

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of -- )  
 )  
Mitchell Enterprises, Inc. ) ASBCA Nos. 53202, 53371, 53487,  
 ) 53569  
Under Contract No. DACA56-98-C-0001 )

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OPINION BY ADMINISTRATIVE JUDGE KIENLEN

ASBCA No. 53487, relating to the remission of \$30,000 in liquidated damages, was abandoned by appellant by letter of 5 January 2006. The appeal in that case, having been heard on the merits, is therefore dismissed with prejudice. The remaining appeals are the subject of this opinion. They concern the allocation of responsibility for the cost of correcting punch list items identified by the government.

These appeals concern appellant's claim for the payment of part of the balance of the contract price in the amount of \$179,384.54 (ASBCA No. 53202), the government's punch list claim against the remaining contract balance in the amount of \$191,794.45 (ASBCA No. 53371), and the government's punch list claim against the contractor for an additional amount of \$396,069.55 (ASBCA No. 53569). All of these monies have been withheld by, or claimed by, the government as recoupment for the costs of correcting, repairing, or completing punch list items, after the government took possession of the newly constructed Transportability Test Facility.

Entitlement and quantum were at issue. The parties have, of necessity, put together a voluminous documentation which we have examined in detail. This opinion outlines the relevant facts leading to the development of the various punch lists, discusses the applicable law, and then applies the law to the punch list items. We have, however, spared the reader most of the detail put together by the parties, except where we thought a full discussion would be useful or necessary to understand our decision. In addition to

the \$30,000 in liquidated damages, the government is entitled to recoup \$3,287 for correcting punch list items.

## FINDINGS OF FACT

### *The Contract*

1. The Tulsa District Office of the Army Corps of Engineers issued an invitation for bids (Solicitation No. DACA56-97-R-0037) for the construction of a Transportability Test Facility (TTF). The facility included the Main TTF Building (Building A), Warehouses (Buildings B and C), a Shipboard Transportability Simulator (STS), and other related items. The Tulsa District Office issued the request for bids on 15 April 1997. The entire TTF facility was to be constructed at the McAlester Army Ammunition Plant, McAlester, Oklahoma. The Defense Ammunition Center (DAC) was to occupy the facility. (ASBCA No. 53202, R4, tab R-4A at 7)

2. Three months later, the government converted the solicitation to a negotiated procurement (request for proposals). (Amendment No. 0007 dated 18 July 1997; RFP DACA56-97-R-0037; ASBCA No. 53202, R4, tab R-4C at 248) Appellant submitted its best and final offer on 29 July 1997. Appellant's offer was \$7,435,000 for all of the items. The government awarded the contract to appellant on 5 December 1997.

3. The contract included the following standard contract clauses: DISPUTES (OCT 1995), as found at FAR 52.233-1 (ASBCA No. 53202, R4, tab R-4C at 414); USE AND POSSESSION PRIOR TO COMPLETION (APR 1984), as found at FAR 52.236-11 (ASBCA No. 53202, R4, tab R-4C at 422); CLEANING UP (APR 1984), as found at FAR 52.236-12 (ASBCA No. 53202, R4, tab R-4C at 423); INSPECTION OF CONSTRUCTION (AUG 1996), as found at FAR 52.246-12 (ASBCA No. 53202, R4, tab R-4C at 437); COMMENCEMENT, PROSECUTION, AND COMPLETION OF WORK (APR 1984), as found at FAR 52.0211-0010 (ASBCA No. 53202, R4, tab R-4C at 458); LIQUIDATED DAMAGES – CONSTRUCTION (APR 1984), as found at FAR 52.211-12 (ASBCA No. 53202, R4, tab R-4C at 458-59); and WARRANTY OF CONSTRUCTION (MAR 1994), as found at FAR 52.246-21 (ASBCA No. 53202, R4, tab R-8A at 1-3).

4. The clause entitled USE AND POSSESSION PRIOR TO COMPLETION (APR 1984) states as follows:

USE AND POSSESSION PRIOR TO COMPLETION (APR  
1984)

(a) The Government shall have the right to take  
possession of or use any completed or partially

completed part of the work. Before taking possession of or using any work, the Contracting Officer shall furnish the Contractor a list of items of work remaining to be performed or corrected on those portions of the work that the Government intends to take possession of or use. However, failure of the Contracting Officer to list any item of work shall not relieve the Contractor of responsibility for complying with the terms of the contract. The Government's possession or use shall not be deemed an acceptance of any work under the contract.

(b) While the Government has such possession or use, the Contractor shall be relieved of the responsibility for the loss of or damage to the work resulting from the Government's possession or use, notwithstanding the terms of the clause in this contract entitled "Permits and Responsibilities." If prior possession or use by the Government delays the progress of the work or causes additional expense to the Contractor, an equitable adjustment shall be made in the contract price or the time of completion, and the contract shall be modified in writing accordingly.

(ASBCA No. 53202, R4, tab R-4A at 157)

5. In relevant part, the INSPECTION OF CONSTRUCTION clause required the contractor to correct defective work and, if the contractor failed to do so, allowed the government to have the work done for the account of the contractor. The pertinent language states:

(f) The Contractor shall, without charge, replace or correct work found by the Government not to conform to contract requirements, unless in the public interest the Government consents to accept the work with an appropriate adjustment in contract price. The Contractor shall promptly segregate and remove rejected material from the premises.

(g) If the Contractor does not promptly replace or correct rejected work, the Government may (1) by contract or otherwise, replace or correct the work and charge the cost to the Contractor or (2) terminate for default the Contractor's right to proceed.

(ASBCA No. 53202, R4, tab R4A at 169)

*Work Begins and DAC Personnel On Site*

6. The first day of work on the project was 28 February 1998. However, this day was a Saturday and was a non-work day. (ASBCA No. 53569, R4, tab R7A at 1) Under the COMMENCEMENT, PROSECUTION, AND COMPLETION OF WORK clause, the Main TTF Building was to be ready within 344 calendar days after receipt of notice to proceed. The remainder of the work was to be ready for use not later than 374 calendar days after receipt of the notice to proceed – 30 days after completion of the Main TTF Building. (ASBCA No. 53202, R4, tab R4C at 458) As a result of all bilateral and unilateral modifications during the contract, the completion date for the Main TTF Building (building A) was extended to 27 August 1999. The date for the remainder of the work, including the STS facility, was extended to 26 September 1999. (ASBCA No. 53202, ¶ 5 of the amended compl. and answer)

7. Beginning 3 June 1999 – 12 weeks prior to the revised scheduled completion date of 27 August 1999 – the government began delivering equipment on site from Rock Island, Illinois for DAC. DAC personnel unloaded equipment and moved it into the south end of the Main TTF Building. (ASBCA No. 53569, R4, tab R7Q at 8-9, -12). On 7, 10, 14, and 16 June 1999, DAC personnel continued to install equipment at the south end of the Main TTF Building and to store equipment in Warehouse C. (ASBCA No. 53569, R4, tabs R7Q at 18, -25, -34, -39; SR4, tab SR35 at 5)

8. DAC personnel left the site on 17 June and returned to the site on 8 July 1999 to resume installation of equipment (ASBCA No. 53569, R4, tabs R7Q at 39, R7R at 19; 3SR15D at 2). On 9 July 1999 DAC personnel were on site installing equipment and accessories. The overhead door at building C was damaged by DAC personnel. Damage was caused by driving a forklift into the door and damaging the door beyond repair. (ASBCA No. 53569, R4, tab R7R at 22) On 12 July 1999 DAC personnel were again on site to install equipment and other items (ASBCA No. 53569, R4, tabs R7R at 26, -28).

9. On 13 July 1999, David Tighe, the government's Quality Assurance Representative (QAR), told Ken Carnley, the contractor's Quality Control Manager (QCM), that room was needed for the DAC personnel to "set their stuff" so that they can "hook it up" in place. He also said that "they think that they can work around him with a minimum of affect." DAC personnel continued with the installation of equipment at the Main TTF Building. Ken Carnley (QCM) noted in his daily report that the installation of equipment "severely hampers contractor access to area to complete work scheduled." David Tighe (QAR) noted in his daily report that he disagreed with that assessment. He contended that the contractor had other work to do and asserted that "there is no schedule

being utilized or the contractor wouldn't be 3 months behind schedule!!!!!!" (ASBCA No. 53569, R4, tab R7R at 29, -31) The record does not bear out Mr. Tighe's notation that the contractor was 3 months behind schedule. Although neither Mr. Tighe nor Mr. Carnley testified, we do not find Mr. Tighe's assertion – that the presence of the DAC personnel did not hamper the contractor – to be credible.

10. On 14 July 1999 DAC personnel continued to install equipment and storage cabinets. DAC personnel also laid out the installation for wire mesh partitions. The QCM noted in his daily report, "Partitions when installed will deny access to contractor to that portion of the TTF build." (ASBCA No. 53569, R4, tab R7R at 34)

11. On 15 July 1999, the DAC installation crew continued installing wire mesh partitions and machinery inside the TTF building and in the STS area (ASBCA No. 53569, R4, tab R7R at 37). On 20 July 1999, DAC personnel continued to install and store equipment, machinery, and storage crates in all buildings. (ASBCA No. 53569, R4, tab R7R at 48) On 22-23 July 1999, DAC personnel were continuing to install equipment throughout the project. (ASBCA No. 53569, R4, tab R7R at 53, -56) On 24 July 1999, the contractor did joint sealant work on Saturday to avoid the heavy foot traffic which occurred during normal duty hours. (ASBCA No. 53569, R4, tab R7R at 59) On 26-31 July 1999, DAC personnel were continuing to install equipment throughout the project. (ASBCA No. 53569, R4, tab R7R at 64, -67, -70, -73, -76, 79)

12. On 2-6, 9-13, 16-17 August 1999 the DAC personnel continued installing equipment throughout the project (ASBCA No. 53569, R4, tab R7S at 6, -9, -11, -15, -18, -27, -30, -33, -36, -39, -46, -49).

13. On 18 August 1999, the QAR noted that the DAC wanted to take possession of rooms 115 and 116. (ASBCA No. 53569, R4, tab R7S at 50) On 18-20, 23-24 August 1999, the DAC personnel continued installing equipment and furnishings, causing further delay to contractor operations. Work at the fire pump house continued to be delayed due to a space conflict. (ASBCA No. 53569, R4, tab R7S at 52, -55, -58, -65, -68)

14. On 25-26, 30 August 1999, the DAC personnel continued installing equipment and furnishings. (ASBCA No. 53569, R4, tab R7S at 71, -74, -84) The presence of the DAC personnel and their equipment on site restricted the contractor's access to work locations.

#### *The August Punch List*

15. An inspection was begun on 18 August 1999 by David Tighe, Mark Miller, Carl Weber, and two other engineers from McAlester. (ASBCA No. 53569, R4, tab R7S at 50) On the 26<sup>th</sup> of August, the punch list inspection was conducted by Mark

Burkholder, the Administrative Contracting Officer (ACO), along with David Tighe and five other personnel, including at least one electrical engineer, one mechanical engineer and an architect. (ASBCA No. 53569, R4, tab R7S at 72; tr. 1-93, -99)

16. The contractor received the 26 August 1999 punch list on site on 1 September and it was distributed to all subcontractors on 1 September 1999. (QAR report No. 551; CQC report 551; ASBCA No. 53569, R4, tab R7T at 1-2) On 2 September 1999, the contractor reviewed the punch list with the QAR. (CQC report No. 552; ASBCA No. 53569, R4, tab R7T at 6)

17. By letter of 13 September 1999 the government provided Mitchell Enterprises with a copy of the punch list that resulted from the inspection on 26 August 1999. There were 202 numbered items on the punch list. (ASBCA No. 53202, R4, tab R11A at 1-10) The letter also advised that there were safety items that needed attention before 27 September 1999:

A final inspection was conducted August 25<sup>th</sup> on the referenced contract. A list of deficiencies is enclosed and has also been provided to your Quality Control personnel at the project site. The following items from the list are related to life safety and must be addressed immediately:

Items: 2, 35, 38, 39, 40, 41, 42, 46, 47, 48, 49, 51, 52, 53, 55, 56, 69, and 70.

Personnel cannot occupy the facility until these items are complete; therefore, the facility cannot be accepted as ready for use.

If these items are not complete by 27 September 1999, the government will “by contract or otherwise, replace or correct the work and charge the cost to the Contractor”, in accordance with Contract Clause 52.246-12, “Inspection of Construction”.

All remaining items must be completed in a timely manner. Also, as indicated on the list, the STS Facility was not complete at the time of the inspection and must be inspected at a later date.

If you need additional information, feel free to contact me at . . . .

