

2. IFB, paragraph 2, entitled "Contractor's Qualifications," provided that "the Contractor shall be able to show evidence of his reliability, ability, and experience by furnishing: . . . [e]vidence that he/she is able to provide replacement parts and devices required without creating a long delay or prolonged downtime for any of the equipment and systems in the buildings."

3. IFB Section IV, "Detailed Specifications," in pertinent part, provided as follows:

1. SCOPE OF WORK:

- A. The Contractor shall provide all labor, material, equipment, supervision, permits and insurance necessary to provide preventive maintenance, emergency service and all parts and device replacements to keep the Honeywell Automation Systems in total at maximum performance and reliability levels and continuous operation.
- B. The Honeywell Automation Systems consist of the Delta 1000, Delta 2000 interface system, Alpha 3000, including all central Processing Units, Transmission Power Supplies, Operator's Terminals, Printers, Annunciators, Data Gathering Panels, CRT, Peripheral Control Units, Hot Interface Modules, all remote points, and all fire and safety monitoring points.

* * *

4. ACCEPTANCE OF EQUIPMENT AND SYSTEMS:

- A. The Contractor is encouraged [sic] to inspect the premises prior to submitting his bid in order to be fully aware of the conditions under which the services are to be provided. Failure to do so will not relieve the Contractor from performing in accordance with the strict intent and meaning of the specifications without additional cost to the State.
- B. Should the Contractor consider that repair work or deviations from the specified methods will be necessary to achieve acceptable results, he shall furnish with his bid a written statement clearly setting forth his recommendations and the reasons for them. The absence of a written statement in this regard will be construed as satisfactory acceptance of the equipment and systems by the Contractor as suitable for normal servicing.

* * *

6. MATERIALS, TOOLS AND EQUIPMENT:

- A. The Contractor shall furnish all tools and equipment necessary for the performance of this contract. . . .
- C. The Contractor shall maintain a supply of spare lending and replacement parts in his inventory to include but not be limited to

DELTA 1000

[IFB list of replacement parts and items deleted].

* * *

DELTA 2000

[IFB list of replacement parts and items deleted].

TEST EQUIPMENT

[IFB list of replacement parts and items deleted].

All replacement parts and materials shall be specifically designed for the application on which they are to be used. The Contractor shall provide replacement parts from the original manufacturer or substitute parts approved by the original part Manufacturer. In the event that the replacement part is superseded by a more recent one, the most recent one shall be provided. Temporary use of substitute parts will be approved when requested in writing.

- D. The Contractor shall replace worn, failed, and doubtful components and parts. Replacements will be of like or current design to minimize System depreciation and obsolescence. Also, all mandatory retrofits developed by the manufacturer must be installed to the system. Charges for the mandatory retrofits shall be included in this contract.

* * *

11. PREVENTIVE MAINTENANCE:

A. GENERAL

Maintenance service shall be performed by the Contractor to maintain the systems described in paragraph 1 SCOPE OF WORK in accordance with the manufacturer's recommended equipment maintenance procedures.

* * *

C. FREQUENCY

For the equipment described in paragraph 1 SCOPE OF WORK, the Contractor is required to spend a minimum of 16 man-hours per month on preventive maintenance, inspections and repairs.

- D. Each preventive maintenance call shall include all services required to maintain the systems at maximum performance and reliability levels.

12. INSTRUCTION:

* * *

- B. The Contractor's service representatives shall receive periodic training to keep them up-to-date with the equipment manufacturer's latest product designs and maintenance service techniques.

13. INSPECTION OF PREMISES:

Bidders should inspect the premises prior to submitting bids in order to be fully aware of the scope of services required. Failure to do so will not relieve the successful bidder from performing in accordance with the strict intent and meaning of the specifications without additional cost to the State.

* * *

16. HOURLY RATES:

Each bidder shall submit with his bid a statement of hourly rates for each class of employee to be used in the performance of each type of work of the contract, such rates to be used in computing additions to or deductions from the monthly payment to the Contractor for changes to the specified duties and services, all indirect expense, and Contractor's overhead and

profit for both regular time and overtime. This rate applies to any charges for work performed during the contract period by the Contractor not covered in the contract specifications.

22. BASE BID:

The base bid shall include all labor, materials, equipment, supervision, permits and insurance to perform the described services to the Honeywell Automation systems located in the O'Connor Building, 201 West Preston Street, the State Roads Building, 300 West Preston Street and the Main State Office Building, 301 West Preston Street, Baltimore, Maryland 21201.

