



Decision

Matter of: U.S. Department of Transportation—Applicability of the Congressional Review Act to Notice of Funding Opportunity for the Department of Transportation’s FY 2023-2024 Multimodal Project Discretionary Grant Opportunity

File: B-335488

Date: October 18, 2023

DIGEST

On June 23, 2023, the U.S. Department of Transportation (DOT) published a document titled *Notice of Funding Opportunity for the Department of Transportation’s FY 2023-2024 Multimodal Project Discretionary Grant Opportunity (MPDG)* (Multimodal NOFO). DOT did not submit a report pursuant to the Congressional Review Act (CRA) to Congress or the Comptroller General on the Multimodal NOFO.

CRA incorporates the Administrative Procedure Act’s definition of a rule and requires that before a rule can take effect, an agency must submit the rule to both the House of Representatives and the Senate, as well as to the Comptroller General. The Multimodal NOFO announced the availability of DOT funding for three discretionary grant programs: the Nationally Significant Multimodal Freight and Highway Projects program, the National Infrastructure Project Assistance program, and the Rural Surface Transportation program. DOT’s stated purpose in the Multimodal NOFO was to fund surface transportation infrastructure projects meeting the criteria of these programs and aligning with DOT goals. We conclude that the Multimodal NOFO meets CRA’s definition of a rule and no CRA exception applies. Therefore, the Multimodal NOFO is subject to CRA’s submission requirement.

DECISION

On June 23, 2023, the U.S. Department of Transportation (DOT) published a document titled *Notice of Funding Opportunity for the Department of Transportation’s FY 2023-2024 Multimodal Project Discretionary Grant Opportunity (MPDG)* (Multimodal NOFO), available at <https://www.transportation.gov/grants/multimodal-project-discretionary-grant-notice->

[funding-opportunity](#) (last visited Sept. 19, 2023). We received a request for a decision as to whether the Multimodal NOFO is a rule for purposes of the Congressional Review Act (CRA). Letter from Senator Ted Cruz to the Comptroller General (July 27, 2023). As discussed below, we conclude that the Multimodal NOFO is a rule subject to CRA’s submission requirement.

Our practice when rendering decisions is to contact the relevant agencies to obtain their legal views on the subject of the request. GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), available at <https://www.gao.gov/products/gao-06-1064sp>. Accordingly, we reached out to DOT to obtain the agency’s legal views. Letter from Assistant General Counsel, GAO, to Acting General Counsel, DOT (Aug. 2, 2023). We received DOT’s response on August 31, 2023. Letter from Acting General Counsel, DOT, to Assistant General Counsel, GAO (Aug. 31, 2023) (Response Letter).

BACKGROUND

The Multimodal NOFO

The Infrastructure Investment and Jobs Act (IIJA), Pub. L. No. 117-58, 135 Stat. 429 (Nov. 15, 2021), provided DOT with funding for three grant programs—the Nationally Significant Multimodal Freight and Highway Projects grants program, the Rural Surface Transportation grant program, and the National Infrastructure Project Assistance grants program. *Id.* §§ 11110 (Nationally Significant Multimodal Freight and Highway Projects), 11132 (Rural Surface Transportation Grant Program); *id.* § 21201 (National Infrastructure Project Assistance); see *also* Multimodal NOFO, at 5. A general purpose of these grant programs, consistent with the overall purpose of the IIJA, is to promote “Federal-aid highways, highway safety programs, and transit programs.” IIJA, preamble.¹ *Id.* §§ 11110, 11132, 21201. The IIJA authorized appropriations for these three programs through FY 2026. Multimodal NOFO, at 5.

