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URBAN
PARTNERSHIP
AGREEMENTS

Congestion Relief
Initiative Holds
Promise; Some
Improvements Needed
in Selection Process



GAO

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Highlights of [GAO-09-154](#), a report to congressional committees

Why GAO Did This Study

As part of a broad congestion relief initiative, the Department of Transportation awarded about \$848 million from 10 grant programs to five cities (Miami, Minneapolis, New York, San Francisco, and Seattle) in 2007 as part of the Urban Partnership Agreements (UPA) initiative. The UPA initiative is intended to demonstrate the feasibility and benefits of comprehensive, integrated, and innovative approaches to relieving congestion, including the use of tolling (congestion pricing), transit, technology, and telecommuting (4Ts). Congestion pricing involves charging drivers a fee that varies with the density of traffic.

This report addresses congressional interest in (1) how well the department communicated UPA selection criteria, (2) whether it had discretion to allocate grant funds to UPA recipients and consider congestion pricing as a priority selection factor, and (3) how it is ensuring that UPA award conditions are met and results are assessed. GAO reviewed departmental documents, statutes and case law, and interviewed department officials and UPA applicants.

What GAO Recommends

The department should provide applicants with information about selection criteria in similar initiatives and follow statutory priority consideration of grant selection factors. For the most part, the department agreed with the draft report and agreed to consider its recommendations.

To view the full product, including the scope and methodology, click on [GAO-09-154](#). For more information, contact Katherine A. Siggerud at (202) 512-2834 or siggerudk@gao.gov and Susan Sawtelle at (202) 512-6417 or sawtelles@gao.gov.

URBAN PARTNERSHIP AGREEMENTS

Congestion Relief Initiative Holds Promise; Some Improvements Needed in Selection Process

What GAO Found

Although GAO did not assess the merits of the UPA initiative's design, it has reported on its support for integrated approaches to help reduce congestion.

With minor exception, the department did a good job communicating the criteria it would use to select urban partners and how much funding was available, but it did not clearly communicate the relative priority of the criteria or extend the same outreach to all applicants. The department clearly communicated 10 of the 11 selection criteria—such as the political and technical feasibility of projects—that it used to decide which cities to select as urban partners, but it did not publicize which criteria, other than the 4Ts, were most important. In addition, over time, the department provided information indicating that about \$852 million was available for these projects—a figure short of the actual \$1.02 billion but sufficient to give applicants a rough idea of the program's size. Clearly communicating selection criteria, their relative priority, and the available funding allows applicants to make informed decisions when preparing their applications. GAO also found that the department told two semifinalists for being named urban partners how to revise their applications to make them more competitive, but did not do so for the other semifinalists. Both were ultimately selected as urban partners. However, in the absence of government-wide or departmental guidance, it is unclear how to assess the appropriateness of this assistance.

The department acted within its authority to allocate about \$848 million of its fiscal year 2007 appropriation under 10 grant programs to five UPA cities. Typically these funds have been awarded through congressional direction (earmarks) to thousands of jurisdictions; but the department's 2007 funds were not subject to such directives. In addition, the department had authority to consider congestion pricing as a priority selection factor when awarding funds because the underlying statutes either explicitly permit it or provide the department with the authority to do so. However, GAO found that the department likely did not comply with statutory requirements of the Transportation, Community, and System Preservation program by failing to require applicants to meet all five statutory factors in order to receive "priority consideration," but this may not have affected the selection outcome.

The department has developed a framework to ensure that UPA award conditions are met and the initiative's results will be evaluated. The department is monitoring urban partners' completion of award conditions, such as obtaining congestion-pricing authority, and has already acted when conditions have not been met, such as by taking away New York City's funding when it could not obtain congestion pricing authority from the state. In addition, the department plans to evaluate urban partners' strategies for, and results in, reducing congestion. The evaluation, to be conducted by Battelle Memorial Institute, is in its early stages.

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Abbreviations

| | |
|------------|--|
| 4Ts | tolling, transit, technology, and telecommuting |
| Corridors | Corridors of the Future |
| FHWA | Federal Highway Administration |
| HHS | Department of Health and Human Services |
| HOT | high-occupancy toll |
| HOV | high-occupancy vehicle |
| ITS-OTMC | Intelligent Transportation Systems-Operational Testing to Mitigate Congestion |
| LEAA | Law Enforcement Assistance Administration |
| PUP | preliminary urban partner |
| SAFETEA-LU | The Safe, Accountable, Flexible, Efficient Transportation Equity Act—A Legacy for Users |
| TCSP | Transportation, Community, and System Preservation program |
| UPA | urban partnership agreement |

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United States Government Accountability Office
Washington, DC 20548

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Congressional Committees

Mobility on our nation's roads is essential for a strong economy. These roads provide businesses with access to materials, markets, and people and provide people with access to goods, services, jobs, and recreation. According to the Department of Transportation (the department), congestion is one of the single largest threats to our economic prosperity and way of life. In addition, the department states that congestion and the growing unreliability of the highway system impose severe costs on the quality of life of millions of Americans.¹ We have reported that the nation's transportation infrastructure is under great strain and that congestion is significant and expected to worsen. Furthermore, federal funds are often tied to a single transportation mode, which may limit the use of these funds to finance the greatest improvements in mobility.² The department also has recognized that these "modal funding silos" present challenges in combating congestion,³ and in May 2006 it issued a strategy to reduce congestion that, among other things, called for

- entering into urban partnership agreements (UPA) under which the department would give priority consideration for funding from existing programs to cities, designated as urban partners, that had developed and were standing ready to quickly implement a comprehensive, integrated, and innovative performance-oriented approach designed to reduce congestion through the use of the "4Ts"—tolling (more specifically,

¹U.S. Department of Transportation, *National Strategy to Reduce Congestion on America's Transportation Network* (Washington, D.C., May 2006).

²GAO, *Transportation Programs: Challenges Facing the Department of Transportation and Congress*, [GAO-09-435T](#) (Washington, D.C.: Mar. 10, 2009). For example, according to the department, highway spending by all levels of government has increased 100 percent in real dollar terms since 1980, but the hours of delay during peak travel periods have increased by almost 200 percent during the same period.

³U.S. Department of Transportation, *Refocus. Reform. Renew. A New Transportation Approach for America* (Washington, D.C., July 2008).

congestion pricing⁴), transit, technology, and telecommuting—rather than relying on unintegrated efforts to relieve congestion;

- establishing a Corridors of the Future (Corridors) program as a model for adopting a multistate approach to planning, developing, constructing, operating, and maintaining nationally and regionally significant transportation corridors that would be designated to reduce congestion and increase freight system reliability; and
- reducing barriers to private-sector investment in the construction, ownership, and operation of transportation infrastructure.⁵

In our prior work, we have supported integrated, performance-based approaches to reducing congestion.⁶ In addition, we have reported that public-private partnerships show promise—but also risk—as a strategy to provide new infrastructure and funding for transportation needs.⁷

In February 2007, Congress enacted a continuing resolution for fiscal year 2007. The continuing resolution funded the department at 2006 levels but did not include spending directives (earmarks) for the department’s grant programs.⁸ According to the department, the continuing resolution gave it

⁴Congestion pricing is a tolling strategy that often entails charging drivers a fee that varies with traffic volumes or by time of day according to a published schedule to help shift some rush-hour traffic to off-peak times. According to the department, it was not looking for proposals that simply tolled roads (i.e., would charge a flat fee) to generate revenue but was instead seeking proposals that would provide congestion relief. The department also considers congestion parking, which charges drivers a fee to park that varies with traffic volumes or by time of day, as a form of congestion pricing.

⁵According to the Federal Highway Administration, public-private partnerships involve a greater private role in planning, financing, designing, constructing, operating, and maintaining a transportation facility compared to traditional procurement methods.

⁶See, for example, [GAO-09-435T](#) and *21st Century Challenges: Reexamining the Base of the Federal Government*, [GAO-05-325SP](#) (Washington, D.C.: Feb. 1, 2005).

⁷See GAO, *Highway Public-Private Partnerships: More Rigorous Up-front Analysis Could Better Secure Potential Benefits and Protect the Public Interest*, [GAO-08-44](#) (Washington, D.C.: Feb. 8, 2008).

⁸Pub. L. No. 105-5, 121 Stat. 8 (Feb. 15, 2007). In previous years, Congress provided the department with specific instructions on which cities and states should receive funds for a number of the department’s programs. For example, according to the department’s Office of Inspector General, there were about 8,000 funding directives in fiscal year 2006, nearly all for highway and transit programs. See U.S. Department of Transportation, Office of Inspector General, *Review of Congressional Earmarks Within Department of Transportation Programs* (Washington, D.C., Sept. 7, 2007).

the opportunity to make funding decisions based on programmatic criteria and merit, rather than devoting funds to projects specifically directed by Congress that, in the department's view, may have had fewer transportation benefits or that otherwise would have been ineligible for funding. Given this flexibility, the department decided to further its 2006 congestion-reduction initiative by making available about \$1 billion of its 2007 appropriation for its UPA initiative, through grants made under 13 existing highway, transit, and technology grant programs. This was a major undertaking over a short time to develop an integrated approach from separately existing programs. The department set aside the bulk of these funds to support its UPA initiative and, in August 2007, conditionally awarded about \$848 million from 10 of the 13 programs to five cities: Miami, Florida; Minneapolis, Minnesota; New York City, New York; San Francisco, California; and Seattle, Washington.

As part of an integrated approach to reducing congestion, many UPA applicant cities⁹ proposed to implement a **tolling** (congestion-pricing) project. To address the other three "Ts," urban partners coupled their congestion pricing projects with transit, technology, and telecommuting projects. **Transit** projects included expanded bus service (and sometimes ferry service), including providing additional buses and bus stops, express bus routes, and park-and-ride facilities. **Technology** uses included such things as providing real-time traveler information on tolls being charged and opportunities for rerouting traffic to alternative travel routes. **Telecommuting** involved increasing the number of telecommuters. Applying for the UPA initiative required no small effort on the part of applicants because many public stakeholders were involved and some cities faced political opposition to congestion-pricing projects. For example, New York City was unable to obtain authority from the state legislature to implement a congestion-pricing approach. In accordance with the terms of the department's agreement with New York City, the department therefore cancelled the city's UPA and in 2008 awarded the funds to Chicago, Illinois; Los Angeles, California; and Seattle, Washington.¹⁰ In addition to awarding funds to cities for integrated

⁹In this report, we refer to metropolitan areas as cities, since cities generally took the lead with UPA applications.

¹⁰Chicago did not meet its December 2008 deadline for obtaining the legal authority necessary to implement congestion pricing. As a result, in accordance with the terms of the department's Congestion Reduction Demonstration Agreement with Chicago, the department cancelled Chicago's agreement.

approaches to reducing congestion that could be implemented quickly, the department saw another major benefit of UPAs as providing an incentive for state and local transportation stakeholders to work together toward transportation solutions. Beyond breaking down stovepipes in devising approaches to reduce congestion, UPAs, according to department officials, helped break down stovepipes within the department as different transportation administrations increased collaboration in addressing congestion-reduction strategies, where before they may have acted separately.¹¹

In response to the department's dedication of about \$1 billion to its congestion-reduction initiatives and its focus on funding a small number of cities through the UPA initiative, Congress, in the conference report for the department's fiscal year 2008 appropriation and in a separate letter from the Senate and House leadership responsible for transportation matters, requested that we review certain aspects of the UPA initiative. To do this, we examined (1) the department's communication and application of the selection criteria and funding devoted to the UPA initiative, (2) the department's authority to allocate substantial grant funds to support the UPA initiative and to consider congestion pricing as a priority factor in selecting urban partner awardees for underlying grant programs, and (3) steps the department is taking to ensure that UPA award conditions are being met and that results will be evaluated. These activities are the main focus of this report. In addition, in response to your interests, we examined how the department selected awardees for its Corridors of the Future program, the department's efforts to promote public-private partnerships, and the extent to which previous recipients of grants from programs that funded the UPA initiative and Corridors were awarded funds from those programs in fiscal year 2007. (See apps. I to III.) We did not assess the merits of the UPA initiative or Corridors program design.

To carry out our work, we reviewed the department's communication of the criteria for selecting UPA awardees and the funding amounts to be devoted to the initiative through notices in the *Federal Register* and UPA initiative outreach materials, such as presentation slides and handouts. We

¹¹As we have reported, the department's operating administrations are organized by mode—reflecting the structure of funding programs—resulting in an organizational structure that can impede collaboration between modes and limit the department's ability to plan, fund, and construct intermodal projects. See GAO, *Intermodal Transportation: DOT Could Take Further Actions to Address Intermodal Barriers*, [GAO-07-718](#) (Washington, D.C.: June 20, 2007).

also discussed these activities with senior department leaders, department staff who reviewed UPA applications, and 14 of the 26 UPA applicants.¹² We also reviewed all of the 26 UPA applications. In determining good grants practices, we reviewed the department's, as well as other government agencies', grant policies. Furthermore, we researched and analyzed the department's legal authority to allocate substantial grant funds to support the UPA initiative and to consider congestion pricing as a selection factor for allocating individual grant funds to support UPAs, by reviewing relevant statutes, case law, and department records, and by obtaining the department's legal views. Finally, we reviewed documents and interviewed department officials on their actions to monitor UPA award conditions and plans to evaluate each urban partner's projects to reduce congestion. Specifically, we reviewed urban partner term sheets and grant or cooperative agreements that list the conditions to receive federal funds. We conducted this performance audit from February 2008 through March 2009 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives. (See app. IV for additional discussion of our scope and methodology.)

Results in Brief

Overall, although we did not assess the merits of the UPA initiative's design, we have reported on our support for the concept of providing performance-oriented, integrated approaches, such as the UPA initiative, to help reduce congestion.

The department clearly communicated all but one of the criteria that it used to select urban partners, but it did not communicate the relative priority of the criteria or the full amount of available funding to applicants, and its methods of assisting applicants raise concerns. More specifically, the department clearly communicated to potential applicants 10 of the 11 criteria it used to select cities as urban partners, such as the need for cost-effective projects. However, it did not communicate to applicants the relative priority, or weights, it would give the criteria in selecting projects.

¹²The 14 applicants included the 5 cities that the department designated as urban partners, the 4 other cities that were semifinalists but were not selected as urban partners, and 5 other unsuccessful applicants.

Clearly communicating selection criteria and their weights is important to ensure that the selection process is as fair as possible, and governmentwide guidance calls for disclosing all selection criteria and their weights to applicants. For the remaining criterion, department officials told us that they looked positively on applications that were politically bold—that is, proposed a congestion-pricing project that represented a political challenge to acceptance in the applicant’s region—but did not inform applicants that political boldness was a selection criterion. In addition, the department did not communicate the full amount of available funding to applicants, although it did keep them abreast of most of the changes to available funding. As the fiscal year 2007 budget evolved, the amount available to the UPA initiative increased from \$100 million to about \$1 billion. The department communicated through *Federal Register* notices that \$852 million was available. While communicating the complete amount (\$1.02 billion) would have been desirable to gain the most responsive applications to the initiative’s goal of congestion-reduction, the \$852 million amount, in our opinion, provided potential applicants with a rough understanding of the program’s size. We also found that the department proactively gave assistance to two semifinalists (called preliminary urban partners or PUPs) that it did not provide to the other seven semifinalists. For example, according to Minneapolis officials, after the city was selected as a PUP, the department told Minneapolis officials to revise its application and include fewer projects than it originally applied for. We believe that while this attention could cause concern, it is unclear—in the absence of government-wide or departmental guidance—how to assess the appropriateness of the department’s actions.

The department had authority under the 2007 Revised Continuing Appropriations Resolution to allocate its appropriations to various existing grant programs, as long as the funds were spent for the purposes specified in the appropriations legislation and the department complied with the restrictions and requirements of the underlying grant statutes.¹³ The department also had authority to consider congestion pricing as a priority factor in selecting urban partners to receive grants under these programs. The department likely failed to comply with all of the statutory priority consideration specified in the statute for one of the grant programs—Transportation, Community and System Preservation program—through which the department awarded a total of \$50.4 million

¹³See the background section of this report for a description of these programs.

to urban partners. Based on available information, however, it is not clear that this failure affected the ultimate grant award decisions.

The department is monitoring UPA award conditions to ensure they are being met and has developed a framework to ensure that the initiative's results will be evaluated. The department created a UPA management team to track urban partners' progress in completing the requirements established as conditions of the awards, such as obtaining authority to use congestion pricing where needed. The UPA management team uses memorandums of understanding, funding agreements, an implementation matrix, and project management documentation, among other things, to monitor the progress being made on award conditions. The department has acted to ensure that urban partners complete award conditions. In April 2008, the department canceled New York City's urban partner designation after the city was unable to obtain the authority for congestion pricing, which was a condition of its UPA award. In addition, the department will evaluate urban partners' strategies for reducing congestion and has created a UPA evaluation subteam to lead this effort. In April 2008, the evaluation team hired Battelle Memorial Institute (Battelle) to evaluate the urban partner projects. Battelle will also coordinate with officials from Miami, which is funding and performing its own UPA evaluation. The department's evaluation team will manage Battelle's efforts, which Battelle plans to complete by late 2011. Although progress has been made in monitoring and evaluating urban partner activities, we did not attempt to assess the overall reasonableness of these efforts because they are in the early stages.

This report contains recommendations to the Secretary of Transportation aimed at better ensuring that applicants for future congestion-reduction initiatives are provided with all selection criteria and their weights ensuring that the department applies statutory priority selection factors correctly.

In commenting on a draft of this report, the department generally agreed with most of our findings. The department indicated that it was considering the recommendations and noted that the recommendation concerning the Transportation, Community, and System Preservation program will require its own legal analysis.

Background

In May 2006, the department announced its *National Strategy to Reduce Congestion on America's Transportation Network* (the "congestion initiative"), a comprehensive national initiative to reduce congestion on the nation's roads, rails, runways, and waterways. A major component of this initiative is the UPA initiative, under which the department gives selected cities special consideration for funding from existing programs. To qualify for selection, a city had to develop and be ready to quickly implement a comprehensive, integrated, and innovative approach to reducing congestion through the use of the 4Ts.

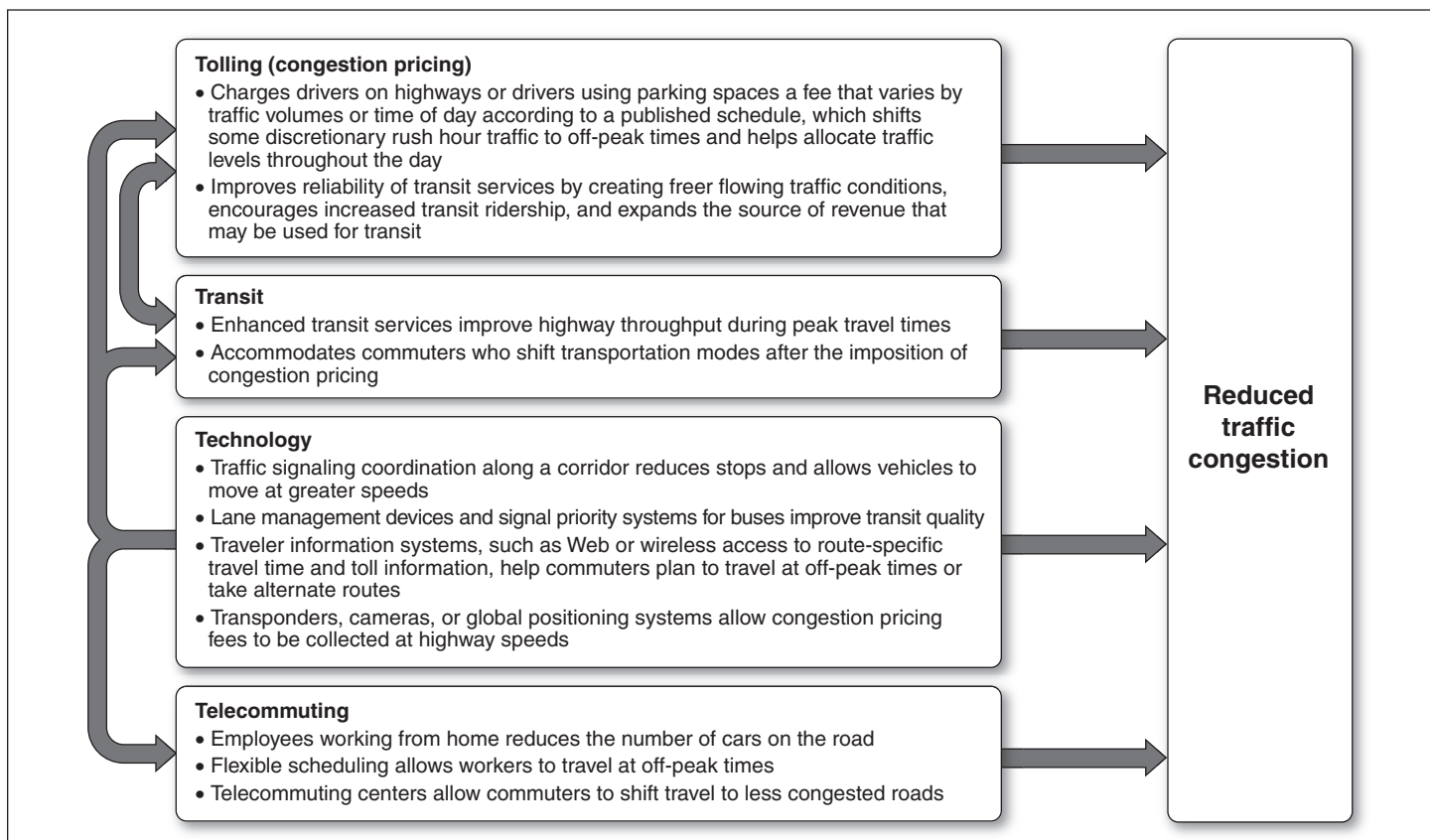
On December 8, 2006, the department issued a *Federal Register* notice soliciting proposals by cities to enter into UPAs with the department.¹⁴ According to the notice, the department planned to fund the agreements through several existing grant programs and lending and credit support programs. This cross-cutting approach was designed to enable the department to fund the greatest improvements in mobility in a coordinated manner across its modal operating administrations. The notice further indicated that the department would support its urban partners with regulatory flexibilities and dedicated expertise and personnel. Applicants wishing to become urban partners had to submit their applications by April 30, 2007. The notice stated that the department would consider applications filed after this date to the extent practicable. In addition, applicants had to apply to any underlying grant program from which they sought funding. They could do so by submitting a single application that covered each of the grant programs as long as the application was responsive to the requirements of each program. To achieve this, the department published several *Federal Register* notices between December 2006 and March 2007, requesting that UPA applicants apply to the underlying programs.

The *Federal Register* notice also set forth requirements for the UPA application. Under the UPA initiative, the department and the urban partner would agree to pursue the 4Ts to reduce traffic congestion. The department sought projects with congestion pricing to help shift some rush-hour traffic to off-peak times, coupled with new or expanded transit services. In this way, buses could move more freely through previously

¹⁴71 Fed. Reg. 71231 (Dec. 8, 2006).

congested roadways and could provide more reliable service.¹⁵ To further reduce congestion, the urban partner could use cutting-edge technologies—such as providing travelers with real-time transportation information—to improve transportation performance and secure agreements from area employers to expand telecommuting programs. (See fig. 1.) Finally, the department’s solicitation stated that neither the procedures nor the criteria identified in the notice would be binding on the department.

Figure 1: The Department’s View of How Tolling (Congestion Pricing), Transit, Technology, and Telecommuting Reduce Congestion



Source: GAO analysis of Department of Transportation information.

¹⁵As we have reported, congestion pricing can potentially enhance mobility by reducing congestion and the demand for roads. See GAO, *Highway Finance: States' Expanding Use of Tolling Illustrates Diverse Challenges and Strategies*, [GAO-06-554](#) (Washington, D.C.: June 28, 2006).

