



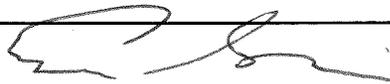
Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: David Sykes

SUBJECT: SEE BELOW

DATE: 05-23-11

Approved 

Date

5/27/11

COUNCIL DISTRICT: Citywide

SUBJECT: FIRE STATION NO. 36 ADMINISTRATIVE HEARING ON REQUEST FOR SUBSTITUTION OF SUBCONTRACTOR

RECOMMENDATION

That the Council consent to the request of Applegate Johnston, Inc. (AJI), the general contractor on the new Fire Station No. 36 Project, to substitute itself and Butte Steel for Sciarini Steel.

OUTCOME

Consent to AJI's substitution request will enable the proper substitution of AJI and Butte Steel for Sciarini Steel.

BACKGROUND

On January 26, 2010, the City Council awarded the Fire Station No. 36 project contract in the amount of \$4,008,500 to Applegate Johnston, Inc. (AJI). A Notice to Proceed was issued on April 12, 2010, with a construction start date of April 22, 2010. The project is approximately 36% complete, and is many months late even though the contractor is accelerating to make up for lost time. The final completion date is yet to be established, and is behind schedule due to difficulties encountered with the weather, change of contractor's key personnel, and the apparent non-performance of the steel subcontractor.

On February 9, 2011, AJI submitted a second request for permission from the City to substitute Sciarini Steel. AJI initially requested a substitution on October 8, 2010, following a 48-hour Notice of Non-Performance issued by AJI to Sciarini Steel on September 17, 2010. This first request was later rescinded by AJI after receiving assurances from Sciarini Steel that it would perform per the contract. AJI has based this second request on the assertion that Sciarini Steel has refused to perform its subcontract work which is in accordance with the requirements of City of San José Public Works Standard Specifications dated July 1992, Section 2-1.15B Substitution of Subcontractors.

The Standard Specifications prohibit AJI from substituting another subcontractor for Sciarini Steel unless the City first consents to the substitution for one of the reasons enumerated therein or if the subcontractor does not contest the substitution. Therefore, in compliance with the City's specifications, the City sent Sciarini Steel Company a certified letter dated February 9, 2011 informing them of AJI's substitution request and notifying them that if they had any objections to the request for substitution, that they submit their objection in writing to the City within 5 working days. Sciarini Steel responded within the requested timeframe on February 14, 2011, objecting to the substitution stating that if they got paid for the work completed, including material stored off site, they could finish the work.

Subsequent to the written objection received from Sciarini Steel, the City notified AJI that it had received an objection from Sciarini Steel to the substitution and that the City could not presently consent to the substitution of the listed subcontractor. In an attempt to resolve the issue, the City chose to exercise its option to seek a resolution to the dispute through partnering, as described in the project's Special Provisions Section 1-1.278 Partnering, which is provided for the purpose of resolving issues and problems between all parties. All parties were not able to meet at the same time, however; separate meetings were held with Sciarini Steel and AJI. During our meeting with Sciarini Steel, it did not provide any additional reasons or documentation to support its objection for the substitution, except for reiterating its prior objection, which is that Sciarini Steel had not received payment for the percentage of work completed, including material stored on site. Sciarini Steel was reminded that the City only approves payments for work installed and not for stored materials, which Sciarini Steel stated it understood.

Since a resolution to the substitution request could not be reached during this meeting, it was requested that AJI provide more detailed background documentation to support its request. In our partnering meeting, the AJI project manager delivered AJI's response to Sciarini Steel's objections of February 14, 2011. Public Works received a cover letter, a copy of the subcontract agreement, copies of 48-hour Notices, project letters, invoices, faxes, photographs, emails and general correspondence regarding licensing, insurance and project notes and procedures related to the non-compliance results of the initial steel installation effort as support for the substitution request.

On March 17, 2011, the City sent a certified letter notifying Sciarini Steel that it was preparing a request for an administrative hearing on the contractor's request for the substitution and forwarded copies of all of the documentation provided by AJI to Sciarini Steel so that it could prepare a rebuttal to the information presented by AJI. The letter and the accompanying documents were returned to the City on April 12, 2011 by the United States Postal Service as unclaimed and the return receipt unsigned. After verification with the post office, no forwarding address was provided. As of this date, no written or verbal rebuttal has been received from Sciarini Steel.

ANALYSIS

A. Substitution Is Proper Because Sciarini Steel Company Failed and/Or Refused To Perform Its Subcontract

Pursuant to Section 2-1.15B(c) of the City of San José Standard Specifications, the City may consent to a general contractor's request to substitute another subcontractor for a listed subcontractor "when the listed subcontractor fails or refuses to perform its subcontract." The facts demonstrate that Sciarini Steel has failed and/or refused to perform its subcontract. Accordingly, staff recommends that the City Council consent to the substitution request.

