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CONSTRUCTION

COMMITTEE RECOMMENDATION

CONTINUED TO SEPTEMBER COMMITTEE consideration of Amelco's request to substitute its subcontractor, Automated Switching and Controls, Inc. (ASCI) AND RECOMMENDED to the MTA Board that the Construction Committee be delegated authority to hear and render final agency decisions, upon a 4/5 majority vote, regarding prime contractor requests to substitute subcontractors on construction contracts, otherwise a recommendation will be forwarded to the MTA Board.

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August 4, 1995

Los Angeles County TO: CONSTRUCTION COMMITTEE

Metropolitan THROUGH: FRANKLIN E. WHITE
Transportation Authority

FROM: STANLEY G. PHERNAMBUCQ

818 West Seventh Street SUBJECT: METRO RED LINE
Suite 300 CONTRACT NO. B641, RADIOS
Los Angeles, CA 90017 SUBCONTRACTOR SUBSTITUTION
PRIME CONTRACTOR: AMELCO ELECTRIC
213.972.6000 SUBCONTRACTOR: AUTOMATED SWITCHING AND
CONTROLS, INC

Mailing Address:

P.O. Box 194
Los Angeles, CA 90053

RECOMMENDATION

It is recommended that the MTA Board:

- a) Hold a public hearing on this subcontractor substitution in compliance with California Public Contract Code (PCC) Section 4107 of the Subletting and Subcontracting Fair Practices Act; and
- b) Make a determination that the requirement No. 7, with regard to substantially delaying progress of the work, set forth in PCC Section 4107 for subcontractor substitution has been met; and
- c) Grant the Prime Contractor's (Amelco's) request to substitute its subcontractor, Automated Switching and Controls, Inc. (ASCI), with the further stipulation that the contractor, within 15 days, submit its plan to meet the current DBE goal. The Contract DBE goal remains equal to or greater than before the substitution.

DBE PARTICIPATION

The DBE goal is 26.91%. Amelco has committed to meeting this goal.

ALTERNATIVES CONSIDERED

The Board has the option to deny the substitution. Denial may cause delay in the project schedule which may affect the Revenue Operations Date for the Wilshire Corridor. Prime Contractor and subcontractor are in dispute about scope of work and major design issues which will require resolution before proceeding with the work.

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The alternatives considered are based upon meetings, documents, and performance to date which reveal the interim milestone schedule has been impacted by late and inadequate design submittals identified in the contract. The Construction Manager's (CM) forecasts indicate contract completion of Wilshire Corridor MTA radio channels to be September 16, 1996 and Wilshire Corridor LAFD/LAPD radio channels to be October 31, 1995. This requires the assigned subcontractor to procure and install the equipment immediately in order to meet the contract schedule.

IMPACT ON BUDGET AND OBJECTIVES

There are no MTA funds involved in this action.

BACKGROUND

The B641 Prime Contractor is to provide for the design, furnish, installation and test of the underground Red Line radio system equipment for Segment 2, to design and furnish (no installation) of the radio system equipment for Segment 3.

The Work includes providing base station and off-air repeater equipment at designated passenger station locations. The services being provided will include communications for Train Operation, Emergency and Control, Fire Department, Police Department, Transit Police, and Maintenance. Hand held portable and trainborne radios will be purchased for Train Operations, Emergency, yard, and maintenance communications. There is a Performance and Payment Bond requirement for the Segment 2 work only.

ASCI is a certified DBE subcontractor whose subcontract accounts for 26.91% of the total contract value.

The Subletting and Subcontracting Fair Practices Act (the "Act") (California Public Contracts Code Section 4107), requires prime contractors to list their subcontractors in their bid and also provides that prime contractors may not substitute a listed subcontractor except under certain conditions. Those conditions are listed on Attachment 1.

