

**EICHBERGER ENTERPRISES, INC.****CONTRACT NO. V626C-513 VABCA3923****VA MEDICAL CENTER****NASHVILLE, TENNESSEE**

**Chris Eichberger**, Vice President, Eichberger Enterprises, Inc., Louisville, Kentucky, for the Appellant.

**Roger T. Gray, Esq.**, Trial Attorney, Office of the District Counsel, Nashville, Tennessee; **Phillipa L. Anderson, Esq.**, Deputy Assistant General Counsel; and **William E. Thomas, Jr., Esq.**, Assistant General Counsel, Washington, D.C., for the Department of Veterans Affairs.

**OPINION BY ADMINISTRATIVE JUDGE McMICHAEL**

Eichberger Enterprises, Inc. (EEI or Contractor) appeals the decision of the Contracting Officer denying its claim for additional compensation based on an alleged Type 2 differing site condition. EEI claims that while it was performing certain work on Contract No. V626C-513, one type of vinyl wall covering required additional labor to "tug" off the walls, and this wall covering left a layer of "fuzz" on the wall that was more difficult to remove, requiring more wall preparation than had been anticipated. As a result of this unanticipated differing site condition, the Contractor estimates that it incurred \$ 20,052 in additional costs.

The Record in this Appeal consists of the Appeal File submitted pursuant to Board Rule 4 (R4, tabs 1-22), the exhibits introduced by the Appellant (Exhs. A-1 through A-3) and by the Government (Exhs. G-1 through G-3) together with a transcript of the Hearing held in Nashville, Tennessee (Tr. 1-156). Both parties have filed Post Hearing briefs.

**FINDINGS OF FACT**

The VA issued Solicitation No. 626-21-92 on December 5, 1991, seeking a contractor to: "[f]urnish all labor, materials, supplies, equipment and supervision necessary to 'Replace Medical Gas System' at the Department of Veterans Affairs, 1310 24th Avenue South, Nashville, TN." (R4, tab 1, at 1) The Solicitation required the contractor to remove and replace medical air, oxygen, and vacuum outlets and inlets in patient rooms. Under the scope of work the contractor was required to remove the existing vinyl wall covering in ten wards, prepare the walls for new wall covering, and install the new wall covering. (R4, tab 1, at 1 and 1B and SECTION 09951, VINYL COATED FABRIC WALL COVERING; Complaint ¶ 1; R4, tab 10)

The Solicitation provided:

Due to the nature of this project, it is *highly recommended* that all prospective bidders attend the scheduled site inspection on the following date and time:

January 3, 1992, at 1:00 p.m.

(R4, tab 1, at 3) (emphasis added)

Prospective bidders were warned: "Visits to the site by bidders may be made only by appointment with the medical center engineering officer." (R4, tab 1, GENERAL REQUIREMENTS § 01010-1.1B) The Solicitation also contained Federal Acquisition Regulation (FAR) Clause 52.236-03, SITE INVESTIGATION AND CONDITIONS AFFECTING THE WORK (APR 1984), which provides in pertinent part:

(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. . . . 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 interpretations made by the Contractor based on the 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.

(R4, tab 1, at 66)

FAR Clause 52.236-02 DIFFERING SITE CONDITIONS (APR 1984) was also included in the Contract. (R4, tab 1, at 66)

On January 3, 1992, the VA conducted a scheduled pre-bid conference and site visit with interested bidders. Present at the pre-bid conference were Gayle Reeves, the Contracting Officer, VA Project Engineer Leland Fong, and ten prospective contractors. (R4, tab 20) Engineer Fong prepared the design documents, assisted in the pre-bid/pre-construction processes, and ultimately administered the Project while the work was performed. (Tr. 115)

EEI did not attend the pre-bid conference. (R4, tab 20) Those contractors present had the opportunity to discuss the scope of the proposed contract and the required work. Prospective bidders in attendance were shown what the VA considered to be a representative sample of the rooms (approximately 13) where the work was to take place. (Tr. 27) Based on the contractors' expressions of interest, the group also toured other parts of the hospital. (Tr. 128) In some rooms inspected by the contractors, wall covering was apparent. There were two types of wall covering observed, one of which had a fabric

backing and ultimately became the focus of the Appellant's claim. (Tr. 27)

The group toured the facility and actually pulled off some of the wall coverings. Some of the wall coverings left a residual "fuzz" fabric backing on the wall which caused the contractors to discuss wall preparation and inquire into how the VA normally handled the wall covering removal. (Tr. 141-3) CO Reeves testified that the fuzz on the walls "was in plain view." (Tr. 99) Engineer Fong related that the prospective bidders "asked how we would normally refinish . . . with that type of wall covering on it," although "[t]hey didn't say anything specific about the type of wall covering that it was." (Tr. 129) Fong said that he responded by saying what other workers at the VA had done which was:

generally just skim coat once they removed the vinyl and they removed the bulk of the fuzz, and . . . general sanding of the surface.

