

Final agency action regarding decision below:

REQHRG Date hearing requested

IN THE OFFICE OF ADMINISTRATIVE HEARINGS

CASH SULLIVAN & CROSS, INC., and  
METROPOLITAN PROPERTY AND  
CASUALTY INSURANCE COMPANY,

Protesting Parties,

-v-

DEPARTMENT OF ADMINISTRATION  
ENTERPRISE PROCUREMENT  
SERVICES,

Respondent.

No. 06-0003-ADM

ORDER GRANTING REQUEST FOR  
AWARD OF ATTORNEY'S FEES

Pending before the Office of Administrative Hearings is Protesting Parties Cash Sullivan & Cross, Inc.'s and Metropolitan Property and Casualty Insurance Company's (collectively "Metropolitan") April 19, 2007 application for attorney's fees (the "Application"), the Arizona Department of Administration's (the "Department") May 23, 2007 response in opposition to the Application, and Metropolitan's May 31, 2007 reply in support of the Application. Pursuant to the Application, Metropolitan seeks an award of fees in the amount of \$17,072.50, and costs in the amount of \$440.28.<sup>1</sup> For the reasons set forth herein, the Application is granted.

Background

This case presented the question of whether the Department improperly denied Metropolitan's protest of the Department's decision to not evaluate Metropolitan's proposal to provide voluntary home and automobile insurance to employees of the State of Arizona, and to award contracts for the provision of such insurance to two other offerors. The parties presented evidence at a formal administrative hearing on January 30, 2007. On February 20, 2007, the Administrative Law Judge issued an

<sup>1</sup> The amount of fees identified in the Application (\$17,067.90) differs slightly from the amount identified in the supporting declaration as having been invoiced (\$17,072.50). The Administrative Law Judge has applied the invoiced amount.

Administrative Law Judge Decision (the "Decision") that was adverse to the

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1 Department's position. The Department accepted the Decision by Order dated March  
2 21, 2007. Thereafter, Metropolitan sought an award of attorney's fees and costs  
3 pursuant to A.R.S. § 41-1007.

#### 4 Applicable Law

5 A.R.S. § 41-1007 provides, in pertinent part:

6 A. Except as provided in section 42-2064, subsection G, a  
7 hearing officer or administrative law judge shall award fees and  
8 other costs to any prevailing party in a contested case or an  
9 appealable agency action brought pursuant to any state  
10 administrative hearing authority. For purposes of this subsection, a  
11 person is considered to be a prevailing party only if both:

- 12 1. The agency's position was not substantially justified.
- 13 2. The person prevails as to the most significant issue or  
14 set of issues unless the reason that the person prevailed is  
15 due to an intervening change in the law.

16 There is no Arizona case law that defines "substantial justification" for purposes  
17 of determining the propriety of an award of attorney's fees and costs under A.R.S. § 41-  
18 1007(A). However, in *Pierce v. Underwood*, 487 U.S. 552 (1988), a case construing  
19 language in the federal Equal Access to Justice Act, 28 U.S.C. § 2412 ("EAJA")  
20 analogous to Arizona's statute, the United States Supreme Court concluded that the  
21 term "substantially justified" means "'justified in substance or in the main' – that is,  
22 justified to a degree that could satisfy a reasonable person." 487 U.S. at 565. Stated  
23 another way, a position can be substantially justified "if a reasonable person could think  
24 it correct, that is, if it has a reasonable basis in law and fact." *Id.* at 566 n.2. Because  
25 the language in A.R.S. § 41-1007 is analogous to the language in the EAJA, it is  
26 appropriate to construe A.R.S. § 41-1007 in accordance with the Supreme Court's  
27 interpretation of the EAJA in *Pierce*.

#### 28 Analysis

29 Preliminarily, the Administrative Law Judge addresses the Department's  
30 contentions that A.R.S. § 41-1007 does not apply to this matter and that the  
procurement code provides the exclusive procedure for asserting a claim against the

1 State. According to the Department, A.R.S. § 41-1007 does not apply because it is pre-  
2 empted by A.R.S. § 41-1005(A)(15), which states: "This chapter does not apply to any:  
3 . . . [r]ule or other matter relating to agency contracts." The Administrative Law Judge  
4 finds that although this matter can be said to relate to an agency contract in that the  
5 procurement in issue resulted in the award of two such contracts, the connection is too  
6 attenuated to conclude that A.R.S. § 41-1005(A)(15) precludes a claim for attorney's  
7 fees under A.R.S. § 41-1007.

8 The Department further contends that Metropolitan's claim is barred by A.R.S. §  
9 41-2615, which states: "Notwithstanding any law to the contrary, including the  
10 provisions of title 12, chapter 7, article 2 and title 12, chapter 9, article 1, this article and  
11 the rules promulgated under this article shall provide the exclusive procedure for  
12 asserting a claim against this state or any agency of this state arising in relation to any  
13 procurement conducted under this chapter." The language of this provision does not  
14 appear to evince any intent by the legislature to preclude a claim for attorney's fees  
15 under A.R.S. § 41-1007; instead, a plain reading of the statute indicates that the  
16 legislature's intent was solely to limit the manner in which procurement claims may be  
17 brought against the State.

18 Having determined that Metropolitan is not barred from asserting its claim for  
19 attorney's fees under A.R.S. § 41-1007, the Administrative Law Judge turns to the  
20 merits of that claim.

21 As set forth above, applying the United States Supreme Court's analysis in  
22 *Pierce* requires a determination of whether the Department's position in this matter can  
23 be said to have had a reasonable basis in law and fact. In this case, the evidence  
24 demonstrated that the Department's procurement officer acted unreasonably when she  
25 failed to properly investigate the circumstances surrounding Metropolitan's failure to  
26 have responded to the evaluation team's requests for clarification, and that Metropolitan  
27 had not been accorded fair treatment with respect to being afforded an opportunity for  
28 discussion of its offer in violation of A.R.S. § 41-2534(F). Under these circumstances,  
29 and considering the totality of the evidence, the Administrative Law Judge concludes  
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1 that the Department's position was not substantially justified. Given this conclusion, and  
2 the fact that Metropolitan was the prevailing party, an award of fees under A.R.S. § 41-  
3 1007 is appropriate.

4 Reasonableness of Requested Fees and Costs

5 The Administrative Law Judge has considered the Declaration of David J.  
6 Cantelme, Esq., and the supporting exhibits, and finds that the professional services  
7 rendered in this matter, and the hourly charges for those services, are reasonable. The  
8 Administrative Law Judge further finds that Metropolitan's costs are reasonable.

9 Based on the foregoing,

10 **IT IS ORDERED** that the Application is granted, and that Metropolitan shall be  
11 awarded \$17,072.50 in fees and \$440.28 in costs.

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13 Done this day, June 8, 2007.

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17 Daniel G. Martin  
18 Administrative Law Judge  
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1 Copy mailed this \_\_\_\_ day of June, 2007 to:

2 William Bell, Director  
3 Department of Administration  
4 ATTN: Alex Turner, Esq.  
5 1700 W. Washington, Suite 601  
6 Phoenix, AZ 85007

7 Rex Nowlan, Esq.  
8 Jeffrey Dollins, Esq.  
9 Assistant Attorneys General  
10 Office of the Attorney General  
11 1275 West Washington  
12 Phoenix, AZ 85007-2997

13 David J. Cantelme, Esq.  
14 D. Aaron Brown, Esq.  
15 Susan V. Meyers, Esq.  
16 Cantelme & Brown, P.L.C.  
17 3030 N. Central Avenue, Suite 1109  
18 Phoenix, AZ 85012

19 By \_\_\_\_\_

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