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GAO

United States General Accounting Office
Washington, DC 20548

Office of
General Counsel

In Reply
Refer to: B-203125

May 29, 1981

Ms. Judith I. Robey
Executive Vice President
Devlin Associates, Inc.
1150 First Avenue, Suite 795
King of Prussia, PA 19406

Do not make available to public reading room

Dear Ms. Robey:

This refers to your letter dated April 28, 1981, requesting additional information on this Office's record retention requirements.

Your letter indicates that you have already consulted the Guide to Record Retention Requirements revised as of January 1st of each year by the Office of the Federal Register. The Guide is the only available compilation or listing of the record retention requirements of this Office. This listing sets forth who is required to keep records, the records they are required to keep, and how long they are required to keep them. It should be noted here that even where the law does not specifically set forth the retention period of the records involved, we have found that retention for a period of 3 years following final payment under a contract or agreement for financial assistance generally is sufficient to meet our needs. They also cite the provisions of law requiring certain members of the public to keep such records. Since the information published in the Guide is merely a digest of the laws' requirements, it would be beneficial to consult the laws cited in the digests for further clarification.

As you will note, the laws generally involve Government contractors or recipients of some form of Federal assistance (i.e., grant, loan, or loan guarantee) who are required to maintain certain records and provide this Office access to those records in order to perform authorized audits, reviews or evaluations. However, until the focus of a specific audit is decided upon, it is difficult to say in advance precisely what records will be necessary to perform our work. Further, the nature and sophistication of the accounting system involved will also have to be considered. Thus, further explanation of the laws' and thus, our requirements prior to an audit is virtually impossible.

It should be pointed out, however, that the extent of our audit and access to records authority vis a vis persons holding negotiated Government contracts has been, and presently is, the subject of litigation. In Hewlett-Packard Co. v. United States, 385 F. 2d 1013 (9th Cir., 1967) cert. den. 390 U.S. 988, the court held that we were entitled to access

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to production cost records including direct material and labor costs, and overhead costs which would permit us to review the reasonableness of the contract prices.

It has also been held that we are entitled to access to contractor records for the purpose of industry-wide costs studies for the purpose of determining the adequacy of the protection afforded the Government by negotiation techniques. This includes records of direct manufacturing costs, research and development costs, marketing and promotion costs, distribution and administration costs and records concerning the methodology and decisions involved in establishing prices for products purchased. Eli Lilly & Co. v. Staats, 574 F. 2d 904 (7th Cir., 1978), cert. den. 439 U.S. 959; United States v. Abbott Laboratories, 597 F. 2d 672 (7th Cir., 1979); and SmithKline Corp. v. Staats, 483 F. Supp. 712 (E.D. Pa., 1980) appeal pending. Contra, Bristol Laboratories Division of Bristol-Meyers Co. v. Staats, 428 F. Supp. 1388 (S.D.N.Y., 1977), aff'd 620 F. 2d 17 (2d Cir., 1980), aff'd without opinion by an equally divided Court, 49 LW 4471; and Merck & Co. v. Staats, No. 74-1447 (D.D.C., 1977) appeal pending.

It should also be pointed out that as a general rule it is the head of the agency providing Federal financial assistance in whom the law vests with the authority to decide which records shall be retained and for how long (and not this Office which merely has access to these records for audit purposes). This would include, we believe, the authority to prescribe the form in which the records may be kept. We are unaware of any general statutory requirement that only originals of records be maintained any general prohibition on the use of microfilmed duplicates instead of originals or the use of computerized information storage and retrieval systems. Therefore, one must look to the statute authorizing the specific program and its implementing regulations to see whether microfilming of records or use of computerized information storage and retrieval systems is authorized. These laws are referred to in the Guide under the various agency headings.

