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Decision

Matter of: Denali Commission—Transfer of Funds Made Available through the Federal Transit Administration's Appropriations

File: B-319189

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DIGEST

Agencies are prohibited from transferring funds absent statutory authority. 31 U.S.C. § 1532. The Secretary of Transportation has specific statutory authority to transfer to the Denali Commission (Commission) funds appropriated to the Federal Transit Administration (FTA) for capital projects. These transfers should not be made using Economy Act agreements. Delays in the transfer of the funds from FTA to the Commission did not constitute deferrals under the Impoundment Control Act of 1974. Funds made available to the Commission from funds appropriated to FTA become available for obligation by the Commission when the Department of the Treasury transfers the funds to the Commission's appropriation account.

DECISION

The Inspector General (IG) of the Denali Commission (the Commission) has requested our decision concerning the transfer of funds appropriated to the Department of Transportation, Federal Transit Administration (FTA) for the Denali Commission for fiscal years 2006 through 2008. Letter from the Inspector General, Denali Commission, to the Managing Associate General Counsel, GAO, Dec. 20, 2009 (Request Letter). The IG questions, in particular, the propriety of using an Economy Act agreement to transfer these funds from FTA to the Commission. *Id.*, at 4. The IG also complains that delays in the transfers of the funds, ranging from 10 months to more than 2 years after the appropriation to FTA, could defeat the congressional intent of the funding and constitute "*de facto* deferrals." *Id.* Finally, the IG asks for clarification on when the funds should be recognized by the Commission as being received and available for obligation. *Id.*

For the reasons explained more fully below, we conclude that the transfers of the funds were not Economy Act transactions and in the future should not be effected by an interagency agreement (IAA). Rather, the transfers are more accurately

characterized as nonexpenditure transfers. The delays in the transfer of the funds from FTA to the Commission do not constitute deferrals under the Impoundment Control Act of 1974. The funds become available to the Commission once the Department of the Treasury (Treasury) transfers them from FTA's appropriation account to the Commission's appropriation.

Our practice when issuing decisions and opinions is to obtain the views of the relevant agencies to establish a factual record and to establish the agencies' legal positions on the subject matter of the request. GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), available at www.gao.gov/legal/resources.html. The record in this case consists of the IG's request letter and FTA's response to written questions posed by our office. Letter from Chief Counsel, FTA, to Assistant General Counsel for Appropriations Law, GAO, June 4, 2010 (FTA Letter). We also interviewed officials from the Department of the Treasury's Financial Management Service (FMS) regarding the procedures for effecting interagency transfers under the facts here. Telephone Conversation with FMS officials, June 5, 2010 (Telephone Conversation of June 5).

BACKGROUND

Congress established the Denali Commission as a federal agency in the Denali Commission Act of 1998. Pub. L. No. 105-277, §§ 301-309, 112 Stat. 2681-637 to 2681-641 (Oct. 21, 1998). The Commission operates exclusively in the state of Alaska for the purposes of, among other things, delivering the services of the federal government in the most cost-effective manner practicable by reducing administrative and overhead costs. *Id.* § 302. One way in which the agency carries out its purpose is to make grants to implement specific projects in rural Alaska. See Request Letter, at 3.

FTA is authorized to make capital investment grants to assist state and local governmental authorities in financing various capital projects. 49 U.S.C. § 5309(b). Of the amounts appropriated to FTA's capital investment grant program, FTA is required to make a designated amount of funds available to the Commission. 49 U.S.C. § 5309(m)(6). Specifically, section 5309(m) of title 49 of the United States Code, "Allocating amounts," provides, in pertinent part:

"(6) Funding for ferry boats. . . . Of the amounts [made available or appropriated to FTA for capital investments grants] \$5,000,000 shall be available for each of fiscal years 2006 through 2010 . . . for payments to the Denali Commission under the terms of section 307(e) of the Denali Commission Act of 1998 (42 U.S.C. § 3121 note) for docks, waterfront development projects, and related transportation infrastructure."

Section 307(e) of the Denali Commission Act provides as follows:

“(e) Docks, waterfront transportation development, and related infrastructure projects.—The Secretary of Transportation is authorized to make direct lump sum payments to the Commission to construct docks, waterfront development projects, and related transportation infrastructure, provided the local community provides a ten percent non-Federal match in the form of any necessary land or planning and design funds. To carry out this section, there is authorized to be appropriated such sums as may be necessary.”

