the GOP bill would relegate to futures outside the mainstream economy?

And does corporate America want a workforce that excludes the potential and creativity of millions of Americans who, in some cases, are literally dying for a chance to succeed?

I do not think the American people would answer yes to any of these practical questions?

The Department of Health and Human Services has analyzed the GOP welfare proposal and their findings are not encouraging.

HHS projects that, during the next 5 years, 6.1 million children nationwide would be cut off from AFDC benefits. Nearly 300,000 in my home State of Texas alone.

I will share more revealing numbers in a moment but my point is this: if family values are truly a concern of my colleagues from the other side of the aisle, why won't they work with us to preserve America's safety net for families.

This welfare reform debate is indeed one of values. We must ask ourselves, what kind of nation shall America become as we prepare for the 21st century?

Shall we wisely seek to nurture the vast potential of all our citizens, or merely those with political clout?

Do we want welfare reform that steers people into productive work, or shall we continue driving them down the dead-end road of dependency?

Mr. Speaker, these are our choices and we dare not consider them lightly?

LEAVE OF ABSENCE

By unanimous consent, leave of absence was granted to Mr. EDWARDS of Texas (at the request of Mr. GEPHARDT) for today on account of the death of a friend.

By unanimous consent, leave of absence was granted to Mr. MINGE (at the request of Mr. GEPHARDT) for today until 7 p.m., on account of family illness.

SPECIAL ORDERS GRANTED

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

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

Ms. DELAURO, for 5 minutes, today.
Mr. MILLER of California for 5 minutes, today.
Mr. DURBIN, for 5 minutes, today.
Mr. DEFAZIO, for 5 minutes, today.
Mr. HOYER, for 5 minutes, today.
Mr. BECERRA, for 5 minutes, today.
Mr. DEAL, for 5 minutes, today.
Mr. TANNER, for 5 minutes, today.
Mrs. THURMAN, for 5 minutes, today.
Mrs. LINCOLN, for 5 minutes, today.
Mr. CLEMENT, for 5 minutes, today.
Mr. PAYNE of Virginia, for 5 minutes, today.
Mr. KLINK, for 5 minutes, today.
Ms. WATERS, for 5 minutes, today.
Mrs. CLAYTON, for 5 minutes, today.
Mr. CLYBURN, for 5 minutes, today.
Mr. OWENS, for 5 minutes, today.
Mr. FLAKE, for 5 minutes, today.
Ms. EDDIE BERNICE JOHNSON of Texas, for 5 minutes, today.
Mr. OLVER, for 5 minutes, today.
Mr. WISE, for 5 minutes, today.
Mrs. SCHROEDER, for 5 minutes, today.
Mr. BROWN of Ohio, for 5 minutes, today.
Ms. PELOSI, for 5 minutes, today.
Mr. ROMERO-BARCELÓ, for 5 minutes, today.
Mrs. MALONEY, for 5 minutes, today.
Mr. GUTIERREZ, for 5 minutes, today.
Mr. VOLKMER, for 5 minutes, today.
Mr. MFUME, for 5 minutes, today.
Mr. STENHOLM, for 5 minutes, today.
Mr. GENE GREEN of Texas, for 5 minutes, today.

(The following Member (at his own request) to revise and extend his remarks and include extraneous material:)

Mr. WAMP for 5 minutes, today.

(The following Member (at his own request) to revise and extend his remarks and include extraneous material:)

Mr. HOKE, for 5 minutes, today.

(The following Member (at her own request) to revise and extend her remarks and include extraneous material:)

Mrs. MYRICK, for 5 minutes, today.

(The following Member (at her own request) to revise and extend her remarks and include extraneous material:)

Mrs. SMITH of Washington, for 5 minutes, today.

(The following Member (at his own request) to revise and extend his remarks and include extraneous material:)

Mr. JONES, for 5 minutes, today.

(The following Member (at his own request) to revise and extend his remarks and include extraneous material:)

Mr. HOYER for 5 minutes, today.

(The following Member (at his own request) to revise and extend his remarks and include extraneous material:)

Mr. KINGSTON, for 5 minutes, today.

(The following Member (at his own request) to revise and extend his remarks and include extraneous material:)

Mr. SALMON, for 5 minutes, today.

(The following Member (at his own request) to revise and extend his remarks and include extraneous material:)

Mr. HAYWORTH, for 5 minutes, today.

(The following Member (at his own request) to revise and extend his remarks and include extraneous material:)

Mr. WELDON, for 5 minutes, today.

EXTENSION OF REMARKS

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

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

Mr. WOLF.
Mr. COOLEY.
Mr. ISTOOK.
Mr. MOORHEAD.
Mr. GILMAN.
Mr. HYDE.
Mr. BURTON of Indiana.
Mr. PACKARD.
Mr. SOLOMON.
Mr. PORTMAN.
Mr. BATEMAN.
Mr. SMITH of New Jersey.
Mr. YOUNG of Florida in two instances.

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

Mr. UNDERWOOD in two instances.
Mr. DIXON.
Mr. CONDIT.
Mrs. MALONEY in two instances.
Ms. WOOLSEY.
Mr. BONIOR.
Mr. HOYER.
Ms. LOFGREN.
Mr. MONTGOMERY in two instances.
Mr. HAMILTON.
Mr. OBERSTAR.
Ms. DELAURO.

(The following Members (at the request of Ms. JACKSON-LEE) and to include extraneous matter:)

Mr. DOOLITTLE.
Mr. PALLONE.
Ms. PELOSI.
Mr. CARDIN.
Mr. TORRICELLI.
Ms. PRYCE.
Mrs. MORELLA.

ADJOURNMENT

Mr. FIELDS of Louisiana. Mr. Speaker, I move that the House do now adjourn.

The motion was agreed to; accordingly (at 12 midnight), the House adjourned until Thursday, March 23, 1995, at 10 a.m.

CONTRACTUAL ACTIONS, CALENDAR YEAR 1994 TO FACILITATE NATIONAL DEFENSE

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

OFFICE OF THE SECRETARY OF DEFENSE,
Washington, DC, March 14, 1995.

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 (CY) 1994 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 5 were disapproved. Those approved include actions for which the Government's liability is contingent and can not be estimated.

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

Sincerely,

D.O. COOKE,
Director,
Administration and Management,

Enclosure: As stated.

DEPARTMENT OF DEFENSE

EXTRAORDINARY CONTRACTUAL ACTIONS TO FACILITATE THE NATIONAL DEFENSE (Public Law 985–804), Calendar Year 1994

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 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 1994.

CONTRACTUAL ACTIONS TAKEN PURSUANT TO PUBLIC LAW 85–804 TO FACILITATE THE NATIONAL DEFENSE, CALENDAR YEAR 1994

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 1994

Department and type of action	Actions approved			Actions denied	
	Number	Amount requested	Amount approved	Number	Amount
Department of Defense, total	45	16,016,149.00	16,016,149.00	5	18,459,908.00
Amendments without consideration	1	16,016,149.00	16,016,149.00	4	3,459,908.00
Formalization of informal commitments	0	0.00	0.00	1	15,000,000.00
Contingent liabilities	44	0.00	0.00	0	0.00
Army, total	1	16,016,149.00	[1] 16,016,149.00	0	0.00
Amendments without consideration	1	16,016,149.00	16,016,149.00	0	0.00
Navy, total	41	0.00	0.00	5	18,459,908.00
Amendments without consideration	0	0.00	0.00	4	[2] 3,459,908.00
Formalization of informal commitments	0	0.00	0.00	1	[3] 15,000,000.00
Contengent liabilities	41	[4] 0.00	0.00	0	0.00
Air Force, total	3	0.00	0.00	0	0.00
Contingent liabilities	3	[4] 0.00	0.00	0	0.00
Defense Logistics Agency, total	0	0.00	0.00	0	0.00
Ballistic Missile Defense Organization, total	0	0.00	0.00	0	0.00
Defense Information Systems Agency, total	0	0.00	0.00	0	0.00
Defense Mapping Agency, total	0	0.00	0.00	0	0.00
Defense Nuclear Agency, total	0	0.00	0.00	0	0.00

[1] Libby Corporation requested extraordinary contractual relief under P.L. 85–804. The request for relief was approved for $16,016,149.
[2] Denials involved Delphi Painting & Decorating Company ($50,000); Farrell Lines, Incorporated ($87,200); Mech-Con Corporation ($2,076,082); and Truax Engineering, Incorporated ($1,246,626).
[3] Southwest Marine, Incorporated requested extraordinary contractual relief under P.L. 85–804. The request for relief was denied.
[4] The actual or estimated potential cost of the contingent liabilities cannot be predicted, but could entail millions of dollars.

SECTION B—DEPARTMENT SUMMARY

DEPARTMENT OF THE ARMY

Contractor: Libby Corporation.

Type of action: Amendment Without Consideration.

Actual or estimated potential cost: $16,016,149.

Service and activity: U.S. Army Aviation Troop Command (ATCOM).

Description of product or service: Tactical quiet generator sets (TQG's).

Background: Libby Corporation (Libby) submitted a request for extraordinary contract relief under Public Law (P.L.) 85–804 requesting an amendment without consideration pursuant to Federal Acquisition Regulation (FAR) 50.302–1. Libby asserted that if it did not receive relief, it would not be able to complete performance on U.S. Army Aviation Troop Command (ATCOM) Contracts DAAK01–88–D–080 and DAAK01–88–D–082 for tactical quiet generator sets (TQGs) which are essential to the national defense.

Justification: Libby was awarded two firm fixed priced requirements contracts on August 30, 1988, for the production of a new generation of tactical generators. Contract D080 called for the production of: 4,498–5KW, and 3,417–10KW TQGs. Contract D082 called for the production of: 1,240–15KW, 1,261–30KW, and 2,436–60KW TQGs. A total of 12,852 TQG were placed under contract. The contracts classified these TQGs as Level III Nondevelopmental Items (NDI). No formal research and development effort preceded the award of these contracts because it was believed that contract performance would require little more than the assembly/integration of existing commercial components into generator sets, meeting military requirements.

Under the terms of the contracts, first article testing (FAT) was set to start in February 1990, production release was set for March 1991, and completion of deliveries was set for May 1993 (Contract D080) and June 1993 (Contract D082). Difficulties were encountered during the preproduction/FAT phase of the contracts. In September 1991, Libby filed a claim alleging Government delay, defective specifications, Government superior knowledge, and impossibility of performance. The contracting officer found that the Government did delay Libby during FAT and revised the delivery schedule to start production in March 1993, with completion by September 1995. While a new delivery schedule was established, the other issues were not fully resolved and a new contract amount was not definitized.

In October 1993, Libby advised the contracting officer that it could not complete production of the TQGs unless it received an additional $46,000,000 beyond the $106,800,000 priced for the production of the two contracts. As of October/November 1993, Libby had manufactured, and the Army had accepted, 3,500 of the 12,852 TQGs under contract. Libby's initial position was that these additional amounts were due under the contract as a result of defective specifications, Government superior knowledge, and impossibility of performance.

During October, November, and December 1993, a negotiation team from ATCOM and the U.S. Army Materiel Command (AMC) conducted a detailed evaluation of Libby's position. The negotiation team reviewed the amount Libby claimed it needed to complete performance of the contracts and evaluated liability for the claimed amount. After intensive negotiations, supported by DCAA, the parties agreed that $32,047,879 was needed to complete performance of the two contracts. However, of this amount, the Army

was only legally liable for $16,031,748. The remaining $16,016,149 reflected costs that could not be attributed to the Government and, therefore, the Government was not legally liable for this amount.

On December 11, 1993, Libby submitted its formal request for extraordinary contract relief to the contracting officer. The Army Contract Adjustment Board (ACAB) heard the case on December 22, 1993, and approved relief in the amount of $16,016,149, subject to the execution of a Settlement Agreement between Libby and the contracting officer which reflected the understandings of the parties as to liability. On February 23, 1994, a Settlement Agreement was executed.

