

O.K. JOHNSON ELECTRIC CO., INC.**CONTRACT NO. V677C-485****VABCA-3464****VA MEDICAL CENTER
TOPEKA, KANSAS**

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OPINION BY ADMINISTRATIVE JUDGE ROBINSON

This appeal is from a final decision by the Contracting Officer ("CO"), denying the claim of O.K. Johnson Electric Co., Inc. ("OKJ" or "Contractor"), for costs incurred in connection with an alleged differing site condition. The Contractor contends that it encountered above-ceiling congestion which was neither shown nor described in the contract, and which was beyond normal expectations for installation of cable trays. As a result, OKJ claims that its construction costs were increased by \$157,756.47.

The Department of Veterans Affairs ("VA" or "Government"), in whose hospital buildings the cable tray installation was performed by the Appellant, defends against the claim by stressing that the pre-contract bid documents pointedly cautioned all bidders to avoid reliance on contract drawing depictions of cable tray routing (shown as straight lines), and to themselves ascertain the nature of existing conditions. The VA contends that, had OKJ made a reasonably thorough pre-bid site investigation, the Contractor would have discovered the existing congested conditions above the ceilings, and would have prepared its bid estimate to account for the difficulty of installing continuous cable trays in such congested spaces.

A hearing was held in Topeka, Kansas, where both entitlement and quantum were litigated. The record for decision in this appeal includes the transcript of the hearing (Vols. I through IV). Transcript Volume IV concludes with the recorded observations of several witnesses and the presiding judge during the course of a site investigation of two of the hospital buildings involved in this dispute. The post-hearing site visit was jointly requested by the parties. To the extent that this opinion reflects the observations made during the site visit, citation will be made to those portions of Volume IV which reflect such observations.

In addition to the hearing transcript, the Board's decision will be based upon evidence contained in the Government's Rule 4 Appeal File (R4, tabs 1 through 24), Appellant's supplements thereto (R4, tabs 101 through 122), together with several exhibits (G-1 through G-15) entered into evidence during the course of the hearing. Counsel for the parties filed post-hearing briefs addressing both entitlement and quantum issues.

FINDINGS OF FACT

The Solicitation

On June 30, 1989, the VA issued invitation for bids (IFB), No. 677-98-89, for "Telephone System Site Preparation" at its Topeka, Kansas Medical Center ("VAMC"). The medical center buildings in which the work was to be done were constructed in 1958. Buildings of that vintage often contain many items of equipment in the spaces between finished ceilings and the structural (concrete) slabs beneath the next higher floor level. For the balance of this decision, this space will be termed the "service area." At the Topeka hospital, the finished ceilings involved in this dispute were composed of lay-in tiles (2'x2' and 2'x4') which generally could be pushed up from below and removed (from their grid support system) for access to/inspection of the service areas above. (R4, tab 24; tr. II/411-12)

The IFB (and subsequent Contract) contained the usual clauses required of construction contracts by the Federal Acquisition Regulations (the "FAR"), including General Condition 1.41, "Differing Site Conditions (Apr 84)" (FAR 52.236-02) and General Condition 1.45, "Site Investigation and Conditions Affecting the Work (Apr 84)." (FAR 52.236-03) The latter clause reads as follows:

(a) The Contractor acknowledges that it has taken steps reasonably necessary to ascertain the nature and location of the work, and that it has investigated and satisfied itself as to the general and local conditions which can affect the work or its cost, including but not limited to (1) conditions bearing upon . . . the character of equipment and facilities needed preliminary to and during work performance. The Contractor also acknowledges that it has satisfied itself as to the character, quality, and quantity of surface and subsurface materials or obstacles to be encountered insofar as this information is reasonably ascertainable from an inspection of the site, including all exploratory work done by the Government, as well as from the drawings and specifications made a part of this contract. Any failure of the Contractor to take the actions described and acknowledged in this paragraph will not relieve the Contractor from responsibility for estimating properly the difficulty and cost of successfully performing the work, or for proceeding to successfully perform the work, without additional expense to the Government.

(b) The Government assumes no responsibility for any conclusions or interpretation[s] made by the Contractor based on information made available by the Government. Nor does the Government assume responsibility for any understanding reached or representation made concerning conditions which can affect the work by any of its officers or agents before the execution of this contract, unless that understanding or representation is expressly stated in this contract.

