

BEFORE THE  
MARYLAND STATE BOARD OF CONTRACT APPEALS

In the Appeal of )  
GROUP HEALTH ASSOCIATION )  
Under RFP No. 15014-S ) MSBCA NO. 1679

September 3, 1992

Request for Proposals - In negotiated procurements an agency may include mandatory requirements which an offeror must agree to comply with if its proposal is to be considered reasonably susceptible of being selected for award. In like manner a proposal which states an inability to comply with contract requirements mandated by the General Procurement Law must be rejected.

APPEARANCE FOR APPELLANT: Kenneth B. Weckstein, Esq.  
Epstein, Becker & Green, P.C.  
Washington, D.C.

APPEARANCE FOR RESPONDENT: Joseph P. Gill  
Assistant Attorney General  
Baltimore, MD

Opinion by Chairman Harrison

Appellant timely appeals the denial of its protest that its proposal for the provision of health benefits services to state employees, retirees and dependents should have been evaluated.

Findings of Fact

1. On May 15, 1992, the Department of Personnel (DOP) issued three Requests for Proposals (RFP's) for its Health Benefits Program: Administrative Services (Preferred Provider Health Benefits); Health Maintenance Organization (HMO) Program Services; and Mental Health Alcohol and Substance Abuse Managed Care. HMO RFP No. 15014-S RBA III was for provision of HMO services to active and retired employees of the State of Maryland and their dependents for a five-year period. A pre-proposal conference for this RFP was held on June 1, and proposals were due on June 25.

2. DOP received the following proposals in response to the RFP:

AETNA Health

Chesapeake Health Plan

CIGNA Health Plan

Columbia-Free State Health System

Delmarva Health Plan

George Washington University Health Plan

George Washington University Health Plan

(with Chesapeake as subcontractor)

Group Health Association (GHA) (Appellant) RBHZ

Health Plus

Kaiser Permanente

MD IPA HMO

MD IPA Preferred/HMO with Opt-Out

Prudential Health Care Plan.

3. Three of the proposals, those of AETNA, CIGNA and Appellant, were found by DGS to not comply with the mandatory requirements of the RFP and are not being considered for award. Technical and cost reviews were conducted for the remainder, and award of up to seven HMO contracts is pending agency and Board of Public Works approval.

4. The RFP has seven sections. The first three sections are relevant to this appeal. Section I,

"Purpose and Timetable/Procurement Process," pp. 2-21, generally describes the process of proposal review and award. Section II, pp. 21-33, sets forth the "Compliance Proposal Requirements," and Section III contains the "Compliance Proposal Contents." These sections provide the following relevant information to potential offerors:

## SECTION I

### PURPOSE AND TIMETABLE/PROCUREMENT PROCESS

#### A. PROPOSAL INFORMATION

\* \* \*

##### 5. RESERVATIONS

The Department of Personnel reserves the right to reject any or all proposals, and/or waive technical defects if, in its judgment, the interest of the State so requires.

##### 11. DEVIATIONS

The offeror must complete and sign the Deviations Statement included in Appendix C. Any deviations from the specifications must be specifically listed by the offeror at the time of submission of the formal proposal. . . . A substantive deviation may be basis for rejection of a proposal. The Department of Personnel reserves the right to determine what constitutes a substantive deviation.

\* \* \*

#### C. PROCUREMENT PROCESS

\* \* \*

##### 2. FORM OF PROPOSAL

Proposals will be received from each offeror in separate sealed packages grouped as follows:

- (a) Compliance Proposal (one original + 5 copies)
- (b) Technical Proposal (one original + 5 copies)

- (c) Cost Proposal (one original + 5 copies)
- (d) Contract (one original + 5 copies)

\* \* \*

5. PROPOSAL EVALUATION

(a) General

The Compliance Proposal package will first be evaluated by the Evaluation Committee for completeness in accordance with the requirements set forth in Sections II [Compliance Proposal Requirements] and III [Compliance Proposal Contents]. If the compliance package does not meet the requirements of Sections II and III, the Technical and Cost Proposals will not be evaluated.

