

Office of Dispute Resolution for Acquisition
Federal Aviation Administration
Washington, D.C.

FINDINGS AND RECOMMENDATIONS

**Matter: Protest of Emerging Engineering Excellence Joint Venture
Under Solicitation No. DTFAAC-07-D-00048**

Docket No.: 08-ODRA-00467

Appearances:

For the Protester, Emerging Engineering Excellence Joint Venture:
Gilbert J. Ginsburg, Esq. and Timothy Sullivan, Esq.,
of Thompson Coburn

For the Intervenor, ASRC Management Services, Inc.: Timothy Lewis, President,
Edward Hessler, Esq., and Mark Halbig, Vice President of Contracts

For the FAA Mike Monroney Aeronautical Center: A. L. Haizlip, Esq., Senior Counsel

I. Introduction

On September 26, 2008, Emerging Engineering Excellence Joint Venture¹ (“EJV”) filed a protest (“Protest”) with the Office of Dispute Resolution for Acquisition (“ODRA”), which was docketed as 08-ODRA-00467. The Protest challenges the award to ASRC Management Services, Inc. (“ASRC”) of a contract (“ASRC Contract”) by the Federal Aviation Administration (“FAA”) Mike Monroney Aeronautical Center, Oklahoma City, Oklahoma (“Center”), under Solicitation No. DTFAAC-07-D-00048 (“Solicitation”) for National Airway Systems Engineering Division support services. Specifically, the Protest challenges the ASRC Contract as an allegedly improper sole source award. The

¹ The Protester is a joint venture comprised of Acme Worldwide Enterprises, Inc. (“ACME”) and Management and Engineering Technologies International, Inc. (“METI”). These companies formed EJV for the purpose of submitting a proposal to the FAA in response to the subject Solicitation.

Contract, which was for a base year with four one-year options, originally had been awarded as a cost-plus-award-fee (“CPAF”) contract with cost reimbursable line items. Subsequently, it was converted to a cost-plus-fixed-fee (“CPFF”) contract by the Center based on the recommendation of the Department of Transportation (“DOT”) Office of Inspector General (“OIG”), contained in a May 28, 2008 Interim Report, entitled “Award-Fee Criteria for the National Airway Systems Contract,” Report No. F1-2008-054 (“OIG Report”). EJV claims that the conversion of the ASR Contract from a CPAF to a CPFF type created a new contract and that EJV should have had an opportunity to bid on the requirement. For the reasons set forth below, the ODRA finds that the Center acted promptly and correctly to implement the recommendations of the OIG and that the AMS does not require under the circumstances here that an additional competition be conducted. The challenged action cannot be said to lack a rational basis or to be arbitrary, capricious or an abuse of discretion. Accordingly, the ODRA recommends that the Protest be denied.

II. Findings of Fact

1. Pursuant to a competition in 2001, the Center awarded to one of the EJV joint venturers, Management and Engineering Technologies International, Inc. (“METI”), Contract No. DTFA01-D-12127 for engineering, technical, and administrative support services (“METI Contract”) for various systems comprising the National Airspace System (“NAS”). *Agency Response* at 1.
2. On May 10, 2007, during the fourth option year of the METI Contract, the OIG issued a memorandum notifying the DOT Senior Procurement Executive that it was auditing CPAF contracts (“OIG Audit”), and would be conducting an audit of various DOT CPAF contracts including the METI Contract. *Agency Response* at 1-2.
3. The purpose of the OIG Audit was to determine whether: (1) the Award-fee plans in the CPAF contracts established adequate criteria for evaluating contractor