(Tr. 143)

When questioned about whether he was aware of any unique problems with the wall covering, Fong said that it could be "found in a lot of other areas other than patient rooms and the painters in our mechanics shop have had to deal with it before." He went on to explain: "what they've described and what I've told contractors at the time, they will go in and usually put a man on each corner of the vinyl and start pulling, and after that they do a little scraping, sanding, and they normally skim coat to level the surface off." (Tr. 119) During that same site visit, one contractor opined that he would have to skim coat the whole wall to make it acceptable. CO Reeves commented at the Hearing that this did not concern her because: "I don't tell anybody how to bid it or how, you know, its not a 'how to' spec[ification] . . . it's just a way we want the wall to look when you're through. I don't care how they do it." (Tr. 100)

The group touring the site also encountered a VA painter who was questioned by the contractors regarding the removal of the fuzz. According to Engineer Fong, the VA painter said that typically they would remove the vinyl and scrape or sand off the fuzz that was there, but the "skim coating was done" basically "because of the glue that was left behind." (Tr. 144) They visited one ward to observe the wall covering and because there were some questions as to whether or not the finish conditions were present in the other wards, the group walked through other wards inspecting rooms and looking at the rooms from the corridor. (Tr. 128)

Asked whether the contract documents contained any information about the vinyl wall covering's fuzziness or "anything like that," Engineer Fong replied that:

normally you would not get that specific. It's vinyl wall covering. You know that you're going to replace it. All you're going to do tell them what type you want back, and the workmanship that you want on the application of it . . . [w]e don't tell the contractor how to perform the work, we just tell the quality of the workmanship and what we expect from [the contractor].

(Tr. 129-30)

Prior to bidding, sometime around January 9, 1992, Chris Eichberger, David Baker and

Mike Watson from EEI made their own visit to the site. (Tr. 73, 87) No one from the VA was available to accompany them on the site visit and CO Reeves had earlier cautioned the Contractor that it should wait until Engineer Fong was available to conduct the visit. (R4, tab 3) Even though CO Reeves informed Baker of her opinion that a site visit without VA personnel present was a "waste of time," EEI nevertheless decided to make an unaccompanied visit and look at one of the wards that was vacant at that time. (Tr. 73-8, 101) While admitting he "was not an expert at wall papering," Mr. Eichberger stated:

When we looked at the wall paper issue, we didn't really give any thought to how hard or how difficult or how easy it would be. Most wall paper is strippable and easily comes off. We did not go over and pull a piece of wall paper off the wall, because I felt like that goes beyond what we're supposed to do. That destroys part of the building, and we don't come in and drill holes in the wall and see if there's two layers of drywall on the wall.

(Tr. 75)

At the time EEI submitted its bid, around January 21, 1992, Mr. Eichberger testified that "we had to sit down, when it came to bid time on this particular project, we didn't have a wall paper price . . . and we had to go with [what] our best guess estimate was, and that's how we determined what [the bid] price was, just basically square footage." (Tr. 77, 88-89) Mr. Eichberger claims that EEI bid the wall covering portion of the job "at about a dollar per square foot, so about an \$80,000 bid." This price included removing, purchasing and rehangng the new wall covering. (Tr. 78) However, the Contractor did not have the exact amount of the bid or "takeoffs" relating to the bid itself because EEI's "computer disc . . . crashed" six or eight months prior to the Hearing, and company officials said they had been unable to recover the bid documents. (Tr. 77-78) David Baker was EEI's estimator and project manager for this Project, and he did most of the work to prepare the bid. (Tr. 73) Mr. Eichberger approved the final bid figure. (Tr. 78)

When it became apparent EEI was the low bidder, CO Reeves contacted EEI to review the site and verify its bid. CO Reeves suspected that EEI had made an error in its bid because it was over \$95,000 lower than the next low bidder, she was concerned that they had underbid the wall covering portion of the job. (R4, tab 2; tr. 102)

Looking at the bid prices, we thought Eichberger was a little bit lower than he should be compared to the other bids, and I always like to have the bidder verify his bid anyway, especially if they were not at the regularly scheduled site visit.

So we called David Baker and we asked him to come in and verify his bid, and we requested him to look at the site . . . . We also requested he bring his wall covering people and that we thought it might be in the wall covering portion of his bid that, you know, we really wanted him to inspect it again.

(Tr. 102)

Mr. Baker came to the job site on January 28, 1992, but did not bring the wall covering subcontractor with him, as requested by the VA. (Tr. 102-03) He reviewed the site with VA personnel and inspected the wall covering. (Tr. 103) To the VA's knowledge, this was the first time EEI had had the opportunity to review the site. (Tr. 101) Engineer Fong

showed Mr. Baker the fuzz on the wall and recounted the discussions between the VA and the other contractors during the first site visit. (Tr. 112, 144) As previously mentioned, these discussions focused around the fuzz on the walls and the possible solution of sanding and skimming. Fong testified that he showed Baker the fuzz and "described exactly what I described to the other contractors, that we went over, how other work had been done . . . to prep the wall . . . that when we had our other site visit, we told other contractors, and the contractors themselves had said that when the vinyl is removed, they normally had to prep the wall using a skim coat." (Tr. 144-45) In a Report of Contact prepared immediately after the site visit, Contracting Officer Reeves related that the Contractor "believes that his price is O.K. and that he saved money on the wall covering and painting. They did go over the drawings and the subs for the wall covering and painting are comfortable with it and that they are aware wall covering is in all four walls in the patient rooms." (R4, tab 4; tr. 104) Baker told the Contracting Officer, and later his boss, that he was "comfortable" with EEI's bid. (Tr. 104, 88) On the same day of the site visit, EEI verified its bid. (R4, tab 5) At the Hearing, Mr. Eichberger acknowledged he did not know what Baker looked at on the particular day he reviewed the site with Engineer Fong. (Tr. 88) Mr. Baker was not called to testify.

EEI was awarded the Contract on March 11, 1992, for the amount of \$937,767. A pre-const