THE NASH & CIBINIC REPORT
government contract analysis and advice monthly from professors ralph c. nash and john cibinic

Author: Ralph C. Nash, Professor Emeritus of Law, The George Washington University
Contributing Authors: Vernon J. Edwards and Nathaniel E. Castellano

OCTOBER 2023 | VOLUME 37 | ISSUE 10

¶ 62 EVALUATOR WORKING PAPERS AND NOTES: What To Do With Them?

Vernon J. Edwards

Government personnel evaluating proposals and quotes may write "notes" to themselves or to each other and prepare evaluation worksheets, either on paper or in a computer application. Is the source selection authority or the Contracting Officer required to collect and retain such materials? May they alter or destroy them? Someone at a Government contracting social media website, *Where In Federal Contracting?* (WIFCON), http://www.wifcon.com/, asked the latter question and received some interesting responses. Three responses, quoted below in part, all from experienced persons, drew our attention:

> *Response 1*: The source selection evaluation report, decision document, and so forth are records. Individual evaluator notes are not records.
>
> *Response 2*: The most prudent and wisest practice in my opinion is preparing a consensus report and that should be the only document retained. Too often an individual evaluator['s] notes reflect misunderstandings and errors from their initial reviews. When discussed in a group setting, evaluators often discover why their first hunch was wrong. What matters is the consensus report that all evaluator[s] acknowledge as the group['s] opinions (however individuals can still express their disagreement if they like as dissenting opinions).
>
> The problem with retaining [evaluator] notes is that a protestor['s] attorney may find misleading statements, confusion, and misunderstandings in the discovery process which don't reflect the evaluator['s] final opinion.
>
> *Response 3*: I was part of the subject of one protest of a services contract source selection, circa 2005, as the Chairperson of the [source selection evaluation board]. After I wrote the official consensus evaluation report, I threw away the individual evaluators' pre-group notes.

The respondents did not ask what the questioner meant by "note." The word suggests brevity but does not communicate much about content. Broadly considered, a "note" might be one or two words or something more. A "note" might say "Strength," or it might explain in detail that an offeror's assertion is not credible or that a system of equations is incomplete. A "note" might contain trade secrets or classified information. It is unwise to be generally dismissive of "notes."

The GAO's Stance On Retention Of Evaluator Working Papers And Notes

Variations of the phrases "evaluator working papers" and "evaluator notes" have appeared in 62 Government Accountability Office (GAO) protest decisions since 1989. Only six of those decisions sustained a protest on some ground or another. It appears that in most cases the GAO's access to evaluator notes and workpapers helped the agency win the protest or did no harm. See, e.g., *Accenture Federal Service, LLC*, Comp. Gen. Dec. B-421134.3, 2023 WL 2931283, stating:

> We reject Accenture's assertion that the agency's documentation of oral presentations was inadequate.…
>
> Here, the offerors submitted written slides responding to the scenarios disclosed in the solicitation. Further, with regard to the "on-the-spot" scenarios, the agency evaluators created 60 pages of notes; discussed each offeror's presentation immediately after the presentation; and subsequently prepared an evaluation report documenting the basis for the assigned ratings. We have reviewed the record, including the evaluator notes and the evaluation report, and find no basis to meaningfully distinguish the facts presented here from those we considered in *Booz Allen Hamilton* [, Comp. Gen. Dec. B-419210, 2020 CPD ¶ 409, 2020 WL 7863818]. Accordingly, the protester's assertion that the agency failed to establish an adequate record of the offerors' oral presentations is denied.
>
> Notwithstanding its unfavorable characterization of the evaluator notes, Accenture next challenges the agency's evaluation of Deloitte's proposal on the basis of those notes. Among other things, Accenture asserts that the notes "highlight weaknesses in Deloitte's approach that were identified by the evaluators" but were not discussed in the subsequent [technical evaluation team] report. Second Supp. Protest at 23–24, 30–31. Accordingly, based on the absence of references in the TET report to some of the evaluators' notations, Accenture asserts that Deloitte's rating of high confidence under the technical evaluation factor is ""unsupported." *Id.* at 31.
>
> We reject Accenture's assertion.…Here, as noted above, the record establishes that, immediately following completion of each oral presentation, the evaluators met to discuss the ratings that would be assigned and, subsequently, each member signed the consensus evaluation report that described the basis for the ratings assigned. Based on our review of the record here, including our review of the contemporaneous evaluator notes, we find no basis to question the agency's evaluation of Deloitte's proposal under the technical evaluation factor.

