

TRANSPORTATION

Whether Air Force Employees and Non-A&AS Contractor Employees May Share Ground Transportation for Duty-Related Travel

This memorandum responds to your 4 March 2011 request for an opinion on whether it would be permissible for Air Force employees to share ground transportation (to include by POV, GOV, contractor company car, and/or rental car) with non-Advisory and Assistance Services (A&AS) contractor employees for duty-related travel, such as to attend an off-base meeting or a temporary duty (TDY) location, where the contract contains a provision for reimbursement of the contractor for travel expenses and the employees are willing to share the transportation.

Background

A November 2000 Opinion of The Judge Advocate General of the Air Force analyzed the question of whether Air Force employees and Advisory and Assistance Services (A&AS)¹ contractor employees could share ground transportation in furtherance of official duties. *See* Opinion of The Judge Advocate General of the Air Force (OpJAGAF) 2000/78, 1 November 2000. The opinion concluded the employees could share ground transportation, so long as the Government agreed in the contract to reimburse the contractor for travel expenses and “when both parties agree to share their transportation.” *Id.* Noting the rule that the Government shall provide transportation to its employees who are carrying out official duties,² the opinion nevertheless explained that:

In A&AS contracts, the Government has agreed to reimburse the contractor for travel expenses. Thus, if the contractor acquires transportation that can be shared with Government employees and both the contractor and the employee agree with the idea, then we believe that the transportation can be shared because it clearly occurs at Government, not contractor, expense. In this case, the responsibility for providing official travel has not been improperly shifted to the contractor

¹ The Federal Acquisition Regulation (FAR) defines advisory and assistance services as “those services provided under contract by nongovernmental sources to support or improve: organizational policy development; decision-making; management and administration; program and/or project management and administration; or R&D activities. It can also mean the furnishing of professional advice or assistance rendered to improve the effectiveness of Federal management processes or procedures (including those of an engineering and technical nature). In rendering the foregoing services, outputs may take the form of information, advice, opinions, alternatives, analyses, evaluations, recommendations, training and the day-to-day aid of support personnel needed for the successful performance of ongoing Federal operations.” FAR 2.101.

² *See* Joint Ethics Regulation (JER), DoD 5500.7-R, para. 4-100a (stating that “Official travel by DoD employees shall be funded by the Federal Government except that DoD Components may accept official travel benefits, including in kind subsistence and accommodations and payments or reimbursements of expenses, from non-Federal sources as provided in this Chapter of this Regulation”).

Conversely, if the Government employee has Government-provided transportation that can be reasonably shared with A&AS contract personnel, the transportation is again being provided for both at Government expense. The contractor does not receive a “windfall” or a “free ride” because the contractor could have obtained the same transportation benefit directly from the Government.

Id. In reaching this conclusion, the opinion reasoned that an A&AS contract is “distinguishable” from a non-A&AS contract. Specifically, “[i]nstead of an ‘arms length’ relationship, A&AS contracts envision a close working relationship between Government and contractor employees . . . A&AS contractor personnel ordinarily share a close working relationship with Government employees, to the point where they are often co-located in the same office.” *Id.*

Five months after this opinion about Air Force and A&AS contractor employees sharing ground transportation, AFMCLO/JA asked whether Air Force and non-A&AS contractor employees could share ground transportation as well. *See* OpJAGAF 2001/22, 18 April 2001. AFMCLO/JA suggested that the same logic from the shared transportation opinion concerning A&AS employees could apply to “all cost-reimbursement contracts where government employees and contractor personnel work closely together,” i.e., to non-A&AS contracts. *Id.* The OpJAGAF found no legal basis that prohibited such sharing of ground transportation, but noted that there might be policy reasons against allowing such sharing of transportation, including potential expanded Government liability in the event of vehicle accidents. Accordingly, AF/JA referred the matter to the Headquarters Air Force Directorate of Transportation, Vehicle and Equipment Division (AF/ILTV). To date, it is unknown if AF/ILTV ever made a formal policy decision on this issue.

