We in the United States owe Greece a debt of gratitude, for being our steady partners and friends over many years, for inspiring our thoughts about democracy, and for sending us so many sons and daughters who have made and continue to make a contribution to the work of our Nation. I wish the people of Greece and all Greek-Americans a very happy Greek Independence Day, and I look forward to sharing the celebration in years to come.

Mr. REID. Mr. Speaker, I rise today to commemorate the 175th anniversary of Greek Independence Day, which falls on March 25. On this historic day, the Greek people broke from the Ottoman Empire after more than 400 years of foreign domination, clearly demonstrating their long-standing and continuing love of freedom.

Greece's democratic ideals and institutions continue to inspire people and nations around the world, and they have enabled the United States and Greece to enjoy a strong relationship. The contributions that Greek-Americans have made in our society are especially evident in my home State of Rhode Island, where the oldest Greek settlement dates back to the late 1890's. Many of the early Greek immigrants to the State worked as mill workers, foundrymen, fishermen, or merchant seamen. Today, the descendants of these hard-working people form a proud and prosperous Greek-American community, which continues to enrich Rhode Island and our Nation.

While we are here today to celebrate Greek history and its contributions, it is also important to recognize the continuing struggles of the Greek people. For more than 20 years, military occupation and human rights abuses by Turkey continue to hamper efforts to bring about a resolution to the situation in Cyprus. The time has come to end the strife and violence that have racked Cyprus since the Turkish invasion. I am a cosponsor of House Concurrent Resolution 42 which calls for the demilitarization of Cyprus and I urge my colleagues to join as cosponsors. The United States can and must play a role to help the people of Cyprus and stabilize relations between Greece and Turkey.

The Ecumenical Patriarchate, the spiritual leader for over 250 million Greek Orthodox Christians, is located in Turkey and continues to be the victim of harassment and terrorist attacks. I am also a cosponsor of House Concurrent Resolution 50, which calls for the United States to insist that Turkey protect the Ecumenical Patriarchate and all Orthodox Christians residing in Turkey and I would urge my colleagues to sign onto this important legislation.

The relationship between the United States and Greece continues to be of political, economical, and social importance. It is my hope we will continue to strengthen the bond between the United States and Greece, and to promote peace and stability in this region of the world. I would like to commend my colleagues, Representatives BILIRAKIS and MALONEY, for forming the Congressional Caucus on Hellenic Issue. As a member of this caucus, I look forward to working with them and my other colleagues to heighten awareness of issues of concern to the Greek-American community and to further our mutually beneficial relationship with Greece.

In closing, I am proud to participate in the celebration of Greek Independence Day. I wish to extend my congratulations and best wishes on this day to the millions of Greek-Americans and all the citizens of Greece.

The SPEAKER pro tempore. Under the Speaker's announced policy of May 12, 1995, the gentleman from Indiana [Mr. LIPINSKI] is recognized for 60 minutes.

[Mr. LIPINSKI addressed the House. His remarks will appear hereafter in the Extensions of Remarks.]

The SPEAKER pro tempore. Under the Speaker's announced policy of May 12, 1995, the gentleman from Ohio [Mr. CHABOT] is recognized for 60 minutes.

[Mr. CHABOT addressed the House. His remarks will appear hereafter in the Extensions of Remarks.]

LEAVE OF ABSENCE

By unanimous consent, leave of absence was granted to:

Ms. WATERS (at the request of Mr. GEPHARDT) for today and the balance of the week on account of official business.

Mr. OLVER (at the request of Mr. GEPHARDT) for today on account of personal business.

SPECIAL ORDERS GRANTED

By unanimous consent, permission to address the House, following the legislative program and any special orders heretofore entered, was granted to:

(The following Members (at the request of Mr. NADLER) to revise and extend their remarks and include extraneous material:)

Ms. JACKSON-LEE of Texas, for 5 minutes, today.

Ms. KAPTUR, for 5 minutes, today.

Mr. PALLONE, for 60 minutes, today.

Mr. LIPINSKI, for 60 minutes, today.

Mr. FIELDS of Louisiana, for 60 minutes, today.

Mr. SANDERS, for 60 minutes, today.

(The following Members (at the request of Mr. HAYWORTH) to revise and extend their remarks and include extraneous material:)

Mrs. MORELLA, for 5 minutes, on March 21.

Mr. CHRISTENSEN, for 5 minutes, on March 21.

Mrs. SEASTRAND, for 5 minutes, on March 21.

Mrs. JOHNSON of Connecticut, for 5 minutes, on March 21.

EXTENSION OF REMARKS

By unanimous consent, permission to revise and extend remarks was granted to:

Mr. DREIER, and to include extraneous matter, on the Dreier amendment to H.R. 2202, in the Committee of the Whole today.

(The following Members (at the request of Mr. NADLER) and to include extraneous matter:)

Mr. BECERRA.

Mr. NEAL of MASSACHUSETTS.

Mr. VISCLOSKY.

Mrs. MALONEY in two instances.

Mr. HAMILTON.

Mr. FRANK of Massachusetts.

Mr. ACKERMAN in two instances.

Mr. LANTOS.

Mr. REED.

Mr. GORDON.

Mr. JACOBS.

Mr. BARRETT of Wisconsin.

Mr. CONDIT.

Ms. HARMAN.

Mr. POSHARD in two instances.

(The following Members (at the request of Mr. HAYWORTH) and to include extraneous matter:)

Mr. SAXTON.

Mr. WALKER.

Mr. KING.

Mr. FLANAGAN.

Mr. DAVIS.

Mr. CRANE.

Mr. WELDON of Pennsylvania.

Mr. BILIRAKIS.

Mr. GOODLING.

Mr. BURTON of Indiana.

Mr. GILMAN in two instances.

(The following Members (at the request of Mr. KLINK) and to include extraneous matter:)

Mr. ROHRABACHER.

Mr. PORTER.

ADJOURNMENT

Mr. BILIRAKIS. Mr. Speaker, I move that the House do now adjourn.

The motion was agreed to; accordingly (at 10 o'clock and 29 minutes p.m.), the House adjourned until tomorrow, Thursday, March 21, 1996, at 10 a.m.

CONTRACTUAL ACTIONS, CALENDAR YEAR 1994 TO FACILITATE NATIONAL DEFENSE

The Clerk of the House of Representatives submits the following report for printing in the CONGRESSIONAL RECORD pursuant to section 4(b) of Public Law 85–804:

OFFICE OF THE SECRETARY OF DEFENSE,
Washington, DC, Mar. 14, 1996.

Hon. NEWT GINGRICH,
Speaker of the House of Representatives, Washington, DC.

DEAR MR. SPEAKER: In compliance with Section 4(a) of Public Law 85–804, enclosed is the calendar year 1995 report entitled Extraordinary Contractual Actions to Facilitate the National Defense.

Section A, Department of Defense Summary, indicates that 35 contractual actions were approved and that two were disapproved. Those approved include actions for which the Government's liability is contingent and can not be estimated.

Section B, Department Summary, presents those actions which were submitted by affected Military Departments/Agencies with an estimated or potential cost of $50,000 or more. A list of contingent liability claims is also included where applicable. The Defense Logistics Agency, Ballistic Missile Defense Organization, Defense Information Systems Agency, Defense Mapping Agency, and the Defense Nuclear Agency reported no actions, while the Departments of the Army, Navy,

and Air Force provided data regarding actions that were either approved or denied.

Sincerely,

L.W. FREEMAN
(For D.O. Cooke, Director).

Enclosure: As stated.

DEPARTMENT OF DEFENSE

EXTRAORDINARY CONTRACTUAL ACTIONS TO FACILITATE THE NATIONAL DEFENSE (PUBLIC LAW 85–804) CALENDAR YEAR 1995

FOREWARD

On October 7, 1992, the Deputy Secretary of Defense (DepSecDef) determined that the national defense will be facilitated by the elimination of the requirement in existing Department of Defense (DoD) contracts for the reporting and recoupment of nonrecurring costs in connection with the sales of military equipment. In accordance with that decision and pursuant to the authority of Public Law 85–804, the DepSecDef directed that DoD contracts heretofore entered into be amended or modified to remove these requirements with respect to sales on or after October 7, 1992, except as expressly required by statute.

In accordance with the DepSecDef's decision, on October 9, 1992, the Under Secretary of Defense for Acquisition and Technology directed the Assistant Secretaries of the Army, Navy, and Air Force, and the Directors of the Defense Agencies, to modify or amend contracts that contain a clause that requires the reporting or recoupment of nonrecurring costs in connection with sales of defense articles or technology, through the addition of the following clause:

The requirement of a clause in this contract for the contractor to report and to pay a nonrecurring cost recoupment charge in connection with a sale of defense articles or technology is deleted with respect to sales or binding agreements to sell that are executed on or after October 7, 1992, except for those sales for which an Act of Congress (see section 21(e) of the Arms Export Control Act) requires the recoupment of nonrecurring costs.

This report reflects no cost with respect to the reporting or recoupment of nonrecurring costs in connection with sales of defense articles or technology, as none have been identified for calendar year 1995.