See also *Oshkosh Defense, LLC*, Comp. Gen. Dec. B-421506, 2023 CPD ¶ 141, 2023 WL 4267650; *Applied Insight, LLC*, Comp. Gen. Dec. B-421221, 2023 CPD ¶ 33, 2023 WL 1100457; *Executive Acquisitions & Global Logistic, Engineering Services, LLC*, Comp. Gen. Dec. B-420231, 2022 CPD ¶ 23, 2022 WL 124728.

Nevertheless, the GAO has long stated that agencies need not retain evaluators' notes or scoring sheets, while warning that agencies may need such documents to defend themselves against a protest and that they destroy them at their own risk. See, for example, *Government Acquisitions, Inc.*, Comp. Gen. Dec. B-401048, 2009 CPD ¶ 137, 2009 WL 2383029, stating:

> [Government Acquisitions, Inc.] protests that the agency's evaluation and source selection decision was inadequately documented, complaining that "[n]o evaluation worksheets, individual evaluator notes or scales were produced." GAI Comments and Supplemental Protest, Mar. 5, 2009, at 3. GAI's protest in this regard is without merit.
>
> Although an agency must document its evaluation judgments in sufficient detail to show that they are not arbitrary, the necessary amount and level of detail will vary from procurement to procurement. *U.S. Defense Sys., Inc.*, B-245563, Jan. 17, 1992, 92-1 CPD ¶ 89 at 3; *Champion-Alliance, Inc.*, B-249504, Dec. 1, 1992, 92-2 CPD ¶ 386 at 6–7.… [T]here is no requirement that an agency retain individual evaluator's notes or worksheets, provided the agency's final evaluation documentation reasonably explains the basis

for the agency's judgments. *Global Eng'g and Constr. LLC*, B-290288.3, B-290288.4, Apr. 3, 2003, 2003 CPD ¶ 180 at 3 n.3.

The FAR Rules About Contract File Documentation

The GAO has been careless in saying that "there is no requirement" that an agency retain evaluators' working papers and notes, because FAR Subpart 4.8, *Government Contract Files*, at FAR 4.801, *General*, states:

> (b) The documentation in the files (see [FAR] 4.803) shall be sufficient to constitute a *complete* history of the transaction for the purpose of—
>
> (1) Providing a *complete* background as a basis for informed decisions at each step in the acquisition process;
>
> (2) Supporting actions taken;
>
> (3) Providing information for reviews and investigations; and
>
> (4) Furnishing essential facts in the event of litigation or congressional inquiries. [Emphasis added.]

FAR 4.802, *Contract files*, states:

> (a) A contract file should generally consist of—
>
> (1) The contracting office contract file that documents the basis for the acquisition and the award….

FAR 4.803, *Contents of contract files*, states:

> The following are examples of the records normally contained, if applicable, in contract files:
>
> (a) Contracting office contract file.
>
> * * *
>
> (13) Source selection documentation….

Other rules about documentation of quote and proposal evaluations appear in FAR Subpart 8.4, Part 13, Part 15, and Subpart 16.5.

