

Administrative Hearing Officer,

Desert Hot Springs Health
and Wellness Foundation

IN THE MATTER OF:

DISPUTE BETWEEN GENERAL
CONTRACTOR AND
SUBCONTRACTOR

ADMINISTRATIVE ORDER TO
SUBSTITUTE OUT PACIFIC CUSTOM
POOLS AS SUBCONTRACTOR FOR
HEALTH AND WELLNESS CENTER

STATEMENT OF THE CASE

This matter came on a special meeting of the Health and Wellness Foundation Board ("Board") for hearing before the Board on April 17, 2013, at 3:00 pm at the Carl May Community Center located at 11711 West Drive, Desert Hot Springs, California, and was heard on that date, notice duly given to all parties to whom were entitled to receive notice.

The purpose of the hearing was to determine whether to approve the request of Doug Wall Construction ("DWC"), the prime contractor responsible for construction of the Health and Wellness Center located in the City of Desert Hot Springs, State of California, to substitute out subcontractor Pacific Custom Pools ("PCP"), which was charged with construction of the Health and Wellness Center swimming pool ("Project"). DWC sought substitution of PCP under Section 4107 (a)(3) and Section 4107 (a)(7) of the Public Contract Code.

For the Health and Wellness Foundation ("Foundation"), Board members Yvonne Parks and Kate Singer, Secretary Jan Pye, Vice-Chair Kathy Greco, and Chairman Rick Daniels, as well as Deputy General Counsel, Robert Lee (collectively, "Foundation Members"), were present. DWC's legal counsel, Marc Homme, and Doug Wall, appeared for DWC. PCP's legal counsel, Scott Therriion, and James Barger, appeared for PCP.

Both immediately prior to and during the subject hearing, DWC introduced documents, attached hereto as Exhibit 1 ("DWC Hearing Exhibits"), which the Foundation Members previously had not had an opportunity to review. PCP also introduced documents, attached hereto as Exhibit 2 ("PCP Hearing Exhibits"), during the hearing to Foundation Members, also representing the first time these documents were reviewed by the Foundation Members. All such documents were received into evidence.

II

APPLICABLE LAW

A subcontractor for a public project may be substituted out provided that the underlying facts merit substitution under any of the situations set forth in Section 4107 (a)(1) through (a)(9) of the Public Contract Code. Under subsection (a)(3), substitution may be proper “[w]hen the listed subcontractor fails or refuses to perform his or her subcontract.” Under subsection (a)(7), substitution is merited “[w]hen 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.” When a contract between a general contractor and subcontractor contains a provision that a subcontractor is bound to complete the work required and may not stop or delay work even though there may be a dispute or controversy, the subcontractor must nevertheless complete the work. In effect, such a clause is an advance waiver of any right to rescind after partial performance and the net result of the clause is to make a breach of contract action the subcontractor’s exclusive remedy. *B.C. Richter Contracting Co., Inc. v. Continental Casualty Company*, 230 Cal.App.2d 491, 500 (1964).

Moreover, even though the substitution requirements of Section 4107 may not technically be satisfied (ie., a general contractor retains a substitute subcontractor prior to obtaining formal consent of the awarding authority), the technical deficiency is considered *de minimis* and does not impact the ultimate decision of the awarding authority to substitute out a subcontractor, provided that all the procedural prerequisites to holding the substitution hearing are met and that every reasonable objective of the applicable statute has been satisfied. *Titan Electric Corp. v. Los Angeles Unified School District*, 160 Cal.App.4th 188 (2008).

III

FINDINGS OF FACT

1. At the Foundation meeting of March 7, 2013, the Board acted under Section 4107(a)(9) of the Public Contract Code pursuant to DWC’s request to determine PCP to be a “non-responsible subcontractor” and mailed PCP notification of such request on March 7, 2013. PCP objected to the proposition that it be substituted out as the Project subcontractor through a letter dated March 12, 2013 sent to the Foundation. On April 17, 2013, the Board conducted a public hearing to discuss and make a determination as to whether PCP should be substituted out as the pool subcontractor per DWC’s request. The requisite five (5) day minimum notice of the April 17, 2013 hearing was provided to DWC and PCP in accordance with Section 4107.

