

ARMED SERVICES BOARD OF CONTRACT APPEALS

Application Under the Equal Access )  
to Justice Act of -- )  
)  
Griffin Services, Inc. ) ASBCA Nos. 52280, 52281, 54246,  
) and 54247  
)  
Under Contract No. SP4700-97-D-0007 )

APPEARANCE FOR THE APPELLANT: Karl Dix, Jr., Esq.  
Smith, Currie & Hancock LLP  
Atlanta, GA

APPEARANCE FOR THE GOVERNMENT: Jo Dubose Spence, Esq.  
Office of Counsel  
Defense Logistics Agency  
Fort Belvoir, VA

OPINION BY ADMINISTRATIVE JUDGE KIENLEN

This application is for attorneys' fees and expenses incurred in connection with the litigation of a dispute arising out of a contract for electrical operations and maintenance services at the Defense Logistics Agency headquarters complex at Fort Belvoir, Virginia.

After an ineffective attempt to exercise an option for the first year, the government exercised successive options for a total of six months. The contractor also incurred costs for extra work. On 2 August 2002 we granted Griffin's motion for summary judgment with respect to the three-month period between 1 January and 31 March 1998. We denied the motion with respect to the earlier period of three months. *Griffin Services, Inc.*, ASBCA Nos. 52280, 52281, 02-2 BCA ¶ 31,943. The appellant later filed a motion for summary judgment with respect to the amount of money to which it was entitled. On 20 July 2004 we granted appellant's quantum summary judgment motion in the amount of \$111,888.33. *Griffin Services, Inc.*, ASBCA Nos. 54246, 54247, 04-2 BCA ¶ 32,710. The appellant received this decision on 23 July 2004.

Thereafter, we decided the remaining entitlement and quantum issues in ASBCA Nos. 52280, 52281. On 27 August 2004 we decided that the appellant was not entitled to compensation for contract services during the option periods between 1 October and 31 December 1997; but, that the appellant was entitled to \$7,467 for the extra work performed during that period. *Griffin Services, Inc.*, ASBCA Nos. 52280, 52281, 04-2 BCA ¶ 32,745. The appellant received that decision on 2 September 2004; it became

final on 3 January 2005. The earlier quantum decision became final on 22 November 2004 - 120 days after receipt of the decision by the appellant. 41 U.S.C. § 607; FED. R. APP. P. 26

### ALLEGATIONS

Griffin has alleged that it is a prevailing party and is eligible to receive an award. It has also alleged that the position of the government in the adversary adjudication was not substantially justified. 5 U.S.C. § 504(a)(2). Griffin seeks \$19,461.64 and has submitted a supporting itemized statement of its attorneys' fees and other expenses. Griffin has met the statutory requirements for filing an application. See *Scarborough v. Principi*, 541 U.S. 401, 124 S. Ct. 1856, 1866 (2004). The government was advised of the application by notice of 12 October 2004 and, in accord with the board's interim procedures, given 30 days to file an answer. The government has not responded.

### TIMELINESS

This application for attorneys' fees and expenses was received on 8 October 2004. The application was received after issuance of the board's decisions on the merits, but prior to the decisions becoming final. Those decisions have become final and it appears that there have been no appeals from those decisions. The application has thus been timely filed.

### PREVAILING AND ELIGIBLE PARTY

We found in favor of the appellant on all issues except those relating to the option exercises for the three-month period from 1 October through 31 December 1997. The appellant is thus a prevailing party. In order for the appellant, a corporation, to be an eligible party, the appellant must have had a net worth that did not exceed \$7,000,000, and had no more than 500 employees, at the time the adversary adjudication was initiated. 5 U.S.C. § 504(b)(1)(B). The appellant has filed an affidavit of Kenneth A. Klueter, the Financial Controller for Griffin Services, Inc., as well as supporting documentation. The government has not contested that the applicant is an eligible party, and we so find.

### SUBSTANTIAL JUSTIFICATION

The government has the burden of establishing that the position of the United States was substantially justified. *Scarborough v. Principi*, 541 U.S. 401, 124 S. Ct. 1856, 1865 (2004). For a position to be substantially justified, a reasonable person must be able to think that the position was correct. In order for the government to show that its

position was substantially justified, the government must establish that its conduct had a “reasonable basis both in law and fact.” *Pierce v. Underwood*, 487 U.S. 552, 565 (1988).

With respect to those claims for which we found that the appellant was entitled to an award, we found that the government had not provided any evidence of the necessary factual predicates to reasonably establish its positions. *Griffin Services, Inc.* at 02-2 BCA at 157,805; 04-2 BCA at 161,821; 04-2 BCA at 161,949. Under those circumstances it cannot be said that the government’s positions were such that a reasonable person could think them to be correct or for them to have a reasonable basis both in law and fact. Therefore, we conclude that the positions of the government with respect to those claims were not substantially justified. *Pierce v. Underwood*, 487 U.S. 552, 565-66 (1988).

### ATTORNEYS’ FEES AND EXPENSES

Our order on this application stated that our decision would be limited to whether the government’s position was substantially justified and any other questions relating to entitlement that may be raised by the record. We are therefore returning the quantum issue to the parties.

### CONCLUSION

The parties should resolve the amount of the fees and expenses. If the parties fail to do so within 30 days, the applicant may return to us for our determination.

Dated: 17 February 2005

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RONALD A. KIENLEN  
Administrative Judge  
Armed Services Board  
of Contract Appeals

I concur

I concur

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MARK N. STEMLER  
Administrative Judge  
Acting Chairman  
Armed Services Board

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EUNICE W. THOMAS  
Administrative Judge  
Vice Chairman  
Armed Services Board

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals on an application for fees and other expenses incurred in connection with ASBCA Nos. 52280, 52281, 54246, and 54247, Appeals of Griffin Services, Inc., rendered in accordance with 5 U.S.C. § 504.

Dated:

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CATHERINE A. STANTON  
Recorder, Armed Services  
Board of Contract Appeals