



Review of Concerns Raised Related to the United States Marshals Service's Implementation of Executive Order 14006



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EXECUTIVE SUMMARY

Review of Concerns Raised Related to the United States Marshals Service's Implementation of Executive Order 14006

The United States Marshals Service (USMS) is responsible for, among other things, housing federal pretrial detainees in a safe and secure manner. The Department of Justice (Department or DOJ) Office of the Inspector General (OIG) initiated this review of selected aspects of the USMS's implementation of Executive Order 14006 (EO 14006) pursuant to complaints received by the OIG and other identified risks. Issued January 26, 2021, EO 14006 called for the DOJ to cease renewals of contracts with privately operated criminal detention facilities.

Since January 2021, five USMS contracts for privately operated criminal detention facilities have expired. In compliance with EO 14006, the USMS did not renew the contracts. However, to replace the USMS's expiring contract with a private contractor to house federal pretrial detainees at the Northeast Ohio Correctional Center (NEOCC), the USMS entered into an intergovernmental agreement (IGA) with a local government entity, which then contracted with the same contractor, to continue to house the detainees at the same facility. The USMS took this action because the available alternative arrangements presented logistical issues for the USMS and legal issues for the district court and counsel for the detainees. The IGA increased the USMS's costs—potentially by as much as \$6 million per year—and provides the USMS with less direct oversight of the facility than when the USMS contracted directly with the private contractor.

During our interviews with USMS and Office of the Deputy Attorney General (ODAG) officials, we were told that the White House Counsel's Office (WHCO) approved the use of an IGA to replace the expiring

contract. While we have no reason to doubt such approval, we found no documentation of the approval in the materials provided to us, and we were told that no such documentation existed. In addition, although ODAG informed the WHCO of the logistical and legal issues with alternate housing for NEOCC detainees, we found no evidence that the WHCO was informed of the increase in cost to the USMS, or the reduction of USMS control over the operations of the facility under the IGA compared to the cost and control under the expiring contract.

In March 2022, we alerted the Department to our concerns about these outcomes resulting from entering into the IGA to continue housing detainees at the NEOCC. ODAG informed the OIG that during the spring of 2022, it communicated the preliminary findings of this review to the WHCO, including our concerns about the cost and control issues under the terms of the IGA for the NEOCC facility. Since that time, no other IGAs have been entered into by the USMS to address expiring contracts with privately operated criminal detention facilities.

As of March 2023, the USMS continued to contract with private entities for the operation of four detention facilities under contracts that existed at the time EO 14006 was issued and that are not scheduled to expire before September 2023. We believe that the Department and USMS should continue to assess the concerns identified in this report to help ensure the proper stewardship of taxpayer dollars and to ensure that decision makers consider how contracting actions meet the objectives of EO 14006. This report makes two recommendations to address the concerns we identified.

Summary of Executive Order 14006 Relevant to the Department of Justice

EO 14006, issued January 26, 2021, declared that profit-based incentives to incarcerate individuals must be reduced by phasing out the federal government's reliance on privately operated criminal detention facilities. Accordingly, EO 14006 directs the Attorney General to cease renewals of Department contracts with privately operated criminal detention facilities, as consistent with applicable law. The USMS recognized the impact of EO 14006 on its detention operations and sought additional guidance from ODAG regarding the intended scope of the Executive Order. We spoke with current and former ODAG officials (collectively, "ODAG officials"). They told us they obtained confirmation from the White House that the USMS's privately operated criminal detention facilities were subject to the provisions of the Executive Order. The ODAG officials told us that they then requested from the WHCO exemptions from the requirements of EO 14006 for the USMS's privately operated criminal detention facilities, based on the considerable logistical challenges that were anticipated if the USMS would have to house pretrial detainees in facilities far from the judicial districts in which their cases were pending. For example, the USMS identified concerns about the time and expense associated with transporting detainees to and from court from distant detention locations and the effect of such distant placements on detainees' access to their counsel. However, according to the ODAG officials, those exploratory requests for exemptions were not granted, and the Department was instead urged to find an alternate strategy for complying with the Executive Order.