The general scope of the Contract consisted of site preparation, in seventeen existing buildings, for a future telephone system to be installed by another entity (Bell South).

This preparation was described, in Paragraph 1.2.A of the General Requirements, to include "general construction, alterations, mechanical and electrical work, utility systems, necessary removal of existing structures and construction." In addition to the above-ceiling installation of cable trays and/or conduits in most of the seventeen buildings, the project consisted of utilizing existing underground ducts to carry telephone lines from the outlying buildings to Building 1, the main hospital building. Within Building 1, an existing telephone room was to be demolished and rebuilt. In addition, new telephone closets were to be constructed on three floor levels (basement, 1st, 2nd). (R4, tabs 8, 22, 24; Exh. G-14)

The dispute underlying this appeal concerns a distinct portion of the Contract involving the installation of cable trays running the length of each corridor of the various buildings. These trays were to be installed in the service areas above those corridors. Although called "trays," these devices are actually completely enclosed rigid metal raceways (also called "wireways"), ranging in sizes of 4", 6", and 8" square, with one side hinged for access. On all of the Contract drawings showing the buildings' floor plans, the cable trays to be installed are depicted with straight lines down the middle of each corridor. However, on Contract Drawing No. 4 of 31, containing information pertinent to the project as a whole, the following General Note 8 states that:

Cable tray layouts are *only diagrammatic and are not intended to show all required fittings, offsets and exact location*. Contractor shall field verify all obstructions and provide an installation which will fit within existing ceiling heights, etc. (Emphasis added)

(Exh. G-13)

The Pre-Bid Inspection

While the IFB made no provision for a Government conducted pre-bid site visit, the Bidders were nevertheless warned by the several FAR clauses in the contract to make themselves familiar with the conditions which would affect the work. Accompanying that warning, General Requirement 1.1.B stated that: "Visits to the site by Bidders may be made only by appointment with the Medical Center Engineering Officer."

An estimator for OKJ testified that he had made several unannounced visits to Topeka's VA Medical Center to inspect the premises. He was not accompanied by any VA personnel when he examined the service areas above the ceilings in the halls. He went to several of the corridors in the various buildings, although at the time of the hearing (3+ years later) the only two locations that he could recall with precision were one in Building 1 and one in Building 4. He described his several visits:

Usually they would be on the way home, and I would come by and and I would come in the hospital and I would walk in the halls and I would pop the ceiling up and shine my flashlight up in the ceiling and so I could see what was up there Of the places that I [saw], there were some that had an awful lot of, for the lack of a term, equipment or material above the ceiling

and some were very nice.

(Tr. IV/553-54)

The witness explained that he had used a rigid 8 1/2" x 11" notebook to lift the ceiling tiles and to slide them aside for viewing the service areas above with a flashlight. He stood on the floor, approximately eight to nine feet below the ceiling tiles. He did not bring a ladder with him nor seek to borrow one from any member of the VA staff. Being just under six feet in height, his view was necessarily limited to that which he could see by standing in place on the floor. This vantage point allows one an (oblique) sight line of approximately ten feet into the overhead area. (Tr. IV/553; 586; 678; II/348)

The estimator further explained that his use of the term "very nice" described those locations he saw, during his pre-bid visits, where there appeared to be sufficient clearance in the service areas to permit the installation of uninterrupted straight runs of wireway material. With respect to those "very nice" areas, he stated that they were what he would expect, comparing such areas to the Contract drawing representations in this manner:

Well, the engineer had a straight line going down that hallway. He designed these plans and he got all of his information to draw these plans up with. So, on that basis I make the assumption that he has already done his investigation to show that this is the way that the thing is to run and there should be relatively no problem.

