

REPORT TO THE HEALTH AND WELLNESS FOUNDATION BOARD



DATE: April 17, 2013

TITLE: Substitution of Subcontractor at the Desert Hot Springs Community Health and Wellness Center Project

RECOMMENDATION

Approve Doug Wall Construction (prime contractor) request to substitute the swimming pool subcontractor at the Community Health and Wellness/John Furbee Aquatic Center Project

DISCUSSION

At the meeting of March 7, 2013, the Foundation Board acted in accordance with Public Contract Code (Section 4107(a).(9) to grant the prime contractor's (Doug Wall Construction-DWC) request to determine Pacific Custom Pools (PCP), the John Furbee Aquatic Center swimming pool subcontractor, a 'non-responsible subcontractor' and mailed PCP notification of such on March 12, 2013. PCP had five (5) working days, from the date of the notification, in which to submit a letter of objection to the Board's pending action for substitution. On March 19, 2013, the City received a letter of objection from PCP. Per the Public Contract Code, the receipt of the objection letter now requires that the awarding authority (Foundation Board) conduct a public hearing to discuss and act on the matter of the actual subcontractor substitution request. Five day minimum notice of today's hearing has been provided to the subcontractor in accordance with Public Works Contract Code Section 4107(a).(9).

Since the Board's last meeting, both parties have expressed (to staff) their desire to address the Board at this meeting to tell "their side of the story". In general, DWC maintains their justification to request the substitution of the pool subcontractor as follows:

1. PCP demobilized their construction crews from the Project site on January 11, 2013 leaving a considerable amount of work remaining to complete the pool construction.
2. The timing of PCP's action to demobilize was deliberate and severely jeopardized the pool water quality and work in place by leaving critical and necessary components uninstalled. These included; the chemical tanks, the solar heating system, the control panel, the 'UV' purification system and pool equipment required for the automatic operation of the pool systems and splash pad features. Without the listed items, acid and chlorine cannot run into the system for purification and balance of the pool water and; the pool water cannot be heated and; the splash pad water cannot be purified and; the splash pad play features cannot operate. Negative consequences included; the potential loss of the pool water due to algae growth and; potential replacement of pool water and; potential damage to freshly applied pool plaster and; failure to meet public opening date.
3. On January 11, 2013, Doug Wall Construction (DWC) provided PCP a '24 hour notice to complete work' for their remaining portion of the work to be completed "per their contract and the project plans/specifications".
4. PCP responded to DWC on January 11, 2013 (via email) that they were "re-assigning their crews to other projects".
5. On January 14, 2013, DWC served PCP with a 'Notice of Non-Compliance' and since, has not received any correspondence from PCP as to their intent to comply.

6. PCP's actions required the City to initiate its pool maintenance contract earlier than originally scheduled in order to preserve the water quality and clean the pool. Without an automatically functioning pool filtration system, the pool maintenance has been performed manually as a result of not having the items listed in No. 2 (above) installed.
7. PCP's action to de-mobilize forced DWC to initiate immediate action to preserve the pool by soliciting bids and contracting with a substitute pool contractor to complete unfinished pool work. Had not DWC taken this action, the negative consequences (listed in item 2) would have resulted and, the installation of the remaining pool equipment would add a minimum 60 additional days to the completion schedule.
8. DWC has determined at least two conditions of Public Works Contract Code Section 4107 have been satisfied as; 4107.(a)(3), "listed subcontractor fails or refuses to perform his or her subcontract" and, 4107.(a)(7), "work performed is substantially unsatisfactory and not in substantial accordance with the plans and specifications" and "the subcontractor is substantially delaying or disrupting the progress of the work" (paraphrased). Note: Public Works Contract Code Section 4107 allows awarding authorities to grant a prime contractor's request to substitute a subcontractor provided any of the situations (listed in Section 4107.1-8) occur during the contract period.

PCP maintains their objection to the DWC request for subcontractor substitution, in a letter to the City dated 3/12/2013 and a subsequent Stop Payment Notice, as follows:

1. PCP has never refused to perform under the terms of the contract between DWC and PCP.
2. PCP has never delayed or disrupted the progress of the work rather DWC has disrupted the work of PCP by refusing to honor the contract between DWC and PCP.
3. PCP has followed their letter of objection with a 'Stop Payment Notice' on March 13, 2013 claiming unpaid sums owed by DWC to PCP.

PCP has not supported items 1-3 with sufficient documentation to justify its rationale for demobilizing from the Project. Additionally, at no time since their demobilization, has PCP demonstrated any intention to return to complete the unfinished work. Instead, the primary focus of their follow up communications has been to initiate actions necessary to resolve their contract delay claims. Additionally, PCP has failed to make payments to several of their own material suppliers and subcontractors who worked on this Project via contract to PCP. Apparently, PCP is instructing that they work directly with the City for payment of their respective amounts owed by PCP.

SUMMARY

Staff supports the request from DWC to substitute the pool subcontractor and recommends that the Foundation Board approve the substitution. DWC initiated actions to process a substitution of subcontractor when convinced that PCP had demobilized permanently from the Project. The timing of PCP's departure critically jeopardized the freshly applied plaster material and pool water. DWC's options were vetted with the pool design engineer (Rowley International), a local pool contractor (the Pool Guy) and a national operator of pool maintenance systems (Knorr Systems Inc.) all who advised that complete installation of the remaining equipment and purification systems was critical and time sensitive for safe operation of the pool. Staff discussed with DWC the formal actions required to execute a subcontractor substitution request. Staff, acting as the Project's duly authorized officer, advised DWC to proceed only "at its own risk" with a substitute pool subcontractor to preserve the integrity of the pool work in place. DWC has coordinated efforts with the City's pool maintenance contractor, in the absence of an operational automated system to manually maintain the pool water, pool and splash pad.

DWC conducted a competitive bid process to select a qualified substitute pool contractor to complete the unfinished work and has selected Condor Pools.

Furthermore, PCP's objections to the substitution request are not supported by staff due to lack of relevance and supportive documentation from PCP.

FISCAL IMPACT

The prime contractor, Doug Wall Construction has not claimed additional costs to the Project associated with this action at this time. PCP's claims for delays have no relevance in the action to process a subcontractor substitution. However, if necessary, claims for delays may be brought before the Board as a separate matter in the near future.

EXHIBITS

- 1) Staff Report-March 7, 2013 Meeting
- 2) Notice of Public Hearing to PCP-April 10, 2013
- 3) Doug Wall Construction-Letter from Attorney Marc S. Homme
- 4) PCP Letter of Objection
- 5) Public Works Contract Code-Section 4100-4114 (See 4107)
- 6) 04/15/13 Letter from Law Offices of Scott Therrien