On May 24, 1995 Amelco submitted a request for substitution alleging ASCI's failure to meet the subcontract bond requirements and upon ASCI's unsatisfactory performance on the Wilshire Corridor, ASCI subcontract portion of the Contract No. B641 scope of work for engineering and design services. Amelco is required and has committed to maintain the same level (26.91%) of DBE participation on the B641 contract if this substitution request is granted.

In accordance with Section 4107 of the PCC, the MTA on May 26, 1995 notified ASCI of Amelco's request for substitution and advised ASCI of its rights to a hearing with the awarding authority. Within the legally required time limit, ASCI formally objected to the substitution.

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On Wednesday, June 14, 1995, Amelco Electric and ASCI met with MTA staff and the CM. Acting in good faith, all parties attempted to resolve the issues surrounding performance and the requested substitution. At the conclusion of this meeting Amelco and ASCI elected to continue to resolve the substitution issues between themselves. To date there has been no resolution, only an expressed interest by Amelco to enter into arbitration. ASCI has insisted upon their right to a hearing with the MTA Board.

The following supporting documents and stated posture relating to the substitution were submitted to the MTA on June 29, 1995:

- Amelco, the Prime Contractor, provided its basis for request for substitution, excerpts from contract specifications, subcontract agreement, various letters, submittal status log, and meeting minutes (Attachment 2A). Amelco having listed ASCI as subcontractor on the bid submitted to the MTA March 23, 1994 alleges that ASCI has not met the bond requirements and that ASCI's performance has substantially delayed the work based upon late and inadequate design submittals and failure to produce an approvable design.
- ASCI, the named subcontractor, submitted its objection to the substitution, excerpts from contract document, subcontract agreement, Errors & Omissions (E&O) and Life insurance documentation, various letter, and meeting minutes (Attachment 2B). ASCI alleges that it has performed satisfactorily but that numerous conflicting directives and changes have tainted its performance. ASCI further alleges that any unsatisfactory performance relates to the Prime Contractor's inability to properly manage the contract due to lack of committed resources.

Staff evaluated the documentation and has determined the following:

- The issue of unsatisfactory performance as it relates to substantially delaying the work is based upon MTA's Design (EMC) and Construction Management consultants' determination of the progress of the work. To date ASCI has not produced an approvable design, which has substantially delayed the progress of the work and further delays will seriously impact project schedule.
- With regard to the bond/insurance requirements, the subcontract language allowed the subcontractor to apply for Life Insurance and E&O insurance in lieu of bonding, which ASCI applied for on May 19, 1995. Since the subcontract bonding requirement was optional, the Prime Contractor has not met this substitution condition.

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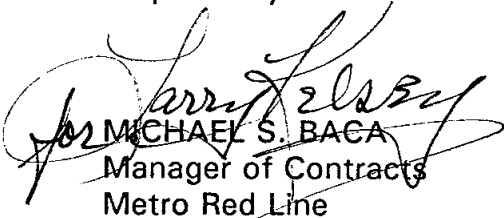
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Therefore, based upon substantial delay to the progress work, it is recommended that the MTA Board find that Amelco's allegation, as it relates to subcontractor substantially delaying the progress of the work, make a determination that this requirement set forth in PCC Section 4107 for subcontractor substitution has been met.

Amelco will be requested to submit a plan outlining how they will complete the work and how the DBE goal will be met.

Prepared By:


MICHAEL S. BACA
Manager of Contracts
Metro Red Line


CHARLES W. STARK
Deputy Executive Officer, Construction
Metro Red Line


GWENDOLYN W. WILLIAMS
Director, Equal Opportunity

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ATTACHMENT 1

The Subletting and Subcontracting Fair Practices Act (the "Act") (California Public Contracts Code Section 4107), requires prime contractors to list their subcontractors in their bid and also provides that the prime contractor may not substitute a listed subcontractor except under certain conditions. Those conditions include :

