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**United States Government Accountability Office  
Washington, DC 20548**

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## Decision

**Matter of:** InGenesis, Inc.

**File:** B-412101.2

**Date:** March 28, 2016

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Edward J. Tolchin, Esq., Offit Kurman, for the protester.  
Richard J. Webber, Esq., and Patrick R. Quigley, Esq., Arent Fox LLP, for the intervenor.  
Douglas J. Becker, Esq., Department of Homeland Security, United States Immigration and Customs Enforcement, for the agency.  
Lois Hanshaw, Esq., and Christina Sklarew, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### **DIGEST**

Protest that the agency improperly exercised an option under another vendor's existing contract is denied where the agency reasonably determined that exercising the option was the most advantageous means of satisfying the agency's needs.

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### **DECISION**

InGenesis, Inc., of San Antonio, Texas, protests the exercise of an option to extend services under contract No. HSCEDM-15-C-00004 awarded to Maxim Health Care Services, Inc. (Maxim), of Columbia, Maryland, by the Department of Homeland Security, Immigration and Customs Enforcement (ICE), for medical services at the South Texas Family Residential Facility (STFRF), a detention facility for undocumented immigrant women and children in Dilley, Texas. InGenesis contends that the agency failed to follow applicable regulations in exercising the option.

We deny the protest.

### **BACKGROUND**

On July 16, 2012, ICE awarded contract No. VHSCECR-12-F-00048 (Contract 048) to InGenesis for medical staffing and support services for undocumented immigrants at various locations in the United States for a 320-day base period and four 12-month option periods. AR, Tab 7, InGenesis Contract 048, at 1, 6.

On September 4, 2015, ICE posted on FedBizOpps (FBO) a justification and approval (J&A) for other than full and open competition for the award of a short-term, sole-source contract to Maxim for performance of comprehensive healthcare services at the STFRF.<sup>1</sup> The J&A states that the Department of Health and Human Services (HHS) sent ICE a list of 32 vendors that could potentially perform the required medical services. AR, Tab 3, J&A, at 2. After discussing its requirements with the vendors, ICE determined that only Maxim had the capability to perform the services. AR, Tab 3, J&A, at 3. The J&A states that the justification is authorized under Federal Acquisition Regulation (FAR) § 6.302-1, Only One Responsible Source and No Other Supplies or Services Will Satisfy Agency Requirements. Id. at 1. InGenesis was not included as a vendor in the list from HHS. Protest at 5.

On September 22, ICE awarded a fixed-price, sole-source contract to Maxim for a base period of 3-months, with three 3-month option periods. The option periods were evaluated in awarding the contract.<sup>2</sup>

On October 30, InGenesis sent the agency an unsolicited proposal for completing work proposed for the STFRF. The agency subsequently notified the protester that its document did not meet the definition of a valid unsolicited proposal under FAR subpart 15.6 and would not be evaluated.<sup>3</sup> AR, Tab 6, Rejection of InGenesis's Unsolicited Proposal, at 1. Specifically, the agency explained that pursuant to FAR § 15.603(c), the document did not meet the requirements for agency evaluation since it offered services that were currently being provided by another vendor and would be reacquired through competitive methods.<sup>4</sup>

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<sup>1</sup> InGenesis timely protested the award of the sole-source contract, but withdrew that protest shortly after it was filed.

<sup>2</sup> The award document included FAR clause 52.217-9, Extension of Services.

<sup>3</sup> FAR subpart 15.6 recognizes that unsolicited proposals allow unique and innovative ideas or approaches that have been developed outside the government to be made available to government agencies for use in accomplishment of their missions. FAR § 15.603(a). As relevant here, a valid unsolicited proposal must: (1) be innovative and unique; (2) not be an advance proposal for a known agency requirement that can be acquired by competitive methods; and (3) not address a previously published agency requirement. Id. at § 15.603(c).

<sup>4</sup> In this regard, the agency states that on October 28, it synopsisized the competitive acquisition on FBO, and reposted it on November 2.

On December 16, the Contracting Officer (CO) issued a determination and findings (D&F) outlining its decision to exercise the first 3-month option period under Maxim's contract and modified the contract.<sup>5</sup> AR, Tab 4, D&F, at 1. The D&F states that in accordance with FAR § 17.207, Exercise of Options, the agency determined, among other things, that "[t]he exercise of Option I is the most advantageous method of fulfilling the [g]overnment's need, price and other factors considered." Id. The D&F includes a section entitled "PRICING," under which the agency checked a box indicating that "[t]he time between award of the contract and [o]ption exercise is so short that the [o]ption price is the lowest obtainable or the most advantageous offer, taking into account factors such as market stability and the usual duration of contracts such as this." Id. The D&F also indicated that the option was evaluated as part of the initial competition and that the contractor had been performing satisfactorily with the terms and conditions of the contract. Id. at 2.

