



- Board of Directors
Engineering and Operations Committee

9/10/2019 Board Meeting

8-2

Subject

Approve contractor request for subcontractor substitution for the F.E. Weymouth Water Treatment Plant Chlorination System Upgrades construction contract, as recommended by the Hearing Officer; the General Manager has determined that the proposed action is exempt or otherwise not subject to CEQA

Executive Summary

This action adopts the recommendation from the hearing held on August 1, 2019, regarding the substitution of a subcontractor for the Chlorination System Upgrades construction contract at the Weymouth plant.

In December 2018, Metropolitan's Board awarded a construction contract to J.F. Shea Construction, Inc. for chlorination system upgrades at the Weymouth plant. In a letter dated June 11, 2019, J.F. Shea Construction requested consent by Metropolitan to replace one of the subcontractors identified in its bid, Three Point Structural Steel Construction, with another qualified subcontractor. On June 17, 2019, Three Point Structural Steel Construction formally objected to its substitution and requested a hearing pursuant to Section 4107 of the Public Contract Code. This action adopts the recommendation of the Hearing Officer from the hearing held on August 1, 2019, and approves the substitution of a subcontractor, as required by Metropolitan's Administrative Code.

Details

Background

Section 4107 of the California Public Contract Code requires that bidders on public works projects identify in their bids all subcontractors who will perform work on the project in excess of one-half of one percent (0.5%) of the prime contractor's total bid. The Code further provides that a prime contractor may not substitute a listed subcontractor with another firm unless the awarding authority consents to the substitution. The Code permits subcontractor substitutions only for specified reasons. Upon receipt of the prime contractor's request to substitute a listed subcontractor, the awarding authority is required to give notice to the affected subcontractor. If written objections to the substitution are received, the awarding authority is required to give notice of and hold a hearing on the prime contractor's request for substitution.

In December 2018, Metropolitan's Board awarded a construction contract to J.F. Shea Construction, Inc. for chlorination system upgrades at the Weymouth plant. In its bid documents, J.F. Shea Construction, Inc. listed Three Point Structural Steel Construction as its subcontractor to perform the structural steelwork. In a letter dated June 11, 2019, J.F. Shea Construction requested that it be permitted to substitute Three Point Structural Steel Construction with another qualified subcontractor, asserting that Three Point Structural Steel Construction had failed or refused to perform work under their subcontract. Three Point Structural Steel Construction, by letter transmitted on June 17, 2019, formally objected to its substitution, refuted J.F. Shea Construction's assertion, and requested a hearing pursuant to Section 4107 of the Public Contract Code.

Metropolitan's Administrative Code provides that the General Manager or his designee is authorized and directed to conduct hearings required by Section 4107 of the Public Contract Code, prescribe procedures therefore, give proper notice thereof, receive all evidence and testimony, rule on the admissibility of evidence, prepare a record of the proceedings, and submit such record and recommendations. Based only upon such record, Metropolitan's Board shall make the determination required by law.

Hearing and Recommendation

In accordance with Metropolitan's Administrative Code, a hearing was held on August 1, 2019, in which principals from both the contractor J.F. Shea Construction and subcontractor Three Point Structural Steel Construction were given the opportunity to present testimony in support of their respective positions before the Hearing Officer designated by the General Manager to conduct the hearing. In addition, documentation from each party was submitted into evidence. Following a review of the evidence and testimony presented, the Hearing Officer has recommended that the proposed substitution should be approved. A summary of the proceedings and the Hearing Officer's recommendation is included in **Attachment 1**. The record of the proceedings is available in the Board Executive Secretary's Office for review.

Summary

This action adopts the recommendation by Metropolitan's Hearing Officer to approve the subcontractor substitution for the Chlorination System Upgrades construction contract at the Weymouth plant. There is no cost to Metropolitan associated with this action.

Policy

Metropolitan Water District Administrative Code Section 8148: Delegation of Hearing Power

Metropolitan Water District Administrative Code Section 11104: Delegation of Responsibilities

By Minute Item 51422, dated December 11, 2018, the Board awarded a construction contract for chlorination systems upgrades at the Weymouth plant.

California Environmental Quality Act (CEQA)

CEQA determination for Option #1:

The current Board action is solely based on a subcontractor substitution for the Weymouth Water Treatment Plant Chlorination System Upgrades construction contract, and not on any changes to the approved project itself. The proposed action is not defined as a project under CEQA because it involves continuing administrative activities, such as contractor-related actions, general policy and procedure making (Section 15378(b)(2) of the State CEQA Guidelines). Accordingly, no further CEQA documentation is necessary for the Board to act on the proposed action.

CEQA determination for Option #2:

None required

Board Options

Option #1

Approve the request for subcontractor substitution for the F.E. Weymouth Water Treatment Plant Chlorination System Upgrades construction contract.

