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THE WHITE HOUSE

WASHINGTON

February 3, 1983

*Pls see me*

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS *JGR*

SUBJECT: OMB Proposed Rules on Political Advocacy  
by Government Grantees and Contractors

By notice published in the Federal Register on January 24, 1983, OMB sought comments on a proposal to revise rules on government grants and contracts with nonprofit organizations. The purpose of the proposed revisions is stated to be to ensure that "federal tax dollars are not used, directly or indirectly, for the support of political advocacy." This purpose would be served by disallowing the costs of political advocacy in government grants and contracts. If any group that has a government grant or contract engages in political advocacy, it must segregate the costs associated with that advocacy and not recoup such costs from the government. The proposed revisions apply only to nonprofit groups, but the notice states that similar revisions will be proposed for civilian and defense contractors by Defense, NASA, and GSA.

Craig Fuller has raised the concern that the logic of the proposed rules would affect traditional lobbying activities of government contractors. One of the "Q&A's" accompanying the proposal, for example, specifically notes that the costs of a corporate jet used in part to fly officials for discussions with congressmen could not be included as allocated overhead in a government contract. The definition of political advocacy -- essentially attempting to influence any sort of governmental decision -- could snare many traditional activities of government contractors, although there is an exception of uncertain breadth for providing information in connection with a bid at the request of a government agency. The proposals paint with a much broader brush than is necessary to address the activities of government grantees that have been perceived as most objectionable. It is possible to "defund the left" without alienating TRW and Boeing, but the proposals, if enacted, could do both.

? It is also important to recognize that the notice somewhat disingenuously takes a high moral ground by citing legal

precedent of limited relevance. Two decisions are cited in the notice and accompanying Q&A's for the general proposition that First Amendment values are promoted by an effort to restrict government support for political advocacy. The decisions, however, are only vaguely relevant to the proposed revisions. Elrod v. Burns, 427 U.S. 353 (1976), cited four times, was a 3-2-3 decision holding no more than that the routine patronage dismissal of government employees in nonpolicymaking, nonconfidential positions was illegal. Aboud v. Detroit Board of Education, 431 U.S. 209 (1977), held that non-union government employees in an agency shop could not be forced to contribute funds to the union to be used for political purposes, but could be forced to contribute dues for more typical union activities.

JUN 20  
Federal Register / Vol. 48, No. 16, Monday, January 24, 1983

## OFFICE OF MANAGEMENT AND BUDGET

[Circular A-122]

### Cost Principles for Nonprofit Organizations

**AGENCY:** Office of Management and Budget.

**ACTION:** Notice.

**SUMMARY:** This notice offers interested parties an opportunity to comment on a proposed revision to Circular A-122, "Cost Principles for Nonprofit Organizations." The proposed revision establishes special provisions for costs related to political advocacy. Similar revisions are being simultaneously proposed for civilian and defense contractors through appropriate actions by the Department of Defense, NASA and GSA, the three agencies with authority to issue procurement regulations. The purpose of these proposals is to ensure that federal tax dollars are not used, directly or indirectly, for the support of political advocacy.

Over the past 25 years, the volume of federal activity conducted through grantees and contractors has dramatically grown. Sound management of federal grants and contracts has correspondingly gained in importance. The responsibility of the President through OMB to improve the management of the executive branch of government with a view to efficient and economical service, and to fulfill other statutory and constitutional responsibilities, extends to issues of grant and contract management no less than to issues of direct federal activity.

In recent years, the problem of the use of federal funds for political advocacy by grantees and contractors has been identified by members of the public, by the Comptroller General, and by Members of Congress. As many of these parties have observed, the diversion to political advocacy of federal funds, and of equipment procured with and personnel compensated by federal funds, is an abuse of the system and an uneconomical, inefficient and inappropriate use of the public's resources. Moreover, the commingling of federal grant or contract activity with private political advocacy creates the appearance of federal support for particular positions in public debate. This appearance can create misunderstanding and interfere with the neutral, non-ideological administration of federally funded programs.

This proposal is designed to balance the First Amendment rights of federal

grantees and contractors with the legitimate governmental interests of ensuring that the government does not subsidize, directly or indirectly, the political advocacy activities of private groups or institutions. These governmental interests are based on concern for protecting the free and robust interchange of ideas.

Americans have the First Amendment right both to engage freely in speech and political expression, and to refrain from speaking, without interference or control on the part of the government or its agents. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). The proposed revision is intended to ensure that the use of Federal grants, contracts and other agreements by private organizations engaging in political advocacy does not erode or infringe these constitutional rights, or distort the political process by encouraging or discouraging certain forms of political activity.

The activities of government in a democracy necessarily involve a degree of political advocacy, since government officials are expected to communicate with the people, explain their programs, and provide leadership and direction to the nation. Thus, Members of Congress and their staffs, the President and his political appointees, necessarily participate in forms of political advocacy. However, it is a distortion of the market place of ideas for the government to use its financial power to "tip the electoral process," *Elrod v. Burns*, 427 U.S. 353, 356 (1976), by subsidizing the political advocacy activities of private organizations and corporations. This proposal will ensure, to the extent consistent with the communications function of the government, that taxpayers are not required, directly or indirectly, "to contribute to the support of an ideological cause [they] may oppose." *Aboud v. Detroit Board of Education*, 431 U.S. 209, 235-236 (1977). The proposal also seeks to avoid the appearance that, by awarding Federal grants, contracts, or other agreements to organizations engaged in political advocacy on particular sides of public issues, the Government has endorsed, fostered, or "prescribe[d] [as] orthodox" a particular view on such issues, *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 645 (1943).

The proposed revision would make unallowable the cost of political advocacy, whether direct or indirect. The revision would also make unallowable any costs of communications equipment, personnel, other equipment, meetings or conferences, or publications, where such cost items are used for political

advocacy in whole or in part. The revision makes unallowable the costs of buildings and office space where 5 percent or more of the space is devoted to political advocacy. When federal grant or contract recipients use facilities, equipment, or personnel funded in part with federal monies for political advocacy, they may create the appearance of government support for their positions. Moreover, if federal funds are used to defray the overhead costs of organizations engaged in political advocacy, it frees up the organization's other funds for use in this political activity.

The principal effect of the revision will be that federal grantees and contractors that choose to engage in political advocacy must separate their grant or contract activity from their political activity. If they mix the two, then they will not receive government reimbursement for the jointly allocable costs. Contractors or grantees will not be permitted to require or induce employees paid in part or in whole with federal funds to engage in political advocacy activities, either as a formal part of job responsibilities or on their own time.

The definition of political advocacy used in this proposal is derived generally from the Internal Revenue Code, 26 U.S.C. 4911, defining attempts to "influence legislation," with modifications designed to comprise direct participation in elections or referenda, administrative processes, certain judicial processes, and other activity of a political advocacy nature.

These proposed revisions will become effective 30 days after final notice in the Federal Register. The revisions will affect only grants, contracts, and other agreements entered into after the effective date. Existing grants, contracts, and other agreements will not be immediately affected. Agency contracts and regulations will incorporate these provisions to the same extent and in the same manner as they do other provisions of Circular A-122.

Violations of these provisions will be a basis for cost disallowance, and in instances of serious or willful violations, may be a basis for debarment or suspension.

Comments should be submitted in duplicate to the Financial Management Division, Office of Management and Budget, Washington, D.C. 20503. All comments should be received within 45 days of this notice.

**FOR FURTHER INFORMATION CONTACT:** John J. Lordan, Chief, Financial Management Branch, Office of

Management and Budget, Washington, D.C. 20503, (202) 395-6823.

Issued in Washington, D.C., January 20, 1983.

Candice C. Bryant,

Acting Deputy Associate Director for Administration.

#### Appendix

The following questions and answers have been prepared by the Office of Management and Budget for informational purposes only.

**Question:** What is the purpose of these revisions?

**Answer:** The purpose is to ensure that federal contracts and grants are not used to support political advocacy either directly or indirectly. Thousands of contractors and grantees, administering hundreds of billions of federal dollars, have had wide latitude to engage in political advocacy activities, often using the same facilities and personnel paid for in part by the taxpayers. The current lack of a government-wide policy prohibiting the use of federal grant and contract funds for political advocacy has been criticized by the General Accounting Office. It is unfair to use federal tax money to support political causes. Nor is it an efficient or economical use of public resources to allow funds to be diverted from statutory purposes to political advocacy.

A particularly important abuse is that many contractors and grantees have been able to defray the overhead costs of their political advocacy, at public expense, by allocating some part of the cost to the administration of the contract or grant. Not only does this free up the organization's own resources for further political activity; it also creates the appearance that the government is supporting one or another side in a political controversy.

**Question:** How will the proposals work?

**Answer:** The proposals will revise cost principles applicable to federal grants, contracts (other than competitive, firm fixed price contracts), and other agreements. Recipients of federal grants, contracts, or other agreements will be barred from receiving government reimbursement for any activities connected with political advocacy at the national, state, or local levels. This includes membership or dues in trade associations or other organizations that have political advocacy as a substantial organizational purpose. In addition, salary costs will be unallowable to recipients who either require their employees to pay dues to political advocacy organizations or require them to engage in political advocacy on the job or during non-working hours. Finally, government funds will not be permitted to pay for facilities in which significant political advocacy activities are conducted, thus requiring physical separation of such activities from those involved in the performance of grants and contracts.

**Question:** What is an example of how this will work?

**Answer:** Take the example of a defense contractor which uses a corporate aircraft for oversight and management of a federal contract. If the contractor chooses to use the aircraft also for lobbying or other political

activities—such as transporting corporate officials to discussions with Congressmen—then under the principles proposed by the Defense Department, the contractor cannot include the cost of the aircraft or of any use of the aircraft as part of overhead costs allocated in part to the contract.

As an example in the non-profit area, take an organization which receives a federal grant to promote better health services for low-income individuals, which decides to organize a political rally to promote more federal funding for medical programs. The organization could not be reimbursed for any portion of the salaries of individuals engaged in organizing the political rally or for any portion of other overhead costs (office machines, printing facilities, etc.) if the same overhead items were used for the rally. The organization would be free to hold the rally—but it would do so at its own expense, and without using people, facilities or resources partially funded by the Federal Government.

**Question:** How is it possible to define "political advocacy"?

**Answer:** The concept of political advocacy, or "influencing legislation," is used in the Internal Revenue Code restrictions on tax-exempt organizations. The Internal Revenue Code definition of "influencing legislation" is employed in this proposal, with several modifications to take account of changes in political practices (e.g., development of political action committees), Supreme Court developments (e.g., decisions declaring certain forms of litigation to be political expression), and shifts in the decisionmaking process (e.g., the growth of administrative agencies and referenda as means of political decisionmaking).

In particular, the scope of the Code definition ("influencing legislation") has been expanded to cover "governmental decisions" in general. Thus, for example, the Internal Revenue Code defines the term "influencing legislation" as including "any attempt to influence any legislation through an attempt to affect the opinions of the general public or any segment thereof." The proposed revision to Circular A-122, correspondingly, defines "political advocacy" as including "attempting to influence governmental decisions through an attempt to affect the opinions of the general public or any segment thereof." The body of experience in interpreting the Internal Revenue Code provision, as appropriately modified, is expected to aid in the interpretation of the proposed revisions.

The proposals thus include as "political advocacy" direct participation in elections or referenda by means of contributions, endorsement, publicity, administration of political action committees, or similar activity; contributions to political advocacy organizations; attempting to influence government policy made through the regulatory process as well as the legislative process; and attempts to influence government policy through litigation as an *amicus curiae*, on behalf of the members of the organization, or on behalf of another party. In addition, several categories of activity excluded from the Code definition of "influencing legislation" (e.g., communications with organization members on political topics and lobbying with respect

to the organization's own interest) have been included in the proposal's definition, to ensure that such activities are not conducted at the expense of the public.

**Question:** What is the penalty for violating these provisions?

**Answer:** Cost recovery, and in instances of serious or willful violations, suspension or debarment from federal grants or contracts.

**Question:** How does this proposal affect the First Amendment right of freedom of speech?

**Answer:** This proposal will promote the First Amendment value that a person can freely speak, or refrain from speaking, on political matters. The Supreme Court has recognized constitutional problems with requirements on a person "to contribute to the support of an ideological cause he may oppose." *Aboud v. Detroit Board of Education*, 431 U.S. 209, 235-236 (1977).

Although government in a democracy necessarily involves some degree of political advocacy because of the need to communicate with citizens, taxpayers cannot rightly be required to support the political advocacy of private organizations and corporations through federal grants and contracts.