Aside from publishing the UPA initiative notice in the *Federal Register*, the department took a number of steps intended to (1) generate interest in the initiative, (2) encourage cities to develop fresh ideas, and (3) provide information to potential applicants. First, before publishing the December 2006 *Federal Register* notice, department officials met separately with officials from three urban areas—Seattle; northern Virginia; and Portland, Oregon—and presented information on congestion pricing and UPAs. Then, after publishing the notice, at the request of New York City, department officials met with the New York state legislature; conducted national workshops in Atlanta, Georgia; Denver, Colorado; and Washington, D.C. that were open to any interested UPA applicant;¹⁶ made presentations at transportation conferences; and held a Webinar for city officials who could not attend the national workshops.¹⁷ In the workshops and the Webinar, department officials discussed congestion pricing and supporting strategies, political and public outreach techniques that might be used to gain support for congestion-pricing initiatives, and potential funding opportunities under UPA. According to the department, it conducted a number of other outreach activities including (1) establishing a Web page with information for such applicants,¹⁸ (2) giving speeches on the UPA initiative, and (3) sending information on congestion pricing to e-mail listservs. In its *Federal Register* notice, the department stated that it reserved the right to solicit, and was actively soliciting, by means other than the notice certain cities the department had determined to be candidates for UPA award consideration.

The department received 26 UPA applications and created a multistep review process to select PUPs (announced in June 2007) and then urban partners (announced in August 2007). First, a review team, composed of staff from several modal administrations,¹⁹ used several technical criteria—such as innovation, the comprehensiveness of the 4Ts, cost-effective use of federal dollars, and the feasibility and likelihood of

¹⁶According to the department, it selected Washington, D.C., as a national workshop site because it was a low-cost location to test the workshop. It selected Atlanta and Denver because they are major transportation hubs that are accessible to many travelers.

¹⁷A Webinar is a workshop transmitted over the World Wide Web.

¹⁸Department of Transportation, National Strategy to Reduce Congestion, Urban Partnerships, www.fightgridlocknow.gov (last visited Jan. 7, 2009).

¹⁹The UPA technical review team included staff from the Federal Transit Administration, the Federal Highway Administration, and the Research and Innovative Technology Administration.

implementation—to perform a technical review of the UPA applications and rank them for the department’s senior leaders. Second, the senior leaders reviewed the review team’s rankings in light of broader department goals and recommended nine PUPs to the Secretary, which according to department officials, the Secretary approved.²⁰ The PUPs then each presented their proposals, first to the Secretary and Deputy Secretary and afterward to officials from the modal administrations involved in the UPA initiative. Following these presentations, the department, in some cases, asked for additional detail or clarification from the applicant. Third, using this information, the review team created funding scenarios—for example, one scenario provided funding for New York City and four other urban partners while another scenario did not provide funding for New York City, but did do so for seven other urban partners. Finally, using UPA applications and funding scenarios, the Secretary selected five urban partners—Miami, Minneapolis, New York City, San Francisco, and Seattle. The *Federal Register* notice stated the department would select up to 10 urban partners.

The urban partner designation did not include funds for the urban partners, but did give them special consideration in obtaining department resources such as funding from grant programs and administrative flexibilities, including streamlined environmental reviews. Between December 2006 and April 2007, the department issued several *Federal Register* notices describing the amount of funding available to urban partners. Initially, the *Federal Register* notice stated that up to \$100 million, over 3 years, was available from 1 grant program, but this amount was expanded to about \$1 billion from 13 grant programs when the President signed the 2007 Revised Continuing Appropriations Resolution. Unlike previous years, the department’s appropriation was not subject to congressional directives that funds be dedicated for particular transportation projects. As a result, urban partners applied for and were eventually awarded funds from 10 grant programs for 94 projects totaling \$848.1 million. (See table 1.) This report focuses on the 5 urban partners, 94 projects, and \$848.1 million in awards announced in August 2007. As the department negotiated with the prospective urban partners, the numbers of urban partners, projects, and awards were reduced somewhat.

²⁰The nine preliminary urban partners were Atlanta, Dallas, Denver, Miami, Minneapolis, New York City, San Diego, San Francisco, and Seattle.

Table 1: Discretionary Grant Programs Available and Used to Support UPAs

Dollars in millions

| Program | Description | Amount available | Amount awarded |
|---|---|------------------|--------------------------|
| Bus and Bus Facilities | Provides for new and replacement buses and related equipment and facilities | \$433 | \$418 |
| New Starts/ Small Starts | Supports locally planned, implemented, and operated transit “guideway” capital investments (e.g., trolleys) | 145 | 113 |
| Intelligent Transportation Systems-Operational Testing to Mitigate Congestion | Supports the implementation of intelligent transportation system policies and programs aimed at increasing the level of integrated deployment of these systems ^a | 100 | 92 |
| Interstate Maintenance Discretionary | Provides funding for resurfacing, restoration, rehabilitation, and reconstruction work on most existing Interstate system routes | 92 | 50 |
| Public Lands Highway Discretionary | Improves access to and within federal lands | 84 | 47 |
| Transportation, Community, and System Preservation | Provides funding for a comprehensive initiative including implementation grants and research to address the relationships between transportation, community, and system preservation and to identify private-sector-based initiatives | 55 | 50 |
| Ferry Boat Discretionary | Provides for constructing ferry boats and terminal facilities | 40 | 40 |
| Value Pricing Pilot | Encourages the implementation and evaluation of projects to manage congestion on highways through tolling and other pricing mechanisms | 30 | 30 |
| Alternatives Analysis ^b | Assists in financing the evaluation of modal and multimodal alternatives and general alignment options for identified transportation needs in a particular, broadly defined travel corridor | 12 | 2 |
| Highways for Life | Accelerates the adoption of innovations and new technologies, thereby improving safety and highway quality while reducing congestion caused by construction | 9 | 0 |
| Delta Region Development | Supports and encourages multistate transportation planning and corridor development in the eight states forming the Delta region ^c | 9 | 0 |
| Truck Parking Pilot | Addresses the shortage of long-term parking for commercial motor vehicles on the national highway system | 6 | 5 |
| Innovative Bridge Research and Deployment | Accelerates the adoption of innovations and new technologies, thereby improving safety and highway quality while reducing congestion caused by construction | 5 | 0 |
| Total | | \$1,020 | \$848^d |

Source: GAO presentation of Department of Transportation information.

^aIntelligent transportation systems involve the use of a variety of hardware and software that enables applications of advanced electronics and information management to monitor, regulate, and facilitate traffic flow; support transit, commercial vehicle, and freight operations; and improve highway safety.

^bAlthough the Alternative Analysis program was part of the UPA initiative, department officials told us they did not consider the 4Ts in awarding these funds.

^cAlabama, Arkansas, Illinois, Kentucky, Louisiana, Mississippi, Missouri, and Tennessee.

^dAmounts do not add to \$848 million because of rounding.

The department awarded New York City \$354.5 million (42 percent) of the \$848.1 million. San Francisco was awarded \$158.7 million (19 percent), Minneapolis \$133.3 million (16 percent), Seattle \$138.7 million (16 percent), and Miami \$62.9 million (7 percent). In addition, although San Diego was not selected as an urban partner, the department awarded it \$15 million under the Bus and Bus-Related Facilities Capital Investment Grants (Bus and Bus Facilities) program and \$3 million under the Intelligent Transportation Systems-Operational Testing to Mitigate Congestion (ITS-OTMC) program for a project element of its UPA application. Departmental senior leaders and officials believed that San Diego's project to demonstrate the safety and efficiency of cutting-edge separation and braking technologies on narrow lanes was meritorious.²¹

Each urban partner proposed to implement a tolling project with congestion pricing that would be supported by projects primarily from at least two of the other three Ts—transit and technology. (See table 2.) According to department officials, telecommuting projects received less emphasis from the urban partners and the department because it was generally beyond the control of the city to influence many employers and because they received telecommuting proposals in few applications.

²¹San Diego's transit project would install vehicle assist and automation system technologies on buses. Vehicle assist technologies help the driver maintain lateral control of the bus. Vehicle automation technologies provide both longitudinal and lateral control of the transit vehicle's movement.

Table 2: Urban Partner Congestion-Reduction Projects Using the 4Ts

| Urban partner | Project element | | | |
|---------------|---|--|--|---|
| | Tolling | Transit | Technology | Telecommuting |
| Miami | Transition from one high-occupancy vehicle (HOV) lane in each direction along I-95 into two variably priced high-occupancy toll (HOT) lanes in each direction. ^a | Expand transit capacity and implement new bus rapid transit service within the HOT lanes. Improve a park-and-ride transit facility. | | |
| Minneapolis | Convert the existing HOV lanes along I-35 West into dynamically priced HOT lanes. Operate dynamically priced shoulder lanes along I-35 West. | Increase park-and-ride and transit capacity along the corridor. Construct double-lane contraflow bus lanes, bus rapid transit stations, and other bus amenities. | Implement bus technologies (e.g., traffic signal priority). | Install a pilot program with the goal of increasing the number of teleworkers in the I-35 West corridor by 500 individuals. |
| New York City | Institute a cordon pricing system in Manhattan south of 86th Street. | Construct a series of bus rapid transit corridors. Construct new transit facilities. Construct an East River bus lane. Purchase additional buses. Improve regional ferry boat service. Collect and analyze data on transit ridership patterns, travel times, and mode preference. | Implement transit technologies, including transit signal priority. | |
| San Francisco | Implement congestion pricing on either Doyle Drive or the Golden Gate Bridge. Variably price parking in downtown San Francisco. | Improve regional ferry boat service. | Develop a simplified forecasting approach for a bus rapid transit corridor. Provide travelers with integrated mobility accounts. Upgrade hardware/software in key corridors to improve traffic movement. Upgrade the regional 511 system to provide real-time tolling, parking, and transit information. ^b | Expand the technical and promotional aspects of telecommuting programs. |
| Seattle | Variably price portions of all through-lanes of SR-520. | Increase transit capacity along SR-520 by enhancing express bus service and constructing transit improvements. Improve regional ferry boat service. | Use advanced technologies to actively manage congestion along SR-520 and I-90. Provide travelers with real-time transportation information. | Work to increase the use of telecommuting within the region. |

Source: GAO presentation of Department of Transportation information.

^aA high-occupancy-vehicle lane is designated for carpool/vanpool vehicles. A high-occupancy toll lane allows carpool/vanpool vehicles to drive toll-free in the lane, but also allows motorists that do not meet established vehicle occupancy requirements to drive in the lane if they pay a toll, allowing them to travel faster and more reliably than traffic in adjacent nonpriced lanes.

^b511 is a nationwide three-digit telephone number to call for traveler information.

Each UPA was subject to several terms and conditions. One significant condition was that no urban partner could expend federal funds until it had obtained the legal authority necessary to implement congestion pricing for the applicable highway or parking area. To date, three urban partners have the necessary authority for congestion pricing—Miami, Minneapolis, and San Francisco—and Seattle needs to obtain it by September 2009.²² However, New York City failed to meet its April 2008 deadline for obtaining congestion pricing authority from the state legislature. As a result, in accordance with the terms of the department's UPA with New York City, the department cancelled New York City's agreement²³ and awarded about \$364 million to Chicago and Los Angeles through the department's Congestion Reduction Demonstration Program.²⁴

As its name indicates, the Congestion Reduction Demonstration Program, established in 2007, is a successor to the UPA initiative. This program's goals and selection criteria are similar to the UPA initiative's. For example, the *Federal Register* notice solicited applications that would support congestion-pricing, transit, and technology strategies to reduce congestion.²⁵ Like the UPA initiative, the Congestion Reduction Demonstration Program allows the department to partner with applicants to support congestion reduction using the department's discretionary

²²In August 2008, San Francisco modified its proposal to meet the congestion-reduction goals of the department. San Francisco will not variably price Doyle Drive or the Golden Gate Bridge, as originally proposed; it will variably price on-street and off-street parking in downtown San Francisco. As a result, San Francisco is receiving about \$72 million less than originally awarded.

²³New York City was allowed to retain \$2 million from the Alternatives Analysis Program because the 4Ts were not considered in making the award, and \$1.6 million from the Value Pricing Pilot Program to help cover project planning and development costs.

²⁴In April 2008, the department allocated Chicago and Los Angeles \$153 million and \$211 million, respectively. For this report, we reviewed urban partners selected in fiscal year 2007; therefore, we did not review the department's actions related to Chicago and Los Angeles.

²⁵72 Fed. Reg. 63951 (Nov. 13, 2007). According to the department, it received and reviewed 35 applications. Of these 35, Los Angeles; Chicago; Atlanta; Denver; Dallas; Santa Clara County, California; and Salt Lake City, Utah previously submitted applications for the UPA initiative.

funds. In addition, in July 2008, the Secretary announced a new administration plan to create a more sustainable way to pay for and build roads and transit systems.²⁶ This plan includes a proposal for creating a Metropolitan Mobility Program. Among other things, this proposal envisions financial support for innovative approaches to reduce traffic congestion.

The Department Communicated Most Selection Information to Applicants, but Gave Two Applicants Assistance over Others

The department clearly communicated 10 of the 11 criteria it used to select urban partners, but it could have better communicated to applicants the relative weights it would assign to the selection criteria and the amount of funding available under the UPA initiative. We also found that the department provided additional attention to two applicants after they were selected as PUPs, but in the absence of government-wide guidance it is unclear on how to assess the appropriateness of this attention.

Nearly All Selection Criteria Were Communicated Clearly to Applicants but the Department Could Have Better Communicated the Weights Assigned to the Criteria

According to grants policies and guidance, funding announcements that clearly state the criteria that will be used to evaluate applications promote competition and fairness in the selection of grantees. For example, an Office of Management and Budget policy directive states that an agency's funding announcements must clearly describe all criteria and if they vary in importance, the relative priority, or weights, assigned to the criteria.²⁷ Similarly, the Federal Highway Administration's (FHWA) assistance agreement procedures manual states that evaluation criteria must be prepared before a funding announcement is published and should be available to both applicants and reviewers.²⁸ These procedures allow

²⁶U.S. Department of Transportation, *Refocus. Reform. Renew.* (July 2008).

²⁷68 Fed. Reg. 37370 (June 23, 2003) Office of Federal Financial Management Policy Directive on Financial Assistance Program Announcements. The department has described the weights of criteria in other areas. For example, the notice of funding availability (72 Fed. Reg 13980 (Mar. 23, 2007)) for the Alternatives Analysis Program laid out the relative weights of the criteria: demonstrated need (30 points), potential impact on decision making (40 points), and capacity of the applicant to carry out the proposed work successfully (30 points).

²⁸U.S. Department of Transportation, FHWA, *Assistance Agreement Procedures Manual* (May 2007).

applicants to make informed decisions when preparing their applications and help ensure the selection process is as fair and equitable as possible. Like the Office of Management and Budget's guidance, the FHWA manual identifies good grants making practice but it does not strictly apply to the UPA initiative, since four of the grant programs under the initiative were not FHWA programs. The department does not have agency-wide guidance that mirrors the Office of Management and Budget guidance.

The UPA initiative was not funded like a traditional grant program, since there was no UPA-specific funding. Instead, the department gave urban partners special consideration when allocating funds from as many as 13 individual grant programs. However, we believe grant-making practices such as those prescribed in the Office of Management and Budget's guidance are relevant to the initiative because they can increase the likelihood that the department will receive applications that best further agency goals.

The department used 11 criteria to select urban partners. (See fig. 2.) We found that the department clearly communicated 10 of these to potential applicants in the December 2006 *Federal Register* notice. For example, this notice made it clear to applicants that the department wanted applicants to incorporate the 4Ts and explained how the different parts of the 4Ts strategy would interact to reduce congestion (synergy of 4Ts). This notice also stated the department sought proposals that would affect the most surface transportation travelers, include congestion pricing, be cost effective, and demonstrate innovative technology applications. The notice also made it clear the department sought proposals that were likely to be implemented, and requested that applicants submit information on political support for their proposal.

Figure 2: Degree to Which the Department Communicated Selection Criteria to Applicants

| Selection criteria | How communicated | Degree communicated |
|--------------------------------------|-----------------------------------|---------------------|
| Congestion pricing measures | | ● |
| Potential congestion reduction | | ● |
| Cost-effectiveness | | ● |
| Funding support | | ● |
| Implementation time frame | <i>Federal Register</i> notice | ● |
| Political and technical feasibility | | ● |
| Synergy of 4Ts | | ● |
| Travelers affected daily | | ● |
| Innovation | | ● |
| National demonstration value | | ● |
| Political boldness | Not communicated to applicants | ○ |
| ● Communicated ○ Not communicated | | |

Source: GAO analysis of the Department of Transportation's criteria and actions.

The remaining criterion—political boldness—however, was not communicated *at all* to applicants. As a result, the applicants we spoke with had varying levels of awareness and understanding of this criterion. Senior department officials considered the political boldness of a city's projects when selecting urban partners. The department defined this criterion as the level of boldness of the congestion-pricing component relative to the level of political acceptance of congestion pricing in the applicant's particular region. Senior department officials told us they viewed projects that were politically bold positively, and took into consideration that although a particular congestion-reduction strategy might not be new nationally, it could be politically bold in the applicant's region. This criterion was not stated in the *Federal Register*, on the department's Web site, or in presentations. The department subsequently told us that political boldness was the same as political and technical feasibility. However, in our view, proposals can be politically feasible without being bold and the department was looking for bold proposals.

Nine of the 14 applicants we spoke with said they were not aware of this selection criterion,²⁹ while another 5 applicants told us they thought the department implied it was seeking politically bold proposals.³⁰

The department's March 2007 *Federal Register* notice indicated the criteria could change. It stated that neither the procedures nor the criteria set out in the notice would be binding on the department. Our search for language of this sort in *Federal Register* notices found that it is unique.³¹ The department indicated it might have needed to change both the criteria and the procedures to gain more participation in the initiative.

The department's *Federal Register* notice announcing the selection criteria for the UPA initiative also fell short of the Office of Management and Budget's policy guidance in that it did not communicate the relative weights of the selection criteria, as the guidance directs. Department officials and six of eight reviewers told us they viewed congestion pricing measures as the most important criterion in selecting urban partners. The department identified congestion pricing as the most important of the 4Ts in a document posted on its Web site 4 weeks before applications were due—and about 16 weeks after the original *Federal Register* notice appeared.³² Although some applicants we spoke with were aware of the department's emphasis on congestion pricing in general, none knew the relative weights of the selection criteria.³³ Nine of the 14 applicants we spoke with about the impact of the weighting information on their applications said that having weighting information would have changed

²⁹These were 3 urban partners and 6 unsuccessful UPA applicants, including 3 PUPs.

³⁰Three of these 5 applicants did not specify how they thought political boldness was implied, a fourth cited its discussions with department officials, and the fifth told us that the department's frequently asked questions document said the department was seeking projects that were politically challenging. Our review of the frequently asked questions document did not find such a statement. These were 2 urban partners and 3 unsuccessful UPA applicants, including 1 PUP.

³¹This search included government-wide *Federal Register* notices from January 1981 through July 2008.

³²On Apr. 2, 2007, the department's Web site stated the department was not requiring that each application include congestion pricing. However, the Web site added that among the 4Ts, congestion pricing was the most important and applications that excluded congestion pricing would be at a competitive disadvantage against applications that included congestion pricing.

³³These were 5 urban partners and 9 unsuccessful UPA applicants, including 4 PUPs.

their applications,³⁴ while the remaining 5 said it would not.³⁵ For example, an official from San Diego noted that knowing the weights of the selection criteria would have helped him to decide which projects to include and exclude, and would have resulted in a more focused application.

The department's incomplete communication to applicants of UPA selection criteria and weights may have had little, if any, effect on the final selection, since four of the five urban partners were rated high for technical merit and the fifth one, while rated lower, was seen as innovative because it would be the first in the country to convert high-occupancy vehicle (HOV) lanes to high-occupancy toll (HOT) lanes while simultaneously increasing HOV eligibility from two to three occupants.

The Department Communicated Much of the Funding Availability as It Became Known

Grant announcements should fully describe the funding opportunity to give applicants a sense of the scope of the funding, and to assist them in prioritizing and developing their proposed projects. To this end, an Office of Management and Budget policy directive requires an agency to publish the full programmatic description of the funding opportunity, to communicate to applicants the areas in which funding may be provided, and to describe the agency's funding priorities. FHWA's procedures manual reflects the Office of Management and Budget's directive to include a description of the funding opportunity in the grant announcement. Communicating the funding opportunity was important for the UPA initiative, since the funding motivated cities to do the comprehensive planning and serious consideration of congestion pricing the department wanted cities to reflect in their applications.

As stated previously, an awardee's selection as an urban partner meant the department would give the awardee priority consideration when allocating funding from as many as 13 individual grant programs.³⁶ The original December 2006 UPA initiative announcement indicated that up to \$100

³⁴These were 3 urban partners and 6 unsuccessful UPA applicants, including 3 PUPs.

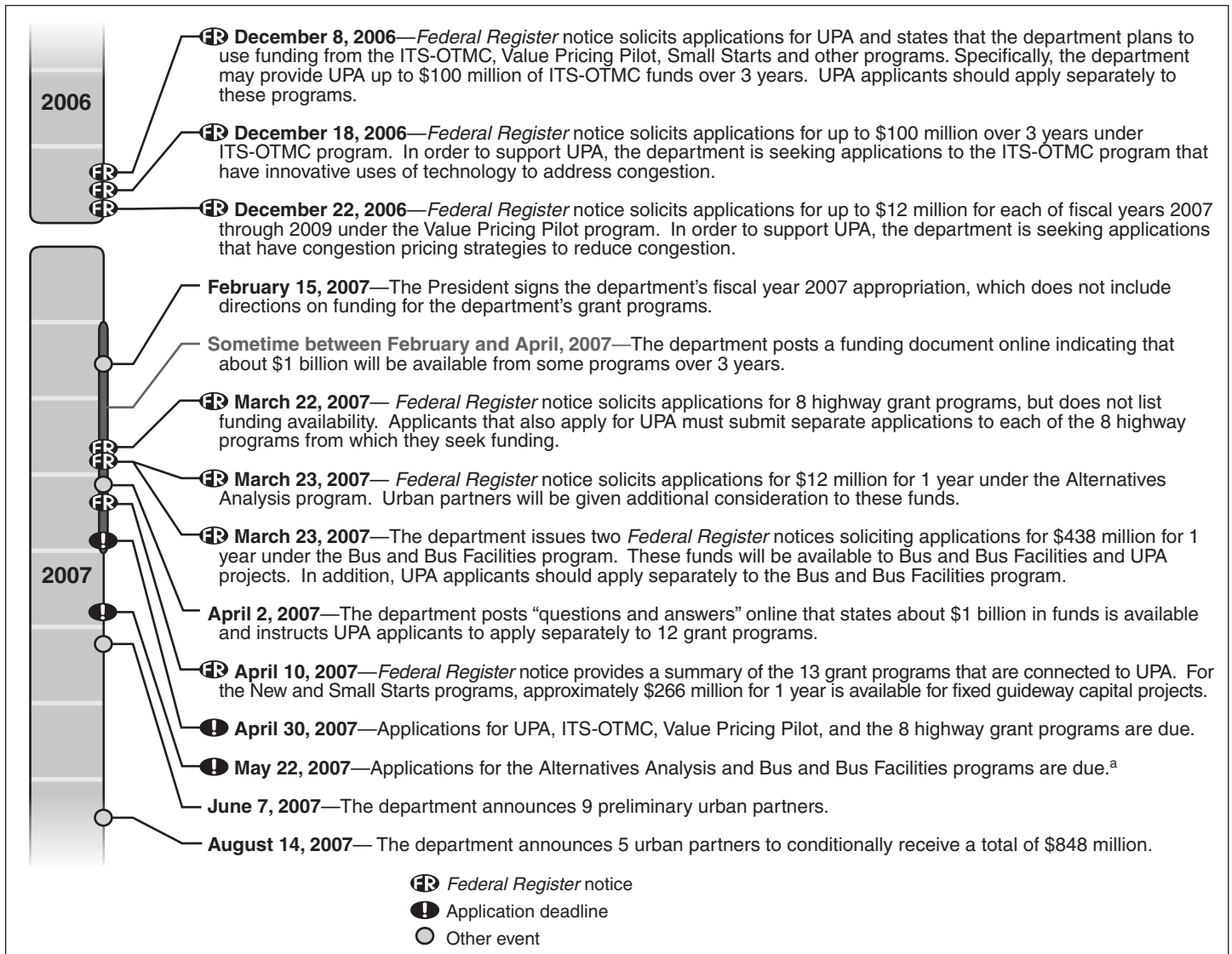
³⁵These were 2 urban partners and 3 unsuccessful UPA applicants, including 1 PUP.