In appropriations acts for each of fiscal years 2006, 2007, and 2008, Congress specified that \$5,000,000 of FTA’s appropriation was to be available for the Denali Commission under FTA’s capital investment grant program.¹ In accordance with these appropriations provisions, FTA subsequently made payments to the Commission for each of those years, as follows:

- (1) Fiscal year 2006—payments made in two installments, one in July and one in November 2007. Request Letter, at 2;
- (2) Fiscal year 2007—payment made in September 2008. Request Letter, at 3;
- (3) Fiscal year 2008—payment made in January 2010. FTA Letter, at 1.

For fiscal years 2006 and 2007, FTA transferred the funds pursuant to an Economy Act agreement. The Economy Act provides that that the head of an agency may place an order with another agency for goods or services, if certain conditions are met. 15 U.S.C. § 1535(a). The IAAs provided that in exchange for the funds transferred, the Commission, as the performing agency, agreed to use the funds for authorized purposes. FTA Letter, at 3. The IAA also permitted FTA to monitor the Commission’s program implementation through quarterly progress and billing reports. *Id.* According to FTA, in February 2009, the Office of Management and Budget advised FTA that its transfers to the Commission should not be treated as Economy Act transactions. *Id.* Accordingly, the January 2010 IAA entered into for the purpose of transferring fiscal year 2008 funds references only 49 U.S.C. § 5309(m)(6) (quoted above) and the relevant appropriations legislation. *Id.*

¹ Transportation, Treasury, Housing and Urban Development, the Judiciary, and Independent Agencies Appropriations Act, 2006, Pub. L. No. 109-115, div. A, title I, 119 Stat. 2396, 2418 (Nov. 30, 2005); Revised Continuing Appropriations Resolution, 2008, Pub. L. No. 110-5, div. B, title I, § 101(9), 121 Stat. 8, 9 (Feb. 15, 2007); Transportation, Housing and Urban Development, and Related Agencies Appropriations Act, 2008, Pub. L. No. 110-161, div. K, title I, 121 Stat. 2375, 2398 (Dec. 26, 2007).

DISCUSSION

The first issue raised by the IG concerns FTA's use of the Economy Act to accomplish the transfers in question. We start with the basic principle that agencies are prohibited from transferring appropriated funds unless they have statutory authority to do so. 31 U.S.C. § 1532. Here, both section 307(e) of the Denali Commission Act and 49 U.S.C. § 5309(m)(6) provide FTA with authority to transfer the capital investment appropriations to the Commission. Moreover, the appropriations acts themselves also provide authority for the transfers. Although the Economy Act provides general authority for interagency transactions, it does not govern transactions carried out under other specific authorities such as those applicable to FTA. 31 U.S.C. § 1535. The Economy Act is inappropriate because FTA is not acquiring goods or services from the Commission. Instead, it is providing congressionally designated funding to another federal agency.

While FTA was correct in not treating the transfer of fiscal year 2008 funds as an Economy Act transaction, it nevertheless utilized an IAA to support the transfer. FTA believes our decision in B-303927, June 7, 2005, mandates its use of an IAA. In that decision, we concluded that the Department of Labor (DOL) had an obligation to monitor the use of funds awarded in the form of a grant to a nonfederal grantee. FTA reads this decision as imposing an obligation on it to "oversee the use of funds once transferred to the Commission" FTA Letter, at 2. FTA contends that it is accountable for the funds, and in order to ensure their proper use, an interagency agreement requiring the Commission to report to FTA was the appropriate instrument through which to make the transfer. FTA Letter at 2-3. We disagree.

We find the facts at issue here are distinguishable from those present in that case. There, DOL awarded funds to a non-federal entity. Here, the FTA appropriations provided funds to the Commission for a grant program, but quite properly, did not award a grant. Consequently, there is no grantor-grantee relationship between FTA and the Commission. Although it received the FTA funds, the Commission is another federal agency, not a state or local government or a private organization. The appropriations acts designated \$5 million for the Commission for each fiscal year. Nothing in the Denali Commission Act, FTA's authorizing legislation, or the appropriations acts requires FTA to monitor the Denali Commission's use of the funds or progress of projects. The Commission is an independent federal agency. As such it has responsibility to monitor its grant projects and ensure that funds are used properly, including the 10 percent nonfederal match. The Commission is well positioned to ensure the successful completion of projects in Alaska and is subject to Congressional oversight. In our view, Congress did not intend for FTA to monitor the use of the funds transferred to the Commission.

