

**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 Regarding Protest
Pursuant to Solicitation DTFA01-96-R-11087**

Docket: **ODRA Docket 98-ODRA-00102 EAJA**

Appearances:

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

For the Agency Product Team: Emmett Fenlon, Esq., and Robert Zuckerman, Esq.

I. Introduction

Camber Corporation (“Camber”) has submitted an application under the Equal Access to Justice Act (“EAJA” or “Act”), 5 U.S.C. § 504 (1994) to the FAA Office of Dispute Resolution for Acquisition (“ODRA”). Camber seeks reimbursement of \$8,548.58 in attorneys’ fees and expenses incurred by it in connection with the second in a series of protests filed with the ODRA. The protest in question (hereinafter “Camber II”) was filed on December 16, 1998, and docketed as 98-ODRA-00102. The Camber II Protest was sustained in part by order of the FAA Administrator, dated November 16, 1998 (“Final Decision”).

As is more fully discussed below, the ODRA finds that Camber is a prevailing party within the meaning of the EAJA. However, the ODRA concludes that Camber is not

entitled to recover the attorneys' fees and expenses claimed, because the Agency's position was substantially justified within the meaning of the EAJA. Accordingly, the ODRA recommends that Camber's application be denied.

II. The Resolution of the Underlying Protest

The Camber II protest concerned a re-competition ("Re-competition") being conducted by the FAA Global Positioning System Integrated Product Team, AND-730 ("Product Team") for a GPS Technical Assistance ("GPS TAC") Contract. The Re-competition had been recommended by the ODRA, and ordered by the FAA Administrator, in consolidated protests filed by Camber and another company, Information Systems & Networks Corporation and docketed as 98-ODRA-00079/98-ODRA-00080 (Consolidated) (hereinafter the "the Original Protests"). The Original Protests had been sustained on the basis that the GPS TAC Contract award had been tainted by an impermissible "bait and switch" involving the awardee, Advanced Management Technology, Inc. ("AMTI"). The Order entered in the Original Protests required that the Product Team conduct the Re-competition at the best and final offer ("BAFO") stage, in order to remedy the effects of the bait and switch.

The Camber II protest challenged the provisions of a September 28, 1998 letter and request for revised offers ("RRO") issued by the Product Team for the Re-competition. Camber alleged, *inter alia*, that the RRO was overly restrictive in its prohibition against the realignment by offerors of their team members or subcontractors for purposes of the Re-competition. Camber expressly identified Overlook Systems Technologies, Inc. ("Overlook"), which had previously teamed with AMTI, as a company effectively excluded from further participation in the Re-competition by the RRO. Camber also brought a second ground of protest alleging the Product Team tailored the Re-competition by eliminating a key personnel position. That ground of protest subsequently was withdrawn voluntarily.

At the conclusion of the default adjudicative process, the ODRA recommended that the Camber II protest be sustained in part. The ODRA concluded that there was a rational basis for the RRO's general prohibition against realignment of team members and subcontractors for purposes of the Re-competition. However, the ODRA also found that, to the extent the RRO effectively prohibited the further participation of Overlook, it lacked a rational basis and was inconsistent with the Administrator's Order in the Original Protests. The ODRA's Findings and Recommendations were adopted by the Administrator in her Final Decision in Camber II. For purposes of consideration of this application, the Findings and Recommendations of the ODRA, and the Administrator's Final Decision in Camber II are incorporated herein by reference.

III. The EAJA Analysis

The applicability of the EAJA to adversary adjudications before the ODRA is well established. See *Weather Experts, Inc.*, 96-ODRA-00013 EAJA; *IBEX Group, Inc.*, 96-ODRA-00037 EAJA; *Camber Corporation*, 98-ODRA-00079 EAJA. In determining whether to make an EAJA award, the adjudicating body involved must determine whether: (1) a timely application for allowable fees and expenses has been filed by an eligible party; (2) the claiming party has prevailed over the Government as a result of adjudication; (3) the Government's position was substantially justified in fact and law; and (4) any special circumstances exist that would render an award unjust. *Weather Experts, supra*.

In the instant case, the Product Team has not challenged Camber's eligibility to claim EAJA fees and expenses. Nor has it challenged the reasonableness of, or the support provided for, the fees claimed in Camber's application. However, the Product Team has challenged whether Camber is a "prevailing party" within the meaning of the EAJA. The Product Team further claims that its position in the underlying litigation was "substantially justified", and thus that no EAJA award should be made.

