Mr. BENTSEN.
Mr. STOKES.
Mr. OBERSTAR.
Ms. DELAURO.
Mr. HOYER.
Mr. KILDEE.
Mr. BROWN of California.
Mr. WAXMAN.
Mr. PICKETT.
Mr. MCDERMOTT.
Mr. SKELTON.
Mr. FAZIO of California.
Mr. FILNER.
Mrs. MINK of Hawaii.
Mr. BAESLER.
Mr. BERMAN.
Mr. HINCHEY.
Mr. SHERMAN.
Mr. POMEROY.
Mr. ABERCROMBIE.

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

Mr. CANADY of Florida.
Mr. COMBEST.
Mrs. KELLY.
Mr. HEFLEY.
Mr. THOMAS in three instances.
Mr. CAMPBELL.
Mr. PETRI.
Mr. LARGENT.
Mr. LEWIS of California in two instances.
Mr. HYDE.
Mr. WELDON of Pennsylvania in two instances.
Mr. FORBES.
Mr. DOOLITTLE.
Mr. OXLEY.
Ms. GRANGER.
Mr. WOLF.
Mr. PORTMAN.
Mr. SHAW.
Mr. MCCOLLUM.
Mr. CUNNINGHAM.
Mrs. MORELLA.
Mrs. JOHNSON of Connecticut.

SENATE ENROLLED BILL SIGNED

The SPEAKER announced his signature to an enrolled bill of the Senate of the following title:

S. 410. An act to extend the effective date of the Investment Advisers Supervision Coordination Act.

ADJOURNMENT

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

The motion was agreed to; accordingly (at 11 o'clock and 49 minutes p.m.), the House adjourned until tomorrow, Friday, March 21, 1997, at 10 a.m.

CONTRACTUAL ACTIONS, CALENDAR YEAR 1996 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, March 11, 1997.

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 1996 report entitled Extraordinary Contractual Actions to Facilitate the National Defense.

Section A, Department of Defense Summary, indicates that 45 contractual actions were approved and that three were disapproved. Those approved include actions for which the Government's liability is contingent and cannot 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 Ballistic Missile Defense Organization, National Imagery and Mapping Agency, and the Defense Special Weapons Agency reported no actions, while the Departments of the Army, Navy, and Air Force, the Defense Logistics Agency, and the Defense Information Systems Agency, provided data regarding actions that were either approved or denied.

Sincerely,

D.O. COOKE,
Director.

Enclosure: As stated.

DEPARTMENT OF DEFENSE

EXTRAORDINARY CONTRACTUAL ACTIONS TO FACILITATE THE NATIONAL DEFENSE (Public Law 85–804) Calendar Year 1996

FOREWORD

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 costs 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 1996.

EXTRAORDINARY CONTRACTUAL ACTIONS TAKEN PURSUANT TO PUBLIC LAW 85–804 TO FACILITATE THE NATIONAL DEFENSE, CALENDAR YEAR 1996

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 1996

Department and type of action	Actions approved			Actions denied	
	Number	Amount requested	Amount approved	Number	Amount
1. Department of Defense, total	45	37,149,785.00	37,149,785.00	3	15,928,654.00
a. Amendments without consideration	2	37,149,785.00	37,149,785.00	2	15,918,654.00
b. Formalization of informal commitment	0	0.00	0.00	1	10,000.00
c. Contingent liabilities	43	0.00	0.00	0	0.00
2. Army, total	4	37,149,785.00	37,149,785.00	2	15,918,654.00
a. Amendments without consideration	2	37,149,785.00	37,149,785.00	2	15,918,654.00
b. Contingent liabilities	[1]2	0.00	0.00	0	0.00
3. Navy, total	38	0.00	0.00	0	0.00
Contingent liabilities	38	0.00	0.00	0	0.00
4. Air Force, total	2	0.00	0.00	0	0.00
Contingent liabilities	[2]2	0.00	0.00	0	0.00
5. Defense Logistics Agency, total	1	0.00	0.00	0	0.00
Contingent liabilities	1	0.00	0.00	0	0.00
6. Ballistic Missile Defense Organization, total	0	0.00	0.00	0	0.00
7. Defense Information Systems Agency, total	0	0.00	0.00	1	10,000.00

SUMMARY REPORT OF CONTRACTUAL ACTIONS TAKEN PURSUANT TO PUBLIC LAW 85–804 TO FACILITATE THE NATIONAL DEFENSE—JANUARY–DECEMBER 1996—Continued

Department and type of action	Actions approved			Actions denied	
	Number	Amount requested	Amount approved	Number	Amount
Formalization of informal commitment	0	0.00	0.00	1	10,000.00
8. National Imagery and Mapping Agency, total	0	0.00	0.00	0	0.00
9. Defense Special Weapons Agency, total	0	0.00	0.00	0	0.00

[1] Indemnification Clause was added to the contracts; estimated or potential cost cannot be determined at this time.
[2] One of the indemnifications is for fiscal year 1997 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: Nuclear Metals, Inc.

Type of action: Amendment Without Consideration.

Actual or estimated potential cost: $4,549,785.

Service and activity: U.S. Army Tank-Automotive and Armaments Command, Armament Research, Development, and Engineering Center; and U.S. Army Materiel Command.

Description of product or service: Low-level radioactive metal processing.

Background: Nuclear Metals, Inc., 2229 Main Street, Concord, Massachusetts (NMI or company), requested extraordinary relief under Public Law 85–804, as implemented in Part 50 of the Federal Acquisition Regulation (FAR). NMI's request was processed through the U.S. Army Tank-Automotive and Armaments Command, Armament Research, Development, and Engineering Center, Picatinny Arsenal, New Jersey, (Picatinny), and through the U.S. Army Materiel Command, Alexandria, Virginia (AMC), with both headquarters recommending that the Army Contract Adjustment Board (ACAB) or Board) grant the requested relief.

After reviewing NMI's written request for extraordinary relief, additional matters submitted subsequent to NMI's initial application, and the recommendations of both Picatinny and AMC, the Board determined that extraordinary contractual relief was warranted under the unique circumstances of this request.

Statement of facts

In 1958 NMI moved its low-level radioactive metal processing operations to Concord, Massachusetts, from the campus of the Massachusetts Institute of Technology, where NMI and predecessor entities had engaged for many years in a variety of nuclear research programs, to include work on the Manhattan Project. NMI established a licensed and permitted holding basin on its Concord site as a place where it could neutralize with lime the spent acid used in some of NMI's metal processing operations. This neutralization process precipitated uranium and copper into the holding basin in the form of hydrated oxides and hydroxides. Relatively small quantities of these deposits slowly accumulated in the basin until 1974.

NMI, a small business, began producing significant quantities of depleted uranium (DU) penetrators to support defense ammunition programs in 1974. With this increased production, which supported Army, Navy, Air Force, and Marine Corps requirements, the volume of uranium precipitates in the holding basin also began to grow rapidly. Although NMI's holding basin remained in compliance with applicable laws, the large volume of precipitates accumulating in the basin, the adoption of increasingly restrictive environmental laws at both the federal and state levels, and advancements in uranium recovery technologies prompted NMI in 1985 to adopt a closed-loop DU recovery process, eliminating further need for the holding basin. In 1986 NMI covered the holding basin with an impervious material to prevent water infiltration and the escape of airborne particles.

By the mid-1980s, both NMI and the Army had become concerned about the need to clean up the holding basin to meet tightening federal and Massachusetts environmental standards. The Army paid for complete and proper disposal of new wastes produced under its ongoing contracts during the 1980s and into the 1990s, but NMI and the Army could not agree on how the cleanup of old waste produced under completed contracts should be handled because most of these contracts were already closed out.[1] By 1993, only one contract under which waste in the basin had been produced remained open. However, the work under that cost-type contract, DAAK10–81–C–0323, had produced only about 2.7% of all holding basin deposits.[2] Consequently, because most of the waste in the basin was not produced under that single open contract, the cost of cleaning up the entire basin could not be allocated to contract DAAK10–81–C–0323.

During the early 1990's, the uncertain liability that the holding basin represented to NMI became a point of contention between NMI and the Nuclear Regulatory Commission (NRC). The NRC licenses NMI to handle the low-level radioactive materials used in NMI's industrial operations at its Concord site. One of the prerequisites for the issuance or renewal of an NRC license is the furnishing of financial assurances that the licensee will be able to bear the decontamination and decommissioning costs associated with eventual closure of its facilities. Specifically, 10 C.F.R., §40.36, requires a licensee to submit a decommissioning funding plan,[3] together with a cost estimate for the decommissioning effort and a description of the method the licensee will use to ensure that funds are available in an amount equal to that estimated cost.[4]

Additionally, an NRC licensee must provide the required financial assurances through a means acceptable to the NRC, such as through prepayment, a surety, insurance, or an external sinking fund coupled with a surety or insurance.[5] As environmental standards became more strict in the 1980s and early 1990s, the NRC began demanding more substantial financial assurances from NMI than it previously had required. NMI sought to meet these demands through commitments from various Army organizations that the Army would pay some or all of NMI's decontamination costs, but the Army refused to enter into such an open-ended commitment at a privately-owned site.

Concurrently, NMI's sales declined dramatically in the early 1990s due to decreased defense ammunition requirements and fewer Army contracts and subcontracts for DU penetrators. This decline in sales cut NMI's revenues by more than half in the early 1990s, leaving NMI with operating losses exceeding $10 million per year in both 1993 and 1994. NMI's weakened financial condition forced it to request a partial exemption from the NRC's financial assurance requirement in 1995.

As its DU sales declined dramatically in the early 1990s, NMI sought to diversify its product line of specialty metals. One of the new products that NMI introduced was Beralcast™, a patented beryllium-aluminum product that is both lighter and stronger than aluminum, and capable of being cast into complex shapes. One important new customer of this NMI product was the Lockheed Martin Electronics and Missiles Company (Lockheed Martin), which currently uses NMI Beralcast™ for 52 components in the electro-optics system that Lockheed Martin is developing for the Comanche helicopter program. According to the Army's Comanche Program Manager (PM Comanche), Beralcast™ was the only known material capable of meeting critical Comanche weight requirements without the Comanche program incurring additional costs in the range of $300 million, and schedule delays of eighteen to twenty-four months. These additional costs and schedule delays would be needed for PM Comanche to accomplish the redesign of key components and/or research and develop alternate materials.

After a number of meetings and exchanges of correspondence between NMI, the Army, and the NRC in the early and mid-1990's, NMI received an official response to its request for a partial exemption from the NRC's financial assurance requirement on July 16, 1996. The NRC denied NMI's request, and directed NMI to provide the financial assurances mandated by 10 C.F.R. §40.36, not later than September 16, 1996. After that date, NMI faced the potential shutdown of its Concord facility.

Application for relief

NMI initially submitted its request for relief on September 22, 1995, and later certified its request on March 15, 1996. NMI requested $4,549,785 to pay the costs of removing low-level radioactive wastes from its holding basin and of restoring the site. NMI also requested the Army to furnish government-provided transportation and disposal of the extracted waste (estimated to cost $2.1 million), for an estimated total cost to the Army of $6.65 million.[6] NMI based its request on NMI's essentiality to the national defense

[1] The Army suggested that NMI bill basin cleanup costs against an appropriate overhead pool or corporate general and administrative accounts, but NMI declined to do so to avoid making its prices less competitive for ongoing work.

