

FORM APPROVED COUNTY COUNSEL  
 BY: Marshall Victor 3/19/09  
 DATE: \_\_\_\_\_  
 MARSHALL VICTOR

**SUBMITTAL TO THE BOARD OF SUPERVISORS  
 COUNTY OF RIVERSIDE, STATE OF CALIFORNIA**

059



**FROM:** Department of Facilities Management

**SUBMITTAL DATE:**  
 March 17, 2009

**SUBJECT:** San Jacinto Valley Animal Shelter - Sub Contractor Substitution

**RECOMMENDED MOTION:** That the Board of Supervisors hold a hearing regarding the request by Tovey/Shultz Construction Inc. (project prime contractor) to substitute out Array Builders, Inc.

**BACKGROUND:** The construction contract documents for the San Jacinto Valley Animal Shelter were approved and authorized to be bid out on July 29, 2008. The bids were received by the Clerk of the Board on October 29, 2008. The apparent low bidder was Tovey/Shultz Construction, Inc. and Notice of Award was sent out on November 4, 2008.

(Continued)

Robert Field, Director  
 Department of Facilities Management

|                       |                               |      |                         |       |
|-----------------------|-------------------------------|------|-------------------------|-------|
| <b>FINANCIAL DATA</b> | Current F.Y. Total Cost:      | \$ 0 | In Current Year Budget: | N/A   |
|                       | Current F.Y. Net County Cost: | \$ 0 | Budget Adjustment:      | N/A   |
|                       | Annual Net County Cost:       | \$ 0 | For Fiscal Year:        | 08/09 |

|                         |                                  |                          |
|-------------------------|----------------------------------|--------------------------|
| <b>SOURCE OF FUNDS:</b> | Positions To Be Deleted Per A-30 | <input type="checkbox"/> |
|                         | Requires 4/5 Vote                | <input type="checkbox"/> |

**C.E.O. RECOMMENDATION:** APPROVE

BY: Jennifer L. Sargent  
 Jennifer L. Sargent

County Executive Office Signature

- Policy
- Policy
- Consent
- Consent

Dep't Recomm.:  
 Per Exec. Ofc.:

Prev. Agn. Ref.: 3.28, 1/27/09

District: 3

Agenda Number:

**ATTACHMENTS FILED WITH  
 THE CLERK OF THE BOARD**

**16.1**

**BACKGROUND:** (Continued)

On February 4, 2009, Tovey/Shultz submitted a request to substitute the listed HVAC sub-contractor (Array Builders, Inc.) alleging that Array's bonding threshold did not permit Array to provide a bond to Tovey/Shultz. Notice of this request was given to Array Builders as required by Public Contract Code 4107(a). Array submitted their objection to the request for substitution to the County, dated February 5, 2009 claiming that Tovey/Shultz failed to provide Array with notice of the performance bond requirement. If a written objection to a substitution is filed, Public Contract Code Section 4107(a) requires that notice be given and a hearing be held by the awarding authority on the prime contractor's request for substitution.

Tovey/Shultz alleges that California Public Contract Code 4107 (a) (1) & (4) allows them to substitute the listed HVAC sub-contractor (Array Builders, Inc.) due to their failure in providing bonding. Public Contract Code Section 4107(a) (1) and (4) provide in pertinent part:

"A Prime Contractor whose bid is accepted may not:

(a) Substitute a person as subcontractor in place of the subcontractor listed in the original bid, except that the awarding authority, or its duly authorized officer, may, except as otherwise provided in Section 4107.5, consent to the substitution of another person as a subcontractor in any of the following situations:

(1) When the subcontractor listed in the bid, after having had a reasonable opportunity to do so, fails or refuses to execute a written contract for the scope of work specified in the subcontractor's bid and at the price specified in the subcontractor's bid, when that written contract, based upon the general terms, conditions, plans, and specifications for the project involved or the terms of that subcontractor's written bid, is presented to the subcontractor by the prime contractor.

