

ARMED SERVICES BOARD OF CONTRACT APPEALS

Application Under the Equal Access)
To Justice Act of--)
)
J.F. Taylor, Inc.) ASBCA Nos. 56105, 56322
)
Under Contract Nos. N00421-94-D-0012)
N00421-96-C-5286)
N00421-97-C-1234)
N00174-99-D-0020)
N00421-01-C-0422)
N00421-02-D-3179)

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OPINION BY ADMINISTRATIVE JUDGE SHACKLEFORD
ON APPELLANT’S APPLICATION UNDER THE
EQUAL ACCESS TO JUSTICE ACT

J.F. Taylor, Inc. (JFT or applicant) has filed an application under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504, seeking recovery of fees and expenses incurred in connection with its appeals pursuant to the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109. The underlying appeals arose in the context of examining JFT’s indirect cost proposals for reimbursement of incurred costs and for making a recommendation to the contracting officer for indirect cost rates. The cost under examination and at issue in the underlying appeals was for executive compensation and DCMA challenged the reasonableness of that compensation.

We sustained the underlying appeals, except for relatively small amounts as to which DCAA persuasively challenged the method of revenue attribution, and remanded to the parties to resolve any remaining quantum issues in accordance with the decision.

J.F. Taylor, Inc., ASBCA Nos. 56105, 56322, 12-1 BCA ¶ 34,920, *aff'd on recon.*, 12-2 BCA ¶ 35,125. We assume familiarity with those decisions. Subsequently the parties resolved the remaining quantum issues (app. reply at 1, n.1).

The government concedes that JFT timely filed its application, that JFT is a prevailing party in these appeals, that JFT meets the net worth and maximum employee requirements for the EAJA, and that the costs the applicant seeks to recover (\$192,325.83) were incurred in these appeals and were reasonable. The sole issue disputed by the government and the sole issue we decide is whether the government has proved that it was substantially justified in its position in the appeals.

DECISION

In *Job Options, Inc.*, ASBCA No. 56698, 11-1 BCA ¶ 34,663 at 170,760-61, we stated as follows:

An EAJA award of fees and expenses to a prevailing party will not be made if the government's position in the underlying agency action and CDA appeal was substantially justified. *See* 5 U.S.C. §§ 504(a)(1), (b)(1)(E); *Luciano Pisoni Fabbrica Accessori Instrumenti Musicali v. United States*, 837 F.2d 465 (Fed. Cir. 1988). The government's position is substantially justified if it had a reasonable basis in fact and law. *Pierce v. Underwood*, 487 U.S. 552, 566 (1988). The burden is on the government to prove that its position was substantially justified. *Community Heating & Plumbing Co. v. Garrett*, 2 F.3d 1143, 1145 (Fed. Cir. 1993); *Oneida Construction, Inc./David Boland, Inc., Joint Venture*, ASBCA No. 44194 *et al.*, 95-2 BCA ¶ 27,893. However, prevailing on the merits does not necessarily entitle an appellant to an EAJA award as the statute was not intended as an automatic fee-shifting device. *Gavette v. OPM*, 785 F.2d 1568, 1578-79 (Fed. Cir. 1986); *Gava v. United States*, 699 F.2d 1367 (Fed. Cir. 1983). Whether the position of the contracting agency was substantially justified, "shall be determined on the basis of the administrative record, as a whole...made in the [CDA appeal]." 5 U.S.C. § 504(a)(1). *BH Services, Inc.*, ASBCA No. 39460, 94-1 BCA ¶ 26,468. In determining whether the government's position was substantially justified, we examine the entirety of the government's conduct and make a judgment call whether the government's overall position had a reasonable basis in both

law and fact. *Chiu v. United States*, 948 F.2d 711, 715 (Fed. Cir. 1991).

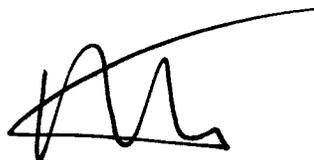
This case arose from an audit taking issue with the reasonableness of the executive compensation claimed by JFT in the context of examining JFT's final indirect cost proposals for reimbursement of incurred costs and for making a recommendation to the contracting officer for indirect cost rates for company fiscal years 2002, 2003, 2004 and 2005. The auditors followed a methodology in effect since the mid-1980's and which is set forth in the DCAA contract audit manual. Generally that methodology utilizes data from several survey establishments that compile and publish levels of executive compensation, some by industry, some by geographical location and some by company size and all for several executive positions. At hearing the government similarly defended the appeals in essentially the same manner, relying on the Board's acceptance of that methodology in *Techplan Corp.*, ASBCA No. 41470 *et al.*, 96-2 BCA ¶ 28,426.

This case had an additional wrinkle not present in *Techplan* – an expert in statistics (Jackson for appellant) essentially testifying opposite an expert in executive compensation (Dorf for government). Appellant's expert successfully questioned the validity of the use of a 10% range of reasonableness (ROR) regardless of the variability of the data. Dorf testified in support of the use of a 10% ROR (*J.F. Taylor*, 12-1 BCA ¶ 34,920 at 171,709, findings 73-75), but did not show that Jackson was wrong. While the government's expert was found to be less credible than appellant's, this case did not turn on the relative credibility of the two experts. It turned on the lack of evidence from the government to rebut the statistical analysis and conclusions performed by Jackson.

Nevertheless, we consider the government's conduct was reasonable and substantially justified for several reasons. First, the government's position was supported by legal precedent. *Job Options*, 11-1 BCA ¶ 34,663 at 170,761 (government conduct substantially justified where position supported by legal precedent). Second, the method used by the government to evaluate the reasonableness of executive compensation had been used over a long period of time and this methodology was part of the DCAA contract audit manual. *Cf. R&B Bewachungsgesellschaft mbH*, ASBCA No. 42221, 93-3 BCA ¶ 26,010, *aff'd on recon.*, 94-1 BCA ¶ 26,315 (government position substantially justified where based on published regulation). Third, the statistical evidence presented at hearing was a new approach, and the government countered it by reiterating the position it had long taken in executive compensation cases. Finally, while the government concedes appellant was a prevailing party, we observe that the government prevailed on some amounts where it challenged revenue attribution and was substantially justified as to those.

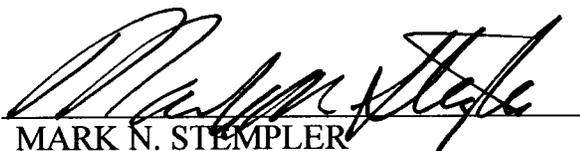
Under these circumstances, we find the government's overall position to be reasonable and substantially justified. Accordingly, the application is denied.

Dated: 22 April 2013



RICHARD SHACKLEFORD
Administrative Judge
Armed Services Board
of Contract Appeals

I concur



MARK N. STEMLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur



EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals on an application for fees and other expenses incurred in connection with ASBCA Nos. 56105, 56322, Appeals of J.F. Taylor, Inc., rendered in accordance with 5 U.S.C. § 504.

Dated:

JEFFREY D. GARDIN
Recorder, Armed Services
Board of Contract Appeals