Moreover, the freedom of First Amendment political advocacy is jeopardized when the views of particular groups are financed by the government. The use of federal grants or contracts for the support of one side in a political debate, like the use of political patronage for the support of a political party, can injure the "free functioning of the electoral process." *Elrod v. Burns*, 427 U.S. 353, 356 (1976). In the marketplace of ideas, where differing political opinions compete for public acceptance, the government should not be in the position of subsidizing the expression of views of particular organizations or corporations, as to defense or domestic policy. Nor should the government create the appearance of official support for the political advocacy of its grantees or contractors.

**Question:** Does this proposal infringe the First Amendment rights of recipient organizations?

**Answer:** No. Recipients remain free to engage in political advocacy on any side of any issue. The proposals merely ensure that organizations engage in political advocacy at their own expense—not the public's. If an organization chooses to exercise its First Amendment rights, it is only fair that it keep those political activities separate from its work at the expense of the public. It should not expect to have its political advocacy subsidized, or to be able to put facilities purchased in part by tax dollars to political use. Like federal agencies and employees, federal grantees and contractors are "expected to . . . execute the programs of the Government without bias or favoritism for or against any political party or group or the members thereof." *CSC v. National Association of Letter Carriers*, 413 U.S. 548, 565 (1973). Federal grant and contract activity will be more efficiently and fairly performed if it is not mixed with advocacy activities on one or the other side of political debate.

**Question:** Will these proposals prevent corporations or other organizations from lobbying in Congress or the agencies for grants or contracts?

**Answer:** No—but they will do it at their own expense, not the public's.

**Question:** Will organizations engaged in political advocacy be eligible to receive federal grants and contracts?

**Answer:** Absolutely. In a memorandum dated April 26, 1982, the Director of OMB made clear that:

"The Administration will continue to award grants and contracts to those parties who are most effective in fulfilling statutory purposes [and that] political advocacy groups may continue to receive grant and contract awards."

This policy will continue in effect, and just as agencies will be forbidden to award grants and contracts because of the political views of applicant groups, they will also be forbidden from discriminating against "parties most effective in fulfilling statutory purposes."

**Question:** What will be the practical effect on organizations that engage in political advocacy?

**Answer:** Federal grantees and contractors that choose to engage in political advocacy will need to separate their grant or contract activity from their political activity. If they mix the two, then they will not receive government reimbursement for the joint costs.

**Question:** What will be the effect on the employees of contractors and grantees?

**Answer:** Employees whose salary is paid in part with federal funds may not be required or induced to engage in political advocacy, either as a part of the job or on their own time. Nor may they be required to join or pay dues to an organization involved in substantial political advocacy. This will ensure that federal funds are not used to hire political armies or to generate political membership support—practices analogous to those held unconstitutional in *Elrod v. Burns*, 427 U.S. 347 (1976). Of course, individual employees remain free to engage in political advocacy on their own if they wish to do so.

**Question:** To what organizations do the proposals apply?

**Answer:** The proposed revision to OMB Circular A-122 will apply to all non-profit organizations receiving federal grants, contracts, or other agreements. Similar proposals are being applied by the Department of Defense, NASA, and the General Services Administration to civilian and defense contractors. The proposed revisions will apply to grants, contracts, and other agreements entered into after the effective date of the revisions. Existing grants, contracts, and other agreements will not be affected.

**Question:** Will these proposals interfere with organizations due process rights to

defend their interests in court?

**Answer:** No. So long as an organization appears in court on its own behalf, litigation is not defined as political advocacy. However, when an organization goes into court to represent others, or to support the claim of others, such attempts to influence policy through the judicial process are a form of political advocacy, as the Supreme Court has held. *NAACP v. Button*, 371 U.S. 415, 429 (1963); *In re Primus*, 436 U.S. 412, 428 (1978). Such activities should not be supported by federal grant or contract money, unless the grant or contract was made expressly for that purpose. Attorneys fee award statutes are not affected by these proposals.

**Question:** Will these proposals make it more difficult for the federal government to reward its political supporters?

**Answer:** Yes. Currently, the federal government may be able to reward its supporters, and punish its opponents, by granting or denying federal grants to organizations engaged in political advocacy. By making such awards to a friendly organization the government assumes a portion of that organization's overhead costs, and thus supports the organizations political activities. In this way, the government can influence the political process by inducing recipients of federal funds to conform their behavior to the governments desires. This was one of the dangers of the political spoils system recognized by the Supreme Court in *Elrod v. Burns*, 427 U.S. 347, 355-356 (1976). These proposals will help make the process neutral again, by eliminating the "political spoils" aspect of the government funding process.

**Question:** Will these proposals solve the whole problem of federal tax money being used to support political advocacy?

**Answer:** No, but they make a major step in the right direction. Congress and the agencies must continue to be vigilant to ensure that grants and contracts are not awarded for purposes that involve political advocacy.

#### **Circular A-122—Cost Principles for Nonprofit Organizations**

Circular A-122 is revised by modifying Attachment B as follows:

1. Insert a new paragraph "B 33 Political Advocacy."

a. The cost of activities constituting political advocacy are unallowable.

b. Political advocacy is any activity that includes:

(1) Attempting to influence the outcome of any Federal, State, or local election, referendum, initiative, or similar procedure, through contributions, endorsements, publicity, or similar activity;

(2) Establishing, administering,

contributing to, or paying the expenses of a political action committee, either directly or indirectly;

(3) Attempting to influence governmental decisions through an attempt to affect the opinions of the general public or any segment thereof;

(4) Attempting to influence governmental decisions through communications with any member or employee of a legislative body, or with any government official or employee who may participate in the decisionmaking process;

(5) Participating in or contributing to the expenses of litigation other than litigation in which the organization is a party with standing to sue or defend on its own behalf; or

(6) Contributing money, services, or any other thing of value, as dues or otherwise, to an organization that has political advocacy as a substantial organizational purpose, or that spends \$100,000 or more per year on activities constituting political advocacy.

c. Political advocacy does not include the following activities:

(1) Making available the results of nonpartisan analysis, study, or research, the distribution of which is not primarily designed to influence the outcome of any Federal, State, or local election, referendum, initiative, or similar procedure, or any governmental decision;

(2) Providing technical advice or assistance to a governmental body or to a committee or other subdivision thereof in response to a written request by such body or subdivision;

(3) Participating in litigation on behalf of other persons, if the organization has received a Federal, State, or local grant, contract, or other agreement for the express purpose of doing so;

(4) Applying or making a bid in connection with a grant, contract, unsolicited proposal, or other agreement, or providing information in connection with such application at the request of the government agency awarding the grant, contract, or other agreement; or

(5) Engaging in activities specifically required by law.

d. An organization has political advocacy as a "substantial organizational purpose" if:

(1) The organization's solicitations for membership or contributions

acknowledge that the organization engages in activities constituting political advocacy; or

(2) Twenty percent (20%) or more of the organization's annual expenditures, other than those incurred in connection with Federal, State or local grants, contracts, or other agreements, or incurred in connection with political advocacy.

e. The term, "governmental decisions" includes:

(1) The introduction, passage amendment, defeat, signing, or veto of legislation, appropriations, resolutions, or constitutional amendments at the Federal, State, or local level;

(2) Any rulemakings, guidelines, policy statements or other administrative decisions of general applicability and future effect; or

(3) Any licensing, grant, ratemaking, formal adjudication or informal adjudication, other than actions or decisions related to the administration of the specific grant, contract, or agreement involved.

f. Notwithstanding the provisions of other cost principles in this circular:

(1) Salary costs of individuals are unallowable if:

(a) The work of such individuals includes activities constituting political advocacy, other than activities that are both ministerial and non-material; or

(b) The organization has required or induced such individuals to join or pay dues to an organization, other than a labor union, that has political advocacy as a substantial organizational purpose, or to engage in political advocacy during non-working hours.

(2) The following costs are unallowable:

(a) Building or office space in which more than 5% of the usable space occupied by the organization or an affiliated organization is devoted to activities constituting political advocacy;

(b) Items of equipment or other items used in part for political advocacy;

(c) Meetings and conferences devoted in any part to political advocacy;

(d) Publication and printing allocable in part to political advocacy; and

(e) Membership in an organization that has political advocacy as a substantial organizational purpose, or that spends \$100,000 or more per year in connection with political advocacy.

2. Renummer subsequent paragraphs.

[FR Doc. 83-2031 Filed 1-21-83; 1:28 pm]

BILLING CODE 3110-01-3

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

March 3, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS *JGR*

SUBJECT: Lyn Nofziger Correspondence on OMB's  
Proposed Revision of Circular A-122

Lyn Nofziger has written objecting to OMB's proposed limits on political advocacy by government grantees and contractors. This proposal has become known, through shorthand designation, as the "A-122 proposal." Although A-122 itself only concerns the activities of non-profit organizations receiving government grants, the proposed revisions of A-122 announced by OMB are linked to corresponding proposals issued by Defense, GSA, and NASA concerning government contractors.

Nofziger states that the proposal is vague, would require detailed records of the political activities of employees of government contractors, and will prevent business from helping obtain passage of legislation, an activity traditionally requested by White Houses. He encloses a two-page analysis of the A-122 proposal.

I have drafted a brief reply for your signature, stating that OMB will soon publish a revised proposal and attaching a copy of the OMB press release announcing this fact.

Attachments



THE WHITE HOUSE

WASHINGTON

March 3, 1983

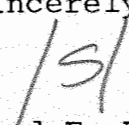
Dear Lyn:

Thank you for your recent memorandum on OMB's proposed revision of Circular A-122 and the related revisions affecting government contractors. As you doubtless know by now, OMB has announced its intention to publish a revised proposal, which will start a new 45-day comment period. I attach for your information a copy of the OMB press release announcing this fact.

The questions which have been raised concerning these proposals are being carefully reviewed within the White House, and you may be assured that your views will be given every appropriate consideration. Thank you for making us aware of your concerns and for sharing your analysis of the proposals with us.

With best personal regards,

Sincerely,

  
Fred F. Fielding  
Counsel to the President

Mr. Lyn Nofziger  
1605 New Hampshire Avenue, NW  
Washington, D.C. 20009

FFF:JGR:aw 3/3/83

cc: FFFielding  
JGRoberts  
Subj.  
Chron



EXECUTIVE OFFICE OF THE PRESIDENT  
OFFICE OF MANAGEMENT AND BUDGET  
WASHINGTON, D.C. 20503

FOR IMMEDIATE RELEASE  
February 25, 1983

OMB 83-6  
OMB Public Affairs  
395-3080

The Office of Management and Budget announced today that it will provide another two months for comment on proposed revisions to its Circular A-122 entitled "Cost Principles for Nonprofit Organizations." This extension will be accomplished by publication in two weeks of a revised proposal, which will start a new 45-day comment period. Meanwhile, OMB will continue to solicit comments on the current proposal until March 10, focusing on a number of specified areas that have aroused concern among affected parties.

Circular A-122 governs grants by Federal Agencies to non-profit organizations. Changes have also been proposed for Government contractors in the procurement regulations of the Department of Defense and the General Services Administration, which are also expected to be revised. In all cases the proposed amendments deal with the long-standing problem of the use of Federal dollars, directly or indirectly, for political advocacy.

It is anticipated that final changes in Circular A-122 will be published in the Summer, following consideration of comments received on the revised proposal. OMB stressed that any changes will be effective only for grants and contracts entered into after the conclusion of FY 1983 (September 30, 1983).

Further details are available, in question and answer form, from OMB Public Affairs, 395-3080.

## Prohibiting the Use of Federal Funds for Political Advocacy:

### Commonly Asked Questions and Answers

On January 24, 1983, the Office of Management and Budget published for comment proposals that would bar the use of federal funds for political advocacy by non-profit organizations. Defense and GSA published similar proposals for government contractors. Since then, OMB officials have heard many comments and questions. The following are responses to the most commonly asked questions.

#### 1. What is the purpose of the proposals?

Answer: The proposals are intended to provide uniform, enforceable rules for the treatment of costs associated with political advocacy by federal grantees and contractors. Longstanding legal provisions have prohibited the use of appropriated funds for political advocacy, but current procedures have not been adequate. For example, the Comptroller General has uncovered significant instances of improper diversion of federal funds for political advocacy activities. After a recent study of grantees under Title X (family planning) of the Public Health

Services Act, the Comptroller General issued the following recommendation:

"Clear federal guidance is needed both to ensure that Title X program funds are not used for lobbying and to preclude unnecessary controversy over whether grantees are violating federal restrictions. The move to revise and make more specific the cost principles applicable to all federal grantees is the appropriate mechanism to achieve these ends."

Among the deficiencies in current restrictions on the use of federal funds for political advocacy are these:

- ° Current rules are haphazard and inconsistent. Grantees and contractors under different programs and agencies are subject to different restrictions, and different forms of political advocacy have been dealt with in different ways. The proposals are intended to provide uniform, evenhanded, comprehensive treatment of political advocacy by federal grantees and contractors.

