Federal Government Opens the Door for Fixed-Price Intergovernmental Agreements

By Joseph Summerill

On Dec. 31, 2002, the Department of Justice Office of Legal Counsel (OLC) issued an opinion on the legality of fixed-price intergovernmental agreements (IGA) for detention services. While this opinion opens the door for allowing the DOJ to procure detention services outside the confines of traditional IGA rules, it could also result in state and local jails assuming additional risks associated with cost increases.

Background on IGAs

An IGA is an agreement between two governmental agencies, in which one of the agencies carries out common services for both of the agencies. These agreements are playing a critical role in the government's efforts to house federal detainees as the number of detainees dramatically increases. For example, between fiscal year 1994 and fiscal year 2002, the number of federal detainees increased by an average of 12 percent annually, according to the Department of Justice Office of the Federal Detention Trustee. However in 2002, only 27 percent of detainees were housed in federal facilities; 14 percent were housed in private facilities and 58 percent were held in state and local jails pursuant to an IGA.

Although IGAs for detention services are not subject to federal procurement regulations, they are governed by special rules concerning proper parties, rates of pay and matters of form.[1] Typically, detention services under a DOJ IGA are paid at a pre-negotiated per diem rate. However, the federal government will reimburse a state or local provider if the provider's actual or allowable costs of detention exceed the pre-negotiated per diem rate.

Similarly, if an audit of the detention services reveals that a decrease in the jail day rate is due, the federal government will seek reimbursement or an offset. This is exactly what happened in 2001 and 2002, when the DOJ inspector general conducted several audits of IGAs for detention services and concluded that the government was being overcharged by its providers. In each of these cases, the federal government was entitled to a substantial reimbursement from the individual provider, resulting in the DOJ inspector general reporting to the deputy attorney general that "the department [had] not yet settled on a procurement process to obtain detention space in a manner that meets prudent business practices and existing procurement regulations."[2]

As a result of these audits, the deputy attorney general instructed DOJ officials to execute IGAs for detention services that are based on a fair and reasonable fixed price determined by DOJ officials and not subject to ongoing or retroactive adjustments. However, before carrying out the deputy attorney general's instructions, DOJ officials asked OLC for a legal opinion addressing whether the government could enter into such fixed-price IGAs. In its opinion issued last December, OLC found that the government could legally enter into fixed-priced IGAs for detention services. OLC based its opinion on authority granted to the DOJ under Section 119 of Public Law 106-553, 114 Stat. 2762A-69 (2000).[3]

Section 119 Authority

On Dec. 21, 2000, Congress passed the fiscal year 2001 Departments of Commerce, Justice and State, the Judiciary and Related Agencies Appropriations Act, which included the following language in Section 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."

According to OLC, although Section 119 appeared in an annual appropriations act, it serves as a permanent authority and does not require Congress to reauthorize it each year. Citing *United States v. Vulte*, *Cella v. United States* and the Permanency of Limitation on Interstate Commerce Commission's Approval of Railroad Branchline Abandonments contained in the 1982 Appropriation Act, OLC held that Congress' use of the term "hereafter" in Section 119 clearly indicated that Congress "earmarked it as permanent legislation." As OLC noted, the term "hereafter" is regularly used by Congress to specify that particular sections of an annual appropriations act are to be treated as permanent legislation.

Having determined that Section 119 is a permanent authority, OLC next examined the breadth of Section 119 phrases "of any reasonable duration" and "on any reasonable basis." The OLC opinion reveals that the DOJ initially proposed alternative language to Congress in lieu of the phrases "of any reasonable duration" and "on any reasonable basis." In particular, the DOJ wanted Section 119 to authorize the attorney general "to acquire such space or facilities on a lease-to-ownership, lease-with-option to purchase or other reasonable basis." However, Congress rejected this alternative, which led OLC to conclude that the

phrase "on any reasonable basis" encompasses "all pertinent terms (including price terms) that would be reasonable to include in an agreement." This is an important conclusion by OLC because it means that the terms of detention service IGAs and procurement contracts are only restricted to being "reasonable."