*Work on the August Punch List*

18. During the month of September, the contractor was working on the punch list items at the Main TFF Building and on finishing work at the STS facility. (ASBCA No. 53569, R4, tab R7T at 25, -31-35, -63)

19. Mr. Steve Mitchell, appellant's president, credibly testified that during September appellant was working to complete the STS Facility, as well as working on the punch list items in the Main TFF building, including painting "in and around and over and on top of [the occupant's] equipment doing this painting." (Tr. 4-17) The daily construction reports record that punch list work was being done by all trades beginning in September. (ASBCA No. 53569, R4, tab R7T at 25, -31-35, -63, tab R7U)

20. The CQC report no. 560 for 10 September 1999 expressly noted that "All crafts working on corrections to deficiency list items." The CQC also noted that "Corrections to deficiency list items noted as completed on master list." (ASBCA No. 53569, R4, tab R7T at 25)

21. The QAR report no. 563 for 13 September 1999 noted that "All contract labor working on punchlist items." (ASBCA No. 53569, R4, tab R7T at 31) The CQC report no. 563 for the same date noted that "All crafts working on corrections to deficiency list items. See remarks." The remarks section stated "Updated deficiency list indicating completion of corrected items, along with dates of completions is being prepared and will be forwarded to the QAR on a not less than weekly basis." (ASBCA No. 53569, R4, tab R7T at 32-33)

22. The QAR report no. 564 dated 14 September 1999 states "All contract labor working on punchlist items." (ASBCA No. 53569, R4, tab R7T at 34) The CQC report (ASBCA No. 53569, R4, tab R7T at 35) noted the following work being performed:

- 1 Adjusting door hardware. Install window screens. Painting misc. steel. Perform final grading. Housekeeping.
- 2 Installing misc. metal bldg. trim and accessories.
- 3 Installing conduit and wiring to door controllers. Installing misc. electrical trim throughout project.
- 4 Painting throughout project.
- 5 Adjusting sprinkler head locations per deficiency list.
- 6 Placing mulch for erosion control throughout site.

23. As reflected in the contractor's daily construction reports, on 24 September 1999, the contractor was continuing to work on the punch list of 26 August 1999.

(ASBCA No. 53569, R4, tab R7t at 63) By 27 September 1999 the contractor, while continuing to work on punch list items, was beginning to demobilize some of its forces. The daily record is not clear which subcontractor or Mitchell forces were demobilizing. (ASBCA No. 53569, R4, tab R7t at 70) DAC personnel and equipment began to move into the facility in early June 1999. Formal beneficial occupancy by DAC occurred no later than 27 September 1999. (ASBCA No. 53487, R4, tab R2 at R-2-2, R-2-3; SR4, tab SR35 at SR35 at 7-8)

### *The Punch List for the STS*

24. An inspection was conducted on 7 October 1999 for the STS building. QAR David Tighe and a representative from the McAlester Army Ammunition Plant conducted the inspection. (ASBCA No. 53569, R4, tab R7U at 18-19) A punch list was prepared and given to the contractor. (CQC No. 587 dated 7 October 1999; ASBCA No. 53569, R4, tab R7U at 18)

25. No contractor daily construction logs were kept after 3 November 1999. The final Mitchell Enterprises payroll for work under this contract was the payroll for the period ending 30 November 1999. (Trial ex. 12; SR4, tab SR37 at 328-29)

26. The Defense Ammunition Center (DAC), the organization occupying the facilities at McAlester, wrote a letter on 13 December 1999 to the Tulsa District Corps Commander. That letter contained a list of new or additional deficiencies for the facility. (ASBCA No. 53569, R4, tab R5Q at 35-38)

### *The December Final Punch List*

27. The ACO, Mr. Mark Burkholder, sent a final revised list of deficiencies titled "Final Punch List" on 20 December 1999. In that letter Mr. Burkholder referenced his earlier letter of 13 September 1999 (ASBCA No. 53202, R4, tab 11A) concerning deficiencies. Mr. Burkholder's 20 December 1999 letter stated that many of the deficiencies "still remain from the punch list provided by previous letter and some are from subsequent inspections of work that was not complete at the time." (ASBCA No. 53202, R4, tab 11B; tr. 1-71)

28. The 20 December 1999 list of deficiencies was in six categories: Site, which contained 5 deficiencies; Exterior Electrical/Communications, which contained 17 deficiencies; TTF Facility, which contained 39 deficiencies; Warehouse B, which contained 4 deficiencies; Warehouse C, which contained 9 deficiencies; and, General All Buildings, which contained 9 deficiencies. This list was only four pages long. It contained only 83 items (plus 10 sub items). Of these 83 items, 24 were left undone from

the 202 items on the 26 August 1999 punch list, while the other 59 were new items. (ASBCA No. 53202, R4, tabs 11A, 11B)

29. The 20 December 1999 letter by Mr. Burkholder required the punch list work to be completed by 17 January 2000. Failure to complete the punch list work by then risked take over by the government. (ASBCA No. 53202, R4, tab 11B)

30. Mr. Burkholder, the ACO, testified that he could not recall whether appellant came on site to perform any of the 20 December 1999 punch list work, “other than Steve Laymas from Reynolds might have been on-site because they were doing another project, and there were subcontractors out there working on the heating units.” (Tr. 1-72, 1-73) The exchange of fax messages on 30 December 1999 between Reynolds Electric and Mitchell Enterprises indicate that Reynolds Electric was in fact working at the behest of Mitchell Enterprises to resolve punch list items. In fact, appellant must have appeared on site after the 20 December 1999 punch list because Mark Burkholder checked off some 25 of the 83 punch list items as having been completed. (ASBCA No. 53569, R4, tab R5Q at 21, -24, tab R5R at 18, -20; tr. 1-111, -115.)

#### *Transfer of Government Accountability and a New Inspection*

31. In mid-January 2000, administrative responsibility for the project was transferred from the Tulsa Resident Office to the Central Oklahoma Resident Office. This meant that Mr. Mark Burkholder was no longer the ACO. This information was not given to Mr. Mitchell, who continued to direct his correspondence to Mr. Burkholder. Dan Johnson became the new Administrative Contracting Officer. He was also the Resident Engineer at the Central Oklahoma Resident Office, Tinker Air Force Base, Oklahoma. (Tr. 1-73, 1-74, 2-105)

32. Dan Johnson told Peter Kozak and Captain Beckman to conduct an inspection of the project. Peter Kozak worked as a mechanical engineer at the Central Oklahoma Resident Office of Tinker Air Force Base. He graduated from North Carolina State with a BS in mechanical engineering. (Tr. 2-7)

33. They conducted that inspection on 21 February 2000. The inspection took two days. They did not look for anything in particular. They walked the project together. Peter Kozak said he put some emphasis on mechanical items because that was his discipline. (Tr. 2-13, 2-14) Many of the items, for which Captain Beckman was primarily responsible, were workmanship items (Beckman dep. tr. 36, 57).

34. According to Peter Kozak, they were “just to put another pair of eyes on the facility and write down what wasn’t finished, what looked out of place, what didn’t look correct. Just basically generate a punch list of things that needed to be worked on.” They

did not review the specifications prior to making their inspection. (Tr. 2-11, 2-12, 2-13; 2-110)

35. Dan Johnson instructed Captain Beckman to prepare a power point presentation for the McAlester Base and DAC personnel on how Dan Johnson was going to deal with the completion of the project. The power point presentation was labeled “TTF Plan of Action.” The plan of action had four parts: 1) Define the Scope, 2) Identify Funds Available, 3) Award POCA Contract, and 4) Complete the Work. Proposed timelines included: verify the punch list (16-24 February 2000), award POCA contract (1 April 2000), and Complete the Work (1 July 2000). (Tr. 2-184, -187; 2d Supp. R4, tab SSR10a)

36. As Dan Johnson explained, the POCA contract referred to a Performance Oriented Contract Activity, which was an existing contract that the Corps of Engineers had with the Ross Group. The government intended to issue purchase orders to the Ross Group, under the POCA contract, for the completion of all the punch list items. (Tr. 2-189, 2-190, 3-230) The government met with the Ross Group to discuss doing this work in February 2000 (tr. 3-229).

#### *The February Punch List*

37. The punch list of 21 February 2000 was submitted to appellant by letter of 8 March 2000. The letter was signed by the contracting officer, R.L. Hedrick. (ASBCA No. 53202, R4, tab R11C at 1, R11C at 2-8) The letter was drafted by Dan Johnson. The 21 February punch list was actually prepared by Dan Johnson with help from Peter Kozak and Captain Beckman, based on prior punch lists and the inspection by Kozak and Beckman. This new punch list contained 334 numbered items organized under the same general headings as the December punch list. (Tr. 2-112; ASBCA No. 53202, R4, tab R11C at 2)

38. By letter of 8 March 2000, the contracting officer (Rick Hedrick) advised Mitchell Enterprises that due to its failure to comply with the ACO’s prior letters, further payments under the contract would be withheld and performance of the work performed by a separate contractor. The letter contained a copy of the 21 February 2000 punch list. Twenty-one of the items had a line drawn through them, with the notation that “Items that have been striked (sic) through have been resolved.” Appellant was not offered a further opportunity to correct items remaining from prior punch lists, nor any opportunity to correct new items on the February punch list. (ASBCA No. 53202, R4, tab R11C)

39. By letter of 13 March 2000 Mr. Mitchell wrote to Dan Johnson that appellant had been trying to gain access to the project site to complete air balance operations since

mid-February, but that “No one seems to want to return calls so that we can schedule that operation.” His letter went on to state:

On this date we have been informed that there is pending correspondence concerning deficiencies as related to these units and other items, and to not plan on scheduling anything until we get that correspondence. If this is true, then surely you can realize the impact in such a delaying factor. If there is correspondence to be forwarded, then we request that this occur as soon as possible, so that we may review, and determine the impact to the close-out of this project.

(ASBCA No. 53569, R4, tab R5T at 5) This letter was written before appellant received Mr. Hedrick’s letter of 8 March 2000. After receiving that letter, Mr. Mitchell wrote a second letter dated 13 March 2000. In that second letter Mr. Steve Mitchell stated:

I am in receipt of your correspondence dated March 8, 2000 concerning “punch list” issues in regards to the above referenced project. Your letter presents a number of issues that are either not true or a complete misrepresentation of fact. Firstly, there exists one “Final Punch List” dated 20 December 1999 on the referenced project. We immediately acted on that list and updated the status of the work on 23 December and 4 January 2000 and by numerous attempted phone calls and faxes.

I will comment on the work that has not been completed or acted upon in regards to that list by section as noted:

*Site:*

All work items were completed except removing some tires. Everything else was completed.

*Exterior Electrical/Communications:*

All contract work was completed. The heights of some communications lines and the fiber testing was commented on in my letter dated Dec. 23, 1999.

*Warehouse B:*

All items completed.

*Warehouse C:*

All items completed except nos. 6 and 8 (tears in ceiling insulation).

*General All Buildings:*

The following items have needed correction on our part. Attempts have been made at removing the plastic from the overhead doors, but to date it has not been fully removed. There were several places where some sprinkler piping and braces needed to be painted and we were going to have to get a lift to the jobsite that would reach over the machinery.

Many efforts have been made at trying to schedule a time when our personnel could be onsite with a lift to accomplish some Mechanical testing and balancing issues and the remaining painting items, but we have been totally delayed in this issue, until your referenced correspondence. Be advised that you have issued a new list of items that has never been seen or reviewed by Mitchell Enterprises and in most cases reflects a lack of knowledge of contract requirements and in some cases the list is contrary to what the contract documents call for. Be advised that the HVU units are installed exactly in accordance with the terms of the negotiated contract. Any attempts at correcting and/or changing the contract requirements and charging the cost to do such against our contract will be vigorously pursued. Further your office's lack of response in regards to our attempts at scheduling workmen back on the job to complete Testing and Balancing has delayed the final close out of our contract and will result in a claim for additional costs associated with the same. Any work performed on the installation by personnel other than those authorized by Mitchell Enterprises will result in a voided warranty.

Your withholding of further payments is hereby formally disputed and will result in a claim to collect the full amount of the contract, plus modifications, plus interest as of this date. The actions that you have taken are considered to be

interfering with the completion of the project and certainly detrimental to the best interest of the Government.

(ASBCA No. 53569, R4, tab R5T at 3)

*Government Permits Inspection But No Repairs*

40. By letter of 3 April 2000, Dan Johnson advised Mr. Mitchell that he could conduct an inspection of the project site, but that no repair work would be allowed and no one would be available to accompany Mr. Mitchell on his inspection of the punch list items on the site. Mr. Johnson set up the meeting for 11 April 2000. Dan Johnson encouraged Mr. Mitchell to conduct the inspection prior to the meeting. Dan Johnson stressed that the meeting of 11 April 2000 “will be your final opportunity to explain your position before a separate contract is issued to correct the deficiencies.” (ASBCA No. 53569, R4, tab R5U at 18)

41. The meeting was held on 11 April 2000, although Mr. Mitchell did not conduct the inspection prior to the meeting. Mr. Mitchell memorialized the meeting, including the discussion relating to the HVU units, in a letter of 12 April 2000. Mr. Mitchell enclosed a typical control sketch for the HVU units. (ASBCA No. 53569, R4, tab R5U at 19) On Friday, 14 April 2000, Mr. Mitchell conducted his inspection without anyone from the government accompanying him to explain the precise nature of the approximately 334 punch list items.

42. On 19 April 2000, Mr. Mitchell provided Mr. Dan Johnson a written response to the punch list items. Mr. Mitchell stated that he noted his proposed action or disagreement. His comments included: “complete,” “will clean,” “no evidence,” “requires joint review,” “regraded 2 months ago, appears functioning well,” “could not find,” “corrected,” “disagree,” or some similar comment. (ASBCA No. 53569, R4, tab R5U at 1) Mr. Dan Johnson responded on 17 May 2000 to Mr. Mitchell’s letter. Mr. Johnson stated:

I have reviewed your response to the deficiencies and in general find it unsatisfactory. While there may be a few items listed that may need to be removed from the list your response to some of the major items such as site clean up, site grading, painting, concrete finish/cracking, bollard finishes, translucent panel, and access ladder installation are unacceptable. Of the approximately 314 [sic] deficiencies listed you disagreed with 111, did not respond to 92, and agreed to 98 comments. It is apparent to me that the only way the Government will be able to complete the work in

accordance with the terms of the contract is to bring in a separate firm.

(ASBCA No. 53202, R4, tab R11E) Johnson's groups of numbers add up to 301.