Applicant's contentions: Libby contended that it could not complete performance of its contracts for $106,800,000. Libby contended that it needed an additional $32,047,897 to complete performance of the contracts. Of this amount, Libby acknowledged that it was not legally entitled to $16,016,149. Libby contended that if it did not receive this relief, it would suffer a cash flow problem so severe that by December 1993/January 1994, it would have to terminate its operations and, with that, stop performance of contracts essential to the national defense. Libby cited FAR 50.302–1, Amendments Without Consideration, as authority for relief.

Decision: As of October 1993, Libby's TQGs contracts were priced at $106,852,103. By October 1993, Libby had concluded that it could not complete performance for that amount and had submitted a claim to ATCOM for an additional $46,000,000. Libby asserted that many of the difficulties it had incurred during the early phases of the contracts entitled it to additional compensation to perform the contracts. Libby characterized those problems under various legal theories like: Government caused delay, defective specifications, Government's superior knowledge, and impossibility of performance. Although the Army conceded that it had delayed Libby's performance during FAT, because the contracts called for the assembly and integration of existing commercial components, the Army was not particularly receptive to Libby's claim.

During the period October to December 1993, Libby engaged in negotiations which reached the conclusion that it would take an additional $32,047,879 to complete performance of the TQGs contracts. Of this amount, the Army agreed that it was liable, under different contract principles, in the amount of $16,031,748. Libby agreed that the Army was not responsible for the additional $16,016,149 needed to complete the TQGs contracts.

Before the ACAB, Libby presented detailed financial information which disclosed that without the additional $16,016,149, its cash flow would not be sufficient to continue performance past January 1994. This figure does not include any amount for profit.

FAR 50.302–1(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 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.

It was found to be essential to the Army and, therefore, the national defense, that it receive the TQGs currently being manufactured by Libby. The Chief of the Combat Support, Combat Service Support & Common Systems Division, Office of the Deputy Chief of Staff for Operations (DCSOPS), verified the need in a memorandum dated December 22, 1993, subject: ''Mission Criticality of Tactical Quiet Generators for the U.S. Army.'' That memorandum detailed the impact on the Army if action was not taken and Libby ceased production of the TQGs. In particular, the following concerns were identified:

(a) A large percentage of the 132,000 Army Military Standard (MILSTD) generators currently in the inventory had two problems impacting on readiness: one, many exceeded their expected useful life of 17 years; and two, about one-third of these generators operated on gasoline instead of multi-fuel. The continued use of gasoline increases support costs and represents a safety concern because of the volatility of gasoline.

(b) Many of the critical major components required to maintain the readiness of the current fleet of generators were no longer available in the supply system. The cost of having to overhaul MILSTD generators was almost twice that of buying comparable TQGs. Delays in fielding TQGs would result in the expenditure of needed operation and maintenance funds at nearly twice the amount of procurement costs.

(c) New weapons systems that were being developed, tested, and fielded depended on the timely fielding of the TQGs. If the TQGs were not fielded as scheduled, these programs may not have been fielded or may have incurred expensive alternative costs.

(d) Modern battlefield requirements had become more sophisticated and had resulted in new needs that MILSTD generators could not fulfill. Most notable was audible and infrared signature suppression. TQGs provided an 80 percent reduction over MILSTDS in both areas, significantly reducing the vulnerability of soldiers to enemy attack. Improved survivability is a high priority on the modern battlefield.

The December 22, 1993, DCSOPS memorandum clearly established the urgent need for the TQGs and the negative impact on the national defense if the TQGs were not delivered as soon as possible.

Libby presented data, confirmed by ATCOM, which indicated that the TQGs being manufactured met the Army's specifications and would be able to meet the current delivery schedule if Libby was provided the $16,016,149 requested under P.L. 85–804.

Conclusion: Under these circumstances, the Army Contract Adjustment Board (ACAB) is of the belief that Libby's continued performance of the TQGs contracts is essential to the national defense. ACAB therefore granted Libby's requested relief. This action will facilitate the national defense. The contracting officer was authorized to amend the TQGs contracts without consideration in the total amount of $16,016,149, as memorialized in the Settlement between Libby and the contracting officer, dated February 23, 1994.

DEPARTMENT OF THE ARMY

Contingent Liabilities: None.

Contractor: None.

DEPARTMENT OF THE NAVY

Contractor: Delphi Painting & Decorating Company.

Type of action: Amendment Without Consideration.

Actual or estimated potential cost: $50,000.

Service and activity: The Department of the Navy, Naval Facilities Engineering Command.

Description of product or service: Removal and disposal of paint that potentially contains lead.

Background: The subject action is an Amendment Without Consideration under FAR Section 50.302–1. Delphi submitted a request for extraordinary relief by letter dated December 21, 1992. Delphi based the request on contractor essentiality and stated that they were entitled to compensation in the approximate amount of $50,000. Within the Department of Defense, P.L. 85–804 is implemented by the Federal Acquisition Regulation (FAR). FAR Part 50, Extraordinary Contractual Actions, Section 50.302, lists the type of adjustments available for relief. The only potentially applicable basis for adjustment in this case is contained under paragraph 50.302–1, Amendments Without Consideration, subparagraph (a). Subparagraph (a) allows Amendments Without Consideration if an actual or threatened loss will impair the productive ability of a contractor whose continued operations as a source of supply is found to be essential to the national defense. The essential nature of the work being performed is the essence of this exception. Upon review of the nature of the work involved in this contract (the removal and disposal of paint that potentially contains lead), it has been determined that this type of work is not uncommon and can not be considered essential to the national defense. Further, the suggestion that future contracts will have to be awarded on a sole source basis is unfounded.

Decision: In conclusion, the Contracting Officer determined, that pursuant to FAR 50.101, the request must be denied in its entirety.

Contractor: Farrell Lines, Incorporated.

Type of action: Amendment Without Consideration.

Actual or estimated potential cost: $87,200.

Service and activity: The Department of the Navy, Military Sealift Command.

Description of product or service: U.S. flag ocean and intermodal transportation service.

Background: The subject action is a request for a portion of the amount which was the subject of a certified claim under the Contract Disputes Act, which was previously denied by the Contracting Officer. Because the basis of the present claim involves some of the same facts as in the certified claim, a brief discussion of those facts follows.

The SMESA contract covered U.S. flag ocean and intermodal transportation services, including combination U.S. flag and foreign flag services, if all U.S. flag service was not available to meet Government requirements between the United States, as well as other parts of the world, and areas in the Middle East. The purpose of the Contract was to support U.S. Gulf War operations. The Contract was solicited and awarded during August 1990, on a firm fixed price basis for a period not to exceed one year. The effective date of the Contract was August 23, 1990. Farrell offered a combination U.S. flag/foreign flag service between the U.S. East Coast (USEC) and the Middle East (ME), including, but not limited to, service to and from Damman. Farrell offered and provided U.S. flag vessel service between the USEC and the Mediterranean, with connecting foreign flag service to the ME.

The connecting service offered and provided by Farrell under the Contract involved the use of a slot charter with Compagnie Maritime D'Affretement (CMA) which, in turn, had entered into various time charters, including one with the owners of the VILLE D'OMAN, Gebr. Peterson Schiffahrtsgesellschaft Westertal GMBH & Co. (Owners). Farrell commenced performance under the Contract in late August/early September 1990.

On January 11, 1991, the owners of the vessel VILLE D'OMAN, asserting the threat of war and reports of floating mines in the Persian Gulf, gave notice of their intent not to permit the vessel to proceed to Damman and discharge its Department of Defense (DoD) cargo. CMA, after several unsuccessful attempts to convince the Owners and crew to proceed to Damman to discharge the DoD cargo under the Contract, directed the

VILLE D'OMAN on January 21, 1991, to discharge its DoD cargo in an alternate port. Farrell subsequently arranged for the replacement of the VILLE D'OMAN by another CMA chartered vessel, the TITANA, which was engaged in the European/Far East trade route, to deliver the DoD cargo to Damman, in accordance with the Contract. The costs associated with the diversion of VILLE D'OMAN and the use of the replacement vessel, the TITANA, to deliver the cargo are at issue.

Farrell's certified claim and the contracting officer's final decision: On July 10, 1992, Farrell submitted a certified claim for $485,978 for reimbursement of unanticipated costs (the $87,200 adjustment sought by Farrell was originally part of this claim). Farrell sought recovery of the additional expenses incurred in shipping the DoD cargo to Damman under a clause in its SMESA contract, which provided for reimbursement of unanticipated costs. Farrell claimed that the Contracting Officer had suggested the clause as a means by which Farrell could be reimbursed.

In support of its claim, Farrell asserted that it had considered trying to invoke the Liberties Clause. However, Farrell alleged that it was discouraged from doing so by the Contracting Officer. Farrell further alleged that the Liberties Clause, if applicable, would have relieved Farrell of the duty to ship the DoD cargo to Damman, based on the VILLE D'OMAN's refusal to proceed there out of safety concerns for the ship and its crew, and would have allowed it an equitable adjustment for its services. Farrell further asserted that it was discouraged from alternately imposing a special surcharge increase to the SMESA rates to cover the additional cost.

The Contracting Officer's Final Decision denied Farrell's claim, concluding that the contract clause permitting reimbursement for unanticipated costs was inapplicable. The Contracting Officer noted that Farrell had contracted to deliver cargo safely to Damman and that the performance of its subcontractors were Farrell's responsibility. The Contracting Officer also pointed out that the unanticipated costs clause applied only to costs not otherwise covered in the Contract, and that the Liberties Clause was the appropriate avenue for Farrell to recover its additional expense. The Contracting Officer concluded, however, that no valid claim existed under that clause because the VILLE D'OMAN was not justified in refusing to proceed to Damman. Further, Farrell had failed to seek the Contracting Officer's approval before arranging alternate delivery of the DoD cargo to Damman, as required by the Liberties Clause. Finally, the Contracting Officer was unable to conclude that MSC personnel had discouraged Farrell from seeking relief under the Liberties Clause or through surcharges.

Request for adjustment: Farrell sought extraordinary relief in the form of a contract adjustment under the provisions of P.L. 85–804 for $87,200. Farrell asserted that its loss was directly caused by Government action. To determine whether an adjustment was appropriate, the Government had to determine whether a loss occurred, whether the loss was caused by Government action, and whether that action resulted in a potential unfairness to the Contractor. 48 C.F.R. 50.302–1(b).

Farrell claimed that when they approached the Contracting Officer with the possibility of invoking the Liberties Clause under the Contract because of the VILLE D'OMAN's refusal to proceed to Damman, the Contracting Officer insisted they perform and stated that Farrell would receive no further bookings if the clause were invoked. Based on this, and the Contracting Officer's subsequent demands for assurances of performance capabilities, Farrell claimed they were forced to abandon their rights under the Liberties Clause and were required to incur additional costs to deliver the cargo to Damman.

Assuming that an $87,200 loss existed, it was not caused by the Contracting Officer's actions. The viability of Farrell's service under the Contract was clearly in doubt during the January 1991 time frame due to Farrell's problem with the owners of the VILLE D'OMAN. The Contracting Officer's response to Farrell's comment about invoking the Liberties Clause was legitimate. It was reasonable for the Government to expect Farrell to perform, as contracted, and resort to the clause would have realistically suggested that Farrell was incapable of performing. This conclusion was bolstered by Farrell's responses to the Contracting Officer's inquiries which confirmed the service problems and detailed operational plans to continue performance under the Contract. Considering that the Contract permitted the Contracting Office to suspend bookings with a carrier for its prospective inability or failure to perform, the Contracting Officer's comments to Farrell were entirely reasonable, under the circumstances, in that they only highlighted contract rights available to the Government.

