

**DATE :** January 19, 2018

**TO :** Wilma Quan-Schecter, City Manager

**FROM:** Michael D. Flores, Independent Administrative Hearing Officer

**Subject:** **FINDINGS AND RECOMMENDATION TO CITY COUNCIL ON PROTEST OF TENNYSON ELECTRIC CO., REGARDING REQUEST FROM GENERAL CONTRACTOR F. LODUCA CO. TO SUBSTITUTE ALTERNATE SUBCONTRACTOR PURSUANT TO CALIFORNIA PUBLIC CONTRACT CODE §4107. FAIRVIEW TRAIL REHABILITATION PROJECT- BID FILE NO. 3542-12000.**

### **Procedural History**

The City of Fresno (“City”) invited bids for the rehabilitation of the Fairview Trail, Project ID PW00759; Bid File no. 3542-12000 (“Fairview Project”). After receiving all bids, City staff issued a determination that designated F. Loduca Company (“Loduca”), as the lowest responsible and responsive bidder and Prime Contractor of the Fairview Project, in compliance with the specifications set forth in the Bid Files. As part of their bid package, Loduca listed Tennyson Electric Incorporated (“Tennyson”) as a subcontractor to perform specified electrical work on the Fairview Project.

On November 20, 2017, Loduca made a written request to the City of Fresno, Construction Management Division (“City”) to substitute Underground Specialties Central Coast, Inc. (“Underground”) in place of Tennyson, pursuant to California Public Contract Code sections 4107(a)(1), (a)(7), and (a)(9); alleging in relevant part that Tennyson had failed to timely execute a written contract for the scope of work specified in the subcontractor’s bid, when the written contract was timely presented to Tennyson by Loduca; that Tennyson substantially delayed or disrupted the progress of the work (Fairview Project) by failing to timely execute the written contract, obtain and provide the required materials specified in the subcontractor’s bid; specifically electric light poles, and by generally failing to perform that work specified in their scope of work included in their bid, which Loduca alleges constitutes 45% of the entire project; and that, because of their failure to timely perform the scope of work as provided in their bid, are not a responsible contractor as designated under California Public Contract Code §4107(a)(9). A true and correct copy of Loduca Co.’s November 20<sup>th</sup> letter is attached hereto as “Loduca Exhibit #1”.

The City informed Tennyson in a letter dated November 28, 2017 of Loduca’s request via certified mail pursuant to California Public Contract Code §4107(a)(9). The letter also informed Tennyson that pursuant to the California Public Contract Code, they had five working days from

the date of the City's letter to submit a written objection to the substitution to the City, and if a written objection was timely received, a hearing by the City's Administrative Hearing Officer would be conducted. A true and correct copy of the City's November 28<sup>th</sup> letter to Tennyson is attached hereto as "Loduca Exhibit #4". Tennyson did provide a written objection to the City, dated December 12, 2017 (Tennyson Exhibit #A), and a hearing was conducted on January 8, 2018, at 9:02 A.M., in Fresno City Hall by Independent Administrative Hearing Officer Michael D. Flores.

### **Issues on Appeal**

Tennyson's objection letter of December 12, 2018 contended that (1) they executed the subcontractor agreement on November 2, 2017, and provided it to Loduca; (2) they had sent emails for material submittal approval to Loduca, to which Loduca never responded; (3) Loduca has not allowed Tennyson to cure any of the defects alleged despite their attempts to do so, and (4) Loduca continues to be "unresponsive and unwilling" to provide services and perform their contracted duties under the subcontractor agreement executed and delivered by Tennyson to Loduca.

### **Findings**

At the January 8<sup>th</sup> hearing, Matthew Tennyson, Operations Officer, and Justin Benz, Project Engineer appeared on behalf of Tennyson Electric, Incorporated.

Frank Loduca, Owner, and Alisha Loduca, Office Manager appeared on behalf of F. Loduca Company.

Bill Herr, Construction Manager, City of Fresno Public Works Department appeared on behalf of the City of Fresno, Public Works Department.