Discussion

AFPEO/HJA has asked us to re-visit the Air Force’s shared transportation policies on the grounds that many Air Force employees share office space with non-A&AS contractor employees. Indeed, a large number of logistics, product, and test centers in the Air Force rely on non-A&AS contractors to support programs, projects, and activities. One of the most significant changes to the government work environment in the last fifteen years is the meteoric expansion of the use of support services contractors.³ These support services contractors often work within government work spaces, side-by-side with the government employees of the program they

³ Much of the increase in the use of services contracts is associated with the war on terrorism and support of overseas contingency operations. GAO concluded that “[t]o meet military requirements during a period of increased operations without an increase in active duty and civilian personnel, DoD has relied not only on reserve personnel activations, but also on increased use of contractor support in areas such as management and administrative services, information technology services, medical services, and weapons systems and base operations support.” GAO Report to Congressional Committees No. 07-631, *Defense Budget: Trends in Operation and Maintenance Costs and Support Services Contracting*, May 2007 at 15. The GAO noted that the monetary value of DoD services contracts rose by 73% between 2000 and 2005. *Id.*

support. Most, if not all, of these non-A&AS services contracts contain provisions that prescribe reimbursements for the contractors' travel expenses. In such situations, non-A&AS contractors arguably are not that "distinguishable" from A&AS contractors. *Cf.* OpJAGAF 2000/78.

Whether the contractor employee works pursuant to an A&AS contract or a non-A&AS contract, may not be that significant. In 1998, the Office of Government Ethics (OGE) issued an opinion regarding Government and contractor employees sharing duty-related transportation. *See* Office of Government Ethics 98 x 8, *Letter to a Private Organization* (25 Jun 1998). That opinion discussed three examples involving shared transportation, but the opinion was silent as to whether the contractors involved were A&AS or non-A&AS contractor employees. Instead, OGE determined that:

unless the contractor knows that transportation under these circumstances is permitted by the terms of the contract with the Government, or that the Government has agreed to reimburse the contractor for this transportation, or that it has been approved in advance by the Government for acceptance under some statutory gift authority, the contractor should not ordinarily be providing ground transportation such as that described above in connection with an agency employee's official duty.

Id. (emphasis added). Importantly, the three examples of shared duty-related transportation that OGE described could very easily involve either A&AS or non-A&AS contractor employees: "transportation in a company vehicle . . . to the contractor's facility, in connection with a program review;" "transportation in a company vehicle between two facilities of a contractor that are several miles apart, to conduct a plant inspection;" and "transportation in cars rented by the contractors for travel by its employees along with Government officials from an airport to the contractor's remote site, for a meeting of Government and contractor personnel." *See id.* Thus, OGE's opinion implicitly suggests that the distinction between A&AS and non-A&AS contractor employees is not necessarily determinative on the question of whether Air Force and contractor employees may share ground transportation to official events. On the contrary, since "transportation received in connection with the performance of official duty generally [has] the effect of reducing official Government expenditures[,] . . . the matter must be resolved under . . . appropriate agency legal arrangement." *Id.*

Air Force personnel who need to attend off-base meetings⁴ and go on TDYs in furtherance of their official duties often find themselves attending the same meetings and going on the same TDYs as the non-A&AS contractor employees with whom they work on a particular program, project, or activity. Air Force personnel who attend such meetings and go on such TDYs may be authorized to travel, inter alia, by GOV, rental car, or POV. Joint Travel Regulation (JTR), Chapter 2, Part A, para. C2001A; Joint Federal Travel Regulation (JFTR), Chapter 3, Part A, para. U3001. That ground transportation must be at Air Force expense. *See* JER, DoD 5500.7-R, para 4-100a; *see also* JTR, Chapter 1, Part A, para. C1050B.2.a (stating that "[a]n employee must not be directed to perform official travel . . . [a]t personal expense"); JFTR, Chapter 3, Part

⁴ This opinion assumes that such an off-base meeting is not a "meeting" as defined 41 C.F.R. § 304-2.1 for purposes of 31 U.S.C. § 1353.