\* \* \*

The award of a contract(s) shall be determined in the sole discretion of the State based upon evaluation of all information contained in the proposals and such additional information as the State may request. The State reserves the right to waive any informality in proposals submitted in response to this RFP when such waiver is in the best interests of the State.

\* \* \*

(b) Compliance Proposal Evaluation

Numerical scores will not be given for this section. If the compliance proposal does not satisfactorily fulfill the Mandatory Requirements, the Technical and Cost Proposals will not be evaluated.

\* \* \*

3. Section I A. 11

Has offeror completed and signed Appendix C?  
Are offeror's list of deviations such that the proposal should not be further evaluated?  
Attach a list of deviations.

\* \* \*

8. Section II B. 1-2

\* \* \*

(MANDATORY) Is there a statement affirming each of the contract requirements listed in Section II B 1-2hh, or a statement to the effect that the offeror agrees to comply with all of these items?

\* \* \*

SECTION II

COMPLIANCE PROPOSAL REQUIREMENTS

A. GENERAL COMPLIANCE INFORMATION

\* \* \*

B. GENERAL LEGAL REQUIREMENTS

1. PROPOSAL REQUIREMENTS: The Bid/Proposal Affidavit, Appendix B, must be fully completed and submitted with the proposal.
2. CONTRACT REQUIREMENTS: The selected offeror will be required to enter into a contract with the State of Maryland and will be required to provide assurance and certification as to the following contract requirements and provisions.....

BBH

Mandatory Contractual Terms:

By submitting an offer in response to this request for proposals, an offeror, if selected for award, shall be deemed to have accepted the following contract provisions, whether specifically set forth in the contract or incorporated therein by reference to this Request for Proposals:

\* \* \*

- i. Termination for Default: "If the contractor fails to fulfill its obligations under this contract properly and on time, or otherwise violates any provision of the the contract, the State may terminate the contract by written notice to the contractor. The notice shall specify the acts or omissions relied upon as cause for termination. All finished or unfinished work provided by the contractor shall, at the State's option, become the State's property. The State shall pay the

contractor fair and equitable compensation for satisfactory performance prior to receipt of notice of termination, less the amount of damages caused by the contractor's breach. If the damages are more than the compensation payable to the contractor, the contractor will remain liable after termination and the State can affirmatively collect damages. Termination hereunder, including the determination of the rights and obligations of the parties, shall be governed by the provisions of COMAR 21.07,01,11B."

\* \* \*

- j. Termination for convenience: "The performance of work under this contract may be terminated by the State in accordance with this clause in whole, or from time to time in part, whenever the State shall determine that such termination is in the best interest of the State. The State will pay all reasonable costs associated with termination of the contract; provided, however, that the contractor shall not be reimbursed for any anticipatory profits that have not been earned up to the date of termination. Termination hereunder, including the determination of the rights and obligations of the parties, shall be governed by the provisions of COMAR 21.07.01.12(A)(2)."

\* \* \*

- v. Indemnification, etc.:

"A. The contractor shall indemnify the State against liability for any suits, actions, or claims of any character arising from or relating to the performance of the contractor or its subcontractors under this contract."

\* \* \*

[In addition to the indemnification clause, the RFP included an Appendix D, which provided:

\_\_\_\_\_ [The offeror] agrees to indemnify, defend and hold harmless the STATE OF MARYLAND from and against any and all losses, claims, demands, damages, suits or actions, of whatever type or nature, arising from or in

any way due to or connected with any activity of \_\_\_\_\_ [the offeror] or of its agents, attorneys, servants or employees, in the handling of monies pursuant to this contract, or in collecting or in attempting to collect any account or accounts referred to \_\_\_\_\_ [the offeror] by the STATE OF MARYLAND and/or the Central Collection Unit under this contract.

The RFP required offerors to "complete . . . and submit" this Appendix (and Appendices A through C) with their technical proposal (RFP at 13, SS 1 B. 5), but advised offerors that review of those Appendices would occur as part of the compliance proposal evaluation. See p. 18, question 6: "Does proposal conform to all of the requirements of Section 1 B. 1-5?"