In *Pitney Bowes Government Solutions, Inc. v. U.S.*, 93 Fed. Cl. 327 (2010), 52 GC ¶ 256, a bid protest decision, the CO told the U.S. Court of Federal Claims that he had ordered the destruction of the individual evaluators' scoring sheets. He stated that ordering the destruction of "all working, draft, and obsolete documents and files [including individual TEP members' score sheets] prior to making [an] award of a procurement" was his "standard practice," and that his practice was consistent with FAR 4.802 and 4.803. But the court held:

> Contrary to [the CO's] position, the destruction of the individual TEP members' score sheets is barred by the FAR provisions. The current contract file for the challenged procurement does not "constitute a *complete* history of the transaction," FAR § 4.801(b) (emphasis added), nor does it "[furnish] essential facts in the event of litigation." FAR § 4.801(b)(4). FAR § 4.801(b) expressly refers to § 4.803, which provides "examples of the records normally contained…in contract files." FAR § 4.803. Specifically, the record as submitted does not contain all "[s]ource selection documentation," as required by FAR § 4.803(a)(13). It was foreseeable that the individual rating sheets could well become relevant to issues arising in a bid protest, particularly in a situation where, as here, the bias of one or more of the panel members is alleged. No preternatural clairvoyance would be required to envision that possibility.

Moreover, according to the court, in addition to violating FAR, the CO's action raised issues of spoliation of evidence:

> [The CO's] destruction of the rating sheets raises issues of spoliation of evidence. "Spoliation is the destruction or significant alteration of evidence, or failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." *See United Med. Supply Co. v. United States,* 77 Fed. Cl. 257, 263 (2007) (quoting *West v. Goodyear Tire & Rubber Co.,* 167 F.3d 776, 779 (2d Cir.1999)). Spoliation may result in sanctions, either based on the court's inherent authority to control the judicial process or grounded in contravention of specific discovery or document-preservation orders. *Id.* at 264. The oldest and most typical remedy for spoliation is the drawing of an "adverse inference" that the destroyed evidence would have been favorable to the opposing side. *Id.* at 263.

Thus, the court granted the protester's motion to supplement the administrative record with depositions of Government personnel. Ultimately, however, and luckily, the Government recovered the evaluators' score sheets from computer backup files, and the court later ruled that no spoliation had taken place. *Pitney Bowes Government Solutions, Inc. v. U.S.*, 94 Fed. Cl. 1 (2010), 52 GC ¶ 354. See Nibley and Datta, *The Protest Record—What Should Be In; What Should Be Out*, 52 GC ¶ 211 (June 23, 2010), and *Destroying Evaluator Worksheets: A Bad Practice*, 24 N&CR ¶ 40.

See also *Laboratory Corp. of America v. U.S.*, 108 Fed. Cl. 549, 559 (2012), 55 GC ¶ 63, stating:

> As a preliminary matter, defendant argues that its agencies did not have a duty to preserve evidence relating to the procurement when it closed because, at that early juncture, neither the [Department of Veterans Affairs] nor [the General Services Administration] could have anticipated litigation. But, the Federal Acquisition Regulations (FAR) indicate otherwise. They require procuring agencies to maintain all the contract documents associated with a procurement. Thus, FAR § 4.801(a) states that "[t]he head of each office performing contracting, contract administration, or paying functions shall establish files containing the records of all contractual actions." 48 C.F.R. § 4.801(a). The FAR lists forty-two (42) items that should "normally [be] contained" in a contract file, including "a copy of the solicitation and all amendments thereto." 48 C.F.R. §§ 4.803(a), (a)(8). Regarding this requirement, the regulations provide that this documentation must be "sufficient to constitute a complete history of the transaction for the purpose of…[f]urnishing essential facts in the event of litigation or congressional inquiries." 48 C.F.R. § 4.801(b)(4). In the court's view, these regulations recognize the prospect of having some form of litigation be associated with a procurement, and preclude the VA and GSA from claiming that they were under no obligation to preserve information relating to the procurement in question because they did not anticipate that the procurement would be protested.

But there is more to all this than just a difference of opinion between the GAO and the court.

The Federal Records Act—What Are "Federal Records"?

