

Intergovernmental Support Agreements: A Primer for the Field

Major Erik J. Zoll*

I. Introduction

The Airborne and Special Operations Museum, located in downtown Fayetteville, North Carolina, was set to become a casualty of a reduction in military funding.¹ Fort Bragg faced a difficult situation when they could no longer afford the custodial service contract for the museum due to a budget reduction in 2013.² Daily custodial services are required by the state in order to maintain the museum's regularly scheduled hours of operation.³ This left Fort Bragg with the prospect of closing the museum several days a week, despite the importance to the City of Fayetteville of maintaining the museum's current daily schedule, due to an investment in advertising money aimed at attracting more tourism to the downtown area.⁴

As luck would have it, that same year the Fiscal Year (FY) 2013 National Defense Authorization Act (NDAA) authorized Army commands to partner with local governments in order to receive installation support services through intergovernmental support agreements, or IGSA's.⁵ Using the new authorization, Fort Bragg and the City of Fayetteville came to an agreement.⁶ The city would provide the required custodial services and the museum would maintain their normal operations schedule.⁷ This arrangement saved the Army fifty thousand dollars annually as compared to the previous contract and kept the tourists

flocking to downtown Fayetteville.⁸

Most installations are dealing with the same budgetary shortfalls when funding facility maintenance or installation services.⁹ This is a result of the Budget Control Act's¹⁰ cuts to Department of Defense (DoD) funding levels.¹¹ The DoD plan for achieving the Budget Control Act operations and maintenance (O&M) savings through FY 2019 is to cut four percent from the installation services and fourteen percent of the facilities budget.¹² In 2015, the Army already faced a \$3 billion dollar maintenance and infrastructure backlog due to funding constraints.¹³ In the future, the Army will continue to take risks on installation sustainment due to existing combatant command requirements around the globe.¹⁴

Commands must search for ways to save money to deal with the funding shortfalls. The IGSA is a new method to help ease the burden and reduce the costs for installation support services. Intergovernmental support agreements authorize the DoD to partner with State or local governments in providing installation support services without regard for any other federal contracting law.¹⁵ This allows commands to save time and money procuring support services. Installations already involved in public-to-public agreements have saved millions.¹⁶ Presidio of Monterey (POM), for example, receives nearly all installation support services from

* Judge Advocate, United States Army Reserves. LL.M., 2017, The Judge Advocate's Legal Center and School, Charlottesville, VA; J.D., 2005, University of Toledo; B.S., 2001, Central Michigan University. Previous assignments include Chief of Administrative Law, 335th Signal Command (Theater), East Point, Georgia, 2013-2016; Soldiers' MEB Counsel, Darnell Army Medical Center, Fort Hood, Texas, 2013; Legal Assistance Attorney, 9th Legal Operations Detachment, Southfield, Michigan, 2011-2013; Trial Counsel, 377th Theater Support Command, Naval Air Station New Orleans, Belle Chase, Louisiana, 2012; Trial Counsel, United States Army Civil Affairs and Psychological Operations Command, Fort Bragg, North Carolina, 2009-2011; International Law Officer, 415 Civil Affairs Battalion, Portage, Michigan, 2008-2011. This paper was submitted in partial completion of the Master of Laws requirements of the 65th Judge Advocate Officer Graduate Course.

¹ The Airborne & Special Operations Museum is a part of the U.S. Army Museum System and is Army owned and operated. AIRBORNE & SPECIAL OPERATIONS MUSEUM FOUND., <http://www.asomf.org/museum-information/about-the-organization/> (last visited Dec. 9, 2016).

² Mr. Doug Earle, Public-Public Partnership: Fort Bragg and City of Fayetteville Custodial Support for Airborne Special Operations Museum Fort Bragg, N.C., at slide 2 (Dec. 12, 2013) (unpublished PowerPoint presentation) (on file with author) [hereinafter Fort Bragg CBA].

³ *Id.* at 3.

⁴ *Id.*

⁵ National Defense Authorization Act for Fiscal Year 2013, Pub. L. 112-239, § 331, 125 Stat. 1632, 1696 (2013).

⁶ Fort Bragg CBA, *supra* note 2, at 2, 4.

⁷ *Id.*

⁸ Contract between Fort Bragg and City of Fayetteville for Custodial Services (Apr. 24, 2014) (on file with author).

⁹ See Karen Jowers, *Base Facilities Deteriorating Under Budget Squeeze*, MILITARYTIMES (Mar. 18, 2015), <http://www.militarytimes.com/story/military/capitol-hill/2015/03/18/budget-constraints-affecting-base-facilities/24966655/>.

¹⁰ See Budget Control Act, 2 U.S.C. § 901 (2012).

¹¹ AMY BELASCO, CONG. RESEARCH SERV., R44039, DEFENSE SPENDING AND THE BUDGET CONTROL ACT LIMITS 1-2 (2015); OFFICE OF THE UNDER SEC'Y OF DEF., DEFENSE BUDGET OVERVIEW: UNITED STATES DEPARTMENT OF DEFENSE FISCAL YEAR 2017 BUDGET REQUEST 1-1 (2016) [hereinafter *FY17 Budget Request*].

¹² *Id.* at 44-45.

¹³ See Jared Serbu, *2016 Budget Aims to 'Arrest' Deterioration in Military Facilities*, FED. NEWS RADIO (Mar. 4, 2015), <http://federalnewsradio.com/sequestration/2015/03/2016-budget-aims-to-arrest-deterioration-in-military-facilities/>.

¹⁴ *FY17 Budget Request*, *supra* note 11, at 3-4. The Navy and Marines noted taking similar risks in installation funding. *Id.* at 3-6, 3-9.

¹⁵ 10 U.S.C. § 2679(a)(1) (2014).