Decision on the Northeast Ohio Correctional Center Resulted in No Substantive Change to the USMS Housing Detainees at Privately Run Detention Facility but Increased USMS Costs

ODAG officials told us the decision to have the USMS enter into an IGA to replace its expiring contract, which enabled detainees to remain at NEOCC, was approved by the WHCO as an exception to EO 14006. The USMS was no longer contracting with a private entity. Instead, the IGA inserted a third party between the USMS and the contractor. However, the USMS's costs of housing the pretrial detainees at the NEOCC potentially increased by as much as \$500,000 per month under the IGA compared to the contract cost, and there was no change in the Department's reliance on privately operated criminal detention facilities, which was the stated purpose of the Executive Order. In addition, under the IGA, the USMS's control over conditions of confinement at the facility were reduced compared to its control under the terms of the contract.

At the time EO 14006 was issued, the USMS's contract for detention services at the NEOCC facility was set to expire just 30 days later, on February 28, 2021. Recognizing the urgency of the new mandate, the USMS requested through ODAG and was approved by the WHCO to execute a 90-day extension on the existing contract, which provided for contract services through May 28, 2021. Shortly thereafter, the USMS further recommended that it be afforded 2 years to implement a plan that would end its reliance on private facilities to the extent practicable while protecting against what the agency considered to be serious concerns related to detainee safety and access to counsel. The USMS asserted that the additional time would allow for the agency to build facilities, find suitable alternative state or local facilities, assess how to transport detainees most efficiently, and identify the necessary funding. However, we were informed that the additional time was not granted by the WHCO.

The Assistant Director and Deputy Assistant Director of the USMS Prisoner Operations Division told us that the USMS explored several options to comply with EO 14006 and acquire the bed space required for relocating the prisoners from the NEOCC upon the conclusion of the contract. These options included considering all other USMS IGAs within 150 miles and the possibility of the Mahoning County Sheriff's Office leasing the contractor-owned NEOCC facility and operating it without contractor staff. However, the USMS found that adequate bed space was not available in other nearby IGAs, and the contractor was not interested in leasing the facility to the Mahoning County Sheriff's Office. USMS officials stated that the only

potentially viable option the USMS was able to identify was moving the NEOCC detainees to the U.S. Penitentiary Lewisburg—near Lewisburg, Pennsylvania—a Federal Bureau of Prisons (BOP) facility about 300 miles from the NEOCC. After the USMS made the plan for relocation known, the Federal Public Defender raised concerns. The USMS Assistant Director for the Prisoner Operations Division also told us that he received correspondence from the U.S. Marshal for the Northern District of Ohio stating, on behalf of the district’s Chief Judge, that he and the Chief Judge agreed with the concerns expressed by the Federal Public Defender, including: (1) that the move would negatively impact the prisoners’ cases and the courts, and (2) their belief that it was “in the best interest of all parties involved to pursue having another entity assume control of the contract facility to continue housing our prisoners while meeting the requirement of the Executive Order.”

An ODAG representative explained that ODAG worked with the USMS to explore all available options for housing NEOCC prisoners in the geographical area around the NEOCC if the Department and the USMS did not renew the NEOCC contract. The ODAG representative told us that ODAG and the USMS determined that there were no viable options for relocating the NEOCC prisoners that met the needs of the judiciary, the affected pretrial prisoners, and the Department. Accordingly, the ODAG representative said that ODAG sought permission from the WHCO to restructure the NEOCC contract as a pass-through IGA.¹ The ODAG representative told us that the WHCO approved the proposed action as an exception to EO 14006. However, the documentation of correspondence with the WHCO provided by ODAG did not include a discussion of the costs associated with the IGA, and there was no documentation of the WHCO’s approval. The documents provided by ODAG demonstrated that it had briefed the WHCO primarily about the significant logistical issues that would arise if detainees were moved away from NEOCC. While restructuring the NEOCC contract as a pass-through IGA complied with the Executive Order’s call to cease the renewal of contracts, it resulted in detainees remaining in the same privately operated detention center being operated by the same contractor, and it increased the USMS incarceration costs at NEOCC. Using average population numbers from September through November 2021, the amount of the increase could equate to more than \$6 million annually, at over \$500,000 more per month, as shown in Table 1 below.²

¹ A pass-through IGA differs from a direct contract in that the USMS signs an agreement with a local government, and in turn, the local government signs a contract with a private contractor.