(Underscoring added).

4. The IFB further provided that "when the Base Bid exceeds \$50,000, each Bidder must furnish a Bid Bond with the Bid, in a form and by a surety company approved by the State. The bond must be in an amount not less than five percent (5%) of the amount of the Base Bid. . . ."

5. DGS held a prebid conference and site visit to explain the scope of work on October 10, 1986 at 10:00 a.m. Appellant's representatives attended this conference.

6. During the prebid conference, DGS and the potential bidders discussed Appellant's trade secrets (proprietary data) regarding the Honeywell Automation System interdependent hardware (parts and equipment) and software and the potential for future upgrades by Appellant as the manufacturer of the hardware and software (computer programs) to keep the system running at the normal operational level expected. (Tr. 73-75, 122). As an outgrowth of the discussions at the prebid conference regarding Appellant's proprietary data, DGS on October 15, 1986 issued Addendum No. 1 to the IFB which, in pertinent part, provided:

This Addendum is hereby made a part of the Bidding Document upon which the General Contract will be based and is issued to modify, explain, correct or add to the original Contract Documents.

Acknowledge receipt of this Addendum by inserting its number and date in the Proposal Form. [sic]. Failure to do so may subject bidder to disqualification.

DELETE Scope of Work Section 1-B, page S-1

ADD Section 1-B, The Honeywell Automation Systems consist of the Delta 1000, Delta 2000 interface system, Alpha 3000, including all central processing Units, Transmission Power Supplies, Operator's Terminals, Printers, Annunciators, Data Gathering Panels CRT, Peripheral Control Units, Hot Interface Modules, one thousand points inclusive of remote, and fire & safety monitoring points.

DELETE Materials, Tools and Equipment Section 6-D, page S-4

ADD Section 6-D, The Contractor shall replace worn, failed, and doubtful components and parts. Replacements will be of like or current design to minimize System depreciation and obsolescence. These replacements shall meet or exceed Underwriters Laboratory standards and be certified as such. All expressed mandatory retrofits developed by the manufacturer must be installed to the system. Charges for the mandatory retrofits shall be included in this contract as an alternate based on cost data as provided by the system manufacturer.

DELETE Section V - Unit prices, page V-1

ADD Section V - Unit Prices & Alternates, page V-1
(Underscoring added).

7. IFB, Addendum No. 1 extended the time for bid opening on October 20, 1986 from 10:00 a.m. to 2:00 p.m..

8. At the present time, Appellant provides the maintenance and services, including recommended and mandatory retrofits, described by the IFB's scope of work pursuant to a contract entered into with Appellant in 1983. Section IV, "Detailed Specifications," Paragraph 4 of the current 1983 contract with Appellant (Appellant's Exh. 3) in pertinent part, provides:

- C. [sic] the replacement part is superseded by a more recent one, the most recent one shall be provided. Temporary use of substitute parts will be approved when requested in writing.¹
- D. The Contractor shall replace worn, failed, and doubtful components and parts. Replacements will be of like or current design to minimize System depreciation and obsolescence. Also, all mandatory retrofits developed by the manufacturer must be installed to the System. Charges for the mandatory retrofits shall be included in this contract." (Underscoring added).

9. "Retrofits"² referred to in Appellant's current 1983 contract and the IFB in the captioned procurement are Appellant's upgrades either in design or quality to the parts, the equipment, and the computer programs of the Honeywell Automation System. (Tr. 26-34). According to Appellant, a "mandatory retrofit" is one required to keep the system from breaking down and includes those retrofits necessary to allow system improvement and enhancement. (Tr. 45, 47-48). A "mandatory retrofit" must be installed or the Honeywell Automation System has the potential of failing, or "crashing." That is, the system, according to Appellant, may fail to maintain system "functionality," if a mandatory retrofit is not installed. (Tr. 65, 71-75, 87).