Finally, OLC examined the phrase "notwithstanding any other provision of law," which begins Section 119. After reviewing several cases, including *Cisneros v. Alpine Ridge Group*, *Oregon Natural Res. Council v. Thomas*, *United States v. Fernandez*, *and Mapoy v. Carrol*, OLC concluded that to the extent that other statutes addressing the DOJ's authority to enter into contracts or IGAs for detention related services conflict with Section 119, they are "overridden by its 'notwithstanding' phrase." Again, this conclusion by OLC is significant. Not only can the DOJ enter into fixed-price IGAs, but it can also procure detention services outside the confines of traditional government contracting rules, as long as the terms of the agreements are for a "reasonable duration" and on a "reasonable basis."

Impact of Opinion On IGAs

The immediate impact of the OLC's opinion is that the DOJ can now begin requiring that all new IGAs for detention services be compensated on a fixed-price basis. In addition, because of the "modification" clause contained within many existing IGAs, the DOJ can begin renegotiating hundreds of existing IGAs between the DOJ and state and local governments to convert them to fixed-price IGAs. In such a case, the state or local government can expect the DOJ to try and shift the risk associated with increased costs of performance from the federal government to the provider.

To avoid this risk, state and local governments should try to negotiate fixed-price IGAs with price adjustments for particular cost increases, such as labor costs. Under a standard contract for detention services, the salaries of correctional officers are governed by the Department of Labor's wage determination rate pursuant to the McNamara-O'Hara Service Contract Act of 1965. If the Labor Department raises the wage determination rate for these correctional officers, the provider is entitled to an equitable adjustment for that rate increase.

However, if a state or local government enters into an IGA with the DOJ pursuant to Section 119, the service contract act may be overridden if it conflicts with the fixed-price nature of the agreement. Accordingly, as the salary rates for correctional officers increase in nearby facilities governed by the service contract act, the state or local provider operating the facility under Section 119 may also feel the need to raise its salary rates for correctional officers. That state or local provider, however, may not be entitled to an equitable adjustment because of the fixed-price nature of the IGA. Accordingly, to maintain a qualified staff, the state or local provider would have to absorb the salary rate increase.

To avoid this and other traps associated with fixed-price IGAs for detention services, state and local governments should attempt to negotiate fixed-price IGAs with price adjustment. Under these IGAs, contingencies otherwise included in the fixed price are identified up front and covered separately. The end result is that the DOJ still maintains control over price, but the state or local provider is not burdened with additional risk.

Conclusion

OLC's recent opinion on the legality of fixed-price IGAs is both a welcome and warning sign for state and local governments providing jail space for the federal government. The DOJ can now enter into IGAs for detention services that are outside the confines of traditional contracting rules. However, if those agreements are fixed-price in nature, the state and local provider must ensure that their interests are protected at the time the agreement is executed. Otherwise, the provider may face the additional risk of absorbing increased costs associated with performing the fixed-price IGA.

ENDNOTES

[1] For example, 18 U.S.C. § 4002 allows the DOJ to enter into an agreement with a state or local government for the purpose of "providing suitable quarters for the safekeeping, care and subsistence of all persons held under authority of any enactment of Congress." However, the agreement is limited to "a period not exceeding three years." Second, 18 U.S.C. § 4006 restricts the DOJ to paying "the reasonable and actual cost of the subsistence of prisoners in the custody of any marshal of the United States." The third statute, 18 U.S.C. § 4013, authorizes the DOJ to "make payments from funds appropriated for the support of United States prisoners ... in custody of a United States marshal ... under agreements with state or local units of government or contracts with private entities." Finally, 18 U.S.C. § 1103(a)(11) allows the DOJ to make payments from immigration appropriations "for necessary clothing, medical care, necessary guard hire and the housing, care and security of" Immigration and Naturalization Service detainees under an agreement with a state or local government.

[2] Memorandum for the attorney general, the deputy attorney general; from Glenn A. Fine, inspector general; subject: Top Management Challenges in the Department of Justice — 2001 List; Dec. 31, 2001.

