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INSPECTOR GENERAL

February 9, 2012

To: Joel Neimeyer, Federal Co-Chair

FINAL REPORT

From: Mike Marsh, CPA, MPA, CFE, Esq., Inspector General

FOR PUBLIC RELEASE

Subject: Inspection of \$1 million grant # 1315 to State of Alaska for Village Resume Project

This inspection¹ concerns grant # 1315 that the Denali Commission (Denali) awarded to the State of Alaska (State). Denali's agency head and its counsel/DAEO asked the Office of Inspector General (OIG) to inspect this grant for compliance with federal law. Their request was in response to a complaint.

In September 2010, the agency head signed the original grant award for \$1 million. A year later, he unilaterally amended it to fund only \$100,000. The State spent only \$19,706 of the grant, leaving an unspent balance of \$80,294. Denali and the State are currently negotiating a different grant to which this balance can be applied.

This grant's history is thus unusual, and the referral to OIG for public reassurance is understandable.

OVERVIEW

OIG notes at the outset that this is not a matter of misbehavior. OIG found no evidence of misconduct or criminal violations by any of the officials — federal or state — who administered this grant.

Nor is this a case of missing money. The State meticulously documented the \$19,706 in terms of the money received, how it was spent, and the resulting deliverable — all in full compliance with federal grant laws. And the \$80,294 balance remains where it's always been: waiting in the U.S. Treasury until Denali approves an electronic funds transfer (a "draw down") between the Treasury and a grantee.

¹ OIG's inspection has been conducted pursuant to section 2 of the standard grant assurances in OMB Form 424B, sections 4(a) and 6(a) of the Inspector General Act, and the CIGIE professional standards for inspections. A draft of this report was discussed with Denali's agency head, and he was provided an opportunity to comment either formally or informally at his discretion. OIG carefully considered his informal comments before publication.

Denali's grant file in Anchorage was incomplete. OIG thus had to reconstruct the grant's history from a variety of sources, including records maintained by the grantee in Juneau. We were able to complete the inspection and reached the following seven conclusions that we offer for consideration by Denali's management.

CONCLUSIONS

1. The intended purpose of the grant was consistent with federal laws.

The grant agreement's description of the substantive scope of work² was short and nebulous for a \$1 million project:

This award to the Alaska Department of Commerce, Community and Economic Development (DCCED) for \$1,000,000.00 will be used to expand and relate existing community, employment and resource information across various State departments and statewide websites for the purpose of increasing: local employment, leasing of community-owned equipment, and sourcing of other local resources for infrastructure and construction projects funding through the Denali Commission.

Phase I: The DCCED will explore the feasibility of the expansion and alignment of current rural community information from multiple sources. . .

Phase II: The DCCED, thorough a contractor or other sources, will build the infrastructure and platform needed to expand and align current community, employment and resource data sources. . .

Phase III: The DCCED, in consultation with the Denali Commission, community contacts and project contractors, will identify and use three to five pilot communities scheduled to receive multiple projects over the next two to five years. . .

Some grant agreements, but not this one, define the precise boundaries of the funded use in a detailed appendix or attachment. Some grant agreements, but not this one, cite a more detailed scope found in the underlying grant application (incorporation by reference). The scope quoted above just is what it is.

After supplementing this scope with materials obtained from Denali's program manager and the State, OIG determined that the essence of the \$1 million project was to develop (1) an online resume bank of bush residents seeking seasonal construction work funded by government grants and contracts and (2) an online market for equipment rentals and supply sales by bush residents to government contractors.

² Award condition # 1.