³⁶Applicants were instructed to apply separately to the UPA initiative and the individual grant programs. In the end, three of these discretionary grant programs (FHWA's Delta Region Development, Highways for Life, and Truck Parking Pilot programs) were not used to fund UPA projects.

million was available to urban partners through the ITS-OTMC program.³⁷ (See fig. 3.) After more funds became available for the department's discretionary use, the department decided sometime between February 15, 2007, and April 2007 to dedicate about \$1 billion to the UPA initiative. As a result, the department solicited applications for the 13 discretionary programs through *Federal Register* notices over a period of 4 months (December 2006 through March 2007).

³⁷This announcement also indicates that Value Pricing Pilot Program and Small Starts funds may be used to fund urban partners, but does not disclose amounts available under these grant programs.

Figure 3: UPA Funding Timeline



Source: GAO analysis of Department of Transportation information.

^aThe application deadline for New Starts and Small Starts program projects varies depending on the stage of the project.

Although funding for UPA was available under 13 grant programs, the department published the amount of funding available in the *Federal Register* for 5 of these programs and distributed funding information for 12 at conferences and through its Web site. Between February 15, 2007, and April 30, 2007 (the date when UPA applications were due), the

department communicated the amount of funding available for UPAs to applicants in two ways: First, the department solicited applications for the 13 grant programs through *Federal Register* notices. (See table 3.) For 5 of these grant programs, the department published the amount of funding available in the notices. The amount available for UPAs through these 5 grant programs totaled \$852 million and ultimately accounted for 77 percent of the funds awarded to urban partners. However, of this \$852 million amount, \$716 million (about 65 percent of the approximate \$1.1 billion that was ultimately made available) was announced less than 6 weeks before the UPA application deadline. By the time this additional funding was announced, applicants may have already substantially completed their applications, and in some cases, obtained the approval of their stakeholders. According to a department official, it took the department several weeks to issue a *Federal Register* notice. For the remaining 8 grant programs, the *Federal Register* notices contained no information on the amount of funding available. A department official told us he does not know why these *Federal Register* notices did not include funding information.

The department disagreed with our assessment that the applicants could have benefited if funding information had been communicated more than 6 weeks before applications were due. The department indicated that it typically provides 2 months for the submission of applications and cited several grant programs in which this was the case. For example, the department said 2 months was adequate time to file Bus and Bus Facilities program applications. However, because of its complexity, the UPA application could be expected to take longer to complete than applications for more traditional grant programs, such as the Bus and Bus Facilities program.

Table 3: The Department's Communication of Information on Funding Availability to Applicants

Dollars in millions

| Grant program | Federal Register notices | | | |
|---|------------------------------------|---|--|----------------------------------|
| | Date published in Federal Register | Funding availability listed in Federal Register | Funding handout distributed via Web site and conferences | Amount awarded to urban partners |
| Intelligent Transportation Systems Operational Testing to Mitigate Congestion | Dec. 18, 2006 | \$100 | \$100 | \$92 |
| Value Pricing Pilot | Dec. 22, 2006 | 36 | 30 | 30 |
| Bus and Bus Facilities | Mar. 23, 2007 | 438 | 438 | 418 |
| Alternatives Analysis | Mar. 23, 2007 | 12 | 12 | 2 |
| New Starts/ Small Starts | Apr. 10, 2007 | 266 | 267 | 113 |
| Interstate Maintenance Discretionary | Mar. 22, 2007 | ^a | ^a | 50 |
| Transportation, Community, and System Preservation | Mar. 22, 2007 | ^a | 61 | 50 |
| Ferry Boat Discretionary | Mar. 22, 2007 | ^a | 60 | 40 |
| Highways for Life | Mar. 22, 2007 | ^a | 20 | 0 |
| Truck Parking Pilot | Mar. 22, 2007 | ^a | 6 | 0 |
| Innovative Bridge Research and Deployment | Mar. 22, 2007 | ^a | 5 | 5 |
| Delta Region Development | Mar. 22, 2007 | ^a | 10 | 0 |
| Public Lands Highway Discretionary | Mar. 22, 2007 | ^a | 80 | 47 |
| Total | | \$852 | \$1,089^b | \$848^c |

Source: GAO presentation of Department of Transportation information.

^aInformation not published in the *Federal Register* or included in the funding handout.

^bAlthough the department made available \$1.020 billion as shown in table 1, it communicated to applicants that \$1.089 billion was available.

^cDollar amounts do not total \$848 million because of rounding.

Second, the department developed a funding handout that listed the amounts available for UPAs through 12 of the 13 grant programs.³⁸ These amounts totaled almost \$1.1 billion. The department updated this document several times with new funding information and posted the

³⁸The department did not include funding information for the Interstate Maintenance Discretionary Program in this handout because, as a department official told us, the department thought it would use these funds at the time for Corridors of the Future. However, urban partners were ultimately awarded \$50 million from this program.

document on the department's Web site sometime between February 15, 2007, and April 2007. In addition, department officials handed out this document at conferences.

Applicants' understanding of the funding available under the UPA initiative varied, and several applicants told us that if they had had more complete funding information, they would have changed their applications. Of the 14 applicants we spoke with about funding, 6 told us they had the funding handout,³⁹ which included information on the availability of funding by program (see table 3), while the other 8 said they did not have this handout when they were developing their applications.⁴⁰ Of the applicants that did not have complete funding information, 6 told us they were aware of the total funding available but not the amounts available for each program, while 2 told us that they did not know the amount of funding available under the initiative when they were applying to the program. Of the 2 UPA applicants that said they did not know the amount of funding available to the initiative, 1 applicant said it thought the total amount of funding available was the \$100 million initially identified under the ITS-OTMC program. Half of the 8 applicants we spoke with that did not have the funding handout told us if they had had better information on the funding available under the UPA initiative, they would have changed their applications and been able to scope their projects better.⁴¹ While communicating the complete amount would have been desirable as a means of eliciting applications that were optimally responsive to the initiative's goal of congestion reduction, the \$852 million amount, in our opinion, provided potential applicants with a rough understanding of the program's size.

The Department Treated Two Applicants Differently from Others While Evaluating Applications

After the department selected nine cities as PUPs, it used various methods to select and determine funding for the final 5 urban partners. The department invited officials from the nine PUP cities to Washington, D.C., to present their applications and asked them to provide additional information, when needed, about their congestion-reduction initiative. Department officials then explored ways to fund UPAs by identifying the PUPs' core projects that were most in the spirit of the initiative. Next,

³⁹These were 3 urban partners and 3 unsuccessful applicants, including 2 PUPs.

⁴⁰These were 2 urban partners and 6 unsuccessful applicants, including 2 PUPs.

⁴¹These were 1 urban partner and 3 unsuccessful applicants.

department staff developed funding scenarios, including options with and without New York City, reflecting the department's concerns that the New York state legislature might not pass the congestion-pricing legislation necessary to allow the New York City projects to move forward. At this time, department officials told us that, in some cases, they were also contacting PUPs to have them submit new grant applications because PUPs had submitted applications for more funding than was available under some grant programs and because PUPs could submit applications for the same uses under other, undersubscribed programs.

However, in two cases, the department went beyond asking UPA applicants to submit applications for the same projects under other funding programs. In these instances, the department contacted the UPA applicants to request substantive changes to the applications.⁴²

- Miami indicated in its application that it would run bus rapid transit, but did not provide details on the project, or state its cost. Miami officials told us they did not intend to purchase buses or improve bus facilities through the UPA initiative. However, after Miami's selection as a PUP, the department encouraged the city to apply for funding from the Bus and Bus Facilities program and suggested specific measures (such as bus branding, hybrid buses, bus facility improvements, and transit signal priority technology) for city officials to include in the proposal. As a result, Miami submitted a Bus and Bus Facilities application 4 weeks after the application deadline and was awarded \$19.5 million in these funds.⁴³ According to department officials, this was reasonable, since Miami's original UPA application had contained bus elements, even though Miami had not originally requested funds to purchase buses or improve bus facilities.
- According to officials from the Minnesota Department of Transportation, after Minneapolis was selected as a PUP, the department asked it to include fewer projects in its UPA application to make the application more competitive for limited funding. According to Minneapolis officials, this allowed Minneapolis to better describe some projects and create more accurate cost estimates.

⁴²Department officials told us that throughout the application process, they provided advice to applicants about their proposed initiatives, when asked to do so.

⁴³The department indicated in the initial December 2006 UPA *Federal Register* notice that late applications would be accepted to the extent practicable.

The officials from the remaining seven PUPs told us the department did not contact them to suggest specific ways of strengthening their applications.

Department officials told us that, after the nine PUPs presented their proposals, all of the PUPs' congestion-reduction plans were meritorious and all nine PUPs were worthy of being designated as urban partners. Because time was of the essence in reaching a decision and announcing the urban partner designations, department officials told us that they provided special attention to the PUPs they felt were likely to be selected as urban partners—rather than spending time with PUPs that were unlikely to be selected—in order to craft the strongest congestion-reduction proposals possible. They said that working with only certain PUPs to develop stronger congestion-reduction efforts was appropriate because prior interactions with other PUPs indicated that those PUPs were less likely to make meaningful changes to their proposals. Finally, they said that if at any time negotiations failed with designated urban partners, the department would be able to offer urban partner designation to another PUP.

There is little if any government-wide or Department of Transportation guidance that would shed light on when and if it is appropriate to provide proactive assistance to grant applicants to help them create stronger applications. Thus, while the assistance could cause concerns, it is unclear how to assess the appropriateness of the department's actions toward Miami and Minneapolis, where the grant-making agency sees the applicants as such strong candidates that they are likely to be selected.

The Department Had the Authority to Allocate Funds to the UPA Initiative, and to Consider Congestion Pricing as a Priority Selection Factor for Underlying Grant Programs

The department had the legal authority to allocate appropriated funds to the UPA initiative as long as the funds were spent for the purposes authorized in the appropriations legislation, and the department complied with the restrictions and requirements of the underlying grant statutes. The department also had authority to consider congestion pricing as a priority factor in making grant selections. Each of the nine grant statutes either explicitly permitted the consideration of congestion pricing or afforded the department discretion to consider congestion pricing because it is rationally related to statutory objectives.⁴⁴ Because of an error in the department's technical evaluation for the Ferry Boat program, the department's initial documentation suggested that the department had improperly favored congestion pricing over statutory priorities. The Secretary did not rely on this documentation in awarding Ferry Boat grants, however, and the corrected information confirmed that the urban partners in fact met statutory priorities, and that the Secretary was within her discretion to apply congestion pricing as a discriminating factor.

Finally, in one instance the Transportation, Community, and System Preservation (TCSP) program the department likely did not comply with all of the statutory requirements in evaluating the grant applications. Based on available information, it is not clear that this failure affected the ultimate grant award decisions. The statute required that "priority consideration" be given to applicants meeting five specified factors, and the department instead gave such consideration to applicants (including urban partners) that met just one such factor. Because "priority consideration" does not entitle an applicant to selection as a grantee, only to a bona fide and careful review and because the department terminated its evaluation after confirming applicants met only one factor, it is not possible to determine whether any applicant met all five factors and thus deserved the required bona fide "hard look."

⁴⁴Statutes for the Value Pricing program and the Intelligent Transportation Systems-Operational Testing to Mitigate Congestion program authorize the use of tolling as a priority selection factor. As we have previously noted, congestion pricing is a form of tolling; therefore, we conclude the express provision for tolling in these statutes authorizes the consideration of congestion pricing.

The Department Had the Authority to Allocate Appropriated Funds to the UPA Initiative

Agencies generally have considerable discretion in choosing how to allocate lump-sum appropriations—appropriations that are available to cover a number of programs, projects, or items—to specific programs and activities. In the past, the department’s discretion had been circumscribed by congressional directives that earmarked most of its appropriations for particular projects, but this changed for fiscal year 2007. The department’s fiscal year 2007 appropriation, enacted in the 2007 continuing resolution, funded the department based on 2006 levels and authorities but removed earmarks contained in the 2006 committee reports (the continuing resolution stated that such earmarks shall have no legal effect). In addition, the continuing resolution did not include congressional directives that funds be dedicated or earmarked for particular projects and stated that earmarks contained in 2006 committee reports shall have no legal effect. The department interpreted this language as permitting it to allocate its appropriations to various grant programs in order to fund its UPA initiative. Specifically, the department drew from three lump-sum appropriations for (1) payment of obligations incurred in carrying out the provisions of bus-related statutes, (2) federal-aid highways and highway safety construction programs, and (3) necessary expenses of the Research and Innovative Technology Administration.

We concluded that the department’s appropriations were available to carry out the discretionary grant programs identified in each of these lump-sum appropriations. The department had broad discretion in choosing how to allocate funds among those programs. For example, the “Federal-aid highways and highway safety construction programs” lump-sum appropriation was available to fund several grant programs, and absent any other statutory restriction, the department could choose how much, if any, of that appropriation to allocate to each of the grant programs. In carrying out each individual grant program, the department, of course, was required to comply with the restrictions and requirements of the underlying grant statutes and to award funding to grantees in accordance with the statutory provisions. In the discussion that follows, we address whether the department complied with these underlying provisions.

The Department Had Authority to Consider Congestion Pricing as a Priority Selection Factor for Each of the Grant Programs, but Improperly Awarded “Priority Consideration” in the TCSP Program Based on a One-Factor Approach

As discussed earlier, in determining which cities would receive the urban partner designation, the department gave special consideration to those that had, or had committed to obtaining, authority to use congestion pricing. The department then awarded grant funds under 10 of its grant programs to the five urban partners. The impact of this sequential process was to give congestion pricing priority as a selection factor not only for the UPA initiative but for the individual grant programs as well.

The specific terms of the authorizing statute for each grant determine whether the department has the authority to give priority to congestion pricing as a selection factor in making grant decisions. According to department officials, they considered congestion pricing as a priority or priority consideration selection factor for only 9 of the 10 programs (excluding the Alternative Analysis program). As a result our analysis focused on the 9 remaining programs.⁴⁵ We concluded that the authorizing statutes for the 9 grant programs used to fund urban partners either explicitly permit the consideration of congestion pricing or afford the department discretion to consider congestion pricing as a factor because it was rationally related to program objectives. (See table 4.) In particular, 2 of the 9 grant-authorizing statutes permit the Secretary to consider congestion pricing as a selection factor by express mention: ITS-OTMC and Value Pricing Pilot programs. The remaining 7 grant-authorizing statutes (Bus and Bus Facilities; Ferry Boat Discretionary; Innovative Bridge; Interstate Maintenance Discretionary; New Fixed Guideway Facilities (specifically Very Small Starts); Public Lands Highway Discretionary; and TCSP programs) grant the department discretion to use congestion pricing as a priority consideration selection factor because tolling has a rational connection to statutory objectives, such as mobility and reduced congestion.

⁴⁵The other sections of this report describe the 10 grant programs the department has treated as being “under” and “within” the UPA initiative, including the Alternatives Analysis Program. According to the department, it did not use the 4Ts including tolling (congestion pricing) in awarding Alternatives Analysis grants for fiscal year 2007, but instead used the factors it identified in the *Federal Register* notice soliciting grant applications. October 2008 DOT letter at 5-6; see 72 Fed. Reg. 13980 (Mar. 23, 2007) (notice states that cities that are “part of the Department’s Congestion Initiative” would get “additional consideration” but not “priority consideration” as the department announced for the other grant programs). This analysis of how the department applied tolling as a priority selection factor therefore does not include the Alternatives Analysis grants.

Table 4: Nine Grant Programs that Permit the Department to Use Congestion Pricing/Tolling as a Selection Factor

| Program | Authority to use congestion pricing/tolling |
|--|---|
| Intelligent Transportation Systems-Operational Testing to Mitigate Congestion (ITS-OTMC) | Statute expressly permits the Secretary to consider “toll collection” as a factor. |
| Interstate Maintenance Discretionary | Statute permits the department to use congestion pricing as a factor because it is rationally related to statutory objectives, such as mobility and congestion. |
| Value Pricing Pilot | Statute expressly permits the Secretary to consider congestion pricing/tolling as a factor. |
| Bus and Bus Facilities | Statute grants the department discretion to use congestion pricing as a priority selection factor because no selection criteria are specified. |
| Ferry Boat Discretionary | Statute permits the department to use congestion pricing as a factor because it is rationally related to statutory objectives, such as mobility and congestion. |
| Innovative Bridge Research and Deployment | Use of the term “includes” indicates the department has discretion to consider other factors. Additionally, the statute permits the department to use congestion pricing as a factor because it is rationally related to statutory objectives, such as mobility and congestion. |
| Public Lands Highway Discretionary | Statute permits the department to use congestion pricing as a factor because it is rationally related to statutory objectives, such as mobility and congestion. |
| Transportation, Community, and System Preservation (TCSP) | Statute permits the department to use congestion pricing as a factor because it is rationally related to statutory objectives, such as mobility and congestion. |
| New Fixed Guideway Facilities (Very Small Starts) | Statute permits the department to use congestion pricing as a factor because it is rationally related to statutory objectives, such as mobility and congestion. |

Source: GAO.

Although we believe the department had authority to consider congestion pricing as a selection factor, with respect to the Ferry Boat program, the department’s initial technical evaluation documentation suggested (albeit incorrectly) that the department had exceeded its authority. This technical evaluation documentation made it appear that the department had overridden the statute by rejecting nonurban partners that lacked congestion pricing but met one or more statutory priorities in favor of urban partners that had congestion pricing but met no statutory priorities. In making the final award decision, however the Secretary relied on correct information showing the urban partners in fact met statutory priorities. The Secretary therefore was within her discretion to apply congestion pricing as a selection factor. Specifically:

- Using congestion pricing as a priority selection factor, the department awarded grants totaling \$40.2 million under the Ferry Boat program to New York City, San Francisco, and Seattle as urban partners. Under this

program, the department is authorized to award grants for the construction of ferry boats and ferry terminal facilities in accordance with statutory eligibility criteria.⁴⁶ The Ferry Boat grant statute lists three permissible “priority” selection factors for Ferry Boat program grants that the department must apply. Priority is required for ferry systems that will (1) provide critical access to areas not well served by other modes of surface transportation, (2) carry the greatest number of passengers and vehicles, or (3) carry the greatest number of passengers in passenger-only service.

- Although the Ferry Boat statute does not explicitly identify congestion pricing as a priority selection factor, the department believes it had discretion to use congestion pricing to discriminate between grant applicants. The department makes a connection between congestion pricing and the second Ferry Boat statutory priority (carrying large numbers of passengers and vehicles), which it believes reflects congressional support for activities that increase mobility and reduce congestion. We agree that the department had discretion to use congestion pricing as a discriminating factor under the Ferry Boat statute, because there is a rational connection between congestion pricing, mobility, and congestion.
- The department could not, however, apply congestion pricing in a way that would fail to comply with the statutory priority factors—that is, it could not reject nonurban partners that met statutory priorities simply because they lacked congestion pricing in favor of urban partners that had congestion pricing but did not meet statutory priorities. The department’s technical evaluation documentation incorrectly suggested that such a situation occurred in the case of one grant, Seattle’s High-Speed, Ultra-Low Wake Passenger-Only Ferry project. Although the department’s technical review team evaluator appeared to have determined that this Seattle project failed to meet two statutory priority selection criteria—carrying large numbers of passengers and vehicles, and carrying a large number of passengers in passenger-only service—the department nevertheless awarded the project \$2 million based on Seattle’s urban partner designation, passing over nonurban partners the technical review team had determined to have met one or more of the statutory priorities. The technical review team evaluator apparently reached this conclusion by incorrectly relying on the total number of passengers carried by individual projects, not the total number of passengers carried by the ferry

⁴⁶23 U.S.C. §129(c).

system as a whole as required by statute.⁴⁷ In fact, Seattle’s ferry system carries the greatest number of passengers of all ferry systems in the country, and therefore was entitled to “priority.”

In addition, in one instance—the TCSP program, under which the department awarded \$50.4 million in grants to urban partners—we concluded that although the department had discretion to use congestion pricing as a discriminating priority factor, it likely did not apply statutory “priority consideration” factors correctly, in the way the statute requires. However, “priority consideration” entitles an applicant only to a bona fide and careful review, not to guaranteed selection. Furthermore, based on available information, it is not clear that the department’s incorrect evaluation approach affected the ultimate outcome of its selections. As a result, we are not recommending that the department re-evaluate the more than 500 grant applications it received for fiscal year 2007 for this program. Specifically:

- Using congestion pricing as a priority selection factor, the department awarded three grants totaling \$50.4 million under the TCSP program to urban partner applicants—Minneapolis, San Francisco, and Seattle. The statute requires that the department give “priority consideration” only to applicants that meet five separate factors, none of which explicitly relates to congestion pricing and all five of which must be satisfied. The statute provides that priority consideration shall be given to applicants that (1) have instituted preservation or development plans and programs; (2) have instituted other policies to integrate TCSP practices; (3) have preservation or development policies that include a mechanism for reducing potential impacts of transportation activities on the environment; (4) demonstrate a commitment to public and private involvement, including the involvement of nontraditional partners in the project team; *and* (5) examine ways to encourage private-sector investments.
- The department believes that the term “priority consideration” does not require the department to award grants to applicants that meet the above criteria; instead, the department believes priority consideration entitles an applicant only to precedential or careful deliberation or thought before competing alternatives. We agree with the department that, unlike “priority,” “priority consideration” does not guarantee an applicant selection. However, the department’s reading, as we understand it, is too narrow. We believe “priority consideration” entitles an applicant to special

⁴⁷23 U.S.C. §147(c).

attention and a careful and bona fide review, not just consideration earlier in the evaluation process. Nonetheless, ultimately, the department had discretion to grant awards to applicants that did not meet priority consideration criteria, based on other factors, such as congestion pricing, found to be rationally connected to statutory objectives.

- The remaining issue is whether, before the department applied congestion pricing as a selection factor, it followed the statute and gave any applicants qualifying for “priority consideration” the bona fide review Congress required. The answer is not clear. The statute lists five factors, with the last two joined by the conjunctive “and,” indicating all five factors must be met in order for an applicant to receive priority consideration. Department review team officials told us they rated grant applicants as meeting statutory priority consideration criteria so long as just one factor was met (essentially the reviewers treated the “and” in the statute as an “or”). We disagree with the department’s interpretation and believe the “and” is used in its ordinary sense, requiring applicants to meet all five factors. Once the department found that an applicant met one factor, it terminated its evaluation. The effect of this error is unknown since, from the current record, it is not possible to determine whether any applicant met all five factors.

Appendix V contains a complete analysis of these legal issues and our conclusions about the department’s compliance.

The Department Has a Framework to Ensure That Award Conditions Are Being Met and That Results Will Be Evaluated

The department is tracking urban partners’ progress in completing the conditions of their awards, such as obtaining their authority to use congestion pricing where needed. In addition, the department has contracted with Battelle Memorial Institute to evaluate the outcomes of UPA projects, such as the extent to which congestion is mitigated. While progress is being made in these two areas, we did not attempt to assess the overall reasonableness of these efforts because they are in early stages.

