

JIMENEZ, INC.

CONTRACT NO. V626C-597

**VA MEDICAL CENTER
NASHVILLE, TENNESSEE**

**VABCA-6351-6354,
6421-6423,
6591 & 6611**

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OPINION BY ADMINISTRATIVE JUDGE PULLARA

These appeals by Jimenez, Inc. (Jimenez or Contractor), Mobile, Alabama, are taken from final decisions of a Department of Veterans Affairs (VA or Government) Contracting Officer (CO) in connection with Contract No. V626C-597 (Contract) for the renovation of patient wards at the VA Medical Center (VAMC), Nashville, Tennessee. The subject contract, in the amount of \$1,974,305, was due to be completed in one year. Change orders eventually increased the Contract price to \$2,044,643.74 and extended the contract time by five days. The Contractor received payments totaling \$1,807,000.47, leaving a balance of \$237,643.27. The Contractor's total performance period was two and a half years, and it claims it incurred total costs of \$2,682,736.65. Performance ended when VA acted under the Inspection of Construction clause, notifying the Contractor that VA would correct all remaining defective work, that VA would charge its costs of correction to the Contractor, and directed the Contractor to vacate the premises. The Contract balance was never paid.

The Contractor seeks to be paid the \$875,736.18 difference between its claimed total costs and the total payments it had previously received. This claim arises under an alleged improper constructive termination for default stemming from VA's breach of the Contract by means of a bad faith dismissal of the Contractor from the job site.

In the alternative, the Contractor seeks to recover \$768,716.62, which sum represents the total of (a) \$29,417.90, as termination settlement costs under a constructive termination for convenience theory, (b) \$237,643.27, as the unpaid balance of the contract, and (c) \$501,655.45, as the sum of three claimed equitable adjustments to the contract price.

The equitable adjustment claims are for (a) VA's alleged wrongful limitations on the Contractor's access to perform work in the second floor ceilings, causing delay damages of \$107,200.30 (field office and home office overhead for 166 days); (b) VA's alleged wrongful rejection of the Airtherm Air Handler Unit (AHU) delivered to the job site by the Contractor, causing delay damages of \$226,986.84 (field office and home office overhead for 330 days) and direct damages of \$100,954.11 for scrapping and removing the AHU; (c) delay by VA in approving Trane AHU submittals, causing delay damages of \$54,756.29 (field office and home office overhead for 82 days) and direct damages of \$11,757.90 for Trane's costs of preparing and delivering multiple resubmittals.

The evidentiary record before the Board includes the Rule 4 Appeal File and the Parties' Appeal File Supplements, (R4, tabs 101-922), Hearing Exhibits (Exh A-1 to A-4; Exh G-1 to G-2; and Exh B-1) and the five-volume transcript (Tr. 1-1736) of the hearing held in this matter in Nashville, Tennessee.

FINDINGS OF FACT

On June 16, 1997, VA awarded fixed-price construction Contract No. V626C-597, Ward Upgrade Phase II for Patient Privacy, to Jimenez in the amount of \$1,974,305. The Contract was for work at the VA Medical Center (VAMC), Nashville, Tennessee. The work included the renovation of existing patient wards on the third floor, including demolition of old and installation of new walls, ceilings, doors, windows and floors. The work also included all necessary utilities and subsystems for a complete, operational patient unit, including nurse call, medical gas and fire alarm systems. In addition to working on the third floor, work also had to be performed in two other locations. First, certain work had to be performed below the floor of the third floor wards, i.e., in the ceiling spaces of the second floor. Second, a new replacement heating, ventilating and air-conditioning system was to be installed, including ducts and an Air Handler Unit (AHU) in the mechanical penthouse on the fourth floor roof. (R4, tab 109)

Completion of work was required within 365 calendar days of receiving the Notice to Proceed. (R4, tabs 109 and 209) According to the Notice to Proceed, effective July 14, 1997, Contract completion was due July 13, 1998. (R4, tab 110)

The CPM Schedules

Section 01311 of the Contract Specifications, "NETWORK ANALYSIS SYSTEM" (NAS), provided for the Contractor to develop and maintain a plan and schedule for the Contract work using the Critical Path Method (CPM) showing the completion of the Contract by the date specified therein. A CPM schedule identifies the activities necessary to complete a project and establishes

the logical sequence in which those activities must be completed, determining when an activity must begin and the time necessary to complete the activity. The longest continuous path of activities where the start of an activity is dependent on the completion of a prior activity and for which there is no "float" is identified as the "critical path." "Float" in a CPM schedule is the number of days difference between either an activity's early start and late start or the early finish and late finish. Where the early start and late start, and the early finish and late finish, dates are the same, there is no "float" and the activity is "critical."

The Contractor submitted and maintained Critical Path Method (CPM) schedules, the first of which indicated a start date of July 14, 1997, and a completion date of July 14, 1998. The original critical path went through Notice to Proceed, Mobilization, Demo Walls/Ceilings, Electrical R/I Ceiling, Electrical Wire R/I, Panel and Discon, Audio Nurse Call, Pre-punch Inspection, Final Cleanup, Punch List/Demobilization.

The CPM updates submitted through May 31, 1998, indicated the project to be on schedule with the completion date of July 14, 1998. (R4, tab 564) By July 1998, however, the work was only 69% complete. (Tr. 168-69) The August 31, 1998 CPM update, showed the project to be 145 work days, or approximately 7 months, behind schedule, with a project completion date of February 5, 1999. (Tr. 39-40) According to that update, the critical path went through mechanical work on the third floor, not through the AHU in the penthouse. (Tr. 163-66)

Over the next few CPM updates, including the last update in November 1998, the project fell further behind by about a month, with the projected completion date slipping to March 8, 1999. By January 1999, the work was only 90% complete. By November 1999, when performance ended, the work was 98% complete. (R4, tab 513; tr. 170)

The AHU was not on the critical path of the first, or any subsequent, CPM schedule presented by the Contractor during the course of contract performance. The original schedule showed the installation of the AHU during March and April 1998. (R4, tab 561) The Airtherm AHU arrived on site in mid-April 1998 but was rejected by VA in August 1998. (Tr. 163-66; R4, tab 17) A Trane AHU was submitted to VA in August 1998 and finally approved in December 1998. (R4, tab 320-21) The Trane AHU was delivered to the site in March 1999 and started up in May 1999. (R4, tabs 337, 345) The propriety of the VA's rejection of the Airtherm unit, and the delays in approval of the Trane submittals, will be considered in greater detail below.

At trial, Appellant's expert argued that the original CPM was defective in numerous details, and that a corrected CPM, with delays due to the AHU inserted therein, demonstrated that the AHU delay was the sole cause of delay in Contract completion. (Tr. 136-38; Exh. A-1)

VA countered that such analysis was faulty as it failed to take into account other critical work remaining at the end of the performance period. According to VA, it was that work, and not the AHU work, that was the primary cause of non-completion. VA's witness identified the critical items as nurse call, fire alarm and medical gas, as well as test and balancing of the AHU. (R4, tab 564; tr. 107-217)

Finally, the Contractor argued at trial that certain items of work on the third floor were tied into the late installation of the AHU, on the theory that the installation of those items depended on having conditioned air. However, this theory is neither supported nor corroborated by any facts in the record. No work was shown to have been delayed due to lack of conditioned air.

Access To Work Space

Although the contract work focused on the renovation of the third floor, access to the ceilings of the second floor was necessary to install waste and domestic water piping serving the third floor. However, the second floor was an active nursing unit and was to remain occupied during the contract work. The ward could not be emptied as there was not another ward available. The Contract specifically indicated that access would be limited during construction. (Tr. 135-54) Contract Drawing G1.01, Third Floor North, General Note No. 5, as modified by Amendment No. 3, provided:

Under no circumstances shall construction activities interfere with safety of the public, owner's employees, or construction personnel. Adhere strictly to the confines of areas of work; do not interrupt hospital functions at any time. Remaining areas of the building outside the limits of construction shall remain operational and not be disrupted by the scope of this work.

EXCEPTION: The construction area directly below Third Floor North is an active nursing unit and will be occupied during this work. Access above these ceilings will be necessary to complete this work. Perimeter rooms are patient bedrooms. *Access to these patient rooms will depend on patient census for the ward. VAMC will make at least two (2) adjacent rooms available to the contractor at all times for new work*

relating to Third Floor North. Coordinate construction with VAMC resident engineers. (Emphasis added.)

(R4, tab 105)

The foregoing language was added by an amendment to the original solicitation when contractors attending the pre-bid walk-through inquired about access to the second floor during construction. The COTR explained as follows:

[A]t the prebid, everybody that walked the job said we need to know what your restrictions are on 2-North. And you know, we walked the wards and then came back to the conference room and, you know, overwhelmingly all of the plumbing contractors were saying you need to tell us how you're going to give us those rooms on 2-North or what restrictions you're going to impose on us if you're not going to just give us the whole ward. And we said okay, we wrote the addendum saying we would turn over two adjacent rooms at a time and after that, . . . I didn't get another call regarding the matter.

(Tr.1353)

The nurse manager of the second floor during the contract work was Nikki Loven. (Tr. 930) When asked to describe the patient census on the second floor during the several years prior to this project, Ms. Loven stated that it was a forty-bed ward, sixteen acute care, telemetry cardiac monitoring, eleven respiratory isolation, TB, and six cardiac transplant beds. The ward was close to full all the time. (Tr. 930-31)

When asked how it was determined which rooms would be available for the work to be performed in the ceilings of the second floor, Ms. Loven explained as follows:

[W]e would look at the census and look at the patient mix. But it can change from hour to hour, depending on what

walks in the door from the emergency room or anywhere. . . . it's an acute care hospital and you never know what's going to come in through the triage emergency room or who's going to need a monitored bed from another floor, from the MICU -- you receive patients from all areas.