² Our estimation of a \$6 million per year increase is an annualized projection based on the latest 3 months of detainee population data for the NEOCC at the time of our analysis. The actual cost increases that the USMS will experience depend on actual future population levels.

Table 1

USMS Change in Cost to Incarcerate at NEOCC^a

Average Monthly Cost of USMS Contract	Average Monthly Cost of IGA	Average Monthly Increase
\$ 2,767,740	\$ 3,355,416	\$ 587,676

^a Totals calculated based on the average daily population from September 2021 to November 2021.³

Source: OIG analysis of United States Marshals Service data

We talked to ODAG and USMS officials about the increase in cost and they stated, and we agree, that inflation, market factors, and other variables could have been elements that would have also affected any contract renewal. The USMS officials told us that an increase in costs of approximately 8.2 percent would have been expected due to inflationary pressures regardless of the decision to end the contract. We acknowledge that the USMS's costs may have increased even under a new contract. However, we point out that between February 2020 (when the last negotiated period of performance began) and May 2021 (when the USMS established the IGA), the U.S. Bureau of Labor Statistics' Consumer Price Index for All Urban Consumers in the Midwest Region, which includes Ohio, all items index, not seasonally adjusted, only increased by approximately 4.3 percent. Regardless, the particular amount of the increase in the USMS's costs is only part of our concern with the decision to enter into an IGA for the NEOCC facility.

The IGA also decreased the USMS's control over the facility's conditions of confinement. The USMS's Prisoner Operations Division has the ability to exercise considerable influence and control over the management of its private contract detention facilities. However, under IGAs, the state or local government manages the services provided and the day-to-day conditions of confinement consistent with applicable laws and regulations. IGA facility agreements neither grant the USMS authority to manage the operations or policies of the facility, nor impose consequences if the USMS's requests and recommendations are not implemented. Under the IGA for NEOCC, USMS staff will remain on-site and continue monitoring the contractor's compliance with the performance requirements, but specific contractual penalties for noncompliance that were present in the private contract arrangement were eliminated in the IGA. The only remedy for noncompliance is for the USMS to reduce or cease its use of the NEOCC. However, in this circumstance, the ability to use that remedy is limited because of the needs of the judiciary and of the affected pretrial prisoners, as discussed above.

We noted that a direct exemption to the Executive Order's requirement to cease renewals of contracts with privately operated detention facilities, when legal and logistical circumstances support the need to retain

³ After sharing the results of our analysis presented in Table 1 with ODAG and the USMS, ODAG questioned our use of the actual average population figures measured over a 3-month period from September 2021 through November 2021, which was an average population of 899. ODAG suggested that it would be more appropriate to use the population as of May 2021, which was 541, because that was the point in time when negotiations would have been ongoing for a follow-on contract or IGA. We do not agree with this reasoning and point out that the population in May 2021 was uncharacteristically low for the facility as a result of the USMS's efforts to draw down the population of the NEOCC in preparation for its potential closure under EO 14006. Consequently, we do not believe the population in May 2021 was indicative of the USMS's likely use of the facility in the months and years that would follow. Indeed, the higher average population from September 2021 to November 2021 is evidence that it is a more representative figure of the USMS use of the space and the associated costs.

the use of a certain facility, would have allowed the USMS to renew the existing contract, thereby avoiding the increased costs and loss of control associated with the IGA. An ODAG official told us that ODAG did not make a new request for a direct exemption for the NEOCC facility in the context of seeking approval for the NEOCC IGA because past requests for exemptions to the WHCO and the White House Domestic Policy Advisor had been denied. However, the documentation provided to us by ODAG did not demonstrate that the WHCO was fully informed of the drawbacks of the IGA. Specifically, the documentation we reviewed, in which ODAG presented the final options for the NEOCC facility, did not include any discussion of the disadvantages of the IGA option, or include any suggestion that an exemption to the Executive Order may actually have been a more cost-effective option than the IGA without compromising USMS control over detainee handling. ODAG officials told us that they did not recall discussing with the WHCO the increased costs or loss of facility control specifically associated with the IGA option.