Fiscal Impact: None

Business Analysis: This option will allow the contractor to substitute a subcontractor to perform structural steelwork. There would be no changes to the contract amount and no impacts to the schedule.

Option #2

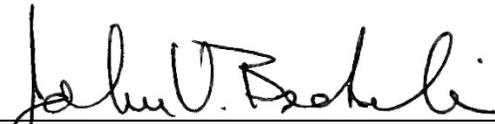
Do not approve the request for subcontractor substitution for the F.E. Weymouth Water Treatment Plant Chlorination System Upgrades construction contract.

Fiscal Impact: Unknown

Business Analysis: This option will disallow the contractor's request to substitute a subcontractor to perform structural steelwork.

Staff Recommendation

Option #1



John V. Bednarski 8/27/2019
Manager/Chief Engineer Date
Engineering Services



Jeffrey Knight/Inger 8/29/2019
General Manager Date

Attachment 1 – Summary and Recommendation of the Hearing Officer

Ref# es12669619

**SUMMARY AND RECOMMENDATION OF
THE HEARING OFFICER**

SUBCONTRACTOR SUBSTITUTION HEARING

Held on August 1 at 10:00 a.m.

Weymouth WTP Chlorination System Upgrades

Contract No. 1883 – Specifications No. 1883A

The Metropolitan Water District of Southern California (Metropolitan) staff present:

Francisco Becerra, Interim Program Management Section Manager (Hearing Officer); Patrick Rohen, Deputy General Counsel; Fred Nichols, Principal Engineering Technician, Construction Contracts; Yubia Casillas, Senior Administrative Analyst, Construction Contracts.

J. F. Shea (Shea) staff present: Steve Cox, Executive Vice President; Ross Kay, Senior Vice President/General Counsel; George Ramos, Project Manager.

Three Point Construction (TPC) staff present: Jacque Gonzales, President.

By letter dated June 11, 2019, Shea formally requested that Metropolitan approve the substitution of TPC, the subcontractor listed in Shea's bid to perform structural steel fabrication and erection on the Project. As the basis of its request, Shea contends that the work performed by TPC is substantially unsatisfactory and not in substantial accordance with the plans and specifications, and that TPC is substantially delaying or disrupting the progress of the work. In either case, an awarding agency would be permitted to approve a subcontractor substitution, pursuant to Sections 4107 (a) (3) and 4107 (a) (7), respectively, of the Public Contract Code. TPC's written objection to its substitution was timely received by Metropolitan, and a hearing was held on August 1, 2019, at Metropolitan's headquarters, to consider Shea's request and TPC's objections to Shea's request.

In advance of the hearing, both Shea and TPC submitted correspondence and other documents in support of their respective positions. Each party was given 30 minutes to present its arguments in favor or against the substitution, followed by 10 minutes each for rebuttal.

The Dispute

The specifications sections relevant to TPC's scope of work include: 05120 (Structural Steel), 05310 (Metal Decking), 05500 (Miscellaneous Metals), 05530 (Metal Grating), 05720 (Aluminum Pipe Railing), and 09900 (Painting Prep-Primer). Each of these specifications sections contain requirements for the submittal of materials, procedures, and/or qualifications for Metropolitan's approval. This process is necessary to ensure that Metropolitan receives the quality of materials and workmanship required under the contract.

Shea asserts that TPC proved unable to comply with the submittal requirements. There were a total of 23 submittals required under the specification sections identified above. Shea presented evidence demonstrating that only four submittals were approved by Metropolitan, and that those submittals were only approved after extensive help from Shea. The remaining submittals were either not provided at all, or were returned for revision by Metropolitan and not corrected and resubmitted by TPC. As the contract work cannot proceed without approved submittals, Shea contends that the failure of TPC to provide them amounted to a failure or refusal to perform the subcontract, and that TPC was substantially delaying or disrupting the progress of the work.

In response, TPC alleges that: (1) TPC was excluded from the Project's pre-construction meeting, and thereby was put at a disadvantage regarding the submittal process; (2) TPC was prevented from contacting and interacting directly with Metropolitan staff, something that was critical for performance of

its work; (3) TPC had not provided the submittals because there were flaws in Metropolitan's contract specifications and the initial construction schedule produced by Shea; and (4) Shea never intended to honor TPC's subcontract, and instead worked to undermine TPC's efforts.

Hearing Officer's Conclusions

The Hearing Officer reviewed the evidence presented as it relates to the two relevant provisions of the Public Contract Code (Sections 4107 (a) (3) and 4107 (a) (7)). Public Contract Code 4107 (a) provides, in relevant part, that an awarding authority may consent to the substitution of a subcontractor:

- (3) When the listed subcontractor fails or refuses to perform his or her subcontract; and
- (7) When the awarding authority, or its duly authorized officer, determines that the work performed by the listed subcontractor is substantially unsatisfactory and not in substantial accordance with the plans and specifications, or that the subcontractor is substantially delaying or disrupting the progress of the work.