43. Notwithstanding the information provided by Mr. Mitchell, the government was determined to move ahead with the decision to have another contractor do the corrective work, and so advised Mitchell Enterprises in the letter of 17 May 2000. (ASBCA No. 53202, R4, tab R11E).

44. Mr. Mitchell replied on 8 June 2000 to the government's final letter by asserting that appellant had responded to and completed most of the original "Final Inspection list [of 20 December 1999]." Mr. Mitchell asserted, "As was the case then and now, Mitchell Enterprises has been ready to complete or correct any deficiencies that were covered by the terms of the contract. Further, we have not been granted access to do so." (ASBCA No. 53202, R4, tab R11F at 1)

45. The government moved ahead with its plans to subcontract the punch list repair work. It retained the Ross Group for that purpose. The Ross Group was given the 21 February 2000 punch list of items to correct. The Ross Group did not "try to go back and cross reference everything from the original contract" as part of its work. They "just tried to complete all the punch list items" based on "site visits with the Corps and what we thought was the deficiency." (Tr. 3-213)

46. About a year after the Ross Group completed its work, the government asked for a report listing the deficiencies and what was done to correct them. The report prepared by the Ross Group reflected, as best they could "what [they] did out there" to correct the punch list items. (Tr. 3-214-15; 2d SR4, tab SSR6 at 1-49) The dollar amounts in the report reflect the Ross bid amounts. They do not reflect the actual costs to Ross. This was not prepared from contemporaneous work documents. (Tr. 3-239)

47. Mr. Wade Woodham, a project engineer for the government at Tinker Air Force Base, prepared exhibit 4 to indicate the status of the TTF Facility punch list items. The exhibit contains all the punch list items assigned to the Ross Group for correction, the status of the items on the punch list – including items that were removed from the Ross Group contract and the reason for the removal, the cost to correct the individual item (without mark-ups), and a reference to the contract requirement, if any. Items on the 20 December 1999 punch list can be traced to the 21 February 2000 punch list and to exhibit 4. (Tr. 3-87; ex. 4; tr. 3-89)

## *The Claims*

48. By letter of 21 May 2000, appellant filed a certified claim for the unpaid balance of the contract price in the amount of \$179,384.54. This letter was addressed to Mr. R. L. Hedrick, but date stamped “2000 Jun 1 PM 3:35 Office of Counsel.” The claim was based on the government’s refusal to pay the final invoice dated 24 February 2000. (ASBCA No. 53202, R4, tab R3)

49. On 31 October 2000, the contracting officer issued unilateral Modification No. P00037. That modification noted that \$221,794.45 remained on the contract, and that \$30,000 was being withheld as liquidated damages. That left \$191,794.45 available to be off set for the cost of correcting the alleged deficiencies. (ASBCA No. 53202, R4, tab R2C)

50. By letter of 11 December 2000 appellant appealed from the 31 October 2000 final decision denying appellant’s 21 May 2000 claim for \$179,384.54 in contract funds; and, appealed from the contracting officer’s determination to reduce the contract price by \$191,794.45 to off set the expected cost for correcting the alleged deficiencies.

51. The appeal from the contracting officer’s denial of appellant’s claim for \$179,384.54 was docketed on 19 December 2000 as ASBCA No. 53202. The appeal from the contracting officer’s decision to reduce the contract price by \$191,794.45 was docketed as ASBCA No. 53571.

52. On 21 September 2001, the contacting officer (R. L. Hedrick) issued a final decision assessing the cost of correcting punch list deficiencies in the amount of \$587,864.00. Because of the prior withholding of funds in the amount of \$191,794.45, the final decision demanded payment from appellant of \$396,069.55 as due and owing to the government. (ASBCA No. 53569, R4, tab R2 at 3)

53. Appellant appealed from the 21 September 2001 final decision, by letter dated 4 October 2001. This appeal was docketed on 15 October 2001 as ASBCA No. 53569.

54. Both parties have used the Ross Group TTF Deficiency Report, dated 12 February 2003, and government exhibit 4 as the basis for analyzing the government’s entitlement to recover for the cost of an alleged deficiency and for establishing the cost of the corrective work. We use the same exhibits as the basis for our analysis. (SSR4, tab SSR6; ex. 4) The Ross Group Report was prepared by Mr. Anthony Leslie Guthrie (tr. 3-209).

55. Brad Ross was the Ross Group superintendent on site (tr. 3-224). Mr. Guthrie testified that David Thomas attended the initial site visit and discussions with the Corps

in February 2000. After that, the project was turned over to Mr. Guthrie, who came on site in the summer of 2000. (Tr. 3-210, 3-229-30)

56. Mr. Guthrie said that the responsibility of the Ross Group was to complete the punch list from the Mitchell Enterprises contract; and that he “came in right there at the beginning and was pretty much there until the end of construction on site.” (Tr. 3-211) He was the project manager. There was a superintendent on site. Mr. Guthrie visited the site regularly “about once a week.” (Tr. 3-211) When Mr. Guthrie first visited the site “the grass had – was real high. It’d grown up about three feet. There was a lot of miscellaneous – just trash on site where they had poured – washed out concrete trucks and there’d be like big concrete paddies sitting around, some old tires, hay bales, some sill fencing, just general trash.” (Tr. 3-212)

57. Mr. Guthrie testified that he was not shown all the detail that would have been needed to finish the punch list. He testified:

I mean, we were basically just trying to work the punch list. I mean, we didn’t try to go back and cross reference everything from the original contract to see what exactly the original design intent was. We didn’t have – I mean, there was – it was really – it would be hard to do that without all the submittals from the previous work that was done.

Since we weren’t privy to all that information, we didn’t – we just tried to complete all the punch list items as best – you know, between site visits with the Corps and what we thought was the deficiency.

(Tr. 3-213) We conclude that the Ross Group did work on the punch list items without regard to whether the corrected work was required by the original Mitchell Enterprises contract.

58. Mr. Guthrie testified that about a year after the Ross Group had completed work on site they prepared a report, in response to a task order from the Corps, that basically listed the punch list item and what was done with respect to that listing. “That was done about a year after we completed the work on site. And we just tried to do the best we can to, you know, recount what we did out there.” (Tr. 3-214) Mr. Guthrie was the author of the report (tr. 3-215; 3-236; SSR4, tab SSR6). Mr. Guthrie took photographs, some before and some after the corrective work was completed. (Photographs supporting the report are at SSR4, tab SSR7) (Mr. Guthrie did not prepare the index sheet before each photograph nor the overall index or table of contents). (Tr. 3-216 (descriptions of some of the photos))

59. The dollar costs associated with the Ross Group performance of the work were bid estimates for the various categories of work. They do not represent the Ross Group's actual costs for performing the work because actual costs were not tracked during performance. (Tr. 3-239) In fact, in some cases the work performed was different from the deficiency on the punch list; *e.g.*, item 14 on the Ross TTF Report relates to ditches north of the TTF; however, Mr. Guthrie testified that they really didn't do much to the ditches north of the TTF, instead they worked all around the area where there were areas holding water. (Tr. 3-240)

60. Mr. Guthrie explained that a "Not Applicable" notation on the Ross TTF Report meant that they "didn't do any work on that particular item." (Tr. 3-240) With respect to many of the deficiency items, Mr. Guthrie acknowledged that he was caught between his subcontractors and the Corps, and did not exercise much independent judgment as to what was required to be done. (Tr. 3-255)

61. Exhibit 4 was a summary document prepared by the government. It was prepared after the work was done by the Ross Group. Mr. Wade Woodham, with the assistance of others, prepared most of the document. The document lists the deficiencies, indicates the status of the deficiencies as they were dealt with by the Ross Group contract, the contract reference supporting the correction of the deficiency, and gives in many instances the government's reasons for removing some items from the deficiency list. Mr. Woodham did most of the analysis, but was assisted by others, including Mr. Kozak and Mr. Risner. (Tr. 3-87)

62. Exhibit 4 also shows the government breakout of the claimed cost to correct each deficiency. Exhibit 4 totals all the item costs and then adds all the mark-ups to reach a final claimed cost. It also shows that 86 items were removed from the February punch list, mostly because the government could not find the deficiency. In our decision we reflect the Ross Group price charged to the government and the government's claimed costs without the mark-ups that are already included in the Ross Group price. Where we find the government entitled to compensation, we have used the Ross Group price because that was the cost to the government for correcting the deficiency.

63. Mr. Woodham joined the project in June of 2000. His primary responsibility was to work with the Ross Group and develop the statement of work for correcting the deficiency list items (tr. 3-104-05). Mr. Woodham explained that the Ross Group assisted him in determining why some items on the deficiency list were removed from the Ross Group contract (tr. 3-107).

## DISCUSSION OF THE APPLICABLE LAW

We have before us government claims for the cost of repairing, replacing, or completing punch list work after substantial completion of the contract. The government bears the burden of proof for its claims for such repair costs of rejected or unaccepted work. *Southwest Welding & Manufacturing Company v. United States*, 413 F.2d 1167 (Ct. Cl. 1969); *Gaffny Corporation*, ASBCA Nos. 37639 *et al.*, 94-1 BCA ¶ 26,522 at 132,007; *George Bernadot Company*, ASBCA No. 42943, 94-3 BCA ¶ 27,242 at 135,743. Because this is a government claim, in order to carry its burden of proof the government must establish the fundamental facts of liability, causation, and resultant injury. *Wunderlich Contracting Co. v. United States*, 351 F.2d 956, 968 (Ct. Cl. 1965). This means that the government, as the proponent or claimant, must prove each element by a preponderance of the evidence. “The fact that the Government included items on a punch list does not *a fortiori* establish the existence or extent of the alleged defects.” *Techno Engineering & Construction, Ltd.*, ASBCA No. 32938, 88-1 BCA ¶ 20,351 at 102,921. Moreover, appellant cannot be held responsible for punch list items first noted after the government takes possession, unless it is shown that the damage was in fact caused by appellant. *Cocoa Electric Company, Inc.*, ASBCA No. 33921, 91-1 BCA ¶ 23,442 at 177,591 (claims 5.6 and 5.7). If the evidence is in balance, the burden has not been met and the government will not have carried its burden of proof. *Sol-Mart Janitorial Services*, ASBCA No. 32504, 87-2 BCA ¶ 19,713 at 99,827; *WBM Building Maintenance, Inc.*, ASBCA No. 39560, 90-2 BCA ¶ 22,929 at 115,112.

We have noted that even where the contractor has performed corrective work at the direction of the government, and the contractor seeks reimbursement for the costs of such rework, we still have essentially a government claim under either or both the standard Inspection of Construction or Warranty clauses of the contract. In either event, “the government has the burden of proof.” It is the government’s burden “to show that the work [initially] performed by the [contractor] failed to meet the contract specifications.” *Cochran Construction Company*, ASBCA No. 40294, 90-3 BCA ¶ 23,239 at 116,609. *See also, Donohoe Construction Company*, ASBCA Nos. 43710 *et al.*, 98-2 BCA ¶ 30,076 at 148,845.

If the government establishes that the work was defective, the government must also establish that it offered the contractor the opportunity to correct the defect and that the contractor failed or refused to correct the defect. This has long been the rule – the Inspection clause requires the government to allow the contractor the opportunity to correct the defects. “Absent proof that appellant would have refused to make corrections, or been unable to do so within a reasonable time, the Government is not entitled to charge appellant with its own costs for correcting deficiencies.” *Techni Data Laboratories*, ASBCA No. 21054, 77-2 BCA ¶ 12,667 at 61,411.

The contractor “is entitled to a reasonable time” to correct deficiencies and if the government corrects the work on its own without notice or opportunity for the contractor to correct the alleged deficiencies, then the “Government acted as a volunteer for reasons which it deemed controlling.” *S. Rosenthal & Son, Inc.*, ASBCA No. 6684, 1963 BCA ¶ 3791 at 18,889-90. This rule has also been followed by other Boards. *E.g.*, *Lionsgate Corporation*, ENG BCA No. 5809, 92-2 BCA ¶ 24,983 at 124,531 and 125,533; *Jimenez, Inc.*, VABCA Nos. 6351 *et al.*, 02-2 BCA ¶ 32,019 at 158,254. We have recently noted this rule in *Donohoe Construction Company*, ASBCA Nos. 47310 *et al.*, 98-2 BCA ¶ 30,076, at 148,845.

Where the government has met its burden to prove that the work was defective, that is, not in accord with contract requirements (liability), and that the contractor had notice and reasonable opportunity to correct the defects but refused or failed to do so (causation), then the government must establish the reasonable price adjustment for the corrective work not performed (resultant injury). *Techni Data Laboratories*, ASBCA No. 21054, 77-2 BCA ¶ 12,667 at 61,411; *California Shipbuilding and Dry Dock Company*, ASBCA No. 21394, 78-1 BCA ¶ 13,168 at 64,373; *Worldwide Parts, Inc.*, ASBCA No. 38896, 91-2 BCA ¶ 23,717 at 118,713; *Marine Construction & Dredging, Inc.*, ASBCA Nos. 38412 *et al.*, 95-1 BCA ¶ 27,286 at 136,023.

The reasonableness of the costs for correcting work is judged in two parts: the segregation of the costs for the corrected work, and the reasonableness of the cost itself. We conclude that the cost incurred for the corrective work performed was reasonable. However, in many instances the costs for several items were commingled, without regard to the fact that liability or causation for some of those items might not be established. The result is that it is impossible to allocate the costs among the several items – where only some are proven to be the responsibility of appellant to correct.