1. When the subcontractor listed in the bid after having had a reasonable opportunity to do so fails or refuses to execute a written contract, when such written contract, based upon the general terms, conditions, plans, and specifications for the project involved or the terms of such subcontractor's written bid, presented to the subcontractor by the prime contractor; or
2. When the listed subcontractor becomes bankrupt or insolvent; or
3. When the listed subcontractor fails or refuses to perform its subcontract; or
4. When the listed subcontractor fails or refuses to meet the bond requirements of the prime contractor as set forth in Section 4108; or
5. When the prime contractor demonstrates to the awarding authority, or its duly authorized officer, subject to the further provisions set forth in Section 4107.5, that the name of the subcontractor was listed as the result of an inadvertent clerical error; or
6. When the listed subcontractor is not licensed pursuant to the Contractors License Law; or
7. 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.



August 21, 1995

Los Angeles County Metropolitan
Transportation Commission
818 W. 7th Street
Los Angeles, California 90053

Attention: Helen M. Bolen
District Secretary

RE: Amendment of Board Item #26
Regular Board Meeting-August 23, 1995

Dear Ms. Bolen:

We request that item #26 be amended to include the
Contract Compliance Determination dated July 19, 1995 on
B641 Radio Contract/DBE, ASCI Substitution from Cheryl
Broussard and the Desk Procedure for DBE Substitution
Request and that copies be distributed to the Board.

Dr. Eric MacCalla
President

Enclosures: Contract Compliance Determination
Desk Procedures for DBE Substitution Request

cc: Larry Zarian, Chair

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July 19, 1995

**INTEROFFICE
MEMO**

Los Angeles County
Metropolitan
Transportation
Authority

818 West Seventh Street
Suite 300
Los Angeles, CA 90017

313.627.1194

TO: OLGA CERVANTES

THROUGH: BERMAN VARGAS

FROM: CHERYL BROUSSARD

SUBJECT: CONTRACT COMPLIANCE DETERMINATION RE:
D641 RADIO CONTRACT / DBE, ASCI SUBSTITUTION

Contract Compliance has completed its review of the documentation submitted by Prime Contractor, Amelco Electric, DBE Subcontractor, ASCI and Construction Manager, Parsons Dillingham (P/D). This review was conducted in response to the subject substitution request in compliance with Section 4107 of the Subletting and Subcontracting Fair Practices Act.

Analysis of the materials reveals that the DBE subcontractor did not default under its subcontract agreement by failing or refusing to perform as contracted but appeared diligent in performance. The reasons for this determination are demonstrated by the findings reported herein.

FINDINGS

L PROCUREMENT

Amelco claims that ASCI violated its subcontract agreement by failing to perform procurement responsibilities.

For the purpose of DBE compliance, the procurement obligation as outlined in the subcontract agreement may have been a violation of the Commercial Useful Function requirement (CUF). 49 CFR Part 23.47 (d)(2) states:

"Consistent with normal industry practices, an MBE may enter into subcontracts. If an MBE contractor subcontracts a significantly greater portion of the work of the contract than would be expected on the basis of normal industry practices, the MBE shall be presumed not to be performing a commercially useful function. The MBE may present evidence to rebut this presumption to the recipient. The recipient's decision on the rebuttal of this presumption is subject to review by the Department."

ASCI's procurement responsibilities were not clearly defined in the contract. Amelco requested that ASCI procure high dollar value items that were greater than the value of procurement items specified in the contract. However, ASCI was

not to be allowed to "manage" the procurements and obtain corresponding mark-ups for that oversight. There is no evidence that ASCI violated its subcontract agreement. It appears that Amelco, in this action, had attempted to violate the Commercial Useful Function as defined above.

2. LATE AND UNACCEPTABLE SUBMITTALS

Amelco claims that ASCI's design submittals and procurement specifications were consistently late and of unacceptable quality.