\* \* \*

### SECTION III

#### COMPLIANCE PROPOSAL CONTENTS

ALL OFFERORS MUST CLEARLY STATE IN THEIR PROPOSAL THAT THEY INTEND TO COMPLY WITH THE FOLLOWING SECTIONS OF THIS SOLICITATION:

A. COMPLIANCE PROPOSAL

Section II A. 1-4.

B. LEGAL REQUIREMENTS

Section II B. 1-2, including Appendix B, Bid/Proposal Affidavit, and Appendix C, Deviations Statement (signed copies of these documents must be attached to the proposal).

\* \* \*

(Emphases added).

5. The first stage of the evaluation process involved review of the compliance proposals.

6. On June 26th, DOP Assistant Secretary Austin, who had been delegated reviewing authority over the instant procurement by the Secretary of DOP and to whom the procurement officer reported, met with the evaluation teams for each of the Health Benefits Programs RFP's, including the HMO RFP, and reviewed the evaluation criteria. Following the meeting, the HMO evaluation team opened and individually reviewed the compliance proposals of each of the offerors.

7. Appellant's compliance proposal did not "provide assurance and certification" as to the contract requirements and provisions (RFP at 22). Nor did Appellant's proposal provide a "statement affirming each of the contract requirements listed in Section II B 1-2hh, or a statement to the effect that [Appellant] agrees to comply with all of these items" (RFP at 18). Instead, Appellant did not comply or said that it "cannot comply" with three mandatory requirements.

8. First, Appellant, while it completed and submitted Appendix D, the State's Hold Harmless Agreement, also submitted its own Appendix D, which requires the State to indemnify and hold harmless Appellant, to wit:

ATTACHMENT 8D  
(APPENDIX D OF STATE OF MD REQUEST FOR PROPOSAL)

The State of Maryland agrees to indemnify, defend



and hold harmless Group Health Association from and against any and all losses, claims, demands, damages, suits or actions, of whatever type or nature, arising from or in any way due to or connected with the activity of providing health care, or its agents, attorneys, servants or employees, in the handling of monies pursuant to this contract, or in collecting or in attempting to collect any accounts referred to Group Health Association by Group Health Association . . . .

9. Second, paragraph (j) of the Mandatory Contractual Terms, "Termination for Convenience," at pp. 26-27 of the RFP quoted above is the State's standard termination for convenience clause. It gives the State the right to terminate the contract "whenever the State shall determine that such termination is in the best interest of the State" (RFP at 26). On p. 7 of its Compliance Proposal, referring to this clause, Appellant stated: "We cannot comply with your terms." Appellant substituted language giving it the right to terminate the contract for convenience, viz., "The performance of work under this contract may be terminated by either the State or Group Health on the last day of any month by either party giving written notice to the other at least 60 days prior to such date."

10. Thirdly, paragraph (i) of the Mandatory Contractual Terms, "Termination for Default," on p. 26 of the RFP quoted above is the State's standard default termination clause. The clause does not state a time for or specifically require advance notice of default termination. On p. 6 of its Compliance Proposal,

referring to this clause, Appellant stated: "We cannot comply with your terms." Appellant substituted a clause requiring 60 days advance notice of default.

11. On June 29, 1992, the HMO evaluation committee found that Appellant had not complied with the required hold harmless agreement and had not provided assurance and certification as to the mandatory contract requirements, specifically the termination for convenience and termination for default clauses. In a memorandum to Ms. Tutko, the Procurement Officer herein, the committee declared Appellant's proposal non-compliant.<sup>1</sup>

12. Ms. Tutko concurred in these findings and presented them to Assistant Secretary Austin. Assistant Secretary Austin concluded that Appellant's proposal was not acceptable. She also concluded that Appellant's proposal was not capable of being made acceptable

