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Final agency action regarding decision below:

REQHRG Date hearing requested - filed under cover letter from Graham Alex Turner, Chief Operational Officer for ADOA to Mario Guevara providing historical restatement of ADOA efforts to get matter set for hearing including attached request for hearing

IN THE OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of:

APPEAL OF ARIZONA'S TOWING PROFESSIONALS, INC. doing business as SHAMROCK TOWING

DPS CONTRACT CLAIM
Invitations for Bid Nos. L6-0021 & L6-0033

No. 99-1010-ADM

ORDER OF THE ADMINISTRATIVE LAW JUDGE DENYING APPELLANT'S REQUEST FOR ATTORNEYS' FEES AND COSTS

On April 12, 2000, Appellant Arizona's Towing Professionals, Inc. doing business as Shamrock Towing ("Shamrock") filed with the Arizona Department of Administration ("Department") an Application for Award of Attorneys' Fees and Costs. The application was renewed on May 25, 2000. Administrative Law Judge ("ALJ") George A. Schade, Jr. issues this Order denying Shamrock's application for attorneys' fees and costs.

FINDINGS OF FACT

1. On February 7, 2000, the Office of Administrative Hearings submitted to the Department the ALJ's Recommended Decision and Order. The decision recommended that Shamrock be compensated \$453,593.00 as damages for the wrongful cancellation of the towing contract by the Arizona Department of Public Safety ("DPS") in January, 1996.

2. On March 13, 2000, the Director issued a Decision and Order which accepted, modified and rejected in parts the ALJ's recommended decision. The Director awarded Shamrock \$62,872.00 as damages for lost profits in 1996 caused by the wrongful cancellation of the contract.

3. On March 29, 2000, Shamrock filed a Motion for Rehearing.

4. On April 18, 2000, the Director granted Shamrock's Motion for Rehearing and

Office of Administrative Hearings
1400 West Washington, Suite 101
Phoenix, Arizona 85007
(602) 542-9826

1 delegated this appeal to the Deputy Director.

2 5. On May 17, 2000, the Deputy Director issued a Decision and Order After
3 Rehearing awarding Shamrock \$62,872.00 as damages for lost profits in 1996.

4 6. On May 25, 2000, Shamrock filed a Notice of Renewal of Application for Award of
5 Attorneys' Fees and Costs.

6 7. On June 13, 2000, Assistant Attorney General Richard L. Rice, Esq., informed
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1 the Office of Administrative Hearings (which had inquired) that he would not be filing a
2 response to Shamrock's application for attorneys' fees and costs. The Office of
3 Administrative Hearings has not received a response to Shamrock's application.

4 8. Shamrock's request is limited to the fees and costs expended up to the point that
5 DPS made a settlement offer, which was the first day of the hearing (January 18, 2000).
6 Expenses incurred for work related to the decision of the Arizona Court of Appeals¹, work
7 associated with the hearing before the Office of Administrative Hearings, and work done
8 thereafter have been excluded.

9 9. Shamrock's request for attorneys' fees and costs is for \$33,159.77, consisting of
10 the following:

11 a. Attorneys' Fees	\$24,054.00
12 b. Expert Report and Consultation	8,650.00
13 c. Costs	<u>455.77</u>
14 Total	\$33,159.77.

15 10. The request for attorneys' fees is based on 137.5 hours from October 2, 1996,
16 to January 17, 2000, for two attorneys. The hourly fee of Mr. Donald M. Peters, Esq., the
17 lead attorney, was billed at \$180.00 per hour and later at \$200.00 per hour. The hourly fee
18 of Ms. Susan A. Cannata, Esq., the associate attorney, was billed at \$125.00 per hour,
19 \$140.00 per hour and later at \$160.00 per hour.

20 11. Based on their professional resumes, reading their pleadings and observations
21 of their representation throughout this proceeding, the ALJ finds that both Mr. Peters and
22 Ms. Cannata are well-educated, experienced and competent legal counsel.

23 12. The expert report and consultation fees of \$8,650.00 were incurred for 19 hours
24 at \$250.00 per hour for Vernon S. Schweigert, for a total amount of \$4,750.00, and 26
25 hours at \$150.00 per hour for his assistant Ms. Heather Litton, for a total amount of
26 \$3,900.00.

27 13. Mr. Schweigert's report provided the calculation of Shamrock's lost profits for
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¹ Arizona's Towing Professionals, Inc., dba Shamrock Towing v. State of Arizona et al., 1999 WL 21460, 287 Ariz. Adv. Rep. 47 (App. 1999).

1 1996 in the amount of \$62,872.00, which the ALJ submitted in his recommended decision
2 and which amount both the Director and Deputy Director accepted for their award of
3 damages.

4 14. The costs of \$455.77 were for copies, computerized on-line legal research,
5 subpoena service fees, and messenger services.