This intended use for the \$1 million of grant # 1315 — while not unique — was legally consistent with Congress' appropriation,³ the agency's enabling act,⁴ and the statutory "work plan" approved by the Secretary of Commerce.⁵ We particularly note that the project supports Congress' direction in the enabling act that, "[t]o the maximum extent practicable, the Commission shall contract for completion of necessary work utilizing local firms and labor to minimize costs."⁶

2. Denali did not breach a binding "obligation" to the grantee.

In September 2011, Denali's agency head unilaterally amended the State's award to reduce its amount from \$1 million to only \$100,000. He noted the following in Denali's grant file:

9-15-11 This 424 document is included as part of the amendment process for deobligating \$900,000, reducing the scope of work, and reducing the project timeline. This unilateral action is taken at my direction. Joel Neimeyer, Federal Co-Chair [emphasis added]

As a general rule, a properly awarded grant constitutes a binding legal "obligation" on the federal government similar to a contract.⁷ The grantee can expect the government to keep its promise unless the grantee violates the rules of the grant, or the parties mutually agree to change its terms. Grantees rely on the promised funding in planning their work, and breach of that legal promise brings out the lawyers.

³ The grant was funded out of the agency's FY 2010 "base" appropriation in P.L. 111-85 (123 Stat. 2845, 2877), which provides only the following:

For expenses of the Denali Commission including the purchase, construction, and acquisition of plant and capital equipment as necessary and other expenses, \$11,965,000, to remain available until expended, notwithstanding the limitations contained in section 306(g) of the Denali Commission Act of 1998.

There were no "earmarks" in this appropriation for training in general, or for anything else. In other words, Congress' base appropriation left it to Denali's discretion to fund projects consistent with the authorized purposes contained in the enabling act.

⁴ To stray beyond an authorized "purpose" would be a violation of the federal Antideficiency Act. See GAO, *Antideficiency Act—Applicability to Statutory Prohibitions on the Use of Appropriations*, # B-317450 (March 23, 2009) at www.gao.gov.

Congressional purposes in Denali's enabling act can be summarized as the very broad ones of economic development, planning, government coordination (efficiency, effectiveness), reducing unemployment, and extension of basic public facilities ("infrastructure"). See Denali Commission Act (P.L. 105-277, 42 USC 3121 note), sections 302, 304(a). From an appropriations law perspective, the grant in question has adequate nexus to these broad purposes.

⁵ The statutory work plan that the Secretary of Commerce approved for FY 2010 provides in pertinent part as follows:

In 2010, the Commission was not appropriated training funds from USDOL, but the FY 2010 Work Plan includes funding for the program in the amount of \$1,000,000 from the Energy and Water appropriation for the continuation of workforce development in rural Alaska. . .

[A]pproximately 10% (\$1 M) of the Energy and Water appropriation [will] be provided to the FY 2010 Training Program to ensure its continuation. . .

The grant in question is consistent with the statutory work plan approved by the Secretary of Commerce.

⁶ Denali Commission Act (P.L. 105-277, 42 USC 3121 note), sec. 305(a).

⁷ See *Lynch v. United States*, 292 U.S. 571 (1934); *San Juan City College v. United States*, 391 F.3d 1357 (Fed. Cir. 2004).

However, in grant # 1315, Denali did not breach a promise to the State. For three reasons, OIG finds that the unused \$980,294 never materialized as a legally-binding “obligation” under federal appropriations law. It legally did not advance beyond the pre-obligation planning stage known in federal budgetary parlance as a non-binding “commitment.”⁸

First, the vague scope in the grant agreement reflected a concept rather than specific activities with performance standards and budgets.⁹ In fact, there was no attempt to even allocate the \$1 million among the three tentative phases of the project. To the extent that the parties intended to model government arrangements with task orders or “indefinite-delivery, indefinite-quantity” (that is, to figure it out along the way), the only “obligation” that actually materialized was the State’s \$19,706 contract for a feasibility study.¹⁰

Second, the “grant agreement” — from the start — contained an escape clause in which Denali’s agency head gave his program manager the unilateral authority to determine the extent of the State’s performance — including the authority to completely terminate the grant:

