

EATON ELECTRIC, INC.

CONTRACT NO. V630C-415

VABCA-5605-5606

VA MEDICAL CENTER
NEW YORK, NEW YORK

Joseph A. Camardo, Jr., Esq., Law Firm of Joseph A. Camardo, Jr., Auburn, New York, for the Appellant.

Stacey North Willis, Esq., Trial Attorney; *Charlma J. Quarles, Esq.*, Deputy Assistant General Counsel; and *Phillipa L. Anderson, Esq.*, Assistant General Counsel, Washington, D.C., for the Department of Veterans Affairs.

ORDER DENYING MOTIONS FOR SUMMARY JUDGMENT

1. Appellant has filed a MOTION FOR SUMMARY JUDGMENT in VABCA-5607 asserting that the specifications and drawings allowed Eaton to use either EMT or a less expensive flexible metal conduit above the existing hung ceilings. The VA has filed a MOTION FOR SUMMARY JUDGMENT in VABCA-5606, alleging that Modification No. 1 was an accord and satisfaction barring Appellant from seeking any additional costs for the equipment required by the issuance of a revised set of drawings.
2. During a conference call on November 18, 1999, both Parties were advised that, subject to the concurrence of the Panel Members, their respective Motions would be denied because material questions of fact were raised.
3. In VABCA-5607, Gary Eaton, President of Appellant, states in his affidavit in support of its MOTION that he prepared Eaton's bid (\$2,536,824.05) and it was based on using EMT. (Eaton Aff. ¶ 4) He states further that the VA requested him to reduce his price by changing the EMT to the cheaper flexible metal conduit. This seems to conflict with his letter of November 3, 1995, where he states that his bid was based on flexible metal conduit. He says he alerted the VA that he was using flexible metal at all locations and "We would have gladly quoted on the more expensive EMT system at that time of negotiations, if we were directed to do so." (R4, tab 29) This situation, coupled with an interpretation by Appellant that would require a General Note prevailing over

the Specifications, raises real threshold factual issues as to the contract conduit requirements.

4. In VABCA-5606, Modification No. 1 seems to be a simple time extension which concerns itself with two periods of time: 1) time associated with the delay in the Contractor's receipt of the revised drawings; and, 2) the time necessary to review and incorporate them into Eaton's proposal. However, the VA suggests that the release language in Modification No. 1 relieves it of any liability for the costs of the changes in the revised drawings as well as costs attributable to any delays prior to February 8, 1996. The evidence in the record establishes a valid dispute as to whether Appellant released the VA from liability for the cost of the revised drawing changes as well as the costs of delays. Moreover, the evidence in support of its position evidences apparent VA confusion as to whether it believes that Modification No. 1 is an accord and satisfaction or whether it asserts Appellant's waiver of any claim for the revised drawing changes under the terms of the Contract.

5. Therefore, since there are disputed facts material to the issues raised by the Parties' Motions, summary judgment is not available. *Centex Bateson Construction Co., Inc.*, VABCA No. 4613, 5162-5165, 97-1 BCA ¶ 28,915.

6. The Board will convene a telephone conference call on *Tuesday, January 11, 2000*, at 10:00 a.m. Eastern time. There will be a discussion of the status of these

appeals and of the additional claims discussed in the Parties' November 18, 1999 conference call with the Board.

IT IS SO ORDERED

DATE: **December 8, 1999**

WILLIAM E. THOMAS, JR.
Administrative Judge
Panel Chairman

We Concur:

GUY H. MCMICHAEL III
Chief Administrative Judge

MORRIS PULLARA, JR.
Administrative Judge