

Ventura County Grand Jury 2009 - 2010



Final Report
City of Simi Valley Public Works
Contracting
May 11, 2010

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City of Simi Valley Public Works Contracting

Summary

The 2009-2010 Ventura County Grand Jury (Grand Jury) elected to investigate a City of Simi Valley (City) public works sewer project. The fourth phase of the project required barricading one of the two same-direction lanes of a major traffic artery. The contractor (Contractor) began the work, but subsequently defaulted and was terminated by the City. The City contract documents included a performance bond which did not prohibit the Contractor's insurance company (Surety) from re-employing the terminated Contractor for the job. Surety re-employed the defaulted Contractor. The Contractor again defaulted and the City subsequently terminated the Contractor and hired another firm which completed the work. These problems in a scheduled short-term project caused one lane of the road to be closed for 19 months. During much of this period, no road work was performed. This resulted in needless exposure of vehicular traffic to additional hazard and delay as well as an inconvenience to the public.

The Grand Jury recommends that the City amend contracting specifications and/or surety bonds to require City concurrence with the employment of all contractors when the surety bond is exercised. Secondly, the Grand Jury recommends that the City be more diligent in the administration of public works contracts.

Background

On June 20, 2007, the City awarded a four-phase public works contract for sewer repair. As a result of observations by members of the Grand Jury, an investigation was initiated into the fourth and final phase of the project, which appeared to have taken an inordinate amount of time for completion.

Methodology

The Grand Jury interviewed and corresponded with City public officials, reviewed public documents related to the subject project, and reviewed City policies and procedures.

Findings

- F-01.** The fourth phase of the contract "Los Angeles Ave., Madera Rd., Lysander Ave. Sewer Rehabilitation- SV 07-11" (Contract) was to trench and provide rigid sliplining of piping beneath the number two, or shoulder, lane along the eastbound side of Los Angeles Avenue between Madera Road and Sinaloa Road.
- F-02.** Los Angeles Avenue is a four-lane arterial road traversing east-west through the Simi Valley.
- F-03.** The Contract was signed June 11, 2007 and was to be completed December 27, 2007. There were no intermediate completion dates for the four phases of the Contract.

- F-04.** The fourth phase of the project started when traffic barricades were installed, closing one of the two eastbound lanes of the thoroughfare on September 17, 2007 and was completed on April 10, 2009.
- F-05.** Following a delay of five months due to the Contractor submitting unacceptable plans for a bypass sewage system, actual construction of the fourth phase began on February 21, 2008.
- F-06.** The City terminated the Contractor on February 29, 2008 after concluding that the Contractor “had breached their contract with City by refusing to repair/replace defective work” in an earlier contract phase and for “being three months over the contract completion date, and working unsafely.”
- F-07.** Under the “Obligations of the Contractor: Termination” clause of the Contract, when the City finds that a contractor is not faithfully following the terms and conditions of the contract, the City may give the contractor a 10-day notice to correct the problem. (Att-01)
- F-08.** If a contractor fails to cure the contract problems within the 10-day notice period, City may terminate the contractor by written notice. (Att-01)
- F-09.** Most public works contracts, including the one under this investigation, have a surety bond provided by the contractor (in the awarding authority’s format). This bond obligates Surety to complete any work not completed by the contractor as a result of default, termination, or non-performance. (Att-02)
- F-10.** In accordance with “City of Simi Valley Purchasing Practices and Procedures 2008,” Surety accepted responsibility for project completion and executed a limited Takeover Agreement of the Contract with the City on August 8, 2008. Surety then rehired the Contractor and work recommenced on August 11, 2008. (Att-02)
- F-11.** When Surety is called upon to complete the work of the Contract, the contract and bond do not require the City’s concurrence with Surety’s choice of contractors. (Att—02)
- F-12.** The City terminated the Takeover Agreement with Surety on January 16, 2009 “for lack of timeliness as their takeover agreement had a completion date of October 31, 2008.”
- F-13.** As an agenda item at a regularly scheduled City Council meeting on January 26, 2009, the City authorized a contract with a different contractor on an emergency basis to finish the project. Work started on February 16, 2009 and was completed on April 10, 2009.
- F-14.** During the times in which the contracts were negotiated and re-negotiated, there were long intervals when the road remained blocked while no work was in progress.

