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Substantial Compliance With Subletting And Subcontracting Fair Practices Act's Objectives Permits Awarding Agency To Substitute Unsafe Subcontractor Without Prime Contractor's Consent.

The City and County of San Francisco entered a contract with a prime contractor, Ghilotti Bros., Inc. for a major renovation of Haight Street.

The contract between the City and Ghilotti allows the City to substitute a subcontractor when the subcontractor fails to perform to the satisfaction of the City in accordance with Administrative Code section 6.21(A)(9) and the Subletting and Subcontracting Fair Practices Act, at no added cost to the City.

Consistent with its bid, Ghilotti entered a subcontract Synergy Project Management, Inc. (Synergy) to perform excavation and utilities work.

Work on the project began in April 2015. Over the next five months, Synergy engaged in many unsafe practices, including improperly shoring trenches, failing to properly store equipment, and engaging in highly dangerous conduct, such as dangling a Synergy foreman by his ankles into an open manhole with no safety equipment or traffic control. Synergy also caused a number of gas line breaks, at least four of which resulted from Synergy's unsafe practices. After Synergy caused a fifth gas line break, the City issued a stop-work order.

In an October 9 letter, the City invoked the substitution provision of its contract with Ghilotti, directing the prime contractor "to remove [Synergy] immediately" and "immediately ... request approval of a replacement subcontractor to perform the Work." In an October 14 letter, the City notified Synergy that it had "directed Ghilotti to remove Synergy and to substitute a replacement contractor" based on Synergy's unsatisfactory work. The City stated that the letter constituted its notice to Synergy under the Subletting and Subcontracting Fair Practices Act that Synergy would be replaced. The Public Contract Code requires a prime contractor to obtain the consent of the awarding authority before replacing a subcontractor listed in the original bid, and it limits the awarding authority's ability to consent to such substitution to specifically enumerated circumstances. Further, if the original subcontractor objects to being replaced, Public Contract Code requires the awarding authority to hold a hearing "on the prime contractor's request for substitution." (Public Contract Code Section 4107 subd. (a).)

Under protest, Ghilotti terminated Synergy, and Synergy objected to being replaced. The City held a hearing under Public Contract Code section 4107 subdivision (a), and the hearing officer found that Synergy's work was "substantially unsatisfactory and not in substantial accordance

with the plans and specifications” under Section 4107 subdivision (a)(7). The hearing officer upheld the City’s “determination to remove Synergy as a subcontractor” on the project.

Synergy and Ghilotti each filed a challenge to the City’s decision, arguing that Section 4107 did not authorize the City to remove a subcontractor except upon the prime contractor’s request, and, because Ghilotti had not made a “request” for substitution, the hearing officer lacked jurisdiction.

The trial court held separate hearings on Ghilotti’s and Synergy’s motions in the fall of 2016. The trial court focused on whether the contract provision conferred jurisdiction on the hearing officer based on the provision’s incorporation of Subletting and Subcontracting Fair Practices Act procedure.

The trial court concluded that the hearing officer had jurisdiction under the contract only if “Ghilotti remove[d] Synergy and request[ed] a replacement of the subcontractor.” The trial court determined that the key issue in the case was whether Ghilotti had taken these actions. The court ultimately found that Ghilotti had not “requested the replacement of Synergy,” and accordingly ruled in favor of Ghilotti and Synergy. The City appealed.

On appeal, the Court of Appeal considered the statutory framework of the Subletting and Subcontracting Fair Practices Act, the purpose of which is to limit bid shopping and bid peddling, and to protect the awarding authority’s selection of subcontractors. Under the Act, a prime contractor cannot normally substitute a subcontractor in place of the subcontractor listed in the original bid, except that the awarding authority may consent to the substitution of a subcontractor under specifically enumerated circumstances. One of those circumstances is when the work performed by the listed subcontractor is substantially unsatisfactory and not in substantial accordance with the plans. (Public Contract Code § 4107, subd. (a)(7).) The Court therefore concluded that the Act contemplates that the awarding authority will monitor the project during construction to ensure compliance with its contractual and statutory obligations.

The Court of Appeal then considered whether the hearing officer that removed Synergy had proper jurisdiction to do so. On appeal, Synergy argued that the City’s substitution order constituted a backdoor removal by the awarding agency that was not authorized by the statute, and that the hearing officer therefore had no jurisdiction to order Synergy’s removal. The Court of Appeal found that the City, in removing Synergy, complied with the overarching purpose of the statute to protect the public without undermining the statute’s more specific purposes. The Court concluded there was valid ground for substitution due to Synergy’s unsafe practices and unsatisfactory work.

The Court held that even though Ghilotti opposed substituting Synergy, the hearing officer had jurisdiction to issue a decision under Section 4107 subdivision (a) because the procedures employed in the substitution substantially complied with the Act’s underlying objectives. The Court of Appeal reversed the trial court and ordered that the hearing officer’s decision will stand.

Synergy Project Mgmt., Inc. v. City & Cty. of San Francisco (2019) 33 Cal. App. 5th 21

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