[2] Of the total amount of waste in the holding basin, NMI estimates that 96% is attributable to work done under defense contracts. The remaining 4% is attributable to commercial work and independent NMI research efforts.

[3] 10 C.F.R., §40.36(a).

[4] 10 C.F.R., §40.36(d).

[5] 10 C.F.R., §50.36(e). NRC regulations also permit a federal, state, or municipal government licensee to meet the NRC's financial assurances requirement through a statement of intent to obtain funds for decontamination and decommissioning when necessary. 10 C.F.R., §40.36(e)(4). Although this provision is not strictly applicable to NMI's privately-owned site, the NRC has allowed private licensees in past cases to meet the financial assurance requirement through government commitments to clean up private sites when they are decommissioned. Because the responsibility for cleanup at NMI's site lies principally with NMI, however, and because the total cleanup liability at NMI's Concord site is uncertain, the Army has not provided NMI such an open-ended commitment.

[6] Transportation and disposal of the waste by the Army was anticipated to be considerably less expensive than the cost to NMI of procuring these services at commercial rates and passing these costs on to the Army.

as a producer of DU products and beryllium-aluminum castings;[7] and, the interest of fairness[8] because NMI did not include disposal costs for the waste in the holding basin in its prices under past Army contracts, which benefited the Army through lower prices.

In conjunction with reviewing NMI's application for relief, Picatinny asked the Defense Contract Audit Agency (DCAA) to audit NMI's Public Law 85–804 request. Among its other findings, DCAA concluded that a denial of NMI's application for extraordinary relief would result in a high probability of NMI's financial insolvency. Based on this conclusion and the recommendation of PM Comanche, both Picatinny and AMC recommended that the ACAB grant NMI the requested relief.

Discussion

NMI requested Public Law 85–804 relief under the provisions of FAR 50.302–1, ''Amendments Without Consideration.'' Paragraph (a) provides that:

''When an actual or threatened loss under a defense contract, however caused, will 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, the contract may be amended without consideration, but only to the extent necessary to avoid such impairment to the contractor's productive ability.''

The circumstances of NMI's request for relief did not meet precisely the situation contemplated in the provision at FAR 50.302–1(a), because NMI was not asking for relief based on an actual or threatened loss under a particular defense contract. Instead, NMI faced an environmental liability related to its research, development, and production efforts under many different defense contracts, nearly all of which were completed and closed out. Although the rights and obligations of the parties under those contracts no longer existed (except under a single contract relevant to only a small portion of the deposits in the holding basin), and NMI was not at risk of a loss under a single contract as described in FAR 50.302–1(a), NMI Nevertheless faced significant financial liability that threatened its ability to perform future defense contracts. It is the future viability of an essential defense contractor that FAR 50.302–1(a) seeks to protect, not merely the prevention of a loss to an essential contractor under a single contract.

The description in FAR 50.320–1(a) of when relief to a contractor deemed essential to the national defense may be appropriate is more narrowly drafted than required by Public Law 85–804. FAR 50.301 more broadly describes the circumstances under which an agency may grant relief to a contractor when it is essential to the national defense. FAR 50.301 states:

''Whether appropriate action will facilitate the national defense is a judgment to be made on the basis of all of the facts of the case. Although it is impossible to predict or enumerate all the types of cases in which action may be appropriate, examples are included in 50.302 below. Even if all of the factors in any of examples are present, other considerations may warrant denying a contractor's request for contract adjustment. The examples are not intended to exclude other cases in which the approving authority determines that the circumstances warrant action.''

Thus, the fact that NMI's holding basin liability did not represent a possible loss under an existing contract did not preclude the ACAB from granting relief to preserve NMI's continued viability as an essential Army contractor.

After reviewing the facts and circumstances surrounding NMI's request for extraordinary relief, the Board was satisfied that NMI was a contractor essential to the national defense. The Comanche helicopter is critically important to the Army in facing its future missions. PM Comanche unequivocally stated that NMI's Beralcast™ products are vitally important to the Comanche program, and PM Comanche adequately described the significant and adverse cost and schedule consequences that the program would suffer if NMI were no longer available as a supplier. With no other material or supplier reasonably available to the Army to substitute for NMI's Beralcast™ in its Comanche applications, NMI was clearly a contractor essential to the Army in performing its national defense missions.[9]

The Board was also satisfied that granting the relief sought in NMI's Public Law 85–804 request was essential to preserving NMI as a viable defense contractor. As a small business that had borne significant losses in each of the last three years.[10] NMI lacked the financial capability to undertake the cleanup of its holding basin while still meeting its other financial and environmental obligations.[11] Without the relief requested, a chain of events may have been initiated that likely would have resulted in a loss or suspension of NMI's NRC license, a loss of its lines of credit from its leaders, and, ultimately, insolvency and/or bankruptcy for the company. Because DCAA concluded in its audit report that failure to grant NMI's request for relief would result in a high probability that NMI would become insolvent, there by threatening NMI's continued availability as a supplier of essential defense products, the Board concluded that granting relief up to the amount NMI requested was appropriate under the circumstances of this application.

NMI also requested extraordinary contractual relief in the interest of fairness, based on its course of dealings with the Army over many years. NMI contented that the prices it charged the Army from 1958 to 1985 did not reflect the full cost of NMI's performance, because basis cleanup costs were not included in those prices, even through basin cleanup costs could properly have been billed against Army contracts during this period. NMI thus alleged that the Army benefited by this undercharging, and that the Army should, accordingly, now pay for the basin cleanup. NMI did not explain, however, how the Army induced NMI not to include basin cleanup costs in its prices.[12] Instead, the Army actually encouraged NMI to begin cleaning up the basin and to charge cleanup costs as overhead against ongoing work. NMI also contended that various contract clauses had committed the Army to pay cleanup costs at its site, and that Army representatives had expressed some degree of responsibility for basin cleanup costs in the past. The Board was not convinced, however, that any contract ever committed the Army to pay more than the allocable share of site cleanup costs under any particular contract, and the Board could not reconcile NMI's agreement to close out past contracts with its current assertion that the Army retained cleanup responsibility for work done under those contracts. Nevertheless, given the Board's determination that NMI was a contractor essential to the national defense, the Board did not need to resolve whether NMI was also entitled to relief in the interest of fairness. The Board considered this issue moot given its disposition of NMI's application for extraordinary relief.

The Board was cognizant during its consideration of NMI's application for relief under Public Law 85–804 that NMI faced a September 16, 1996, deadline with the NRC for the submission of satisfactory financial assurances. But for this regulatory dilemma that NMI faced with the NRC, in addition to NMI's weakened financial condition after three consecutive years of losses, the Board would have been inclined to allow resolution of the environmental problems at NMI's site through more traditional mechanisms. For instance, NMI could have billed cleanup costs against overhead or general and administrative accounts, or pursued contract or environmental litigation to definitively resolve the relative legal responsibilities of the parties under the terms of past contracts and applicable environmental laws. However, the Board found that these means of resolving the current dilemma were inadequate[13] to ensure that NMI remained a reliable supplier of essential defense products. Therefore, it was appropriate for the Board to act on NMI's request without the delay associated with the normal pursuit of traditional relief mechanisms.

Decision

By unanimous decision of the Board, an amendment without consideration was authorized under FAR 50.301 and FAR 50.302–1. The Board concluded that NMI's continued performance under its existing defense contracts, and NMI's continued availability as a source of critical supplies, was essential to the national defense within the intent of FAR 50.302–1. This relief was subject to the following conditions:

a. Picatinny was authorized and directed to enter into negotiations for a supplemental agreement with NMI, under an appropriate existing contract, agreeing that the Army would pay an amount not to exceed $4,549,785, on a fixed-price, no-profit basis, for NMI to clean up the holding basin at its Concord facility. This amount was subject to downward negotiation only, with negotiations addressing, in addition to the matters below, the questioned costs identified in DCAA's audit report and other relevant pricing matters. Picatinny may only conclude this agreement after proper funding is obtained in accordance with paragraph b. below. In performing this effort, if NMI's costs for cleaning up the holding basin exceed the negotiated price of this supplemental agreement, NMI will treat the excess costs in accordance with paragraph d. below.

[7] FAR 50.302–1(a).

[8] FAr 50.302–1(b).

[9] NMI also claimed in its application for extraordinary contractual relief that it produces other products that also makes it essential to the national defense. These products include tank armor, tank ammunition, other ammunition employing DU penetrators, and Beralcast™ Patriot missile components. The ACAB did not reach the question of whether NMI is a contractor essential to the national defense in its production of these other items because NMI's status as an essential supplier to PM Comanche made resolution of the question of its essentiality to these other programs unnecessary.

[10] NMI reported operating losses in its corporate annual report of $10.5 million in 1993, nearly $11 million in 1994, and nearly $2 million in 1995.

[11] In addition to the holding basin, NMI must also assess its responsibility for other contamination at its Concord site and begin cleanup operations or reserve funds to clean up these ares at some future time, as required by law. These obligations, which NMI will recognize as operating expenses as they are incurred, presented NMI with significant financial challenges, even with the assistance NMI sought under Public Law 85–804.

[12] FAR 50.302–1(b) requires some government action to be associated with a contractor's loss for that loss to be the basis for extraordinary relief.

[13] The Board's ability to grant relief is limited by FAR 50.203(b)(2), which states that no Public Law 85–804 relief is available ''[u]nless other legal authority within the agency concerned is deemed to be lacking or inadequate[.]''

b. The funds committed to support this supplemental agreement will be appropriate defense ammunition funds. No funds will be obligated under this supplemental agreement until they are properly identified and certified as available. Picatinny will coordinate with higher headquarters to identify appropriate funds for this effort as expeditiously as possible.

c. The supplemental agreement also would obligate the Army to provide transportation and disposal of the waste removed from NMI's holding basin. The volume of waste that the Army was obligated to remove will be identified in the supplemental agreement, and the Army will have no further removal or disposal obligation after this volume is removed. Picatinny will coordinate with the Radioactive Waste Disposal Office at Rock Island to obtain the support needed to meet this commitment. Certified funds of the same type identified in paragraph b. above also would support this transportation and disposal effort.

d. As a condition of this supplemental agreement, NMI agreed to complete necessary environmental assessments at its site within a reasonable period, and to submit a site remediation plan approved by the NRC (or other governmental entity performing the NRC's current oversight role) to the contracting officer by a date to be designated in the supplemental agreement.

(1) Cleanup of areas not supporting current production at NMI's Concord site, in addition to the holding basin work addressed in paragraphs a., b., and c. above, and pursuant to the plan identified above, will proceed at a reasonable pace to ensure compliance with applicable environmental standards. These additional site assessment, planning, and cleanup costs will be billed by NMI against appropriate overhead and/or general and administrative pools as normal operating expenses, and not against the contract line item(s) established by this supplemental agreement for holding basin cleanup. Excess holding basin cleanup costs, if any, which exceed the amount negotiated pursuant to paragraph a. above, also will be charged in a manner consistent with the costs discussed in this paragraph against appropriate NMI overhead and/or general and administrative cost pools.