- ° Present rules are often largely unenforceable, because grant and contract activities and unauthorized political advocacy activities are often conducted within the same

facilities and by the same personnel. It is often impossible for auditors under the current system to determine whether federal funds are being diverted to political advocacy.

° Even if current rules could be fully enforced, they still permit grantees and contractors to maintain federally subsidized organizational structures committed to political advocacy. When the government, for example, pays significant portions of the salaries of chief lobbyists of grantees and contractors -- whose effectiveness as lobbyists only requires periodic concentrations of their time in lobbying activities -- the government effectively subsidizes the lobbying process. And, because grantees and contractors can be expected to favor programs which finance their activities, present policies tend to subsidize only one side of most public policy debates.

2. Will the proposals affect existing contracts and grants?

Answer: No. OMB is now receiving public comments on the proposals. They will not become effective until after substantial revisions have been made. A final rule will not be

completed until midsummer at the earliest and then will apply only to new contracts and grants entered into after Fiscal Year 1983 -- after September 30, 1983. Existing contracts and grants will continue to be governed by current cost principles.

3. The comment period was originally scheduled to close on March 10. How does OMB intend to proceed? Will the comment period be extended?

Answer: The comment period will effectively continue for an additional 60 days. This extension will be accomplished by publication in two weeks of a revised proposal, which will start a new 45-day comment period. Meanwhile, comments will continue to be solicited on the current proposal during the remaining comment period, particularly in several specific areas that have have aroused concern among affected parties.

4. Will the revised proposal contain substantive modifications?

Answer: Yes, and in a number of major respects. A number of persons have suggested ways in which the practical concerns of affected parties can be accommodated without compromising the basic purpose of the proposals. In particular, OMB is

considering and is actively soliciting specific proposals from affected parties in the following areas:

- ° Exemption of contacts with non-legislative state and local officials, such as zoning boards, from the definition of political advocacy.
- ° Exemption of most contacts with Executive branch officials from the definition of political advocacy.
- ° Exemption from the definition of political advocacy of providing information to trade associations and similar groups.
- ° Exemption of standard marketing activities from the definition of political advocacy.
- ° Substantial exemption of equipment usage from rules governing political advocacy.
- ° Establishment of a waiver policy for inadvertent or technical violations of the rules.

5. Do the proposals affect the tax deductibility of dues to trade associations or like groups?

Answer: No. The tax exempt status of organizations paying dues to trade association or like groups, and rules for the tax deductibility of such dues, will in no way be affected by the proposals.

6. Do the proposals affect organizations by reason of their payment of dues to or membership in trade associations or politically active groups?

Answer: No. The proposals do not in any way affect the status of organizations that join or pay dues to trade associations or politically active groups. The proposals merely prohibit the use of federal grant or contract funds for the payment of such dues.

7. Are the proposals applicable across the board, to contractors as well as non-profit grantees?

Answer: Yes. OMB's proposed changes in Circular A-122 apply to non-profit organizations, while identical proposals by Defense and GSA apply to contractors. The proposals do not apply to



state and local governments or their contractors or grantees, or to hospitals, universities, or Indian tribes.

8. Will the proposals be applicable to all forms of grants and contracts?

Answer: No. Where the government acquires final products for a fixed price, its only legitimate interest is that the goods or services are of the kind and nature described in the contract. The proposals primarily deal with so-called "cost plus" grants and contracts in which the government is asked to pay for portions of the time of officials and resources, otherwise used for political advocacy purposes.

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

February 24, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS *JGR*

SUBJECT: Lyn Nofziger Correspondence on OMB's  
Proposed Revision of Circular A-122

Lyn Nofziger has written objecting to OMB's proposed limits on political advocacy by government grantees and contractors. This proposal has become known, through shorthand designation, as the "A-122 proposal." Although A-122 itself only concerns the activities of non-profit organizations receiving government grants, the proposed revisions of A-122 announced by OMB are linked to corresponding proposals issued by Defense, GSA, and NASA concerning government contractors.

Nofziger states that the proposal is vague, would require detailed records of the political activities of employees of government contractors, and will prevent business from helping obtain passage of legislation, an activity traditionally requested by White Houses. He encloses a two-page analysis of the A-122 proposal.

I have drafted a brief reply for your signature, stating that the proposal is being carefully reviewed by the Administration -- which I take it is now the case.

THE WHITE HOUSE

WASHINGTON

March 3, 1983

Dear Lyn:

Thank you for your recent memorandum on OMB's proposed revision of Circular A-122 and the related revisions affecting government contractors. As you doubtless know by now, OMB has announced its intention to publish a revised proposal, which will start a new 45-day comment period. I attach for your information a copy of the OMB press release announcing this fact.

The questions which have been raised concerning these proposals are being carefully reviewed within the White House, and you may be assured that your views will be given every appropriate consideration. Thank you for making us aware of your concerns and for sharing your analysis of the proposals with us.

With best personal regards,

Sincerely,

Orig. signed by FFF

Fred F. Fielding  
Counsel to the President

Mr. Lyn Nofziger  
1605 New Hampshire Avenue, NW  
Washington, D.C. 20009

FFF:JGR:aw 3/3/83

cc: FFFielding  
JGRoberts  
Subj.  
Chron

**WHITE HOUSE  
CORRESPONDENCE TRACKING WORKSHEET**

FIDD1-02

- O - OUTGOING
- H - INTERNAL
- I - INCOMING

Date Correspondence Received (YY/MM/DD) 1/1

Name of Correspondent: Syn Rofziger

MI Mail Report User Codes: (A) \_\_\_\_\_ (B) \_\_\_\_\_ (C) \_\_\_\_\_

Subject: OMB's circular A-122, "Cost Principles for Non-Profit Organizations"

ROUTE TO: Office/Agency (Staff Name)	ACTION Action Code	Tracking Date YY/MM/DD	DISPOSITION	
			Type of Response	Completion Date YY/MM/DD
<u>W Holland</u>	ORIGINATOR	<u>8310221</u>		<u>1/1</u>
<u>WAT 18</u>	Referral Note: <u>D</u>	<u>8310221</u>		<u>58303102</u>
	Referral Note:	<u>1/1</u>		<u>1/1</u>
	Referral Note:	<u>1/1</u>		<u>1/1</u>
	Referral Note:	<u>1/1</u>		<u>1/1</u>

**ACTION CODES:**

- A - Appropriate Action
- C - Comment/Recommendation
- D - Draft Response
- F - Furnish Fact Sheet to be used as Enclosure
- I - Info Copy Only/No Action Necessary
- R - Direct Reply w/Copy
- S - For Signature
- X - Interim Reply

**DISPOSITION CODES:**

- A - Answered
- B - Non-Special Referral
- C - Completed
- S - Suspended

**FOR OUTGOING CORRESPONDENCE:**

Type of Response = Initials of Signer  
Code = "A"  
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Comments: \_\_\_\_\_

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Always return completed correspondence record to Central Files.  
Refer questions about the correspondence tracking system to Central Reference, ext. 2590.

LYN NOFZIGER


*Rebut*  
*(RS) to Lyn, P*

February 17, 1983

126425 ✓

MEMORANDUM

TO: Ed Meese  
Jim Baker  
Fred Fielding  
Ed Rollins

FROM: Lyn Nofziger 

Gentlemen:

I'm sure you are aware of OMB's circular A-122, "Cost Principles for Non-Profit Organizations." This, of course, is OMB's proposed limits on political advocacy of government contractors. I know that it was aimed primarily at those people using government grants to lobby the government. But in effect it goes far beyond that intent. It is also affecting many, many companies that do business with the Federal Government and many businesses to whom White Houses have traditionally turned when they wanted help in getting legislation passed.

I am enclosing a copy of an analysis that I asked to be drawn which shows you exactly what the proposal does. In addition, lawyers who have worked on this tell me the proposal is vague and may be subject to a number of interpretations. What this is going to do is force companies to keep detailed records on the political activities of their employees. If this is Constitutional, and I doubt much that it is, instead of getting government off of people's backs as we promised to do for lo these many years, you are adding an intolerable burden onto

the backs of many, many people. I think that you could simplify the proposed rule by just saying that persons or organizations receiving grants from the government cannot use that money to lobby the government.

In any event, Gentlemen, you're going to make it almost impossible for a lot of people who want to help you get a lot of things passed from actually helping you. I really think you ought to reconsider this thing.

P.S. I am sending out only four copies of this to the named people. I certainly do hope that it doesn't spread far and wide.

*P.S. - The opposition is growing not only among the lobbyists but also among the Republicans on the bill. Jack Brooks is thinking about hearings. Also I'm told Bob Michel is upset.*

*RH*

February 16, 1983

OMB'S PROPOSED LIMITS ON POLITICAL  
ADVOCACY OF GOVERNMENT CONTRACTORS

OMB HAS PROPOSED CHANGES IN THE COST PRINCIPLES APPLICABLE TO GOVERNMENT CONTRACTORS.

EXISTING LAW DISALLOWS PAYMENT OF "POLITICAL ADVOCACY" COSTS.

OMB'S DRAFT REGULATION (A-122) WOULD GO FURTHER BY DISALLOWING:

- The entire salary of any employee
  - whose work includes any political advocacy
    - this will inevitably include all corporate officers, lawyers, public relations activity, etc.
  - who has been "induced" to join any organization, other than a labor union, that has political advocacy as a substantial organizational purpose
    - such organizations include industry associations like the Defense Preparedness Industry Association, the American Bar Association, etc.
  - who has been "induced" to engage in any political advocacy during non-working hours
- The entire cost of a building or office space if more than 5% of the usable space is used for any political advocacy
  - thus the presence of a corporate vice president or division head engaged (inevitably) in advocacy would taint his entire facility, if he and his support staff use more than 5% of the space
- The entire cost of items of equipment used in any part for political advocacy.
  - thus, one "political" use would impugn charges for all time of a
    - phone system
    - word processing system
    - company airplane

OMB'S DRAFT REGULATION WOULD GREATLY EXPAND THE DEFINITION OF POLITICAL ADVOCACY TO INCLUDE:

- Attempting to affect any local, state or federal decision by
  - communicating with officials or legislators, or
  - influencing public opinion
- Attempting to influence any federal, state or local
  - election and
  - referendum or initiative
- Starting, operating, or contributing to a PAC

THE PROPOSED CHANGES ARE OBJECTIONABLE BECAUSE THEY:

- Unfairly and unconstitutionally penalize government contractors for participation in public debate undertaken at their own costs
  - the value of a contractor's service to the government should not be reduced because, with his own funds, he is involved in public discussions
- Undermines precisely the kind of support the administration frequently requests from contractors
  - unsolicited Congressional appearances, phone calls, educative advertising, etc., are all proscribed
- Penalizes many activities required in the normal course of business
  - for example, participating in a municipal referendum affecting zoning, environmental control, etc.
- Creates an administrative nightmare and a source of gross inefficiency by demanding segregation of facilities and corporate officers.





EXECUTIVE OFFICE OF THE PRESIDENT  
OFFICE OF MANAGEMENT AND BUDGET  
WASHINGTON, D.C. 20503

For Immediate Release  
January 20, 1983

OMB 84-4

The Administration announced today several steps designed to ensure that Federal dollars are not used, directly or indirectly, for political advocacy. The changes involve Federal contracts, including military contracts, and Federal grants to nonprofit organizations.

While assuring a full right of eligibility to compete for and receive Federal grants and contracts by organizations involved in political advocacy, the changes seek to assure that the Government does not subsidize such activities. Political advocacy includes lobbying and other attempts to influence legislation, as well as direct participation in elections or referenda, administrative processes and certain judicial processes.

Today's actions are designed to achieve a complete separation of costs involved in carrying out the Federal purposes for which grants or contracts are made, from costs associated with advocacy.

The separation of functions paid for by Federal grants and contracts from all kinds of political advocacy would mean a rigorous division of such "overhead" elements as office space and automobiles between those used for the Federal grant and those used for advocacy. For example, office complexes housing grantees or contractors where more than 5 percent of the space is used for political advocacy may not be charged to Federal grants or contracts, meaning that there would have to be physical separation of the two activities.

The changes would also deny payment of salaries from Federal grants or contracts for employees who engage in political advocacy as part of their jobs, or who are required, coerced or induced into joining advocacy organizations or participating in political advocacy activities on the job or during non-working hours. In addition, grant or contract funds could not be used to pay for membership dues in advocacy organizations.

For contracts, the changes would assure that the cost of lobbying Congress for specific weapons systems, for example, would not be included in the contract amount to be paid by the Government.

