OFFICE OF GOVERNMENT ETHICS

98 x 8

Letter to a Private Organization
dated June 25, 1998

Your letter of April 29, 1998, raised several recurring issues regarding the propriety of executive branch employees' acceptance of ground transportation provided by a Government contractor while they are conducting program reviews and similar official Government business with the contractor at its site. We appreciate the operating principle which you expressed on behalf of your organization members, which is to refrain from offering anything of value to Government employees that cannot be accepted under applicable laws and regulations. Our response herein will examine the relevant laws and regulations, discuss the specific fact patterns that you described, and provide other general guidance that we hope will be useful to your organization members.

GIFT RULES

Under the regulatory Standards of Ethical Conduct for Employees of the Executive Branch (Standards of Conduct) at 5 C.F.R. part 2635 and a civil statute at 5 U.S.C. § 7353, your member organizations, as well as each of their employees, are considered "prohibited sources" for gifts to Government employees of agencies with whom they either hold or seek contracts. Prohibited sources of gifts are described at 5 C.F.R. § 2635.203(d) and 5 U.S.C. § 7353(a) as including persons and entities who seek official action by the employee's agency, do business or seek to do business with that agency, or have interests that may be substantially affected by the employee's official duties. Executive branch employees can neither solicit nor accept anything of monetary value from such sources unless it is excluded from the definition of gifts at 5 C.F.R. § 2635.203(b) or accepted (with no solicitation) under one of the exceptions in section 2635.204.

These rules govern primarily in circumstances where gifts such as ground transportation about which you inquired are being offered to employees for their personal benefit, in situations not directly related to the performance of official duty. In contrast, gifts of transportation received in connection with the performance of official duty generally have the effect of reducing official Government expenditures, and are actually being accepted by the Government, not the individual employee, even though the employee may be receiving and utilizing such gifts. In those situations,

the Standards of Conduct rules do not apply, and the matter must be resolved under authority of an agency gift acceptance statute or other appropriate agency legal arrangement. Anti-augmentation principles regarding appropriated funding generally prevent executive branch agencies from accepting gifts, absent a statutory basis.

This dichotomy is evident in the exclusions from the definition of gifts in the Standards of Conduct rules applicable to individual employees, at 5 C.F.R. § 2635.203(b)(7) and (b)(8). By the terms of those exclusions, ground transportation at a contractor's site would not be considered a gift to the employee under the Standards of Conduct, if the Government paid for it, or if the Government obtained it under the terms of the contract, or if the Government rather than the employee accepted it under specific statutory authority.

APPLICATION TO DUTY-RELATED TRANSPORTATION

Three of your examples involve contractor-provided ground transportation in connection with an agency employee's performance of official duty while away from his normal duty station by means of air travel: transportation in a company vehicle from an airport or hotel 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 tour during a program review; and transportation in cars rented by the contractor 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. These three examples illustrate gifts of services being provided to the Government, not the employee. They have the effect of reducing official travel expenses for which the employee will otherwise be reimbursed by the Government under travel orders or other similar expense authorization procedure.

The issue in these situations, therefore, is whether the *Government* may accept such transportation, not whether the individual employee can do so. This is analogous to what you described for gifts to U.S. Senate employees in connection with official travel. For the executive branch, however, authority to accept gifts is limited by the anti-augmentation principles alluded to above. As a result, unless the contractor knows that transportation under these circumstances is permitted by the terms of a 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 performance of official duty.

Unusual or unique circumstances should be coordinated in advance with the particular agency. For instance, transportation between two contractor sites might be considered an integral part of some types of inspection visits, rather than a gift. This could occur where it is necessary that employees of the contractor and the Government travel together in order to observe certain local conditions en route, or to discuss matters or continue a meeting during a lengthy transit between two sites, or because of extraordinary time constraints on the overall visit. In such circumstances, the transportation might be a legitimate adjunct to the inspection, rather than a gift. In other unusual cases, site visits might necessitate contractor-provided transportation because of safety, security, limited access to a location, or the unavailability or impracticality of commercial transportation to a remote site.

