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Comptroller General
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United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Denali Commission—Overobligation of Apportionment

File: B-316372

Date: October 21, 2008

DIGEST

The Denali Commission incurred an obligation for the amount of a grant to the Alaska Department of Commerce, Community and Economic Development when it transmitted its Financial Assistance Award to the Alaska Department on August 27, 2005. The Commission did not violate the Antideficiency Act because it had sufficient funds available for the grant at the time it incurred the obligation; however, the Commission failed to record the obligation in accordance with the recording statute, 31 U.S.C. § 1501(a).

DECISION

The Inspector General of the Denali Commission has requested our decision on whether the Commission violated the Antideficiency Act (Act) in December 2005 when it recorded an obligation of \$400,000 for a grant to the Alaska Department of Commerce, Community and Economic Development. Letter from Mike Marsh, Inspector General, Denali Commission, to Susan Poling, Managing Associate General Counsel, GAO, Mar. 12, 2008 (Request Letter). As explained below, the Commission incurred an obligation for the grant on August 27, 2005, when the Commission transmitted a Financial Assistance Award to the Alaska Department of Commerce, Community and Economic Development, although it failed to properly record the obligation. Nevertheless it had an apportionment sufficient at that time to cover the grant amount; therefore, the Commission did not violate the Antideficiency Act. Compliance with the Antideficiency Act is measured at the time an agency incurs an obligation, not when it records the obligation. B-302358, Dec. 27, 2004.

Our usual practice when rendering decisions is to request the views of the relevant federal agency to establish a factual record and to elicit the agency's legal position on the subject matter of the request. GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), available

at www.gao.gov/legal/resources.html. In this instance, the request letter included, as an attachment, a copy of the Commission's Resolution No. 05-24, dated July 13, 2005, and apportionment and reapportionment schedules for fiscal year 2006 for the Commission. The Commission subsequently provided us with copies of the Financial Assistance Award, other relevant apportionment schedules, and a legal analysis that the Commission had requested from a Federal Aviation Administration senior attorney.

BACKGROUND

Congress established the Denali Commission (Commission) in the Denali Commission Act of 1998. Pub. L. No. 105-277, §§ 301–308, 112 Stat. 2681-637 to 2681-641 (Oct. 21, 1998). The Commission operates exclusively in, and for the benefit of, the state of Alaska and has three purposes. One is to deliver federal services in the most cost-effective manner by reducing administrative and overhead costs. Another is to provide training and economic development services in rural communities. The third purpose is to provide infrastructure needs such as power generation and transmission facilities, modern communication systems, water and sewer systems. *Id.* § 302. The Commission is composed of seven members, who are appointed by the Secretary of Commerce. Six members are Alaskans, including the Governor of Alaska (or her nominee), who serves as the State Cochairperson. The seventh member is a federal official, who serves as the Federal Cochairperson. *Id.* § 303. One way in which the Commission carries out its mission is to make grants to Alaska state departments to implement specific projects. Request Letter.

On July 13, 2005, the Commission passed a resolution approving up to \$400,000 for a grant to the Alaska Department of Commerce, Community and Economic Development (Alaska Department) for the operation of the Commission's Mini-Grant Program. Denali Commission, *Financial Assistance Award*, No. 202-06 (Dec. 2, 2005), available at www.denali.gov/dcpdb/Data/attachments/signed%20award152.pdf (last visited Oct. 8, 2008) (Award No. 202-06). This program provides grants for projects that will generate new income for a community, create jobs, or otherwise improve the community economy. Examples of mini-grant projects are a shellfish nursery, a crane for a dock facility, and the installation of restroom facilities to accommodate more tourists and improve public health and safety. Alaska Division of Community and Regional Affairs, *State FY 07 Mini-Grant Program*, available at www.commerce.state.ak.us/dca/grt/minigrant.htm (last visited Oct. 8, 2008).

In August 2005, Commission staff sent a Financial Assistance Award document to the Alaska Department for signature. The Alaska Department misplaced the award document and, consequently, never returned it to the Commission. After following up with the department in October 2005, Commission staff transmitted a second award document to the department, dated December 2, 2005. A department official signed the document and returned copies to the Commission. That same day the

Commission recorded a \$400,000 obligation for the grant award against a 3-year appropriation that was available for obligation in fiscal years 2005 through 2007.¹ Telephone Conversation between Corrine Eilo, Director of Administration, Denali Commission, and Jonathan Barker, Senior Attorney, GAO, July 8, 2008.