¹⁶ BETH E. LACHMAN ET AL., RAND CORP., MILITARY INSTALLATION PUBLIC-TO-PUBLIC AGREEMENTS: LESSONS FROM PAST AND CURRENT EXPERIENCES 162, 165 (2016).

the surrounding municipalities and saves over \$2 million annually.¹⁷

This paper will analyze the IGSA statute and detail the Army guidance and procedures for approval. Part II of the primer will look at the history of public-to-public partnerships and how these partnerships led to the development of the IGSA statute. Part III will examine the IGSA statute as amended in the FY 2015 NDAA. Part IV will look at Executive Order (EXORD) 200-16 issued by the Army in response to the FY 2015 amendments and details the Army procedure for an IGSA's approval. Judge advocates are heavily involved in the formation of an IGSA at the command level and this primer will assist those attorneys, with or without contract and fiscal law experience, in understanding the IGSA guidelines and the Army's requirements for approval.

II. The Road to Intergovernmental Support Agreements

Even though the law was introduced in the FY 2013 NDAA, the road to IGSA's began over twenty years ago. A pilot program in the FY 1995 NDAA authorizing DoD installations in Monterey, California to purchase municipal services from local government agencies lays the foundation for the current statute.¹⁸ Due to the success in Monterey, the Army launched a second pilot program at two more installations that again proved successful.¹⁹ As a result, the FY 2013 NDAA granted all DoD commands the authorization to procure support services from local governments.²⁰ Reviewing the history of IGSA's provides examples of successful partnerships along with the advantages and limitations.

A. Presidio of Monterey

The public partnership between POM and the City of Monterey (Monterey) started with an elevator maintenance contract.²¹ From that initial contract, the affiliation grew to what is now considered the *gold standard* for public-to-public partnerships.²² For almost twenty years POM procured a majority of its installation support services from Monterey, which provided millions of dollars in cost savings to the federal government.²³

The partnership began in the early 1990's during the base closure and realignment process.²⁴ With the potential closure of POM, Monterey met with the Base Realignment Commission (BRAC) and proposed a "Community Installation Partnership."²⁵ The proposed partnership would decrease installation costs and keep POM out of the base realignment process.²⁶ The commission supported the proposal and legislation passed authorizing the suggested partnership.²⁷

The FY 1995 NDAA codified the partnership and authorized POM to receive municipal services from government agencies in the county of Monterey.²⁸ Early projects under this authority included operation and maintenance of parks, a nature reserve, and a child development center.²⁹ Monterey also continued to provide fire protection services to POM as it has since 1954.³⁰ In 1998, POM signed the first contract to procure municipal services that included facility maintenance, stormwater system maintenance, and various capital improvement projects.³¹

An Army Audit Agency review conducted in 2000 revealed that from 1998 to 2000 POM realized an estimated

¹⁷ *Id.*

¹⁸ National Defense Authorization Act for Fiscal Year 1995, Pub. L. 103-337, § 816, 108 Stat. 2663, 158 (1994).

¹⁹ National Defense Authorization Act for Fiscal Year 2005, Pub. L. 108-375, § 325, 118 Stat. 1811, 1847 (2004); *see* Sec'y of Army, Implementation Report to Congress on the Pilot Program for Purchase of Certain Municipal Services for Army Installations (undated) (on file with author) [hereinafter Report to Congress].

²⁰ *See* National Defense Authorization Act for Fiscal Year 2013, Pub. L. 112-239, § 331, 125 Stat. 1632, 1696 (2013); *see also* 10 U.S.C. § 2336 (2013).

²¹ *See* Catherine Caruso, *Texas Airmen Admire Monterey Model*, U.S. ARMY (Feb. 26, 2016) https://www.army.mil/article/163124/texas_airmen_admire_monterey_model.

²² Ivan Bolden & Donna Wilhoit, Office of the Assistant Chief of Staff for Installation Mgmt., Intergovernmental Support Agreements, at slide 2 (undated) (unpublished PowerPoint presentation) (on file with author).

²³ LACHMAN, *supra* note 16, at 161-62. Fort Ord previously provided municipal service to Presidio of Monterey (POM) until the installation closed in 1994 due to Base Realignment and Commission (BRAC). *Id.* From 1994 to 1997, POM received municipal services from the Navy Post Graduate School through an interservice support agreement. *Id.*

²⁴ *Id.* at 162.

²⁵ *Id.* The initial "Community Installation Partnership" proposal was for the Naval Post Graduate School to close its fire station and contract for fire protection services with the City of Monterey. *Id.* At the time, the Navy was spending \$1.7 million for its two fire stations and has since reduced the cost to \$900,000 annually, however no contract was ever agreed upon. *Id.* Presidio of Monterey currently receives fire protection services from the City of Monterey for \$340,000 annually. *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ National Defense Authorization Act for Fiscal Year 1995, Pub. L. 103-337, § 816, 108 Stat. 2663, 158 (1994). The statute authorizes POM to purchase fire-fighting, security-guard, police, public works, utility, or other municipal service from government agencies within the County of Monterey. *Id.*

²⁹ LACHMEN, *supra* note 16, at 162.

³⁰ *Id.* at 165.

³¹ *Id.* at 162-63. POM signed the contract with the Presidio Municipal Services Agency (PMSA), a nonprofit organization established by the cities of Monterey and Seaside. *Id.* at 162. The PMSA had no employees and used resources from the cities to coordinate and manage the contracts with POM. *Id.* at 163.

savings of forty-one percent, almost \$2.5 million, on the operating costs of municipal services by contracting with the Presidio Municipal Services Agency.³² As a result, the FY 2004 NDAA provided permanent authorization for DoD assets in Monterey County, California to purchase municipal services necessary for installation operation.³³ A second audit conducted in 2010 by the Department of Public Works estimated POM saved twenty-two percent on municipal services as compared to previous federal and commercial contracts.³⁴ The estimate did not include the hundreds of thousands of dollars in capital improvements and cost savings POM received by Monterey upgrading and maintaining parks, the nature preserve, and the child care facility on the installation.³⁵