*All phases will be approved by the Training Program Manager through consultation and in writing. At anytime this project deems improbable [sic] and funds cannot be targeted to another project aligned with Denali Commission priorities, the Program Manager reserves the right to deobligate remaining, unspent funds from DCCED [the State] for other projects.*¹¹

While a smaller grantee would find such uncertainty troublesome, the State agreed to it by accepting the grant. Nevertheless, Denali’s unilateral right to change its mind was not consistent with a binding “obligation.”¹²

Third, our review of the email traffic shows that the parties in practice simply “agreed to agree” as they went along (legally known as their “course of dealing”). Various players repeatedly reassured each other that further negotiations would occur after review of the feasibility study funded with the initial \$20,000. Such a context of uncertainty — an agreement to negotiate further — does not suggest the parties’ desire for a binding “obligation” of \$1 million.

To put it another way, the concept of a \$1 million grant in form materialized as a \$20,000 grant in substance.

⁸ GAO defines a “commitment” as “[a]n administrative reservation of allotted funds, or of other funds, in anticipation of their obligation.” See Government Accountability Office, *A Glossary of Terms Used in the Federal Budget Process*, GAO-05-734SP (Sept. 2005), page 32.

⁹ See GAO, *Principles of Federal Appropriations Law*, 3rd ed., vol. II, page 7-17.

¹⁰ See GAO, *Principles of Federal Appropriations Law*, 3rd ed., vol. I, page 5-43 and vol. II, pages 7-19 to 7-21.

¹¹ Award condition # 1.

¹² See GAO, *Principles of Federal Appropriations Law*, 3rd ed., vol. II, pages 7-10, 7-40, 7-41; GAO, *Denali Commission—Overobligation of Apportionment*, # B-316372 (Oct. 21, 2008) at www.gao.gov.

Despite our conclusion that Denali did not breach a legal “obligation” to the State, we recognize that most grantees would be quite disturbed by a 90% cut in \$1 million of expected funding. This was not the reaction, though, when we interviewed the State’s grant personnel — including the state official that signed the grant application. Rather, they identify the ambitious aims of the grant with an appointee of a prior administration who no longer works for the State. They cite the challenges and alternatives detailed in their Denali-funded study,¹³ and they question the feasibility of proceeding further with the solution assumed by the grant.

This position by the State’s personnel is consistent with this excerpt from their progress report submitted last fall:

*Considering the Village Resume Project – Scoping, Piloting, and Development Denali Commission project [grant # 1315] as a whole, the project will proceed in a radically different manner as 90% of the funding was rescinded by the Denali Commission (September 2011). This does not constitute a problem, but is a major deviation from the originally proposed project. . .*¹⁴

And the State’s progress report for January 2012 succinctly summarizes their current position in its final paragraph:

*In short, DED [State] current duties and commitments associated with the Village Resume project [grant # 1315] have come to a natural close with the completion of the Village Resume Project: Feasibility Study. The larger Village Resume Project – Scoping, Piloting, and Development will most likely not be fully realized due to funding rescission. A management-level decision needs to be made regarding use of the remaining funds (\$80,000).*¹⁵

OIG appreciates that state personnel were cautiously reconsidering the need for further spending after receipt of the feasibility study.¹⁶ Denali functions as a form of northern experimental station, and such candor should be encouraged from all grantees as Denali explores new solutions to old problems.

3. The agency head complied with directions from OMB and Congress when he released unused funding to the U.S. Treasury.

Obviously, Denali’s decision to greatly reduce grant # 1315 was not made in a vacuum. The context was Congress’ unexpected decision to recover unused funding out of no-year appropriations remaining from prior years.

¹³ See Three Star Enterprises, *The Village Resume Project: Market Assessment* (Oct. 31, 2011).

¹⁴ Excerpt from grantee’s Quarterly Progress Report dated Oct. 13, 2011 (emphasis added).

¹⁵ Excerpt from grantee’s Quarterly Progress Report dated Jan. 10, 2012 (emphasis added).

