ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals 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 RESPONDENT'S MOTION FOR RECONSIDERATION

On 17 February 2012, the government timely moved for reconsideration of our 18 January 2012 decision, *J.F. Taylor, Inc.*, ASBCA Nos. 56105, 56322, 12-1 BCA ¶ 34,920, and requested the Chairman refer the motion to the senior deciding group. On 27 February 2012, appellant filed an opposition to the request for referral to the senior deciding group and on 14 March 2012 appellant filed an opposition to the motion for reconsideration. On 13 April 2012, the government filed a reply in support of its motions. On 20 April 2012, appellant requested leave to file an enclosed response in support of its opposition to the request for referral to the senior deciding group. Leave is hereby granted and that final submission is part of the record.

The Chairman has considered and denied respondent's request to refer this motion to the senior deciding group. We assume familiarity with our 18 January 2012 decision.

The moving party on a motion for reconsideration must establish a compelling reason for us to modify our original decision. In deciding whether that standard is met,

we look to see whether there is newly discovered evidence, mistakes in our findings of fact or errors of law. *American AquaSource, Inc.*, ASBCA No. 56677, 10-2 BCA ¶ 34,590; *SplashNote Systems, Inc.*, ASBCA No. 57403, 12-1 BCA ¶ 35,003.

The government makes one major contention with four arguments sprouting from that contention. The major contention is that we erred as a matter of law in finding that the government did not rebut appellant's statistical arguments and by therefore concluding that the DCAA methodology was statistically flawed. We find no error in our finding that the government did not rebut appellant's statistical argument and deny the motion for reconsideration. We discuss the four arguments below.

1. Appellant's Statistical Analysis was Rebutted

In support of the contention that the analysis was rebutted, respondent points to the testimony of Mr. Bentz who testified that in developing a reasonable or market level of compensation amount for a selected percentile no detailed statistical analysis of that data is done because the survey houses have already done the detailed statistical analysis. We cited that testimony in finding 34 of our opinion. Moreover, in the decision portion of our opinion, we stated that while Bentz "testified credibly that the reviews were performed using the usual DCAA procedures, the nuts and bolts of the JFT presentation challenging these procedures was not credibly addressed and they are therefore unrebutted." *J.F. Taylor*, 12-1 BCA ¶ 34,920 at 171,719. The extent of the rebuttal of the nuts and bolts of the statistical arguments was that the survey houses have already done the detailed statistical analysis. That was and is insufficient to overcome the conclusion based upon the evidence, that the DCAA methodology was statistically flawed.

The argument that appellant's statistical analysis was rebutted is a challenge to the weight of the evidence and the inferences to be drawn therefrom. Disagreements with the trier of fact as to the weight accorded certain evidence and the inferences to be drawn from such evidence are not appropriate grounds for reconsideration. *Walsky Construction Co.*, ASBCA No. 41541, 94-2 BCA ¶ 26,698; *Grumman Aerospace Corp.*, ASBCA No. 46834 *et al.*, 03-2 BCA ¶ 32,289, *aff'd*, 497 F.3d 1350 (Fed. Cir. 2007).

Therefore, the first argument fails.

2. The Board's Ruling is Inconsistent with *Techplan* and *ISN*[1]

The inconsistency the government finds between our opinion in JFT and our opinion in *Techplan* is that the experts in *Techplan* agreed that a range of reasonableness (ROR) of plus or minus 10% was common and we used that range to find the amount of

[1] *Techplan Corporation*, ASBCA No. 41470 *et al.*, 96-2 BCA ¶ 28,426; *Information Systems & Networks Corporation*, ASBCA No. 47849, 97-2 BCA ¶ 29,132.

unreasonable compensation in *Techplan*. The inconsistency alleged with respect to *ISN* is that the Board's *ISN* holding supported the *Techplan* expert opinions. Thus, the government argues:

