

REDACTED VERSION

Office of Dispute Resolution for Acquisition Federal Aviation Administration Washington, D.C.

RECOMMENDATION

**Matter: Application of Camber Corporation Under the Equal Access to
Justice Act**

Docket Nos.: ODRA-98-00079 EAJA

Appearances:

For Applicant, Camber Corporation: Ira E. Hoffman, Esq., Grayson and Associates, P.C.

For the Agency Program Office: Emmett Fenlon, Esq. and Robert Zuckerman, Esq.,

I. Introduction

Camber Corporation ("Camber") has submitted to the FAA Office of Dispute Resolution for Acquisition ("ODRA") an application under the Equal Access to Justice Act ("EAJA"), 5 U.S.C. §504 (1994), for reimbursement of its attorneys' fees and expenses incurred in connection with the *Protests of Camber Corporation and Information Systems & Networks Corporation*, 98-ODRA-00079 and 98-ODRA-00080 (Consolidated), which were the subject of the Administrator's Order No. ODRA-98-79, dated September 3, 1998. Although the ODRA finds that Camber was a "prevailing party" in those consolidated protests, it concludes that Camber is not entitled to recover for its attorney's fees and expenses under the EAJA, because, at all material times, the position of the Program Office was "substantially justified" within the meaning of that statute. Accordingly, the ODRA recommends that the application be denied.

II. The Underlying Protest

The underlying Camber protest (hereinafter the "Protest") involved a procurement by the FAA Global Positioning System ("GPS") Product Team, AND-730 (the "Program Office") for a GPS Technical Assistance Contract (hereinafter the "GPS TAC Contract"). The GPS TAC Contract had been awarded to Advanced Management Technology, Inc. ("AMTI"). Camber and one other firm, Information Systems & Networks Corporation ("ISN"), filed separate protests challenging that award. Several grounds of protest were advanced by both protesters, and the ODRA consolidated the two protests for purposes of adjudication. Camber thereafter submitted supplemental protest grounds, including one relating to an alleged "bait and switch" by AMTI. A similar "bait and switch" allegation

had been raised by ISN in its initial protest. Although the ODRA rejected all other grounds of protest, it did conclude that a "bait and switch" had, in fact, occurred.

In this regard, the ODRA found that AMTI had utilized employees of a prospective subcontractor, Overlook Systems Technologies, Inc. ("Overlook") as key personnel within AMTI's May 1998 Best and Final Offer ("BAFO") proposal for the GPS TAC Contract without that subcontractor's authorization and had misrepresented the availability of Overlook's personnel in order to secure the award for itself. More particularly, the ODRA found that (1) AMTI had asked Overlook to supply reduced rates for those personnel for use in the BAFO; (2) Overlook had conditioned use of these reduced rates on AMTI allocating to it approximately 33% of the overall volume of work on the GPS TAC Contract; (3) AMTI, proceeded to use the Overlook key personnel, but had only allocated to Overlook in the BAFO approximately [Deleted]% of the GPS TAC work volume -- *i.e.*, roughly [Deleted] of the amount contemplated by Overlook; (4) AMTI nevertheless continued to represent to the Program Office without qualification that Overlook's personnel would be available for performance of the GPS TAC Contract; and (5) AMTI's misrepresentation was "material," in that the inclusion of those personnel on the AMTI Team was critical to AMTI obtaining the Contract award. *Protests of Camber Corporation and Information Systems & Networks Corporation*, 98-ODRA-00079 and 98-ODRA-00080 (Consolidated) (hereinafter *Camber*), Findings 39-63 and Section III, Discussion at pages 62-70. By Order No. 98-79 dated September 3, 1998 (hereinafter the "Administrator's Order"), the Administrator adopted the ODRA's Findings and Recommendations and sustained Camber's Protest (and that of ISN) on the single ground of "bait and switch."

III. EAJA Analysis

On September 29, 1998, Camber filed with the ODRA an Application For Fees and Other Expenses Under The Equal Access to Justice Act (hereinafter the "Application"). In its Application, Camber sought to recover under the EAJA a total of \$50,930.10 in attorneys' fees and expenses. Under the EAJA, 5 U.S.C., §504(b)(1)(B), an eligible "party" is defined as an individual whose net worth did not exceed \$2,000,000 at the time the adversary adjudication commenced, or a business entity with a net worth that did not exceed \$7,000,000, and who did not employ more than 500 employees at the time the adversary adjudication commenced. Camber has claimed eligibility under this standard, and the Program Office has not challenged that claim.