¹⁶ Key sections of the contractor’s report are its *Study and Contract Purpose* (1.3), *Study Limitations* (sec. 4.1), *Unanswered Questions* (sec. 4.2), and *Consultant Recommendations* (sec. 5.2).

At the macro level, Congress and the President struggled long and hard to reach final agreement on the nation's FY 2011 appropriations. At the micro level, one of many compromises was for Denali to return some unused funding to the Treasury:

Of the unobligated balances from prior year appropriations available for "Independent Agencies, Denali Commission", \$15,000,000 is rescinded.¹⁷

In effect, Congress sent Denali an FY 2011 base appropriation of just under \$11 million — which Congress neutralized with the \$15 million rescission. However, Denali's management responded that, as of the date of the rescission's enactment, only a fraction of the \$15 million still remained from prior years.

The agency head was then caught between the competing pressures of OMB and local stakeholders. OMB is responsible for enforcing Congress' instructions and insisted that Denali remit the full \$15 million. Some stakeholders asserted that Denali should return less than \$2 million.

To put it another way, federal executives do not lightly question the instructions of OMB budget officials. Nor do they lightly renege on obligated grants. GAO ultimately intervened as Congress' "booth referee" of appropriations law and confirmed OMB's authority to collect the full amount.¹⁸

In crafting a solution, Denali's agency head assumed that \$900,000 of the "debt" could be funded by "deobligating" the bulk of unused grant # 1315. He explained his decision to still leave \$100,000 for the grant as follows:

At this time, we do not know if the [feasibility study] contract will come in at \$20K, below, or above. Consequently, I want to leave some additional funding on the grant in the event the contract comes in above. . . More importantly, the results of the contract are not yet known and may include issues of interest to the Training Advisory Committee that the Committee may wish to pursue. Consequently, I have elected to leave a portion of the grant funding in place for this possibility. . .¹⁹

As detailed above, OIG finds in retrospect that all but \$19,706 was never an "obligation" in the first place. In other words, \$980,294 of the intended "grant" was subject to immediate return to OMB and Congress as one of the "unobligated balances" subject to the rescission.²⁰ This important distinction became moot, though, when Denali was ultimately able to accumulate sufficient funding to retire the \$15 million debt by the end of FY 2011.

¹⁷ See P.L. 112-10, sec. 1477.

¹⁸ See GAO, *Denali Commission—Fiscal Year 2011 Rescission*, # B-322162 (Sept. 19, 2011) at www.gao.gov.

¹⁹ Email, dated Sept. 7, 2011, from Denali's agency head to an inquiring stakeholder.

²⁰ The State signed its contract with Three Star Enterprises on April 7, 2011, with the price not to exceed \$19,706. Congress enacted its rescission in P.L. 112-10 on April 15, 2011.

While the agency head was fortunate that the State did not contest his authority to unilaterally change the grant, state personnel noted their perception of “mixed messages” from Denali as to whether the grant was being reduced to \$100,000 or a fifth of that (\$20,000).

On one hand, such a perception may signal an erosion of intergovernmental trust and confidence. On the other hand, the context of the communication gap is an unusual one that is difficult to fairly critique. On August 4, a high-level OMB official²¹ formally confirmed that the budget examiner was correct in requiring repayment of the full \$15 million. On September 19, GAO further confirmed that Congress meant what it said.²² To comply, the agency head aggressively worked to triage funding that grantees no longer needed or could at least postpone.

In retrospect, an agency head faced with such an event could possibly retain the respected Federal Mediation and Conciliation Service to convene affected stakeholders in a process similar to negotiated rulemaking.²³ But, again, it is difficult to realistically judge this in hindsight given the narrow window of time that the agency head here faced for meeting OMB’s expectations.