> The implicit holding of the Board in the instant appeal is in direct conflict with the Board's decisions and the experts' opinions in both the *Techplan* and the *ISN* appeals. Is the Board overruling these holdings and adding an additional procedural step (*i.e.*, statistical analysis) to those steps that were used and approved by the Board in *Techplan* and *ISN*? If it is so holding, the Board should state as such. Is the Board holding that a statistical analysis of survey data should be performed instead of applying a range of reasonableness, as approved by the Board in *Techplan* and *ISN*? If it is so holding, the Board should state as such. As it stands, both industry and the Government are bewildered about the state of the law regarding reasonable executive compensation. The Board should either reconcile this appeal with *Techplan* and *ISN* or explain why the facts of this particular appeal require the data to be subjected to statistical analysis. Incorrectly concluding that the incompetent testimony of Appellant's expert witness went "unrebutted" and basing its decision on that incorrect conclusion leaves both the Government and the industry confused as to how to implement FAR 31.205-6.

(Gov't mot. at 5-6)

The simple answer is that this argument is premised on disagreement with our findings of fact and credibility determinations which as stated above do not form a valid basis for reconsideration. We decline to respond to the rhetorical questions raised about the meaning and intentions of our decision as any response would not be relevant to the issue of whether respondent is entitled to reconsideration.

In any event we considered *Techplan* in our decision and found that JFT was challenging step 6 of the *Techplan* analysis. Here we were presented with evidence that DCAA used a 10% ROR regardless of the variability of the data, evidence not presented in *Techplan* and we evaluated the reasonableness of the compensation in light of that evidence. Neither party in *Techplan* or *ISN* offered any statistical analysis of the ROR or raised the same arguments as did JFT and thus the issues were different. It should not be surprising that the outcome could also be different. The second argument is insufficient to compel reconsideration of our decision.

3. Appellant Did Not Relate its Expert Evidence to the Compensation Industry

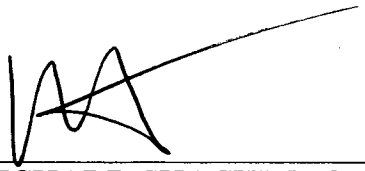
This argument is yet another challenge to our decision to rely on the expert opinion of Mr. Jackson. The government states that our decision is wrong because Jackson was not an expert in the compensation industry, while conceding that we in fact found he was not an expert in the compensation industry. He is however an expert in statistical analysis and he showed, and we agreed, that the methodology used by DCAA was statistically flawed and therefore unreasonable. Further, as appellant points out in its reply to the motion, "the Government's argument is founded on a false premise, namely that JFT was somehow required to relate its case to the nebulous 'compensation industry' to which the Government refers" (app. opp'n at 11), when in fact JFT was only required to establish that its compensation was reasonable under FAR Part 31 criteria, which makes no mention whatsoever of the compensation industry. We see no error in relying as we did on Jackson's opinions.

4. The Board's Decision is Contrary to Statute

The fourth and final argument made by the government is that "[i]n adopting Appellant's expert's methodology for determining reasonable compensation, the Board is approving a methodology that could result, and has resulted in one instance in this case, in approving compensation that violates the statutory cap on defense contractors' executive compensation" (gov't mot. at 7). *See* 10 U.S.C. § 2324(e)(1)(p). To the extent our decision in this case may have resulted in an amount of reasonable compensation that exceeded the statutory cap, our remand of the case to the parties was to "resolve any remaining quantum issues" and to the extent the statutory cap affected the quantum issues, we would expect the parties to include that possibility in their discussions of quantum issues. This argument is not a sufficient rationale for us to reconsider our initial decision.

The motion for reconsideration is denied.

Dated: 14 August 2012



RICHARD SHACKLEFORD
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur

MARK N. STEMPLER
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 in ASBCA Nos. 56102, 56322, Appeals of J.F. Taylor, Inc., rendered in conformance with the Board's Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals