

SUPPLEMENTAL

COUNCIL AGENDA: 04-24-07
ITEM: 8.1



Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: Katy Allen

SUBJECT: SEE BELOW

DATE: 04-19-07

Approved

Date

4/20/07

COUNCIL DISTRICT: 3 & 4

**SUBJECT: SUPPLEMENTAL MEMO NEW FIRE STATION NO. 34 - HEARING ON
REQUEST FOR SUBSTITUTION OF SUBCONTRACTOR**

REASON FOR SUPPLEMENTAL MEMORANDUM

To address a new letter submitted by the subcontractor, California Woodworking (CW), to address the recent development that there is no longer a specific subcontractor to substitute in for CW and to inform Council of the attempts by Public Works to meet with the contractors to assist in attempting to resolve the issue.

RECOMMENDATION

- (a) **ADMINISTRATIVE HEARING** and consideration of staff's recommendation to grant the request of Gonsalves & Stronck Construction Company (G&S), the general contractor on the new Fire Station No. 34 project, to substitute the subcontractor listed by G&S to perform the custom cabinet work, and adoption of a resolution setting forth the decision of the City Council.
- (b) If the City Council approves the request for substitution, adoption of a resolution authorizing the Director of Public Works to approve the subcontractor to be substituted for California Woodworking (CW) once Gonsalves & Stronck Construction Company identifies a new subcontractor.

ANALYSIS

A. Response to CW's Letter

On April 7, 2007, CW submitted a letter to the City responding to the recommendation of Public Works contained in City Council Memorandum on this matter. A copy of that letter is attached to this Supplemental Memorandum.

CW makes two main arguments in its letter as to why the City Council should deny G&S's request for substitution: (1) G&S has failed to comply with the requirement to provide CW with a subcontract based on CW's written bid, and (2) Westmark has already commenced preliminary work on the project. Neither of these arguments changes the recommendation of Public Works to grant the request for substitution of the subcontractor by G&S.

Issue #1: CW's claim that G&S has failed to comply with the requirement to provide CW with a subcontract based on CW's written bid.

Staff's recommendation is based on changes made by CW that went beyond those necessary to make the subcontract consistent with CW's bid proposal. CW correctly points out that G&S was required by Section 2-1.15B(a) of the Standard Specifications to provide CW with a subcontract based on the terms and conditions of CW's written bid, and that G&S failed to do this. However, CW included additional changes to the provisions that were never discussed by the parties before G&S accepted CW's proposal. This category of changes involves areas in which the parties are free to differ. G&S was within its right not to accept these changes.

On pages 3 and 4 of its letter, CW effectively concedes that it made changes that went beyond those necessary to make the subcontract consistent with its bid proposal. For example, CW argues that the changes to the indemnity provision have "no relevance or affect to the relationship between the Owner and the contractor unless the modification of that provision is outside the general indemnity terms of the Project Contract, and can be shown to be a quantifiable risk to the Owner."

The real issue is not about the impact to the City of the proposed change to the indemnity language, but the issue is whether CW's proposed changes provide a reasonable basis for G&S to not execute a contract with CW. Public Works concludes that the changes proposed by CW to the indemnity provision are material and that G&S is not required to agree to them.

CW also argues that a number of its other proposed changes were "minor" when compared with the changes needed to make the subcontract consistent with CW's bid proposal. However, staff concludes that these other changes were also material and that G&S was not required to agree to them.

Issue #2: CW's claim that Westmark has already commenced preliminary work on the project.

CW also contends that G&S has already entered into an agreement with a new subcontractor, Westmark, and that Westmark has started preparing shop drawings and contacted the Woodwork Institute. The City still considers CW to be the subcontractor on the Fire Station No. 34 project and will continue to do so until there is a proper subcontractor substitution. In addition, Westmark has withdrawn from the project, resulting in CW's contention no longer being relevant as noted below. The City will take appropriate action if G&S does not use CW to perform the work if there is not a proper substitution.

04-19-07

Subject: Fire Station 34 Subcontractor Substitution Supplemental Memo

Page 3

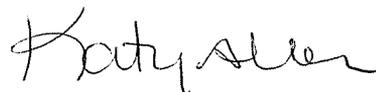
B. Delegation of Authority Regarding a Substitute Subcontractor

G&S's request initially involved substituting Westmark for CW. However, G&S reported to staff on April 10, 2007 that Westmark has indicated that it can no longer commit to delivering the cabinet work for project within the scheduled timeframe due to the length of time G&S has taken to resolve the substitution issue. Westmark has asked G&S to be relieved of its prior commitment to G&S. G&S is currently negotiating with another subcontractor to perform the work. Accordingly, Public Works recommends that the City Council authorize the Director of Public Works to approve an appropriate and qualified subcontractor to replace CW when G&S submits such a subcontractor. This will allow the project to proceed most expeditiously.

C. Attempt to Meet with the Contractors

In an attempt to help facilitate a resolution of this matter, Public Works has made several offers over the last couple of weeks to meet with G&S and CW in the hopes of getting them to discuss the issues. G&S has expressed a willingness to meet with the City and CW. However, CW has indicated that because of previous work commitments in Southern California it could not meet with the City and G&S until after Friday, April 20, 2007. Public Works has made another offer to meet with the parties the morning of the April 24, 2007 Council meeting. Public Works is hopeful that both contractors will accept this offer.

