

Information Paper

Travel Alternatives When Visiting Contractor Facilities

DoD Standards of Conduct Office (2017)
Office of the DoD General Counsel

When may a Federal employee, on an official visit to a work site of a Government contractor, accept transportation provided by that contractor?

I. Easy and Safe Answer: Pay for it!

1. Reimbursement. If the Federal employee uses transportation provided by the contractor, the employee may reimburse the contractor for the fair market value of the transportation. When such travel is in furtherance of official duty, reimbursement by the Government may be appropriate pursuant to regulations.

2. Use own transportation. Federal employees may always provide their own transportation in lieu of accepting transportation provided by the contractor. When such travel is in furtherance of official duty, reimbursement by the Government may be appropriate pursuant to regulations.

3. Even if transportation may be accepted, it may be prudent to decline the offer. Although it may be permitted by regulation to accept transportation from a contractor, it may be prudent to decline the offer or any gift from a contractor to avoid the appearance of impropriety. In fact, 5 C.F.R. § 2635.204 warns that, “Even though acceptance of a gift may be permitted by one of the exceptions contained in paragraphs (a) through (l) of this section, it is never inappropriate and frequently prudent for an employee to decline a gift offered by a prohibited source or because of his official position.”

II. Authority Permitting Acceptance of Transportation

1. Transportation for official business. When transportation is offered to a Federal employee who is conducting official business, it is a gift to the *Government*, not to the employee. It may be accepted only if it complies with gift-acceptance statutes or is provided according to a contract.

A. Authorization provided by the contract. Transportation rules can vary depending on the contract type. For situations involving fixed-price contracts where there are no provisions for direct reimbursement of contractor transportation expenses, contractor personnel and government employees should not share transportation, unless another exception applies.

Transportation is acceptable if it is included in a contract between the Government and the contractor. For example, where contractor personnel are reimbursed for costs associated with transportation or the contract includes a requirement for the contractor to provide transportation to government personnel, government and contractor personnel may share that

transportation since the Government is actually paying for the transportation.¹

B. Transportation provided by contractor that is integral to the site visit. If the contractor offers transportation within a single site, it may be acceptable as transportation integral to the site visit. Such transportation is not considered a gift, and there is no explicit regulation or statute authorizing acceptance. Generally, such transportation does not have an independent market value, is not otherwise available, entails unique capabilities, or is of nominal value. Examples include use of a contractor shuttle between buildings or lift in an elevator. Factors also include safety, security, and the lack of alternative travel. When facilities are not contiguous, and transportation is not limited to contractor vehicles, transportation is most likely not integral to the site visit.²

C. Transportation to a meeting or similar function for official business *not essential to an agency's statutory or regulatory function*: 31 U.S.C. § 1353 and 41 C.F.R. § 304-1.1 *et seq.* For transportation to a meeting or similar function for official business not essential to an agency's function, 31 U.S.C. § 1353, as implemented by 41 C.F.R. § 304-1.1 *et seq.*, applies. Functions that do not qualify under this statute include investigations, inspections, audits, site visits, negotiations, or litigation. The employee may accept such transportation on behalf of the Government if authorized in advance by the employee's travel-approving authority. Two exceptions, however, allow the acceptance of the transportation, under certain conditions, when agency authorization was *not* obtained in advance. *First*, according to 41 C.F.R. § 304-3.13(a), if the employee's agency previously authorized accepting non-Federal payment of *some* travel expenses for the trip in question, the employee may accept the current offer of transportation if (1) the transportation offered is the same in kind or comparable in value to transportation "offered to or purchased by other similarly situated meeting attendees" and (2) the employee's agency did not decline to authorize acceptance of the transportation. (If an agency knew of the travel in question and did not authorize it, it would be likely that it "declined" authorization under this subsection. Clarification may be needed, however, when the lack of authorization was due to an oversight.)

