

1 **Final agency action regarding decision below:**

2
3 **REQHRG Date hearing requested Inspector Cook/kld**

4
5 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

6
7 LUBO GORDIC,

8 Complainant,

9
10 -v-

11 LICENSE NO. 139425, CLASS K-05
12 C M C INSTALLATIONS L L C (LLC),

13 Respondent.

Case No. M03-0233

Docket No. 03F-M0233-ROC-com

**RECOMMENDED ORDER ON
RESPONDENT'S MOTION FOR
AWARD OF ATTORNEY'S FEES
AND COSTS.**

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18 On December 23, 2003, Respondent's representative filed *Petition for Hearing,*
19 *or Rehearing,* which the undersigned deemed to be a MOTION FOR AWARD OF ATTORNEY
20 FEES AND COSTS pursuant to A.R.S. § 41-1007 against the Registrar of Contractors
21 (Registrar) as the Real Party in Interest.

22 On January 23, 2004, counsel for the Registrar filed RESPONSE TO MOTION FOR
23 AWARD OF FEES AND COSTS.

24 On January 30, 2004, Respondent's representative filed a RESPONSE in reply to
25 the Registrar's filing.

26 Initially, the undersigned notes that Respondent's initial filings requesting an
27 award of attorney's fees and costs reference three separate statutory sections as the
28 basis for its request: A.R.S. § 41-1001.01(A)(1); A.R.S. § 41-1092.12; and A.R.S. § 41-
29 1007. However, on due consideration of the language of those statutory sections, it is
30 determined by this tribunal that A.R.S. § 41-1001.01(A)(1) and A.R.S. § 41-1092.12 are
not applicable in any manner to the facts and circumstances herein, and therefore,
those sections will not be further considered, and **Respondent's motion is denied**

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1 relative to those statutory sections.

2 To the extent the third statutory section may be applicable, A.R.S. § 41-1007
3 provides that:

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

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

14
15 C. A party that seeks an award of fees or other costs shall apply to the hearing
16 officer or administrative law judge, within thirty days after the final decision or order,
17 providing:

- 18 1. Evidence of the party's eligibility for the award.
- 19 2. The amount sought.
- 20 3. An itemized statement from the attorneys and experts stating:
 - 21 a. The actual time spent representing the party.
 - 22 b. The rate at which the fees were computed.

23 PROCEDURAL HISTORY

24 Based on a contract with Complainant homeowner Gordic, Respondent
25 constructed an exterior spiral staircase. The homeowner filed a complaint with the
26 Registrar in August, 2002, and the Registrar issued a Corrective Work Order to
27 Respondent. When the complaint was not resolved and Complainant requested
28 hearing, the Registrar issued a CITATION AND COMPLAINT, which Respondent answered,
29 and the matter proceeded to hearing on April 8, 2003.

30 In an Order issued on May 27, 2003, the Registrar adopted the Recommended
Decision of the undersigned, and Respondent was found to have violated A.R.S. §§ 32-
1154.A.2 and A.7 relative to two of the multiple items originally complained of by Gordic.
Discipline was imposed on the license, contingent on two factors: Complainant
providing Respondent access to correct the two items constituting the proven violation,
and Respondent's failure to correct, prior to the effective date (July 6, 2003) of the
Registrar's Order.

1 Respondent attempted to gain access to accomplish correction but alleged a
2 denial of access by Complainant, and for that reason filed a Motion to Dismiss on June
3 11, 2003. Complainant filed a response asserting a willingness to cooperate.

4 Again arguing a denial of access, Respondent filed a Petition for Rehearing on
5 July 1, 2003, which the Registrar denied in an Order issued on July 24, 2003 (which
6 Order amended the effective date of the original Order from July 6 to September 2,
7 2003).

8 To resolve the factual dispute over access, the Registrar determined to set the
9 matter for a compliance hearing, and on September 2, 2003, issued a Notice of
10 Compliance Hearing scheduling the hearing for October 21, 2003.

11 On August 27, 2003, six days before the Notice of Compliance Hearing was
12 issued, Complainant and Respondent executed a monetary settlement of the matter,
13 based on an agreement drafted by Respondent's counsel. A copy was filed with the
14 Registrar that same date.

15 The compliance hearing was convened by the undersigned on October 21, 2003,
16 at which time Respondent appeared and presented testimony and evidence, and also
17 initially submitted the instant Motion for Award of Fees and Costs (which was deemed to
18 be premature). Complainant did not appear. Based on the Administrative Law Judge
19 Decision on compliance then authored by the undersigned, the Registrar issued an
20 Order on November 24, 2003¹ which closed the complaint as withdrawn², based on the
21 settlement agreement between the two parties.³

22 Respondent then filed the instant *Petition for Hearing, or Rehearing*, processed
23 herein as a resubmission of the initial Motion for Award of Fees and Costs.