(Tr. 934-35)

The Government prepared a chart from its records depicting the layout of the second floor and the turnover dates of the various blocks of rooms. That chart, referred to as the Access Chart, shows that 35 blocks of rooms, consisting of from 1 to 7 rooms per block, mostly averaging 2 rooms per block, were turned over to the Contractor during periods ranging from October 6, 1997, to July 15, 1998, or 285 days. The total number of rooms turned over was 77, of which 40 were patient rooms. (R4, tab 616)

Ronald Hopper, the plumbing superintendent for Ryan Reynolds Mechanical, Jimenez' plumbing subcontractor, testified that his company was to do the rough-in and trim-out of the plumbing system and the gas for the head walls in each patient room. Mr. Hopper was in charge of layout. He took the blueprints and laid the job out, i.e., where the core drilling had to be done for the drain pipes to go down from the third floor into the second floor ceiling. He was in charge of manpower, ordering materials and coordination with other trades.

Plumbing work began in August 1997 following demolition and removal of fixtures on the third floor. (Tr. 1260-61) Jimenez' superintendent would coordinate with VA and other trades. (Tr. 1262-66) The plumber could not start work until Jimenez prepared the rooms by taking the ceiling tiles out and putting plastic along the walls. Mr. Hopper could usually finish a room in a day's time, maybe a day and a half. The plumber would pick up trash, sweep and advise

Jimenez that he was ready for the next space. Jimenez would finish the room, including patching holes, putting the ceiling tile back in, pulling the plastic down and sweeping. Generally, Mr. Hopper stated, he had at least two rooms at a time, so when Jimenez finished prepping one room, the plumber would go right into that room and start work while Jimenez personnel were prepping the next room. Until the room was clean, inspected and accepted by the VA, another block of rooms would not be turned over. Some delays occurred when Jimenez would not get a room cleaned up in time for another block to be turned over quickly. That caused the plumber to be delayed sometimes two or three days or, on one occasion, a week. The plumber was also delayed by the drywall and tile trades. The drywall men were putting framing and drywall in areas in which plumbing was yet to be done. The plumber had to knock studs loose in order to get a core drill in. Mr. Hopper referred to it as a lack of coordination. By the time the tile people got to the job, the plumbers were pretty well through with the rough-in, waste vents and water piping. The tile had to be laid before the plumber could start placing fixtures and trimming it out. However, the tile contractor couldn't keep a full crew on the job and the baths were being tiled very slowly, which had a significant impact on the plumber. Mr. Hopper attributed delays about equally to other trades and to getting access on the second floor. (Tr. 1268-74)

Mr. Hopper would have preferred to get rooms in a pattern such that he could finish a run of piping from one end to the other, but that didn't always happen. Sometimes he had to run his plumbing just outside a room, put a cap on it, work in another area, come back later, uncap it and continue it on to the next block of rooms to make his tie-in. (Tr.1276)

When asked whether that was a "big deal," he answered, "Not really." He explained that the only difference between that and working one end to the

other was that he'd have to move some of his material down the hall, but that the work was pretty much the same in each room. (Tr. 1277) He said that he didn't really have that much material on the second floor anyway since it was an occupied patient area, so that he couldn't take much more than what he was going to be using while he was there. (Tr. 1277-78) Mr. Hopper did not consider the manner and speed with which VA turned over rooms to be a source of delay to his progress. (Tr. 1278)

The Contractor contacted the CO in writing on January 12, 1998, to complain that delays were occurring on the second floor due to lack of access and that such delay was impacting other trades and overall progress. (R4, tab 412) The CO responded on January 12, 1998, pointing out the Contractor's obligation to give notice prior to starting work in a specific area of the site. Moreover, the Contractor had yet to complete coordination plans with its plumbing subcontractor. The CO denied that a Government-caused delay occurred. (R4, tab 413)

By letter dated November 13, 2000, the Contractor requested a final decision "on the dispute involving a reasonable interpretation of General Note No. 5, Sheet G1.01, Amendment No. 3, as this note relates to the Government's rights and ability to restrict access to the ceilings below the third floor north." By final decision dated February 8, 2001, the Contracting Officer denied the claim. (R4, tab 442) The Contractor seeks \$107,200.30 for field office overhead and unabsorbed overhead for 166 calendar days of delay from February 12, 1998, to July 27, 1998. The Contractor viewed such delay as resulting from VA's failure to provide what the Contractor considered to be reasonable access to second floor rooms. (R4, tab 804)

Rejection of Airtherm AHU

VA's on-site technical representative was the Contracting Officer's Technical Representative (COTR), Samuel D. Smart, a project staff engineer for the VAMC. He began his career with VA as a trainee 10 years earlier. (Tr. 586) Mr. Smart was an electrical engineer by degree and a general engineer by practice, but not a mechanical engineer. (Tr. 614) Two other VA staff engineers, neither of whom were mechanical engineers, occasionally assisted him. (Tr. 633-34) Assistance from the VA's Architect/Engineer (A/E), Gobbell Hays Partners, Inc., Nashville, Tennessee, came from the A/E's engineering consultant, Mike Gable of Smith Seckman Reid, Inc., Consulting Engineers, Nashville, Tennessee. (Tr. 586, 589)

Contract Specification Section 15763, AIR HANDLING UNITS, required that the unit be "a factory fabricated assembly consisting of fan, coils, filters, and other necessary equipment" and be certified by the Air-Conditioning and Refrigeration Institute (ARI). (R4, tab 102, Sect. 15763, Para. 1.1-B.1 and 1.3-B1) After factory fabrication, the unit was to be tested and then split for shipping and jobsite rigging. (Para. 2.1-A.1. 3)

The unit was also required to be "entirely of double wall galvanized steel construction." (Para. 2.1-A.1.1) The casing, which includes wall, floor and roof, was required to be "double wall galvanized steel, minimum 2 inches thick, constructed of minimum 18-gauge outer skin and 20-gauge solid or perforated inner skin. Perforated panels are not allowed in cooling coil sections, floors, door panels and where solid sheet is required to avoid air bypass." (Para. 2.1-C.2) "Maximum overall thermal conductance of casing panels shall not exceed 0.12 Btu/hr-sq. ft.-degree F." (Para. 2.1-C.4) "AHU's shall be designed to insure that there is no condensation on the exterior of the unit based on outside

design conditions. Thru [sic] metal connections between inner and outer panels shall be kept to an absolute minimum. If tubular structural members are used inside of tube shall be insulated equal to casing.” (Para. 2.1-C.5)

With regard to insulation, Specification Section 15763, Para. 2.1-E, stated:

E. Insulation

1. Insulation: Section 15250, INSULATION.
2. The walls, roof and floor of the AHU shall be insulated. Insulation shall be held securely in position between the inner and outer skin of casing.
3. Insulation shall be same thickness as specified for AHU casing. 1-1/2 pound density rigid glass fiber. Neoprene-coated, matt-faced , or 1 mil plastic liner which meets the requirements of NFPA 90A is required when perforated sheet-metal inner wall is used. Insulation shall meet ASTM 1071 requirements.
4. Glass fiber insulation shall not be exposed to the airstream.

(R4, tab 102)

In early August 1997, the Contractor sent its submittal for the AHU to VA, through the A/E. The Contractor was purchasing an Airtherm AHU through Mechanical Industrial Sales, Pensacola, Florida (MIS). (R4, tab 211) MIS had furnished hundreds of air handlers previously, many to hospitals, and several to VA. (Tr. 433-34) Mr. Jimmy Nicholson of MIS put the submittal package together, assisted by Airtherm. (Tr. 432) The representative for Airtherm was Charles Tennant, who had been with the company for 32 years. (Tr. 298) Airtherm had been in business for 70 years. (Tr. 300)

Mike Gable of Smith Seckman Reid, VA’s engineering A/E, reviewed the submittal, made six comments, checked the box, “Amend & Resubmit,” and forwarded the package to VA on August 11, 1997. On September 16, 1997, Mr. Smart, COTR, returned the submittal to Jimenez, adding 18 comments, the last of which was “Comply with AE notes.” (R4, tab 211)

The Contractor forwarded its AHU resubmittal on November 19, 1997. Mr. Gable had only one minor comment and checked the box, "Make Corrections Noted." The COTR, however, had several other questions and asked the Contractor to submit certain requested information. The COTR informed the Contractor to resubmit directly to him rather than through Mr. Gable. (R4, tabs 211, 235)

The third Airtherm submittal was made on December 31, 1997. It was apparently reviewed only by the COTR who returned it with comments on January 7, 1998, stating, "Comply with the notes above. Do not resubmit." (R4, tab 211)

The Airtherm unit was ordered and arrived on the project site between April 13 and 14, 1998. (R4, tab 17) The unit measured approximately 9' wide, 5-1/2' high and 29' long and consisted of thirteen sections. (R4, tab 211; tr. 342) Each section consisted of a box frame, made of welded steel angle channels, with double-wall panels attached to the top, sides and bottom of the frame. A panel consisted of outer and inner plates of galvanized steel and a core of rigid, fiberglass insulation. The panels had tabs along the edges through which the panels were screwed to the frame, leaving a 2- to 3-inch gap along the joints between panels. This gap was insulated by the placement of 3/4" thick isocyanate foam board insulation along the channels, on the interior of the unit. This foam board, similar to styrofoam used in ice chests, was faced with aluminum foil but the edges were exposed where cut to fit.