Because there is no exchange of goods or services between FTA and the Commission and no monitoring responsibilities for FTA with respect to the ultimate use of the funds, there is no need for the two agencies to enter into an IAA. According to Treasury, the appropriate mechanism for transferring the congressionally designated funding is through a nonexpenditure interagency transfer. A nonexpenditure transfer

transaction is defined as a transaction that does not represent payment for goods and services but serves only to adjust amounts available in accounts. 1 TFM 2-2020. This type of transfer may be effected without an IAA and is initiated by the agency receiving the appropriation, in this case FTA. *See* Telephone Conversation of June 5. The forms and procedures for using the nonexpenditure transfer system are set forth in section 2030 of the *Treasury Financial Manual*.

The IG also asks about the delay in receiving funds from FTA for fiscal years 2006, 2007, and 2008. The IG questions whether these delays may constitute a “*de facto* deferral.” Request Letter, at 3–4.

A “deferral of budget authority” under the Impoundment Control Act, is defined as:

“(A) withholding or delaying the obligation or expenditure of budget authority (whether by establishing reserves or otherwise) provided for projects or activities; or

“(B) any other type of Executive action or inaction which effectively precludes the obligation or expenditure of budget authority, including authority to obligate by contract in advance of appropriations as specifically authorized by law.”

2 U.S.C. § 682.

The Impoundment Control Act does not impose any specific requirements on the Executive Branch as to the rate at which budget authority must be obligated or expended. B-200685, Dec. 23, 1980. In order for there to be a violation, there must be sufficient evidence of an intention to refrain from obligating or expending available budget authority, based on the facts and circumstances present.² *Id.*

While there were delays in transferring the funds, these delays appear to have resulted from administrative issues and questions about effectuating the transfer of funds, not any intention to delay the obligation of the funds. In addition, FTA states that with respect to the most recent transfer, the Commission did not request the funds for fiscal year 2008 until August 2009. FTA Letter, at 1. While it is unclear whether preparation of the IAAs during these years contributed to any of the delays, we see no basis to conclude that any of the delays constituted a deferral under the Impoundment Control Act. In any event, we expect that, in the future, effecting the transfer as a nonexpenditure transfer, as discussed above, will expedite the process.

² The IG does not define what would constitute a *de facto* deferral. Because the term “deferral of budget authority” is specifically defined by statute, we have no basis to apply a different term, “*de facto* deferral of budget authority,” to these facts.

Finally, the IG asks for clarification as to when the funds transferred to the Commission are available for obligation. The FTA funds designated for the Commission are part of a large appropriation to FTA and are treated as a lump sum by Treasury. Telephone Conversation of June 5. For example, in fiscal year 2008, Treasury states that a single Treasury Account Symbol³ (TAS) was assigned for the lump sum of \$1,569,091,997 to FTA for capital investment grants despite the fact that the appropriation included earmarked funds to an enumerated list of entities and to the Denali Commission. *Id.* When Treasury transfers the funds to the Commission's appropriation account, the funds become available for obligation by the Commission. Prior to Treasury adjusting its accounts and thereby effectuating the transfer, the Commission may not obligate the funds. Thus, it may not enter into contracts or grant agreements in anticipation of receiving the funds. The Antideficiency Act would prohibit the Commission from overobligating funds in its account, regardless of whether it anticipates receiving funds in that account. *See* 72 Comp. Gen. 59 (1992).

CONCLUSION

Funds appropriated to FTA for the Denali Commission should be transferred to the Commission as a nonexpenditure transfer. FTA does not have an oversight role in administering the funds and should not delay transferring the funds in order to prepare an IAA to facilitate monitoring of their use. Funds become available to the Commission when Treasury transfers the funds to the Commission's account.



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Acting General Counsel

³ Treasury Account Symbols represent, by agency, and bureau (for miscellaneous receipts), individual appropriations, receipts, and other fund accounts. Agencies' appropriations and spending authorizations granted by Congress, with expenditures and receipts, are posted to these accounts. Agencies use account symbols to report to Treasury and the Office of Management and Budget. The Financial Management Service establishes or changes new appropriation account symbols derived from the annual appropriation bills. 1 TFM 2-2020.