of your proposal.

**Effect of Regulations Governing Jail Agreements**

The OFDT's plan for making revisions to the process by which the USMS establishes the amount to pay state and local entities for jail space for the housing of detainees involves the execution of agreements based upon a *price* for such space. Under the current process for establishing intergovernmental service agreements (IGA) with state and local entities, the amount paid is based upon the *cost* of jail space and is governed by Office of Management and Budget (OMB) Circular A-87, entitled *Cost Principles for State, Local, and Indian Tribal Governments*.

According to OFDT officials, their proposal to use an econometric statistical model to estimate a price for jail beds is allowable under the Federal Acquisition Regulation (FAR). Because the agreements would no longer be

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based upon reimbursement of costs, it would seem that OMB Circular A-87 would no longer apply. Thus, one major impact of implementing the proposal would be changing the criteria governing the agreements from an OMB Circular to the FAR, which is a broader and more encompassing regulation. The FAR requires the execution of contractual agreements and such contractors must comply with guidelines and laws related to principles such as: (1) equal employment opportunity without regard to race, religion, color, sex, or national origin; (2) privacy; (3) workers with disabilities; (4) energy and water efficiency; (5) age discrimination; and (6) employment opportunities for military veterans.

Our understanding of the history of the Department of Justice's (DOJ) efforts to obtain detention space for federal detainees is that state and local entities have not been universally willing to be governed by the FAR. This necessitated the DOJ's 1982 request to utilize intergovernmental service agreements governed by OMB Circular A-87 to reimburse state and local facilities for the costs of providing detention services. Further, DOJ officials believed that the use of IGAs would assist in the acquisition of detention space because officials viewed the award process as more streamlined and less cumbersome than the contracting process. Therefore, we believe that it is important to evaluate the totality of the impact of administering all agreements for jail space under the FAR.

### **Accuracy of Current IGA Rates**

According to the information provided by the OFDT's statistician, the per diem base rate used in the econometric statistical model was calculated using the current IGA rates. During the briefing that we received, the statistician pointed out that this methodology assumes that these current IGA rates (which are cost-based agreements executed under the confines of OMB Circular A-87) accurately reflect the costs for each facility.

According to OFDT officials, no tests were performed to establish this assumption of accuracy. However, as noted in our 2004 audit of the OFDT, prior Office of the Inspector General (OIG) audits have resulted in questioned costs because the per diem rates calculated were in error due to a variety of factors, including the inclusion of unallowable or unsupported costs and the use of inaccurate or unsupported population figures.<sup>1</sup>

### **Performance of the Model in Predicting Current IGA Rates**

From the documentation provided during the briefing, it appears that the statistical model performed well for only a small number of facilities. According to the statistician, when the model was tested by using it to predict the current

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<sup>1</sup> Office of the Inspector General, *Audit of the Department of Justice Office of the Federal Detention Trustee*, Report Number 05-04, December 2004.

IGA rates, the results showed that the model-derived rates for only 41 percent of the facilities [redacted] deemed acceptable by the OFDT. Moreover, the statistician's report states that the model performed worst for facilities located in large metropolitan areas and in the West and Midwest regions. While we noted that the report states that the differences were not statistically significant, what remains unknown is the percent of the detainee population accounted for in these instances for which the model does not provide reliable results. Without knowing the population, it is impossible to identify the federal dollars associated with these facilities for which the model does not fare well, as well as the severity of the impact on the overall cost of detention space to the taxpayers.

We also recognize that the OFDT has built in an allowance for the use of adjustments and exceptions when the model does not perform well for the specific conditions of a facility or geographic location. However, these adjustments and exceptions (which would be made outside the execution of the statistical model) could be problematic in ensuring consistent application of the new pricing strategy.

**Implementation Plan**

As noted previously, we understand that you are still in the process of developing the proposal and are working on myriad details and issues that must be addressed before it can be implemented. However, at the time of the briefing, the OFDT had not yet established a schedule for the implementation phase of the endeavor. Obviously, it is important to plan carefully the way in which facilities will be transferred from cost-based jail agreements to the new indexed price-based agreements governed by the FAR. Further, it is important to plan for the various exigent circumstances that might be encountered, such as reluctance on the part of the state and local entities or protracted discussions with involved parties over the rate to be used. Moreover, as the USMS is not the only user of state and local facilities for detainees, the OFDT's planned changes to the procurement process for such space will have ramifications outside of the USMS.

. . . .

Thank you again for the opportunity to hear your proposal during the development stage. If you have any questions or would like to meet again to discuss jail space agreements, please contact me on (202) 616-4633 or Carol S. Taraszka, Regional Audit Manager, Chicago Regional Audit Office, on (312) 353-1203.

cc: Richard P. Theis  
DOJ Audit Liaison

OFDT RESPONSE TO THE DRAFT AUDIT REPORT



U. S. Department of Justice

Office of the Detention Trustee

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Washington, D.C. 20535

December 15, 2006

MEMORANDUM TO Glenn A. Fine  
Inspector General  
Office of the Inspector General

FROM:   
Stacia A. Hyllton  
Federal Detention Trustee

SUBJECT: Response to the Draft Report - Oversight of Intergovernmental  
Agreements by the United States Marshals Service and the  
Office of the Federal Detention Trustee

In accordance with your memorandum dated November 17, 2006, the Office of the Federal Detention Trustee (OFDT) offers the following comments, based upon our review of the recommendations contained in the subject report.