In short, after reviewing and considering the letter submitted by CW, Public Works continues to recommend that the City Council grant the request of G&S to substitute a different subcontractor for CW.



KATY ALLEN
Director, Public Works Department

For questions please contact DAVID SYKES, ASSISTANT DIRECTOR, at (408) 535-8300.

KJ:dp:df:aa
Attachment
New FS#34 Substitution of Subcontractor

4/7/2007

California

Woodworking



4550 E. PINE AVE. FRESNO, CA. 93703
ph: (559) 252-5568 fax: (559) 252-5579
License No. 646408 W.I.C. Member Since 1997

To: City of San Jose Dept. of Public Works
Attn: Ms. Katy Allen Director
Subject: Memorandum of 3/27/07: Council Agenda 04-10-07 / Item 8.2 / Fire Station No. 34
Response from California Woodworking to Memorandum Recommendation

Dear Ms. Allen:

I have received and reviewed the above Memorandum, and respectfully submit my response for your consideration. It is my hope that the rebuttal arguments offered by me will result in your reconsideration and reversal of the recommendation for approval of the substitution request.

Gonsalves and Stronk Construction (G&S)
California Woodworking (CW)
City of San Jose (the City)
the Memorandum (as noted above)

The City has determined that the substitution request by G&S shall be based upon Section 2-1.15B of the San Jose Standard Specifications. Article 1.15B prohibits the contractor from substituting a listed subcontractor unless the City authorizes that substitution. That substitution can be authorized at the discretion of the City ("may") only after 1) specific conditions exist that qualify that substitution ((a) through (g)), and after the hearing process determines that the condition ((a) through (g)) is valid and therefore allows for that substitution.

In this substitution request, The City has determined that 2-1.15B(a) is the applicable condition that must be satisfied to allow for the substitution of CW. This paragraph contains specific language that places a legal incumbency upon the contractor to present the listed subcontractor with an agreement that is ..."based upon the general terms, conditions, plans and specifications for the project involved or the terms of the subcontractor's written bid"... If the contractor does not meet this condition, then a substitution cannot be allowed under this paragraph.

The subcontract agreement presented to CW did not meet the conditions of 2-1.15B(a). Within the Memorandum, you have stated that this is the case in a minimum of 5 agreement conditions that are substantial, clearly communicated and non-negotiable and were presented to G&S in our pre-bid scope letter of 6/5/06 and in our bid-day scope letter of 6/6/06 (Category 2). Item #5 is most critical, as it insures that the specific language of our Inclusions, Exclusions and Terms (which directly relate to our pricing) are held in place within any agreement for the work. This language was clearly communicated to G&S during the pre-bid and bid-day process, and G&S maintained the option to reject this proposal, or at least contact me to discuss this prior to their choice to list CW. By listing CW for this project, G&S made the choice to accept our bid-day proposal as a whole.

Subsequently, G&S has refused to include the language of our bid in the agreement and are now attempting to replace us for rejecting an agreement that does not recognize the bid they accepted on 6/6/06.

Logic holds that if the agreement offered to me does not comply with the requirements of 2-1.15B(a), then my refusal to execute that agreement does not create grounds for the approval of a substitution. G&S has not yet presented CW an agreement that complies with 2-1.15B(a). Based upon your own findings, I request that the City reject the substitution request by G&S and direct them to comply with 2-1.15B(a) and section 4107 of the Public Contract Code and present CW with a compliant agreement to execute so that we can begin our work.

The statements within the Memorandum relating to the G&S action to subcontract with Westmark Products for the work are incorrect and incomplete. The action by G&S to subcontract with another firm is important to this process, cannot be left un-addressed, and I respectfully submit my position on this as follows:

2-1.15G (Violations of Subcontractor Requirements) holds that penalties may be assessed against the contractor for a violation of the requirements of 2-1.15B. This provision of the San Jose Specifications is exclusive to the City and has been enacted through the process of hearings, legal consultation and information discovery. 2-1.15G (through the possibility of immediate penalties) protects the subcontractor from an illegal substitution with due process from the City at the time of the project ("short-term resolve"), thereby preserving the right of the original listed subcontractor to provide the work for that project. Also, 2-1.15G (through the possibility of immediate penalties) assists to discourage intimidation of subcontractors and the possibility of bid-peddling scenarios at the project level by substituting that subcontractor rather than showing compliance with 2-1.15B(a) and section 4107 of the Public Contract Code.

On or about Nov. 16, 2006 G&S presented me an agreement that did not comply with 2-1.15B(a). It should be noted that this agreement was offered to me almost 5 months after the start of the project and beyond the milestone dates for the submittal process. Within that agreement, it required that I provide services prior to the execution of an agreement ("provide submittals within 10 days of receipt of this contract"), did not recognize the entirety of my bid-day scope letter, and set contractual conditions outside of 2-1.15B(a). I refused to execute that agreement, and instead made modifications that served to open negotiations for an agreement resolution.

