wiley

NEWSLETTER

Professional and Consulting Costs Under FAR 31.205-33: Allowability Depends on Sound Engagement Decisions and Good Record-Keeping

October 2021

Companies of all sizes continually allocate scarce resources, and make business judgments about whether events or plans require professional or consulting services on an ongoing or an *ad hoc* basis. Hiring a geotechnical engineer, for example, to help resolve construction disputes may be a sound proposition for a heavy construction company. But a company having only sporadic requirements for such services, on the other hand, would probably be justified in letting real-time needs for such services dictate when to bring someone in to help out; indeed, maintaining in-house capability could be unreasonable under the circumstances. This decision is at the heart of many issues related to the allowability of professional and consulting costs under Federal Acquisition Regulation (FAR) Part 31 and in particular the cost principle at FAR 31.205-33. Beyond whether or not to have in-house capability for such services, establishing clear ground rules for external engagements and documenting what external professionals or consultants do are the keys to proving that such costs are allowable and allocable to Federal cost objectives. FAR 31.205-33 is a frequently disputed cost principle in many contexts, and often in complex situations. But the basics of maximizing recovery are just that: ***basic***. This article explores some of the simple ways to survive the audit.

Doing it the right way starts with a strong foundation—with a reasonable decision to engage outside expertise, rather than to maintain in-house capability. This is a choice required by FAR 31.205-33(d) which, among other factors, looks at "whether the

Practice Areas

Government Contracts

service can be performed more economically by employment rather than contracting" and the company's "past pattern of acquiring such services." This is inherently a business judgment, which auditors should generally not question, but documenting contemporaneously the rationale for contracting outside resources instead of employing in-house professionals is one way to head off most auditor concerns on this fundamental issue. Having the rationale for the decision down on paper before a dispute arises is critical. With a solid rationale for contracting over employment, several other best practices promote good allowability hygiene.

- ***Avoid the obvious no-nos.*** FAR 31.205-33(c) calls out a set of things that the Government will never reimburse, such as services to improperly obtain information, to improperly influence the content of solicitations or evaluations, or to violate any statute or regulation. These are no-brainers, but they should be called out as prohibited in the engagement agreement—this protects all concerned and lowers audit risk.
- ***Describe what you want.*** The regulation also makes services which are "not consistent with purpose and scope" of the engagement unallowable. A company should either define very specifically the services it seeks, or establish a broader scope of work that would fairly encompass a range of services the consultant will provide. Either way, the engagement agreement should spell out the scope of work up front—and then stick to the plan going forward, unless circumstances change.
- ***Make sure the expert can deliver.*** If you are paying for a high-priced consultant, make sure you can prove, at a minimum, that you're engaging someone who—at least on paper—has the qualifications for the work. Without that, proving the reasonableness of the costs can be a challenge.
- ***Bring the receipts.*** FAR 31.205-33(f) requires contractors to prove what the professional or consultant actually did for the company. This requirement exists first, to ensure that no prohibited-activity costs were incurred; and, second, so that auditors can assess whether the amount paid for the services was reasonable. Contractors should be prepared to provide three things:

1. Details. A written engagement agreement is critical to show the scope of work, the rate to be paid, and the costs to be reimbursed. When the scope changes, the agreement should change at the same time.
2. Invoices. Contractors must be able to provide written billings with "sufficient detail," to show what the expert did, and the time required, if hourly compensation is involved. Contractors should reject invoices which do not provide information which a reasonable person, in the conduct of a competitive business, would find sufficient to support payment.
3. Work Product. Be ready to provide hard evidence of what the consultant did. The regulation calls out several things in this regard, such as trip reports, minutes of meetings, and white papers and similar reports. There is no magic formula or hard minimum. But the contractor must create and maintain a record of what was done; in general, more is better.

Auditors seem to love calling out questionable professional and consulting services costs. But the FAR provides reasonably clear guidance on how to avoid allowability issues. There is no rigid rule for the level of detail and documentation required to establish the allowability of professional and consulting services costs

under FAR 31.205-33. However, the effort and company infrastructure devoted to compliance with the cost principle should, at a minimum, be scaled to the quantum of dollars expended, and thus at risk in an incurred cost audit. Having a good documentary ground game for engaging and administering professionals and consultants across the board generates the best picture for the auditor. Don't be an easy target for disallowance.