**Recommendation #2:** *Modify eIGA so that it captures average daily population, indirect costs, and credits as part of its Jail Operating Expense Information.*

**Response:** eIGA already collects information pertaining to the average daily populations. We do not agree with collecting information pertaining to indirect cost or revenues. OFDT developed the Jail Operating Expense sheet in accordance with Part 15 of the Federal Acquisition Regulations (FAR) which requires the government, in establishing the reasonableness of the offered prices, to use every means available before requesting cost or pricing data. As stated at FAR 15.402 Pricing policy, contracting officers must not require unnecessarily the submission of cost or pricing data, because it leads to increased proposal preparation costs, generally extends acquisition lead time, and consumes additional resources of the contracting parties. OFDT believes that the JOIE already requires jails to submit substantial expense information; it does not seek to increase that burden by requiring jails to submit such additional information such as indirect costs and credits.

Moreover, the OFDT and eIGA method is based on determining a rate by using price analysis techniques. Price analysis is the process of examining and evaluating a proposed price without

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evaluating its separate cost elements to determine a fair and reasonable price. Projected revenues and indirect costs are variable in nature and do not provide any additional information required to determine a fair and reasonable rate.

**Recommendation #3:** *Modify eIGA so that it presents a jail-day rate to the IGA analysts based on the actual and allowable costs of the jail.*

**Response:** OFDT disagrees. As the Draft Report points out on pages xvii, 29, 30 and 32, using a cost-based negotiated rate may be inaccurate and unreliable. Moreover, based upon the manner in which the OIG uses the term, "actual and allowable costs," it is clear that the OIG is recommending the use of a cost-reimbursement arrangement which OFDT does not agree should be used in the case of IGA agreements. OFDT supports the continued use of fixed-price agreements, with the reasonableness of the rate being determined by price analysis, not cost analysis. Price analysis is the process of examining and evaluating a proposed price without evaluating its separate cost elements to determine a fair and reasonable price.

The Department of Justice (DOJ) and the Department of Homeland Security (DHS) have approximately 22 competitively awarded contracts for privately provided detention and/or correctional services, nearly 1,800 IGAs with State and local authorities for the housing of Federal prisoners and inmates, and approximately 22 federally-operated detention facilities. This historical data provides the perfect platform for determining a fair and reasonable price, and would be acceptable evidence for the award of a competitively awarded contract to a privatized detention facility.

OFDT believes a comparison of previously proposed IGA prices, Government-operated facility per capita rates and private contract prices, with a proposed rate from a local government, clearly meets the requirements of the FAR, as pertains to Price Analysis.

**Recommendation #4:** *Develop procedures for re-examining the : core rate to ensure that it accurately reflects the average jail-day rate based on actual and allowable costs.*

**Response:** OFDT agrees, in part. Prior to the audit, OFDT had already planned to review, evaluate, and validate the core pricing model that is integral to its eIGA initiative. Accordingly, OFDT supports the OIG's recommendation. In furtherance of OFDT's Strategic Objective 1.2 (Ensure Efficient Use of Detention Space and Regulate Price Increases), the Detention Trustee has approved a project plan for evaluating and validating the methodology for establishing the core rates. In concert with eIGA, the objectives of this project are to: (1) collect and analyze detailed data describing detention facility expenditures; (2) identify additional factors, where possible, that are predictive of detention facility expenditures on a per capita basis; (3) assess the impact of inflation on per capita detention expenditures; and (4) evaluate the reliability of the current pricing model, including re-specification of model parameter estimates, where necessary. Because detailed financial data is necessary to support this project, it is not anticipated that any substantial work will begin on this project until eIGA has been implemented and 12 months of data have been collected to support the quantitative analysis.

Despite OFDT's agreement that it should review, evaluate and validate the core pricing model, OFDT continues to object to the OIG's implied recommendation of the use of a cost-reimbursement arrangement, which OFDT does not agree should be used in the case of an IGA.

**Recommendation #5:** *Develop guidance and training for the USMS on how jail-day rates will be established using eIGA. The guidance and training should include how to negotiate with detention facilities, clearly documenting the basis for negotiated jail-day rates, evaluating cost and non-cost factors, when it is appropriate to deviate from the scheduled adjustments to the core rate, how deviations should be documented, defining what constitutes an appropriate facility to compare jail-day rates, evaluating and documenting the analysis of established jail-day rates of similar facilities in justifying a jail-day rate, documenting the rationale for any retroactive increase or extension of temporary agreements, and ensuring that follow-up on temporary jail-day rates is timely.*

**Response:** OFDT agrees. As we have repeatedly informed the OIG, we are currently developing training and guidance for the eIGA system. Additionally, OFDT is funding Federal Acquisition Institution-mandated training for USMS IGA Analysts through an outside vendor.