10. Appellant also issues "optional," "recommended," or "enhancement," retrofits. These retrofits change or improve the Honeywell Automation System design but are not critical to continued system operation. (Tr. 38-39, 42-44, 71, 165). Thus an owner may elect not to install an optional or recommended retrofit without detriment to the operation of its system. (Tr. 44). However, Appellant may subsequently issue a mandatory retrofit that depends on previous optional, enhancement, or recommended retrofits, which an owner may have elected not to install because they were optional or only recommended by Appellant. In that event an owner must then provide all previous, optional or recommended retrofits necessary to bring the Honeywell Automation System to the level of design necessary to accept the mandatory retrofit.³ For example, Honeywell may design a new replacement part and issue it as a mandatory retrofit. This part, however, may not work in an owner's current system until the owner provides ("furnishes and installs") the changes or upgrades to the computer program that Appellant has previously issued as only optional or recommended retrofits. (Tr. 38-39). Of course, Appellant charges an owner for providing previously issued retrofits necessary to upgrade an owner's system to the point that Appellant can provide the mandatory retrofit, unless the owner has an agreement with Appellant that includes the cost of providing all retrofits. (Tr. 168).

¹Language obviously was deleted inadvertently from the current contract with Appellant. The missing language apparently would state as follows:

["All replacement parts and materials shall be specifically designed for the application on which they are to be used. The Contractor shall provide replacement parts from the original manufacturer or substitute parts approved by the original part manufacturer. In the event that] the replacement part is superseded by a more recent one, the most recent one shall be provided. Temporary use of substitute parts will be approved when requested in writing." [Represents deleted material].

²A 'retrofit' is a change in design, construction or equipment, as of an airplane or machine tool already in operation, in order to incorporate later improvements." Webster's New World Dictionary, Second College Edition (1980). (See Tr. 26-33, 34, 45-47). A "patch," which is part of a retrofit, is the actual data entered into the computer. (Tr. 37).

³Of course, Appellant and its customers may enter contracts under which all of Appellant's future retrofits are provided regardless of whether Appellant classifies them as either mandatory or recommended retrofits. Appellant's current 1983 contract with DGS (Appellant's Exh. 3) is structured in this manner as is its bid submitted in response to the instant IFB. (Tr. 55-56, 59).

11. DGS testified at the hearing that its intent is to continue operating its Honeywell Automation System at its present design level under the service and maintenance contract advertised in the IFB without having to purchase additional optional or recommended retrofits. (Tr. 85-86, 92). The IFB states, however, that the successful contractor is to provide all parts, components and device replacements to keep the Honeywell Automation System in total at maximum performance and reliability levels and continuous operation. (Findings of Fact No. 3). The proposed contract provides that "[a]ll expressed mandatory retrofits developed by the manufacturer must be installed to the system," although the IFB required bidders to separately state their charges for mandatory retrofits. (Tr. 92; Findings of Fact No. 6).

12. Although Appellant and DGS discussed (Tr. 100-101), and the IFB may contemplate, that Appellant and DGS would enter into a licensing agreement for the proprietary data necessary for future mandatory retrofits produced by Appellant to keep the system running, if Appellant is not awarded the contract, no such agreement was produced for the record. Both Appellant and DGS thought there had been such an agreement, however. (Tr. 60, 76-79, 80, 100-101).

13. DGS received and opened bids on October 20, 1986 with the following results:

EMS Consultants, Inc.	\$49,429.88
Energy Management, Inc.	\$68,544.00
Appellant	\$78,387.00

14. Appellant did not sign its bid in the space provided on the bid form, although it did execute the anti-price fixing affidavit on the bid form.

15. Appellant's bid bond was not signed by an official of Appellant, although the bid bond was properly signed and sealed by the surety.

16. Appellant's bid did not acknowledge that it had received Addendum No. 1 in the space provided on the bid form.

17. Appellant's bid form presented its bid price in the following manner:

BASE BID	Seventy - Eight Thousand <u>Three Hundred Eighty-Seven Dollars</u> (Words)	<u>(\$78,387.00)</u> (Numbers)
ALTERNATE #1 (Circle One)	ADD "NONE (INCLUDED IN BASE BID)" DEDUCT (Words) (Numbers)	

18. Appellant's base bid includes all retrofits, including any mandatory retrofits that it may issue in the future. (Tr. 52-55, 59-60, 68). Appellant thus offers to furnish and install all retrofits, optional, recommended, or mandatory as it issues them. However, Appellant's bid does not state an alternate price to provide mandatory retrofits separate from its charges for service and maintenance, although the IFB, Addendum 1 required bidders to separately specify their charges for mandatory retrofits. (See Findings of Fact No. 6).