Contract B641 Radio required a three stage level of design approval, CDR, PDR and FDR. Documentation shows that design submittal dates were not fixed but were mutually agreed to by the Contractor and MTA. Additionally, since the MTA contract allowed for a 6 month overlap between start of installation and best possible conclusion of design, Amelco issued a Request For Contract (RFC) modification, adjusted to its approved revised Baseline Schedule.

Responsibility for scheduling belongs to the prime contractor not the subcontractor. Understandably, both participate in the submittal process, however, it appears that much of the delays noted and those that continue, result from Amelco's failure to employ a full time scheduler as required in their MTA contract, and therefore, provide ASCI with an accurate schedule. This situation further exacerbated the lack of communication and a pattern of non-responsiveness to ASCI's specific requests for information. This may have contributed to Amelco's determination of the "unacceptable quality" of ASCI's submittals.

Documentation shows all submittals were, at the very least, finally approved as noted and rejections were a result of the subcontractor's interpretation of the contract requirements.

3. BONDING AND INSURANCE REQUIREMENT

Amelco claimed that ASCI failed or refused to comply with subcontract bonding and insurance requirements.

Correspondence, exhibits and executed documents evidence that ASCI did not fail or refuse to comply with insurance and bonding requirements. The contract requires that ASCI apply for payment and performance bonding. Although bonding was not obtained, ASCI did comply with this requirement by 1), making persistent application for same; and 2), by obtaining life insurance and \$2 million of product liability insurance. Documentation supports that ASCI established a pattern of diligence in their pursuit of the required insurance and bonding requirements.

4. REGISTERED PROFESSIONAL ENGINEERS STAMP

Amelco claims that ASCI refused to PE stamp the FDR submittal, certifying compliance with contract performance specifications.

ASCI agreed to generate a final PE-stamped set of drawings once the FDR was accepted and approved by the MTA. Inasmuch as the DBE did not receive the FDR this action did not occur.

5. SETTLEMENT ATTEMPTS

Amelco claimed "private attempts" to arrive at a mutually acceptable negotiated settlement with ASCI were unsuccessful.

Amelco's attempts toward a mutual settlement could not be determined in that the subject negotiations were private.

6. REJECTION OF FINAL DESIGN REVIEW (FDR)

Amelco claims that ASCI failed its documentation responsibilities: design, procurement, and test.

The MTA's rejection of the FDR was based on the rejection of the formally approved TAIT Channelized Repeater design. The MTA's rationale to order the change to the On Frequency Repeaters system instead of the approved TAIT design seems unclear. Additionally, it appears that ASCI was not informed of the decision to change to the OFR system in a timely manner. As stated, this radio system design involved a 3 stage level of approval. All documentation indicates the DBE was allowed to proceed according to the approved design. Amelco's action of removing ASCI the day before ASCI was to provide a demo/prototype prohibited ASCI from demonstrating that their TAIT design met meet system performance specifications.