The Department Is Monitoring Urban Partners' Completion of Award Conditions

The department's UPA initiative management team⁴⁸ monitors urban partners' completion of award conditions by tracking each urban partner's progress in implementing congestion-reduction projects. According to a department official, the UPA initiative management team meets weekly in an effort to obtain and track real-time data from urban partner sites and address issues as they occur. Typical meetings consist of reports from department officials on the status of each urban partner's planning efforts, federal fund obligations, and environmental reviews. The UPA initiative management team identifies and monitors the award conditions of UPAs in the following ways:

- *Term sheet.* Each urban partner entered into a term sheet, or memorandum of understanding, with the department that includes the urban partner's award conditions. Each term sheet describes the congestion-reduction projects funded by the department, the amount of funding to be obligated, and the responsibilities of the parties. A department official told us that although not legally binding, the term sheets formalize both the department's and the urban partners' understanding of project requirements and deadlines, and provide the department with a mechanism to track urban partners' progress in meeting the award conditions.
- *Funding agreements.* Each urban partner has proposed to implement several projects to reduce congestion. These projects are tied to funding agreements that establish the amounts of funding to be provided by the department, the grant programs that serve as the sources of funding, and the conditions that must be met to ensure obligation of federal funds. The content of these funding agreements varies and is dependent on statutory and contractual requirements associated with each funding source.
- *Implementation matrix.* The UPA initiative management team has created an implementation matrix spreadsheet to track and update progress in meeting requirements from the UPA term sheets and funding agreements. For example, each urban partner's implementation matrix spreadsheet tracks the following conditions contained in urban partner funding agreements: (1) the completion of preconditions for obligating federal funds, (2) UPA project funding sources, and (3) the dates federal funds were (or were expected to be) obligated. The implementation matrix

⁴⁸The UPA initiative management team consists of a team leader from an FHWA team assigned to each urban partner and staff from different modal administrations with backgrounds in information and project management; congestion pricing; transit, technology, environment and planning; and evaluation and performance management.

also tracks award conditions contained in each UPA term sheet, including initiative-driven conditions, such as legislative authority for congestion pricing, and project-related award conditions, such as environmental approval, planning, design, development, evaluation requirements, and completion dates.

- *Project management documentation.* The UPA initiative management team requires that each urban partner adhere to project management processes and protocols. The department has requested that each urban partner provide standard project management documentation that follows project management standards,⁴⁹ including project management plans, project charters, baseline schedules and budgets, and progress reports. These items will be tracked by the UPA initiative management team. According to department officials, only Miami's UPA projects have progressed far enough to require a significant amount of tracking, and Miami officials have begun to provide project management documentation. Seattle also has provided a draft project management plan in support of its UPA. However, in anticipation of the other urban partners entering the project implementation phase, the department is exploring the use of software applications that fulfill project management standards and can be used to track the urban partners' adherence to project management documentation requirements.

The department has already taken steps to ensure that urban partners complete their award conditions. For example, in April 2008, New York City was unable to obtain the legal authority to do congestion pricing, which was a selection condition of its UPA. As a result, New York City lost its designation as an urban partner and the funding for its congestion-reduction projects. In addition, in May 2008, the department determined that the congestion-pricing project identified in San Francisco's term sheet might not achieve the department's congestion-reduction goals. As a result, the department decided not to release about \$100 million of San Francisco's UPA funding from several grant programs⁵⁰ until the city adopted a congestion-pricing project that was acceptable to the department. (San Francisco did so in October 2008.) A department official has indicated that the UPA initiative management team will continue to

⁴⁹American National Standards Institute, *A Guide to the Project Management Body of Knowledge*, ANSI/PMI 99-001-2004 (2004).

⁵⁰Alternatives Analysis, Bus and Bus Facilities, Ferry Boat Discretionary, TCSP, Value Pricing Pilot, and ITS-OTMC programs.

monitor urban partners' completion of award conditions throughout the implementation of UPA initiative congestion-reduction projects.

We did not evaluate whether the implementation tracking was reasonable or whether the award conditions were fulfilled, because projects have not progressed far enough to make this determination.

The Department Plans to Evaluate Urban Partners' Strategies for Reducing Congestion

To oversee the development and implementation of the UPA evaluation, the department created an evaluation subteam within the UPA initiative management team. In April 2008, the department hired Battelle to evaluate three urban partners: Minneapolis, San Francisco, and Seattle. Battelle also was hired to provide technical assistance to New York City and Miami, which both agreed to contract for and fund their own evaluations.⁵¹ From these individual urban partnership evaluations, including Miami, Battelle will develop a national evaluation of the UPA initiative to generate conclusions about the effectiveness of various types of congestion-reduction strategies.

The evaluation subteam manages Battelle's development and implementation of the UPA evaluation process. For example, the UPA evaluation subteam will approve central parts of Battelle's evaluation framework, such as the site test plans that will detail data collection and analysis activities for each urban partner site. In addition, a department official has told us that for each urban partner site, the evaluation subteam will coordinate with site officials and Battelle to ensure the evaluation effort receives adequate support and is appropriate for each site's projects.

The urban partnership evaluation will be completed in four phases. For each phase, Battelle will produce a product that the UPA evaluation subteam must approve. (See table 5.) According to Battelle, phase one—the initial evaluation strategy formulation—is complete, and phase two is underway.

⁵¹After New York City lost its designation and funding as an urban partner, the department reallocated these funds to Los Angeles and Chicago under the Congestion Reduction Demonstration Program. In September 2008, the department hired Battelle to evaluate the Los Angeles and Chicago congestion-reduction efforts. However, in January 2009 Chicago lost its designation as a Congestion Reduction Demonstration partner, and as a result the department cancelled Battelle's evaluation of Chicago's congestion-reduction projects.

Table 5: Four Phases of the UPA Evaluation

| Phase | Product | Expected completion date | Status^a |
|--------------|---|--|--|
| One | Initial evaluation strategy formulation | June 4, 2008 | Completed June 25, 2008 |
| Two | National evaluation framework development Site-specific evaluation plans | Draft submitted to the department on Sept. 5, 2008 Expected by Apr. 30, 2009 ^b | Completed Nov. 21, 2008 Being drafted by Battelle |
| Three | Evaluation monitoring and technical support | Expected Mar. 30, 2009, to Mar. 25, 2011 ^b | |
| Four | Data analysis and report of findings | Expected May 13, 2009, to Aug. 25, 2011 | |

Source: Battelle Memorial Institute.

^aCompletion dates are based on the initial project plan submitted to the department on June 13, 2008.

^bSubject to change as projects are implemented.

The department identified four questions to be used in the urban partnership evaluation. (See table 6.) As part of phase one, Battelle then developed a number of evaluation analyses from these questions that it presented to the department in an initial strategy briefing. Battelle rated the evaluation potential of each urban partner using these analyses, based on the analyses' applicability and feasibility. Battelle defined applicability as the likelihood that each site will be able to provide significant answers to the four evaluation questions and feasibility as the likelihood that Battelle will be able to measure the impact of project strategies to reduce congestion and determine that those strategies are the cause of any improvement found. Since Battelle will be relying on data collected by each urban partner site to perform its evaluation, the department is working with urban partners to ensure they will devote sufficient resources to data collection.

Table 6: Evaluation Questions and Analyses for the UPA Evaluation

| Evaluation questions | Evaluation analyses |
|---|--|
| How much was congestion reduced? | Understand the extent to which the combined congestion-reduction strategies reduced traffic congestion in study routes/corridors and in adjacent routes/corridors. |
| What are the associated impacts of the congestion-reduction strategies? | Understand the contribution of the 4Ts to the congestion impacts. Understand the associated impacts of the 4Ts on the environment, movement of goods, businesses, and safety. |
| What are the lessons learned? | Document a variety of lessons learned by the key stakeholders implementing the congestion-reduction strategies. |
| What are the overall costs and benefits of the strategies? | Document public and private costs and consider the benefits in relation to costs. |

Source: Battelle Memorial Institute.

Battelle has delivered a draft national evaluation framework as part of phase two of the evaluation process. The national evaluation framework will act as a guide for site-specific evaluations and defines the entire evaluation process. The department is reviewing the draft framework. The national evaluation framework will be followed by site-specific evaluation plans that provide a high-level view of data collection, analyses to be performed, roles and responsibilities of stakeholders, and schedules for urban partner sites. Minneapolis and Seattle are the first sites scheduled, and the remaining sites will follow. While Battelle is still working on finalizing future deliverables, phase three will include the collection of pre- and postdeployment data, and phase four will conclude the evaluation with Battelle's report of findings. As of December 2008, the department had not decided whether to release the reports as they are completed or in a consolidated format at the end of the evaluation.

Miami proposed to fund and perform its urban partnership evaluation. According to Florida Department of Transportation officials, Miami did this to make its UPA application more competitive and because at the time, Miami did not know that the department would provide funding for this activity. Miami's UPA evaluation will also answer the four evaluation questions. In September 2008, Miami provided the department with a master transit evaluation matrix, which Miami officials have described as a crosswalk between the variables Miami will measure and the department's evaluation questions. In addition, to date, Miami has hired a contractor to perform transit surveys and create lessons-learned reports for its transit

projects under the UPA initiative. Miami will receive technical assistance from the department and from Battelle, and will work with the University of South Florida's Center for Urban Transportation Research to complete its evaluation. Battelle and the department have noted that the urban partner evaluations will differ somewhat, since all urban partners have different congestion-reduction plans.

We did not determine whether the evaluation methodologies proposed by Battelle or Miami were reasonable, because these methodologies have not been fully developed.

Conclusions

We support performance-based integrated approaches—such as the one the department employed for the UPA initiative—because of the potential for a greater impact than can be achieved by operating the component programs in a stand-alone mode. Moreover, the initiative was a highly complex activity undertaken relatively quickly to take advantage of flexibilities allowed under the 2007 Revised Continuing Appropriations Resolution and to produce results in a relatively short period of time.

With minor exceptions, the department did a good job of letting applicants know which criteria it would use in selecting urban partners and of the funding available for the initiative. However, the department could have done a better job of letting applicants know which of the dozen selection criteria it considered most important so that applicants could tailor their applications accordingly.

The department acted within its legal authority in funding individual grant programs to support the UPA initiative, and using congestion pricing as a priority or priority consideration selection factor in making award decisions under the individual grant statutes. In one instance—the TCSP program—the statute required that “priority consideration” be given to applicants meeting five specified factors, and the department instead gave such consideration to applicants (including urban partners) that met just one such factor. Because of the department’s approach, it is not possible to determine from the documentation we reviewed whether any of the applicants in fact qualified for priority consideration. However, because “priority consideration,” unlike “priority,” entitles an applicant only to a bona fide and careful review, not to guaranteed selection, and because the department ultimately had discretion to use congestion pricing as a discriminating priority factor, we are not recommending that the department re-evaluate the more than 500 grant applications it received for fiscal year 2007 for this program. Rather, in the future, the department

should evaluate these grant applications in accordance with the statute, by awarding priority consideration only to applicants that meet all five factors.

The department has promoted UPA goals and concepts in its proposed successors to the UPA initiative—the Congestion Reduction Demonstration and the Metropolitan Mobility programs.⁵² To the extent that the department moves forward to select communities to receive funds for these proposed initiatives and to allocate funds to them, it must look back on the lessons learned from the UPA initiative to ensure that the missteps identified in this report are not repeated. This is especially important when the department employs a relatively novel framework as an umbrella to integrate the underlying programs that may fund these initiatives.

Recommendations for Executive Action

We are making two recommendations. First, to better ensure that potential applicants for future congestion relief initiatives are aware of the criteria for assessing the applications, we recommend that the Secretary of Transportation communicate all selection criteria—and the relative weight to be given to the criteria—to potential applicants. Second, for the Transportation, Community, and System Preservation program, we recommend that the Secretary direct the Administrator, FHWA, to give priority consideration only to applicants that meet all five statutory factors, as required by the grant statute.

Agency Comments and Our Evaluation

The department reviewed a draft of our report and generally agreed with most of its findings. The department indicated that it was considering the recommendations; however, it indicated that the recommendation concerning the Transportation, Community, and System Preservation program will require careful legal analysis by the agency.

⁵²For fiscal year 2008, Congress directed that not more than 10 percent of the funds provided to carry out the bus program could be used to fund the UPA initiative or any other new highway congestion initiative such as the Congestion Reduction Demonstration program. Pub. L. No. 110-161 (December 26, 2007). The department acknowledged that this restriction would affect its use of fiscal year 2008 funds. *See* Letter from D.J. Gribbin, General Counsel, DOT, to Susan D. Sawtelle, Managing Associate General Counsel, GAO, Apr. 17, 2008).

Overall, the department told us that it views performance-based initiatives, such as the UPA initiative, as critical tools for applying its limited discretionary funding to achieve the greatest possible congestion reduction. The department said that the UPA initiative also made use of other best practice approaches. For example, the department incorporated an intermodal perspective for assessing program applicants based on established and publicized criteria. Intermodal teams assessed the merits and viability of proposals under the leadership of the Office of the Secretary to ensure that funding was awarded in a manner consistent with statute and regulation, to those projects that offered the most significant congestion relief benefits. The department also emphasized that it used extensive outreach to potential participants, because the program's dynamic environment made it particularly important to ensure clear, consistent, and effective communication. The department indicated that it made its expertise available to all potential applicants on an ongoing basis from the outset of the program. Finally, the department stated that the UPA initiative incorporates elements for assessing results, so that information can be obtained for consideration in future efforts of this type.

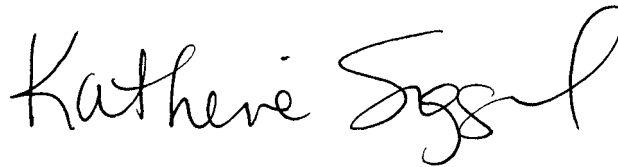
Our draft report stated that the department appeared to give Minneapolis proactive assistance in crafting a stronger application before the department selected the city as a preliminary urban partner. We concluded that this action was inappropriate and tendered a draft recommendation on this issue. The department took exception to our discussion that it provided Minneapolis assistance at this point of the evaluation process. The department maintained that it did everything possible to ensure these interactions were consistent and fair to all applicants, and did not agree that its discussions with Minneapolis or any potential applicants were either unfair or inappropriate. As a result, we had additional discussions with Minneapolis officials and reviewed documentary evidence which showed that the department provided assistance to Minneapolis after it was selected as a preliminary urban partner, similar to Miami. As a result, we revised our draft report accordingly and removed the draft recommendation.

The department offered several technical comments, which we have incorporated where appropriate.

We are sending copies of this report to other congressional committees and subcommittees with responsibility for highway mobility issues; the Secretary of Transportation; the Administrator, Federal Highway Administration; the Administrator, Federal Transit Administration; the

Administrator, Research and Innovative Technology Administration; and the Director, Office of Management and Budget. This report will be available at no charge on the GAO Web site at <http://www.gao.gov>.

If you have any questions about this report, please contact either Susan Sawtelle, Managing Associate General Counsel at (202) 512-6417 or sawtelles@gao.gov; or me at (202) 512-2834 or siggerudk@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this report. Staff who made key contributions to this report are listed in appendix VI.

A handwritten signature in black ink that reads "Katherine Siggerud". The signature is written in a cursive style with a large, looping "S" for the last name.

Katherine A. Siggerud
Managing Director, Physical Infrastructure Issues

List of Congressional Committees

The Honorable Patty Murray
Madam Chairman
The Honorable Christopher S. Bond
Ranking Member
Subcommittee on Transportation, Housing and
Urban Development, and Related Agencies
Committee on Appropriations
United States Senate

The Honorable John Olver
Chairman
The Honorable Tom Latham
Ranking Member
Subcommittee on Transportation, Housing and
Urban Development, and Related Agencies
Committee on Appropriations
House of Representatives

The Honorable James Oberstar
Chairman
The Honorable John Mica
Ranking Republican Member
Committee on Transportation and Infrastructure
House of Representatives

The Honorable Peter DeFazio
Chairman
The Honorable John Duncan
Ranking Member
Subcommittee on Highways and Transit
Committee on Transportation and Infrastructure
House of Representatives

Appendix I: Department of Transportation Actions to Select Corridors of the Future and Ensure Transportation Benefits

In May 2006, the Department of Transportation (the department) established Corridors of the Future (Corridors) as a demonstration program to accelerate the development of multistate transportation corridors to reduce congestion. In designating such corridors, the department followed criteria that it communicated to potential applicants. In addition, the department has established a framework to ensure that states will work together and that Corridor projects will come to fruition and produce transportation benefits.

Background

In September 2006, the department issued a *Federal Register* notice soliciting applications for Corridors, which is a major component of its congestion-reduction initiative. This program is to accelerate the development of multistate transportation corridors, for one or more transportation modes, in need of investment to reduce congestion. The department also encouraged participation by sending an e-mail to transportation groups and by citing the program's benefits in speeches. According to department officials, another purpose of the demonstration program is to encourage states to work together, rather than acting separately, to reduce congestion along major transportation corridors.

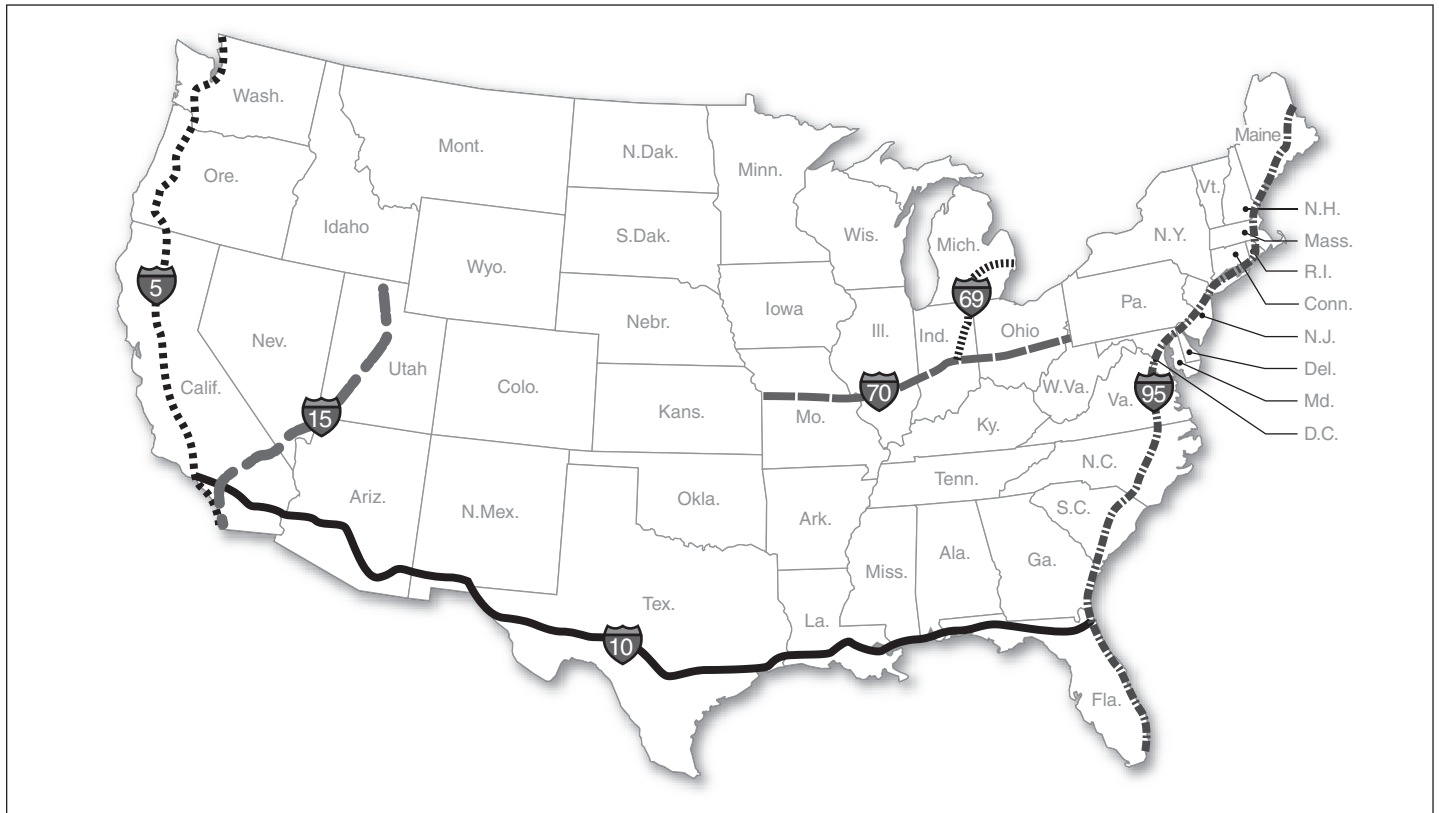
The department solicited applications for Corridors in two phases. For phase one, the department asked for proposals containing general information about the proposed corridor, such as its location, purpose, preliminary design features, and estimated capital costs. The department received 38 proposals and established a review team comprising representatives from the department's surface transportation administrations, with expertise in finance, environment and planning, and infrastructure. In accordance with the review team's recommendations, the department announced it had selected eight potential corridors to submit applications for phase two. The phase two applications were more detailed than the phase one proposals and supplied information on the corridor's physical description, congestion-reduction goals, mobility improvements, economic benefits and support of commerce, value to users, innovations in project delivery and finance, environmental stewardship, finance plan, and proposed project timeline. Several state officials told us that the process of completing proposals or applications for Corridors fostered cooperation between states and began discussions about multistate efforts to reduce congestion that would not have happened otherwise.

On September 14, 2007, relying on the recommendations of the review team, the department announced its selection of six corridors: Interstate

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Ensure Transportation Benefits**

95, Interstate 15, Interstate 5, Interstate 10, Interstate 70, and Interstate 69.
(See fig. 4.)

Figure 4: Locations of the Six Corridors of the Future



Sources: U.S. Department of Transportation (data); and MapArt (base map).

Designation as a corridor did not include an award of funds, but did give individual corridors priority access to department resources such as funding from grant programs and administrative flexibilities, such as environmental streamlining. Each corridor proposed a series of improvement projects that collectively totaled about \$106 billion and individually ranged in cost from about \$8.5 million to \$63 billion. However, because of funding limitations, the department strategically chose where to best utilize funds and only selected one or two projects per corridor. For example, Interstate 10 proposed about \$6.7 billion in high-priority projects in several areas: security, incident management, traveler information systems, traffic management, multiagency coordination, and capital projects. Following Interstate 10's designation as a corridor, the

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department provided \$8.6 million in funding for two projects within this corridor. (See table 7.) In all, the department provided \$66.2 million in funding from five grant programs for 10 projects in the six corridors.

Table 7: Corridors Projects That Received Funding

Dollars in millions

| Corridor | Project description | Amount awarded |
|-----------------|---|-----------------------|
| Interstate 95 | North Carolina will use Interstate Maintenance Discretionary program funds to widen the interstate (including additions to lanes and ramp capacity improvements) and increase vertical clearances for bridges. | \$21.0 |
| | North Carolina will use Transportation, Community, and System Preservation (TCSP) program funds to install sensors and dynamic message signs. | 0.8 |
| Interstate 15 | Nevada will use Public Lands Highway Discretionary program funds for environmental work to expand the number of lanes in and around Las Vegas, realign off ramps at one interchange, and widen the roadway to support managed or express lanes. | 10.0 |
| | California will use Highways for Life program funds to replace concrete on an existing section of roadway. | 5.0 |
| Interstate 5 | Washington will use Interstate Maintenance Discretionary program funds for environmental and predesign work and a right-of-way purchase for a new bridge across the Columbia River between Oregon and Washington. | 15.0 |
| Interstate 10 | Arizona will use Interstate Maintenance Discretionary program funds to widen a section of the interstate. | 4.0 |
| | Louisiana will use Delta Region Development program funds to construct additional lanes and add auxiliary lanes. | 4.6 |
| Interstate 70 | Missouri will use Interstate Maintenance Discretionary program funds for an environmental study to evaluate the impact of adding two dedicated truck lanes in each direction along the interstate. | 2.0 |
| | Indiana will administer TCSP program funds for a corridor-wide study to evaluate the feasibility of constructing truck-only lanes along the interstate. | 3.0 |
| Interstate 69 | Arkansas will administer TCSP program funds for a corridor-wide study to identify sources of innovative financing for projects on the corridor. | 0.8 |
| Total | | \$66.2 |

Source: GAO presentation of Department of Transportation information.