The FAA Administrator has previously ruled, based on the Recommendation of the ODRA, that the EAJA will be applicable to adversary adjudications before the ODRA. FAA Order No. ODRA-98-1 EAJA (April 9, 1998), adopting ODRA Recommendation in *Equal Access to Justice Application of Weather Experts, Inc.*, 96-ODRA-00013 EAJA. As the ODRA has explained in *Weather Experts*, there are four "threshold issues" to be addressed in connection with all EAJA applications: (1) whether an eligible party "prevailed" over the Government; (2) whether the Government's position was substantially justified; (3) that no special circumstances exist that would make an award unjust; and (4) that any fee application has been submitted within 30 days of the decision

and is supported by an itemized statement. *Id.*, citing *I.N.S. v. Jean*, 496 U.S. 154, 158 (1990).

The Camber Application, submitted on September 29, 1998 with respect to an Order issued on September 3, 1998, was clearly within the 30-day submission time requirement and was adequately supported by an itemized statement and backup materials. There do not appear to be any "special circumstances" that would make an EAJA award unjust, and the Program Office has raised none. Moreover, in its Response to Camber's Application, the Program Office does not take issue with Camber as to whether it was a "prevailing party," and acknowledges that "Camber prevailed on one of its three protest counts, the supplementary protest count of bait and switch." The only issue to be resolved, therefore, is whether the Program Office "position" can be considered "substantially justified," so as to preclude the award of EAJA fees.

Camber correctly argues that the Government must bear the burden of demonstrating "substantial justification" for its actions. *Weather Experts, supra*, at 7, citing *Stratton v. Bowen*, 827 F.2d 1447, 1449-50. Camber also correctly notes that the term "substantially justified" encompasses "both the agency's pre-litigation conduct and [its] subsequent litigation positions" Response at 3, citing *I.N.S., supra*, 496 U.S. at 158-159. In terms of "pre-litigation" conduct, the ODRA previously found no fault in how the Program Office conducted the GPS TAC procurement:

It is clear from the record that the Program Office committed no wrongdoing or impropriety related to the "bait and switch". In fact, the technical evaluation here was both thorough and comprehensive, and, absent the [AMTI] misrepresentation, would have provided a rational basis for contract award.

Camber, supra, Findings and Recommendations, Section III, Discussion, at page 69. Thus, the ODRA has already found that the procurement and evaluation process was handled reasonably, professionally and in accordance with the AMS policy guidance. The only flaw in the process, the "bait and switch," was, in the ODRA's view, "an impropriety not of the Agency's making." *Id.*, Section I, Introduction. What is left, then, is to determine whether the Program Office's litigation "positions" were "substantially justified," even if not sustained fully by the ODRA.

An agency's litigation "position" need not be correct to be "substantially justified." Indeed, the EAJA's legislative history indicates that, in enacting the EAJA, Congress did not intend the mere fact that the agency loses its case to "raise a presumption that the Government's position was not substantially justified." *Weather Experts, supra*, quoting from H.R. Rep. No. 96-1418, 96th Cong., 2d Sess. 11 (1980); S. Rep. No. 96-253, 96th Cong., 1st Sess. 7 (1979). Further, the "substantial justification" standard does not "require the Government to establish that its decision to litigate was based on a substantial probability of prevailing." *Id.* As the ODRA has previously observed:

Substantial justification is not a standard equal to a "rational basis." In *Pierce v. Underwood*, 487 U.S. 552, 555-556 (1988), the Court held that the substantially justified standard under the EAJA requires that there be a "reasonable basis both in law and fact" for the Government's action, and that the "reasonable basis" standard is no different from "justified in substance or in the main --- that is, justified to a degree that could satisfy a reasonable person. The Court addressed the pertinent inquiry explicitly as follows:

[A] position can be justified even though it is not correct, and we believe it can be substantially (*i.e.*, for the most part) justified if a reasonable person could think it correct, that is, if it has a reasonable position in law and fact.

Id. at 556, n.1. Thus, an agency decision that is reasonable but incorrect would be viewed as substantially justified for EAJA purposes.

