

FORM APPROVED COUNTY COUNSEL  
 BY: MARSHALL VICTOR 4/20/09 DATE

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



**FROM:** Department of Facilities Management

**SUBMITTAL DATE:**  
 April 21, 2009

**SUBJECT:** San Jacinto Valley Animal Shelter - Substitution of Subcontractor

**RECOMMENDED MOTION:** That the Board of Supervisors consent to the substitution of Array Builders as requested by Tovey/Shultz Construction, Inc., and approve the use of ACH Mechanical, Inc. as the HVAC subcontractor. (see Attachment A)

**BACKGROUND:** A hearing was held on April 7, 2009 regarding the request by Tovey/Shultz Construction, Inc. to substitute out the HVAC subcontractor, Array Builders. After receipt of oral argument, the public hearing was closed and the matter was taken under submission for a staff recommendation and final decision. Attached is a summary of the issues and findings leading to the recommendation of staff that there appears to be sufficient grounds to consent to the request for substitution.

Robert Field, Director  
 Assistant County Executive Officer EDA/FM

RF:FG:lmh  
 Project #FM08110001843  
 2009-04-776

<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  
 County Executive Office Signature

- Policy
- Policy
- Consent
- Consent

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

## ATTACHMENT A

## Attachment to Agenda Item 3.19

SUBJECT: San Jacinto Valley Animal Shelter Substitution of Subcontractor

RECOMMENDATION: Consent to the substitution of Array Builders as requested by Tovey/Shultz Construction Inc. and approve the use of ACH Mechanical, Inc. as the HVAC subcontractor.

### ISSUES

- 1) Is Section 4108 of the Public Contract Code applicable in this case?
- 2) Should consent to the request for substitution by Tovey/Shultz Construction Inc. be granted based on Section 4107(a)(1) of the Public Contract Code?

### CONCLUSIONS

- 1) It would appear under the case of *Golden State Boring & Pipe Jacking, Inc. v. Orange County Water District* (2006) 143 Cal.App.4<sup>th</sup> 718, that Section 4108 of the Public Contract Code is not applicable in this case.
- 2) There is sufficient evidence for the Board to consent to the substitution of the subcontractor, Array Builders, based on Section 4107(a)(1) of the Public Contract Code.

### ANALYSIS

#### Summary of Dates:

- 1) Tovey/Shultz Construction Inc. ("TSCI") was awarded the contract for San Jacinto Valley Animal Shelter on January 27, 2009. Array Builders ("Array") was listed on their bid as the HVAC subcontractor.
- 2) On February 4, 2009, TSCI requested that Array be substituted out and ACH Mechanical be substituted in.
- 3) The County sent notice to Array on February 5, 2009 as required by Public Contract Code Section 4107.
- 4) Array objected to the notice of request for substitution on February 11, 2009.
- 5) The County sent notice on March 31, 2009 to all parties on March 23, 2009.
- 6) Array requested a continuance of the March 31, 2009 hearing to allow his legal counsel to attend. The hearing was continued to April 7, 2009.
- 7) TSCI submitted documentation with their request for substitution and provided oral statements at the hearing before the Board of Supervisors on April 7, 2009 through Peter Tovey and their counsel.
- 8) Letters from Array to TSCI and the County were submitted prior to the hearing on April 7, 2009. Array appeared at the hearing on April 7, 2009 by Reya Hedayat, principal and owner.
- 9) After receipt of oral argument, the public hearing was closed. The matter was taken under submission and continued for two weeks for a staff recommendation and final decision.

Summary of Pertinent Facts & Arguments:

Based on a series of letters submitted and oral presentations at the Board hearing on April 7, 2009, the following appears to be the progression of facts in this matter as alleged by the parties.

TSCI sent a letter to Array dated February 2, 2009 stating in pertinent part “ I regret to inform you that TSCI cannot enter into a subcontract agreement with your 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. . . .”

Array responded to the February 2, 2009 letter with their letter dated February 4, 2009. That letter stated in pertinent part “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. . . .” That letter went on to cite Section 4108(c)(1) and (3) of the Public Contract Code as a basis for why Array should not be substituted out on the project.

Thereafter, TSCI submitted their February 4, 2009 letter to the County asking to substitute out Array based on Public Contract Code Section 4107(a)(1) and (4), to which Array repeated their objection and cited Section 4108 of the Code.

At the hearing on April 7, 2009, counsel for TSCI as well as Peter Tovey addressed the Board. They repeated that TSCI had, during approximately the last 15 minutes before bid closing, called Array to ask them what was their bond rate. TSCI stated that they were told over the phone by Array that their bond rate was 2.5%. TSCI had issued an invitation for bid that contained a statement that “Tovey/Shultz Construction Inc. may require a performance bond and payment bond from any given subcontractor. Include bond rate on all of your proposals.” The bid invitation did not contain “the amount and requirements of the bond or bonds” as mandated by Public Contract Code Section 4108(c)(1). Counsel noted at the hearing the invitation was posted on TSCI’s website. Counsel for TSCI referred all parties to the case of *Golden State Boring & Pipe Jacking, Inc v. Orange County Water District* (2006) 143 Cal.App.4<sup>th</sup> 718. Counsel argued based on this case that Public Contract Code Section 4108, including the bid invitation requirements, are not applicable, as Array specifically noted they did not respond to any bid invitation. TSCI stated that Array had said they were ready to sign the subcontract,

but TSCI said bonding requirements were part of that subcontract, and since Array was not bondable, TSCI was not ready to sign the contract with Array without the bond requirement. They were ready to move forward with another subcontractor at an approximate higher cost to them of \$70,000.00.