In the Multimodal NOFO, in order to “streamline the process for applicants” for the FY 2023–2024 grant period, DOT “combined [its] solicitations” for all three of the above-referenced grant programs. *Id.* at 5. The Multimodal NOFO “encouraged [applicants] to apply for multiple programs” and indicated that DOT would automatically consider applicants for each program “unless they opt[ed] out of a specific program.” *Id.* at 6. As the Multimodal NOFO explained, the three grant programs have “slightly different” eligibility criteria, but applicants generally may include states or groups of states, metropolitan planning organizations, units of local

¹ Under the general rubric of improving highways, highway-safety, and transit programs, each program focuses on particular types of improvement projects, in line with their titles and corresponding IIJA provisions. Two of these programs—the Rural Surface Transportation grant program and the National Infrastructure Project Assistance grants program—originated with the IIJA. IIJA §§ 11110, 11132; *id.* § 21201.

government, political subdivisions of states or local governments, and tribal governments or groups of tribal governments. *Id.* at 10. The Multimodal NOFO outlined the precise eligibility and selection criteria for each program, as well as the types of projects eligible to receive DOT funding under each one. *Id.* at 10, 15. Overall, DOT stated that its purposes were to fund “surface transportation infrastructure projects . . . with significant national or regional impact” and “to improve and expand the surface transportation infrastructure in rural areas.” *Id.* at 1. DOT further stated that it sought to award projects that “align with the [National Roadway Safety Strategy]”, “reduce greenhouse gas emissions and . . . address climate change impacts”, “address environmental justice”, “address equity and barriers to opportunity”, and “support the creation of good-paying jobs”, among other things. *Id.* at 6–7.

As compared with a similar notice of funding opportunity that DOT issued in FY 2022 for these grant programs, the Multimodal NOFO used changed “criteria” to evaluate applicants and make award decisions in certain respects. *Id.* at 8.² For example, the Multimodal NOFO “revised how [Outcome Area] criteria will be rated” and indicated that Rural Program applicants requesting less than \$25 million need only address a subset of these criteria. *Id.* The Multimodal NOFO also indicated that “[f]or the first time” DOT would be using “a Cost Estimate Review team” to “evaluate in greater detail the cost estimates for any project requesting \$1 billion or more in funding.” *Id.* Finally, the Multimodal NOFO stated that the “list of counties qualifying as Areas of Persistent Poverty” had been updated in accordance with new census data, and that the definition of “Historically Disadvantaged Communities” had been updated “in accordance with the [White House’s] Climate & Economic Justice Screening Tool”, developed “as part of the Justice40 initiative.” *Id.* The Multimodal NOFO indicated that applicants planning to “reapply using materials prepared for prior competitions” should ensure they are “up to date” with DOT’s revised criteria. *Id.* at 8–9.

The Multimodal NOFO provided an application deadline of August 21, 2023, and indicated that DOT would award “approximately \$5.45–5.575 billion” to the current “round” of applicants “from FY 2023 and FY 2024 funding.” *Id.* at 2.

The Congressional Review Act

CRA, enacted in 1996 to strengthen congressional oversight of agency rulemaking, requires federal agencies to submit a report on each new rule to both houses of Congress and to the Comptroller General for review before a rule can take effect. 5

² DOT previously announced and awarded funding for the FY 2022–2023 period via a publication titled *Notice of Funding Opportunity for the Department of Transportation’s Multimodal Project Discretionary Grant Opportunity*, 87 Fed. Reg. 17108 (Mar. 25, 2022).

U.S.C. § 801(a)(1)(A).³ The report must contain a copy of the rule, “a concise general statement relating to the rule,” and the rule’s proposed effective date. *Id.* CRA allows Congress to review and disapprove federal agency rules for a period of 60 days using special procedures. See 5 U.S.C. § 802. If a resolution of disapproval is enacted, then the new rule has no force or effect. 5 U.S.C. § 801(b)(1).

CRA adopts the definition of rule under the Administrative Procedure Act (APA), 5 U.S.C. § 551(4), which states that a rule is “the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency.” 5 U.S.C. § 804(3). CRA excludes three categories of rules from coverage: (1) rules of particular applicability; (2) rules relating to agency management or personnel; and (3) rules of agency organization, procedure, or practice that do not substantially affect the rights or obligations of non-agency parties. *Id.*

DOT did not submit a CRA report to Congress or the Comptroller General on the Multimodal NOFO. In its response to us, DOT asserted that CRA is inapplicable to the Multimodal NOFO because the Multimodal NOFO is an “exempt procedural rule” and “not a final agency action.” Response Letter at 5–6.