EXTRAORDINARY CONTRACTUAL ACTIONS TAKEN PURSUANT TO PUBLIC LAW 85–804 TO FACILITATE THE NATIONAL DEFENSE, CALENDAR YEAR 1995

SECTION A—DEPARTMENT OF DEFENSE SUMMARY

SUMMARY REPORT OF CONTRACTUAL ACTIONS TAKEN PURSUANT TO PUBLIC LAW 85–804 TO FACILITATE THE NATIONAL DEFENSE—JANUARY–DECEMBER 1995

Department and type of action	Actions approved			Actions denied	
	Number	Amount requested	Amount approved	Number	Amount
Department of Defense, total	35	[1]0.00	0.00	2	111,753,769.00
Amendments without consideration	0	0.00	0.00	2	111,753,769.00
Contingent liabilities	35	0.00	0.00	0	0.00
Army total	0	0.00	0.00	1	110,700,000.00
Amendments without consideration	0	0.00	0.00	1	110,700,000.00
Navy, total	33	[1]0.00	0.00	1	1,053,769.00
Amendments without consideration	0	0.00	0.00	1	1,053,769.00
Contingent liabilities	33	0.00	0.00	0	0.00
Air Force, total	2	[1]0.00	0.00	0	0.00
Contingent liabilities	[2]2	0.00	0.00	0	0.00
Defense Logistics Agency, total	0	0.00	0.00	0	0.00
Ballistic Missile Defense Organization, total	0	0.00	0.00	0	0.00
Defense Information Systems Agency, total	0	0.00	0.00	0	0.00
Defense Mapping Agency, total	0	0.00	0.00	0	0.00
Defense Nuclear Agency, total	0	0.00	0.00	0	0.00

[1] The actual or estimated potential cost of the contingent liabilities can not be predicted, but could entail millions of dollars.
[2] One of the indemnifications is for FY 1996 annual airlift contracts and is included in this report. The Air Force has deemed the second indemnification to be ''classified,'' not subject to this report's purview.

SECTION B—DEPARTMENT SUMMARY

DEPARTMENT OF THE ARMY

Contractor: Martin Marietta Corporation.

Type of action: Amendment Without Consideration.

Actual or estimated potential cost: $110,700,000.

Service and activity: U.S. Army Missile Command.

Description of product or service: The request was made for payment of certain nonrecurring investment costs incurred that were not fully recovered upon the 1992 cancellation of the Forward Area Air Defense Line-of-Site Forward Heavy System (LOS-F-H).

Background: The Martin Marietta Team, consisting of Martin Marietta Technologies Inc., Electronics & Missiles; and two of its subcontractors, Oerlikon Aerospace, Inc., and Williams International, submitted a request for extraordinary contract relief under Public Law 85–804, requesting an amendment without consideration pursuant to Federal Acquisition Regulation (FAR) 50.302–1(b), ''Government action.''

The Team requested a total of $110.7 million for losses sustained when the Army canceled the Forward Area Air Defense Line-of-Site Forward Heavy System (LOS–F–H) in 1992. The request was for payment of certain nonrecurring investment costs incurred by the Team which could not be fully recovered when the program was canceled. The $110.7 million request for relief was further broken down as follows: Martin Marietta Technologies Inc.—$54.9 million; Oerlikon Aerospace, Inc.—$41.1 million; and Williams International—$14.7 million.

Martin Marietta Corporation (MMC) was the prime contractor on the LOS–F–H System,[1] with Oerlikon performing as the principal subcontractor for the fire units and missiles, and Williams serving as the subcontractor integrating two environmental control units into the systems primary power unit.

Statement of facts

In 1986 the Army had a need to provide air defense protection for heavy maneuvering forces deployed forward on the battlefield. Consequently, on January 24, 1986, the U.S. Army Missile Command (MICOM) issued a Request for Information (RFI) for a proposed LOS–F–H Program. Following analysis of several responses to the RFI, MICOM issued a Draft Request for Proposals (RFP) on January 3, 1986. The Draft RFP contained deployment requirements and target quantities and deliveries.

On January 12, 1987, Martin Marietta Corporation (MMC) responded to the draft RFP, advising that significant up-front MMC nonrecurring investment and capital outlay would be required to comply with the RFP requirements. MMC requested that the definitive RFP address indemnification for the expenses identified. MMC was the only contractor that raised indemnification as an issue. On March 16, 1987, MICOM issued a definitive RFP. The RFP contained a six year funding profile for the proposed program along with a statement that if the funding profile was insufficient, offerors should offer an alternative profile which matched their proposed delivery schedule. The funding profile provided was as follows:

Fiscal year:	*Millions*
1988	$43
1989	243
1990	410
1991	404
1992	407
1993	416

On April 3, 1987, the LOS–F–H Project Office completed Acquisition Plan number 2 for the LOS–F–H Program. This plan called for the acquisition of a Non Developmental Item (NDI) as a component of the Forward Area Air Defense System (FAADS) to operate with and provide protection for forward heavy maneuvering Army units. The plan stated that the responses to the RFI had demonstrated that several systems met the criteria for an NDI, but that none of them met the full system requirements defined in the Required Operational Capability (ROC) for the FAADS. The plan called for the immediate procurement of the NDI system that came nearest to meeting the full system requirements, with the capability to grow to meet the requirements of the ROC. This approach was adopted in part based on a determination that several firms had responded to the RFI, offering systems that could ultimately satisfy the Army's full system requirements. The plan also called for fielding of the system to begin in FY 1990 and full deployment to four forward divisions in Europe by the end of the calendar year 1992. It called for award of up to four $2.0 million firm fixed-price contracts for candidate evaluation.

On May 29, 1987, MMC responded to the definitive RFP. In its response, MMC proposed

[1] The Program/Contract was also commonly known as the Air Defense Anti-Tank System (ADATS).

clauses (identified as H–12a and H–12b) which called for indemnification of the funds it had previously identified as necessary for nonrecurring up-front investment and capital outlay. These two clauses were rejected by MICOM. No other competing offeror requested similar indemnification.

On June 12, 1987, MMC was awarded Contract DAAH0187–C–A049, one of four candidate evaluation contracts. This contract contained follow-on production options which were unpriced.

On August 14, 1987, the Army changed the funding profile for fiscal years (FYs) 1988, 1989, and 1990, as follows:

FY 1988—$95 million.
FY 1989—$255 million.
FY 1990—$397 million.

At that time, MMC was advised by the Contracting Officer (CO) that its proposal had to be both affordable and executable in FY 1988–FY 1990.

On November 12, 1987, following extensive negotiations, MMC submitted its Best and Final Offer for the unpriced options. This offer stated that MMC was delaying recovery of its major investments until the production phases of the program (FY 1990 through FY 1993). On November 30, 1987, MMC was announced as the winner of the competition.

On February 10, 1988, modification P00004 to the MMC candidate evaluation contract was executed. This modification priced the unpriced production and interim contractor support options. Option 1 was exercised. This modification did not provide for indemnification for the up-front and capital outlay expenses requested earlier by MMC.

At the time modification P00004 was executed, certain Army officials, including but not limited to the LOS–F–H Project Manager, were aware that, as a result of the budgeting process, the funding profile contained in the definitive RFP had been sharply reduced for FY 1989 and forward, The MICOM contracting organization and others did not know of any finite reductions at that time the modfification was executed. Modification P00004 contained a provision that production Special Tooling/Special Test Equipment (ST/STE) costs would be deferred to succeeding production efforts and that if the contract was terminated for any reason other than default, any unamortized cost would be subject to termination settlement in accordance with the Terminiation provision of the contract. It also stated that in the event of nonexercise of an option or program cancellation for any reason other than default, the contract would be subject to an equitable adjustment to provide for recoupment by the contractor of any unamortized production ST/STE acquisition cost, or adjustment of the amortization schedule, as appropriate.

On February 11, 1988, bilateral modification P00006 to the contract was executed by the CO. This modification exercised Option 2 on an incremental funding basis.

Then on February 25, 1988, just 15 days after contract award, the CO notified MMC by letter that a reduction in the FY 1989 funds allocated to the LOS–F–H Project in the President's FY 1988 Budget necessitated a not-to-exceed (NTE) proposal from MMC for substantially less hardware quantities than set forth in Option 3 of the contract. It was requested that such a proposal be received before March 4, 1988. Prior to the CO's letter of February 25, 1988, there was no indication that any Government official notified MMC of the reduction. MMC contended that while it was aware of budget cut speculation from reading several periodicals in the November and December 1987 time frame, it was not aware of any specific reduction decisions prior to the CO's letter of February 25, 1988.

On March 16, 1988, MMC provided the NTE proposal requested. The proposal contained the long lead time items necessary to support 5 fire units and 60 missiles as opposed to the quantities necessary to support the 15 fire units and 178 missiles called for in the contract at that time for Option 3. While MMC did not mention its up-front and capital investment in its March 16, 1988, proposal, it did make reference to its investment and its intent to recover it as originally planned. This letter accompanied the signed copy of contract modification P00022 MMC sent to the CO. Modification P00022 incorporated the reduced quantity for Option 3 into the contract. It also exercised Option 3 for the reduced quantities at NTE prices to be definitized within 180 days.

On December 9, 1988, MMC provided its proposal for final pricing of the new quantities for Option 3. This proposal was conditioned on MICOM acceptance of a contractor proposed provision (H–28) wherein MICOM would recognize: 1) that MMC had and would continue to make a significant investment in the LOS–F–H program; 2) that recovery of that investment was planned commencing with the FY 1990 program requirement; and 3) the allowability of an reimbursement for the investment in subsequent year production options. However, the parties failed to reach any agreement on provision H–28, and it was not incorporated into the contract. MMC Provision H–28 is attached.

