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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF CONTRA COSTA

CITY OF PIEDMONT, Plaintiff, v. HARRIS & ASSOCIATES, ROBERT GRAY & ASSOCIATES, DOES 1-100, Defendants.	CASE NO. C11-00762 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO COMPEL ARBITRATION** [C.C.P. § 1281.2] Date: Time: 9:00 a.m. Dept: 9 Judge: Hon. Judith Craddick

I.

INTRODUCTION

This action arises from a complaint for an alleged breach of contract and related claims for professional negligence brought by Plaintiff City of Piedmont ("Piedmont") against Harris & Associates ("Harris") and Robert Gray & Associates.

Piedmont's complaint alleges that it entered into two contracts with Harris: A May 2, 2005 Professional Engineering and Consulting Services Agreement for the Piedmont Hills Utility Underground Assessment District ("Underground Utility Contract") and a March 1, 2007 On-Call

City Engineer Agreement ("City Engineer Agreement"). (Complaint, 2:22-27, Exs. A&B) While Piedmont's Complaint does not specifically allege which agreement is germane to Harris' work, the undisputed facts surrounding this project reveal that Harris' work falls solely under the City Engineer Agreement.

As detailed below, Harris was retained by Piedmont pursuant to a written contract to act as the City Engineer on an on-call basis. This agreement is alleged as an operative contract in the Complaint and it is attached thereto as Exhibit B. This contract contains a binding arbitration provision through the American Arbitration Association ("AAA").

The on-call City Engineer agreement is the only contract between Piedmont and Harris applicable to the breach of contract and negligence claims asserted in the Complaint. While the Complaint also alleges the 2005 Underground Utility Contract between Piedmont and Harris, that agreement was amended in 2008 to remove Harris' duties to provide design and engineering work related to the project at issue in this lawsuit. Instead, another engineer, Robert Gray & Associates ("RGA") assumed those responsibilities through a written contract with Piedmont executed on the same day as the amendment to the 2005 Underground Utility Contract. Harris was not obligated to prepare bid documents, finalize plans and specifications or provide design work on the project, pursuant to the amended agreement with Piedmont. Harris has no liability to Piedmont for the alleged problems with the design of the project.

The City Engineer Agreement contains an enforceable arbitration provision. In spite of Harris' pre-lawsuit written demand that this dispute be arbitrated, Piedmont has refused to proceed to arbitration and filed this action. Therefore, Harris respectfully requests that the Court grant this motion to compel arbitration.

II.

STATEMENT OF FACTS

For approximately 15 years, the City of Piedmont employed Harris & Associates as an on-call City Engineer through a series of written contracts between the parties. As part of this process, Harris and Piedmont entered into a City Engineer contract in 2007 which continued to allow Harris to act as City Engineer for Piedmont on an on-call basis. (Declaration of Russell

Moore [Moore Decl.], ¶¶3-4, Ex. A)[1] The on-call City Engineer contract expired on June 30, 2009.

In addition to Harris' city engineering services agreements, Piedmont and Harris would occasionally enter into other engineering agreements for specific projects. On May 2, 2005, Harris and Piedmont entered into the 2005 Underground Utility Contract. (Moore Decl., ¶5, Ex. B). In this contract, Harris was employed as an engineer in connection with the formation and administration of a benefit assessment district for the provision of underground utilities to a specified area within the town of Piedmont. (*Id.*, ¶6). According to the contract, Harris was to perform design services, prepare bid documents, prepare the plans and specifications, and provide assistance in the formation and funding of the assessment district. (*Id.*, ¶7).

In the summer of 2008, Piedmont and Harris began negotiations aimed at reducing the overall costs associated with the engineering services to be performed in connection with the Underground Utility Contract. (Declaration of Rocco Colicchia [Colicchia Decl.], ¶3) After a series of meetings and e-mail exchanges, it was decided that Harris' agreement regarding engineering services for the Underground Utility Contract would be amended to delete the civil engineering tasks from Harris' scope of work, and those tasks would thereafter be performed by Robert Gray & Associates ("RGA"). (Colicchia Decl., ¶4)

On November 11, 2008, Piedmont and Harris executed an Amendment to the 2005 Engineering Services Agreement for the Piedmont Hills Utility Underground Assessment District ("Amendment"). (Moore Decl., ¶8, Ex. C) This Amendment reduced Harris' scope of services on the Project and transferred the civil engineering work related to the Project to RGA, including the design and finalization of plans, specifications and estimates and preparation of the bid package and other special provisions for the Project. (*Id.*, ¶9) That same day, Piedmont executed an Engineering Services Contract with RGA for the civil engineering work, in an amount not to exceed $100,000. (Request for Judicial Notice [RJN], ¶A; Complaint, Ex. C)

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[1] Russell Moore and Rocco Colicchia are employees of Harris & Associates and have submitted declarations in support of this motion, and are hereafter identified as "Moore" and "Colicchia."