(4) When the listed subcontractor fails or refuses to meet the bond requirement of the prime contractor as set forth in Section 4108."

Array Builders, Inc. alleges that Public Contract Code 4108 (c)(1) & (3) controls because they contend the bonding requirement was not communicated to Array Builders, Inc. Public Contract Code Section 4108 provides as follows:

"(a) It shall be the responsibility of each subcontractor submitting bids to a prime contractor to be prepared to submit a faithful performance and payment bond or bonds if so requested by the prime contractor.

**BACKGROUND:** (Continued)

(b) In the event any subcontractor submitting a bid to a prime contractor does not, upon the request of the prime contractor and at the expense of the prime contractor at the established charge or premium therefor, furnish to the prime contractor a bond or bonds issued by an admitted surety wherein the prime contractor shall be named the obligee, the prime contractor may reject the bid and make a substitution of another subcontractor subject to Section 4107.

(c) (1) The bond or bonds may be required under this section only if the prime contractor in his or her written or published request for subbids clearly specifies the amount and requirements of the bond or bonds.

(2) If the expense of the bond or bonds required under this section is to be borne by the subcontractor, that requirement shall also be specified in the prime contractor's written or published request for subbids.

(3) The prime contractor's failure to specify bond requirements, in accordance with this subdivision, in the written or published request for subbids shall preclude the prime contractor from imposing bond requirements under this section."

The letters and documentation submitted by both parties are provided to the Board as attachments to this Board item, as well as the notice that was given to the parties of this hearing.

959



TOVEY/SHULTZ CONSTRUCTION INC.

February 2, 2009

1231 COLLEAVE  
1/18/08 5:00 PM  
92710  
1/23/09 4:15 PM  
1/23/09 4:15 PM  
1/23/09 4:15 PM

Reza Hedayat  
Array Builders, Inc  
2694 E. Garvey Ave South, Suite #3  
West Covina, Ca 92791

Re: San Jacinto Valley Animal Shelter – Release of bid

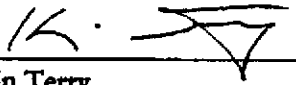
Mr. Hedayat,

I regret to inform you that TSCI cannot enter into a subcontract agreement with you for the SJVAS project. Before TSCI used your low bid amount on bid day, October 29, 2008 our estimating department called you to confirm that you are bondable and what your rate for bonding would be. You told us yes, that you were bondable at a 2.5% rate. Your written proposal received on bid day excludes bond costs and that is why we called you to get the bond amount. By stating you excluded the costs implies you are bondable and that was confirmed when we asked you to supply us with a cost to include in your bid. At no time since the County notified us of the "Notice of Award" on November 4, 2008 have you informed us that you were not bondable until we met for pre-construction planning on January 27, 2009. As we stated that day TSCI requires a bond for your work on this project. This was also stated in our "invitation to bid" form that was faxed or emailed to all bidders that TSCI invited to bid.

Please send us a release letter that we can give to the county as they will be obligated to release you based on the Public Contract Code section 4108. If you do not respond by Thursday February 5, 2009 TSCI will submit our request for your release without it.

Sincerely,

TOVEY/SHULTZ CONSTRUCTION, INC.

  
\_\_\_\_\_  
Kevin Terry  
Senior Project Manager

# ARRAY BUILDERS INC.

CONTRACTORS LICENCE # 913484 (B,C-20)

February 4, 2009

Mr. Kevin Terry  
Senior Project Manager  
Tovey/Shultz Construction, Inc.  
18261 Collier Avenue  
Lake Elsinore, CA 92530

Dear Mr. Terry:

We are receipt of your letter dated February 2, 2009, regarding your concern as to the bondability of Array Builders Inc. ("Array") with respect to the San Jacinto Valley Animal Shelter (SJVAS) project (the "Project").