- performance; and (2) the award fees paid to contractors were adequately supported. *Agency Response* at 2, *citing* Tab 10.
4. During the performance of the third option year of the METI Contract, the FAA Chief Financial Officer in Washington, D.C. approved an acquisition plan for a follow-on CPAF contract, with a base year and four 1-year option periods. *Agency Response* at 2, *citing* Tab 7, paragraph a.
 5. During the Spring of 2007, METI, and its joint venture partner, competed for the CPAF contract pursuant to the Solicitation by submitting a proposal on behalf of EJV. *Comments* at 1.
 6. The Solicitation was a 100% set-aside for competitive award among Socially and Economically Disadvantaged Businesses that were certified by the Small Business Administration (“SBA”) for participation in the SBA’s 8(a) program. *Agency Response* at 3.
 7. Section B of the Solicitation, identified by Contract Line Item Numbers (“CLINS”) the specific services required, and set forth various position titles, along with their associated maximum hourly rates. *Agency Response*, Tab 3, Section B. The number of positions varied according to the staffing levels prescribed in the Performance Work Statement. *Agency Response*, Tab 3, Section J, Attachment 1.
 8. The bidders’ proposal pricing was to be based on CLINS for the base year and four option years. *Agency Response*, Tab 3, pp.2 and 15. Pricing for each year was comprised of direct labor costs (DL), direct labor overhead (O/H), a not-to-exceed (NTE) G&A rate applied to the sum of DL and DL O/H, as well as a fee rate, which was inclusive of base and award fees, and applied to the total of DL, O/H and G&A. *Agency Response*, Tab 3, p. 2.

9. Specifically, the fee rate was to be proposed as a “maximum fee amount,” which would be prorated based on a six month performance period and allocated based on a split of 30% for the base fee and 70% for the award fee. *Agency Response*, Tab 3, p. 6.
10. EJV’s proposal was one of four which the Center received and evaluated in response to the Solicitation. *Agency Response* at 3; Tab 5.
11. The Center evaluated technical proposals by applying the Solicitation’s evaluation criteria, which provided for contract award to be made on the basis of best value, with technical factors being slightly more important than cost or price. *Agency Response* at 3, *citing* Tab 3, Section M.1.
12. The Center’s evaluation of proposals determined that ASRC’s score was the second highest technical score. EJV received the highest technical score by a small margin, *i.e.*, three hundredths (.03) of a point. As for the proposed prices, EJV’s price was the highest of the four offerors, exceeding that of ASRC by more than [DELETED]. *Agency Response* at 3, *citing* Tab 7.
13. The Center conducted further analysis to determine whether the ASRC proposal or the EJV proposal represented the best value and concluded that the marginally higher technical benefit of the EJV proposal was not significant enough to warrant paying its additional cost as compared to the ASRC proposal. *Agency Response* at 4, *citing* Tab 6 and 7.
14. The rationale for the Center’s award decision was memorialized in a document entitled “Award Decision Document” dated June 12, 2007. *Agency Response* at 4, *citing* Tab 7.
15. On June 18, 2007, the Center awarded Contract No. DTFAAC-07-D-00048 (“Contract”) to ASRC. *Agency Response*, Tab 13. The Contract included both

CPAF and cost reimbursable line items, with approximately \$242 million identified for the CPAF line item. *Id.*

16. EJV did not protest the Center's award of the Contract to ASRC. *Agency Response* at 4.
17. As with the predecessor METI Contract, the OIG included the ASRC Contract in its audit. *Agency Response* at 4.
18. Prior to releasing its findings in connection with its audit, the OIG discussed its findings with Center contracting officials on February 20, 2008, and senior FAA officials on April 30 and May 1, 2008. Protest, Exhibit 3, OIG Report at 6.
19. In response to the "planned interim report," the FAA Chief of Procurement Law [Assistant Chief Counsel of the Acquisition and Commercial Law Division] advised the OIG by email dated April 30, 2008 that the FAA concurred with the recommendations of the planned report. *Agency Response*, Tab 11. The email stated as follows: "The FAA agrees to use another type of contract to obtain the National Airways systems engineering Division support services. Within the next 90 days, FAA will modify the contract to make it a cost-plus-fixed-fee type, retroactive to the date of award." *Id.*
20. The OIG Report reflected that the "corrective actions" would consist of the following:
 - Modify the existing ... Contract to a cost-plus-fixed-fee-type contract (retroactive to the date of the award) within the next 90 days.
 - For future CPAF contracts awarded by the Aeronautical Center:
 - Require that performance evaluation plans contain award-fee structures that motivate excellent contractor performance by only paying award fees for above-satisfactory performance.

