

THE NASH & CIBINIC REPORT

government contract analysis and advice monthly from
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JUNE 2018 | VOLUME 32 | ISSUE 6

DATELINE JUNE 2018

Ralph C. Nash

We've often wondered whether the world of Government procurement would be better off if changes to the regulations were issued only once or twice a year. We've speculated that most changes to the Federal Acquisition Regulation have a minor impact with the result that the constant flow of FAR changes is somewhat disruptive. Thus, it seems as if gathering all the changes into one package might make sense.

Now we know the answer to our question. There has been only one substantive change to the FAR in the last 16 months (as we write on June 1, 2018). The FAR Semiannual Regulatory Agenda, 83 Fed. Reg. 1950, issued on Jan. 12, 2018, indicates that there are 16 final rules and 22 proposed rules ready to be issued when the Administration's regulatory freeze is lifted. See 82 Fed. Reg. 8346 (Jan. 24, 2017); 59 GC ¶ 27. See also *Dateline April 2017*, 31 NCRNL DATE APR. This cascade of changes may be released before this issue of the REPORT is published; but, whether it is or not, our readers will notice that most of the changes are minor fixes that we have been able to live without for the long period of silence. (A couple have been implemented by internal memorandum.)

Curiously, the one major change that is needed has disappeared from the list. That is the updating of the organizational conflict-of-interest rules that has been in the mill for over a decade. The FAR Council issued an advance notice of proposed rulemaking on this issue in 2006, 73 Fed. Reg. 15962 (Mar. 26, 2008), and a proposed rule in 2011, 76 Fed. Reg. 23236 (Apr. 26, 2011). A final rule seemed imminent when the freeze went into effect but now it has disappeared. This seems inexplicable when there is almost universal agreement that FAR Subpart 9.5 is seriously out of date.

This leaves us with a final question. Is there any way to persuade Congress to stop for a while? The constant flow of procurement legislation has become numbing and the lagging implementation has become endemic. We could all benefit for a one- or two-year rest while the regulators catch up with the process.
RCN

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COMPETITION & AWARD

¶ 26 POSTSCRIPT: SOURCE SELECTION DECISIONS

Vernon J. Edwards

Last month, in *Source Selection Decisions: Ratings Should Not Be Used*, 32 NCRNL ¶ 16, Ralph wrote:

Over the years we have always taught that source selection decisions must be made on the basis of comparative “strengths, deficiencies, significant weaknesses, and risks” documented in accordance with the requirement in Federal Acquisition Regulation 15.305(a). In most cases, agencies also give comparative ratings of the proposals although this is discretionary under this regulation, which states: “Evaluations may be conducted using any rating method or combination of methods, including color or adjectival ratings, numerical weights, and ordinal rankings.” Competently written source selection decisions pay little attention to the ratings and focus on the strengths, deficiencies, significant weaknesses, and risks.

We have, indeed, taught that. But reading Ralph’s piece prompted me to think about *strengths, weaknesses, and deficiencies*. What are they? Are they not ratings?

The Federal Acquisition Regulation does not define *strength*. A definition of *weakness* was added to the FAR by the FAR Part 15 Rewrite, Federal Acquisition Circular 97-02, 62 Fed. Reg. 51224, 51233 (Sept. 30, 1997). FAR 15.001 thus defines *weakness*:

“Weakness” means a flaw in the proposal that increases the risk of unsuccessful contract performance. A “significant weakness” in the proposal is a flaw that appreciably increases the risk of unsuccessful contract performance.

So a weakness is a “flaw,” which the OXFORD DICTIONARY OF ENGLISH defines as “a mark, blemish, or other imperfection which mars a substance or object.” That clears things up. And thus we suppose that a strength is a perfection that reduces risk and a significant strength is one that reduces risk appreciably.

FAR 15.001 also defines *deficiency*:

“Deficiency” is a material failure of a proposal to meet a Government requirement or a combination of significant weaknesses in a proposal that increases the risk of unsuccessful contract performance to an unacceptable level.

That definition, also added by the FAR Part 15 Rewrite, replaced the definition that had been in FAR 15.601, which was:

Deficiency, as used in this subpart, means any part of a proposal that fails to satisfy the Government’s requirements.

The new definition muddled up that simpler definition by adding the phrase “a combination of significant weaknesses,” which raises all kinds of questions. (One could base a Master’s thesis or perhaps even a Ph.D. dissertation on the crummy definitions in the FAR.)