---

<sup>1</sup> The Evaluation Committee also found that the compliance proposals of CIGNA and AETNA did not provide assurance and certification as to the contract requirements and provisions. CIGNA had provided its own hold harmless agreement and included qualifiers in the mandatory contractual terms stating that the termination for default and termination for convenience clauses "shall be subject to binding arbitration." AETNA did not agree to the mandatory indemnification clause and also said that it would not provide plan benefits under a self-funded, non-insured basis, as required by Section IV of the RFP. The Evaluation Committee declared AETNA's and CIGNA's proposals non-compliant.

because Appellant had not executed the State's hold harmless agreement but inserted its own requirement that the State hold Appellant harmless and, as to the mandatory termination for convenience and termination for default clauses, had said: "We cannot comply with your terms." Accordingly, Assistant Secretary Austin instructed Ms. Tutko to reject Appellant's proposal.<sup>2</sup>

13. By letter dated July 1, Ms. Tutko advised Appellant that it had failed to meet the compliance requirements and that its technical and cost proposals would not be evaluated.<sup>3</sup>

14. By letter dated July 2, Appellant retracted its statements that it could not comply with the mandatory contract terms and agreed to comply with the contractual terms stated in the RFP for both the termination for convenience and termination for default clauses and the State's hold harmless agreement. On the same day, at Assistant Secretary Austin's direction, Ms. Tutko responded to Appellant in writing stating that, "You stated in your compliance proposal that GHA could not

---

<sup>2</sup> For similar reasons, Assistant Secretary Austin rejected CIGNA's and AETNA's Compliance Proposals and instructed Ms. Tutko to advise CIGNA and AETNA thereof.

<sup>3</sup> Ms Tutko similarly advised CIGNA and AETNA that their proposals would not be further reviewed because of their failure to meet the compliance requirements.

comply with two of the specifically identified mandatory terms. We acted in reliance on those representations, and we cannot permit you to retract them at this point." <sup>4</sup>

15. Thereafter, on July 8, Appellant filed a protest and requested a meeting with DOP, which was held on July 15. At the meeting, Appellant filed a supplemental protest. In these protests, Appellant asserted that the RFP permitted deviations and that, in any event, its non-compliance with the mandatory contract language was no more than a minor irregularity.

16. Assistant Secretary Austin reviewed her original decision to reject Appellant's proposal. She discussed the decision with Ms. Tutko and consulted with counsel. After deliberation, Assistant Secretary Austin concluded that she had acted reasonably and, on July 21, DOP issued a Final Decision denying Appellant's protest.

The final decision stated in relevant part:

Section I. C.5(b) 8, Section II B. 1-2 (page 18) [of the RFP] asked as part of the compliance evaluation, "(MANDATORY) Is there a statement affirming each of the contract requirements listed in Section II B. 1-2hh, or a statement to the effect that the offeror agrees to comply with all of these items?"

On page 23, under the heading Mandatory Contractual Terms, the RFP stated that "By submitting an offer

---

<sup>4</sup> DOP similarly rejected an attempted retraction by CIGNA who asserted that it had not intended to include statements qualifying mandatory contractual terms.

in response to this request for proposals, an offeror, if selected for award, shall be deemed to have accepted the following contract provisions, whether specifically set forth in the contract or incorporated therein by reference to this request for proposals...."

Rather than affirm GHA's commitment to agree to those mandatory terms, GHA's proposal stated "We cannot comply with your terms" with respect to the termination for convenience and termination for default clauses. (Emphasis supplied). Furthermore, GHA's proposal gave itself the right to terminate the contract for convenience. While it is true that the RFP did permit some deviations, it is not true that the RFP permitted deviations from mandatory contractual language, and given the clear statement that proposals not affirming each of the contract requirements would not be further evaluated, it is impossible to see how GHA believed that the RFP invited deviations on that point.

Therefore, GHA's outright refusal in its compliance proposal to agree to terms which were clearly labeled as mandatory, and on which the RFP clearly advised offerors they had to agree in order to have their technical and cost proposals evaluated, constituted a major defect rather than a minor irregularity, justifying rejection of the proposal.