Department Receives Exemption for the Western Region Detention Facility

After the OIG briefed ODAG officials in April 2022 of the preliminary findings of our work on this topic, including the events related to the NEOCC, we learned that the WHCO authorized a formal exemption from compliance with EO 14006 for one of the then remaining USMS detention contracts prior to its expiration in June 2022. The contract related to the Western Region Detention Facility in San Diego, California, which primarily serves the U.S. District Court for the Southern District of California and had been due to expire earlier in the year but was extended through June 30, 2022. The circumstances at the Western Region facility were similar to those at the NEOCC in that the USMS's alternative plan for closing the facility was to relocate prisoners to a BOP facility more than 3 hours from the courthouse. USMS and ODAG officials told us that the Chief Judge for the Southern District of California had raised substantial concerns with that planned course of action. According to an ODAG official with whom we spoke, "a pass-through IGA was one option explored in the Southern District of California, but there were no local partners identified who could step into that role. ODAG and the USMS also took into consideration the issues raised by OIG's review of the pass-through [IGA] arrangement utilized at NEOCC. ODAG communicated the issues raised by OIG to WHCO during Spring 2022...[subsequently] the WHCO provided an exemption from the EO to [Western Region Detention Facility]...."

Conclusion and Recommendations

ODAG and the USMS devoted substantial good-faith efforts toward complying with the requirements of EO 14006 including considerations for the NEOCC facility. However, as described in this report, we found that the approach followed for replacing the expiring NEOCC facility contract resulted in: (1) increased Department costs without a substantive change in the housing of pretrial detention inmates at the NEOCC or a change in the Department's reliance on privately operated criminal detention facilities, and (2) decreased USMS control over the facility's conditions of confinement.⁴ Moreover, we determined that the documentation provided to the OIG by ODAG relating to the decision to enter into an IGA to enable continued housing of detainees at the NEOCC facility did not include an assessment of all the costs associated with the IGA option, thereby raising questions about whether the decision was fully informed.

As of March 2023, there are four USMS-contracted detention facilities still operating under contracts that will require action when the contracts expire. The Department should continue to assess available options for complying with the Executive Order and ensure that the details of each option are fully considered so as to avoid wasteful spending and maintain adequate USMS control over conditions of confinement. Additionally, consistent with government records laws and requirements, ODAG and the USMS should

⁴ Consistent with the Inspector General Act of 1978, the information in this report does not substitute the OIG's judgment for the judgments made by the Administration regarding the substantive merits of the Executive Order.

maintain documentation of any decisions made regarding the appropriate method for housing detainees, which should describe the rationale for those decisions.⁵

We recommend that for expiring contracts with privately operated detention facilities where the Department and the USMS have concluded that there is no viable option for ending reliance on those facilities:

1. The Department ensure that the projected costs and benefits of all available options for housing detainees are fully disclosed to responsible officials and stakeholders when making decisions pertaining to EO 14006.
2. ODAG and the USMS maintain documentation of any associated decisions—and the related justifications—for the appropriate method for housing detainees, which should describe the rationale for those decisions.

⁵ 44 U.S.C. § 3101 requires each federal agency to “make and preserve records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency and designed to furnish the information necessary to protect the legal and financial rights of the Government and of persons directly affected by the agency’s activities.”

APPENDIX 1: Office of the Deputy Attorney General and U.S. Marshals Service Response to the Draft Report



U.S. Department of Justice
Office of the Deputy Attorney General

Office of the Deputy Attorney General

950 Pennsylvania Ave., N.W.
RFK Main Justice Bldg.
Washington, D.C. 20530

MEMORANDUM

TO: Jason R. Malmstrom
Assistant Inspector General
Audit Division
Office of the Inspector General

FROM: Bradley Weinsheimer *Bradley Weinsheimer*
Associate Deputy Attorney General
Office of the Deputy Attorney General

DATE: March 14, 2023

SUBJECT: Office of the Deputy Attorney General and U.S. Marshals Service Response to draft report, "Review of Concerns Related to the United States Marshals Service's Implementation of Executive Order 14006"

Thank you for the opportunity to comment on your draft report entitled, "Review of Concerns Related to the United States Marshals Service's Implementation of Executive Order 14006" (Report). On behalf of the Office of the Deputy Attorney General (ODAG) and the U.S. Marshals Service (USMS), we concur with the Report's two recommendations. The Report, however, is missing important context that better explains the decision by the USMS to contract with Mahoning County, OH for detention space at the Northeast Ohio Correctional Center (NEOCC), owned and operated by a private prison provider. That context, and the surrounding circumstances that led to the contract, are briefly summarized below.