Rather than respond to me in any form, G&S contacted Westmark Products, and executed an agreement. Further, and most importantly, G&S (through the execution of that agreement) directed Westmark to start work on the project. Westmark started the shop drawing process and contacted the Woodwork Institute, where they ordered and received the W.I. Certification documents and labels for that work. Westmark progressed the work by starting the submittal process and the expended costs of the W.I. certification. This constitutes a progress of the work. Please also know that CW and Westmark are both Active Member licensee's of W.I., and this has not gone unnoticed within that organization.

The Memorandum states (Page 3) that "G&S has represented that the subcontract agreement is "on hold in obeyance of pending consent by the City...". That is not correct. G&S has stated in their response of 3/7/07 (Addendum Page 68) that "...the prosecution of work per that agreement is on hold per obeyance..." . In fact, Westmark did proceed with work, and that work was halted only after CW began the process of protest to the actions of G&S.

I respectfully request for your consideration and submit to you that 1) the substitution by G&S did happen and is in defiance of specific San Jose Specifications, 2) that G&S is an experienced and

knowledgeable public works contractor and are aware of the Public Contract Code and the San Jose Specifications in this regard, and 3) this action by G&S did serve to intimidate CW rather than begin negotiations towards an agreement.

The Memorandum has stated that modifications to the agreement made by me "provide a basis to approve" the request by G&S (Category 3 items). This basis for approval presumes that modifications to an agreement that was originally presented as non-compliant with 2-1.15B(a) can be used to qualify the request. 2-1.15B(a) does not allow for substitution based upon modifications to a document by the subcontractor. 2-1.15B(a) does not allow substitution based upon a disagreement between parties with terms and conditions that are outside of 2-1.15B(a). It requires that a compliant document shall be presented by the contractor. The fact that G&S has a "standard subcontract agreement" is irrelevant. The fact that another firm is willing to execute that "standard agreement" is also irrelevant.

Category 3-

Item#1:

CW is not required to provide services prior to the execution of an agreement. This requirement by G&S is beyond compliance with 2-1.15b(a) and modifying that requirement to allow a reasonable term to complete this work is justified. G&S has not provided CW with any project schedule information to date, and since the agreement came to us almost 5 months into the project (and after the submittal "Milestone Dates" had passed, I felt it prudent to address this item in the project specifications as may relate to our responsibilities for submittal completion. The fact that the balance of the agreement was substantially non-compliant with 2-1.15B(a) renders this item irrelevant or minor and could have been prevented by earlier communication from G&S.

Item#2-

The Indemnity provision within a subcontract agreement between the contractor and subcontractor has no relevance or affect to the relationship between the Owner and the contractor unless the modification of that provision is outside of the general indemnity terms of the Project Contract, and can be shown to be a quantifiable risk to the Owner. I submit that review of the legal ramifications of the changes to the Indemnity provision will show that the use of the changes to that provision to qualify for a substitution is "a bit of a reach". Further, the original agreement was already substantially out of compliance with 2-1.15B(a), and this modification is minor compared to the issues of refusing the entirety of our bid-day proposal.

Item #3-

G&S waited until almost 5 months into the project to present us with an agreement that was non-compliant, did not recognize our bid-day documents, and basically set the stage for a lengthy negotiation period followed by a need for us to provide our services in a substantially reduced time frame. This potentiality was not included in our bid day considerations. Therefore, I felt it was necessary to address this issue immediately, and therefore offered considerations for G&S. In terms of other more substantial issues within the agreement, the issue of time has always been minor and successfully negotiable compared to say..... the issue of requiring union labor from a non-union shop. Again, I submit that this is a minor issue.....not the real issue at hand, and could have been easily resolved with contact from G&S....perhaps even a phone call. I do not deny making these changes, I only submit that the balance of the agreement was so substantially out of compliance with 2-1.15B(a) already that this item is nearly irrelevant.

Item#4-

I respectfully request that you reference the San Jose Specifications / 2-1.15D and 7-1.01 and Public Contract Code / Section 4108(c) #1,2and3. CW legally removed this provision as G&S did not comply with advertisement laws so as to require bonding.

Item #5 and item #6-

These modifications are minor to the agreement as a whole and do not qualify for substitution from an agreement that was substantially non-compliant with 2-1.15B(a) to begin with.

My position is that G&S presented CW with a non-compliant agreement. Upon my refusal to execute that agreement, and subsequent modifications in attempt to open negotiations with G&S, G&S responded in clear violation 2-1.15B(a) by subcontracting with another firm, who proceeded with the work until I protested and opened the process for this decision by the City. To date, G&S has not yet complied with 2-1.15B(a) and presented me with an agreement that complies (even closely).

I submit that the basis of the recommendation by Public Works is one of irrelevance compared to the whole of the actions by G&S, and respectfully request that the City immediately and unanimously reject the request by G&S and direct G&S to present CW with an agreement that fully complies with 2-1.15B(a) so that we can complete our agreement and begin our work on this project.

Thank You,
Ray Gorman / California woodworking