17. This appeal followed.

Decision

In negotiated procurements, an agency may indicate that certain requirements are mandatory. A proposal which fails to include them is unacceptable.

"Identification of those proposals that are acceptable, or capable of being made acceptable, is a matter within the reasonable discretion of the Procurement Officer."

Systems Associates, MSBCA 1257, 2 MICPEL, paragraph 116 at p. 12 (1985). See Section 13-206(a), State Finance and Procurement Article, COMAR 21.05.03.03.

The Board finds that Assistant Secretary Austin reasonably exercised her discretion in determining that

Appellant's proposal was not reasonably susceptible of being selected for award; i.e., was not acceptable or capable of being made acceptable.

The RFP advised offerors that compliance proposals would be evaluated first, and that: "If the compliance proposal does not satisfactorily fulfill the Mandatory Requirements, the Technical and Cost Proposals will not be evaluated." The compliance proposal requirements, in Section II of the RFP, has two subsections: A. General Compliance Information, and B. Contract Requirements. The Contract Requirements subsection contains a set of "Mandatory Contractual Terms." It advises offerors that, by submitting an offer in response to the RFP, the offeror "shall be deemed to have accepted [those] contract provisions."

Further, the RFP explicitly required offerors to "provide assurance and certification" of compliance with those terms. The RFP provided offerors with the exact form of "assurance and certification" required. Evaluation of the compliance proposals was not by numerical scores but, instead, by an examination of proposals for yes or no responses to a list of eight sets of questions. One of those questions was:

(MANDATORY) Is there a statement affirming each of the contract requirements listed

in Section II B. 1-2hh, or a statement to the effect that the offeror agrees to comply with all these terms?

The question is "mandatory"; the required answer is yes.

Appellant declined to unequivocally agree to three mandatory contract requirements: hold harmless, termination for convenience, and termination for default.

Appellant submitted the State's hold harmless agreement, contained in Appendix D of the RFP. Appendix D and paragraph v. of the mandatory contractual terms requires an offeror to indemnify and hold harmless the State. Appellant stated that it would comply in its response to paragraph v. However, Appellant also substituted its own agreement as an Attachment 8D requiring the State to hold Appellant harmless. Thus, Appellant did not unequivocally agree to comply with such indemnification requirement when it submitted its compliance proposal. Based on the record herein, we find Appellant did not intend to indemnify and hold harmless the State when it submitted its compliance proposal.

Appellant did not agree to comply with the State's termination for convenience clause but specifically stated, "We cannot comply with your terms." Appellant substituted its own clause giving it the right to terminate the contract for convenience.

Appellant did not agree to comply with the

State's termination for default clause, which does not require advance notice of termination. Appellant again specifically stated, "We cannot comply with your term," and then substituted its own clause requiring 60 days advance notice.<sup>5</sup>

In view of these responses, we find that Assistant Secretary Austin reasonably determined that Appellant's proposal was not acceptable nor capable of being made acceptable. Appellant did not provide "assurance and certification" of compliance with mandatory contract terms; did not provide a "statement affirming each of the contract requirements"; and did not supply a statement "to the effect that [Appellant] agrees to comply with all of these items." Instead, Appellant said it would not comply.

---

<sup>5</sup> Appellant asserts that it did this to remain in compliance with its Master Group Contract as approved by the State Insurance Division on January 22, 1992, which contract provided that either party could terminate at the end of a month upon 60 days notice. Provisions in the Master Group Contract, although required by the Insurance Division, do not negate mandatory contract clauses under the General Procurement Law. No offeror indicated prior to the date for receipt of proposals that the termination clauses set forth in the proposal documents were inconsistent with State insurance requirements.



Appellant's late modification of its proposal on July 2,<sup>6</sup> and its protests, did not change the reasonableness of Assistant Secretary Austin's decision. Although not required to, Assistant Secretary Austin reviewed her decision. She met with Appellant and consulted with Ms. Tutko and counsel and determined that she had acted reasonably in rejecting Appellant's proposal.