Through testimony of Mr. Tennyson, Mr. Benz, Mr. Loduca and Ms. Loduca, the Hearing Officer was able to compile an approximate "timeline" of what occurred beginning at the time Loduca initially communicated with Tennyson after the award of the Fairview Project to Loduca, June 26, 2017 (Loduca Exhibit #2, p.1), until November 28, 2017, when Tennyson submitted their objection to Loduca's request for substitution of subcontractors (Tennyson Exhibit #A).

According to testimony from both parties and the documentary evidence, Loduca was awarded the Fairview Project by the City Council on June 22, 2017.

On June 26, 2017, Alisha Loduca emailed Jacob Blea at Tennyson the bid results, and also requested information as to whom they should contact regarding operations issues, contract issues, and other miscellaneous issues (Loduca Exhibit #2, p. 1).

Ms. Loduca testified that on July 5, 2017, Loduca received an email from Mr. Blea. The email stated that Tennyson was looking forward to working with Loduca on the Fairview Project, but did not provide any contact information as requested by Loduca's June 26<sup>th</sup> email to Tennyson.

The email from Mr. Blea did however state that, “We will get that information together and over to you.” (Loduca Exhibit #2, p. 1).

Neither Tennyson nor Loduca provided any testimony or other evidence regarding any communication between the two companies during the month of August, 2017. Ms. Loduca testified that Loduca received the General Contractor Agreement from the City on September 1, 2017, and sent a signed Subcontractor Agreement to Tennyson for their signature via USPS Priority Mail on September 2, 2017. Ms. Loduca testified that she did not provide a specific deadline to Tennyson for signing and returning the Subcontractor Agreement. In reply to a question by the Hearing Officer, Ms. Loduca testified that it is the regular practice to expect the signing and return of such an agreement “as quickly as possible”. Matthew Tennyson testified that when Tennyson received the Subcontractor Agreement from Loduca in September of 2017, they assigned employee Jason Baker to act as Operations Manager on the Fairview Project. In response to the Hearing Officer’s question, Mr. Tennyson testified that as Operations Manager on the Fairview Project, Mr. Baker would act as a “liaison” between Tennyson and Loduca, and would be the primary contact for Loduca with Tennyson.

Ms. Loduca then testified that in early September, 2017 (no date given), the City requested that Loduca work with the City to schedule a “Pre-Construction” meeting. Ms. Loduca testified that Loduca contacted Tennyson to determine their availability to attend the Pre-Construction meeting, to request a “status update” on the execution of the Subcontractor Agreement, and the necessary “lead time” required for submission of the electric pole order. Ms. Loduca testified that she received no response to her inquiries. Ms. Loduca then testified that on September 11 and 12, 2017 she telephoned Tennyson regarding the same issues, but had to leave messages as the telephone went immediately to voicemail on both occasions. She then testified that she sent Jacob Brea another email requesting status updates on the same issues, and received no response.

Ms. Loduca testified that she then contacted Mike Tennyson (apparently by email), and Mike Tennyson responded that he was unaware of the contract with F. Loduca, but that he would talk to Jason Baker about it (Loduca Exhibit #2, p. 4). In response, on September 13<sup>th</sup>, Ms. Loduca forwarded Mike Tennyson the emails to Jacob Brea dated June 26 and July 5, 2017, relating to her requests for contact information and the Fair Labor “questionnaire” Tennyson was required to complete (Id.). Mike Tennyson emailed Ms. Loduca later on the 13<sup>th</sup> stating that the Subcontractor Agreement was, “routing through our office for approvals”, and that Loduca “...should see it back shortly.” (Loduca Exhibit #2, p. 7).

Ms. Loduca testified that on September 15, 2017, she received an email from Jason Baker stating that Loduca would receive the executed Subcontractor Agreement no later than September 19, 2017. Neither Loduca nor Tennyson included a copy of this email to the Hearing Officer in their exhibits. Ms. Loduca testified that F. Loduca Co. never received an executed Subcontractor Agreement from Tennyson. Matthew Tennyson testified that they sent the executed Subcontractor Agreement to Loduca via USPS First Class Mail, in November, 2017. Subsequent to the hearing, and in conformance with the Hearing Officer’s direction, Tennyson provided both the Hearing Officer and Loduca a copy of the cover letter allegedly sent with the executed Subcontractor Agreement to Loduca (Tennyson Exhibit #B). The cover letter states that Loduca could “look forward to our [material] submittals arriving soon for the lighting package.” The

cover letter also states that the “lead time” for the electric light poles is “12-16 weeks upon release.” The cover letter is dated September 11, 2017, and has the name, “Jason Baker” at the signature line, but the copy of the letter provided by Tennyson was not signed.