19. EMS Consultants, the apparent low bidder on a three year contract basis, presented its bid price on the bid form in the following manner:

BASE BID	"1 Year = Sixteen Thousand Four Hundred Seventy-Six and 66/100 3 Years = Fourty [sic] NINE THOUSAND FOUR HUNDRED TWENTY NINE AND 98/100 (Words)	\$16,476.66 - 1 Year \$49,429.98 - 3 Years <u>(Numbers)</u>
ALTERNATE #1 (Circle one)	ADD NO DOLLARS DEDUCT (Words)	<u>(\$ 0.00)</u> (Numbers)

EMS Consultants, however, addressed the IFB requirement for a statement of alternate prices for mandatory retrofits on a sheet attached to its bid as follows:

"ADD Section V - Unit Prices & Alternates, page V-1

ADDITIONAL LABOR PRICE DETAIL

ELECTRONIC TECHNICIAN

	S. TIME	O. TIME
SALARY	\$17.74	\$26.61
FRINGE/HOUR	4.70	6.42
TRANSPORTATION	3.10	3.10
ADMINISTRATIVE	2.70	5.22
OVERHEAD	+ 7.22	+ 7.77
TOTAL COST	35.46	49.12
	+ 6.54	+ 12.88
HOURLY RATE	\$42.00	\$62.00

ALTERNATE FOR INSTALLATION OF MANUFACTURERS MANDATORY RETROFIT:

THERE WILL BE NO ADDITIONAL CHARGE FOR MANDATORY RETROFITS FURNISHED BY THE MANUFACTURER."

20. EMS Consultant's bid does not include an alternate price to provide, both furnish and install, the mandatory retrofits Appellant may issue in the future. EMS Consultants bid thus covers the labor and possibly the expertise necessary to install mandatory retrofits, but does not cover any fees (licensing fees) or other charges Appellant may exact for the parts, necessary computer programming information, or installation by Appellant's personnel. (Tr. 89).

21. DGS' procurement officer stated that he could not determine how much the contract would cost DGS over its term from his review based on either EMS Consultants' bid or Energy Management's bid, if a mandatory retrofit is issued by Appellant during the next three years. (Tr. 89). He acknowledged, however, that the requirements and performance level sought under the new contract are the same as that provided under the current contract. (Tr. 85-86). He further acknowledged that neither EMS Consultants' bid nor Energy Management's bid reflect potential charges from Appellant for providing future mandatory retrofits to either DGS or the successful bidder other than Appellant. (Tr. 98). However, he surmised that Appellant would continue to provide without charge any mandatory retrofits that Appellant issues in the future based on the theory that Appellant has a continuing obligation to cure defects in the Honeywell Automation System design. (Tr. 98; see Tr. 151). The DGS procurement officer also stated that he ranked the bids lowest to highest based on each bidder's total base bid without determining whether the bids fully included providing future mandatory retrofits issued by Appellant. (Tr. 89, 99).

22. The prices Appellant has charged its customers for mandatory retrofits, optional retrofits, or enhancement retrofits in the past have ranged from \$200, for a minor retrofit, to as much as \$15,000 for an individual, major retrofit. (Tr. 62). Appellant installs all of its retrofits when issued. (Tr. 167). It will not permit other companies to install its retrofits nor train personnel of its competitors to install them. (Tr. 167).

23. If Appellant is not awarded the contract, either DGS or the DGS' maintenance and service contractor, depending on which party is responsible for the cost of providing a mandatory retrofit, arguably, must bargain with Appellant for a license with appropriate royalty fees to provide future mandatory retrofits issued by Appellant. Such costs will necessarily have to cover any preceding optional or recommended retrofits on which a mandatory retrofit is dependent that Appellant may issue after DGS' contract with Appellant ends. (Tr. 60-62, 79, 80, 168).

24. Following bid opening, Appellant, on October 24, 1986, filed a protest with the DGS's procurement officer stating, in pertinent part, as follows:

In general, we base this protest on the inability of the other vendors to meet the specific requirements of the bid specification. On one specific point, the low bidder's price fell below the level required for bonding protection for the State which is obviously a concern.

We will be contacting your office shortly to review our protest in detail."
(Underscoring added).

25. On November 11, 1986, Appellant provided additional details describing its concerns as a basis for its protest. It alleged that EMS Consultants was neither a responsive nor a responsible bidder on grounds summarized as follows:

EMS Consultants inability to meet experience requirements.