Assistant Secretary Austin reasonably exercised her discretion in determining that Appellant's proposal was not reasonably susceptible of being selected for award because it did not comply with material requirements of this solicitation. This Board may not disturb that determination. See Systems Associates, supra at p. 12.

Notwithstanding the above, Appellant observes that the RFP permitted deviations. Offerors were allowed to submit a list of deviations in Appendix C, and one of

---

<sup>6</sup> Appellant's attempt to retract its statements on July 2 -- a week after proposals were due -- was an impermissible modification of its proposal. COMAR 21.05.03.02 (F), "Late Proposals, Withdrawals, and Modifications," states: "Any proposal, withdrawal or modification received after the established due date and time at the place designated for receipt of proposals is late and may only be considered in accordance with COMAR 21.05.01.10." COMAR 21.05.02.10(B) states: "A late . . . request for modification . . . may not be considered."

the sub-questions for compliance evaluation review is:  
"Is Appendix C, Deviations Statement, completed and submitted with the proposal?" (RFP at 18). However, this section must be read in harmony with, not in contradiction to, the RFP's specific mandatory contract requirements and the proposal review questions regarding those requirements.

The RFP advised offerors that by submitting an offer, they "shall be deemed to have accepted" the mandatory contract terms. It specifically instructed offerors to "provide assurance and certification" of compliance with those terms. Finally, the RFP told offerors that compliance proposal evaluators would ask this question of each proposal:

(MANDATORY) Is there a statement affirming each of the contract requirements listed in Section II B. 1-2hh or a statement to the effect that the offeror agrees to comply with all of these items?

Thus, while deviations were permitted, the RFP made clear that the contract terms were mandatory.

In any event, even if the RFP did permit deviations to the mandatory contractual terms, and we find it did not, substantive deviations were not allowed. A "Note" on the first page of the RFP states:

We will assume complete adherence to our specifications in the areas of benefit levels, provisions, and financial assumptions. Any substantive deviations from a mandatory or technical specification may be cause for rejection of a proposal.

On p. 6 of the RFP, paragraph 11, "Deviations," offerors

were warned: "A substantive deviation may be basis for rejection of a proposal. The Department of Personnel reserves the right to determine what constitutes a substantive deviation." Finally, question 3 of the compliance proposal evaluation (RFP at 17) asked: "Are offeror's list of deviations such that the proposal should not be further evaluated?"

DOP had the right to reject proposals with substantive deviations without discussion with offerors. Appellant's deviations were substantive. Under an HMO contract, Appellant, not DOP, would be providing medical and other services for State of Maryland employees, retirees and dependents. DOP therefore required that offerors indemnify and hold harmless the State for suits against the State resulting from their activities. In its compliance proposal, Appellant, while submitting the required indemnity agreement included in the proposal documents, also submitted an additional Appendix 8D requiring the State to indemnify and hold harmless the Appellant for Appellant's activities.

Termination for Convenience: In Transit Casualty Co., MSBCA 1260, 2 MICPEL, paragraph 118 at 16, note 11 (1985), the Board noted that:

*R/S/AY* [Under Maryland procurement law, the right of the State to terminate a contract for convenience is a mandatory requirement to be provided in all State procurement contracts. The State's right to terminate a contract for

convenience is the guid pro quo for the State's waiver of sovereign immunity regarding suits based on written State contracts. There is no similar right in those wishing to contract with the State.

(citations omitted; emphasis added). Yet it was this

very right which Appellant substituted for the State's termination for convenience clause, saying that it could not comply with the State's mandatory requirement.<sup>7</sup>

Termination for Default: Whether the State needs the ability to terminate a contract for default without notice (as provided in COMAR and the RFP) or with 60 days notice (as Appellant required) is a matter of substance. Yet Appellant said it "cannot comply" with this mandatory requirement.

Accordingly, even if Appellant could deviate from the mandatory contract requirements, its deviations were substantive, and Assistant Secretary Austin reasonably rejected Appellant's proposal because of those deviations.