(2) In addition, normal waste processing and cleanup efforts associated with future work at NMI's Concord site to be performed under current and future contracts will be billed as appropriate against those contracts; such efforts are not affected by this supplemental agreement.

(3) NMI will provide for the long-term decontamination and decommissioning of facilities and equipment supporting current production in accordance with 10 C.F.R. §40.36.

e. As a further condition of this supplemental agreement, NMI will execute a release in conjunction with this supplemental agreement waiving and holding the Army harmless from any contract or environmental claims related to existing contamination and waste at NMI's Concord site. This release may except from its coverage the Army's responsibility for eventual decontamination and disposal of government-furnished equipment that NMI maintains under its facilities contract with the U.S. Army Industrial Operations Command, Rock Island, Illinois. This release will not prohibit NMI's normal billing for its ongoing incurrence of assessment, cleanup, and decontamination costs in accordance with paragraph d.(2) above.

In addition to ensuring that the above conditions are met, Picatinny was authorized to incorporate into the implementing supplemental agreement with NMI such additional terms and conditions as Picatinny believed were reasonably necessary to protect the Army's interests.

This action authorized by this decision will facilitate the national defense consistent with the intent of Public Law 85–804.

Contractor: Uniroyal Chemical Company, Inc.

Type of action: Amendment Without Consideration.

Actual or estimated potential cost: $32,600,000.

Service and activity: U.S. Army Armament, Munitions & Chemical Command.

Description of product or service: Post-retirement benefits.

Background: Uniroyal Chemical Company, Inc., sought an adjustment to its Contract No. DAAA0990–Z–0003 to provide funding for post-retirement benefits (PRBs) earned by Uniroyal employees who performed work at the Government-owned contractor-operated (GOCO) Joliet Army Ammunition Plant (JAAP), Illinois, under that cost reimbursement contract and its predecessor contracts. For the reasons set forth in this opinion, the Army Contract Adjustment Board granted Uniroyal's request in an amount not to exceed $32.6 million, subject to certain conditions expressed below.

Statement of facts

Uniroyal began serving as the operating contractor for the Army Armament, Munitions and chemical Command (AMCCOM) GOCO ammunition plant at Joliet, Illinois, during World War II and served in that capacity until December 1993 when plant operations were terminated as a part of post-Cold War Defense Department ''downsizing.''During those decades, Uniroyal workers at the plant manufactured explosives, chemicals, bombs, shells and other munitions needed by the Army and the other military services.

As part of the compensation package provided to attract and retain personnel for the potentially dangerous work at the ammunition plant, Uniroyal offered its JAAP workers medical and death benefit insurance coverage in addition to pension plans. By 1951 this compensation package included death benefits for qualified retirees, and by 1954 it included post-retirement medical benefits. These benefits were, and continue to be, comparable to those offered Uniroyal employees in similar commercial work. Under the terms of the Army's cost reimbursement contract with Uniroyal, Uniroyal was required to obtain approval by the Army of such benefit plans, and it did so.

Unlike pension plans, which the Employee Retirement Income and Security Act (ERISA) requires to be fully funded to cover the actuarially predicted liabilities of the company, the PRBs at issue were not required to be so funded, and for decades were not even required for accounting purposes to be recognized as a corporate liability. Rather, as was the normal practice in industry, that is, in accordance with generally accepted accounting principles, Uniroyal's PRB program was administered on a ''Pay-As You-Go'' (PAYG) basis. Rather than accruing this liability during the employees' working years and obtaining reimbursement from the Army on that basis, Uniroyal's use of the PAYG methodology, with the Army's approval, meant that in each year only the payments of retirees' medical and death benefit costs experienced that year were reimbursed by the Army. No funds were set aside in advance to ''pre-fund'' a reserve account to cover this liability.

By postponement of the Government's obligation to pay for such PRBs until costs were actually incurred, the Government benefited from Uniroyal's methodology. During the Vietnam conflict years in particular, when the build-up of the workforce would have required setting aside tens of millions of dollars into a reserve for PRBs if pre-funding were the norm, Uniroyal's use of the standard PAYG practice freed up those million of dollars for other essential defense purposes.

In 1977, as JAAP operations were reduced dramatically following the end of the Vietnam conflict, Uniroyal contemplated the possibility that its JAAP contract would terminate and not be renewed as it had been since 1951. The possibility of a contract termination presented a substantial financial liability issue to Uniroyal because at that time the pension benefit obligation was not fully funded and, because PRBs were handled on a PAYG basis, no funds had been set aside in a reserve for PRBs. Uniroyal's Director of Pension and Benefits asked the Uniroyal JAAP Plant Manager to confirm that the Army would provide funding to reimburse all accumulated pension and PRB costs attributable to its JAAP service in the event the contract were to terminate. The Plant Manager reported that Government personnel monitoring the contract had concurred with his understanding that, upon termination, determination of the amounts due and payable by the Government to Uniroyal would include projected costs to cover life and hospitalization insurance for Uniroyal's JAAP retirees.[14] Based upon this report, Uniroyal did not disclose in its financial statements as an unfunded liability of the corporation any cost attributable to the PRB obligations accumulated at JAAP, and Uniroyal continued its service at JAAP under the same PRB accounting and payment practices.

Although compliance with ERISA eventually led to accrual and funding of pension benefits, the PRB obligation for retiree health insurance and death benefits continued to be funded on a PAYG basis. Uniroyal continued performance at JAAP under several successor contracts. The current and preceding contracts contained a ''carry-over'' clause (Section A–2(3)) which provided that obligations and liabilities not finalized under earlier contracts would be treated as if incurred under the successor contract. For Government cost accounting purposes, Uniroyal treated its PRB obligations (that is, the PAYG expenditures) as insurance expenditures under Cost Accounting Standard (CAS) 416 rather than as a pension expenditure under CAS 412. There was no evidence that this accounting treatment of PRBs was not the norm or that it was ever questioned by Government contracting officials.

Over the years, the Government continued to reimburse Uniroyal for its PRB expenditures on a PAYG basis, and when Uniroyal's GOCO operation for the Army at Newport Army Ammunition Plant terminated in 1985, the Army agreed to subsume the extant PRB obligation for Uniroyal's Newport retirees under the JAAP contract and to continue to pay those costs on a PAYG basis under this contract. The Defense Contract Audit Agency (DCAA) subsequently expressed the opinion that the Government's liability for those costs had terminated when the Newport contract ceased. The Army then decided to hold funding of the Newport retirees' PRB costs in abeyance. Uniroyal filed a certified claim for the Newport PRBs, and the contracting officer eventually (after the current contract had been executed in 1992) settled that claim

[14] See Uniroyal's Exhibit 10. Although the Government officials who reportedly concurred in Uniroyal's understanding at that time were not identified, the Army, in responding to the Petition for Relief under PUBLIC LAW 85–804, has not rebutted or denied that such assurances were provided to Uniroyal.

for approximately $5.7 million, evidently without the concurrence of DCAA.

Accounting for PRBs on a PAYG basis continued to be the industry norm through the late 1980's, when rising health care costs caused accountants increasing concern that companies' burgeoning PRB commitments to their employees were not being reflected as liabilities in their financial statements. In response to those concerns, in late 1990 the Financial Accounting Standards Board (a private organization whose rules establish generally accepted accounting principles followed by businesses to account for revenues, expenses, assets, and liabilities) promulgated Financial Accounting Standard (FAS) 106. FAS 106 effectively required businesses to start accounting for PRBs by accrual—during years that an employee renders the necessary service—of the expected cost of providing those benefits to the employee and the employee's covered dependents.

Transitioning from a PAYG method of accounting for PRBs to an accrual method presented businesses with the problem of how to account for the potentially enormous sums needed to cover the expected PRB costs for current employees and retirees that had not been recognized and funded over previous years under the PAYG system. FAS 106 gave businesses two options to address this ''transition obligation.'' Per paragraph 110 and 111 of FAS 106 they could immediately recognize this entire obligation. Alternatively, per paragraph 112, they could ''delay recognition'' over the average remaining service period of active plan participants, except that (a) if the average remaining service period were less than 20 years, businesses could elect to amortize this obligation over 20 years, and (b) if all or almost all of the plan participants were inactive (retired), the employer was to use the average remaining life expectancy period of those retirees as the amortization period.

Upon issuance of FAS 106, had Uniroyal been free to immediately recognize this ''transition obligation'' for its work at JAAP over the decades on a cost reimbursement basis, the Army arguably would have been compelled to pay that sum under the predecessor to the current contract (although such a change might have been deemed a voluntary change in accounting practices not entitling Uniroyal to reimbursement for the resulting cost increase). However, this option was precluded by the issuance of a new cost principle in the Federal Acquisition Regulations (FAR), currently section 31.2056(o), to cover the allowability of PRBs.

Issued to deal with the change in accounting practices prescribed in FAS 106, the primary purpose of the new FAR cost principle was to mandate that businesses actually fund the PRB obligations which they would now be accruing on their books before they could bill the Government for those costs under cost reimbursement contracts. Due, however, to the Defense Department's concern over the potentially enormous fiscal impact for cost reimbursement contracts of ''immediate recognition'' of the PRB ''transition obligation,'' FAR 31.205–6(o) was amended shortly after its promulgation in the summer of 1991 to provide that allowable PRB costs assigned to any contractor fiscal year for this transition obligation were limited to the amount derived from the ''delayed recognition'' methodology prescribed in paragraph 112 of FAS 106. On its face, FAR 31.205–6(o) does not provide for any acceleration of PRB transition obligation recognition, and consequent increased allowability, if a business or business segment totally terminates its operations.

Prior to issuance of FAS 106 and FAR 31.205–6(o), DCAA, as noted above, had questioned the propriety of the Army's agreement to continue to provide payment under Uniroyal's JAAP contract of the PRBs for Uniroyal's former employees at Newport Army Ammunition Plant. In addition, Uniroyal was aware that there was a controversy over payment of PRBs for Remington Arms Company, Inc., retirees based on work at Lake City Army Ammunition Plant.[15] These controversies, coupled with recognition that cessation of JAAP operations was a realistic possibility as post-Cold War downsizing began, had caused Uniroyal increased concern, as the September 1990 expiration of the predecessor to the current contract was approaching and negotiation of the current contract was in progress, over how its PRB obligation would be handled. Execution of the current contract was delayed based on these concerns.

In September 1990, Uniroyal proposed funding this PRB costs at JAAP on an accrual basis, although DCAA had previously opined that a similar plan for Uniroyal's Newport employees would be deemed a voluntary change in accounting practices, the increased costs of which were not required to be reimbursed by the Government. In February 1991, the contracting officer emphasized that Uniroyal's proposed change in accounting practices would be deemed such a voluntary change, and in July 1991, the Government declined to enter into an agreement with Uniroyal to provide for accrual of PRB costs. After issuance of FAR 31.205–6(o), however, the Army and Uniroyal agreed that Uniroyal would begin accounting for PRBs on an accrual basis and would fund PRB costs attributable to both past and ongoing service at JAAP consistent with that FAR provision. A Memorandum of Agreement (MOA) to this effect was executed in January 1992, concurrently with execution of the current contract into which it was incorporated.