- Clearly describe adjectival ratings so there will be a defined basis for assessing performance and ratings consistent with any grading tables.
- Enhance the Acquisition Work Instruction-103 related to CPAF contracts, and the documentation needed for these contracts, within the next 90 days.
- Enhance the evaluation criteria to become more performance based, and ensure that evaluations are properly conducted and documented in accordance with the criteria set forth in the performance evaluation plan and contract.
- Require that contracting officers review, compare, and document their strategies when justifying the appropriateness of the type of contract chosen in accordance with the Acquisition Management System Policy.

Protest, Exhibit 3, OIG Report at 6-7.

21. On May 19, 2008, in a document entitled “Determination and Findings,” the Center memorialized its rationale for converting the ASRC Contract to a CPFF type. *Agency Response*, Tab 13. The rationale stated:

Upon completion of the [OIG] audit, the auditors conducted an out-brief and an Out Brief Report was provided to [the Center’s Office of Acquisitions]. The OIG’s opinions as stated in their Out Brief Report included that the performance criteria were vague and the grading table did not contain specific evaluation criteria so there would be a defined basis for assessing performance. The report stated they believed the award fee criteria for the ASRC Management Services contract should be revised.

The FAA did not concur with all of the OIG’s opinions. However, in an effort to reach resolution the Program Office and the Office of Acquisition agreed that changing the contract from a cost-plus-award fee to a cost-plus-fixed fee arrangement would be the best option. Changing the cost-plus-fixed fee was discussed between [representatives of the Center’s Acquisition Office and the FAA Procurement Law Division] [the Assistant Chief Counsel of the Acquisition and Commercial Law Division] agreed that changing to a cost-plus fixed fee arrangement was an acceptable resolution and she saw no legal issues associated with issuing a

bilateral contract modification to effect this change. As documented in a May 2, 2008 email message from ... [the Center's Office of Acquisitions] to [the] Acting FAA Deputy Administrator ... changing to a CPFF arrangement is acceptable to [the Center, the FAA Procurement Law Division] and the OIG.

As stated above, [the Assistant Chief Counsel of the Acquisition and Commercial Law Division] advised [Center Acquisitions] management that she saw no legal issues with issuing a bilateral contract modification to effect the change to CPFF and indicated that making the modification retroactive to the beginning of the first evaluation period of the contract was acceptable. [Her] only caveat was that the FAA to ensure the negotiated fixed fee does not exceed the maximum fee (base and award) that would have been available under the contract as awarded. As the FAA will ensure that the negotiated fixed fee percentage is no more than the four percent total fee, base and award, provided for in the original contract and both cost-plus-award fee and cost-plus-fixed fee fall under the umbrella of cost-reimbursement type of contract in the AMS, executing a bilateral contract modification to effect the change is considered fair and the best course of action. Although the first six-month award fee evaluation period has been completed, the FAA will propose to the contractor that the contract modification be retroactive to the beginning of the base year. Considering the OIG's opinions and recommendations, and the program office's mission and AMS considerations for a cost-plus-fixed fee contract, issuing a modification to change to a cost-plus-fixed fee arrangement is determined to be in the Government's interest.

Agency Response, Tab 13.