**Additional Corrective Action:** While OFDT agrees with the OIG that the USMS should document the basis for the rate and any deviations from the core rate under eIGA, it continues to be concerned about the documentation of IGAs under the current system. Indeed, OFDT agrees with the OIG's assertion on page 34 of its Draft Report that, although by virtue of 18 U.S.C. § 4013(a)(4)(C), the USMS legally was permitted to consider "conditions" other than cost in setting the fixed rate per diem, the extent to which the USMS did so in setting a fixed rate per diem was not always sufficiently documented. Consequently, as OFDT already has done, OFDT will continue to recommend to the USMS that it review its files for these IGAs to ensure that appropriate documentation exists regarding the costs or other conditions which formed the basis for the fixed rate. Additionally, if upon a further review of any existing IGA, the USMS or OFDT determines that a jail misrepresented its costs and that, but for that misrepresentation, the USMS would not have agreed to the approved rate, OFDT will recommend to the USMS that it take action to adjust the rate. Indeed, it should be noted that, contrary to the OIG's assertion, OFDT has never stated that fraud is the only instance in which payments may be recovered and, if a jail misrepresented its costs to the USMS to obtain a more advantageous rate, OFDT concurs that corrective action is warranted.

**Recommendation #6:** Develop guidance that limits the amount of profit a state or local jail can earn for housing federal prisoners.

OFDT disagrees. Since IGA(s) are considered a fixed-price arrangement, we refer OIG to the March 1999 letter to the Department of Justice from G. Edward DeSeve, then Deputy Director for Management of the Office of Management and Budget (OMB). With regards to the negotiating of fixed-price agreements, DeSeve stated:

"Therefore, under such fixed-price arrangements, no consideration is given to what profit or fee a particular contractor or recipient may earn or receive. The concept of profit or

fee is simply inapplicable to these instruments, since the total contract price is the only basis upon which a fair and reasonable price can be established.”

Fixing a fee or profit would only be applicable in a cost-reimbursement type of agreement. If we were to use cost-reimbursement agreements, we would be responsible for any loss the local government may incur in providing bed space to the USMS, which from the OFDT standpoint is an unacceptable exposure to the government.

This exposure is shown in the recent OIG of \_\_\_\_\_, in which the OIG determined the actual and allowable costs to be \$100.26 for FY 2004 and the USMS provided payment to the jail \$84.69, \$15.57 lower than actual costs, thus creating an *underpayment* totaling approximately \$10.0 million for the period of FY 2004, FY 2005, and FY 2006. Additionally, a recent Maryland legislative audit determined that the State had been under paid for the housing of federal prisoners by approximately \$3.5 million over the last four years.

The FAR at Part 16.301-3 provides the following limitations with respect to cost reimbursement agreements:

**16.301-3 Limitations**

- (a) A cost-reimbursement contract may be used *only* when—
  - (1) The contractor’s accounting system is adequate for determining costs applicable to the contract; and
  - (2) Appropriate Government surveillance during performance will provide reasonable assurance that efficient methods and effective cost controls are used.

The reality is that, while local jails employ accounting systems, these systems are not always adequate to segregate costs associated with the housing of federal prisoners from the costs associated with the housing of state or local prisoners and there is not appropriate Government surveillance to ensure efficient methods and effective cost controls are used. Simply auditing “actual and allowable” costs does not identify the prudence of such costs. A fixed price arrangement is the proper method for these agreements to protect the government.

APPENDIX XII

USMS RESPONSE TO THE DRAFT AUDIT REPORT



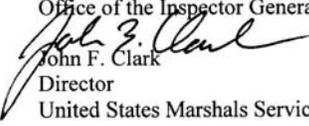
U.S. Department of Justice  
United States Marshals Service  
*Office of the Director*

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Washington, DC 20530-1000

December 19, 2006

MEMORANDUM TO: Guy K. Zimmerman  
Assistant Inspector General for Audit  
Office of the Inspector General

FROM:   
John F. Clark  
Director  
United States Marshals Service

SUBJECT: Response to Draft Audit Report – Oversight of  
Intergovernmental Agreements by the United States  
Marshals Service and the Office of the Federal Detention  
Trustee

The United States Marshals Service (USMS) has reviewed the draft audit report cited above and provides responses to recommendations for which this agency is responsible. As you are aware, the USMS and the Office of the Federal Detention Trustee (OFDT) are jointly responsible for responding to this report. The USMS has responded to Recommendations #1, 7, 8, 9, and 10 and consulted with OFDT on our responses. There are some general comments related to the report at the end of the document.

We appreciate the opportunity to review and respond to the draft report.

If you have any questions, please contact Assistant Director Sylvester Jones, Witness Security and Prisoner Operations, at (202) 307-5100.

cc: Richard Theis  
DOJ Audit Liaison

Yvonne Athanasaw  
USMS Audit Liaison

Stacia Hylton  
Federal Detention Trustee

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Recommendation #1 – Address each open audit recommendation from prior OIG audits of IGAs, which collectively contain dollar-related findings of \$40 million.