In this case, each of the alleged deficiencies was separately identified by the government on one or another punch list. Each item was separately listed by the Ross Group – the contractor doing the corrective work. That contractor grouped together the costs for correcting some of those items; grouping together items for which appellant might be liable with items for which appellant might not be liable. This grouping was inexplicable. Not only did it prevent a reasonable accounting of the costs for various items of corrective work, it made it impossible in most cases to reach a jury verdict on the cost of otherwise recoverable corrective work – because the items grouped together are generally not reasonably able to be segregated by cost. *See, e.g.*, *Grumman Aerospace Corp.*, ASBCA No. 46834, 05-2 BCA ¶ 33,084 at 164,002.

## DECISION ON PUNCH LIST ITEMS

### *February 2000 Punch List*

We turn now to the application of those legal rules to each of the punch list items. We begin with the 334 items, more or less, on the 21 February 2000 punch list. Because the government did not give the contractor the opportunity to correct the items listed, we apply the rule of *S. Rosenthal & Son, Inc.*, 1963 BCA at 18,889-90: The government may not charge the cost of correcting punch list items if the government has not given the contractor a reasonable opportunity to correct defective work. As noted above, this rule has been consistently followed in our cases.

As we have found, the government did not allow the contractor the opportunity to correct defective items initially designated on the 21 February 2000 punch list. To the contrary, the government affirmatively advised the contractor that no repair work would be authorized. Therefore, except for items that were on a prior punch list, the government may not charge the contractor for corrective work listed on the 21 February 2000 punch list.

### *December 1999 Final Punch List*

We turn now to the prior punch list – the 20 December 1999 punch list. This punch list was prepared long after the DAC had moved into and occupied the TTF Facility. The list was based on their final inspection and the corrective measures taken with respect to the 202 items on the initial 26 August 1999 punch list. This December punch list contained only 83 items (plus 10 sub items) – less than one-third were holdovers from the 202 items on the August punch list, while the rest were new items.

We examine each of the items on the December punch list. The government's exhibit 4 provides a basis for determining the final status of those items. Where exhibit 4 reveals that an item was removed from the punch list, the government has acknowledged that either there is no deficiency or no cost expended to correct a deficiency. If exhibit 4 shows that an item was corrected, we will look to see if the government can establish that the item failed to comply with a contract requirement, whether the contractor was given a reasonable opportunity to correct and failed or refused to do so, and whether the government can establish the reasonable cost for correcting the deficiency.

We also have examined the December punch list itself and noted actions taken by Mr. Burkholder on that list – where Mr. Burkholder has indicated that a deficiency was corrected by crossing it out or putting an "x" by it. We have also examined the February punch list and noted items from the December punch list that were recognized as not required or corrected, by being crossed out on that punch list. Finally, we have

identified, from the Ross Report, the items that were on the December punch list. We have used the Ross Report – as well as Mr. Burkholder’s actions on the December punch list and the government’s notations on the February punch list – as the basis for determining the status, action taken, contract requirement, and cost, for each of the items on the December punch list. Where appropriate, we have examined other records and considered witness testimony to resolve factual issues.

In examining the December punch list, we have compared those items as they were carried forward on the greatly expanded and sequentially numbered February punch list and, we have used the February item numbers as a point of reference. We have done this because some of the items on the February list are portrayed as sub items under the December list, and because the cost of correcting some of the December items was commingled with the cost of correcting items that first appeared on the February list. We also did this because the Ross Group report is cross referenced to the February list.

For the convenience of the reader, we have reported our analysis and conclusions in tabular form. The major documents we have relied upon in preparing this analysis are: the December list with Burkholder actions (ASBCA No. 53569, R4, tab R5Q-21, 24); the February list (ASBCA No. 53202, R4, tab R11C); the Ross Group Report on status observed and actions taken (2d Supp. R4, tab SSR6); and the Woodham summary (ex. 4).

The December Final Punch List and Status of the Items

<u>December List Item No. and Description.</u> <u>“X” means Burkholder crossed out the item as completed</u>	<u>February List Item No. with comments or changed description</u>	<u>Cost claimed by Gov’t on Exhibit 4 Exclusive of Mark-Ups and Status or Action shown on Ross Group Report and on Exhibit 4</u>	<u>Conclusion</u>
<u>Site</u>			
1. General clean up	001	The Ross Group did no work for this specific item. Under this item it grouped together the costs for work done under the following items: 002, 004, 005, 006, 007, 008, 065, and 248. The Ross Group	No cost specifically allocated for this general clean up item. The costs for all clean up activities or items were commingled under this item. No separate work was performed for this item. Items 007, 008, 248 were not on the December list and thus

		lump sum price was \$2,910. The government claimed a lump sum cost for all eight items plus 062, 063 of \$1,533.	those costs could not be recovered by the government. Items 004, 005, 006, 065 were not proven. No cost is recoverable for this separate item. The appeal on this claim is sustained.
1a. Concrete waste	002	The Ross Group removed various piles of concrete waste from washing out trucks. Cost as part of item 001	There is photographic and testimonial evidence of the existence of concrete debris left on site by the contractor near the chain link fence. (SSR4, tab SSR1 at 37, -43; tr. 1-79, 1-82; R/53569, tab R7U at 40) This cost is recoverable. However, the cost was commingled with other non-recoverable costs (items 004, 005, 006, 007, 008, 065, 248). The government did not allocate the costs. However, this was one of eight items grouped under item 001 and it would have required a truck to haul off the concrete debris. <b>In the nature of a jury verdict, we allow the government \$190 for this item. The appeal of this claim is denied to the extent of \$190.</b>
Not on the December list.  Added as a sub item on the February list.	003 Valve box plates covered with concrete	Claimed cost included in item 279. On Exhibit 4 the government claimed cost as part of item 279.	This item was not on a punch list until the February punch list. Appellant offered to clean off the valve boxes (ASBCA No. 53202, R4, tab R-11D-3). Appellant was not allowed to correct items on the February punch list. Therefore, the government may not charge for such

			corrective work. The appeal on this claim is sustained.
1b. Construction debris piles	004	The Ross Group removed “various trash piles on site”. Cost as part of 001. On Exhibit 4 the government claimed cost as part of item 001.	Record reflects that general site clean up took place before the contractor left the site (e.g., ASBCA No. 53569, R4, tab R7U at 39, -46, 48). Appellant asserted in April 2000 that no construction debris was on site. (ASBCA No. 53202, R4, tab R11D at 3) Months after the contractor has left the site and the government has taken occupancy, there can be no presumption that all debris on site was construction debris left by the contractor. The government has the burden to prove by a preponderance of the evidence that all the “various trash piles” removed by the Ross Group was construction debris left by the contractor. Merely listing on a punch list that debris was left on site is insufficient to carry the burden to prove liability, causation, and resultant injury. The appeal on this claim is sustained.
1c. Construction trash	005	The Ross Group removed “various trash scattered throughout site”. Cost as part of 001. On Exhibit 4 the government claimed cost as part of item 001.	See comment for 1b above. The appeal on this claim is sustained.
1d. Remove trailers and debris from	006 Trash piles and tires where trailers	The Ross Group removed “various debris” from the contractor staging area. The Ross	In December 1999 the COE permitted Reynolds Electric to leave its trailer on site; Reynolds agreed to move

yard	were located	Group does not identify tires as part of the debris. Cost as part of 001. On Exhibit 4 the government claimed cost as part of item 001.	trailer to Fire Station project and assist with removal of debris the week of January 3, 2000. (ASBCA No. 53569, R4, tab R5Q at 10) There is a picture in the record showing tires and some debris (SSR4, tab SSR3 at 47). However, that picture is not identified as being the location where the Reynolds trailer was located. There was no testimony concerning this item. Appellant asserted in April 2000 that site clean up had been completed (ASBCA No. 53202, R4, tab R11D at 3). Months after the contractor has left the site and the government has taken occupancy, there can be no presumption that debris on site was left by the contractor. The government has the burden to prove by a preponderance of the evidence that any debris was left by the contractor. The evidence is insufficient to carry that burden. Therefore, the cost is not recoverable. The appeal on this claim is sustained.
Not on the December list.  Added as a sub item on the February list.	007 Hay bales still on site.	The Ross Group removed several hay bales. Cost as part of 001. On Exhibit 4 the government claimed cost as part of item 001.	This item was not on the punch list until the February punch list; thus, appellant was not given the opportunity to correct. Moreover, hay bales were part of the project to protect vegetation and prevent rain run off. (ASBCA No. 53202, R4, tab

			R11D at 3) No evidence that the hay bales should not have been left until vegetation was well established. The cost for removing the hay bales is not recoverable. The appeal of this claim is sustained.
Not on the December list.  Added as a sub item on the February list.	008 Construction trash scattered throughout site	Ross Group removed several piles of trash. Cost as part of 001. Same item as 005.	Record reflects that general site clean up took place before the contractor left the site (e.g., ASBCA No. 53569, R4, tab R7U at 39, -46, 48). Appellant asserted in April 2000 that no construction debris was on site. (ASBCA No. 53202, R4, tab R11D at 3) Months after the contractor has left the site and the government has taken occupancy, there can be no presumption that debris on site was left by the contractor. The government has the burden to prove by a preponderance of the evidence that any debris was left by the contractor. The government has not pointed to any evidence to support that conclusion. Therefore, the cost is not recoverable. The appeal on this claim is sustained.
2. Several fence gates missing center stops	009 Crossed out.	Removed from list because corrected by Mitchell	Not claimed by the government.
3. Joints in	010	Ross Group routed out many control joints and	Appellant asserted in April 2000 that the concrete joints

concrete missing filler		sealed with elastomeric sealant. The Ross Group price was \$7,531. On Exhibit 4 the government claimed cost of \$3,850.	were preformed joint strips per the specifications. (ASBCA No. 53202, R4, tab R11D at 3) The government offered no testimony regarding this item. Likewise, the government did not cite any evidence documenting the missing concrete filler or the number of joints sealed, nor did the government identify specific contract language or testimony establishing that what was not done was required or that what was done by the Ross Group was a proper substitute. (See position statements in gov't br. at 106; app. br. at 17) The appeal of this claim is sustained.
Not on the December list.	011 thru 013	These items are related to concrete joints as subsets of item 010. The Ross Group reported that no work was done on these items. On Exhibit 4 the government claimed that the costs for these items were included in item 011. No cost stated.	These items were not on a punch list until the February punch list; thus, appellant was not given an opportunity to correct. The appeal of these claims is sustained.
4. Ditch north of TTF does not drain. An "X" was placed on this item by Burkholder, indicating that this item	014 description changed to: "Ditches North of TTF does not drain."	Ross Group stated that many areas on site were "ponding or holding water". The Ross Group stripped existing vegetation on the entire project and re-graded areas holding water. The Ross Group price was \$19,611. On Exhibit 4	The Burkholder list indicates that the original deficiency was corrected. Deficiency noted by the Ross Group was different from the cited item. By the time the Ross Group came on site in May 2000 (SSR, tab SSR8) the government had kept appellant from working on

<p>was corrected or completed.</p>		<p>the government claimed cost of \$16,000.</p>	<p>the site – including the landscaping – for five months. The work performed by the Ross Group exceeded the scope of the original deficiency. The government did not establish the existence of this deficiency by a preponderance of the evidence. The government cannot recover on this claim. Moreover, even if the cost of correcting the original deficiency were recoverable, the claimed cost includes work that greatly exceeds the original deficiency. There is no reasonable testimonial or acreage basis in the record on which we can allocate the costs. Therefore, the cost is not recoverable. The appeal of this claim is sustained.</p>
<p>5. Post indicator valve north of TTF not installed properly. An “X” was placed on this item by Burkholder, signifying that this item was corrected or completed.</p>	<p>015</p>	<p>The Ross Group took apart and recalibrated a valve position indicator that was not working. The Ross Group price was \$2,404. On Exhibit 4 government claimed a cost of \$1,250. It included the cost for item 016.</p>	<p>The Burkholder list indicates that the original deficiency was corrected. It was corrected when appellant straightened the valve indicator post. (Photo SSR4, tab SSR1 at 77 shows leaning value indicator post, straightened by appellant.) (GPFF 363; tr. 4-87). The work performed by the Ross Group was different from and exceeds that required by the original deficiency. There is insufficient evidence to establish that this item was not corrected. Claim fails for lack of credible evidence. The appeal of this claim is</p>

			sustained.
Not on the December list.  Added as sub item on the February list.	016 Post Indicator Valve broken or loose, near warehouse B.	Ross Group repeated what was done in item 015. The Ross Group price was included in item 15. On Exhibit 4 the government claimed the cost was included in item 015.	This item was not on a punch list until the February punch list; thus, appellant was not given the opportunity to correct. Further, it appears to be a different PIV Post than the one listed in item 015. The Ross Group either did the same work on both posts, or did the work only on one post. The fact statement brief by the government only addressed item 015 (RPF at 89-91). The government has failed to produce sufficient evidence to establish that there was a defect on this post at the time the government took occupancy. Claim fails for lack of evidence and failure to provide opportunity to correct. The appeal of this claim is sustained.