22. On May 28, 2008, the OIG Report was issued. The OIG Report explained that the Center had "awarded a hybrid-structured contract to ASRC ... that encompasses a broad range of engineering, technical, and administrative support for civilian and military aircraft guidance and surveillance systems. This contract includes both CPAF and cost reimbursable line items, for approximately \$316 million – about \$243 million was for the CPAF line item." OIG Report at 1.
23. The OIG Report summarized its findings as follows:

We found that contracting officials did not justify the cost-effectiveness of selecting a CPAF-type contract Through an evaluation of the administrative costs versus the expected benefits, the contracting officer should be able to assess whether the benefits the government gains through a CPAF contract will outweigh the additional costs of overseeing and administering the contract. Without such an evaluation, the ... Center had no assurance that a CPAF-type contract was appropriate. Additionally, the evaluation criteria in the performance evaluation plan did not include measurable criteria needed to adequately evaluate contractor performance. Further, a portion of the award-fee criteria required the contractor to merely comply with basic contractual requirements. The performance evaluation plan allowed award-fee payments up to 72.5 percent of the award-fee pool for average or below results. The problems cited in this report existed, in part, because ... Center personnel did not have detailed guidance on how to structure award-fee plans to incentivize contractors. As a result of our audit, senior FAA officials agreed to take action and use another contract type more suitable for obtaining engineering and technical support, and revise ... Center guidance.

Protest, Exhibit 3, OIG Report at 2.

24. The OIG Report made the following recommendations:

We recommend that the Acting Associate [sic] Administrator, Regions and Center Operations, direct the Director of the Aeronautical Center to:

1. Require that the contracting officer use another contract type more suitable for the national Airway systems engineering and technical support services contract.
2. Revise Aeronautical Center Acquisition Work Instruction-103 to improve performance evaluation plans. Ensure the guidance explains how to:
 - a. Develop measurable award-fee criteria for evaluating contractor performance;
 - b. Develop award-fee payment structures that encourage contractor excellence and explain that contractors will not receive award fees for simply meeting contract requirements; and

- c. Define adjectival ratings clearly and provide performance monitors with adjectival ratings consistent with the grading table.

Protest, Exhibit 3, OIG Report at 5-6.

25. The OIG Report further stated: “As FAA management’s actions are ongoing at the time of this report, we cannot evaluate the efficiency of these actions; however, we believe the results of these actions will correct problems identified in this report. Implementing the planned corrective action of modifying the contract to a cost-plus-fixed-fee will put approximately \$199.4 million in remaining contract funds to better use by ensuring FAA’s acquisition objectives are being met by using a more suitable contract type.” *Id.* at 7.
26. The OIG Report requested formal comments from the FAA within 30 calendar days, indicating the specific actions taken or planned for each recommendation, the target date for completion and whether the FAA agrees “that the remaining \$199.4 million of contract funds can be put to better use by ensuring FAA’s acquisition objectives are being met via a more suitable contract type.” OIG Report at 7.
27. Although the Center expressed some disagreements with the OIG Report recommendations, the FAA Acquisition Executive instructed the Assistant Chief Counsel of the Acquisition and Commercial Law Division and the Center Director of Acquisitions to resolve the disagreement. *Agency Response* at 5, *citing* Tabs 7 and 13.
28. By letter of June 2, 2008, the Center sought from ASRC an administrative adjustment to the Contract via a bi-lateral modification. *Agency Response* at 5, *citing* Tab 12. The Center explained “it is our intent to replace the base and award fee with a single fixed fee.” *Id.*

29. ASRC responded by letter, dated July 2, 2008, proposing a “[DELETED] percent Fixed Fee effective August 2008,” which was the same fee percentage as was proposed in ASRC’s original cost proposal. *Agency Response*, Tab 19.
30. The Center issued a bi-lateral [DELETED] modification to change CLIN 0001 from CPAF to CPPF, while CLINs 0002 and 0003 remained unchanged. *Agency Response* at 5, *citing* Tab 14. The change was based on ASRC’s proposal of July 2, 2008 and did not affect the estimated contract amount of \$43,682,367.00. *Id.*, Tab 16.
31. In formal comments dated July 8, 2008 to the OIG Report, the FAA stated that it concurred with each of the OIG’s recommendations. The FAA’s response to the OIG’s recommendation that the Center require that the contracting officer use another contract type more suitable for the National Airway Systems engineering and technical support services contract was as follows:

The Federal Aviation Administration (FAA) agrees to use another type of contract to obtain the National Airway Systems Engineering Division support services. Within 90 days of the July 2008 Acquisition Management System (AMS) revision, the FAA will modify the contract to make it a cost-plus-fixed-fee type, retroactive to the date of award. Contract revision completion is expected by October 31. Revision of the contract type to cost-plus-fixed-fee will allow FAA to put the \$199.4 million in remaining contract funds to better use, as the administrative burden for the government will be reduced.

Protest, Exhibit 2.

32. EJV requested that the FAA provide it with a copy of the FAA’s formal comments to the OIG Report, which it received on September 24, 2008. EJV thereafter filed this Protest at the ODRA.
33. On October 29, 2008, the Center filed its Agency Response to the Protest, which included a Motion to Dismiss and a detailed “Chronology of Facts.” The

Protester filed its Comments on the Agency Response (“Comments”), which state, among other things, that EJV “does not dispute the factual chronology set forth in the FAA’s Motion.” *Comments* at 1.

III. Positions of the Parties

EJV asserts that the conversion from a CPAF to a CPFF type of contract was a change of such significance that it effectively gave rise to a new agency requirement that was required to be competed. *Comments* at 3, 5. In this regard, the Protest cites to a decision of the Government Accountability Office (“GAO”) in arguing that the integrity of the competitive process is compromised when a contract “modification so substantially changes the purpose or nature of a contract that the contract for which the competition was held and the contract which is being performed are essentially different.” *Memorex Corporation*, B-200722, 81-2 CPD ¶ 334, October 23, 1981.

In further support of its position, the Protester cites to language in Part 12 of the FAA’s “Pricing Handbook” that describes the role of profit and fee in the context of a CPAF contract “as a stimulant for efficient contract performance and as a reward for risks assumed by the contractor,” and argues “[b]y converting the contract to a CPFF type and converting all of the award fee to CPFF, in addition to the base fee, FAA substantially altered the ‘percentage of the contract base price ... anticipated for payment as profit.’” *Comments* at 5. The Protester further points to the Acquisition Management System (“AMS”) preference for competition, *citing* AMS § 3.2.2.2, among other things, in support of its position that the requirement, once converted to CPFF, must be re-competed. *Comments* at 6.

The Protester also asserts that the decision to modify the Contract, rather than re-compete it, was an abuse of discretion, since it was made simply to accommodate the OIG and did not reflect the exercise of “sound judgment,” as there is no evidence in the record of any negotiations by the FAA over the amount of the fixed-fee proposed by ASRC, which in

effect equaled the entire amount of the award fee. *Comments* at 8, *citing Agency Response*, Tab 19.

In its Agency Response, the Center urges the ODRA to dismiss the Protest because the Protester failed to protest the award of the ASRC Contract in June of 2007 and now should not be allowed to protest as an alleged sole source acquisition what the Center calls “an administrative adjustment” to the ASRC Contract. *Agency Response* at 8. The Center argues that the bi-lateral modification did not constitute a change beyond the scope of the contract,² as it did not change the contract type, price, duration, or the nature of the work to be performed, but rather changed only the method of calculating the profit/fee, and was issued in response to the OIG Report. *Agency Response* at 11. Moreover, to the extent that the change reduced the contractor’s performance risks by guaranteeing its profit, the Center cites to GAO decisions for the proposition that payment changes that have the effect of reducing a contractor’s risks are not beyond the scope where they have no effect on the “type or amount of work required, the manner in which it was to be performed, or the schedule of performance.” *Agency Response* at 14, *citing Sierra Pacific Airlines*, B-20539, 82-2 CPD ¶ 54 (1982); *Central Texas College System*, B-214172, 85-1 CPD ¶ 153; *Clifton Precision, Division of Litton Systems*, B-207582, 82-1 CPD ¶ 5990. The Center further asserts that the Protester has failed to demonstrate that it was prejudiced as a result of the conversion to CPFF. *Agency Response* at 15.

