

<sup>1</sup> IFB Section H.16.2 also required the awardee to obtain a performance bond in the amount of no less than 100% of the contract amount immediately following contract award.

Subsequently, by amendment dated September 16, 2011, the District modified the IFB to explicitly delete the original bid bond requirement under Section H.16.1. (AR Ex. 2.) In its place, the IFB was amended to include a direct mandate, under a newly revised Section H.16.1, that offerors provide a bid bond with their bid submission in the amount of \$100,000, which also had to be maintained by the offeror until notification of the contract award. (*Id.*)<sup>2</sup>

The District received six bids from companies in response to the IFB including bids from the protester, and the ultimate awardee, Securitas Security. Of these six bidders, three of these companies, including Securitas Security, submitted the bid bond required by the IFB along with their bid. Alternatively, in lieu of submitting the required bid bond, the protester's bid was accompanied, instead, by a letter to the District by which the protester explicitly admitted that it was unable to obtain the required bid bond prior to the bid submission deadline. (AR Ex. 5.) Further, the protester stated in this same correspondence that it had been assured by a third-party bonding firm that it would be able to secure the required bid bond within 10 days of the District's expressed interest in its bid and, on this basis, Elite requested that the District waive the bid bond requirement for its company (*Id.*)

However, after receiving Elite's bid, the District promptly notified the protester that its bid would not be considered further for contract award based upon its failure to submit the required bid bond along with its bid submission. (AR Ex. 6.) The present protest followed.

## DISCUSSION

We exercise jurisdiction over this protest and its underlying allegations pursuant to D.C. Code §2-360.03(a)(1).

Elite's grounds of protest in this matter primarily concern the rejection of its bid as nonresponsive to the IFB requirements based upon its failure to include a bid bond along with its bid as expressly required by the terms of the IFB. (Protest 1-2.) Specifically, the protester alleges that the evaluation process was unfair because it did not allow sufficient time for the bidders to secure the required bid bond to accompany their bids.<sup>3</sup> (*Id.*) The protester asserts that because of this allegedly unreasonable bid bond requirement, only two of the six bidders under the IFB were able to obtain, and submit the required bid bond. (*Id.*) In this regard, the protester further alleges that even the awardee, Securitas Security, did not submit an actual bid bond with its bid submission. (*Id.*)

In response to these allegations, the District asserts that the protester's bid was properly rejected as nonresponsive because it did not meet the mandatory bid bond submission

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<sup>2</sup> This September 16<sup>th</sup> amendment also modified, and replaced, the original IFB Section H.16.2 to require that the awardee obtain a performance bond in the amount of \$1 million upon entering into a contract with the District and submit it to the contracting officer within 10 days of contract award.

<sup>3</sup> The protester also generally alleges the occurrence of numerous other irregularities in the evaluation process including allegations that the District failed to answer bidder questions, provided inadequate notification to the protester of the revised bid due date, and provided late notification of the September 16<sup>th</sup> amendment to the IFB prior to bid opening. Given that these allegations do not appear to be the primary basis of the present protest, the Board finds it unnecessary to address in further detail that these pre-award allegations would otherwise be untimely filed in this matter.

requirement while the awardee, Securitas Security, did meet this requirement. (AR 2-3.) According to the District, the letter that the protester submitted in lieu of the required bid bond did not satisfy this bid bond requirement and further did not provide adequate grounds for excusing the protester from meeting this bid bond requirement under District of Columbia law. (*Id.* at 4-5.) Moreover, the District points out that the protester's challenges to the IFB and evaluation process as unfairly imposing a bid bond requirement are untimely as the protester was required to protest these matters prior to bid opening. (*Id.* at 3-4.)<sup>4</sup>

The Board has repeatedly held that in order to be considered responsive to an IFB, a bid must be an unequivocal offer to provide the exact items called for by the solicitation. *Barcode Technologies, Inc.*, CAB No. P-524, 45 D.C. Reg. 8723 (Feb. 11, 1998); *S. Md. Restoration, Inc.*, CAB No. P-241, 39 D.C. Reg. 4268 (Aug. 7, 1991). Moreover, as it relates to the present matter, a bid bond is a form of guarantee designed to protect the interests of the government in the event of a contractor's default and, thus, when required by a solicitation, is a material part of the bid which must be furnished at the time of bid submission. *See HR General Maintenance Corp.*, CAB No. P-545, 46 D.C. Reg. 8556 (October 9, 1998). Thus, in instances where a bidder has failed to provide a bid bond required by the solicitation, the Board has held that such bids may properly be rejected as nonresponsive to the solicitation requirements. *Nation Capital Builders, LLC*, CAB No. P-0761, 57 D.C. Reg. 287 (November 20, 2007).

In the present case, the protester does not dispute that the solicitation mandated that offerors provide a bid bond to accompany their bid submission to the District.<sup>5</sup> In response to this requirement, the contemporaneous evaluation record confirms that three of the six bidders in this procurement, including the awardee, Securitas Security, in fact, submitted the proper evidence of having obtained the required bid bond for the contract. (AR Ex. 4.) Therefore, as an initial matter, the protester is incorrect in its assertion that the awardee, and a majority of the offerors, did not, and could not, meet the bid bond requirement.

The protester, on the other hand, did not provide a bid bond with its bid and expressly acknowledged that it was missing this material requirement when it submitted its bid to the District on September 27, 2011. (AR Ex. 5.) Moreover, the protester further confirmed its awareness of having not met this material requirement by essentially requesting that the District waive the bid bond requirement based upon the protester's pending application for a bid bond. (*Id.*) The IFB requirement, however, was obviously not met by the protester's pending application for a bid bond as the IFB explicitly required that evidence of an actual bid bond be submitted with each offeror's bid. (AR Exs. 1, 2, 3.) Additionally, the District further reasonably determined that the protester did not meet the criteria for a waiver of the bid bond requirement in this procurement under 27 DCMR 2702, and ultimately found the protester's bid to be nonresponsive based upon this material omission of the bid bond. (AR 5-6.)

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<sup>4</sup> The Board also notes that the protester filed no Comments on the Agency Report to further support its protest allegations, or to oppose the Agency Report allegations, as permitted by Board Rule 307. This rule further provides that where the protester fails to file Comments on the Agency Report, facts in the Agency Report not otherwise contradicted by the protest, or documents in the record, may be treated as conceded by the Board.

<sup>5</sup> 27 DCMR 2700 sets forth guidelines as to the types of evidence of security that a contracting officer may accept from bidders in satisfaction of a bid bond requirement, which were incorporated into the IFB. (AR Exs. 2, 3.)

While the protester now complains that the IFB's bid bond requirement was improper, and could not reasonably be met by any offeror prior to the bid opening date, the protester never formally challenged the propriety of this bid bond solicitation requirement prior to the rejection of its bid for award. Indeed, protests challenging the propriety of a solicitation term that is apparent prior to bid opening must be filed prior to bid opening. D.C. Code § 2-360.08(b)(1). Consequently, the protester's present challenge to the reasonableness of the IFB's bid bond requirement, which it clearly knew of prior to bid opening, is now untimely raised in this protest.

For the reasons discussed herein, the Board finds that the protester's bid was reasonably deemed nonresponsive by the District, and properly rejected for award, for failure to meet the IFB's material bid bond requirement.

The present protest is, therefore, denied.

**SO ORDERED.**

DATED: January 9, 2012

/s/ Monica C. Parchment  
MONICA C. PARCHMENT  
Administrative Judge

CONCURRING:

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Chief Administrative Judge

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