(Tr. IV/555)

The witness, when asked what level of difficulty he had anticipated as a result of his several site investigations, replied that: "With what I saw, it would be average." (Tr. IV/557)

During one site visit, the estimator had contacted the hospital's Engineering Service, and been shown to a switch key room in connection with the installation of certain electrical equipment. He did not then inquire about anything relating to above-ceiling cable tray installations in the corridors of any of the buildings, nor did he ask (nor did the VA volunteer) whether there were any as-built drawings ("as-builts") of the hospital which were available for examination. (Tr. IV/552-53)

No as-builts had been furnished or mentioned in the IFB. At the hearing, the VA engineer revealed considerable knowledge of the kinds of equipment which were located in the above-ceiling service areas of the hospital buildings. He further testified that his office possessed some as-builts of the hospital buildings, and that they showed "[m]ost of [the locations of equipment above ceilings], you know, I couldn't say there was a hundred percent, but I'd say on different projects, yes, we have, you know, a layout of what's up there." Neither of the parties attempted to enter any of these pre-contract as-built drawings into evidence. (Tr. II/427-54; IV/629-30)

According to the President of OKJ, this particular project was one of the firm's larger jobs. It was also the Contractor's most extensive installation of wireways (between

10,000 and 12,000 lin. ft.) to that point. The Contractor's largest previous wireway installation had been at the Stormont Vail hospital in Topeka, where over 7,000 linear feet of four inch wireway had been installed above ceilings. He had not encountered congestion anywhere as severe as at the VAMC. This was the fourth or fifth job which OKJ had done at the Topeka VAMC over the preceding thirteen years. (Tr.II/168-92)

OKJ's President did not conduct a pre-bid site visit, although he did review the estimator's takeoff figures. He was aware of Note 8 of Contract Drawing 4 of 31, and acknowledged that one could not rely on the straight line depictions of wireway above corridors. He further stated that an estimator would have to put some factor into the bid to account for more offsets than were shown on the drawings. He would have expected the estimator to review the drawings and visit the site, taking a ladder with him. (Tr. II/193-196, 240)

Bid Preparation

The estimator who made these site visits had a considerable amount of experience in estimating commercial and institutional electrical construction, including other hospitals. He admitted to having "busted" an estimate on one of those projects. He subsequently prepared OKJ's cost estimate for the bid to the VA. Based upon his observations at the job site and his reading of the Contract specifications and drawings, the estimator performed a takeoff. He calculated the cost of all wireway materials to be \$43,168.50. He estimated a total of 1,671(+) labor hours at a rate of \$20.64, for a total labor price of \$ 34,492.50. The total for this wireway work, excluding OKJ's markup, was \$ 77,661.00 (Exh. G-5; tr. IV/536-37, 560)

In his bid, the estimator had included the costs for only thirteen 90 fittings for all of the cable trays on the project. He arrived at this figure by counting the number of 90° fittings that he saw on the Contract drawings. He did not see or include any 45° fittings. Soon after Contract award (and *before* this dispute arose), he ordered "maybe" one hundred of these 90 fittings, as well as "maybe" one hundred and twenty-five 45° fittings. (Tr. IV/584-90; Exh. G-5) When cross-examined on this matter, the witness testified as follows:

The reason I didn't put it in my bid was because I didn't know how many I was going to have, to be exact, and I felt that it was just better to try to - - I knew I was going to have to order more than what I had on my take-off, I'll be able to put it that way. When I did this and I did order more material, I ordered it because I didn't know how many I was going to have and I didn't want to put them in there because I thought - - I'm not naive but I thought that I might be able to get by with [*i.e.*, use] as few fittings as possible and so that is why - - this is one reason they weren't on here [his bid], and what I did have to start off with, I didn't think that was excessive.

(Tr. IV/591)

Notwithstanding his optimistic bidding assumptions with respect to the number of fittings needed for the cable trays, the estimator had been aware of Note 8 of Contract

Drawing 4 of 31 prior to the time of his bid estimate. He understood that the essence of the Note was that the straight line depictions of cable tray corridor runs on the plans were not a guarantee that the wireways could actually be run straight from one end of a corridor to the other. He was equally aware that not all necessary offsets/fittings were shown on these plans. (Tr. IV/543-46, 549)

At another part of his testimony, the estimator (in explaining his bid price for only 13 fittings), stated that he was reluctant to bid more fittings for fear that the electrical foreman would arrive on the job and question "Why all the fittings?" In the estimator's own words: "[S]o that's why, because when the people install a job, they are more or less deciding - - *they are designing it then because it hasn't been designed before.* They have to get it into the best accessibility that they have, and you don't try to buy any more material than you have to." (Emphasis added) (Tr. IV/677)