A, paras. U3000.B and U3001 (discussing reimbursable travel expenses, and noting that “POC operating expenses ordinarily are reimbursed through a mileage allowance”). The non-A&AS contractor employees attending the same meetings and going on the same TDYs similarly may travel by a company car, rental car, or POV. If the contract provides a provision for reimbursement for travel expenses, the Air Force will ultimately fund the non-A&AS contractor employee’s travel as well. Thus, the Air Force may end up paying for multiple trips to the same official event.

However, if the non-A&AS contractor employee offered the Air Force employee a ride in the contractor employee’s POV, a rental car paid for by the contractor employee’s employer, or the company car to attend the off-base meeting or to go on the TDY, the Air Force employee should be able to legally accept that ride. Because the contract provides for reimbursement of the contractor’s travel expenses, the Air Force is funding the travel. *Cf.* OpJAGAF 2000/78 (noting that Air Force and A&AS contractor employees sharing transportation provided by the contractor under a contract in which the Air Force has agreed to reimburse the contractor for its travel expenses is permissible because the shared transportation “clearly occurs at Government, not contractor, expense”). Accordingly, the Air Force would be funding the Air Force employee’s official travel as well, IAW JER 4-100a. Likewise, if the Air Force employee offered the non-A&AS contractor employee a ride in the Air Force employee’s POV, a rental car paid for by the Air Force, or a GOV to the off base meeting or to go on the TDY, the contractor employee should be able to legally accept such a ride since he/she would have been reimbursed his/her travel expenses had he/she used another mode of transportation. OpJAGAF 2001/22 found no legal basis why Air Force and non-A&AS contractors should not be allowed to make such travel sharing arrangements. With regards to policy objections, the Headquarters Air Force, Logistics, Installations and Mission Support, Directorate of Logistics (AF/A4L), the successor organization to AF/ILTV and the proponent of AFI 24-301 (Vehicle Operations), in a memorandum of 28 July 2011, stated that:

We concur with your finding that it is permissible for AF personnel to share ground transportation with AAS and non-AAS contractors. AF-provided ground transportation for contractors not on a cost reimbursable contract will be limited to a space available basis.

Nothing in the foregoing is meant to suggest that sharing ground transportation by Air Force and contractor employees should be mandatory, advisable, or encouraged. In many situations, valid reasons may exist why Air Force employees and contractor employees may wish to not share transportation.⁵ Moreover, under certain circumstances, it may be inappropriate for the parties to share transportation. *See, e.g.,* DoD Standards of Conduct Office pamphlet, “Ethics Issues in Government-Contractor Teambuilding,” 15 Jul 99, page 40 (noting that “[t]here may be an appearance problem that requires discussion with an ethics counselor if, for example, this

⁵ OpJAGAF 1996/158, 18 October 1996, noted that “[s]ituations where a contractor’s assistance would merely be more convenient or economical to the government do not justify acceptance. The potential complaints from taxpayers, competing contractors, news media, and others about appearances of special interest and preferential treatment outweigh any purported economic savings.”

arrangement occurs frequently or the DoD employee is making official decisions affecting the contractor”). Supervisors and employees, with the assistance of their ethics counselors, should be able to identify those situations and handle them accordingly. However, shared ground transportation could be a permissible option in those cases where the contract contains a provision that provides for reimbursement to the contractor for its travel expenses and the Air Force and non-A&AS contractor employees are willing to share ground transportation, and no other grounds exists as to why this shared transportation arrangement would be ill-advised.

For the foregoing reasons, the practice of Air Force employees sharing ground transportation (to include by POV, GOV, contractor company car, and/or rental car) with non-A&AS contractor employees for duty-related travel, if the contract provides for reimbursement for the contractor’s travel expenses and both parties are willing to share transportation, is legally permissible.

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