DISCUSSION

An agency action is subject to CRA if it meets the APA’s definition of a rule and no CRA exception applies. Because the Multimodal NOFO meets the APA’s definition of a rule, and because no CRA exception applies, the Multimodal NOFO is subject to CRA’s submission requirement.

The Multimodal NOFO meets the APA definition of a rule. It is an agency statement, as it is an official document issued by DOT and posted on the agency’s website. Multimodal NOFO; see *also* B-334146, June 5, 2023 (finding that a document issued by the U.S. Department of Agriculture (USDA) and posted on USDA website qualified as agency statement); B-331560, Apr. 16, 2020. Second, the Multimodal NOFO has future effect, as its provisions apply to, and announce criteria for, grant-program applications submitted after its issuance and before future deadlines. Multimodal NOFO, at 2; see *also* B-334146 (finding that a USDA notice of funding opportunity document had future effect); B-333732, July 28, 2022 (finding that a USDA publication had future effect because it defined criteria for determining future financial assistance benefits). Finally, the Multimodal NOFO prescribes or implements law or policy and describes agency procedures, as it defines the procedures by which eligible entities may apply for three grant programs, describes

³ Alternatively, an agency can find for good cause that notice and public procedure are impracticable, unnecessary, or contrary to the public interest, and the rule will then take effect at a time the agency determines. 5 U.S.C. § 808(2).

the process by which DOT will evaluate these applications, and specifies the level of funding that applicants may receive. Multimodal NOFO, at 1–15; B-334146 (finding that a USDA notice of funding opportunity implemented law or policy and described agency procedures when it “establish[ed] a new grant program” with “eligibility requirements”, “criteria used to select proposals”, and “funding level[s]”); *see also* B-333732 (finding that USDA’s announcement of a payment-in-kind program for sugar was a rule because it established application procedures, payment limits, and sanctions for future noncompliance with program requirements).

Additionally, none of CRA’s exceptions apply:

First, the Multimodal NOFO is not a rule of particular applicability. Rules of particular applicability are those addressed to specific, identified entities that address actions that may or may not be taken by those entities, in light of the facts and circumstances specific to those entities. B-334995, July 6, 2023; B-334411, June 5, 2023; B-334146; B-334221, Feb. 9, 2023. The Multimodal NOFO applies broadly to states or groups of states, metropolitan planning organizations, units of local government, political subdivisions of states or local governments, and tribal governments or groups of tribal governments, among other entities. Multimodal NOFO, at 10. Thus, it has general, not particular, applicability. *See* B-334146 (USDA notice of funding opportunity had general applicability because it was addressed to “local and state governments, small and large businesses, and nonprofit entities.”); *see also* B-334221; B-330843, Oct. 22, 2019.

Second, the Multimodal NOFO is not a rule relating to agency management or personnel. “A rule falls within the CRA exception for rules relating to agency management or personnel if it relates to purely internal agency matters, with no effect on non-agency parties.” B-334411; B-334146; B-334221. Here, the Multimodal NOFO relates primarily to non-agency parties. As explained above, it specifies the means by which a wide variety of non-agency parties may apply for funding pursuant to three DOT grant programs, as well as specifying the selection criteria and funding levels for those programs for FY 2023–2024. Multimodal NOFO, at 1–15. Thus, it does not relate to agency management or personnel. B-334146 (finding that USDA notice of funding opportunities that “establish[ed] a grant program for a wide array of non-federal entities” did not relate to agency management).