Ms. Loduca also testified that she communicated further with Jason Baker, again asking him for a status update on when Loduca could expect the submission of the electric pole order, and how much “lead time” would be necessary for the ordering of the electrical poles. Ms. Loduca testified that she wanted Loduca to have the information prior to the Pre-Construction meeting with the City. According to Bill Herr, Construction Manager for the City Public Works Department, the Pre-Construction meeting took place on September 15, 2017. Frank Loduca testified that he had left a telephone message with Mike Tennyson prior to the Pre-Construction meeting with the City “inviting” Tennyson to the meeting. Mr. Loduca then testified that he received no reply from Mike Tennyson, but did communicate with Jason Baker, who, the day before the meeting confirmed that he would attend on Tennyson’s behalf, but then telephoned Mr. Loduca shortly before the start of the meeting to inform him that he would not be able to attend. Tennyson had no representative at the Pre-Construction meeting.

Ms. Loduca testified that on September 19, 2017, she once again emailed Jason Baker regarding the status of the executed Subcontractor Agreement, the estimate of the lead time necessary for the electric poles and the estimated time Loduca could expect the electric pole submittals. Ms. Loduca testified that she also copied Mike Tennyson with this email. There was no September 19, 2017 email submitted to the Hearing Officer by Loduca or Tennyson. However there was an email submitted by Loduca dated September 21, 2017 from Alisha Loduca to Jason Baker requesting an “update on the Fairview Trail submittal” (Loduca Exhibit #2, p. 10). The September 21, 2017 email refers to a previous communication in which Mr. Baker apparently thought that the submittal would be ready the previous Tuesday, which could have possibly been September 19<sup>th</sup>; the previous Tuesday according to the calendar.

Ms. Loduca testified that she received an email from the City (no specific person mentioned) requesting the status of the submission for the electric light poles from Tennyson. Ms. Loduca testified that the City’s email stated that the poles had the longest “lead time”, and since they were the most important part of the Fairview Project, the Project’s schedule “revolved” around that timeframe and the installation of the electric poles. Neither Loduca nor Tennyson provided an email from the City with the September 22, 2017 date, but Loduca did provide an email from Alisha Loduca to Jason Baker dated September 19, 2017 stating that at the Pre-Construction meeting on September 15<sup>th</sup>, it was decided that the Fairview Project wouldn’t be started until the electric polls were ordered and/or delivered, and again asking Mr. Baker for a submittal (Loduca Exhibit #2, p.9).

Ms. Loduca then testified that she telephoned Tennyson, and left a voicemail message stating that if there was no response to her email requests for electric light pole submittals and status on the executed Subcontractor Agreement within 48 hours, then F. Loduca Co. would move to request that another subcontractor be substituted for Tennyson on the Fairview Project. Alisha Loduca testified that she and Frank Loduca discussed the situation, and decided to attempt to order the electric poles themselves and make the material submittal to the City themselves, although they had no experience in doing so. Ms. Loduca testified that on October 6, 2017, after

receiving no response from Tennyson, she contacted Great Basin Lighting Company to determine whether the electric poles could be ordered from them. Ms. Loduca testified that Great Basin referred them to another vendor, JAMS Services (“JAMS”). When Ms. Loduca contacted JAMS about the electric poles on October 15th, she testified that they asked if they could contact Tennyson directly regarding the ordering of the electric poles. Ms. Loduca testified that she gave JAMS permission to do so. Ms. Loduca testified that she was contacted by JAMS two days later and was informed that they could not reach Tennyson.