On January 9, 2009, Harris, acting as City Engineer, sent an email to RGA and the City of Piedmont inquiring as to the status of the pre-final design for the City's review. (Colicchia Decl., ¶5, Ex. A). RGA responded that it had not yet submitted the design, and that they were waiting on the City for information regarding certain underground installations. (Colicchia Decl., ¶6, Ex. B) Harris, by reply, indicated that it would need several days to conduct the City Engineer's review. (Colicchia Decl., ¶7, Ex. C).

Harris received RGA's "not for construction" drawings on January 28, 2009. Harris requested that Piedmont authorize four hours of City engineering time for Harris to review the drawings, which Piedmont authorized. (Colicchia Decl., ¶¶8-9) These drawings from RGA did not include any final set of design drawings, but rather a preliminary set of drawings that were marked "Not for Construction," and no specifications were provided. (Colicchia Decl., ¶10). On February 2, 2009, Harris provided RGA with three pages of comments based on the preliminary drawings Harris had received. (Colicchia Decl., ¶11, Ex. D (H281-285)) Harris also requested that RGA's final drawings and specifications be sent to Harris for review before the Project went out for bid. (*Id.*, Ex. D (H285)).

RGA acknowledged Harris' comments to the preliminary drawings, but noted that RGA would not be able to send Harris a set of the requested final drawings and specifications for comment because those documents had already been submitted to Piedmont the previous week per Piedmont's deadline. (Colicchia Decl., ¶12, Ex. D (H281)). RGA concluded by stating that "the only thing I can do is apply your comments to our latest drawing and add the notes and missing items." (Colicchia Decl., ¶13, Ex. D (H281)).

It appears that RGA sought Piedmont's authorization to provide Harris with later versions of the project drawings for review (Lively Decl., ¶5 Ex. B, CP17), but Harris was never provided copies of further drawings for review. (Colicchia Decl., ¶14) In fact, RGA later prepared a set of drawings with a revision date of February 18, 2009 with a signature line for Harris, but these drawings were never provided to Harris for signature. Harris also never approved these revised drawings. (Lively Decl., ¶7, Ex. E; Colicchia Decl., ¶14; Moore Decl., ¶14) Instead, Piedmont employed ILS Associates, a civil engineering and land surveying firm based in Novato,

California, to do a further review of the contract documents and plans. On February 19, 2009, ILS Associates issued revisions to the technical specifications and the composite drawings for Piedmont. (Lively Decl., ¶¶7-8, Ex. C, CP1169-1171). Harris was not informed of ILS Associates, Inc.'s review and was not provided with any of the specifications or bid set plans for review. (Colicchia Decl., ¶15)

While the project was out to bid, Piedmont requested that Harris attend the opening of the project bids in Harris' capacity as City engineer. Thus, Harris attended the bid opening and was requested to prepare an analysis of the lowest three bidders' bid sheets. (Moore Decl., ¶10)

Russ Moore on behalf of Harris performed a bid analysis essentially to ensure that the bids were responsive to the bid documents, as confirmed in an e-mail from Mr. Moore to Larry Rosenberg, Public Works Director for Piedmont. (Moore Decl. ¶11, Ex. D). Specifically, Harris' email noted that Russ Moore's analysis had checked "(1) math correct in bid proposal (2) proposer's information included and bid proposal signed (3) Current Class A license (4) 10% Bid Bond provided (5) Experience and Qualifications filled out (6) Subcontractors listed (7) Non-Collusion Affidavit enclosed." (Moore Decl. ¶12).