Based on these statutory dictates and the evidence produced prior to and during the hearing, the Hearing Officer has concluded, and recommends to Metropolitan's Board of Directors, that subcontractor substitution is appropriate in these circumstances under Public Contract Code Section 4107 (a) (3).

While Shea provided detailed documentation of TPC's inability to produce submittals conforming to the contract's requirements, TPC provided little to no evidence in support of its allegations that it was prevented from producing the submittals by Shea's actions or failure to act. In order for segments of work on a project to commence, the contractor or subcontractor must provide the submittals associated with that portion of the work. Metropolitan staff must review the submittals and confirm that they meet the project specifications. The subcontract between Shea and TPC required TPC to provide the 23 submittals associated with specifications sections relevant to TPC's scope of work. Analysis of the record yielded the following conclusions:

1. The contract specifications relevant to TPC's scope of work contain clear requirements for the submittal of materials, procedures, and/or qualifications proposed for use on the Project;
2. Of the 23 submittals required under TPC's scope of work, only four were successfully completed by TPC;
3. Shea made numerous attempts to assist TPC with the submittal process, as evidenced in various emails. Shea also consistently offered to help TPC in matters related to the submittals, and provided assistance to TPC with obtaining a performance bond;
4. Shea provided email messages to TPC listing the submittals that were outstanding and provided samples to help TPC understand what was required;
5. Shea arranged a meeting with Metropolitan staff on June 5, 2019 to resolve issues regarding submittals. Shea and Metropolitan attempted to explain to TPC that no additional information or Project documents were required for TPC to provide the necessary submittals. Shea alleged that, during the meeting, TPC stated that contract specifications only apply to Shea as the prime contractor, and not to TPC as the subcontractor. Shea believed that this statement by TPC made it clear that TPC had no intention of performing the requirements in its subcontract;
6. The subcontract between Shea and TPC requires TPC to provide submittals to comply with the specifications in the bid documents, and TPC had those bid documents when it submitted its bid to Shea;

TPC asserted that Shea attempted to prevent TPC from performing and inappropriately excluded TPC from necessary procedural steps during the Project. Analysis of the evidence supplied by Shea and TPC yielded the following conclusions:

1. TPC asserted that Shea failed to include TPC at the initial pre-construction meeting and that TPC was thereby put at a disadvantage regarding the submittal process. However, no subcontractors were invited to the pre-construction meeting on the Project. Metropolitan pre-construction meetings are targeted at prime contractors. The meeting is general in nature; more detailed meetings are held as necessary with individual subcontractors;
2. TPC asserted that it was inappropriately prevented from contacting and interacting directly with Metropolitan staff, something that TPC contends was critical for performance of its work. TPC was instructed by Shea not to contact Metropolitan directly. However, Shea's direction to TPC is consistent with Metropolitan's practices on construction projects. In practice, Metropolitan staff does not meet in person or by phone with subcontractors unless the prime contractor is present, because Metropolitan does not have a direct contractual relationship with subcontractors. As a result, Metropolitan staff will only meet or speak with a subcontractor while the prime contractor is present to prevent misunderstandings and/or allegations of interference in the prime contractor's management of the project. TPC did not demonstrate that the inability to contact Metropolitan staff directly prevented it from timely providing the required submittals. Furthermore, Metropolitan did meet with TPC and Shea to discuss the submittals process on June 5, 2019;
3. TPC asserted that there were flaws in the contract specifications and initial construction schedule produced by Shea. While staff agrees that Shea's initial schedule was flawed, it did not prevent TPC from proceeding with preparation of submittals. The flaws in the specifications cited by TPC were not flaws; the specifications purposely provide for alternatives for constructing certain portions of the work (such as bolted handrail connections versus welded connections); and
4. TPC asserted that Shea never intended to honor TPC's subcontract, and instead worked to undermine TPC's efforts to perform the subcontract. The documents and correspondence provided do not demonstrate that Shea misled TPC or took any steps to prevent them from performing. Also, as noted above, Shea responded to all of TPC's questions and attempted to clarify the submittal requirements throughout the process.

The evidence and testimony presented by the parties establishes that TPC failed to timely provide the majority of required submittals that complied with the specifications; that this failure to provide submittals was not the result of any actions taken, or failure to take actions, by Shea or Metropolitan; and this failure to provide submittals constituted a failure to perform on its subcontract. Accordingly, it is the Hearing Officer's conclusion that the grounds for approval of Shea's request to substitute TPC with another subcontractor have been met and recommends that the Board approve Shea's request to substitute another subcontractor in place of TPC.