

THE BOARD OF SUPERVISORS OF THE COUNTY OF STANISLAUS
ACTION AGENDA SUMMARY

DEPT: Chief Executive Officer

BOARD AGENDA # B-11

Urgent

Routine

AGENDA DATE December 11, 2007

CEO Concurs with Recommendation YES NO

(Information Attached)

4/5 Vote Required YES NO

SUBJECT:

Adopt the Decision of the Hearing Officer in the Matter of Improper Substitution of a Listed Subcontractor on the Gallo Center for the Arts Project and Impose the Penalty Authorized by Public Contract Code Section 4110 Against Clark & Sullivan Builders, Inc.

STAFF RECOMMENDATIONS:

1. Pursuant to Public Contract Code Section 4114, without further notice or hearing, adopt the hearing officer's attached August 18, 2006, decision, findings and conclusions to find that the prime contractor, Clark & Sullivan Builders, Inc., improperly substituted a listed subcontractor in violation of Public Contract Code Section 4100, et seq.;
2. Find that there is substantial evidence supporting the attached hearing officer's August 18, 2006, decision, findings and conclusions; and

(Continued on Page 2)

FISCAL IMPACT:

The statute provides for a maximum of a 10% penalty, which would equal \$190,538, if imposed. The County will not authorize the release of \$190,538 in retention withheld on the prime contract, and as required by Public Contract Code Section 4110 the penalty amount will be deposited in the fund from which the prime contract is awarded.

BOARD ACTION AS FOLLOWS:

No. 2007-964

On motion of Supervisor Grover, Seconded by Supervisor Monteith

and approved by the following vote,

Ayes: Supervisors: Grover, Monteith, and Chairman O'Brien

Noes: Supervisors: DeMartini

Excused or Absent: Supervisors: Mayfield

Abstaining: Supervisor: None

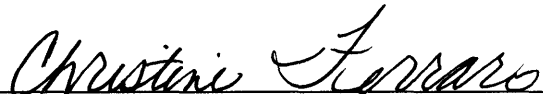
1) Approved as recommended

2) Denied

3) Approved as amended

4) Other:

MOTION:



ATTEST: CHRISTINE FERRARO TALLMAN, Clerk

File No.

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RECOMMENDATIONS: (Continued)

3. Impose a penalty as authorized by Public Contract Code Section 4110 in the amount of \$190,538 representing 10% of the amount of the subcontract involved; and
4. Order said penalty to be deposited in the fund from which the prime contract is awarded.

DISCUSSION:

The Subletting and Subcontracting Fair Practices Act ("the Act") set forth in Public Contract Code Section 4100 et seq., contains the following requirements:

- The Act requires that prime contractors list their subcontractors at the time they submit their bids.
- Under the Act, the County's consent is required if the prime contractor wants to use a different subcontractor. The consent of the County is required BEFORE the substitution takes place.

Clark & Sullivan listed Custom Air as the subcontractor for HVAC work on project when it submitted its bid in 2004. Subsequently, disputes arose between Clark & Sullivan and Custom Air regarding its work on the project. In May of 2006, Clark & Sullivan hired Modern Air to "assist" Custom Air with portions of the work. In May or June of 2006, Clark & Sullivan did not pay Custom Air over \$350,000 work performed and refused to provide assurances that payment would be made. Custom Air refused to continue to work until the payment dispute was solved. Modern Air, however, continued to work on the HVAC portion of the project.

On July 12, 2006, Custom Air's attorney wrote a letter accusing Clark & Sullivan of "illegally" substituting Custom Air for Modern Air. On July 31, 2006, Clark & Sullivan submitted a written request to the County to substitute Modern Air for its listed contractor Custom Air to do the HVAC.

Pursuant to Public Contract Code Section 4114, the County delegated its functions under Public Contract Code Section 4107 to an independent hearing officer, Paul Taylor, of Hefner Stark & Marois, LLP. Mr. Taylor is a hearing officer knowledgeable in substitution hearings, arbitrations and mediation.