We at Array never received any solicitation or invitation to bid on the Project from Tovey/Shultz Construction, Inc. We volunteered to send you a scope letter, which was faxed to your company on October 29, 2008, and which scope letter excluded bonding costs (item 7). Therefore, at no time has Array indicated or agreed to provide a performance bond with respect to the Project. Instead, the 2.5% cost on bond quotation was merely an estimate by Array, and not a commitment.

With respect to California Public Contract Code Section 4108 referenced in your letter, please refer to paragraphs (c) (1) and (c) (3) of such Section, which read as follows:

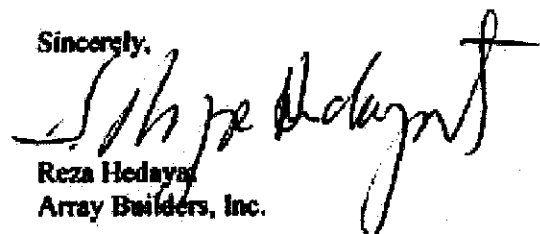
*(c)(1) The bond or bonds may be required under this section only if the prime contractor in his or her written or published request for subbids clearly specifies the amount and requirements of the bond or bonds.*

*(c)(3) The prime contractor's failure to specify bond requirements in accordance with this subdivision, in the written or published request for subbids shall preclude the prime contractor from imposing bond requirements under this section.*

In our meeting at your offices on January 27, 2009, we presented our capability to provide the best price performance for the Project, and that our subcontractors would cover this portion of the work with their performance bond if necessary. Therefore, we believe that no sufficient reason exists for Array to release our approved bid for this Project, and this letter shall confirm that Array does not consent to your submission of a request for release to Riverside County. We look forward to completing the Project successfully with your cooperation.

Should you wish to discuss this matter further, please call me at (626) 339-0095.

Sincerely,



Reza Hedaya  
Array Builders, Inc.

Original through certified mail



TOVEY/SHULTZ CONSTRUCTION INC.

February 4, 2009

1221 COLLIER AVE  
LAKELAND, FL 33801  
92510  
PHONE (714) 677-  
FAX (714) 654-  
WWW.TSCINC.COM

Frank J. Gonzales  
County of Riverside  
Department of Facilities Management  
3133 Mission Inn Avenue, Suite 100  
Riverside, Ca 92507

Re: San Jacinto Valley Animal Shelter – HVAC Subcontractor Substitution Request

Mr. Gonzales,

Please see the attached letters between TSCI and Array Builders. TSCI is hereby requesting permission from the County to substitute another HVAC subcontractor in place of the low HVAC bidder due to the latter's failure or refusal to provide bonding for this project. Array Builders' scope of work is the largest subcontract on the project at 17% of the total bid. Before the bid TSCI requested that Array Builders provide us with a bond rate (since its bid stated it was excluded from the dollar amount of his bid) and we were advised by Array Builders that their bond rate is 2.5%. We did not discover until after the bid that Array Builders cannot or will not bond their work on the project. Array Builders has been in business less than 1 year and TSCI feels the risk is too high considering the volume of the scope of the HVAC work.

For these reasons, we're requesting permission to substitute the following contractor in place of Array Builders for purposes of performing the HVAC work on this project:

ACH Mechanical Contractors, Inc.  
521 11th Street  
Redlands, CA. 92374  
Voice (909) 307-2850  
Fax (909) 307-2853  
email: [hvargas@achmechanical.com](mailto:hvargas@achmechanical.com)

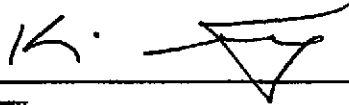
This request for substitution is being made pursuant to Public Contract Code ' 4107, subds. (a)(1) (failing or refusing to sign subcontract) and (a)(4) (failing or refusing to meet the bonding requirement of the prime contractor.