1. Subcontractor not in compliance with licensing and insurance terms of its subcontract agreement with Applegate Johnston.
 - On May 24, 2010, AJI and Sciarini Steel executed AJI's Standard Subcontract. After the award of the construction contract, on August 10, 2010, AJI received notice from the City that Sciarini Steel's license had been suspended creating a 3 week delay in the steel portion of the work.
 - Additionally, on December 22, 2010, Sciarini's insurance was found to be out of compliance with the AJI contract. The General Liability carrier providing the insurance did not meet city minimum standards. It was later determined that Sciarini had no general liability, auto and excess coverage available from September 28 to December 14, 2010.
 - On February 9, 2011, the insurance carrier cancelled the general liability insurance due to non-payment of the premium, and its contractor's licensed bond was cancelled on March 9, 2011.
2. Subcontractor fails or refuses to respond to 48 hour Notices or to meet submittal deadlines, scheduled material delivery dates or scheduled work.

In its letter, dated March 2, 2011, AJI asserts that the subcontractor has once again failed to meet submittal deadlines which prompted the first request for substitution. Prior to AJI's second substitution request, Sciarini Steel acknowledged partial responsibility for the schedule delay in its fax to AJI on October 10, 2010. On February 2, 3, 4 and 9, 2011, AJI once again had to issue 48-hour Notices for non-response, schedule deliveries and scheduled work missed.

Due to the lack of construction progress caused by the delay of the steel submittals, and Sciarini Steel's refusal to respond to inquiries from suppliers and AJI, AJI worked with Sciarini Steel's seismic and structural detailing vendors directly in order to produce the required submittals for the fabrication and installation of critical path structural members.

Further evidence of Sciarini Steel's non-performance is the fact that after the delivery of the structural steel to the site on October 18, 2010, six days later than promised by Sciarini Steel in its fax to Applegate Johnston on October 11, 2010, it was discovered by a third party firm, providing special inspection services for the City and the structural engineer of record, that the

proper welding certifications were not in place to install the steel. The welding qualifications and factory mill certifications had to be revised and resubmitted for review, and approval for installation was not obtained until 3 weeks later. Additionally, on November 4, 2010, Sciarini Steel delivered unacceptable buckling restrained braces (BRBs) to the site for installation. Since they were not the manufacturer specified BRBs specified by the structural engineer of record, they were not installed. Consequently, AJI took over the contracting and purchasing responsibilities from Sciarini Steel and worked directly with the manufacturer. The specified structural members were delivered on February 16, 2011, approximately eleven weeks late including the re-submittal, fabrication and delivery of the steel from Utah.

3. Compensation

On February 14, 2011, in a fax response provided by Sciarini Steel to AJI's request for substitution, Sciarini stated that it only needs to be paid for the work completed to date to complete the contract. Sciarini Steel's response stated that it had invoiced up to 69% completion (\$215,615.50) but had been paid only \$26,648.99 or 8.5%. Our records indicate that on September 30, 2010, Sciarini billed for structural steel design, structural steel fabrication and structural steel erection in the amount of \$133,750 and 100% of the request was approved by the City for payment. This represented approximately 43% of Sciarini Steel's contract amount of \$314,650, and none of the steel had been delivered to the site. There appears to be no dispute that payments were approved for Sciarini Steel for the work performed.

Sciarini Steel's non-responsiveness to AJI regarding submittals and delivery schedules also extended to its suppliers. As a result, payments had to be made by AJI to the suppliers directly since they had not been paid by Sciarini Steel. AJI made the payments to the vendors in order to move forward with the revised steel submittals, the detailing of all steel, steel fabrication with the specified manufacturer, preparation of the revised welding qualifications and factory mill certifications, and the delivery and erection of the BRBs on the site.

B. Making Consent Retroactive

Since the initial delivery of the steel to the site was not approved for installation by the City's consultant providing special inspection services, the structural engineer of record or AJI, due to the non-compliant welding qualifications and factory mill certifications, any work completed after September 30, 2010, more specifically, October 18, 2010 was mainly due to the general contractor efforts in working directly with Sciarini Steel's vendors. In order not to delay the project any further as a result of Sciarini's Steel's failure to perform its work, AJI made a decision to proceed with the work that Sciarini Steel was supposed to perform. AJI performed some of the work, working directly with Sciarini Steel vendors Cal West Steel Detailing and Star Seismic, and ultimately contracted with Butte Steel to perform the remaining additional required work. AJI took this action from October 2010 through February 2011 before obtaining the City's consent to the substitution request. In taking this action, AJI accepted the risk that it might be violating the subcontractor listing requirements but apparently felt that this risk was justified to avoid any further delays to the construction of the project. AJI made the decision to

proceed in this manner on its own with no input from the City. The City did not suggest or otherwise endorse or influence AJI's decision to proceed in this manner.

