

GC GUIDANCE ON ELECTRIC VEHICLE RECHARGING STATIONS

Several National Laboratory contractors have asked us whether Department of Energy (“Department” or “DOE”) appropriated funds may be used to reimburse the lab contractors for the cost of installing electric vehicle recharging stations and to pay (whether by reimbursement or by DOE directly) electricity bill costs resulting from the use of such stations.

As more fully discussed below, the labs have several options for installing electric vehicle recharging stations and making these stations available to lab employees and visitors. First, labs may install such stations to the extent reasonably required to meet current or anticipated fleet vehicle or demonstration project needs. Second, labs may install electric vehicle recharging stations not required to meet fleet vehicle (or demonstration project) needs, provided the lab contractor itself pays the costs related to installation without drawing on its DOE letter of credit. In such a circumstance, the lab contractor should work with DOE before beginning construction to ensure that ownership and responsibility for maintenance of the recharging stations is clear and, if necessary, that there is appropriate gift acceptance authority in place.

Third, once an electric vehicle recharging station is installed, a lab can use that station to charge fleet (and demonstration project) vehicles. Fourth, once such a station is installed, a lab can make it available for use by employees and visitors, subject to certain requirements. In particular, where it wishes to do so, the lab contractor should work with DOE to effectuate a mechanism by which it would effectively reimburse DOE for the costs associated with personal recharging. (In most instances, DOE pays the labs’ electricity bills directly.)

I. Installation

A. For Fleet Vehicle Needs

The costs of installing electric vehicle recharging stations are, to the extent reasonably required to meet current or anticipated fleet vehicle (or demonstration project) needs, reimbursable by DOE. The Purpose Statute establishes the general rule that “[a]ppropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law.” 31 U.S.C. § 1301(a). Installation costs for electric vehicle recharging stations tied to current or anticipated fleet vehicle (or demonstration project) needs would be considered a necessary expense of operating the labs’ fleet vehicles and would therefore be unlike the circumstance presented in the Government Accountability Office’s (“GAO”) Architect of the Capitol (“AOC”) opinion. B-320116 (2010). In addition, the costs of installing the recharging stations reasonably required to meet fleet vehicle (or demonstration project) needs will likely be allowable under the M&O contract.

B. For Non Fleet Vehicles

On the other hand, where a lab contractor wishes to install electric vehicle recharging stations not required to meet current or anticipated fleet (or demonstration project) needs (or to install more recharging stations than such needs warrant) it must pay the cost of installation itself. In

addition, there are several issues the lab contractor should work with DOE to resolve prior to beginning construction.

The basic issue is that DOE cannot reimburse lab contractors' installation costs to the extent recharging stations are intended for employees' commuting purposes and not reasonably required to meet current or anticipated fleet vehicle (or demonstration project) needs. In this circumstance, unlike that of fleet or vehicles or demonstration projects, neither the labs involved nor DOE-GC in its own research have identified specific statutory authority authorizing such reimbursement and it is axiomatic that "[a]n agency may not use appropriated funds to pay for items of personal expense unless there is specific statutory authority." 68 Comp. Gen. 502, 505, Matter of: Utility Costs under Work-at-Home Programs (June 19, 1989). Although GAO decisions are not binding on the executive branch, Bowser v. Synar, 478 U.S. 714, 732-33 (1986), GAO's line of decisions regarding the unavailability of appropriated funds for personal expenses stems from decisions of the Comptroller of the Treasury, see, e.g., 2 Comp. Dec. 262 (1895). Therefore the Department follows the reasoning therein and thus does not generally use appropriated funds for personal expenses. Expenses related to an employee's commute, including parking and gas (or other fuel), are personal expenses, and therefore are not payable from the Department's appropriated funds.

The question has arisen, however, whether – notwithstanding the apparent absence of “specific statutory authority” – such reimbursement might be permissible because the installation of electric vehicle recharging stations is “in direct support of [the agency's] mission.” B-320116. As GAO's AOC opinion states, “[t]he issue then is whether [the agency] may treat the installation of essential infrastructure to support recharging stations for private vehicles as a ‘necessary expense’ of one of its appropriations.” Id. To qualify as a necessary expense (1) there must be a reasonable relationship between the object of the expenditure and the general purpose for which the funds were appropriated, (2) the expenditure must not be prohibited by law, and (3) the expenditure must not otherwise be provided for in another appropriation. B-303170 (2005). Here, there is an insufficient relationship between the Department's appropriations and commuting expenses, even where the National Labs support the Department's mission related to energy efficiency and renewable energy.