On March 10, 1989, the CO concurred in an MMC suggestion that its December 1988 proposal was outdated and that the new pricing be combined with a planned repricing exercise for Option 4. On April 14, 1989, the CO provided MMC with RFP package D9–109–89, which called for a restructure of the contract. With regard to Option 4, the package called for prices for 5 fire units and 60 missiles, and 4 fire units and 48 missiles. No funding profile was provided. Funding constraints, additional and extensive testing requirements, and other programmatic and administrative delays were identified as contributing factors to the need for the restructure.

On June 27, 1989, MMC provided its response. With regard to Option 4, MMC proposed the following:

Option	Quantities	NTE price
Option IV	5 Fire Units and 60 missiles	$151,292,880
Option IV(a)	4 Fire Units and 48 missiles	131,289,560
Option IV(b)	4 Fire Units and 10 missiles	88,772,880

MMC's proposal stated that its unsolicited Option IV(b) was an alternate that contained suggested hardware and support services which MMC believed would fulfill the Army's near term requirements and meet the Army's perceived budget restraints. The proposal further stated that the proposed prices included additional MMC supplemental funds in the amount of $29 million. At this time MMC again requested indemnification of allocable and allowable advance expenditures. On July 17, 1989, the CO rejected this proposal because it did not contain firm NTE prices. A new proposal was requested.

Several meetings between various representatives of MMC and MICOM followed. One such meeting was held on July 21, 1989, in the office of the Director of the Acquisition Center at MICOM. Following these meetings, amendment 4 to the restructure solicitation was issued. At this time two clauses proposed by MMC (identified as H–36 and H–37) were incorporated into the solicitation. These clauses, which deal with indemnification of and recovery of MMC upfront nonrecurring and capital outlay costs, are also found in contract modification P00063. Clauses H–36 and H–37 are attached.

On October 24, 1989, MMC submitted its combined proposal for definitization of the new Option III and IV quantities. At that time, citing H–36, MMC submitted a proposal for the recovery of capital and nonrecurring investment costs. The proposal was further revised by MMC in November 1989, and completed on March 29, 1990.

On May 7, 1990, MMC wrote the CO, raising the possibility of early transition of the missile production line from Switzerland to the United States. A change in the contract provision dealing with ST/STE was requested. On May 31, 1990, the CO responded that since the program was experiencing perturbations and system technical performance uncertainties, the Government was not willing, at that time, to increase its exposure relative to such requirements.

On June 15, 1990, an independent reliability, availability, and maintainability (RAM) review of the MMC LOS–F–H System was completed by a team appointed by the Deputy Under Secretary of the Army (Operations Research), and the Commanding General of the Operational Test Evaluation Agency. This review established that while the system met or exceeded technical requirements, its long term RAM performance left much to be desired. On July 8, 1990, the CO advised the MMC Contract Manager that no further action would be taken at that time on the earlier indemnification request pursuant to an agreement between the Army's Air Defense Program Executive Office and MMC officials.

On September 13, 1990, the CO wrote to MMC advising that an updated proposal was needed for audit by The Defense Contract Audit Agency (DCAA). On November 16, 1990, MMC forwarded the updated request for information to the CO. On January 24, 1991, a DCAA Audit Report for the request for indemnification was completed.

In the interim, on November 5, 1990, the U.S. Congress enacted Public Law 101–510, which stated that the Secretary of the Army may not obligate any funds after November 5, 1990, for a payment under the ADATS (the MMC LOS–F–H candidate) air defense program for contractor corrections of system reliability deficiencies to meet original program specifications.

On February 15, 1991, the parties finalized contract modification P00116, wherein a Test Program Extension Phase was added to the contract. Negotiation of this agreement began before any action was taken by the U.S. Congress. The parties agreed that MMC would fund a reliability growth program and MICOM would fund a test program extension to verify actual system reliability.

On June 18, 1991, a MICOM Price Analysis Report concerning indemnification was completed. On August 16, 1991, the MICOM Commanding General forwarded the MMC request to the Army Contract Adjustment Board (ACAB) through the Army materiel Command (AMC). The referral stated that MMC's Public Law indemnification request was being forwarded pursuant to a contract requirement that MICOM would make a ''best effort'' to ensure that the special provision was proceeded in a timely fashion. No recommendation was made. The letter requested action by the ACAB on the request and asked that if indemnification was granted, MICOM be provided appropriate guidelines for and an opportunity to negotiate the implementing provision. On December 6, 1991, AMC forwarded the MMC indemnification request to the ACAB. AMC recommended denial of the request as premature.

On January 22, 1992, the Secretary of Defense announced that the Army's LOS–F–H program was canceled. On February 27, 1992, the ACAB notified MMC that since the program had been canceled, indemnification was no longer a suitable form of relief for MMC. MMC was advised to submit a revision of its

request if it desired to maintain its request under Public Law 85–804.

MMC has been paid a total of $363,513,948.04. This represents amounts paid under the basic contract, its options, and under the termination for convenience clause to include $25.8 million under Clause H–37. The team's present request for $110.7 million is in addition to amounts already received.

Applicants contentions

For the following reasons the Team believed that it should be granted relief for losses it sustained as a result of the supplemental funding it provided to the Government and for which it has not been reimbursed:

First, the Government identified the LOS–F–H program as a high-priority program, answering a critical need for air defense for the Army's heavy maneuvering forces, and the Team made a firm commitment to the Program.

Second, the Government defined a program plan that, by any objective assessment, could not be accomplished without contractor concurrent supplemental funding which the Team provided.

Third, throughout the contract, statements, representations, and other actions by the Government encouraged the Team to continue supplemental funding of the program, even as Government funding decreased and technical requirements increased. The Team lists the following ten Government actions in support of this assertion:

1. The Government accepted MMC's original proposal, which clearly identified its plan to provide supplemental funding for the early program phases and then recover that funding during priced production options;

2. By indemnifying ST/STE, the Government clearly demonstrated an intent to carry the program through to production;

3. The Government continued to acknowledge and accept MMC's supplemental funding;

4. The Army, in December 1987, after selecting the Martin Marietta Team, and prior to contract award, reduced FY 1989 funding for the LOS–F–H program. On February 10, 1988, the Army awarded the contract that it knew could not be executed as contracted for by the parties. As a result, MMC became contractually obligated to spend the initial increment of supplemental funding required to perform the contract ($65 million). MMC was notified by the CO 15 days after contract award that significant hardware reductions would be made due to FY 1989 funding reductions. At this time, MMC's contractual method of recovery (priced production options) was effectively eliminated because of the Army's intent to reduce production quantities and funding;

5. The Government accepted additional nonrecurring funding ($29 million) by MMC when Government funding was insufficient to execute contract Option IV (FY 1990);

6. Special Provision H–36 was incorporated in to the contract, committing to a ''best effort'' to secure indemnification of MMC's nonrecurring expenditures;

7. Special Provision H–37 was incorporated into the contract, providing for recovery of nonrecurring expenses within the obligated contract funds in the event of termination through no fault of MMC;

8. The Government insisted that MMC fund and perform a reliability growth program (an additional $17.3 million) to achieve performance over and above current contract reliability requirements;

9. MICOM program officials encouraged MMC to expend funds to relocate the ADATS missile production line from Switzerland to the United States in anticipation of Government production requirements; and

10. The Government failed to process MMC's original request for indemnification under Public Law 85–804 in a timely manner.

Decision

The Team requested an amendment without consideration for $110.7 million, asserting that it lost this amount providing contractor supplemental funding to the LOS–F–H program. Suffering a loss is not enough to justify an amendment without consideration under Public Law 85–804 and FAR 50.302–1. To justify relief under this provision, a contractor must established that the loss: (a) will impair the future productive ability of a contractor whose continued operation is essential to the national defense (FAR 50.302–1(a)); or (b) is the result of Government action, which in the interests of fairness deserves to be compensated (FAR 50.302–1(b)).

In this case, the Team did not assert that the provisions of FAR 50.302–1(a) apply, but instead framed their request for relief in terms of Government action (FAR 50.302–1(b)). It is generally recognized that the Government action theory of recovery is composed of three elements:

1. The contractor has suffered an actual loss;

2. The loss resulted from some Government action (either a contractual or sovereign act); and

3. The Government action action has resulted in unfairness to the contractor.

As discussed below, while the ACAB agreed that the Team suffered a loss of at least $110.7 million, the weight of the evidence did not support the claim that the loss was the result of Government action(s), or that it would be unfair to maintain the status quo with regard to the parties' position involving the canceled LOS–F–H Program. The ACAB found that the losses suffered by the Team were the result of calculated business decisions made under the pressure of competition, and not the result of Government action. It was decided that the risk of loss in this situation must therefore be born by the Team.