Third, and finally, the Multimodal NOFO has a substantial impact on the rights and obligations of non-agency parties. GAO has previously found that notice of funding opportunity documents associated with agency grant programs can have a substantial impact on non-agency parties. Most recently, we found that a USDA notice of funding opportunity document substantially affected the rights and obligations of non-agency parties by implementing a new grant program for non-federal entities and establishing the program’s eligibility requirements, selection criteria, and funding ranges. B-334146. As we explained, a notice that “determine[s] whether and in what amount [non-agency] entit[ies] may receive funding . . . substantially affects the rights or obligations of those non-agency

parties.” *Id.* Similarly, we have found that agency rules amending or clarifying the requirements of financial assistance programs for non-agency parties substantially affected those parties’ rights and obligations. In B-333732, for instance, we concluded that USDA’s 2021 Thrifty Food Plan substantially affected non-agency parties because it increased the maximum benefit allotments for qualifying families under the Supplemental Nutrition Assistance Program (SNAP).

Here, by reference to the above cases, the Multimodal NOFO has substantial effects on the rights and obligations of non-agency parties. While the Multimodal NOFO does not, itself, establish a new grant program like the USDA notice in B-334146, it defines the FY 2023–2024 eligibility requirements, selection criteria, and funding ranges for three existing DOT grant programs. Multimodal NOFO, at 4–5. Each of these programs offers potential DOT funding to a wide range of non-agency parties, as discussed above, which makes DOT’s actions in the Multimodal NOFO comparable to USDA’s actions in B-334146 and B-333732. In the present case, as in B-334146 and B-333732, the agency’s actions “determine[d] whether and in what amount [a non-agency] entity may receive funding”, which “substantially affects the rights or obligations of those non-agency parties.” B-334146.

In its response to us, DOT asserts that the Multimodal NOFO is an “exempt procedural rule.” DOT relies upon four prior GAO decisions: B-330190, Dec. 19, 2018, B-329926, Sept. 10, 2018, B-329916, May 17, 2018, and B-292045, May 19, 2003. Response Letter, at 5.⁴ Each of these decisions is distinguishable, however, because they involved changes to agencies’ internal conduct with only indirect and insubstantial effects on the rights and obligations of non-agency parties. See B-330190 (finding CRA inapplicable to agency memorandum that “outline[d] the agency’s internal procedure for addressing violations of 8 U.S.C. §1325(a)”); B-329926 (finding CRA inapplicable to agency manual governing “the use of evidence from the Internet” by agency officials during adjudicatory proceedings); B-329916 (finding CRA inapplicable to Internal Revenue Service action that “shifts the timing of a step in the agency’s process” for reviewing tax returns); B-292045 (finding CRA inapplicable to a Department of Veterans Affairs (VA) memorandum announcing a change in VA’s procedures for disposal of real property because it “relat[ed] to agency management” and did not “affect any party’s right or obligation”). None of these actions was directed at non-agency parties or concerned, like the Multimodal NOFO and the agency actions in B-334146 and B-333732, with specifying the terms and conditions for non-agency parties to apply to receive federal funds. B-330190; B-329926; B-329916; B-292045.

⁴ Additionally, DOT urges that the Multimodal NOFO is distinguishable from the grant notices in B-334146 because USDA in that case exercised “general statutory authority” to “accomplish certain enumerated statutory ends.” Response Letter, at 5. However, GAO’s determination that the notice of funding opportunities at issue in B-334146 did not qualify for the CRA’s third exception was based on the effects of USDA’s actions on non-agency parties, as discussed above, not on the general or specific nature of USDA’s statutory authority.

Relatedly, DOT relies on *Batterton v. Marshall*, 648 F.2d 694 (D.C. Cir. 1980) to distinguish “legislative” from “procedural” rules and urge that rules “may alter the manner in which the parties present themselves or their viewpoints to the agency” without affecting rights or interests. Response Letter, at 4 (citation omitted). However, *Batterton* concerned the distinction between “legislative” and other rules for purposes of applying APA notice-and-comment requirements. See *Batterton*, 648 F. 2d at 707. As the legislative history of CRA makes clear, a rule may be non-legislative and exempt from APA notice-and-comment requirements while still being subject to CRA’s submission requirements. A principal sponsor of the CRA legislation stated that:

Although agency interpretive rules, general statements of policy, guideline documents, and agency policy and procedure manuals may not be subject to the notice and comment provisions of section 553(c) of title 5, United States Code, these types of documents are covered under the congressional review [CRA] provisions of the new chapter 8 of title 5.