By letter dated May 18, 1998, the Contracting Officer notified the Contractor that VA had performed a preliminary, informal inspection of the AHU. The letter set forth a list of 20 "deficiencies." The list was based on comments furnished by the COTR. The Contractor answered each of the 20 items and, for the most part, either agreed with VA, and indicated willingness to

correct or modify as necessary, or pointed out the manner in which VA was in error. (R4, tab 217) The item with which the Contractor strongly disagreed, and that eventually became the greatest point of controversy, was as follows:

6. AHU insulated double walls are not continuous. The unit is basically a single wall unit with flanged "pans" with insulation inserts screwed to its exterior. There are breaks in the insulation where the perimeter of each "pan" is screwed to the unit. These breaks will cause energy loss and condensation. [Contract Specification] Section 15763, 2.1,A.1, requires that the AHU be entirely of double wall galvanized steel construction. Section 15763, 2.1,C.5 states that the AHU shall be designed to insure that there is not condensation on the exterior of the unit, and goes on to insure that through metal connection between inner and outer panels be kept to a minimum and insulation is continuous. The specification specifically requires that the maximum overall thermal conductance of AHU not exceed 0.12 BTU/hr-sq ft-degree F (15673,2.1,C.4 and F.2 & G). Section 15763, 1.3, E addresses condensation forming on the AHU as a latent defect.

(R4, tab 213)

The CO directed the Contractor to correct work that did not conform to the contract requirements, at no additional charge to VA. In a June 30, 1998 memorandum to COTR Smart, the A/E's Mr. Gable listed 12 items which he deemed not to be in compliance with the contract. Again, the most critical item dealt with the issue of whether the AHU was "entirely of double wall galvanized steel construction." Mr. Gable stated:

The Airtherm Unit provided is made of single wall construction with what appears to be field installed insulated panels attached with sheet metal screws to the outside of the unit. Not only does the unit installed not comply with the Contract Documents, it also is not the unit submitted by the mechanical

contractor. The unit submitted was a “Factory fabricated . . . solid 2” double wall construction air handling unit.”

* * * * *

9. All insulation for the AHU should be contained within the inner and outer skin of the double wall casing, as required by Specification Section 15763-2.1, E. The board insulation strips provided on the inside of the AHU are unacceptable.

(R4, tab 215)

On July 13, 1998, the CO sent a “Cure Notice” to the Contractor. She referenced her May 18, 1998 letter and stated that VA had not received a response regarding the Contractor’s intended corrective action. She also enclosed a copy of her previous letter, the COTR’s comments, and Mr. Gable’s June 30, 1998 memorandum. She noted that the contract completion date was July 18, 1998, and that the project was only approximately 69% complete. It was apparent that the Contractor would not meet the completion date. She directed the Contractor to furnish a plan of correction regarding the AHU deficiencies and a revised progress schedule within 10 days.

The Contractor replied by letter dated July 17, 1998, identifying actions taken since receipt of the CO’s May 18 letter, stating proposed corrective actions and proposing a site meeting on the double-wall construction issue, which needed to be resolved before other corrective measures could be completed. (R4, tab 17)

Prior to the meeting, Mr. Gable sent a memorandum to COTR Smart on July 20, 1998, essentially reiterating his June 30 memorandum and recommending that “the AHU be replaced with a continuous double wall unit as required by the specifications.” (R4, tab 18) The next day, July 21, 1998, Mr. Gable provided some “minimum modifications to the AHU [that] will improve its performance, reduce the risk of exposing eroding insulation to the air stream and aid in the prevention of

'sweating' on the unit outer casing," in the event that the VA opted not to replace the unit. (R4, tab 19)

On July 28, 1998, a meeting was held. The CO viewed the purpose of the meeting as "to discuss possible field modifications that could be accomplished to bring the AHU into compliance with the specifications." (R4, tab 26) According to the Airtherm representative, Charles Tennant, the unit already met specifications but he went into the meeting with the purpose of offering to do whatever it took, above and beyond the specifications, to prevent the unit from being rejected. (Tr. 324) Subsequently Mr. Tennant provided the COTR with a list of previous installations of its double wall AHU. (R4, tab 235)

In an August 3, 1998 memorandum to the CO, the COTR recommended that "final, official rejection of the Airtherm AHU on site be issued to the Contractor" for eight reasons summarized as follows: (a) AHU does not meet contract specifications, (b) proposed field modifications will void ARI certification, (c) field modifications would conflict with specification requirement (15763, 2.1, A, 3 and 1.1, B, 1) that the AHU be fully assembled at the factory, (d) A/E had recommended replacement of AHU and had informed COTR that "they will not be held accountable for problems that may result from VA acting against their advisement," (e) if the AHU was not replaced and then performed poorly and caused downtime, patient care would be compromised, (f) conductance of unit (0.185) exceeds that specified (0.12), (g) VA lacks confidence in Airtherm's reassurances regarding AHU performance, and (h) AHU is not supported on continuous rails as specified. (R4, tab 225)

By letter to the Contractor dated August 3, 1998, the CO rejected the Airtherm unit, giving only two reasons: first, extensive field modifications would have to be accomplished which still would not insure that the AHU would meet

contract requirements, and, second, the field modifications would void the ARI certification. She directed the Contractor to replace the AHU, without charge to VA with a unit that complied with contract requirements. (R4, tab 226)

On August 10, 1998, the Contractor advised that it was proceeding with the removal and replacement of the Airtherm AHU as directed. (R4, tab 229) However, another round of correspondence occurred in late September 1998, with each party essentially restating their positions. (R4, tabs 31 and 32) On October 2, 1998, the Contractor finally directed Airtherm to remove its AHU from the site. (R4, tab 235)

By letter dated October 15, 1999, the Contractor requested a formal Contracting Officer's final decision on the dispute involving VA's rejection of the Airtherm AHU. The Contractor sought \$475,482.85 and a contract time extension of 483 calendar days. The Contractor asserted that VA had improperly administered the contract, that the COTR acted arbitrarily and capriciously, and exceeded his delegated authority, that VA improperly rejected the Airtherm AHU when it did not prove that the unit did not conform to contract requirements and that the CO exceeded her authority and caused economic waste in directing removal of the unit rather than requiring repairs to bring the unit into compliance with the contract as read by the Government. (R4, tab 235)

On June 30, 2000, the CO issued her final decision in response to the Contractor's October 15, 1999 claim. It was asserted that the Airtherm AHU did not meet contract requirements. Those requirements were, in summary, (1) that the AHU was not "entirely of double wall galvanized steel construction," (2) that uninsulated areas were covered with board insulation glued to the inside of the unit, unprotected and exposed to the airstream, (3) that the conductance of the 3/4" board insulation did not meet the thermal conductance level specified, (4) that the unit did not have adequate structural base members supporting the floor, and (5)

that the filter section had an access panel screwed to the unit wall rather than an access door. The decision went on to state that it was the judgment of VA and its A/E that field modifications would not have been sufficient to guarantee the performance and quality of the AHU. The CO asserted that rejection of the unit was justified and that acceptance of a deficient unit raised concerns regarding potential recurring maintenance problems and compromised the quality of air supplied to acute care nursing wards. In response to the Contractor's economic waste argument, i.e., that the cost of replacement far exceeded the cost of repairs, the CO argued that the repairs would not have brought the AHU into contract compliance and that a cost comparison was invalid. With respect to the Contractor's assertion that VA failed to identify the precise deficiencies considered in rejecting the Airtherm, the CO argued that the COTR conveyed the deficiencies to the Contractor during the period April 30 to June 12, 1998, that the CO sent a May 18, 1998 letter to the Contractor identifying the precise deficiencies, and that the July 13, 1998 Cure Notice precisely identified the deficiencies. The CO denied the claim, concluding that the Airtherm unit did not comply with the contract requirements and that corrections proposed by Jimenez would not have brought the unit into compliance. With respect to the time extension requested, such claim was denied on the basis that the CPM furnished by Jimenez did not show that the AHU was on the critical path of work. She concluded that the delay in progress of the work was not due to delay in providing the AHU but was caused by Jimenez' lack of progress on critical path work unrelated to the AHU. (R4, tab 239)

At the hearing in this matter, COTR Smart testified that the Contractor's submittals repeatedly referenced insulated double-wall construction, so he was very surprised to see insulation in the air stream. (Tr. 594) He referred to the unit as a single wall unit with double wall, insulated panels, or pans, attached to the exterior of the unit. (Tr. 628) He said the unit was not "entirely double-wall construction."

(Tr. 595) “Entirely” to him meant no gaps at any point. (Tr. 604) VA’s A/E’s engineering consultant, Mike Gable, did not testify.