The Executive Order and the USMS' Use of Private Prisons

Executive Order 14006, issued by President Biden on January 26, 2021, calls for the Department of Justice (Department) to cease renewals of contracts with privately operated criminal detention facilities. Implementing this Executive Order has sometimes created challenges and tension between the courts, the defense bar, and the USMS because ceasing contracts with private detention facilities in some circumstances has created situations in which detainees would need to be housed at locations a significant distance from courts and counsel, thus creating difficult logistical challenges and additional expense associated with housing and transporting detainees.

Since the USMS neither owns nor operates its own facilities, the USMS must partner with state and local governments using Intergovernmental Agreements (IGAs), private detention facilities under direct contract with the USMS, and Federal Bureau of Prisons (BOP) facilities. Additional challenges arise when trying to house detainees in close proximity to the prosecuting judicial district, as defense counsel in particular require routine access to detainees, who must also be transported on a timely basis for court appearances. In order to best serve the courts and accommodate defendants' need for access to their legal counsel and personal support systems, such as family, the USMS makes every effort to house prisoners within 50 miles of the applicable courthouse.

The BOP provides the USMS with detention space in a small number of facilities. Less than 15% of USMS prisoners are housed in BOP allocated beds. In order to meet the need for the remainder of the required space, the USMS has approximately 1,200 IGAs with state and local facilities, approximately 700 of which are used at any given time. The USMS houses a majority of all USMS prisoners in IGA facilities.

While state and local governments have historically provided detention space to the USMS pursuant to the terms of an IGA, their primary mission is to house prisoners prosecuted within their jurisdictions. Accordingly, these facilities limit the detention space available to the USMS and the availability of this space is not guaranteed; it fluctuates based on local need. Local county facilities may be filled with state pre-trial prisoners and sentenced prisoners serving short term sentences due to overcrowding in state facilities. The USMS historically has attempted to maximize the use of state and local detention facilities when there were available options for doing so.

In several areas of the country, BOP facilities or state and local facilities either do not exist or have limited space available for USMS use. In those areas, the USMS in the past contracted with private detention facilities. These facilities are typically in areas where there are extremely large prisoner populations. Consistent with statutory requirements, the USMS previously established contracts and IGAs for privately-operated detention space when there is a general lack of detention space to fully support the detention mission in one or more judicial districts.

From the time of issuance of the Executive Order, the USMS worked extensively to consider feasible options for replacing contracts with privately-operated facilities. This included meetings and discussions with ODAG and White House officials to discuss implementation plans and feasible options. As noted in the Report, the USMS proposed extending all private prison contracts for up to two years to give adequate time to find available and reasonable options, but this proposal was not accepted by White House officials. The USMS continued to work diligently, in close coordination with ODAG and White House officials, to comply with the Executive Order. By the end of Fiscal Year 2022, the USMS had ended seven contracts for privately-operated detention facilities (including NEOCC), effecting approximately 3,000 detainees. As reflected in the Report, one additional facility -- the Western Region Detention Facility located in San Diego, CA -- in June 2022 received an exemption from the Executive Order.

While not mentioned in the Report, one contract ended with a privately-run detention center related to a private prison in Jamaica, New York: the Queens Detention Facility. By the end of June 2021, the USMS had concluded its contract with this facility and projected their efforts in moving inmates from it would decrease detention costs by approximately \$5.3 million annually. This was achieved by moving detainees to other nearby facilities with available bed space, including state and local facilities with which the USMS had IGAs. The USMS likewise by the end of Fiscal Year 2022 was successful in finding feasible alternatives for five other facilities with which the USMS had private prison contracts. As described more fully below, however, there were few available options with respect to NEOCC, the sole focus of OIG's Report.

USMS Efforts Concerning NEOCC

NEOCC is a privately owned detention facility used by the USMS since 2004, with its last contract negotiated in 2009. Despite diligent and repeated efforts, the USMS was unable to find a viable alternative to the private prison continuing to provide detention services, and in late May 2021, the USMS entered into a pass-thru IGA¹ that allowed Mahoning County, OH to enter into a lease with the private prison operator for NEOCC such that the private prison operator continued to operate the detention facility but permitted the USMS to contract with Mahoning County, not the private prison operator, for use of the space. This arrangement was approved by White House officials.