Array, in their letters and at the hearing on April 7, 2009, stated they submitted a bid to TSCI unsolicited, and that they had not received or responded to any bid solicitation from TSCI. Mr. Hedayat, the President of Array Builders, was the representative at the hearing and stated that he personally had been a registered mechanical engineer since 1985, with 26 years experience, and that in the last 9 months, Array had performed 250 jobs. With regard to the bond, he had interviewed for several other jobs and in response to a question during those interviews had stated that yes they were bondable but could not bond the job, and that had been accepted by the interviewer(s). It was unclear whether these interview(s) were with a property owner or general contractor(s). Mr. Hedayat further argued that asking for the bond rate is different than asking for a bond, and he was never asked for a bond. Mr. Hedayat referenced Public Contract Code Section 4108 and argued that it was applicable, and further stated that he believed TSCI was bid shopping.

Analysis of Issues and Findings:

Issue 1: Is Section 4108 of the Public Contract Code applicable in this case?

Finding: It would appear under the case of *Golden State Boring & Pipe Jacking, Inc. v. Orange County Water District* (2006) 143 Cal.App.4<sup>th</sup> 718, that Section 4108 of the Public Contract Code is not applicable in this case.

As noted above, Public Contract Code Section 4108 requires that written or published requests for subbids include a statement by the prime contractor specifying the amount and requirements of any bond or bonds. TSCI did not specify the amount and other requirements of the bond as Section 4108(c) mandates before requiring bonds from a subcontractor. Therefore, TSCI cannot then rely on subdivision (a) under Section 4108 that every subcontractor must be ready to submit bonds. Array has affirmatively stated that Array did not rely on any written or published invitation for bids when submitting their bid to TSCI. It would appear that neither party may rely on Public Contract Code Section 4108 in this instance.

The *Golden State* case suggests that when a bid is submitted that is not a response to a written or published bid invitation, Public Contract Code Section 4108 is not applicable. Because this requirement in the bid solicitation was not met by TSCI, and there was no reliance on the bid solicitation by Array, *Golden State* supports the position that Section

4108 is not applicable. The matter is then left to the exchange of negotiations between the parties in the submitting and accepting of bid(s).

Issue 2:        Should consent to the request for substitution by TS be granted based on Public Contract Code Section 4107(a)(1)?

Finding:        There is sufficient evidence for the Board to consent to the substitution of the subcontractor, Array.

Public Contract Code Section 4107(a) provides that consent to substitution of a subcontractor may be given when a subcontractor listed in the bid fails or refuses to execute a written contract for the scope of work specified in the subcontractor's bid and at the price specified, when the 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. See also *Interior Systems, Inc. v. Del E. Webb Corp.* (1981) 121 Cal.App.3d 312.

In this case, we have TSCI, the prime contractor who received an unsolicited bid from a subcontractor, Array. That subbid stated that bond costs were excluded; no other statement was included in that subbid regarding bond(s). TSCI has stated, and Array has confirmed, that TSCI placed a call to Array Builders regarding the terms of the subbid. That call resulted in changes to the original bid submission by Array. At a minimum, further documentation obtained from TSCI shows a price regarding alternate work items on the project advertised by the County was requested by TSCI and quoted by Array. The subject of bonds was also discussed, but it is at this point the parties disagree as to what occurred. TSCI contends that they asked Array whether they were bondable and for their bond rate, and were advised they were bondable and the rate was 2.5%. Array states they were asked for the bond rate but were never asked for a bond.

It is apparent there was some discussion after submission of the original subbid by Array Builders. It is common practice that within the last hour and minutes prior to a bid closing, faxes and phone calls are very frenetic as bids are received and countered and tallied and finalized. Unfortunately this can make for some disagreements and difficult fact finding after the completion of the process. Therefore at this point we also look to the reason for the statutory procedure which requires consent by an awarding authority to a substitution of a subcontractor. The purpose of the statute is to prevent bid shopping, which is the use of low bids already received by a general contractor to pressure other subcontractors into submitting even lower bids; to prevent bid peddling, which is an attempt by subcontractors to undercut known bids already submitted to the general contractor in order to procure the job after the award of the contract; and to give the awarding authority the opportunity to investigate and approve the initial subcontractors

and any replacements. (*Titan Electric Corp. v. Los Angeles Unified School Dist* (App.2 Dist. 2008) 160 Cal.App.4<sup>th</sup> 188, modified on denial of rehearing; review denied.)

Array did allege at the hearing on April 7, 2009 that TSCI was bid shopping. TSCI however represented at that hearing that the new subcontract to replace Array would cost them approximately \$70,000 more, which would indicate there is no bid shopping here. TSCI has also supplied information about the qualifications of the proposed replacement subcontractor ACH Mechanical, for review by the building department involved herein, the Department of Facilities Management.

It appears to be undisputed that TSCI phoned Array to ask for a quote of their bond rate. While TSCI states at one point they also asked Array if they were bondable, Array says the question was not asked. The purpose of asking for the bond rate however, would appear to serve only one objective, and that is to impose a bond requirement and determine the cost for the bonds. There appears to have been no affirmative statement by Array that they were not bondable or would not provide a bond regarding this particular project

As a result, presentation by TSCI to Array of a contract which included a bond requirement was based upon the bid of Array and later negotiations of the parties regarding the bid terms. Under Public Contract Code Section 4107(a) and cases cited thereunder, there appears to be sufficient grounds to grant TSCI's request to substitute out Array Builders.