A key rule about *strengths, weaknesses, and deficiencies* appears in FAR 15.305(a): “The relative strengths, deficiencies, significant weaknesses, and risks supporting proposal evaluation shall be documented in the contract file.” That is the only

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mention of strengths in FAR Part 15. (Read that rule again and see if it makes sense to you upon reflection. Do strengths, weaknesses, and deficiencies “support” proposal evaluations, or are they evaluation findings that must be supported?)

A key rule about *weaknesses* and *deficiencies* appears in FAR 15.306(d), which states the requirements for the conduct of discussions:

(3) At a minimum, the contracting officer must, subject to paragraphs (d)(5) and (e) of this section and [FAR] 15.307(a), indicate to, or discuss with, each offeror still being considered for award, deficiencies, significant weaknesses, and adverse past performance information to which the offeror has not yet had an opportunity to respond.

Yet another key rule about weaknesses and deficiencies is in FAR 15.506(d), which instructs agencies to explain in debriefings their evaluation of significant weaknesses and deficiencies in an unsuccessful offeror’s proposal.

Clearly, as used in FAR Part 15, the words *strength*, *weakness*, and *deficiency* are descriptions or labels of particular proposal content. But do they describe particular properties, like the redness of a rose, so that we can say, *Look at that strength*, or are they subjective assessments or judgments of proposal content, i.e., ratings, so that we can say, *I think that design feature is a deficiency*? Are all strengths, weaknesses, and deficiencies of the same magnitude or significance as others, such that a proposal with three strengths is always better than a proposal with only two strengths? Is a proposal with three weaknesses or significant weaknesses always worse than a proposal with one? Does each deficiency degrade a proposal to the same extent as every other?

Note that under the *Department of Defense Source Selection Procedures* (Mar. 31, 2016), <https://www.acq.osd.mil/dpap/policy/policyvault/USA004370-14-DPAP.pdf>, one of the principal distinctions between a rating of *Outstanding* and a rating of *Good* appears to be the number of strengths in a proposal:

Outstanding: Proposal indicates an exceptional approach and understanding of the requirements and contains multiple strengths.

Good: Proposal indicates a thorough approach and understanding of the requirements and contains at least one strength.

See page 25, Table 2A, and page 26, Table 3.

Strength, Weakness, And Deficiency Are Ratings

How is the characterization of particular proposal content as a *strength*, *weakness*, or *deficiency* any different from the characterization of the proposal itself as *Outstanding*, *Good*, or *Unacceptable*? *Strength*, *weakness*, and *deficiency* are ratings—shorthand descriptive labels that encompass and summarize more detailed information. And thus it follows that an explanation must be forthcoming when some statement or set of statements in a proposal is rated as a strength, weakness, or deficiency. *How is it a strength? How is it a weakness? How is it a deficiency?* The issue is the same issue as in: *How is proposal X outstanding? How is proposal Y marginal? What makes it so?* See *Scoring or Rating in Source Selection: A Continuing Source of Confusion*, 20 N&CR ¶ 7:

It is essential that everyone involved in contractor selection understands the distinction between evaluating offerors and their offers and *scoring* or *rating* them. Evaluation is the process of determining the relative value of a thing. Scoring or rating is the use of words or symbols to express evaluation findings in simple terms. The Federal Acquisition Regulation requires agencies to evaluate offerors and their offers, but it does not require that they score or rate them. FAR 15.305(a) is misleading in saying that evaluations “may be conducted using any rating method or combination of methods, including color or adjective ratings, numerical weights, and ordinal rankings,” because rating, in the sense of the assignment of adjectives or symbols, is not a method of conducting an evaluation, it is a method of expressing the results of an evaluation.

* * *

Scores or ratings (the FAR uses the term “rating”) summarize complex information about the attributes of offerors and offers, making it easier to see the big picture at a glance. They do this by converting detailed information about a proposal into a shorthand expression—usually a number or an adjective—that represents some abstract measure of value. On a scale of 0 to 100 points, 100 being best, a score of 80 summarizes the merits of an offeror and its offer on an abstract scale of value, but the score does not tell you anything about the sources and nature of that value. Thus, the big picture comes at the cost of a considerable loss of information. Given such loss of information, why score? The answer is that scoring responds to the demand: Cut to the chase! How good are the proposals?

* * *

This summary information enables the SSA [Source Selection Authority] to quickly determine where the offerors stand in the eyes of the evaluators, but the scores do not tell the SSA the reasons for that standing or enable the SSA to make an intelligent tradeoff decision... To know that, the SSA must refer to the evaluators' documentation of their factual findings and judgments.