The changes announced are in two forms:

- o The Office of Management and Budget proposed for comment revisions in its Circular A-122, "Cost Principles for Nonprofit Organizations."
- o The main contracting agencies -- the Department of Defense, the General Services Administration and the National Aeronautics and Space Administration -- are simultaneously announcing proposed changes in their contracting regulations.



### Allowable Costs

#### OMB PROPOSING DISALLOWANCE OF LOBBYING COSTS FOR CONTRACTS, GRANTS

The Office of Management and Budget is proposing a stringent, governmentwide policy on the charging of lobbying costs to federal contracts and grants.

Under the proposed policy, contractors and grantees would be barred from using federal funds for "political advocacy," a term that embraces far more than the traditional notion of lobbying as trying to influence a member of Congress to vote a certain way on a particular issue.

Political advocacy, as used in the OMB proposal, includes not only legislative activities but also efforts aimed at influencing rulemaking or other administrative processes in the executive branch of the government—the White House and the federal departments and agencies.

The term also includes participation in or contributions to the expenses of litigation other than litigation in which the organization is a party or has standing to participate in its own behalf.

In addition, participation in elections or referenda at any level of government, as well as contributions of membership dues, money, or services to any organization having political advocacy as a "substantial organizational purpose," are considered political advocacy and thus would be off-limits to those receiving federal funds, under the new proposal.

Currently, federal policies on lobbying costs vary from agency to agency. Under the lobbying cost policy issued by DOD last October, the costs of both lobbying and legislative liaison activities at all levels of government are unallowable on defense contracts (38 FCR 721, 741). A month later, the General Services Administration issued a lobbying cost principle for all non-defense contracts that disallowed lobbying costs but not costs for legislative liaison activities (38 FCR 760).

#### Commingling Forbidden

Under current lobbying guidelines, contractors may separate out the portion of time or other resources devoted to unallowable activities when computing their costs on a contract. But that will be virtually impossible to do under the proposed policy, since any item or activity above a bare minimum that is devoted to political advocacy renders the entire item or activity unallowable. In other words, contractors will be forced to keep their political advocacy items and activities strictly separate from those devoted to performing the functions of the contract.

For example, salary costs of individuals are totally unallowable if "the work of such individuals includes activities constituting political advocacy," or if the individuals' employer has "required or induced" them to "join or pay dues to an organization other than a labor union that has political advocacy as a substan-

tial organizational purpose, or to engage in political advocacy during non-working hours."

Regarding building or office space, the entire space is unallowable if more than 5 percent of it is devoted to political advocacy. The same applies to items of equipment or other items used in part for political advocacy; meetings and conferences devoted in any part to political advocacy; and publication and printing allocable in part to political advocacy.

#### Exception for Legislative Liaison

However, certain activities are specifically excluded from the definition of political advocacy under the proposal. Such allowable activities include:

- making available the results of a nonpartisan study or analysis, provided the distribution is not intended to influence the outcome of any federal, state, or local election, referendum, or other procedure, or any governmental decision;
- applying for or bidding on a grant, contract, unsolicited proposal, or other agreement, or providing information in connection with such application at the request of the government agency awarding the grant, contract, or other agreement;
- providing technical advice or assistance to a governmental body or to a committee or subcommittee in response to a written request.

This latter category includes certain legislative liaison activities presently disallowed under the DOD lobbying cost policy and in this respect would be more favorable to DOD contractors than the current policy, according to DAR Council director James Brannan.

At present, there is no specific lobbying cost principle governing all federal grants, though there are statutory prohibitions governing lobbying in general and certain grantmaking departments in particular.

If adopted in final form, the proposed policy would supersede both the DOD and GSA lobbying policies and ensure a uniform approach to the issue for all uses of federal funds, grants and contracts alike.

#### Proposed Circular A-122, DAR Changes

The changes as they affect grantees are being proposed as a revision to OMB Circular A-122, "Cost Principles for Nonprofit Organizations." The proposed revision is scheduled to appear this week in the *Federal Register* and carries a 45-day comment period.

Parallel changes are likewise being proposed to the Defense Acquisition Regulation, the Federal Procurement Regulations, and the NASA Procurement Regulation.

On Jan. 20, the same day that the proposed revision to OMB circular A-122 was formally released, DOD issued a letter to industry seeking comment within 45 days on the proposed DAR change. DOD, GSA, and NASA plan to coordinate their activities in order to achieve the desired consistency in policy.

The circumstances surrounding the development and issuance of the proposed lobbying policy are

puzzling. Although OMB has been working with an interagency group for several weeks on the proposed policy, many senior officials at DOD, GSA, and NASA were not aware that any change was being contemplated until the day it was issued.

Officials from those three agencies who were contacted by FCR were not happy with the proposal, and indicated that it was entirely OMB's initiative. All indicated that the comments they receive on the proposal will shape the final form of the cost principle, but the general expectation is that some changes to their current lobbying policies will be made in light of the OMB proposal.

John Lordan, head of OMB's financial management branch and the person directly responsible for coordinating the development of the policy, said merely that the initiative stems from the Administration's concern that federal dollars not be used in any way to subsidize political advocacy activities.

Text of the OMB proposal on lobbying that applies to grantees appears at page 230.

Text of the DAR letter to industry regarding the proposed cost principle on political advocacy follows:

The Administration is concerned with using Government funds for political advocacy purposes. In conjunction with proposed changes to OMB Circular A-122, "Cost principles for nonprofit organizations," concerning political advocacy, the attached proposed cost principle is under consideration by DOD, GSA, and NASA. The proposed changes define political advocacy and make those costs unallowable.

The definition of political advocacy used in this proposal is derived generally from the Internal Revenue Code, 26 U.S.C. §4911, defining attempts to "influence legislation," with modifications designed to comprise direct participation in elections or referenda, administrative processes, certain judicial processes, and other activity of a political advocacy nature.

Your comments (15 copies) are requested within 45 days of the date of this letter. Please address your comments to:

Mr. James T. Brannan  
Director, Defense Acquisition  
Regulatory System, OUSDRE(AM)  
Room 3C257, Pentagon  
Washington, D.C. 20301

Sincerely,

WILLIAM A. LONG  
Deputy Under Secretary  
(Acquisition Management)

Attachment as stated

15.XXX.XX Political Advocacy (CWAS-NA)

(a) The cost of activities constituting political advocacy are unallowable.

(b) Political advocacy is any activity that includes:

(1) Attempting to influence the outcome of any Federal, State, or local election, referendum, initiative, or similar procedure, through contributions, endorsements, publicity, or similar activity;

(2) Establishing, administering, contributing to, or paying the expenses of a political action committee, either directly or indirectly;

(3) Attempting to influence governmental decisions through an attempt to affect the opinions of the general public or any segment thereof;

(4) Attempting to influence governmental decisions through communication with any member or employee of a legislative body, or with any government official or employee who may participate in the decisionmaking process;

(5) Participating in or contributing to the expenses of litigation other than litigation in which the organization is a party with standing to sue or defend on its own behalf; or

(6) Contributing money, services, or any other thing of value, as dues or otherwise, to an organization that has political advocacy as a substantial organization purpose, or that spends \$100,000 or more per year on activities constituting political advocacy.

(c) Political advocacy does not include the following activities:

(1) Making available the results of nonpartisan analysis, study, or research, the distribution of which is not primarily designed to influence the outcome of any Federal, State, or local election, referendum, initiative, or similar procedure, or any governmental decision;

(2) Providing technical advice or assistance to a governmental body or to a committee or other subdivision thereof in response to a written request by such body or subdivision;

(3) Participating in litigation on behalf of other persons, if the organization has received a Federal, State, or local grant, contract, or other agreement for the express purpose of doing so;

(4) Applying or making a bid in connection with a grant, contract, unsolicited proposal, or other agreement, or providing information in connection with such application at the request of the government agency awarding the grant, contract, or other agreement; or

(5) Engaging in activities specifically required by law.

(d) An organization has political advocacy as a "substantial organizational purpose" if:

(1) The organization's solicitations for membership or contributions acknowledge that the organization engages in activities constituting political advocacy; or

(2) Twenty percent (20%) or more of the organization's annual expenditures, other than those incurred in connection with Federal, State or local grants, contracts, or other agreements, are incurred in connection with political advocacy.

(e) The term, "governmental decisions" includes:

(1) The introduction, passage, amendment, defeat, signing, or veto of legislation, appropriations, resolutions, or constitutional amendments at the Federal, State, or local level;

(2) Any rulemakings, guidelines, policy statements, or other administrative decisions of general applicability and future effect; or

(3) Any licensing, grant, ratemaking, formal adjudication, or informal adjudication, other than actions or decisions related to the administration of the specific grant, contract, or agreement involved.

(f) Notwithstanding the provisions of other cost principles in this part:

- (1) Salary costs of individuals are unallowable if:
- (i) the work of such individuals includes activities constituting political advocacy, other than activities that are both ministerial and non-material; or
  - (ii) the organization has required or induced such individuals to join or pay dues to an organization other than a labor union that has political advocacy as a substantial organizational purpose, or to engage in political advocacy during non-working hours.
- (2) The following costs are unallowable:
- (i) building or office space in which more than 5% of the usable space occupied by the organization or an affiliated organization is devoted to activities constituting political advocacy;
  - (ii) items of equipment or other items used in part for political advocacy;
  - (iii) meetings and conferences devoted in any part to political advocacy;
  - (iv) publication and printing allocable in part to political advocacy; and
  - (v) membership in an organization that has political advocacy as a substantial organizational purpose, or that spends \$100,000 or more per year in connection with political advocacy.

#### Judicial Review

#### REVIEW OF PRE-AWARD PROTESTS IS LIMITED IN SCOPE, CLAIMS COURT SAYS

The scope of the Claims Court's review of pre-award protests is limited, the court decides. Only when an agency's pre-award decisions are clearly irrational or unreasonable should they be overturned, the court rules, adopting the District of Columbia Circuit's *Steinthal* standard. (*Baird Corp. v. U.S.*, Cls. Ct. No. 645-82C, 1/14/83).

Last year the Army issued a solicitation for night vision devices. The procurement was set aside for small businesses, and was limited to firms with less than 750 employees. Baird maintained that a larger, 1,000-employee size standard should have been used, and asked the Army to delay the award pending a ruling from the Small Business Administration's Size Appeals Board.

The contracting officer denied the request, and bids were opened as scheduled. Baird was low bidder, but was disqualified for noncompliance with the 750-employee size standard. The company filed suit in the Claims Court to block the award.

#### Standard of Review

Writing for the court, Judge Thomas J. Lydon points out that judicial review of an agency's pre-award decisions must be limited in scope. "The court should not substitute its judgment on such matters for that of the agency, but should intervene only when it is clearly determined that the agency's determinations were irrational or unreasonable."

Citing *M. Steinthal & Co. v. Seaman* (400 FCR A-1, D-1), the judge stresses that judicial intrusions into the procurement process should be infrequent. "In the absence of overriding public interest considerations, the court should refuse to look favorably on declaratory or injunctive relief requests in pre-award bid protest actions." Thus, an agency's pre-award pro-

urement decision should generally not be overturned unless a disappointed bidder can show that the decision lacked a rational basis, the court concludes.

#### Correct Size Standard Applied

Baird maintained that since the night vision devices would be installed in military tanks and other armored vehicles, the small business size standard (1,000 employees) applicable to manufacturers of military vehicles should have been applied. Moreover, the company noted, the larger size standard is also used for producers of periscopes and other types of daytime viewing devices used in military vehicles.

However, Judge Lydon points out, all production contracts for this particular night vision device since the mid-1970s have used the [750-employee] size standard for makers of light and heat detection devices. Furthermore, the SBA Size Appeals Board subsequently ruled against Baird, noting that the night vision device is not only installed independently of any daytime viewing aids, but also that its two major components (an image intensifier and a magnifier) are properly classifiable as light detection devices.

"The point here is that classification of an item is a discretionary act and reasonable minds may well disagree," the judge explains. Since the Army's use of the lower size standard was reasonable, there is no basis for the court to change it, he concludes.

#### Attacking the Set-Aside

Baird also contended that using a small business set-aside for the procurement was improper. The Army violated a Defense Acquisition Regulation provision which prohibits a total small business set-aside when at least one "planned emergency producer" wants to "participate in the acquisition," Baird maintained. The company argued that it had previously qualified for PEP status.

However, Baird hasn't qualified under the PEP program with respect to the particular night vision device needed in this procurement, Judge Lydon states. Rather, Baird had attained PEP status for another night viewing device with a different federal stock number. "It should not be left to the PEP supplier to determine on its own which item the government wants," he states.

Moreover, the procurement was not a total set-aside for small business, the judge adds. An Army form which provided information to prospective offerors did indicate that a 100 percent small business set-aside was contemplated, he concedes. However, in considering pre-award protests, the court must consider the totality of the procurement process, he explains.