First, there was no question that the Army identified to MMC and the other competitors that the LOS–F–H was a high-priority program answering a critical need for air defense of the Army's heavy maneuvering forces. However, this statement of need hardly qualified as the type of Government action that warrants granting relief under FAR 50.302–(b) when a program is subsequently canceled. When this statement of need was made it was truthful and supported with adequate funding. These kinds of statements are frequently made by the Government. In fact, if the Government can not make these definitive statements, it is prohibited from acquiring the goods or services requested. Using the Teams' analysis, anytime the Government cancels a program a contractor would be entitled to relief under Public Law 85–804. Adoption of this analysis would make unnecessary and meaningless other protection found in Government contracts which provide for the effect of a canceled contract (e.g. termination for convenience clause), and would eliminate from contractor's consideration any risk of loss on the contract.

Second, the Team asserted that any objective assessment of the Army's requirements reveals a program that could not be accomplished without contractor concurrent supplemental funding. The ACAB was unable to verify the Team's implied position that all four competitors considered supplemental funding to be essential to this acquisition because the proposals of those offerors not selected for award had been destroyed. However, the consensus of the Government personnel involved in this action indicated that of the four offerors, only MMC affirmatively notified the Army that its proposal involved the use of contractor funds to accomplish early Government objectives. Furthermore, the ACAB had been advised that whether an offeror proposed the use of their funds to support the initial efforts under the contract with recovery in follow on production options was not a factor in the Army's cost/price deliberations. What was unique about the LOS–L–H contract was that the RPF informed offerors of the Army's six year funding profile for the program (total funding line of $1.984 billion). Offerors were told that award would be made to the contractor that closest achieved the Army's desired objectives.

MMC's response to this situation was informative. Even though MMC identified the Army's funding profile to be insufficient in the early years to pay for all of its costs, and even though it proposed indemnification clauses to cover its nonrecurring up-front investment and capital outlay (clauses specifically rejected by the Army, i.e., H–12a and H–12b), MMC elected to remain in the competition. Apparently, MMC viewed the Army's overall funding profile to be sufficient, and made a business decision to shift a substantial proportion of its cost to the follow on production options. MMC could have chosen not to submit an offer, but it did not elect that course of action. These facts suggested that MMC considered the risks involved and made a business decision that it could present an acceptable offer that met the Army's funding line. By analogy, it is noted that the Government may accept a contractor's ''buy-in'' to a contract, and if this is permissible, certainly the Government may accept advanced funding by the contractor on the contract. Consequently, the ACAB was not persuaded that the acceptance of a contractor's proposal[2] especially one from a major experienced DoD contractor like MMC, constituted the kind of Government action which justified providing relief under Public Law 85–804.

MMC had identified some ten Government actions which occurred throughout the contract which encouraged it to continue supplemental funding. The first (acceptance of MMC's original proposal) is discussed above. Others of significance are discussed below.

MMC contended that by indemnifying production ST/STE, the Army clearly demonstrated an intent to carry the program through to production. While the contract contained such a provision, it was unreasonable to conclude that it constituted some form of a guarantee that the LOS–F–H program would enter production. The Army clearly had an expectation that this program would enter full scale production; however, there were no guarantees. Indeed, it can be argued that the presence of this limited indemnification provision in the contract was a warning that production was not a foregone conclusion, i.e., there were risks involved and contractors must plan accordingly.

MMC complained that the exercise of Option 2 on February 10, 1988, was unfair because the Army knew that would cause MMC to expend its supplemental funds and at the time the Army knew the program would have to be restructured because of funding shortfalls in FY 1989. There was some appeal to this argument, however, shortly thereafter on February 25, 1988, immediately after becoming aware of the reduced funding, the CO notified MMC of the problem. During the 15 days between February 10–25, 1988, MMC

[2] Acceptance of MMC's original proposal was listed as the first of ten Government actions that encouraged it to provide supplemental funding to the LOS–F–H program. Government actions 3 and 5 are similar in their charge.

did not obligate all of its supplemental funding ($65 million). In fact, MMC did not definitize its $1.00[3] contracts with its subcontractors, Oerlikon and Williams, until March and April of 1988, respectively. On February 25, 1988, MMC could have objected to the changed circumstances, but it did not. It was not unreasonable to conclude that MMC failed to object because it believed that an objection would cancel the program and lead to the termination of the contract. At that point, still believing the program could be saved, MMC concluded it was worth the risk and continued performance.

The same analysis applied to the execution of Option IV, which MMC asserted amounted to $29 million in supplemental funding by the Team. The restructuring of the option began in August 1988. MMC had the opportunity of repricing any remaining options in the contract so it could recover all of its supplemental funding. However, MMC, which was in a sole source position at that time, elected not to seek such a repricing, probably out of a concern that the program may have been canceled. Consequently, MMC made the decision to continue to accept the risks it had undertaken from the beginning of the competition.

MMC asserted that the insertion of Special Provision H–36 in its contract, committed the Army to a ''best effort'' to secure indemnification of MMC's nonrecurring investment costs. The parties had different opinions on the meaning of H–36. MMC believed that the clause represented a Government commitment to use its best effort to secure indemnification for MMC for what the Government considered to be legal and of value to the Government. On the other hand, MICOM officials stated that the clause merely required MICOM to make its best effort to insure that special provisions, deemed to be of value to the Government, and in accord with applicable statutes and regulations, would be processed in a timely manner for consideration at a higher level and, if approved, incorporated into the contract. A review of H–36 supported MICOM's reading of the clause. In any event, the ACAB did not believe that agreeing to the incorporation of such clause in a contract constituted the type of Government action which triggers the applicability of Public Law 85–804.

MMC also cited the inclusion of Special Provision H–37 as a Government action which encouraged its expenditure of nonrecurring investment costs. This clause was negotiated in July 1989 after MMC made its decision to accept the risk of loss associated with the contract. The ACAB found it difficult to ascertain how the interpretation of this clause harmed MMC, since the TCO paid MMC $25.8 million under its terms and conditions.

MMC's argument that the Army insisted that it spend $17.3 million on a reliability growth program was not supported by the record.[4] During the period April 1, 1990, to May 18, 1990, the Government conducted an independent Reliability, Availability, and Maintainability (RAM) review of the LOS–F–H system. This report, dated June 15, 1990, found that while the LOS–F–H met or exceeded program requirements in the area of technical performance, it had not demonstrated the capability of meeting RAM criteria essential for deployment. A reliability growth program was recommended before the system entered production. MMC and the Government reached an agreement whereby MMC would fund a RAM growth program and the Government would fund an extended test program. This occurred before Congress directed in November 1990 that the Army not fund improvement of system reliability deficiencies. All things considered, the ACAB believed that this arrangement was not properly characterized as a situation where the Army insisted that MMC do anything. Rather, the ACAB believed the proper characterization was that the parties reached an agreement on a solution for correcting a mutually recognized problem with the system.

MMC asserted that LOS–F–H program officials encouraged it to relocate Oerlikon's missile production line from Switzerland to the United States. The circumstances surrounding this issue were in dispute.

Colonel Gamino, the Project Manager, stated that the idea of moving the missile production line to the United States came from MMC. He pointed out that moving the line had the obvious advantages of lower cost, reduced risk and increased political support. He advised that MMC approached him on several occasions indicating it was considering the move. He stated that while he neither objected to the proposal, nor encouraged further consideration of the move, he made it clear to MMC that the decision to move the line was a business decision that would have to be made by MMC.

General Drolet, the Program Executive Officer at the time, indicated that his first knowledge that such a move was under consideration came in a discussion with Colonel Gamino, during which he was advised that Colonel Gamino had learned that MMC had been involved in undisclosed discussions with the Swiss on moving the line. The General confirms that the Army had earlier expressed serious concern to MMC over the cost of the missile, and that when he discussed the matter with MMC officials after his discussion with Colonel Gamino he encouraged MMC to explore the concept because he felt that such a move would reduce the cost of the missile.

Dr. Arnold Maynard, as employee in the LOS–F–H Project Office at the time, advised that he remembered the concept coming up during discussions between Project Office officials; all of whom felt it was a good idea primarily because of the political consequences of production in the United States. However, Dr. Maynard did not recall any discussions with MMC officials on the subject.

MMC, on the other hand, maintained that the idea to move the line came from unidentified senior Army officials and that those officials provided strong encouragement for the move. MMC cited first quarter of calendar year 1989 program cost reviews as the point in time when the move was conceived and encouragement begun.

The ACAB had carefully reviewed this evidence and concluded that the decision to move Oerlikon's missile production line was a business decision of MMC's and was not the product of any Government action. It appeared from the record that the funds associated with the move had been invested by the time the issue of moving the line came to the attention of Army officials.

The final Government action MMC complained of was the Army's failure to timely process its original request for indemnification. MMC asserted that it should not have taken 31 months to process its request from the CO to the senior procurement official at the Department of the Army (October 1989–February 1992). MMC acknowledged that some delays were caused by a misunderstanding of the documents requested to support the proposal and the fact that the action was put ''on hold'' (for less than two months) in mid-1990 while reliability growth was being worked. MICOM described the situation as follows: MMC and the CO were unable to agree that the request was complete and ready to be sent forward until MMC provided further input on March 29, 1990. The RAM issue became prominent shortly thereafter. This caused the parties to agree that the request should not be sent forward and the Army should put the indemnification request ''on the back burner'' until further notice. Following receipt of briefings from both MICOM and MMC in the third quarter of 1990, Department of the Army officials requested that MICOM take action to send the request forward for action. This called for an update of MMC's request, which was received in November 1990, and an audit was completed by the Defense Contract Audit Agency in the latter part of January 1991. A MICOM price analysis was completed in June 1991. In August 1991, the request was forwarded by MICOM through AMC to Headquarters Department of the Army for action. AMC sent the request forward on December 6, 1991. The ACAB took action at the end of February 1992.