Pursuant to Public Contract Code ' 4107, please provide notice of our request for substitution to Array Builders by certified or registered mail as required by this section. The

last known address for Array Builders is: 2694 E. Garvey Avenue South, #3, West Covina,  
CA 91791. If you have any questions please give me a call at 909-815-8492.

Sincerely,

TOVEY/SHULTZ CONSTRUCTION, INC.

A handwritten signature in black ink, appearing to read 'K. Terry', written over a horizontal line.

Kevin Terry  
Senior Project Manager



**Harris & Associates**

Program Managers  
Construction Managers  
Civil Engineers

February 5, 2009

**Transmitted via Certified Mail**

Reza Hedayat  
Array Builders, Inc.  
2694 E. Garvey Ave South, Suite #3  
West Covina, Ca 92791

**Re:**

**County of Riverside, Facilities Management  
San Jacinto Valley Animal Shelter  
Substitution of Subcontractor**

Dear Mr. Hedayat,

Tovey/Shultz Construction, Inc., the General Contractor for the subject project, listed Array Builders as the HVAC subcontractor. Tovey/Shultz Construction, Inc. has requested that the County of Riverside approve the substitution of another subcontractor in lieu of Array Builders, Inc.

Per the requirements of the State of California Public Contracts Code Section 4107, please consider the correspondence as official notification of said substitution. Array Builders, Inc. shall have five (5) working days within which to submit written objections to the substitution to this office. Failure to file these written objections constitutes the listed subcontractor's consent to the substitution.

If written objections are filed, the awarding body shall give notice in writing of at least five working days to the listed subcontractor of a hearing by the awarding authority on the prime contractor's request for substitution.

Sincerely,

**Harris & Associates**

Kurt Gray, CCM  
Construction Manager

cc: Frank Gonzales

File No: 021.004.001  
Issue:



# ARRAY BUILDERS INC.

CONTRACTORS LICENCE # 913484 (B,C-20)

2694 E. Garvey Avenue South #3 West Covina, CA 91791 P: 626-339-0095 F: 626-339-0095

February 11, 2009

Mr. Kurt Gray  
Harris & Associated  
43-100 Cook Street, Suite 103  
Palm Desert, CA 92211

Re:

**San Jacinto Animal Shelter  
Substitution of Subcontractor**

Dear Mr. Gray,

We are receipt of your letter dated February 5<sup>th</sup>, 2009 regarding the concern as to contractual obligation between Array Builders Incorporated (Array) and Tovey Shultz.

We at Array never received any solicitations or invitation to bid on the Project from Tovey Shultz. We volunteered to send them our scope and quotation, which was faxed on October 29<sup>th</sup>, 2008.

Tovey Shultz had made no pre-noted condition in regard to the bonding of this project before using our quoted bid.

Please refer to Public Contract code Section 4108 Subdivisions (c) (1) + (c) (3), which read as follows:

*(c) (1) The bond or bonds may be required under this section only if the prime contractor in his or her written or published request for subbids clearly specifies the amount and requirements of the bond or bonds.*

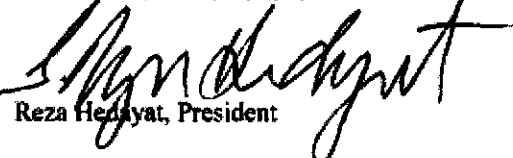
*(c)(3) The prime contractor's failure to specify bond requirements in accordance with this subdivision, in the written or published request for subbids shall preclude the prime contractor from imposing bond requirements under this section.*

We at no time had any reservation to execute our contract with Tovey Shultz regarding the work specified in our bid based on our price. Therefore, Tovey Shultz's request for a substitution of a subcontractor solitarly based on bonding issue is not substantiated.

We are looking forward to clarify the objections of Tovey Shultz and to proceed to participate in the Project to its successful completion. Please do not hesitate to call us on this matter.

Sincerely,

ARRAY BUILDERS INC.



Reza Hedayat, President