RESPONSE: In consultation with the Office of the Federal Detention Trustee (OFDT), the United States Marshals Service (USMS) disagrees with Recommendation #1. With regard to 11 open audits which were listed as an attachment to the OFDT's March 17, 2006, memorandum to Guy K. Zimmerman, the OFDT has instructed the USMS to refrain from efforts to collect the amounts which the Office of the Inspector General (OIG) has determined were overpayments. The agreements which were the subject of the audits incorporated a fixed rate which was mutually accepted by the parties at the time the agreements were entered into. Even if the IGAs were ambiguous as to the issue of the rate to be paid (which the USMS specifically disputes), it was the intention of the parties that the USMS would reimburse the local government at the fixed day rate.

Indeed, as the OIG has conceded in its report, in many instances, conditions other than cost data influenced the establishment of the fixed rate per diem.<sup>1</sup> Where there has been a meeting of the minds with regard to the fixed rate per diem that was established based upon cost and other conditions, the USMS simply cannot now seek to recoup the payments that were made pursuant to that fixed rate.

As provided in a recent response to DOJ's data call for responses to the Inspector General's List of Top Management Challenges, OFDT's position is that, "...the agreements incorporated a "fixed rate" and, accordingly, that the agreements with the state and local governments were negotiated, fixed price agreements... OFDT believes that, in the absence of fraud, the agreements are not subject to retroactive adjustment. Once the USMS and the state or local government negotiated and reached an agreement on a price for the services, that price was fixed and the parties were bound. OFDT believes that the Government cannot, years later, reexamine the state or local government's costs and prisoner population for the period in question and seek to recover an amount by which, in hindsight, appears to have exceeded those costs."

Although the USMS disagrees with the OIG's assertion that IGAs are cost reimbursement-type arrangements, we agree that in cases where fraud or misrepresentation of costs exists, action must be initiated to recover payments. To accomplish this, the USMS will again review all OIG audits cited in the IGA audit to determine if cases of fraud or misrepresentation exist. To supplement this review, the USMS may use internal or external documents such as jail documents; IGA supporting documents; or OIG working papers. In concert with OFDT, the USMS will review each audit on a case-by-case basis to make a final decision as to a remedy. Should a decision be made that it is in the best interest of the USMS and OFDT to do so, an agreement will be negotiated with the jail to implement the remedy, including, potentially, prospective per diem offsets.

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<sup>1</sup> Draft Audit Report, pp. xviii, 30.

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Recommendation #7 – Develop annual training plans for IGA analysts that will provide appropriate procurement core competencies such as those outlined by the Federal Acquisition Institute.

RESPONSE: The USMS agrees with this recommendation and will develop annual training plans for all staff working in the Programs and Assistance Branch (PAB). These plans will be developed no later than February 28, 2007, pending implementation of *e-IGA*. The USMS recently received funding from OFDT to send PAB staff to Price Analysis training. PAB staff will complete the Price Analysis training by February 28, 2007. Additional training requirements will be annotated on the training plans and PAB staff will attend training provided that resources are available upon passage of the USMS appropriation.

Recommendation #8 – Update policies that clearly describe PAB and USMS responsibilities for establishing and monitoring IGAs.

RESPONSE: The USMS agrees with this recommendation. While some policies have recently been updated, more work can be done on current policy, or new policy should be prepared. In order to effectively and efficiently revise/produce policy, the USMS estimates that a six month period is required after OFDT provides the information required under Recommendations 5 and 6 of this report. It is also anticipated that based on *e-IGA*, a comprehensive overhaul of the policies related to IGAs will be necessary.

Recommendation #9 – Review all IGAs to ensure that the agreements are current and prepare new agreements for those that have expired.

RESPONSE: The USMS agrees with this recommendation. Ninety-nine percent of identified expired permanent IGAs have been extended. All remaining expired IGAs will be extended by January 31, 2007. Beginning in CY07, PAB staff will issue a memorandum to the field, under the Assistant Director's signature, on a monthly basis identifying usage of expired IGAs and require they discontinue use until the execution of a new agreement.

Recommendation #10 – Ensure adequate resources are provided to oversee IGAs. This includes adequate staffing for the review and approval of IGA actions, and for the audit of IGAs.

RESPONSE: The USMS agrees with this recommendation. Additional staffing for review, approval and audit of IGAs is critical to successful operation of the program. Inadequate staffing has resulted in the USMS's inability to accomplish the mission. Currently, two positions are announced and selection of personnel is expected in January 2007. Filling of these vacancies is expected to improve the program. Upon implementation of *e-IGA*, a workgroup will be convened to discuss PAB staffing and needed resources. A proposal will be made to USMS management requesting adequate resources for the program. Completion of this step is dependent upon implementation of

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*e-IGA* but it is estimated a period no longer than six months after *e-IGA* is implemented would be necessary to accomplish this goal.