Ms. Loduca testified that she was then contacted by the City regarding a status update on the electric poles. Loduca provided an email from Jaime Macias, Project Inspector, City of Fresno on October 17, 2017, requesting to know “what is going on with Tennyson Electric” (Loduca Exhibit #2, p. 11). Loduca also provided the response to Jamie Macias’ email explaining the on-going problems Loduca had been experiencing with Tennyson, including Tennyson failing to return the executed Subcontractor Agreement, and that Loduca had received no communication from Tennyson since September 19<sup>th</sup>. The email in response to Mr. Macias’ October 17<sup>th</sup> email also informed Mr. Macias that Loduca planned to request a substitution of subcontractors for Tennyson (Id., p. 12).

Ms. Loduca testified that she drafted a material submittal for the electric poles from JAMS Services using a template found on the City’s website, and provided it to the City on October 24, 2017. Ms. Loduca then testified that the City requested paint chip samples for the electric poles on November 9, 2017, and she contacted JAMS Services to request assistance in obtaining the samples. Ms. Loduca testified that JAMS then informed her that Tennyson had since been in contact with them regarding the electric poles. She was also informed that the request had been made by Jacob Benz of Tennyson. Ms. Loduca testified that she contacted Mr. Benz by telephone and email (no specific date for this communication was given). Ms. Loduca testified that she received a return telephone call from Karl Kappler informing her that he was the new Project Manager for Tennyson.

Loduca provided an email dated November 13, 2017 from Jacob Benz, Tennyson Electric to Loduca Electric containing material submittals for the electric poles from three different vendors: Gardco Lighting, Valmont Poles, and Tesco Service Panel (Loduca Exhibit #2 p. 13; Tennyson Exhibit #D, pp. 1-40 (attached submittals included)). In response to Mr. Benz’ November 13<sup>th</sup> email, Loduca emailed Mr. Benz and informed him that Frank Loduca had already informed Mike Tennyson and Karl Kappler of Tennyson that Loduca Electric had decided to request a substitution of subcontractors for Tennyson, that the submittals received in the last email had been requested more than two months prior, and that in the future it was hoped that Tennyson would be more “responsible” (Loduca Exhibit #2, p. 14). In response to Loduca’s email, Mike Tennyson sent an email to Loduca Electric stating that as far as Tennyson Electric was concerned, there was an executed agreement between the two companies, Loduca Electric had failed to give Tennyson “...any written notification otherwise”, and would be proceeding under the California Public Contract Code, “...for listed subcontractors and executed contracts.” The email went on to direct new Project Manager Karl Kappler to put Loduca Electric on notice that Tennyson did not agree with Loduca Electric’s accusations, nor were they given an opportunity to address any problems Loduca may have had with Tennyson. Finally the email stated that

Tennyson would move forward in good faith, "...until otherwise informed of our legal rights." (Loduca Exhibit #2, p. 16; Tennyson Exhibit #D, p. 49).

In a letter to the City of Fresno, Construction Management Division, dated November 20, 2017, F. Loduca Company formally requested that the City allow the substitution of Underground Specialties, Central Coast for Tennyson Electric, Inc., pursuant to California Public Contract Code §4107. The letter was signed by Frank Loduca (Loduca Exhibit #1).

In a letter sent to Loduca Electric Company dated November 27, 2017, Project Manager for Tennyson Electric, Karl Kappler stated that Tennyson had been contacted by several vendors of electric light poles and had informed Tennyson that Loduca had attempted to purchase the electric poles directly from the vendors instead of going through Tennyson per their Agreement. The letter further stated that pursuant to the terms of the Agreement and the California Contract Code, Tennyson could not be replaced without a minimum 48 hours' notice. Finally the letter informed Loduca that if they had not heard back from them within 48 hours, Tennyson would contact the City to request assistance in resolving the matter (Tennyson Exhibit #D, p. 58).

Tennyson was sent a letter, dated November 28, 2017 from the City notifying them of Loduca's request for substitution of subcontractors (Loduca Exhibit #4).

### **Analysis of Issues**

**Public Contract Code §4107(a)**: Section 4107(a) generally prohibits a "prime" or "general" contractor from substituting a subcontractor listed in the general contractor's original bid to the awarding authority (in the case, the City), except in specific instances. F. Loduca requested that the City allow them to substitute Underground Specialties, Central Coast for Tennyson Electric based on three of the exceptions contained in section 4107(a).