In fact, the Army planned to buy nearly 2,300 of these night vision devices in 1982, and originally contemplated two separate awards, the judge notes. Baird won the first (unrestricted) contract, but the second solicitation (a partial set-aside) was the subject of several bid protests. As a result, the solicitation was split into two smaller procurements. Baird then won the first of these smaller contracts. The second procurement, which is the subject of this litigation, is a direct descendant of the partial set-aside, he emphasizes.

Thus, it is reasonable to conclude that the set-aside was part of a larger procurement, the judge declares.

## OFFICE OF MANAGEMENT AND BUDGET

[Circular A-122]

### Cost Principles for Nonprofit Organizations

**AGENCY:** Office of Management and Budget.

**ACTION:** Notice.

**SUMMARY:** This notice offers interested parties an opportunity to comment on a proposed revision to Circular A-122, "Cost Principles for Nonprofit Organizations." The proposed revision establishes special provisions for costs related to political advocacy. Similar revisions are being simultaneously proposed for civilian and defense contractors through appropriate actions by the Department of Defense, NASA and GSA, the three agencies with authority to issue procurement regulations. The purpose of these proposals is to ensure that federal tax dollars are not used, directly or indirectly, for the support of political advocacy.

Over the past 25 years, the volume of federal activity conducted through grantees and contractors has dramatically grown. Sound management of federal grants and contracts has correspondingly gained in importance. The responsibility of the President through OMB to improve the management of the executive branch of government with a view to efficient and economical service, and to fulfill other statutory and constitutional responsibilities, extends to issues of grant and contract management no less than to issues of direct federal activity.

In recent years, the problem of the use of federal funds for political advocacy by grantees and contractors has been identified by members of the public, by the Comptroller General, and by Members of Congress. As many of these parties have observed, the diversion to political advocacy of federal funds, and of equipment procured with and personnel compensated by federal funds, is an abuse of the system and an uneconomical, inefficient and inappropriate use of the public's resources. Moreover, the commingling of federal grant or contract activity with private political advocacy creates the appearance of federal support for particular positions in public debate. This appearance can create misunderstanding and interfere with the neutral, non-ideological administration of federally funded programs.

This proposal is designed to balance the First Amendment rights of federal

grantees and contractors with the legitimate governmental interests of ensuring that the government does not subsidize, directly or indirectly, the political advocacy activities of private groups or institutions. These governmental interests are based on concern for protecting the free and robust interchange of ideas.

Americans have the First Amendment right both to engage freely in speech and political expression, and to refrain from speaking, without interference or control on the part of the government or its agents. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). The proposed revision is intended to ensure that the use of Federal grants, contracts and other agreements by private organizations engaging in political advocacy does not erode or infringe these constitutional rights, or distort the political process by encouraging or discouraging certain forms of political activity.

The activities of government in a democracy necessarily involve a degree of political advocacy, since government officials are expected to communicate with the people, explain their programs, and provide leadership and direction to the nation. Thus, Members of Congress and their staffs, the President and his political appointees, necessarily participate in forms of political advocacy. However, it is a distortion of the market place of ideas for the government to use its financial power to "tip the electoral process," *Elrod v. Burns*, 427 U.S. 353, 356 (1976), by subsidizing the political advocacy activities of private organizations and corporations. This proposal will ensure, to the extent consistent with the communications function of the government, that taxpayers are not required, directly or indirectly, "to contribute to the support of an ideological cause [they] may oppose." *Abood v. Detroit Board of Education*, 431 U.S. 209, 235-236 (1977). The proposal also seeks to avoid the appearance that, by awarding Federal grants, contracts, or other agreements to organizations engaged in political advocacy on particular sides of public issues, the Government has endorsed, fostered, or "prescribe[d] [as] orthodox" a particular view on such issues, *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 645 (1943).

The proposed revision would make unallowable the cost of political advocacy, whether direct or indirect. The revision would also make unallowable any costs of communications equipment, personnel, other equipment, meetings or conferences, or publications, where such cost items are used for political

advocacy in whole or in part. The revision makes unallowable the costs of buildings and office space where 5 percent or more of the space is devoted to political advocacy. When federal grant or contract recipients use facilities, equipment, or personnel funded in part with federal monies for political advocacy, they may create the appearance of government support for their positions. Moreover, if federal funds are used to defray the overhead costs of organizations engaged in political advocacy, it frees up the organization's other funds for use in this political activity.

The principal effect of the revision will be that federal grantees and contractors that choose to engage in political advocacy must separate their grant or contract activity from their political activity. If they mix the two, then they will not receive government reimbursement for the jointly allocable costs. Contractors or grantees will not be permitted to require or induce employees paid in part or in whole with federal funds to engage in political advocacy activities, either as a formal part of job responsibilities or on their own time.

The definition of political advocacy used in this proposal is derived generally from the Internal Revenue Code, 26 U.S.C. 4911, defining attempts to "influence legislation," with modifications designed to comprise direct participation in elections or referenda, administrative processes, certain judicial processes, and other activity of a political advocacy nature.

These proposed revisions will become effective 30 days after final notice in the *Federal Register*. The revisions will affect only grants, contracts, and other agreements entered into after the effective date. Existing grants, contracts, and other agreements will not be immediately affected. Agency contracts and regulations will incorporate these provisions to the same extent and in the same manner as they do other provisions of Circular A-122.

Violations of these provisions will be a basis for cost disallowance, and in instances of serious or willful violations, may be a basis for debarment or suspension.

Comments should be submitted in duplicate to the Financial Management Division, Office of Management and Budget, Washington, D.C. 20503. All comments should be received within 45 days of this notice.

**FOR FURTHER INFORMATION CONTACT:**  
John J. Lordan, Chief, Financial Management Branch, Office of

Management and Budget, Washington, D.C. 20503, (202) 395-6823.

Issued in Washington, D.C., January 20, 1983.

Candice C. Bryant,

Acting Deputy Associate Director for Administration.

#### Appendix

The following questions and answers have been prepared by the Office of Management and Budget for informational purposes only.

**Question:** What is the purpose of these revisions?

**Answer:** The purpose is to ensure that federal contracts and grants are not used to support political advocacy either directly or indirectly. Thousands of contractors and grantees, administering hundreds of billions of federal dollars, have had wide latitude to engage in political advocacy activities, often using the same facilities and personnel paid for in part by the taxpayers. The current lack of a government-wide policy prohibiting the use of federal grant and contract funds for political advocacy has been criticized by the General Accounting Office. It is unfair to use federal tax money to support political causes. Nor is it an efficient or economical use of public resources to allow funds to be diverted from statutory purposes to political advocacy.

A particularly important abuse is that many contractors and grantees have been able to defray the overhead costs of their political advocacy, at public expense, by allocating some part of the cost to the administration of the contract or grant. Not only does this free up the organization's own resources for further political activity; it also creates the appearance that the government is supporting one or another side in a political controversy.

**Question:** How will the proposals work?

**Answer:** The proposals will revise cost principles applicable to federal grants, contracts (other than competitive, firm fixed price contracts), and other agreements. Recipients of federal grants, contracts, or other agreements will be barred from receiving government reimbursement for any activities connected with political advocacy at the national, state, or local levels. This includes membership or dues in trade associations or other organizations that have political advocacy as a substantial organizational purpose. In addition, salary costs will be unallowable to recipients who either require their employees to pay dues to political advocacy organizations or require them to engage in political advocacy on the job or during non-working hours. Finally, government funds will not be permitted to pay for facilities in which significant political advocacy activities are conducted, thus requiring physical separation of such activities from those involved in the performance of grants and contracts.

**Question:** What is an example of how this will work?

**Answer:** Take the example of a defense contractor which uses a corporate aircraft for oversight and management of a federal contract. If the contractor chooses to use the aircraft also for lobbying or other political

activities—such as transporting corporate officials to discussions with Congressmen—then under the principles proposed by the Defense Department, the contractor cannot include the cost of the aircraft or of any use of the aircraft as part of overhead costs allocated in part to the contract.

As an example in the non-profit area, take an organization which receives a federal grant to promote better health services for low-income individuals, which decides to organize a political rally to promote more federal funding for medical programs. The organization could not be reimbursed for any portion of the salaries of individuals engaged in organizing the political rally or for any portion of other overhead costs (office machines, printing facilities, etc.) if the same overhead items were used for the rally. The organization would be free to hold the rally—but it would do so at its own expense, and without using people, facilities or resources partially funded by the Federal Government.

**Question:** How is it possible to define "political advocacy"?

**Answer:** The concept of political advocacy, or "influencing legislation," is used in the Internal Revenue Code restrictions on tax-exempt organizations. The Internal Revenue Code definition of "influencing legislation" is employed in this proposal, with several modifications to take account of changes in political practices (e.g., development of political action committees), Supreme Court developments (e.g., decisions declaring certain forms of litigation to be political expression), and shifts in the decisionmaking process (e.g., the growth of administrative agencies and referenda as means of political decisionmaking).

In particular, the scope of the Code definition ("influencing legislation") has been expanded to cover "governmental decisions" in general. Thus, for example, the Internal Revenue Code defines the term "influencing legislation" as including "any attempt to influence any legislation through an attempt to affect the opinions of the general public or any segment thereof." The proposed revision to Circular A-122, correspondingly, defines "political advocacy" as including "attempting to influence governmental decisions through an attempt to affect the opinions of the general public or any segment thereof." The body of experience in interpreting the Internal Revenue Code provision, as appropriately modified, is expected to aid in the interpretation of the proposed revisions.

The proposals thus include as "political advocacy" direct participation in elections or referenda by means of contributions, endorsement, publicity, administration of political action committees, or similar activity; contributions to political advocacy organizations; attempting to influence government policy made through the regulatory process as well as the legislative process; and attempts to influence government policy through litigation as an *amicus curiae*, on behalf of the members of the organization, or on behalf of another party. In addition, several categories of activity excluded from the Code definition of "influencing legislation" (e.g., communications with organization members on political topics and lobbying with respect

to the organization's own interest) have been included in the proposal's definition, to ensure that such activities are not conducted at the expense of the public.

**Question:** What is the penalty for violating these provisions?

**Answer:** Cost recovery, and in instances of serious or willful violations, suspension or debarment from federal grants or contracts.

**Question:** How does this proposal affect the First Amendment right of freedom of speech?

**Answer:** This proposal will promote the First Amendment value that a person can freely speak, or refrain from speaking, on political matters. The Supreme Court has recognized constitutional problems with requirements on a person "to contribute to the support of an ideological cause he may oppose." *Aboud v. Detroit Board of Education*, 431 U.S. 209, 235-236 (1977). Although government in a democracy necessarily involves some degree of political advocacy because of the need to communicate with citizens, taxpayers cannot rightly be required to support the political advocacy of private organizations and corporations through federal grants and contracts.

Moreover, the freedom of First Amendment political advocacy is jeopardized when the views of particular groups are financed by the government. The use of federal grants or contracts for the support of one side in a political debate, like the use of political patronage for the support of a political party, can injure the "free functioning of the electoral process." *Elrod v. Burns*, 427 U.S. 353, 356 (1976). In the marketplace of ideas, where differing political opinions compete for public acceptance, the government should not be in the position of subsidizing the expression of views of particular organizations or corporations, as to defense or domestic policy. Nor should the government create the appearance of official support for the political advocacy of its grantees or contractors.

**Question:** Does this proposal infringe the First Amendment rights of recipient organizations?

**Answer:** No. Recipients remain free to engage in political advocacy on any side of any issue. The proposals merely ensure that organizations engage in political advocacy at their own expense—not the public's. If an organization chooses to exercise its First Amendment rights, it is only fair that it keep those political activities separate from its work at the expense of the public. It should not expect to have its political advocacy subsidized, or to be able to put facilities purchased in part by tax dollars to political use. Like federal agencies and employees, federal grantees and contractors are "expected to . . . execute the programs of the Government without bias or favoritism for or against any political party or group or the members thereof." *CSC v. National Association of Letter Carriers*, 413 U.S. 548, 555 (1973). Federal grant and contract activity will be more efficiently and fairly performed if it is not mixed with advocacy activities on one or the other side of political debate.

**Question:** Will these proposals prevent corporations or other organizations from lobbying in Congress or the agencies for grants or contracts?

**Answer:** No—but they will do it at their own expense, not the public's.

**Question:** Will organizations engaged in political advocacy be eligible to receive federal grants and contracts?

**Answer:** Absolutely. In a memorandum dated April 26, 1982, the Director of OMB made clear that:

"The Administration will continue to award grants and contracts to those parties who are most effective in fulfilling statutory purposes [and that] political advocacy groups may continue to receive grant and contract awards."