### Other comments:

- The OIG's observation on page 42 that the number of audits was greatly reduced by the USMS fails to recognize that beginning in FY05 desk audits were conducted rather than onsite audits.
- Appendix IV, Schedule of Dollar-Related Findings for Prior Audit Reports, reports \$37,891,762 in "Questioned Costs." The Appendix's footnote defines "Questioned Costs" as expenditures that do not comply with legal, regulatory, or contractual requirements, are not supported by adequate documentation at the time of the audit, or are unnecessary or unreasonable. The USMS contends that the amounts reported are not "Questioned Costs," as that definition found in the Appendix's footnote is erroneous.
- It should be noted that some audits in Appendix IV have been referred to the Department of Justice Audit Resolution Committee where no action has been taken to date.
- Appendix IV lists the (Report GR-40-97-004), identifying \$2,524,227 as the amount of Funds Put to Better Use. This amount represented an unsupportable capital cost recovery proposal which was made by the but was never endorsed by the USMS and subsequently was not considered in development of the rate.
- Appendix IV fails to disclose that of the \$37,891,762 in alleged over payments listed, there were amounts collected or otherwise recovered (offsets on future rates). For example, \$1,756,532 was recently forgiven in accordance with DOJ procedures for
- Of the \$37,891,762 in alleged overpayments per Appendix IV, \$9,528,017 represents audits covered by the Trustee's March 17, 2006, memorandum.

APPENDIX XIII

**OFFICE OF THE INSPECTOR GENERAL ANALYSIS AND  
SUMMARY OF ACTIONS NECESSARY TO CLOSE REPORT**

The OIG provided a draft of this audit report to the USMS and the OFDT for their review and comment and their responses are incorporated as Appendices XI and XII of this final report. The OFDT and USMS concurred with 6 of our 10 recommendations, but continued to disagree that they should attempt to recoup millions of dollars in overpayments to state and local detention facilities. The OFDT also disagreed to modify eIGA to maintain data on indirect costs and revenue generated from a detention facility's operation, have eIGA present a cost-based jail-day rate to IGA analysts in their negotiations with state and local jails, or limit the amount of profit that a state or local jail may earn for housing federal detainees.

The OIG recognizes that there are significant pressures on the USMS to obtain detention space but, as explained below, we disagree with the OFDT's and USMS's position on these issues. Rising detention population and costs present a challenge to DOJ's ability to obtain affordable bed space for individuals not housed in federal facilities. In the past, the USMS required detention facilities interested in housing federal detainees to submit a cost sheet as part of the IGA application process. The USMS cost sheet requested financial and prisoner population information, and informed the preparer that the jail-day rate would be computed on the basis of actual, allowable, and allocable costs associated with the operation of the facility that benefit federal detainees during the most recent accounting period. Prior OIG audits often noted jail-day rates that exceeded the rate supported by a detention facility's allowable costs and average daily population. We believe that not collecting or using cost data when negotiating an IGA rate, and therefore potentially allowing payment of a rate that far exceed costs, will exacerbate the continuing escalation in detention costs nationwide. Because DOJ's current annual detention budget exceeds \$1 billion, the long-term budget implications of IGA policies are substantial.

This appendix presents our analysis of the USMS's and OFDT's disagreements with our recommendations to try and recoup millions of dollars in overpayments to state and local detention facilities, and expand the information collected by eIGA and used by IGA analysts in their negotiations with state and local jails. A summary of actions necessary to either resolve or close each of the report's 10 recommendations is provided after our analysis of the OFDT's and USMS's general comments.

## Recouping Overpayments

The OIG has completed 31 individual IGA audits since 1995 and reported overpayments totaling almost \$60 million, of which \$37 million remains unaddressed by the USMS. However, the OFDT and USMS assert that because IGAs are negotiated, fixed price agreements they cannot collect the overpayments identified by the OIG in these audits. In its response to this draft audit report, the USMS stated that OFDT has instructed it to refrain from efforts to collect what the OIG determined to be overpayments. The USMS response stated:

*OFDT believes that, in the absence of fraud, the agreements are not subject to retroactive adjustment. Once the USMS and the state or local government negotiated and reached an agreement on a price for the services, that price was fixed and the parties were bound. OFDT believes that the Government cannot, years later, reexamine the state or local government's costs and prisoner population for the period in question and seek to recover an amount by which, in hindsight, appears to have exceeded those costs.*

The OFDT further stated that it "supports the continued use of fixed-price agreements, with the reasonableness of the rate being determined by price analysis, not cost analysis."

Recently, OFDT obtained an opinion from the General Counsel of the Justice Management Division stating that the IGAs are "fixed price agreements that do not contain a basis for the Department to seek retroactive price adjustment" as a matter of contract law.

As noted in the report, we do not agree with the contention that the IGAs in question were fixed-price contracts that are not adjustable in the absence of fraud by the state or local facility. Rather, the agreements were cost-based, meaning that costs were the basis of the award amount and that cost analysis rather than price analysis was used to establish the jail-day rate.