[3] For additional information on the Section 119 authority, see "Reforming Prison Contracting: An Examination of Federal Private Prison Contracts," in the December 2002 edition of *Corrections Today*.

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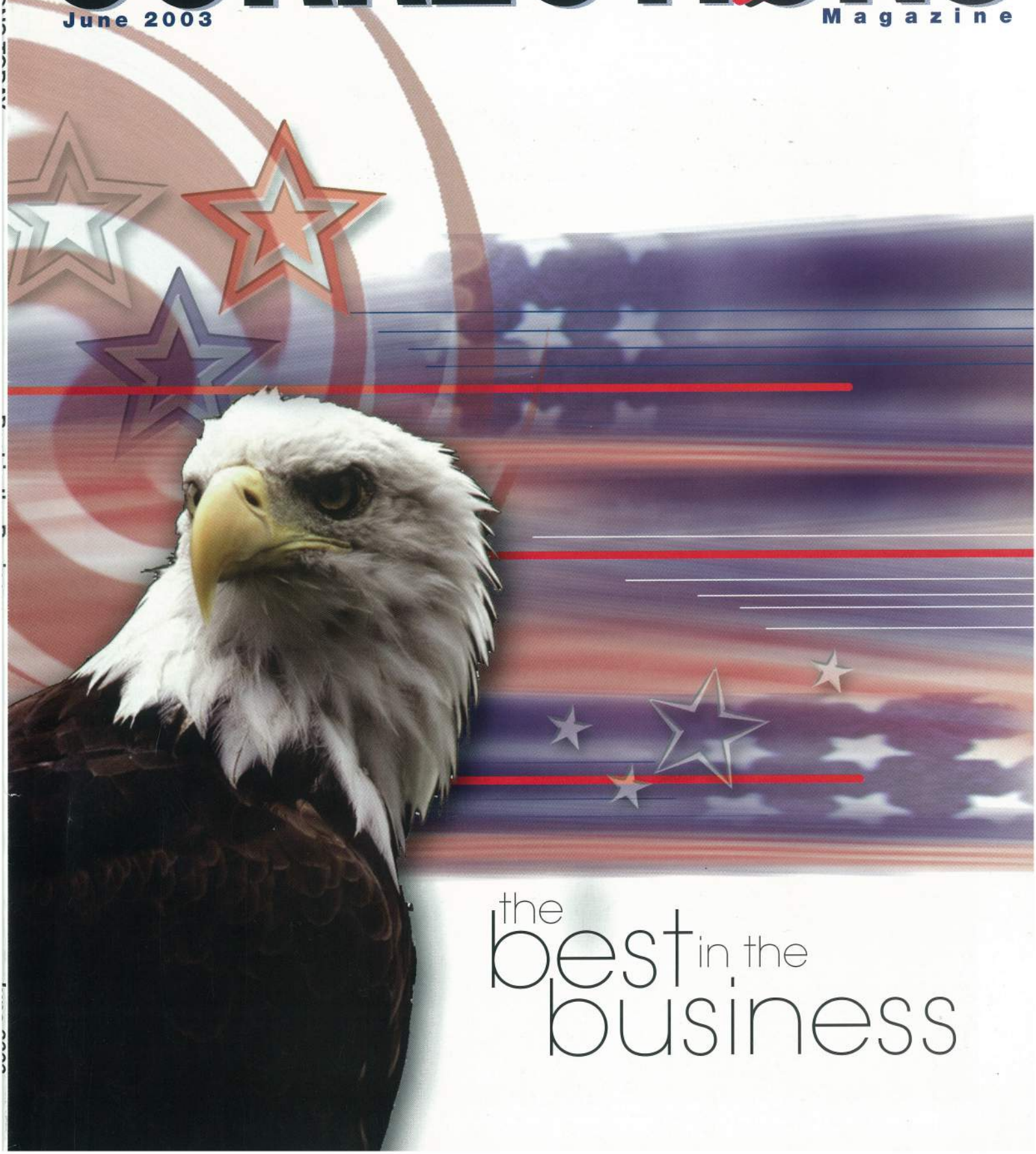

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