

**United States Court of Appeals**  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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**No. 09-1066**

**September Term, 2009**

FILED ON: JUNE 10, 2010

EMERGING ENGINEER EXCELLENCE JOINT VENTURE,  
PETITIONER

v.

FEDERAL AVIATION ADMINISTRATION,  
RESPONDENT

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On Petition for Review of an Order  
of the Federal Aviation Administration

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Before: ROGERS, TATEL and GRIFFITH, *Circuit Judges*.

**J U D G M E N T**

This case was considered on the record from the Federal Aviation Administration (FAA) and on the briefs of the parties pursuant to D.C. Circuit Rule 34(j). It is

**ORDERED** and **ADJUDGED** that the petition is denied.

Petitioner, Emerging Engineer Excellence Joint Venture (E<sup>3</sup>JV), challenges the FAA's decision not to re-bid an approximately \$240 million engineering support contract after changing the contract's compensation structure. Pursuant to FAA procedures, E<sup>3</sup>JV protested this decision to the agency's Office of Dispute Resolution for Acquisition (ODRA). ODRA found that the FAA acted reasonably in modifying the contract without a re-bid, and that in any case, E<sup>3</sup>JV had failed to demonstrate that it was prejudiced by any error. ODRA therefore recommended that E<sup>3</sup>JV's protest be denied. In the order on review, the FAA adopted this recommendation.

E<sup>3</sup>JV concedes that to prevail in its protest, the venture had to prove prejudice from the allegedly improper contract modification, i.e., it had to "demonstrate that but for the alleged error, there was a *substantial chance* that it would [have] receive[d] [the] award." *Statistica, Inc. v. Christopher*, 102 F.3d 1577, 1581 (Fed. Cir. 1996) (internal quotation marks omitted). E<sup>3</sup>JV also concedes that we may reverse ODRA's prejudice determination, adopted by the FAA, only if the decision was arbitrary or capricious. *See Multimax, Inc. v. FAA*, 231 F.3d 882, 886–87 (D.C. Cir. 2000).

ODRA's decision easily survives this deferential review. In the proceedings before the agency, the venture submitted two declarations to meet its burden of proof regarding prejudice. The first, from the CEO of one of the two E<sup>3</sup>JV members, identified parts of the venture's original proposal that E<sup>3</sup>JV would have changed had it been allowed to bid on the revised contract (e.g., indirect rates and employee compensation), but did not estimate the magnitude of the changes. The second, from a declarant whose qualifications are not in the record, but who E<sup>3</sup>JV describes as an expert in government contracting, stated generically how the modifications to the compensation structure of the FAA contract could change bidders' estimates. In light of these declarations, ODRA found that E<sup>3</sup>JV's "showing of prejudice essentially is limited to its allegation that the conversion deprived it of an opportunity to compete, . . . and that it would have restructured its bid had the [new compensation structure] been specified in the original competition," and concluded that "[s]uch general and speculative allegations fall short of the requisite showing of prejudice." As the FAA notes, neither of the declarations submitted by E<sup>3</sup>JV provided any estimate of the amount by which the venture's bid would have been reduced for the new contract specification; neither considered whether a lower-cost bid from E<sup>3</sup>JV would have received a lower technical score; and neither made any attempt to estimate how a revised bid from E<sup>3</sup>JV might have compared to a new bid from its prime competitor, the current contract holder. Given all this, we cannot say that the agency acted arbitrarily or capriciously in rejecting E<sup>3</sup>JV's protest.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or rehearing en banc. *See* FED. R. APP. P. 41(b); D.C. CIR. R. 41.

*Per Curiam*

**FOR THE COURT:**  
Mark J. Langer, Clerk

BY: /s/

Michael C. McGrail  
Deputy Clerk