It was the ACAB's judgment that while there was delay in processing the request, the record did not support MMC assertion that the Army was responsible for the majority of the delay. Furthermore, since MMC's original request for indemnification was based on essentially the same facts that were now before the ACAB, MMC had suffered no prejudice since there was no reason to believe that an earlier decision by the Army on this request would be different than the one reached by ACAB today.

Conclusion

The ACAB considered all materials submitted by the Martin Marietta Team, all information submitted by the MICOM Contract Adjustment Board, and all testimony presented to the ACAB on October 6, 1994. Based on that review, it was the unanimous decision of the ACAB that relief under the authority of Public Law 85–804 was not appropriate in this case and the request was denied.

ATTACHMENT—PRIME CONTRACT SPECIAL PROVISIONS

Special provision submitted to MICOM, but not incorporated into the LOS–F–H contract.

H–28 contractor recovery of nonrecurring investment

''The Government recognizes that the contractor has and will continue to make a significant financial investment in the LOS–F–H program substantially as was proposed in the FAAD LOS–F–H BAFO Cost Volume IV, OR19,200P, pages 2–53 to 2–60, dated November 12, 1987. The Government also recognizes that the recovery of this investment by the contractor is planned, commencing with the FY 1990 program and for each program year, in accordance with the schedule as provided in the same BAFO Cost Volume IV, OR19,200, page 0–18. To this end, it is the intention of the Government, as stated herein, to recognize the allowability of and reimbursement for this nonrecurring contractor investment in subsequent program year production options and to assure the recovery of that contractor investment as specified above should these options be exercised by the Government.''

Special Provisions incorporated into Option IV

[3] In a letter to Williams dated July 17, 1987, MMC stated: ''To win this program we must develop a strong team that is not only willing to share the rewards, but also to shoulder their share of the risk.'' Similar letters were sent to all major MMC subcontractors. In accordance with this business decision, Williams and Oerlikon embarked on their Option 2 efforts for $1.00.

[4] While MMC cited this as one of the Government actions which encouraged it to expend investment costs, MMC was not asking for reimbursement of any of the expenditures associated with the effort. The $17.3 million figure was not included in the $110.7 million request for relief.

H–36 indemnification procedures

''The contractor has provided, for consideration by the Government with his NTE submittal, the following contract special provisions that he has requested the Government include in the resultant definitized contract: (1) Capital Indemnification; and (2) Indemnification of Non-recurring Investment. Approval for inclusion of these provisions is at a higher headquarters. It is the intent of MICOM to review in detail the content of these provisions. After review, MICOM will make a ''best effort'' to ensure that the special provisions deemed to be of value to the Government and IAW applicable statutes and regulations, are processed in a timely manner and, upon receipt of approval, to incorporate the special provisions into the contract by contract modification.

Approval or disapproval of the above provisions shall not result in a change to the NTE or the definitized price of Option IV.''

H–37 contractor recovery of nonrecurring investment

''The Government recognizes that the contractor has and will continue to make a significant financial investment in the LOS–F–H program. The Government also recognizes that the recovery of this investment by the contractor is planned, commencing with the FY 1990 program and for each program year. To this end, it is the intention of the Government to recognize all reasonable, allowable and allocable nonrecurring contractor investment in subsequent program year production options should these options be exercised by the Government. Nothing contained herein in any way shall be construed to diminish the Government's right to review and audit these costs at any time IAW provisions in the contract. In the event no options are exercised, there will be no liability on the part of the Government not covered elsewhere in the contract. The amount claimed to be invested through Option IV by the contractor is not-to-exceed amount of $98,000,000, which is subject to downward negotiation only.

In the event the Government terminates this contract for convenience, the contractor may include in its termination claim and the Government will recognize any previously incurred reasonable, allocable, and allowable unrecovered investment costs to the extent such costs do not cause the termination settlement to exceed the funding obligated to the contract.''

Contingent Liabilities: None.

Contractor: None.

DEPARTMENT OF THE NAVY

Contractor: EMS Development Corporation (EMS).

Type of action: Amendment Without Consideration.

Actual or estimated potential cost: $1,053,769.

Service and activity: Department of the Navy, Naval Sea Systems Command.

Description of product or service: Supply of degaussing systems on LHD 5 and LHD 6.

Background: EMS Development Corporation (EMS) submitted a Request for Extraordinary Contractual Relief under Public Law 85–804 (hereinafter referred to as the ''Act'') on May 15, 1995, in the amount of $1,053,769, not including profit. The request arose out of contract N00024–92–C–2204, between NAVSEA and Ingalls Shipbuilding, Inc. (ISI), for construction of LHD 5 and 6. EMS was a subcontractor chosen by ISI to supply degaussing systems on LHD 5 and LHD 6.

The Secretary of the Navy has authority under the Act to approve or deny requests for extraordinary contractual relief. Section 5250.201–70(a) of the Navy Acquisition Procedures Supplement (January 1992) delegates authority to deny requests for extraordinary contractual relief to the Head of the Contracting Activity, which authority may be and has been further delegated to the Naval Sea Systems Command (NAVSEA) Deputy Commander for Contracts. Based on this delegation of authority, it was determined that there was no basis to grant EMS's request for extraordinary contractual relief. Therefore, EMS's request for relief pursuant to Public Law 85–804 was denied in its entirety.

Through a full and open competition, NAVSEA awarded contract N00024–92–C–4045 to EMS in July 1992 for 11 degaussing systems. The contract called for a first article testing of the system, Level III drawings, provisional documentation and technical manuals, plus ten production degaussing units. The degaussing systems consisted of four power supplies (sizes 5KW, 8KW, 12KW and 26KW), one switchboard, and one remote control unit. The period of performance for the contract was July 1992 to November 1994.

Subsequent to this contract award, ISI solicited EMS to participate in a competitive procurement for degaussing systems to be installed on LHD 5 and LHD 6. The degaussing systems under the ISI procurement were identical to the systems being procured under the NAVSEA contract, with the exception of two 40KW power supplies. EMS acknowledged in the request for relief that it submitted a proposal to ISI with a price predicated on the assumption that the costs of engineering design, Level III drawings, first article testing, provisional documentation and technical manual preparation on all but the two 40KW power supplies would be absorbed under the NAVSEA contract. In addition, because of the simultaneous production of degaussing systems, EMS was able to offer ISI significant material cost savings. The period of performance stipulated in the ISI Request for Proposal (RFP) coincided with the NAVSEA period of performance. Because of the larger number of systems being produced within the same period of performance, EMS was able to propose aggressive burden rates. These facts and assumptions resulted in a highly competitive unit price for the degaussing systems to be supplied for LHD 5 and LHD 6.

In December 1992, NAVSEA exercised one of the existing contract options which increased the number of production units from 10 to 16. In January 1993, ISI awarded EMS a contract in the amount of $906,380 to provide degaussing systems for LHD 5 and LHD 6. On June 23, 1993, EMS was notified that the NAVSEA contract was to be terminated in its entirety for the convenience of the Government. The termination for convenience resulted from the identification of surplus degaussing systems from ships scheduled for decommissioning. At that time, the NAVSEA contract was 11 months into completion, but still eight months from the completion of first article testing. The termination of the NAVSEA contract caused serious impacts on EMS's cash flow and financial posture. In addition, the termination jeopardized EMS's ability to provide the degaussing systems to ISI at the contract cost and schedule.

EMS continued performance under the ISI contract while negotiating the terms of the NAVSEA termination beginning in February 1995. During negotiations, the Termination Contracting Officer (TCO) informed EMS that production costs would not be allowed because EMS had not completed first article testing prior to the termination. Further, the TCO warned that inclusion of unabsorbed overhead in EMS's termination settlement proposal could be cause for rejection.

Because of their tenuous cash flow situation, EMS did not have the financial resources to prolong termination settlement negotiations and settled for $100,000 less than initially requested. EMS then filed a request for relief under Public Law 85–804 with ISI. On May 3, 1995, ISI terminated its subcontract with EMS for default, citing EMS's failure to make progress as the basis for the termination. Additionally, ISI refused to consider EMS's request for a subcontract price adjustment. The actions taken by ISI, coupled with the NAVSEA terminated contract, left EMS in financial extremis. On May 15, 1995, EMS requested extraordinary contractual relief under Public Law 85–804 directly with the Navy, asserting ''essentiality'' to the national defense and ''Government Action'' as the basis for granting relief. EMS requested relief in the amount of $1,053,769, plus profit, on increased costs caused by Government action, which represented the alleged loss sustained due to the termination of the NAVSEA prime contract and the ISI subcontract, as well as attendant increases incurred on all other contracts.

A. EMS did not establish a basis for contract adjustment

The Federal Acquisition Regulation (FAR), Part 50.302, lists the following three types of contract adjustment under the Act: (1) amendments without consideration (FAR 50.302–1); (2) correcting mistakes (FAR 50.302–2); and (3) formalizing informal commitments (FAR 50.302–3). EMS requested a contract adjustment pursuant to FAR 50.302–1.