In September 2006, when the Commission submitted its fiscal year 2007 apportionment request to the Office of Management and Budget (OMB) for that appropriation, OMB advised the Commission that it may have violated the Antideficiency Act (ADA)² because, in December 2005, when the Commission recorded the obligation against the appropriation, the Commission had an apportionment of only \$164,480.³ Subsequently, the Commission adjusted its accounts to record the obligation against no-year appropriations for which it had an apportionment. E-mail from Corrine Eilo, Director of Administration, Denali Commission, to Jonathan Barker, Senior Attorney, GAO, May 9, 2008 (Eilo E-mail). This account adjustment did not take place until September 2006.

DISCUSSION

The question the Inspector General posed is whether the Commission violated the Antideficiency Act when it recorded an obligation in December 2005 for \$400,000 against the 3-year appropriation for which it had only \$164,480 apportioned. As posed, the answer would be yes. If an agency overobligates its apportionment, even though there may be an adequate appropriation, the agency violates the Antideficiency Act. 31 U.S.C. § 1517(a)(1). However, in examining the facts here, as explained below, the Commission incurred the obligation not in December, but in August 2005, when it first transmitted the Grant Award to the Alaska Department. At that time, the Commission had sufficient funds apportioned in a no-year account to

¹ Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, 118 Stat. 3300, 3302 (Dec. 8, 2004). Congress appropriated amounts to the Department of Housing and Urban Development's (HUD) Community Development Fund, to remain available for three fiscal years until September 30, 2007, for grants for the Economic Development Initiative "in accordance with the terms and conditions specified in the statement of managers accompanying this Act." *Id.* at 3302. The statement of managers specified that \$1,300,000 should be made available to the Denali Commission for economic development in remote Native and Rural Villages in Alaska. H.R. Rep. 108-792, at 1531 (2004). According to Commission staff, HUD transferred the funds to the Commission in April 2005.

² See *SF 132 Apportionment and Reapportionment Schedule*, Appropriation Account 9505071200, signed by OMB Sept. 29, 2006 (2006 SF 132), at n.1. OMB apportions all budgetary resources made available to executive agencies. OMB Circular No. A-11, § 120.4 (2008).

³ *Id.* at Line No. 2A.

cover the obligation.⁴ The no-year account was the account to which the Commission ultimately charged the grant obligation after adjusting accounts in September 2006. Eilo E-mail.

An agency incurs an obligation when it makes a definite commitment that creates a legal liability on the part of the government or takes an action that could mature into a legal liability by virtue of actions on the part of the other party beyond the control of the United States. B-300480, Apr. 9, 2003; GAO, *A Glossary of Terms Used in the Federal Budget Process*, GAO-05-734SP (Washington, D.C.: Sept. 2005), at 70, available at www.gao.gov/legal/resources.html. For grants, generally, an agency incurs an obligation at time of grant award. *See, e.g.*, B-300480, at 4. *See also* 31 U.S.C. § 1501(a)(5).

In B-126652, Aug. 30, 1977, we concluded that the Economic Development Administration (EDA) incurred an obligation for a grant based on an Offer of Grant similar to Denali's Financial Assistance Award form. In that case, EDA proposed to send an Offer of Grant to applicants that provided:

“This approval and award of grant . . . shall constitute an obligation to make such grant. Such obligation *may be terminated* without further cause, however, if the grantee shall fail to *affirm its timely utilization* of the grant by signing and returning to the Economic Development Administration within 30 days its affirmation of intent as set forth below.”

B-126652, at 2 (emphasis added). With this language, EDA incurred an obligation because EDA accepted the grant application, specified the project approved and the amount of funding, and imposed a timeframe for affirmation by the grantee.