24 RESPONDENT'S POSITION

25 Respondent's Motion for Award of Fees and Costs is premised on its contention
26 that due to the Registrar's failure to act or respond to Respondent's repeated inquiries

27 ¹ This Order became final on January 3, 2004.

28 ² As of February 25, 2004, the Registrar's public database indicates that this complaint is open, rather than
29 withdrawn.

30 ³ Based on the evidence presented at the compliance hearing, the undersigned also determined that Complainant
had unreasonably denied access to Respondent prior to the settlement agreement by demanding Respondent
address most all the items Complainant had originally complained of, and not just the two items determined to be
Respondent's responsibility.

1 over a particular period of time, the Registrar should be responsible for reimbursement
2 of Respondent's attorney's fee of \$699.00 and settlement cost of \$1200.00, both of
3 which Respondent incurred to settle this complaint in order to prevent the suspension of
4 its license, which based on the information available, Respondent understood would
5 occur on the effective date of September 2, 2003.

6 Respondent understood that its license would be suspended on that date for
7 several reasons:

8 Complainant's continued refusal to allow access (unless Respondent
9 addressed items previously determined not to be Respondent's responsibility), which
10 prevented Respondent from complying with the Registrar's Order and placed its license
11 at risk of suspension absent such compliance;

12 The terms of the Registrar's Order of July 24, 2003 (denying
13 Respondent's Petition for Rehearing), which extended the effective date for compliance
14 to September 2, 2003; and,

15 The Registrar's failure to act or respond in any way during the 84 days
16 prior to September 2, 2003, to clarify or explain at any time that the license suspension
17 would be stayed until the issue of access and compliance had been addressed through
18 the hearing process.

19 Specifically, Respondent contends that the Registrar's alleged inaction during the
20 84 day time period from June 11, 2003 (when Respondent submitted its Motion to
21 Dismiss) until September 2, 2003 (when the Notice of Compliance Hearing was issued),
22 was unfair and unreasonable, given the numerous interim oral and written
23 communications⁴ from Respondent advising of its efforts to comply with the Registrar's
24 Order and requesting a response, and in light of Respondent's concern for the apparent
25 imminent suspension of its license.

26 Absent any such response, Respondent then hired an attorney to represent its
27 interests in communicating with the Registrar, and when that was not successful in
28 addressing Respondent's concerns for its license, Respondent had the attorney
29 negotiate with Complainant and draft the settlement agreement. Based on the

30 ⁴ Attached to Respondent's Motion as exhibits are copies of correspondence on its letterhead addressed to the

1 documentation submitted with its motion, Respondent's attorney's fees totaled \$699.00
2 and it cost Respondent \$1200.00 to settle the matter.

3 Respondent contends that it should be considered the prevailing party as
4 required pursuant to A.R.S. § 41-1007 because the Registrar's failure to act was not
5 justified and Respondent prevailed at the compliance hearing.

6 REGISTRAR OF CONTRACTORS' POSITION

7 Counsel for the Registrar contends that Respondent's motion for an award of
8 fees and costs should be denied for both procedural and substantive reasons.

9 First, the Registrar contends that Respondent's Motion for Award of Fees and
10 costs is procedurally defective because it is untimely (relative to the October 21, 2003
11 filing of the motion for attorney's fees and costs at the time of the compliance hearing,
12 since the Registrar's Order denying rehearing became effective on September 2, 2003,
13 more than 30 days earlier) or premature (relative to either the October 21, 2003 filing or
14 the Motion for Rehearing filed on December 23, 2003 (processed as motion for award of
15 fees and costs), since the Registrar's Order adopting the Recommended Decision on
16 Compliance did not become final until January 3, 2004.

17 Substantively, the Registrar contends that Respondent has not demonstrated
18 that it was the prevailing party relative to the hearing process culminating in the
19 Registrar's Order determining that Respondent had violated A.R.S. § 32-1154 (which
20 Order became final when rehearing was denied and which became effective September
21 2, 2003) because Respondent had been found in violation of that statute and therefore
22 clearly had not prevailed.

23 Relative to the hearing process culminating in the Order on compliance, the
24 Registrar contends that the question whether or not the Registrar acted or did not act
25 timely on Respondent's June 11, 2003 motion to dismiss has never been addressed,
26 nor any order entered on that issue, and therefore, Respondent cannot claim to have
27 prevailed on the issue of inaction because it has never been decided.