In response to this protest, the agency provided additional details regarding the considerations included in the D&F. Regarding price, the CO explains that for the initial award, Maxim and the agency negotiated increased labor rates--due to additional commuting costs associated with the remote location of the STFRF--to incentivize qualified personnel to staff the project. CO Statement at 2. Prior to exercising the option, the CO continued to consider Maxim's negotiated rates to be fair and reasonable because the location of the facility had not changed in the three months since contract award. Id. at 2-3. The CO also reviewed the rates proposed in InGenesis's October 15 unsolicited proposal and found that its proposed rates were lower than Maxim's. Id. at 3. However, the CO explains that she did not consider InGenesis to be a reasonable alternative source for these services, based on her knowledge that InGenesis was [deleted] at the facilities under its existing Contract 048; she concluded the [deleted] were attributable to InGenesis's [deleted] under Contract 048. Id.

Additionally, in considering continuity of services, the CO considered ICE's legal and moral obligation to provide a minimum standard of care to detained, undocumented immigrants on a continual basis, i.e., 24-hours a day, 7-days a week, and 365-days a year. Id. at 3; Legal Memorandum at 2. The CO also determined that the transition period between the current contractor and a new contractor would take at least three months, given the difficulty of assembling a large team of qualified healthcare professionals in a remote location, training such

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<sup>5</sup> The D&F states that it was issued on December 16, 2016. Since these events occurred in December 2015, we view the 2016 date as a typographical error.

The modification to exercise the option states that the supplemental agreement was pursuant to the authority of FAR clause 52.217-9. AR, Tab 5, Modification of Maxim's Contract, at 1.

professionals on ICE standards, and completing background checks, licensing, and privileging. CO Statement at 3. Additionally, in considering the cost of disrupting services if the agency chose not to exercise the option, the CO determined that the potential for departures of staff, the costs to cover such departures--for example, the reassignment of, and travel costs for, government personnel to temporarily staff the facility--and the time to process staff for a new contractor would exceed the cost of continued performance by Maxim. Id. at 3-4. Finally, the CO considered that the upcoming competitive procurement was scheduled for release in January 2016.<sup>6</sup> Id. at 4.

On December 22, the protester timely challenged the agency's determination to exercise the option.

## DISCUSSION

The protester argues that the agency's exercise of the option failed to consider the determinations required by FAR § 17.207(d).<sup>7</sup> Protest at 4.

A determination that the option price is the most advantageous must be based on one of the following findings: (1) a new solicitation fails to produce a better price; (2) an informal market survey or price analysis indicates that the option price is lower; or (3) the time between contract award and option exercise is short enough and the market stable enough that the option price is the most advantageous. FAR § 17.207(d). The CO shall also consider such factors as market stability and comparison of the time since award with the usual duration of contracts for such supplies or services. Id. The FAR also directs that the CO's consideration of "other factors" should take into account the need for continuity of operations, as well as the potential costs of disrupting operations. FAR § 17.207(e).

While our Office views an agency's decision not to exercise an option as a matter of contract administration, we will entertain protests arguing that an agency unreasonably decided to exercise an option in an existing contract, rather than conduct a new procurement. Antmarin Inc.; Georgios P. Tzanakos; Domar S.r.l., B-296317, July 26, 2005, 2005 CPD ¶ 149 at 2 n.2. Because the exercise of an option permits an agency to satisfy current needs for goods or services without

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<sup>6</sup> As of the January 21 submission of the agency report, the agency anticipated the release of the solicitation for forthcoming competitive procurement in mid-February 2016, with award in late May or early June 2016. AR, Tab 9, CO Declaration, at 2.