Even where an expenditure is personal in nature, GAO has allowed the use of appropriated funds where the expenditure primarily benefits the Government. B-309604 (2007). Here, however, instead of conveying a collateral benefit to the employee or visitor while retaining the primary benefit to the Government, the benefit of personal vehicle recharging accrues primarily to the employee or visitor. As the AOC opinion notes, “the use of appropriations to install and operate recharging stations for employees' and Members' use for their personal vehicles [confers] a benefit to them that would facilitate their commute between home and work.” B-320116.

In light of GAO's statement that “the expenses of an employee's commute between home and work are personal expenses,” B-320116, and its admonition that personal expenses may be paid “only where there is clear and convincing evidence that the expenditure that would ordinarily be a personal expense primarily benefits the government,” 68 Comp. Gen. at 505 (emphasis added), we cannot conclude that the installation of more stations than reasonably required to meet current or anticipated fleet vehicle (or demonstration) needs “primarily benefits the government” rather

than the employees and visitors who would use them to recharge their vehicles. Accordingly, absent evidence of a more specific appropriation we cannot conclude that DOE has statutory authority to reimburse such installation costs. Likewise, given that these recharging stations are not for fleet vehicle (or demonstration project) needs, their costs will likely not be allowable under the M&O contract because they are not being incurred for DOE's benefit.

That does not necessarily mean, however, that a lab cannot install more recharging stations than required to meet its fleet (or demonstration project) needs. To the contrary, the lab contractor is free to pay the installation costs at its expense (and without reimbursement in any manner through the M&O contract). If it does so, there are several issues it should work through with DOE before beginning construction. First, there is a property issue regarding who would own the recharging stations. Assuming the contractor retains ownership of the recharging stations, it will be important to know whether these recharging stations are removable, if necessary (e.g., after the term of the contract or if DOE makes changes to the use of the area in which the recharging stations are installed) and, if so, what the consequences will be of removing these stations given that they would presumably be installed on DOE land or affixed to a DOE-owned building. The costs of fixing any damaged land or building by removing the recharging stations likely would not be an allowable cost under the contract. Similarly, the costs associated with installing the electricity lines and maintaining the recharging stations may not be allowable (even if the contractor "gifts" DOE the recharging stations). Thus, a lab planning such installation should consult with DOE on these issues before proceeding with construction.

Second, to the extent the Department would own the recharging stations and related infrastructure, or the lab contractor wishes to gift them to DOE, there is a gift acceptance issue. (The recharging station could be seen as a gift to the Government when placed on Government property.) A lab contractor contemplating paying installation costs out of its own pocket should therefore work with DOE before proceeding with construction to ensure that ownership of the stations and related infrastructure is clear and that, if necessary, there is appropriate gift acceptance authority in place.

II. Electricity Bills

A. For Fleet Vehicle Needs

Where, as is generally the case, DOE pays the lab's electricity bill directly, there would be no issue with DOE paying the costs reasonably required to meet current or anticipated fleet vehicle (or demonstration project) needs. If there is a circumstance where the lab contractor pays the electricity costs, the costs of electricity incurred to the extent reasonably required to meet current fleet vehicle (or demonstration project) needs would generally be allowable similarly to other electricity costs used in the operation of the lab. Here, as with the installation of recharging stations to meet fleet vehicle or demonstration project needs, DOE's expenditures would be pursuant to "specific statutory authority." See supra Part I.A.

B. For Non Fleet Vehicles

On the other hand, DOE cannot pay for or reimburse the labs' electricity bill costs to the extent not reasonably required for current fleet vehicle (or demonstration project) needs. Here again, our discussions and research have not identified "specific statutory authority" authorizing such reimbursement. See supra Part I.B. However, if a lab contractor pays the electricity costs, it is free to pay the cost of non-fleet or demonstration vehicle (e.g., employee or visitor) recharging out of its own pocket and, if it so chooses, charge a user fee to recoup its costs (or hire a contractor to do so).

If DOE pays a lab's electricity bill directly and the lab contractor wishes to allow employees or visitors to make use of existing recharging stations, it should work with DOE to effectuate a mechanism by which it would effectively reimburse DOE an amount equal to the marginal expense incurred by DOE in defraying these non-fleet vehicle (or demonstration project) recharging costs. The lab should be aware that, in addition, to electricity costs, this may involve certain contract administration costs, e.g., tracking how many employee or visitor (as opposed to fleet or demonstration) vehicles use the recharging stations. Thus, the lab contractor should anticipate that the amount paid by the private users or the lab (and "reimbursed" to DOE) would need to meet the costs associated with employee or visitor use, including administrative costs.

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