**Exterior Electrical/Communications**

1. Install second guy for communication line at entry to building 28. An "X" was placed on this item by Burkholder.	017 Crossed out	Removed because "EE does not see the need for this."	Not claimed by the government.
2. Cap empty conduits. An "X" was	018 Crossed out	Removed because the government could not find deficiency.	Not claimed by the government.

placed on this item by Burkholder.			
3. Seal boots and underground conduits at electrical poles	019	The Ross Group plugged the empty conduits and sealed around conductors. The Ross Group price was \$1,280. On Exhibit 4 the government claimed a cost of \$755. The Ross Group and Exhibit 4 cite the NEC code generally as the requirement.	Appellant asserted in April 2000 that no boots were made for these conduits, but that they could be sealed with silicone (ASBCA No. 53202, R4, tab R11D at 3). The referenced NEC was not introduced into evidence. No witness testified about the NEC or the contract requirement for the work performed by the Ross Group. The government did not point to any evidence in the record that established that this was a contract requirement. (Gov't RPPF br. at 94-96; app br. at 21) Claim fails for failure to establish that the work was required by the contract. The appeal of this claim is sustained.
4. Service conduits on riser poles not properly strapped. An "X" was placed on this item by Burkholder.	020 Crossed out	Exhibit 4 removed this item because it was corrected by Mitchell	Not claimed by the government.
5. Communication wire requires standoff from riser	021	The Ross Group and Exhibit 4 stated that this item was a requirement imposed by the Base. The Ross Group price was \$625. On Exhibit 4	Appellant asserted that this was not a contract requirement. The government agrees that this requirement was imposed by the Base. The government

pole		the government claimed a cost of \$251.	did not establish that this Base requirement was included as a requirement in the contract. (Gov't RPF br. at 102-03) The appeal of this claim is sustained.
6. Communication and fiber optic lines along C-Tree road too low.	022	The Ross Group and Exhibit 4 stated that this item was a requirement imposed by the Base. The Ross Group price was \$9,164. Exhibit 4 government claimed cost of \$5,196.	Appellant asserted that this was not a contract requirement and would require adding more poles. The government agrees that this requirement was imposed by the Base. The government did not establish that this Base requirement was included as a requirement in the contract. (Gov't. RPF br. at 96-102) The appeal of this claim is sustained.
7. CT wires in main service transformer are improperly terminated	023	The Ross Group stated this was a workmanship item. Exhibit 4 stated this was required by section 16375 at 2.6.4 & 2.9. The Ross Group price was \$375. On Exhibit 4 the government claimed a cost of \$221.	Appellant asserted in April 2000 that this item was corrected (ASBCA No. 53202, R4, tab R11D at 3-4). Contract references cited on Exhibit 4 for this item do not address the alleged deficiency. No witness testified as to the standard of workmanship. The government did not address this item in its brief. The government did not establish that this was a contract requirement or that work done by appellant did not meet the workmanship standard required by the contract. The appeal of this claim is sustained.
8. Spare conduit in	024	The Ross Group and Exhibit 4 stated that this was required by the NEC	Appellant asserted in April 2000 that this item was corrected. The government

service transformer not grounded		Code generally. The Ross Group price was \$218. On Exhibit 4, government claimed a cost of \$129.	did not address this item in its brief. The referenced NEC was not introduced into evidence. No witness testified about the NEC or any contract requirement for the work performed by the Ross Group. The government did not point to any evidence in the record that established that this was a contract requirement. The appeal of this claim is sustained.
9. Secondary conduits do not have protective plastic bushings.	025 Crossed out	Removed because this item does not need to be done.	The government did not claim for this item.
10. Listed poles did not have messengers grounded or bonded around corners.	026	Removed because the messengers were grounded.	The government did not claim for this item.
11. Listed poles have insufficient slack on cable going around bends	027	Removed because there was sufficient slack.	The government did not claim for this item.
12. Messenger at pole TR-17 needs to be spliced to	028	Removed because this was not required.	The government did not claim for this item.

eliminate bends			
13. Install hangers on cable between poles C301 and C302	029	Removed this item because the hangers were not necessary.	The government did not claim for this item.
14. No continuity on 10 fibers between buildings 16 and 419	030	The Ross Group tested all ten fibers. There was continuity in all ten fibers. Ross Group price was \$9,561. On Exhibit 4 the government claimed cost was \$6,400.	Appellant in April 2000 asserted that these fibers were tested and that the problem was elsewhere (in government installed lines) (ASBCA No. 53202, R4, tab R11D at 4). These fibers passed the continuity test after installation by appellant. Continuity problems existed in preexisting government fiber optic lines. (Gov't. RPF br. at 103-12; app br. at 24-25) The Ross Group tests confirmed the existence of continuity. This established that there was no defect. The government cannot charge for tests that do not establish the existence of a defect. The claim fails for lack of proof of any deficiency. The appeal of this claim is sustained.
15. Fiber optic splice near building 419 sags	031	Removed this item because the government could not find deficiency.	The government did not claim for this item.
16. Multimedia outlets not	032	Removed this item because the government agreed that it could not	The government did not claim for this item.

marked in building 419		find a contract requirement for this item.	
17. Circuit only established on 2 of 12 fibers	033	Ross Group did no work on this item. Exhibit 4 references item 030 for this item.	The government did not make a separate claim for this item. We denied claim 30. The appeal of this claim is sustained.
<b>TTF Facility</b>			
1. Provide 4-way seismic bracing for sprinkler system risers	034	Ross Group installed seismic bracing on two risers in TTF and one riser in Warehouse B, in accord with section 13080.3.1 The Ross Group price was \$897. On Exhibit 4 government claimed cost of \$452.	In April 2000 appellant responded to this item by asking what was the contract requirement. Seismic bracing was required by section 13080.3.1 and sections 15330.3.2.1 and 15331.3.2.1. The Ross Group installed seismic bracing at these points. There was no contrary evidence. We conclude that the preponderance of the evidence establishes that this was a deficiency and that the price was reasonable (tr. 3-51). (Gov't. RPPF br. at 112-14; app. br. at 25) <b>Government entitled to \$897. The appeal of this claim is denied.</b>
Not on the December list	035 Must be at top of riser.	Government agreed this was included in item 034.	The government did not make a separate claim for this item. <b>We granted the claim in item 34. The appeal of this claim is denied.</b>
2. Tamper switches on sprinkler	036 Crossed out	Removed from list because it was corrected by Mitchell.	The government did not claim for this item.

system not connected. An "X" was placed on this item by Burkholder.			
3. Dry system inspectors do not meet NFPA. An "X" was placed on this item by Burkholder.	037 Crossed out	Removed because this was accepted by the Base.	The government did not claim for this item.
4. Air maintenance device installed on dry pipe valve is not as submitted No bypass or strainer upstream of regulator. Does not meet spec 15331.2.5.2 An "X" was placed on this item by Burkholder.	038	The Ross Group said this was a workmanship issue. It replaced the air maintenance device as incompatible with a tank type, air compressor. The Ross Group price was \$1,321. On Exhibit 4 government claimed cost of \$636.	The Burkholder list indicates that the original deficiency was corrected. The Ross Group used appellant's subcontractor to do this work. Before doing this work, the subcontractor stated, "This device was originally installed properly. The air compressor was changed (due to failure) and personnel from McAlester Army Depot made modifications to our original system installation. Parts of the system were taken out and/or lost by others." (ASBCA No. 53569, R4, tab R8f at 97-98) There was no testimony offered concerning this item or the standard of workmanship required by the contract. The government failed to establish by a preponderance of the evidence that this corrective work was required by the contract, or that the defect

			was caused by appellant. (Gov't. br. at 115; app. br. at 25-26) Claim fails for lack of evidence. The appeal of this claim is sustained.
5. Accelerator on dry pipe valve is not connected to system according to manufacturer's directions. Must be connected at least two feet above the level of the priming water.	039	The Ross Group stated that this was a workmanship item and the Ross Group connected the accelerator on the dry pipe valve to the system. The Ross Group price was \$805. On Exhibit 4 the government claimed a cost of \$602. However, on Exhibit 4 the government also noted that this item was accepted by the Base.	The 12 June 2000 letter by Grinnell, Mitchell's and the Ross Group's subcontractor, stated, "This item has previously been completed. This currently is in compliance with code." (ASBCA No. 53569, R4, tab R8f at 97-98) The Ross Group's report reflects bid estimates, and not actual cost – because actual costs of any work were not tracked (tr. 3-239). There was no testimony regarding this item or the workmanship standard applied. The government noted that this item was accepted by the Base. There is insufficient evidence that actual work either was required or was done to correct this item. This item fails for lack of proof. (Gov't. RPFf br. at 114) The appeal of this claim is sustained.
6. Provide inlet ducts on exhaust fans An "X" was placed on this item by Burkholder.	040 Crossed out	Removed because this was corrected by Mitchell.	The government did not claim for this item.
7. HVU Ducts	041 Crossed out	The Ross Group installed additional unistrut	This item was crossed off by Burkholder and was also

<p>760/560 and larger require bracing per section 13080. An “X” was placed on this item by Burkholder, signifying that this item was corrected or completed.</p>		<p>seismic bracing on the outside of air plenums. The Ross Group price was \$23,573. On Exhibit 4 the government claimed cost of \$17,623.</p>	<p>crossed off the February list. There was no credible explanation for doing this work. (Gov’t. RPPF br. at 143-49; app. br. at 46-48) Credible testimony by Steve Mitchell established that Mitchell Enterprises installed the required seismic bracing. (Tr. 4-105, -112) Moreover, appellant could not be held to have had notice of a deficiency if the item was crossed off the list. The government failed to present credible evidence that it gave notice to appellant; and, failed to present credible evidence that the additional seismic bracing installed by the Ross Group was required. The claim fails for lack of proof. The appeal of this claim is sustained.</p>
<p>8. Provide tees and plugs in gas meter piping. An “X” was placed on this item by Burkholder.</p>	<p>042 Crossed out</p>	<p>Removed because the government could not find the deficiency.</p>	<p>The government did not claim for this item.</p>
<p>9. Provide seismic bracing for all gas piping 1” or larger. An “X” was placed on</p>	<p>043 Crossed out</p>	<p>Removed because this item was corrected by Mitchell.</p>	<p>The government did not claim for this item.</p>

<p>this item by Burkholder.</p>			
<p>10. Domestic water heater: pipe pressure and other listed items. An "X" was placed on this item by Burkholder.</p>	<p>044 Crossed out</p>	<p>Removed because this item was corrected by Mitchell.</p>	<p>The government did not claim for this item.</p>
<p>11. Dampers to individual diffusers not installed in rooms 111-115</p>	<p>045</p>	<p>The Ross Group reported that there were no dampers and that they installed the dampers. The Ross Group price was \$2,200. On Exhibit 4 the government claimed a cost of \$985.</p>	<p>Dampers were required as shown on the drawing (Sequence 82, ASBCA No. 53202, R4, tab R-4C at 201, 203). The preponderance of the evidence establishes that this was a deficiency and that the price for correcting it was reasonable (tr. 3-51). <b>The government is entitled to \$2,200. The appeal of this claim is denied.</b></p>
<p>12. Verify, ¼ per foot pitch of dry pipe system</p>	<p>Not on February List.</p>	<p>Not on the Ross Report</p>	<p>The government did not claim for this item.</p>
<p>13. Conduit for panel board feeders missing protective plastic bushings. Check for possible insulation damage. Burkholder</p>	<p>046</p>	<p>Removed because it does not need to be done.</p>	<p>The government did not claim for this item.</p>

noted that he “can’t verify” this item.			
14. HVU-3 10HP motor conductors too small. An “X” was placed on this item by Burkholder.	047 Crossed out	Removed because the government could not find the deficiency.	The government did not claim for this item.
15. Remove plastic from diffusers	048	Removed because the government could not find the deficiency.	The government has not claimed for this item.
16. Door hardware incomplete in room 113	049	Removed because the Base was going to install “cores.” However, for this item the Ross Group had a price of \$165.	The government did not claim for this item.
17. Front entrance missing door jamb screws. An “X” was placed on this item by Burkholder.	050 Crossed out	Removed because the government could not find the deficiency.	The government did not claim for this item.
18. At the front entrance the screws are protruding from screen. An “X” was placed on this item by Burkholder.	051 Crossed out	Removed because it was done according to plans.	The government did not claim for this item.
19.	052	Removed because the	The government did not

<p>In room 120 need a louver in north wall. An "X" was placed on this item by Burkholder.</p>	<p>Crossed out</p>	<p>government could not find the deficiency.</p>	<p>claim for this item.</p>
<p>20. At the covered dock, steel columns not painted behind downspouts</p>	<p>053</p>	<p>The Ross Group commingled this work together in conjunction with items 173 and 189 – items not on the December list. The Ross Group included at least 19 items in the price for item 173. The Ross Group price for item 173 was \$32,341. On Exhibit 4 the government referenced item 189 for the cost of this item. The government claimed \$29,040 on Exhibit 4 for item 189 and this item. Actually, on Exhibit 4 the government commingled 31 items in the cost of item 189 – most of which were only on the February list.</p>	<p>Even if this cost were recoverable, the cost was commingled with other non-recoverable costs (items 173, 189 were only on the February list). The government did not segregate the costs. There is no reasonable basis in the record on which we can allocate the costs or reach a jury verdict. Therefore, the cost is not recoverable. The government has failed to carry its burden of proof. (Gov't. RPPF br. at 179; app. br. at 28-29) The appeal of this claim is sustained.</p>
<p>21. Louvers leak on south end.</p>	<p>054</p>	<p>The Ross Group reported that all louvers in the TTF were re-caulked. The work was done between December 2000 and March 2001. The Ross Group price for re-caulking all the louvers was \$3,578. On Exhibit 4 the government claimed a cost of \$2,029.</p>	<p>The work performed exceeded the work required for the listed deficiency. Even if this cost were recoverable, the cost for caulking the louvers on the south end was included with the cost for caulking all the louvers. We do not know the number of louvers. There is no way to allocate the cost to</p>

			just those louvers on the south end that allegedly needed to be caulked. There is no reasonable basis in the record on which we can allocate the costs or reach a jury verdict. Therefore, the cost is not recoverable. The government failed to carry its burden. (Gov't. RPPF br. at 187; app. br. at 30-31) The appeal of this claim is sustained.
22. In room 105 the air compressor runs all the time. An "X" was placed on this item by Burkholder.	055 Crossed out  (See item 178 which added: "Rm 105, alternating start of compressors needs to be checked or verified")	The Ross Group report calls this a workmanship issue. It rewired the compressor. The Ross Group price was \$2,440. On Exhibit 4 government claimed a cost of \$1,824.	Item 055 was marked as okay on the December list and crossed out on the February list. Appellant is not liable for correcting a deficiency when it has not been given notice that a deficiency exists. (Gov't. RPPF br. at 188-90; app. br. at 29-30) The appeal of this item is sustained.
23. Overhead crane has exposed high voltage lines. An "X" was placed on this item by Burkholder.	056	The Ross Group marked this item as Not Applicable and did no work on this item. Nevertheless on Exhibit 4 the government claimed a cost of \$288. However, the government also noted that the item "has to be this way."	The Burkholder list indicates that the original deficiency was corrected or was acceptable. Because of the Burkholder action and the government's notation on Exhibit 4 that the item "has to be this way," we conclude that the government has failed to carry its burden of proof to establish that there was a deficiency, or that any corrective work was performed. The appeal of this claim is sustained.
24.	057	The Ross Group installed	The government