NEOCC is primarily used by the USMS to support the Northern District of Ohio, although detainees from other Districts also are housed there for a variety of reasons. As of January 2021, the facility had a total capacity of 2,016 prisoners, of which 990 beds were allocated for USMS use. The most recent contract prior to 2021 was established on March 29, 2009, and was set to expire in late February 2021 but was extended to the end of May 2021.

From the time of the Executive Order through May 2021, the USMS developed an implementation plan that was focused on drawing down the detainee population at NEOCC while it sought a solution for housing detainees once the private prison contract ended. NEOCC in February 2021 had 935 federal detainees,² which was steadily reduced by entering into IGAs with local jails or those within a 50-miles radius of NEOCC, placing detainees in BOP facilities, and by moving some detainees whose cases were pending in other Districts. Throughout March and April 2021, the Department shared detailed implementation plans with White House officials, keeping them apprised of the challenges NEOCC presented.

¹ As noted in the Report, a pass-thru IGA is one in which the USMS signs an agreement with a local government that in turn signs a contract with a private contractor.

² One reason for this high number likely was that NEOCC enjoyed a good reputation for dealing with COVID issues.

Although not described in any detail in the Report, the USMS also explored an option of the private prison operator leasing a cell block of the facility to Mahoning County which then would operate and staff it. The Mahoning County Sheriff and City Council had approved such a plan, which would have cost the USMS [REDACTED] per detainee per day, with reductions in cost once the overall population hit certain levels (e.g., a price reduction for detainees 500-800, and a further reduction for detainees above 800).³ In late April 2021, however, the private prison operator backed out of the plan, apparently because it was able to convince the Ohio Department of Corrections to agree to terms on the utilization of space vacated by the USMS upon expiration of its contract. The Ohio Department of Corrections had maintained a population in NEOCC throughout the duration of the USMS contract through its own agreement with the private prison operator for a separate part of the facility.

Despite these diligent efforts, by May 7, 2021, with the expiration of the private prison contract quickly approaching, the USMS had not been able to find a solution for housing the 541 detainees still remaining at NEOCC. As to those detainees, given that White House officials were not amenable to an exemption to the Executive Order or a further extension of the private prison contract, the only viable option seemed to be placing the remaining 541 inmates at BOP's Lewisburg, PA facility, some 299 miles away.

An Ohio Senator, the Chief Judge for the Northern District of Ohio, the Administrator of the U.S. Courts, and defense counsel all raised with the Department and others due process concerns about moving detainees that far away, and the prospect of significant litigation loomed. It was only when no other available option existed that, with the approval of White House officials, the USMS negotiated the pass-thru IGA with Mahoning County.

While the Report mentions the concerns raised by interested stakeholders, it does not describe the compressed time period in which the pass-thru IGA arose. It was not until May 17, 2021, that the USMS was able to persuade the Ohio Department of Corrections to relinquish a cell block that the USMS could use for their remaining detainees. At this point, however, the private prison operator was unwilling to allow Mahoning County to run and operate the facility, as was the arrangement under the April failed lease option. Instead, the only viable option was for Mahoning County to contract with the private prison operator and then for the USMS to contract with Mahoning County for use of the cell block — at an increased cost.

While far from the ideal option, this solution prevented having to move detainees nearly 300 miles away, at great expense and creating near-certain due process challenges. The USMS, in the 11 days remaining before the private prison contract expired, negotiated a contract that permitted the detainees to remain at NEOCC. Under the contract, USMS staff remain on-site and continue monitoring the contractor's compliance with the performance requirements.

It is true that this arrangement resulted in the detainees remaining at NEOCC with the USMS able to exert lesser control over the facility and at a higher cost than the previous contract. But, as noted, the USMS remained on site to monitor the contract performance, and the increased

³ The 2009 contract with the private prison operator had a cost per detainee of [REDACTED], again with reductions once the detainee population hit certain levels.

costs were unavoidable and preferable to the available alternative. It also is true that there does not appear to have been a detailed discussion with White House officials about the precise cost impact of the new contract, but there was little time for such a discussion, and White House officials already had indicated that an exemption to the Executive Order was not then an option. Factors other than cost, including due process considerations and the need to have detainees in close proximity to the court, counsel, and family support systems drove the decision as to the best resolution of challenges posed by NEOCC.