Weather Experts, supra, at page 7. Moreover, in formulating a litigation "position" an agency need not adhere to "what the law is," but only to "what [it] was substantially justified in believing it to have been." *Pierce v. Underwood*, 487 U.S. 552 at 561 (1988). In other words, "an agency's position is substantially justified if it relied upon a credible interpretation of the law." *Weather Experts, supra*, at 9, citing *S&H Riggers & Erectors v. Occupational Safety and Health Review Commission*, 672 F.2d 426, 431 (5th Cir. 1982).

In the present case, even Camber appears to concede that the Program Office was justified in the position it was taking at least up until the end of June 1998, when the "bait and switch" caused Overlook to leave the jobsite and the Program Office issued its July 2, 1998 "Cure Notice" to AMTI. *See* Comments, page 5. Camber's argument, as enunciated in its Comments on the Program Office Response, focuses only on the reasonableness of the Program Office position after that date. Camber insists that, once Overlook left the site and it issued its July 2, 1998 Cure Notice, "the Program Office had sufficient facts available to it" that it should have known "that its position was not substantially justified." Comments at pages 8-9 (emphasis in original).

The pertinent questions here are: (1) when did the Program Office first learn that AMTI had misrepresented the availability of the Overlook key personnel for the GPS TAC effort; and (2) whether, even in the face of that knowledge, its continued defense of the Camber Protest was based on a "credible interpretation of the law." There is no evidence either in the record of the underlying Protest or in the submissions pertaining to the Camber Application that would indicate that the Program Office became aware of the misrepresentation in the May 1998 BAFO at any time before the beginning of August, when it received copies of (1) Overlook's April 16, 1998 letter to AMTI setting forth the condition for use of its reduced rates (*i.e.*, the allocation to Overlook of 33% of the GPS TAC work); and (2) the August 5, 1998 letter to the ODRA from AMTI's counsel explaining that AMTI had proceeded to use those rates with its BAFO and to reduce

radically Overlook's participation percentage, without Overlook's knowledge and consent, as a "business decision." *Camber, supra*, Findings 59-61. That information was made available to the Program Office only as a result of the discovery process in the Protest, and its significance may not have been appreciated fully until it was analyzed in the ODRA Findings. Such information may not have been known to or appreciated by Overlook until that juncture either. Furthermore, as the ODRA noted in *Weather Experts, supra*, the actions and positions taken by FAA contracting officials must be judged, not by 20/20 hindsight, but rather by the policy guidance available to them at the relevant time. The novelty of a legal issue weighs in the Government's favor in analyzing the reasonableness of its position for purposes of the EAJA. *Id.*, at 10, citing *Marcus v. Shalala*, 17 F.3d 1033, 1037 (7th Cir. 1994). Prior to the decision in *Camber*, there had been no ODRA precedent regarding "bait and switch." In addition, there was no guidance in the FAA's Acquisition Management System ("AMS") defining "bait and switch" or specifying corrective action once it was detected. Thus, contrary to *Camber's* assertion (*see* Comments at page 10), the Program Office could not have "misunderstood the nature of a 'bait and switch' as a matter of law." *Id.* (emphasis supplied). Until the ODRA opted to rely on prior GAO decisions regarding "bait and switch" as "persuasive precedent" in formulating its recommendations to the

FAA Administrator in *Camber*, the Program Office viewed the Overlook "walk-out" as simply a matter of post-award contract administration. *See* Program Office letter to ODRA dated July 16, 1998 at page 3. Certainly, the issuance of a Cure Notice to AMTI after that "walk-out" was consistent with the notion that the matter was one of post-award contract administration. In an earlier ODRA decision, the ODRA had ruled that it would not exercise its bid protest jurisdiction under the AMS to review matters of post-award contract administration. *See Washington Consulting Group, Inc.*, 98-ODRA-00059 (Interlocutory Decision on Motion to Dismiss).

In this context, the litigation position taken by the Program Office in the present case, although not ultimately sustained, was based on a "credible interpretation of the law." Thus, the ODRA considers the Program Office's position to have been "substantially justified" within the meaning of the EAJA, even after the Overlook "walk-out" and the July 2, 1998 Cure Notice.

IV. Conclusion and Recommendation

For the reasons set forth above, the ODRA finds that *Camber* is not entitled to recovery of its attorney's fees and expenses under the EAJA. Accordingly, it recommends that the application submitted by *Camber* be denied.

_____/s/_____
Richard C. Walters
Dispute Resolution Officer
For the Office of Dispute Resolution for Acquisition

APPROVED:

_____/s/_____
Anthony N. Palladino
Associate Chief Counsel and Director
Office of Dispute Resolution for Acquisition