B. Additional Installation Pilot Programs

After the success in Monterey, the Army initiated a second pilot program. The FY 2005 NDAA authorized the Secretary of the Army to choose two installations to procure specific municipal services from their respective local governments.³⁶ The two installations chosen for this pilot program were Fort Gordon, Georgia, and Fort Huachuca, Arizona.³⁷

Fort Gordon used the authorization to contract with the City of Augusta for water and wastewater treatment services.³⁸ They utilized Augusta's excess capacity which lowered the city's cost by expanding the customer base.³⁹ In return, Fort Gordon obtained services at a lower rate than operating their existing water system.⁴⁰ Fort Gordon estimates the installation saved \$7,393,385 in capital upgrade costs along with \$47,500 in yearly commodity savings.⁴¹ In September 2007, Fort Gordon extended the partnership by

signing a fifty-year contract with Augusta valued at over \$200 million.⁴²

Fort Huachuca used the pilot program to acquire traffic signal maintenance and traffic measurement services from the City of Sierra Vista.⁴³ In addition, the installation closed the on-post library and all general library services are now provided by the city.⁴⁴ The library closure saves the installation over \$300,000 annually.⁴⁵

The FY 2005 NDAA directed the Secretary of the Army to submit a report to Congress and the Comptroller General that described the obstacles of the pilot program, evaluated the efficiencies, and made recommendations for expansion or alteration.⁴⁶ The Secretary's report detailed how the program provided cost benefits to the Army and the local governments.⁴⁷ In addition to cost savings, the partnerships produce the intangible benefit of fostering better relationships between the community and the installations.⁴⁸

However, there were some obstacles to implementing the program. The geographic location of Fort Gordon, which is ten miles west of Augusta, limited the city's ability to provide many of the services in an efficient manner.⁴⁹ Additionally, even though Sierra Vista is contiguous to Fort Huachuca, the city's population is smaller and the staff was too lean to provide services to the installation.⁵⁰ Even with these limitations the report ultimately recommended expanding the municipal services authorized for procurement and making the legislation permanent.⁵¹ Congress followed the recommendations and six short years later the FY 2013 NDAA provided for intergovernmental support agreements DoD-wide.⁵²

³² *Id.* at 165 (as compared to the interservice support agreement signed with the Navy Post Graduate School from 1994 to 1997).

³³ *See* National Defense Authorization Act for Fiscal Year 2004, Pub. L. 108-136, § 343, 117 Stat. 1392, 1448 (2003).

³⁴ LACHMEN, *supra* note 16, at 165.

³⁵ *Id.* Presidio of Monterey received almost \$1.3 million in capital improvements and \$102,000 in operations and maintenance (O&M) cost avoidance. *Id.*

³⁶ *See* National Defense Authorization Act Fiscal Year 2005, Pub. L. 108-375, § 325, 118 Stat. 1811, 1448 (2004); 10 U.S.C. § 2461 note (2004) (Pilot Program for Purchase of Certain Municipal Services for Military Installations). The authorized services were refuse collection and disposal, library and recreational services, facility maintenance and repair, and utilities. *Id.*

³⁷ Report to Congress, *supra* note 19, at 2.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at 3.

⁴¹ *Id.*

⁴² *See Augusta Wins Water-Sewer Contract for Fort Gordon*, AUGUSTA CHRONICLE, (Oct. 4, 2012), <http://chronicle.augusta.com/news-metro-latest-news/2012-10-04/augusta-wins-water-sewer-contract-fort-gordon>. Fort Gordon used a military utility conveyance authority to sign the 50 year contract. 10 U.S.C. § 2688 (2012). Under the authority the Secretary of Defense is authorized to contract for utility services for a term not to exceed fifty years after determining the transfer is cost effective. *Id.* § 2688(d)(2).

⁴³ Report to Congress, *supra* note 19, at 2.

⁴⁴ *Id.* at 3-4.

⁴⁵ *Id.* at 2.

⁴⁶ *See* 10 U.S.C. § 2461 note (2004) (Pilot Program for Purchase of Certain Municipal Services for Military Installations).

⁴⁷ Report to Congress, *supra* note 19, at 4-5.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *See* National Defense Authorization Act for Fiscal Year 2013, Pub. L. 112-239, § 331, 125 Stat. 1632, 1696 (2013); 10 U.S.C. § 2336 (2013).

C. National Defense Authorization Act of 2013

The FY 2013 NDAA provided all DoD agencies with the authorization to enter into agreements with local governments to procure installation support services.⁵³ However, the law's placement in the procurement section of Title 10 left some confusion as to the appropriate contracting method.⁵⁴ The Office of the Secretary of Defense (OSD) believed the Federal Acquisition Regulation (FAR) still applied to IGSA's due to the location of the statute.⁵⁵ Because most communities do not employ personnel with FAR expertise, the requirement added time and money to the initial efforts by commands and local governments to reach agreements.⁵⁶ Local governments were forced to hire consultants in order to wind through the FAR contracting process.⁵⁷

To meet the true intent of an IGSA, the FY 2015 NDAA amended the statute. The NDAA issued clarifications to the statutory language governing a command's authority to enter into an agreement and defined an IGSA as a legal instrument.⁵⁸ Furthermore, the amendment reassigned IGSA's from the procurement chapter to the real property chapter.⁵⁹ As a result, lawmakers clarified their intent that IGSA's were no longer subjected to any other federal contracting law, such as the FAR.⁶⁰

III. Intergovernmental Support Agreements

The FY 2015 NDAA amendments leave us with the current IGSA statute. The law, now codified at 10 U.S.C. § 2679, contains five subsections that provide general guidelines for drafting an agreement. The guidelines outline seven basic principles: (1) to provide, receive, or share, installation-support services, (2) the ability to sole-source, (3) may use wage-grades normally paid by the state/local

government, (4) must enhance mission effectiveness or create efficiencies or economies of scale including reduced costs, (5) the service must be pre-existing, (6) excludes security guard or fire-fighting functions, and (7) the term cannot exceed 5 years.⁶¹ This section will discuss the IGSA principles to provide practitioners with an understanding of the law. Army judge advocates are active in the IGSA formation process and must attend partnership meetings with local governments, therefore, having a knowledge of the law is essential.⁶² Furthermore, this section will briefly discuss Office of Management and Budget (OMB) Circular A-76 and its inclusion into the language of the statute.