Conclusions

- C-01.** Both the City and Surety followed the terms of the Contract and, in particular, the surety bond according to "The City of Simi Valley Purchasing Practices and Procedures 2008." (F-01, F-03, F-06 through F-12)
- C-02.** Surety accepted responsibility for completion of the project and was able to rehire the terminated Contractor for that purpose. The City's Contract does not require concurrence of the City with Surety's selection of contractors. (F-9 through F-11)
- C-03.** For most of the 19-month construction period during the fourth phase, there was no work visibly in progress while one-half of the eastbound thoroughfare remained closed. Much of that time was subsequent to the termination of the original contract. (F-04 through F-06, F-13, F-14)
- C-04.** During the prolonged period of the Contract, diversion of traffic on a heavily traveled road presented an impediment to traffic as well as an inconvenience to the public at large. (F-03 through F-06, F-12, F-14)
- C-05.** The City was slow to take action in overseeing the Contract. (F-04 through F-06, F-12, F-14)

Recommendations

- R-01.** The City should amend the surety bond and/or the terminology of its public works contracts to require concurrence of the City with respect to Surety's selection of a contractor to complete work under the contract as a result of default, termination, or non-performance. (C-01, C-03 through C-05)
- R-02.** The City should be more diligent in the administration of public works contracts. (C-03 through C-05)

Responses

Response Required From:

City Council, City of Simi Valley (R-01 and R-02)

Response Requested From:

City Manager, City of Simi Valley (R-01 and R-02)

Information To:

City Manager, City of Camarillo (R-01)
City Manager, City of Fillmore (R-01)
City Manager, City of Moorpark (R-01)
City Manager, City of Ojai (R-01)
City Manager, City of Oxnard (R-01)
City Manager, City of Port Hueneme (R-01)
City Manager, City of Santa Paula (R-01)

City Manager, City of Thousand Oaks (R-01)
City Manager, City of Ventura (R-01)
County Executive Officer, County of Ventura (R-01)

References

Ref-01. "City of Simi Valley Purchasing Practices and Procedures 2008" (PUR 2008)

Attachments

Att-01 "City of Simi Valley Purchasing Practices and Procedures 2008"

Obligations of the Contractor: Termination

Att-02 "City of Simi Valley Purchasing Practices and Procedures 2008"

Bond for Faithful Performance

Att.-03 Project Time Line

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Attachment -01

"City of Simi Valley Purchasing Practices and Procedures 2008"

Obligations of the Contractor: Termination

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Change orders, supplemental agreements, and approved revisions to plans and specifications become a part of item First.

5. Obligations of the CITY.

A. The CITY shall be obligated to pay CONTRACTOR based upon the actual City-authorized quantities in place and the unit and/or lump sum prices bid by CONTRACTOR, including but not limited to all labor, material and equipment, rather than the CONTRACT bid price.

B. CITY shall make regular progress payments to the CONTRACTOR within 30 days after mutual concurrence with the unit quantities and/or lump sum items of work performed, subject to applicable retention requirements. In no event shall the total amount paid exceed the CONTRACT bid price of \$ _____ unless otherwise agreed to by the parties in writing.

C. Upon receipt of an invoice for work performed to CITY'S satisfaction, CITY shall make progress payments within thirty (30) days of receipt of invoice. If the work is not performed satisfactorily or the invoice is defective, CITY shall notify CONTRACTOR, in writing, of the reasons within seven (7) days of receipt of invoice. The intent of this Section is to comply with Public Contract Code Section 20104.50.

6. Obligations of the CONTRACTOR.

A. CONTRACTOR shall perform as required by this CONTRACT. CONTRACTOR also warrants on behalf of itself and all subcontractors engaged for the performance of this CONTRACT that only persons authorized to work in the United States pursuant to the Immigration Reform and Control Act of 1986 and other applicable laws shall be employed in the performance of the work hereunder.

B. The CONTRACTOR shall comply with Labor Code Section 1773.2 and a copy of the general wage rate list shall be posted at each job site. CONTRACTOR shall obey all Federal, State, local and special district laws, ordinances and regulations.

7. Audit. CITY shall have the option of inspecting and/or auditing all records and other written materials used by CONTRACTOR in preparing its statements to CITY as a condition precedent to any payment to CONTRACTOR.

8. Hold Harmless and Indemnification. CONTRACTOR shall defend and provide legal defense with attorney(s) acceptable to CITY, indemnify, and hold harmless CITY, its agents, officials, officers, representatives and employees, from and against all claims, lawsuits, liabilities or damages of whatever nature arising out of or in connection with, or relating in any manner to any act or omission of CONTRACTOR, its agents, employees, and subcontractors, and employees thereof, pursuant to the performance or non-performance of this CONTRACT. The CONTRACTOR shall thoroughly investigate any and all claims and indemnify the CITY and do whatever is necessary to protect the CITY, its agents, officials, officers, representatives and employees as to any such claims, lawsuits, liabilities, expenses, or damages arising out of this CONTRACT.