Government attempts to actively ascertain and secure Farrell's commitment to continue contract performance can not be construed as an unreasonable influence causing Farrell to abandon its contract rights under the Liberties Clause. The Government had a legitimate, real, and urgent need to determine Farrell's intent and ability to provide service. If Farrell was unable to perform under the Contract, then the Government clearly would have been entitled to exercise its rights, under the Contract, to suspend the booking of cargo with Farrell for failure to perform or for the prospective inability of Farrell to make good any future bookings. Farrell's decision to abandon any contract rights it may have had under the Liberties Clause and incur additional costs to ship the cargo to Damman is considered an affirmative and voluntary business decision on its part that was not induced by the Contracting Officer. Consequently, any additional expense incurred by Farrell was not caused by Government action.

Decision: After a careful and thorough review of Farrell's case, the Navy did not find that payment of the requested amount would facilitate the national defense. Further, it was concluded that Government action was not the cause of Farrell's loss. The Government had a right and a responsibility to seek full contractor performance under the terms and conditions of the Contract, particularly during a contingency such as Desert Shield/Desert Storm. No contractual relationship existed between the Government and Farrell's subcontractor, CMA. It was Farrell's responsibility to insure that CMA fulfilled its obligations under its contract with Farrell. Thus, it was decided that Farrell must absorb the loss resulting from CMA's failure to perform. Farrell accepted the cargo under the Contract and was obligated to deliver that cargo to Damman. Farrell made a conscious business decision in choosing its subcontractor, and must, therefore, bear the consequences of that decision, not the Government. Accordingly, Farrell's request for extraordinary relief under P.L. 85–804 for a contract adjustment in the amount of $85,200 was denied.

Contactor: Mech-Con Corporation.

Type of Action: Amendment Without Consideration.

Actual or estimated potential cost: $2,076,082.

Service and activity: The Department of the Navy, Naval Facilities Engineering Command.

Description of product or service: Construction of the Propellant Disposal Facility.

Background: By letter of May 29, 1992, Mech-Con Corporation, Pomfret, Maryland, submitted a request for extraordinary relief. The Contractor's request is based on alleged unconscionable and unfair acts by the Government.

Within the Department of Defense, P.L. 85–804 is implemented by the Federal Acquisition Regulation (FAR). FAR PART 50, EXTRAORDINARY CONTRACTUAL ACTIONS, Section 50.302, lists the type of adjustments available for relief. The only appropriate adjustment in this case is contained under paragraph 50.302–1, Amendments Without Consideration, subparagraphs (a) and (b). Subparagraph (a) allows Amendments Without Consideration if an actual or threatened loss will impair the productive ability of a contractor whose continued operations as a source of supply is found to be essential to the national defense. A review of the file does not establish that Mech-Con is essential to national defense. Therefore, contractor has not met the requirements of FAR 52.302(a).

Subparagraph (b) allows relief in instances where the Government directs its action primarily at the contractor and acts in its capacity as the other contracting party, the contract may be adjusted in the issue of fairness. However, any relief under this subparagraph is limited by paragraph 50.203(c), which states that no contract shall be amended or modified unless the contractor submits a request before all obligations (including final release and payment) under the contract have been discharged.

The Contractor claimed monies in the amount of $2,076,082 for legal fees, interest expenses, and other miscellaneous costs under or relating to Contract N62477–74–C–0333, Construction of the Propellant Disposal Facility, Naval Ordinance Station, Indian Head, MD.

A review of the contract file showed that the contact was awarded to the joint venture of Mech-Con and Heller Electrical Corporation on September 26, 1977. The contract was awarded in the amount of $4,258,643, with a contract completion date of 455 days. On June 30, 1981, modification P00029 was issued which terminated the contract for the convenience of the Government. On January 27, 1982, Mech-Con signed a final release on the contract.

Decision: Entitlement could not be granted under FAR 50302–1(b), because Mech-Con signed the final release. Contained within the final release, Mech-Con agreed that for the sum of $6,433,894.38, all liabilities, obligations, and claims had been discharged and satisfied. However, following the signing of the final release, Mech-Con alleged that the Government coerced it into signing the final release. However, Mech-Con did not provide any documentation to support this allegation. Thus, the final release is valid. Therefore, Mech-Con did not meet the requirements of FAR 52.302–1(b) and FAR 52.203(c).

Contractor: Truax Engineering, Inc. (TEI).

Type of action: Amendment Without Consideration.

Actual or estimated potential cost: $1,246,626.

Service and activity: The Department of the Navy.

Description of product or service: Development of a low-cost, reusable rocket.

Background: The claimed potential cost involved in the request is $1,246,626 as of November 1, 1993, plus a claimed $50,000 per month since then. This was TEI's second Government contract, for development of a low-cost reusable rocket to be launched and recovered from the sea (SEALAR). Funding for the program was limited from the beginning. A subsequent contract modification (P00009) substantially descoped the Contract by deleting all tasks not specifically related to the proof-of-principle launch and recovery. On June 4, 1991, a burst liquid oxygen tank damaged the rocket and caused delays and additional costs. Although later contract modifications increased the estimated cost, the Contract was allowed to expire on its completion date without the proof-of-principle launch and recovery having been achieved.

Justification: As stated, the Contractor's request was for a contract adjustment without consideration. The standard, set by FAR 50.302.1(b), for granting such an adjustment is one of fairness to a contractor that sustains a loss (not merely a decrease in anticipated profit) under a defense contract because of Government action. When the Government directs its action primarily at the contractor and acts in its capacity as the other contracting party, the contract may be adjusted. When this action increases performance cost and results in a loss to the Contractor, fairness may make some adjustment appropriate. A review of the facts in this case, however, indicated that fairness with regard to the Contractor's claimed losses had already operated under an administrative provision of the contract.

Decision: For purposes of this decision, the facts regarding this case are outlined in the Contracting Officer's findings and recommendation dated December 13, 1993. In that document, it is noted that the Contractor's request was based on substantially the same circumstances as a previously settled claim, including nonbinding arbitration, under the disputes resolution process of the contract. The Contractor had misinterpreted the favorable recommendation by the arbitrator and the subsequent negotiated settlement of the earlier claim as ''proof'' that TEI was entitled to the entire amount claimed under P.L. 85–804. The company's approach is inconsistent with a negotiated settlement. Moreover, TEI's position overstated the arbitrator's findings and recommendation, as well as the role of the arbitrator. In submitting its P.L. 85–804 request for relief without a breakdown of actual costs incurred, the Contractor ignored a provision in the contract modification which settled the earlier dispute, viz., that it ''. . . agrees to forgo any further claim or requests for relief . . . except that this shall not preclude . . . relief under Part 50 of the [FAR] for costs or losses not included in the Contractor's . . . claim.''

The Contracting Officer's statement also observed that TEI further asserted it had to remain in business at continued losses until its dispute and P.L. 85–804 claims were settled. There was no apparent reason for this except that TEI apparently anticipated further SEALAR-related business from the private sector, and made a business decision to continue operations albeit at a heavy loss. The Contractor calculated its losses by comparing unaudited, undifferentiated balance sheets from December 1991 and August 1993 and requested the difference as relief under P.L. 85–804. Essentially, then, TEI asked the Government to underwrite all its business operations after the expiration of its only remaining Government contract.

Finally, given the facts that (1) the SEALAR program was canceled, and (2) TEI's self-declared principal reason for being in business was the SEALAR program, relief action under P.L. 85–804 would not appear to facilitate the national defense. In addition, information on the Contractor's recent business activity with regard to trying to develop the concept of reusable ICBM's has been evaluated and the same conclusion reached in that situation.

In light of the above circumstances, and under authority delegated by NAPS 5250.201–70, the request by Truax Engineering, Inc., for relief under P.L. 85–804 was disapproved.

Contractor: Southwest Marine, Inc.

Type of action: Formalization of Informal Commitments.

Actual or estimated potential cost: $15,000,000.

Service and activity: The Department of the Navy.

Description of product or service: Drydock overhauls performed at Atlantic Dry Dock Corporation and Southwest Marine, Inc.

I. INTRODUCTION

In the early 1980s, Southwest Marine, Inc. (SWM), and Atlantic Dry Dock Corporation (ADD) invested in drydock facilities in San Diego, California, and Jacksonville, Florida, respectively, expecting to receive more Navy ship repair and overhaul contracts. Claimants asserted that they added facilities because of representations of senior Navy officials of more repair work if increased drydock facilities were available in the homeports of San Diego and Jacksonville, and because of the existing Navy homeport policy, planned changes in the Navy master ship repair policy to require ownership of facilities, as well as planned Navy use of additional multi-ship repair contracts. SWM and ADD asserted that increases in work did not materialize to the extent expected due to Navy alteration of, or failure to implement, these policies. In particular, claimants pointed to the change in the homeport policy from all overhauls performed in the homeport if adequate competition existed, to one third of overhauls reserved for the homeport if adequate competition existed, to later all overhauls competed coastwide. SWM and ADD claimed harm because the expected number of contracts were not competed only in the homeport or for work restricted to the homeport, but due to high debt burden/facilities costs, claimants' prices were not competitive with other companies.

Conference Report No. 103–339 (at 93–94) for the FY 1994 DoD Appropriations Act provides:

The conferees are aware of a long standing dispute between Southwest Marine of San Diego, California, and Atlantic Dry Dock of Jacksonville, Florida, and the Department of the Navy over facility investments made by these two shipyards. Although [] the shipyard owners agree that there is no legal remedy for a claim to be paid by the Navy, they continue to believe that, in fairness, the Navy should pay costs which the yards incurred in making facility investments. The conferees direct the Navy to examine this issue again and inform the Committees on Appropriations of the House and Senate by May 31, 1994, on what course of action it recommends to resolve this matter.

Pursuant to this language, the Navy has conducted a reexamination of the SWM/ADD facility investment claims, making an impartial and independent review of the record. This review has encompassed the Navy Report to Congress of November 1992 on this matter and data considered in that Report, including all SWM/ADD submissions made prior to that Report. As well, the SWM/ADD joint submission of January 29, 1993; SWM 1994 submissions of May, August 8, and September 2; and ADD submission of May 1994 were considered. Additionally, ASN(RD&A) met with claimants on October 24, 1994, to provide them the opportunity to present the issues and facts of the dispute from their perspective. Also, a letter from the shipyards dated October 24, 1994, was reviewed.

II. PRIOR CONGRESSIONAL LANGUAGE AND NAVY CONSIDERATION OF CLAIMS

In 1986, P.L. 99–500, Making Continuing Appropriations for FY 1987, Section 122 of the Military Construction Appropriation (hereinafter referred to as Sec. 122), directed:

The Secretary of the Navy shall enter into negotiations with shipyards located on Sampson Street, San Diego, California, and on Fort George Island, Jacksonville, Florida, to determine what liability (if any), the United States has for damages suffered by such a shipyard resulting from facility improvements made by such shipyard during 1982 in good faith reliance on representations and assurances provided to officials of such shipyards by representatives of the Department of the Navy in 1981 and 1982 with respect to future work of the Department of the Navy at such shipyard.

Pursuant to Sec. 122, SWM and ADD submitted a joint request for relief on October 29, 1987, totaling $59,558,447 for lost profits not realized after the facility investments. In response to questions from the Navy, claimants provided supplemental documentation. The parties held negotiations on January 24 and 25, March 14, and April 26, 1989. By a May 10, 1989, letter to Congress, the Secretary of the Navy determined that the Navy bore no legal or equitable liability to the shipyards and formally denied the request. This position was supported by a 5-page Contracting Officer Memorandum of Decision and a 60-page legal memorandum.