In negotiating the MOA, Uniroyal had sought assurances from AMCCOM regarding the future availability of the PRB funding vehicle provided by the JAAP contract. In the MOA, AMCCOM undertook that it would make its best efforts to obtain adequate funding for Uniroyal's JAAP contract, subject to the needs of the Government. AMCCOM also stated in the MOA that it had no intention of discontinuing its contracting with Uniroyal for the operation and maintenance of JAAP. The Army did not concede a contractual obligation to fund Uniroyal's outstanding PRB obligation in the event of cessation of Uniroyal's operations at JAAP, but AMCCOM—that is, the contracting officer who executed the MOA—indicated in the MOA that in such eventuality, AMCCOM would support favorably a Uniroyal request pursuant to Public Law 85–804 for funding the PRB costs attributable to Uniroyal's operation of JAAP.

Thus, as performance of the current contract began in early 1992, the Army began funding Uniroyal's accrual of its PRB obligation, including the large transition obligation previously not recognized on Uniroyal's books because it had been handled on a PAYG basis.[16] Within months, however, the Army determined to deactivate JAAP, and by the end of 1993 Uniroyal's JAAP operation was terminated.[17] At this point, of course, Uniroyal's accumulated PRB obligation had not been fully funded, and this claim was brought in the subsequent year to seek amendment to the contract to cover that obligation.

Analysis

Public Law 85–804 authorizes the amendment or modification of federal contracts without regard to other provisions of law governing the administration of such contracts when such action would facilitate the national defense. Executive Order 10789 authorizes federal agencies to implement the act within the limits of appropriated funds and empowers agencies to amend or modify contracts ''without consideration'' (that is, to confer an additional benefit upon a contractor without the Government receiving some additional contractual benefit in return) when circumstances warrant.

FAR 50.302–1 delineates examples (not intended to be exclusive) of when such amendment without consideration is appropriate. When actual or threatened loss under a defense contract will impair the productive ability of a contractor whose services are deemed essential to the national defense, the contract may be amended to avoid such impairment. Alternatively, regardless of the essentiality of the contractor services to future defense needs, if a contractor would suffer a loss because of Government action in its contractual dealings with the contractor, the contract may be adjusted in the interest of fairness, even though the Government's action did not make it liable under the contract terms and the law applicable to the contract.

Per FAR 50.102, a threshold issue must be resolved before proceeding to address whether the circumstances in this case warrant the extraordinary relief sought: Public Law 85–804 may not be relied upon for relief when other adequate legal authority for the requested relief exists. In other words, if Uniroyal had an adequate basis for relief under the terms and conditions of its contract and the governing rules and regulations, pursuit of such a legal remedy rather than the equitable one sought here would be required. Although litigation by other contractors of entitlement to PRB coverage is presently ongoing in other forums, and resolutions of such litigation might alter the status quo as to legal entitlement, at present the Board was satisfied that Uniroyal had no adequate remedy under the contract terms for the following reasons.

In this cost reimbursement contract, FAR clause 52.216–7 provided that the contractor's entitlement to reimbursement was limited to those costs determined to be allowable in accordance with the cost principles of FAR Subpart 31.2 in effect on the date of the contract. The above discussed FAR provision 31.205–6(o), limiting the allowability of PRB transition obligation costs in any contractor fiscal year to the portion allocable to that year, using the delayed recognition methodology described in paragraphs 112 and 113 of FAS 106, was in effect when the current contract was executed. This provision did not provide for any alternate method of calculating allowable costs, such as allowing assignment of the entire transition obligation to one accounting period upon termination of a contract or upon a contractor's total cessation of operations.[18]

[15] That controversy was resolved by this Board's decision of May 8, 1991, ACAB No. 1238, granting extraordinary contractual relief to Remington Arms Company to cover its PRB obligation after cessation of its operation of the Lake City plant, which occurred as the result of another company winning the competition for the contract to continue work at that plant.

[16] Pursuant to the provisions of FAR 31.205–6(o) and the MOA, the PRB funds were deposited into a trust, with the Government having a reversionary right to any sums left in the trust upon termination or expiration of Uniroyal's PRB obligations to the retired JAAP employees and their covered dependents.

[17] JAAP employees who were not eligible to retire at that time were terminated.

[18] Even if FAR 31.205–6(o) had not been issued prior to execution of the current contract, the Army's position is, as it was in the Remington Arms case, that Uniroyal's accounting practice (which was not alleged to be different from the industry norm) of treating PRB costs as insurance costs under Cost

Although the contracting officers, over the course of Uniroyal's service at JAAP, had approved Uniroyal's pension and retirement plans in accordance with the provisions now found in clause H–26 of the contract, that clause provided that the contractor would be reimbursed for those costs only if such reimbursement was not contrary to the applicable cost principles set forth in the FAR. Similarly, clause H–24.1 of the contract provided that reimbursement to Uniroyal for fringe benefits, for disbursements it might be required by law to make during or after the contract term, and for other expenses, was subject to compliance with the cost principles in FAR part 31.[19] In sum, the Board was of the opinion that Uniroyal had no contractual right to the sum which forms the basis for this claim and that consideration of this claim under Public Law 85–804 was therefore appropriate.

Turning to the equities, the Board was satisfied that adequate grounds for relief under Public Law 85–804 had been established. The Board did not find that Uniroyal had demonstrated that denial of relief would impair a productive ability essential to the national defense. ACAB found, however, that denial of the relief requested would have the effect of Uniroyal's operating the JAAP for the Army for decades without recompense for these PRB obligations incurred in the performance of the GOCO work, obligations which exceed the cumulative fee earned by Uniroyal over those decades. The Board also found sufficient Government action over the course of the JAAP operation, upon which Uniroyal relied, which contributed to Uniroyal's having this large unfunded PRB obligation at the time operations terminated.

Admittedly, Uniroyal was not induced by the Army to account for and fund its PRB obligations on a PAYG basis; that was the industry norm when such benefits first began being offered to employees. Nonetheless, these liabilities were incurred under a series of cost reimbursement contracts to operate JAAP to manufacture essential munitions for the military, and the PRB obligations constitute a cost of manufacture that was simply being deferred to future time periods—with the Army's approval. The Army benefited by having available for other defense purposes the sums that would have been tied up in reserves had such liabilities been accrued and charged to the contracts during the working lives of the JAAP employees. Once accrual became the norm following the issuance of FAS 106, the Army would have fully funded these costs over ensuing years had JAAP operations continued long enough to complete amortization in accordance with FAR 31.205–6(o). Were Uniroyal's other business segments not involved in Army contracts now obligated to undertake those costs, the Army would in effect receive a windfall by not having paid the full cost of Uniroyal's JAAP operations. It cannot be said that either party envisioned such an outcome when they entered into the agreement to have Uniroyal operate JAAP on a cost reimbursement basis.

Indeed, the Army, through its conduct, continually evidenced its intent to fund the PRB obligation, and Uniroyal relied upon this consistent Army position. As previously noted, the Army approved Uniroyal's pension and retirement plans, and there was no evidence over the decades when the plant's operations were at peak employment levels that it warned Uniroyal that its PAYG methodology might result in unrecoverable obligations. On the contrary, when in 1977 Uniroyal sought assurances in the face of post-Vietnam downsizing that its PRB obligations would ultimately be satisfied by the Government if operations terminated, Uniroyal evidently received such assurances from Government officials responsible for administering the contract and, consequently, continued to perform the JAAP work without seeking modification of the contract terms and with no change in its accounting practices. The ''carry-over'' provisions in the contracts (currently section A–2(3)) reinforced the impression that the Government would reimburse Uniroyal for all incurred, accrued, or contingent liabilities. The Army's agreement to cover Uniroyal's PRB obligations for its Newport Army Ammunition Plant retirees under the JAAP contract further reinforced Uniroyal's view that no additional steps had to be taken to assure that its retirees' PRBs would be reimbursed by the Government.[20] If there remained another similar Army operation to which the extant JAAP PRB obligation could now be applied, perhaps no extraordinary relief would be necessary. However, that was not the case, and considerations of fundamental fairness, ensuring that a defense contractor whose work was vital to the national defense receives adequate compensation for that work, made it in the interest of national defense to provide relief under the authority of Public Law 85–804.

Neither the issuance of FAS 106, changing the general accounting practices related to PRBs, nor the issuance of FAR 31.205–6(o), precluding Government contractors from obtaining immediate recognition and reimbursement for the large obligation resulting from transition to an accrual basis for accounting for PRBs, was anticipated by either of the parties to the JAAP operation when Uniroyal began performance and during most of the ensuing years when the bulk of the liability was being incurred. It was not until the late 1980's that the possibility of such changes became apparent. When those changes in acceptable practices and governing regulations occurred, AMCCOM, in executing the 1992 MOA with Uniroyal, expressly indicated to Uniroyal that it would support Uniroyal's equitable claim to recover for such costs in the event that operations terminated before full accrual could occur. That Command (now Industrial Operations Command) had in fact supported Uniroyal's claim, which bolstered the Board's conclusion that relief was warranted under the circumstances involved.

In reaching the conclusion that relief was warranted, the Board was cognizant of the possibility that Uniroyal might not be obligated as a matter of law to continue to pay PRB costs to its JAAP retirees, although Uniroyal had provided an opinion of counsel that it would be so obligated. Counsel representing Uniroyal in the hearing before the Board frankly admitted that there was some unsettledness among the courts in the area. However, Uniroyal had manifested that it had no desire to put the benefits of its retirees in jeopardy, and the relief granted would ensure that that does not occur. The Army's equitable obligation, in the Board's view, was indirectly to the hundreds of employees who devoted their working lives to the potentially hazardous duty at JAAP in service of the national defense. The PRBs at issue were made part of Uniroyal's compensation package to attract and retain a workforce in an environment that exposed them not only to explosives but to contaminants bearing potential health risks. It was in the interest of the national defense that the health care and death benefits that such employees anticipated receiving in compensation for their service to the nation not be imperiled.

The Board therefore determined in principle to grant Uniroyal's request, and a discussion of the terms and conditions of the relief that should be afforded Uniroyal under the authority of this decision follows.

Remedy

Uniroyal originally requested relief in the amount of $56 million. Since the submission of this claim, negotiations with the Government led to Uniroyal's agreement to alter the methodology and some of the assumptions uesd to estimate its JAAP PRB liability. Uniroyal had also agreed that the excess in its pension fund, estimated when negotiations last occured to be approximately $9 million, would be applied to satisfy its PRB obligation. At the time those negotiations were concluded, Uniroyal and the Government appeared to have agreed in principle that $32.6 million would suffice to meet this PRB obligation. No formal agreement was reached at that time, and a substantial period has passed since negotiations occurred. Subject to the additional conditions specified below, the Board authorized amendment of the contract to provide relief in an amount not greater than that $32.6 million figure, with direction that the parties enter into good faith negotiations to reevaluate the premises upon which that figure was reached and to adjust that figure downward in the event that such downward adjustment is warranted by changes in premises, indices or factors upon which that $32.6 million figure was based. The contracting officer, in executing this amendment, must be satisfied that the sum is fair and reasonable, both to Uniroyal and the Government.