Another troubling side effect of the rescission was its negation of the important process for Denali’s annual “work plan.” The enabling act requires the agency head to consult with numerous stakeholders, including a statutory panel of statewide leaders²⁴ and a month of public comment advertised in the *Federal Register*.²⁵ Though the plan’s approval ultimately lies with the agency head and the Secretary of Commerce,²⁶ stakeholders devote considerable time and talent in recommending priorities for spending Denali’s money around the state. Stakeholders are obviously frustrated when a rescission in effect neutralizes the year’s base appropriation anticipated during their input.

Congress ideally would settle the agency’s total appropriation before the start of the fiscal year and, shortly thereafter, the Secretary of Commerce would approve an annual work plan based on those available resources. In practice, though, the actual funding can be scattered throughout the year through such diverse variables as continuing resolutions, interagency transfers,²⁷ reimbursement for services,²⁸ cancellation of grants, grants that close under budget, public donations,²⁹ and congressional rescissions.

²¹ OMB’s associate director for general government programs.

²² See GAO, *Denali Commission—Fiscal Year 2011 Rescission*, # B-322162 (Sept. 19, 2011) at www.gao.gov.

²³ See www.fmcs.gov.

²⁴ See Denali Commission Act (P.L. 105-277, 42 USC 3121 note), sec. 303(b)(1).

²⁵ See Denali Commission Act sec. 304(b)(1).

²⁶ See Denali Commission Act sec. 304(b).

²⁷ For instance, see 7 USC 918a (funding for Denali from USDA Rural Utilities Service) and GAO, *Denali Commission—Transfer of Funds Made Available through the Federal Transit Administration’s Appropriations*, # B-319189 (Nov. 12, 2010) at www.gao.gov.

²⁸ Agreements between federal agencies for services under the Economy Act (31 USC. 1535, 1536).

²⁹ See Denali Commission Act sec. 305(c). But see GAO, *Denali Commission—Authority to Receive State Grants*, # B-319246 (Sept. 1, 2010) at www.gao.gov.

Stakeholders' frustration with this uncertainty is understandable. However, the enabling act does not envision that the work plan will be amended throughout the year whenever there is a change in the actual funding received. The statute prescribes a detailed process³⁰ for an *annual* planning conversation that extends over some time, rather than a finite budget control with regulatory effect. It's the difference between the thoughtful goals of a community's "comprehensive plan" and the binding rules of its zoning code.

In fact, Denali's statute, literally read, does not require the allocation of specific monetary amounts in the work plan. Literally read, one could conceivably do a "plan" that complies with section 304 but contains no specific monetary amounts and identifies no specific funding sources — a descriptive plan that ranks problems and solutions for the purpose of allocating whatever the agency ends up getting that year.

In short, the statute's multi-month, multi-level process for the work plan is an annual one rather than an iterative one.

Most pertinent is the statute's direction that the agency head, on behalf of the Secretary of Commerce, will return the *proposed* plan to the statutory panel of stakeholders until the agency head is satisfied with any needed revisions.³¹ This reinforces the advisory nature of the process that informs, but does not determine, the final choices made by the agency head and the Secretary.

4. The statutory "work plan" provided inadequate guidance for the use of \$1 million for a training program — and the plan should have been returned by the agency head and Secretary of Commerce for revision.

Though Denali functions as an independent federal agency in most senses, its enabling act still reserves some oversight linkages to the Secretary of Commerce (similar to the linkages that the Saint Lawrence Seaway Development Corporation has to the Secretary of Transportation³²).

One such linkage is the Secretary's appointment of Denali's agency head as a Commerce employee who can be fired for cause.³³ Another statutory linkage is the Secretary's annual approval of the "work plan" for allocating Denali's anticipated funding among its subject areas.³⁴

Our discussion above describes the detailed planning process that precedes the Secretary's approval. This statewide conversation is an important part of Denali's statute — rather than a mere ritual. And it is usually a successful process as numerous stakeholders and the public bring Denali their perspectives and expertise.

