

# FAR 45.5 and the Government's “Official Records” Unraveling the “Original Sin” of Contract Property Management

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*“The contractor’s property control records shall constitute the Government’s official property records...”*

*(FAR 45.505)*

We’re all familiar with these words. Many of us have grown up around them. In fact, they may have been one of the first things we learned. They are basic, foundational, never questioned, and accepted without discussion or debate. They are also, unfortunately, wrong.

Heresay you say? Consider for a moment: in the early 1990s, several proposed re-writes of the FAR, Sub-part 45 (Government Property) were initiated. For many reasons, the proposed rules were not implemented; however, those efforts created a lively and vigorous debate over the meaning of “official property records.” In some quarters, that debate continues to this day. The purpose of this article is to hopefully settle the issue, or at least help explain it.

As we all know, contractors keep records, all sorts of records – records necessary for contract performance, records of store requisitions, payroll records, timecards, records of progress payment inventory, purchase orders, accounts receivable/payable, fabrication records of Special Tooling and Test Equipment, and stockroom records of material. Many such records are highlighted in FAR Part 4.705-3 (Acquisition and Supply Records). FAR 45.5, however, is a bit different, for here the language designates the contractor’s property records (arguably the very same records included in FAR Part 4.705-3) as the Government’s official records.

Why the designation? As best can be determined (after all this language goes back over 50 years), the “official records” language was based on the presumption that government records and contractor records were essentially the same and therefore duplicative. The following passage from an Armed Services Procurement Regulation committee document reveals the thinking of the time:

*“Historically, it was noted that prior to promulgation of the “Manual for Control of Government Property in (the) Possession of Contractors,” ASPR Appendix B, it was generally the practice of the military departments to maintain the property control records for Government property provided to contractors...” “Concurrently, contractors also maintained property control records and a system for identifying Government Property.” “In the elimination of this obviously unnecessary and costly duplication of effort...”*

*ASPR Committee, Sept 24, 1957*

So, in order to remedy this “duplication of effort,” the FAR framers simply designated the contractor’s property records as the “official” records of the government. Presto! No more duplication of effort. With the stroke of a pen, all records were the same. The official records policy was also part contrivance designed to defuse any issue concerning the reconciliation of contractor records with government records. In other words, since government records and contractor records would now be the “same” – there would be nothing to reconcile.

Reality, however, is often messy – for in truth there was no duplication of effort. There was only a misunderstanding of context. In short, the responsibilities of government and contractor with respect to the record-keeping requirements of government property are two decidedly different things: the contractor’s responsibility is to act as custodian for the government property in its care (a stewardship responsibility). The government’s records reflect a fiduciary responsibility – an obligation linked to our system of government – a system where the “people” retain political power. Put another way, (I hope you are all fondly recalling your civics classes) all government property is actually owned by the citizens (i.e., the “people”), and government agencies act merely as property stewards.

The government’s fiduciary obligation exists from the

time the property is acquired, until the government is relieved of accountability, i.e., until such time as the Government decides to relinquish or transfer title through a disposal action such as donation, sale or abandonment. The type of property simply does not matter, nor does its location (i.e., a contractor's plant). A box of paper clips, for example, or an F-16 fighter aircraft are both subject to property management principles based on our fiduciary responsibilities. It is this same principle that requires us to take ethics training every year, to file our taxes, and to reconcile our travel statements when we return from the NPMA National Education Seminar.

Okay then. So what are the government's official records? With the exception of FAR Part 45.5, the phrase "official records of the government" or "government's official record" exists nowhere else in the literature (at least this writer has been unable to find it). However, Title 44 (44 U.S.C. 3301) defines the government's records as "all books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or

other activities of the government or because of the informational value of data in them."

So then, do the business records of private industry fall under the purview of Title 44? Arguably no. The new FAR draft proposed rule makes this clear: Contractor records are created and maintained within the context of property stewardship, and "shall not be construed as substituting for the Government's fiduciary responsibilities or requirements." In short, record keeping must be seen in the proper context: contractor records can only be stewardship in nature. Government records can only be fiduciary in nature.

So, the fact that a private company is contractually required to create, keep and maintain records for government property in its possession does not alter the fact that such records are in fact, the domain of the private sector – not the Government. Yes, the government has the right – even the duty – to audit and/or review the adequacy of the contractor's stewardship records of government property. But those records belong to and are the official records of the contractor – not the government (and never the twain shall meet). ♦

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