This relief was subject to the following additional conditions: Pursuant to FAR 31.205–6(o), and consistent with practices already established to provide for payments of accrued PRB liabilities since the issuance of that FAR provision and Uniroyal's 1992 MOA with the Government, the sum negotiated pursuant to this decision was to be deposited into a trust fund (or escrow account) established for the sole purpose of providing PRBs for the covered retirees. The funds deposited therein may be used for costs associated with administering Uniroyal's PRB program with respect to its JAAP retirees, including reimbursing Uniroyal for PRB claims of its JAAP retirees, the payment of reasonable trustee or escrow agent compensation, other reasonable and proper fees necessary to ensure effective and productive management and administration of the account, and any taxes to which the account may be subject. The contracting officer may specify such other terms as deemed appropriate regarding investment and management of the fund to ensure that the retirees' interests as well as those of the Government are adequately protected, including affirmation of the Government's right to examine and audit the account and records of all transactions conducted in its administration. The Government was given a reversionary interest in any sum (undistributed principal and income) remaining in the account upon completion of payment to the last beneficiary of

Accounting Standard 416, rather than as pension costs which are covered under CAS 412 and 413, precludes an adjustment allowing allocation of the unaccrued liabilities to the contract upon plan termination as would be the case under CAS 413.

[19] For the purpose of resolving this threshold issue of legal entitlement, we accept the view of the Army Materiel Command Command Counsel's office that clause H–24.2, which purports to allow the contracting officer to approve reimbursement of other costs and expenses, without mentioning the cost principles, cannot reasonably be construed to give the contracting officer license to approve reimbursement of costs contrary to the cost principles.

[20] When, in 1990, perhaps seeing the writing on the wall as to the impending FAS 106 change in acceptable accounting practices regarding PRBs, Uniroyal broached the subject of changing its accounting practices to an accrual basis, the Government led Uniroyal to believe that such voluntary change in its practice might not allow reimbursement for any resulting increased costs.

the trust or upon termination of the trust for any reason. The aforementioned surplus in Uniroyal's pension fund was to be contributed to this PRB trust. The Government will have no liability for any shortfalls in the account. Uniroyal will release the Government from liability for any and all claims arising from or related to the PRB liability for which this trust was established.

This award of relief was expressly conditioned on the availability of funds, either from (a) expired funds which remain available to fund this contract adjustment, (b) other currently available Defense ammunition funds, (c) if necessary, approval by Congress (through its authorizing and appropriating committees) of a reprogramming or transfer request to make available the necessary funds out of other existing appropriations, or (d) if necessary, supplemental appropriations. The Contracting Officer was directed to act expeditiously to negotiate the contract modification necessary to implement this decision and, with the assistance of higher headquarters, to secure adequate appropriated funds to cover the relief authorized herein.

Conclusion

Subject to the above conditions, the Board has found that it was in the interest of national defense to award to Uniroyal a sum not to exceed $32.6 million to reimburse Uniroyal for its obligation to provide post-retirement benefits to the more than 800 affected retirees who worked in the Army's critical munitions production mission at Joliet Army Ammunition Plant over the decades since World War II. Such relief was consistent with the expectations of all the parties that Uniroyal would be fully compensated in accordance with the bargain it entered into with the Army to perform the work at JAAP on a cost reimbursement basis.

If the ultimate negotiated amount of the proposed contract modification implementing this decision exceeds $25 million, the modification cannot be executed by the parties until the Senate Committee on Armed Services and the House Committee on National Security and the Senate and House Appropriations Committees are notified of the proposed obligation and 60 days of continuous session of Congress have passed after transmittal of such notification.

Contractor: Precision Machining, Inc.

Type of action: Amendment Without Consideration.

Actual or estimated potential cost: $9,392,870.

Service and activity: Department of the Army, Aviation and Troop Command.

Description of product or service: Ribbon Bridges.

Background: Precision Machining, Inc., (PMI) submitted a request for amendment without consideration on contract number DAAK01–93–C–0075, Ribbon Bridge, and a request for relief under Public Law 85–804, dated August 11, 1995. Based on the Aviation and Troop Command (ATCOM) Contract Adjustment Board (ACAB) meeting on June 27, 1996, and in accordance with the authority delegated to the Department of the Army, Headquarters, ATCOM, Acquisition Center, Field Support Branch, it was decided that PMI was not essential to the Government in performance of the Ribbon Bridge contract.

This decision was based on the availability of other sources and the non-urgent need for Ribbon Bridges. It was true that PMI had the only contract for the Ribbon Bridge at that time, however, the item had a competitive level III drawing package the Government could resolicit for the remaining 20 Ramp Bays needed by the Marine Corps. As the Army had downsized, extra Interior Bays were transferred from the Army to the Marines, reducing the need for bays from PMI.

Statement of Facts

In its request under Public Law 85–804, PMI cited several instances of Government action which allegedly caused losses to PMI. Each allegation is addressed below.

PMI alleged the Government delayed inventory availability prior to award and alleged a long delay in making award. However, PMI agreed to the contract by its signature dated July 24, 1993, which the Contracting Officer executed July 29, 1993. There was no basis for compensation since PMI freely signed the contract.

PMI alleged delay and impact incorporating the termination inventory of the prior contractor into the production because some of it was not useable. PMI had inspected that inventory and it made the choice to use it. The basic contract did not include the termination inventory. PMI knew they would have to inspect the inventory to determine what could be used. The property listed in Modification P00009 was the useable property that PMI screened as acceptable and for which they paid by a reduction in contract price.

PMI had failed to set forth specific supporting information of delays in processing of Engineering Change Proposals/Requests for Waivers/Requests for Deviations (ECPs/RFWs/RFDs). Therefore, ACAB could not track which ones PMI believed the Government caused to be delayed and how that delay impacted the claimed loss. Many of the ECPs were delayed because PMI failed to furnish a legible document for microfilming and necessary data was consistently omitted or incorrect data was entered on the form.

The Government did not agree that the specifications were outdated, inadequate, inaccurate, or defective. There were five previous producers of this item. If there were inadequacies, inaccuracies, and defects, they would have been discovered previously. As far as being outdated, the specifications had been in use for some time, but not that much had changed in welding, painting, etc. Without specifics on which specifications were so outdated that they caused delays, this could not be addressed in detail.

The Government's lack of decisive action on the First Article Test Report (FATR) approval was caused by PMI failing to comply with contractual requirements for procedures to be approved before production began. The FAs should not have been built, let alone tested, before these approvals were received. The Government could not continue to ignore that fact when the FAs were presented for acceptance.

The Government attempted to obtain more details on the allegations in the August 11, 1995, request by letter from the Contracting Officer dated October 16, 1995. Instead of responding with the facts requested by the Contracting Officer, PMI continued with vague comments about how many people worked on the inventory, how ECPs from the previous contract impacted the effort, and that the parts were inspected for form, fit, and function at that time. This was not in agreement with information provided earlier. PMI had only one person counting at the Post Award and told the Government the parts were inspected as they were pulled for production. Additionally, PMI had seen the inventory before it was shipped, There should not have been anything unexpected.

PMI's October 18, 1995, letter also failed to explain how the waivers delayed full production. The statement was made in the attachment to the letter that one open waiver would delay acceptance. However, one of the waivers was shown as 700 days old. PMI did not have to wait until September 26, 1995, for acceptance of bridges. The question remained unanswered.

PMI was asked for details supporting the loss claimed. PMI had not been able to do that either for themselves or for the DCAA to calculate it for them. There were no records from the original bid. PMI could not provide any details on the 25 percent efficiency factor and $1,000,000.00 loss on the inventory, except to say it was an estimate. The documentation provided to support transporter problems did not contain hours, only copies of inspection reports. PMI corrected the sequence of events on the Taber purchase order to show the order was placed two years after the inventory was received.

It was hard to understand how PMI was able to produce the bays they did if the drawings were ''illegible and virtually unusable.'' It would have been difficult for the Government representative to inspect and accept those bays. The Government level III drawings were not production drawings; each contractor must decide how they will produce the items and develop the necessary in-house drawings.

There were no ECPs that changed the drawing package while Ketron had the contract, therefore, none could be provided. PMI should have prepared an ECP for the change to Parker-Hannafin as soon as they knew the situation existed. That was the only example PMI provided for the delay in this area.

PMI revised their allegation to say the bays were conditionally accepted, not that the bays were not accepted at all. Conditional acceptance allowed the invoices to be paid. The failure of the PMI–02 to be approved was due to the failure on PMI's part to provide adequate information for the Government to make a decision.

Federal Acquisition Regulation (FAR) 17.202 does not address the five year recommended limit; FAR 17.204 states approval before use is required. This part of the FAR does not apply to a reprocurement. Also, the award was a bilateral agreement PMI was willing to make. The options were exercised fourteen months after award.

PMI stated they did not understand what was meant by supporting the costs they incurred for each delay mentioned in their request for relief. PMI give the impression to the auditor they were hoping the DCAA audit would do that for them. However, since the auditor could find no records for the original award and few records for the current contract, he was also unable to provide support for the areas of delay.

Conclusion

Based on the above, it was decided that none of the Government acts identified by PMI have harmed them and, therefore, the request for recompense was denied. Also, PMI's request to reform the contract, revise the delivery schedule, or convert the contract to a cost plus fixed fee contract was denied.

Contractor: Precision Machining, Inc.

Type of action: Amendment Without Consideration.

Actual or estimated potential cost: $6,525,784.

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

Description of product or service: HELLFIRE storage and shipping containers.

Background: Precision Machining, Inc., (PMI) submitted a request for relief under Public Law 85–804 for amendment without consideration in connection with contract number DAAH01–90–C–0253 with the U.S. Army Missile Command (MICOM) for HELLFIRE storage and shipping containers. The Principal Assistant Responsible for Contracting (PARC) at MICOM was delegated the authority to deny or refer requests for contract price adjustment without consideration.

Upon receipt of PMI's request by the Contracting Officer, it was forwarded to a Command Contract Adjustment Board (CAB) for

review and recommendation. This Board, which was comprised for senior Command officials, served in an advisory capacity. The Board completed a detailed investigation of PMI's request and made its recommendation to the PARC for action. The official response of MICOM to PMI's request follows.

Statement of Facts

PMI's essentiality request under the provisions of FAR 50.302–1(a) was addressed in a memorandum from the Office of the U.S. Army Deputy Chief of Staff for Operations and Plans (ODCSOPS). This memorandum, dated February 1, 1996, which was directed to the attention of the Army's Air to Ground Missile Systems Project Office at Redstone Arsenal, Alabama, hereinafter referred to as the Project Office, noted that HELLFIRE II missile deliveries were currently being delayed due to PMI's inability to produce missile containers. It concluded that, given the number of HELLFIRE II missiles that were currently available for deployment, a delay in delivery of 500 to 700 additional missiles until July 1996, when containers from a new container supplier were scheduled for delivery, was non-critical/essential. The 500 to 700 number was computed by the Project Office after taking into consideration PMI's production capacity and the fact that approximately one-third of the missiles scheduled for delivery under PMI's contract were for the U.S. Navy.

