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The original J.F. Taylor decision was a resounding victory for contractors who think DCAA has overreached in its attempts to find a basis for questioning compensation costs. We wrote about the decision **right here** . Judge Shackleford found that the unrebutted evidence showed that DCAA's methodology for establishing the reasonableness of executive compensation was "fatally flawed statistically" and "significantly overstated and speculative."

Good stuff, and a great win for contractors everywhere (though DCAA has, to all appearances, ignored that ASBCA decision and continues to question exec comp costs using the same flawed methodology).

But then J.F. Taylor submitted an application for nearly $200,000 in attorney fees it had incurred appealing the matter, pursuant to the Equal Access to Justice Act (EAJA). Judge Shackleford **denied** the request, finding that the government's position was "substantially justified" because it was based on published regulation (citing *R&B Bewachungsgesellschaft mbH*, ASBCA No. 42221, 93-3 BCA If 26,010, *aff'd on recon.*, 94-1 BCA 126,315). As Judge Shackleford wrote, "… 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." In other words, Judge

Shackleford conflated the DCAA Contract Audit Manual (CAM)—which is an internal document published by and for DCAA auditors without public input and without the force of regulation—with published regulations such as the FAR. Even the non-lawyers here at Apogee Consulting, Inc.
thought
that was an error of law that demanded a Motion for Reconsideration.

J.F Taylor's attorneys thought so too, and filed that Motion. In a **recent decision**, Judge Shackleford denied it as well.

Judge Shackleford's decision was based on the fact that the government's position was supported by legal precedent—namely, the *Techplan* decision. Even though the original decision found that DCAA "generally followed" the
Techplan
approach to evaluating exec comp, the Judge also found that J.F. Taylor's expert statistician challenged "Step 6" of the
Techplan
analysis, and that challenge was unrebutted. Therefore, the Judge opined that—

That [failure to rebut] 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. … [while] 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.

Having so found, Judge Shackelford then indulged in a bit of what attorneys might call *obiter dicta*,
opining that—

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.

So okay, then. Unlike our prior article where we thought Judge Shackleford's elevation of the DCAA CAM to regulatory status was a travesty and judicial error of epic proportions, we're not going to go there again. You win some; you lose some. J.F Taylor won its case in main and avoiding paying some $500,000. The fact that it had to spend $200,000 to do so is an unfortunate reality of litigation.

We are not going to get all worked up regarding how the Judge changed the basis of his original finding, so as to continue to find that the government's position was "substantially justified." We're not going to get all worked up about how he elided J.F. Taylor's attorneys' arguments about the purpose of the EAJA. DCAA and DCMA got away with another one, apparently.

It happens.

In order for the contracting community to roll back the tide of unreasonable DCAA findings and unsupported Contracting Officer decisions, individual contractors, such as J.F. Taylor, need to stand up and say, "enough is enough." Those **courageous contractors** need to spend the funds litigating, even with little likelihood that they will have their attorney fees reimbursed. Only in such a manner can the rule of law prevail over the petty bureaucrats and their flawed administrative policies.