**A. Section 4107(a)(1)**- This subsection allows for a general contractor to substitute another subcontractor if the original subcontractor, "*...after having had a reasonable opportunity to do so, fails or refuses to execute a written contract for the scope of work specified in the subcontractor's bid and at the price specified in the subcontractor's bid, when that written contract, based upon the general terms, conditions, plans, and specifications for the project involved or the terms of that subcontractor's written bid, is presented to the subcontractor by the prime contractor.*"

The November 20, 2017 letter sent by Loduca to the City stated that Tennyson was sent the Subcontractor Agreement by mail on September 2, 2017, "...with instructions to return the contract signed, with certificates of insurance, and the city required Fair Employment Practice Compliance Report" and that Loduca had not received any of the documents as of the date of the letter. (Loduca Exhibit #1). At the January 8, 2018 hearing, Alisha Loduca testified that F. Loduca sent Tennyson the Subcontractor Agreement with the required F. Loduca authorized signatures on September 2, 2017, via USPS Priority Mail, with tracking number. Both Matthew Tennyson and Tennyson Project Engineer Jacob Benz testified at the January 8<sup>th</sup> hearing that the executed Subcontractor Agreement was sent back to Loduca via USPS First Class Mail in November of 2017, but not sent insured, certified or with a means of tracking or confirming its

receipt by Loduca. Alisha Loduca testified at the January 8<sup>th</sup> hearing that Loduca has never received the executed Subcontractor Agreement, up to and including January 8, 2018. The Hearing Officer could find no language in the Fairview Project Specifications, or the City's Standard Specifications regarding how agreements were required to be served upon the parties for execution, nor was he provided a copy of the Subcontractor Agreement. So he reviewed the general California rules regarding service of documents by mail. For most if not all contracts, California adheres to the "Mailbox Rule", in which an agreement, such as the Subcontractor Agreement between Loduca and Tennyson is considered accepted when the "offeree" (Tennyson in this case) signs the Agreement and places the signed Agreement in an official U.S. Mail receptacle.

There is no dispute as to whether Tennyson received the Subcontractor Agreement from Loduca. However, the testimony from Mr. Tennyson and Mr. Benz, combined with the documents produced by both Tennyson and Loduca which Tennyson is confusing, inconsistent and incomplete, and does not support their contention that the Subcontractor Agreement was signed and sent back to Loduca. At the January 8<sup>th</sup> hearing, both Matthew Tennyson and Jason Benz representing Tennyson testified that the Subcontractor Agreement was signed and sent back to Loduca sometime in November of 2017. After the hearing, Tennyson provided the Hearing Officer a cover letter dated September 11, 2017 on Tennyson letterhead which stated that the Subcontractor Agreement was enclosed with the cover letter (Tennyson Exhibit #B). This cover letter contradicts the sworn testimony of both Mr. Tennyson and Mr. Benz. But the cover letter provided by Tennyson, with the signature line of Jason Baker, then Project Manager assigned to work with Loduca on the Fairview Project, was *unsigned*. An unsigned document is rarely considered persuasive evidence. Even if for argument sake the Hearing Officer accepted the unsigned cover letter from Tennyson as persuasive evidence in support of their contention, an email dated September 13, 2017 from Jason Baker to Alisha Loduca states that they (Tennyson) were still "routing" the Agreement through the office on September 13<sup>th</sup>; two full days after the September 11<sup>th</sup> cover letter indicated Tennyson had sent the Agreement to Loduca, and two months before Mr. Tennyson and Mr. Benz testified Tennyson had sent the Agreement to Loduca. Additionally, none of the evidence provided by Tennyson mentioned whether the required insurance certificates and Fair Employment Practice Report were also returned with the Agreement to Loduca.

While the Hearing Officer in no way believes that Mr. Tennyson or Mr. Benz purposefully misrepresented the facts regarding Tennyson's execution and return of the Subcontractor Agreement to Loduca, the evidence presented is contradictory, and reviewed as a whole, does not support Tennyson's contention that they signed and returned the Agreement to Loduca.