142 Cong. Rec. H3005 (daily ed. Mar 28, 1996) (Statement of Rep. McIntosh); see also B-331171, Dec. 17, 2020 (“The sponsors of CRA intended the definition of rule to be as broad as possible to ensure congressional review of agency action.”). Here, as discussed above, the Multimodal NOFO does more than just alter the manner in which certain parties present themselves to DOT, it determines whether and in what amount non-agency entities may receive funding from the federal government.

DOT also asserts that the Multimodal NOFO’s “requirements for eligible applicants, cost sharing requirements, eligible project types, and eligible project costs” did not originate with the Multimodal NOFO but come directly from the “detailed statutory authorit[ies]” governing DOT’s grant programs. Response Letter, at 4. In other words, according to DOT, “any rights and obligations” at issue in this matter “are prescribed by existing laws,” not by the Multimodal NOFO. *Id.* We acknowledge that the statutes governing DOT’s grant programs are detailed in many respects and establish eligibility and other criteria outlined in the Multimodal NOFO. However, it is not the case that the Multimodal NOFO did nothing more than echo terms and conditions already set forth in DOT’s program statutes. Those statutes left DOT with clear discretion and gap-filling authority in many respects. For example, the statute governing the National Infrastructure Project Assistance program states that applications shall be submitted “at such time, in such manner, and containing such information as [DOT] determines to be appropriate.” 49 U.S.C. § 6701(c). It also instructs DOT to “determin[e]” whether a given project applying for grant funds “is in need of significant Federal funding” and “will be cost-effective,” among other things. *Id.* § 6701(f). In the Multimodal NOFO, DOT exercised its discretion to elaborate upon these statutory terms by defining the “time” and “manner” in which applications must be submitted and specifying detailed “information” requirements. See, e.g.,

Multimodal NOFO, at 1–3 (stating deadlines and “anticipated” funding amounts not set forth in DOT’s program statutes). With respect to the issue of whether projects will be “cost-effective,” for example, the Multimodal NOFO outlines a “recommended approach for the completion and submission of a benefit-cost analysis (BCA) narrative and calculation file,” as well as encouraging applicants to “review DOT’s detailed guidance” cited in the Multimodal NOFO. *Id.* at 42. By providing detailed instructions in this and other respects, the Multimodal NOFO affected “whether and in what amount [non-agency] entit[ies] may receive funding”, which, once again, “substantially affects the[ir] rights or obligations.” B-334146

Finally, DOT asserts that the Multimodal NOFO is “not a final agency action” and is “exempt” from CRA because no applicant is “obligated to apply for” or “entitled to receive” the advertised funding, and because DOT has yet to make the “final project selections” that may result in grant awards. Response Letter, at 6 (citation omitted). However, DOT did not distinguish the funding notice in B-334146, which, like the Multimodal NOFO, was discretionary and left final award decisions contingent upon further action by USDA. See, e.g., USDA, *Partnerships for Climate-Smart Commodities*, USDA-NRCS-COMM-22-NOFO0001139, available at <https://www.grants.gov/web/grants/view-opportunity.html?oppld=337878> (last visited Sept. 19, 2023) (outlining an opportunity for “[d]iscretionary” grants). A grant notice need not announce mandatory funding or make final award decisions in order to have a substantial effect on the rights and obligations of non-agency parties. B-334146. Rather, as we have explained, an agency action may be “non-binding” and contemplate “further action” without therefore becoming “eligible for CRA’s procedural exception.” B-334032.2, Apr. 5, 2023 (“CRA’s requirements are applicable to general statements of policy that lack legally binding effects.”) (citation omitted). Here, DOT’s announcement of criteria that “determine[d] whether and in what amount [a non-agency] entity may receive funding” is sufficient to make the Multimodal NOFO ineligible for that exception. See B-334146.

CONCLUSION

The Multimodal NOFO is a rule under CRA because it meets the APA’s definition of a rule and no CRA exception applies. Therefore, the Multimodal NOFO is subject to CRA’s requirement that it be submitted to Congress before it can take effect.



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