Protesters have challenged the designation, or lack thereof, of something in a proposal as a *strength*, a *weakness*, or a *deficiency*, and they have had some successes. See, for example, *Veteran National Transportation, LLC*, Comp. Gen. Dec. B-415696.3, 2018 CPD ¶ 141, 2018 WL 2002813 (challenging agency's assignment of weaknesses to technical proposal—*denied*); *Federal Acquisition Services Alliant JV, LLC*, Comp. Gen. Dec. B-415406.2, 2018 CPD ¶ 139, 2018 WL 1905243 (challenging assignment of weakness instead of deficiency to selectee—*denied*); *CRAssociates, Inc.*, Comp. Gen. Dec. B-414171.2, 2018 CPD ¶ 87, 2018 WL 1542120 (challenging failure to assess strengths to protester's proposal—*denied*); *Booz Allen Hamilton, Inc.*, Comp. Gen. Dec. B-415218, 2018 CPD ¶ 84, 2017 WL 8677375 (challenging assignment of a weakness—*denied*); *Immersion Consulting, LLC*, Comp. Gen. Dec. B-415155, 2017 CPD ¶ 373, 2017 WL 6261541, 60 GC ¶ 49 (challenging Source Selection Authority's removal of strengths and weaknesses assigned by evaluation board—*sustained*); *Janus Global Operations, LLC*, Comp. Gen. Dec. B-414569.8, 2017 CPD ¶ 367, 2017 WL 6261544 (challenging agency's failure to assign strengths—*denied*); *Protection Strategies, Inc.*, Comp. Gen. Dec. B-414648.2, 2017 CPD ¶ 365, 2017 WL 5969278 (challenging agency's assignment of strength to awardee's proposal—*sustained*); *ENSCO, Inc.*, Comp. Gen. Dec. B-414844, 2017 CPD ¶ 357, 2017 WL 6298469 (challenging agency's assignment of a significant weakness—*sustained*); *Pinnacle Solutions, Inc.* Comp. Gen. Dec. B-414360, 2017 CPD ¶ 172, 2017 WL 2774395, 59 GC ¶ 228 (challenging assessment of weaknesses—*sustained*); *ASRC Communications, Ltd.*, Comp. Gen. Dec. B-412093, 2016 CPD ¶ 36, 2015 WL 9948268 (challenging agencies elimination of a deficiency from evaluation of awardee's proposal—*sustained*); and *Engineering Management & Integration, Inc.*, Comp. Gen. Dec. B-400356.4, 2009 CPD ¶ 114, 2009 WL 1532023, 51 GC ¶ 256 (challenging assignment of a deficiency—*sustained*).

And we have read several protest decisions that seemingly turned on questions of the relative number of strengths and weaknesses in competing proposals, as if those things were unitary in nature and effect and countable as such. For instance, in *Intercontinental Construction Contracting, Inc.*, Comp. Gen. Dec. B-415040, 2018 CPD ¶ 82, 2017 WL 8288117, involving a two-step design-build source selection, we read that the Contracting Officer eliminated one offeror at the end of the first phase with the following explanation:

Given that there are proposals with Substantial or Satisfactory Confidence in Performance ratings due to strong past performance information, *and more strengths and/or fewer weaknesses* in their Technical Approach, I do not consider [ICCI] to be among the highest rated proposals and they will not be invited to participate in Phase II. [Emphasis added.]

And see *Booz Allen Hamilton, Inc.* Comp. Gen. Dec. B-414283, 2017 CPD ¶ 159, 2017 WL 2375936:

The contracting officer concluded that both SAIC and Booz Allen had strengths for their management and technical approaches that, when aggregated, resulted in an overall technical rating of good for both proposals. However, the contracting officer concluded that Booz Allen's significant strength for [DELETED] did not justify payment of a price premium, *especially when there were more strengths* associated with the SAIC proposal. *Id.* We find nothing unreasonable about the contracting officer's conclusions. [Emphasis added.]

Strength, Weakness, And Deficiency Are Unnecessary Intermediate Ratings

The process that we call evaluation consists of reading proposals and searching for statements (promises, intentions, hypotheses, assertions of fact, etc.) that, alone or in combination with others, affect how well the proposals perform with respect to each of the evaluation factors for award. We call such statements *proposal facts*. Having identified such statements, the evaluators must reach conclusions about how well the proposal performs on each of those evaluation factors. We call those conclusions *evaluation findings*.

An *evaluation factor* is a property of an offeror or of its offer that affects value. In a well-planned and comprehensively designed source selection, each evaluation factor has four expressly identified components: (1) a statement identifying the object of evaluation—a particular facet of the offeror or its offer that is to be evaluated; (2) a statement of the property (attribute, feature, quality, characteristic, etc.) of that object that is of interest to the buyer because it affects value; (3) a description or definition of that property; and (4) a scale or standard for determining whether and to what extent that property is present in the object.