Charles Tennant of Airtherm testified that “entirely double wall” means that each and every section of the unit shall be double wall. He explained, “There’s a lot of air handlers that don’t require anything prior to the cooling coil be insulated, and, in that case, it’s not entirely a double wall unit. When you say entirely double wall, that means the end-user wants every section to be insulated and double walled.” (Tr. 309)

The Contractor’s quantum claim, as revised prior to trial, included the following: “Field Office Overhead” and “Unabsorbed Overhead,” \$226,986.84, and “Direct Cost,” \$100,954.11 (including 10% profit and 1.8% bond), for a total of \$327,940.96. (R4, tab 802) The direct costs included “the claims of Airtherm, Mechanical Industrial Sales, all non-reusable materials (filters and filter housing, etc.) and the labor to demolish and remove the Airtherm AHU and to reinstall the AHU (TRANE).” (R4, tab 802) The breakdown of direct costs may be summarized as follows:

- (1) Airtherm: March 26, 1998 invoice from Airtherm to Jimenez, the price of the unit was \$39,629.12. In addition, Airtherm claimed that interest on the unpaid invoice increased the total to \$48,729.23. A salvage credit in the amount of \$2,813.47 was stated for the fan and motor. (Tr. 394)
- (2) Mechanical Industrial Sales: Costs of \$16,623.59 included \$4,110.66 for having lost its commission for the Airtherm AHU; \$940.80 for three trips to the job site; \$6,400.00 for “Labor responding to submittal reviews – time for preparing for job site meetings due to submittal review due to changing job specifications, 160 man-hours @ \$40.00”; \$865.00 for “Copies 875 resubmittals – letters to VA \$1.00”; \$146 for “Faxes 73 \$2.00”; \$83.65 for “Mail & over night 7 overnight \$11.95;” overhead and profit were added at 17.5% and 15% respectively. (Tr. 462-64)

- (3) Mastercraft-Master Clean: \$2,200 invoice “to air wash, or brush all return air feeder lines, 4 trunk lines” “to bring return air lines and trunk lines back to new state for installation of Trane AHU.” This was necessary due to the extended period of time the duct work remained without being part of a filtration system. (Tr. 229)
- (4) Aeromechanical: \$11,162 invoices for “materials used in the installation of airtherm AHU which became unusable for Trane AHU upon Airtherm’s rejection,” including filter housings and filters. The filter section and accessories were custom built and were not able to be returned or reused with the Trane AHU. (Tr. 229)
- (5) Ferguson Enterprises: \$62.36 invoices for unusable materials.
- (6) Home Depot: \$355.37 invoices for miscellaneous unusable items.
- (7) Sentry Steel Service: \$4,171.50 invoice “to hoist Airtherm AHU up to penthouse and to remove Airtherm AHU from penthouse.”
- (8) Labor: \$2,288.39 to demolish and remove Airtherm AHU, per payroll information.
- (9) Labor: \$4,561.26 to reinstall AHU (TRANE), per payroll information.

In a March 22, 2000 Audit Report, the Defense Contract Audit Agency (DCAA) auditor questioned the Airtherm and Mechanical Industrial Sales claims totaling \$61,965 as follows:

We noted the contractor has not paid nor recorded a liability for the proposed Airtherm or Mechanical Industrial Sales claims. We also noted that no cost support was provided for the proposed \$44,504 Airtherm subcontract amount, while support for the proposed \$17,461 Mechanical Industrial Sales, Inc. subcontract consisted of a single page letter without any further cost support for the amounts proposed. We requested that the contractor provide documentation concerning the extent of their review of proposed subcontract cost. However, no documentation was provided.

(R4, tab 143)

The auditor verified the balance of the costs without exception. Appellant subsequently furnished a May 7, 2001 Schedule of Costs which provided the Airtherm invoice to Jimenez. (R4, tab 802) However, the only support for the Mechanical Industrial Sales claim was, again, a single page letter, with no supporting documentation of any obligation on the part of Jimenez to pay anything to Mechanical Industrial Sales.

Trane AHU Submittals

Following rejection of the Airtherm AHU, the Contractor transmitted a Trane Company Submittal, dated August 19, 1998, prepared by Shivers-Harris, Mobile, Alabama. Mr. Mike Gable of SSRI, the A/E's engineering consultant, completed his review of the transmittal on August 26, 1998, and provided VA with a total of five comments, recommending that the Contractor make the corrections noted (humidifier only) and amend and resubmit (A/C unit only). The comments on the A/C unit are summarized as follows: (1) provide marine lights in each module having an access door and a marine light in the discharge plenum, (2) questioned length of the AHU (too long by one foot) and its interface with existing slab opening, (3) provide an itemized breakdown of the internal static pressure losses, (4) verify that the fan motor would perform without overloading and that the diffuser plate section static pressure loss (stated by the manufacturer to be 0.80" w.g.) would not exceed 0.10" w.g., and (5) provide certain humidifier switches. (R4, tab 311)

In VA's Return of Submittal 101, dated August 27, 1998, the COTR included the A/E's comments and added twenty-six comments summarized as follows: (1) 24" wide doors are specified; if not possible, maximize width of each door; a person must be able to enter each access section; indicate widths of doors less than 24"

wide, (2) each access section door to have a window, (3) label locations of after filter and humidifier, (4) identify after filter & rack, (5) certify fan motor tested per NEMA MG-1 standards, (6) water pressure drop through cooling coil shall be less than 5 ft., (7) capacity of cooling coil is too low, (8) certify that maximum overall thermal conductance of the casing panels does not exceed 0.12 Btu/hr-sf-degree F, (9) plot static efficiency on the fan curve and insure that performance criteria are met, (10) static pressure is higher than the 7.2" total specified, (11) certify that excessive deflection of structure will not occur, (12) interior wall to be constructed of galvanized steel, (13) exterior wall to be 18 gauge, (14) verify operation of safety latches, (15) certify construction details of blender section, (16) certify compliance of coils with specification requirements, (17) insulation to be 2" thick, (18) certify construction details of drain pans, (19) certify maximum pressure drop across diffuser, (20) certify fan ratings in accordance with AMCA 210 or ASHRAE E51, (21) certify details of fan construction, (22) marine light required, (23) provide hinged door both sides of pre-filter module, (24) coordinate supply discharge opening with size and location of existing penetration, (25) provide access door each side of discharge plenum, and (26) expressed concerns regarding steam humidifier, such as proper location of controller, absorption distance not to exceed 24", and switch option to be provided. The Contractor was required to "Modify and Resubmit" its AHU submittal. (R4, tab 311)

Mel Harris testified as Trane's representative. Mr. Harris worked for Williams Trane of Mobile, Alabama, an authorized Trane air conditioning franchise for Mobile and south Alabama and northwest Florida. He'd been with Trane for 21 years as a field sales engineer. (Tr. 714-15) Trane's first submittal above had been prepared by a technical sales assistant. Mr. Harris did only a cursory review of the submittal and admitted at trial that he did not do as good a job of review as he should have done. He agreed that VA responded properly in turning down that

first submittal. Mr. Harris transmitted a second submittal through Jimenez on September 2, 1998. (Tr. 730-31; R4, tab 312)

In his second submittal, Mr. Harris responded to each of the COTR's 26 comments and the A/E's 5 comments, summarized as follows: (1) door sizes were listed for each of seven modules, ranging from 8.4" wide (air blender and flat filter modules) to 12.4" wide (medium access module) to 27.4" or 28.6" wide (fan module and 3 med./lge. access modules) by nearly 60" high; it was stated that these were the largest possible doors in these modules and that doors were not available in the Discharge Plenum module, (2) advised that windows were not available for the two modules having 8.4" wide doors, air blender and flat filter, (3) & (4) humidifier and Farr final filter and filters to be field installed, (5) confirmed that fan motor met NEMA MG-1 standards, (6) advised that water pressure drop through coil was 53.16', (7) (skipped), (8) advised that thermal conductance was 0.13 Btu/hr-sf-degree F, (9) provided fan curves and assured that performance criteria were met but did not respond to request for plot of static efficiency, (10) confirmed that Trane's total static pressure of 7.59" was higher than the 7.2" referenced but that the latter was based on unspecified static pressures, (11) confirmed that excessive deflection of structure would not occur, (12) confirmed that interior wall was constructed of G90 galvanized steel, (13) confirmed that exterior walls were 18 gauge, (14) verified operation of safety latches, (15) provided construction details of blender section, (16) verified compliance of coils with specification requirements, (17) confirmed insulation to be 2" thick, (18) verified construction details of drain pans, (19) verified maximum pressure drop across diffuser, (20) asserted that subject fans were to be rated in accordance with ARI 430, not AMCA 210, (21) provided details of fan construction, (22) asserted that marine lights were to be field installed, (23) confirmed that hinged doors were being provided on both sides of pre-filter module, (24) confirmed that Jimenez and Trane would coordinate the unit's

discharge opening with the existing floor penetration, (25) advised that access doors were not available in the discharge plenum but that an access had been provided upstream with doors on both sides, and (26) advised that steam humidifier was to be field provided and installed by Jimenez in space provided by Trane, with 36" between humidifier and fan inlet, and switch option to be addressed by Jimenez, (27) Trane responded to A/E's comments summarized as follow: (1) Marine lights are provided in all access sections and in the fan section; marine lights not available in air blender module, flat filter module, access module provided for installation of the humidifier, Farr diffuser module, Farr final filter module, discharge plenum, (2) unit is only 7" longer than unit shown in contract and Contractor will coordinate existing discharge opening of unit with the existing supply air opening in the floor, (3) provided requested itemized breakdown of the internal static pressure losses totaling 7.59, (4) verified that the fan would handle 8.35" w.g. at 37.3 bhp, which is 110% of the total static pressure of the Trane unit; also, see the fan curves attached to the re-submittal, and (5) not addressed. (R4, tab 312)

In his September 14, 1998 review of Trane's second submittal, the A/E checked two boxes, "Make Corrections Noted (Air Handling Unit Only)" and "Amend and Resubmit (Air Filters Only)," and made comments summarized as follows: (1) pressure drop through coil of 53.16' is not acceptable; please provide coil with drop as low as possible but not to exceed 20', (2) provide minimum 24" wide access door in Air Blender module per contract, (3) thermal conductance acceptable if allowed by owner, (4) verify the fan is minimum Class II construction, (5) increase cooling coil AT to required capacity of 1,180 MBH, (6) maximum Final Resistance for the pre-filter is 0.7" per specification 15885, (7) CFM required for the filter banks is 19,800, not the 9,345 as shown on the filter submittal; face area submitted (30ft²) is not acceptable for the required air flow; please correct the airflow, face area and face velocity and re-submit. (R4, tab 312)