**B. Section 4107(a)(7)-** This subsection allows for a general contractor to substitute another subcontractor, "*When 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.*"

The November 20, 2017 letter sent to the City from Loduca contended that despite repeated requests for a return of the executed Subcontractors Agreement, City required insurance

certificates, and a Fair Employment Practice Report, along with numerous email messages, telephone voicemail messages and several communications with Tennyson since July of 2017, Loduca still had not received the Subcontractor Agreement or the other City required documents, and had received submittals for the electrical poles in November of 2017, although they had been requested numerous times since September of 2017. The November 20<sup>th</sup> letter also contended that Tennyson's lack of communication, and failure to provide the lead time information and electric light pole submittals in a timely manner was evidence that they could not handle the work load they had bid on, and since the installation of the light poles was a crucial aspect of the Fairview Project, and constituted 45% of the entire Project, Tennyson's failure to provide the lead time information and submittals in a timely manner negatively affected the Project's work schedule which resulted in a substantial delay. Tennyson contends that they were never given the required 48 hours' notice of Loduca's intent to request a substitution from the City. However, Alisha Loduca sent an email to Jacob Benz on November 9, 2017 notifying Mr. Benz and Tennyson that Loduca, among other things, was planning on making a request to the City for substitution of subcontractors. (Loduca Exhibit #2, p. 12)

It is important to note that the language of 4107(a)(7) requires that the "awarding authority or its duly authorized officer" must be the entity that determines whether the subcontractors actions or inaction constitutes a substantial delay or disruption of the work progress. There was no evidence presented to the Hearing Officer that the City, or the Public Works Department believed that Tennyson's failure to timely communicate or provide submissions for the electric poles constituted a "substantial" delay or disruption of the work progress. The emails to Loduca from Jamie Macias, Project Inspector for the Fairview Project requested information on the status of the submittals for the electric poles from Tennyson, but never mentioned the delay in receiving them as a substantial delay or disruption in the work progress. When questioned by the Hearing Officer at the January 8<sup>th</sup> hearing, Bill Herr, Construction Manager for the Public Works Department testified that he did not consider the delay in receiving the pole submittals from Tennyson a substantial delay or disruption in the work progress of the Project, and that work on the Project had been on-going for approximately three weeks. However, it could be argued that F. Loduca Electric Company, as "Prime" or "General" Contractor on the Fairview Project could be considered a "duly authorized officer" under section 4107(a)(7). Frank Loduca testified that the delay in the submittal and subsequent ordering, delivery and eventual installation of the electrical poles did constitute a substantial delay or disruption of the progress of the Project as it affected his business. Mr. Loduca testified that because the electric light poles were not ordered as soon as they could have been, they were not delivered and installed before the recent inclement weather, which had caused some flooding and saturated the ground where the poles were to be installed, which would further delay completion of the Project. Mr. Loduca testified that had the electrical poles been ordered in September when requested, they would have been installed prior to the rain storm and the rest of the Project could have gone forward. Mr. Loduca testified that the installation of the light poles was the most complex portion of the Project as well as its largest component, and therefore it greatly affected the rest of the Project work schedule. Mr. Loduca testified that the extra time Loduca has been required to spend on the Project has affected the schedule for the other projects his company had scheduled for the future. The delays on the Fairview Project required that the schedules on future projects Loduca is involved in be adjusted accordingly, which would likely result in Loduca either suffering added expenses, or losing significant revenue. Mr. Loduca believed that Tennyson's inaction



constituted a substantial delay or disruption of work progress for this reason. For the record, Mr. Herr has informed the Hearing Officer that the electrical poles were ordered and have been or are in the process of being installed on the Project.

Certainly the evidence establishes that at best, Tennyson's handling of their responsibilities to Loduca was less than efficient, and there is substantial evidence that there was a general lack of communication not only with Loduca, but within Tennyson Electric's office itself. When contacted by Alisha Loduca on September 13<sup>th</sup>, Mike Tennyson emailed Ms. Loduca that he wasn't even aware that there was an agreement between Tennyson and Loduca, even though Tennyson was provided the bid results by Loduca in July of 2017 (at Tennyson's request), and according to a cover letter dated September 11, 2017 from Tennyson to Loduca, had sent the executed agreement back to Loduca. The evidence also establishes that Tennyson failed to communicate with Loduca despite repeated attempts by Loduca for updates and status of the executed Subcontractor Agreement as well as requests for submittals and estimated lead time for the electric light poles. Tennyson finally communicated with Loduca only after Loduca had, in desperation, attempted to create material submissions for the poles themselves in order to keep the Project moving, and Tennyson was informed of Loduca's efforts. While the Public Works Department has not determined that the delay in Tennyson's light pole submittals was a substantial delay or disruption in the progress of the work on the Project, their delay will most likely cause a future financial loss or extra cost for F. Loduca Electrical Co. It is within the discretion of the City Council to determine whether Loduca's status as a "prime" or general contractor on the Fairview Project would qualify them as part of the "awarding authority or its duly authorized officer" for purposes of this subsection of 4109.