As detailed in our report, the USMS has consistently requested that detention facilities complete a cost sheet as part of the IGA application process. The cost sheet instructions state that the jail-day rate is based on actual and allowable costs subject to Office of Management and Budget (OMB) Circular A-87. As shown below, the cost sheet requires the detention facility to certify that the costs included are accurate, complete, current, and

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do not contain any unallowable or unallocable costs prohibited by OMB Circular A-87. The detention facility also must certify that its records can be audited to verify the jail-day rate.

**Section VI - Certification Statement**

*This is to certify that, to the best of my knowledge and belief the data furnished in Schedules B through G are accurate, complete and current, and do not include any unallocable, or unallowable, or unallowable costs prohibited by OMB Circular No. A-87 (Cost Principles for State and Local Governments) or any cost not related to the jail facility as discussed on Form USM-243 (Cost Sheet for Detention Services). The records of this agency area available for review and audit by the authorized representative of the U.S. Government to verify any jail per diem rate negotiated.*

Signature \_\_\_\_\_ Date \_\_\_\_\_  
Name \_\_\_\_\_ Title \_\_\_\_\_

Moreover, even if the IGAs in question were negotiated, fixed-price agreements, as the OFDT and USMS contend, that does not mean that the specified price could not be subject to adjustment by the operation of the clauses in the agreements that specifically address re-pricing or recoupment of amounts disallowed by audits. For example, the agreements provide that:

- Jails are responsible for complying with OMB Circular A-87 and 28 CFR, Part 66, and the allowability of the costs covered in its submitted cost sheets. To avoid possible subsequent disallowance or dispute based on unreasonableness or unallowability under the specific cost principles, recipients must obtain prior approval on the treatment of special or unusual costs;
- Jails shall notify the USMS of any significant change in the facility, including significant variations in inmate populations, which cause a significant change in the level of services. The notification shall be supported with sufficient cost data to permit the USMS to equitably adjust the jail-day rate included in the IGA. Depending on the size of the facility, for the purpose of assessing changes in the population a 10 percent increase or decrease in the prison population is considered significant;
- The USMS will hold jails accountable for any overpayment, audit disallowance, or any breach of the IGA that results in a debt owed to the federal government. The USMS may apply interest, penalties, and administrative costs to a delinquent debt owed by a debtor pursuant to the Federal Claims Collection Standards; and

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- Jails are responsible for the management and fiscal control of all funds. Responsibilities include the accounting of receipts and expenditures, cash management, the maintaining of adequate financial records, and the refunding expenditures disallowed by audits.

In our judgment, these facts contradict the USMS and OFDT contention that IGAs are negotiated, fixed-price agreements that are not subject to recovery of overpayments in the absence of fraud.

In addition, the USMS acknowledged in its response to the draft audit report that it has in the past recovered (either by collection or offsets on future rates) a portion of funds identified as overpayments. It also acknowledged that in other circumstances, overpayments have been forgiven in accordance with DOJ procedures. Further, the JMD General Counsel acknowledged that depending on the circumstances of each case, the Department may have a legal remedy for recovering overpayments where a state submitted inaccurate cost information during the IGA formation process. He also noted that nothing in the agreements prohibits the DOJ from seeking a prospective rate adjustment.

### **Modifying eIGA**

As detailed in our report, the OFDT is revising the process of how it calculates IGA rates. As part of this process, the OFDT and USMS agreed to develop guidance for establishing IGAs, ensure adequate resources are provided to oversee IGAs, and devise training plans for IGA analysts. We believe that eIGA is a positive step to improving the process historically used to establish jail-day rates. However, we believe that OFDT should improve eIGA by expanding the information eIGA collects to include indirect costs and revenue generated from a detention facility's operation (also known as credits). In turn, this information should be used to calculate a cost-based jail-day rate for consideration by IGA analysts.

Our audit identified significant deficiencies with how jail-day rates have been established and monitored in the past. Because eIGA is not operational, and the OFDT has neither issued guidance nor trained IGA analysts on how jail-day rates will be established using eIGA, we are unable to predict how successful eIGA will be. However, one critical issue is how the rates negotiated through eIGA compare to rates that would have been established using a detention facility's actual and allowable costs. Moreover, we believe that, as we demonstrated in our review of jail-day rates that were established using the eIGA model, providing cost information to the

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IGA analysts will give the USMS more leverage in its negotiations, help control rising detention costs by reducing negotiated jail-day rates, and provide an important check on the price reasonableness model.

In its response, the OFDT noted that eIGA already collects information pertaining to a jail's average daily population, and that the Jail Operating Expense Information already incorporates substantial expense information. The OFDT stated that it does not intend to increase the burden placed on jails by requiring them to submit the additional information suggested by the OIG. In support of this position, OFDT points to the language of Federal Acquisition Regulation (FAR) 15.402 stating that "contracting officers must not require unnecessarily the submission of cost or pricing data because it leads to increased proposal preparation costs, generally extends acquisition lead time, and consumes additional resources of contracting parties."