6 **CONCLUSIONS OF LAW**

7 1. The ALJ has the authority to determine an application for attorneys' fees and
8 costs.²

9 2. In order to "ensure fair and open regulation by state agencies, a person...Is
10 eligible for reimbursement of the person's costs and fees if the person prevails against
11 any agency in an administrative hearing as provided in section 41-1007."³

12 3. An "administrative law judge shall award fees and other costs to any prevailing
13 party in a contested case...brought pursuant to any state administrative hearing authority.
14 For purposes of this subsection, a person is considered to be a prevailing party only if both:

15 1. The agency's position was not substantially justified.

16 2. The person prevails as to the most significant issue or set of issues..."⁴

17 4. Shamrock prevailed in its appeal inasmuch as the Deputy Director awarded
18 Shamrock damages of \$62,872.00 for lost profits. The fact Shamrock recovered a portion
19 of its total claimed lost profits in the amount of \$946,845.00 is, however, not sufficient by
20 itself for Shamrock to recover its attorneys' fees and costs expended in this appeal. The
21 two requisites of A.R.S. § 41-1007(A) must be met before an application for attorney's fees
22 and costs can be approved in an administrative proceeding.⁵

23 5. The positions of DPS that Shamrock was not entitled to damages because it had
24 not sufficiently mitigated them, but if it was entitled to damages, those would be limited to
25 the one-year term of the contract, were not substantially unjustified. The Arizona
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29 ² A.R.S. § 41-1007(A).

30 ³ A.R.S. § 41-1001(A)(2).

⁴ A.R.S. § 41-1007(A).

⁵ Administrative proceedings differ from civil actions in the recovery of attorneys' fees and costs. Compare A.R.S. § 41-1007 with A.R.S. §§ 12-341 and 12-341.01.

1 Court of Appeals had already held that the cancellation of the contract had been “improper”
2 and had remanded Shamrock’s appeal “for entry of judgment in favor of Shamrock.”⁶ The
3 Court of Appeals remanded to determine the damages, if any, Shamrock was entitled to
4 recover for the improper cancellation of the contract.

5 DPS’s positions that Shamrock was not entitled to any damages for lack of
6 mitigation, but if it was entitled to damages, its recoverable damages were limited to the
7 one-year term of the contract awarded to Shamrock were reasonable. The contract
8 specified a term of one year with an option to renew. The interpretation of such clauses in
9 public contracts has not been squarely addressed by an Arizona court. DPS’s positions
10 may not have been - in the ALJ’s determinations - correct, but they were more than
11 marginally reasonable.⁷ And ultimately, DPS lost on the first but won on the second
12 position.

13 6. Shamrock did not prevail on the most significant issue or set of issues, namely,
14 whether Shamrock was entitled to recover lost profits based on the expected renewal of
15 the one-year contract for the subsequent four years.⁸ The Deputy Director rejected those
16 claims for lost profits. The nuances associated with a bidder’s expectations of renewal and
17 resulting profits were the heart and wealth of Shamrock’s appeal.

18 7. The amounts of Shamrock’s requests for attorneys’ fees, expert’s fees and costs
19 are reasonable for the work performed in this appeal.⁹

20 8. A decision of an administrative law judge under A.R.S. § 41-1007 “is subject to
21 judicial review. If fees and other costs were denied by the...administrative law judge
22 because the party was not the prevailing party but the party prevails on appeal, the court
23 may award fees and other costs for the proceedings before the...administrative law judge if
24 the court finds that fees and other costs should have been awarded under’ A.R.S. § 41-
25 1007(A).¹⁰

26 ORDER

27 Shamrock’s Application for Award of Attorneys’ Fees and Costs is denied.
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29 ⁶ Arizona’s Towing Professionals, Inc., dba Shamrock Towing v. State of Arizona et al., 1999 WL
30 21460, 287 Ariz. Adv. Rep. 47 (App. 1999), slip. op., p. 13.

⁷ BLACK’S LAW DICTIONARY 1429 (“*substantially justified*”) (6th ed. 1990).

⁸ This legal issue will most likely require a judicial determination for finality.

⁹ Kadish v. Arizona State Land Department, 177 Ariz. 322, 332, 868 P.2d 335, 345 (App. 1993).

1 SUBMITTED this 29th day of June, 2000.

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George A. Schade, Jr.
5 Administrative Law Judge
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9 A copy of this Order of the Administrative
10 Law Judge Denying Appellant's Request
11 for Attorneys' Fees and Costs was mailed
12 on June 29, 2000, to:

13 J. Elliott Hibbs
14 Director
15 Arizona Department of Administration
16 1700 West Washington, Suite 601
17 Phoenix, Arizona 85007

18 Donald M. Peters, Esq.
19 Susan A. Cannata, Esq.
20 Miller LaSota & Peters, P. L. C.
21 5225 North Central Avenue, Suite 235
22 Phoenix, Arizona 85012

23 Richard L. Rice, Esq.
24 Office of the Attorney General
25 1275 West Washington
26 Phoenix, Arizona 85007

27

George A. Schade, Jr.
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¹⁰ A.R.S. § 41-1007(E).