

## **Tech BizSolutions Featured E-news Subject**

### **Sales and Marketing Costs under government grants and contracts**

---

**A** client recently told us they heard that sales and marketing expenses were considered unallowable per government contracting rules. While many advertising and public relations costs are expressly unallowable, government rules do not prevent a small business from marketing its products and services, and in many cases, provides ample opportunities to promote itself. This is true for NIH grants, as well.

#### **FAR Part 31**

In general, per FAR Part 31.205-1, advertising, public relations, exhibiting at trade shows, entertainment, and company ceremonies are unallowable. The clause defines advertising as promoting the sale of products or services, regardless of the medium employed. Advertising and public relations costs are allowable only for very specific circumstances that typically don't apply to small businesses.

FAR 31.205-38 addresses selling and marketing costs, which in most cases are allowable as defined in the clause. Selling costs include commissions paid to bona fide employees or non-employees with an established sales agreement. FAR 52.203-5 Covenant Against Contingency Fees prohibits sales fees or commissions to be paid if a contract is secured using improper influence of government contracting officials.

FAR 31.205-43 is also helpful concerning rules for hosting and attending trade meetings and conferences, which are vital networking opportunities for most small business clients we serve. Membership in trade, business, technical, and professional organizations are allowable. Similarly, subscriptions to periodicals of these same types are allowable.

Economic planning costs are allowable (FAR 31.205-12) when it involves long range planning and development of your business.

#### **Increased regulatory focus**

This area of contract costs has been heavily scrutinized over the years by government lawmakers and agencies. Attention and resulting regulations tend to focus on the practices of large government contractors, thereby painting small businesses with the same regulatory broad brush and scrutiny.

It is difficult for the FAR to account for every category of cost that government contractors might incur and to state whether it's allowable or not. Auditors for the Defense

Contract Audit Agency (DCAA) use the DCAA's Contract Audit Manual as guidance when determining allowable selling and marketing expenses. The manual goes far beyond just restating the FAR clauses by recommending auditors use extensive evaluation and collection of data to ferret out suspected misclassification of costs. Much is left to the opinion and judgment of the auditor as to whether marketing activities yield a "recognizable benefit" to the government.

This guidance, in our opinion, perpetuates the stance of many auditors that marketing costs are soft targets and the contractor is guilty until proven innocent. Government contractor should therefore be aware they are not obligated to abide by every statement made in the DCAA manual.

As an example, using the guidance in the DCAA manual, it appears easy for an auditor to declare costs unallowable for producing a company newsletter or website.

#### **Defense against questioned costs**

SBIR contractors have an added advantage defending against DCAA allegations of unallowable sales and marketing costs. The SBIR program strongly emphasizes its commercialization Phase III component in legislation, in SBIR solicitations, and among SBIR government sponsors. That makes it easy to argue that performing sales and marketing activities to promote a contractor's SBIR commercialization efforts is in the best long term interest of the government, since this is already the SBIR goal. If pressed further by an auditor, you can argue that commercializing products developed under SBIR programs results in price reductions. This benefits the government when they shop for these same items.

#### **Review marketing and sales plan**

Small businesses with government grants and contracts can review the FAR addressing selling, public relations, and marketing costs. Any marketing or sales plan should maximize recovery of costs and minimize the risks that costs would be deemed unallowable by the most aggressive government auditor. Contact Tech BizSolutions at 303-443-4440 for additional advice on sales and marketing costs.

---