In 1989, Conference Report No. 101–331 (at 422) for the FY 1990 DoD Authorization Act provided:

The conferees desire that the Navy fully explore all equitable and legal aspects of certain claims for relief submitted by shipyards pursuant to section 122 of the FY 1987 Military Construction Appropriations Act (P.L. 99–591).

Accordingly, the conferees direct the Secretary of the Navy to reconsider actively and together with the shipyards all facts and the quantum aspects of the claims and to report to the committees on Armed Services of the Senate and House of Representatives the results of such reconsideration with a definitive analysis of such claims under section 122.

Pursuant to this language, the parties met (first on March 28, 1990) and exchanged considerable documentation regarding the facts and legal issues of the case. On November 2, 1992, by letter to Congress, the Secretary found that the shipyards were not entitled to compensation, either as a matter of law or equity, and formally denied the request. This letter forwarded a detailed 97-page Navy analysis conducted by the Navy General Counsel of the facts, legal and equitable issues, and quantum, including copies of relevant documentation (87 attachments). This analysis will hereinafter be referred to as the 1992 Navy Report.

III. BACKGROUND

SWM and ADD claimed that, in the early 1980s, each invested in certain capital improvements at its San Diego facility and Jacksonville facility, respectively, with the expectation of receiving increased Navy ship repair and overhaul contracts. SWM began serious plans for purchase of a drydock in late 1981. The drydock was purchased in December 1982, with the loan requirements finalized in March-April 1983 with Wells Fargo Bank. SWM installed a large new floating drydock, new piers, and a new warehouse. In the first half of 1980, ADD began planning for

the construction of a 4,000 ton marine railway and made a firm decision to proceed in January/February 1982. The railway was completed in October/November 1982. ADD added a pier extension, begun in June 1983 and completed in July 1984.

Claimants alleged that investments in these facilities improvements were made in reliance on Navy policies in 1982, including the Navy's existing homeport ship repair policy, planned changes in the Navy master ship repair policy, and planned Navy use of additional multi-ship repair contracts, combined with various Navy representations of increased homeport repair work if SWM or ADD invested in increased drydock facilities. The following summarizes these areas.

Navy Representations: SWM/San Diego Homeport. Prior to facility improvements by SWM and National Steel and Shipbuilding Company (NASSCO) in the 1980s, there was a shortage of drydocking capability in the San Diego homeport. The only drydock was the Navy graving dock which the Navy leased to the San Diego Unified Port District, which made the dock available to local ship repair firms doing Navy ship repair work. The Navy dock permitted adequate competition, but only one drydock in the area limited the number of overhauls or other repair work that could be done in the homeport in any one year.

A March 12, 1981, letter from VADM Fowler, Commander, Naval Sea Systems Command (NAVSEA), to Arthur Engel, President of SWM, advised of ''* * * an increase in the size of the Navy Shipbuilding Program in the forthcoming years;'' that the problems caused by the increase ''* * * will be solvable if the Navy and industry embark on innovative, cooperative planning;'' and that one of four objectives of the Navy and industry should be to ''* * * [s]trengthen the industrial base and enhance the vitality of the shipbuilding industry.''

In late 1981, NAVSEA prepared a draft report outlining a business plan for overhaul and repair of Navy ships in the San Diego area which provided:

Addition of another graving dock or floating drydock would enable a significant number of Naval vessels to remain in the homeport of San Diego for repair and overhaul. ''In order to foster a robust private sector industrial base, the Navy should investigate immediately all alternatives to relocate a floating drydock in San Diego.''

An option for obtaining additional drydock capability would be to provide a ''contractual means of providing incentives to a contractor or contractors to make substantial capital improvements in a new drydock and pier'' and fully explore all appropriate methods to provide incentives to assist or encourage private development of drydocking facilities, including multi-year contracts, capital investment incentive clauses, capital investment sharing, and contractor consortiums.

''[T]here is little the Navy can do to guarantee future work to individual companies in the private sector to encourage capital investment to expand facilities/capabilities.''

Acknowledgment that SWM was seeking to add a 20,000 ton drydock to its facilities.

Recognition that there was a need to establish more stringent qualification criteria for Master Ship Repair (MSR) contract holders to ''continually glean contractors with inadequate resources from the ranks of eligible bidders'' and that the Navy ''should develop quantitative criteria for MSR eligibility that specifies minimum, albeit substantial, levels of technical, management, financial, and facilities resources.''

Acknowledgment that there was a need to provide schedule stabilization of ship repair requirements to give the local ship repair industry more certainly in workload demands: ''There should be a commitment to retain in San Diego as much depot maintenance repair work as port capability allows. . .'' with multiship packages maximized, with minimum concurrence in schedules, for overhauls and Selected Restricted Availabilities (SRAs).

According to a Declaration by Mr. Engel, submitted with SWM's 1987 claim submission in early 1982, Mr. Engel met with Mr. Lehman, then Secretary of the Navy, to discuss SWM's intended capital improvements. ''Secretary Lehman indicated that SWM's facilities improvements would be appreciated and encouraged by the Navy.'' In early spring of 1982, Mr. Engel met with ASN(S&L), Mr. Sawyer. ''We again discussed SWM's improvement plans. Mr. Sawyer also indicated that facility improvements would be followed by more repair work in the homeport.''

In March 1982, a cost type overhaul contract for USS HENRY WILSON was awarded outside the homeport at a price nearly twice that proposed by two San Diego shipyards. In relation to this award, certain Government statements were reported:

The March 31, 1982, San Diego Union reported that Mr. Carlucci, then Deputy Secretary of Defense, told Congressman Hunter that lack of sufficient drydock facilities in San Diego was the main consideration in this award decision.

The April 2, 1982, San Diego Union reported that ASN(S&L) Sawyer stated that the award was based on a superior proposal in the solicitation's higher weighted factors [presumably, facilities was one of these factors] and that ''I would like to encourage some of the local (San Diego) firms to invest in their own facilities. The real bottom line is, if I could urge something on the people of San Diego, looking at the market projections for overhauls and repairs there, is to do it the American way and invest in better facilities.'' Mr. Sawyer was also reported as saying that improved repair facilities in San Diego would make it easier for the Navy to adhere to the homeport policies on repairs, which ''is alive and well.''

The June 7, 1982, San Diego Union reported that, in response to a question regarding what was needed to get overhaul contracts in San Diego, ASN(S&L) Sawyer stated: ''three good shipyards.''

In an undated and unidentified newspaper article provided by SWM, it was reported that a Navy memorandum to Edwin Meese, then Counselor to the President, regarding the WILSON award stated that, in order for homeport firms to obtain greater number of ship overhaul contracts, they should increase facility investment, noting that SWM has no drydock while the awardee does.

On August 12, 1982, Chapman Cox, DASN (Installations) met with San Diego business leaders and the San Diego Port Commission. (This meeting is described by SWM but not mentioned in the 1992 Navy Report.) He stated that the homeport policy was still in effect despite the recent change in policy requiring only one third of overhauls to be restricted to the homeport (discussed below); the overall percent of homeport repair and overhaul work would remain the same; there would be an increase in the number of ships homeported in San Diego there was a need for additional homeport facilities and private investment to that end was encouraged; and endorsed a proposal to build a drydock to be operated by the Port Commission and used by local firms.

The September 22, 1982, San Diego Daily transcript and San Diego Union reported that Mr. Sawyer and VADM Fowler met with San Diego contractors at a September 21, 1982, session organized by the local Chamber of Commerce. Mr. Sawyer emphasized the need to improve the quality of area facilities, noting that with the anticipated 30 percent growth in Navy work over the next two years, there was a potential for $240,000,000 in assured work in the period. Mr. Saywer said that these predictions depended on improved facilities, adequate competition, and local contractors' ability to win one third of coastwide overhaul solicitations. Both Navy officials sought to encourage interest in the Port District obtaining a drydock for the use of area contractors. Mr. Sawyer said that there was no guarantee San Diego firms would receive additional work just because the facilities were there unless a public body were involved in its construction. Mr. Engel pointed out the risk in private investment in the absence of Navy guarantees and asked whether the homeport policy would be eliminated.

According to a Declaration by a Wells Fargo employee responsible for investigating and recommending approval of the drydock loan to SWM, he met with personnel from the Supervisor of Shipbuilding, Conversion and Repair (SUPSHIP) San Diego to discuss the future of Navy ship repair and overhaul business in San Diego. ''Although the Navy would not formally commit itself, SUPSHIPS personnel did indicate that there would be a substantial amount of future work in the San Diego homeport and that there was a need for additional drydock capacity and pier capacity.'' It was the Wells Fargo employee's impression that the Navy was encouraging the development of improved facilities to handle future work. ''The anticipation of an increase in the volume of overhaul and ship repair contracts in the San Diego homeport was one of several major considerations in our credit decision.''

Navy Representations: ADD/Jacksonville Homeport. Before ADD completed its marine railway, only one contractor in the homeport, Jacksonville Shipyards, Inc. (JSI), had an adequate drydock to repair Navy ships. Consequently, because there was no competition for overhaul work in Jacksonville between at least two sources, overhauls of ships homeported in Jacksonville had to be competed coastwide. A further barrier to repairing ships in the Jacksonville homeport was that JSI did not actively compete in coastwide competitions.

RADM Kinnebrew was Commander of Cruiser Destroyer Group Twelve (homeported in Mayport) from February 1980 to August 1981. According to a Naval Sea Systems Command attorney interview with RADM Kinnebrew on June 7, 1988, at some point during his tenure, RADM Kinnebrew had one or two discussions with Mr. Gibbs, President of ADD, in which he indicated that additional ship repair capability in the Mayport/Jacksonville area would be welcome because it would increase the possibility of accomplishing ship repair in the homeport. RADM Kinnebrew also indicated to Mr. Gibbs that the Navy planned to homeport some FFG–7 Class ships in Mayport and that the Navy would continue to homeport destroyers in Mayport for the foreseeable future. According to RADM Kinnebrew, he did not make any promises or commitments to ADD regarding future work. The Admiral cannot recall what was said at a particular meeting, but indicated in this interview that these were the general remarks made over the course of the discussions with Mr. Gibbs.

According to a Declaration by Mr. Gibbs, RADM Kinnebrew met with Mr. Gibbs in February 1980 and stated that he wanted ADD to construct facilities that would enable ADD to repair and overhaul destroyers and frigates and indicated that his statements to ADD were authorized by his superiors. After this conversation, Mr. Gibbs ''was

convinced that the initiation of a substantial facilities improvement program at ADD would result in substantial business opportunities with the Navy.''

As reported in Vol. 12, Number 24 of the Weekly Report of the Jacksonville Area Chamber of Commerce (undated), ADM Train, Commander in Chief, Atlantic Fleet, addressed a session of the Jacksonville Area Chamber of Commerce in Norfolk on May 2, 1980. ADM Train indicated that: if Jacksonville expands its ship maintenance and repair capabilities, it will be in line for more Navy work; such additional capabilities in an area ensure more competition which, in turn, could lead to more Navy ship repair and maintenance work in Jacksonville; Jacksonville lacks the drydock facilities necessary for major overhauls of Navy ships; and the Navy wants major overhaul facilities to exist in the ship's homeport to avoid having the crew relocated. As a result of these remarks, the Jacksonville Chamber of Commerce indicated they would contact local shipyards about plans for expansion and help in locating additional ship repair facilities in Jacksonville.

According to a Declaration by Mr. Gibbs, in the summer of 1981, ADD and its consulting firm, SEACOR Associates, made presentations to the Navy in Norfolk and to RADM Nunnelely, Director of the Ships Maintenance and Modernization Division of the Office of the Chief of Naval Operations, regarding the proposed construction of the marine railway. The Navy audience at both sessions ''responded favorably'' to the proposed improvements and ''encouraged continued construction.''

