

# SUBSTITUTING LISTED SUBCONTRACTORS ON CALIFORNIA PUBLIC WORKS PROJECTS

by Bernard S. Kamine  
Kamine Law PC

Procedures .....	1
Grounds For Substitution Besides Listing Error .....	2
Subcontractor Failure or Refusal to Execute Written Subcontract .....	2
Subcontractor Insolvency or Bankruptcy .....	3
Subcontractor Failure or Refusal to Perform .....	3
Subcontractor Failure or Refusal to Provide Bonds.....	3
Subcontractor Failure to Have Appropriate Contractors License .....	4
When Owner Finds Subcontractor Failed to Perform or Delayed.....	4
Subcontractor Ineligible to Work on Project under Labor Code.....	4
Subcontractor Not Responsible .....	4

## PROCEDURES

Most bids for public works contracts in California must include a list of subcontractors who will perform more than 1/2 of 1% of the work (Pub. Cont. Code § 4100 et seq.; compare City of Los Angeles Admin. Code § 10.14 which requires listing subcontractors who will do more than 1/2 of 1% or \$10,000 worth of the work, whichever is greater).

Listed subcontractors can only be changed with the permission of the public agency under the following procedures:

**Notice of Inadvertent Clerical Error in Listing the Subcontractor:** Deliver notice to the awarding authority, the erroneously listed subcontractor, and the subcontractor who should have been listed within 2 **working** days after the bid opening (Pub. Cont. Code § 4107.5).

**Listed Subcontractor's Objection to Alleged Inadvertent Clerical Error:** Deliver written objections to the awarding authority and the prime contractor within 6 **working** days after bid opening; failure to timely object amounts to agreement that a clerical error occurred (Pub. Cont. Code § 4107.5).

**Notice of Other Request to Substitute a Subcontractor:** Public Contract Code § 4107 lists the other grounds for substitution. There is no time limit for one of these substitution requests, but, upon receipt of the request from the prime contractor, the awarding authority must send notice to the listed subcontractor, by certified mail, stating the reasons why the substitution is sought (Pub. Cont. Code § 4107).

- 1 -

KAMINE LAW PC

REPRESENTING CONTRACTORS, SUPPLIERS, SURETIES AND OWNERS SINCE 1976.

Phone: 213/972-0119. Fax: 213/972-0005. Website: [www.KAMINECONSTRUCTIONLAW.COM](http://www.KAMINECONSTRUCTIONLAW.COM)

***DISCLAIMER** : This article is offered without charge; please pass it on to others who may find it useful. Providing this article in no way creates an attorney-client relationship between any reader and Kamine Law PC or the author(s). **WARNING** : Changes in the law may affect the accuracy of this article, and the information here may not be applicable to your particular situation.*

*You should contact an attorney before using this information*

**Listed Subcontractor's Objection to a Substitution:** Deliver written objections to the awarding authority within 5 **working** days after the notice of request for substitution is sent; failure to object amounts to consent to the substitution (Pub. Cont. Code § 4107).

**Hearing on Objection to Substitution:** If the listed subcontractor delivers written objections, the awarding authority shall give notice to the listed subcontractor, in writing, at least 5 **working** days prior to a hearing by the awarding authority on the prime contractor's request for substitution. Both the prime contractor and the listed subcontractor should consider being represented by an attorney at this hearing.

**Risks from Failing to Follow these Procedures:** *Titan Electric Corporation v. Los Angeles Unified School District* (2008) 160 CA4th 188, 203, 72 CR3d 570, explains:

The consequences of an unauthorized substitution can be severe for the prime contractor: the subcontractor may sue the prime contractor (but not the public entity) for damages (*Southern Cal. Acoustics, supra, 71 Cal.2d at p. 727*), and the public entity may cancel the prime contractor's contract or assess a penalty not to exceed 10 percent of the amount of the subcontract involved. (§ 4110.) Also, an unauthorized substitution may subject the prime contractor to discipline by the Contractors' State License Board. (§ 4111.)

See Pub. Cont. Code § 4103:

Nothing in this chapter limits or diminishes any rights or remedies, either legal or equitable, which: (a) An original or substituted subcontractor may have against the prime contractor, his or here successors or assigns . . . .

See also *R.J. Land & Associates Construction Co. v. Kiewit-Shea* (1999) 69 CA4th 416, 81 CR2d 615

## **GROUND FOR SUBSTITUTION BESIDES LISTING ERROR**

### **Subcontractor Failure or Refusal to Execute Written Subcontract**

Pub. Cont. Code § 4107(a)(1) requires:

(1) That the subcontractor get a reasonable opportunity to execute the subcontract, **and**

(2) That the tendered subcontract:

(a) Be for the scope of work specified in the subcontractor's bid;

(b) Be for the bid price; and

(c) Be based upon:

(i) The general terms, conditions, plans, and specifications for

- 2 -

KAMINE LAW PC

REPRESENTING CONTRACTORS, SUPPLIERS, SURETIES AND OWNERS SINCE 1976.