<p>In room 116 the return air duct has no grill.</p>		<p>a return air grill. The Ross Group price was \$881. On Exhibit 4 government claimed a cost of \$500. Nevertheless, the government agreed that the grill was not required on original contract because the return was capped.</p>	<p>acknowledged on Exhibit 4 that this item was not a contract requirement. The appeal of this claim is sustained.</p>
<p>25. Angle bracing at interior crane column not attached to structure</p>	<p>058</p>	<p>The Ross Group reported that it bolted one anchor brace to the structure. The Ross Group price was included in item 099. On Exhibit 4 government removed this item because it could not find the deficiency.</p>	<p>The government did not claim for this item.</p>
<p>26. All areas: electrical conduit not painted</p>	<p>059</p>	<p>Removed because the government agreed this work was not required by the contract because the conduit was not installed as part of this contract.</p> <p>(However, the Ross Group painted this conduit and commingled the cost into other painting in item 173 (see item 53 above))</p>	<p>The government did not claim for this item.</p>
<p>27. Exterior receptacle on north wall has no power. An "X" was placed on</p>	<p>060 Crossed out.</p>	<p>Removed because the work was included in work performed by the Base.</p>	<p>The government did not claim for this item.</p>

this item by Burkholder.			
28. In room 127 the door hardware is not complete	061	Removed because the Base was to install “cores”	The government did not claim for this item.
29. No final clean up performed	062	The Ross Group did not have a separate price for this item and indicated that it did no work for this item. Exhibit 4 references item 001 with work done as part of several unallocated items.	Even if this cost were recoverable, the cost was commingled with other non-recoverable costs (see item 001). The government did not segregate the costs. There is no reasonable basis in the record on which we can allocate the costs or reach a jury verdict. Therefore, the cost is not recoverable. The appeal of this claim is sustained.
Not on the December list.  (Added as a sub item on the February list)	063. TTF, Warehouse A and B, and STS not cleaned properly	The Ross Group did not have a separate price for this item and indicated that it did no work for this item. Exhibit 4 references item 001 with work done as part of several unallocated items.	This item was not on a punch list until the February punch list; thus, appellant was not given the opportunity to correct. Additionally, even if this cost were recoverable, the cost was commingled with other non-recoverable costs (items 004, 005, 006, 007, 008, 065, 248). The government did not segregate the costs. There is no reasonable basis in the record on which we can allocate the costs or reach a jury verdict. Therefore, the cost is not recoverable. The appeal of this claim is sustained.
Not on the December list.	064 Windows on STS dirty and not	Removed because the government could not find deficiency.	The government did not claim for this item.

(Added as a sub item on the February list)	secured to walls		
30. Remove duct tape from downspouts	065	The Ross Group removed duct tape from cast iron downspout boots on south side of TTF bldg. The Ross Group did not have a separate price for this item, but merely referenced item 001. On Exhibit 4 the government also lists this as part of item 001.	Appellant asserted in April 2000 that the duct tape had been removed (ASBCA No. 53202, R4, tab R11D at 5). The government's brief did not identify any evidence of this deficiency and we have found none in the record. Therefore, the cost is not recoverable. The appeal of this claim is sustained.
31. Guardrail post at southwest corner is not anchored	066	The Ross Group reported that it installed missing bolts. The Ross Group price for this item was \$1,763; however, this price also included the price for work done on items 067 and 068 – which were not on the December list. On Exhibit 4 the government claimed a cost of \$1,000, to include items 067 and 068.	Even if this cost were recoverable, the cost was commingled with other non-recoverable costs (items 067, 068 that were not on the December list). The government did not segregate the costs. There is no reasonable basis in the record on which we can allocate the costs or reach a jury verdict. Therefore, the cost is not recoverable. The appeal of this claim is sustained.
Not on the December list.  (Added as a sub item on the February list)	067 Guardrail improperly welded to bollard. Missing vertical I-beam	The Ross Group reported that, on a bollard on Northwest corner of TTF Building, it removed the “guardrail where welded to bollard, set new guardrail post, cut guardrail back to allow installation of ‘elephant ear’ guardrail end cap.” The Ross Group price referenced item 066. On Exhibit 4 the government	This is a new deficiency that was not on a punch list until the February punch list; thus, appellant was not given the opportunity to correct. The government cannot recover because appellant was not given the opportunity to correct. The appeal of this claim is sustained.

		claimed its cost was included in item 066.	
Not on the December list.  (Added as a sub item on the February list)	068 Guardrail throughout not bolted together.	Ross Report stated that “Many bolts missing in guardrail around perimeter of the TTF building, bolts loose.” The Report indicated that the following work was done: “Installed new bolts in areas missing bolts and tightened the few bolts that were already installed.” The Ross Group price referenced item 066. On Exhibit 4 the government claimed its cost was included in item 066.	This is a new item that was not on a punch list until the February punch list; thus, appellant was not given the opportunity to correct. The government cannot recover because it did not give appellant the opportunity to correct. The appeal of this claim is sustained.
32. Bollard at southwest corner of building not installed properly, very poor workmanship, paint is flaking off and steel is beginning to rust.	069	Removed because the bollards were functional and the replacement cost was prohibitive.	The government did not claim for this item.
Not on the December list.  (Added as a sub item on the February list)	070 Many bollards improperly installed throughout, poor workmanship	Removed because the bollards are functional and the replacement cost is prohibitive.	The government did not claim for this item.

<p>Not on the December list.</p> <p>(Added as a sub item on the February list)</p>	<p>071 Bollards throughout missing concrete bases, improperly filled and shaped</p>	<p>Removed because the bollards are functional and the replacement cost is prohibitive.</p>	<p>The government did not claim for this item.</p>
<p>Not on the December list.</p> <p>(Added as a sub item on the February list)</p>	<p>072 Stripping is deficient on all bollards, should be replaced</p>	<p>The Ross Group removed the black electrical tape, repainted all bollards yellow, and painted black stripes on all bollards. The Ross Group price was \$8,403. On Exhibit 4 government claimed a cost of \$6,282.</p>	<p>This was a new item that was not on a punch list until the February punch list; thus, appellant was not given the opportunity to correct. Moreover, it is not clear that black electrical tape to create the black stripes was prohibited. (Drawing legend states: “50 mm Black Spiral with 50 mm Space Between Stripes on Yellow Background”) Because this item was not on the December list, appellant was not given the opportunity to correct and the government cannot recover the cost of any corrective work. The appeal of this claim is sustained.</p>
<p>33. Exterior concrete not finished properly in many areas. Sloughed concrete not removed from surface.</p>	<p>073</p>	<p>Removed because the government could not find the deficiency.</p>	<p>The government did not claim for this item.</p>
<p>Not on the December list</p>	<p>074 Significant cracking in</p>	<p>Both the Ross Group and Exhibit 4 reference item 335 – an item not even on</p>	<p>This item was not on a punch list until the February list, and item 335 was not even on</p>

(Added as a sub item on the February list)	concrete loading dock, East side	the February list, for the cost of correcting this item.	the February punch list; thus, appellant was not given the opportunity to correct. Because appellant was not given the opportunity to correct the deficiency, the government cannot recover the cost of any corrective work. The appeal of this claim is sustained.
34. Joist bridging not properly connected to structure	075	The Ross Group stated that it bolted the joist bridging to the structure in various places. It included the cost of this work in item 099 at a price of \$24,247. Exhibit 4 references item 099 and includes the cost of 075 as part of the \$13,748 for missing bolts throughout the TTF and warehouse B & C. Item 099 was not on the December list.	Appellant asserted in April 2000 that it could not find the deficiency. There was no testimony concerning this item. The government's brief dealt with item 099, but not item 075. The government has not proven by a preponderance of the evidence that this was a deficiency. Even if this cost were recoverable, the cost was commingled with other non-recoverable costs (item 099, which was not on the December list). The government did not segregate the costs. There is no reasonable basis in the record on which we can allocate the costs between the two items or reach a jury verdict. Therefore, the cost is not recoverable. The appeal of this claim is sustained.
35. Sprinkler system cannot be supported	076	Removed because the government could not find the deficiency.	The government did not claim this item.

from overhead door			
36. Retard chamber is installed after the water flow detector on three sprinkler risers. Must be installed in accord with NFPA, Sec. 17-43.	077	The Ross Group charged \$2,040 for this item, but did no work – the money was used for second pour of concrete on loading dock. On Exhibit 4 the government claimed a cost of \$1,625, but also states that this was “Accepted by Base”	No corrective work performed on this item. The government noted that the base accepted this item. The government cannot collect for work not performed. The appeal of this claim is sustained.
37. Protected communication terminal for the TTF is not grounded. An “X” was placed on this item by Burkholder.	078	Removed because the government could not find the contract requirement.	The government did not claim for this item.
38. General Communication	079	Removed because the government concluded that this is not a deficiency.	The government did not claim for this item.
38a. Wrong type 66 blocks installed	080	The Ross Group called this a workmanship item. It installed older style 66 block, replacing the newer wide style terminal 66 blocks installed by appellant. The Ross Group price was \$562. Exhibit 4 listed the cost at \$420, and cited contract	Appellant asserted in April 2000 that this was originally done in accord with contract specifications (ASBCA No. 53202, R4, tab R11D at 6). The government offered no testimony or record evidence to establish that the new type 66 blocks did not meet the contract specifications. The

		requirement at E-18, 16741-2.2.3.4	government claim fails for a lack of evidence. The appeal of this claim is sustained.
38b. Cables not marked	081	Removed because this was not a contract requirement.	The government did not claim for this item.
38c. Cables marked wrong	082	Removed because this was not a contract requirement	The government did not claim for this item.
38d. Cable not identified	083	Removed because the government could not find the deficiency.	The government did not claim for this item.
38e. Outlet marked wrong	084	Removed because this was not a contract requirement	The government did not claim for this item.
38f. Circuits open	085	Removed because the government could not find the deficiency.	The government did not claim for this item.
39. Smoke detectors in HVU are not supervised to the detector.	086	The Ross Group rewired each ductwork smoke detector to clear trouble indication in fire alarm panel and for proper operation. The Ross Group cited Section 16721-3.4 of the contract. The Ross Group price was \$6,814. On Exhibit 4 government claimed a cost of \$3,864.	The Base fire department tested the fire alarm system and the system passed the inspection on 23 September 1999 (ASBCA No. 53569, R4, tab R7T at 61). The subcontractor installing the fire protection system noted in letter of 20 December 1999 that, "The Smoke detectors were approved and installed per plans and specs.; Operationally tested and approved by the McAAP [McAllester] and COE; If ANY unit is actuated it will set off the Alarms and will shut down ALL air handling equipment. What more can be required." (ASBCA No. 53569, R4, tab R5Q at 11)

			There was no testimony explaining the alleged deficiency. Appellant testified that the system was in accord with the contract requirements for the system. The citations provided by the government do not establish that there was a deficiency. The government failed to carry its burden to establish by a preponderance of the evidence that there was a deficiency described to appellant that appellant failed to correct. The appeal of this claim is sustained.
<b>Additional Comments, TTF Facility</b> (added by the February punch list)			
Not on the December list.	087 thru 206	Miscellaneous list of additional deficiencies related to the TTF Facility. Nineteen of these items were removed because the government could not find the deficiency. The costs for twenty-seven of these items were included in the costs for other items. The Ross Group did no work on twenty of these items, but the government claimed costs for three of those twenty items, including items 094, 095, 125.	First added on the February punch list. Appellant not given an opportunity to correct. The appeal of these claims is sustained.
<b>Warehouse B</b>			
1. Seal insulation at translucent panels. An	207	The Ross Group sealed the insulation around translucent roof panels with vinyl tape. This was cited as a workmanship	The Burkholder list indicates that the original deficiency was corrected or acceptable. The contract requirements relied on by the government