Harris was not providing an opinion as to the sufficiency of the design or specifications provided by RGA for the Project. Harris was never provided with the final plans, specifications or any other documents provided in the bid package for review or otherwise. (Moore Decl. ¶13; Colicchia Decl., ¶16). Moreover, Harris has still never been provided with the final plans used by bidders on the Project, despite several requests by Harris' counsel to be provided with those documents. (Lively Decl., ¶12)

These facts demonstrate that Harris' limited scope of work is subject to the City Engineer Agreement and the arbitration agreement contained therein. Paragraph 8 of the City Engineer Agreement provides a detailed dispute resolution procedure applicable to the present lawsuit. (Complaint, Exhibit B; RJN, ¶2, Ex. B) Specifically, Paragraph 8 of the City Engineer Agreement mandates that "all disputes relating to this City Engineer Agreement shall be resolved" first by mediation and then by binding arbitration. The arbitration is to be conducted through the American Arbitration Association in San Francisco, and the arbitration award is

enforceable in any court of competent jurisdiction. (*Id.*)

The Complaint alleges that Harris created the plans and specifications for the Project. (Complaint, 3:4-7) In addition, Piedmont claims that bedrock was encountered during construction on the project and that the plans and specifications allegedly provided by Harris did not "account for the bedrock in a meaningful way." (Complaint, 3:18-20) The Complaint also alleges that certain portions of the project were not constructible as reflected in the plans. (Complaint, 4:25-26) The Complaint goes on to allege that Piedmont incurred additional construction costs and delays allegedly related to Harris' work performed under the City Engineer Agreement, according to proof. (Complaint, 5:9-15) Notwithstanding the fact that Harris' duties did not include the claims above, these issues as alleged by Piedmont must be arbitrated pursuant to the City Engineer Agreement.

On March 11, 2011, Harris, through its attorney, David Lively, demanded that Piedmont pursue its claims against Harris through arbitration. To date Piedmont has refused to do so. (Lively Decl., ¶¶2-4, Ex. A)

Pursuant to Code of Civil Procedure section 1281.7, Harris is filing this motion in lieu of an answer.

III.

LEGAL ARGUMENT

A. The Court Should Compel Arbitration Because Piedmont's Claims Are Subject To The Written Arbitration Agreement

Code of Civil Procedure section 1281.2 provides that a court "shall" order parties to arbitrate disputes that are subject to an express arbitration agreement:

> On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an Agreement to arbitrate the controversy exists . . .

Code of Civil Procedure § 1281.2.

Given the strong public policy in favor of enforcing arbitration agreements, "[d]oubts as

to whether an arbitration clause applies to a particular dispute are to be resolved in favor of sending the parties to arbitration." *Engineers and Architects Assn. v. Community Development Dept.* (1994) 30 Cal.App.4th 644, 652. Accordingly, arbitration clauses in agreements are liberally construed in favor of arbitration. *Izzi v. Mesquite Country Club* (1986) 186 Cal.App.3d 1309, 1315.

In the present matter, the City Engineer Agreement is undoubtedly the contract applicable to Piedmont's claims against Harris. Harris performed its work related to the Project as an on-call City Engineer, as specified in the City Engineer Agreement. Piedmont executed the Amendment to the Underground Utility Contract which removed from Harris' scope of services the drafting of the design drawings and specifications for the Project. Piedmont simultaneously executed an agreement with RGA whereby RGA assumed those design and drafting responsibilities related to the Project. Therefore, the arbitration provision in the City Engineer Agreement is applicable to Harris' performance as an on-call City Engineer for the Project.

B. The City Engineer Agreement Contains An Enforceable Arbitration Provision

The City Engineer Agreement requires the arbitration of this dispute. (Complaint, Ex. B) Specifically, the City Engineer Agreement provides:

> Binding Arbitration. **All disputes covered by this Paragraph 8** and not resolved by non-binding mediation **may be resolved by mutual Contract of the parties by binding arbitration before the American Arbitration Association's San Francisco office** with the hearing locale to be in Piedmont, California, or such other location as the parties shall mutually agree. To initiate such arbitration, one party shall give the other party written notice of its intent to do so, and the other party shall have fifteen (15) days after receipt of such notice in which to provide its written consent to such binding arbitration. If the other party does not provide its written consent within such fifteen (15) day period or declines in writing to provide such consent prior to the end of such fifteen (15) day period, or if neither party has sent a notice of intent to initiate binding arbitration, either party shall be free thereafter to initiate legal action against the other party relating to the subject matter of the dispute. Copies of all documents to be used a the arbitration hearing shall be furnished to the other party no later than thirty (30) days prior to the hearing or the documents shall be barred. **The arbitration award shall be enforceable in any court having jurisdiction with the mutual consent of the parties.**