This policy will continue in effect, and just as agencies will be forbidden to award grants and contracts because of the political views of applicant groups, they will also be forbidden from discriminating against "parties most effective in fulfilling statutory purposes."

**Question:** What will be the practical effect on organizations that engage in political advocacy?

**Answer:** Federal grantees and contractors that choose to engage in political advocacy will need to separate their grant or contract activity from their political activity. If they mix the two, then they will not receive government reimbursement for the joint costs.

**Question:** What will be the effect on the employees of contractors and grantees?

**Answer:** Employees whose salary is paid in part with federal funds may not be required or induced to engage in political advocacy, either as a part of the job or on their own time. Nor may they be required to join or pay dues to an organization involved in substantial political advocacy. This will ensure that federal funds are not used to hire political armies or to generate political membership support—practices analogous to those held unconstitutional in *Elrod v. Burns*, 427 U.S. 347 (1976). Of course, individual employees remain free to engage in political advocacy on their own if they wish to do so.

**Question:** To what organizations do the proposals apply?

**Answer:** The proposed revision to OMB Circular A-122 will apply to all non-profit organizations receiving federal grants, contracts, or other agreements. Similar proposals are being applied by the Department of Defense, NASA, and the General Services Administration to civilian and defense contractors. The proposed revisions will apply to grants, contracts, and other agreements entered into after the effective date of the revisions. Existing grants, contracts, and other agreements will not be affected.

**Question:** Will these proposals interfere with organizations due process rights to

defend their interests in court?

**Answer:** No. So long as an organization appears in court on its own behalf, litigation is not defined as political advocacy. However, when an organization goes into court to represent others, or to support the claim of others, such attempts to influence policy through the judicial process are a form of political advocacy, as the Supreme Court has held. *NAACP v. Button*, 371 U.S. 415, 429 (1963); *In re Primus*, 436 U.S. 412, 428 (1978). Such activities should not be supported by federal grant or contract money, unless the grant or contract was made expressly for that purpose. Attorneys fee award statutes are not affected by these proposals.

**Question:** Will these proposals make it more difficult for the federal government to reward its political supporters?

**Answer:** Yes. Currently, the federal government may be able to reward its supporters, and punish its opponents, by granting or denying federal grants to organizations engaged in political advocacy. By making such awards to a friendly organization the government assumes a portion of that organization's overhead costs, and thus supports the organizations political activities. In this way, the government can influence the political process by inducing recipients of federal funds to conform their behavior to the governments desires. This was one of the dangers of the political spoils system recognized by the Supreme Court in *Elrod v. Burns*, 427 U.S. 347, 355-356 (1976). These proposals will help make the process neutral again, by eliminating the "political spoils" aspect of the government funding process.

**Question:** Will these proposals solve the whole problem of federal tax money being used to support political advocacy?

**Answer:** No, but they make a major step in the right direction. Congress and the agencies must continue to be vigilant to ensure that grants and contracts are not awarded for purposes that involve political advocacy.

### Circular A-122—Cost Principles for Nonprofit Organizations

Circular A-122 is revised by modifying Attachment B as follows:

1. Insert a new paragraph "B 33 Political Advocacy."

a. The cost of activities constituting political advocacy are unallowable.

b. Political advocacy is any activity that includes:

(1) Attempting to influence the outcome of any Federal, State, or local election, referendum, initiative, or similar procedure, through contributions, endorsements, publicity, or similar activity;

(2) Establishing, administering,

contributing to, or paying the expenses of a political action committee, either directly or indirectly;

(3) Attempting to influence governmental decisions through an attempt to affect the opinions of the general public or any segment thereof;

(4) Attempting to influence governmental decisions through communications with any member or employee of a legislative body, or with any government official or employee who may participate in the decisionmaking process;

(5) Participating in or contributing to the expenses of litigation other than litigation in which the organization is a party with standing to sue or defend on its own behalf; or

(6) Contributing money, services, or any other thing of value, as dues or otherwise, to an organization that has political advocacy as a substantial organizational purpose, or that spends \$100,000 or more per year on activities constituting political advocacy.

c. Political advocacy does not include the following activities:

(1) Making available the results of nonpartisan analysis, study, or research, the distribution of which is not primarily designed to influence the outcome of any Federal, State, or local election, referendum, initiative, or similar procedure, or any governmental decision;

(2) Providing technical advice or assistance to a governmental body or to a committee or other subdivision thereof in response to a written request by such body or subdivision;

(3) Participating in litigation on behalf of other persons, if the organization has received a Federal, State, or local grant, contract, or other agreement for the express purpose of doing so;

(4) Applying or making a bid in connection with a grant, contract, unsolicited proposal, or other agreement, or providing information in connection with such application at the request of the government agency awarding the grant, contract, or other agreement; or

(5) Engaging in activities specifically required by law.

d. An organization has political advocacy as a "substantial organizational purpose" if:

(1) The organization's solicitations for membership or contributions



acknowledge that the organization engages in activities constituting political advocacy; or

(2) Twenty percent (20%) or more of the organization's annual expenditures, other than those incurred in connection with Federal, State or local grants, contracts, or other agreements, or incurred in connection with political advocacy.

e. The term, "governmental decisions" includes:

(1) The introduction, passage, amendment, defeat, signing, or veto of legislation, appropriations, resolutions, or constitutional amendments at the Federal, State, or local level;

(2) Any rulemakings, guidelines, policy statements or other administrative decisions of general applicability and future effect; or

(3) Any licensing, grant, ratemaking, formal adjudication or informal adjudication, other than actions or decisions related to the administration of the specific grant, contract, or agreement involved.

f. Notwithstanding the provisions of other cost principles in this circular:

(1) Salary costs of individuals are unallowable if:

(a) The work of such individuals includes activities constituting political advocacy, other than activities that are both ministerial and non-material; or

(b) The organization has required or induced such individuals to join or pay dues to an organization, other than a labor union, that has political advocacy as a substantial organizational purpose, or to engage in political advocacy during non-working hours.

(2) The following costs are unallowable:

(a) Building or office space in which more than 5% of the usable space occupied by the organization or an affiliated organization is devoted to activities constituting political advocacy;

(b) Items of equipment or other items used in part for political advocacy;

(c) Meetings and conferences devoted in any part to political advocacy;

(d) Publication and printing allocable in part to political advocacy; and

(e) Membership in an organization that has political advocacy as a substantial organizational purpose, or that spends \$100,000 or more per year in connection with political advocacy.

2. Renumber subsequent paragraphs.

[FR Doc. 83-2031 Filed 1-21-83; 1:28 pm]

BILLING CODE 3110-01-M



### Allowable Costs

#### OMB PROPOSING DISALLOWANCE OF LOBBYING COSTS FOR CONTRACTS, GRANTS

The Office of Management and Budget is proposing a stringent, governmentwide policy on the charging of lobbying costs to federal contracts and grants.

Under the proposed policy, contractors and grantees would be barred from using federal funds for "political advocacy," a term that embraces far more than the traditional notion of lobbying as trying to influence a member of Congress to vote a certain way on a particular issue.

Political advocacy, as used in the OMB proposal, includes not only legislative activities but also efforts aimed at influencing rulemaking or other administrative processes in the executive branch of the government—the White House and the federal departments and agencies.

The term also includes participation in or contributions to the expenses of litigation other than litigation in which the organization is a party or has standing to participate in its own behalf.

In addition, participation in elections or referenda at any level of government, as well as contributions of membership dues, money, or services to any organization having political advocacy as a "substantial organizational purpose," are considered political advocacy and thus would be off-limits to those receiving federal funds, under the new proposal.

Currently, federal policies on lobbying costs vary from agency to agency. Under the lobbying cost policy issued by DOD last October, the costs of both lobbying and legislative liaison activities at all levels of government are unallowable on defense contracts (38 FCR 721, 741). A month later, the General Services Administration issued a lobbying cost principle for all non-defense contracts that disallowed lobbying costs but not costs for legislative liaison activities (38 FCR 760).

#### Commingle Forbidden

Under current lobbying guidelines, contractors may separate out the portion of time or other resources devoted to unallowable activities when computing their costs on a contract. But that will be virtually impossible to do under the proposed policy, since any item or activity above a bare minimum that is devoted to political advocacy renders the entire item or activity unallowable. In other words, contractors will be forced to keep their political advocacy items and activities strictly separate from those devoted to performing the functions of the contract.

For example, salary costs of individuals are totally unallowable if "the work of such individuals includes activities constituting political advocacy," or if the individuals' employer has "required or induced" them to "join or pay dues to an organization other than a labor union that has political advocacy as a substan-

tial organizational purpose, or to engage in political advocacy during non-working hours."

Regarding building or office space, the entire space is unallowable if more than 5 percent of it is devoted to political advocacy. The same applies to items of equipment or other items used in part for political advocacy; meetings and conferences devoted in any part to political advocacy; and publication and printing allocable in part to political advocacy.

#### Exception for Legislative Liaison

However, certain activities are specifically excluded from the definition of political advocacy under the proposal. Such allowable activities include:

- making available the results of a nonpartisan study or analysis, provided the distribution is not intended to influence the outcome of any federal, state, or local election, referendum, or other procedure, or any governmental decision;
- applying for or bidding on a grant, contract, unsolicited proposal, or other agreement, or providing information in connection with such application at the request of the government agency awarding the grant, contract, or other agreement;
- providing technical advice or assistance to a governmental body or to a committee or subcommittee in response to a written request.

This latter category includes certain legislative liaison activities presently disallowed under the DOD lobbying cost policy and in this respect would be more favorable to DOD contractors than the current policy, according to DAR Council director James Brannan.

At present, there is no specific lobbying cost principle governing all federal grants, though there are statutory prohibitions governing lobbying in general and certain grantmaking departments in particular.

If adopted in final form, the proposed policy would supersede both the DOD and GSA lobbying policies and ensure a uniform approach to the issue for all uses of federal funds, grants and contracts alike.

#### Proposed Circular A-122, DAR Changes

The changes as they affect grantees are being proposed as a revision to OMB Circular A-122, "Cost Principles for Nonprofit Organizations." The proposed revision is scheduled to appear this week in the *Federal Register* and carries a 45-day comment period.

Parallel changes are likewise being proposed to the Defense Acquisition Regulation, the Federal Procurement Regulations, and the NASA Procurement Regulation.

On Jan. 20, the same day that the proposed revision to OMB circular A-122 was formally released, DOD issued a letter to industry seeking comment within 45 days on the proposed DAR change. DOD, GSA, and NASA plan to coordinate their activities in order to achieve the desired consistency in policy.

The circumstances surrounding the development and issuance of the proposed lobbying policy are

puzzling. Although OMB has been working with an interagency group for several weeks on the proposed policy, many senior officials at DOD, GSA, and NASA were not aware that any change was being contemplated until the day it was issued.

Officials from those three agencies who were contacted by FCR were not happy with the proposal, and indicated that it was entirely OMB's initiative. All indicated that the comments they receive on the proposal will shape the final form of the cost principle, but the general expectation is that some changes to their current lobbying policies will be made in light of the OMB proposal.

John Lordan, head of OMB's financial management branch and the person directly responsible for coordinating the development of the policy, said merely that the initiative stems from the Administration's concern that federal dollars not be used in any way to subsidize political advocacy activities.

Text of the OMB proposal on lobbying that applies to grantees appears at page 230.

Text of the DAR letter to industry regarding the proposed cost principle on political advocacy follows:

The Administration is concerned with using Government funds for political advocacy purposes. In conjunction with proposed changes to OMB Circular A-122, "Cost principles for nonprofit organizations," concerning political advocacy, the attached proposed cost principle is under consideration by DOD, GSA, and NASA. The proposed changes define political advocacy and make those costs unallowable.

The definition of political advocacy used in this proposal is derived generally from the Internal Revenue Code, 26 U.S.C. §4911, defining attempts to "influence legislation," with modifications designed to comprise direct participation in elections or referenda, administrative processes, certain judicial processes, and other activity of a political advocacy nature.

Your comments (15 copies) are requested within 45 days of the date of this letter. Please address your comments to:

Mr. James T. Brannan  
Director, Defense Acquisition  
Regulatory System, OUSDRE(AM)  
Room 3C257, Pentagon  
Washington, D.C. 20301

Sincerely,

WILLIAM A. LONG  
Deputy Under Secretary  
(Acquisition Management)

Attachment as stated

15.XXX.XX Political Advocacy (CWAS-NA)

(a) The cost of activities constituting political advocacy are unallowable.

