

# CLIENT NEWS BRIEF

## Appellate Court Concludes That Public Entities May Initiate Substitution Of A Subcontractor

In *Synergy Project Management, Inc. v. City and County of San Francisco*, certified for publication on March 14, 2019, the California Court of Appeal concluded that awarding agencies, like prime contractors, have the power to request substitution of a subcontractor under Public Contract Code section 4107 (hereafter referred to as Section 4107).

### **Background**

The City and County of San Francisco (City) had awarded a contract to Ghilotti Bros., Inc. (Ghilotti) for a major renovation of Haight Street. Ghilotti had listed Synergy Project Management, Inc. (Synergy) as the subcontractor for excavation and utilities work. Unfortunately, during the project, Synergy broke five gas lines and engaged in numerous other unsafe practices. As a result, the City, pursuant to Section 4107 and a specific provision in the construction contract, directed Ghilotti to remove Synergy from the project and substitute a new subcontractor to perform the remaining excavation and utilities work.

Under protest, Ghilotti removed Synergy from the project and proposed two potential replacement contractors. Synergy objected to its replacement and a hearing was held pursuant to Section 4107. At the conclusion of the hearing, the hearing officer determined that Synergy's unsafe practices rendered its work "substantially unsatisfactory and not in substantial accordance with the plans and specifications," which established a ground for substitution. Synergy and Ghilotti challenged this determination at the trial court, arguing that the hearing officer's determination was invalid because Section 4107 does not authorize an owner to remove a subcontractor, except upon a request initiated by the prime contractor. The trial court agreed based on the plain language of Section 4107, and the City filed an appeal.

### **The Court's Decision**

The Court of Appeal disagreed with the trial court and concluded that while Section 4107 "contemplates that the prime contractor will normally be the party to seek substitution, the procedure followed [in this case] 'complied in substance with every reasonable objective of the statute. [citation omitted.]'" The court reasoned that the intent of the larger statutory framework encompassing Section 4107, the Subletting and Subcontracting Fair Practices Act (the Act), was intended to prevent "bid shopping" and "bid peddling" after the award of a public contract. The court acknowledged that the Act afforded subcontractors certain rights, such as Section 4107, which ensures the listed subcontractor is permitted to perform the subcontract, unless statutory grounds exist for valid substitution.

However, the court also noted that the Act gives owners the power to investigate and approve any subcontractor whether proposed in the original bid or as a substitute. Here, the court concluded there was no risk of bid shopping or bid peddling because the substitution was related to Synergy's substandard performance of the work, which serves as a valid ground for substitution. Therefore, the City was within its investigatory power to seek substitution and had not violated the rights of Synergy under the Act.

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## **Takeaways**

In light of this decision, public agencies can now consider initiating the substitution process for a subcontractor on a public works project, as long as a valid ground for substitution exists under Section 4107. This is the second subcontractor substitution case in the last few months that strengthens a public entity's rights regarding substitution. ([See 2019 Client News Brief No. 26.](#))

If you would like more information about this case or have any questions related to public works projects generally, please contact the authors of this Client News Brief or an attorney at one of our [eight offices](#) located statewide. You can also subscribe to our [podcast](#), follow us on [Facebook](#), [Twitter](#) and [LinkedIn](#) or download our [mobile app](#).

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