We disagree with the OFDT's suggestion that the submission of the additional data is unnecessary in this case. First, Section 15.403 of the FAR states that cost or pricing data shall not be required in the following circumstances:

- (1) Prices are based on adequate price competition
- (2) Prices agreed upon are based on prices set in law or regulation
- (3) Commercial item is being acquired
- (4) A waiver has been granted
- (5) When modifying a contract or subcontract for commercial item

None of these circumstances describe the IGA process. For example, detainee bed space is not a commercial item and IGAs are not competitively awarded.

Second, FAR 15.404-1 states that contracting officers are "responsible for evaluating the reasonableness of the offered prices." That provision further provides that "[t]he complexity and circumstances of each acquisition should determine the level of detail of the analysis required." For the reasons stated in our report, we believe that cost data is necessary to any evaluation of price reasonableness in the IGA context.

We also disagree that the eIGA method is a true price analysis as the OFDT asserts. The FAR defines price analysis as "the process of examining and evaluating a proposed price without evaluating its separate cost elements and proposed profits." FAR 15.404-1(b). In contrast, cost analysis is defined as "the review and evaluation of the separate cost elements and profit in an offeror's . . . proposal . . . and the application of

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judgment to determine how well the proposed costs represent what the cost of the award should be, assuming reasonable economy and efficiency." FAR 15.404-1(c). Contrary to its argument that it is performing a strict price analysis, the OFDT is requesting and taking into account certain types of cost information (labor and fringe benefits by position, consultant and contractual services, utilities, telephone, equipment, and insurance to name some of the categories) as part of the revised eIGA process, and therefore should request and consider in its negotiations the other categories of data.

In a demonstration of eIGA that OFDT provided to us in October 2006, average daily population, indirect costs, and credits were not captured in eIGA. At that time, the OFDT stated that these elements would not be included because they varied daily. In our judgment, however, indirect costs and credits are no more variable than labor, fringe benefits, equipment, or utilities, all of which eIGA collects. Further, by asking for telephone costs without asking for the telephone credits, the information obtained is inaccurate and does not provide an adequate basis for the costs of the jail, the level of profit it would obtain under eIGA, or a fair and reasonable price.

We also do not concur with the OFDT's assertion that historical rates from the 1,800 IGAs that have been awarded by DOJ and ICE provide a reasonable basis to justify prices on new awards. This assertion assumes that historical rates were reasonable. However, our prior audits have questioned millions of dollars of payments associated with these agreements because of jail-day rates that included unallowable or unsupported costs and inaccurate or unsupported jail population figures. In addition, because OFDT has yet to establish policies or procedures regarding how similar facilities will be identified and compared, and has acknowledged the difficulty in comparing facilities in the same geographic area (San Francisco and Modesto) as well as between geographic areas (Northeast versus Southwest), we are concerned about how this data will be used to establish price reasonableness.

The OFDT also disagreed with our recommendation to develop guidance that would limit the amount of profit a state or local jail may earn for housing federal prisoners. In its response, the OFDT referred to a March 1999 opinion from OMB and stated that fixing a fee or profit would only be applicable in a cost-reimbursement type of agreement.

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Our report does not recommend that the OFDT and USMS establish jail-day rates using a cost reimbursement type of arrangement. However, we continue to believe that whatever contract model is used, the OFDT and the USMS must ensure that the rates paid are reasonable. We do not believe that they can effectively do so without considering the amount of profit state and local facilities are earning and ensuring that such profit is kept within reasonable limits.

The USMS also included a series of comments that are unrelated to the reports specific recommendations. We address these comments in the following paragraphs.

The USMS stated that our observation on the reduced number of onsite audits failed to recognize the number of desk audits that were conducted beginning in FY 2005. As part of our audit, we requested a listing of all audits conducted by the USMS. Our analysis of the number of audits was based on the information supplied by the USMS. Thus, the reason any such audits were not referred to in our report was that the USMS did not disclose this practice. Nevertheless, we also note that the number of onsite audits performed by the USMS decreased by almost 50 percent from FYs 2003 to 2004, before the practice of conducting desk audits was implemented in FY 2005.

The USMS did not agree with our classification of over \$37 million in questioned costs based on the definition noted in Appendix IV. Appendix IV is a compilation of prior OIG audit findings. The questioned costs are computed by adding together the expenditures that either did not comply with legal, regulatory, or contractual requirements, are not supported by adequate documentation at the time of audit, or are unnecessary or unreasonable and multiplying that figure by the average number of jail days. We believe the term questioned cost and the definition of questioned cost in the appendix is accurate.

The USMS stated that some of the audits listed in Appendix IV were referred to the Department of Justice Audit Resolution Committee, where no action has been taken to date, and that almost \$1.8 million in overpayments was recently forgiven in accordance with DOJ procedures for [SENSITIVE INFORMATION REDACTED]. We accordingly revised Appendix IV to identify audits that were referred to the Department of Justice Audit Resolution Committee and changed the status of [SENSITIVE INFORMATION REDACTED] as an audit that no longer needed to be addressed by the USMS.