EMS Consultants lack of sufficient inventory of replacement parts and replacement equipment.

EMS Consultants failure to inspect premises prior to bidding and lack of knowledge of system complexity.

EMS Consultants inability to supply mandatory retrofits, since Appellant's current software revisions and mandatory software retrofits are proprietary information subject to license not available to EMS Consultants.

EMS Consultants inability to meet two hour emergency response requirement.

EMS Consultants technical inability; employees do not have latest training on newer designs of Appellant's systems.

EMS Consultants inability to perform timely fire alarm system tests.

EMS Consultants' service personnel lack of current training; Appellant will not train EMS Consultants personnel.

Award to EMS Consultants is not in the State's best interest, since EMS Consultants underbid to keep its bid below requirements for a performance bond. (Underscoring added).

26. The DGS procurement officer denied Appellant's protest by letter dated December 29, 1986.

27. Appellant filed a timely appeal with the Board on January 9, 1987.

Decision

The initial issue that we address is whether Appellant has standing to protest award to EMS Consultants, since Appellant is the apparent third low bidder. A bidder not eligible for award in the event its protest is upheld does not have standing to challenge award to the apparent low bidder. COMAR 21.10.02.⁴ Erik K. Straub, Inc., 1 MSBCA (MICPEL) ¶83 (September 11, 1984). See: RGS Enterprises, 1 MSBCA (MICPEL) ¶45 (April 8, 1983).

The proof in the record does not establish that the apparent second low bidder is either nonresponsive or its bid nonresponsive. (Tr. 8-9; DGS Exh. 11). Appellant thus is not in line for contract award and thus would not be aggrieved by an award even if the apparent

⁴In this regard, COMAR 21.10.02.01A provides that an "[i]nterested party" means an actual or prospective bidder, offeror, or contractor that may be aggrieved by the solicitation or award of a contract, or by the protest." COMAR 21.10.02.01C provides that a "[p]rotester" means any actual or prospective bidder, offeror, or contractor who is aggrieved in connection with the solicitation or the award of a contract and who files the protest."

low bidder is not responsible or its bid nonresponsive.⁵ Accordingly, Appellant is not an interested party having standing to protest on the basis of its challenge of EMS Consultants' bid.

However, Appellant alleges that none of the other vendors had the ability to meet the contract's specifications. According to Appellant, no other bidder can perform mandatory retrofits nor receive the training required by the contract, since Appellant's policy is not to provide its proprietary information or training to its competitors.⁶

Appellant thus argues that DGS has changed or waived the specification requirement that the successful bidder provide mandatory retrofits. Appellant points out in this regard that the specifications requiring the successful contractor to perform mandatory retrofits are not intrinsically defective. It contends, however, that DGS has improperly changed the basis on which it will make an award since it no longer will require the successful bidder to provide mandatory retrofits. (Tr. 97-99; see Tr. 85-87). We agree, assuming, arguendo, that this issue is properly before us since the procurement officer has not ruled specifically on this issue. See: The CTC Machine & Supply Corp., 1 MSBCA (MICPEL) ¶15 (April 20, 1982).

The IFB before it was amended stated that ". . . all mandatory retrofits developed by the manufacturer must be installed to the system. Charges for the mandatory retrofits shall be included in this contract." (Underscoring added). After Appellant's representatives pointed out at the prebid conference that it did not have to provide its competitors with retrofit data, DGS issued Addendum I to the IFB stating that "[a]ll expressed mandatory retrofits must be installed to the system. Charges for the mandatory retrofits shall be included in this contract as an alternate based on cost data as provided by the system manufacturer." (Underscoring added).

We find, and the DGS procurement officer confirmed (Tr. 85), that the IFB as amended by Addendum I was intended to require the successful bidder to provide for its stated contract price all mandatory retrofits that Appellant may issue in the future, albeit it required bidders to state their prices for maintenance and repair services in their base bids and separately state their prices for mandatory retrofits as an alternate based on cost data provided by Appellant.⁷

