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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Denali Commission— Surface Transportation Extension Act of 2010

File: B-322481

Date: August 2, 2012

DIGEST

Under the Surface Transportation Extension Act of 2010, as amended, the Department of Transportation (DOT) was required to provide to states for apportioned programs all amounts that section 1934 of the Safe, Accountable, Flexible, Efficient Transportation Act: A Legacy for Users (SAFETEA-LU) had enacted as allocations. Because Denali is a federal agency and not a state, it receives no apportionment under SAFETEA-LU. Thus, DOT properly made available to the State of Alaska as apportionments amounts from the State's section 1934 allocation that section 1934 had otherwise designated for Denali. In addition, we have no basis to object to the Secretary of DOT exercising his discretion under the Extension Act. The Secretary of DOT determined that Denali's section 1960 projects and activities were sufficiently funded and therefore awarded Denali no budget authority for fiscal year 2011.

DECISION

The Inspector General (IG) of the Denali Commission (Denali) has requested our decision regarding the level of funding Denali is entitled to receive under sections 1934 and 1960 of the Safe, Accountable, Flexible, Efficient Transportation Act: A Legacy for Users[1] (SAFETEA-LU) for fiscal years 2010 and 2011.[2] Letter from

[1] Pub. L. No. 109-59, 119 Stat, 1144 (Aug. 10, 2005).

[2] When enacted in 2005, SAFETEA-LU authorized funding through fiscal year 2010. The applicability of SAFETEA-LU was extended by the Surface Transportation Extension Act of 2010, Pub. L. No. 111-147, tit. IV, 124 Stat. 71, 78 (Mar. 18, 2010), as amended by the Surface Transportation Extension Act of 2011, Pub. L. No. 112-5, tit. I, 125 Stat. 14,15 (Mar. 4, 2011) (SAFETEA-LU Extension Act).

Inspector General, Commission, to Managing Associate General Counsel, GAO (Sept. 2, 2011) (Request Letter).[3] Section 1934 had designated for Denali a portion of SAFETEA-LU's statutory allocation to the State of Alaska. Sections 411(d)(1) and 411(d)(2) of the SAFETEA-LU Extension Act required the Department of Transportation (DOT) to make available to the State of Alaska the amounts that section 1934 had otherwise designated for Denali. Regarding section 1960, the Secretary of DOT determined that Denali's projects and activities financed under section 1960 were sufficiently funded and, pursuant to his authority under the SAFETEA-LU Extension Act, awarded Denali no budget authority under section 1960 for fiscal year 2011. Letter from Deputy Assistant General Counsel for General Law, DOT, to Assistant General Counsel for Appropriations and Budget, GAO (Dec. 23, 2011) (Response Letter). We have no basis to object to DOT's determination in that regard. *See* B-271511, Mar. 4, 1997.

BACKGROUND

Sections 1934 and 1960 of SAFETEA-LU are part of the Federal-Aid Highway Program (FAHP). FAHP refers to an array of individually authorized programs administered by the Federal Highway Administration (FHWA). FHWA, *Financing Federal-Aid Highways*, Publication No. FHWA-PL-07-017 (Mar. 2007), *available at* http://www.fhwa.dot.gov/reports/financingfederalaid/index.htm (last visited July 25, 2012), at 5. FAHP is funded with contract authority.[4] *Financing Federal-Aid Highways*, at 17. FHWA states that it does not distribute cash to states; rather, it notifies states "that a balance of Federal funds is available for their use, meaning that the State can incur obligations, begin projects, and then later be reimbursed for eligible costs incurred." *Id.* Congress enacts appropriations to FHWA to liquidate the obligations. *See, e.g.*, Transportation, Housing and Urban Development, and Related Agencies Appropriations Act, 2009, Pub. L. No. 111-8, 123 Stat. 524, 915, 923 (Mar. 11, 2009) (heading titled "Liquidation of Contract Authorization").

FHWA makes FAHP amounts available to states using two different mechanisms. FHWA, Publication No. FHWA-PL-07-017, at 11. FHWA annually distributes to

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[3] Our practice when issuing decisions and opinions is to obtain the views of the relevant agencies in order to develop a factual record and to establish the agencies' legal positions on the request's subject matter. GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), *available at* http://www.gao.gov/products/GAO-06-1064SP. The record in this case consists of the Request Letter and the Response Letter, which contains additional factual information and the legal views of DOT.

[4] "Contract authority" is budget authority that permits an agency to incur obligations in advance of appropriations. GAO, *A Glossary of Terms Used in the Federal Budget Process*, GAO-05-734SP (Washington, D.C.: Sept. 2005), at 21.

states what it calls "apportionments," the amounts of which are determined by application of statutory formulas. *See id.* at 11. FHWA also makes "allocations" to states. *Id.* The amounts of some allocations are established in provisions of law, while other allocations are subject to some discretion on the part of DOT in selecting recipients. *Id.* at 13. For purposes of this decision, it is important to note that the amounts at issue here are all statutory allocations.

DISCUSSION

Section 1934

Section 1934 of SAFETEA-LU provided contract authority to FHWA for fiscal years 2005 through 2009 for specified transportation improvement projects in several states, including $75 million of allocations to projects within the State of Alaska.[5] Pub. L. No. 109-59, 119 Stat. at 1485-86. Of that $75 million in allocations, the act designated $20 million for the "Denali Commission for docks, waterfront development projects and related transportation infrastructure." *Id.* at 1516-17.