³⁰ See Denali Commission Act sec. 304.

³¹ See Denali Commission Act sec. 304(b).

³² See 33 USC 981-982; 49 USC 110; 49 CFR 1.3, 1.25.

³³ See Denali Commission Act sec. 303(b)(2)(B).

³⁴ See Denali Commission Act sec. 304.

For instance, work plans over the past decade have identified a variety of innovative solutions for rural health care and electrification. In other words, there were specific solutions-in-waiting on the table when the work plans were debated and crafted.

In contrast, the FY 2010 work plan provided no specific guidance when it reserved \$1 million of Denali's base appropriation for a training program:

In 2010, the Commission was not appropriated training funds from USDOL, but the FY 2010 Work Plan includes funding for the program in the amount of \$1,000,000 from the Energy and Water appropriation for the continuation of workforce development in rural Alaska. . .

The FY 2010 Work Plan is based on the two primary goals. First, to use the remaining FY 2009 funds in the amount of \$3,209,100.00 to continue legacy priority.

*Secondly, in response to an early policy of the agency, that approximately 10% (\$1 M) of the Energy and Water appropriation be provided to the FY 2010 Training Program to ensure its continuation. When combined with prior year funds that were only recently received by the agency from Federal USDOL, this will allow the Commission to continue the program and fund substantial workforce development in rural Alaska.*³⁵

In other words, Denali wanted to continue a program that the U.S. Department of Labor no longer wished to fund. But Denali had no specific plans on how to use the \$1 million it set aside. Rather, the work plan implicitly defers that decision until later in the year. And very late in the federal fiscal year — September 2010 — the agency head attempted to send the entire \$1 million to the State as the nebulous grant that we above find did not constitute a federal “obligation.”

Section 304(a) of the enabling act certainly does not require that the work plan identify specific grants. But the statute does require some identification of the solutions-in-waiting that Denali intends to try in particular subject areas. Simply reserving \$1 million for training solutions, to be found later, would not seem a sufficient output from the detailed process prescribed in the statute.

The records for grant # 1315 show that Denali meetings and staff briefings considered numerous possibilities, but this brainstorming did not translate into more focused guidance in the work plan. But, beyond these discussions, OIG notes that agencies serving Alaska have over the years quite creatively encouraged the young and rural to consider careers as diverse as engineering, dental therapy, accounting, aviation, city governance, and space exploration. Or, to think of it another way, \$1 million could potentially be spread among 50 grants of \$20,000. Or \$1 million could potentially fund inspiring visits with the nation's “masters” for a student from every village in the state.

³⁵ Emphasis added.

However, our point here is not to second guess management's policy choices that fall within the legal boundaries of agency discretion. Rather, we merely suggest that section 304 envisions that the extensive Alaskan input it marshals will at least result in identification of the *types* of training grants (the creative approaches) that Denali will explore in the year ahead. And nothing in the enabling act requires that Denali limit its vision for bush careers to seasonal construction work, lucrative as that can be when it's available.

Section 304(b) authorizes the agency head and the Secretary of Commerce to "partially approve" the work plan, with the disapproved portion sent back to the statutory panel of stakeholders for revision. That should have been done here.

Denali's enabling act³⁶ appears to convene a blue-ribbon "dream team" of top executives from key stakeholders — entities that do the heavy lifting of applying Denali grants in the bush. Initiation of an inspired work plan is the duty that the statute assigns to this panel of seasoned players.³⁷ But the lack of direction for \$1 million in public money is symptomatic that the process can be suboptimal in practice unless the agency head and Secretary of Commerce exercise the guiding role that Congress prescribed.

In practice, the resources of this statutory panel of stakeholders are often diverted into the details of day-to-day personnel issues. Such involvement in the agency's daily management would be unusual even for a classic board of directors with roles as governing fiduciaries — a full-time cross that the existing statute does not ask these very part-time advisors to bear. And any stakeholders even willing to bear it would balance allegiances to Denali and to their sending organizations that benefit from Denali funding (potential conflicts of interest).