A. Provide, Receive, and Share Services

Military commands are authorized to provide, share, and receive installation support services from local governments.⁶³ The goal of partnering is to create efficiencies or economies of scale in order to maximize cost reduction.⁶⁴ Efficiencies are improvements to the production and performance of services while saving time, labor, and most importantly, money.⁶⁵ A good example is Fort Huachuca's receipt of library services from Sierra Vista. The installation receives the same services and saves \$300,000 annually.⁶⁶

Economies of scale, on the other hand, decrease the unit cost of a product or service as a result of a larger scale operation.⁶⁷ Partnerships to reduce cost through an economy of scale are encouraged as many of the same support services are necessary for local governments to operate on a daily basis.⁶⁸ These agreements can reduce costs for both entities as demonstrated by the Fort Gordon water services contract with the City of Augusta.⁶⁹

⁵³ National Defense Authorization Act for Fiscal Year 2013, Pub. L. 112-239, § 331, 125 Stat. 1632, 1696 (2013); 10 U.S.C. § 2336 (2013).

⁵⁴ LACHMEN, *supra* note 16, at 2.

⁵⁵ Telephone Interview with Mark J. Connor, Assoc. Deputy Gen. Counsel, Army Gen. Counsel (Sept. 27, 2016); Ivan Bolden & Donna Wilhoit, Intergovernmental Support Agreements, at slide 3 (undated) (unpublished PowerPoint presentation) (on file with author).

⁵⁶ LACHMEN, *supra* note 16, at xviii, 138.

⁵⁷ *Id.* at 138.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 2.

⁶¹ See 10 U.S.C. § 2679 (2014); See also Headquarters, U.S. Dep't of Army, Execute Order No. 200-16 (6 Jun 16) [hereinafter EXORD 200-16].

⁶² EXORD 200-16, *supra* note 61, para. 3.D.3., annex B, pt. 1, para. a.

⁶³ 10 U.S.C. § 2679(a)(1) (2014). The term "local government" includes a county, parish, municipality, city, town, township, local public authority, school district, special district, and any agency or instrumentality of a local government. 10 U.S.C. § 2679(e)(2) (2014). Installation support services

are defined as "those services, supplies, resources, and support typically provided by a local government for its own needs and without regard to whether such services, supplies, resources, and support are provided to its residents generally, except that the term does not include security guard or fire-fighting functions." 10 U.S.C. § 2679(e)(1) (2014). The Department of Defense (DoD) prohibition on contracting for the performance of firefighting or security-guard function has been in place since 1986. 10 U.S.C. § 2465 (2012). There are exceptions for contracts in performance before September 24, 1983. *Id.* § 2465(b)(1)-(b)(4). This exception allowed POM to continue receipt of firefighting services from the City of Monterey. LACHMEN, *supra* note 16, at 163 n.7.

⁶⁴ 10 U.S.C. § 2679(a)(1) (2014).

⁶⁵ *Efficiency*, BUS. DICTIONARY, <http://www.businessdictionary.com/definition/efficiency.html> (last visited Jan. 3, 2016).

⁶⁶ Report to Congress, *supra* note 19, at 3-4.

⁶⁷ *Economy of Scale*, THE FREE DICTIONARY, <http://www.thefreedictionary.com/economy+of+scale> (last visited Nov. 20, 2016).

⁶⁸ 10 U.S.C. § 2679(a)(1) (2014).

⁶⁹ Report to Congress, *supra* note 19, at 4 n.2.

When procuring services with an IGSA, commands must use O&M funds.⁷⁰ This is also typical of service contracts procured using the FAR.⁷¹ However, the statute allows commands to provide and share services with local governments as well.⁷² For instances when O&M funds are expended to provide or share services, the “funds received . . . as reimbursement . . . shall be credited to the appropriation or account charged with providing the installation support services.”⁷³ This ensures commands do not lose precious O&M funds by working with local governments.⁷⁴

B. Sole Source Agreements

When using an IGSA the statute gives direct authority for commands to enter into sole source agreements with local governments.⁷⁵ This is contrary to FAR contracting procedures that require the head of an agency achieve full and open competition by using the competitive procedures unless otherwise authorized by the statute.⁷⁶ The competitive contracting procedures are in place to reduce costs, improve performance by contractors, and decrease fraud.⁷⁷

The IGSA statute, however, still has measures in place to promote competition, limit fraud, and keep the spirit of the FAR alive. First, if a contract is used as the basis for an agreement it must be awarded competitively.⁷⁸ This applies if the command is receiving, sharing, or providing services to the local government.⁷⁹ Second, the service must be pre-existing.⁸⁰ The contract serving as the basis for the IGSA “may only be used when the Secretary concerned or the State or local government . . . already provides such services for its own use.”⁸¹ If the service meets these requirements, a command can sign a sole source agreement for a term not to exceed five years.⁸² After five years the appropriate service

Secretary can renew the IGSA.⁸³

C. Wage Grades Normally Paid by the State.

Federal contracting administered by the FAR requires the government adhere to the Service Contract Act and the Davis-Bacon Act.⁸⁴ Both federal statutes set a wage scale requirement contractors must pay employees on government contracts. The Service Contract Act and Davis-Bacon Act require contractors to pay prevailing wages based on the locality of the contract or pay no less than the federal minimum wage.⁸⁵ In 2014, the President signed an executive order raising the minimum wage for federal contractors and subcontractors to over ten dollars an hour.⁸⁶