The department is developing agreements for how the states along each corridor will work together to develop their corridor. As of February 2009, the department finalized agreements for three corridors. According to a department official, the department is working to finalize the remaining three agreements by the end of December 2009.

The Department Selected Awardees for Corridors by Following Its Published Criteria

Beyond the general information requested for phase I proposals, the September 2006 *Federal Register* notice provided nine criteria for reviewing phase two applications. Specifically, the proposals and applications were to include

- a description of the corridor,
- proposed strategies for reducing congestion,
- planned mobility improvements,
- expected economic benefits and support of commerce,
- estimated value to users of the corridor,
- innovative project delivery and financing features,
- evidence of exceptional environmental stewardship,
- a finance plan and opportunities for private-sector participation, and
- a proposed project timeline.

In reviewing both the phase one proposals and phase two applications, the department applied the criteria stated in the *Federal Register* and, according to the department, gave equal weight to all the criteria. According to the Office of Management and Budget policy directive described earlier in this report, since the selection criteria for Corridors did not vary in importance, it was not necessary for the department to describe the weights of the criteria in its funding announcements.

Amount of Funding Available under Corridors Was Unclear and Most Funds Awarded to Projects Were Requested in Applications

As discussed earlier in this report, grant announcements should provide a complete description of the funding opportunity to give applicants a sense of the scope of the funding, and to assist them in prioritizing and developing proposals for projects. The September 2006 *Federal Register* notice did not state a specific amount of funding available to corridors through grant programs. However, the *Federal Register* notice did state that (1) if a corridor was selected for participation in the Corridors program, the department would work with the corridor to identify possible funding sources and (2) the department would select up to five corridors (although six were ultimately selected). The *Federal Register* notices soliciting Corridors proposals and applications were issued before February 15, 2007, when the President signed the department's fiscal year 2007 appropriation without any congressional directives that funds be dedicated for particular projects. Therefore, department officials told us that, at the time Corridors proposals and applications were solicited, the department did not know to what extent funds would be available for allocation to Corridors projects.

Department officials told us that in April 2007, the department sent out an e-mail to phase two applicants stating that \$329 million, from eight Federal Highway Administration (FHWA) grant programs, was available to applicants that met the grant programs' respective statutory criteria and emphasized the proposed projects' highway safety and congestion-reduction benefits. However, it was not clear in this document what portion of the \$329 million would be dedicated to Corridors. According to the department, the level of funding that would be allocated to Corridors was unknown at this time. In July 2007, the department set aside \$66.2 million for Corridor designees and funded 10 projects. This sum represented the amount remaining after funds were set aside for congressionally directed activities, urban partnership agreements (UPA), and other grant programs. Department officials told us that after identifying the six corridors, they called each corridor to solicit projects that could be funded.

For 9 of the 10 funded Corridors projects, we found corresponding projects listed in the respective Corridors applications. However, the Corridors application for Interstate 10 did not include an Arizona project to widen a section of this highway. Officials from the Florida and Texas Departments of Transportation who served as the points of contact for the Interstate 10 Corridors project told us they did not receive telephone calls from the department soliciting projects for funding in the Interstate 10 corridor. Rather, these officials told us that Arizona received Corridors funding for a project that was not listed in the Interstate 10 Corridors

application and therefore was not a priority for the corridor. According to the department, it was not necessary for a project to be listed in a Corridors application for the project to be funded. Instead, the department said, it gave priority consideration in its funding decisions to parties designated as corridors. In our opinion, this approach appears to act at cross purposes to the department's goal of encouraging multistate collaboration to address pressing congestion along corridors.

The Department Plans to Ensure Award Conditions Are Met and Assess the Results

The department is developing an agreement for each corridor on how the states will work together to plan, develop, finance, construct, and maintain the corridor. As of February 2009, the department had finalized agreements for three corridors. According to a department official, the department is working to finalize the remaining three agreements by the end of December 2009. Each agreement will establish the objectives for developing the respective corridor. The department is asking the signatory states to use the following objectives as the guiding principles for development:

- Promote innovative national and regional approaches to congestion mitigation.
- Address major transportation investment needs.
- Illustrate the benefits of alternative financial models that involve private-sector capital.
- Promote a more efficient environmental review and project development process.
- Develop corridors that will increase freight system reliability and enhance the quality of life for citizens.
- Demonstrate the viability of a transportation investment model based on sound economics and market principles.

Each agreement will require that the signatory states develop a multistate approach to developing and managing the corridor. The department is asking that the states execute a memorandum of understanding among themselves, with the department's concurrence, that sets forth how the states will collaborate to support each other in corridor activities. To ensure that the signatory states are speaking with one voice, the department is asking each corridor to establish a committee that can

represent the states and negotiate on behalf of the corridor with the department.

Each agreement also will include specific requirements for developing and operating the corridor. The department is asking the signatory states to develop a process under which each project will be subject, as applicable, to specific development goals to ensure coordinated planning, financing, construction, operation, maintenance, and performance of the corridor. The department is also encouraging the signatory states to cooperatively develop a method to select projects and establish a schedule for project delivery. The department would like the signatory states to create and maintain a schedule that will establish priorities for undertaking projects and obtaining funding from different sources.

Lastly, each agreement will address the development of a performance plan for the corridor, including operations and management performance goals and expectations, and methods to measure travel time and reliability. Beginning 1 year after the effective date of the agreement and regularly thereafter, the department will ask the signatory states to report to the department on the corridor's performance and progress.

Appendix II: The Department Actively Promotes Public-Private Partnerships to Reduce Highway Congestion

In February 2008, we reported that the department encourages and promotes the use of highway public-private partnerships through policy and practice, including the development of experimental programs that waive certain federal regulations and encourage private investment.¹ The department believes that public-private partnerships have the potential to reduce highway congestion, among other things.

Since our report, the department has taken additional steps to promote highway public-private partnerships through programs and practice. This appendix updates our prior report on the activities the department has used to promote public-private partnerships. We did not assess these new efforts.

Departmental Programs Promote Public-Private Partnerships

Since our February 2008 report, the department has extended credit and credit support under the Transportation Infrastructure Finance and Innovation Act program to two public-private partnerships. This act authorizes the department to provide secured (direct) loans, lines of credit, and loan guarantees to public and private sponsors of eligible surface transportation projects. For example, in December 2007, under the Transportation Infrastructure Finance and Innovation Act, the department allocated \$589 million for Virginia's Capital Beltway high-occupancy toll lanes project, which will use congestion pricing to ensure reliable traffic flow on one of the nation's most congested highways. In addition, in March 2008, the department allocated \$430 million for segments of Texas state highway 130, which will form part of a new 91-mile tollway intended to relieve congestion on Interstate 35. Both transactions involved a partnership between private borrowers and a state.

¹These include: (1) incorporating highway public-private partnerships into its policy statements, such as its 2006 national congestion strategy, which stated that the federal government should remove or reduce barriers to private investment in the construction or operation of transportation infrastructure; (2) using its administrative flexibility to develop three experimental programs (Special Experimental Projects Numbers 14 and 15 and the Innovative Finance Test and Evaluation Program) to allow more private-sector participation in federally funded highway projects; and (3) publishing a public-private partnership manual that has material to educate state transportation officials about highway public-private partnerships and to promote their use. See GAO, *Highway Public-Private Partnerships: More Rigorous Up-front Analysis Could Better Secure Potential Benefits and Protect the Public Interest*, [GAO-08-44](#) (Washington, D.C.: Feb. 8, 2008).

In addition, as of December 2008, the department had allocated about \$9.2 billion in private activity bonds to eight public-private partnerships.² The Safe, Accountable, Flexible, Efficient Transportation Equity Act—A Legacy for Users (SAFETEA-LU) amended the Internal Revenue Code to add qualified highway or surface freight transfer facilities to the types of privately developed and operated projects for which tax-exempt facility bonds (a form of private activity bonds) may be issued. For example, the department allocated \$980 million for private activity bonds to a group of private companies that are planning to build a tunnel connecting the Port of Miami on Dodge Island with Watson Island and Interstate 95 on the Florida mainland.³ However, according to a department official, not all of the \$9.2 billion allocated in private activity bonds has been issued. In addition, according to this official, the department is currently reviewing applications for additional private activity bond allocations to other public-private partnerships.

Finally, the department plans to study projects that use methods of procurement that integrate risk and streamline project development. SAFETEA-LU established the Public-Private Partnership Pilot Program, known as Penta-P, to evaluate the benefits of forming public-private partnerships for new construction projects. In 2007, the department executed agreements for three pilot projects: the first is a single contract for the construction of two light rail lines in Houston, Texas, that will ultimately serve the city's two main airports; the second is a contract in Denver, Colorado, for two rail projects that will serve the Denver airport and northwest Denver; and the third is a contract in Oakland, California, for a transit system that will connect the Oakland International Airport with the San Francisco Bay Area Rapid Transit District's Coliseum Station. According to a department official, construction on the projects has not begun. Denver is contemplating an innovative contract that increases risk sharing between the private partner and the local, state, and federal governments. In this agreement, the Denver Regional Transportation District will ask its private partner to assume a degree of risk by contributing equity capital to the project. This capital will be at risk until the project is operating and collecting revenue. In addition, the

²Qualified private activity bonds are tax-exempt bonds issued by a state or local government, the proceeds of which are used for a defined, qualified purpose by an entity other than the government that issued the bond.

³In December 2008, Florida cancelled this project because the firm that was supposed to provide the equity for the project could not meet its commitments.

Metropolitan Transit Authority of Harris County, Texas, is contemplating an innovative contract under which a “facility provider” will share risk with the vehicle provider, construction firm, and operator. Also, the project’s development will be streamlined, since the private partner will coordinate all work with the contractor, vehicle provider, and operator. As these projects proceed, the department will study how public-private partnerships affect completion times, projections of project costs and benefits, and project performance. Lastly, the San Francisco Bay Area Rapid Transit District plans to use an innovative contract where a consortium of private firms will assume the risk to design, build, operate, maintain, and finance the project.

The Department Promotes Public-Private Partnerships through Multiple Practices

The department has promoted public-private partnerships in the following ways:

- *Developing publications.* In July 2008, the department published a report that describes the use of public-private partnerships by transportation authorities and updates the department’s 2004 report to Congress on public-private partnerships.⁴
- *Drafting model legislation for states to consider highway public-private partnerships within their jurisdiction.* The model legislation addresses such subjects as bidding, agreement structures, reversions of the facilities to the state, remedies, bonds, federal funding, and property tax exemptions, among other things. In July 2008, the department published a framework for overhauling the way transportation decisions and investments are made.⁵ Specifically, the framework recommends the use of public-private partnerships, expansion of Transportation Infrastructure Finance and Innovation Act program capacity, and removal of the \$15 billion cap on private activity bonds administered by the department. In addition, the department is currently developing guidance on the use of public-private partnerships by procurement agencies. This guidance will describe how federal, state, and local officials have structured public-private partnerships.

⁴U.S. Department of Transportation, Federal Highway Administration, *Innovation Wave: An Update on the Burgeoning Private Sector Role in U.S. Highway and Transit Infrastructure* (July 18, 2008).

⁵U.S. Department of Transportation. The Secretary of Transportation, *Refocus. Reform. Renew. A New Transportation Approach for America* (July 2008).

- *Maintaining a public-private partnership Internet Web site.* This Web site serves as a clearinghouse for information to states and other transportation professionals about public-private partnerships, pertinent federal regulations, and financing options.⁶
- *Making public presentations.* Department officials have made public speeches and written at least one letter to a state in support of highway public-private partnerships. Officials of the department also have testified before Congress in support of highway public-private partnerships. Since February 2008, the department has conducted workshops on the structure and rationale for public-private partnerships. For example, in October 2008, the department gave a presentation at a transit conference on how public-private partnerships can be used to address funding shortages in highway infrastructure projects.
- *Making public-private partnerships a key component of congestion mitigation.* Two major parts of the department's May 2006 national strategy to reduce congestion are the UPA initiative and Corridors. In August 2007, the department awarded funds to five urban partners that would make congestion pricing a key component of congestion mitigation. Such a strategy could act to promote highway public-private partnerships, since tolls provide a long-term revenue stream, key to attracting investors. In September 2007, the department awarded funds to six interstate routes for use in developing multistate corridors to help reduce congestion. These six interstates were selected for their potential to use private resources to reduce traffic congestion within the corridors and across the country.
- *Encouraging public-private partnerships in its reform proposal to Congress.* In July 2008, the Secretary announced the administration's new plan to create a more sustainable way to pay for and build roads and transit systems. This plan includes a proposal for leveraging federal resources. Among other things, this proposal encourages states and metropolitan areas to explore innovative transportation financing mechanisms by expanding the use of public-private partnerships. For example, the administration's plan proposes that all federal aid projects with a total cost of over \$250 million would not receive federal assistance unless the project sponsor first compared the project's lifecycle costs under the most cost-effective form of conventional public procurement with the project's lifecycle costs if procured using a public-private

⁶The Web site can be found at <http://www.fhwa.dot.gov/ppp>.

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partnership (assuming state law allows for public-private partnership procurement).

Appendix III: Extent to Which Previous Recipients of Grant Programs Received UPA Initiative and Corridors Funding

This appendix provides information on the extent to which previous recipients of grants provided through 11 programs received funds under the UPA initiative and Corridors.¹ To develop this information, we compared the amounts of funds states were allocated during fiscal years 2004 through 2006 with the amounts awarded for the UPA initiative and Corridors in fiscal year 2007.

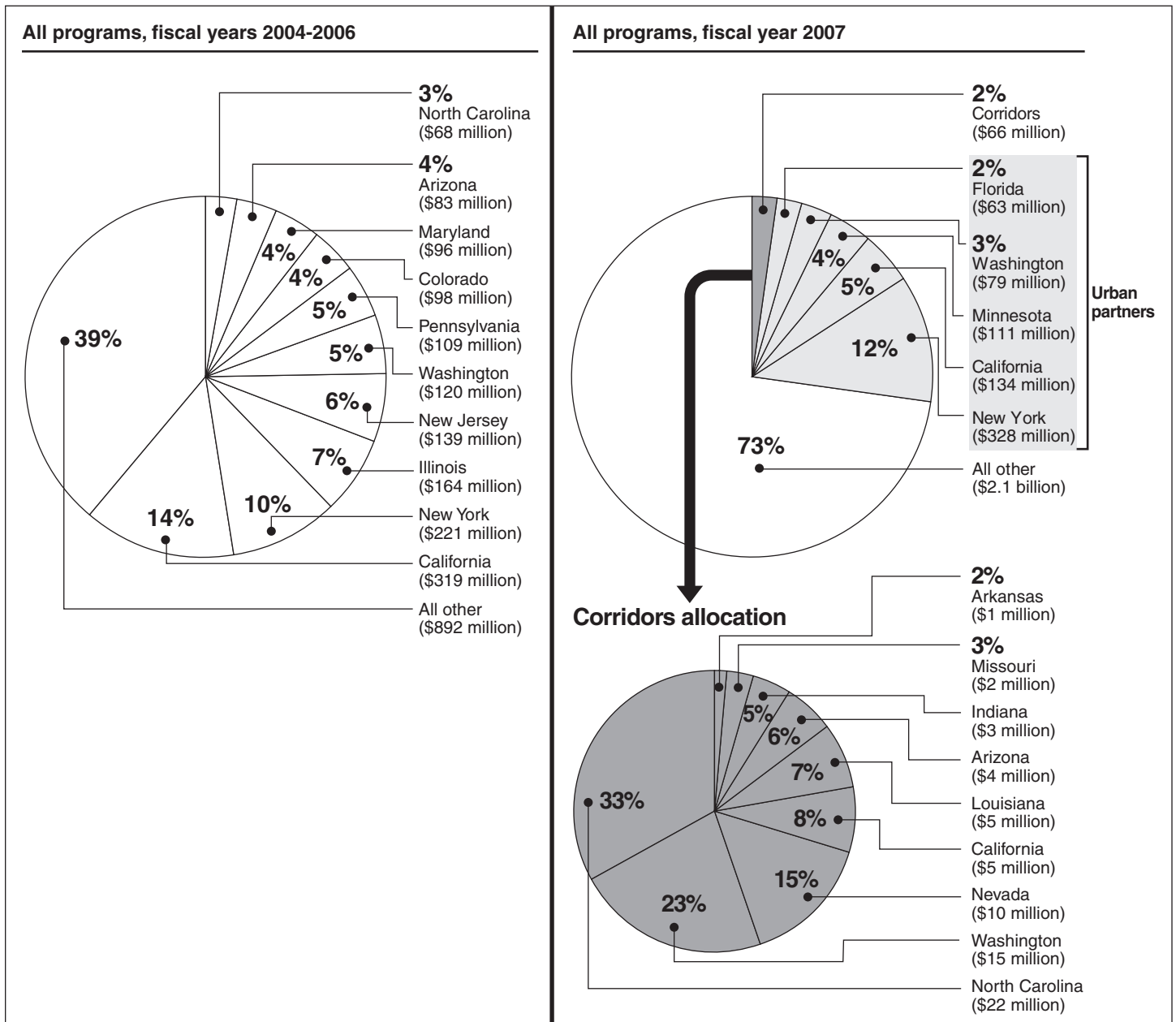
Urban partners were awarded about 26 percent of the funding provided through the 11 grant programs in fiscal year 2007, while Corridors states were awarded 2 percent of the funding provided through those grant programs. (See fig. 5.) For fiscal years 2004 through 2006, about \$6.9 billion was allocated through the 11 grant programs to 50 states and the District of Columbia, in amounts ranging from about \$319 million on average per year (California) to \$2.4 million on average per year (Wyoming). The top 10 states, in descending order of grant size, were California, New York, Illinois, New Jersey, Washington, Pennsylvania, Colorado, Maryland, Arizona, and North Carolina. Three of the top 10 states had urban partners (California, New York, and Washington), and two of these states were involved in a Corridors project that received funding (California and Washington) in fiscal year 2007. In fiscal year 2007, about \$2.8 billion was awarded through the 11 grant programs. Of this amount, about \$715 million was awarded to urban partners and about \$66 million was awarded to Corridors states through grants ranging from about \$328 million (New York) to \$1.1 million (Arkansas).

¹For this analysis, we provide information on 11 of the 13 grant programs that were available for the UPA initiative and Corridors. We do not provide information on the remaining 2 programs because (1) no funds were dedicated to the Intelligent Transportation Systems-Operational Testing to Mitigate Congestion program during fiscal years 2004 through 2006 and (2) the department did not award Truck Parking Pilot program funds in fiscal year 2007 for the UPA initiative or Corridors.

The 11 grant programs in the analysis are the Alternatives Analysis; Bus and Bus Related Facilities Discretionary Grant; Delta Region Development; Ferry Boat Discretionary; Highways for Life; Innovative Bridge Research and Deployment; Interstate Maintenance Discretionary; New Starts/Small Starts; Public Lands Highway Discretionary Program; Transportation, Community, and System Preservation; and Value Pricing Pilot.

Appendix III: Extent to Which Previous Recipients of Grant Programs Received UPA Initiative and Corridors Funding

Figure 5: Comparison of Funding Provided through 11 Grant Programs to Top 10 States and to UPA Initiative and Corridors States



Source: GAO analysis of Department of Transportation information.

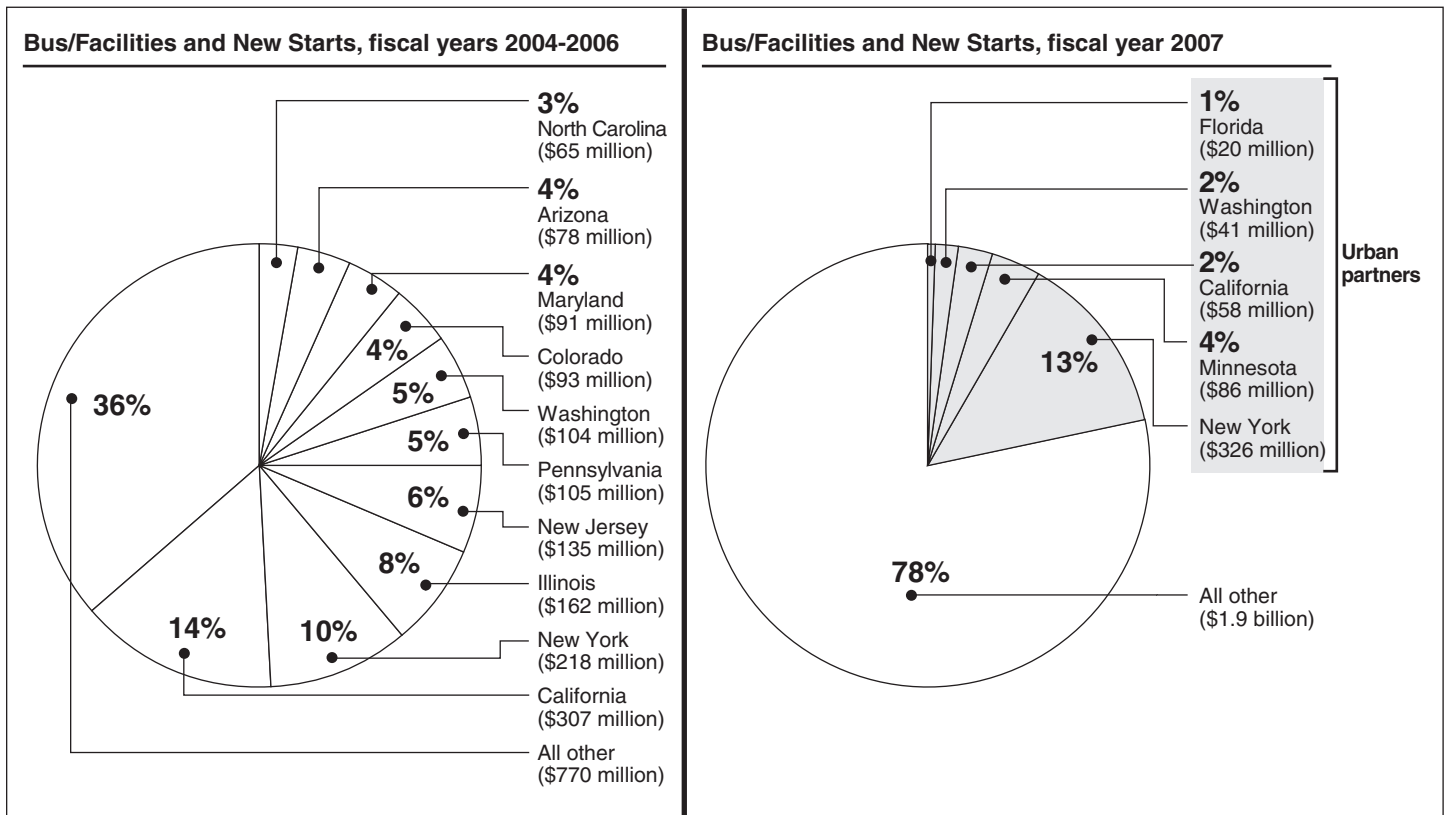
Note: The dollar amounts for all programs, fiscal years 2004-2006, are an average annual allocation over 3 years.