For a small agency with such critical challenges as a rescission that exceeds its base appropriation, any diversion of the panel's brainstorming suggests the popular business metaphors of bayoneting the wounded, hacking away in the wrong jungle, or rearranging deck chairs on the Titanic.

In fairness to the agency head, OIG notes the unenviable context (perhaps a "perfect storm") in which the new appointee faced the FY 2010 work plan. His predecessor's term ended near the beginning of the fiscal year (Oct. 3),³⁸ and he was not sworn in as the replacement until four months later (Feb. 1). The agency received its base appropriation during this leadership void (Oct. 28),³⁹ but it could take no action due to a statutory defect — a serious succession gap that OIG detailed in a report to Congress.⁴⁰

³⁶ See Denali Commission Act (P.L. 105-277, 42 USC 3121 note), sec. 303(b)(1).

³⁷ See Denali Commission Act sec. 304.

³⁸ October 3, 2009.

³⁹ See P.L. 111-85, 123 Stat. 2845, 2877, enacted October 28, 2009.

⁴⁰ See Denali OIG, *Semiannual Report to the Congress* (May 2010), pages 1-3, at www.denali-oig.org.

The new agency head began the statutory process for the work plan immediately upon being sworn in (Feb. 1). He convened the statute's stakeholder panel (Feb. 1), though federal conflict of interest law limited participation by some members. He quickly published the proposed plan in the *Federal Register*⁴¹ (Feb. 18). He convened a training advisory committee to search for uses for the \$1 million (April 1). He invited public comment at five points in the process. He obtained final approval for the work plan from the Secretary of Commerce (July 15), with less than three months remaining in the federal fiscal year. He reconvened his training committee to brainstorm further in an eleventh hour effort to find the best home for the \$1 million (Aug. 31).

5. The State waived its reimbursement for indirect costs (grant administration overhead).

The State's actual spending was a just fraction (a mere 2%) of the million-dollar project originally envisioned. State personnel nevertheless spent considerable time exploring the grant's potential through meetings and other administrative activities. The grant agreement provided that the State was to be compensated for these efforts: "*Indirect costs up to 5% are allowable under this Award.*"⁴²

However, OIG's review of the State's accounting records shows that the grantee never requested reimbursement for indirect costs. OIG conferred with three state employees during fieldwork in Juneau, including the state employee that signed the original grant application. All three employees confirmed that the State did not intend to apply for reimbursement of these overhead costs, given the limited spending under the grant that materialized.

OIG thus finds that the State waived its reimbursement for indirect costs.

While there is no claim for indirect costs in grant # 1315, an agency's unilateral reduction of the promised award presents the possibility that the grantee may have already expended more than a pro rata share of overhead in reliance on the original funding level. For instance, actual grantee costs for overhead could be concentrated in the project's startup phase. Any future Denali grants with an escape clause should address this contingency to avoid legal disputes.

6. The agency head's delegation of authority was not an issue in this grant.

Stakeholders sometimes question an agency head's delegation of authority to subordinates. Sometimes the stakeholder wants to verify that the subordinate can bind the government to a requested benefit (confirmation of apparent authority, or ratification). Sometimes the stakeholder asserts that an unwanted result should be overridden because the subordinate had too much discretion (a "blank check").

However, for two reasons, there were no legal issues in grant # 1315 concerning the agency head's delegation.

⁴¹ See 72 Federal Register 7256 (Feb. 18, 2010).

⁴² Award condition # 4.