(b) Political advocacy is any activity that includes:

(1) Attempting to influence the outcome of any Federal, State, or local election, referendum, initiative, or similar procedure, through contributions, endorsements, publicity, or similar activity;

(2) Establishing, administering, contributing to, or paying the expenses of a political action committee, either directly or indirectly;

(3) Attempting to influence governmental decisions through an attempt to affect the opinions of the general public or any segment thereof;

(4) Attempting to influence governmental decisions through communication with any member or employee of a legislative body, or with any government official or employee who may participate in the decisionmaking process;

(5) Participating in or contributing to the expenses of litigation other than litigation in which the organization is a party with standing to sue or defend on its own behalf; or

(6) Contributing money, services, or any other thing of value, as dues or otherwise, to an organization that has political advocacy as a substantial organization purpose, or that spends \$100,000 or more per year on activities constituting political advocacy.

(c) Political advocacy does not include the following activities:

(1) Making available the results of nonpartisan analysis, study, or research, the distribution of which is not primarily designed to influence the outcome of any Federal, State, or local election, referendum, initiative, or similar procedure, or any governmental decision;

(2) Providing technical advice or assistance to a governmental body or to a committee or other subdivision thereof in response to a written request by such body or subdivision;

(3) Participating in litigation on behalf of other persons, if the organization has received a Federal, State, or local grant, contract, or other agreement for the express purpose of doing so;

(4) Applying or making a bid in connection with a grant, contract, unsolicited proposal, or other agreement, or providing information in connection with such application at the request of the government agency awarding the grant, contract, or other agreement; or

(5) Engaging in activities specifically required by law.

(d) An organization has political advocacy as a "substantial organizational purpose" if:

(1) The organization's solicitations for membership or contributions acknowledge that the organization engages in activities constituting political advocacy; or

(2) Twenty percent (20%) or more of the organization's annual expenditures, other than those incurred in connection with Federal, State or local grants, contracts, or other agreements, are incurred in connection with political advocacy.

(e) The term, "governmental decisions" includes:

(1) The introduction, passage, amendment, defeat, signing, or veto of legislation, appropriations, resolutions, or constitutional amendments at the Federal, State, or local level;

(2) Any rulemakings, guidelines, policy statements, or other administrative decisions of general applicability and future effect; or

(3) Any licensing, grant, ratemaking, formal adjudication, or informal adjudication, other than actions or decisions related to the administration of the specific grant, contract, or agreement involved.

(f) Notwithstanding the provisions of other cost principles in this part:

(1) Salary costs of individuals are unallowable if:

(i) the work of such individuals includes activities constituting political advocacy, other than activities that are both ministerial and non-material; or

(ii) the organization has required or induced such individuals to join or pay dues to an organization other than a labor union that has political advocacy as a substantial organizational purpose, or to engage in political advocacy during non-working hours.

(2) The following costs are unallowable:

(i) building or office space in which more than 5% of the usable space occupied by the organization or an affiliated organization is devoted to activities constituting political advocacy;

(ii) items of equipment or other items used in part for political advocacy;

(iii) meetings and conferences devoted in any part to political advocacy;

(iv) publication and printing allocable in part to political advocacy; and

(v) membership in an organization that has political advocacy as a substantial organizational purpose, or that spends \$100,000 or more per year in connection with political advocacy.

#### Judicial Review

#### REVIEW OF PRE-AWARD PROTESTS IS LIMITED IN SCOPE, CLAIMS COURT SAYS

The scope of the Claims Court's review of pre-award protests is limited, the court decides. Only when an agency's pre-award decisions are clearly irrational or unreasonable should they be overturned, the court rules, adopting the District of Columbia Circuit's *Steinthal* standard. (*Baird Corp. v. U.S.*, Cls. Ct. No. 645-82C, 1/14/83).

Last year the Army issued a solicitation for night vision devices. The procurement was set aside for small businesses, and was limited to firms with less than 750 employees. Baird maintained that a larger, 1,000-employee size standard should have been used, and asked the Army to delay the award pending a ruling from the Small Business Administration's Size Appeals Board.

The contracting officer denied the request, and bids were opened as scheduled. Baird was low bidder, but was disqualified for noncompliance with the 750-employee size standard. The company filed suit in the Claims Court to block the award.

#### Standard of Review

Writing for the court, Judge Thomas J. Lydon points out that judicial review of an agency's pre-award decisions must be limited in scope. "The court should not substitute its judgment on such matters for that of the agency, but should intervene only when it is clearly determined that the agency's determinations were irrational or unreasonable."

Citing *M. Steinthal & Co. v. Seamans* (400 FCR A-1, D-1), the judge stresses that judicial intrusions into the procurement process should be infrequent. "In the absence of overriding public interest considerations, the court should refuse to look favorably on declaratory or injunctive relief requests in pre-award bid protest actions." Thus, an agency's pre-award pro-

urement decision should generally not be overturned unless a disappointed bidder can show that the decision lacked a rational basis, the court concludes.

#### Correct Size Standard Applied

Baird maintained that since the night vision devices would be installed in military tanks and other armored vehicles, the small business size standard (1,000 employees) applicable to manufacturers of military vehicles should have been applied. Moreover, the company noted, the larger size standard is also used for producers of periscopes and other types of daytime viewing devices used in military vehicles.

However, Judge Lydon points out, all production contracts for this particular night vision device since the mid-1970s have used the [750-employee] size standard for makers of light and heat detection devices. Furthermore, the SBA Size Appeals Board subsequently ruled against Baird, noting that the night vision device is not only installed independently of any daytime viewing aids, but also that its two major components (an image intensifier and a magnifier) are properly classifiable as light detection devices.

"The point here is that classification of an item is a discretionary act and reasonable minds may well disagree," the judge explains. Since the Army's use of the lower size standard was reasonable, there is no basis for the court to change it, he concludes.

#### Attacking the Set-Aside

Baird also contended that using a small business set-aside for the procurement was improper. The Army violated a Defense Acquisition Regulation provision which prohibits a total small business set-aside when at least one "planned emergency producer" wants to "participate in the acquisition," Baird maintained. The company argued that it had previously qualified for PEP status.

However, Baird hasn't qualified under the PEP program with respect to the particular night vision device needed in this procurement, Judge Lydon states. Rather, Baird had attained PEP status for another night viewing device with a different federal stock number. "It should not be left to the PEP supplier to determine on its own which item the government wants," he states.

Moreover, the procurement was not a total set-aside for small business, the judge adds. An Army form which provided information to prospective offerors did indicate that a 100 percent small business set-aside was contemplated, he concedes. However, in considering pre-award protests, the court must consider the totality of the procurement process, he explains.

In fact, the Army planned to buy nearly 2,300 of these night vision devices in 1982, and originally contemplated two separate awards, the judge notes. Baird won the first (unrestricted) contract, but the second solicitation (a partial set-aside) was the subject of several bid protests. As a result, the solicitation was split into two smaller procurements. Baird then won the first of these smaller contracts. The second procurement, which is the subject of this litigation, is a direct descendant of the partial set-aside, he emphasizes.

Thus, it is reasonable to conclude that the set-aside was part of a larger procurement, the judge declares.

## OFFICE OF MANAGEMENT AND BUDGET

[Circular A-122]

### Cost Principles for Nonprofit Organizations

**AGENCY:** Office of Management and Budget.

**ACTION:** Notice.

**SUMMARY:** This notice offers interested parties an opportunity to comment on a proposed revision to Circular A-122, "Cost Principles for Nonprofit Organizations." The proposed revision establishes special provisions for costs related to political advocacy. Similar revisions are being simultaneously proposed for civilian and defense contractors through appropriate actions by the Department of Defense, NASA and GSA, the three agencies with authority to issue procurement regulations. The purpose of these proposals is to ensure that federal tax dollars are not used, directly or indirectly, for the support of political advocacy.

Over the past 25 years, the volume of federal activity conducted through grantees and contractors has dramatically grown. Sound management of federal grants and contracts has correspondingly gained in importance. The responsibility of the President through OMB to improve the management of the executive branch of government with a view to efficient and economical service, and to fulfill other statutory and constitutional responsibilities, extends to issues of grant and contract management no less than to issues of direct federal activity.

In recent years, the problem of the use of federal funds for political advocacy by grantees and contractors has been identified by members of the public, by the Comptroller General, and by Members of Congress. As many of these parties have observed, the diversion to political advocacy of federal funds, and of equipment procured with and personnel compensated by federal funds, is an abuse of the system and an uneconomical, inefficient and inappropriate use of the public's resources. Moreover, the commingling of federal grant or contract activity with private political advocacy creates the appearance of federal support for particular positions in public debate. This appearance can create misunderstanding and interfere with the neutral, non-ideological administration of federally funded programs.

This proposal is designed to balance the First Amendment rights of federal

grantees and contractors with the legitimate governmental interests of ensuring that the government does not subsidize, directly or indirectly, the political advocacy activities of private groups or institutions. These governmental interests are based on concern for protecting the free and robust interchange of ideas.

Americans have the First Amendment right both to engage freely in speech and political expression, and to refrain from speaking, without interference or control on the part of the government or its agents. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). The proposed revision is intended to ensure that the use of Federal grants, contracts and other agreements by private organizations engaging in political advocacy does not erode or infringe these constitutional rights, or distort the political process by encouraging or discouraging certain forms of political activity.

The activities of government in a democracy necessarily involve a degree of political advocacy, since government officials are expected to communicate with the people, explain their programs, and provide leadership and direction to the nation. Thus, Members of Congress and their staffs, the President and his political appointees, necessarily participate in forms of political advocacy. However, it is a distortion of the market place of ideas for the government to use its financial power to "tip the electoral process," *Elrod v. Burns*, 427 U.S. 353, 356 (1976), by subsidizing the political advocacy activities of private organizations and corporations. This proposal will ensure, to the extent consistent with the communications function of the government, that taxpayers are not required, directly or indirectly, "to contribute to the support of an ideological cause [they] may oppose." *Abood v. Detroit Board of Education*, 431 U.S. 209, 235-236 (1977). The proposal also seeks to avoid the appearance that, by awarding Federal grants, contracts, or other agreements to organizations engaged in political advocacy on particular sides of public issues, the Government has endorsed, fostered, or "prescribe[d] [as] orthodox" a particular view on such issues, *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 645 (1943).

The proposed revision would make unallowable the cost of political advocacy, whether direct or indirect. The revision would also make unallowable any costs of communications equipment, personnel, other equipment, meetings or conferences, or publications, where such cost items are used for political

advocacy in whole or in part. The revision makes unallowable the costs of buildings and office space where 5 percent or more of the space is devoted to political advocacy. When federal grant or contract recipients use facilities, equipment, or personnel funded in part with federal monies for political advocacy, they may create the appearance of government support for their positions. Moreover, if federal funds are used to defray the overhead costs of organizations engaged in political advocacy, it frees up the organization's other funds for use in this political activity.

The principal effect of the revision will be that federal grantees and contractors that choose to engage in political advocacy must separate their grant or contract activity from their political activity. If they mix the two, then they will not receive government reimbursement for the jointly allocable costs. Contractors or grantees will not be permitted to require or induce employees paid in part or in whole with federal funds to engage in political advocacy activities, either as a formal part of job responsibilities or on their own time.

The definition of political advocacy used in this proposal is derived generally from the Internal Revenue Code, 26 U.S.C. 4911, defining attempts to "influence legislation," with modifications designed to comprise direct participation in elections or referenda, administrative processes, certain judicial processes, and other activity of a political advocacy nature.

These proposed revisions will become effective 30 days after final notice in the **Federal Register**. The revisions will affect only grants, contracts, and other agreements entered into after the effective date. Existing grants, contracts, and other agreements will not be immediately affected. Agency contracts and regulations will incorporate these provisions to the same extent and in the same manner as they do other provisions of Circular A-122.

Violations of these provisions will be a basis for cost disallowance, and in instances of serious or willful violations, may be a basis for debarment or suspension.

Comments should be submitted in duplicate to the Financial Management Division, Office of Management and Budget, Washington, D.C. 20503. All comments should be received within 45 days of this notice.

**FOR FURTHER INFORMATION CONTACT:** John J. Lordan, Chief, Financial Management Branch, Office of

Management and Budget, Washington, D.C. 20503, (202) 395-6823.

Issued in Washington, D.C., January 20, 1983.

Candice C. Bryant,

Acting Deputy Associate Director for Administration.

#### Appendix

The following questions and answers have been prepared by the Office of Management and Budget for informational purposes only.

**Question:** What is the purpose of these revisions?

**Answer:** The purpose is to ensure that federal contracts and grants are not used to support political advocacy either directly or indirectly. Thousands of contractors and grantees, administering hundreds of billions of federal dollars, have had wide latitude to engage in political advocacy activities, often using the same facilities and personnel paid for in part by the taxpayers. The current lack of a government-wide policy prohibiting the use of federal grant and contract funds for political advocacy has been criticized by the General Accounting Office. It is unfair to use federal tax money to support political causes. Nor is it an efficient or economical use of public resources to allow funds to be diverted from statutory purposes to political advocacy.