Post-Award Problems

There were five bidders for this project. The base bid prices (high to low) were as follows: \$1,573,042, \$ 1,072,000, \$ 1,067,200, and \$ 994,240, with OKJ's low responsive bid at \$ 978,175. The VA awarded the contract to OKJ for its base bid price and the notice to proceed was received by the Contractor on January 17, 1990. (R4, tabs 1, 4, 5)

On August 1, 1990, the CO notified the Contractor that he was concerned that the site preparation project might not be finished by the contract completion date of October 15, 1990. He attributed the problem to undermanning of the job, requesting that OKJ advise as to whether the project was on schedule or if additional resources were contemplated to meet the October 15 date. (R4, tab 9)

In a letter dated September 12, 1990, the Contractor responded to the CO's concerns by stating, *inter alia*: "[T]he hallways where the 4x4, 6x6, & 8x8 [inch] Wireway is to run, is so obstructed and congested that the installation has tripled our labor, fittings, supports and practically halted our progress." The letter was signed by the Contractor's President, Mr. James Mylnek. (R4, tab 10)

A series of letters ensued, culminating in OKJ's certified claim for \$157,756.47 - attributed solely to additional wireway installation costs. The Contractor contended that the area had been inspected prior to bid but that "lifting out ceiling tile in excess of 10,400 feet prior to bid time was unfathomable." It characterized the congestion as a differing site condition involving "unknown physical conditions at the site which differ from those ordinarily encountered." (R4, tabs 8-18)

The Contractor sought the difference between the labor hours bid for wireways (1,671.17 hrs. for \$34,493) and the labor hours actually expended for that work (6,939.50 hrs. for \$143,230.91). It also sought the difference between the price bid for wireway materials at \$43,168.50, and the \$57,106.54 actually expended. OKJ ultimately installed 565 more fittings than it had bid for this project. (Tr II/222-23; R4, tabs 110, 111)

In his final decision denying this claim, the CO pointed to the drawing note which cautioned that the straight lines depicting future cable tray installation above corridors

were diagrammatic only and did not show "required fittings, offsets and exact locations." Further, the CO stressed the Contractor's duty to conduct an adequate pre-bid site investigation in accordance with the warning in (FAR) Clause 52.236-03, General Condition 1-45 of the contract, titled "Site Investigation and Conditions Affecting the Work." The first sentence of that clause reads, inter alia, that: "The Contractor acknowledges that it has taken steps reasonably necessary to ascertain the nature and location of the work, and that it has investigated and satisfied itself as to the general and local conditions which can affect the work and its cost" (R4, tab 24)

At the hearing, the Contractor's electrical foreman explained that the contract entailed the installation of cable trays running the length of each corridor. These cable trays would then connect to smaller conduit servicing the individual rooms along each corridor. Bell South would use this system of ducts to carry telephone cable under a later VA contract. The cable tray comes in ten foot sections of hinged metal boxes, which are installed "end to end" with coupling devices requiring eight bolts per connection. Prior to actually starting work (but after contract award), the journeyman electrician member of a two-person team of installers (journeyman and helper) will remove enough ceiling panels so that he can stand on a stepladder and inspect the service area (about 4 feet in height, width of corridor - 12 feet+). Having observed the existing equipment, including sheetrock firewalls, he selects the most favorable route for running the cable tray within the service area in such a manner as to avoid as many cuts or bends (90° or 45°) as possible. Having laid out the most accessible route, the installation team then stands on stepladders to attach the the cable trays to the overhead ceiling slab and to each other. Because Hospital Buildings 1 and 2 were to be occupied during construction, OKJ could not plan to use a more substantial work platform such as portable scaffolding. (Tr. I/ 30-41)

The electrical foreman had over 22 years of experience installing such equipment in homes, schools, industrial buildings and hospitals. Although he would expect to find more congested above-ceiling conditions in hospitals ("a lot of ductwork, a lot of air handling equipment, stuff like that"), and was aware of a "degree of difficulty" to be expected when running wireway in a thirty-one year old hospital such a