**Appendix III: Extent to Which Previous
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Urban partners were awarded about 22 percent of the funding provided through the two largest grant programs, Bus and Bus-Related Facilities Capital Investment Grants (Bus and Bus Facilities) and New Starts/Small Starts, in fiscal year 2007. (See fig. 6.) For fiscal years 2004 through 2006, about \$6.4 billion was allocated through Bus and Bus Facilities and New Starts/Small Starts to 50 states and the District of Columbia, in amounts ranging from about \$307 million on average per year (California) to \$900,000 on average per year (Wyoming). The top 10 states, in descending order of grant size, were California, New York, Illinois, New Jersey, Pennsylvania, Washington, Colorado, Maryland, Arizona, and North Carolina. Three of the top 10 states had cities designated as urban partners (California, New York, and Washington) and 3 of the top 10 states were part of a Corridors project that received funding (Arizona, California, and Washington) in fiscal year 2007. In fiscal year 2007, about \$2.4 billion was awarded through the Bus and Bus Facilities and New Starts/Small Starts programs. Of this amount, \$530 million was awarded to urban partners in grants ranging from about \$326 million (New York) to \$19.5 million (Florida). In fiscal year 2007, no funding was awarded for Corridors projects from Bus and Bus Facilities and New Starts/Small Starts.

Appendix III: Extent to Which Previous Recipients of Grant Programs Received UPA Initiative and Corridors Funding

Figure 6: Comparison of Funding Provided through the Bus and Bus Facilities and New Starts/Small Starts Programs to Top 10 States and to UPA Initiative and Corridors States



Source: GAO analysis of Department of Transportation information.

Note: The dollar amounts for Bus and Bus Facilities and New Starts/Small Starts for fiscal years 2004 through 2006 are an annual average allocation over 3 years.

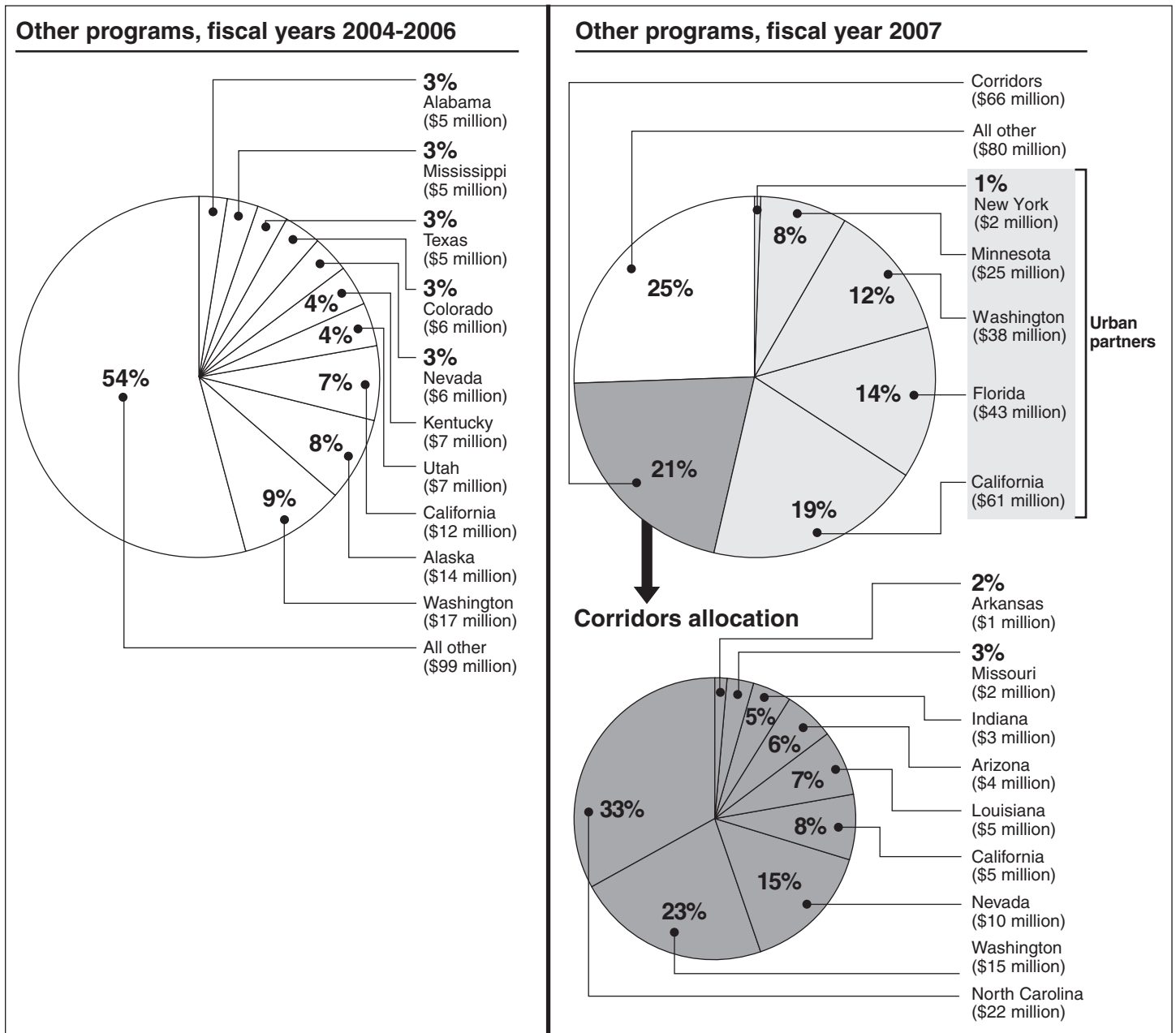
Urban partners were awarded about 54 percent of the funding provided through the remaining 9 grant programs in fiscal year 2007, while Corridors states were awarded about 21 percent of the funding provided through those programs. (See fig. 7.) In fiscal years 2004 through 2006, about \$547 million was awarded through the remaining 9 grant programs to 50 states and the District of Columbia, in amounts ranging from about \$17 million on average per year (Washington) to about \$500,000 on average per year (New Hampshire). The top 10 states, in descending order of grant size, were Washington, Alaska, California, Utah, Kentucky, Nevada, Colorado, Mississippi, Texas, and Alabama. Two of the top 10 states had cities designated as urban partners (California and Washington) and 3 of the top 10 states were part of a Corridors project that received

**Appendix III: Extent to Which Previous
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funding (California, Nevada, and Washington) in fiscal year 2007. In fiscal year 2007, about \$315 million was awarded through the 9 grant programs. Of this amount, about \$169 million was awarded to urban partners and about \$66 million was awarded to Corridors states through grants ranging from about \$61 million (California) to \$1.1 million (Arkansas).

Appendix III: Extent to Which Previous Recipients of Grant Programs Received UPA Initiative and Corridors Funding

Figure 7: Comparison of Funding Provided through 9 Remaining Grant Programs to Top 10 States and to UPA Initiative and Corridors States



Source: GAO analysis of Department of Transportation information.

Note: The dollar amounts for the 9 remaining grant programs, fiscal years 2004–2006, are an annual average allocation over 3 years.

Appendix IV: Scope and Methodology

To determine the extent to which the department communicated information about the selection criteria and funding for the UPA initiative, applied the criteria, and selected applicants for grant awards, we analyzed department publications, such as *Federal Register* notices on the UPA initiative and its underlying grant programs, and UPA initiative outreach materials, such as presentation slides and handouts. To understand how UPA applicants understood this information about the selection criteria and funding, we interviewed representatives of 14 of the 26 UPA applicants, including all of the 9 preliminary urban partners and 5 of the 17 unsuccessful UPA applicants, which we selected at random. Because the department did not track which applicants received particular outreach materials, we had to rely on these interviews with applicants to analyze the extent to which the department communicated information about the selection criteria and funding. Additionally, we spoke with representatives of five randomly selected cities that did not apply to the UPA initiative but had been identified by the department's Volpe National Transportation Systems Center as having extreme or high levels of congestion. We also spoke with officials of three national professional transportation groups about their role, if any, in communicating information on the UPA initiative to potential applicants and their understanding of UPA selection criteria and funding.

In determining good grants practices, we reviewed grants policies from the department and its agencies—particularly FHWA—as well as other government agencies, such as the Departments of Energy, Commerce, and Labor. Furthermore, we reviewed several of our reports on competitive discretionary grants and grants guidance from the Office of Management and Budget and the *Guide to Opportunities for Improving Grant Accountability* developed by the Domestic Working Group Grant Accountability Project.

In examining how the department applied UPA selection criteria, we reviewed and analyzed department documents such as the 26 UPA applications, the department's instructions for UPA application reviewers, the results of the reviewers' assessments of applications, and documentation of the reviews conducted by senior department officials. We compared the department's review of UPA applications, particularly the criteria used, with the criteria listed in *Federal Register* notices and reviewed other materials made available to applicants, such as a UPA frequently asked questions document. We also spoke with senior department officials about their application of the UPA selection criteria and their UPA funding decisions. Additionally, we also spoke with 8 of the 11 department officials who served on the UPA application review team

and with senior department officials about their reviews of UPA applications.

To assess whether the department had authority to allocate grant funds to support the UPA initiative and give priority consideration in allocating individual grants to support projects that involve congestion pricing, we analyzed the department's fiscal year 2006 appropriation, the fiscal year 2007 revised continuing resolution, the applicable authorizing legislation, and relevant case law and other legal authorities. We obtained the department's legal position regarding its authority in these areas through formal and informal correspondence and through discussions with the department's General Counsel and other senior department officials. We reviewed the department's documentation of its technical evaluation team application review for several grant programs: the Intelligent Transportation Systems-Operational Testing to Mitigate Congestion; Interstate Maintenance Discretionary; Ferry Boat Discretionary; Public Lands Highway Discretionary; and Transportation, Community, and System Preservation programs. We also spoke with department staff members that manage the four grant programs to determine how they reviewed and ranked applications. We selected these grant programs because their statutes authorize the department to give priority or priority consideration to certain categories of applicants.

To describe the steps the department is taking to ensure that award conditions are met and that results will be evaluated, we reviewed documents on the department's actions to monitor UPA award conditions and plans to evaluate each urban partner's projects to reduce congestion. Specifically, we reviewed urban partners' term sheets (or memorandums of understanding) with the department and grant and cooperative agreements that list the conditions to receive federal funds. We also reviewed documents from Battelle Memorial Institute's plans to evaluate UPAs. In addition, we interviewed officials from the department, Battelle Memorial Institute, and Miami about their plans for implementing and evaluating projects.

To determine how the department applied the criteria and selected applicants for grant awards for Corridors, we reviewed all phase one and phase two applications, the September 2006 *Federal Register* notice, and the guidance given to review team members. In addition, we spoke with 10 of the 38 Corridors applicants. Of these, 5 applied to phase one and were not invited to apply to phase two, 1 applied to phase two but was not selected, and 4 were designated as corridors. To understand the department's review of Corridors applications, we spoke with six of eight

review team members. In addition, to describe the steps the department is taking to ensure that selection conditions are met and results are assessed, we reviewed Corridors development agreements, which state performance objectives and the conditions for receiving federal funds. We also spoke with the department officials responsible for managing five grant programs to understand how the program managers will monitor and evaluate Corridors projects.

To determine what actions the department has taken to support public-private partnerships to reduce highway congestion, we reviewed several documents, such as the department's 2006 National Strategy to Reduce Congestion on America's Transportation Network, documents on the department's public-private partnership Web site, and our reports on public-private partnerships. We also interviewed department officials on actions the department has taken.

To identify the previous recipients of funding from the 13 discretionary grant programs used to fund the UPA initiative and Corridors, we collected funding information for fiscal years 2004 through 2007 from FHWA and the Federal Transit Administration and compared the recipients of those funds and the amounts they received for fiscal years 2004 through 2006 with UPA and Corridors recipients and the amounts they received in 2007. We assessed the reliability of the data by interviewing knowledgeable department officials about data collection methods, particularly those pertaining to funds allocated to states for fiscal years 2004 through 2007 from the 13 grant programs. We determined that the data were sufficiently reliable for the purposes of this report.

Appendix V: The Department's Legal Compliance in Awarding Grants to Support the UPA Initiative

Introduction and Summary of Conclusions

As part of our review of the department's *National Strategy to Reduce Congestion on America's Transportation Network*, we examined whether, for fiscal year 2007, the department had legal authority to allocate its lump-sum appropriations to 10 existing discretionary grant programs in order to "fund" the UPA initiative, and if so, whether the department could use tolling (specifically, congestion pricing) as a priority or priority consideration factor in deciding which applicants would be awarded grants under those programs.¹

We conclude that because there were no statutory designations of funding for specific projects or programs in fiscal year 2007—no legally binding "earmarks" or other directives—the department had authority to allocate its lump-sum appropriations to its existing discretionary grant programs. The department's appropriations were available to carry out the programs identified in each of the lump-sum appropriations, and the department had discretion in choosing how to allocate funds among those programs.

We conclude further that, for nine of the 10 grant programs that were used to fund UPA projects, the department had authority to use congestion pricing as a discriminating priority or priority consideration factor to select among otherwise equally qualified grant applicants. Each of the grant statutes underlying these 9 programs either explicitly permitted consideration of tolling or afforded the department discretion to consider tolling because it was rationally related to program objectives. For 8 of these 9 grant programs, it is clear that the department then applied congestion pricing in this way, although in the Ferry Boat program, the department's technical evaluation documentation initially suggested the department had improperly supplanted statutory priorities with tolling by allegedly awarding a \$2 million grant to an urban partner that did not meet any statutory priority criteria (but had congestion pricing) while passing over a number of nonurban partners that met at least one priority criterion (but lacked congestion pricing). The technical evaluation was incorrect, however, and was not relied on by the Secretary in making the final grant decision. The Secretary relied on corrected information showing the urban

¹As noted elsewhere in this report, the department treated 10 grant programs as being "under" and "within" the UPA initiative, including the Alternative Analysis program. According to the department, the 4T's, specifically tolling, were not used in awarding Alternative Analysis grants. Letter from D.J. Gribbin, General Counsel, DOT, to Susan Sawtelle, Managing Associate General Counsel, GAO, October 31, 2008 October 2008 DOT Letter)at 5-6; see 72 Fed. Reg. 13980 (Mar. 23, 2007). Therefore, this legal analysis does not include a discussion of the Alternative Analysis grant.

partners in fact met statutory priorities. The Secretary therefore was within her discretion to apply congestion pricing as a discriminating factor.

With respect to the remaining grant program—the Transportation, Community, and System Preservation (TCSP) program—we conclude that the department likely did not apply statutory “priority consideration” factors consistent with the requirements of the statute. Because priority consideration does not entitle an applicant to grant selection, only to a bona fide and careful review, and because the department had discretion to use congestion pricing as a rational discriminating priority factor, the department’s action may not have affected the outcome of its grant awards. Although not free from doubt, we believe the statute allows the department to give priority consideration only to cities that meet all five statutory criteria, while the department believes an applicant must meet only one factor, and rated applicants accordingly. Because the department used a one-factor rating approach, it is not possible to determine from the current record whether any of the applicants satisfied all five criteria and thus deserved a bona fide “hard look.” Given that the department had ultimate discretion to select applicants that were not entitled to priority consideration, we do not recommend reevaluating the more than 500 project applications and possibly reawarding the fiscal year 2007 TCSP grants. We note also that all TCSP grant funding has been obligated. Instead, the department should ensure that all future TCSP program discretionary grant awards are carried out in accordance with the statute, that is, by giving priority consideration only to applicants that meet all five of the factors.²

²As part of our analysis and similar to our regular practice in preparing legal opinions, we requested the department’s legal position on its authority to allocate its fiscal year 2007 lump-sum appropriations to support the Urban Partner initiative and to select grantees under the 9 underlying grant statutes using tolling as a selection factor. See GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: September 2006), <http://www.gao.gov/legal/resources.html> (last visited Feb. 5, 2009). The department provided its views in two letters, see Letters from D.J. Gribbin, General Counsel, DOT, to Susan D. Sawtelle, Managing Associate General Counsel, GAO, Apr. 17, 2008 (April 2008 DOT Letter) and Oct. 31, 2008 (October 2008 DOT Letter); in meetings on Oct. 9 and 23 and Nov. 21, 2008; and in phone calls and e-mail correspondence.

Background

The department received a number of lump-sum appropriations for fiscal year 2006. These included

- approximately \$36 billion “for Federal-aid highways and highway safety construction programs” administered by FHWA, see Pub. L. No. 109-115, 119 Stat. 2396, 2402 (2005);
- \$1.5 billion “[f]or payment of obligations incurred in carrying out the provisions of 49 U.S.C. 5305, 5307 5308, 5309, 5310, 5311, 5317, 5320, 5355, 5339, and 5340 . . .” for bus and transit-related programs administered by the Federal Transit Administration, id., 119 Stat. at 2417; and
- approximately \$5.8 million “[f]or necessary expenses of the Research and Innovative Technology Administration. . .,” id., 119 Stat. at 2423.

Although the fiscal year 2006 appropriations act itself made these sums available for a number of programs, the accompanying conference report contained designations—so-called “earmarks”—directing how substantial amounts of these appropriations should be spent.³ For fiscal year 2007, however, Congress enacted a \$463 billion continuing resolution, giving budget authority to federal agencies based on the same 2006 levels, but removing the nonstatutory earmarks: “[a]ny language specifying an earmark in a committee report or statement of managers accompanying an appropriations Act for fiscal year 2006 shall have no legal effect with respect to funds appropriated by this division.” Revised Continuing Appropriations Resolution, 2007, Pub. L. No. 110-5, sec. 112 (Feb. 15, 2007).

The department interpreted this language as permitting it to allocate the above lump sums to discretionary grant programs administered by FHWA, the Federal Transit Administration, and the Research and Innovative Technology Administration, in order to “fund” policy initiatives such as the UPA initiative. April 2008 DOT Letter at 2. Accordingly, following passage of the fiscal year 2007 continuing resolution, the department announced in the *Federal Register* that it was soliciting applications by metropolitan areas to enter into UPAs with the department. 71 Fed. Reg. 71231 (Dec. 8, 2006). Under the UPA initiative, cities would agree to demonstrate

³For example, the conference report stated that the department should make \$35 million in Ferry Boat and Ferry Boat Terminal Facility funds available for 26 specifically identified projects and that it should fund hundreds of specific Bus and Bus Facility projects at levels totaling millions of dollars. See H. R. Rep. No. 109-307, at 158, 188, 191 (2005).

innovative strategies that would reduce traffic congestion. In order to be designated as an urban partner, applicants had to demonstrate their ability to implement the 4Ts: tolling/congestion pricing, transit, technology (use of cutting-edge approaches to improve system performance), and telecommuting (expansion of telecommuting and flexible work schedules). The urban partner designation itself would not entitle a city to any grant funding; urban partners (as well as other cities) had to apply and qualify for grants under the department's existing discretionary grant programs. Designation as an urban partner, however, would entitle a grant applicant to "preferential treatment" as the department made its individual grant decisions. 71 Fed. Reg. at 71233-34.

The department received 26 applications for the UPA initiative and well over 1,300 project applications from urban partner applicants and others, for grants under various discretionary programs. After narrowing the 26 applicants to 9 potential urban partners, the department selected Miami, Minneapolis, New York City, San Francisco, and Seattle as urban partners in August 2007. In the meantime, the department solicited applications under 13 grant programs, and in almost all instances, explained the department would give "priority consideration" to cities selected as urban partners in deciding which cities would be awarded such grants.⁴ As announced, the department then gave priority consideration to these 5 urban partners in awarding them approximately \$848 million in grants for 94 different projects under 10 discretionary grant programs administered by FHWA, the Federal Transit Administration, and the Research and Innovative Technology Administration. The department also awarded \$18 million in grants to preliminary urban partner San Diego under two of these programs. All told, the department awarded approximately 98 percent of the total \$866 million in grant funding under these 9 programs to urban partners.

⁴See 71 Fed. Reg. 75806 (Dec. 18, 2006) (Intelligent Transportation Systems-Operational Testing to Mitigate Congestion program); 71 Fed. Reg. 77086 (Dec. 22, 2006) (Value Pricing Pilot Program); 72 Fed. Reg. 13522 (Mar. 22, 2007) (Ferry Boat Discretionary; Innovative Bridge Research and Deployment; Interstate Maintenance Discretionary; Public Lands Highway Discretionary; Highways for Life; Transportation, Community, and System Preservation; Truck Parking Facilities Pilot; and Delta Region Transportation Development programs); 72 Fed. Reg. 13974 (March 23, 2007) (Bus and Bus Facilities program); 72 Fed. Reg. 17982 (Apr. 10, 2007) (New Starts/ Small Starts program).

Analysis

The Department's Authority to Allocate Lump-Sum Appropriations to the UPA Initiative

A lump-sum appropriation is one that Congress intends to cover a number of programs, projects, or items. By contrast, a line-item or an earmarked appropriation refers to funds that Congress has designated for specific and particular purposes. See GAO, *Principles of Federal Appropriations Law*, Vol. II, 3d ed., [GAO-06-0382SP](#) (Washington, D.C.: Feb. 2006), at 6-5. Agencies have considerable discretion in choosing how to allocate lump-sum appropriations to specific programs and activities. As the Supreme Court recognized in *Lincoln v. Vigil*, 508 U.S. 182 (1993), “as long as the agency allocates funds from a lump-sum appropriation to meet permissible statutory objectives, [the Administrative Procedure Act] gives the courts no leave to intrude.” *Id.* at 193. The Supreme Court in *Lincoln* found that the allocation of funds from a lump-sum appropriation is an example of an administrative decision generally committed to agency discretion, noting “the very point of a lump-sum appropriation is to give an agency the capacity to adapt to changing circumstances and meet its statutory responsibilities” “in what [the agency] sees as the most effective or desirable way.” 508 U.S. at 192 (citing, among other authorities, GAO, *Principles of Federal Appropriations Law*).

After the fiscal year 2007 continuing resolution removed the fiscal year 2006 report earmarks (and even before),⁵ the department's appropriations were available to carry out the discretionary grant programs identified in the each of the lump-sum appropriations. The department had broad discretion in choosing how to allocate funds among those programs; for example, because the \$1.5 billion lump-sum appropriation was available to fund various bus and other transit-related programs under a dozen different statutes, absent any other statutory restriction, the department

⁵The department had legal authority to allocate its lump sum appropriations to discretionary grant programs even before the fiscal year 2007 Continuing Resolution. Although the term “earmark” is often used to refer to congressional funding designations contained in conference reports, managers' statements, and other legislative documents, only designations contained in enacted statutes are binding as a matter of law. See, e.g., *Lincoln*, 508 U.S. at 192, quoting 55 Comp. Gen. 307, 319 (1975); *Hein v. Freedom From Religion Foundation, Inc.*, 551 U.S. 587, 127 S. Ct. 2553, 2568 n.7 (2007). The department nevertheless followed these nonbinding earmarks, as do most agencies. While it has long been settled that “[e]xpressions of committees dealing with requests for appropriations cannot be equated with statutes enacted by Congress,” *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 191 (1978), it is also true that “an agency's decision to ignore congressional expectations may expose it to grave political consequences.” *Lincoln*, 508 U.S. at 193.

could choose how much of that appropriation to allocate to each of the dozen programs. See *Illinois Environmental Protection Agency v. United States Environmental Protection Agency*, 947 F.2d 283, 291-92 (7th Cir. 1991) (EPA could set aside a portion of discretionary air pollution grant funds for its own air pollution control activities; EPA appropriation for “Abatement, Control and Compliance” was available for these activities). In carrying out each individual grant program, the department, of course, was required to comply with the restrictions and requirements of the underlying grant statutes and to award funding to grantees in accordance with the statutory provisions. We address below whether the department complied with these underlying provisions.