---

<sup>7</sup> Appellant's assertion that the "basic language" of its deviations were approved by the State is not correct. The termination for convenience provision in Appellant's current contract, while providing 90 days notice before termination, specifically states that the agreement may be terminated "only" at the sole discretion of the State, and that termination is "an unrestricted right of the State of Maryland." Appellant's current contract requires Appellant to indemnify the State, not vice versa.

Appellant argues that its proposed deviations constituted informalities or minor irregularities that should have been waived by DOP.

COMAR 21.06.02.05 defines a "minor irregularity" as "one which is merely a matter of form and not of substance or pertains to some immaterial or inconsequential defect or variation in a bid or proposal from the exact requirement of the solicitation . . . ." Cases involving claims of minor irregularity typically include situations where bidders or offerors failed to sign bids, Apollo Paving Co., MSBCA 1092, 1 MICPEL, paragraph 29 (1982); failed to initial a bid correction, Wolfe Brothers, Inc., MSBCA 1147, 1 MICPEL, paragraph 53 (1983); or failed to place a total bid amount in a blank provided on the last page of the bid sheets, Calvert General Contractors Corp., MSBCA 1314, 2 MICPEL, paragraph 140 (1986). Here, Appellant did not fail to adhere to requisite formalities, but explicitly said it could not comply with mandatory contract requirements.

Maryland law is clear that "the procurement officer is given discretion to determine whether an irregularity either is waivable or fatal to the consideration of a bid or proposal." Wolfe Brothers, Inc., 1 MICPEL, paragraph 53 at 5; Neoplan USA Corp., MSBCA 1186, 1 MICPEL, paragraph 76 at 20 (1984). Such a

determination is reversible only upon a finding that it was fraudulent or so arbitrary as to constitute a breach of trust. Wolfe Brothers, Inc. at 6; Neoplan USA Corp. at 20. Assistant Secretary Austin's determination that Appellant's refusal to comply with mandatory contractual terms was not a minor irregularity was a reasonable exercise of her discretion, not arbitrary or a breach of trust.

Minor irregularities in a technical proposal can be overlooked when the Procurement Officer determines that the offer clearly indicates an intent to fully meet the RFP requirements. Here, Appellant indicated no such intent but clearly stated that it "cannot comply." Such is not a minor irregularity, but a matter of substance. Accordingly, DOP had no obligation to waive or let Appellant cure these deficiencies. COMAR 21.06.02.04(C).<sup>8</sup>

---

<sup>8</sup> Nor did DOP, as suggested by Appellant, have any obligation to permit Appellant to revise its proposal as part of a request to all offerors to submit best and final offers. The "best and final offer" provision applies to offerors who have been deemed "qualified," both on compliance and technical grounds. (RFP at 16). Appellant was rejected at the compliance stage.

Appellant next contends that DOP improperly rejected its proposal as "nonresponsive." This is not correct. Assistant Secretary Austin did not reject Appellant's proposal because it was nonresponsive, but because it was not reasonably susceptible of being selected for award.

Appellant finally asserts that DOP improperly applied the concept of estoppel in its July 2 letter refusing to permit Appellant to modify its proposal. The letter, however, does not say that DOP was misled to its injury and changed its position for the worse, nor does it use the term estoppel. The letter says only that DOP had taken Appellant and other offerors at their word regarding compliance with the mandatory contract provisions. This is not estoppel, but the essence of a compliance proposal evaluation.

For the foregoing reasons, Assistant Secretary Austin did not act unreasonably or abuse her discretion in determining, based upon Appellant's compliance proposal, that its offer was not reasonably susceptible of being selected for award. This appeal is therefore denied.

Dated: September 3, 1992 Robert B. Harrison III  
ROBERT B. HARRISON  
Chairman

I concur:

Neal E. Malone  
NEAL E. MALONE  
Board Member

\* \* \*

I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 1679, appeal of Group Health Association, under DOP RFP No. 15014-S.

Dated: September 3, 1992

Mary F. Priscilla  
Mary F. Priscilla  
Recorder