Second (and alternatively), 41 C.F.R. § 304-3.13(b) provides that if the employee's agency did *not* previously authorize "acceptance of any payment from a non-Federal source prior to . . . travel," the employee may still accept the "payment" in the form of transportation (payment-in-kind) from the contractor (i) if travel expenses incurred by the employee were authorized on his or her travel authorization, *and* (ii) the value of the transportation offered is of an amount that would not make the employee's travel expenses exceed the travel authorization amount. In this second case of accepting transportation, the employee must request, *within 7*

¹ Other examples where such transportation is included in the contract include: Contracts for on-site inspections which typically contain a provision requiring the contractor to make available to the Federal employee reasonable assistance for carrying out those official duties. See, e.g., Federal Acquisition Regulation (FAR) § 52.246-2(d), "Inspection of Supplies—Fixed Price" (Aug. 1996) ("If the Government performs inspections or tests on the premises of the Contractor or subcontractor, the Contractor shall furnish, and shall require subcontractors to furnish, at no increase in contract price, all reasonable facilities and assistance for the safe and convenient performance of these duties."); FAR § 52.246-4(d), "Inspection of Services—Fixed-Price" (Aug. 1996) (stating a requirement of assistance similar to FAR § 52.246-2(d), above); FAR § 52.246-8(d), "Inspection of Research and Development—Cost Reimbursement" (Mar. 2001) (providing a requirement of assistance similar to FAR § 52.246-2(d), above); FAR § 52.246-14, "Inspection of Transportation" (Apr. 1984) ("The Contractor shall furnish Government representatives with the free access and reasonable facilities and assistance required to accomplish their inspections and tests.").

² See OGE 98 x 8, p. 2; see also Ethics Issues in Government— Contractor Teambuilding, http://www.defenselink.mil/dodgc/defense_ethics/dod_oge/partwd.doc, p. 41, ex. #5 (July 15, 1999).

working days of end of trip, authorization from his or her travel-approving authority.

Moreover, if the employee's agency does not authorize the employee's acceptance, either the agency or the employee must reimburse the contractor for the market value of the travel—otherwise the employee may be subject to a penalty (defined at 41 C.F.R. § 304-3.18). 41 C.F.R. §§ 304-3.13(b)(3), 304-3.13(c).

D. For transportation for official business *essential* to an agency's statutory or regulatory function. In this case, 31 USC § 1353 does *not* apply. In *rare* instances, other statutory authority may exist for accepting the transportation. One example of such authority is transportation provided by tax-exempt organizations for a Federal employee's training, as follows:

- **Transportation by a tax-exempt organization: 5 U.S.C. § 4111 (Civilian Employees Only).** According to 5 U.S.C. § 4105, the head of a Federal agency may authorize employee training at “non-Government facilities.” 5 U.S.C. § 4111(a) then authorizes acceptance of payment of transportation costs for training at such facilities by a tax-exempt organization (one “determined by the Secretary of Treasury to be an organization described by 501(c)(3) of title 26 which is exempt from taxation under section 501(a) of title 26”). 5 U.S.C. § 4111(b) makes it clear that this “payment” can be “in cash or in kind.”

2. Transportation between lodging and contractor facility.

A. Transportation provided for official business. See discussion in II,1, above.

B. Transportation provided not for official business, but as gift to the Federal employee: 5 C.F.R. § 2635.204 (2003). If the transportation provided to an employee were not for official business, it may be a *gift* to the *employee*. Such gifts are normally prohibited since they are from a prohibited source (person doing business with the employee's agency) or given because of the employee's official position. The employee may, however, be able to accept the gift of transportation under one of the exceptions to the prohibition, including:

- **Gifts of \$20 or less.** The employee may accept any gift, valued at no more than \$20 per source per occasion, that also, along with other gifts from the same source to the same employee, amounts to no more than \$50 *per calendar year*.
5 C.F.R. § 2635.204(a).

- **Gifts based on personal relationship.** The employee may accept any gift *clearly* motivated by a personal relationship and not because of the employee's Federal position. 5 C.F.R. § 2635.204(b).
- **Gifts based on outside employment.** The employee may accept any gift provided to an employee because of the employee's or the employee's spouse's outside business activities, where it is *clear* that the gift has not been offered or enhanced by the employee's Federal employee status. 5 C.F.R. § 2635.204(e)(1)-(2).

Remember that although the above exception may permit the employee to accept the gift, it may yet be prudent to decline the gift to avoid an appearance of impropriety. *See* 5 C.F.R. § 2635.204. Employees who accept a gift of transportation not authorized by 5 C.F.R. §§ 2635.201-205 or by statutory authority, must repay the donor the market value of that transportation. 5 C.F.R. § 2635.205(a)(3).

3. Transportation after work—not for official business (for example, to a restaurant)

See the discussion at II,2,B, above.