

FALD NEWSLETTER

The Importance of Evaluation Criteria

One of the most important aspects of drafting a financial assistance Notice of Funding Opportunity is developing the evaluation criteria. The evaluation criteria are the measuring sticks used to rate applications and they play a significant role in determining which applicant(s) will receive an award.

Well-designed evaluation criteria serve two main functions. First, they provide information to applicants about what they should include in their applications and how that information should be structured. Second, they make the role of merit reviewers easier by providing clear directions for what reviewers should be considering when scoring each application.

Compare the following two potential evaluation criteria related to an applicant's project management plan: (1) Reviewers will evaluate whether the applicant's project management plan is appropriate to conduct the specified tasks (0-10 points); and (2) Reviewers will evaluate the extent to which the applicant's project management plan

is comprehensive and appropriate for ensuring the realization of the project's goals and objectives (0-10 points). The first criterion is essentially a yes or no choice – is the application appropriate or not? This does not provide the merit reviewers much guidance in choosing a numerical score for each application. It is also very general in nature and not focused on whether the applicant has a plan that is likely to lead to a successful project. By contrast, the second criterion uses *evaluative language* to clearly convey – both to applicants and reviewers – what is considered important: is the project management plan comprehensive and will it ensure that the project's goals and objectives are met. A competition using the second criterion rather than the first is likely to result in a more rational differentiation between applications with strong and weak project management plans, ensuring that the best applications receive the highest scores. For more information about evaluation criteria see Appendix 1 to 2 C.F.R. Part 200, E.1.

DID YOU KNOW?

The Federal Assistance Law Division has been actively involved in the Grants Enterprise Management (GEMS) Initiative. Pursuant to the Digital Accountability and Transparency Act of 2014 and OMB-M-18-24, the GEMS initiative is the effort to consolidate the requirements of the three grant management systems that are currently being used at DOC with the goal of migrating to a single modern grants management system. FALD attorneys met with the NIST business process engineers and discussed the legal work flows and ensured that this reflected the requirements of the DOC Grants and Cooperative Agreements Manual. FALD also participated in the GEMS process harmonization workshop, which was a four-day workshop to define a harmonized grants management process across DOC. The workshop resulted in a finalized work flow that FALD was part of shaping along with the grants management and program offices. FALD looks forward to the final grants management system being selected as a contributing member in the process for selecting and preparing for this important tool.

CASE SUMMARY CORNER

Provide Reasoned Explanations for Agency Actions: A Tale of “Termination”

In the case of *Policy and Research, LLC v. U.S. Department of Health and Human Services* (313 F. Supp. 3d 62 (D.D.C., May 11, 2018)), HHS ended 5-year multi-year awards after three years and was reminded by the court that an agency must follow its own rules and that, in contrast to movie theater etiquette, silence is not golden.

In 2015, HHS awarded a series of discretionary grants (in the form of multi-year cooperative agreements) for five-year “project periods.” Despite the overall five-year performance period, HHS funded the awards in one-year increments called “budget periods,” thus each award was comprised of five annually funded budget periods. Funding for each budget period was conditioned upon the award recipient submitting a “continuation application” that HHS would evaluate to determine whether the project was making satisfactory progress, whether appropriations were available for the project, and whether the recipient had maintained adequate stewardship of federal funds. Award documentation specifically indicated that future year funding was “subject to availability of funds and satisfactory progress.” Typically, HHS’s practice was to approve annual continuations of awards.

In this case, after issuing funds for the third budget period of the award, covering 2017-2018, HHS notified awardees that 2017 would be the final funded year of their awards and that the project period of the awards would be shortened to end along with the end of the current budget year. The HHS notices provided *no explanation for HHS’s decision* to shorten the project periods by two years.

Several award recipients challenged HHS’s action as an improper “termination,” arguing that the terminations

without explanation were arbitrary and capricious actions under the Administrative Procedure Act (APA) because the ending of the awards was inconsistent with HHS’s very own requirements as set forth in its regulations. It was crucial, said the court, that the agency reach its decision to end the awards through a “logical and rational process” and “articulate a satisfactory explanation for its action.” And certainly, an “agency acts arbitrarily and capriciously if it acts in a manner that is contrary to its own regulations or a congressional statute.”

HHS unsuccessfully tried to persuade the court that it did not trigger the termination procedures set forth in its regulations. HHS argued that instead of terminating the award’s performance period midstream, HHS merely exercised its discretion to decline to approve a continuation of the award. HHS explained that “project period” equated to “budget period;” and therefore, declining a continuation award was equivalent to not approving a new award. The court found HHS’s analysis faulty and determined that HHS had, in fact, terminated a multi-year award mid performance without explanation, which was contrary to established procedures for the treatment of award terminations preserved in its own regulations.

The fundamental lessons of this case? Maintain good practices: (1) follow established policies, procedures, and regulations; and (2) provide reasoned explanations for actions, where required, including an action that discontinues funding and shortens the overall period of performance of a multi-year award.

CONTACT US!

This newsletter, written by FALD staff, provides general information to Department of Commerce employees but is not intended to render legal advice. Please contact FALD regarding any specific legal matter involving financial assistance. Email us at FALD@doc.gov.