FAR 50.302–1(a) stipulates an adjustment may be granted without consideration if the ''actual or threatened loss under a defense contract would impair the productive ability of a contractor whose continued performance on any defense contract or whose continued operation as a source of supply is found to be essential to the national defense.'' In addition, FAR 50.302–1(b) provides that if ''. . . a contractor suffers a loss (not merely a decrease in anticipated profits) under a defense contract because of Government action . . . when the Government action, while not creating any liability on the Government's part, increases performance cost and results in a loss to the contractor,'' an adjustment without consideration may be made to the contract. EMS alleged it was entitled to an adjustment pursuant to both 50.302–1(a) and 50.302–1(b).

1. Amendments Without Consideration—Essentiality:

In its submission, EMS stated it was the sole supplier for the EMS–10, MCD–1, SSM–2, SSM–4 and SSM–5 degaussing units. The FFG, AOE, TAO, LSD, and CVN class ships are equipped with these systems. In addition, EMS was awarded a sole source contract for a computer controlled power supply for SSN–21. Accordingly, EMS argued it comprised the U.S. industrial base for this technology.

At the time of this request, EMS was a subcontractor to Avondale Industries, Inc. (AII), and National Steel and Shipbuilding Company (NASSCO) to supply the degaussing systems for the LSD 52 and AOE 10, respectively. Avondale's subcontract with EMS was found to be approximately 13 percent complete as of June 18, 1995. The subcontract value is $367,000, of which $60,000 had been paid to EMS through progress payments. NASSCO's subcontract with EMS was 37 percent complete as of June 18, 1995, and $155,486 of a total contract value of $375,028 had been paid to EMS through progress payments. Discussions were conducted with the cognizant program offices to validate EMS's assertion that it was the only source available for the needed equipment and, if not, to ascertain whether any other company would supply the needed systems in a timely fashion. Similar discussions were entered into with representatives from both Avondale and NASSCO.

Several facts were disclosed during the aforementioned discussions. First, both the program offices and the shipyards confirmed that other sources existed which could produce the required systems with slight modification to their production lines. Secondly, the Program Managers stated the degaussing systems are not essential to acceptance of the ship(s) on which they are to be installed and should their delivery be delayed, they could be installed during a post delivery availability period.

FAR 50.302–1(a) requires the contractor's continued performance or operation to be essential to the national defense to merit a contract amendment without consideration. EMS's continued performance or operation was not required to support delivery of the AOE or LSD ships. In addition, EMS was not considered to be essential to the national defense because other sources existed which could satisfy the needs of the Government.

EMS did not, therefore, demonstrate a sufficient basis for an amendment without consideration based on ''essentiality'' to the national defense.

2. Amendments Without Consideration—Government Action:

EMS asserted the termination for convenience of the NAVSEA contract was the cause for the deterioration of its financial condition. Specifically, EMS stated the termination action taken and the denial by the Navy to allow completion of the first article testing and level III drawings reduced its overhead base, which resulted in increased burden rates. The increased rates caused cost overruns on other existing contracts. NAVSEA was of the opinion that EMS's assertions were without merit for two reasons: (1) EMS suffered significant financial loses on contracts to supply degaussing systems prior to NAVSEA's termination of its contract with EMS; and (2) EMS knowingly and voluntarily chose to sign a full and final release waiving its rights to further termination costs because the company had a tenuous cash flow situation as a result of the losses on its other contracts.

In the backup data submitted as attachments to its Public Law 85–804 submission, EMS acknowledged a substantial loss, equating to approximately $1M on a contract with Electric Boat Division of General Dynamics (EB). A review of EMS's cash flow statements showed this loss had a significant negative impact on EMS's financial status. In fact, the supporting data showed an overall projected loss of $1.2M from EMS's existing contracts, including the $970,108 projected loss on the Electric Boat contract. This loss is unrelated to EMS's claimed losses associated with the increased overhead rates. Therefore, the Navy's decision to terminate the NAVSEA contract could not be considered the sole cause for the deterioration of EMS's financial condition.

As stated above, EMS was informed by the TCO that no production costs or costs associated with unabsorbed overhead would be included in the termination settlement. The TCO further stated that EMS could dispute both issues, but that such an action would increase the time required to reach a settlement. EMS chose to not delay the termination negotiation and, instead, to pursue extraordinary contractual relief because, as cited in its request for relief, ''they needed a quick cash settlement.'' The company further stated that it realized the negotiated settlement represented a loss to EMS.

Pursuant to FAR 49.201, when a fixed price contract is terminated for convenience, a settlement should compensate the contractor for the work done and the preparations made for the terminated portion of the contract, including a reasonable allowance for profit. Fair compensation is a matter of judgment and is subject to negotiations and, preferably, a bilateral agreement. Such an agreement was executed by administrative modification A00001 on February 1, 1995. The termination settlement, as agreed to by EMS, expressly stated ''(t)he contractor has received –0– for work and services performed, or items delivered, under the complete portion of the contract.'' In addition, the termination modification contained a release specifying the net settlement constituted payment in full and ''complete settlement of the amount due the Contractor for the complete termination of the contract and all other demands and liability of the Contractor and the Government under the contract. . . .'' EMS elected not to continue settlement negotiations and endorsed the agreement on January 31, 1995, with the full knowledge it has relinquished its right for future recourse. Further, the termination settlement contained several reserved items protecting the rights and liabilities of the parties. EMS elected not to reserve its right for recovery of costs associated with the first article production units and increased overhead costs on other contract(s) resulting from the termination. EMS was responsible for protecting its rights and liabilities, and identifying areas to be reserved for possible future action. EMS did not include costs in the termination settlement associated with the issues which it claimed to be the catalyst for its extreme financial position. EMS had the right to protect its interest in recovery of the subject costs and knowingly forfeited that right with the signing of the settlement modification. The forfeiture of the reservation for recovery of the subject costs was not and could not be considered to be the result of Government action.

FAR 50.302–1(b) requires an applicant for relief to show that it has suffered a loss, not merely diminished profits, under a defense contract because of government action. With full knowledge of a loss resultant from the termination of the NAVSEA contracts, EMS endorsed the modification releasing its right to assert any claim arising out of events regarding the termination. Accordingly, it could not be concluded that EMS's loss was solely the result of Government action. It was, therefore, considered inappropriate to grant relief under Public Law 85–804 for those same events.

CONCLUSION

After considering all relevant information, it was determined that EMS's Public Law 85–804 request should be denied.

Contingent liabilities

Provisions to indemnify contractors against liabilities because of claims for death, injury, or property damage arising from nuclear radiation, use of high energy propellants, or other risks not covered by the Contractor's insurance program were included in these contracts. The potential cost of the liabilities could not be estimated since the liability to the United States Government, if any, would depend upon the occurrence of an incident as described in the indemnification clause. Items procured were generally those associated with nuclear-powered vessels, nuclear armed missiles, experimental work with nuclear energy, handling of explosives, or performance in hazardous areas.

Contractors:	*Number*
Westinghouse Election Corporation	9
General Dynamics Corporation, Electric Boat Division	6
Lockheed Missiles & Space, Co., Inc.	3
Martin Marietta Defense Systems	4
Newport News Shipbuilding	3
Hughes Aircraft Company	1
Hughes Missile Systems Company	1
Charles Stark Draper Laboratory	1
Alliant Techsystem, Inc./Thiokol Corporation	1
Loral Defense Systems—East	1
Kearfott Guidance & Navigation Corporation	1
Raytheon Company, Electric Systems Division	1
Rockwell International Corporation, Autonetics Strategic Systems Division	1
Total	33

CONTINGENT LIABILITIES SUMMARY TABLE

Contractor	Service and activity	Description of product service
Westinghouse Electric Corporation	Department of the Navy, Naval Sea Systems Command	Replacement nuclear reactor plant components.
	Department of the Navy, Naval Sea Systems Command	New Attack Submarine nuclear reactor plant components.
	Department of the Navy, Naval Sea Systems Command	Replacement nuclear reactor plant components.
	Department of the Navy, Naval Sea Systems Command	New Attack Submarine nuclear reactor plant components.
	Department of the Navy, Strategic Systems Program	FY 1996 Launcher Training Services.
	Department of the Navy, Strategic Systems Program	Launcher Expendables for U.S. and U.K. Trident II Weapon Systems.
	Department of the Navy, Strategic Systems Program	D5 Backfit Program.
	Department of the Navy, Strategic Systems Program	Strategic Systems Programs Alterations (SPALTS) and Navy Change Requests.
	Department of the Navy, Strategic Systems Program	U.S. Operation and Maintenance.
General Dynamics Corporation	Department of the Navy, Naval Sea Systems Command	Engineering technical services and program support for design, manufacture, test and delivery of New Attack Submarine prototype Main Propulsion Unit and prototype Ship Service Turbine Generator.
	Department of the Navy, Naval Undersea Warfare Center Division	Engineering and Analysis Services for SSN–688 & SSN–21 Hull Programs.
	Department of the Navy, Naval Sea Systems Command	Engineering, technical and logistic services in support of R&D Submarine (SSN 691) Baseline Modifications.
	Department of the Navy, Naval Sea Systems Command	Basic Ordering Agreement for supplies and services in support of operational and unique SSN and SSBN Submarines.
	Department of the Navy, Naval Sea Systems Command	Engineering effort and design studies in support of the New Attack Submarine Program.
	Department of the Navy, Naval Sea Systems Command	Engineering effort and design studies in support of the Seawolf Submarine and Advance Submarine RDT&E Programs.
Lockheed Missiles & Space Co., Inc.	Department of the Navy, Strategic Systems Program	FY 1996 Trident II (D5) Missile Production, related hardware, and services.
	Department of the Navy, Strategic Systems Program	Trident Reentry Body Long Term Supportability.
	Department of the Navy, Strategic Systems Program	Propellant Hazard Test and Analysis Program.
Martin Marietta Defense Systems	Department of the Navy, Strategic Systems Program	Basic Ordering Agreement for Support of Trident and Trident II Fire Control Systems, Guidance Support Equipment and Related Support Equipment.
	Department of the Navy, Strategic Systems Program	Trident I and II Fire Control System.
	Department of the Navy, Strategic Systems Program	U.S. effort, SPALTs, Logistics Support, and Fault Insertions.
	Department of the Navy, Strategic Systems Program	Verification of failures on MK–5 Inertial Measurement Units.
Newport News Shipbuilding	Department of the Navy, Naval Sea Systems Command	Basic Ordering Agreement for supplies and services in support of operational SSN 594, 637, and 688 Class submarines.