IV. Discussion

It is well established that, in the context of adjudicating bid protests, the ODRA will not overturn or recommend that the Administrator overturn procurement actions that comport with the AMS, have a rational basis, are neither arbitrary, capricious, nor an abuse of discretion, and are supported by substantial evidence. *Protests of Air Transport Association, et al.*, 08-ODRA-00452, -00453, -00454, -00455, -00456, -00457, -00461,

² *Agency Response* at 13, *citing Aragona Construction Co. v. United States*, 165 Ct. Cl. 382 (1964); *Air-A-Plane Corp. v. United States*, 187 Ct. Cl. 269, 408 F.2d 1030 (1969); *Edward R. Marden Corp. v. United States*, 194 Ct. Cl. 799, 442 f.2d 364 (1971).

and -00462. In reviewing challenged procurement actions, it also is well established that the ODRA will not substitute its judgment for judgments of contracting officials exercised consistent with the requirements of the AMS. *See Protest of Northrop Grumman Systems Corporation, 06-ODRA-0038*. Moreover, a protester's mere disagreement with an Agency action or decision does not, by itself, provide a sufficient basis for sustaining a bid protest. *Protests of Air Transport Association, supra., citing Protest of En Route Computer Solutions, 02-ODRA-0220*. Finally, in order to prevail, a protester bears the burden of demonstrating that the challenged action was prejudicial to it.

A. The Role of the OIG and the ODRA's Jurisdiction

The ODRA's review of this matter occurs in the context of the OIG Report that gave rise to the conversion of the ASRC Contract.³ The Report was issued by the OIG pursuant to its statutory authority under the Inspector General Act of 1978 ("Inspector General Act"), P.L. 95-452, October 12, 1978, 92 Stat. 1101, which established an Office of Inspector General within the DOT as well as in other Federal Departments. More specifically, the OIG was established by Congress as an "independent and objective" entity which would, among other things, conduct and supervise audits and investigations relating to programs and operations within the DOT, as well as recommend policies designed:

- (A) to promote economy, efficiency, and effectiveness in the administration of, and
- (B) to prevent and detect fraud and abuse in, such programs and operations; and
- (C) to provide a means for keeping the head of the establishment and the Congress fully and currently informed about problems and deficiencies relating to the administration of such programs and operations and the necessity for and progress of corrective action.

Id., Section 2.

³ The ODRA notes that inspector general determinations are given deference by the courts. *See United States v. Rail Union Technical Assistance, Inc.*, 1993 WL 944583 (D.N.J.) (unpublished).

The Inspector General Act further provides specific authority for the OIG, among other things, “to recommend policies for, and to conduct, supervise, or coordinate other activities carried out or financed by the [DOT] for the purpose of promoting economy and efficiency in the administration of, or preventing and detecting fraud and abuse in, its programs and operations.” *Id.*, Section 4.

The ODRA’s bid protest jurisdiction extends to reviewing whether actions taken by FAA contracting officials have a rational basis and comply with AMS policy and guidance. *See Protests of Hi-Tec Systems, Inc.*, 08-ODRA-00459, -00460 (Decision on Motion to Dismiss, dated December 1, 2008), *citing Protests of Air Transport Association, et al.*, 08-ODRA-00452, -00453, -00454, -00455, -00456, -00457, -00461, and -00462, *citing Electronic Data Systems Federal Corp. v. General Services Administration, Board of Contract Appeals*, 792 F.2d 1569 (Fed.Cir.1986).⁴ The ODRA does not have jurisdiction to review whether actions taken by the OIG pursuant to its statutory mandate comport with AMS policy and guidance. Thus the issue to be determined in this Protest is limited to whether the implementation of the OIG Recommendation by the Center: (A) had a rational basis and was not arbitrary, capricious or an abuse of discretion; (B) satisfied the requirements of the AMS; and (C) was prejudicial to the Protester.

