[EXCERPT]

Denali Commission
Agency Financial Report (AFR)
Annual Performance Report (APR)
Fiscal Year 2010

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Inspector General's Perspective on Management & Performance Challenges Facing the Denali Commission

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INSPECTOR GENERAL

INSPECTOR GENERAL'S PERSPECTIVE ON MANAGEMENT AND PERFORMANCE CHALLENGES FACING THE DENALI COMMISSION

The OMB-required Performance and Accountability Report (the "PAR") is largely a book authored by the agency's management. However, OMB reserves one of the final sections for the inspector general's perspective:

> *The PAR shall include a statement prepared by the agency's Inspector General (IG) summarizing what the IG considers to be the most serious management and performance challenges facing the agency and briefly assess the agency's progress in addressing those challenges.*

Denali's Office of Inspector General (OIG) considers the following to be the most significant issues facing management at this time.

Congress' reauthorization: The search for a good statutory home

The Denali Commission's statutory authorization expired two years ago. Congressional staff and OMB are considering the future statutory fate of Congress' only experiment with a regional commission that serves a single state (Alaska).

Congress' other six regional commissions each serve from four to 13 states. The single-state Denali Commission (Denali) has a unique statute that has been problematic to implement in practice over its short federal lifespan of just over a decade.[1]

As Congress searches for a good statutory home for Denali, the major issues will be (1) geography defined as the served "region," (2) form of legal entity, (3) governance structure, (4) funding structure, (5) match requirements, and, of course, (6) the expected value added for the public (mission, subject matter expertise) from having this additional layer in the federal funding "food chain" (see Exhibit 1).

EXHIBIT 1

DENALI'S TYPICAL FUNDING "FOOD CHAIN"

Congressional appropriation
↓
Cabinet-level department
↓
Denali Commission
↓
Major grantee
↓
Sub-awardee
↓
Project management firm
↓
Contractors
↓
Local employees

[1] See Denali OIG, *Semiannual Report to the Congress* (May 2010) at *www.denali-oig.org*.

Denali OIG has discussed these issues at length in our last *Semiannual Report to the Congress* (May 2010),[2] where we cataloged over 80 potential statutory amendments to Denali's enabling act. And our OIG reports over the past five years have detailed the difficulties we've observed and the interventions required from other federal agencies (OMB, GAO, DOJ, OGE) to address the statutory ambiguities. Some of these disputes between players and stakeholders have now reached the level that OIG recently introduced management to the Federal Mediation and Conciliation Service as a possible resource.

And our upcoming *Semiannual Report to the Congress* (Nov. 2010) will discuss these issues some more.

The obstacle course to diversified funding

The Denali Commission is an independent federal agency created by Congress and thus subject to federal restrictions on both the sources and uses of its funding. Though Congress now funds Denali at less than half of its highest appropriations, the agency's statutory form presents a legal straitjacket that frustrates management's pursuit of substitute funding from other sources.

Various federal and state players have alerted OIG to legal issues as Denali's management has become more aggressive and creative in its quest to replace the lost congressional funding. The questions concern Denali's statutory authority to tap into potential funding from other federal agencies, the state government, private donors, and property dispositions. Such issues involve the technical application of arcane appropriation laws (not misconduct), and OIG has sought the proactive guidance of the U.S. Comptroller General in the search for solutions.[3]

Denali's statutory funding structure was appropriate in the agency's early years when congressional appropriations were expected as the dominant support. However, the current issues signal that the agency needs the legal flexibility to pursue more diversified funding. Denali's position is a difficult one because conflicting federal policies seem to simultaneously encourage and discourage efforts to obtain nonfederal contributions.

Again, the ultimate answer lies with Congress.

The Faustian bargain of anorexic staffing

Discretionary congressional spending continues to contract, and Congress now funds Denali at less than half of its highest appropriations. Employees have understandably been accepting other employment in the face of Denali's uncertain future. Management has understandably been hesitant to backfill vacated positions. Denali has less than 20 employees at this point.

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[2] See *www.denali-oig.org.*

[3] See Denali OIG, *Semiannual Report to the Congress* (May 2010), pages 6-9; GAO, *Denali Commission—Authority to Receive State Grants,* # B-319246 (Sept. 1, 2010) at *www.gao.gov;* GAO, *Denali Commission—Use of Interagency Agreements to Transfer Funds Made Available Through Federal Transit Administration's Appropriation,* # B-319189 (pending for decision). This is an appropriate OIG approach to such issues under 31 USC 3526(d), 31 USC 3529, and Inspector General Act sections 4(a)(4) and 6(a)(3).