9. **Amendments.** Any amendment, modification, or variation from the terms of this CONTRACT shall be in writing and shall be effective only upon mutual written approval by the Director of Public Works and CONTRACTOR.

10. **Anti-Discrimination.** In the performance of the terms of this CONTRACT, CONTRACTOR shall not engage in, nor permit subcontractors to engage in discrimination in employment of persons because of the age, race, color, religious creed, sex, sexual orientation, national origin ancestry, physical disability, mental disability, medical condition, or marital status of such persons. Violation of this provision may result in the imposition of penalties referred to in Labor Code Section 1735.

11. **Termination.** If, during the term of this CONTRACT, CITY determines that CONTRACTOR is not faithfully abiding by any term or condition contained herein, CITY may notify CONTRACTOR in writing of such defect or failure to perform. The notice must give to the CONTRACTOR a ten (10) day period of time thereafter in which to perform said work or cure the deficiency. If CONTRACTOR has not performed the work or cured said deficiency within the ten (10) days specified in the notice, such failure shall constitute a breach of this CONTRACT, and CITY may terminate this CONTRACT immediately by written notice to CONTRACTOR to said effect. Thereafter, neither party shall have any further duties, obligations, responsibilities, or rights under this CONTRACT except, however, any and all obligations of CONTRACTOR'S surety shall remain in full force and effect, and shall not be extinguished, reduced, or in any manner waived by the termination hereof. In said event, CONTRACTOR shall be entitled to the reasonable value of its services performed from the beginning of the period in which the breach occurs up to the day it received CITY'S Notice of Termination, minus any damages, including liquidated damages if so provided herein, occasioned by such breach. CITY reserves the right to delay any such payment until completion or confirmed abandonment of the project, as may be determined in the CITY'S sole discretion, so as to permit a full and complete accounting of costs. In no event, however, shall CONTRACTOR be entitled to receive in excess of the compensation quoted in its bid.

12. **Insurance.** CONTRACTOR shall, prior to commencing performance hereunder, submit proof of all insurance coverage as required by the Specification or other document incorporated in and made a part of this CONTRACT.

13. **Complete CONTRACT.** This CONTRACT shall constitute the complete CONTRACT between the parties hereto. No verbal agreement, understanding, or representation not reduced to writing and specifically incorporated herein shall be of any force or effect, nor shall any such verbal agreement, understanding, or representation be binding upon the parties hereto.

14. **Independent Contractor.** It is expressly understood between the parties to this CONTRACT that no employee/employer relationship is intended; CONTRACTOR is an independent contractor.

15. **Time of Performance.** Time is of the essence in this CONTRACT.

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Attachment-02

"City of Simi Valley Purchasing Practices and Procedures 2008"

Bond for Faithful Performance

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BOND FOR FAITHFUL PERFORMANCE
BOND NO.

KNOW ALL PERSONS BY THESE PRESENTS:

That we, _____ hereinafter referred to as "Contractor" as principal, and _____ hereinafter referred to as "Surety," are held and firmly bound unto the City of Simi Valley, California, hereinafter referred to as "City", or "Obligee" in the sum of _____ Dollars (\$ _____), lawful money of the United States of America, for the payment of which sum well and truly to be made, we bind ourselves, jointly and severally, firmly by these presents.

This condition of the foregoing obligation is such that:

WHEREAS, said Contractor has been awarded and is about to enter into the annexed Contract with the City of Simi Valley, California, for the construction of _____, and is required by said City to give this bond in connection with the execution of said Contract.

NOW, THEREFORE, if said Contractor shall well and truly do and perform all the covenants and obligations of said Contract to be done and performed at the time and in the manner specified herein, then this obligation shall be null and void one year after date of recordation of Notice of Completion by City of the completed work; otherwise it shall be and remain in full force and effect, and Surety shall cause the Contract to be fully performed or to pay to obligee the cost of performing said Contract in an amount not exceeding the said sum above specified, and shall also, in case suit is brought upon this bond, pay to obligee court costs and a reasonable attorney's fee, to be fixed by the court.

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Attachment-03

Project Time Line

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Project Time Line

June 26, 2007	City issued "Notice to Proceed" to Contractor
September 17, 2007	Traffic controls (barricades) installed for fourth phase of contract
November 27, 2007	Completion date of original contract
February 21, 2008	Work actually started on phase four
February 29, 2008	Contractor terminated by Public Works Director
August 8, 2008	Surety executed Takeover Agreement with City
August 11, 2008	Surety rehired terminated Contractor
October 31, 2008	Completion date of project under Takeover Agreement
January 16, 2009	City terminated Takeover Agreement
January 26, 2009	City awarded contract to new contractor to complete phase four
February 16, 2009	New contractor started work
April 10, 2009	Project completed