In VA's Return of Submittal 105, dated September 17, 1998, the COTR incorporated the A/E's comments above and addressed Trane's responses to the COTR's and the A/E's previous comments. Previously unresolved items are summarized as follows: (1) 8.4" wide air blender access door is not acceptable- provide 24" wide door; also, query regarding accessibility with a 12.4" door, (2) accepted lack of windows in flat filter doors (8.4" wide) but required window in air blender door (now required to be 24" wide), (4) with regard to filter, COTR stated flat plate transitions were not acceptable, that AHU including filter module transitions must be entirely of insulated double wall construction, (6) water pressure drop through cooling coil shall not exceed 20', (8) accepted thermal conductance of 0.13 Btu/hr-sf-degree F, (9) again requested plot of static efficiency on the fan curve, (10) accepted 7.59" static pressure, but query regarding calculation, (11) again asked for certification regarding deflection of structure, (14) again asked for verification regarding operation of safety latches, and (26) previous comments on steam humidifier not addressed and repeated; also, absorption distance must be 24" maximum, not 36", otherwise submit another humidifier, (27) COTR's comments on Trane's response to A/E's previous comments, summarized as follows: (1) provide marine light in air blender module and humidifier access module. The Contractor was required to "Address and Resubmit" its AHU submittal. (R4, tab 312)

At trial, Harris explained that the Contractor had already procured filter sections and filters, in connection with the Airtherm, and, in an effort to try to hold costs down, the Contractor was working directly with the filter vendors to reuse those if possible. Thus it was Harris' understanding that, with respect to the second submittal above, A/E Gable was saying that the Trane AHU unit was approved with corrections, and that only the filter sections, for which Trane was not responsible, were required to be resubmitted. However, the

COTR addressed additional areas and required resubmittal of the entire AHU. (Tr. 739-45)

Mr. Harris transmitted a third submittal, dated October 6, 1998, with two "Variation Requests": first, that Trane be allowed to furnish a standard diffuser section with an air pressure drop of 0.81" in lieu of the 0.10" specified and, second, that Trane be allowed to furnish a standard final filter section with a face velocity of 550 fpm in lieu of the 400 fpm specified, thereby eliminating the need for flat plate transitions. The third submittal also addressed the A/E's comments, summarized as follows: (1) pressure drop through coil is 16.15', (2) air blender module to have 24" wide access door with a 6"x6" window, (3) thermal conductance had been accepted by VA, (4) fan is Class II construction, (5) it was agreed between Nashville Trane representative and A/E that BTU's did not have to match exactly as long as leaving air temperature at the scheduled air flow met specifications, (6) per A/E, filter pressure drop is included in the esp, and (7) the face area of the final filter bank is 36.0 sf. (R4, tab 313)

Mr. Harris' third submittal also addressed the COTR's comments. Previously unresolved items are summarized as follows: (1) a 24" door is being provided in air blender module, (4) with regard to filter, Trane stated that flat plate transitions were no longer needed, that filter housing and doors were same as remainder of AHU, and that tracks had positive sealing devices, (6) water pressure drop of chilled water coil is 16.15', (9) provided static efficiency curves, (10) explained calculation to COTR, (11) provided information regarding deflection of structure, (14) provided verification regarding operation of safety latches and (26) regarding steam humidifier, Trane stated that Jimenez would coordinate with Honeywell, that absorption distance will be 24" maximum; provided additional information from others, (27) will provide marine lights in air blender module and humidifier access module. (R4, tab 313)

The A/E's single comment on the Contractor's third submittal was as follows:

Please submit an air handling unit with a larger casing and fan wheel in lieu of the unit submitted. The factors which have resulted in this decision are as follows: 1) the static pressure drop of 0.81" through the diffuser section is much greater than the 0.1" pressure drop specified. 2) The face velocity through the final filter section of 550 fpm is much greater than the velocity specified of 400 fpm. By increasing the size of the A/C unit submitted it will be possible to meet both the unit construction and the pressure /velocity requirements of the specifications.

(R4, tab 313)

The A/E checked the box, "Amend & Resubmit." In VA's Return of Submittal 107, dated October 21, 1998, the COTR incorporated the A/E's comment and addressed Trane's responses to the COTR's and the A/E's previous comments. The COTR echoed the A/E's concerns above and added queries regarding lingering issues such as access in the fan module, positive sealing between filters, static efficiency curves, safety latches and whether the Farr filters were still being proposed. Also, he stated that a total static pressure of 8.4" was not acceptable to VA. The COTR required that the Contractor "Revise & Resubmit." (R4, tab 313)

Trane's fourth AHU submittal, dated November 2, 1998, addressed the COTR's concerns and included the following response to the A/E's comment:

Discussed with Mike Gable of Smith Seckman Reid, Inc., that going to a larger casing size is not a possibility because the fan would operate in the surge area of the fan curve and would not operate in a stable region.

(R4, tab 316)

In VA's Return of Submittal 108, dated November 3, 1998, the COTR accepted some and rejected some of Trane's responses to the COTR's previous comments. With respect to Trane's response rejecting the A/E's suggestion that the casing size be increased, the COTR stated that "If Trane cannot meet VA spec with a standard package a custom unit will have to be provided." The COTR required that the Contractor "Revise & Resubmit." (R4, tab 316)

Trane's fifth submittal, dated December 1, 1998, included a larger Air Handler Unit, and other responses acceptable to the COTR. The submittal was approved by Return of Submittal 109, dated December 7, 1998. (R4, tab 320-21) The Trane AHU was delivered to the site in March 1999 and started up in May 1999. (R4, tabs 337, 345)

By letter dated January 12, 2000, the Contractor requested a formal CO's final decision on the dispute involving the Trane AHU submittals. The Contractor's claim was based on alleged defective specifications, constructive changes, and excessive, unreasonable delay in the submittal process for the Trane AHU. The amount of money in dispute was stated to be \$58,642.86, for which a breakdown of costs was attached. The claim included \$10,500 for Williams-Trane Company and over \$42,000 in "direct cost" and "research & preparation" for Jimenez, plus contractor markups. The Contractor asserted that unreasonable delays in the submittal process for the Trane AHU impacted the progress of the contract from August 1998 until December 1998, but that no time extension was being sought in this claim because a time extension and delay costs were included in the previously submitted claim in connection with the Airtherm AHU. (R4, tab 346)

The Contracting Officer issued her final decision in the matter on June 30, 2000. The CO admitted that there was one VA drawing error relative to the

pressure drop through the coil (5' versus 20'), which was corrected in the second return of submittal. It was also acknowledged that the A/E made an error in calculating internal static pressure (0.10 versus 0.53), which was corrected after the fourth submittal. She stated that Trane agreed to furnish a unit meeting the corrected specifications at no additional cost to VA. With respect to alleged constructive changes, she denied that such occurred in connection with either the 24" widths and locations of access doors, the fan information Trane furnished, or the galvanized steel. With respect to the Contractor's allegation that the contract work was constructively suspended due to a delay in approval of the AHU submittal, she stated that the CPM furnished by the Contractor did not show the AHU in the critical path of work. Therefore, she reasoned, the delay in progress of the work was not due to a delay in approval of the Trane AHU. Finally, she noted that the COTR did request certain certifications when there was insufficient information contained in the submittals to determine if the AHU was in compliance with the contract. She stated, "In accordance with Section 01340, [Para.] 1-7 the Government has the right to require additional submittals, whether or not particularly mentioned in the contract and any adjustment in contract price will be made in accordance with the Changes clause of the contract." She concluded as follows:

It is the decision of the contracting officer that the contractor is entitled to an equitable adjustment in the contract price for additional submittal information required by the Government. However, the amount claimed is excessive. Williams-Trane incurred direct costs in providing additional submittal information. Jimenez is only entitled to the prime fee on subcontract work as defined in VAAR 852.236-88(b) Changes.

Based on the above, your request for equitable adjustment in the revised amount of \$64,972.07 is hereby denied.

(R4, tab 348)

Ending of Contract and Withholding of Funds

After installation of the AHU in May 1999, the Contractor's Test & Balance (T&B) subcontractor was unable to test and balance the HVAC system. The Contractor's superintendent asserted that, according to the test & balance subcontractor, the problem was caused by a design defect relating to the location of a sensor. However, the subcontractor did not testify and prove those allegations. VA claimed that the problem was caused by excessive leaks in the ductwork resulting from poor workmanship. (Tr. 1586-88) We find the latter testimony un rebutted and more credible.

In the meantime, the Contractor continued slowly working on other uncompleted work and correcting completed work, such as flooring, nurse call, medical gas and fire alarm systems. The CO testified that VA had ordered systems furniture for the nursing station and offices by separate procurement, for which storage costs were being incurred. (Tr. 1664-66) Thus, on September 27, 1999, the CO wrote to the Contractor that pursuant to the "Use and Possession Prior to Completion" clause of the contract, the Government "hereby exercises its right to take possession of Ward 3N currently under construction," even though the Contract was not substantially complete since patients could not be moved into the ward yet. Enclosed was a list of seventeen "items of work remaining to be performed or corrected." Items 1, 2, 4, 5, 6, 8, 11, 12, 16 and 17 involve "remove," "repair," "patch," or "correct" various types of work, all of which appear to be fairly minor. Items 3 and 7 request from the Contractor information relating to a warranty for ceramic tile and a certification for certain levers or

handles. Again, these seem to be fairly minor items. However, the following listed items were of greater concern to VA at this stage of the project:

9. Correct all mechanical deficiencies that will prevent final Test and Balance.
10. Perform final Test and Balance of HVAC System(s).
13. Perform medical gas certification and provide certification.
14. Install nurse call master station at Nurse Station and perform final test and certification.
15. Certify fire alarm system.

