



# NATIONAL SHERIFFS' ASSOCIATION

## BASIC ORDERING AGREEMENT KEY POINTS AND FAQs

JONATHAN F. THOMPSON  
Executive Director & CEO

### **KEY MESSAGES:**

- Preventing the release of criminal aliens back into the community is paramount to ICE's mission – and that's what this new agreement addresses.
- ICE places a high priority on enhancing public safety through the arrest and removal of criminal aliens from the United States. However, when an alien is arrested on a local criminal charge, all too often, they are subsequently released before ICE has the opportunity to pick them up from a local jail.
- Our valued state and local law enforcement partners are being challenged in court for facilitating a secure and orderly custodial transfer of criminal aliens to ICE.
- Recognizing these challenges, this new process clarifies that aliens held in these jurisdictions will be held under the color of federal authority, thereby affording our law enforcement partners liability protection from potential litigation as a result of faithfully executing their public safety duties.

### **FAQ (proactively available to the public):**

#### **1. What is a Basic Ordering Agreement?**

- A Basic Ordering Agreement, or BOA, is an existing procurement tool for acquiring a substantial, but presently unknown, quantity of supplies or services. A BOA is not a contract, but rather is a “written instrument of understanding” negotiated between an agency and a service provider that contains a description of services to be provided, terms applicable to a future order between the parties, and a method for pricing, issuing, and delivering on future orders. Each individual order on a BOA constitutes a contract. The Government is under no obligation to issue orders on a BOA, and a service provider that enters into a BOA is not required to accept any orders issued by the Government.

#### **2. What is the specific BOA process being implemented by ICE and interested state and local jurisdictions?**

- Jurisdictions that choose to participate in the BOA process would be considered service providers and would house detainees upon ICE's issuance and their acceptance of a Form I-203 (Order to Detain or Release Alien) that is accompanied by: (1) a Form I-247A (Immigration Detainer – Notice of Action); and (2) either a Form I-200 (Warrant for Arrest of Alien) or Form I-205 (Warrant of Removal). For any order placed under the BOA, ICE would reimburse the service provider for up to 48 hours of detention, under applicable regulations.

#### **3. Why is this process being instituted?**

- ICE's valued state and local law enforcement partners who work with us to protect public safety are being challenged in court for facilitating a secure and orderly custodial transfer of criminal aliens to ICE. This new process is a result of collaboration with the National Sheriffs' Association and the Major County Sheriffs of America and affords our partners an additional legal basis to defend themselves when they faithfully execute their public safety duties by detaining individuals at ICE's request and are sued. Specifically, state and local law enforcement agencies detaining aliens at the request of ICE pursuant to the BOA process are immune from claims under 42 U.S.C. § 1983 because such detention is under color of *federal* authority and section 1450 Duke St. • Alexandria, VA 22314 • 703.836.7827 phone • 703.683.6541 fax • [www.sheriffs.org](http://www.sheriffs.org) • [nsamail@sheriffs.org](mailto:nsamail@sheriffs.org)



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1983 provides for liability only against officials acting under color of *state* authority. U.S. immigration law explicitly provides that state and local officers may cooperate with DHS in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States, and that such cooperation is under *color of federal authority* for purposes of determining the liability, and immunity from suit, of the officer or employee in a civil action brought under federal *or* state law (8 U.S.C. § 1357(g)(8), (10)).

#### 4. What is the lawful basis of the BOA?

- Subsections 287.7(e) and (d) of Title 8 of the Code of Federal Regulations authorize, but do not require, ICE to reimburse a law enforcement agency for detention under a detainer. Such reimbursement would also constitute a “necessary expense” under the appropriations laws.

#### 5. How is the BOA process different than the 287(g) Program?

- The purpose of the BOA process is to allow ICE up to 48 hours to pick up removable aliens after their scheduled release from state or local custody, and to reimburse the service provider for that brief period of detention. The 287(g) Program enables state and local law enforcement officers to perform certain immigration officer functions subject to the direction and supervision of ICE, under a formal Memorandum of Agreement with ICE. Unlike BOA service providers, ICE’s 287(g) Program partners work to identify and process aliens amenable to removal proceedings who are booked into their facilities.

#### 6. Will BOA service providers have immigration arrest authority?

- No. The BOA process does not delegate any immigration officer authorities to state and local law enforcement officers. Instead, participating jurisdictions would, on a reimbursable basis, house certain detainees when ICE issues a Form I-203 (Order to Detain or Release Alien) that is accompanied by: (1) a Form I-247A (Immigration Detainer – Notice of Action); and (2) either a Form I-200 (Warrant for Arrest of Alien) or Form I-205 (Warrant of Removal).

#### 7. Why doesn’t ICE just get a judicial warrant from a judge?

- United States District Court Judges/Magistrates have no authority to issue a civil immigration arrest warrant, and may only issue a judicial warrant for a criminal immigration violation if criminal prosecution is being pursued by the federal government. Further, as has been repeatedly affirmed by courts, including by the Supreme Court itself, judicial warrants are not required for civil immigration arrests. Section 236(a) of the Immigration and Nationality Act, 8 U.S.C. § 1226(a), makes clear, “on a warrant issued by the [Secretary of Homeland Security], an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States.” Congress delegated these probable cause determinations to immigration officers, rather than to a magistrate or federal district court judge.