**C. Section 4107(a)(9)-** This subsection allows for a general contractor to substitute another subcontractor, "*When the awarding authority determines that a listed subcontractor is not a responsible contractor.*" Similar to 4107(a)(7), it is the awarding authority who determines whether the subcontractor is "responsible". However, section 4107(a)(9) does not include the term "or its duly authorized officer" as does section 4107(a)(7). Section 4107 does not define the term, "responsible", but California Public Contract Code §1103 contains the definition of a "responsible bidder" that may be applied in this situation. Section 1103 defines a "responsible bidder" as a bidder (or in this case a subcontractor), "*...who has demonstrated the attribute of trustworthiness, as well as quality, fitness, capacity, and experience to satisfactorily perform the public works contract.*"

As discussed in detail above, the evidence provided to the Hearing Officer establishes that Tennyson failed to communicate with Loduca for long periods of time, and failed to provide information requested by Loduca regarding their efforts to fulfill the contractual duties to Loduca by providing required documents, contact information, material submittals, and most importantly, the furnishing and installation of the electric light poles themselves, which was the purpose of the contractual relationship with Loduca, and the major component of the Fairview Trail Rehabilitation Project. The evidence establishes that they failed to carry out most if not all of their contractual duties to Loduca in a timely manner. These failures do not demonstrate, in the Hearing Officer's opinion, the attributes of trustworthiness, quality, fitness, or capacity to satisfactorily perform their contracted duties on the Fairview Project. There was no evidence presented by Loduca that the City or Project Inspector Jamie Macias specifically stated that they

believed Tennyson was not a responsible contractor. Loduca did however provide emails from Mr. Macias requesting the status of the electric light pole submissions, and in one email asked Alisha Loduca, “What is going on with Tennyson Electric[?]” (Loduca Exhibit #2, p. 11). All Loduca could tell Mr. Macias and the City was that they had attempted to obtain status information from Tennyson for several months and had no success. Finally, Loduca informed Mr. Macias and the City that they felt their only option was to attempt to obtain the light pole submissions themselves and request that the City allow them to obtain a substitute subcontractor (Id.). Certainly the City must have felt some frustration as well.

**Conclusion-** As discussed in detail above, the evidence provided to and reviewed by the Hearing Officer establishes that Tennyson failed to timely communicate with Loduca in providing contact information, failed to provide status updates on their efforts to provide submittals for the electrical light poles they were to furnish and install under their original bid and Subcontractor Agreement with Loduca, and failed to respond to Loduca regarding Loduca’s concerns about the delays Tennyson’s silence would cause the Fairview Project. Additionally, the Hearing Officer believes that the evidence also establishes that there was little if any communication regarding the subcontractor agreement with Loduca within Tennyson Electric, Inc. itself. Some presumably executive level persons were not even aware that Tennyson had an agreement with Loduca, or was contracted to provide services for the Fairview Trail Project. At the January 8<sup>th</sup> hearing, both Matthew Tennyson, and Jacob Benz testified that the original project manager under the agreement with Loduca, Jason Baker, was at the time in question, having “personal issues”, and after given some time off, was eventually terminated by Tennyson, and a new project manager assigned to work with Loduca. In reviewing the evidence provided to the Hearing Officer, it is clear that Mr. Baker was initially assigned to be the chief liaison between Tennyson and Loduca, and responsible for ensuring that all documents were returned to Loduca, material submissions were obtained, electric light poles ordered, and all other major aspects of the agreement including updates and other communication with Loduca was maintained. The emails and testimony provided to the Hearing Officer establish that at least in the beginning of the agreement, Loduca’s communications to Tennyson were understandably directed almost exclusively to Mr. Baker. However, after Mr. Baker had failed to respond to Alisha Baker’s many emails and phone messages, both Alisha and Frank Loduca attempted to communicate with others at Tennyson, but still received no replies. Certainly Mr. Baker could be assigned a great deal of the blame for his failure to timely communicate and perform Tennyson’s contractual duties, at least at the initial stage. However, Tennyson as Mr. Baker’s employer has an affirmative duty to follow through and monitor Mr. Baker’s efforts to ensure that he is performing his duties in a professional, efficient and timely manner, in accordance with the terms and conditions of the agreement. Although Tennyson is within its rights to rely on an employee to perform the duties he is assigned, they also have a responsibility to monitor that employee to make sure that he performing those duties as he or she should, because if he or she is not, then the liability for that failure, whether it be in the form of civil litigation or loss of good will and reputation, will fall on the company.

