

STAFF REPORT

City Council Business Item

DATE: February 6, 2023

TO: Honorable Mayor and Council Members

FROM: Brendan Byrd, Public Works Director/City Engineer

THROUGH: Merritt Perry, City Manager

SUBJECT: **Public Hearing to Consider Approving the Substitution of a Subcontractor for the Apparent Low Bidder for the City's Police Facility Remodel Project, Resolution 2023-04**

STAFF RECOMMENDATION:

Approve a request by Sequoia Construction Specialties to substitute a subcontractor pursuant to Public Contract Code Section 1771.1 for the City of Fortuna Police Facility Remodel Project and adopt Resolution 2023-04.

EXECUTIVE SUMMARY:

The Police Facility Remodel Project plans were put out to bid on October 31st 2022. After a several extensions to the bid period due to bid addendums and the December earthquake, the bid opening was held on January 5th 2023 at 3 pm. The City received three bids, and the apparent low bidder was found to be Sequoia Construction Specialties (Sequoia). Further information regarding the bid results can be found in the subsequent staff report which recommends award of the project.

At the bid opening, staff verified that all of the prime contractors who bid project are registered with the Department of Industrial Relations (DIR), which is a requirement of Public Contract Code (PCC). The detailed review of each bid, which includes checking all subcontractor licenses and registrations, occurs afterwards. During the detailed review of each bid, it was found that two of the subcontractors listed in Sequoia's bid, Redwood Glass and J&G Lawn and Garden, are not currently registered with the DIR, which is a requirement for all subcontractors listed on a public works contract bid.

After finding that two of the subcontractors on Sequoia's bid were not registered, staff contacted Clare Gibson (City's PCC Attorney), who is the City's on-call attorney for Public Contract Code law. After providing the City's PCC Attorney with the information, it was identified that Code Section 1771.1(c) clearly states that subcontractor substitutions due to inadvertent errors are permissible in situations per the text below (text bolded below specifically applies to this situation):

(c) An inadvertent error in listing a subcontractor who is not registered pursuant to Section 1725.5 in a bid proposal shall not be grounds for filing a bid protest or grounds for considering the bid nonresponsive, provided that any of the following apply:

(1) The subcontractor is registered prior to the bid opening.

(2) Within 24 hours after the bid opening, the subcontractor is registered and has paid the penalty registration fee specified in subparagraph (E) of paragraph (2) of subdivision (a) of Section 1725.5.

(3) The subcontractor is replaced by another registered subcontractor pursuant to Section 4107 of the Public Contract Code.

After speaking with the City's PCC Attorney, staff reached out to Sequoia to alert them of the issue. Sequoia indicated that the listing of Redwood Glass and J&G Lawn and Garden was an error. Sequoia indicated their intent to perform a subcontractor substitution as to J&G Lawn and Garden and clarified that Redwood Glass is a material supplier only so does not need to be listed in the bid as a subcontractor. Staff indicated to Sequoia that any substitution would need to be consistent with the requirements of PCC Section 1771.1 to be determined legally valid, and that they would be responsible to furnish all items to the City within the timelines established by the code. A listing of the required documentation and timelines for a subcontractor substitution is provided below (summarized from PCC Section 4107.5):

- a) The prime contractor provides the City written notice claiming error within (2) days following the bid opening, along with copies to the subcontractor listed in error and the intended new subcontractor;*
- b) The inadvertently listed subcontractor does not submit a written objection to the claim of inadvertent error within six (6) working days of the date of the bid opening; and*
- c) The prime contractor, the subcontractor listed in error, and the intended subcontractor each submit an affidavit to the City along with such additional evidence as the parties may wish to submit that an inadvertent clerical error was in fact made, provided that the affidavits from each of the three parties are filed within eight (8) working days from the time of the bid opening.*

Staff received each of the required items of documentation from Sequoia noted above within the established timelines. Also of note, J&G Lawn and Garden did not provide written objection, rather they furnished an affidavit attesting to the error in registration. Sequoia has proposed to remove Redwood Glass from the subcontractor list (as they are only a material supplier), and substitute J&G Lawn and Garden with All Area Landscaping. Staff confirmed that All Area Landscaping possess active contractor's licenses and DIR registration. Copies of the documentation received from Sequoia have been included in Attachment B.

Concurrent with the timelines noted above, the City also received a bid protest from the second low-bidder, Adams Commercial General Contracting (ACGC). In summary, the protest asserts that due to the status to the DIR registration for J&G Lawn and Garden, Sequoia's bid should be considered non-responsive and that the project should be awarded to ACGC, or bids should be rejected. The full bid protest from ACGC has been included as Attachment C. Sequoia elected to provide a written response to the bid protest, clarifying their intent to pursue a subcontractor substitution to remedy the situation. The response has been included as Attachment D.

After receipt of all items noted above, including the bid protest and response and all substitution documentation from Sequoia, the City's PCC Attorney completed a full review of the situation and provided to the City their legal recommendation. In short, the Attorney's recommendation is that pursuant to PCC Section 4107.5, Sequoia has provided all documentation required to complete a subcontractor substitution and remain a responsive bidder, and therefore the bid protest from ACGC

'lacks merit'. Additionally, the City has "no obligation – and indeed no legal grounds - to reject Sequoia's bid as they seek to correct the listing error as expressly authorized by PCC Section 1771.1." The full legal response from the City's PCC Attorney can be found in Attachment E.

The final step to complete a subcontractor substitution is for the awarding authority to 'provide consent' for the substitution, provided that all requirements of PCC Section 4107 have been met, a public hearing has been held, and that there are 'no compelling reasons' to the contrary. With the recommendation from the City's PCC Attorney, staff recommend that after the public hearing is held, the Council consent to the substitution and adopt Resolution 2023-04, which has been included as Attachment A. If consent to the substitution is provided, the following business item is the recommendation of project award to Sequoia Construction Specialties.

FINANCIAL IMPACT:

There is no fiscal impact with regards to Sequoia Construction's request for a subcontractor substitution. Sequoia is required to honor the same bid price, and the contract award recommendation will be presented by staff as a separate business item.

RECOMMENDED COUNCIL ACTION:

1. Receive staff presentation and review Council questions with staff
2. Open Public Comment
3. Close Public Comment
4. Motion to approve a request by Sequoia Construction Specialties to substitute a subcontractor pursuant to Public Contract Code Section 1771.1 for the City of Fortuna Police Facility Remodel Project and adopt Resolution 2023-04. Voice vote.

ATTACHMENTS:

- Attachment A – *Resolution 2023-04, a resolution of the City Council of the City of Fortuna accepting a request by the apparent low bidder to substitute a listed subcontractor in its bid for the Police Facility Remodel Project pursuant to Labor Code 1771 and Public Contract Code Sections 4107 and 4107.5*
- Attachment B – Written Notice and Affidavits from Sequoia Construction
- Attachment C – Bid Protest from Adams Commercial General Contracting
- Attachment D – Response to Bid Protest from Sequoia Construction Specialties
- Attachment E – Legal Response from City's Attorney, Clare Gibson