In some locations, the prevailing or minimum wages under the federal laws are higher than the rates paid the local government. The FY 2005 report to Congress listed both laws as obstacles to further implementation of services at both Sierra Vista and Augusta.⁸⁷ Both cities noted the wage rates of employees that would be assigned to the partnership were substantially lower than required by the Service Contract Act.⁸⁸ In contrast, the City of Monterey pays wages higher than the prevailing wage rates required by the Service Contract Act and Davis-Bacon Act.⁸⁹ This allowed POM to utilize more municipal services offered by the city.⁹⁰

Intergovernmental support agreements authorize commands to use wage grades normally paid by that local government.⁹¹ Using these wage grades enables commands in regions of the United States with lower hourly incomes to fully utilize available installation support services in the community.⁹² However, there is some risk. The Department of Labor (DoL) has not provided an advisory opinion on whether IGSA's are subject to the executive order's minimum

⁷⁰ 10 U.S.C. § 2679(c) (2014).

⁷¹ See U.S. DEP'T OF ARMY, 7000.14-R, DOD FINANCIAL MANAGEMENT REGULATION, vol. 2A, para. 010201 (Apr. 2016).

⁷² 10 U.S.C. § 2679(a)(1) (2014).

⁷³ *Id.* § 2679(c).

⁷⁴ This is an exception to the general rule that funds received by the agency are sent to the Treasury without deduction for any charge or claim. Miscellaneous Receipts Statute, 31 U.S.C. § 3302(b) (2012).

⁷⁵ 10 U.S.C. § 2679(a)(1) (2014).

⁷⁶ Competition in Contracting Act, 10 U.S.C. § 2304(a)(1) (2012).

⁷⁷ See Memorandum from Office of Mgmt. & Budget to Chief Acquisition Officers, subject: Enhancing Competition in Federal Acquisition (May 31, 2007).

⁷⁸ 10 U.S.C. § 2679(a)(4) (2014).

⁷⁹ *Id.*

⁸⁰ *Id.* § 2679(a)(3).

⁸¹ *Id.*

⁸² *Id.* § 2679(a)(2)(A).

⁸³ EXORD 200-16, *supra* note 61, para. 1.B.7.

⁸⁴ FAR subpt. 22.10, 22.403-1 (2016). The Service Contracts Act applies to contracts that furnish services inside the United States valued over \$2,500. Service Contract Act of 1965, 41 U.S.C. § 351(a) (2012). The Davis-Bacon Act relates to construction contracts on public buildings and public works valued over \$2,000. Davis-Bacon Act, 40 U.S.C. § 3142 (2012).

⁸⁵ Service Contract Act of 1965, 41 U.S.C. § 351(a)-(b)(1) (2012).

⁸⁶ Exec. Order No. 13658, 79 Fed. Reg. 9851 (Feb. 12, 2014).

⁸⁷ Report to Congress, *supra* note 19, at 4.

⁸⁸ *Id.* To account for the wage rate difference the cities would have to set up two separate pay scales, one for employees working at the city and one for employees working on federal contracts. *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* at 4 n.2.

⁹¹ 10 U.S.C. § 2679(a)(2)(B) (2014).

⁹² Report to Congress, *supra* note 19, at 5.

wage standard.⁹³ The Army recently replied to a DoL inquiry requesting additional materials to help understand the Congressional intent behind IGSAs, however, no response has been provided to date.⁹⁴

D. Effects on OMB Circular A-76⁹⁵

The OMB Circular A-76 is a federal policy affecting executive agencies to include the DoD.⁹⁶ It requires agencies to categorize government employee job-related activities as either inherently governmental or commercial.⁹⁷ All inherently governmental activities will only be performed by government personnel.⁹⁸ Conversely, all activities deemed commercial in nature must undergo a public-private competition by the command to determine if government personnel or the private sector can perform the work more efficiently.⁹⁹ The circular's supplemental handbook provides detailed guidance on preparing cost estimates for government performance, contractor performance, and interservice support agreements.¹⁰⁰

Service Secretaries are required to "ensure that intergovernmental support agreements authorized by this section are not used to circumvent the requirements of Office of Management and Budget Circular A-76 regarding public-private competitions."¹⁰¹ Therefore, commands cannot reduce their civilian workforce by entering into an IGSA.¹⁰² Public-private competitions are still required to determine the most cost efficient way to perform commercial activities,¹⁰³ though now an IGSA should play a part in that equation. However, since 2008, various legislation has placed a moratorium on the public-private competitions required by

the circular.¹⁰⁴ The moratorium prohibits commanders from converting civilian positions even if the work assigned to civilian personnel has no established billet or the billet is vacant.¹⁰⁵

A commander's restriction on converting civilian billets over to contract positions is particularly relevant with the hiring freeze put in place by the President on January 23, 2017.¹⁰⁶ No vacant positions may be filled unless the billet is "necessary to meet national security or public safety responsibilities."¹⁰⁷ Hiring contractors outside the Government to circumvent the hiring freeze is prohibited by the president's memorandum.¹⁰⁸ Intergovernmental service agreements provide no relief as the A-76 moratorium and the hiring freeze prevents commanders from converting civilian positions.

IV. Implementation¹⁰⁹

The statute defines the principles to the formation of an IGSA, however, the language does not direct DoD agencies on how they must implement the law. The individual Service Secretaries are free to determine the appropriate way to execute an IGSA within their department.¹¹⁰ So far the Army and Air Force have taken the lead in the implementation and management of IGSA's.¹¹¹

The Air Force (AF) issued Policy Directive 90-22 in July 2014, and a rewrite in August 2016, outlining the program's roles and responsibilities of all relevant offices.¹¹² The policy tasks the "Air Force Community Partnership Program" (AFCP) with developing and managing the IGSA's and to

⁹³ EXORD 200-16, *supra* note 61, annex B pt. 4.

⁹⁴ Email from Roger Wilkinson, Headquarters Dep't of the Army, Office of the Judge Advocate General, to author (Jan. 26, 2017, 14:08 EST) (on file with author).

⁹⁵ This section is only intended to provide a general understanding of Office of Management Circular A-76 and not complete analysis.

⁹⁶ OFFICE OF MGMT. & BUDGET, CIRCULAR NUMBER A-76 (REVISED), at 5(a) (2003) [hereinafter *Circular A-76*]. The DoD is statutorily required to perform a public-private competition before conversion of civilian personnel to contractor performance. 10 U.S.C. § 2461 (1988).

⁹⁷ *Id.* at 4(a).

⁹⁸ *Id.* at 4(b).

⁹⁹ *Id.* at 4(a)-(e).

¹⁰⁰ See OFFICE OF MGMT. & BUDGET, CIRCULAR NO. A-76 REVISED SUPPLEMENTAL HANDBOOK (1996).

¹⁰¹ 10 U.S.C. § 2679(d) (2014).

¹⁰² EXORD 200-16, *supra* note 61, para. 1.C.

¹⁰³ 10 U.S.C. § 2679(d) (2014).

¹⁰⁴ VALERIE ANN BAILEY GRASSO, CONG. RESEARCH SERV., R40854, CIRCULAR A-76 AND THE MORATORIUM ON DoD COMPETITIONS: BACKGROUND AND ISSUES FOR CONGRESS 5-8 (2013).

¹⁰⁵ See Memorandum from Assistant Sec'y of Def. to Principal Officials of Military Departments et al, subject: Update on OMB Circular A-76 Public-Private Competition Prohibitions – FY 2016 (21 Apr. 2016).

¹⁰⁶ See Memorandum from President of the U.S. to Heads of Exec. Dep't & Agencies, subject: Hiring Freeze (23 Jan. 2017) [hereinafter *Hiring Freeze*].

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ This section covers the each agencies strategic IGSA guidance, however, the primer will focus on the Army's process for IGSA execution and approval.

¹¹⁰ 10 U.S.C. § 2679(a) (2013).

¹¹¹ The Army has thirteen completed or in progress IGSA's. Email from Joshua T. Randolph, Attorney Advisor, Installation Mgmt. Command, to author (Sept. 29, 2016, 11:27 EST) (on file with author). The Air Force, Marines, and Navy have eleven, four, and zero completed or in progress IGSA's respectively. Email from Brad Collier, Pub. Private Venture Program Manager, Navy Facilities Headquarters, to author (Feb. 2, 2017, 11:52 EST) (on file with author); Email from Carolyn White, Ass't Deputy Gen. Counsel, Air Force Installations, Energy & Env't, to author (Jan. 18, 2017, 4:07 EST).

¹¹² U.S. DEP'T OF AIR FORCE, DIR. 90-22, AIR FORCE COMMUNITY PARTNERSHIP PROGRAM 1 (24 July 2014); U.S. DEP'T OF AIR FORCE, DIR. 90-22, AIR FORCE COMMUNITY PARTNERSHIP PROGRAM 1 (25 Aug. 2016) [hereinafter *AFPD 90-22*].

provide the necessary guidance to forming community partnerships.¹¹³ The AFCP Program Office established a SharePoint site as an information repository to provide helpful information for commands and potential partners in the community.¹¹⁴

When partnering opportunities are identified, the AFCP Program Office facilitates the process.¹¹⁵ The program office sends a “brokering team” to assist in meetings and outline opportunities that will mutually benefit the AF and local government through a series of six to seven meetings.¹¹⁶ Subject matter experts ensure the necessary resources are identified and the agreements or contracts are established using the proper authorities.¹¹⁷ IGSA’s are exempt from laws governing the award of government contracts, however, AF policy requires acquisitions using this authority implement a contract that complies with the FAR.¹¹⁸

The Navy and Marines utilize IGSA’s with the Marines following the Navy’s implementation guidance.¹¹⁹ Similar to the Air Force, the Navy and Marines employ community partnership programs to develop relationships with local governments.¹²⁰ Pursuant to the Navy’s policy, IGSA’s awarded by the agencies remain subject to the FAR.¹²¹ Proposed IGSA’s by the Navy and Marines must be forwarded to the Deputy Assistant Secretary of the Navy (Energy, Installations, and Environment) for review and approval.¹²²

Within the Army, the Office of the Assistant Chief of Staff for Installation Command (OACSIM) has primary responsibility for IGSA implementation and oversight.¹²³ The office is responsible for publishing Army IGSA policy and on June 6, 2016, the Army issued EXORD 200-16 in

response to the FY 2015 amendments.¹²⁴ The EXORD’s mission is to immediately seek opportunities for cost savings and to strengthen relationships with local governments through a range of public-to-public arrangements, including IGSA’s.¹²⁵ Commands are directed to review soon-to-expire installation support service contracts in coordination with the appropriate contracting officer for a possible transition to an IGSA.¹²⁶ The EXORD reinforces the IGSA statute’s guidelines, details the paperwork and coordination necessary for approval, and provides templates to assist commands.¹²⁷ The following sections will review the Army’s EXORD requirements and highlight information for judge advocates involved in the IGSA implementation process.

A. The Army Process

The Army process is laid out in the main body of the EXORD and in Annex B Part 1.¹²⁸ Army commands must develop a broad selection of potential partners and meet with all cities and counties that reside within a reasonable distance, not just locations contiguous to the installation.¹²⁹ For example, Fort Benning reached outside of its contiguous cities to partner with Auburn University for the installation’s ecological forest monitoring.¹³⁰ Auburn University is a State-supported institution located forty miles west of Fort Benning.¹³¹ The IGSA signed with the university saved Fort Benning sixty-six thousand dollars annually as compared to their previous contract.¹³²

After developing partnerships that require the use of an IGSA, commands must draft a partnership proposal for the idea.¹³³ The EXORD provides a template for the proposal in

¹¹³ *Id.*

¹¹⁴ See *Air Force Community Partnership Program*, U.S. DEP’T OF AIR FORCE (last visited Jan. 4, 2016), <https://community.af.mil/wg/airforcepartnerships/p/member>.