On December 18, 1981, VADM Fowler met with a group of Jacksonville area Navy, business, and industrial leaders at the Mayport Officers Club to discuss ship maintenance support for Navy expansion at Naval Station Mayport (NAVSTA Mayport). According to a Declaration by Mr. Gibbs, VADM Fowler ''. . . reiterated the notion that, if improved facilities were built, Jacksonville contractors would get work to fill those facilities.''

To prepare VADM Fowler for the December 18, 1981, talk in Mayport, RADM Johnston, SUPSHIP Jacksonville, sent VADM Fowler copies of background memoranda. One memorandum (undated), entitled ''Growth of Support Capability in Jacksonville,'' states: current ship intermediate and depot level maintenance support facilities in the Jacksonville area have a maximum capacity of 20,000 man-days per month, which capacity will be ''overtaxed'' by the Selected Restricted Availability (SRA) workloads projected in FYs 1983, 1984, and 1986; there is a need to expand the current ceiling of industrial capacity to between 30,000 and 35,000 man-days per month to meet long term needs; ''the projected maintenance needs are well publicized and discussions with the industrial community have been conducted by local flag officers, SUPSHIPS JAX and CO, NAVSTA Mayport''; ''[a]n extensive effort has been and continues in the Jacksonville area to outline the programmed Navy build up and to call for community support. A stable, predictable plan will enhance credibility and reassure commercial activities who will be investing their resources''; ADD is proposing a major expansion of facilities in order to handle FFG–7 SRAs; the problem of assuring adequate depot and intermediate level repair capacity ''is real but solvable.'' Another memorandum (undated), entitled ''Background of Current Situation,'' references a request from the Commander, Naval Air Forces Atlantic to review ''community planning in light of Navy expansion'' in the Mayport area and develop a program to encourage commercial growth for both ship maintenance support and housing for personnel. It also identifies possible questions for the meeting: ''What assurances can be given that SRAs/RAVs [Restricted Availabilities] will be committed to the Mayport area and not contracted out of homeport?''; Will the NAVSEA policy of soliciting most regular overhauls on a coastwide basis continue?''

According to a Declaration by Mr. Hoepner, former President of the bank (Flagship Bank, subsequently acquired by Sun Bank) that provided the marine railway loan, Mr. Lehman and Congressman Bennett met in Washington in January 1982 with the Jacksonville Chamber of Commerce. At that meeting, Mr. Hoepner ''was led to believe that existing and proposed Navy policies and practices would result in greater business for ADD if it were to make proposed capital improvements.'' In other discussions between bank employees and Navy officials, Navy officials reaffirmed the homeport policy and were not equivocal about its policies or the likelihood that ADD's capital improvements would result in more business.

According to a Declaration by a former employee of Flagship Bank involved in evaluation of ADD's loan application, he had several discussions with Navy personnel in which the Navy indicated that, ''if another company improved its facilities so that there would be competition in the homeport, the Navy would provide more overhaul work in the homeport.'' Based on these discussions, he concluded that ADD's market projections were valid and that it was reasonable for ADD to rely upon Navy assurances regarding future ship repair and overhaul work in Jacksonville.

A May 1982 draft report of the Jacksonville Chamber of Commerce Ship Repair Facility Task Force stated that ship repair awards will increase during the 1980s and 1990s as a result of ADD's soon-to-be completed marine railway and JSI's drydock, which will create a competitive situation in the homeport, and that SUPSHIP advised that the Navy will restrict overhaul and SRA work requiring drydock capability when a competitive situation exists. The task force should do all it can to ascertain that this work is indeed restricted to the homeport to provide an opportunity for a fair return on the shipyards' investments in view of the ''financial risk being undertaken by these shipyards in anticipation of the needs of the Navy.''

The April 1982 Jacksonville Seafarer reported that: by the end of 1984, NAVSTA Mayport will be home to 45 vessels (compared to 25 in December 1981); the expansion ''could mean a bonanza of repair and maintenance contracts for area shipyards;'' at a March 18, 1982, meeting of local subcontractors chaired by JSI, a JSI representative indicated that Navy concerns expressed at sessions between Jacksonville Chamber of Commerce and Navy officials was that the Jacksonville area have a viable competitive base and that the industrial base capacity be adequate to handle the increase in Navy work; that JSI was encouraging ADD to proceed with the planned marine railway to meet the competition requirements in the homeport; JSI had made commitments of manpower levels to be maintained to support Navy needs; Congressman Bennett stated that, if the community does not have the industrial capacity to meet Navy ship repair needs, he will ''see that the ships go somewhere else, and not only for repair, but for home basing''; the Jacksonville area shipyards, business community, and Navy were ''working to expand the area's capacity for repairs,'' and the Navy itself was actively working to encourage capacity expansion; upon assuming his command in the area, SUPSHIP cited three goals: increased Navy housing in Mayport, development of ship repair capacity, and development of industrial capacity in the community to support that ship repair capacity.

The May 1982 Jacksonville Seafarer reported that: the Navy wants three drydock-capable yards in Jacksonville to provide a guaranteed competitive situation for repair work on new and existing ships homeported in the area; over $1.3 billion of work is scheduled to be done on vessels homeported at Mayport and Charleston during the next decade; because there are no drydocks capable of performing this work in Charleston, SUPSHIP Jacksonville indicated that Jacksonville yards can ''expect to get much of the work from there [Charleston] if the area has the drydock capacity''; ''Navy and Jacksonville Chamber of Commerce Task Force have agreed that if local yards cannot handle the work, it would favor having new companies established in the Jacksonville area to perform the work;'' and regarding doubts about the ability of the projected ship repair business volume to support the new shipyard facilities, the Navy ''can not guarantee in writing contracts over the long-term, largely because of its inability to award multiyear repair contracts because of budgeting restrictions, though Johnston [SUPSHIP JAX] did assure task force members that the work would be available if the facilities were. . . .''

Navy Homeport Policy. Before 1982, the Navy's homeport policy required that all ship repair availabilities, including overhauls (six months duration or more) or shorter term availabilities (selected restricted availabilities (SRAs), restricted availabilities, or technical availabilities), of ships having crews attached be accomplished in the homeport area when adequate competition was available. The primary goals of this policy were to minimize disruptive effects on Navy personnel and families caused by conducting ship maintenance away from the homeports and to provide industry better predictability of future business opportunities.

In testimony on March 10, 1982, before the House Armed Services Committee regarding the Naval Ship Overhaul Program, VADM Fowler had testified that the Navy policy is to overhaul ships in or near the homeport to minimize family disruption and improve crew morale. Other key factors in determining where a ship will be overhauled include ship complexity, fleet operations schedules and material readiness requirements, shipyard workload and qualifications, shipyard capacity and capability in the homeport area, and contract requirements regarding competition and small businesses. The following statements by the Admiral were also included in the record: ''the long-term effect [of the homeport policy] is expected to be an increase in private sector industrial capacity near major homeport areas. In fact, the industry is already increasing its capability in areas of heavy fleet concentration such as San Diego, California; Norfolk, Virginia; and Jacksonville, Florida.''

On July 19, 1982, OPNAVNOTE 4700 directed that at least one third of the regular overhauls of ships having crews attached be reserved for the homeport, with the balance to be competed coastwide and that SRAs be performed in the homeport ''where feasible.''

In 1985, the homeport policy required unrestricted competition for all overhauls, a change that resulted from Congressional direction (in the Conference Report on Making Continuing Appropriations for FY 1985 dated October 10, 1984) to terminate the policy of reserving one-third of overhauls for the homeport. The direction was based on factors which Congress believed would adversely affect the mobilization capability of non-homeport private shipyards—namely, decline of commercial ship repair workload

making private ship repair firms more dependent on Navy work; increased ship repair work being done by shorter repair availabilities (specifically SRAs) that were 100 percent reserved for the homeport area; and corresponding decrease in overhauls available for coast-wide competition above the 30 percent homeport reservation.

In 1987, the homeport policy was codified at 10 U.S.C. 7299a by Sec. 1101 of the FY 1988/89 DoD Authorization Act. This law directs the Navy to restrict to the homeport area short-term repair or maintenance work if there is adequate competition. Short-term is defined as performance of six months or less.

Master Ship Repair (MSR) Policy. The 1981 NAVSEA draft report, mentioned above, noted that about 70 percent of work awarded under MSR contracts was subcontracted and recommended that MSR contract holders be required to meet certain qualifications regarding technical, management, financial, and facilities resources. As reported in the September 22, 1982, San Diego Union, at the September 21, 1982, meeting between the Navy and San Diego contractors, in response to a question regarding MSR contractors, VADM Fowler stated that the Navy had reached no conclusion regarding a requirement for firms to have waterfront facilities.

In the Conference Report to the Continuing Resolution for FY 1983, dated December 20, 1982, Congress directed the Navy to establish a certification procedure to qualify firms as MSR holders to guarantee fully qualified private sector capability. This language led to the Navy's establishment of a MSR recertification program on January 28, 1983, intended to ensure that MSR holders had the necessary facilities, management capability, and technical expertise.

On May 27, 1983, NAVSEAINST 4280.2 was issued to revise policy for MSR contracts. MSR contractors would be required to have the ability to perform an entire overhaul or SRA of a Naval ship of 500 tons or larger, including control (possession or committed access) of facilities (piers, shops, and a Navy-certified drydock), and an organization capable of performing 56 percent of the work for an overhaul in-house.

(In this respect, it is noted that SWM finalized its drycock purchase negotiations in December 1982—before Congressional identification of the MSR recertification program and before the SR policy change in May 1983.)

Multi-Ship Contracting Policy. In the Naval Sea Systems Command Ship Overhaul Policy Statement dated January 18, 1982, VADM Fowler stated that multiple ship procurements will be used, when appropriate, to provide incentives for shipyard improvements and capital investments as well as to obtain benefits of learning and economies of scale. In March 1982 Congressional testimony, VADM Fowler stated that multi-ship and cost type contracting under negotiated solicitations provided incentives for shipyard improvements and other benefits. The 1981 NAVSEA draft report mentioned above had recommended multi-year contracts as a possible way to provide incentives to encourage private development of ship repair facilities.

A July 13, 1982, San Diego Tribune article reported an internal NAVSEA memorandum indicating a NAVSEA desire for ''a plan to award in one package in San Diego to the yard that promises to build the biggest and best facility to support this multi-ship overhaul and the Navy: 6 ships.'' This article stated that Navy officials would not comment on the authenticity of the memorandum or elaborate on ship repair plans in San Diego.

OPNAVNOTE 4700, issued on July 19, 1982, provided that multiple ship overhaul contracts would normally be competed coast-wide and that increased use of multiple ship overhaul solicitations was desired to provide incentives for shipyard capital improvements and to achieve improved performance through greater competition. NAVSEA NOTICE 4710, issued September 3, 1982, reflected the policy to compete multiple ship contracts coast-wide.

(In this respect, it is noted that when SWM finalized its drydock purchase negotiations in December 1982, the multi-ship contracting policy provided that such contracts would normally be competed coast-wide. Moreover, multi-ship contracts never were in widespread use (partly because of the inherent restriction on competition) and have decreased in use since 1982. SWM admits that by 1982, the Navy had only awarded one multi-ship contract in San Diego and had canceled another multi-ship solicitation, repackaging the work as single ship contracts.)

IV. CLAIM SUBMISSIONS

The following discusses the SWM/ADD claims by addressing the claimants' submissions made since the last Navy analysis and decision regarding the facility investment claims—the Navy's November 2, 1992, Report to Congress—in relation to the prior record. As noted above, all the claimants' submissions have been reviewed, considered and analyzed as well as prior Navy reports.

January 29, 1993, Submission. Claimants submitted a joint document entitled ''Claimants' Response to Navy Report to Congress,'' Dated January 29, 1993, (forwarded to Congress on February 1, 1993) in response to the Navy's November 2, 1992, Report to Congress which concluded that there was no legal or equitable basis to compensate SWM and ADD for their claims.

