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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Denali Commission—Authority to Receive State Grants

File: B-319246

Date: September 1, 2010

DIGEST

The Denali Commission does not have authority to accept grant funds from the state of Alaska that the state has designated for use for a particular purpose. The state grant constitutes a conditional gift because, as a condition of receipt, the Commission was required to award the grant to a particular organization for a particular project and then monitor it, thereby placing an obligation or duty on the Commission. Federal agencies may not accept conditional gifts unless specifically authorized by statute to do so. While the Denali Commission has authority to accept gifts, its gift acceptance authority does not extend to conditional gifts.

DECISION

The Inspector General of the Denali Commission (Commission) has requested a decision on whether the Commission may accept grant funds from the state of Alaska. The grant funds in question were provided to the Commission in 2007 for the interior build-out for a training facility on the Yuut Elitnaurviat campus in Bethel, Alaska. Letter from Inspector General, Denali Commission, to Managing Associate General Counsel, GAO, Dec. 8, 2009 (Request Letter). The Inspector General does not question the underlying legitimacy of the project, but asks whether the acceptance of state funding results in an improper augmentation of the Commission's appropriation. Request Letter, at 1–2. We conclude that the Commission lacked authority to accept the grant funds from the state of Alaska.

Our practice when issuing decisions or opinions is to obtain the views of the relevant agency to establish a factual record and to establish the agency's legal position on the subject matter of the request. GAO, *Procedures and Practices for Legal Decisions and Opinions,* GAO-06-1064SP (Washington, D.C.: Sept. 2006), *available at* www.gao.gov/legal/resources.html. In addition to the information provided by the Request Letter and supporting documentation, the Commission's Director of Administration provided written responses to our office. Letter from Director of

Administration, Denali Commission, to Assistant General Counsel for Appropriations Law, GAO, July 1, 2010 (Commission Letter). We also gathered information by interviewing Commission officials and examining documents provided by the Commission and the Inspector General.

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, and for the benefit of, the state of Alaska for the purposes of: (1) delivering federal services in the most cost-effective manner by reducing administrative and overhead costs; (2) providing job training and other economic development services in rural communities; and (3) promoting rural development, providing power generation and transmission facilities, modern communication systems, water and sewer systems and other infrastructure needs. *Id.* § 302. The Act provides further that the Commission "may accept, use, and dispose of gifts of services or property." *Id.* § 305(c).

By letter dated July 2, 2007, the State of Alaska Department of Commerce, Community and Economic Development (Department) notified the Commission that it "has been appropriated a [fiscal year] 2008 Designated Legislative Grant per [Alaska Statute] 37.05.316 for the purpose of" the Yuut construction project in the amount of $1,580,000. Letter from Grants Administrator, State of Alaska Department of Commerce, Community and Economic Development, to Denali Commission, July 2, 2007. The Department advised the Commission that "[i]n order for the grant funds to be released, you must enter into a grant agreement with the Department . . . for this project." *Id.* Accordingly, on November 8, 2007, the Commission entered into a grant agreement with the Department. The "Project Description" under the Scope of Work stated that the purpose of the grant "is to provide funding to the Denali Commission for use towards Yuut Elitnaurviat, The People's Learning Center Match Funding."[1] Designated Legislative Grant Agreement, Attachment A.

The Commission states that funds were provided to the Commission incrementally in fiscal year 2009 on the following dates: December 22, 2008; January 28, 2009; and March 10, 2009. Commission Letter. The Commission, in turn, awarded its own grant

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[1] The Project Description referenced AS 37.05.316, an Alaska State Code provision. Alaska Stat. § 37.05.316 (2007). This section provides that "[w]hen an amount is appropriated or allocated to a department as a grant under this section for a named recipient that is not a municipality, the department to which the appropriation or allocation is made shall promptly notify the named recipient of the availability of the grant and request the named recipient to submit a proposal to provide the goods or services specified in the appropriation act for which the appropriation or allocation is made."

in the full amount, $1,580,000, to the Yuut Elitnaurviat. Denali Commission, Financial Assistance Award Number 01075-00. The Commission treated its grant to the Yuut Elitnaurviat as it would any other grant it awards, assigning it a program manager to monitor the grantee's performance. Telephone Conversation between Director of Administration, Denali Commission, and Senior Attorney, GAO, July 16, 2010. According to the Commission, Yuut Elitnaurviat successfully completed the project and the Commission officially closed the grant effective February 12, 2009. Letter from Grants Administrator, State of Alaska Department of Commerce, Community and Economic Development, to Denali Commission, March 19, 2009.

DISCUSSION

As a general rule, an agency may not augment its appropriations from outside sources without specific statutory authority. 31 U.S.C. § 3302; 36 Comp. Gen. 268 (1956). Here, the Commission points to section 305 of the Denali Commission Act as authority for accepting the state funds. This section provides that the Commission may accept gifts or donations of property or services. The issue, then, is whether the state-directed grant funds designated for a particular project constitute a gift to the Commission as that term is used in its authorizing legislation.