These various exceptional situations should be anticipated in advance, so that provisions can be made for them in the contract itself or through other appropriate prior arrangements with the agency. Careful advance discussion between the agency and the contractor can help avoid abuses and ensure compliance with decisions of Government agencies having responsibility for fiscal matters, including the Office of Legal Counsel at the Department of Justice and the Comptroller General.

APPLICATION TO NON-DUTY-RELATED TRANSPORTATION

In contrast, if free ground transportation is provided by the contractor to a Government employee while in an official travel status away from his normal duty station to conduct a program review, but after working hours in connection with dinner at a local restaurant (at the employee's own expense), as in your remaining example, the transportation would be more appropriately analyzed as a gift to the employee rather than to the Government. It would apparently be provided to the employee for his own personal benefit, and it would not appear to be connected with his performance of official duty or to directly reduce Government travel expenditures, in most cases. Of course, if those assumptions are incorrect, then this transportation must instead be considered a gift to the Government, as in the earlier examples.

Using these assumptions and analyzing this transportation as a gift to the employee, an exception to the ban on an employee's acceptance of gifts from a prohibited source may apply, at 5 C.F.R.

§ 2635.204(a). That exception permits acceptance of gifts having an aggregate market value of $20 or less per occasion (and not exceeding an aggregate market value of $50 per source in a calendar year). The other exceptions enumerated in section 2635.204 of the employee Standards of Conduct regulation do not appear to be relevant, though some agencies may have additional special regulatory exceptions for gifts to employees, as permitted by section 2635.204(k). Consequently, if the exception for $20 per occasion or $50 per source per year will be exceeded, then the Government employee will likely not be able to accept the described free transportation to a restaurant. Note that gifts of transportation provided by the contractor itself or by any of its employees are considered gifts from the same source. Of course, if the Government employee were to pay fair market value, the transportation would not constitute a gift at all, as explained at section 2635.203(b)(9) of the Standards of Conduct regulation.

ALTERNATIVE MEASURES

Your letter had suggested that this Office might consider issuing a new specific authorization for executive branch employees to accept contractor gifts of local ground transportation offered in connection with official duty. As discussed above, however, gifts of transportation in connection with the performance of official duty that have the effect of reducing Government travel expenses can only be accepted by a Government agency, not its employees, even though received and utilized by those employees. The Office of Government Ethics (OGE) has no authority to issue regulations concerning agency gift acceptance, other than for itself.[1] Agencies with gift acceptance statutes are primarily responsible for determining what may be permitted by those statutes.[2]

---

[1] While OGE did have some coordination responsibility for the regulations issued under 31 U.S.C. § 1353 by the General Services Administration concerning agency acceptance of certain travel from non-Federal sources (41 C.F.R. part 304-1), that procedure is not available for transportation in connection with an agency's essential statutory or regulatory mission functions, which we understand to be the subject of your inquiry. See 41 C.F.R. § 304-1.2(c)(3).

[2] Although OGE is currently working on a regulation to implement its own gift acceptance statute, which could serve as a model rule for other agencies, each gift acceptance statute must ultimately be interpreted by the particular agency (with assistance from other Government agencies having responsibility for fiscal matters), because it may contain unique provisions and limitations.

For gifts of transportation that are provided to the employee for his personal benefit and not in connection with the performance of official duty or directly reducing Government travel expenses, OGE does have authority to issue additional gift exceptions in the Standards of Conduct regulation. We have determined, however, that it would not be appropriate to create an additional exception for such gifts. When we issued the uniform Standards of Conduct regulation for the executive branch in 1992 for codification at 5 C.F.R. part 2635, it was decided during the rulemaking process to limit the number and scope of exceptions in the final rule. The exception for gifts worth $20 or less was found adequate to cover various types of de minimis gifts, including ground transportation, that would be considered appropriate for acceptance.

CONCLUSION

I trust that your members will find useful this general guidance concerning Government restrictions on soliciting and accepting gifts, and its application herein to your examples of ground transportation provided by a contractor to Government employees at a contractor's site. If you have other concrete examples that raise additional unresolved questions of general applicability, please feel free to contact us again. For unique gift issues involving specific agencies and contracts, your members may wish to contact the particular agencies' ethics officials directly.

Sincerely,

Stephen D. Potts
Director