In the Report, the OIG criticizes the pass-thru IGA contract in part by comparing the cost of the contract in September through November 2021 to the costs that would have existed under the old contract. This is a faulty comparison for at least three reasons.

First, there is no reason to believe that had the USMS been able to negotiate directly with the private prison operator in 2021, the cost would have remained the same. Indeed, just the opposite is true. The prior contract was negotiated in 2009, and a contract negotiated in 2021 certainly would have been at a higher cost. The Report recognizes this but makes no effort to adjust its calculation or estimate the impact of increased costs.⁴ When the USMS negotiated in April 2021 with Mahoning County for the lease option where Mahoning County would operate the facility (that the private prison operator ultimately rejected), the negotiated price per detainee was ██████ per day, which is far closer to the current contract cost of ██████ per detainee than it is to the expired private prison contract cost of ██████ (each of these contracts contain price reductions when the detainee population reaches certain levels). The demand for bed space in the area also created a circumstance in which the private prison operator could negotiate a higher price or insist on different contract terms.

Second, the average daily population (ADP) in September 2021 through November 2021, when OIG happened to conduct their analysis, was nearly 900 detainees. But at the time the contract was being negotiated, the USMS was seeking to house approximately 541 detainees. In November 2022 and currently, the ADP is closer to 780. Because the overall cost of the contract is based on the number of detainees housed each day, the cost difference between the current contract and the old private prison contract should be based on a smaller ADP.⁵

⁴ The Reports states, “We talked to ODAG and USMS officials about the increase in cost and they stated, and we agree, that inflation, market factors, and other variables could have been elements that would have also affected any contract renewal.” Report at 3. But while displaying in a chart the cost comparisons between the old and new contracts, the Report makes no effort to adjust costs for inflation, market factors, and other variables, nor does it suggest the methodology it would have expected the USMS or Department to have used in making this comparison.

⁵ The Report essentially dismisses a similar argument made previously by ODAG by stating, “We do not agree with this reasoning and point out that the population in May 2021 was uncharacteristically low for the facility as a result of the USMS’s efforts to draw down the population of the NEOCC in preparation for its potential closure under EO 14006. Consequently, we do not believe the population in May 2021 was indicative of the USMS’s likely use of the facility in the months and years that would follow.” Report at 3, n.3. But the Report does not then go on to analyze why the ADP of nearly 900 is instead an appropriate number for calculating the cost comparison. While it is correct to point out that the 2021 contract had higher per detainee costs than did the 2009 contract, estimating the impact of those costs requires assumptions about the ADP during the contract term. In Fiscal Year 2019, the ADP was 629, in 2020 719, and in 2021 775, all substantially lower than the ADP OIG used in its analysis.

Third, the one option most clearly unavailable to the USMS was returning to the old private prison contract. White House officials did not authorize an exemption to the Executive Order, and even if they had, as noted above, the private prison operator most certainly would have negotiated a much higher price as compared to the 2009 contract. Instead, the available option was moving 541 detainees nearly 300 miles away, and then having to transport them for court, medical, and other reasons. Both the old and new NEOCC contracts included transportation for court and medical visits as part of the contract. If held in a BOP facility, however, those costs would have been born by the USMS. And that is not to mention the costs associated with having to litigate due process complaints, or the non-monetary costs born by detainees and their families in not having ready access to counsel or a nearby support system. The Report made no effort to quantify and compare these costs from the only other option available to the USMS – moving the remaining 541 detainees nearly 300 miles away.

Conclusion

As stated above, we concur with the recommendations contained in the report. The Department will ensure that the projected costs and benefits of available options for housing detainees are disclosed to applicable officials and stakeholders when making decisions pertaining to Executive Order 14006, and we will document decisions, as appropriate. But the Report, while factually accurate, does not adequately provide the context and surrounding circumstances for why the USMS entered into the contract with Mahoning County for detention space at NEOCC. While the Report criticizes the lack of communication concerning the precise cost of the new contract, it fails to explain that the precise costs became known literally just days before the private prison NEOCC contract was set to expire, or that the final contract price was very similar to the lease negotiated with Mahoning County that would have not included the private prison operator running the facility. White House officials were aware and approved of the Mahoning County pass-thru IGA, and the Report does not suggest otherwise. There is little reason to believe that had more information about the precise costs been shared with White House Officials, there would have been a different outcome, especially given the absence of available options.