A. The Prevailing Party Issue

Camber contends that it meets the definition of a “prevailing party,” because its protest was sustained and the Product Team was directed to permit “any of the offerors who timely submitted revised BAFOs in response to the RRO, to submit amended BAFOs within a reasonable time . . . for the limited purpose of proposing Overlook as a team member or prospective contractor.” *See* Camber II ODRA Findings and Recommendations at 14 and Administrator’s Final Decision at 1. Camber correctly points out that “the competition would not have reopened to include Overlook but for the filing of the protest.” EAJA Application at 8. Camber also cites to the definition of a prevailing party adopted by the United States Supreme Court, and previously utilized by the ODRA in the *IBEX* case, to wit:

Plaintiffs may be considered “prevailing parties” for attorney’s fee purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing the suit.

Texas State Teacher’s Association v. Garland Independent School District, 489 U.S. 782, 789 (1989).

In the ODRA’s view, the overwhelming weight of authority, in previous EAJA decisions of the ODRA, and in the EAJA caselaw generally, supports finding Camber a “prevailing party” within the meaning of the EAJA statute. There is no question that Camber succeeded in challenging the RRO’s effective exclusion of Overlook from the Re-competition. This was clearly one of the expressed aims of the protest; and in the ODRA’s view constitutes “success on a significant issue in litigation which achieved some of the benefits the parties sought in bringing the suit.” *Id.*

B. The Substantial Justification Issue

It is well established that once a claiming party has made a supported EAJA application, the burden shifts to the Government to demonstrate that the position in question was substantially justified. *Weather Experts, Inc., supra*. The ODRA has previously recognized that:

[T]he substantially justified standard under the EAJA requires that there be a “reasonable basis in both law and fact” for the Government’s action, and that the “reasonable basis” standard is no different from “justified in substance and in the main – that is, justified to a degree that could satisfy a reasonable person.”

Weather Experts, supra, quoting from Pierce v. Underwood, 487 U.S. 552, 555 – 556 (1988). An Agency’s litigation position need not be correct in order to be found “substantially justified” for EAJA purposes:

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, citing H. R. Rep. No. 96- 1418, 96th Cong., 2d Sess. 11 (1980). To the contrary, “an Agency’s position is substantially justified if it relied upon a credible interpretation of the law.” *Weather Experts, supra* at 9.

Camber’s application references the Camber II Final Decision holding that the exclusion of Overlook from the Re-competition “would be patently unjust and entirely inconsistent with the ODRA’s recommendations and with the remedy embodied in the Administrator’s Order” Camber II Findings and Recommendations at 11. We stated that:

It simply does not make sense to permit AMTI to participate in the Re-competition, while at the same time excluding Overlook, a victim of AMTI's "bait and switch" and the firm which, played a decisive role in securing the earlier award for AMTI. *See* Finding 5 above at ODRA Recommendations, Findings 41 – 48. In other words, the effective exclusion of Overlook by the RRO is devoid of a rational basis.

Camber II Findings and Recommendations at 13. In response to Camber's EAJA application, the Product Team notes the Camber II Decision upheld the RRO's general prohibition against realignment of teams and subcontractors. The Product Team correctly points out that Camber's protest was sustained only in part, *i.e.*, only on the issue of the exclusion of Overlook from the Re-competition. *See* Product Team Opposition at 2. In that regard, the ODRA found in Camber II that:

There is also a rational basis, under the circumstances presented here, supporting the more general limitation of the RRO, at least as it applies to realignment/reaffiliation of companies who were not excluded from participating previously in the GPS/TAC procurement as the direct result of the bait and switch.

See ODRA Findings and Recommendations, page 11.

The Order in the Original Protests, which represented the only guidance available to the Product Team at the time that it issued the RRO, contained the following statement:

It would not be inappropriate or inconsistent with the AMS for the Program Office to opt to allow further team reconfiguration and realignment, in recognition of the passage of time since January 1998.

Original Protests Findings and Recommendations at 71. The Product Team asserts that that it reasonably believed, based on this express language, that it had discretion to not permit realignments of team members and subcontractors. The Product Team states that it "interpreted the option to allow further team

realignment as presuming the discretion not to allow further realignment.” *See* Opposition at 6. The Product Team further explained its rationale as follows:

The Program Office weighed the Agency’s need to expedite procurement of these services against the equity of allowing open-ended realignment. The Program Office determined that it could not afford the schedule risks, in the midst of an expedited Re-competition, of full realignment and could not make a special exception for Overlook, even as a victim of a bait and switch. The Program Office believed that creating a special exception for Overlook could be interpreted as arbitrary and capricious by the other unaffiliated companies. This was a tough call, but one that was thoroughly considered and reasonable.

