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INSPECTOR GENERAL

March 19, 2012

To: Joel Neimeyer, Federal Co-Chair

FINAL REPORT

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

FOR PUBLIC RELEASE

Subject: Inspection of selected contracting authority issues

The agency head for the Denali Commission (Denali) and its counsel/DAEO¹ jointly asked the Office of Inspector General (OIG) to interview a special government employee (SGE) concerning her complaint about the agency's oversight of a grant. The SGE is the head of a stakeholder organization that represents numerous grantees.

OIG interviewed the SGE as requested and has now concluded the referred matter. However, in the course of the SGE's interview, she also complained that Denali's agency head and the inspector general had contracted out for various professional services. She challenges their authority to do this.

Introduction

SGEs are appointed to advise the agency head based on the subject matter expertise of the home organizations that send them. An SGE complaint on contracting-out obviously does not arise in the abstract or as mere academic theory.

Based upon OIG's interview of the SGE and the documents she provided, her complaint appears rooted in her continuing disagreement with a determination by the U.S. Department of Justice that she and some others are subject to federal conflict-of-interest laws.² She attributes the unpopular ruling to Denali's counsel (its DAEO) and the inspector general, though each is in federal reality just the "messenger" rather than the "booth referee."

¹ Designated agency ethics official.

² The application of federal conflict-of-interest laws to the Denali Commission is discussed at Denali OIG, *Semiannual Report to the Congress* (May 2010), pages 10-14, at www.denali-oig.org.

Nevertheless, federal officials violate the Antideficiency Act if they spend appropriations for purposes beyond those that Congress has authorized.³ And any allegation that this has occurred is, of course, a serious matter.

More specifically, the SGE challenges (1) the authority of Denali's management to contract with another federal agency for part-time legal services (including a DAEO) and (2) OIG's authority to contract with a retired federal investigator to interview particular witnesses. The SGE's complaint involves an interpretation of law rather than a dispute over the underlying facts.⁴

For the following reasons, OIG finds the SGE's complaint unfounded on both issues.

*Denali's authority to contract
for legal services from another federal agency*

With only two exceptions,⁵ Denali's enabling act⁶ leaves it to the agency head's discretion as to whether work should be performed by the agency's own employees, loaned personnel from other agencies, contractors, grantees, or donors.

Section 306(c)(1) of the enabling act provides that “[t]he Federal Co-chairperson of the Commission may, without regard to the civil service laws and regulations, appoint such personnel as may be necessary to enable the Commission to perform its duties.”

Section 306(e) provides that “[t]he Federal Co-chairperson of the Commission may procure temporary and intermittent services [for ‘experts or consultants’] under section 3109(b) of title 5, United States Code . . .”

Section 305(a) provides that “[a]gencies may, upon request by the Commission, make services and personnel available to the Commission to carry out the duties of the Commission. . . [emphasis added]”

Section 306(d) provides that “[a]ny Federal Government employee may be detailed to the Commission without reimbursement, and such detail shall be without interruption or loss of civil service status or privilege [emphasis added].”

³ See GAO, *Antideficiency Act—Applicability to Statutory Prohibitions on the Use of Appropriations*, # B-317450 (March 23, 2009) at www.gao.gov.

⁴ Denali OIG is addressing this matter under Inspector General Act sections 4(a)(2), 4(a)(3), 4(a)(4), and 6(a)(2). A draft of this report was provided to Denali's agency head with the opportunity to comment either formally or informally at his discretion.

⁵ The enabling act requires Denali to have its own agency head (“federal co-chairperson”) and its own inspector general.

⁶ Denali Commission Act, P.L. 105-277, 42 USC 3121 note.

Section 305(c) provides that “[t]he Commission may accept, use, and dispose of gifts or donations of services or property [emphasis added].”

Section 305(d) provides that “[t]he Commission, acting through the Federal Co-Chairperson, is authorized to enter into contracts and cooperative agreements, award grants, and make payments necessary to carry out the purposes of the Commission. . . . [emphasis added]”⁷

Federal regulation 5 CFR 2638.201 requires each federal agency to have a “designated agency ethics official” (DAEO).

And, last but not least, Congress has in the Economy Act⁸ authorized federal agencies to contract for services from other federal agencies on a reimbursable basis.

Denali’s management has a memorandum of agreement in which the Anchorage office of the FAA provides part-time legal services as needed. This arrangement falls within the wide spectrum of staffing options that the above statutes provide to Denali’s agency head. More specifically, section 305(a) and the Economy Act directly sanction such an arrangement.

Denali OIG’s authority to contract for services

Section 6(a)(2) of the Inspector General Act authorizes inspector generals “to make such investigations and reports relating to the administration of the programs and operations of the applicable establishment as are, in the judgment of the Inspector General, necessary or desirable . . .”

Section 6(a)(9) authorizes inspector generals “to enter into contracts and other arrangements for audits, studies, analyses, and other services with public agencies and with private persons, and to make such payments as may be necessary to carry out the provisions of this Act.”

Section 8G(g)(2) authorizes inspector generals “to obtain the temporary or intermittent services of experts or consultants . . .”

Several additional provisions reinforce the independence of the inspector general from an agency’s management. Section 6(f) requires OMB to review a separate OIG budget for each agency. Section 8G(g)(4) requires an agency to fund separate legal counsel for the OIG. Section 8G(d) cautions that the agency head “shall not prevent or prohibit the Inspector General from initiating, carrying out, or completing any audit or investigation, or from issuing any subpoena during the course of any audit or investigation.”

⁷ Section 305(d) was added by P.L. 106-31 sec. 105.

⁸ See 31 USC sections 1535 and 1536. The Economy Act is discussed in detail at GAO, *Principles of Federal Appropriations Law*, 3rd ed., vol. III, chapter 12(B).

Congress requires 73 federal agencies to have an inspector general. Denali OIG is currently the smallest at 1 FTE (that is, the inspector general himself, with no staff). Like most of the inspector generals, Denali's OIG contracts out the annual financial audit to a CPA firm with the needed expertise. Denali OIG also uses contractors for procurement, interviews of particular witnesses, mediation services, assessment of IT security, and an annual critique of the agency's public reporting.⁹

While Denali's inspector general has credentials as a lawyer, CPA, and CFE,¹⁰ the above provisions of the Inspector General Act make it clear that the appointed individual is not expected to effectuate federal oversight alone. Each year, Denali OIG directly discusses its budget and concerns with the OMB examiner. And each year, that budget includes a line for OIG's contractual services.

In short, Denali OIG's use of contractual services for the above purposes is authorized and expected by sections 6(a)(2), 6(a)(9), and 8G(g)(2) of the Inspector General Act.

Conclusion

The SGE's complaints about the contracting authority of Denali's management and OIG are unfounded.

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⁹ For instance, see Denali OIG, *Semiannual Report to the Congress* (Nov. 2011) and Denali OIG, *Semiannual Report to the Congress* (May 2009) at www.denali-oig.org.

¹⁰ Certified fraud examiner.