Decision

Based on the above and in accord with the authority delegated by the PARC, it was decided that the facts surrounding PMI's essentially request do not support the relief requested. Accordingly, PMI's request on that basis was denied.

Statement of Facts

PMI's request under the provisions of FAR 50.302–1(b) cited several instances of Government action which they characterized as unfair which were alleged to have produced losses to PMI. These were addressed as follows:

The first was an allegation that contract specifications for a container component identified as a shock mount contained excessive testing requirements. The investigation of the CAB disclosed that both the Project Office and PMI had agreed that the testing requirements were necessary to avoid the possibility of a vendor stockpiling shock mounts that would fail.

The second allegation was that components of the container, identified as the latch and the stud assembly, were sole source and that delays by the sole source vendors had increased costs and caused delays. The investigation by the CAB determined that delays involving the vendors identified had occurred but that the sources were ''suggested sources'' rather than ''sole sources.'' Further, that some of the delays were caused by the poor financial condition of PMI. Finally, that approval of additional sources was a contractor responsibility.

The third allegation was that components of the container, identified as the shock mount, the latch assembly, the stud assembly, and the ammunition box handle, contained insufficient information for alternate source development, leaving the vendors identified as ''sole source'' by default. The investigation by the CAB disclosed that the drawings in question were specification control drawings which made it clear that suggested sources included in the drawings were not guaranteed to be presently available as a source.

The fourth allegation was that the Project Office had been reluctant to issue drawing changes with a resulting delay in issuance of Engineering Change Proposals, Requests for Deviations, and Requests for Waivers. The investigation by the CAB disclosed that while there were delays in the areas noted, those delays were caused by the failure of PMI to properly document the need for proposed changes, deviations, or waivers.

The next allegation was that Government design changes created delays and increased costs. Two instances were cited. In one of these, the change in question was settled by bilateral contract modification wherein PMI agreed to a specific increase in the price of the contract in settlement of the change. The second situation involved a case where PMI was allowed to ship containers in place until room could be made for them at the contract destination (another Government contractor). PMI was promptly paid for the items and confirmed it had plenty of room and would hold them on site at PMI as an accommodation for the other contractor.

The next allegation was that the Government provided faulty GFM. The investigation of the CAB disclosed that the material involved was not GFM, but material owned by a former Government producer which PMI bought from the Government ''as is.''

The final allegation was that the Army violated the provisions of FAR 17.204(e) in connection with the contract. The investigation of the CAB disclosed that the facts of the case did not support any such conclusion in that while the option exercise period of the last option was extended, no quantities were added. Furthermore, if the facts were viewed in the most favorable light for PMI, only slightly more than four percent of the items bought under the contract could possibly be involved.

Decision

Based on the above, it was the decision of the PARC that none of the Government acts that PMI identified were unfair. Accordingly, the request on this basis was also denied.

Contractor: Westinghouse Electric Corporation.

Type of action: Contingent Liability.

Actual or estimated potential cost: The amount the Contractor will be indemnified cannot be determined at this time, but will depend upon the occurrence of an incident related to the performance of the contract.

Service and activity: Department of the Army, Anniston Chemical Demilitarization Facility (ANCDF).

Description of product or service: Construction, systemization, operations, maintenance, and decommission of ANCDF.

Background: In accordance with Federal Acquisition Regulation (FAR) 50.403–1, Westinghouse Electric Corporation requested that, pursuant to authority provided in Public Law 85–804, the Army include an indemnification clause in its contract DAAA09–96–C–0018 for the construction, systemization, operations, maintenance, and decommission of the Anniston Chemical Demilitarization Facility (ANCDF).

Statement of Facts

Under this contract, Westinghouse is responsible for all facets of the process to destroy the lethal chemical agents and munitions stockpiled at the Anniston Army Depot. Upon review of the functions and responsibilities that Westinghouse has, the Secretary of the Army found that execution of such would subject the contractor to certain unusually hazardous risks as defined below.

The Secretary of the Army considered the availability, cost, and terms of private insurance to cover these risks, as well as the viability of self-insurance, and concluded that adequate insurance to cover the unusually hazardous risks was not reasonably available.

It was not possible to determine the actual or estimated cost to the Government as a result of the use of an indemnification clause since the liability of the Government, if any, would depend upon the occurrence of an incident related to the performance of the contract.

The Secretary of the Army found that the use of an indemnification clause in this contract would facilitate the national defense.

Decision

In view of the foregoing and pursuant to the authority vested in the Secretary of the Army by Public Law 85–804 (50 U.S.C. 1431–1436) and Executive Order 10789, as amended, inclusion of the indemnification clause prescribed in FAR 52.250–1, with its Alternate 1, in the contract for ANCDF was authorized, provided the clause defines the unusually hazardous risks and includes the limitations on coverage precisely as described in the definition below. The Secretary of the Army further authorized the inclusion in subcontracts (at any tier) under this contract, provided the pass-through indemnification was limited to the defined unusually hazardous risks and provided that the Contracting Officer approves each pass-through indemnification in writing.

The contractual document executed pursuant to the authorization shall comply with the requirements of FAR Subparts 50.4 and 28.3, as implemented by Department of Defense and the Department of the Army.

Definition of unusually hazardous risks

The risks of:

(1) sudden or slow release of, and exposure to, lethal chemical agents during the disposal of stockpiles of chemical munitions, mines, and other forms of weapons-related containerization and during facility decommissioning and closure;

(2) explosion, detonation, or combustion of explosives, propellants, or incendiary materials during the course of disposal of stockpiles of chemical munitions, mines, or other forms of weapons-related containerization;

(3) contamination present at or related from the installation prior to the contractor's construction or operation of the chemical demilitarization facility CDF, whether known or unknown by the Government or contractor at such time;

(4) contamination resulting from the activities of third parties when the contractor has no control over such activities or parties; and

(5) contamination resulting from the placement of components and materials from decommissioning and placement of wastes and residues from demilitarization, destruction, or closure in accordance with the contract and all applicable laws and regulations.

Provided that the indemnification clause shall in no way indemnify the contractor against local, state, or federal civil or criminal fines or penalties levied by local, state, or federal tribunals, nor shall this clause indemnify the contractor against the costs of defending, settling, or otherwise participating in such civil or criminal actions brought in local, state, or federal tribunals.

The term ''lethal chemical agents,'' for the purposes of this clause, means the chemicals as listed in the table on record and their naturally occurring breakdown products, but does not include residues and wastes produced from the demilitarization process except to the extent that these residues and wastes contain, or are deemed by a court or agency of competent jurisdiction to contain, chemicals as listed in the table on record.

The term ''disposal'' for the purposes of this clause, includes the reconfiguration, destruction, or demilitarization and interim storage and movement of chemical munitions, mines, and other forms of weapons-related containerization, decontamination of

equipment and facilities, and the transportation and placement of wastes and residues from destruction or demilitarization.

The term ''damage to property'' in this clause shall include the costs of monitoring, investigation, removal, response, and remediation for property (to include groundwater) due to the risks above once certification of closure in accordance with the closure plan has been accepted by the State or the Environmental Protection Agency, and contract performance has been completed and accepted by the Army.

Contractor: Raytheon Engineers and Constructors, Inc.

Type of action: Contingent Liability.

Actual or estimated potential cost: The amount the Contractors will be indemnified cannot be determined at this time, but will depend upon the occurrence of an incident related to the performance of the contract.

Service and activity: Department of the Army.

Description of product or service: Construction, operations, maintenance, and closure of the Johnston Atoll Chemical Agent Disposal System (JACADS) faiclity.

Background: In accordance with Federal Acquisition Regulation (FAR) 50.403–1, Raytheon Engineers and Constructors, Inc., requested that, pursuant to authority provided in Public Law 85–804, the Army include an indemnification clause in its contract DAAA09–96–C–0081 for the construction, operations, maintenance, and closure of the Johnston Atoll Chemical Agent Disposal System (JACADS) facility.

Under this contract, Raytheon is responsible for all facets of the process to destroy the lethal chemical agents and munitions stockpiled at the JACADS facility. Upon review of the functions and responsibilities that Raytheon has, it was found that execution of such will subject the contractor to certain unusually hazardous risks which are defined below.

Statement of facts

The Secretary of the Army considered the availability, cost, and terms of private insurance to cover these risks, as well as the viability of self-insurance, and concluded that adequate insurance to cover the unusually hazardous risks was not reasonably available.

It was not possible to determine the actual or estimated cost to the Government as a result of the use of an indemnification clause since the liability of the Government, if any, would depend upon the occurrence of an incident related to the performance of the contract.

The Secretary of the Army found that the use of an indemnification clause in this contract would facilitate the national defense.

Decision

In view of the foregoing and pursuant to the authority vested in the Secretary of the Army by Public Law 85–804 (50 U.S.C. 1431–1436) and Executive Order 10789, as amended, inclusion of the indemnification clause prescribed in FAR 52.250–1, with its Alternate 1, in the contract for the JACADS facility was authorized, provided the clause defines the unusually hazardous risks and includes the limitations on coverage precisely as described in the definition below.

The contractual document executed pursuant to this authorization shall comply with the requirements of FAR Subparts 50.4 and 28.3 as implemented by the Department of Defense and the Department of the Army.

Definition of unusually hazardous risks

The risks of:

(1) sudden or slow release of, and exposure to, lethal chemical agents during the disposal of stockpiles of chemical munitions, mines, and other forms of weapons-related containerization and during facility decommissioning and closure;

(2) explosion, detonation, or combustion of explosives, propellants, or incendiary materials during the course of disposal of stockpiles of chemical munitions, mines, or other forms of weapons-related containerization;

(3) contamination present at or released from the installation prior to the contractor's construction or operation of the chemical demilitarization facility CDF, whether known or unknown by the Government or contractor at such time;

(4) contamination resulting from the activities of third parties when the contractor has no control over such activities or parties; and

(5) contamination resulting from the placement of components and materials from decommissioning and placement of wastes and residues from demilitarization, destruction, or closure in accordance with the contract and all applicable laws and regulations.

Provided that the indemnification clause shall in no way indemnify the contractor against local, state, or federal civil or criminal fines or penalties levied by local, state, or federal tribunals, nor shall this clause indemnify the contractor against the costs of defending, settling, or otherwise participating in such civil or criminal actions brought in local, state, or federal tribunals.

The term ''lethal chemical agents,'' for the purposes of this clause, means the chemicals as listed in the table on record and their naturally occurring breakdown products, but does not include residues and wastes produced from the demilitarization process except to the extent that these residues and wastes contain, or are deemed by a court or agency of competent jurisdiction to contain, chemicals as listed in the table on record.

The term ''disposal,'' for the purposes of this clause, includes the reconfiguration, destruction, or demilitarization and interim storage and movement of chemical munitions, mines, and other forms of weapons-related containerization, decontamination of equipment and facilities, and the transportation and placement of wastes and residues from destruction or demilitarization.

The term ''damage to property'' in this clause shall include the costs of monitoring, investigation, removal, response, and remediation for property (to include groundwater) due to the risks above once certification of closure in accordance with the closure plan has been accepted by the State or the Environmental Protection Agency, and contract performance has been completed and accepted by the Army.