As it stands, the IFB raises the specter of a contract with EMS Consultants that EMS Consultants probably will not be able to perform if mandatory retrofits subsequently are developed by Appellant. There is no guarantee that EMS Consultants will have access to data generated by Appellant or in Appellant's possession that is essential for EMS Consultants to provide the mandatory retrofits. Further, it is obvious that neither DGS, nor the other bidders, nor for that matter Appellant, know what Appellant will charge for future mandatory retrofits that Appellant has not yet developed. These costs could vary significantly depending on the nature of the retrofit. (Findings of Fact No. 22). However, these points raise speculative contract performance questions regarding which party will assume any risks of nonperformance under the contract. These issues are not properly before the Board for decision because they do not give rise to a dispute relating to formation of a State contract. C&P Telephone Co. of Md., 1 MSBCA (MICPEL) ¶78 (July 30, 1984). Thus, we would deny

⁵We need not address the issues raised concerning Appellant's standing on the basis of its lack of responsiveness to the IFB. - However, we note that Appellant's bid bond appears to obligate the surety, although its bid was not signed by an authorized company official and it failed to acknowledge receipt of Addendum I.

⁶Appellant's protest, in this regard, arguably could be classified as a challenge to the IFB specifications raised after bid opening. If so, its protest on this ground would be denied as untimely, since this ground for protest was apparent prior to bid opening. COMAR 21.10.02.03A provides that "[p]rotests based on alleged improprieties in any type of solicitation which are apparent before bid opening . . . shall be filed before bid opening. . . ."

⁷The plain meaning of the IFB as amended is that DGS wanted bidders to segregate their charges for maintenance and services from their charges for providing mandatory retrofits so that it could reasonably compare Appellant's bid, as the incumbent, with other potential bids. DGS apparently assumed that Appellant, as the manufacturer, would quote uniform prices for mandatory retrofits to all potential bidders. In any event, the IFB, as amended, does not delete the requirement that the successful bidder provide any mandatory retrofits subsequently developed by Appellant.

Appellant's appeal, if it were DGS' intent to award a contract under the IFB specifications requiring the successful bidder to furnish and install for its stated contract price all mandatory retrofits issued by Appellant.

DGS's position before the Board, however, is that it intends to award the contract to EMS Consultants on the basis that EMS Consultants will perform maintenance and related services under the contract and install any mandatory retrofits at the unit price for labor stated in its bid, provided Appellant makes available, presumably free of charge, the necessary data and training for the installation. Stated another way, DGS does not intend to award a contract that requires EMS Consultants to fully provide mandatory retrofits for its stated contract price. Thus DGS intends to award a maintenance and service contract to EMS Consultants and will rely on Appellant to furnish mandatory retrofits. (Tr. 98). It is important to reiterate here that EMS Consultants' bid does not cover any costs for purchasing the data necessary to install components and parts, or the costs for installation services provided by Appellant's service personnel. Nor is there a licensing agreement between Appellant and DGS covering such costs.

The contractual arrangement described that DGS now seeks to enter is not the contract DGS solicited. DGS thus has relaxed the IFB specifications requiring the successful bidder for its stated contract price to provide all expressed mandatory retrofits issued by Appellant. In this regard, "it is fundamental that an agency may not solicit quotations on one basis and then make award on another basis. Moreover, where an agency's needs change and create a material discrepancy between the RFQ's specification and its actual needs, the RFQ should be revised to provide bidders with the most accurate information available. Introl Corp., 64 Comp. Gen. 672 (1985), 85-2 CPD ¶135." Discount Machinery and Equipment, Inc., Comp. Gen. Dec. B-220949, February 25, 1986, 86-1 CPD ¶193. Neoplan USA Corp., 1 MSBCA (MICPEL) ¶76 (June 25, 1984) at 25.

Appellant requests cancellation of the IFB and readvertisement of DGS requirements based on DGS' actual needs. Appellant would be eligible to bid if DGS' requirements are readvertised. Accordingly, Appellant is an interested party having standing to contest award to EMS Consultants on the ground that DGS has changed its requirements and seeks to make an award on a basis different from that set forth in the IFB as amended.⁸ Compare Big State Enterprises, Comp. Gen. Dec. B-218055, April 22, 1985, 85-1 CPD ¶459; Olympia USA, Inc., Comp. Gen. Dec. B-216509, November 8, 1984, 84-2 CPD ¶513.

For the foregoing reasons, therefore, Appellant's appeal is denied in part, sustained in part, and remanded to the DGS procurement officer for further consideration.

⁸Appellant's appeal is not untimely in this regard since DGS' intent to award on a basis different from that described in the solicitation did not become clear until DGS explained its actions at the hearing. (Tr. 85-86, 98).