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ABOUT CAPLAW

CAPLAW is a nonprofit membership organization dedicated to providing the legal resources necessary to sustain and strengthen the national Community Action Agency (CAA) network. For 45 years, since they were first created by the Economic Opportunity Act of 1964, CAAs have been fighting poverty, helping individuals become self-sufficient, building communities, and changing lives. Nationwide, approximately 1,000 CAAs leverage almost \$10 billion in total funding, and provide a multitude of services, including job training, Head Start, economic development, energy assistance, and housing.

Through its in-house legal staff and a network of private attorneys, CAPLAW provides legal consultations, training, and publications on a wide variety of legal and management topics. This assistance enables CAAs to operate legally sound organizations and to promote the effective participation of low-income people in the planning and delivery of CAA programs and services, thereby enhancing CAAs' ability to provide the nation's poor with opportunities to improve their quality of life and to achieve their full potential.

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INTRODUCTION

Figuring out which costs can be charged to a grant and which cannot is often a very tricky, and critical, decision. Almost thirty years ago, the federal Office of Management and Budget (“OMB”) attempted to clarify this murky area by issuing to federal agencies uniform cost principles in the form of three different Circulars; one applicable to grants to colleges and universities (A-21); one applicable to grants to states and local governments (A-87) and one applicable to grants to nonprofits (A-122). The Circulars were later adopted and sometimes modified individually by federal granting agencies as regulations governing cost-reimbursement grants and cooperative agreements. The cost principles are also often used by states and other direct federal grantees that pass through federal grant funds to subgrantees. The federal government recently centralized the location of the principles, as well as other guidance related to federal grants, by relocating them to the Code of Federal Regulations (“C.F.R.”), at Title 2.

Despite the widespread reliance on the cost principles, however, there is a dearth of resources interpreting their sometimes opaque wording or explaining how these provisions are actually applied or work together in real-life situations. Although there are administrative decisions and the like available in scattered agency sites and publications, there has not been any one reference for gathering decisions or reports made by various authorities interpreting the provisions. Thus, the idea for this guide.

CAPLAW has published this annotated guide, which focuses on Circular A-122, now codified at 2 C.F.R. Part 230, to assist nonprofit grantees, and other entities, such as states, that are responsible for ensuring grantees’ compliance, to interpret and apply the Circular’s provisions. This guide collects and summarizes administrative decisions, court decisions, and audits that have interpreted various provisions of the Circular in an attempt to provide a factual context for the cost principles. Although it lists all of the specific types of costs contained in Appendix B to the cost principles, it includes the language only of the portions of the specific cost principles that are relevant to the decisions discussed. Therefore, it is recommended that readers use this guide along with the OMB cost principles themselves. The cost principles applicable to nonprofit grantees, found at 2 C.F.R. Part 230, can be accessed online at: http://www.access.gpo.gov/nara/cfr/waisidx_09/2cfr230_09.html.

The OMB cost principles found at 2 C.F.R. Part 230 are divided into three appendices. Appendix A provides general guidelines for determining the allowability of costs; the principles found in Appendix A apply to each cost charged to a federal grant. Appendix B provides detailed guidelines for specific types of costs. Appendix C lists organizations that are not subject to Part 230. If a cost violates the general principles in Appendix A, or the specific rules in Appendix B, it may be disallowed, i.e. federal funds may not be used to pay for it and the federal government may recover those funds.

The majority of the authorities cited in this guide interpret Part 230 (Circular A-122), but some decisions interpreting Circular A-87 (cost principles applicable to state and local governments) and other regulations have also been included. Most of these decisions are issued by funding agencies, through an administrative appeal process, such as HHS's Departmental Appeals Board; court decisions have also been included where relevant. This guide also provides references and links to audits published by various administrative agencies. Additional recommended resources for clarification of cost principles are the HHS Grants Policy Statement (http://www.hhs.gov/grantsnet/docs/HHSGPS_107.doc) and Head Start Policy Clarifications (<http://eclkc.ohs.acf.hhs.gov/hslc/Program%20Design%20and%20Management/Head%20Start%20Requirements/Policy%20Clarifications%20and%20FAQs>).

Grantee should demonstrate that the party has a grant-related purpose. Describing a party as for “networking purposes,” without documenting who attended and activities conducted, does not adequately demonstrate grant-related purposes.

- An event is not “entertainment” if it has a “documented business purpose.” *Ohio Department of Job and Family Services, DAB No. 1961 (interpreting A-87).*

To determine if an event is for entertainment purposes (and therefore unallowable) the test is not whether employees are entertained or “amused.” The test is whether the event has a documented business purpose.

- The costs of a Head Start graduation ceremony (special clothing, refreshments, etc.) are not allowable, although it is permissible to use the Head Start center for the event and for Head Start staff to participate in it. *Policy Clarification OHS-PC-A-101 (July 15, 2008).*

AUDITS

- Charges for Holiday Party, breakfast meeting for ten guests at \$53 per guest, a reception and dinner, and dinner for 11 guests were unallowable. *The Education Leader’s Council. ED-OIG. (<http://www.ed.gov/about/offices/list/oig/auditreports/a03f0010.pdf>)*

Auditor’s Tip: Alcoholic beverages are not an allowable cost. See App. B, ¶13, above.