(R4, tab 511)

Patients could not be placed in the ward until these items were completed. VA installed systems furniture for the nursing station and offices in the fall of 1999, but did not move patients in until March 2000. (Tr. 1664-66)

By letter of September 29, 1999, the Contractor referred to the list above as a "punch" list and asked for additional information on three correction/repair items, such as locations, but asserted that the medical gas and fire alarm systems had already been completed. The remaining items were not mentioned and appear to have been tacitly admitted. (R4, tab 512)

On September 29, 1999, the CO wrote the Contractor that medical gas and fire alarm certifications had not been provided. She further advised that the list provided by her previous letter was not a "punch" list but was a "completion item" list. She defined completion items as "major items of work that need correction or have not been completed that will block substantial completion and prevent VA acceptance of the work and occupancy of the space." With respect to the Contractor's inquiry regarding locations of deficiencies, she responded that such deficiencies were "located throughout construction area." It was noted that the Contractor's slow progress had seriously impacted the mission of the medical center, that progress on the remaining contract work had been almost non-

existent since the beginning of the year, that the Contractor was 90% complete in January 1999 and, at the end of September 1999, was only 98% complete. The Contractor was directed to finish all completion items within fourteen calendar days or VA would correct the work and charge the cost to the Contractor. (R4, tab 513)

The Contractor replied on September 30, 1999, that it intended to “complete this process within fourteen days.” However, the Contractor pointed out that under the “Use and Possession Prior to Completion” clause, “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” and that “while the Government has such possession or use, the Contractor shall be relieved of the responsibility for the loss or damage to the work resulting from the Government’s possession or use.” Accordingly, the Contractor requested a very detailed list of the remaining work or defects within the work. (R4, tab 514)

By letter of October 1, 1999, the CO asserted that, in accordance with the Use and Possession Prior to Completion Clause, a list of items of work remaining to be performed or corrected had been provided to the Contractor, i.e., the September 27, 1999 list. She also stated that the clause did not prescribe a time frame for advance notification. She advised that Use and Possession Prior to Completion does not imply acceptance of the contract work, that VA could not occupy the space and use it for its intended purpose, that, under the Inspection of Construction clause, final inspection would be made when the contract work was ready for beneficial use or occupancy, and that VA would conduct a final inspection when notified by the Contractor that it was substantially complete. Finally, she indicated that the completion item list provided on September 27,

1999, would be supplemented if VA found other deficiencies that would prevent beneficial occupancy and final acceptance. (R4, tab 515)

By letter dated October 5, 1999, the Contractor took the position that “all items, other than latent ones or those that clearly appear on your list of 27 September 1999, will only be punch-list items. Therefore, upon completion of the items on your 27 September list, we will request a final inspection.” (R4, tab 516)

On October 13, 1999, the CO directed the Contractor to “proceed with correction of all remaining deficiencies. You are advised that your deadline for correction of your deficiencies is October 18, 1999. VA will proceed with all remaining corrective work October 19, 1999, in accordance with FAR 52.246-12, Inspection of Construction.” (R4, tab 518)

In a letter dated October 14, 1999, the Contractor complained that the CO had not conducted any formal test or performed any formal inspections and had not provided the Contractor with a specific list of deficiencies discovered during such tests or inspections. He also opined that if VA took over all remaining work on the project then it would have, “by any reasonable definition, implemented a default termination,” which the Contractor would seek to have converted to a termination for convenience in light of pending claims and time extension requests. (R4, tab 519) A meeting was held between the parties on October 22, 1999, but no resolution of these matters occurred. (R4, tabs 520-24)

By memorandum dated October 25, 1999, Subject: Status of Completion Items (at 10-19-99 thru 10-22-99 VA inspection), the COTR furnished the CO with a list of deficiencies, numbering 24, with 28 subparts. (R4, tab 525) On November 2, 1999, VA’s A/E, Gobbell Hays Partners, Inc., transmitted to the CO the A/E’s October 29, 1999 nine-page list of “incomplete and deficient items” noted during an October 25, 1999 walk-through, plus a six-page “Job Observation Report” prepared by the A/E’s mechanical consultant, Smith

Seckman Reid, Inc., during the same walk-through. (R4, tab 536) None of those lists were furnished to the Contractor.

On November 3 and 5, 1999, the Contractor and the Contracting Officer, respectively, signed the "Twenty-seventh Progress Payment." (Exh. G-2) That document showed the current contract amount, including change orders, to be \$2,044,643.74. Previous payments totaled \$1,805,316.93, leaving a balance of \$237,643.27. Of that balance held by VA, \$198,246.94 represented retainage and \$39,396.33 represented the value of work not completed.

The Contractor's estimate of the cost to complete the contract work, at the time the contract ended, was \$18,140. (R4, tabs 552 and 816) VA offered no evidence of the estimated value of such cost. While there were vague assertions that it took several more months to complete the work and cost VA large sums of money to have another contractor get the facility ready for patient occupancy, no such claim was ever filed by VA, nor was any supporting documentary evidence offered in the record before us in opposition to the Contractor's claim to the funds withheld by VA.

On November 10, 1999, the Contractor complained in a letter to the CO that it had not received a copy of the A/E's completion/punch list. The Contractor stated that VA could not invoke the Inspection of Construction clause until the Contractor received an official punch-list and VA had satisfactorily answered all requests for direction or information. In the meantime, the Contractor was proceeding on the specific items of work the CO had instructed it to do. (R4, tab 537)

In a memorandum dated November 19, 1999, Subject: Pre-final Inspection Survey Results, the COTR furnished the CO with a 79-paragraph list, "based on VA's inspection, performed on 10-19-99 through 10-22-99, and the A/E's 10-25 survey." The COTR wrote that the list was not all inclusive but was intended to

convey the condition of the project. Deficiencies are listed in general terms such as "Fire doors are damaged," "Labels are missing on fire doors," and "Expansion joints are incomplete and installed improperly." The first paragraph states that the conditions stated below are "typical throughout and should be verified by the contractor." Paragraph 15 states that VA has received a partial but not a final medical gas system certification. Paragraphs 23 and 24 indicate that test and balance has not been completed and lists 18 deficiencies involving the HVAC system. The nurse call master station and fire alarm systems are not mentioned and were apparently completed by this time. (R4, tab 539)

The CO informed the Contractor in a November 22, 1999 letter that:

Jimenez has been previously informed of the deficiencies in your contract work and VA has allowed you ample time to correct. The work remaining on this contract is the defective work that has previously [been] identified by VA. Jimenez has not corrected most of the items identified nor shown sufficient progress toward that end. Therefore, in accordance with FAR 52.246-12, Inspection of Construction, paragraph (g)(1) *you are notified that the Government will correct all remaining defective work. You are advised that Jimenez will be charged the cost VA incurs to correct your defective work.* (Emphasis added.)

Jimenez is directed to immediately vacate the staging area in the northeast area (rear) of the medical center property. Please insure removal of your storage trailer, dumpster and any construction materials or debris in this area. (Emphasis added.)

In response to your letter dated November 10, 1999, regarding "Completion/Punch List from A/E," you are advised that the Inspection of Construction clause does not require the Government to provide the contractor an "official punch-list" prior to invoking this clause. VA is obligated to provide Jimenez a punch list only after the contract work is complete and ready for final inspection and acceptance. Jimenez has

not completed the contract work to comply with the contract requirements and has not requested final inspection.

(R4, tab 540)

The Inspection of Construction Clause (AUG 1996), FAR 52.246-12, Specification Section 01001, Paragraph 1.70, states in pertinent part as follows:

(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.

(R4, tab 102)

By letter dated December 2, 1999, the Contractor requested that VA begin a very detailed, itemized final inspection, asserting that all major components of work had been completed, that the Contractor was then awaiting three minor items (5 doors, belt guard, expansion joints) to be delivered, that ductwork items would be corrected by the end of the day, that efforts to complete test & balance would restart the following Monday, and that all defective tiles had been replaced. (R4, tab 541)

On December 2, 1999, the CO advised the Contractor that its request for final inspection was denied, asserting that the contract work was not complete and "numerous life safety defects, in addition to those you listed, still remain that prevent occupancy." She stated that VA was proceeding to procure the

services of another general contractor to correct the Contractor's defects. (R4, tab 543)

The Contractor filed its request in a November 14, 2000 letter for a formal Contracting Officer's final decision on the "dispute involving the series of decisions and actions that have resulted in a default of the [subject] contract accompanied by bad faith and/or an abuse of discretion." (R4, tab 552) Jimenez' position was that such default, accompanied by bad faith, justified the use of the modified total cost method of pricing. The Contractor sought payment in the amount of \$864,448.37, calculated by subtracting previous payments from its total costs. Alternatively, alleging that the CO constructively terminated the contract for the Government's convenience, Jimenez sought payment in the amount of \$262,643.27, calculated by subtracting previous payments from the contract amount and by adding claimed convenience termination settlement costs in the amount of \$29,417.90. (R4, tab 552)

In a final decision dated March 14, 2001, the Contracting Officer stated that during the year and a half period from the July 18, 1998 completion due date to the alleged termination in December 1999, "Jimenez was informed of a multitude of deficiencies in their work" and that "detailed information regarding these deficiencies was provided through correspondence from the Contracting Officer, written comments from the COTR and field reports from the VA's A/E consultant." She asserted that many of the deficiencies were of such a critical nature, involving life safety, that VA could not occupy the ward until they were corrected; that VA allowed Jimenez ample time to correct the deficiencies; that it became apparent that Jimenez was unable to make the corrections; that the need to occupy the ward became critical; that VA had no alternative but to hire another contractor to complete the work under the Inspection of Construction clause. The CO stated it was her decision that

Jimenez was not entitled to an equitable adjustment or a time extension, and that the Government did not constructively terminate the contract for default or convenience but chose the remedy available under the Inspection of Construction clause. Accordingly, the claim was denied. (R4, tab 557)

DISCUSSION

We will first address entitlement in the three equitable adjustment claims. If entitlement is found we will then address direct costs and delay/suspension claims arising therefrom. Finally, we will address the Contractor's termination/breach claims as well as its claim to be paid the balance of the contract funds.