It is a violation of the subcontractor listing requirements to use another subcontractor to perform the work of a listed subcontractor without obtaining the City's consent to the substitution. In this case, however, staff is recommending that the City Council consent to AJI's request for substitution after the substitution has in fact occurred, the provision of which "retroactive" consent is permissible under applicable law. This recommendation is based on the consistent pattern of facts demonstrating Sciarini Steel's failure and/or refusal to perform extending back over the course of several months, as more fully described above.

CONCLUSION

The City requested documentation supporting their respective positions, however, only AJI submitted a detailed case supporting their request to substitute Sciarini Steel per Section 2-1.15B per the Standard Specifications. The supporting documentation provided by AJI was sent to Sciarini Steel on March 17, 2011 via certified letter for its review and consideration with a recommendation from City staff that it prepare a rebuttal in writing and deliver it to the City by 5:00 p.m. on Friday, March 25, 2011. As mentioned before, the letter and the accompanying documents were returned to the City on April 12, 2011 unclaimed by Sciarini Steel, and no written or verbal rebuttal has been received from Sciarini Steel.

Based upon the numerous instances of substantial and continual uncontroverted failures to perform the terms of its subcontract with AJI, staff believes there is sufficient basis for the City Council to determine that Sciarini Steel has failed and/or refused to perform its subcontract and to thereby consent to the requested substitution. Further, regardless of whether or not the failure to pay compensation is controverted, Section 2-1.15B(c) of the Standard Specifications does not require the City to determine whether – as between AJI and Sciarini Steel- any such failure or refusal to perform is or is not justified. Section 2-1.15B(c) recognizes both that an owner, such as the City, is not in a position to resolve disputes between the general contractor and its subcontractors, and should not have to stop construction on a project when the subcontractor refuses or fails to perform – regardless of the reasons for such lack of performance.

Accordingly, given that Sciarini Steel has failed and/or refused to perform its subcontract, staff recommends consenting to AJI's substitution request. The City Council's acceptance of this recommendation will not affect Sciarini Steel's ability to pursue its payment claims against AJI.

In making these recommendations staff does not anticipate any additional costs to the project. Per the standard and special provisions of the contract, any delays to the construction resulting from the substitution request are incumbent on AJI to address and correct. Therefore, no cost impact or budget reference is included in this report.

POLICY ALTERNATIVES

Alternative # 1: Section 2-1.15B.1 of the City of San José Standard Specifications does not require the City to consent to the substitution even if one of the grounds for granting substitution exists. It provides that the City “may” consent to the substitution in such situations.

Accordingly, the City Council could decide *not* to give its consent to the requested substitution.

Pros: This alternative maximizes the protections afforded to the subcontractor Sciarini Steel.

Cons: There is a potential negative impact to the project, particularly the project construction schedule, while the contractor is forced to attempt to negotiate a settlement with Sciarini Steel. If the parties are still not able to reach an agreement, AJI would have to make a third request to the City to consent to the substitution of Sciarini Steel.

Reason for not recommending: Potential negative impacts on the project, particularly the project schedule.

PUBLIC OUTREACH/INTEREST

- Criterion 1:** Requires Council action on the use of public funds equal to \$1 million or greater. **(Required: Website Posting)**
- Criterion 2:** Adoption of a new or revised policy that may have implications for public health, safety, quality of life, or financial/economic vitality of the City. **(Required: E-mail and Website Posting)**
- Criterion 3:** Consideration of proposed changes to service delivery, programs, staffing that may have impacts to community services and have been identified by staff, Council or a Community group that requires special outreach. **(Required: E-mail, Website Posting, Community Meetings, Notice in appropriate newspapers)**

This item does not meet any of the criteria listed above. This memorandum will be posted on the City’s website for the June 14, 2011 Council agenda.

COORDINATION

The project and memorandum have been coordinated with the City Attorney’s Office.

CEQA

CEQA: Exempt, PPO6-009 and PPO9-150.

/s/

DAVID SYKES
Acting Director of Public Works

For questions please contact HARRY FREITAS, DEPUTY DIRECTOR, at (408) 535-8300.

HONORABLE MAYOR AND CITY COUNCIL

05-23-11

Subject: Fire Station No. 36 Project

Page 7

Attachment

EXHIBITS A1-6 (CSJ AJI and Sciarini Steel Correspondence)

EXHIBITS B1-14 (AJI exhibits)

EXHIBITS C1-27 (General Correspondence October 19, 2010 – March 2, 2011)

DS: RR:ra