Gifts or donations are gratuitous conveyances or transfers of ownership in property without any consideration. B-274855, Jan. 23, 1997. The essential elements of a gift are donative intent, delivery, and acceptance. *Id.* An agency with gift acceptance authority may accept an unconditioned gift. *See, e.g.*, B-286182, Jan. 11, 2001. An agency may not accept a *conditioned* gift, however, except pursuant to express authority provided by Congress that would allow it to do so.[2] B-303689, Sept. 30, 2005, *citing Story v. Snyder,* 184 F.2d 454 (D.C. Cir.), *cert. denied,* 340 U.S. 866 (1950). Gifts that involve any duty, burden or obligation may not be accepted unless the agency has been given specific statutory authority to accept conditioned gifts. *See* 11 Comp. Gen. 355 (1932).

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[2] Congress has provided some agencies with authority to accept conditional gifts. For example, the gift acceptance authority provided to the Public Health Service, a component within the Department of Health and Human Services, provides as follows:

> "The Secretary of Health and Human Services is authorized to accept on behalf of the United States gifts made unconditionally by will or otherwise for the benefit of the Service or for the carrying out of any of its functions. *Conditional gifts* may be so accepted if recommended by the Surgeon General, and the principal of and income from any such conditional gift shall be . . . used in accordance with its conditions . . . ."

42 U.S.C. § 238(a) (emphasis added).

The authority cited by the Commission to receive gifts or donations would allow the Commission to accept an unconditional gift, that is, one that it could use for any purpose it chose, consistent with its authorities and agency mission. Here, however, the Alaska state legislature provided that the funds be used only for a specific purpose, that is, for the Yuut construction project identified in the state legislation, thereby imposing a condition on the Commission's use of the gift. By imposing an obligation on the Commission to award and monitor a specific grant, the Alaska legislature attempted to essentially direct the Commission's actions if it were to accept the funds. In order to accept such a gift, the Commission would need specific statutory authority. The Commission's general authority to accept gifts of property or services does not extend to conditional gifts.[3] Therefore, the Commission lacked authority to accept the state grant funds.

Concerning the Commission's awarding of the federal grant, it appears that the Yuut Elitnaurviat may have used its grant from the Commission to satisfy a nonfederal matching requirement for other federal grants. In a letter to a member of the Alaska state legislature, the Yuut Elitnaurviat states that "[w]e are asking the State of Alaska for $1.58 million. . . . Our federal funds are . . . contingent upon securing sufficient non-federal match from the State of Alaska." Letter from Executive Director, Yuut Elitnaurviat, to Member of the Alaska House of Representatives, Mar. 28, 2007. A grantee generally may not use funds received under one federal grant to meet its nonfederal share under another federal grant. B-270654, May 6, 1996.

Finally, in our review of the record submitted, we have identified other concerns that warrant the Commission's attention. It appears that the Commission, without authority, signed an open-ended indemnification agreement with the Alaska Department of Commerce. Designated Legislative Grant Agreement, Attachment C (Standard Provisions), Article 2. Open-ended indemnification agreements, which provide for potentially unlimited liability, violate the Antideficiency Act, 31 U.S.C. § 1341. *See, e.g.,* B-260063, June 30, 1995; *Hercules, Inc. v. United States*, 516 U.S. 417, 426–27 (1996). The grant agreement also contains a provision stating that "it is a requirement of this grant that the Grantee irrevocably waive its sovereign immunity with respect to state enforcement of this Grant Agreement." Designated Legislative Grant Agreement, Attachment C (Standard Provisions), Article 37. Notwithstanding the Commission's apparent agreement to this provision, it is a well-established principle that only Congress can waive an executive agency's sovereign immunity. *Wagstaff v. United States Department of Education*, 509 F.3d 661 (5th Cir. 2007). A

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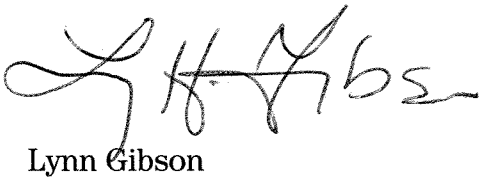
[3] Even assuming that the Commission had conditional gift acceptance authority, the Commission may not have been authorized to accept the state funds under these circumstances. By accepting the condition imposed—that the Commission award a grant to Yuut for a specific project—the Commission, in effect, would be delegating its grantmaking decisional authority to the state of Alaska. *See* B-303689, Sept. 30, 2005.

waiver of sovereign immunity requires specific and unequivocal legislation enacted by Congress. *See United States Department of Energy v. Ohio*, 503 U.S. 607 (1992). Because we have concluded that the Commission did not have authority to accept the state funds or award the grant to Yuut, we do not further address these additional concerns.

CONCLUSION

The Commission did not have authority to accept the $1,580,000 in grant funds from the state. In addition, the federal grant funds it awarded may have been used by its grantee to satisfy a non-federal matching requirement. The Commission should investigate this possibility and take the steps necessary to adjust its accounts consistent with this decision and findings made pursuant to its investigation of its grantee's use of federal grant funds.



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