2. On or about July 25, 2011, DWC and PCP entered into a contract ("Pool Contract") for PCP to perform work for the Project. DWC is the general contractor for construction of the Health and Wellness Center, as the City of Desert Hot Springs ("City") awarded the contract for such services to DWC. Rights to the Health and Wellness Center project were subsequently transferred from the City to the Foundation.
3. On or about January 11, 2013, PCP demobilized its construction crews from the Project site leaving a considerable amount of work remaining to complete the Project, citing DWP's failure to pay PCP. Through a letter dated January 11, 2013, DWC served on PCP a "24 hour notice to complete work" for PCP to complete the remaining portion of the Project per the Pool Contract. In an email dated January 11, 2013, PCP responded to DWC that PCP was "will be leaving the project this morning – this is the last straw." Through a letter dated January 14, 2013, DWC served PCP with a "Notice of Non-Compliance" and since that time never received any correspondence or other indication from PCP stating PCP's intention to comply, absent receipt of payment. Said letter confirmed that PCP intended "[a]s of close of business today [January 11, 2013], PCP will be re-assigning it's [sic] workforce to other projects." The letter also confirmed that PCP had abandoned the Project and would be replaced by DWC's work forces to complete the unfinished portions of the Project.
4. PCP had demobilized its crews permanently from the Project. The demobilization occurred two to three days after the pool was plastered.
5. It is widely known in the pool industry that the pool must be filled with water immediately after the pool is plastered. The timing of PCP's action to demobilize severely jeopardized the pool plaster, water quality, and work already completed by leaving critical and necessary components uninstalled. These components include the following: the chemical tanks, the solar heating system, the control panel, and the UV purification system and pool equipment required for the automatic operation of the pool systems and splash pad features. Without the above-listed items, acid and chlorine cannot run into the system for purification and balance of the pool water, the pool water cannot be heated, the splash pad water cannot be purified, and the splash pad play features cannot operate, all of which could have resulted in the loss of the pool water due to algae growth, replacement of pool water, damage to freshly applied pool plaster, and failure to meet the public opening date of the Health and Wellness Center (collectively, "Damages").
6. Upon PCP's demobilization from the Project, 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 of which advised that complete installation of the remaining equipment and purification systems was critical and time sensitive for safe operation of the pool.

7. City staff, acting as the Foundation's duly authorized agent for purposes of the Project, discussed with DWC the formal actions required to execute a subcontractor substitution request. City staff advised DWC to proceed only "at its own risk" with a substitute pool subcontractor to preserve the integrity of the pool work already in place. DWC conducted a competitive bid process to select a qualified substitute pool contractor to complete the unfinished work and selected Condor Pools to complete the Project most of which has now been completed. Had DWC not taken this action, the Foundation would have likely incurred the Damages, delaying completion of the Project by at least 60 days.
8. PCP's actions required the Foundation to initiate its pool maintenance contract earlier than originally scheduled in order to preserve the water quality and to clean the pool. Without an automatically functioning pool filtration system, the pool maintenance has been performed manually as a result of PCP's failure to complete the work required.
9. Section 3.6 of the Pool Contract provides that in the event of any disagreement between DWC and PCP "as to (i) the scope of the work required under this Agreement, (ii) scheduling, (iii) pricing of Change Orders, (iv) or any other disagreement, Subcontractor will not stop working or reduce progress, but will promptly follow the written orders of GENERAL CONTRACTOR as to the performance of the work, and will continue with the prompt and diligent prosecution of the work on the Project; said dispute shall not delay timely completion of the Work or any related thereof." Section 5.13 of the Pool Contract contains identical language except for one minor variation in subsection (iii), which variation is of no import to the subject proceedings.
10. During the April 17, 2013 hearing, there was some disagreement between DWC and PCP as to whether a particular contract exhibit was part of the Pool Contract. PCP directed the Foundation Members to an exhibit that PCP stated was part of the Pool Contract ("Exhibit AA"), and was included as part of the PCP Hearing Exhibits. Exhibit AA was not part of the Pool Contract that was part of the DWC Hearing Exhibits. Exhibit AA added language to Sections 3.6 and 5.13 of the Pool Contract that essentially excluded these sections from applicability in instances of DWC's failure to promptly make payments to PCP.
11. Each and every page of the Pool Contract submitted as part of the PCP Hearing Exhibits was initialed by both DWC and PCP. However, Exhibit AA was initialed by PCP but was not initialed by DWC.
12. Even if Exhibit AA was in fact a part of the Pool Contract under which DWC and PCP were bound, Exhibit AA does not in any way alter Section 3.4 of the Pool Contract, which statement is not being contested by either PCP or DWC. Section 3.4 provides as follows:

If in the judgment of GENERAL CONTRACTOR the Work of Subcontractor is not proceeding in accordance with the terms of this Article 3, or Subcontractor has breached any other provision of this Agreement, or should Subcontractor at any time refuse, fail or neglect to supply a sufficient amount of skilled workers or materials of the proper quality and quantity or cause by any action or omission, including the performance of this Agreement or Subcontractor's presence on the Project site, or the presence of its subcontractors or suppliers on the jobsite, the stoppage or delay of, or interference with, the work of GENERAL CONTRACTOR or of any other subcontractor or supplier on the Project, or cause any loss or damage to GENERAL CONTRACTOR due to failure to complete the Work by the date agreed upon between the GENERAL CONTRACTOR and subcontractor, GENERAL CONTRACTOR shall have the right to invoke any remedy against Subcontractor otherwise provided in this Agreement and shall further have the right, after giving twenty four (24) hours to Subcontractor of its breach, to proceed to have the Work of this Agreement done in the manner most expedient to GENERAL CONTRACTOR and change the cost (including any incidental expenses) thereof Subcontractor, and GENERAL CONTRACTOR shall be entitled to take possession of and use any materials, tools, equipment, plans, permits, and diagrams on the jobsite or intended for the Work and use the same for performance of the Work. Subcontractor waives any claim, demand, or cause of action against GENERAL CONTRACTOR for the loss or use of the tools, materials, equipment, plans, permits or diagrams, taken or used by GENERAL CONTRACTOR in accordance herewith. The rights of GENERAL CONTRACTOR pursuant of this Article specifically include, but are not limited to, the right to cause Subcontractor to change its job supervisor and the right to expel Subcontractor from the jobsite, to engage other help to complete the Work, and to deduct from any amounts due to Subcontractor any damages directly or indirectly sustained by GENERAL CONTRACTOR.

IV

DETERMINATION OF ISSUES

1. By reason of the facts found in the Findings of Fact, Paragraphs 1-12, PCP may be substituted under Section 4107 (a)(3) of the Public Contract Code as PCP failed and refused to perform its obligations under the Pool Contract, especially during a critical juncture of the Project.
2. By reason of the facts found in the Findings of Fact, Paragraphs 1-12, PCP may be substituted under Section 4107 (a)(7) of the Public Contract Code as the work performed by PCP was substantially unsatisfactory and not in substantial accordance with the plans and specifications called for by the Project, and PCP

substantially delayed and disrupted the progress of the Project, especially during a critical juncture.

3. By reason of the facts found in the Findings of Fact, Paragraphs 1-12, any technical deficiencies of not formally engaging in the proceedings required in Section 4107 of the Public Contract Code, prior to DWC retaining Condor Pools, is hereby determined to be *de minimis*, and, it is proper to substitute PCP out of the Project.

V

ORDER

THEREFORE, it is ordered that PCP be substituted out in favor of Condor Pools.

Dated: May 30, 2013

Richard A. Daniels,
Chairman