The Department's Authority to Use Congestion Pricing as a Priority Selection Factor

As detailed in this report, the single most important factor in determining which cities would be designated as urban partners was whether a city had, or had committed to obtaining, authority to implement tolling (congestion pricing). Except for nonurban partner San Diego, the department then awarded all of the funding under the 10 programs to the five urban partners. Because congestion pricing was the most important factor in selecting the urban partners, and because urban partners were placed “at the head of the line” in receiving grant awards, concerns have been raised about whether congestion pricing was an inappropriate “superpriority” factor in making grant selections.

Whether the department had authority to use congestion pricing in this manner depends on the specific terms of each grant statute. *Duncan v. Walker*, 533 U.S. 167, 172 (2001) (“Our task is to construe what Congress has enacted. We begin, as always, with the language of the statute.”). But before we evaluate how the department applied the terms of each statute, it will be helpful to address the general scope of agency discretion in making grant awards.

The scope of an administrative agency's authority to award federal assistance funding depends on the specific terms of the authorizing statutes. “When Congress passes an Act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted.” *State Highway Comm'n of Missouri v. Volpe*, 479 F.2d 1099, 1107 (8th Cir. 1973), quoting *Stark v. Wickard*, 321 U.S. 288, 309-10 (1944). In the case of statutory earmarks and formula grants, for example, agencies have little or no discretion in making awards. By contrast, agencies are given considerable flexibility in making so-called discretionary grants. See generally GAO, *Principles of Federal Appropriations Law*, Vol. I, 3d ed., [GAO-04-261SP](#) (Washington,

D.C.: Jan. 2004), at 3-40 to 3-52. Some discretionary grant statutes require agencies to make awards on a competitive basis, while others do not.⁶ Agencies have greater (but not unlimited) flexibility in making noncompetitive grants. In such instances, it is well settled that where an agency does not have sufficient appropriations to fund all applicants for a program and the legislation does not establish priorities or guidance, the agency may, within its discretion, establish selection priorities, classifications, and/or eligibility requirements, so long as it does so on a rational and consistent basis. *Id.* at 3-49 to -52. However, “in such a case the agency must, at a minimum, let the standard be generally known so as to assure that it is being applied consistently and so as to avoid both the reality and appearance of arbitrary denial of benefits to potential beneficiaries.” *Morton v. Ruiz*, 415 U.S. 199, 231 (1974).⁷

⁶See, e.g., GAO, *Welfare Reform: Competitive Grant Selection Requirement for DOT's Job Access Program Was Not Followed*, [GAO-02-213](#) (Washington, D.C., Dec. 7, 2001). Even where not required by statute, some agencies have established competitive grant award procedures as a matter of policy. See, e.g., GAO, *Discretionary Grants: Further Tightening of Education's Procedures for Making Awards Could Improve Transparency and Accountability*, [GAO-06-268](#) (Washington, D.C., Feb. 21, 2006). Although the department has adopted the so-called agency “common rules” concerning the award and management of grants, see 49 C.F.R. Part 18, the rules do not address the issues raised here.

⁷The *State Highway Comm'n of Missouri v. Volpe* case cited above illustrates a range of the department's discretion in making grant awards. The court found there that the Federal-Aid Highway Act provided the department with no discretion to withhold highway grant funds from states once funds had been apportioned by statutory formula, but did provide the department with discretion, as constrained by statutory eligibility and selection criteria, to approve or disapprove which specific state-proposed projects would receive that funding. The court rejected the department's argument that it had discretion to hold back the funds as a means of carrying out administration policy, noting that “[i]t is impossible to find . . . discretion . . . to withhold approval on projects . . . because of a system of priorities the Executive chooses to impose on all expenditures.” *Id.* at 1114. As the court explained:

“The issue before us is not whether the Secretary abused his discretion in [withholding funds] but whether the Secretary has been delegated any discretion to so act in the first place. . . . [T]he Secretary [does not possess] unfettered discretion as to when and how the monies may be used. The Act circumscribes that discretion and only an analysis of the statute itself can dictate the latitude of that discretion. . . . It should require no citation of authority to reaffirm the proposition that the Secretary's authority is limited to carrying out the law according to its terms. . . . As has been observed, “[a]n agency may not finally decide the limits of its statutory power.”

479 F.2d at 1106-07, 1109, 1124 (citation omitted) (emphasis added).

In cases where the authorizing statute provides discretion, agencies are deemed to act within their authority as long as there is a rational basis for their decisions and their acts are not “arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A); see *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971). Under this standard, courts look to whether the agency’s decision was “based on a consideration of the relevant factors and whether there has been a clear error in judgment.” *Overton Park*, 410 U.S. at 416. Although the factual inquiry is to be “searching and careful” and there must be a “thorough, probing, in-depth review,” the ultimate standard of review “is a narrow one.” *Id.* at 415-16. See, e.g., *City of Grand Rapids v. Richardson*, 429 F. Supp. 1087, 1094-95 (W.D. Mich. 1977) (denying request to halt grant awards based on allegations of vague and unpublicized eligibility criteria; while court was “tremendously sympathetic” to the losing applicant, “the Court cannot say that the agency committed error, abused its discretion or acted arbitrarily or capriciously within the meaning of . . . *Overton Park*,” nor did agency violate “elementary fairness”).

One other introductory point is relevant before reviewing the department’s use of congestion pricing in awarding grants under the 9 programs. As a general rule, section 301 of Title 23 of the U.S. Code *prohibits* the imposition of tolls on all roads, highways, bridges, tunnels, and other transportation facilities constructed with federal funds.⁸ Thus in our view, the department could not use any form of tolling, such as congestion pricing, as a selection factor for a grant—whether made under Title 23 (FHWA and Research and Innovative Technology Administration grants) or Title 49 (Federal Transit Administration grants)—if the tolling that was the basis of the grant’s “priority” was prohibited by section 301. Congress has enacted a number of exceptions to the tolling ban, however,⁹ and the department has confirmed that all of the tolling, specifically congestion

⁸Section 301 provides, “Except as provided in section 129 of this title with respect to certain toll bridges and toll tunnels, all highways constructed under the provisions of this title shall be free from tolls of all kinds.” “Highway” is defined to include a road, street, or parkway; a bridge, tunnel, right-of-way, or other facility in connection with a highway; and the portion of any interstate bridge or tunnel or approach paid for by a state. 23 U.S.C. § 101(a)(11).

⁹As relevant here, tolling is permitted on certain interstate and noninterstate highways, bridges, and tunnels and certain ferry boats, terminals, and approaches; see 23 U.S.C. § 129(a)-(c). In addition, states and localities are authorized to toll facilities participating in certain pilot programs such as the Value Pricing Pilot Program discussed below, see 23 U.S.C. § 149 note, and, as of 2005, high-occupancy-vehicle (HOV) lanes that are converted to high-occupancy-toll (HOT) lanes; see 23 U.S.C. § 166.

pricing, activity supporting the grants at issue qualified under one or more of these exceptions. October 2008 DOT Letter at 15-16.

Bus and Bus Facilities Program

Using congestion pricing as a priority selection factor, the department awarded grants under the Bus and Bus-Related Facilities Capital Investment Grants (Bus and Bus Facilities) program to all five urban partners—New York City, San Francisco, Minneapolis, Seattle, and Miami—and to San Diego, which was not designated as an urban partner. The total funding was \$433 million, the single largest amount allocated to the 10 programs at issue and fully half of the \$866 million awarded under all of these programs. Under the Bus and Bus Facilities program, the department “may make grants . . . to assist State and local governmental authorities in financing capital projects to replace, rehabilitate and purchase buses and related equipment and to construct bus-related facilities . . .” 49 U.S.C. § 5309(b)(3). The only explicit direction in the statute concerning the selection of grantees is that the department “shall *consider* the age and condition of buses, bus fleets, related equipment, and bus-related facilities.” 49 U.S.C. § 5309(m)(8) (emphasis added). The department is required only to “consider” this factor, however, not to give it priority.

The statute also authorizes the department to make bus grants subject to “*terms, conditions, requirements, and provisions that the Secretary determines to be necessary or appropriate for the purposes of this section.*” 49 U.S.C. § 5309(c)(3) (emphasis added). In the department’s view, this provision, combined with the absence of mandatory selection criteria, underscored its “broad discretion” to use congestion pricing as a selection factor, because the statute leaves to the department’s judgment what conditions are “necessary” or “appropriate” to achieve “the purposes of this section.” April 2008 DOT Letter at 7. Requiring congestion pricing as a selection factor for bus grants was “necessary” or at least “appropriate,” in the department’s judgment, because motorists who are priced off the roads by congestion pricing will need greater mass transit options. Requiring congestion pricing also was consistent, in the department’s judgment, with the general policies, findings, and purposes of the public transportation statute, such as development of “improved public transportation . . . techniques,” 49 U.S.C. § 5301(f), which the department believes would include an integrated congestion management system of which congestion pricing is a component. As the department also notes, Congress has found that

“[the] welfare and vitality of urban areas, the satisfactory movement of people and goods within those areas, and the effectiveness of programs aided by the United States

Government are jeopardized by deteriorating or inadequate urban transportation service and facilities, *the intensification of traffic congestion*, and the lack of coordinated, comprehensive, and continuing development planning . . .,”

Id. § 5301(b)(2) (emphasis added). Congress therefore has declared that

“[it is] in the interest of the United States . . . to foster the development and revitalization of public transportation systems that—(1) maximize the . . . efficient mobility of individuals; (2) minimize environmental impacts; and (3) minimize transportation-related fuel consumption . . .”

Id. § 5301(a) (emphasis added); see October 2008 DOT Letter at 7. The department's judgment is that congestion pricing supports all three of these goals, and that one of these, mobility, will enhance the effectiveness of the bus transportation system.¹⁰

We conclude that the department acted within its discretion in using congestion pricing as a priority selection factor for the fiscal year 2007 Bus program grants. Courts have found that language very similar to that in the Bus program statute provides agencies with broad discretion in awarding grants so long as the agency complies with any specific statutory directives. The court in *Pullman Inc. v. Volpe*, 337 F. Supp. 432 (E.D. Pa. 1971), for example, addressed the predecessor statute to the precise Bus program provision at issue here.¹¹ The court held that the provision, authorizing the department to include in public transit capital investment grants “*such terms and conditions as [the Secretary] may prescribe*,” see 337 F. Supp. at 438, provided broad discretion to fulfill broad congressional purposes such as to “encourage the planning and

¹⁰ The department notes as well that while the Bus program provision of 49 U.S.C. § 5309(b)—authorizing the department to make grants to “replace, rehabilitate and purchase buses and related equipment and to construct bus-related facilities”—does not have a specific statutory tolling requirement, another clause in the Capital Investment Grants statute—49 U.S.C. § 5309(c)(1)(A)—prohibits the department from approving any grant unless the department “determines that the project is part of an approved transportation plan and program of projects under 49 U.S.C. § 5303,” which, in turn ties in to congestion reduction. April 2008 DOT Letter at 6-7. The department states that using tolling as a selection factor for bus grants “is fully consistent with” the requirements of 49 U.S.C. § 5303, including section 5303(k)(3)'s requirement that transportation planning in large cities address “congestion management” through Title 23 (highway) grant projects involving “travel demand reduction and operational management strategies” such as the 4Ts. April 2008 DOT Letter at 7.

¹¹ *Pullman* involved section 3(a) of the Urban Mass Transportation Act of 1964, Pub. L. No. 88-365, formerly codified at 49 U.S.C. § 1602(a).

establishment of areawide urban mass transportation systems needed for economical and desirable urban development, with the cooperation of mass transportation companies both public and private . . .” See Pub. L. No. 88-365, sec. 2(b)(2), 78 Stat. 302, 303 (July 9, 1964). The court found that while the department did not have complete discretion—in selecting grantees, for example, it had to make a number of statutory findings—the “such terms and conditions” provision authorized the department to

“determine[] the procedure to be applied and the grants to be made. Within those limitations the statute is permissive, provides only the broadest conceptual guidelines for action, and requires highly developed expertise in the determination of the conditions under which the grant of assistance will fulfill the broad congressional purposes.”

Id. at 438. *Pullman* therefore upheld as within the department’s broad discretion a grant condition requiring the local applicant to use competitive bidding for any subcontracts and to determine bid responsiveness. The court found this requirement “consistent with the statute’s encouragement of local responsibility in urban mass transportation” and thus an appropriate exercise of the department’s discretion. *Id.*

Like the department’s grant condition in *Pullman*, the department’s congestion pricing grant condition here is consistent with the overarching objectives of the Bus statute—to provide a public transportation system that maximizes mobility and minimizes environmental impacts and transportation-related fuel consumption. While the *Pullman* statute arguably afforded even greater discretion (it allowed the department to impose “such terms and conditions as [the Secretary] may prescribe,” while the current statute authorizes the department to set “terms [and] conditions . . . that the Secretary determines to be necessary or appropriate for the purposes of this section”), and while congestion pricing may not be strictly “necessary” for 49 U.S.C. § 5309(c)(3) purposes to achieve the objectives of the bus statute—a well-functioning bus system does not “need” congestion pricing; congestion pricing “need”s a well-functioning bus system—we agree with the department that congestion pricing is at least “appropriate” to achieve the larger statutory purposes. See *Town of Secaucus v. DOT*, 889 F. Supp. 779, 789 (D.N.J. 1995) (upholding grant award for construction of strengthened foundation underlying mixed public transportation hub/commercial development because project would “enhance the effectiveness of a mass transportation project”); B-160204, Dec. 7, 1966 (GAO approval of grants to purchase city buses used occasionally for charter service in off-peak hours, because buses were needed for “an efficient and coordinated mass transportation

system”); *see generally State Highway Comm'n of Missouri v. Volpe*, above, 479 F.2d at 1112 (a statute “should be construed according to its subject matter and the purpose for which it was enacted.”). Other grant statutes with similarly broad language have been found to provide broad agency discretion. *See, e.g., Illinois Environmental EPA v. USEPA*, above, 947 F.2d at 291 (authority to make grants “upon such terms and conditions . . . necessary to carry out the purpose” of Clean Air Act provision should be read broadly; grant statute’s purpose was to implement air quality standards within states); *LEAA*, above, 605 F.2d 21, 22, 27 (1st Cir. 1979) (authority to make grants “according to the criteria and on the terms and conditions the Administration determines consistent with this chapter” provided “large discretion”).

Ferry Boat Program

Using congestion pricing as a priority selection factor, the department awarded grants totaling \$40.2 million under the Ferry Boat grant program to urban partners New York City, San Francisco, and Seattle. The department is authorized to award grants under this program for construction of ferry boats and ferry terminal facilities in accordance with eligibility criteria in 23 U.S.C. § 129(c), *see* 23 U.S.C. § 147(a), and priority selection criteria in 23 U.S.C. § 147(c). Regarding the latter, the statute requires the department to give priority in the allocation of funds

“to those ferry systems, and public entities responsible for developing ferries, that—(1) provide critical access to areas not well-served by other modes of surface transportation; (2) carry the greatest number of passengers and vehicles; or (3) carry the greatest number of passengers in passenger-only service.”

23 U.S.C. § 147(c).

Although congestion pricing is not explicitly identified as a priority selection factor, the department believes it had discretion to apply congestion pricing as a discriminating or “tie-breaking” factor to select among otherwise equally qualified applicants, because congestion pricing is rationally related to the purposes of the Ferry Boat program. April 2008 DOT Letter at 6, 9. The department reasons that Congress’s decision to give priority to ferry systems that carry the greatest number of passengers and vehicles reflects congressional support for increasing mobility and reducing congestion. *Id.* at 6, note 1; *see also id.* at 8-9 (tolling and congestion pricing are consistent with the department’s core mission focusing on “mobility, safety, efficiency, convenience, and economic growth.”); October 2008 DOT Letter at 9 (congestion pricing will shift passengers from cars to ferries, maximizing “social yield” on the federal government’s investment). The department therefore used congestion

pricing to select among applicants qualifying under one or more of the statutory priorities.

We agree that the department had discretion to use congestion pricing as a discriminating factor among equally qualified applicants based on the rational connection between congestion pricing, mobility, and congestion. However, the department did not have authority to override the statute by, for example, rejecting applicants that lacked congestion pricing but met one or more statutory priorities in favor of urban partners that had congestion pricing but met no statutory priorities. The department's initial technical evaluation documentation for the fiscal year 2007 Ferry Boat grant awards suggested (incorrectly) that this occurred for one grant, Seattle's grant for the High-Speed, Ultra-Low Wake Passenger-Only Ferry project. According to the evaluation documentation, that project application "[d]oes *not* meet statutory priority selection criteria under 23 U.S.C. 147(c) of serving large number of passengers and vehicles, or large number of passengers in passenger-only service." (Emphasis added.) The department's technical evaluator rated the application as "qualified" rather than "highly qualified," in part because it did not "meet statutory preference criteria." The department nevertheless awarded a \$2 million grant for this project based on Seattle's urban partner status, passing over applications for at least 23 other projects from other jurisdictions that the department's technical evaluator determined met one or more of the statutory priorities.¹²

The initial technical evaluation was incorrect, however. As noted, the statute requires priority for "*ferry systems, and public entities* responsible for developing ferries"—not for individual projects—that carry the greatest number of passengers and vehicles, and the ferry system in Seattle carries the greatest number of passengers of all ferry systems in

¹²According to the department's technical evaluation forms, projects were proposed by non-urban partners that the evaluator determined met at least one of the statutory priorities in Alaska (3 projects), Connecticut (1 project), Florida (2 projects), Hawaii (1 project), Illinois (1 project), Kentucky (2 projects), Louisiana (2 projects), Massachusetts (3 projects), New York (1 project), Ohio (3 projects), the U.S. Virgin Islands (2 projects), and Virginia (2 projects).

the country (emphasis added).¹³ Thus all of the projects proposed by Seattle should have been rated as meeting at least one of the statutory priority criteria. October 2008 DOT Letter at 9-10. Yet the department evaluator apparently focused (incorrectly) on whether an individual project would carry the greatest number of passengers. October 2008 DOT Letter at 9.¹⁴

Equally important, the department told us that the Secretary did not rely on (or see) the technical evaluation forms for the Seattle High-Speed project (or any other project funded under the UPA initiative), but instead relied on other department officials' determinations that the recommended grants "comply or would comply with the statutory requirements of the FBD [Ferry Boat Discretionary] program," October 2008 DOT Letter at 10, which would have included the statutory priorities. Accordingly, despite the technical reviewer's error, the Secretary was within her discretion to apply congestion pricing as a discriminating factor and to select Seattle's High-Speed project for funding. See *Mass. Dep't of Correction v. Law Enforcement Assistance Administration*, 605 F.2d 21, 24-25 (1st Cir. 1979) (*LEAA*) (upholding grant decision despite errors in technical evaluation process; "[w]hatever was the case at the panel review level, LEAA's final decision did not rely on the discredited factors. It relied exclusively on [permissible factors] . . . [W]e do not believe these beginning errors sufficiently infected the entire process . . . to warrant setting aside a decision entrusted to LEAA's discretion.").

Transportation, Community,
and System Preservation
Program

Using congestion pricing as a priority selection factor, the department awarded grants under the TCSP program totaling \$50.4 million for projects by urban partners Minneapolis, San Francisco, and Seattle. Under the TCSP statute, enacted in 1998 as a "smart growth" initiative, the

¹³The ferry systems in Seattle, New York City, and San Francisco—the three urban partners that received Ferry Boat grants in fiscal year 2007—are the three largest in the country. In 2006, the Seattle system (Washington state, Kitsap Transit, and Pierce County) had 24.45 million passenger trips, the New York City system (New York City Department of Transportation, Port Authority of New York and New Jersey, and Metro North Ferry) had 22.28 million passenger trips, and the San Francisco system (Golden Gate, Vallejo, and Alameda) had 3.44 million passenger trips. The remaining top 10 ferry systems had between 1.93 million and 0.16 million passenger trips (Puerto Rico and Broward County, Florida, respectively). See FTA National Transit Database, 2006.

¹⁴The technical evaluator may have made additional errors, because he also determined that many of the other proposed individual projects *did* meet "the greatest number of passengers" factor, including another project in Seattle (Guemes Island Ferry Dock Repair).

department may award grants and other assistance to support local strategies that integrate transportation projects with community and system preservation “livability” plans and practices. The statute specifies broad eligibility criteria: grants may be awarded for any project under the federal-aid highway, bus, or transit-related programs or for “any other activity relating to transportation, community, and system preservation that the Secretary determines to be appropriate.” Pub. L. No. 109-59, sec. 1117(d), 23 U.S.C. §101 note (Aug. 10, 2005).¹⁵

The statute also requires the department to give “*priority consideration*” to applicants that meet specified criteria. *See id.* sec. 1117(e) (emphasis added). “Priority consideration” is not a defined term; Congress added it in 2005 when it converted TCSP from a pilot program to a permanent program. As originally enacted in 1998, the statute required the department to give selection “*priority*” to applicants meeting specified criteria.¹⁶ Thus, as under the Ferry Boat statute discussed above, the department did not have discretion under the TCSP pilot program to pass over applicants that met the “priority” criteria in favor of those that did not. In 2005, however, Congress added the word “consideration” after “priority.”¹⁷ The legislative history is silent on the reason for this change, but Congress must be presumed to have intended a meaning different from “priority,” as well as from mere “consider[ation],” which it used in the Bus statute as discussed above. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) (in construing a statute, courts must give effect, if possible, to every word Congress used). Thus at least in the context of grant selection criteria, it is possible

¹⁵The department also must ensure that there is an “equitable distribution” of TCSP funds to a diversity of populations and geographic regions. *Id.* sec. 1117(f).

¹⁶*See* Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, § 1221(c)(3) (June 9, 1998) (“*Criteria.*—In allocating funds made available to carry out this subsection, the Secretary shall give *priority* to applicants that [meet certain criteria.]”) (planning grants), (d)(2) (implementation grants)(same)(emphasis added). The department told us that primarily because of congressional earmarks, to date it has been able to award discretionary grants in only 3 of the program’s 10 years—the first 2 years (fiscal year 1999 and fiscal year 2000) and the year at issue here, fiscal year 2007. *See generally* FHWA, Transportation and Community and System Preservation Pilot Program, Third-Year Report (“*FHWA Third-Year Report*”) at 2 (noting grantee, federal program partner, and stakeholder groups’ concerns that the TCSP program’s intended focus was decreasing because of earmarks).

¹⁷*See* Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Pub. L. No. 109-59, § 1117(e) (Aug. 10, 2005) (“*Criteria.*—In allocating funds made available to carry out this section, the Secretary shall give *priority consideration* to applicants that [meet certain criteria.]”)(emphasis added).

Congress intended a sort of hierarchy—consideration, priority consideration, and priority—with priority requiring the greatest adherence to named criteria.

Relying on dictionary definitions of “priority” and “consideration,” since the terms are not defined in the statute, the department believes that “priority consideration” does not require the department to award funds to applicants that meet the criteria but “means only that the Secretary shall give the applicants that meet one or more of the criteria in section 1117(e) precedential or careful deliberation or thought before competing alternatives . . .” October 2008 DOT Letter at 13 (emphasis added).