In arguing that it is essential that an equitable settlement be achieved and that Congress, if necessary, should give further direction/clarification to that end, claimants include various statements. Claimants identify ''Navy barriers'' to equitable resolution of the claims, namely: Navy placed a significant burden on claimants to draft a statement of facts, only to subsequently unilaterally draft a Navy statement of facts which raised a ''whole host of new issues'' and, thereby, delayed agreement on a statement of facts; Navy refused to give weight to sworn statements submitted by claimants or to provide any sworn evidence to contradict these statements; and Navy placed undue reliance on written versus oral exchanges, which denied claimants access to top-level Pentagon personnel and resulted in entitlement analysis being delegated to NAVSEA officials. Claimants also take issue with certain factual and legal conclusions of the Navy Report, which are discussed below; maintain their position that Sec. 122 creates Navy liability, with quantum being the only item to be determined; argue that P.L. 85–804 provides a ''mechanism'' to provide monetary settlement under formalization of informal commitment or residual powers authority; state that promissory estoppel represents a basis to provide monetary relief; argue that the doctrine and sovereign immunity is not a defense to Navy liability; and take issue with Navy conclusions regarding quantum.

This submission does not provide new facts or legal theories to support the claims but rather primarily consists of rebuttal arguments to conclusions made in the 1992 Navy Report. Those rebuttal arguments are discussed below.

May 1994 Submissions. SWM submitted in May 1994 a revised quantum proposal as a ''resolution'' to the claim, seeking a $15,000,000 cash payment in 1994, to be repaid $2,500,000 annually over a six-year period (1995–2000) by reducing SWM's depreciation cost pool allocated to current/future Navy cost contracts. This submission does not provide new facts or underlying legal theories to support the claim. Relative to the 1992 Navy Report, SWM's quantum request after discussions with the Navy was $18,600,000 in reliance damages for unrecovered depreciation and facilities capital cost of money, plus profit, from the time of the investment through 1987.

ADD also submitted in May 1994 a revised quantum proposal as a ''resolution'' to the claim. ADD and North Florida Shipyards (NFS) would form a third company (X Co.) to receive a 10 year lease of Navy AFDM 7 at NAVSTA Mayport for $1 rent per year, in return for yearly drydock operation/maintenance at X Co. expense, and ADFM 7 use dedicated to Navy ship repair. Use of AFDM 7 would be limited to ADD and NFS, which would compete for its use for specific Navy work. This submission indicates a different quantum than previously requested; ADD's request addressed in the 1992 Navy Report was for $6,900,000 in reliance damages. It does not provide new facts or underlying legal theories to support the claim.

August 8, 1994, Submission. SWM requested that the Navy provide SWM a $15,000,000 payment in 1994 pursuant to P.L. 85–804 to formalize an informal commitment or pursuant to exercise of residual powers. SWM asserted that the Navy should ''report to the [appropriations] committees the amount of relief that it views as appropriate, in view of the Navy officials' inducement of Southwest's facilities investments.'' A legal memorandum provided arguments to support its conclusion that ''relief along the lines proposed by Southwest would be an appropriate exercise of the Navy's discretion under P.L. 85–804, and in particular its discretion to formalize informal commitments by Navy officials.''

This submission contains no new facts or underlying legal theories but, expands on the May 1994 submission by providing additional legal argument that P.L. 85–804 authority is available to make the $15,000,000 payment and rebuts P.L. 85–804 statements in the 1992 Navy Report. The relief requested is also different in quantum and type from that addressed in the 1992 Navy Report. See discussion above regarding the May 1994 SWM submission.

Sepember 2, 1994, Submission. In response to an Assistant General Counsel (Research, Development & Acquisition) letter of August 24, 1994, requesting that SWM submit any additional ''facts and information, or theories of relief'' in support of its request for relief, SWM reiterated its request for extraordinary contractual relief in the form of a payment of $15,000,000 in 1994, with the following conditions: SWM will enter into an advance agreement providing for repayment by reduction of the depreciation cost pool allocated to SWM's Government contracts by $2,500,000 annually for the six-year period 1995–2000; SWM will reduce remaining long-term debt associated with the capital asset expenditures that gave rise to the dispute; SWM will provide a written release of any further Government liability for this claim. Alternatively, the $15,000,000 could be forgiven in equal increments over six years. According to SWM, because tax obligations relating to payment arise in the year of loan forgiveness rather than in the year of payment, more of the proceeds of payment would be applied to long-term debt reduction. SWM's request, certified in accordance with the Contract Disputes Act by Mr. Herbert Engel, SWM's President, seeks relief under P.L. 85–804 based on formalization of informal commitments or residual powers.

The narrative factual background of this submission essentially repeats the text in

the January 29, 1993, submission, with minor changes. The discussion of P.L. 85–804 essentially repeats the text in the August 8, 1994, submission, with additional allegations that SWM's financial position is ''far worse now than it was last April'' when the Department of Transportation Board of Contract Appeals denied SWM's request for extraordinary relief; SWM will soon run out of credit and that, absent some financial relief, will ''probably be insolvent within a matter of weeks.'' September 2, 1994, Submission at 40. A ''1994 Consolidated Forecast'' is also provided.

V. SPECIFIC CLAIMANT ARGUMENTS AND RELEVANT FACTS

The following summarizes those SWM/ADD arguments that take issue with the 1992 Navy Report as well as sets forth corresponding facts and Navy conclusions. (Cites are to the January 29, 1993, submission; as the other two submissions are repetitive, they are not specifically cited.)

Claimants were denied access to top-level Pentagon decision-makers. January 29 Submission at 9–10.

Facts: The negotiations and analysis of the claims undertaken for the 1992 Navy Report were handled by the General Counsel of the Navy, at the request of the Secretary of the Navy, with the exception of certain quantum issues when the General Counsel was unavailable and the Deputy General Counsel (Logistics) acted in his stead. Claimants were not denied access to senior Navy decision-makers.

The process of jointly drafting an uncontested statement of facts was arduous and unfair. January 29 Submission at 7–9.

Facts: More important than the length of time or difficulty in compiling a statement of facts is that the Navy fully considered claimants' views on all issues. When agreement could not be reached on certain issues, the 1992 Navy Report noted the claimants' differing views so that Congress would be able to consider all sides of the matter.

The Navy failed to give proper weight to sworn statements provided by claimants or to obtain sworn statements from relevant former Navy officials.

Facts: Claimants raised this argument, and the navy fully considered it, before issuance of the Navy 1992 Report. The Navy did not (and does not) consider that claimants' declarations, even if accepted as entirely accurate on their face, provide a factual basis for recovery on legal or equitable principles. Therefore, there was no need to substantiate or refute the facts asserted by claimants.

In the years following the facilities expansion programs, both ADD and SWM failed to realize the promised levels of work, which result is attributable to the Navy's refusal to issue homeport-restricted solicitations. SWM and ADD suffered a competitive disadvantage over other overhaul contractors due to the debt incurred by the facilities investments. January 29 Submission at 35.

Facts: The shipyards were independently contemplating facility improvements in the 1981–82 period and the investments were made after independent market analysis and business risk assessment. The investments were planned and initiated, in part, before Navy representations and, in part, based on expected increases in commercial work. The improvements resulted in benefits to each shipyard: an increase in Navy ship repair business and valuable operating asset improvements which enabled the shipyards to bid on and perform contracts for which they would otherwise have been unable to compete. From FY 1983–87, total overhaul work increased and total dollar volume of ship repair business in each homeport increased. The shipyards realized profits on most fixed priced Navy contracts performed during the relevant period. ADD was profitable during this time. SWM did not recover $2,600,000 of costs of performance. However, there is no evidence that this loss was attributable to purchase of the drydock. Instead, other factors could have caused the loss, such as SWM's loss of its small business size status just before its workload started to decrease, the general decline of the commercial ship repair industry during the period in question, SWM's decision to purchase a drydock with more than twice the capacity necessary for the vast majority of Navy homeported ships, or SWM inefficiencies in performance. SWM represented to its bank when obtaining the loan that SWM would lease the drydock to competitors when it was not using the drydock itself, but has not done so.

Furthermore, the shipyards do not offer any credit for cost recoveries realized under Navy fixed price and commercial contracts. SWM received over $80,000,000 in Navy payments for fixed price repair work performed in FY 1984–87 and asserts that none of this $80,000,000 represents recovery of its costs of performance. SWM also received over $50,000,000 in payments for commercial work during this time, but offers no credit for use of the drydock or recovery of drydock costs from this work. ADD received over $60,000,000 in Navy payments for fixed price repair work performed in FY 1983–87 and asserts that none of this $60,000,000 represents recovery of its costs of performance. ADD also received over $48,000,000 in payments for commercial work and non-Navy government work during this time and offers no credit for use of the marine railway or recovery of marine railway cost from such work.

Additionally, Navy policy is to not grant use of government drydock facilities to perform ship repair contracts if there is adequate competition in the homeport between private yards with dedicated access to privately-owned drydocks. This policy has benefited the shipyards. For example, in San Diego, because there is such competition between SWM and National Shipbuilding and Steel Company (NASSCO), the Navy does not make available its graving dock to offerors. As a result, offerors without dedicated access to private drydock facilities are ineligible to compete for phased maintenance multi-year/multi-ship solicitations.

The Navy attributed the decline in overhaul work in Jacksonville and San Diego to the trend to perform shorter repairs rather than overhauls, but the examples cited by the Navy do not prove that there was an inadequate supply of overhauls work for the Navy to honor its representatives. January 29 Submission at 33–41.

Facts: The Navy 1992 Report identified other trends in ship maintenance that ''affected Navy ship repair planning[]'' and that led to a decrease in the percentage of overhauls solicited only in the homeport. In particular, more complex ships meant that the length of time to perform an overhaul increased. Therefore, to maintain fleet operational requirements, a greater number of SRAs vice overhauls were scheduled. The Navy describes these trends as part of the factual background to the claims and does not argue that the increasing preference for SRAs somehow gave an excuse to not ''honor its representations.''

The Navy's correlation between SWM's loss of its small business size status and a subsequent loss of revenue does not take into account that, during ''large parts'' of FY 1984, SWM's facilities were unavailable for Navy work because the company was in the process of installing and testing its new drydock and SWM ''expected some disruption of normal operations,'' and the new drydock changed SWM's business from primarily topside work and small drydock availabilities to larger jobs beyond the capacity of most small businesses. January 29 Submission at 42–43.

Facts: SWM lost its small business size status in December 1983, causing a significant loss of business because of an inability to bid on the many small business set-asides offered in the homeport. SWM had ranked first or second in Navy homeport repair business in FYs 1981, 1982, and 1983, but fell to fourth in FY 1984 and fell further to eighth in FY 1985 before beginning to recover in FYs 1986 and 1987. The Navy noted in its Report, the SWM rebuttal to this issue—specifically, that SWM in a November 25, 1991, letter asserted that it expected a decline in its FY 1984 business volume due to installation and testing of the drydock which is inconsistent with an earlier SWM statement that it is entitled to the award of numerous FY 1984 repair availabilities. Finally, where the new drydock gave SWM the capacity to perform larger jobs, the choice was with SWM to continue bidding on set-asides if it so desired; the loss of its size status took that choice away from SWM.

Contrary to the Navy's position, Congress should not be blamed for the change in homeport policy, because Congressional language on homeport policy only established ''short-term, expedient measures designed to alleviate problems experienced by non-home port yards during a recession.'' The Navy must take responsibility for its role in reversing the homeport policy; the Navy had a ''disposition toward the elimination of all homeport restrictions on overhaul solicitations'' and never advised Congress of the SWM or ADD facility investments made in reliance on Navy representations. January Submission at 43–47.