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The USMS commented that \$2.5 million identified as funds to put to better use in the [SENSITIVE INFORMATION REDACTED] audit represented an unsupported capital cost recovery proposal that was neither endorsed nor considered by the USMS in the development of the jail-day rate. Our audit report stated that the USMS could save more than \$2.5 million annually by disallowing the proposed capital cost recovery surcharge of \$23.05 per jail day. Since Appendix V discusses the issue in detail, we do not believe that clarification of this matter is warranted.

Finally, the USMS commented that of the nearly \$38 million in overpayments identified in Appendix IV, over \$9.5 million represented audits covered by the OFDT's March 17, 2006, memorandum in which the Detention Trustee advised the USMS not to collect overpayments. Since our report discusses at length the basis of our disagreement with OFDT, and includes the Detention Trustee's memorandum in Appendix VI, we did not revise the Appendix to identify audits covered by the memorandum.

### Summary of Necessary Actions

Based on the OFDT and USMS responses, we consider the report unresolved. The following is a summary of actions necessary by each component to either resolve or close the recommendations.

1. **Unresolved (USMS).** In consultation with the OFDT, the USMS disagreed with this recommendation. The OFDT and USMS believe that in the absence of fraud, the agreements are not subject to retroactive adjustment. The USMS stated, however, that it will review each audit on a case-by-case basis to make a final decision as to a remedy. This recommendation can be closed when the USMS adequately addresses each open recommendation.
2. **Unresolved (OFDT).** As previously discussed, the OFDT did not agree to modify eIGA so that it captures information on ADP, indirect costs, and credits. This recommendation can be resolved when the OFDT either agrees to modify eIGA to capture this information or proposes an alternative corrective action.
3. **Unresolved (OFDT).** As previously discussed, the OFDT did not agree to modify eIGA so that it presents a jail-day rate to the IGA analysts based on the actual and allowable costs of the jail. This recommendation can be resolved when the OFDT either agrees to modify eIGA to present a jail-day rate based on actual and allowable costs or proposes an alternative corrective action.

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4. **Resolved (OFDT).** The OFDT stated that, in concert with eIGA, it will collect and analyze detailed data describing detention facility expenditures; identify additional factors, where possible, that are predictive of detention facility expenditures on a per capita basis; assess the impact of inflation on per capita detention expenditures; and evaluate the reliability of the current pricing model, including re-specification of model parameter estimates, where necessary. Because detailed financial data is necessary to support this project, it is not anticipated that any substantial work will begin until eIGA has been implemented and 12 months of data have been collected to support the quantitative analysis. This recommendation can be closed when the OFDT provides documentation showing that it adequately re-examined the core rate.
5. **Resolved (OFDT).** The OFDT agreed to develop guidance and training for the USMS on how jail-day rates will be established using eIGA. Additionally, OFDT stated that it is funding Federal Acquisition Institution-mandated training for USMS IGA Analysts through an outside vendor. This recommendation can be closed when we review the guidance and training material on how jail-day rates will be established using eIGA.
6. **Unresolved (OFDT).** As previously discussed, the OFDT did not agree to develop guidance that limits the amount of profit a state or local jail can earn for housing federal prisoners. This recommendation can be resolved when the OFDT either agrees to develop guidance that limits the amount of profit a state or local jail can earn for housing federal prisoners or proposes an alternative corrective action.
7. **Resolved (USMS).** The USMS agreed to develop annual training plans for all staff working in the Programs and Assistance Branch. This recommendation can be closed when we review guidance for implementing annual training plans for staff working in the Programs and Assistance Branch and approved first year training plans.
8. **Resolved (USMS).** The USMS agreed with the recommendation and estimated that updated policies can be developed 6 months after the OFDT provides information required under Recommendations 5 and 6. The USMS also anticipated that a comprehensive overhaul of the policies related to IGAs will be necessary based on the implementation of eIGA. This recommendation can be closed when we are provided with the USMS's revised IGA policies.

9. **Resolved (USMS).** The USMS agreed with the recommendation. According to the USMS, 99 percent of identified expired permanent IGAs have been extended, and the remaining expired IGA will be extended by January 31, 2007. In addition, the USMS stated that beginning in calendar year 2007 the Programs and Assistance Branch staff will issue a memorandum to the field, under the Assistant Director's signature, on a monthly basis identifying usage of expired IGAs and require they discontinue use until a new agreement is established. This recommendation can be closed when we are provided documentation on the extended IGAs, as well as the formal policy on the USMS's new procedures.
  
10. **Resolved (USMS).** The USMS agreed with the recommendation. According to the USMS, additional staffing for review, approval, and audit of IGAs is critical to the successful operation of the program. Upon implementation of eIGA, a workgroup will be convened to discuss staffing and needed resources for the Programs and Assistance Branch. Completion of this step is estimated at no longer than six months after eIGA is implemented. This recommendation can be closed when we review the documentation detailing the agreed upon resources for adequately overseeing IGAs.