Phone: 213/972-0119. Fax: 213/972-0005. Website: [www.KAMINECONSTRUCTIONLAW.COM](http://www.KAMINECONSTRUCTIONLAW.COM)

**DISCLAIMER** : This article is offered without charge; please pass it on to others who may find it useful. Providing this article in no way creates an attorney-client relationship between any reader and Kamine Law PC or the author(s). **WARNING** : Changes in the law may affect the accuracy of this article, and the information here may not be applicable to your particular situation.

You should contact an attorney before using this information

the project, or

(ii) The terms of that subcontractor's written bid.

Most public works subcontracts have a clause like this:

The Contract Documents are incorporated into this Agreement by reference, and insofar as they relate in any way, directly or indirectly, to the performance of, or payment for, work under this Agreement, Subcontractor shall be bound to Contractor in the same manner and to the same extent as Contractor is bound to Owner under the Contract Documents. Where the Contract Documents refer to Contractor, but the labor, services, equipment or materials described pertain to Subcontractor's trade, craft or type of work, the Contract Documents shall be interpreted to apply to Subcontractor instead of to Contractor

That should satisfy the requirement that the subcontract be based upon the general terms, conditions, plans, and specifications for the project.

Note the "or," in section 2(c), above. The subcontractor cannot insist upon terms of its written bid, if they conflict with the general terms, conditions, plans, and specifications for the project. Doing so can be a refusal to execute subcontract, unless the terms are expressly called out in the subcontractor's written bid that was provided to the contractor sufficiently before the contractor submitted its bid to the agency to allow the contractor to consider those terms and conditions.

Also, watch out for efforts by the subcontractor to establish different terms of the subcontract before executing the written version, e.g., by commencing work before the subcontract is signed or by making submittals that deviate from the prime contract terms, conditions, plans or specifications in an effort to get them approved to provide a basis for claiming that they then represent the subcontract terms, conditions, plans or specifications. Such devious conduct may provide evidence that the subcontractor is not responsible (see below).

### **Subcontractor Insolvency or Bankruptcy**

Pub. Cont. Code § 4107(a)(2) allows substitution of a subcontractor who "becomes insolvent or the subject of an order for relief in bankruptcy.":

### **Subcontractor Failure or Refusal to Perform**

Pub. Cont. Code § 4107(a)(3) allows substitution of a subcontractor who "fails or refuses to perform his or her subcontract."

### **Subcontractor Failure or Refusal to Provide Bonds**

Pub. Cont. Code § 4107(a)(4) allows substitution of a subcontractor who "fails or refuses to meet the bond requirements of the prime contractor." However, Pub. Cont. Code § 4108(c) clarifies that the prime contractor must have stated what bonds would be

- 3 -

KAMINE LAW PC

REPRESENTING CONTRACTORS, SUPPLIERS, SURETIES AND OWNERS SINCE 1976.

Phone: 213/972-0119. Fax: 213/972-0005. Website: [www.KAMINECONSTRUCTIONLAW.COM](http://www.KAMINECONSTRUCTIONLAW.COM)

***DISCLAIMER** : This article is offered without charge; please pass it on to others who may find it useful. Providing this article in no way creates an attorney-client relationship between any reader and Kamine Law PC or the author(s). **WARNING** : Changes in the law may affect the accuracy of this article, and the information here may not be applicable to your particular situation.*

*You should contact an attorney before using this information*

required, and have specified the amount of the bonds, "in his or her written or published request for subbids."

### **Subcontractor Failure to Have Appropriate Contractors License**

Pub. Cont. Code § 4107(a)(6) allows substitution of a subcontractor who is not properly licensed to perform the work required under the subcontract.

### **When Owner Finds Subcontractor Failed to Perform or Delayed**

Pub. Cont. Code § 4107(a)(7) allows substitution of a subcontractor who the awarding authority determines:

- (1) Has performed work:
  - (a) That is substantially unsatisfactory **and**
  - (b) That is not in substantial accordance with the plans and specifications, **or**
- (2) Has substantially delayed or disrupted the progress of the work.

### **Subcontractor Ineligible to Work on Project under Labor Code**

Pub. Cont. Code § 4107(a)(8) allows substitution of a subcontractor who is ineligible to work on a public works project under Labor Code §§ 1777.1 or 1777.7:

### **Subcontractor Not Responsible**

Pub. Cont. Code § 4107(a)(9) allows substitution of a subcontractor when the awarding authority determines that the subcontractor is not a responsible contractor.

Pub. Cont. Code § 1103 defines responsibility as having "demonstrated the attribute of [1] trustworthiness, as well as [2] quality, [3] fitness, [4] capacity, and [5] experience to satisfactorily perform the public works contract."