



# Memorandum

**TO:** HONORABLE MAYOR AND  
CITY COUNCIL

**FROM:** Matt Cano

**SUBJECT: DIGESTER & THICKENER  
PROJECT UPDATE**

**DATE:** February 25, 2022

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Approved

Date

02/25/22

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## INFORMATION

The purpose of this memorandum is to provide an update on the work of the Department of Public Works and to provide some background related to concerns regarding labor violations brought to the Department's attention and the investigation of such allegations regarding the Digester and Thickener Facilities Upgrade Project (Project).

## BACKGROUND

The City oversees a \$3.8 billion 5-year Capital Improvement Program. The Program includes significant investments to sustain, enhance and develop a wide array of public infrastructure to improve reliability, enhance recreational experiences, advance public safety and ensure that San José is well positioned for further economic growth and opportunity. Currently, there are roughly 250 Capital Improvement Program projects underway. These include, but are not limited to, projects to build and/or renovate parks, community centers, fire stations, roadways, the Mineta San Jose International Airport, the San Jose-Santa Clara Regional Wastewater Facility (RWF) and more.

The Office of Equality Assurance (OEA) within Public Works actively reviews labor compliance on public works construction projects and service and maintenance agreements, and investigates allegations brought to OEA's attention. OEA's primary function is to ensure prevailing, living, and minimum wage policies are adhered to and in compliance with federal, state, and local laws. These laws are specific to workers' pay rates, including straight, overtime, double time, and meals/break times. OEA reviews certified payrolls and other labor compliance documents for active enforcement and investigates any third-party inquiries or referrals. Some inquiries received by third parties do not fall within the scope of enforcement for OEA; however, all complaints are accepted and reviewed with the necessary City departments and divisions, and referrals may be made to the State of California's Department of Industrial Relations.

The majority of the violations that the Office encounters are related to misclassifications and underpayment of wages under California Labor Code section 1775, late or inaccurate document submittals under section 1776 and penalties for violations of specified provisions relating to employment of apprentices under section 1777. More specifically, a violation of Labor Code section 1775 occurs when a contractor or subcontractor misclassifies a worker, there is an underpayment to the worker based on classification, and/or an underpayment to workers based on hours performed on the construction site. A violation of section 1776 occurs when documents are not submitted timely, documents are incomplete or missing, and/or the documentation is inaccurate when compared to other submittals. A violation of section 1777 occurs when a contractor or subcontractor fails to submit Division of Apprentice Standards Form 140 (Public Works Contract Award Information) and Form 142 (Request for Dispatch), including receipt confirmations from the apprenticeship programs, and failure of the contractor or subcontractors to meet the apprenticeship ratios on a public works construction project.

OEA's enforcement authorities are limited, and certain violations require coordination with the State of California's Department of Industrial Relations' Division of Labor Standards Enforcement (DLSE). For example, DLSE requests OEA submit Public Works Complaint form DLSE PW 1A when violations of Labor Code section 1777 are discovered. Moreover, Labor Code section 1777.5 (2)(A) states in part, "...the California Apprenticeship Council shall distribute training fund contributions received by the council under this subdivision, less the expenses of the Department of Industrial Relations for administering this subdivision...".

## **RESPONSES TO SPECIFIC QUESTIONS**

The City has received specific questions regarding labor compliance for certain subcontractors on the Digester & Thickener Upgrade Project being completed at the RWF. The City Council awarded the construction contract to Walsh Construction LLP on May 24, 2016, and the Notice to Proceed was issued on July 5, 2016.

The Project is one of the most complex projects being completed in the City, extending throughout the plant operational area and modifying and upgrading several aspects of the treatment process. The Project has experienced significant delays from the original completion date of Fall 2019, as reported to Council twice previously, due to the several issues as detailed below:

1. During construction, it was found by the designer of record that the original design was not fully addressing all of the seismic forces that would occur during a major seismic event. A change to the design was implemented during construction, adding delay and cost to the Project. The City has entered a settlement agreement with the designer of record for the Project regarding this issue.
2. Hazardous materials were identified on site during the deep excavation associated with the Project. Polychlorinated Biphenyl (PCB)-laden caulk in the expansion joints of the interior of the digester, tunnels and thickening tanks and contaminated soil

around the foundation of the digesters were found in high enough concentration to warrant an Environmental Protection Agency approved risk remediation plan, adding significant delay while the City diligently worked with the Environmental Protection Agency to safely complete this cleanup.

