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	)	

APPEARANCES FOR THE APPELLANT:

Richard B. O'Keeffe, Jr., Esq.
Nicole J. Owren-Wiest, Esq.
Samantha S. Lee, Esq.
Wiley Rein LLP
Washington, DC

APPEARANCES FOR THE GOVERNMENT:

E. Michael Chiaparas, Esq.
DCMA Chief Trial Attorney
Robert L. Duecaster, Esq.
Trial Attorney
Defense Contract Management Agency
Manassas, VA

OPINION BY ADMINISTRATIVE JUDGE SHACKLEFORD
ON APPLICANT'S MOTION FOR RECONSIDERATION

J.F. Taylor Inc. (JFT or applicant), has moved for reconsideration of our decision[1] denying its application for fees and expenses under the Equal Access to Justice Act (EAJA). The government has replied to the motion. For the reasons set forth below, the motion is denied. We assume familiarity with the decisions issued on the underlying appeals, *J.F. Taylor, Inc.*, ASBCA Nos. 56105, 56322, 12-1 BCA ¶ 34,920, *aff'd on recon.*, 12-2 BCA ¶ 35,125, and our initial EAJA decision, *J.F. Taylor, Inc.*, ASBCA Nos. 56105, 56322,13 BCA ¶ 35,297.

[1] Judge Thomas, who participated in the decision under reconsideration, has since retired.

In finding the government's conduct reasonable and thus substantially justified, we stated our rationale as follows:

> 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.

J.F. Taylor, Inc., 13 BCA ¶ 35,297 at 173,271.

JFT contends our decision is incorrect and challenges the first three reasons stated in the above quoted passage from our decision on the application. It does not challenge the fourth rationale because there is no apportionment request pending based upon the relatively small amounts where the government prevailed on its challenge to revenue attribution.

As to our first rationale, that the government's position was supported by legal precedent, applicant states that it presumed the precedent we referred to was our decision in *Techplan Corp.*, ASBCA No. 41470 *et al.*, 96-2 BCA ¶ 28,426, and argues that the government "***misused*** and ***distorted*** the *Techplan* decision" (mot. at 3). Moreover, applicant points out that while it argued that DCAA's policy decision in *JFT* was contrary to *Techplan*, we failed to address this argument in our decision, and that such failure is reason enough to reconsider citing *Charles G. Williams Constr. Inc. v. White*, 271 F.3d 1055 (Fed. Cir. 2001), as support for that position.

While applicant argues that the government misused and distorted *Techplan*, as the government points out in its reply (reply at 1), we did not so find in our decision on the claim. *J.F. Taylor, Inc.*, 12-1 BCA ¶ 34,920. In fact, we said DCAA generally followed the factors set forth in *Techplan*. *Id.* at 171,718. What made the government's evidence

lacking was not its misuse of *Techplan*, but its total reliance on *Techplan* without meeting the Jackson wrinkle challenging step 6 of the *Techplan* analysis head-on. That may have been a tactical error in defending the claim, but not one fatal to substantial justification of the position it took relying on *Techplan* as precedent.

Next, JFT argues that as a matter of law it is irrelevant that the method used by the government to evaluate the reasonableness of executive compensation had been used over a long period of time and that this methodology was part of the DCAA Contract Audit Manual. JFT does not dispute that when an agency position is based on a published regulation its position may be deemed substantially justified to defeat an EAJA applicant, but here, JFT says we have a DCAA policy (invariable 10% ROR) and a manual that is not published and does not have the force of regulation. DCMA counters by agreeing that reliance on the DCAA manual and long standing practice alone might not justify an otherwise unreasonable position, but those factors combined with the fact that the methodology in the manual was based upon legal precedent (*Techplan*) justified the government's position.

We agree with DCMA. As we just pointed out, DCAA "generally followed" the factors set forth in *Techplan*, *J.F. Taylor*, 12-1 BCA ¶ 34,920 at 171,718, and we found Benz credible for the finding that the reviews were performed using the usual DCAA procedures, *J.F. Taylor*, 12-1 BCA ¶ 34,920 at 171,719, which of course are based on *Techplan.*

Finally, JFT argues unpersuasively that while the statistical evidence presented at hearing by JFT was a new approach, countering it by reiterating the position it had long taken in executive compensation cases is not a proper legal basis for our finding the government's position substantially justified. This argument is a variation of the previous argument that the long taken position in executive compensation cases was based upon the DCAA manual which is not a published regulation. However, as pointed out earlier, said manual is based upon the *Techplan* legal precedent that it followed. Thus, we are not persuaded to modify our decision on this basis.

Finally, appellant gratuitously states as follows:

> What the EAJA Application Denial thus stands for is, in essence, that if an agency does something that is inherently unreasonable for a long time, it ultimately becomes unreasonable for that agency to compel a contractor to litigate the issue, without hope of recouping, under EAJA, some small portion of the costs of correcting the agency's error. The EAJA Application Denial does not provide any reviewable analysis or legal authority to support the conclusion that an unjustified position becomes justified

> simply through passage of time. In this case, Respondent's position in these Appeals has never been justified as a matter of statistics, and it was not justified on the basis of the Board's precedent or the DCAM. For these reasons, the Board should reconsider its Denial of Appellant's EAJA Application.

(Mot. at 7)

Other than voicing our disagreement with the assertion that the agency position was inherently unreasonable over a long period of time, we do not reply to applicant's characterization of what our decision means, any more than we would speculate as to what the outcome would have been had the government presented an expert witness in statistics to counter Mr. Jackson. While one could quibble over the status of the DCAA manual and the established practice by DCAA in approaching executive compensation cases, the fact remains that the *Techplan* decision was established law that the government relied upon and that the DCAA manual was based upon; and, on that basis, we do not modify our decision that the government's position was substantially justified.

Applicant's motion for reconsideration of our decision is denied.

Dated: 23 October 2013

RICHARD SHACKLEFORD
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

MARK N. STEMPLER
Administrative Judge
Acting 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