Access To Work Space

The Contractor seeks to be compensated for alleged delays in performance caused by what it considered to be undue limitations placed by VA on the Contractor's access to work spaces on the second floor. While it was the third floor that was being renovated, access to the second floor ceilings was necessary to perform certain work. In that regard, a drawing note clearly placed bidders on notice that the second floor would be an active nursing unit, that it would be occupied by patients, and that access to patient rooms would depend on patient census, *i.e.*, the unpredictable ebb and flow of patients in and out of the ward. The note stated that VA would make "at least two adjacent rooms available to the contractor at all times" for new work related to the third floor.

It appears to us that VA cooperated in a reasonable manner, under the prevailing circumstances and practicalities of running a medical ward, in providing access to second floor areas. Granted, the Contractor did not receive

access to the rooms in a sequence that would allow the maximum efficiency in performing the work. However, no such access was promised by the Contract.

Notwithstanding the Contractor's complaints, its plumbing subcontractor was not significantly delayed due to access limitations. Moreover, the Contractor demonstrated no impact on the overall Contract completion date due to alleged access problems in any event. We find no merit in this claim and the appeal is denied.

Rejection of Airtherm AHU

The issue here is the propriety of VA's having rejected the Airtherm unit. When the Government rejects work as being not in compliance with its specifications, then the burden is upon the Government to demonstrate non-compliance. *Southwest Welding & Manufacturing Company v. United States*, 188 Ct. Cl. 925, 413 F.2d 1167 (1969); *Nicon, Inc.*, VABCA No. 5949, 00-2 BCA ¶ 31,117; *Ben M. White Company*, ASBCA No. 36423, 91-1 BCA ¶ 23,375. The Government has not met that burden in the instant case.

In her June 2000 final decision, the CO cited five contract requirements that the unit allegedly did not meet: 1) that the AHU was not "entirely of double wall galvanized steel construction," 2) that uninsulated areas were covered with board insulation glued to the inside of the unit, unprotected and exposed to the airstream, 3) that the conductance of the 3/4" board insulation did not meet the thermal conductance level specified, 4) that the unit did not have adequate structural base members supporting the floor, and 5) that the filter section had an access panel screwed to the unit wall rather than an access door.

The first listed, and apparently primary reason for rejecting the Airtherm unit, was VA's and it's A/E's view that the unit was not entirely double wall

construction. As we see it, the unit was constructed from one end to the other entirely of double wall panels and was “entirely of double wall construction.” What VA really objected to was that the joints of the Airtherm were not double wall construction. The Contractor’s witnesses testified regarding the understanding in the trade of the term “entirely double wall construction.” While trade usage may not vary or contradict plain contract language, trade usage and custom may always explain or define contract language. *W.G. Cornell Co. v. United States*, 179 Ct. Cl. 651, 376 F.2d 299 (1967); *Southern Commercial Waterproofing*, VABCA No. 5992, 01-2 BCA ¶ 31,570; *J.A. Jones Construction*, VABCA No. 5414, 99-1 BCA ¶ 30,380. On this critical point, we found Mr. Tennant’s and Mr. Nicholson’s testimony to be more persuasive, *i.e.*, that the unit was, in fact, entirely double wall as those terms are commonly used and understood within their industry. Evidence of trade practice is superior to evidence of common usage in interpreting language relating to work done by a particular trade. *Bodell Constr. Co.*, ASBCA No. 38355, 92-1 BCA ¶ 24,433. We were not impressed by VA witness Smart’s views or expertise in this particular area and note again that his mechanical engineering consultant, Mr. Gable, did not testify in this matter. We did not find Mr. Gable’s written positions, without further explanation, to be persuasive. Thus, we find that the AHU offered by Airtherm did meet the double wall requirement of the Contract.

The second, fourth and fifth items cited by the CO, relating to the exposed board insulation, the base supports and one access door, are not deemed to have been of such consequence that they could not have been repaired or corrected. While the Government has a right to expect compliance with contract specifications, that right is not absolute and will not be enforced if, to do so, would result in economic waste. *R.M. Crum Construction Co.*, VABCA Nos. 2143 *et al.*, 85-2 BCA ¶ 18,132. *See also Granite Construction Company v. United States*, 962 F.2d 998, 1006-08 (Fed. Cir. 1992) *cert. denied*, 506 U.S. 1048 (1993) (holding that insistence on

strict compliance, where the completed work was adequate for the project and replacement was unnecessary, constituted a constructive change); *Toombs & Co., Inc.*, ASBCA Nos. 34590 *et al.*, 91-1 BCA ¶ 23,403 at 117,432-33 (holding that removal and replacement of nonconforming duct boots constituted economic waste where there was no adverse aesthetic impact and no proof of operating cost or sanitary impact).

With respect to the third item above, the CO's assertion that the thermal conductance of the ¾" board insulation did not meet the level specified, we note that the Contract required that the "maximum overall thermal conductance of *casing panels* shall not exceed 0.12 Btu/hr-sq. ft.-degree F." (Emphasis added.) The 2"-thick Airtherm casing panels did in fact meet that requirement. There was no similar requirement for joints. Nevertheless, VA imposed the thermal conductance standard for panels on the joints and, therefore, applied a stricter standard than that required by the Contract. VA could not properly reject the Airtherm AHU on the basis of the thermal conductance of the joints. Similarly, VA improperly applied the prohibition, that "glass fiber insulation shall not be exposed to the airstream," to the foam board insulation on the joints.

Based on the foregoing, we find that VA improperly rejected the Airtherm AHU. Thus, Appellant is entitled to compensation for the increased costs it incurred as the result of such rejection.

Turning to quantum, we determine the Contractor's allowable direct costs as follows: With respect to the amount due Airtherm, we find that to be \$36,815.65 (invoice amount of \$39,629.12 less salvage credit of \$2,813.47). The interest portion is excluded from the calculation but interest will be paid, as a matter of course, on all amounts found due herein in accordance with the *Contract Disputes Act*.

With respect to the \$16,623.59 claim of Mechanical Industrial Sales, we exclude the entire amount as unsupported. We note in passing that a portion of the claim is for a commission. Any sales commission due MIS would seem to be a matter between Mechanical Industrial Sales and Airtherm, and there is no evidence of an independent obligation on the part of Jimenez to pay any amount above and beyond the sales price.

The other direct costs associated with the rejection of the Airtherm AHU are allowed in the amount of \$24,800.88. Accordingly, Appellant is entitled to the total amount of \$68,998.19 (\$36,815.65 + \$24,800.88, plus markups) in connection with the Airtherm rejection.

Trane AHU Submittals

The Appellant challenges the propriety of VA's rejection of the second submittal for the Trane AHU. We must decide whether or not that submittal offered an AHU substantially in compliance with the Contract specifications, or in compliance to such a degree that the second submittal should have been approved.

The A/E is an advisor to VA, not to the Contractor, and VA properly has the final say regarding contract compliance. The real question, however, is simply whether the Contractor offered an AHU that complied with the Contract, regardless of the identity of the final reviewer. If the unit was not in compliance with the specifications, the VA was within its right to reject the submittal and require resubmittal.

We find that the AHU in the second submittal did not comply with the specifications in all material respects and that the COTR's inquiries were not without merit. The Contractor simply has not persuaded us that the second submittal was wrongfully disapproved. Moreover, the subsequent submittals of the

Trane unit did not offer an AHU in substantial compliance with the specifications, until the fifth submittal increased the size of the casing, which permitted all factors to be achieved (fpm, face area and pressure drops). The Trane unit was to replace an existing AHU, with space and distance limitations. It was up to the manufacturer to accommodate those existing conditions and meet all specified performance requirements. The record discloses that the Trane representative gave short shrift to the first submittal, as he readily admitted, and then continued to attempt to persuade VA that its standard unit would perform as the Contract required, when, in fact, a non-standard or custom unit, with a larger casing, was required to meet Contract requirements. In these circumstances, we find that the second submittal was properly rejected, as were the third and fourth submittals. Accordingly, we find Appellant's claim to be without merit and the appeals are denied.

Delay/ Suspension Claims

In addressing delays, each party relied considerably on CPM analysis. VA relied on the Contractor's CPM schedules created, and submitted to VA, during performance of the work. Based on those CPMs, the Contract completion date was never affected by delay in installing the AHU since the AHU was never on the critical path, either because the float was not used up or because the critical path kept shifting to other work that was being delayed due to other causes.

Appellant, on the other hand, spends considerable time denigrating its own original CPM analyses, for obvious reasons. However, the parties are generally held to the CPMs they created and relied upon during the performance of the work, in the absence of compelling reasons to the contrary.

As we stated in *P.J. Dick Incorporated*, VABCA Nos. 5597 *et al.*, 01-2 BCA ¶ 31,647, “we will let the parties ‘live or die’ by analysis of the CPM to determine the number of days of additional contract performance time,” citing *Santa, Fe, Inc.*, VABCA No. 2168, 87-3 BCA ¶ 20,104 and *Coffey Construction Company, Inc.*, VABCA Nos. 3361 *et al.*, 93-2 BCA ¶ 25,788.

Appellant seeks to have us rely on its CPM expert, and his newly created CPM analysis, which was prepared during litigation. Not surprisingly, this CPM showed VA-caused delays to the AHU accounting for the entire delay through 1999. Such self-serving analyses, created after project completion and which make adjustments to attain new and revised projected schedules, depending on theoretical contingencies, are of limited value. In *Bay Construction Co.*, VABCA Nos. 5594 *et al.*, 2002 WL 442118 (March 19, 2002), we said:

[W]e have analyzed [the Contractor]’s claims as ones for suspension. The Contract’s SUSPENSION OF WORK clause is the only remedy-granting clause available to [the Contractor] for relief. To establish its entitlement to an equitable adjustment under the SUSPENSION OF WORK clause, [the Contractor] must meet a four-part test. We recently recounted this test in *P J. Dick Incorporated* as:

First there must be a delay of unreasonable length extending the Contract completion time. Second, the delay must have been proximately caused by the VA’s action or inaction. Third, the delay resulted in some injury and fourth, there is no delay concurrent with the suspension that is the fault of the contractor.