(Complaint, Ex. B; Colicchia Decl., Ex. A)

The arbitration provision in the City Engineer Agreement is broad, and covers "all disputes relating to this Contract." (Complaint, Ex. B, ¶8) Piedmont's claims for breach of contract and negligence relate solely to claims borne out of the City Engineer Agreement. Specifically, the Complaint alleges that Harris prepared inadequate and incomplete plans and specifications, failed to recommend or review a pre-project soils investigation, failed to review and supervise the maintenance records and plans, failed to review, approve and/or process tentative and final maps, and failed to adequately review bid proposals. These are all alleged breaches borne out of the City Engineer Agreement, and no other independent bases for liability against Harris are alleged in the Complaint. (Complaint, 5:19-24)

The phrase "any controversy arising out of or relating to the contract" has been held to encompass tort as well as contractual liabilities so long as they have their roots in the relationship between the parties which was created by the contract. *Berman v. Dean Witter & Co., Inc.* (1975) 44 Cal.App.3d 999, 1003.

C. The Terms Of The Arbitration Provision Are Sufficient To Compel Arbitration Of This Dispute

Piedmont may claim that the arbitration provision in the City Engineer Agreement is not mandatory and that it may choose to pursue litigation in lieu of binding arbitration as called for in the City Engineer Agreement. This claim fails because of the terms of the enforceable arbitration provision and the strong public policy in favor of arbitration of disputes.

Service Employees International Union, Local 18, AFL-CIO v. American Building Maintenance Company (1972) 29 Cal. App. 3d 356 is on point. In *American Building*, the court held that an arbitration clause stating that a dispute "may be submitted to an impartial arbitrator" provided each side with the right, but not the obligation, to have the matter submitted to arbitration. In rejecting the argument that the permissive language precluded an order compelling arbitration of the dispute, the court noted:

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> It is observed that under the construction contended by respondents the arbitration provision would be of little purpose. **It would lack validity and enforceability, and would amount to no more than a barren recital that the parties might in the future agree to arbitrate a dispute.**

Id., at 358. (Emphasis added)

The case of *Erickson v. Aetna Health Plans of California, Inc.* (1999) 71 Cal. App. 4th 646 also confirms that the present dispute must be arbitrated. In *Erickson*, the arbitration provision provided that the dispute would first be submitted to a grievance panel, and that "if you are not satisfied with the [grievance panel's] proposed resolution, you may request binding arbitration." The *Erickson* court held that this permissive language permitted the insurer to compel arbitration. The court further noted "since the parties always could elect consensual arbitration without a contract provision, interpretation of the clause to require only consensual arbitration would make the provision of little purpose." *Id.*, at 656-657.

These cases are instructive in analyzing the arbitration provision between Piedmont and Harris. The instant arbitration provision uses the term "may," as did the provisions in *American Building* and *Erickson* above. Pursuant to the *American Building* case, this language means that either side has the right to have the dispute decided in arbitration. The arbitration requirement is confirmed by the detailed procedures for the initiation and maintenance of arbitration, including the timeframe for exchange of documents, etc. Just like the arbitration provision in *American Building* and *Erickson*, refusing to enforce the arbitration agreement in the present matter would result in the provision being nothing more than a barren recital, confirming rights the parties already have (i.e. to enter into arbitration only after a mutual agreement to do so).

Finally, Piedmont cannot reasonably claim that the arbitration provision is uncertain or ambiguous regarding the parties' right to arbitration, since Piedmont drafted the City Engineer Agreement and any such ambiguities or uncertainties are to be interpreted most strongly against the drafter. Civil Code §1654.

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IV.

CONCLUSION

The Complaint against Harris in this action relates solely to a claim for breach of City Engineer Agreement and professional negligence allegedly arising out of that written contract. The operative contract requires Piedmont and Harris to arbitrate these claims. Based on the foregoing, Harris respectfully requests that its Motion to Compel Arbitration be granted, pursuant to Code of Civil Procedure section 1281.2.

Dated: June 29, 2011

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By: _____
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