3. The Project also encountered unforeseen corrosion in some of the main pipes that were not part of the original scope. This required replacement of the 78-inch reinforced concrete piping and included the construction and installation of two major bypass pumping systems. One of these pumping systems is still in place today and has been used to support two other projects. This issue resulted in project inefficiencies and resequencing of the project schedule.

Despite these challenges, the Project is 99% complete and in the commissioning phase. The substantial project completion date is Spring 2022 with a contract acceptance forecasted for December 2022.

The enormity of the Project is reflected in the number of subcontractors used by Walsh. There are approximately 69 first tier and over 60 lower tier subcontractors that have worked on the Project. Because Walsh is a union signatory contractor, the majority of the subcontractors are union subcontractors representing 11 trades. Examples of the trades working on the Project include Operating Engineers, Carpenters, Electricians, Laborers, Sprinkler Fitters, Painters, Insulators, Millwrights, Iron Workers, Sheetmetal Workers, and Cement Masons.

Inquiries have been made over the past several months regarding three primary areas:

- Walsh had contracted with an unlicensed subcontractor.
- There has been workers' compensation fraud.
- There have been Division of Apprenticeship Standards reporting violations.

Staff's investigation into the above items is summarized below.

### **Unlicensed subcontractor**

Walsh subcontracted an unlicensed subcontractor, McGeehan Welding, for welding work on the Project. Walsh had successfully worked with McGeehan on prior projects under a valid license and relied on that previous experience rather than reverifying the firm's credentials. Walsh stated that it discovered that the license McGeehan provided was invalid in April 2019 when it performed an audit of its subcontractors' licenses. On May 6, 2019, Walsh officially terminated its contract with McGeehan on the grounds that McGeehan furnished an invalid Contractor's State License Board number. A general contractor, such as Walsh, is responsible for hiring its subcontractors and making sure that the subcontractors it hires have a valid contractor's license.

Walsh has committed to the City that since this incident, it has taken additional steps to make sure all current subcontractors are licensed and to ensure that in the future it does not use unlicensed subcontractors. In particular, Walsh has committed to performing routine contractor

license audits on all existing subcontractors working on their projects and updating their construction management and documentation program, CMiC, to assure new subcontractors joining the Project possess valid contractor licenses.

The use of an unlicensed contractor is a significant issue. Because of this, additional evaluation of the quality of the welding process was undertaken, in addition to City's regular construction oversight process. The City's construction oversight process includes the use of an independent third-party special inspection consulting firm (Signet), which provides inspection for several aspects of the construction, including the welding process. This inspection includes the review of welding procedure specifications, welder credentials for all welding work, and the physical inspection of welding that occurred on the Project. The City construction management team also performs visual inspections of all welds on the project. In addition, Walsh engaged a separate specialty firm (RMA Group) to perform an additional quality control inspection, including the testing of 46 welded connections using a combination of die penetration and magnetic particle methods to confirm the quality of the work. All final welds were found in compliance with specification and code requirements, and no discrepancies were found in the reports documenting the welding work.

Additionally, the process piping that is associated with these welds has been pressure tested and these lines are in service, some for over three years, without any issues. Again, the City has found the quality and performance of the welds to be satisfactory with no issues.

As mentioned above, the use of an unlicensed contractor is a significant issue, and City staff will be referring this matter to the California State Contractor's License Board for a determination as to whether any action needs to be taken against the contractor. Additionally, Public Works has worked with Walsh to ensure that protocols are adhered to, so this does not occur again in the future. Staff will be discussing with Walsh the recovery of costs for investigating this matter.

### **Workers' Compensation**

Contractors are required to provide proof of workers' compensation insurance during registration and renewals of a California Contractor's License (Business and Professions Code section 7125). Additionally, contractors performing work on public works construction projects are required to be registered with the Department of Industrial Relations and verification of workers' compensation insurance is required for registration (Labor Code section 1725.5). It is not a practice of the City to independently verify that all subcontractors hired by the general contractor are complying with workers' compensation requirements, as all contractors are required to maintain a California Contractor's License and Department of Industrial Relations Registration to perform work on public works projects. Investigating a general allegation of workers' compensation fraud on a project of this magnitude is extraordinarily difficult. However, since specific questions were raised regarding two subcontractors – Robert Litton Welding and G&G Welding – staff investigated whether the two subcontractors had workers' compensation insurance for the relevant periods for which they worked on the Project.