While the future of the Denali Commission lies with Congress, OIG has recommended to management that it explore OPM-approved interchange agreements[4] that would allow employees to "migrate" into the federal personnel system at much larger agencies. While Alaska is geographically isolated from the rest of the federal system, the federal government is the dominant employer in the state.[5] Training for Denali's technical employees has been both extensive and expensive, and it would seem "in the interest of good administration" to retain their skills in the public sector. Though Denali's employees are in the excepted service for Title 5 purposes, the agency's personnel system arguably meets the merit-based equivalency and classification prerequisites for interchange agreements.

Section 306(c) of the Denali Commission Act gives the agency head the authority to "appoint" personnel "without regard to the civil service laws and regulations." Section 306(c) then goes on to detail that the agency head "may fix the compensation of personnel without regard to" various specified civil service provisions involving classification and pay rates. And section 306 addresses numerous other personnel details.

However, despite all of Congress' attention to detail on certain personnel issues, the enabling act remains silent as to what procedural protections Denali's employees — once hired — have from "adverse actions" and downsizings (RIFs). When Congress specifies particular Title 5 requirements in a detailed statute like Denali's, the case law deems Congress to implicitly intend that the unmentioned Title 5 requirements still remain in effect. As the key precedent states, *"Congress knows how to exempt a civil service position from the protections found in chapters 75 and 77 of title 5 if it so desires."*[6]

Nevertheless, authoritative resolution of employees' Title 5 rights would require a determination of jurisdiction by the Merit Systems Protection Board. Denali OIG's *Semiannual Report to Congress* (May 2010)[7] further discusses this uncertainty that troubles both management and employees as they plan for the entity's future as well as their own.

Some Alaska players have encouraged the agency head to operate with a reduced staff and use the savings for grants. However, this understaffing is a Faustian bargain that has deprived the Denali Commission of key accountability positions that support compliance with congressional intent.

Instead of employing its own full-time legal counsel, Denali relies upon part-time help from a volunteer lawyer at another federal agency. Denali has eliminated its position charged with evaluating project performance (evaluation & reporting program manager). Denali has not

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[4] See 5 CFR 6.7 and 5 CFR 214.204.

[5] See Neal Fried and Brigitta Windisch-Cole, "The Federal Government in Alaska," *Alaska Economic Trends* (Alaska. Dept. of Labor and Workforce Development, Feb. 2002), pages 3-14.

[6] See *King v. Briggs,* 83 F.3d 1384, 1388 (Fed. Cir. 1996).

[7] See Denali OIG, *Semiannual Report to the Congress* (May 2010), pages 3-6.

implemented OIG's recommendations for a rural ombudsman to mediate disputes and a director of innovation to pioneer untried solutions.[8]

Single audits as a tool rather than a ritual

Denali is in the business of making grants, and Congress has given the agency around $1 billion to get the job done over the years. And Congress obviously wants assurance as to what grantees do with the money.

Congress some years back enacted a national requirement that grantees with annual federal spending over $500,000 must obtain an audit from a CPA firm. Funding agencies now have ready access to these audit reports through an online federal database.

These "single audits" are one of the four tools that Denali's oversight staff use to monitor what's been done with what's been given. The other three tools are site visits, progress narratives, and OMB-prescribed financial reports.

Denali's oversight staff needs to develop its expertise in using the audit reports in the following important ways: (1) screening grant applications; (2) assisting CPA firms in planning meaningful audits;[9] (3) confirming grant use; (4) assuring corrective response to findings;[10] (5) conducting "quality control reviews" of CPA firm workpapers to reinforce public confidence in the process.[11] To the extent that Denali can master such methods, the little agency may have an Economy Act service that it can share (for reimbursement) with other more distant federal funders.

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[8] See Denali OIG, *Semiannual Report to the Congress* (May 2007), page 4; Denali OIG inspection report for Chitina, Alaska (Oct. 2008); Denali OIG inspection report for McGrath, Alaska (Sept. 2009); Denali OIG inspection report for Red Devil, Alaska (Jan. 2007); Denali OIG inspection report for Sterling Landing, Alaska (Jan. 2007).

[9] See OMB Circular A-133, sec. 525.

[10] See OMB Circular A-133, sec. 400.

[11] See OMB Circular A-133, sec. 400; GAO, *Single Audit Quality: Actions Needed to Address Persistent Audit Quality Problems*, GAO-08-213T (Oct. 25, 2007).