Facts: See discussion above of homeport policy. In addition to direction to terminate the policy for reserving one-third of overhauls to the homeport in the Conference Report on the FY 1985 Continuing Appropriations Acts, the Conference Report for the FY 1984 DoD Appropriations Act added five additional overhauls, above the number included in the President's budget, to be awarded to private shipyards—two to be competed on the West Coast and three to be competed on the East Coast. The Navy 1992 Report notes SWM arguments similar to those in the January 29, 1993, submission and finds that there is no evidence to support that the Navy was, off the record, advocating to Congress that the homeport policy should be abandoned. Also, Congress was aware of Navy public statements regarding the need for additional drydock facilities in San Diego and Jacksonville at the time Congress directed relaxing the homeport policy. Members of the Florida and California Delegations were aware of those statements and actively participated in conveying many of them to constituents. In October 1984, Congress directed abandonment of the policy to restrict one-third of the homeport overhaul contracts to the homeport, and the Navy thereafter implemented that direction.

The principles of statutory construction dictate that Sec. 122 be interpreted to recognize Government legal liability for the claim. The words ''if any'' in the statute mean that Congress made no determination as to quantum of damages; Congressional interpretations of Sec. 122 after its enactment are relevant. Furthermore, Sec. 122 is like a Congressional reference case where the Court of Claims has previously ruled that equity demands compensation. January 29 Submission at 58–69.

Facts: These arguments were fully addressed in the Navy 1992 Report. Sec. 122 provides, in pertinent part, that ''[t]he Secretary of the Navy shall enter into negotiations * * * to determine what liability (if any) the United States has for damages suffered by such a shipyard * * *.'' After the Navy originally denied the claim in 1990, Congress, in again addressing the matter, did not direct entitlement, but rather reconsideration of the claims. Conference Report accompanying the FY 1990 DoD Authorization Act. In the Conference Report for the FY 1994 DoD Authorization Act, Congress again only directed reconsideration—not entitlement. Special reference cases are generally enacted either to waive a Government affirmative defense or to provide an admission of liability by the Government, leaving to the courts the factual and legal questions relating to damages. These cases are strictly construed, and a Congressional confession of liability must be clearly expressed. Sec. 122 and its progeny have no expression of liability and is not a Congressional reference case. Post-enactment interpretations by Members of Congress are given legal effect only where not inconsistent with the statute and legislative history.

The Navy's conclusion that the Secretary will not exercise residual powers under P.L. 85–804 because such action is not ''necessary and appropriate'' or would not ''facilitate the national defense'' runs counter to the record, Sec. 122, and the post-enactment Congressional letters of clarification. P.L. 85–804 is authority for the Navy to provide equitable relief on the basis of formalization of informal commitments or residual powers authority. Federal Acquisition Regulation (FAR) 50.302–3 and FAR 50.401, respectively.

Facts: The Navy in 1992 denied relief under P.L. 85–804 on both formalization of informal commitment and residual powers grounds based on the facts. The Navy did (and does) recognize that the residual powers authority could be utilized but was (and is) not appropriate on the facts of the case. Both shipyards were never precluded from ship repair competitions; the facility improvements enhanced the ability to receive future Government contracts; and the shipyards received benefits from the capital improvements, including an increase in Navy ship repair work. Regarding the requirement to determine that granting relief will facilitate the national defense, the Navy found no evidence that the shipyards' continued viability was endangered. See also discussion below.

Although claimants now concede that they could not prevail if they sued the Government in the Court of Federal Claims on a claim of promissory estoppel, they assert that all elements of promissory estoppel essentially are present which ''indicates why Congress felt a moral or honorable obligation to compensate the shipyards.'' Sec. 122 permits application of the ''tenets of promissory estoppel to the matter.'' January 29 Submission at 74–75.

Facts: Statements by Navy representatives were opinions and predictions that an increase in homeport drydocking capability would increase the amount of Navy ship repair work which could be solicited within the homeport. The statements were reasonable predictions about future Navy ship repair business and expressed legitimate goals for enhanced competition and a stronger national industrial mobilization base. While the Navy desired and encouraged facility improvements in the two homeports, it disavowed any guarantees that future work would follow (and in fact expressly rejected making guarantees of work prior to the investments being made) and did not unfairly induce these investments. The Navy also did not urge specific improvements which were rather chosen by the shipyards.

There is no evidence that the Navy misled the shipyards by misrepresenting or concealing material facts. When the Navy statements were made, they were accurate and reasonable in light of the expanding 600-ship Navy and existing policy, and the Navy in 1981–82 did not know Congress would later direct changes in the homeport policy or that other later changes in policy would occur to reflect changing requirements. Navy officials never promised specific contracts or a specific amount of future repair work. The Navy representations were too indefinite and uncertain to support a claim of promissory estoppel. The record also shows that others (e.g., the Jacksonville Chamber of Commerce Ship Repair Facility Task Force) made representations and inducements to encourage homeport investment.

These shipyards were aware that Government policies affecting contractors are subject to change and, to the extent that they based their business decisions on certain existing Navy policies, they assumed the business risks that those policies could change.

Sec. 122 effectively waives sovereign immunity. The analogy of Congressional reference cases applies because Sec. 122 must be interpreted as a determination of liability. January 29 Submission at 76–78.

Facts: The Navy changes in homeport, master ship repair, and multi-ship policies were actions taken by the Government in its sovereign capacity. They were actions with a public and general application that affected all Navy ship repair contractors, all Navy ships, and ships' crews and their families, among others. These actions were not directed at SWM and ADD. The Government is immune from liability for its sovereign acts. The arguments regarding interpretation of Sec. 122 and the applicability of Congressional reference cases were found legally unpersuasive in other sections of the Navy Report. Furthermore, the case law on reference cases requires that the Government be guilty of wrongful or negligent acts in order to have liability on broad equity grounds. There is no evidence that the Navy acted wrongfully or negligently in making any representations or in changing contract or homeport policies.

Claimants repeat their disagreement with the Navy on various quantum issues—e.g., what facility investments can be considered ''drydocking capacity'' investments; propriety of ADD's inclusion of facilities capital cost of money; propriety of claimants' inclusion of imputed profit; and propriety of ADD's application of a discount to proposed change order prices. Claimants state that they did not recover investment costs from the fixed price contracts awarded in the claim period because, in order to win competitions, they could not raise prices to a level that would result in cost recovery for facility investments. January 29 Submission at 97–112.

Facts: Claimants have not presented any evidence to demonstrate that any alleged unrecovered facility investment costs are attributable to decreased levels of work competed in the homeport or to below-cost bids for fixed price ship repair contracts rather than other causes (such as inefficiencies). Furthermore, each shipyard realized increased Navy work after the facility investments. From FY 1983–87, the dollar volume of Navy ship repair business in Jacksonville doubled and ADD experienced a significant increase in Navy work following the investment. From FY 1983–87, San Diego Navy ship repair business increased substantially. SWM Navy work significantly increased in FY 1987 and after. Prior to FY 1987, SWM sales did not increase due, in large part, to SWM's loss of small business status in February 1984. The damages suffered are highly speculative. ADD/SWM have not acknowledged any recovery of investment costs in $60,000,000 and $80,000,000, respectively, of fixed price Navy and commercial ship repair work in the claim period. The companies may have already recovered more than the booked depreciation costs of the investments. During the October 24, 1994, meeting with ASN(RDA), both claimants admitted that they have been profitable for the last few years, with the exception of loss years in 1993 and 1994 for SWM.

VI. REEXAMINATION SUMMARIZED

In its 1993 and 1994 submissions, SWM/ADD did not submit any new facts, issues, legal theories, or supporting documentation relating to Navy actions during the relevant claim period that were not analyzed as part of the 1992 Navy Report. Also, SWM's P.L. 85–804 request at that time was the same as the present request—formalization of an informal commitment or residual powers. The only new data submitted relates to SWM's P.L. 85–804 request for payment of $15,000,000—specifically, data on its current financial position and its 1993/94 ship repair workload. The 1992 Report fully and completely documented the facts, substantive differences of opinion between the parties, legal and equitable issues and analysis, including supporting documentation. The Navy's 1992 Report fully analyzed claimants' claim on legal entitlement and on certain equitable or ''fairness'' theories: P.L. 85–804, broad moral responsibility, equitable estoppel, and promissory estoppel. The Navy cannot find a basis to reach conclusions different from those in the 1992 Navy Report.

Based on the Navy's independent review of the record—that existing for the 1992 Navy Report and all additional information submitted after the 1992 Navy Report—the Navy finds no legal entitlement for the claims and no reason to grant relief to the claimants based on fairness.

VII. P.L. 85–804

As mentioned above, SWM has requested payment of $15,000,000 to allow SWM ''to reduce the long-term debt resulting from its facilities investment, which is contributing to its current serious cash flow problems,'' September 2 Submission at 4–5, pursuant to P.L. 85–804 (formalization of an informal commitment or residual powers).

Formalization of an Informal Commitment. FAR 50.302–3 provides: Under certain circumstances, informal commitments may be formalized to permit payment to persons who have taken action without a formal contract; for example, when a person, responding to an agency official's written or oral instructions and relying in good faith upon the official's apparent authority to issue them, has furnished or arranged to furnish supplies or services to the agency, or to a defense contractor or subcontractor, without formal contractual coverage. Formalizing commitments under such circumstances normally will facilitate the national defense by assuring such persons that they will be treated fairly and paid expeditiously.

No informal commitment shall be formalized unless the contractor submits a written request for payment within six months after furnishing, or arranging to furnish, supplies or services in reliance upon the commitment and the approving authority finds that, at the time the commitment was made, it was impracticable to use normal contracting procedures. FAR 50.203(d).

The 1992 Navy Report determined that these two conditions were absent. The Report stated that the facts ''do not involve an urgency, emergency or other situation that

precluded use of normal procurement procedures'' (at 64) and that SWM and ADD submitted their request for relief years after the investments and changes to Navy policies (at 95).

SWM argues that it would be unfair to hold it to the six month period because it believed that payment for facilities investments would occur in the future by being awarded additional contracts pursuant to the homeport and other policies. Only years later did SWM realize such contracts were not going to be awarded. However, the Navy does not have authority to waive this regulatory limitation or allow the six months to run from when SWM knew, or should have known, that the facts upon which it relied had changed. In any case, SWM knew years before 1987, when it first submitted its claim, that the ship repair policies had substantially changed. Therefore, there is no basis to find that SWM acted promptly under any reasonable standard.

Regarding the impracticability of normal contract procedures, SWM argues that the Navy does not normally contract for private shipyards' facilities improvements and there is no requirement to find an emergency or other urgent situation. However, FAR 50.203(d)(2) requires that the agency must make a finding that, at the time the commitment was made, it was ''impracticable to use normal contracting procedures.'' The subject matter of the informal commitment in question (e.g., private facility investments) is irrelevant to this regulatory limitation on formalization of informal commitments. While there is no specific regulatory requirement to find an emergency or other urgent situation, such time-sensitive situations are typical examples that can justify the impracticability of going through the often lengthy steps required to award a contract.

Residual Powers. Residual powers to enter into, amend, or modify a contract, or indemnify a contractor for unusually hazardous or nuclear risks, may be used ''when necessary and appropriate, all circumstances considered.'' FAR 50.401.

The 1992 Navy Report found that the circumstances of this case did not warrant finding that extraordinary contractual relief was necessary and appropriate or that such relief would facilitate the national defense. The Report found that there was no liability on a theory of promissory estoppel because Navy representations were too vague and uncertain, were merely projections of anticipated future work in the homeports, and never promised specific contracts or guaranteed additional work. There was no liability under an equitable estoppel theory because the Navy did not mislead the claimants by misrepresentations or by concealing material facts. Navy representations in the nature of predictions of future homeport workload were reasonable and true, at the time, based on existing policies, and the claimants' investments resulted in valuable capital improvements that led to additional ship repair work. Finally, the Report found that there was no basis for relief on a theory of broad moral responsibility because there was no wrongful or negligent Government conduct.