Contingent Liabilities

Provisions to indemnify contractor's 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 contractors insurance program were included in these contracts. The potential cost of the liabilities cannot be estimated since the liability to the Government, if any, will depend upon the occurrence of an incident as described in the indemnification clause. Items procured are 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*
Raytheon Engineers & Constructors, Inc	1
Westinghouse Electric Corporation	1
Total	2

DEPARTMENT OF THE NAVY

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*
Lockheed Martin Missiles & Space	3
Vitro Corporation	1
Interstate Electronics Corporation	1
Lockheed Martin Defense Systems	7
Rockwell International Corporation	1
Electric Boat Corporation	7
Loral Defense Systems—East	1
Raytheon Company	1
Rockwell Corporation, Autonetics Strategic Systems Division	1
Northrop Grumman Marine Systems	3
Alliant Techsystems, Inc./Thiokol	1
Honeywell, Inc	1
Lockheed Martin Tactical Systems, Inc	2
The Charles Stark Draper Lab, Inc.	1
Kearfott Guidance & Navigation Corporation	1
Newport News Shipbuilding and Dry-dock Company	6
Total	38

CONTINGENT LIABILITIES SUMMARY TABLE

Contractor	Service and activity	Description of product service
Lockheed Martin Missiles & Space	Department of the Navy, Strategic Systems Programs	FY 1996 Training Support.
	Department of the Navy, Strategic Systems Programs	Trident Re-entry Systems Applications Program.
	Department of the Navy, Strategic Systems Programs	FY 1997 Trident II (D5) Missile Production, related hardware and services.
Vitro Corporation	Department of the Navy, Strategic Systems Programs	Engineering technical services in support of the U.S. Trident I and Trident II Weapon Systems Integration.
Interstate Electronics Corporation	Department of the Navy, Strategic Systems Programs	Test Instrumentation Engineering, Logistics Services, and Field Services.
Lockheed Martin Defense Systems	Department of the Navy, Strategic Systems Programs	FY 1997 Trident Training Support Services.
	Department of the Navy, Strategic Systems Programs	Fire Control Training Engineering Services.
	Department of the Navy, Strategic Systems Programs	U.S. FBM/SWS and U.K. Polaris and U.K. Trident II Systems.
	Department of the Navy, Strategic Systems Programs	Verification of Failures on MK–5 Inertial Measurement Units.
	Department of the Navy, Strategic Systems Programs	Replenishment spares, repair, SPALTS, overhaul and EOC parts, tools, test equipment and operational support services for Trident I (including C4 B/F) & Trident II FC systems and support equipment.
	Department of the Navy, Strategic Systems Programs	Basic Ordering Agreement for repair, modification, SPALTS and repair parts for Trident I/II guidance IMUS, MCAS, and Guidance Ancillary Support Equipment.
Lockheed Martin Defense Systems	Department of the Navy, Strategic Systems Programs	Basic Ordering Agreement for support of Trident I and Trident II Fire Control Systems, Guidance Support Equipment and related support equipment.

CONTINGENT LIABILITIES SUMMARY TABLE—Continued

Contractor	Service and activity	Description of product service
Rockwell International Corporation	Department of the Navy, Strategic Systems Programs	FY 1997 Technical Assistance Program
Electric Boat Corporation	Department of the Navy, Strategic Systems Programs.	FY 1997 COTS Hardware/Software.
	Department of the Navy, Strategic Systems Programs	COTS Implementation Analysis.
	Department of the Navy, Strategic Systems Programs	Technical Support for Ship Systems and Subsystems Support U.S. SSBN Weapon Systems during Submarine DASO's.
	Department of the Navy, Naval Sea Systems Command	Reactor Plant Planning Yard Services for Nuclear Power Submarines, Moored Training Ships and Guided Missile Cruisers.
	Department of the Navy, Naval Sea Systems Command	NSSN IPPD 1996.
	Department of the Navy, Naval Sea Systems Command	SSN 23 Construction.
	Department of the Navy, Naval Sea Systems Command	Basic Ordering Agreement for Design Studies for SSN 688 Program Office.
Loral Defense Systems—East	Department of the Navy, Strategic Systems Programs	Modification/Repair of Items on U.S. Trident Weapons Subsystems.
Raytheon Company	Department of the Navy, Strategic Systems Programs	FY 1996 Captive Line.
Rockwell Corporation, Autonetics Strategic Systems Division.	Department of the Navy, Strategic Systems Programs	FY 1996 Inertial Equipment Modification and Repair.
Northrop Grumman Marine Systems.	Department of the Navy, Strategic Systems Programs	FY 1996 Expendable Hardware Procurement.
	Department of the Navy, Strategic Systems Programs	Technical Services to support the SWS Launcher Training Systems Maintenance and Operational Support, and to related formal and informal training materials acquisition and support, in the U.S. and the U.K.
	Department of the Navy, Strategic Systems Programs	FY 1997 Launcher Backfit Program and Technical Engineering Services.
Alliant Techsystems, Inc./Thiokol	Department of the Navy, Strategic Systems Programs	Disposal of C3 Second Stage Rocket Motors at the Utah Test and Training Range.
Honeywell, Inc	Department of the Navy, Strategic Systems Programs	Repair and Recertification of Size 10 PIGAS for the MK–6 Guidance System.
Lockheed Martin Tactical Systems, Inc.	Department of the Navy, Strategic Systems Programs	FY 1997 Technical Services and Logistics Program (FY 1997 base year and FY 1998 option year).
	Department of the Navy, Strategic Systems Programs	FY 1997 base year and FY 1998 option year Trident I (C4) and II (D5) Navigation Subsystem technical services and support.
The Charles Stark Draper Lab., Inc.	Department of the Navy, Strategic Systems Programs	Technical Engineering Services and support.
Kearfott Guidance and Navigation Corporation.	Department of the Navy, Strategic Systems Programs	Failure verification, repair and recertification of MITA–5 Gyros in support of the Trident II MK–6 Guidance System.
Newport News Shipbuilding and Drydock Company.	Department of the Navy, Naval Sea Systems Command	Reactor Plant Planning Yard Services for Nuclear Power Submarines.
	Department of the Navy, Naval Sea Systems Command	Reactor Plant Planning Yard Services for CVN–65.
Newport News Shipbuilding and Drydock Company.	Department of the Navy, Naval Sea Systems Command	Advance Planning and Material Procurement for U.S.S. Enterprise (CVN 65) FY 1997 Extended Selected Restricted Availability (ESRA).
	Department of the Navy, Naval Sea Systems Command	Engineering, Technical and Logistics Services in Support of Aircraft Carrier Programs.
	Department of the Navy, Naval Sea Systems Command	Basic Ordering Agreement to Support Depot Level Maintenance of CVN 65.
	Department of the Navy, Naval Sea Systems Command	Basic Ordering Agreement for Design Studies for SSN 688 Program Office.

DEPARTMENT OF THE AIR FORCE

Contractor: Various.

Type of action: Contingent Liability.

Actual or estimated potential costs: 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 1997 Annual Airlift Contracts.

Reference: Definitions of unusually hazardous risks applicable to CRAF FY 1996.

Background: Thirty-one contractors requested indemnification under Public Law 85–804 for the unusually hazardous risks (as defined) involved in providing airlift services for CRAF missions (as defined). In addition, Headquarters, Air Mobility Command (AMC), requested indemnification for subsequently identified contractors and the subcontractors who conducted or supported the conduct of CRAF missions. The contractors for which indemnification was requested were those awarded contracts on August 14, 1996, as a result of solicitation F11626–96–R0002. The 31 contractors who requested indemnification are listed below:

CONTRACTORS TO BE INDEMNIFIED AND PROPOSED CONTRACT NUMBER

Air Transport International (ATN), F11626–96–D0013.

Alaska Airlines (ASA), F11626–96–D0015.

American International Airways (CKS), F11626–96–D0014.

American Trans Air (ATA), F11626–96–D0013.

Atlas Air (GTI), F11626–96–D0017.

Burlington Air Express (BAX), F11626–96–D0013.

Carnival Airlines (CAA), F11626–96–D0014.

Continental Airlines (COA), F11626–96–D0018.

Delta Air Lines (DAL), F11626–96–D0019.

DHL Airways (DHL), F11626–96–D0020.

Emery Worldwide (EWW), F11626–96–D0012.

Evergreen International (EIA), F11626–96–D0012.

Federal Express (FDX), F11626–96–D0013.

Fine Airlines (FBF), F11626–96–D0021.

Miami Air (MYW), F11626–96–D0012.

North American Airlines (NAO), F11626–96–D0022.

Northwest Airlines (NWA), F11626–96–D0012.

OMNI Air (OAE), F11626–96–D0023.

Polar Air Cargo (PAC), F11626–96–D0013.

Rich International (RIA), F11626–96–D0012.

Southern Air Transport (SAT), F11626–96–D0012.

Sun Country Airlines (SCX), F11626–96–D0014.

Tower Air (TWR), F11626–96–D0014.

Trans Continental Airlines (TCA), F11626–96–D0014.

Trans World Airlines (TWA), F11626–96–D0024.

United Airlines (UAL), F11626–96–D0025.

Inted Parcel Service (UPS), F11626–96–D0026.

US Air (USA), F11626–96–D0012.

US Air Shuttle (USS), F11626–96–D0027.

World Airways (WOA), F11626–96–D0012.

Zantop International (ZIA), F11626–96–D0028.

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.

Statement of facts

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 31 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. 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 31 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, the request was approved on October 2, 1996, to indemnify the 31 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. Approval was also granted to contracting officers to indemnify subcontractors that request indemnification, with respect to those 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.

Definition of unusually hazardous risks applicable to CRAF FY 1996 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 missions 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), public, 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 contract 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 prepositioning 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 describe in the indemnification clause.

Contactor	*Number*
Civil Reserve Air Fleet (CRAF) FY 1997 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.

DEFENSE LOGISTICS AGENCY

Contractor: Roche Products Limited.

Type of Action: Contingent Liability.

Actual or estimated potential cost: Estimated or potential cost cannot be determined at this time.

Service and activity: Defense Personnel Support Center, Defense Logistics Agency

Description of product or service: Pyridostigmine Bromide Tablets (PBT)

Background: Roche Products Limited submitted a request that the clause entitled ''Indemnification Under Public Law 85–804,'' FAR 52.250–1, be included in Contract SPO200–95–D–0005.

On September 13, 1995, the Defense Personnel Support Center (DPSC), a field activity of the Defense Logistics Agency (DLA), awarded indefinite quantity contract SPO2000–95–D–0005 to Roche for Pyridostigmine Bromide Tablets, 30mg (PBT), NSN 6505–01–178–7903. PBT is used as a nerve agent pre-treatment to enhance the efficacy of post-exposure antidote therapy. Under the terms of the contract, delivery was contingent upon approval of indemnification.

Statement of facts

This indemnification action would facilitate the national defense since the availability of PBT was critical to the protection and welfare of military personnel in combat situations where the threat of nerve agents existed. In addition, Roche is the sole manufacturer of this item: Duphar B.V. no longer manufactures nerve agent antidotes for the Department of Defense. Due to allegations that PBT played a role in Gulf War veterans' illnesses, Roche refused to deliver PBT without an indemnification provision.