Opposition at 6.

As we have previously said, “an Agency decision that is reasonable but incorrect would be viewed as substantially justified for EAJA purposes.” *Camber Corporation*, 98-ODRA-000079 EAJA at page 3. In formulating its position, the Agency may rely for EAJA purposes on a reasonable and credible, although incorrect 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). As we stated in response to an earlier Camber EAJA application, “the actions and positions taken by FAA contracting officials must be judged, not by twenty/twenty hindsight, but rather by the policy guidance available to them at the relevant time.” *Camber Corporation, supra* at page 4.

In the ODRA’s view, the Product Team reasonably relied on a credible interpretation of language from the decision in the Original Protests, and reasonably believed it had discretion to not permit realignments. Furthermore, prior to the issuance of the Camber II Decision, there was no specific legal precedent available to guide the Product Team in terms of carving an exception for Overlook from its “no-realignment” strategy. We have held in that regard “[t]he novelty of a legal issue weighs in the Government’s favor in analyzing the reasonableness of its position under the EAJA.” *Weather Experts, Inc., supra* at

7, citing *Marcus v. Shalala*, 17 F.3d 1033, 1037 (7th Cir. 1994). Given that the Final Decision in Camber II generally upheld the Product Team’s strategy (except as to its effect on Overlook), and given the Product Team’s understandable concern regarding its authority to make an exception for Overlook, its position must be viewed as reasonable.

Based on the above, the ODRA concludes that the Product Team’s position in Camber II was justified “in the main” and thus was substantially justified for EAJA purposes, *Pierce v. Underwood*, *supra*.¹

¹ As a result of the ODRA’s recommendation in this case, it is not necessary to reach the issue of the allowability of the fees being claimed. However, in the interest of providing guidance to future litigants, one novel aspect of the fees being claimed is discussed herein. Camber’s application includes, *inter alia*, fees and expenses incurred in the voluntary alternative dispute resolution (“ADR”) process that took place concurrently with the adjudication of the Camber II protest. Under the circumstances presented here, the ADR-related fees would not be recoverable. The Act itself specifically provides at Section 504(a)(1) that:

An Agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and expenses incurred by the party in connection with that proceeding, unless the adjudicative officer of the Agency finds that the position of Agency was substantially justified or that special circumstances make an award unjust. (Emphasis added).

The same section of the EAJA provides that the issue of substantial justification is to be resolved on the basis of the entire administrative record “which is made in the adversarial adjudication for which fees and other expenses are sought.” *Id.* (Emphasis added). The express language of the Act makes clear that an adjudication is required for an EAJA award to occur. However, an adjudicative decision is not necessarily a prerequisite for an award. For example, where an adjudicative process leads to a favorable settlement by agreement, an EAJA award may be available. *See generally PetroElec Construction Co. Inc.*, ASBCA No. 32999, 87-3 BCA ¶ 20,111. Nonetheless, the instant case is readily distinguishable. Here, it was the adjudication alone and not any ADR effort that resulted in Camber’s prevailing party status.

The ODRA’s research has not revealed significant caselaw supporting the concept that where ADR is attempted and is unsuccessful and the matter goes on to final adjudication, the prevailing eligible party may recover both the costs of that adjudication and the costs and fees it incurred during the ADR process. In *Weather Experts*, *supra*, the case which established applicability of the EAJA to the FAA’s dispute resolution process, we concluded that:

Inasmuch as the ODRA’s internal dispute procedures are subject to, and in compliance with § 554 of the APA, the EAJA applies to the adjudicative portion of the ODRA dispute resolution process. *See also Keyava Construction v. U.S.*, 15 Cl. Ct. 135, 138 (1988). (Emphasis added).

The ODRA questions whether the Act authorizes fee awards for voluntary ADR efforts that do not resolve the matter in controversy. Moreover, making an EAJA award under such circumstances could well be at odds with the policy strongly favoring resolution of disputes through ADR. Agencies could be less willing to engage in ADR, if they know they may be required to bear both their own costs and those of the contractor if the effort fails. Additionally, the possibility of such an award might require a forum to

IV. Conclusion

For the reasons stated above, the ODRA recommends that Camber's application for attorney's fees and expenses pursuant to the EAJA be denied.

/s/

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evaluate the reasonableness of an agency's ADR position -- *i.e.*, to determine whether the agency was "substantially justified" in that ADR position. This, in turn, could have serious implications for maintaining ADR confidentiality and could discourage the agency from exploring the strengths and weaknesses of its case with the ADR neutral.