So, if an agency is going to evaluate an offeror’s “technical approach” (a commonly used factor) its source selection strategy (see FAR 15.303(b)(2)) should: (a) state what, exactly, is meant by “technical approach”; (b) state what particular property (factor) or properties of a technical approach are of interest; (c) define or describe each such property; and (d) include a scale or standard of measurement for each such property that is to be the basis for determining whether and to what extent that property is present in a technical approach. The evaluator’s job is to search each offeror’s description of its technical approach for proposal facts (evidence) pertaining to that property and then produce an evaluation finding based on application of the factor scale or standard of measurement.

Value is an assessment of a proposal’s usefulness that must be based on proposal facts and evaluation findings. It is usually expressed on a value rating scale of some kind, such as the one below, the use of which would be appropriate when using the tradeoff process for source selection (see FAR 15.101-1):

PROPOSAL VALUE SCALE	
RATING	DESCRIPTION
Excellent	Proposal is eligible for award, performs at the highest level on each of the nonprice evaluation factors for award, and offers a fair and reasonable price.
Very Good	Proposal is eligible for award, performs at the highest level on the most important nonprice evaluation factor for award and at the median or higher level on each of the other factors, and offers a fair and reasonable price.
Good	Proposal is eligible for award, performs at the median or higher level on each of the nonprice evaluation factors for award, and offers a fair and reasonable price.
Fair	Proposal is eligible for award, performs at an acceptable level on each of the nonprice evaluation factors for award, and offers a fair and reasonable price.
Poor	Proposal performs at an unacceptable level on one or more of the nonprice evaluation factors for award, or offers a price that is not fair and reasonable, or is otherwise ineligible for award.

Each proposal is rated and then ranked, from best to worst, through a series of paired comparisons and tradeoffs with the others to determine which proposal is the best overall. What matters in this process is the thoroughness of the proposal evaluation and the reasonableness of the evaluators’ findings as they work from premises about how certain kinds of statements affect value—i.e., the evaluation standards, through the particular proposal facts, to their findings about the proposal’s value.

What is the purpose of identifying parts of a proposal as *strengths*, *weaknesses*, or *deficiencies*? It strikes us that if the evaluation factors are well established, as described above, then it is unnecessary to add the intermediate step of labeling particular statements or sets of statements as “strengths,” “weaknesses,” or “deficiencies.” Such ratings—while perhaps helpful to a Source Selection Authority in setting the stage for detailed consideration of the proposals based on the proposal facts and evaluation findings—become one more thing to explain, justify, document, and argue about *if cited as bases for the source selection decision*. And we think that the bid protest decisions we cited above, and the many others like it, prove our point.

Why be inefficient? Why get bogged down in intermediate ratings that are not essential to decisionmaking? Why not just reason from evaluation factor definitions and standards (major premises), through particular proposal facts (minor premises), to evaluation findings about proposal value? We realize that FAR 15.305(a) states: “The relative strengths, deficiencies, significant weaknesses, and risks supporting proposal evaluation shall be documented in the contract file.” But we do not read that sentence as requiring the rating of proposal content as strengths, deficiencies, and weaknesses. Our interpretation of that sentence is that if a source selection team chooses to apply such ratings it must explain (“document”) them.

Poorly Defined Evaluation Factors

Let’s look at a real case of poorly defined evaluation factors. We recently came across a solicitation for support services. The solicitation identified three evaluation factors: (1) mission capability, (2) past performance, and (3) price. Mission capabil-

ity consisted of three subfactors: (1) technical approach; (2) signed contractor teaming agreements; and (3) staffing plan and technical experience. The technical approach subfactor consisted of three sub-subfactors: (1) management concepts and organization plan; (2) technical solution; and (3) work samples. In a technical solution the agency would look for: (a) a sound approach that demonstrates the suitable labor categories, staffing mix, and man-hours needed to successfully execute the task order; (b) a concise and clear approach to accomplish the Government’s requirement; (c) solutions that are considered to reflect low risk in that they are clear and precise, supported, and demonstrate an understanding of the requirements; and (d) the ability to successfully execute the approach proposed. Here is our analysis of the “technical solution” sub-subfactor in light of our scheme for evaluation factors—object of evaluation, property of interest, property description, and scale or standard—and the actual language of the solicitation itself:

MISSION CAPABILITY FACTOR			
Technical Approach Subfactor			
Technical Solution Sub-subfactor			
Object of Evaluation	Property of Interest	Property Description	Scale or Standard
Approach	Soundness	Something that leads to greatest efficiencies	None given
	Conciseness	None given	None given
	Clarity	None given	None given
Labor categories	Suitability	None given	None given
Staffing mix	Suitability	None given	None given
Man-hours needed	Suitability	None given	None given
Solutions	Low risk	None given	None given
	Clarity	None given	None given
	Precision	None given	None given
	Supported	None given	None given
	Demonstrative of understanding	None given	None given
Ability	Likelihood of success	None given	None given

And here are the proposal preparation instructions pertaining to the “technical solution” sub-subfactor:

- Provide your technical solution. Your detailed narrative must describe your technical approach proposed for satisfying all the activities listed in the Statement of Work.
- Discuss any technical alternatives considered and why the proposed alternative was chosen.
- Provide a complete list of the labor categories and hours that will be used to successfully complete the task order.

Question: What is an evaluator to look for? Answer: Whatever he or she thinks is good and whatever he or she thinks is bad, which are to be labeled strengths, weaknesses, and deficiencies. *Strengths, weaknesses, and deficiencies* are ratings that evaluators judgmentally apply to statements or sets of statements that they discover in a proposal and react to in a certain way.

Getting Lost In The Proposal Ocean

We think that the impulse to apply intermediate ratings—*strength, weakness, deficiency*—to particular content in proposals springs from poorly defined evaluation factors. Told to evaluate a description of a “technical solution” for something as nebulous as “soundness,” and sent off without any clear and commonly shared guidance about what is or is not “sound,” evaluators are left to their own devices. They read through a proposal until they see something that they like or dislike, and if

they like it or dislike it enough they may label it a “strength” or a “weakness,” or even a “significant strength” or “significant weakness,” or a “deficiency,” or a “correctable” or “not correctable” deficiency.

It is easy to see how an evaluator might say, colloquially, that particular proposal content is “a strength” or “a weakness.” Suppose, to use a simple example, we are in the market for a powered lawn mower and we are offered (a) a gas-powered mower (e.g., a 22 in., Honda high wheel, variable speed, gas, self propelled) and (b) a battery-powered mower (a 20 in., Ryobi 40-volt, brushless lithium-ion, cordless self-propelled). The physical and performance properties of the two methods of powering a lawn mower are facts. But when instructed to evaluate “utility,” one evaluator might find that the use of battery power is a strength, because the battery is rechargeable and eliminates the need to buy and store gasoline. Another might find that the use of battery power is a weakness, because one battery will not provide enough energy to finish the lawn and it takes an hour to recharge the battery. Absent a definition of “utility” and a common scale or standard on which a determination of “utility” is to be based, what we have is a difference of opinion that could be argued indefinitely without resolution. But if we have a definition and a common standard for “utility,” then the evaluators should not need the intermediate labels of strength or weakness. They could report facts and findings about mower performance, which would be the basis on which the Source Selection Authority would make the selection (see FAR 15.308).

But all too often what we see is a practice—the labeling of proposal content as *strengths*, *weaknesses*, and *deficiencies*—that was adopted long ago in response to the practical need to plot one’s way to a value determination without a chart or map, so to speak. The question: What are we looking for? The answer: Things we like (strengths) and things we don’t like (weaknesses and deficiencies). Think of such things as islands in an otherwise featureless ocean. Lacking a well-specified procedure for navigation, evaluators look about in a proposal, read something, react to it, describe the reaction, note its location, and count such discoveries as they go. (*Three strengths! Five weaknesses!*)

We think that the search for and labeling of strengths, weaknesses, and deficiencies is what evaluators do when they don’t have a charted course and specified process. The problem with such an approach is not that it cannot work. It clearly can. People can muddle through. But it strikes us as less efficient than thinking and planning in advance and establishing clear and specific evaluation factors, standards, and procedures. It is especially inefficient if proposal preparation instructions do not inform offerors of what the evaluators will be looking for, probably because the evaluators did not know when the solicitation was written.

Conclusion

The assignment of the intermediate ratings of *strength*, *weakness*, and *deficiency* may be helpful, but it is not necessary and is therefore inefficient, or potentially so, especially if evaluators, or an agency and an unsuccessful offeror, get bogged down in disagreement about whether such and such proposal content was or was not a strength, weakness, or deficiency. It is also risky if evaluators get lost while sailing in the proposal ocean and drift into rocks and shoals. Nevertheless, it does no harm to refer to strengths, weaknesses, and deficiencies during internal discussions, as long as the Source Selection Authority remembers that they are merely ratings and makes no mention of them in the source selection decision document. That document should refer to proposal facts, to evaluation findings about how well each proposal performs in terms of each of the evaluation factors for award, to the differences among the proposals in terms of those factors, and to the resultant differences in the value that they provide. *VJE*