



Metro

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Metropolitan Transportation Authority

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AUGUST 26, 2020

TO: BOARD OF DIRECTORS

THROUGH: PHILLIP A. WASHINGTON *PAW*
CHIEF EXECUTIVE OFFICER

FROM: DEBRA AVILA *Debra Avila*
CHIEF VENDOR/CONTRACT MANAGEMENT OFFICER

SUBJECT: WSCC PAYMENTS TO NEAL ELECTRIC

ISSUE

Contractor Walsh-Shea ("WSCC") and Subcontractor Neal Electric Corporation ("Neal") have on-going disputes related to base contract work, change work, re-work, and outstanding payment amounts. This is to advise the Board of Directors the appropriate actions by Metro to resolve these disputes.

BACKGROUND AND DISCUSSION

Neal claims that WSCC owes them in excess of \$20 million. Conversely, WSCC alleges that due to Neal's incomplete / substandard work, WSCC has overpaid Neal in excess of \$27 million and will not make further payments. Although Neal and WSCC have shared their own accountings with Metro, the documentation is contradictory and is likely due to the disputes related to base work and re-work.

Neal's total subcontract amount (including base work and changes) totals \$74,417,094.25 as identified by Neal in its Conditional Waiver dated March 25, 2020. The same Waiver confirms that Neal has been paid a total of \$66,702,724.01 (as of February 2020). Neal's Conditional Waiver shows the subcontract balance totals \$4,254,887.16 (not including retention amounts). Metro has not received any additional Waiver and Release forms by Neal in WSCC's Application for Progress Payment since March 2020.

In May 2020, in accordance with applicable California law, Neal filed a Stop Payment Notice in an amount totaling \$20,455,478 for alleged unpaid amounts. Pursuant to California Civil Code §3196, WSCC obtained and provided to Metro

a Stop Payment Notice release bond in the amount of \$25,569,347.98 (125% of the claimed Stop Payment Notice amount). Metro is obligated to retain the bond until such time it receives a release of the Stop Payment Notice from Neal.

Since Metro does not have a direct contractual relationship with Neal, Metro does not have access to all of the contract documents, accounting information, and correspondence between WSCC and Neal in order to determine the validity of the allegations between the parties.

How is a subcontractor supposed to be paid by a Contractor on a Metro construction contract?

The subcontractor submits Conditional or Unconditional Waiver and Release forms to the Contractor. By the 25th day of each month, the Contractor submits its Application for Progress Payment to Metro, which includes the subcontractor's Waiver and Release forms. Metro reviews the Contractor's Application for completeness and consistency with contractual requirements within 7 days of receipt. Within 30 days after receiving a proper Application, Metro makes Progress Payment to the Contractor. Within 7 days of receipt of the Progress Payment, the Contractor must pay its subcontractors.

If a Contractor fails to pay a subcontractor, Metro's recourse against the Contractor for non-payment is:

- Withhold funds from a current Progress Payment. In the event the Contractor fails to submit the required Waiver and Release forms for the past and current progress payment then any monies due for that Work performed shall not be paid and will be carried over to the next Progress Payment, until such time Contractor submits the required Waiver and Release forms.
- If a subcontractor files a Stop Payment Notice, Metro shall retain from Progress Payments otherwise due the Contractor in an amount equal to one hundred twenty-five percent (125%) of the amount claimed under the Stop Payment Notice under California Civil Code §9000 et. seq. until the issue is either resolved with the courts or between the parties.
- Withhold funds from future Progress Payment if Metro later discovers Contractor was not complying with the requirements of the Contract.
- Terminate the Contract.
- Withhold funds from Final Payment if prior Progress Payments are subject to correction.
- Seek prosecution of Contract for violation of federal and California False Claim Acts.

A Subcontractor's recourse for non-payment is:

- Refuse to sign Waiver and Release forms, then payment to the Contractor can be withheld.
- File Stop Payment Notice.
- Make a claim with the Surety against the Contractor's Payment Bond.
- File a Breach of Contract Claim against the Contractor.

POSSIBLE NEXT STEPS

- Metro's only contractual remedy is to terminate the contract with WSCC. However, termination would only be legally defensible if it is clear that WSCC failed to pay its subcontractors undisputed amounts.
- Neal's recourse is to continue to pursue its Stop Payment Notice and seek an expedited hearing with the court. If Metro were to issue payment directly to Neal, Metro would be circumventing the legal process.
- Neal could notify WSCC's Payment Bond Surety and seek recovery of any payments it is due.
- Metro has and continues to work informally with WSCC and Neal to reach a resolution of their disputes.