

TEST YOUR KNOWLEDGE OF CHANGE ORDERS AND EQUITABLE ADJUSTMENTS

By Richard D. Lieberman, Consultant and Retired Attorney

You are a construction company that receives a contract to modernize the Internal Revenue Service center. Among other things, the contract requires you to provide a security system. As explained below, the security cabling for that system is required to be “concealed or in conduit (EMT) [Electrical Metal Tubing].”

Your contract states the following:

General Provisions:

1.17 Conduit is required in all unfinished areas where cables cannot be concealed above the ceilings on raceways or in hollow walls or placed in existing cable trays. Cables are concealed when they are run below the raised flooring and above the drop ceiling.

12. All security system cabling shall be enclosed in conduit when exiting the protected [limited access] area.

Definitions and Instructions

7. “Concealed” (as applied to circuitry) – Covered completely by building materials

8. “Exposed” (as applied to circuit) –Not covered in any way by building material

Work of Other Trades

All cabling shall be concealed or in conduit (EMT) unless specifically approved in writing by the contracting officer.

Installation

All security wiring shall be concealed or in conduit as noted.

Conductors and Cables

Conceal cables in finished walls, ceiling and floors unless otherwise directed.

Your bid contemplated the use of PVC [Poly Vinyl Chloride] cable which is “cable tray rated”. The legend on the drawing requires the security cable to be plenum or PVC cable. You begin to install PVC security cabling in cable trays in a raised access flooring system.

The Contracting Officer (“CO”) directs you to install the security cabling in EMT conduit “per the contract.” You explain in detail to the CO that you disagree with his interpretation of the contract, but the CO is adamant, so you comply with the CO’s direction and install all the

security cabling in EMT conduit. You then submit your claim for \$491,000 in extra costs for installing in conduit. You state that the use of a cable tray, placed underneath the raised access flooring system or above the drop ceiling meets the contract requirement of being “concealed” because the raised access flooring or drop ceiling each are composed of “building materials” that completely cover the cables.

Will you win your claim? The contracting officer denies your claim, and you appeal the denial to the Civilian Board of Contract Appeals (“CBCA”). How will the CBCA rule? In *Columbia Const. Co. v. General Services Administration*, CBCA 3258, Jan. 20, 2015, the CBCA granted the entire claim, noting that the contract’s plain language indicated that the company had the option of either concealing the security cable in building materials or installing it in EMT conduit. The CBCA said:

The raised access flooring and drop ceiling were areas that were covered by building materials and the [contractor used the specified installation method]....The terms of the contract allowed appellant to install the security cabling in cable trays under the raised access floor and above the drop ceiling. Where conduit was specifically called out by size in drawings, [the contractor] had the option of using cable trays, so long as the surrounding building materials covered the cables completely and the security cable was installed using [the specified installation method] There are other portions of the contract where the drafters indicated that security cables are sufficiently “concealed” when they are run below the raised flooring system or above the ceilings in cable trays. [Cites section 1.17 of specification].

TIP: (1) It is crucial that both the CO and contractor read the entire contract carefully. Contract interpretation begins with the *plain language* of the contract, and here, the plain language allowed the contractor to use cable trays with concealment. If the CO wanted the use of EMT conduit throughout, he could have modified the contract to demand EMT conduit for all security cabling—but this would have required a formal written modification. Such a modification would have granted the contractor the right to an equitable adjustment—which the contractor received anyway by the CBCA because the CO made a constructive change to the contract (a change to what the contract required without issuing a formal written modification).

(2) Just because a CO disagrees on the interpretation of a specification doesn’t make the CO right. Similarly, the contractor is not necessarily right in its interpretation. However, rather than facing a possible default with noncompliance with specifications, Columbia Construction took a safer route—it complied with the CO’s direction and then filed an appropriate claim for the constructive change. The Board agreed with Columbia.