* * * *

[The Contractor’s CPM consultant] also attributed all of [it]’s time loss and extended performance time to Government changes, delays and suspensions. He ignored or casually dismissed any

reference to [the Contractor]'s small crews and lack of progress, and did not appropriately consider any information that was unfavorable to the Appellant. That [the Contractor] was behind schedule was observed by the COTR and noted in almost every monthly progress payment report. Yet, [The Contractor's CPM consultant] downplayed these observations and concluded that his analysis showed the various [Contractor]-caused factors raised by the Government did not in any way impact the critical path. The Appellant did not effectively address various discrepancies in the daily logs and failed to prove several of the key facts upon which it based its case. No subcontractors, who performed significant amounts of the actual work on the job, were called to testify about Government caused delays, and there is no indication any of those subcontractors presented delay or suspension claims.

* * * *

Appellant failed to prove by a preponderance of the evidence any particular time during the Contract where Bay suffered compensable suspension of work solely attributable to the Government's actions or inactions, for which it should receive additional compensation. Appellant is not entitled to additional direct labor costs (VABCA-5625) or unabsorbed home office overhead (Eichleay) (VABCA-5526) pursuant to the Contract's SUSPENSION OF WORK clause.

The case before us today is strikingly similar. While we find that VA's rejection of the Airtherm AHU did cause some delay in AHU installation, the Contractor has failed to persuade us that this delay caused delay in the overall Contract completion date. Any Government-caused delay in AHU installation was concurrent with Contractor-caused delays in other critical Contract work.

The Contractor's CPM analyses ignore what was actually occurring throughout the latter months of 1999, i.e., that the Contractor was still working to complete significant Contract work unrelated to the AHU delay, such as the test and balancing of the AHU, and certifications of the nurse call and medical

gas systems. In the absence of solely VA-caused delays, the existence of concurrent delays precludes any recovery by the Contractor from the Government for delay. Accordingly, these appeals are denied.

Ending of Contract, Termination/Breach Claims and Withholding of Funds

The Contractor seeks to characterize VA's action of closing out the Contract via the Inspection of Construction Clause as tantamount to either 1) a breach of the Contract, in bad faith, for which it is entitled to recover \$864,448.37, calculated by subtracting previous payments from its total costs, or 2) a constructive termination of the Contract for the Government's convenience, in which case it is entitled to be paid, in addition to the withholdings as determined above, the sum of \$29,417.90 for "termination fees allowed under the termination for convenience clause of the contract." The Contractor asserts VA acted in bad faith both when it dismissed Jimenez from the site, without providing a list of deficiencies and without allowing Jimenez the opportunity to make corrections, and when VA withheld the balance of the Contract funds with no accounting thereof.

In *T.A. Industries, Inc.*, VABCA No. 2941, 90-3 BCA ¶ 22,967 at 115,345, we reviewed applicable standards in considering allegations of "bad faith":

[An Appellant] must overcome the presumption that public officials conscientiously discharge their duties. *Kalvar Corporation, Inc. v. United States*, 211 Cl.Ct. 192, 543 F.2d 1298 (1976); *Dawson Construction Company Inc.*, VABCA No. 1967, 88-1 BCA ¶ 20,335. In the case of Appellant's claim that the Contracting Officer's decision to terminate was arbitrary and an abuse of discretion, Appellant may overcome the presumption by a preponderance of the evidence. Appellant's proof that the termination was motivated by bad faith must meet the much higher "well nigh irrefragable proof" standard. *Darwin Construction Co.*,

Inc. v. United States, 811 F.2d 593 (Fed. Cir. 1987). Appellant provides no proof that the Contracting Officer abused her discretion in terminating Appellant for default. Appellant's argument is based solely on its conjecture that the Contracting Officer . . . could have taken some action other than default termination more favorable to Appellant or more in tune with Appellant's ruminations concerning its assessment of the "best interests" of the Government. . . . Conjecture is not evidence; we find no basis in the record that the Contracting Officer abused her discretion.

Also see, *Fanning, Philips & Molnar*, VABCA No. 3964, 96-1 BCA ¶ 28,214 and *Coates Industrial Piping, Inc.*, VABCA No. 5412, 99-2 BCA ¶ 30,479. In *Coates* we stated:

The burden of proving bad faith by the Government is a very onerous one and for an action or an inaction of the Government to constitute bad faith or abuse of discretion, some specific intent to injure the other party or actions motivated by malice alone must be proven to overcome the presumption that public officials act in good faith in the discharge of their duties.

In the instant case, the Contractor has not persuaded us that VA's actions were in bad faith. Mistakes were made, as we will see below, but they did not rise to the level of bad faith. The appeal is denied in this respect.

With regard to the termination for convenience claim, the Contractor is basically complaining that, by using the Inspection of Construction clause to close out the Contract, rather than the Termination for Convenience clause, the Contractor was deprived of its termination settlement costs. However, the use of a particular clause to delete work does not depend on which clause provides the greatest benefit to the Contractor. Rather, the choice of clause is determined by the extent of the work being deleted. When major portions of contract work are deleted, the Termination for Convenience clause must be

used. *Nager Electric Co. v. United States*, 442 F.2d 936 (Ct.Cl. 1971); *Dollar Roofing*, ASBCA No. 36,461, 92-1 BCA ¶ 24,695. On the other hand, minor deletions, or changes in the specifications or in the scope of work, are usually treated as deductive changes rather than termination actions. *Celesco Industries, Inc.*, ASBCA No. 22,251, 79-1 BCA ¶ 13,604. In the instant case, taking into account the fact that 98% of the Contract was complete and little work remained to be done, we find that action under the Inspection of Construction clause, rather than the Convenience Termination clause, was appropriate. Use of the latter clause was not justified in this case and the Contractor's convenience termination settlement cost claim is denied.

Turning to the question of VA's withholding, we consider several applicable principles. When the Government rejects work under the Inspection clause as not in compliance with its specifications, the burden of proof is on the Government to demonstrate that fact. *Southwest Welding and Mfg. Co. v. United States*, 413 F.2d 1167, 1176, n. 7, 188 Ct.Cl. 925, 940, n. 7 (1967); *Donohoe Construction Co.*, ASBCA Nos. 47310 *et al.*, 98-2 BCA ¶ 30,076 at 148,845. Also, the Government's entitlement to recover under the Inspection clause for the costs of corrective work is conditioned on its having afforded the Contractor a reasonable opportunity to correct or replace the work. *Abbot Power Corporation*, VACAB No. 1133, 77-1 BCA ¶ 12,427; *Lions Gate Corporation*, ENG BCA No. 5809, 92-2 BCA ¶ 24,983.

In implementing the Inspection clause in the instant case, VA did not give the Contractor notice of the specific deficiencies with which it was being charged, even though VA had in its possession detailed lists of such claimed deficiencies. Based on the cases above, that fact alone is sufficient to sustain the Contractor's appeal. However, an even more compelling circumstance in the Contractor's favor is that the record is devoid of any evidence

establishing either the value of the alleged deficiencies or the value of the costs the VA allegedly incurred in correcting the deficiencies. VA simply asserted its right to withhold and keep the entire amount of money in its possession when it ended the Contract, *i.e.*, \$237,643.27. We find that Appellant is entitled to be paid the portion of those withholdings which are represented by the retainage amount of \$198,246.94.

Finally, we consider the \$39,396.33 portion of the withholdings that represented uncompleted work. That work was not subject to the Inspection of Construction clause since it was not deficient and could not be “corrected.” Use of that Inspection clause is limited to “rejected work.” Part of the confusion here arises because VA never formalized a deductive change order reducing the Contract amount. Nevertheless, we deem VA’s withholding of this amount to be a constructive deductive change under the Changes clause. Where a contractor appeals a credit taken by the Government for a deductive change order, the burden of proof will be on the Government to establish its entitlement. *Nager Electric Company v. United States*, 194 Ct. Cl. 835, 442 F.2d 936 (1971); *Gladwynne Construction Co.*, VABCA Nos. 6594 *et al.*, 02-1 BCA ¶ 31,848; *Dawson Construction Co., Inc.*, VABCA No. 3558, 94-1 BCA ¶ 26,362; *Blount, Inc.*, ASBCA No. 41604, 91-2 BCA ¶ 23,704. The Contractor asserts that there was no more than \$18,140 worth of work uncompleted at the end of the project. We find that the best evidence of the value of the uncompleted work is in the last progress payment, signed by both parties at the end of the project, which shows the value of uncompleted work to be \$39,396.33. Neither party has offered probative evidence to rebut this amount, to which each party had previously agreed. We conclude that VA is entitled to retain that sum and, to that extent, the Contractor’s appeal is denied.

DECISION

In summary, the appeal in VABCA-6353 (direct costs arising from the wrongful rejection of the Airtherm) is sustained in the amount of \$68,998.19, plus Contract Disputes Act (CDA) interest from October 15, 1999, until paid. The appeals in VABCA-6351, 6352 and 6354 (delay costs related to the Airtherm) are denied. The appeals in VABCA-6421-23 (Trane) are denied. The appeal in VABCA-6591 (Access) is denied. The appeal in VABCA-6611 (Withholding/Termination) is sustained in the amount of \$198,246.94, plus CDA interest from November 14, 2000, until paid, and in all other respects is denied.

Date: **September 24, 2002**

MORRIS PULLARA, JR.
Administrative Judge
Panel Chairman

We Concur:

RICHARD W. KREMPASKY
Administrative Judge

GUY H. MCMICHAEL III
Chief Administrative Judge