On August 16, 2006, a hearing was held regarding Clark & Sullivan's substitution request. Attorneys for the County, Clark and Sullivan, and Custom Air were in attendance. Clark & Sullivan submitted testimony and documentary evidence and

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generally contended that Custom Air had failed to perform its obligations under the subcontract and that it therefore employed Modern Air to complete the work.

Custom Air likewise submitted testimony and documentary evidence and generally admitted that it refused to complete the work, but it did so due to the acts of Clark & Sullivan. Custom Air also asserted that Clark & Sullivan had violated the Public Contract Code by substituting Modern Air without the consent of the owner as required by Section 4107.

Mr. Taylor reviewed and considered the evidence before him and issued his decision, findings and conclusion on August 18, 2006. Mr. Taylor found that Clark & Sullivan's request to substitute its listed contractor was moot because it had already entered into a contract with Modern Air to perform Custom Air's work without the consent of the County. Further, he found that Clark & Sullivan had provided no legal authority to support a public agency's ability to consent to a substitution after it has already occurred. In a footnote, Mr. Taylor stated that "Clark & Sullivan's failure to obtain consent prior to its contract with Modern Air was the violation of Public Contract Code Section 4107."

Clark & Sullivan has delivered several letters to the County stating its disagreement with Mr. Taylor's decision. Clark & Sullivan has requested the Board overturn the decision of Mr. Taylor and approve the substitution request.

Staff has reviewed the testimony and evidence presented at the hearing, Mr. Taylor's decision, and Clark & Sullivan's contentions regarding said decision. Based on said review, staff recommends that, pursuant to Public Contract Code Section 4114, the Board adopt Mr. Taylor's recommended decision without further notice or hearing and find that substantial evidence supports the finding that Clark & Sullivan Builders, Inc., violated Public Contract Code Sections 4100, et seq., by improperly substituting its listed contractor.

Upon a finding of a violation and Pursuant to Public Contract Code Section 4110 et seq., the Board may exercise the option, in its own discretion, to either (1) cancel the contract with Clark & Sullivan or (2) assessing a penalty in an amount of not more than 10% of the amount of the subcontract involved, and this penalty shall be deposited in the fund out of which the prime contract is awarded.

The contract cancellation option was not feasible given the status of construction of the Gallo Center for the Arts. It is recommended that other option allowed, the assessment of the penalty be authorized, and assessed in full because the General Contractor was found to have not complied with the Act as described in the Hearing Officer's Opinion dated August 18, 2006.

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The contract amount for Clark & Sullivan's subcontract with Custom Air, the listed subcontractor, is \$1,905,380; therefore a 10% penalty will equal \$190,538.

Attached as Exhibit 1 is the August 18, 2006, decision, findings and conclusions of hearing officer, Paul W. Taylor. Attached as Exhibit 2 is the transcript of the August 16, 2006, hearing before Mr. Taylor, and the exhibits submitted during the hearing. Exhibit 3 is the notice to Clark and Sullivan regarding this matter. Exhibit 4 is a letter and exhibits from Clark and Sullivan. Exhibit 5 is documents related to this matter. All of these exhibits and documents will also be available in Chambers for inspection, consideration and use by the Board at the time the matter is called.

POLICY ISSUES:

The Board of Supervisors provides policy guidance to the successful completion of Capital Projects. The Public Contract Code, Section 4110 provides for the listing of subcontractors on public works contracts and delegates to the Board of Supervisors the imposition of penalties for violation of the act.

STAFFING IMPACT:

County Capital Projects Staff and various design, engineer and construction management professionals are dedicated to the successful completion of the Gallo Center for the Arts and all the County's Capital Project efforts.

ATTACHMENTS: (click on links below)

Exhibit 1

Exhibit 2, pages 1 - 94

Exhibit 2, pages 95 - 178

Exhibit 3

Exhibit 4

Exhibit 5