B. The Center’s Actions Had a Rational Basis

In this case, the record shows that the OIG, with other Inspectors General, had conducted a government-wide audit of CPAF contracts, including the METI and ASRC Contracts. Finding of Facts (“FFs”) 2 and 17. The purpose of the OIG Audit was to determine whether the award-fee plans of the CPAF contracts established adequate criteria for evaluating contractor performance; and whether the award fees paid to contractors were

⁴ This case is distinguishable from those where the ODRA is called upon to review an audit report prepared and submitted into the record as evidence of fact, essentially summarizing “the extent and nature of expenditures made by an entity outside of the government.” *Appeals of Roebbelen Engineering, Inc.*, DOT BCA No. 1814, 87-1 BCA ¶ 98,628, 1995 WL 488515. Factual findings and legal conclusions contained in an audit report ordered pursuant to an agency’s contractual authority is not controlling on the reviewing forum’s authority to adjudicate. *See Appeals of Inslaw, Inc.*, 89-1 BCA 21238, 1988 WL 134410 (DOTCAB).

adequately supported. FF 3. The record reflects that, during the pendency of the OIG Audit, the ASRC Contract at issue was competed among several competitors, including the Protester, and awarded as a CPAF-type contract to ASRC, without protest. FF 10 - 16.

After auditing the ASRC Contract, as a preliminary matter, the OIG met with Center contracting officials and senior FAA officials to discuss its findings, as well as the recommendations that it planned to make in its forthcoming report. FF 18 - 19. Based on those discussions, the FAA promptly informed the OIG that it concurred with the recommendations and made a commitment to modify the ASRC contract within 90 days by converting it to a CPFF type. *Id.* The record also shows that the FAA's commitment was incorporated into the OIG Report, which expressly recommended that the "Acting Associate [sic] Administrator, Regions and Center Operations, direct the Director of the Aeronautical Center" take the corrective action of modifying the existing ASRC Contract to a CPFF type contract, retroactive to the date of award, within 90 days. FF 20, 24.

Moreover, in the Report, the OIG expressly noted its approval of the FAA's planned corrective action, stating: "we believe the results of these actions will correct problems identified" and describing the conversion of the ASRC Contract into a CPFF type of contract as "more suitable." FF 25-26. In this regard, the OIG Report found the award-fee plan criteria in the ASRC Contract was "vague, and did not include measurable award-fee criteria needed to adequately evaluate contractor performance." *Protest*, Exhibit 3, *OIG Report* at 3. Additionally, the OIG Report described the programmatic risks associated with the use of the CPAF-type contract to involve "unwarranted or subjective performance evaluations and ratings" which "could result in inflated evaluations and, consequently, inappropriately approved award fees." *Id.*

The record shows that, pursuant to instructions from senior FAA officials, including legal counsel, the Center took action in strict conformance with the proposed corrective action approved by the OIG in its report. FF 27. The Center promptly converted CLIN 0001 of

the ASRC Contract to a CPFF-type via a bi-lateral modification, while CLINs 002 and 003 remained unchanged. *FF* 30.

The ODRA finds that the conversion of the ASRC Contract was consistent with assisting the OIG in carrying out the OIG's statutory mandate and responsibilities in avoiding waste and abuse⁵ and with the basic obligations of Federal employees to the public trust. 5 C.F.R. § 2635.101. The ODRA concludes that the protested action had a rational basis, and was neither arbitrary, capricious, nor an abuse of discretion and was supported by substantial evidence.