A particularly important abuse is that many contractors and grantees have been able to defray the overhead costs of their political advocacy, at public expense, by allocating some part of the cost to the administration of the contract or grant. Not only does this free up the organization's own resources for further political activity; it also creates the appearance that the government is supporting one or another side in a political controversy.

**Question:** How will the proposals work?

**Answer:** The proposals will revise cost principles applicable to federal grants, contracts (other than competitive, firm fixed price contracts), and other agreements. Recipients of federal grants, contracts, or other agreements will be barred from receiving government reimbursement for any activities connected with political advocacy at the national, state, or local levels. This includes membership or dues in trade associations or other organizations that have political advocacy as a substantial organizational purpose. In addition, salary costs will be unallowable to recipients who either require their employees to pay dues to political advocacy organizations or require them to engage in political advocacy on the job or during non-working hours. Finally, government funds will not be permitted to pay for facilities in which significant political advocacy activities are conducted, thus requiring physical separation of such activities from those involved in the performance of grants and contracts.

**Question:** What is an example of how this will work?

**Answer:** Take the example of a defense contractor which uses a corporate aircraft for oversight and management of a federal contract. If the contractor chooses to use the aircraft also for lobbying or other political

activities—such as transporting corporate officials to discussions with Congressmen—then under the principles proposed by the Defense Department, the contractor cannot include the cost of the aircraft or of any use of the aircraft as part of overhead costs allocated in part to the contract.

As an example in the non-profit area, take an organization which receives a federal grant to promote better health services for low-income individuals, which decides to organize a political rally to promote more federal funding for medical programs. The organization could not be reimbursed for any portion of the salaries of individuals engaged in organizing the political rally or for any portion of other overhead costs (office machines, printing facilities, etc.) if the same overhead items were used for the rally. The organization would be free to hold the rally—but it would do so at its own expense, and without using people, facilities or resources partially funded by the Federal Government.

**Question:** How is it possible to define "political advocacy"?

**Answer:** The concept of political advocacy, or "influencing legislation," is used in the Internal Revenue Code restrictions on tax-exempt organizations. The Internal Revenue Code definition of "influencing legislation" is employed in this proposal, with several modifications to take account of changes in political practices (e.g., development of political action committees), Supreme Court developments (e.g., decisions declaring certain forms of litigation to be political expression), and shifts in the decisionmaking process (e.g., the growth of administrative agencies and referenda as means of political decisionmaking).

In particular, the scope of the Code definition ("influencing legislation") has been expanded to cover "governmental decisions" in general. Thus, for example, the Internal Revenue Code defines the term "influencing legislation" as including "any attempt to influence any legislation through an attempt to affect the opinions of the general public or any segment thereof." The proposed revision to Circular A-122, correspondingly, defines "political advocacy" as including "attempting to influence governmental decisions through an attempt to affect the opinions of the general public or any segment thereof." The body of experience in interpreting the Internal Revenue Code provision, as appropriately modified, is expected to aid in the interpretation of the proposed revisions.

The proposals thus include as "political advocacy" direct participation in elections or referenda by means of contributions, endorsement, publicity, administration of political action committees, or similar activity; contributions to political advocacy organizations; attempting to influence government policy made through the regulatory process as well as the legislative process; and attempts to influence government policy through litigation as an *amicus curiae*, on behalf of the members of the organization, or on behalf of another party. In addition, several categories of activity excluded from the Code definition of "influencing legislation" (e.g., communications with organization members on political topics and lobbying with respect

to the organization's own interest) have been included in the proposal's definition, to ensure that such activities are not conducted at the expense of the public.

**Question:** What is the penalty for violating these provisions?

**Answer:** Cost recovery, and in instances of serious or willful violations, suspension or debarment from federal grants or contracts.

**Question:** How does this proposal affect the First Amendment right of freedom of speech?

**Answer:** This proposal will promote the First Amendment value that a person can freely speak, or refrain from speaking, on political matters. The Supreme Court has recognized constitutional problems with requirements on a person "to contribute to the support of an ideological cause he may oppose." *Aboud v. Detroit Board of Education*, 431 U.S. 209, 235-236 (1977). Although government in a democracy necessarily involves some degree of political advocacy because of the need to communicate with citizens, taxpayers cannot rightly be required to support the political advocacy of private organizations and corporations through federal grants and contracts.

Moreover, the freedom of First Amendment political advocacy is jeopardized when the views of particular groups are financed by the government. The use of federal grants or contracts for the support of one side in a political debate, like the use of political patronage for the support of a political party, can injure the "free functioning of the electoral process." *Elrod v. Burns*, 427 U.S. 353, 356 (1976). In the marketplace of ideas, where differing political opinions compete for public acceptance, the government should not be in the position of subsidizing the expression of views of particular organizations or corporations, as to defense or domestic policy. Nor should the government create the appearance of official support for the political advocacy of its grantees or contractors.

**Question:** Does this proposal infringe the First Amendment rights of recipient organizations?

**Answer:** No. Recipients remain free to engage in political advocacy on any side of any issue. The proposals merely ensure that organizations engage in political advocacy at their own expense—not the public's. If an organization chooses to exercise its First Amendment rights, it is only fair that it keep those political activities separate from its work at the expense of the public. It should not expect to have its political advocacy subsidized, or to be able to put facilities purchased in part by tax dollars to political use. Like federal agencies and employees, federal grantees and contractors are "expected to . . . execute the programs of the Government without bias or favoritism for or against any political party or group or the members thereof." *CSC v. National Association of Letter Carriers*, 413 U.S. 548, 565 (1973). Federal grant and contract activity will be more efficiently and fairly performed if it is not mixed with advocacy activities on one or the other side of political debate.

**Question:** Will these proposals prevent corporations or other organizations from lobbying in Congress or the agencies for grants or contracts?

**Answers:** No—but they will do it at their own expense, not the public's.

**Question:** Will organizations engaged in political advocacy be eligible to receive federal grants and contracts?

**Answer:** Absolutely. In a memorandum dated April 26, 1982, the Director of OMB made clear that:

"The Administration will continue to award grants and contracts to those parties who are most effective in fulfilling statutory purposes [and that] political advocacy groups may continue to receive grant and contract awards."

This policy will continue in effect, and just as agencies will be forbidden to award grants and contracts because of the political views of applicant groups, they will also be forbidden from discriminating against "parties most effective in fulfilling statutory purposes."

**Question:** What will be the practical effect on organizations that engage in political advocacy?

**Answer:** Federal grantees and contractors that choose to engage in political advocacy will need to separate their grant or contract activity from their political activity. If they mix the two, then they will not receive government reimbursement for the joint costs.

**Question:** What will be the effect on the employees of contractors and grantees?

**Answer:** Employees whose salary is paid in part with federal funds may not be required or induced to engage in political advocacy, either as a part of the job or on their own time. Nor may they be required to join or pay dues to an organization involved in substantial political advocacy. This will ensure that federal funds are not used to hire political armies or to generate political membership support—practices analogous to those held unconstitutional in *Elrod v. Burns*, 427 U.S. 347 (1976). Of course, individual employees remain free to engage in political advocacy on their own if they wish to do so.

**Question:** To what organizations do the proposals apply?

**Answer:** The proposed revision to OMB Circular A-122 will apply to all non-profit organizations receiving federal grants, contracts, or other agreements. Similar proposals are being applied by the Department of Defense, NASA, and the General Services Administration to civilian and defense contractors. The proposed revisions will apply to grants, contracts, and other agreements entered into after the effective date of the revisions. Existing grants, contracts, and other agreements will not be affected.

**Question:** Will these proposals interfere with organizations due process rights to

defend their interests in court?

**Answer:** No. So long as an organization appears in court on its own behalf, litigation is not defined as political advocacy. However, when an organization goes into court to represent others, or to support the claim of others, such attempts to influence policy through the judicial process are a form of political advocacy, as the Supreme Court has held. *NAACP v. Button*, 371 U.S. 415, 429 (1963); *In re Primus*, 436 U.S. 412, 428 (1978). Such activities should not be supported by federal grant or contract money, unless the grant or contract was made expressly for that purpose. Attorneys fee award statutes are not affected by these proposals.

**Question:** Will these proposals make it more difficult for the federal government to reward its political supporters?

**Answer:** Yes. Currently, the federal government may be able to reward its supporters, and punish its opponents, by granting or denying federal grants to organizations engaged in political advocacy. By making such awards to a friendly organization the government assumes a portion of that organization's overhead costs, and thus supports the organizations political activities. In this way, the government can influence the political process by inducing recipients of federal funds to conform their behavior to the governments desires. This was one of the dangers of the political spoils system recognized by the Supreme Court in *Elrod v. Burns*, 427 U.S. 347, 355-356 (1976). These proposals will help make the process neutral again, by eliminating the "political spoils" aspect of the government funding process.

**Question:** Will these proposals solve the whole problem of federal tax money being used to support political advocacy?

**Answer:** No, but they make a major step in the right direction. Congress and the agencies must continue to be vigilant to ensure that grants and contracts are not awarded for purposes that involve political advocacy.

### Circular A-122—Cost Principles for Nonprofit Organizations

Circular A-122 is revised by modifying Attachment B as follows:

#### 1. Insert a new paragraph "B 33 Political Advocacy."

a. The cost of activities constituting political advocacy are unallowable.

b. Political advocacy is any activity that includes:

(1) Attempting to influence the outcome of any Federal, State, or local election, referendum, initiative, or similar procedure, through contributions, endorsements, publicity, or similar activity;

(2) Establishing, administering,

contributing to, or paying the expenses of a political action committee, either directly or indirectly;

(3) Attempting to influence governmental decisions through an attempt to affect the opinions of the general public or any segment thereof;

(4) Attempting to influence governmental decisions through communications with any member or employee of a legislative body, or with any government official or employee who may participate in the decisionmaking process;

(5) Participating in or contributing to the expenses of litigation other than litigation in which the organization is a party with standing to sue or defend on its own behalf; or

(6) Contributing money, services, or any other thing of value, as dues or otherwise, to an organization that has political advocacy as a substantial organizational purpose, or that spends \$100,000 or more per year on activities constituting political advocacy.

c. Political advocacy does not include the following activities:

(1) Making available the results of nonpartisan analysis, study, or research, the distribution of which is not primarily designed to influence the outcome of any Federal, State, or local election, referendum, initiative, or similar procedure, or any governmental decision;

(2) Providing technical advice or assistance to a governmental body or to a committee or other subdivision thereof in response to a written request by such body or subdivision;

(3) Participating in litigation on behalf of other persons, if the organization has received a Federal, State, or local grant, contract, or other agreement for the express purpose of doing so;

(4) Applying or making a bid in connection with a grant, contract, unsolicited proposal, or other agreement, or providing information in connection with such application at the request of the government agency awarding the grant, contract, or other agreement; or

(5) Engaging in activities specifically required by law.

d. An organization has political advocacy as a "substantial organizational purpose" if:

(1) The organization's solicitations for membership or contributions

acknowledge that the organization engages in activities constituting political advocacy; or

(2) Twenty percent (20%) or more of the organization's annual expenditures, other than those incurred in connection with Federal, State or local grants, contracts, or other agreements, or incurred in connection with political advocacy.

e. The term, "governmental decisions" includes:

(1) The introduction, passage, amendment, defeat, signing, or veto of legislation, appropriations, resolutions, or constitutional amendments at the Federal, State, or local level;

(2) Any rulemakings, guidelines, policy statements or other administrative decisions of general applicability and future effect; or

(3) Any licensing, grant, ratemaking, formal adjudication or informal adjudication, other than actions or decisions related to the administration of the specific grant, contract, or agreement involved.

f. Notwithstanding the provisions of other cost principles in this circular:

(1) Salary costs of individuals are unallowable if:

(a) The work of such individuals includes activities constituting political advocacy, other than activities that are both ministerial and non-material; or

(b) The organization has required or induced such individuals to join or pay dues to an organization, other than a labor union, that has political advocacy as a substantial organizational purpose, or to engage in political advocacy during non-working hours.

(2) The following costs are unallowable:

(a) Building or office space in which more than 5% of the usable space occupied by the organization or an affiliated organization is devoted to activities constituting political advocacy;

(b) Items of equipment or other items used in part for political advocacy;

(c) Meetings and conferences devoted in any part to political advocacy;

(d) Publication and printing allocable in part to political advocacy; and

(e) Membership in an organization that has political advocacy as a substantial organizational purpose, or that spends \$100,000 or more per year in connection with political advocacy.

2. Renumber subsequent paragraphs.

[FR Doc. 83-2031 Filed 1-21-83; 1:28 pm]  
BILLING CODE 3110-01-M