Written by Nick Sanders
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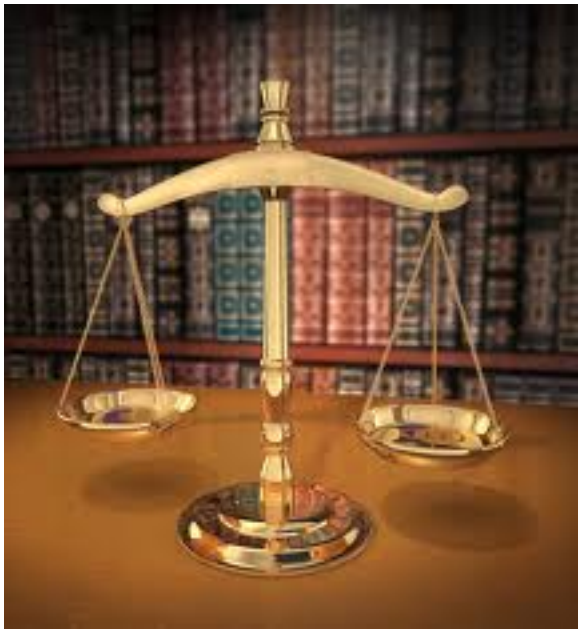

Wow.

If ever an ASBCA decision cried out for a Motion for Reconsideration, **this one** is it. It concerns the application of J.F. Taylor, Inc. for recovery of legal fees and expenses pursuant to the Equal Access to Justice Act (EAJA). J.F. Taylor's application was denied.

You remember J.F. Taylor, don't you? We wrote about the case **here** . It was a critical case, as DCAA's methodology for determining the reasonableness of a contractor's executive compensation was thrown out as being "fatally flawed statistically." DCAA questioned roughly $849,000 of Taylor's exec comp costs, which led to a DCMA demand for about $620,000. The government's legal case went down in flames, and only about $42,000 of the originally questioned $849,000 was found to have been unreasonable.

Pursuant to the EAJA, J.F. Taylor sought reimbursement of legal fees and expenses associated with its legal victory. As Judge Shackleford wrote—

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.

Notwithstanding the fact that DCAA's methodology—and the DCMA Contracting Officer's reliance on it—was flawed, Judge Shackleford found that "the government's conduct was reasonable and substantially justified" for several reasons. Among the reasons cited by the Judge was this humdinger of a legal error—

… 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 If 26,010, *aff'd on recon.*, 94-1 BCA 126,315 (government position substantially justified where based on published regulation).

Did you see that?

Judge Shackleford just wrote that the DCAA Contract Audit Manual was a "published regulation". We all know that's simply not true. If it were a published regulation, for instance, then public comments would be solicited when revisions were considered. If it were a published regulation, for instance, you could find the DCAA CAM on the Code of Federal Regulations (CFR) website.

Just to name two "for instances".

We bet we could also find other legal precedents that clearly found that the DCAA CAM did not have the effect of a regulation. We trust the Wiley Rein attorneys will cite them in the Motion for Reconsideration that we hope is coming. In the meantime, trust us: the DCAA CAM is *not* a Federal regulation.

So here's the deal.

DCAA has lost twice on the exec comp issue—*Metron* and *J.F. Taylor*. The audit agency

continues to use its “fatally flawed” methodology to question exec comp costs of smaller contractors—the ones who can’t afford to fight back. We know this because at least one of those contractors is among our clientele.

The government will continue to aggressively pursue this approach because it suffers no penalty, no legal sanction, for doing so. The government will continue to line its pockets with “unreasonable” executive compensation because no Court seems to be interested in stopping government officials from doing so—even though the methodology strikes us as being akin to extortion.

The only way to sanction DCAA and DCMA and the Department of Justice for continuing to advance their flawed legal theories is to award reasonable legal fees and expenses to the contractors to have the gumption to take this issue on, and to prevail.

Now Judge Shackleford has taken away that stick—and he’s done it via a fatally flawed legal analysis.[1]

Wow.

[1] We are not attorneys! Our perception of Judge Shackleford’s analysis may itself be fatally flawed. But we believe that equity and comity demand that this decision be reversed on reconsideration.