¹¹⁵ AFD 90-22, *supra* note 112, at 1.

¹¹⁶ U.S. Air Force, *Air Force Community Partnership Program*, DCO Connect Training, at slide 6-7 (Feb. 12, 2015) (unpublished PowerPoint presentation) (on file with author) [hereinafter *AFCP Presentation*].

¹¹⁷ *Id.* at slide 6. Attorneys are considered subject matter experts and must engage in the meetings. *Id.*

¹¹⁸ See Memorandum from Assistant Sec’y of Air Force to Major Commands et al., subject: *Air Force Community Partnership (AFCP) Program; 10 U.S.C. § 2679 “Installation Support Services: Intergovernmental Support Agreements (IGSA)”* (24 Aug. 2015).

¹¹⁹ See Memorandum from Assistant Sec’y of the Navy to Chief of Naval Operations and Commandant of the Marine Corps, subject: *Intergovernmental Support Agreements with State and Local Governments* (23 Nov. 2015) [hereinafter *Navy Policy*].

¹²⁰ See U.S. Marine Corps, *Marine Corps Community Partnership Program* (undated) (on file with author); Email from Brad Collier, Pub. Private Venture Program Manager, Navy Facilities Headquarters, to author (Feb. 2, 2017, 11:52 EST) (on file with author).

¹²¹ See *Navy Policy*, *supra* note 119.

¹²² *See id.*

¹²³ EXORD 200-16, *supra* note 61, para. 3.C.1.A.

¹²⁴ *See id.*

¹²⁵ *Id.* para. 2.

¹²⁶ *Id.* para. 3.A.

¹²⁷ *Id.* paras. 1.B.-1.E., 3.A.1.-3.A.2., 3.D.8.

¹²⁸ *Id.* para. 3-3.A.2., annex B, pt. 1.

¹²⁹ *Id.* annex B, pt. 1, para. a. Some partnerships may be executed under a separate authority so judge advocates must be present to assist in determining the appropriate one.

¹³⁰ Intergovernmental Support Agreement between United States and Auburn University for Ecological Forest Monitoring Services on Fort Benning (Sept. 26, 2016) (on file with author) [hereinafter *Fort Benning IGSA*].

¹³¹ Mr. James Parker, *Cost Benefit Analysis, Ecological Monitoring Fort Benning*, at slide 3 (Apr. 14, 2016) (unpublished PowerPoint presentation) (on file with author) [hereinafter *Fort Benning CBA*].

¹³² Fort Benning IGSA, *supra* note 130, at 2; Fort Benning CBA, *supra* note 131, at slide 6.

¹³³ EXORD 200-16, *supra* note 61, annex B, pt. 1, para. b.

Annex B Part 2.¹³⁴ In addition to the Proposal Template, commands are required to fill out a Business Case Analysis (BCA) to show the IGSA is in the best interest of the Army.¹³⁵ The partnership proposal and BCA are discussed further in section IV.B.

During development of the proposal, commands must coordinate with their supporting Office of the Staff Judge Advocate and Resource Manager at a minimum.¹³⁶ If the service under consideration affects an existing or follow-on small business contract commands must also coordinate with the Small Business Administration (SBA). Existing small business or AbilityOne contracts will not be terminated to form an IGSA. For expiring small business contracts the command will coordinate with the SBA.¹³⁷ If not, the proposals will be returned to the command.¹³⁸ Fort Bragg's IGSA for the museum custodial services, for example, was originally a small business contract.¹³⁹ After coordinating with the SBA and explaining the funding restraints, the SBA released Fort Bragg from the small business requirement and the command signed an IGSA with the City of Fayetteville.¹⁴⁰

After the proposal package is complete it must be submitted through the chain of command for approval and concurrently submitted to OACSIM.¹⁴¹ This allows OACSIM to provide guidance early in the proposal's inception and review for completeness to avoid delays later in the process.¹⁴² Once the proposal is endorsed by the command headquarters OACSIM will forward to the Assistant Secretary of the Army for Installations, Energy & Environment (ASA (IE&E)) for approval.¹⁴³

After approval by the ASA (IE&E), an approval memorandum will be sent to the installation and the originating command.¹⁴⁴ The agreement must be signed by the command within ninety days of approval by an IGSA certifying official.¹⁴⁵ Once executed a signed copy must be

sent to OACSIM within ninety days.¹⁴⁶ If the Army is receiving services under the IGSA, the command will designate a technical representative to provide oversight similar to a FAR contract ensuring the Army is receiving the expected benefits.¹⁴⁷

B. The Proposal Package

The package required by OACSIM consists of a partnership proposal and a BCA.¹⁴⁸ The proposal is a template document designed to elicit information in order to determine if an IGSA is the appropriate contracting method and the agreement is fully developed. The template begins by examining the Army's OMB Circular A-76 and small business concerns.¹⁴⁹ Commands are required to answer a series of questions to determine if both of these policies are affected.¹⁵⁰ If so, a further explanation must be provided to show adherence to federal law and Army policy.¹⁵¹

Next, the command must provide the details surrounding the proposal. A brief concept summary of the IGSA is required along with the background, objectives, and description.¹⁵² The description outlines duration, payment plan, and any planning assumptions.¹⁵³ This section must also detail how the IGSA will reduce costs by creating efficiencies or economies of scale as compared to the existing arrangement.¹⁵⁴ For IGSA's valued over \$200 thousand per year, the proposal must also describe how the agreement will be administered by the command.¹⁵⁵

Finally, the command must answer the IGSA's "requirements for success."¹⁵⁶ The checklist determines if all requirements have been satisfied by the proposal.¹⁵⁷ For example, one requirement includes staffing a dedicated team that includes a contracting representative and a legal

¹³⁴ *Id.* annex B, pt. 1, para. b, annex B, pt. 2.