APPENDIX 2: Office of the Inspector General Analysis and Summary of Actions Necessary to Close the Report

The OIG provided a draft of this report to the Office of the Deputy Attorney General (ODAG) and the U.S. Marshals Service (USMS). The ODAG responded on behalf of both ODAG and the USMS, and this joint response is incorporated in Appendix 1 of this final report. In response to our report, ODAG and the USMS concurred with our recommendations and discussed the actions they will implement in response to our findings. As a result, the status of the report is resolved. The following provides the OIG analysis of the response and summary of actions necessary to close the report.

Analysis of the ODAG and USMS Response

In its joint response, ODAG and the USMS stated that the report is missing important context that could better explain the actions that were taken for the Northeast Ohio Correctional Center (NEOCC) facility. ODAG and the USMS also restated prior objections to the exact amount of the estimated increase in the USMS's costs for the NEOCC facility.

This report recognizes that both ODAG and the USMS made substantial good-faith efforts toward complying with the requirements of Executive Order 14006 (EO 14006) and that there were challenges associated with alternative housing for detainees at the NEOCC facility. We presented the limitations associated with our analysis and associated cost projections. While we acknowledge that inflation, market factors, and other variables could have affected the cost of any potential contract renewal, we also acknowledge that the precise effect of those variables on any hypothetical contract negotiation in May 2021 would be nearly impossible to accurately estimate. Under any scenario, however, the likely increase in costs, whether through direct negotiation with the contractor or entering into an intergovernmental agreement (IGA) with Mahoning County as a pass-through agency, would be relevant information for decision makers to consider. As noted in our report, we found no evidence that the Department provided the White House Counsel's Office (WHCO) any information on costs when discussing the IGA option for the NEOCC facility. The increase in the USMS's costs is only part of our concern with the decision to enter into an IGA for the NEOCC facility. The report addresses concerns related to the lack of transparency to decision makers about relevant considerations, the decreased control over the facility's conditions of confinement, and the lack of documentation about the decision.

None of the objections raised in ODAG's and USMS's joint response refuted the fact that, if the White House had been fully informed by the Department as to the costs and benefits of the IGA option, it would have had the opportunity to consider an alternate approach for the NEOCC facility. The Department acknowledged that, "It is true that [the IGA] arrangement resulted in the detainees remaining at NEOCC with the USMS able to exert lesser control over the facility and at a higher cost than the previous contract." Had the White House been briefed on the likelihood of those adverse outcomes in May 2021, it could have considered an exemption to the Executive Order—as it did later for the Western Region Detention Facility, after we brought our concerns with these issues to the Department's attention in April 2022. As of March 2023, the Department has four additional detention facilities under contracts that existed when EO 14006 was issued. We are encouraged that the Department agreed with the two recommendations in our report. The Department's resulting corrective actions should ensure that the Department is maintaining required documentation on its decisions and disclosing to responsible officials and stakeholders' information on the costs and benefits of available options as the remaining detention contracts approach expiration.

Recommendations for the Office of the Deputy Attorney General and U.S. Marshals Service

For expiring contracts with privately operated detention facilities where the Department and the USMS have concluded that there is no viable option for ending reliance on those facilities, we recommended:

1. **The Department ensure that the projected costs and benefits of all available options for housing detainees are fully disclosed to responsible officials and stakeholders when making decisions pertaining to EO 14006.**

Resolved. ODAG and the USMS concurred with our recommendation. As a result, this recommendation is resolved. This recommendation can be closed when we receive documentation showing that the Department has ensured that the projected costs and benefits of all available options for housing detainees are fully disclosed to responsible officials and stakeholders when making decisions pertaining to EO 14006.

2. **ODAG and the USMS maintain documentation of any associated decisions—and the related justifications—for the appropriate method for housing detainees, which should describe the rationale for those decisions.**

Resolved. ODAG and the USMS concurred with our recommendation, and, as a result, this recommendation is resolved. This recommendation can be closed when we receive evidence of appropriate documentation of decisions and related justifications concerning the appropriate method for housing detainees, which should describe the rationale for those decisions.