<p>“X” was placed on this item by Burkholder.</p>		<p>issue. The Ross Group price was \$760. On Exhibit 4 the government claimed a cost of \$431. Exhibit 4 cites to the following contract requirements: A3.05, A4.02, 07810, 07920.</p>	<p>do not require vinyl tape. In its brief the government points to no evidence in support of this item. The Ross Group noted this as a workmanship requirement. There was no testimony regarding this item or the standard of workmanship that was required by the contract. The government has failed to carry its burden of proof. (Gov’t. br. at 106, 110; app. br. at 36) The appeal of this claim is sustained.</p>
<p>Not on the December list.  (Added as a sub item on the February list)</p>	<p>208 Torn insulation, various locations</p>	<p>The Ross Group sealed all areas with vinyl tape where insulation was torn. The Ross Group price was \$426. On Exhibit 4 the government claimed a cost of \$242.</p>	<p>This item was not on a punch list until the February punch list; thus, appellant was not given the opportunity to correct. Nevertheless, appellant offered to correct this item in April 2000. Appellant was not allowed to correct any of this work. The government cannot recover for work for which appellant was not given the opportunity to correct. The appeal of this claim is sustained.</p>
<p>2. Verify ¼” per foot pitch of dry pipe system.</p>	<p>209</p>	<p>The Ross Group noted that there was no contract reference and that no work was done on this item. It nevertheless showed a price of \$1,338, but noted that the money was spent on a second concrete pour on the loading docket. On Exhibit 4 the government claimed a cost of \$1,000.</p>	<p>No corrective work was done on this item. Whether or not it is a deficiency is irrelevant. The government cannot recover for work not performed. The appeal of this claim is sustained.</p>
<p>3.</p>	<p>210</p>	<p>Removed because the</p>	<p>The government did not</p>

In room 230, the door has no interior hardware		government could not find this deficiency.	claim for this item.
Not on the December list.  (Added as a sub item on the February list)	211 Panic hardware installed on wrong side	Removed because the government could not find this deficiency.	The government did not claim for this item.
Not on the December list.  (Added as a sub item on the February list)	212 Remove shipping tape from door hardware	The Ross Group says it removed shipping plastic and labels from kick plates, closers, and panic devices, at a price of \$728. On Exhibit 4 the government claimed a cost of \$498.	This item was not on a punch list until the February punch list; thus, appellant was not given the opportunity to correct. Nevertheless, appellant offered to correct this item in April 2000. Appellant was not allowed to correct any of this work. The government cannot claim for work for which appellant was not given the opportunity to correct. The appeal of this claim is sustained.
4. In room 202 the door hardware is incomplete. An "X" was placed on this item by Burkholder.	213	The Ross Group reported that it added missing screws to the door in room #113. (This is a different room from the room noted on the December and the February lists.) The Ross Group price was \$180. On Exhibit 4 the government claimed a cost of \$752 for this item and item 214.	The Burkholder list indicates that the original deficiency was corrected. The Ross Report refers to room 113, while the December and February lists refer to room 202. This is a failure of evidence. The government has failed to establish the existence of the deficiency in room 202 by a preponderance of the evidence. The appeal of this claim is sustained.
Not on the December list	214 Panic hardware	The Ross Report said that the hardware was correctly installed, but	This item was not on a punch list until the February punch list; thus, appellant was not

<p>(Added as sub item on the February list)</p>	<p>installed on wrong side</p>	<p>that the door swung into the room. The Ross Group and Exhibit 4 cite Section 08700-12. The Ross Group said they removed the existing door frame, installed a new one, and made the door swing out of the room. The Ross Group price was \$1,151. On Exhibit 4, government claimed the price in item 213.</p>	<p>given the opportunity to correct. The government cannot claim for work for which appellant was not given the opportunity to correct. (Moreover, the cited reference says nothing about which way the door swings. The government has not pointed to any reference which specifies that the door should swing out. We note that generally interior doors swing into rooms, while only exterior doors swing out.) The appeal of this claim is sustained.</p>
<p>Not on the December list.  (Added as a sub item on the February list)</p>	<p>215 Remove shipping tape from door hardware</p>	<p>The Ross Group included the price for this item in the price for item 212. On Exhibit 4 the government claimed cost was also included in item 212.</p>	<p>This item was not on a punch list until the February punch list; thus, appellant was not given the opportunity to correct. Nevertheless, appellant offered to correct this item in April 2000. Appellant was not allowed to correct any of this work. The government cannot claim for work for which appellant was not given the opportunity to correct. The appeal of this claim is sustained.</p>
<p><b>Additional Comments, Warehouse B</b> (added by the February punch list)</p>			
<p>Not on the December list.</p>	<p>216 thru 239</p>	<p>Miscellaneous list of additional deficiencies related to Warehouse B. Nine of these items were removed because the government could not find the deficiency. The Ross Group included the price for item 237 in item 226, the total price for the</p>	<p>First added on the February punch list. Appellant not given an opportunity to correct. The appeal of these claims is sustained.</p>

		remaining items was \$19,074. On Exhibit 4 the government also included the cost for item 237 in item 226, but in addition the government included the cost for item 223 in item 86. The total costs the government claimed for the remaining items was \$9,869.	
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**Warehouse C**

1. Dry system inspectors test station test connections do not meet the requirements of NFPA 13.4-15.4.3. Must be located on the end of the most distant sprinkler pipe. Valves must be readily accessible. An "X" was placed on this item by Burkholder.	240 Crossed out	Removed because this item was accepted by the Base.	The government did not claim for this item.
2. Verify ¼: per foot pitch of dry pipe system	241	The Ross Group reported that they did no work on correcting this item. But, allocated \$1,377, the money was used for a	No corrective work performed. The government cannot recover for a deficiency when no corrective work was done

		second pour of concrete on the loading dock. Nevertheless, on Exhibit 4 the government claimed a cost of \$1,000.	with respect to the deficiency. The appeal of this claim is sustained.
3. Seal insulation at sky lights	242	The Ross Group reported that this was a workmanship defect and reported that it sealed insulation around the sky lights with vinyl tape, at a price of \$358. On Exhibit 4 the government claimed a cost of \$203.	Appellant assert in April 2000 that it would correct this item. However, the government did not permit appellant to correct. The government cannot recover when appellant was not permitted to correct. Moreover, there was no testimony regarding this item or the standard of workmanship that was required by the contract. The government brief offered no explanation. (Gov't. br. at 106, 111) We conclude that the government has failed to establish by a preponderance of the evidence that this was a contract deficiency, or that appellant was given the opportunity to correct. The appeal of this claim is sustained.
4. Seal insulation at ridge vents. An "X" was placed on this item by Burkholder.	243	The Ross Group reported that this was a workmanship defect and that it sealed insulation around the ridge vents with vinyl tape, at a price of \$1,477. On Exhibit 4 the government claimed a cost of \$838.	Appellant assert in April 2000 that it would correct this item. However, the government did not permit appellant to correct. The government cannot recover when appellant was not given the opportunity to correct. Moreover, there was no testimony regarding this item or the standard of workmanship that was required by the contract.

			<p>Moreover, the Burkholder list indicates that the original deficiency was corrected or was acceptable. The government brief offered no explanation. (Gov't. br. at 106, 111) We conclude that the government has failed to establish by a preponderance of the evidence that this was a contract deficiency. The appeal of this claim is sustained.</p>
<p>5. Manual fire alarm pull box stations missing from some door exits per National Fire Alarm Code, par. 5.8.</p>	244	<p>The Ross Group reported that it installed an alarm pull at each "walk door" and tied them into the alarm system at a cost incorporated into item 223. That price was \$5,056. Item 223 was not on the December list. That item pertained to missing pull station at Warehouse B. There is no way to allocate costs between item 244 and 223. On Exhibit 4, government claimed a cost of \$3,780.</p>	<p>Appellant assert in April 2000 that these were installed per contract requirements. (ASBCA No. 53202, R4, tab R11D at 13) There is no evidence that the additional pull alarms actually installed by the Ross Group were required by the plans and specifications. The Ross Group installed alarms at "walk doors" while the National Fire Alarm Code allegedly requires alarms "in the normal path of exit from the area with a manual fire alarm box at each exit on each floor." "Walk doors" and "normal path of exit" might be the same thing, but we have no testimony or other evidence to establish that. Moreover, the NFPA 72 Code is not in the record – although the government's fact brief at #489 erroneously asserted that it was in Trial Exhibit 13, tab 11 – there is no trial exhibit 13. It would</p>

			<p>be conjecture or speculation on our part to decide they were the same thing. Moreover, the Ross Group cost for adding these pull alarms was combined with the cost for item 223. Item 223 was not on the December list. The government has not explained how it arrived at its claimed cost of \$3,780. (The government brief states that exhibit 4 identifies the cost of items 223 and 244 as being \$5,533.96 (Gov't. br. at 42). That is not true. Exhibit 4 references item 86 for item 223. Item 86 has a claimed cost of \$3,864, when added to claimed cost for item 244 of \$3,780, equals a total for the two items of \$7,644.) Even if the cost for this item were recoverable, there is no reasonable way to allocate costs between item 244 and item 223 (or item 86), or to reach a jury verdict. The government has not carried its burden of establishing that the claimed cost of correction was reasonable. The appeal of this claim is sustained.</p>
<p>6. In room 202 there was a tear in the ceiling insulation</p>	<p>245 Description changed to read: "Rm 302, tear in ceiling insulation."</p>	<p>The Ross Group sealed the insulation in a different room, room 302, with vinyl tape and included the cost in item 208. On Exhibit 4 the government references item 208.</p>	<p>Work done for item 245 was not the same deficiency as listed on the December list. The government cannot collect for work done on a different deficiency for which no notice was given. Moreover, the costs were commingled with item 208,</p>

			which was not on the December list and thus not a recoverable cost. There is no reasonable basis in the record to allocate the costs between item 208 and item 245, or reach a jury verdict. The appeal of this claim is sustained.
7. In room 203 door is missing inside hardware	246	Removed because the government could not find deficiency.	The government did not claim for this item.
Not on the December list.  (Added as a sub item to the February list.)	247 Door does not close properly	The Ross Group reported that the door would not close and it shimmed hinges to permit the door to close. The Ross Group price was \$239. On Exhibit 4 government claimed the cost of \$136.	This is a new item that was not on a punch list until the February punch list; thus, appellant was not given the opportunity to correct. The government cannot collect for correcting defective work when appellant was not given the opportunity to correct. The appeal of this claim is sustained.
Not on the December list.  (Added as a sub item to the February list.)	248. Remove door frame angle-iron stiffener	The Ross Group removed temporary metal door-frame stiffener. The Ross Group and the government, on Exhibit 4, included the cost of this work in item 001.	This was a new item that was not on a punch list until the February punch list; thus, appellant was not given the opportunity to correct. The government cannot collect for correcting defective work when appellant was not given the opportunity to correct. The appeal of this claim is sustained.
Not on the December list.	249 Panic hardware installed on	Removed because the government could not find deficiency.	The government did not claim for this item.

(Added as a sub item on the February list.)	inside of room		
Not on the December list.  (Added as a sub item on the February list.)	250 Door hardware not properly secured, bolts not installed completely	The Ross Group stated that it installed all missing fasteners at a price included in item 247. On Exhibit 4 government claimed the cost included in item 247.	This was a new item that was not on a punch list until the February punch list; thus, appellant was not given the opportunity to correct. The government cannot collect for correcting defective work when appellant was not given the opportunity to correct. The appeal of this claim is sustained.
Not on the December list.  (Added as a sub item on the February list.)	251 Door closer needs adjustment	The Ross Group reported that it adjusted door closer at a cost included in item 247. On Exhibit 4 government claimed the cost included in item 247.	This was a new item that was not on a punch list until the February punch list; thus, appellant was not given the opportunity to correct. The government cannot collect for correcting defective work when appellant was not given the opportunity to correct. The appeal of this claim is sustained.
8. In room 201 there is a tear in the ceiling insulation	252 Description changed to read: "Room 301, tear in ceiling insulation."	The Ross Group states that it sealed the insulation in room 301 with vinyl tape and included the price in item 208. On Exhibit 4 the government claimed the cost included in item 208.	The December list referenced room 201. The February list referenced room 301, instead of room 201. This item was not on a punch list until the February punch list; thus, appellant was not given notice or the opportunity to correct the tear in room 301. Because appellant was not given the opportunity to correct, the government cannot recover that cost. Even if the cost of this item 252 were recoverable, the cost was commingled with

			other non-recoverable costs (item 208). The government did not segregate the costs. There is no reasonable basis in the record on which we can reasonably allocate the costs, or reach a jury verdict. Therefore, the cost is not recoverable. The appeal of this claim is sustained.
9. At the west end the overhead door motor is missing its cover	253	The Ross Group reported that it installed a cover. The Ross Group price was \$241. On Exhibit 4 the government claimed a cost of \$108. The government cited the contractor's submittal as the requirement for this cover.	The specification is silent with respect to a motor cover. We have not found the submittal in the record and cannot confirm that the submittal promised a cover for the motor. There was no testimony on this matter and the government brief cited to no evidence in the record. The government has failed to prove by a preponderance of the evidence that this was a contract requirement. The government claim fails for lack of proof. However, appellant asserted in April 2000 that it would reinstall the motor cover. Nevertheless, appellant was not permitted the opportunity to reinstall the motor cover. The government cannot recover where it does not allow the contractor the opportunity to do the corrective work. The appeal of this claim is sustained.
<b>Additional Comments, Warehouse C</b> (added by the February punch list)			
Not on the December list.	254 thru 280	Miscellaneous list of additional deficiencies related to Warehouse C.	First added on the February punch list. Appellant not given an opportunity to

		Seven of these items were removed, mostly because the government could not find the deficiency. The costs for ten of these items were included in the costs of other items. Of the remaining items the Ross Group price was \$17,864. On Exhibit 4 the government claimed a cost of \$8,120 for those items.	correct. The appeal of these claims is sustained.
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**General All Buildings**