28 The Registrar further contends that its position on Respondent's allegation of
29 inaction relative to Respondent's motion to dismiss was substantially justified, for

1 several reasons: given that Complainant's response on June 23, 2003 was sufficient to
2 raise a factual question on access (which a compliance hearing would be necessary to
3 resolve); given that the prior request for rehearing was not denied until July 24, 2003,
4 such that the Registrar thereafter reasonably determined on August 21, 2003 to set a
5 compliance hearing and then did so by notice issued on September 2, 2003; and finally,
6 given that at no time in the interim did the Registrar take any steps to enforce the
7 original order. Therefore, the Registrar contends that Respondent's demand for
8 immediate dismissal of the complaint without allowing the fact-finding process to
9 proceed through the compliance hearing did not prove the Registrar's position was not
10 substantially justified.

11 CONCLUSION OF THE ADMINISTRATIVE LAW JUDGE

12 Respondent is entitled to its fees and costs if the Registrar's position was not
13 substantially justified and if Respondent prevailed as to the most significant issue or set
14 of issues. Pursuant to A.R.S. § 41-1007, both requisites must be present before an
15 application for attorney's fees and costs can be approved in an administrative setting.⁵

16 In this instance, it is the conclusion of the undersigned that the Registrar was
17 substantially justified in eventually determining to set the compliance hearing, given
18 Respondent's allegation that Complainant would not provide access and Complainant's
19 response to the contrary. Consistent with the Registrar's policy, such divergent positions
20 would reasonably require a compliance hearing to resolve the issue of access, rather
21 than have it be resolved by administrative fiat.

22 Nonetheless, the undersigned concludes that Respondent's essential premise in
23 asserting its right to attorney's fees and costs goes to the Respondent's inaction during
24 the length of time it took to make the determination to set the compliance hearing,
25 because during that time the Registrar apparently provided no interim response –
26 despite Respondent's multiple inquiries - to explain that the impending suspension of
27 Respondent's license by the Registrar would be stayed pending such a hearing.
28 Unaware of and arguably unable to gain information from the Registrar about that
29

30 ⁵ Administrative proceedings differ from civil actions with regard to the recovery of attorney's fees and costs. Compare

1 aspect of the Registrar's policy, Respondent then took action to prevent suspension by
2 settling the underlying complaint shortly before the apparent date on which the license
3 was to be suspended, but at an expense in attorney's fees and settlement costs it might
4 not otherwise have incurred.

5 The undersigned determines that the Registrar's essential premise is that no
6 award of fees and costs can be made because the particular issue whether the
7 Registrar acted timely has never been addressed by any administrative law judge, nor
8 has any order been entered to that end, such that Respondent cannot be considered to
9 have prevailed on that issue.

10 It is the conclusion of this administrative law judge that this premise of the
11 Registrar is compelling. That is, to the extent that Respondent may be said to have
12 prevailed as a result of the compliance hearing - in that the Registrar's impending
13 disciplinary suspension of its license did not occur - there is reason to question whether
14 the Registrar can be considered a party to that proceeding, and in any event there was
15 no reason at that time to take evidence from both Respondent and the Registrar to
16 address the issue of the Registrar's alleged inaction vis-à-vis Respondent's
17 determination to settle the underlying case.

18 For those reasons, Respondent cannot yet be shown to have prevailed on the
19 most significant issue to be addressed as a prerequisite to any award of fees and costs,
20 because that issue - whether the Registrar's inaction over the time in question was not
21 substantially justified and caused Respondent to incur those attorney's fees and costs -
22 has not yet been heard. Therefore, Respondent's Motion for Award of Attorney's Fees
23 and Costs is not yet ripe for a determination on its merits.

24 Pursuant to A.R.S. § 41-1092.3, an "appealable agency action" means "an action
25 that determines the legal rights, duties or privileges of a party and that is not preceded
26 by an opportunity for an administrative hearing." Because the nature of the Registrar's
27 particular action (or inaction over time) in response to Respondent's multiple
28 submissions, would determine Respondent's legal right to attorney's fees and costs, it is
29 the conclusion of the undersigned that this issue presents an appealable agency action,

1 and as such should be addressed and resolved through an appropriate evidentiary
2 hearing before an administrative law judge.

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8 On the basis of the foregoing, IT IS RECOMMENDED by the undersigned that
9 the Registrar re-caption and re-submit this matter for hearing as an appealable agency
10 action, with Respondent and the Registrar as the named parties.

11 Done this day, February 5, 2004.

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16 _____
17 Anthony Halas
18 Administrative Law Judge
19

20 Copy mailed this ____ day of
21 _____, 2004 to:

22 Israel G. Torres, Director
23 Registrar of Contractors
24 ATTN: Jennifer Brown
25 800 West Washington, 6th Floor
26 Phoenix, AZ 85007

27 Montgomery Lee
28 Assistant Attorney General
29 1275 West Washington
30 Phoenix, AZ 85007

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Mesa, AZ 85202

Lubo Gordic
4536 E. Merrill Lane
Higley, AZ 85236

By _____