The language in the Denali Financial Assistance Award has the same key terms upon which we based our conclusion that the EDA Offer of Grant established an obligation. Like the EDA Offer, Denali's grant award specifies the project and the amount of funding, as well as a 30-day timeframe for affirmation by the grant applicant. When the Commission transmitted the Financial Assistance Award to the Alaska Department in August, the language of the award form recognized an obligation at that time. The award form stated that:

“This Financial Assistance Award . . . *constitutes an obligation of federal funding*. By signing . . ., the Recipient agrees to comply with the Award provisions indicated below and attached. . . . If not signed

⁴ *See SF 132 Apportionment and Reapportionment Schedule*, Appropriation Account 95X1200, signed by OMB Aug. 9, 2005 (2005 SF 132).

and returned without modification by the Recipient within 30 days of receipt, the Federal Co-Chair may unilaterally terminate this Award.”

Award No. 194-05, at 2 (emphasis added).

Accordingly, the Commission incurred a \$400,000 obligation on August 27, 2005, when it transmitted the initial Financial Assistance Award to the Alaska Department.⁵

Denali’s Inspector General suggests that the Commission may have incurred an obligation when it passed its resolution on July 13, 2005, approving the grant. We disagree. Although the resolution generally expressed the Commission’s approval for making a grant, the resolution lacks the specificity required to establish a firm commitment on the part of the government to make a grant. *See generally Champaign County, Illinois v. United States Law Enforcement Assistance Administration*, 611 F.2d 1200, 1204–05 (7th Cir. 1979) (a letter from the head of an agency indicating that he had directed that funds be made available for a grant did not “amount to a formal award”). The resolution merely states that the Commission allocates funds to the Mini-Grant Program for up to \$400,000. It fails to state essential specifics such as who the grantee is and what the award performance period is. Accordingly, since the resolution did not impose a legal liability on the government nor communicate grant terms that the awardee accepted, the Commission did not incur an obligation at the time it passed the resolution.

On August 27, 2005, when the Commission incurred an obligation, it should have recorded the obligation for the grant under the so-called “recording statute,” 31 U.S.C. § 1501, but did not. The statute requires an agency to record an obligation for a grant when it is supported by documentary evidence that the grant is “payable under an agreement authorized by law.” 31 U.S.C. § 1501(a)(5)(B). To correct this failure to record, the Commission must adjust its accounts to record the obligation properly.

According to the Commission, in August 2005, it had three appropriations available to it. In the Consolidated Appropriations Act for Fiscal Year 2005, Congress appropriated \$67,000,000 to the Commission for its expenses for fiscal year 2005, providing that \$2,500,000 of that amount was to remain available until expended. Pub. L. No. 108-447, 118 Stat. at 2961. Congress also appropriated \$1,300,000 of 3-year funds available until September 30, 2007, specifically for economic development in remote Native and rural villages in Alaska.⁶ In addition, the

⁵ Of course, after the expiration of the 30-day deadline for affirmation of the grant, the Co-Chair may terminate the award and deobligate the funds.

⁶ Pub. L. No. 108-447, 118 Stat. at 3302. See note 1 above.

Commission had \$6,600,809 of no-year funds that were apportioned by OMB on August 9, 2005. *SF 132 Apportionment and Reapportionment Schedule, signed by OMB Aug. 9, 2005.* Each of these three appropriations was available for purposes of making the August 2005 grant to the state. However, only the no-year appropriation, apportioned on August 9, had an apportionment adequate to cover the amount of the grant. The Commission should have recorded the obligation against this appropriation.⁷ Accordingly, the Commission has not violated the Antideficiency Act.

The Commission should examine its policies and procedures to ensure that it is recording its grant obligations properly, in accordance with 31 U.S.C. § 1501, and that it has appropriate controls in place to ensure that it has an apportionment at the time of obligation. Without appropriate controls, the Commission has no assurance that it complied with the Antideficiency Act as it incurred grant obligations. When the Commission adjusts its records to reflect this obligation as of August 27, 2005, instead of September 2006, it should review obligations subsequent to August 2005 to make sure there were adequate apportionments and unobligated balances to cover grants awarded during that time.

CONCLUSION

When the Denali Commission incurred an obligation on August 27, 2005, for a Financial Assistance Award to the Alaska Department of Commerce, Community and Economic Development, it had an apportionment sufficient to cover the obligation. Accordingly, it did not violate the Antideficiency Act. The Commission, however, failed to record the obligation in accordance with the 31 U.S.C. § 1501.



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⁷ When the Commission adjusted its accounts in 2006 in response to OMB's query regarding its available apportionment, it charged the \$400,000 obligation to the no-year appropriation. Eilo E-mail.