CONCLUSION

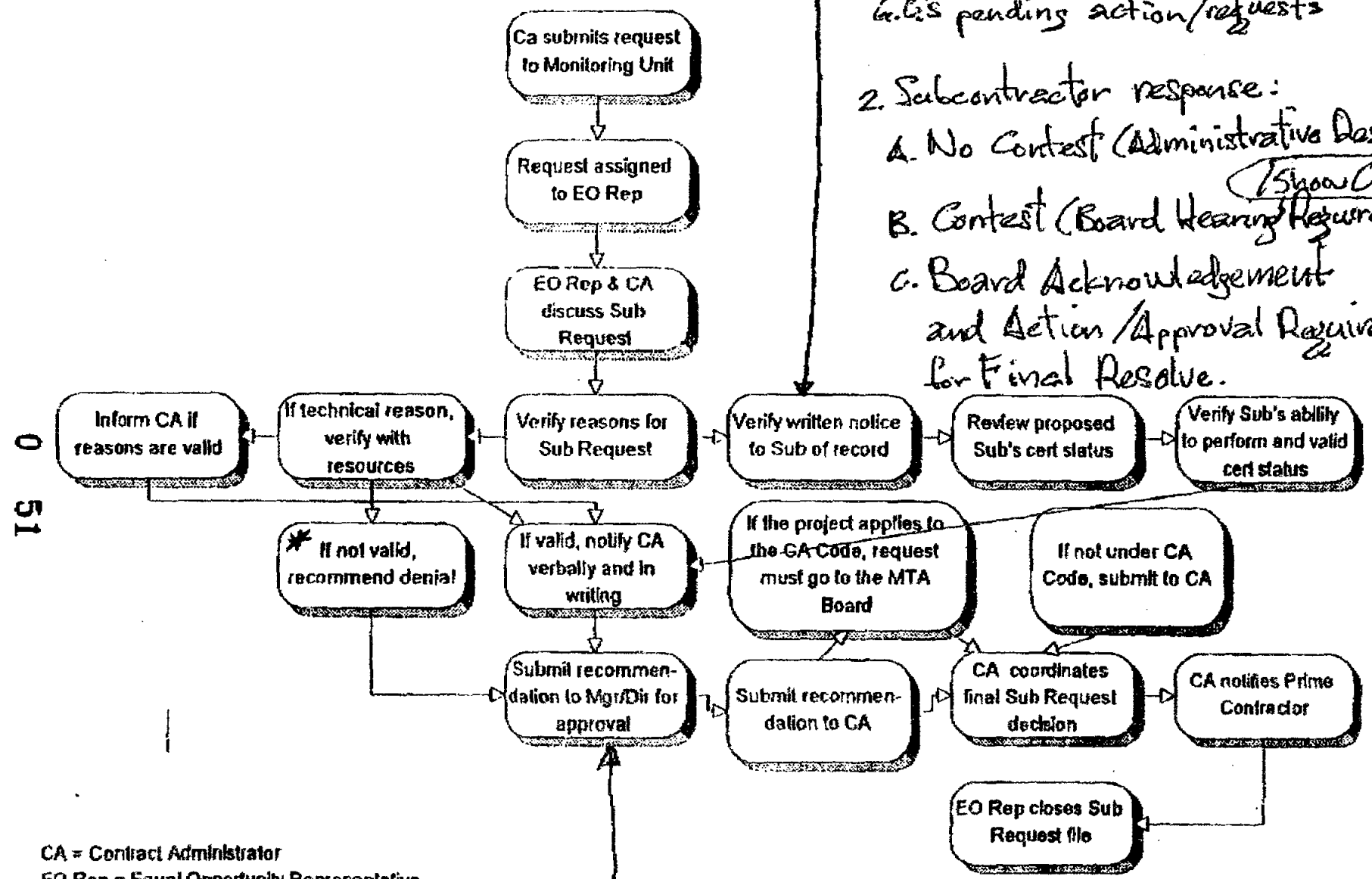
It appears that much of the ensuing conflict between Amelco and ASCI on this contract resulted from the following:

- Miscommunication regarding scheduling and negotiation for time extensions
- Amelco's failure to provide clear procurement assignment responsibilities in the contract.
- Failure to reach agreement on the sharing of budget cost savings on the schedule of values.
- A plan for DBE compliance should be submitted by Amelco to this department for review no later than August 8, 1995.

SUBSTITUTION PER PCC SECT. 4107

DESK PROCEDURES FOR DBE SUBSTITUTION REQUEST

1. Subcontractor must be notified of G.C.'s pending action/requests
2. Subcontractor response:
 - A. No Contest (Administrative Resolve)
 - B. Contest (Board Hearing Required / Show Cause)
 - C. Board Acknowledgement and Action/Approval Required for Final Resolve.



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CA = Contract Administrator
 EO Rep = Equal Opportunity Representative
 11-17-94 Monitoring Unit (Revised 1-26-95)

Verify/Qualify Replacement Subcontractor for Terms and Conditions of Compliance and Continued Good Faith Effort