C. The Protested Action Complied With the AMS

As for whether the Center's implementation of the OIG recommendations was in compliance with the AMS, the ODRA notes that the FAA's AMS emphasizes the use of competitive procurements, but does not require full and open competition. AMS § 3.1.1. Under Section 348 of the Department of Transportation Appropriations Act of 1996, Public Law 104-50 (49 U.S.C. § 40110(d)), which authorizes the AMS, Congress provided that certain aspects of "Federal acquisition law" do not apply to the FAA AMS, including, *inter alia*, the Competition in Contracting Act, which mandates the use of "full and open competition" in Government procurements.⁶ In contrast, the FAA's procurement system provides contracting officials with broad discretion to select contractors "based on prudent discretion and sound judgment" and to employ "any procedures that do not violate applicable statutes or regulations. AMS § 3.1.1.⁷

⁵ See Inspector General Act, Section 6(a) and (b)(1). The Inspector General Act provides that agencies "shall, insofar as is practicable and not in contravention of any existing statutory restriction or regulations ... furnish ... such assistance" as may be necessary for the DOT OIG to carry out its duties and responsibilities. Inspector General Act of 1978, § 6, 5 U.S.C.A. App. 3.

⁶ Although the ODRA considers GAO decisions as persuasive authority where they are consistent with FAA statutory authorities and policies, given the inapplicability of the CICA, the ODRA would not consider applicable GAO decisions which apply CICA standards for competition. *Protest of Northrop Grumman Corporation*, 00-ODRA-00159 at F.N. 3 (GAO precedent viewed as persuasive authority where consistent with the FAA's AMS and ODRA caselaw).

⁷ In this regard, single-source contracting is permitted under the AMS when necessary to fulfill the FAA's mission, provided that there is a documented rational basis for the decision which shows that the single-source is in FAA's best interest and "necessary and important to support FAA's mission." AMS §§ 3.1.3, 3.2.2.2 and 3.2.2.4; *see also* AMS Procurement Guidance, Single Source Contracting, A:1.

In the specific and unique circumstances of this case, involving: (1) a previously competed Contract; (2) an OIG Report which expressly recommended that the Contract be converted to a CPFF type for the purpose of correcting identified problems and avoiding risk to the Government; and (3) no resulting changes to the total contract amount and contract scope, the ODRA finds that the AMS did not require that the Center conduct a re-competition of the requirement before converting the Contract from a CPAF to a CPFF type.

D. The Protester Has Not Demonstrated Prejudice

It is axiomatic that in order to be successful a protester must demonstrate that the complained of action was prejudicial to it, *i.e.*, that but for the action complained of, it would have had a substantial chance of receiving the contract award. *Protest of DMS Technologies*, 04-ODRA-00306. The ODRA previously has stated that even:

[w]here Agency actions are found to have been erroneous or lacking a rational basis, the protest will not ordinarily be sustained, unless it has demonstrated that the actions in question have in some way prejudiced or resulted in harm to the Protester. [*Citation omitted*]. The ODRA will not sustain a protest unless the Protester demonstrates a reasonable possibility of prejudice, that is, unless the protester demonstrates that, but for the Agency actions, it would have had a substantial chance of receiving the award.

Protest of L. Washington & Associates, Inc., 02-ODRA-00232, *citing Protest of Enroute Computer Solutions*, 02-ODRA-00220. Here the Protester's showing of prejudice essentially is limited to its allegation that the conversion deprived it of an opportunity to compete, *Comments* at 9, and that it would have restructured its bid had the CPFF-type of contract rather than the CPAF-type been specified in the original competition. *Protest* at 5, 6. Such general and speculative allegations fall short of the requisite showing of prejudice. Thus, even if the Protester had demonstrated that the conversion of the Contract lacked a rational basis or violated the requirements of the AMS, its Protest nonetheless fails. *Protest of DMS Technologies, supra*.

V. Conclusion and Recommendation

For the reasons enunciated above, the ODRA recommends that this Protest be denied in its entirety.

-S-

Marie A. Collins
Dispute Resolution Officer
FAA Office of Dispute Resolution for Acquisition

APPROVED:

-S-

Anthony N. Palladino
Associate Chief Counsel and Director
FAA Office of Dispute Resolution for Acquisition