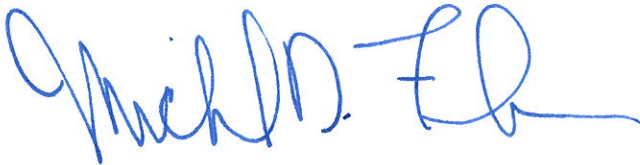
Additionally, and perhaps most importantly, Tennyson never informed Loduca of the reasons for their lack of communication. Tennyson has contended that Loduca has not allowed them to “cure” any of the problems caused by their lack of communication. But there was no testimony or written evidence submitted suggesting that Tennyson ever informed Loduca of the reasons for

their silence, despite the numerous written and voicemail requests from Loduca regarding the status of the Subcontractor Agreement and the material submissions. The Hearing Officer wonders if some type of compromise or understanding could have been negotiated between the two companies even at that late stage had Tennyson reached out to Loduca and provided them with some type of explanation for their failure to keep in communication. Instead, the evidence suggests that they either responded much later than perhaps they should, or not at all.

### **Recommendation**

For the reasons provided above, the Hearing Officer recommends that the City Council GRANT the request of F. Loduca Electric Company to substitute Underground Specialties Central Coast, Inc., as subcontractor for Tennyson Electric Incorporated, pursuant to California Public Contract Code section 4107.

Date: January 19, 2018

A handwritten signature in blue ink, appearing to read "Michael D. Flores". The signature is fluid and cursive, with a long horizontal stroke at the end.

Michael D. Flores  
Independent Administrative Hearing Officer

Cc: Bill Herr, Construction Manager, Public Works Department

# PROOF OF SERVICE

I, the undersigned declare:

I am a citizen of the United States over the age of eighteen years. I am employed as an independent contractor of the City of Fresno; my business address is 2600 Fresno Street, Fresno, California 93721.

On **January 19, 2018**, I caused to be served the foregoing documents described as **Findings and Recommendation to City Council: Fairview Trail Rehabilitation Project** on the interested parties to the within action by placing the original/a true copy thereof, enclosed in a sealed envelope, addressed as stated on the attached mailing list, as follows:

(BY CERTIFIED) I am "readily familiar" with the City's practice of collection and processing correspondence for certified mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Fresno, California in the ordinary course of business.

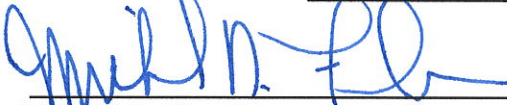
(BY FIRST CLASS MAIL) I am "readily familiar" with the City's practice of collection and processing of correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day with postage thereon fully paid at Fresno, California in the ordinary course of business.

(BY PERSONAL SERVICE) I delivered such document by hand to the interested parties.

(BY POSTING) I posted the foregoing Notice and Order at the property located at:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on or about January 19, 2018, at Fresno, California.



Michael D. Flores

Subject: **Public Works Bid File No. 3542-12000 / Findings and Recommendation to City Council**

Mailed To: **Matthew Tennyson  
Tennyson Electric Co.  
7275 National /Drive, Suite A  
Livermore, CA 94550**

**Frank Loduca  
F. Loduca Co  
P.O. Box 690111  
Stockton, CA 95269**