We agree that the department likely is not required to select “priority consideration” candidates, because this was the meaning of “priority” before the statute was amended. But the department’s reading, as we understand it, is too narrow. The department appears to argue that it must simply give “careful deliberation” first to applicants that meet the criteria, then to “competing alternatives” applicants that do not meet the criteria, without giving substantive weight to the criteria themselves in selecting grant recipients. This process-oriented interpretation does not account for the fact that “priority” and “priority consideration” both appear in selection “*criteria*” provisions (see notes 16-17 above), not in selection process provisions. While a process-oriented interpretation has been recognized in a number of court decisions, it is used there as a specialized term—“a term of art in the jargon of federal employment law.” *Pope v. FCC*, 311 F.3d 1379, 1381 (Fed. Cir. 2002).¹⁸ Moreover, when the department analyzed the 1998 and 2005 statutes more contemporaneously, it read both “priority” and “priority consideration” as pertaining to

¹⁸As the Federal Circuit explained in *Pope* (involving whether a veteran’s preference candidate had been given the requisite priority consideration for an attorney position), “[i]n a nutshell, ‘priority consideration’ requires the deciding official [to] treat the priority candidate as ‘first in line, up or down’ . . . There of course is no assurance that a priority candidate will be picked for the open job, but there is assurance that the priority candidate will not have his application compared with the applications of others, and he is not in competition with others.” *Pope*, 311 F.3d at 1382. See also *Watts v. Carlson*, 854 F.2d 528 (Table), 1988 WL 81534 *2 (D.C. Cir. 1988) (unpublished opinion) (interpreting “priority consideration” in the context of federal employment litigation using dictionary definitions, the court found that “[t]he precedence conferred . . . related only to consideration, not selection. Watts was entitled to have his applications . . . considered prior to applications submitted by other candidates. The agreement did not guarantee that the consideration received would be entirely favorable, resulting in selection and promotion.”).

selection criteria, not selection sequence,¹⁹ and indeed, according to the department, this was how the fiscal year 2007 evaluations for TCSP grants were performed. The department reviewers considered whether applicants met priority consideration and other factors. Final selections were made applying congestion pricing as a discriminating factor.

In our view, the fact that Congress changed “priority” to “priority consideration” means the department was not bound to select applicants that met the “priority consideration” factors. Because Congress retained the phrase in the selection “criteria” provision, we also believe it relates to more than simply the timing of an applicant’s consideration. Congress singled out a class of candidates and mandated that the department give them special attention and a careful and bona fide review. Ultimately, however, the department had discretion to select applicants that were not in the “priority consideration” class, or to select among multiple applicants that were all in the class, based on other factors rationally connected to the objectives of the statute. Congestion pricing was a factor rationally related to the TCSP statute, in the department’s judgment, because the stated purpose of the statute is to support development and implementation of strategies to integrate transportation and community plans for addressing, among other things, improving the efficiency of the nation’s transportation system—which congestion pricing would help to achieve. October 2008 DOT Letter at 10-11; *see* Pub. L. No. 109-59, § 1117(b)(1). We agree that the department could use congestion pricing as a discriminating factor in selecting among otherwise qualified applicants.

The remaining issue is whether, before the department applied congestion pricing as a discriminating factor, it followed the statute and gave applicants that qualified for priority consideration (if any) the bona fide “hard look” that Congress required. The answer to this is not straightforward. Department officials told us they treated applications as qualifying for priority consideration if a candidate met just one of the five statutory criteria, and looked no further. As discussed below, we believe the better view is that the statute requires all five to be met. Because of the

¹⁹See FHWA, TEA-21 - Transportation Equity Act for the 21st Century, Fact Sheet, “Transportation and Community and System Preservation Pilot Program” (Sept. 14, 1998) (“*DOT TEA-21 Fact Sheet*”), available at www.fhwa.dot.gov/tea21/factsheets/t-c-sp.htm (last visited November 6, 2008); FHWA, Office of Legislation and Strategic Planning, Program Analysis Team, SAFETEA-LU, Fact Sheets on Highway Provisions, “Transportation, Community, and System Preservation Program” (Oct. 25, 2007) (“*DOT SAFETEA-LU Fact Sheet*”), available at www.fhwa.dot.gov/safetealu/factsheets/tcsp.htm (last visited Nov. 7, 2008).

department's one-factor approach, however, it is not possible to determine from the current record whether any of the applicants met all five factors. Even if no urban partner had satisfied all five criteria but some other applicants had done so, the outcome might not have changed. Because the department had discretion, once it gave bona fide consideration to priority consideration applicants, to make selections based on congestion pricing, its announced key factor, it could well be that the same urban partners would have been selected. It is also possible that having taken a hard look at "true" priority consideration candidates, the department would have selected applicants that were not urban partners instead. Given that the department had ultimate discretion to select nonpriority-consideration applicants, and that all TCSP grant funding has been obligated, we do not recommend re-evaluating the more than 500 project applications and possibly reawarding the fiscal year 2007 TCSP grants. Instead, the department should ensure that all future TCSP discretionary grant awards are carried out in accordance with the statute, that is, by giving priority consideration only to applicants that meet all five of the factors, for the reasons we now address.

Literally read, the statute requires that an applicant satisfy all five factors in order to qualify for priority consideration. The statute lists five factors,

with the last two joined by the word “and.”²⁰ The usual meaning of the word “and” is conjunctive—“and” means “and”—unless the context dictates otherwise. The presumption is that “and” is used in its ordinary sense. *See, e.g.*, *Reese Brothers v. United States*, 447 F.3d 229 (3d Cir. 2006); *Zorich v. Long Beach Fire Dep’t and Ambulance Serv.*, 118 F.3d 682, 684 (9th Cir. 1997). Overall, we believe the TCSP program’s context does not dictate otherwise. Several of the five factors have subparts, providing different ways in which an applicant can satisfy that factor, and these are separated by the word “or” rather than “and.” This shows that when Congress intended to provide alternatives, it did so. On the other hand, the five factors appear to overlap to some extent, for example in referring to environmental protection, arguably indicating that just one factor must be met. At least initially, however, environmental protection was one of the key aims of the TCSP program,²¹ and thus requiring that it be addressed in more than one area may be warranted. In addition, the second factor refers to applicants that “[h]ave *other* policies to integrate transportation, community, and system preservation practices,” arguably indicating this was intended as an alternative. In context, however, we read this as simply a way to describe one in a list of five factors requiring an applicant to have different types of plans, policies, and programs, to be

²⁰Pub. L. No. 109-59, § 1117(e) provides:

- “(e) Criteria.—In allocating funds made available to carry out this section, the Secretary shall give priority consideration to applicants that—
- “(1) have instituted preservation or development plans and programs that—
 - “(A) are coordinated with State and local preservation or development plans, including transit-oriented development plans;
 - “(B) promote cost-effective and strategic investments in transportation infrastructure that minimize adverse impacts on the environment; *or*
 - “(C) promote innovative private sector strategies;
 - “(2) have instituted other policies to integrate transportation, community, and system preservation practices, such as—
 - “(A) spending policies that direct funds to high-growth areas;
 - “(B) urban growth boundaries to guide metropolitan expansion;
 - “(C) ‘green corridors’ programs that provide access to major highway corridors for areas targeted for efficient and compact development; *or*
 - “(D) other similar programs or policies as determined by the Secretary;
 - “(3) have preservation or development policies that include a mechanism for reducing potential impacts of transportation activities on the environment;
 - “(4) demonstrate a commitment to public and private involvement, including the involvement of nontraditional partners in the project team; *and*
 - “(5) examine ways to encourage private sector investments that address the purposes of this section.”
- (Emphasis added).

²¹*See, e.g.*, DOT Press Release (Jan. 13, 1999) (describing TCSP as a program created “to help protect the environment and improve access to jobs, services, and the marketplace.”).

expected in a grant program focusing on planning rather than on construction.

The department states that because the five criteria are “stated in a wide-sweeping manner” and because of the “broad context of the entire TCSP statute” “with its inclusive purposes, wide eligibility requirements, and extensive criteria for priority consideration . . . it was logical to conclude that the applicants did not have to meet all five of the criteria . . .” October 2008 DOT Letter at 12-13. We believe these factors show the opposite. Given the extraordinary breadth of the eligibility requirements, it is logical that Congress would provide criteria for narrowing the pool, by specifying which applicants deserve special consideration. Only having to meet one of the criteria would undercut the very concept of “priority,” because virtually all applicants could satisfy one of these broad requirements.²²

The provision’s legislative history also supports the interpretation that all factors must be met. As noted, when Congress made the TCSP program permanent in 2005, it amended what were then two “priority” criteria provisions (one for planning grants, another for implementation grants). It combined them into a single provision and changed the requirement from the department having to give “priority” to having to give only “priority consideration.” At the same time, Congress amended the “purposes” provision from a list of five purposes joined by the word “and” to a list of roughly the same five purposes introduced by the term “one or more of the following.” *See* Pub. L. No. 105-178, sec. 1221(c)(2) (1998 statute), Pub. L. No. 109-59, sec. 1117(b) (2005 statute). Despite all of these changes, Congress retained the “and” in the list of priority consideration factors.

²²The department cites *Action for Boston Community Development, Inc. v. Shalala*, 136 F.3d 29 (1st Cir. 1998), and *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979), to show that “and” can mean “or” based on context. We agree, but the holdings of those cases do not support the department’s position. *Reiter* held that “or” in the Clayton Act means “or,” and thus supports our interpretation of the TCSP statute. *Boston Community Development* held that “and” means “or” but for reasons not applicable here. The case involved a challenge by a Head Start provider to the non-renewal of its grant by the Department of Health and Human Services (HHS) under a statute giving long-time providers priority unless HHS finds they “fail[] to meet program, financial management, and other requirements established by the Secretary.” 136 F.3d at 31 (emphasis added). The court held that “and” meant “or” because otherwise, HHS would have to renew the grant unless the provider failed in *all* respects, potentially endangering young children. The court also focused on the catch-all “and other requirements,” a virtually limitless list of standards that a provider would have to fail before HHS could terminate. The result is the opposite for TCSP, where the public interest favors priority for those who achieve *more* of the program’s purposes, not fewer, and where there is no similar catch-all language.

This suggests that “and” was intentional, not a drafting oversight. The fact that Congress was amending the statute to require only priority consideration rather than priority also supports this reading—once the department had this additional selection discretion, it would make the provision be virtually meaningless if only one of the five factors had to be met.

The overall purpose of the program and the department’s historic descriptions of it also support the reading that all five factors must be met. The TCSP program was established as a counterpoint to traditional transportation grant programs that focus on new construction as a way to improve mobility, without necessarily considering the effect on surrounding communities and the environment. The TCSP program was intended to encourage communities to think more strategically and to integrate their transportation planning with community and regional economic planning. As the department has noted on many occasions, the TCSP program is intended to address the relationships among transportation, community, and system preservation plans and practices—the so-called land use/transportation link²³—and to encourage the “use [of] transportation to build livable communities.”²⁴ Giving priority to applicants that meet all five factors supports this purpose by rewarding those that integrate the greatest number of activities. The department itself has recognized this focus on integration in numerous descriptions of the TCSP program, literally underlining the “and” between the final two priority

²³See, e.g., FHWA, Office of Legislation and Intergovernmental Affairs, Program Analysis Team, “Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users—A Summary of Highway Provisions,” at 16-17 (Aug. 25, 2005); 63 Fed. Reg. 49632, 49633 (Sept. 16, 1998); 64 Fed. Reg. 25098, 25099-25101, 25103 (May 10, 1999).

²⁴FHWA, Transportation and Community and System Preservation Pilot Program, First-Year Accomplishments (“*FHWA First-Year Report*”); *FHWA Third-Year Report* at 3-4 (same), 12 (“while maintaining highway mobility is important, we can no longer ‘build’ our way out of traffic congestion.”), 19 (“Rather than simply being perceived as the ‘highway builder,’ TCSP allows the department to introduce transportation design and investment policies as a legitimate—and important—component of community preservation activities . . . bringing a more wholistic [sic] approach”).

factors and emphasizing that it will give priority to applicants that meet all five program purposes (which roughly mirrored the priority factors).²⁵

Finally, the conjunctive “and” should be interpreted as a disjunctive “or” only to avoid an incoherent reading of the statute or a reading that leads to an irrational result. *Sosa v. Chase Manhattan Mortgage Corp.*, 348 F.3d 979, 983 (11th Cir. 2003); *OfficeMax v. United States*, 428 F.3d 583, 589 (6th Cir. 2005). Reading these factors as conjunctive would not lead to such a result, however, because an applicant can meet all five factors. The department demonstrated this in recent discussions by outlining how it believes the TCSP projects funded for Seattle, Minneapolis, and San Francisco could have met all of the five factors.

Value Pricing Pilot Program

Using congestion pricing as a priority selection factor, the department awarded grants totaling \$20 million under the Value Pricing Pilot program to urban partners Minneapolis, New York, San Francisco, and Seattle. Under this program, the department is authorized to fund cooperative agreements with up to 15 state and local governments to “establish, maintain and monitor value pricing programs,” Pub. L. No. 109-59, sec. 1604, 23 U.S.C. § 149 note, and Value Pricing Pilot projects may include tolling and other forms of congestion pricing on federally funded highways.

²⁵See, e.g., *DOT TEA-21 Fact Sheet*, above (paraphrasing five priority factors in section 1221(d)(2)(B) and underlining “and” between last two factors); *DOT SAFETEA-LU Fact Sheet*, above (paraphrasing five priority selection factors in section 1117(e) and using “and” between last two factors); *TCSP Additional Information* (Attachment 1 to Mar 22, 2007 FHWA Associate Administrator Memorandum re Information: TCSP Request for Fiscal Year 2007 Grant Applications) (stating for “Selection Criteria” that “[a]ctivities funded under the TCSP Program must address and integrate *each* of the purposes of the program”) (emphasis added); 63 Fed. Reg. 49632, 49634, 49637, *but see id.* at 49635 (Sept. 16, 1998) (same; “If a proposal does not address one or more purposes, the applicant must clearly state why *each* purpose was not addressed. Priority will be given to those proposals which clearly and comprehensively meet and integrate the greatest number of purposes”) (emphasis added); 64 Fed. Reg. 25098, 25104, 25106, 25112 (May 10, 1999) (“The panel looked for proposals that . . . specifically address[ed] *each* of these [TCSP purposes]. In some cases, a proposal would indicate that if congestion were reduced that would also increase access to jobs [but] [t]he panel looked for more proactive solutions”) (emphasis added); 64 Fed. Reg. 63366, 63369 (Nov. 19, 1999) (same); 65 Fed. Reg. 55317, 55318, 55322 (Sept. 13, 2000) (same); *FHWA First-Year Report* (“The emphasis . . . is on strategies that meet *all* of these objectives rather than just one or two. TCSP is not simply an economic development or environmental preservation program. Instead, projects should search for ways to reconcile transportation system performance, infrastructure costs, economic needs, and environmental impacts.”) (emphasis added).

Intelligent Transportation
System-Operational Testing to
Mitigate Congestion Program

We conclude that the department had authority to use congestion pricing as a priority selection factor. Because the very purpose of the program is to fund congestion pricing and tolling pilot projects, congestion pricing clearly was a permissible selection factor.

Using congestion pricing as a priority selection factor, the department awarded grants under the Intelligent Transportation System-Operational Testing to Mitigate Congestion (ITS-OTMC) program totaling \$89 million to urban partners New York City, Seattle, Minneapolis, and San Francisco, and \$3 million to San Diego, which is not an urban partner. Under this program, the department is authorized to fund grants to cities to carry out comprehensive programs of intelligent transportation system research, development, and operational testing. *See* Pub. L. No. 109-59, §§ 5201, 5306 (Aug. 10, 2005), 23 U.S.C. § 512 note. The grant statute requires the department to give “*higher priority*” to funding program projects that, among other things

“(1) *enhance mobility and productivity through improved traffic management . . . [and] toll collection . . . ; (2) utilize interdisciplinary approaches to develop traffic management strategies and tools to address multiple impacts of congestion concurrently; [and] . . . (3) address traffic management . . . [or] toll collection* traveler information with goals of . . . *reducing metropolitan congestion by not less than 5 percent by 2010 . . .*”

Pub. L. No. 109-59, sec. 5306(b) (emphasis added).

Because the statute specifically requires the department to give higher priority to projects that enhance mobility through toll collection, and focuses on reducing congestion—a goal that the department’s expert judgment, is facilitated and enhanced by congestion pricing—the department was clearly authorized to use congestion pricing as a priority selection factor in awarding these grants.

New Fixed Guideway Facilities
Program (Very Small Starts)

Using congestion pricing as a priority selection factor, the department awarded a total of \$112.7 million in grants to urban partner New York City under the New Fixed Guideway Facilities (New Starts) program.²⁶ The funding consisted of a series of individual grants, each for less than \$25

²⁶A fixed guideway is any transit service that uses exclusive or controlled rights of way or rails, such as light and heavy rails, commuter rails, automated fixed guideway systems such as “people movers,” and busway/HOV lanes.

million, thus qualifying as Very Small Starts grants. October 2008 DOT Letter at 4-5.

Under the general New Starts program, the department may award grants “only if the Secretary, based on evaluations and considerations set forth in paragraph (3), determines that the project is [among other things] . . . justified based on a comprehensive review of its mobility improvements, environmental benefits, [and] cost effectiveness,” *see* 49 U.S.C. § 5309(d)(2)(B). In making this determination, the department must evaluate, among other things, “(i) congestion relief; (ii) improved mobility; (iii) air pollution; (iv) noise pollution; [and] (v) energy consumption,” *see* 49 U.S.C. § 5309(d)(3)(D), as well as “other factors that the Secretary determines to be appropriate to carry out this subsection,” 49 U.S.C. § 5309(d)(3)(K). The department has identified these “other factors” as including congestion management/pricing strategies. *See* 72 Fed. Reg. 17981, 17982 (Apr. 10, 2007); 72 Fed. Reg. 30907, 30913 (June 4, 2007).

By contrast, grants made under the Very Small Starts program—a subset of the New Starts program—are not currently subject to these or any other specific selection criteria.²⁷ The department therefore had discretion to use selection criteria rationally connected to achieving the purposes of the statute. The department states that it looked to the above New Starts selection criteria for guidance in exercising this discretion, October 2008 DOT Letter at 5, and in the department’s judgment, congestion-pricing measures meet several of the New Starts selection factors. Congestion pricing reduces congestion by creating a price incentive for motorists to keep off the roads in the most congested times of day and to use public transit alternatives. Less congestion, in turn, improves mobility, reduces environmental pollution, and reduces fuel consumption. October 2008 DOT Letter at 5; *see also* Department of Transportation, *Fight Gridlock Now*, available at www.etc.dot.gov (accessed Nov. 14, 2008).

We conclude that the department had authority to use congestion pricing as a priority factor in making these Very Small Starts grants. Based on the department’s technical expertise in traffic management, we give deference

²⁷The New Starts selection criteria do not apply to grants for less than \$25 million until certain regulations have been finalized. *See* 49 U.S.C. § 5309(3)(1)(B). Although the department has proposed regulations, it has not finalized them because of appropriations act restrictions. *See, e.g.*, Transportation, Housing and Urban Development, and Related Agencies Appropriations Act, 2008, Pub. L. No. 110-161, sec.170, 121 Stat. 2401 (Dec. 26, 2007).

to the department's position that congestion pricing supports and enhances the achievement of several of the selection factors for this program—reduced congestion, increased mobility, and reduced pollution.

Innovative Bridge Research and Deployment Program

Using congestion pricing as a priority selection factor, the department awarded grants totaling \$5.1 million under the Innovative Bridge Research and Deployment program to urban partner Seattle. Under this program, the department is authorized to award grants to “promote, demonstrate, evaluate, and document the application of innovative designs, materials, and construction methods in the construction, repair, and rehabilitation of bridges and other highway structures.” 23 U.S.C. § 503(b)(1). The department is required to “select and approve” grants for this program “based on whether the project . . . meets the goals of the program described in paragraph (2).” *Id.* § 503(b)(3)(B). Paragraph (2) provides a nonexclusive list of the program's goals; it states that “[t]he goals of the program shall *include*” eight different objectives, *id.* § 503(b)(2), none of which is to reduce congestion or increase the use of congestion pricing. Although congestion pricing is not explicitly identified as a selection factor, the statute affords the department discretion to use congestion pricing as a selection factor provided congestion pricing is rationally related to the program's objectives. The statute's use of the term “include” indicates that the list of goals was nonexclusive. *Puerto Rico Maritime Shipping Authority v. I.C.C.*, 645 F.2d 1102, 1112 (D.C. Cir.1981); *Adams v. Dole*, 927 F.2d 771, 776 (4th Cir. 1991). The department suggests that the statutory objective in 23 U.S.C. § 503(b)(2)(B) to reduce “traffic congestion” supports the use of congestion pricing, see April 2008 Letter at 6, October 2008 Letter at 14, although this objective only pertains to congestion during bridge construction. In our view, an even stronger nexus is that congestion pricing would help achieve some of the policies of the national transportation system reflected in the federal aid highway program: “(i) national and interregional personal mobility (including personal mobility in rural and urban areas) and reduced congestion; [and] (ii) flow of interstate . . . commerce and freight transportation . . .” *Id.* § 101(b)(3)(C).

Interstate Maintenance Discretionary Program

Using congestion pricing as a priority selection factor, the department awarded grants totaling \$50 million under the Interstate Maintenance Discretionary grant program to urban partners Miami and Minneapolis. Under this program, federal set-aside funds are available “for resurfacing, restoring, rehabilitating, and reconstructing any route or portion thereof on the Interstate System . . . and any toll road on the Interstate System” not subject to certain agreements. 23 U.S.C. § 118(c)(1). The statute requires “priority consideration” of applicants proposing maintenance on high-cost

(above \$10 million), high-volume (urban high-volume, or rural high-truck-volume) routes. 23 U.S.C. § 118(c)(3).

Although congestion pricing is not an explicit priority selection factor, we conclude that the department had discretion to use it to discriminate among otherwise equally qualified applicants. Miami qualified for statutory priority consideration because it proposed a high-cost project on a high-volume route. Although Minneapolis may not have qualified for priority consideration (its grant was only for \$6.6 million), as discussed above under the TCSP program; nonetheless, the department could select Minneapolis based on congestion pricing if there was a rational nexus between congestion pricing and the Interstate Maintenance Discretionary program's objectives or the general federal aid highway objectives. As noted in discussing the Bridge program, this nexus exists with the federal aid highway goals of mobility and reduced congestion; the Bridge program priority for high-volume and urban routes also reflects a mobility focus that would be enhanced by congestion pricing. See April 2008 DOT Letter at 6. We therefore conclude the department had discretion to use congestion pricing as a factor.

Public Lands Highway Discretionary Program

Using congestion pricing as a priority selection factor, the department awarded a \$47.3 million grant under the Public Lands Highway Discretionary program to urban partner San Francisco. Under this program, which improves access to and within public lands, the department must allocate a portion of annual authorized funding on the basis of state need "as determined by the Secretary," and in making this allocation, the Secretary is required to "give preference" to projects that are "significantly impacted by Federal land" and "resource management activities that are proposed by a State that contains at least 3 percent of the total public land in the United States." 23 U.S.C. § 202(b)(1)(A), (B) (emphasis added). San Francisco met these preference criteria because California has at least 3 percent of U.S. public lands and San Francisco's proposed grant project (either on the Golden Gate Bridge or Doyle Drive) was deemed "significantly impacted" based on location, traffic volumes, and access to the public land. According to a department official, the department then applied congestion pricing to select San Francisco from among the "preferred" applicants.²⁸

²⁸San Francisco has since removed the congestion-reduction aspects of its grant project, Doyle Drive, but the department has retained this grant under San Francisco's UPA because the other grants under the agreement include congestion-reduction components.

There is no explicit basis in the Public Lands grant statute to use congestion pricing as a discriminating factor, and the department acknowledges that there is not a specific congestion-reduction or mobility component “associated with” the Public Lands program. April 2008 DOT Letter at 6. Nonetheless, there was a rational nexus between congestion pricing and program objectives. As the department notes, congestion pricing will provide California with additional funds, “thereby leveraging the federal investment,” and congestion pricing “is reasonably expected to reduce emissions.” April 2008 DOT Letter at 6; October 2008 DOT Letter at 3-4. Furthermore, as with the other federal-aid highway program grants discussed above, congestion pricing supports the general program goals of mobility and reduced congestion. Thus we believe the department had discretion to use congestion pricing as a factor in awarding this grant.

Appendix VI: GAO Contacts and Staff Acknowledgments

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