This Office has not previously objected to proposals that agencies authorize their contractors or grantees to microfilm original documents and destroy the originals, provided that:

1. Permission is requested and granted in advance by the contracting or granting agency.

2. Microfilm readers will be available for use of the representatives of the Comptroller General.

[redacted]

3. Microfilmed documents can be readily reproduced to hard copy for us to the extent they are required in our work.

4. The quality of the contractor's or grantee's record microfilming process is subject to periodic reviews by the responsible procurement or granting activity.

5. Microfilm be retained for the same period as the hard copy records that they replaced.

6. Microfilm be properly indexed and have adequate finding aids.

7. Microfilm process be in accordance with high quality standards for photographic reproduction. (See also 8 GAO Policy and Procedure Manual for Guidance of Federal Agencies § 4.6 (copy enclosed).)

Admittedly, differences in interpretation could arise in the definition of original documents and records to be microfilmed. Frequently, purchase orders, contracts, or other files contain notes, worksheets, etc., which are helpful to auditors as well as contractor personnel in reconstructing or understanding past transactions. In the process of microfilming the files, these notes, etc., could be destroyed. However, this problem would be alleviated if the contractor or the grantee provides assurances that notes, worksheets, etc., were also going to be microfilmed.

Currently, we have no established policy governing the use of computerized information storage and retrieval systems for keeping records which may be of interest to this Office. Generally, we use the individual system maintained by the various contractors or grantees. Of course, we are concerned with accessibility of any system for the purpose of performing our work, the reliability of the system and whether information is stored in the system for the same length of time that an original document is otherwise retained. Presumably, if the system that they choose to maintain is sufficient to satisfy the requirements established by the agency primarily charged with the administration of laws relating to the maintenance of the records, it will be sufficient for our purposes. For example, compliance with the standards imposed by the Internal Revenue Service regarding the maintenance of records have been found to be sufficient by this Office for purposes of performing our audits. Both microfilming and use of computerized information storage and retrieval systems have been authorized for keeping tax records. See Rev. Rulings 75-265, 71-19 and Rev. Procs. 76-43, 75-33 and 64-12.

Furthermore, as to the evidentiary value of microfilmed records or printouts of information stored in computers (at least from the Government's standpoint), 28 U.S.C. § 1732(b) authorizes the admission of microfilmed

records or computer printouts into evidence the same as originals when such records are microfilmed or stored in computers in the regular course of the business or activity. See for example, United States v. Manton, 107 F. 2d 834 (2d Cir., 1938), cert. den. 309 U.S. 664; United States v. Fendley, 522 F. 2d 181 (5th Cir., 1975); United States v. Saputski, 496 F. 2d 140 (9th Cir., 1974). See also Fed. Rules Evid. 1001-1004, 28 U.S.C. App., making microfilmed writings admissible to the same extent as originals except where (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original. These rules also treat computer printouts as original writings or recordings for purpose of their admissibility into evidence.

Finally, there is no single sanction or penalty applicable in all cases where someone required to keep and provide records required by law fails to do so. Instead, some provisions of law impose criminal penalties for failure to maintain or provide specific records while other provisions do not. See for example, 12 U.S.C. §§ 1730d, 1829b and 1957; 26 U.S.C. §§ 6001, 7203 and 7206(5)(B); and, 49 U.S.C. § 20(7). However, if records are deliberately destroyed to prevent or interfere with an authorized judicial, legislative or administrative proceeding, then this destruction could constitute obstruction of the law in violation of 18 U.S.C. §§ 1503 and 1505.

Generally, enforcement of our access to records authority is limited to subpoenaing records for recalcitrant parties. Should the person in possession of the records disobey the subpoena, he would then be subject to being held in contempt of court. See 31 U.S.C.A. § 54(c). However, in addition to being held in contempt of court, any person who violates a special or general order to submit books, records, papers or other transcripts for use by this Office in conducting energy verification examinations under 42 U.S.C. § 6381 may be assessed a civil penalty under 42 U.S.C. § 6384(a).

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