

Approval to 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.

December 11, 2007

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- ▶ This matter arises from a dispute between the General Contractor, Clark & Sullivan Builders, Inc. and their Listed Subcontractor for Heating, Air Conditioning and Ventilation (HVAC), Custom Air.
- ▶ The law requires a General Contractor to use all of their “listed” subcontractors unless and until a substitution is granted by the owner public agency.
- ▶ In May 2006, the County learned that Clark & Sullivan was planning to use an unlisted subcontractor. Within days, on May 23, 2006 the County advised Clark & Sullivan that a hearing is required under the law if a subcontractor is being substituted.

2006

May

June

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May 23, 2006

County letter to Clark & Sullivan advising of requirements to substitute contractors



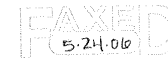
CHIEF EXECUTIVE OFFICE
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May 23, 2006



Tim Fleischer
Clark & Sullivan Builders, Inc.
801 10th Street, Suite 1-1
Modesto, California 95354

Subject: Gallo Center for the Arts
Reference: Second Mechanical Subcontractor

Dear Tim:

We understand that Clark & Sullivan is bringing Modern Air as a second Mechanical Contractor on board to support your current listed subcontractor, Custom Air. Please be aware that if you substitute a listed subcontractor the following requirements are required:

- The County Board of Supervisors has to consent to the listed subcontractor.
- The County has to make the finding that the subcontractor is not performing and is substantially delaying the progress of the project based upon evidence supplied by Clark & Sullivan.
- The County has to give the listed Subcontractor notice and the right to a hearing.

The Board of Supervisors can delegate the hearing function, but the decision must be affirmed by Clark & Sullivan.

Sincerely,

Don H. Fleischer
Senior Construction Manager

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- ▶ Clark & Sullivan did not request a hearing and instead completed the substitution. The listed Subcontractor, Custom Air, objected to the substitution.
- ▶ On July 31, 2006, a full six weeks after completing the substitution, the County received a request for substitution from Clark & Sullivan.
- ▶ In response to the Clark & Sullivan request, the County retained the services of an independent hearing officer to hear this disputed matter.

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- ▶ The Hearing was held on August 16, 2006. A substantial amount of evidence was provided at the hearing and Clark & Sullivan and Custom Air both presented their cases at that time.
- ▶ The independent Hearing Officer concluded that the substitution request was moot as the substitution had already occurred without the hearing and owner's consent in advance as required by law.
- ▶ Basically, the Hearing Officer found that Clark & Sullivan had to obtain consent before the substitution – not after the substitution. The County believes this was and is a correct statement of the law.

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▶ Four recommendations are before the Board of Supervisors this morning:

1. Pursuant to Public Contract Code Section 4114, without further notice or hearing, adopt the hearing officer's 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.;

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2. Find that there is substantial evidence supporting the hearing officer's August 18, 2006 decision, findings and conclusions; and
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

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4. Order said penalty to be deposited in the fund from which the prime contract is awarded.

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Clark & Sullivan representatives are present and have requested an opportunity to address the Board of Supervisors this morning.

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