15. EQUIPMENT AND OTHER CAPITAL EXPENDITURES

“Capital expenditures for general purpose equipment, buildings, and land are unallowable as direct charges, except where approved in advance by the awarding agency.” ¶15.b(1).

“Capital expenditures for improvements to land, buildings, or equipment which materially increase their value or useful life are unallowable as a direct cost except with the prior approval of the awarding agency.” ¶15.b(3).

- “Equipment is defined as any item with a life expectancy of more than one year and an acquisition cost of \$5,000 or more per unit. A grantee must receive prior approval from its responsible Regional Office before purchasing any equipment that is valued at \$25,000 or more.” *Policy Clarification OHS - PC - A - 011 (May 22, 2007). See also ACF Grants Policy Statement, Part II-1 (incorporated into terms and conditions of all Head Start grant awards)*

- But if grantee requests retroactive approval, granting agency must give the request proper consideration. *See Enterprise for Progress in the Community, DAB No. 1558 (1996).*

For retroactive approval, purchase of land must have been reasonable and allocable.

- Purchase of land found unreasonable when made with intent to expand Head Start program even though expansion was not a part of the “ongoing grant program” at the time. That the land was purchased at a “good price” did not make the purchase reasonable. Denial of retroactive approval to Head Start grantee was upheld, given failure of grantee to provide information required by Head Start regulations. *Bee Community Action Agency, DAB No. 1625 (1997).*

“Equipment and other capital expenditures are unallowable as indirect costs... ¶15.b(5).

“Prior approval . . . generally . . . will be in writing.” 2 C.F.R. 230.25 (b). See also 2 C.F.R. 215.2 (w) (“Prior approval means written approval by an authorized official evidencing prior consent.”).

- Oral ok from grantor field representative did not meet prior approval requirement. *Bee, DAB No. 1625.*

“Capital expenditures for general purpose equipment, buildings, and land are unallowable as direct charges, except where approved in advance.” ¶15.b(1).

- Without prior approval, grantee may not shift costs in its budget from non-capital expenditures to capital expenditures. *Marie Detty, DAB No. 2024.*
- Head Start grantee may not use funds appropriated for non-capital expenditures for minor repairs to pay contractor to construct a building neither the grantee nor the prospective landlord own, even if grantee might save money in the long run as a result (*i.e.*, the grantee is promised reduced monthly rent for helping to pay for building’s construction costs). The grantee should first seek prior approval from the granting agency *Detty, DAB No. 2024.*
- Prior approval does not have to be in the form of a formal letter. For example, grantee emailed its granting agency, explaining a proposed property purchase. Grantee then purchased the building. Officer of the granting agency then emailed a reply, congratulating it on “successfully acquiring the building.” Email was found to be evidence of prior written approval. *Brown Magnolia Community Development Corporation, DAB No. 1917 (2004).*⁹

9. This decision interprets 45 C.F.R. 74.25, which is slightly different from the capital expenditures guidelines in

- **Maintenance obligations are not capital expenditures.** *East Bay Perinatal Council, DAB No. 1793 (2001).*

Maintenance obligations, especially those required by the terms of a lease, are not capital expenditures. They are merely “leasehold improvements.” Examples of leasehold improvements include: replacing damaged sewer lines, removing a sand pit, replacing damaged asphalt, tree-trimming and landscaping. However, other similar activities might be considered capital expenditures: installation of HVAC units, 200 AMP panel and 2 inch conduit, and the creation of a storage site for children’s toys.

- **When grantee sells equipment bought with federal grant money, the government has a right to the proceeds.** *Campesinos Unidos, Inc., DAB No. 1546 (1995).*

The federal government has a right to either the amount of the proceeds or current market value of the equipment, multiplied by the federal share of the equipment. Note: a similar provision is now contained in 45 C.F.R. 74.34(g)(grant administration rules for nonprofits).

Grantee may not sell vehicles purchased with grant funds and then use proceeds on repairs for its facilities, even though repair costs are usually allowable. Grantee must either seek approval to use the proceeds, or give them back to the granting agency.

Auditor’s Tip: Grantees should contact the grantor and obtain instructions from the grantor for the disposition of the proceeds.

AUDITS

Welfare to Work (National Puerto Rican Forum). DOL-OIG. (<http://www.oig.dol.gov/public/reports/oa/2006/02-06-201-03-386.pdf>)

Juniata County Child Care and Development Services, HHS-OIG. (<http://oig.hhs.gov/oas/reports/region3/30503317.pdf>)

A Head Start Program Instruction, ACYF-PI-HS-06-05, addresses loans obtained by Head Start programs in which Head Start-purchased equipment or real property has been used as collateral. This practice is not permitted.

OMB Circular A-122. Thus, this decision might be useful but is not authoritative for ¶15 in A-122.