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AWARDING AUTHORITY MAY INITIATE SUBSTITUTION OF A PUBLIC WORKS SUBCONTRACTOR

In *Synergy Project Management, Inc. v. City and County of San Francisco* (2019) 33 Cal. App. 5th 21, the First District Court of Appeals held for the first time that an awarding authority may seek substitution of a subcontractor under Public Contract Code section 4100 et seq.

Factual Background

The City and County of San Francisco (City) contracted with prime contractor Ghilotti Bros., Inc. (Ghilotti) for a major renovation of Haight Street. Ghilotti subcontracted excavation and utility work to Synergy Project Management, Inc. (Synergy). After Synergy broke five gas lines and engaged in other unsafe behavior (e.g., dangling foreman upside down from a forklift and lowering him into a manhole without safety equipment or traffic control), the City invoked a provision of its contract with Ghilotti to direct Ghilotti to remove Synergy from the project and substitute a new subcontractor. Under protest, Ghilotti terminated Synergy and identified two replacement contractors to the City. Synergy objected to being replaced. A substitution hearing was held under PCC section 4107(a), and the City's hearing officer determined that Synergy's poor performance established a statutory ground for substitution.

Synergy and Ghilotti each filed a petition for a writ of administrative mandate in the trial court. They contended the hearing officer lacked jurisdiction because Ghilotti had not made a "request" for substitution within the meaning of either section 4107(a) or the relevant provision of the City-Ghilotti contract. The court agreed and granted the petitions.

Opinion

On appeal, the City claimed the trial court's ruling was erroneous. The Court of Appeal agreed with the City and concluded that while section 4107 "contemplates that the prime contractor will normally be the party to seek substitution, the procedure followed in holding a hearing 'complied in substance with all reasonable objectives of the statutory scheme.'" [Citation omitted.]

The court reasoned that the intent of the larger statutory framework encompassing section 4107, the Subletting and Subcontracting Fair Practices Act (the Act), was intended to prevent “bid shopping” and “bid peddling” after the award of a public contract. The court acknowledged that the Act afforded subcontractors certain rights, such as are contained in section 4107, which ensure the listed subcontractor is permitted to perform the subcontract, unless statutory grounds exist for valid substitution.

However, the court also noted that the Act gives owners the power to investigate and approve any subcontractor whether proposed in the original bid or as a substitute. Here, the court concluded there was no risk of bid shopping or bid peddling because the substitution was related to Synergy’s substandard performance of the work, which serves as a valid ground for substitution. Therefore, the City was within its investigatory power to seek substitution and did not violate the rights of Synergy under the Act.

Takeaway

Public project owners can now initiate the subcontractor substitution process on public works projects as long as valid grounds for the substitution exist under section 4107. A previous different Appellate Court decision¹ outlined the “limited due process” that must be afforded the subcontractor in a substitution hearing as follows:

- 1) Use of a neutral hearing officer (can be employee of the agency);
- 2) Advance notice of the grounds for substitution;
- 3) Ability to produce written evidence and argument;
- 4) Ability to produce testimonial evidence (no oath taken by witnesses and cross-examination need not be allowed); and
- 5) Length of the hearing can be limited ahead of time.

If you have any questions concerning this update or related issues, do not hesitate to contact our office.

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¹ See, *JMS Air Conditioning v. Santa Monica Community College District* (2018) 30 Cal. App. 5th 945.