<sup>7</sup> To the extent the protester raises challenges to the initial, sole-source award to Maxim, these arguments are untimely. Our Bid Protest Regulations do not allow us to now consider challenges that were raised and withdrawn in a previous protest. See 4 C.F.R. § 21.2(a)(2).

going through formal competitive procedures, the FAR provides that before an option can be exercised, an agency must make a determination that exercise of the option is the most advantageous method of fulfilling its need, price and other factors considered. FAR § 17.207(c)(3). As a general rule, option provisions in a contract are exercisable at the discretion of the government. PR Newswire Assoc., LLC, B-401692, Nov. 5, 2009, 2009 CPD ¶ 223 at 2. Our Office will not question an agency's exercise of an option under an existing contract unless the protester shows that the agency failed to follow applicable regulations or that the determination to exercise the option, rather than conduct a new procurement, was unreasonable. Sippican, Inc., B-257047.2, Nov. 13, 1995, 95-2 CPD ¶ 220 at 2; Tycho Tech., Inc., B-222413.2, May 25, 1990, 90-1 CPD ¶ 500 at 3.

We find no basis to question the agency's exercise of the option here.<sup>8</sup> As noted above, the record shows that the CO based her decision to exercise the option on the short timeframe between award and exercise of the option, in accordance with FAR § 17.207(d)(3). AR, Tab 4, D&F, at 1. In this regard, the CO considered that the location of services had not changed in the three months since contract award.

The CO also considered that: (1) Maxim's negotiated rate was determined to be fair and reasonable; (2) Maxim's performance on the base contract was satisfactory; (3) continuity of services was necessary to provide continuous medical care; (4) the agency was preparing a competitive procurement for award for its longer term needs; (5) any transition period between the current and new contractor was estimated to take three months; and (6) potential costs could be incurred if operations were disrupted. The agency also considered that InGenesis's unsolicited proposal offered lower rates than the rates under Maxim's option, but did not find InGenesis to present a reasonable alternative due to its [deleted], which the CO attributed to its [deleted], on an existing contract performing similar work.<sup>9</sup>

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<sup>8</sup> To the extent that InGenesis is asserting that the agency was required to consider all three factors under FAR § 17.207(d) before exercising the option, we disagree. The language of the FAR requires a CO to base its determination to exercise an option on one of three factors under FAR § 17.207(d). The protester has offered no legal reason, and we know of none, that requires an agency to engage in all three analyses to determine whether the exercise of the option offers the most advantageous price.

<sup>9</sup> To the extent the protester argues that the agency's evaluation of its unsolicited proposal was unreasonable, we find no merit to this argument. The decision to make award based on an unsolicited proposal is in the agency's discretion, and then only where the requirements of FAR § 15.607 are met. FAR § 15.607; Rante Corp., B-411188, June 1, 2015, 2015 CPD ¶ 166 at 2; Mine Safety Appliances Co., B-227839, July 8, 1987, 87-2 CPD ¶ 24. FAR § 15.607(a) sets forth those circumstances where an agency is required to reject an unsolicited proposal; it does  
(continued...)

Accordingly, the agency appropriately considered both pricing and other information, as permitted by the FAR, and reasonably determined that the exercise of the option under Maxim's sole-source contract was the most advantageous method of fulfilling its needs.<sup>10</sup> FAR § 17.207(d)(3) and (e).

The protester also contends that the agency's post-protest explanations of the considerations included in the D&F are improper. Protester's Comments at 4. We find no merit to this argument. Our Office generally considers post-protest explanations, such as the one presented here, where the explanations provide a detailed rationale for contemporaneous conclusions and fill in previously unrecorded details, so long as the explanations are credible and consistent with the contemporaneous record. See SRA Int'l, Inc., B-411773, B-411773.2, Oct. 20, 2015, 2015 CPD ¶ 323 at 5 n.3

The protest is denied.

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General Counsel

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(...continued)

not follow that in all other circumstances the agency must accept an unsolicited proposal. See S. T. Research Corp., B-231752, Aug. 16, 1988, 88-2 CPD ¶ 152 at 1-2. As the proposal failed to comply with FAR § 15.607(a), we find no basis to review the agency's determinations here. We also find no merit to the protester's argument that the agency's determinations regarding InGenesis's price were unreasonable. The CO determined that the protester's unsolicited proposal did not represent a valid unsolicited proposal that should be evaluated. The protester has provided no basis to challenge that determination.

<sup>10</sup> The protester also raises various challenges to the reasonableness of the agency's determination under FAR § 17.207(d)(3). For example, the protester contends that but for InGenesis's assistance, Maxim and the agency could not meet the staffing requirements at the STFRF and that the agency made a nonresponsibility determination when it took into account InGenesis's ability to staff this contract. The protester has offered no factual or legal support for these arguments. Thus, we find no basis to sustain these protests.