CONTINGENT LIABILITIES SUMMARY TABLE—Continued

Contractor	Service and activity	Description of product service
	Department of the Navy, Naval Sea Systems Command	Engineering effort and design studies in support of the Seawolf Submarine Program.
	Department of the Navy, Naval Sea Systems Command	Engineering, technical, and logistic services in support of Aircraft Carrier programs.
Hughes Aircraft Company	Department of the Navy, Strategic Systems Program	Electronic Assembly, Inertial Measurement Unit Electronics, and other Electronic Components.
Hughes Missile Systems Company	Department of the Navy, Naval Air Systems Command	Procurement of Tomahawk All-Up-Round Production, Depot Maintenance, and Operational Test Launch.
Charles Stark Draper Laboratory	Department of the Navy, Strategic Systems Program	U.S. Systems Support and PIGA Screening.
Alliant Techsystem, Inc./Thiokol Corp.	Department of the Navy, Strategic Systems Program	C3 Second Stage Motor Disposal and Support.
Loral Defense Systems-East	Department of the Navy, Strategic Systems Program	U.S. Technical Services and Support Program.
Kearfott Guidance & Navigation Corp.	Department of the Navy, Strategic Systems Program	Procurement of Inertial Measurement Units (IMU), IMU Repair and Recertification, IMU Recalibration and Long Lead Material.
Raytheon Company	Department of the Navy, Strategic Systems Program	Captive Line Parts Program.
Rockwell International Corp	Department of the Navy, Strategic Systems Program	SINS, ESGM, and ESGN House System Evaluation and Engineering Support Program.

DEPARTMENT OF THE AIR FORCE

Contractor: Various.

Type of action: Contingent Liability.

Actual or estimated potential cost: The amount the Contractors will be indemnified by the Government cannot be predicted, but could entail millions of dollars.

Service and activity: Civil Reserve Air Fleet (CRAF).

Description of product or service: FY 1996 Annual Airlift Contracts.

Reference: ''Definitions of Unusually Hazardous Risks Applicable to CRAF FY 1996.''

Background: Twenty-nine contractors requested indemnification under Public Law 85–804, as implemented by Executive Order 10789, for the unusually hazardous risks (as defined) involved in providing airlift service for CRAF missions (as defined). In addition, Headquarters, Air Mobility Command (AMC), requested indemnification for subsequently identified contractors and subcontractors who conducted or supported the conduct of CRAF missions. The contractors for which indemnification was requested were those to be awarded as a result of Solicitation Fl 1626–95–R0002, and future contracts to support CRAF missions which are awarded prior to September 30, 1996. The 29 contractors who requested indemnification are listed below:

CONTRACTORS TO BE INDEMNIFIED AND PROPOSED CONTRACT NUMBER

Air Transport International (ATN), F11626–95–D0015.

Airborne Express (ABX), F11626–95–D0024.

American Airlines (AAL), F11626–95–D0022.

American Int'l Airways (CKS), F11626–95–D0038.

American Trans Air (ATA), F11626–95–D0019.

Atlas Air (GTI), F11626–95–D0023.

Burlington Air Express (BAX), F11626–95–D0020.

Carnival Airlines (CAA), F11626–95–D0020.

Continental Airlines (COA), F11626–95–D0018.

Delta Air Lines (DAL), F11626–95–D0026.

DHL Airways (DHL), F11626–95–D0027.

Emery Worldwide (EWW), F11626–95–D0018.

Evergreen International (EIA), F11626–95–D0018.

Federal Express (FDX), F11626–95–D0019.

Miami Air (MYW), F11626–95–D0018.

North American Airlines (NAO), F11626–95–D0029.

Northwest Airlines (NWA), F11626–95–D0018.

OMNI Air (OAE), F11626–95–D0037.

Rich International (RIA), F11626–95–D0018.

Southern Air Transport (SAT), F11626–95–D0019.

Sun Country Airlines (SCX), F11626–95–D0030.

Tower Air (TWR), F11626–95–D0020.

Trans World Airlines (TWA), F11626–95–D0031.

United Airlines (UAL), F11626–95–D0032.

United Parcel Service (UPS), F11626–95–D0033.

US Air (USA), F11626–95–D0035.

US Air Shuttle (USS), F11626–95–D0034.

World Airways (WOA), F11626–95–D0018.

Zantop International (ZIA), F11626–95–D0036.

Note: The same contract number may appear for more than one company because in some cases the companies provided services under a joint venture arrangement.

Desert Shield/Storm and Restore Hope showed that air carriers providing airlift services during contingencies and war require indemnification. Insurance policy war risk exclusions, or exclusions due to activation of CRAF, left many carriers uninsured—exposing them to unacceptable levels of risk. Waiting until a contingency occurs to process an indemnification request could result in delaying critical airlift missions. Contractors need to understand up front that risks will be covered by indemnification and how the coverage will be put in place once a contingency is declared.

Justification: The specific risks to be indemnified are identified in the applicable definitions. No actual cost to the Government was anticipated as a result of the actions that were to be accomplished under this approval. However, if the air carriers were to suffer losses or incur damages as a result of the occurrence of a defined risk, and if those losses or damages, exclusive of losses or damages that were within the air carriers' insurance deductible limits, were not compensated by the contractors' insurance, the contractors would be indemnified by the Government. The amount of indemnification could not be predicted, but could entail millions of dollars.

All of the 29 contractors were approved DoD carriers and, therefore, considered to have adequate, existing, and ongoing safety programs. Moreover, HQ AMC has specific procedures for determining that a contractor is complying with government safety requirements. Also, the contracting officer had determined that the contractors maintain liability insurance in amounts considered to be prudent in the ordinary course of business within the industry. Specifically, each contractor had certified that its coverage satisfied the minimum level of liability insurance required by the Government. Finally, all contractors were required to obtain war hazard insurance available under 49 U.S.C. Chapter 443 for hull and liability war risk. All but one of the contractors maintained said insurance. The remaining contractor had applied for the insurance with the Federal Aviation Administration, as required by the contract. Additional contractors and subcontractors that conduct or support the conduct of CRAF missions may be indemnified only if they request indemnification, accept the same definition of unusually hazardous risks as identified, and meet the same safety and insurance requirements as the 29 contractors who sought indemnification in this action.

Without indemnification, airlift operations to support contingencies or wars might be jeopardized to the detriment of the national defense, due to the non-availability to the air carriers of adequate commercial insurance covering risks of an unusually hazardous nature arising out of airlift services for CRAF missions. Aviation insurance is available under 49 U.S.C. Chapter 443 for air carriers, but this aviation insurance, together with available commercial insurance, does not cover all risks which might arise during CRAF missions. Accordingly, it was found that incorporating the indemnification clause in current and future contracts for airlift services for CRAF missions would facilitate the national defense.

Decision: Under authority of Public Law 85–804 and Executive Order 10789, as amended, the request was approved on October 11, 1995, to indemnify the 29 air carriers listed above and other yet to be identified air carriers providing airlift services in support of CRAF missions for the unusually hazardous risks as defined. Indemnification under this authorization shall be effected by including the clause in FAR 52.250–1, entitled ''Indemnification Under Public Law 85–804 (APR 1984),'' in the contracts for these services. This approval is contingent upon the air carriers complying with all applicable government safety requirements and maintaining insurance coverage as detailed above. The HQ AMC Commander will inform the Secretary of the Air Force immediately upon each implementation of the indemnification clause.

Approval was also granted to contracting officers to indemnify subcontractors that request indemnification, with respect to those risks as defined.

DEFINITION OF USUALLY HAZARDOUS RISKS APPLICABLE TO CRAF FY 1995 ANNUAL AIRLIFT CONTRACTS

1. Definitions:

a. ''Civil Reserve Air Fleet (CRAF) Mission'' means the provision of airlift services under this contract (1) ordered pursuant to authority available because of the activation of CRAF, or (2) directed by Commander, Air Mobility Command (AMC/CC), or his successor for mission substantially similar to, or in lieu of, those ordered pursuant to formal CRAF activation.

b. ''Airlift Services'' means all services (passenger, cargo, or medical evacuation), and anything the contractor is required to do in order to conduct or position the aircraft, personnel, supplies, and equipment for a flight and return. Airlift Services include Senior Lodger and other ground related services supporting CRAF missions. Airlift Services do not include any services involving any persons or things which, at the time of the event, act, or omission giving rise to a claim, are directly supporting commercial business operations unrelated to a CRAF mission objective.

c. ''War risks''means risks of:

(1) War (including war between the Great Powers), invasion, acts of foreign enemies, hostilities (whether declared or not), civil war, rebellion, revolution, insurrection, martial law, military or usurped power, or attempt at usurpation of power.