FAR Subpart 4.8 implements the requirements of the Federal Records Act, 44 USCA Chapter 31, *Records Management by Federal Agencies*, and Chapter 33, *Disposal of Records*, and the implementing regulations of the National Archives and Records Administration (NARA), 36 CFR Chapter 12, *National Archives and Records Administration*. The Act and the NARA regulations require agencies to create and retain *federal records*. See 44 USCA § 3101, *Records management by agency heads; general duties*, stating:

> The head of each Federal agency shall make and preserve records containing *adequate and proper documentation* of the organization, functions, policies, decisions, procedures, and essential transactions of the agency and designed to furnish the information necessary to protect the legal and financial rights of the Government and of persons directly affected by the agency's activities. [Emphasis added.]

44 USCA § 3301, *Disposal of records*, defines "records" as follows:

> (a) Records Defined.—
>
> (1) In general.—As used in this chapter, the term "records"—

(A) includes all recorded information, regardless of form or characteristics, made or received by a Federal agency 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 United States Government or because of the informational value of data in them; and

(B) does not include—

(i) library and museum material made or acquired and preserved solely for reference or exhibition purposes; or

(ii) duplicate copies of records preserved only for convenience.

(2) Recorded information defined.—

For purposes of paragraph (1), the term "recorded information" includes all traditional forms of records, regardless of physical form or characteristics, including information created, manipulated, communicated, or stored in digital or electronic form.

(b) Determination of Definition.—

The Archivist's determination whether recorded information, regardless of whether it exists in physical, digital, or electronic form, is a record as defined in subsection (a) shall be binding on all Federal agencies.

NARA (the "Archivist") has elaborated on the definition of "Federal records" in 36 CFR § 1220.18. For instance, it has explained the meaning of "adequate and proper documentation" as used in 44 USCA § 3301, quoted above, as follows:

Adequate and proper documentation means a record of the conduct of Government business that is complete and accurate to the extent required to document the organization, functions, policies, decisions, procedures, and essential transactions of the agency and that is designed to furnish the information necessary to protect the legal and financial rights of the Government and of persons directly affected by the agency's activities.

NARA also explains the definition of "Federal records" as follows:

Records or *Federal records* is defined in 44 U.S.C. 3301 as including "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 the data in them (44 U.S.C. 3301)." (See also [36 CFR] § 1222.10 of this part for an explanation of this definition).

And NARA has explained "documentary materials" as follows at 36 CFR § 1220.18:

Documentary materials is a collective term that refers to recorded information, regardless of the medium or the method or circumstances of recording.

Are evaluator working papers and notes federal records? See 36 CFR § 1222.12:

(c) Working files and similar materials. Working files, such as preliminary drafts and rough notes, and other similar materials, are records that must be maintained to ensure adequate and proper documentation if:

(1) They were circulated or made available to employees, other than the creator, for official purposes such as approval, comment, action, recommendation, follow-up, or to communicate with agency staff about agency business; and

(2) They contain unique information, such as substantive annotations or comments that adds to a proper understanding of the agency's formulation and execution of basic policies, decisions, actions, or responsibilities.

The NARA regulations distinguish "records" or "Federal records" from "personal files" or "personal papers" as follows in 36 CFR § 1220.18:

Personal files (also called *personal papers*) are documentary materials belonging to an individual that are not used to conduct agency business. Personal files are excluded from the definition of Federal records and are not owned by the Government.

Thus, it appears that evaluator working papers and notes about a proposal that are written or entered into a computer application and considered during proposal evaluation are federal records and Government property, not the personal property of the evaluators who wrote them. However, the determination of whether a document is a federal record can be difficult. A NARA website provides the following guidance to federal employees:

Many factors contribute to the determination that recorded information qualifies as a Federal record. If the answer to *any* of the following questions is "yes," the item is a Federal record.

- Did the agency require creation or submission and maintenance of the information?
- Was the information used to conduct or facilitate agency business?
- Does the item contain unique information that explains formulation of significant program policies and decisions?
- Was the information distributed to other offices or agencies for formal approval or clearance?
- Is the information covered by an item in an agency records schedule or regulation? [Emphasis on "any" added.

https://www.archives.gov/records-mgmt/publications/documenting-your-public-service.html#:~:text=Employees%20should%20consult%20the%20agency,are%20personal%20or%20Federal%20records.