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### **8. What happens if ICE does not pick the alien up within 48 hours?**

- As the terms of the BOA itself make clear, “No payment will be made for any detention beyond 48 hours, and the service provider will not house the alien for longer than 48 hours under this BOA.” If ICE does not pick up the alien within 48 hours, the BOA process provides no authority for the state or local law enforcement agency to continue holding the alien. However, ICE anticipates picking up most aliens held for us by a BOA service provider within the 48-hour window.

### **9. Will the BOA service provider be required to undergo any training?**

- No. The BOA process does not change the authorities or processes of the state or local law enforcement agency.

### **10. Why are only a small number of jurisdictions participating as BOA Service Providers?**

- ICE is phasing in the implementation of the BOA process with a small number of partner jurisdictions in order to ensure a smooth roll-out.

### **11. What are your plans to expand this nationwide?**

- ICE intends to gradually expand implementation with willing law enforcement partners.

### **Response to Query (will be used in response to specific media queries)**

#### **1. Is this an admission that the use of detainees is illegal?**

- No. ICE continues to maintain that when a state or local law enforcement agency acts in coordination with and at the request of ICE, it may exercise its inherent arrest authority to briefly maintain custody of an individual, for whom ICE possesses probable cause of removability, beyond the time when he or she would otherwise have been released from state or local physical custody. ICE detainees, which reflect a determination that there is probable cause to believe that the subject is a removable alien, are also accompanied by an administrative warrant—either Form I-200 (Warrant for Arrest of Alien) or Form I-205 (Warrant of Removal)—detailing the basis of the probable cause determination. That is, detainees are only lodged against aliens who ICE itself is statutorily authorized to arrest and detain. The state or local law enforcement agency’s exercise of its inherent arrest authority for a brief period, in cooperation with ICE, is supported by ICE’s probable cause determination. Indeed, ICE’s detainer and warrant paperwork will continue to be used under the BOA process.

#### **2. What is the expected annual cost of this process?**

- Although the BOA process comes at a cost, that cost is far outweighed by its potential benefits for public safety. The rate of reimbursement provided under the BOA process is both reasonable and cost effective at



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\$50 for up to 48 hours.

### 3. Does detaining an individual under a BOA order equate to an honored ICE detainer?

- Under the BOA, local jurisdictions enter into an agreement with the Government and are reimbursed for the detention of a specific, requested alien for up to 48 hours. The request for detention must be accompanied by (1) a Form I-247A (Immigration Detainer – Notice of Action); and (2) either a Form I-200 (Warrant for Arrest of Alien) or Form I-205 (Warrant of Removal).

### 4. Can a jurisdiction have both a BOA and a 287(g) program (without an IGSA)?

- The BOA process is only available to reimburse a state or local jurisdiction for detention prior to ICE picking up the alien. Because delegated immigration officers under the 287(g) Program complete the arrest of aliens in their facilities on behalf of ICE, the detention of such aliens would not fit within the BOA process.

### 5. Is this process designed to assuage Sheriffs' fears about cooperating with ICE through financial gain?

- While the BOA process will ameliorate financial concerns with cooperation, by reimbursing them for detention, this process is intended to afford our law enforcement partners an additional legal basis to defend themselves when they faithfully execute their public safety duties by detaining individuals at ICE's request and are sued. In other words, this is about the law enforcement community's commitment to public safety; it's not about the money.

### 6. Why are people being handed over to ICE if they've only been arrested for a minor offense, like driving without a license?

- Federal immigration law provides that aliens can be removed from the United States for a variety of reasons, ranging from illegal entry to commission of certain crimes. It's also important to bear in mind that illegally entering the country is a federal crime, in addition to a basis for removability.
- ICE only lodges immigration detainers against individuals who have been arrested and for whom ICE can document probable cause of removability. While ICE prioritizes public safety and national security threats, all aliens removed by the agency are removed because they have violated federal laws. ICE looks at the complete criminal and immigration history of any alien arrested by another law enforcement agency. While the instant crime for which an alien is arrested may be minor, many of these aliens are career criminals with extensive criminal histories and/or multiple immigration violations.
- To be clear the BOA is predicated on an alien being booked into a state or local prison or jail. The alien must have been criminally arrested under the same laws applicable to those legally present in the country.

### 7. Whose custody is an alien in when they are detained by a local jurisdiction under a BOA?

- Individuals detained under a BOA are detained by the local jurisdiction under the color of federal authority. In this context, "color of federal authority" simply means that the actions of a law enforcement partner to maintain custody of a criminal alien beyond that individual's scheduled time of release are legitimate because



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they flow from federal law. Congress has been clear on this point: when a state or local law enforcement partner cooperates with ICE “in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States,” such cooperation “shall be considered ... under color of federal authority.” 8 U.S.C. § 1357(g)(8), (g)(10)(B).

### **8. What detention standards are required of a facility housing an alien under a BOA?**

- ICE’s detention standards only apply to immigration detention facilities. As the BOA is not a detention contract, ICE’s detention standards are not applicable.