(2) Any hostile detonation of any weapon of war employing atomic or nuclear fission and/or fusion, or other like reaction or radioactive force or matter,

(3) Strikes, riots, civil commotions, or labor disturbances related to occurrences under subparagraph (1) above;

(4) Any act of one or more persons, whether or not agents of a sovereign power, for political or terrorist purposes, and whether the

loss or damage resulting therefrom is accidental or intentional, except for ransom or extortion demands;

(5) Any malicious act or act of sabotage, vandalism, or other act intended to cause loss or damage;

(6) Confiscation, nationalization, seizure, restraint, detention, appropriation, requisition for title or use by, or under the order of, any government (whether civil or military or de facto), or local authority;

(7) Hijacking or any unlawful seizure or wrongful exercise of control of the aircraft or crew (including any attempt at such seizure or control) made by any person or persons on board the aircraft or otherwise, acting without the consent of the insured; or

(8) The discharge or detonation of a weapon or hazardous material while on the aircraft as cargo or in the personal baggage of any passenger.

2. For the purpose of the contact clause entitled ''Indemnification Under Public Law 85–804 (APR 1984),'' it is agreed that all war risks resulting from the provision of airlift services for a CRAF mission, in accordance with the contract, are unusually hazardous risks, and shall be indemnified to the extent that such risks are not covered by insurance procured under Chapter 443 of Title 49. United States Code, as amended or other insurance, because such insurance has been canceled, has applicable exclusions, or has been determined by the government to be prohibitive in cost. The government's liability to indemnify the contractor shall not exceed that amount for which the contractor commercially insures under its established policies of insurance.

3. Indemnification is provided for personal injury and death claims resulting from the transportation of medical evacuation patients, whether or not the claim is related to war risks.

4. Indemnification of risks involving the operation of aircraft, as discussed above, is limited to claims or losses arising out of events, acts, or omissions involving the operation of an aircraft for airlift services for a CRAF mission, from the time that aircraft is withdrawn from the contractors regular operations (commercial, DoD, or other activity unrelated to airlift services for a CRAF mission), until it is returned for regular operations. Indemnification with regard to other contractor personnel or property utilized or services rendered in support of CRAF missions is limited to claims or losses arising out of events, acts, or omissions occurring during the time the first propositioning of personnel, supplies, and equipment to support the first aircraft of the contractor used for airlift services for a CRAF mission is commenced, until the timely removal of such personnel, supplies, and equipment after the last such aircraft is returned for regular operations.

5. Indemnification is contingent upon the contractor maintaining, if available, nonpremium insurance under Chapter 443 of Title 49, United States Code, as amended, and normal commercial insurance, as required, by this contract or other competent authority. Indemnification for losses covered by a contractor self-insurance program shall only be on such terms as incorporated in this contract by the contracting officer in advance of such a loss.

Contingent Liabilities

Provisions to indemnify contractors against liabilities because of claims for death, injury, or property damage arising from nuclear radiation, use of high energy propellants, or other risks not covered by the Contractor's insurance program were included; the potential cost of the liabilities cannot be estimated since the liability to the United States Government, if any, would depend upon the occurrence of an incident as described in the indemnification clause.

Contractor	*Number*
Civil Reserve Air Fleet (CRAF) FY 1996 Annual Airlift Contracts	1
Total	[1]1

[1]One additional indemnification was approved; however, the Air Force has deemed it to be ''CLASSIFIED,'' not subject to this report's purview.

EXECUTIVE COMMUNICATIONS, ETC.

Under clause 2 of rule XXIV, executive communications were taken from the Speaker's table and referred as follows:

2267. A letter from the Assistant Administrator, Environmental Protection Agency, transmitting the annual report on conditional registration of pesticides during fiscal year 1995, pursuant to 7 U.S.C. 136w–4; to the Committee on Agriculture.

2268. A letter from the Director, Administration and Management, Department of Defense, transmitting the calendar year 1995 report on ''Extraordinary Contractual Actions to Facilitate the National Defense,'' pursuant to 50 U.S.C. 1434; to the Committee on National Security.

2269. A letter from the Chairman of the Board, National Credit Union Administration, transmitting notification that the Administration is establishing and adjusting schedules of compensation; to the Committee on Banking and Financial Services.

2270. A letter from the Executive Director, Thrift Depositor Protection Oversight Board, transmitting the final inventory of real property assets under the jurisdiction of the RTC immediately prior to its termination; to the Committee on Banking and Financial Services.

2271. A letter from the Director, Office of Management and Budget, transmitting OMB's estimate of the amount of change in outlays or receipts, as the case may be, in each fiscal year through fiscal year 2002 resulting from passage of H.R. 927, pursuant to Public Law 101–508, section 13101(a) (104 Stat. 1388–582); to the Committee on the Budget.

2272. A letter from the Assistant Secretary for Legislative Affairs, Department of State, transmitting the fiscal year 1995 report on implementation of the support for East European Democracy Act [SEED] Program pursuant to 22 U.S.C. 5474; to the Committee on International Relations.

2273. A communication from the President of the United States, transmitting the annual report on Science, Technology and American Diplomacy for fiscal year 1995, pursuant to 22 U.S.C. 2656c(b); to the Committee on International Relations.

2274. A letter from the Secretary of Commerce, transmitting the Bureau of Export Administration's annual report for fiscal year 1995, pursuant to 50 U.S.C. app. 2413; to the Committee on International Relations.

2275. A letter from the Director, Congressional Budget Office, transmitting CBO's sequestration preview report for fiscal year 1997, pursuant to Public Law 101–508, section 13101(a) (104 Stat. 1388–587); jointly, to the Committee on Appropriations and the Budget.

2276. A letter from the Assistant Secretary for Legislative Affairs, Department of State, transmitting the Secretary's certification and justifications that the Republic of Belarus, the Republic of Kazakstan, the Russian Federation, and Ukraine are committed to the courses of action described in section 1203(d) of the Cooperative Threat Reduction Act of 1993 (title XII of Public Law 103–160), section 1412(d) of the Former Soviet Union Demilitarization Act of 1992 (title XIV of Public Law 102–484), and section 502 of the Freedom Support Act (Public Law 102–511); jointly, to the Committees on National Security and International Relations.

2277. A letter from the Secretary of Health and Human Services, transmitting a report on the fiscal year 1994 Low Income Home Energy Assistance Program, pursuant to 42 U.S.C. 8629(b); jointly, to the Committees on Commerce and Economic and Educational Opportunities.

2278. A letter from the Secretary of Transportation, transmitting a draft of proposed legislation entitled ''Federal Aviation Authorization Act of 1996,'' pursuant to 31 U.S.C. 1110; jointly, to the Committees on Transportation and Infrastructure, Science, and Ways and Means.

REPORTS OF COMMITTEES ON PUBLIC BILLS AND RESOLUTIONS

Under clause 2 of rule XIII, reports of committees were delivered to the Clerk for printing and reference to the proper calendar, as follows:

Mr. SHUSTER: Committee on Transportation and Infrastructure. House Concurrent Resolution 146. Resolution authorizing the 1996 Special Olympics Torch Relay to be run through the Capitol Grounds (Rept. 104–487). Referred to the House Calendar.

Mr. SHUSTER: Committee on Transportation and Infrastructure. House Concurrent Resolution 147. Resolution authorizing the use of the Capitol Grounds for the 15th annual National Peace Officers' Memorial Service (Rept. 104–488). Referred to the House Calendar.

Mr. MCINNIS: Committee on Rules. House Resolution 386. Resolution providing for consideration of the joint resolution (H.J. Res. 165) making further continuing appropriations for the fiscal year 1996, and for other purposes, and waiving a requirement of clause 4(b) of rule XI with respect to consideration of certain resolutions reported from the Committee on Rules (Rept. 104–489). Referred to the House Calendar.

PUBLIC BILLS AND RESOLUTIONS

Under clause 5 of rule X and clause 4 of rule XXII, public bills and resolutions were introduced and severally referred as follows:

By Mr. MONTGOMERY (for himself, Mr. STUMP, Mr. EDWARDS, and Mr. HUTCHINSON):

H.R. 3117. A bill to amend title 38, United States Code, to enable the Secretary of Veterans Affairs to improve service-delivery of health care to veterans, and for other purposes; to the Committee on Veterans' Affairs, and in addition to the Committee on Commerce, and Ways and Means, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned.

By Mr. STUMP (for himself, Mr. MONTGOMERY, Mr. HUTCHINSON, and Mr. EDWARDS):

H.R. 3118. A bill to amend title 38, United States Code, to reform eligibility for health care provided by the Department of Veterans Affairs; to the Committee on Veterans' Affairs.

By Mr. MONTGOMERY (by request):

H.R. 3119. A bill to amend title 38, United States Code, to revise and improve eligibility for medical care and services under