What Are The Rules About The Destruction Of Federal Records?

44 USCA § 3314, *Procedures for disposal of records exclusive*, states: "The procedures prescribed by this chapter are exclusive, and records of the United States Government may not be alienated or destroyed except under this chapter." 18 USCA § 641 and § 2071 prescribe criminal penalties for "unlawful or accidental removal, defacing, alteration, or destruction" of federal records. 36 CFR Part 1230, *Unlawful or Accidental Removal, Defacing, Alteration, or Destruction of Records*, prescribes definitions and rules for the handling of such cases. COs have no authority to destroy or direct the destruction of evaluation records except as provided by NARA-approved agency record management procedures. And see in FAR 4.805, Table 4-1, Retention Periods. We suspect that many if not most COs are not aware of the Federal Records Act, the NARA regulations, and their agency records management procedures.

FAR 4.805, *Storage, handling, and disposal of contract files*, states:

(a) Agencies must prescribe procedures for the handling, storing, and disposing of contract files, in accordance with the National Archives and Records Administration (NARA) General Records Schedule 1.1, Financial Management and Reporting Records. The Financial Management and Reporting Records can be found at http://www.archives.gov/records-mgmt/grs.html. These procedures must take into account documents held in all types of media, including microfilm and various electronic media.…

* * *

(c) An agency that requires a shorter retention period than those identified in Table 4-1 shall request approval from NARA through the agency's records officer.

Yet, talking with working-level contracting personnel and reading protest decisions has left us with the impression that some agencies routinely destroy evaluator working papers and notes prior to contract award. See *Northeast MEP Services, Inc.*, Comp. Gen. Dec. B-285963.5, 2001 CPD ¶ 28, 2001 WL 96568, at n.4:

> NASA informed us that the Goddard Space Flight Center "generally disposes or destroys" the evaluators' individual documents after a consensus evaluation board judgment is achieved. Tr. at 33. We find troubling the routine destruction of documents such as these, where the retention of this documentation, at least until the agency can determine whether its evaluators' judgment will be challenged, does not work any undue hardship upon the agency.

It is worse than "troubling," since some source selections involve the prospective obligation of millions or even billions of taxpayer dollars, and we hear almost daily of the need for transparency in Government. What is troubling is the GAO's routine acceptance of the destruction of evaluation records and its failure to remind agencies of the requirements of law and regulation.

Our Advice

First, agency source selection plans should (1) describe the system of documents that the agency and its evaluators must, should, and may create during the evaluation of proposals; (2) specify the procedures that must be followed for creating, collecting, retaining, and preserving such documents; and (3) identify the official who will be responsible for ensuring compliance with those procedures, whether the CO, the head of the evaluation team, or someone else.

Second, COs should brief evaluators on the requirements of FAR Subpart 4.8 and emphasize the importance of creating and maintaining "adequate and proper" records for sound decisionmaking. They should advise evaluators that their notes and working papers will be part of the contract file and are not personal records.

Third, COs should familiarize themselves with their agency's records management policies and procedures and seek and document legal advice before destroying any source selection document or ordering or permitting any such document to be destroyed.

While those measures are important in all acquisitions, it should go without saying that they are especially important in large dollar value competitive acquisitions.

Conclusion

The notion that it is good practice to destroy evaluator working papers and notes after preparation of an evaluation consensus report is demonstrably unsound. It is questionable as a protest avoidance tactic, and doing so would likely violate the Federal Records Act and the NARA regulations, since it is unlikely that COs or other source selection officials have "disposition authority" (see 36 CFR § 1220.18) to destroy documents that are federal records before the expiration of a scheduled retention period. See FAR 4.805(c).

We know that many Government personnel are disdainful of what they consider needless documentation and document hoarding. But with billions of dollars riding annually on "best value" decisions, the public is entitled to a complete record of the bases on which agencies conduct evaluations and make source selection decisions. Premature destruction of federal records undermines the integrity of the acquisition process. *VJE*