Acquisition of the PBT involves an unusually hazardous risk that could impose liability upon the contractor in excess of financial protection reasonably available. Since allegations have been made that PBT, or PBT in combination with other agents, e.g., insecticides, have caused Gulf War veterans' illnesses, Roche, as manufacturer, was threatened by unknown liability for which insurance coverage was not available. It was not possible to determine the actual or estimated cost to the Government as a result of the use of an indemnification clause because the liability of the Government, if any, would depend upon the occurrence of an incident described in the indemnification clause.

The Contracting officer believed the approval of the Indemnification Request would be in the best interests of the Government. Accordingly, it was agreed that the following would be incorporated in the contract, if indemnification was approved:

''The Contractor requests inclusion of Indemnification Clause FAR 52.250–1 in Contract SPO200–95–D–0005 for the supply of pyridostigmine bromide in a 30 milligram dose (''the Product''). Indemnification was requested because the Contractor identified an unusually hazardous risk associated with supply and use of the Product. Specifically, there is an unusually hazardous risk since the Contractor is acting purely as a contract manufacturer and has no knowledge of the Product's safety or efficacy for the Government's purpose or any purpose whatsoever. The contractor considered this risk magnified since the Product will be relied upon for military combat use as a pretreatment against nerve-agent intoxication, although there is no actual clinical experience with pyridostigmine bromide as an effective pretreatment antidote to actual chemical weapons attack. Given the critical nature of the Product's use, individual may be injured or killed. Those individuals or their estates may seek to hold the contractor responsible for the injuries or death, thus exposing the contractor to unlimited liability. In addition, there have been allegations that pyridostigmine bromide, either alone or in combination with other agents, in a possible causative factor in Gulf War veterans' illnesses. The Contractor regards any risk (known or unknown, and arising anywhere in the world) associated with the procurement, use or distribution of the Product as unusually hazardous. In light of the foregoing, the parties have agreed to the following definition of the risk:

(1) Claims as to lack of efficacy of the Product; and

(2) Claims as to adverse short-term or long—term reactions as a result of human use of the Product, alone or in combination with other agents, including, but not limited to, temporary or permanent disability, birth defects, or death.''

Decision

It was determined that authorization of the inclusion of the FAR Indemnification Clause in DPSC contract SPO200–95–D–005 with Roche Products Limited will facilitate the national defense. Pursuant to the authority vested in the Under Secretary of Defense (Acquisition and Technology) by Public Law 85–804 and Executive Order 10709, the inclusion of clause 52.250–1 in the instant

contract for the risks identified above was authorized.

Contingent Liabilities

Provisions to indemnify Contractor against liabilities due to claims which may result from the hazardous risk associated with the supply and use of pyridostigmine bromide, or other risks, as defined, not covered by the Contractor's insurance program were included; the potential cost of the liability 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*
Roche Products Limited	1
Total	1

DEFENSE INFORMATION SYSTEMS AGENCY

Contractor: Total Procurement Services, Inc.

Type of action: Formalization of Informal Commitment.

Actual or estimated potential cost: $10,000.

Service and activity: Defense Information Systems Agency, Defense Commercial Communications Office.

Description of product or service: Processing of noncompliant transactions.

Background: The Defense Information Technology Contracting Organization (DITCO) notified Total Procurement Services, Inc. (TPS) by letter dated September 24, 1996, that the Defense Information Systems Agency (DISA) would no longer process TPS's noncompliant transactions. DITCO and the operational personnel in the electronic commerce initiative had been working with TPS since at least July 1996, but noncompliance continued.

TPS responded to that notice in a letter dated September 24, 1996. TPS's letter raised a number of issues but essentially contended that the noncompliance was on the part of the Network Entry Point (NEP) at Ogden, principally in the areas of script writing and segment delimiters and terminators. TPS further claimed $10,000 under authority of Public Law 85–804 for TPS's cost to support the 2003 Implementation Convention (IC) over a ten month period.

Decision

DISA did not agree that the Government was at fault in the problems TPS experienced. DISA did not see evidence of Government-caused problems. As TPS was aware, the Government conducted an extensive Independent Validation and Verification (IV&V) review of Ogden NEP operations in relation to TPS. The Government took great pains and incurred great expense to ensure that this IV&V of the Ogden NEP was conducted independently and with no bias toward the Ogden operation or against TPS. This review, conducted by expert personnel not associated with the Ogden NEP, concluded that NEP processing and communications were not responsible for frequent data anomalies reported and observed in unprocessed data retrieved from TPS since August 26, 1996. Furthermore, the IV&V found no indication that TPS's data problems reported before August 26, 1996, were caused by NEP processing or the NEP-TPS file exchange.

On November 1, 1996, the EC/EDI system migrated from the NEP environment to the Electronic Commerce Processing Node (ECPN) environment. This new system will provide far greater accuracy in identifying and rejecting incoming transactions that do not comply with processing standards. The system is not designed to allow for human intervention.

Insofar as TPS's claim was concerned, no loss was shown. The Navy's migration to the 3050 IC was delayed. If the migration had been on schedule, however, DISA presumed that TPS would have been supporting 3050 IC. Implicit in TPS's continued support of the 2003 IC was a desire to continue processing Navy business for TPS's trading partners. Thus, either the 2003 or the 3050 IC would have been supported.

It should be noted that the authority conferred by Public Law 85–804 is for use in extraordinary situations where the productive ability of a contractor or its continued operation as a source of supply is essential to national defense. Even if a loss occurred, which it did not, that is not a sufficient basis for exercising the authority. Furthermore, the statute may not be relied on when other adequate legal authority exists within the Agency to address the claim. The old VAN License Agreement incorporated the Disputes clause which represents an adequate legal authority to resolve this claim. TPS's claim of September 24, 1996, was denied.

Contingent Liabilities: None.

Contractor: None.

EXECUTIVE COMMUNICATIONS, ETC.

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

2347. A letter from the Director, Office of Regulatory Management and Information, Environmental Protection Agency, transmitting the Agency's final rule—Tebufenozide; Pesticide Tolerance for Emergency Exemptions [OPP–300461; FRL–5595–3] (RIN: 2070–AC78) received March 20, 1997, pursuant to 5 U.S.C. 801(a)(1)(A); to the Committee on Agriculture.

2348. A letter from the Director, Office of Regulatory Management and Information, Environmental Protection Agency, transmitting the Agency's final rule—Imidacloprid; Pesticide Tolerance for Emergency Exemptions [OPP–300460; FRL–5594–2] (RIN: 2070–AB78) received March 20, 1997, pursuant to 5 U.S.C. 801(a)(1)(A); to the Committee on Agriculture.

2349. A letter from the Director, Office of Regulatory Management and Information, Environmental Protection Agency, transmitting the Agency's final rule—Avermectin B1 and Its Delta-8,9,-Isomer; Pesticide Tolerance [OPP–300465; FRL–5597–7] (RIN: 2070–AB78) received March 20, 1997, pursuant to 5 U.S.C. 801(a)(1)(A); to the Committee on Agriculture.

2350. A letter from the Director, Office of Management and Budget, transmitting a report that appropriation to the National Transportation Safety Board [NTSB] for ''Salaries and Expenses'' for the fiscal year 1997 has been apportioned on a basis which indicates the necessity for a supplemental appropriation, pursuant to 31 U.S.C. 1515(b)(2); to the Committee on Appropriations.

2351. A letter from the Assistant Secretary for Command, Control, Communications, and Intelligence, Department of Defense, transmitting the section 381 report (expanded as required by section 830 of the National Defense Authorization Act for fiscal year 1997), pursuant to 10 U.S.C. 113 note; to the Committee on National Security.

2352. A letter from the Director, Administration and Management, Department of Defense, transmitting the calendar year 1996 report entitled ''Extraordinary Contractual Actions to Facilitate the National Defense'' (report printed in the RECORD), pursuant to 50 U.S.C. 1434; to the Committee on National Security.

2353. A letter from the Assistant Secretary for Force Management Policy, Department of Defense, transmitting the Department's report on the status of the DOD actions to implement a demonstration project for uniform funding of morale, welfare and recreation activities, pursuant to Public Law 104–106, section 335(e)(1) (110 Stat. 262); to the Committee on National Security.

2354. A letter from the Adjutant General, the Veterans of Foreign Wars of the United States, transmitting proceedings of the 97th National Convention of the Veterans of Foreign Wars of the United States, held in Louisville, KY, August 17–23, 1996, pursuant to 36 U.S.C. 118 and 44 U.S.C. 1332 (H. Doc. No. 105–60); to the Committee on National Security and ordered to be printed.

2355. A letter from the President and Chairman, Export-Import Bank of the United States, transmitting a draft of proposed legislation to amend the Export-Import Bank Act of 1945, as amended; to the Committee on Banking and Financial Services.

2356. A letter from the Chairman, Federal Trade Commission, transmitting the 19th annual report to Congress on the administration of the Fair Debt Collection Practices Act, pursuant to 15 U.S.C. 1692m; to the Committee on Banking and Financial Services.

2357. A letter from the Secretary of Education, transmitting a draft of proposed legislation entitled the ''Partnership to Rebuild America's Schools Act of 1997''; to the Committee on Education and the Workforce.

2358. A letter from the Assistant to the Board, Board of Governors of the Federal Reserve System, transmitting the Board's final rule—Government Securities Sales Practices [Regulations H and K, Docket No. R–0921] received March 12, 1997, pursuant to 5 U.S.C. 801(a)(1)(A); to the Committee on Commerce.

2359. A letter from the General Counsel, Department of Transportation, transmitting the Department's ''Major'' final rule—Federal Motor Vehicle Safety Standards; Occupant Crash Protection [Docket No. 74–14; Notice 114] (RIN: 2127–AG59) received March 17, 1997, pursuant to 5 U.S.C. 801(a)(1)(A); to the Committee on Commerce.

2360. A letter from the Director, Office of Regulatory Management and Information, Environmental Protection Agency, transmitting the Agency's final rule—Clean Air Act Final Interim Approval of Operating Permits Program; State of Connecticut [AD–FRL–5702–5] received March 20, 1997, pursuant to 5 U.S.C. 801(a)(1)(A); to the Committee on Commerce.

2361. A letter from the Director, Office of Regulatory Management and Information, Environmental Protection Agency, transmitting the Agency's final rule—Approval and Promulgation of Implementation Plans; California State Implementation Plan Revision, San Diego County Air Pollution Control District [CA 184–0031a, FRL–5709–3] received March 20, 1997, pursuant to 5 U.S.C. 801(a)(1)(A); to the Committee on Commerce.

2362. A letter from the Director, Office of Regulatory Management and Information, Environmental Protection Agency, transmitting the Agency's final rule—Approval and Promulgation of Air Quality Implementation Plans, Tennessee; Approval of Revisions to Knox County Regulations for Violations and General Requirements [TN–165–01–9633a; FRL–5709–8] received March 20, 1997, pursuant to 5 U.S.C. 801(a)(1)(A); to the Committee on Commerce.

2363. A letter from the Director, Office of Regulatory Management and Information, Environmental Protection Agency, transmitting the Agency's final rule—Approval and Promulgation of Implementation Plan for New Mexico: General Conformity Rules [NM