Robert Litton Welding's contractor license indicates that it is "exempt" from workers' compensation insurance based on having "no employees". However, Robert Litton has maintained the required insurance during the time it has worked on the Project based on a review of the State Contractor's License Board website, and has employed four employees on the Project. This discrepancy will be forwarded to the State of California for them to determine if any follow up is required and if any laws were violated. An additional concern of worker's compensation discrepancy was received on February 18, 2022 for G&G Welding. The concern appears to be that that G&G may not have carried worker's compensation insurance for one month while working on the Project. Upon a review of the State's website, G&G is listed as exempt from worker's compensation for that same time period. Staff will also be forwarding this issue to the State of California for State to review and make any determinations as to whether any laws were violated.

Staff will continue to track the status of these inquiries with the State to determine if any actions are taken and whether those actions could lead to process changes on the City's construction oversight for future projects. Staff will also continue to work with Walsh moving forward to ensure that they are verifying that there are no workers' compensation discrepancies on this or future projects with the City.

### **Apprenticeship Standards**

On June 8, 2021, the Department of Public Works received questions regarding two specific welding companies – Robert Litton Welding and McGeehan Portable Welding and Fabrication that raised concerns as to whether these subcontractors were adhering to DAS/CAC (Division of Apprenticeship Standards/California Apprenticeship Council) requirements. As a result, the City undertook a review of the labor compliance paperwork for these two companies.

It must be noted that the City did not receive any complaints from any unions working on the Project regarding failures to make contributions to training funds or to submit proper apprenticeship documentation.

City staff reviewed over 216 weeks of payroll records from these two welding companies which entailed approximately 7,000 performance hours. Staff also reviewed the State of California Training Fund portal website to determine whether required contributions were made by these two welding companies for the time period worked on the Project.

The investigation determined neither Robert Litton nor McGeehan Portable Welding made required California Apprenticeship Council (CAC) Training Fund contributions. Robert Litton Welding is potentially liable for an estimated \$20,530 in CAC Training Fund contributions. McGeehan Portable Welding is potentially liable for an estimated \$2,366 in CAC Training Fund contributions. CAC Training Fund contributions are collected and distributed by the CAC, a subdivision of the Division of Apprenticeship Standards (DAS), which is a subdivision of the Department of Industrial Relations. The CAC training fund contributions do not go directly to the employee, nor does it come to the City. All training fund contributions are utilized by the DAS to increase opportunities for apprentices.

Robert Litton Welding submitted a properly executed DAS 140 (Public Works contract award information form) to the Prime Contractor – Walsh. However, a subcontractor is also required to submit a DAS 142 (request for dispatch) form. Proof of the DAS 142 form submission/receipt from the applicable apprenticeship council was not furnished by Robert Litton Welding. Failure to submit a DAS 142 form is a violation of Labor Code section 1777.5.

In addition, McGeehan Portable Welding and Fabrication did not furnish an executed DAS 140 or DAS 142 form to Walsh. Failure to submit DAS 140 and DAS 142 forms is a violation of Labor Code section 1777.5. These type of violations are one of the most prevalent that the City finds on projects.

CAC Training Fund contributions and DAS 140/142 submittal violations are not enforced by OEA, but rather are enforced by the State. Therefore, City staff will be submitting these violations to the State for follow up.

Additionally, City staff determined that Robert Litton Welding failed to properly compensate two employees for overtime performed. The total restitution owed is \$1,887.42. OEA has enforcement authority for underpayments and will issue a Notice of Violation to ensure worker restitution.

## **CONCLUSION**

In summary, the City strives to deliver projects in a fair and equitable manner to the community. This is an extremely complicated project that has been under construction for almost six years with well over one hundred subcontractors. The Department strives for 100 percent compliance with all laws on construction projects, takes any allegations of impropriety on its projects very seriously, and investigates any specific allegations that are made. Staff has a strong partnership with Walsh Construction and will continue to work with Walsh to eliminate any violations of all types on this Project and future projects.

/s/  
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