¹³⁵ *Id.* annex B, pt. 1 para. b, annex B, pt. 3.

¹³⁶ *Id.* para. 3.D.3.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ Fort Bragg CBA, *supra* note 2, at slide 2.

¹⁴⁰ Telephone Interview with Mark J. Connor, Assoc. Deputy Gen. Counsel, Army Gen. Counsel (Sept. 27, 2016).

¹⁴¹ EXORD 200-16, *supra* note 61, para. 3.D.5., annex B, pt. 1. If an agreement or work statement is already drafted commands should submit those documents as well. *Id.*

¹⁴² *Id.* annex B, pt. 1, paras. c, d.

¹⁴³ *Id.* para. 3.A.2., annex B, pt. 1, para. f.

¹⁴⁴ *Id.* annex B, pt. 1, para. g.

¹⁴⁵ *Id.* para. 3.A.2., annex B, pt. 1, para. h. The approval letter from the Assistant Secretary of the Army will specify who is authorized to sign the agreement. *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* annex B, pt. 1, para. i.

¹⁴⁸ *See id.* annex B, pt. 2, annex B, pt. 3.

¹⁴⁹ *Id.* annex B, pt. 2, at 1.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* para. 3.D.9.

¹⁵⁶ *Id.* annex B, pt. 2, at 2.

¹⁵⁷ *Id.*

counsel.¹⁵⁸ These requirements do not require a written explanation, just a checkmark showing the command has explored the issue.¹⁵⁹ When complete the proposal document should be a maximum of four pages.¹⁶⁰

The second part of the proposal package is the BCA. Aside from restating the summary and description, the BCA includes the various courses of action (COA) the command is analyzing.¹⁶¹ The BCA must analyze the status quo and proposed IGSA along with any other logical COA.¹⁶² For example, Fort Benning's BCA for ecological foresting monitoring analyzed hiring civilians or using traditional contracting methods as alternatives to the status quo and proposed IGSA.¹⁶³ Once all COAs are determined, the cost factors such as labor, materials, and overhead must be estimated.¹⁶⁴ Any facts used in the analysis should be listed to show how the costs were reached.¹⁶⁵ The Fort Benning's BCA listed its use of OMB Circular A-76 to develop the costs associated with hiring civilians and contract labor.¹⁶⁶ After analysis, the proposed IGSA should prove to be the lowest priced COA to be a viable option. The level of effort expended preparing the CBA should be commensurate with the funding involved in the agreement.¹⁶⁷

C. The Agreement Format

The command has options when preparing the final agreement with a local government. A traditional FAR-based contract may still be used even though it is no longer required by law.¹⁶⁸ For commands that desire to use a non-FAR based IGSA agreement, the EXORD provides two pilot templates from which to choose.¹⁶⁹ Each template contains the minimum requirements for an IGSA, however, commands can make additional conditions or requirements if needed.¹⁷⁰

One template was developed by the U.S. Army Mission and Installation Contracting Command (MICC) and the other by the U.S. Army Corps of Engineers (USACE).¹⁷¹ Both templates serve as a plug-and-play document. They both

contain bracketed areas where the appropriate information about the IGSA must be inserted along with additional guidance to assist the drafter.¹⁷² Selecting the appropriate template will come down to personal preference. However, the USACE template notes that it should only be used when the Army is receiving services under the agreement.¹⁷³ Regardless of the template used, once the agreement is signed the command is responsible for the monitoring and administering the IGSA, not the contracting community.¹⁷⁴

V. Conclusion

Intergovernmental service agreements are an intriguing new method for commands to save funds on installation support services. In a time when installation budgets are decreasing, these agreements provide one more tool in the toolbox for judge advocates to assist their commanders. Not every command will be as lucky as POM and receive almost all municipal services from the local government through an IGSA, but there may be some opportunities for cost savings by working with the community right outside the front gate.¹⁷⁵

One thing is for certain with IGSAs, the Army's guidance will change. This type of agreement is fairly new and as OACSIM collects and reviews data, FRAGOs will be issued to the field.¹⁷⁶ Judge advocates should expect additional Army guidance by the end of 2017, so keep your eyes open for the exciting new chapter in the world of IGSAs.¹⁷⁷

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* annex B, pt. 2, at 1.

¹⁶¹ *Id.* annex B, pt. 3, at slide 2-5.

¹⁶² *Id.* annex B, pt. 3, at slide 5.

¹⁶³ Fort Benning CBA, *supra* note 131, at slide 6-7.

¹⁶⁴ EXORD 200-16, *supra* note 61, Annex B Pt. 3 at slide 6.

¹⁶⁵ *Id.* annex B, pt. 3, at slide 4.

¹⁶⁶ Fort Benning CBA, *supra* note 131, at slide 4.

¹⁶⁷ EXORD 200-16, *supra* note 61, para. 3.D.5.

¹⁶⁸ *Id.* para. 3.D.8.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *See id.* annex C, pt. 1-5, annex D.

¹⁷³ *See id.* annex C, pt. 1-5.

¹⁷⁴ *Id.* para. 3.D.8.

¹⁷⁵ On October 16, 2016, Presidio of Monterey and the cities of Monterey and Seaside signed an IGSA for facility and infrastructure operations and maintenance valued at nearly \$10 million. Brian Lepley, *Historic Service Agreement Struck by Presidio, Cities*, U.S. ARMY (Dec. 16, 2016), https://www.army.mil/article/179856/historic_service_agreement_struck_by_presidio_cities.

¹⁷⁶ EXORD 200-16, *supra* note 61, para. 3.B.3.

¹⁷⁷ Email from Donna Wilhoit, Office of the Assistant Chief for Installation Mgmt., Privatization and Partnership Division, to author (Jan. 17, 2017, 16:42 EST) (on file with author).