1. Remove plastic from overhead doors and personnel doors.	281	The Ross Group said that it power washed plastic off the overhead doors and had to touch up some paint. The Ross Group price was \$2,322. The Ross group commingled this price with the price for item 283. On Exhibit 4 government claimed the cost of \$1,317, but did not include the costs for item 283.	Even if this cost were recoverable, the cost was commingled with other non-recoverable costs (item 283). The government did not segregate the costs. Since the Ross Group included both items 283 and 281 together, it becomes impossible to segregate out just item 281, especially when we note that the government includes in item 283 the cost for item 279. There is no reasonable basis in the record on which we can allocate the costs or reach a jury verdict. Therefore, the cost is not recoverable. The appeal of this claim is sustained.
Not on the December list.  (Added as a sub item of the February	282 Plastic still on kick plates and panic hardware throughout	The Ross Group states that it removed shipping plastic and labels from kick plates and that the price was included in item 212 at a price of \$728. Exhibit 4 indicates	Appellant asserted in April 2000 that it would correct this item. Appellant was not given the opportunity to correct. Because appellant was not given the opportunity to correct, the government

list.)		that the cost was included in item 212. Item 212 was for removing shipping tape from door hardware. Item 212 was not on the December List	cannot recover that cost. Even if this cost were recoverable, the cost was commingled with other non-recoverable costs (item 212). The government did not segregate the costs. There is no reasonable basis in the record on which we can allocate the costs or reach a jury verdict. Therefore, the cost is not recoverable. The appeal of this claim is sustained.
Not on the December list.  (Added as a sub item for the February list.)	283 Plastic still on overhead doors.	The Ross Group repeats the work done for item 281 and includes the cost as part of the cost of doing item 281. Exhibit 4 states that the cost for this item was included in item 279 – an item not included in the December list.	Appellant asserted in April 2000 that there was only one door that was still covered with plastic; and, indicated that it would be removed. Appellant was not given the opportunity to correct. Because appellant was not given the opportunity to correct, the government cannot collect for correcting defective work when appellant was not given the opportunity to correct. The appeal of this claim is sustained.
2. Pipe labeling is falling off. Verify directional arrows are correct direction.	284	The Ross Group states that it removed old pipe labels and installed new pipe labels with arrows pointing in the correct direction at a price of \$4,620. On Exhibit 4 the government claimed a cost of \$1,280 for this item. Exhibit 4 states that this was required by the contract at 09900-3.5	Appellant asserted in April 2000 that it was willing to correct this item (ASBCA No. 53202, R4, tab R11D-14). However, appellant was not allowed to make any corrections. The government cannot recover for corrective work when it did not allow the contractor the opportunity to correct the defect. The appeal of this claim is

			sustained.
<p>Not on the December list.</p> <p>(Added as a sub item for the February list.)</p>	<p>285 Sprinkler piping labels not installed with bands. Some labels are coming off.</p>	<p>The Ross Group states that it corrected this at a cost of \$2,257. On Exhibit 4 the government claimed a cost of \$1,009.</p>	<p>Appellant asserted in April 2000 that it was willing to correct this item (ASBCA No. 53202, R4, tab R11D at 14). However, this item was not on a punch list until the February punch list; thus, appellant was not given the opportunity to correct. The government cannot collect for correcting defective work when appellant was not given the opportunity to correct. The appeal of this claim is sustained.</p>
<p>Not on the December list.</p> <p>(Added as a sub item for the February list.)</p>	<p>286 Compressor arrows pointing wrong direction</p>	<p>The Ross Group states that it removed old pipe labels and installed new pipe labels. The price for this work was done as part of item 163 at a total included price of \$1,728. Item 163 was not on the December list. On Exhibit 4 the government claimed a cost of \$980. As to item 163, the government removed that item because it could not find the deficiency.</p>	<p>This item was not on a punch list until the February punch list; thus, appellant was not given the opportunity to correct. The government cannot collect for correcting defective work when appellant was not given the opportunity to correct. Moreover, there is no way to determine the extent of the work performed by the Ross Group and whether the work performed was limited to correcting defects or replacing all directional arrows. It appears as though the work performed exceeded the deficiency. Additionally, the grouping of the costs for different items makes it impossible to reasonably allocate the costs between the different items. The appeal of this claim is sustained.</p>
3.	287	The Ross Group states	Even if the cost of this item

<p>Sprinkler piping not painted in areas.</p>		<p>that it did this work included in the price of \$32,341 for item 173, but item 173 was not on the December list. Exhibit 4 indicates that the claimed cost was included in item 189, but item 189 was also not on the December list.</p>	<p>287 were recoverable, the cost was commingled with other non-recoverable costs (items 173, 189). The government did not segregate the costs. There is no reasonable basis in the record on which we can reasonably allocate the costs, or reach a jury verdict. Therefore, the cost is not recoverable. The appeal of this claim is sustained.</p>
<p>Not on the December list.  (Added as a sub item for the February list.)</p>	<p>288 Paint seismic restraint piping</p>	<p>Ross Group includes this within the price of \$32,341 for item 173, along with item 289, but item 173 was not on the December list. Exhibit 4 includes this as a claimed cost of 189. None of these items was on the December list.</p>	<p>This item was not on a punch list until the February punch list; thus, appellant was not given the opportunity to correct. The government cannot collect for correcting defective work when appellant was not given the opportunity to correct. The appeal of this claim is sustained.</p>
<p>Not on the December list.  (Added as a sub item for the February list.)</p>	<p>289 Paint sprinkler dry pipe drains</p>	<p>Ross Group includes this within the cost of item 173. Exhibit 4 includes this as a cost of 189. None of these items were on the December list.</p>	<p>This item was not on a punch list until the February punch list; thus, appellant was not given the opportunity to correct. The government cannot collect for correcting defective work when appellant was not given the opportunity to correct. The appeal of this claim is sustained.</p>
<p>4. Many interior panels still have dried mud from before</p>	<p>290</p>	<p>The Ross Group states it hand cleaned the interior panels at a cost included with item 144. Exhibit 4 also include the cost of this item as part of item 144, but item 144 was not</p>	<p>Even if the cost of this item 290 were recoverable, the cost was commingled with other non-recoverable costs (item 144, which was not on a punch list until the February punch list). The government</p>

installation		on the December list. Item 144 dealt with concrete splatter on wall panels on the load dock.	did not segregate the costs. The process of cleaning dried mud from interior panels would seem to be significantly different from cleaning concrete splatter off wall panels. There is no reasonable basis in the record on which we can reasonably allocate the costs, or reach a jury verdict. Therefore, the cost is not recoverable. The appeal of this claim is sustained.
5. Exterior panels damaged in several locations.	291	The Ross Group replaced 5 panels on the TTF, 1 on warehouse B, and 2 on warehouse C at a total price of \$5,815. On Exhibit 4, government claimed a cost of \$4,169.	The government did not offer any evidence that appellant was the cause of the damaged panels. We found that during the move in of equipment, DAC personnel did damage one garage door with a fork lift. DAC personnel were in the building loading, unloading, and setting up equipment since June 1999. These items first appeared on the December list months after the government had taken occupancy. There is no basis for a presumption that the panels were damaged by appellant. Government claim fails for lack of proof. The appeal of this claim is sustained.
Not on the December list.	292 thru 299	Additional deficiencies added by the February punch list that are related to exterior panels. Items 294 and 297 were removed. The Ross Group price for items 292	First added on the February punch list. Appellant not given an opportunity to correct. The appeal of these claims is sustained.

		and 299 were included in item 291; item 295 was included in item 148; remaining items had a total price of \$1,383. On Exhibit 4 the government claimed \$785 for those remaining items.	
6. Guardrails missing proper number of bolts and in some cases not attached tightly.	300	The Ross Group reported tightening and adding missing bolts at a price included in item 066. On Exhibit 4 the government claimed its cost as included in item 066.	Even if this cost were recoverable, the cost was commingled with other non-recoverable costs (item 066 was commingled with items 067, 068 that were not on the December list). The government did not segregate the costs. There is no reasonable basis in the record on which we can allocate the costs or reach a jury verdict. Therefore, the cost is not recoverable. The appeal of this claim is sustained.
7. In several locations paint is missing on structure above overhead door opening. Also insulation in these areas is loose and not sealed.	301	The Ross Group painted the support steel as part of the cost for item 173, but that item 173 was not on the December list. On Exhibit 4 the government claimed this cost as part of item 189.	Even if this cost were recoverable, the cost was commingled with other non-recoverable costs (items 173, 189 that were not on the December list). The government did not segregate the costs. There is no reasonable basis in the record on which we can allocate the costs or reach a jury verdict. Therefore, the cost is not recoverable. The appeal of this claim is sustained.
8. Painting on structure is not complete	302	The Ross Group reported that it painted the structural steel in the TTF building at a price	Even if this cost were recoverable, the cost was commingled with other non-recoverable costs (items 173,

<p>in many locations</p>		<p>included in item 173, but item 173 was not on the December list. On Exhibit 4 the government claimed the cost included as part of item 189, item 189 was not on the December list.</p>	<p>189 that were not on the December list). The government did not segregate the costs. There is no reasonable basis in the record on which we can allocate the costs or reach a jury verdict. Therefore, the cost is not recoverable. The appeal of this claim is sustained.</p>
<p>Not on the December list.</p>	<p>303 thru 317</p>	<p>Additional deficiencies added to the February punch list that are related to painting issues. The Ross Group did not have a separate price for these items, but included them all in the price for item 173. On the other hand, on Exhibit 4 the government claimed costs for these items to be included in items 189, 125, 103. No separate amount claimed for these items.</p>	<p>First added on the February punch list. Appellant not given an opportunity to correct. The appeal of these claims is sustained.</p>
<p>9. Down-spouts and splash blocks are damaged.</p>	<p>318</p>	<p>Ross Group replaced cracked splash blocks with new splash blocks and supplied splash blocks where splash blocks were missing, at a price of \$453. On exhibit 4, government claimed a cost of \$257.</p>	<p>The government has presented no evidence that the damaged splash blocks were damaged by appellant or that appellant failed to install splash blocks. Although the August list did indicate that there were damaged splash blocks at Warehouse C, there is no way to determine which splash blocks may have been damaged before occupancy and which were damaged after occupancy. This is the</p>

			government's burden to establish this allocation. It has not carried its burden and its claim fails. (App. br. at 45-46) The appeal of this claim is sustained.
Not on the December list.	319 through 334	On Exhibit 4 the government claimed a total cost of \$11,784.	These items were not on a punch list until the February punch list; thus, appellant was not given the opportunity to correct. The government cannot collect for correcting defective work when appellant was not given the opportunity to correct. The appeal of these claims is sustained.
Not on the December list.	Not on the February list.	Additional unnumbered items under item 335. The Ross Group showed a total price for these items of \$138,454. On Exhibit 4 the government claimed a total cost of \$84,976.	These items were not even on the February punch list; thus, appellant was not given the opportunity to correct. The government cannot collect for correcting defective work when appellant was not given the opportunity to correct. The appeal of these claims is sustained.

The government has made its case very difficult. Of the three punch lists, only the August 1999 punch list was timely created. Most of those 202 items were promptly resolved. Months after the government had taken over complete occupancy of the facility the government issued a December 1999 final punch list. After the owner has taken occupancy of the facility, it is more difficult to establish liability for the cause of the deficiency, since the owner has had ample opportunity to cause damage to the facility. In this case, after even more months had past the February 2000 punch list was created. This was the third list. This list went from the December 83 items (plus ten sub items) to 334 items (with a later addition of 8 items). This February list was prepared by people with no prior knowledge of the contract requirements. Moreover, 86 of these items were subsequently removed from the punch list, mostly because the government could not find the listed deficiency.

When it came to the issue of correcting the February deficiencies, the government would not allow appellant to correct any of the items. Finally, the government grouped together the costs for correcting items for which appellant might be liable with items for which appellant might not be liable. Each item had been separately identified; there was no explanation as to why each item could not have been separately priced. By grouping together items for which appellant was liable with items for which appellant was not liable, the government made it impossible to allocate the costs for the items for which appellant was liable, or to reach a jury verdict on most of those costs. The government commingled good with the bad, without any basis for allocating costs to the individual items. We did not even have any costs (savings) related to appellant's effort that could have aided in reaching a jury verdict.

Of the punch list items, we conclude that the government has sustained its burden to establish liability, causation, and resultant injury only with respect to items 002, 034, 035, and 045. We allow the repair contractor's price, which includes the government claim with all the contractor (Ross Group) mark-ups, in the total amount of \$3,287.

#### CONCLUSION

The appeal in ASBCA No. 53487, pertaining to the government's withholding of \$30,000 in liquidated damages, is dismissed with prejudice. The appeal in ASBCA No. 53202, pertaining to the payment of the contract balance, is sustained in the amount of \$176,097.54 (\$179,384.54 - \$3,287), plus interest under the Contract Disputes Act of 1978, as amended, from 1 June 2000 until paid. The appeals in ASBCA Nos. 53371 and 53569 are also sustained.

Dated: 4 May 2006

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RONALD A. KIENLEN  
Administrative Judge  
Armed Services Board  
of Contract Appeals

I concur

I concur

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MARK N. STEMLER  
Administrative Judge

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EUNICE W. THOMAS  
Administrative Judge

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Acting Chairman  
Armed Services Board  
of Contract Appeals

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Vice Chairman  
Armed Services Board  
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA Nos. 53202, 53371, 53487, 53569, Appeals of Mitchell Enterprises, Inc., rendered in conformance with the Board's Charter.

Dated:

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CATHERINE A. STANTON  
Recorder, Armed Services  
Board of Contract Appeals