First, the agency head here personally signed the grant agreement that included the following provision:

*All phases will be approved by the Training Program Manager through consultation and in writing. At anytime this project deems improbable [sic] and funds cannot be targeted to another project aligned with Denali Commission priorities, the Program Manager reserves the right to deobligate remaining, unspent funds from DCCED [the State] for other projects.*⁴³

While the wording wouldn't please a proofreader or an English teacher, this provision explicitly delegates particular decisions under particular conditions to the manager of Denali's training program. This was a reasonable and expected delegation under section 306(c)(1) of Denali's enabling act which authorizes the agency head to "appoint such personnel as may be necessary to enable the Commission to perform its duties."

Second, the agency head himself took an active, direct, and personal role in the development of this grant. He approved the overall work plan (discussed above) that he forwarded to the Secretary of Commerce. He convened and attended an advisory committee that advised him on the proposed project. He signed the original grant. He signed the unilateral amendment of the grant after noting the following in Denali's grant file:

9-15-11 This 424 document is included as part of the amendment process for deobligating \$900,000, reducing the scope of work, and reducing the project timeline. This unilateral action is taken at my direction. Joel Neimeyer, Federal Co-Chair [emphasis added]

Under Denali's enabling act, the agency head has the final word on the issuance of a grant⁴⁴ — and in this case he chose to personally exercise it. Any stakeholder differences with his policy choices on grant # 1315 were with him directly, rather than a function of delegation to a subordinate. In other words, the issue of delegation becomes moot when the subordinate is just the messenger.

7. The "grant" did not circumvent federal procurement laws.

The rules for awarding federal "contracts" are very different from the rules for awarding federal "grants." The Federal Acquisition Regulations prescribe detailed procedures to assure that contracts are awarded through competition that protects the public. In contrast, agencies have considerable discretion as to how they select grantees. Federal law encourages, but does not require, competition in the award of grants.⁴⁵

⁴³ Award condition # 1.

⁴⁴ See Denali Commission Act (P.L. 105-277, 42 USC 3121 note), sec. 305(d).

⁴⁵ See 31 USC 6301(3); GAO, *Principles of Federal Appropriations Law*, 3rd ed., vol. II, pages 10-25 to 10-26.

When the “principal purpose” is to purchase goods or services “for the direct benefit or use” of the federal government, the law requires a contract.⁴⁶ In contrast, a grant is appropriate when the principal purpose is to publicly support or stimulate activity by a non-federal player.⁴⁷ Federal procurement laws are circumvented if an agency issues a grant to avoid the competition required for a contract. This is a legal matter that the disappointed can appeal to the Government Accountability Office.⁴⁸

Taken alone, the wording of grant # 1315 gave OIG some initial concern that the “principal purpose” of the funding might be to purchase a service for the federal government that would assist it in making future awards of grants and contracts. OIG noted that the project supports Congress’ direction in the enabling act that, “[t]o the maximum extent practicable, the Commission shall contract for completion of necessary work utilizing local firms and labor to minimize costs.”⁴⁹

However, our review of the State’s detailed records confirmed that the primary purpose was to support beneficiaries in bush Alaska (properly a grant). Denali thus did not violate federal law when it issued grant # 1315 without a competitive process and a procurement contract.

While not legally required for a grant, a competition to award the \$1 million may still have been valuable. The work plan allocated \$1 million of the FY 2010 base appropriation for training projects. There were no doubt alternatives to investing the entire \$1 million in the online marketing of bush resumes, supplies, and equipment rentals for seasonal construction projects.

However, again, our point is not to second guess management’s policy choices that fall within the legal boundaries of agency discretion. Rather, we merely suggest that a competition for \$1 million in grants could potentially discover new approaches for inspiring the latest generation to a wide spectrum of long-term careers.

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INSPECTOR GENERAL
DENALI COMMISSION

⁴⁶ See 31 USC 6303.

⁴⁷ See 31 USC 6304.

⁴⁸ See GAO, *Sprint Communications Company, L.P.*, # B-256586, # B-256586.2 (May 9, 1984).

⁴⁹ Denali Commission Act (P.L. 105-277, 42 USC 3121 note), sec. 305(a).