Subsequently, the SAFETEA-LU Extension Act extended the authorization of funding under SAFETEA-LU and enacted additional contract authority for fiscal years 2010 and 2011. *See* Pub. L. No. 112-5, § 101, 125 Stat. at 15; Pub. L. No. 111-147, § 411, 124 Stat. at 78-79. The SAFETEA-LU Extension Act, however, made no contract authority available for section 1934 allocations. While the SAFETEA-LU Extension Act, as a general matter, provided that the contract authority for fiscal years 2010 and 2011 was to be made available "in the same manner and at the same level" as was the funding in SAFETEA-LU for fiscal year 2009, the SAFETEA-LU Extension Act specified that amounts that would have been available for section 1934 allocations were instead to be made available to states as apportionments. Response Letter, at 4; *see also* Pub. L. No. 111-147, §§ 411(c), 411(d)(1), 411(d)(2), 124 Stat. at 79-81. Sections 411(d)(1) and (d)(2) of the SAFETEA-LU Extension Act state that with respect to fiscal years 2010 and 2011, "Notwithstanding any other provision of law, . . . the portion of the share of funds of a State . . . determined by the amount that the State received or was authorized to receive for fiscal year 2009 to carry out [section 1934 of SAFETEA-LU]" shall be made available to the state for certain *apportioned* programs. Pub. L. No. 111-147, 124 Stat. at 80–81, as amended by Pub. L. No. 112-5, § 101, 125 Stat. at 15.

The effect of sections 411(d)(1) and (2) was to eliminate the section 1934 allocations of contract authority. Contract authority originally made available under

[5] The Act provided that the section 1934 contract authority was available as follows: 10 percent was available for fiscal year 2005, 20 percent for fiscal year 2006, 25 percent for each of fiscal years 2007 and 2008, and 20 percent for fiscal year 2009.

section 1934 was instead made available to the states for apportioned programs. Accordingly, as required by sections 411(d)(1) and 411(d)(2), DOT made available to the State of Alaska as apportioned funding an amount corresponding to the total amount designated in section 1934 for Alaska projects, including the amount designated for Denali projects. *Id.*

DOT asserts that it had no discretion to continue to fund the allocated projects identified in section 1934. Response Letter, at 4. We agree. The language of subsections 411(d)(1) and (2) is clear: DOT was required to provide to states for apportioned programs all amounts that section 1934 had enacted as allocations. Because Denali, as a federal agency and not a state, receives no apportionment under SAFETEA-LU, amounts otherwise designated for Denali from the State of Alaska's allocations are now available, by operation of sections 411(d)(1) and (2), to the State for its apportioned programs.

Section 1960

Section 1960 of SAFETEA-LU amended the Denali Commission Act of 1998 by inserting a new section titled "Denali Access System Program."[6] Pub. L. No. 109-59, § 1960. Under the Program, Denali distributes federal funding for surface transportation projects in Alaska. Denali Commission Act, § 309(c), *classified at* 41 U.S.C. § 3121 note. Section 1960 provided that FHWA would allocate to Denali $15 million in contract authority for the Program for each of fiscal years 2005 through 2009. *Id.; see also* Response Letter, at 3.

Section 411(d)(4)(A) of the SAFETEA-LU Extension Act eliminated contract authority from certain allocated projects or activities, including those under section 1960, if the Secretary determined that the project or activity was "sufficiently funded before or during fiscal year 2009 to achieve the authorized purpose of the project or activity." Pub. L. No. 111-147, § 411(d)(4)(A), 124 Stat. at 82; Response Letter, at 4.

Section 411(d)(4)(A) of the SAFETEA-LU Extension Act granted the Secretary of DOT broad authority to make determinations about the sufficiency of funding for projects or activities. With respect to fiscal year 2011, the Secretary determined that a number of allocated projects and activities, including projects of the Denali Access System Program under section 1960, were fully funded and, therefore, no longer eligible for contract authority. Response Letter, at 4. Accordingly, while DOT provided Denali $14,025,000 in contract authority for fiscal year 2010, it provided no

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[6] Congress established the Denali Commission in the Denali Commission Act of 1998, Pub. L. No. 105-277, §§ 301-309, 112 Stat. 2681-637 to 2681-641 (Oct. 21, 1998), for the purpose of, among other things, delivering the services of the federal government within the State of Alaska in the most cost-effective manner by reducing administrative and overhead costs.

funding for fiscal year 2011. *Id.* Congress gave the Secretary the authority to determine whether projects or activities were sufficiently funded with prior year funds. We give considerable weight to an agency's reasonable application of a statute that it administers, *see* B-271511, Mar. 14, 1997, and have no basis to question DOT's determination here.[7]

CONCLUSION

DOT complied with the SAFETEA-LU Extension Act when it did not provide amounts to Denali for fiscal years 2010 and 2011 for transportation projects under section 1934 of SAFETEA-LU. With respect to section 1960, the Secretary of DOT exercised his discretion under the SAFETEA-LU Extension Act and determined that Denali's projects and activities authorized under section 1960 were sufficiently funded. We have no basis to object to DOT's determination here.

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General Counsel

[7] Our conclusion in B-319189, Nov. 12, 2010, is inapplicable to the circumstances presented here. In B-319189, the Federal Transit Administration (FTA) had specific statutory direction to transfer FTA appropriations to Denali, and FTA had no authority to monitor Denali's use of the amounts transferred. Here, the Secretary of DOT is exercising statutory discretion accorded by section 411.