The only new circumstances presented by SWM in its new submissions is its alleged cash flow problems, i.e., that it will soon run out of credit; absent relief, SWM will probably be insolvent within ''a matter of weeks''; and insolvency may impact SWM's ability to complete Government contracts and ''may require drastic actions to protect the company's assets.'' September 2, 1994, Submission at 40–41. In support of its financial situation, SWM submitted a ''1994 Consolidated Forecast'' (Attachment 19), ''Projected Impact of $15,000,000 Relief Payment on Cash Flows For the Period 1994–1997'' (Attachment 52), and a Port of San Diego breakdown of workload from October 1, 1992, to September 30, 1993, (Attachment 49).

SWM states that its financial position is ''far worse'' than last April when its P.L. 85–804 request for losses under four Maritime Administration (MARAD) contracts was denied by the Department of Transportation Contract Adjustment Board (DOTCAB). SWM's request to DOTCAB was for a $5,500,000 amendment without consideration, on the basis that it may lose sufficient working capital and have to cease operation before it can process its claims pursuant to the Contract Disputes Act.

DOTCAB solicited the positions of affected agencies regarding SWM's essentiality to the national defense and whether granting relief would facilitate the national defense. The Coast Guard responded that SWM was not essential and its continued viability would not facilitate the national defense. MARAD responded in the negative to both issues. The Navy stated that it cannot conclude that SWM is essential to the national defense and:

The company provides a significant source of competition for depot level availabilities that require drydocking of Navy ships homeported in San Diego. The loss of Southwest Marine's drydocking capability could have an adverse effect on Navy ships homeported in San Diego from a cost and time standpoint as well as on the quality of life for the ships' crews and their families.

The Navy is mindful that ''[w]hether appropriate [extraordinary relief] action will facilitate the national defense is a judgment to be made on the basis of all the facts of the case.'' As we are not in possession of all pertinent facts and, equally important, because the matter is before the Maritime Administration and not the Navy, we offer no comment as to the advisability of granting Southwest Marine's request.

DOTCAB interpreted the Navy's letter as withholding an opinion on the question of whether granting relief (versus the continued viability of SWM) would facilitate the national defense; conveying that SWM is not essential to the national defense; and stating that the continued viability of SWM does aid and assist (i.e., facilitate) the national defense, because avoiding the adverse impact identified makes the Navy's tasks easier.

DOTCAB, in analyzing whether granting or withholding relief will affect SWM's ability to continue operations, found that SWM's actions have impaired its financial situation. SWM paid bonuses in 1993 to senior executives who, as a group, represented the four major stockholders (while aware of substantial losses being incurred under the MARAD contracts) and wrote off almost $5,000,000 in loans made to subsidiaries, both of which contributed to losses leading to default of the credit agreement with Wells Fargo Bank. SWM made a loan of $5,000,000 to its Chief Executive Officer for personal investment in another business, obtaining the funds in a transaction with its bank secured by SWM property—an impairment of SWM's ability to borrow further against its assets.

DOTCAB concluded that SWM was not essential to the national defense; that granting relief under P.L. 85–804 at that time would not facilitate the national defense; that SWM did suffer losses under the four MARAD contracts (although there is no finding as to the cause of the losses); and that it does not find that relief under the Contract Disputes Act is unavailable in sufficient time to continue SWM's viability.

Facilitation of National Defense. A prerequisite to granting relief under P.L. 85–804, including the use of residual powers, is the agency's determination that granting relief will facilitate the national defense. FAR 50.301 provides that ''[w]hether appropriate action will facilitate the national defense is a judgment to be made on the basis of all of the facts of the case.'' Therefore, it is appropriate to consider the impact on the Navy if SWM's operations were to cease due to financial difficulties.

Uniqueness or Essentiality of SWM's Capabilities. Based on Navy projections of ship repair requirements in San Diego through the year 2000, the Navy needs at least two drydocks and sufficient pier space to conduct up to 12 depot maintenance availabilities at any one time. NASSCO and SWM are the only two private shipyards in San Diego that have the capability to drydock all Navy ships, with the exception of the largest (CVs/LHA/LHDs). If SWM were to go out of business, the Navy would be able to meet the foregoing facility requirements in San Diego. The drydocking facilities of NASSCO and the Navy in San Diego are adequate to meet Navy projected repair requirements. NASSCO has a Navy-certified floating drydock (20,750 LT capacity). The Navy has the Naval Station graving dock (33,000 LT) and the Steadfast floating drydock (9,700 LT). In addition to this drydock capacity, four other contractors (apart from NASSCO and SWM) hold Master Ship Repair Agreements (MSRA) and three contractors hold Agreements for Boat Repair (ABR). Therefore, the continued viability of SWM as a ship repair company in San Diego is not essential for Navy operations or for industrial mobilization considerations.

Consequences if SWM Goes out of Business. If SWM were to cease operations, the Navy would lose the services of a ship repair firm with good facilities and performance record. The quality of SWM's piers and Navy-certified drydock is good. SWM's performance record, both past and current performance, on Navy ship repair contracts has been good. SWM is the San Diego shipyard with the most experience on AEGIS cruisers and destroyers. Unlike NASSCO, whose primary focus is on ship construction, SWM devotes its business to ship maintenance and modernization. Other examples of its experience include a successful completion of a major cruiser New Threat Upgrade, selection to support the USS *John Paul Jones* (DDG 53) shock trials, and award of the major amphibious ship (LPD/LSD) phased maintenance contracts in San Diego for the past five years.

Other effects should SWM cease operations include a decrease in competition and facilities available to perform homeport maintenance. There would remain only one private shipyard (NASSCO) with its own Navy-certified drydock capable of drydocking most Navy ships homeported in San Diego. Furthermore, if SWM's certified drydock were no longer available, the drydock capacity in San Diego would be significantly reduced. The Navy would have to award certain work sole source to NASSCO, if justifiable on a case by case basis; make the Navy's drydock or pier facilities available for purposes of achieving competition; or expand the solicitation area to include more distant facilities. The capacity of Government drydocks in San Diego is limited and making them available for competition would reduce their availability for emergent voyage repairs. Expanding the solicitation area could lead to contracts outside the homeport, with attendant costs of moving the ship and crew and negative affect on personnel quality of life. This could also cause a violation of Personnel Tempo (PERSTEMPO) Program Turn-Around-Ratio criteria, which could disrupt operations.

The following ships are, or soon will be, undergoing maintenance availabilities at SWM:

Contract No., ship, and completion date

N00024–89–C–8507, *Denver* (LPD–9), 10/28/94.

N00024–89–C–8507, *Duluth* (LPD–6), 1/06/95.

N00024–94–C–0057, *John Young* (DD–973), 12/16/94.

N62791–94—0103, LCM's (3), 10/14/94.

N62791–94–C–0108, *Peleliu* (LHA–5)[1], 12/09/94.

N00024–92–C–2802, *John Paul Jones* (DDG–53), 11/14/94.

N62387–93–C–3001, *San Jose* (T–AFS–7), 11/01/94; *Curtis Wilbur* (DDG–54), 12/19/94; *Fort McHenry* (LSD–43), 4/21/95; *Rushmore* (LSD–47), 4/21/95; *Cleveland* 4/28/95.

[1] The U.S.S. *Peleliu* is located at a Navy pier.

If SWM were to file for protection under Chapter 11 of the Bankruptcy Code, work on these ships would be affected and operating schedules delayed. The work would be delayed until the Bankruptcy Court approved either an assumption of these contracts by SWM or Navy terminating the contracts. Although there would be delay and perhaps additional cost in completing these contracts, the negative impact on Navy operations could be accommodated.

Therfore, as concluded in the Navy response to DOTCAB (a conclusion that remains valid), ''loss of [SWM's] drydocking capability could have an adverse effect on Navy ships homeported in San Diego from a cost and time standpoint as well as on the quality of life for the ships' crews and their families.''

SWM Viability. SWM has not demonstrated that it cannot obtain further lines of credit to support its cash flow requirements. There is no substantiation that SWM will cease operations any time soon. SWM merely stated that it ''will probably be insolvent.''

DCAA Audit Report No. 4221–94J17600001 of January 26, 1994, which analyzed SWM's financial condition in relation to its P.L. 85–804 request before MARAD, found ''no adverse financial conditions which would preclude SWM from performing on its government contracts. Our audit disclosed relatively insignificant financial distress, and no indications of significant long-term problems.'' A basis for this opinion included audited 1994 business volume forecasts and projected cash flow resulting from this business volume. An updated financial capability audit of SWM, DCAA Audit Report No. 4151–94J17600007 of November 1, 1994, discloses ''no adverse financial conditions which would preclude it [SWM] from performing on its government contracts,'' and ''relatively insignificant'' financial distress with no ''indications of significant long-term problems.'' Regarding SWM's line of credit, SWM entered into an amended loan agreement with Wells Fargo Bank in June 1994. Although SWM may now be noncomplaint with the amended loan agreement's covenants on profitability and cash flow coverage, the bank has indicated that it will probably restructure the loan agreement. Accordingly, the audit concludes that SWM has demonstrated that it can work with the bank in resolving its needs.

Moreover, even if SWM's allegations of financial straits were accurate, granting the requested $15,000,000 relief would not necessarily result in SWM remaining a viable entity in San Diego. There is no evidence demonstrating that the amount and type of relief requested will satisfactorily resolve the alleged cash flow problems. There is no evidence to demonstrate that the amount requested related to SWM's financial viability. SWM has provided no explanation of the basis for requesting the $15,000,000 amount, i.e., how was it calculated? Nor is there any guarantee that SWM will not continue certain actions that DOTCAB found to have at least partly caused SWM's financial difficulties, such as granting bonuses to stockholders and writing off loans to subsidiaries.

Conclusion Regarding P.L. 85–804. Based on all of the foregoing considerations, it is not considered necessary to make a finding regarding ''facilitation of the national defense,'' and, although SWM's operations in San Diego are beneficial to the Navy, the Navy cannot find that granting the requested P.L. 85–804 relief to SWM is appropriate in this case.

VIII. CONCLUSION

the Navy finds no legal entitlement for the SWM/ADD claims and no reason to grant relief to the claimants based on fairness. Moreover, the Navy cannot find that granting the requested P.L. 85–804 relief to SWM is appropriate in this case.

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 can not be estimated since the liability to the United States 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.

Contractor:	*Number*
Hercules, Inc	1
Rockwell International Corp	2
Interstate Electronics Corp	1
Unisys Systems Corporation	1
Westinghouse Electric Corporation	4
Honeywell Incorporated	2
Lockheed Missiles & Space Co., Inc	3
Raytheon Company	4
Kearfott Guidance & Navigation	4
Hughes Aircraft Company	4
Martin Marietta Defense Systems	8
General Dynamics Corps., Electric Boat Division	3
Newport News Shipbuilding and Drydock Co	3
Hughes Missile Systems Company	1
Total	41

DEPARTMENT OF THE AIR FORCE

Contractor: Various.

Type of action: Contingent Liability.

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

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

Description of product or service: FY 1994 Annual Airlift Contracts.

Reference: ''Definitions of Unusually Hazardous Risks Applicable to CRAF FY 1994 and FY 1995 annual airlift Contracts'' are described on pages 50 and 51.

Background: Twenty-six contractors have requested indemnification under P.L. 85–804, as implemented by Executive Order 10789, for the unusually hazardous risks (as defined) involved in providing airlift services for CRAF missions (as defined). In addition, Air Mobility Command (AMC) has requested indemnification for subsequently identified contractors and subcontractors who conduct or support the conduct of CRAF mission. The contractors for which indemnification is requested are those to be awarded as a result of Solicitation F11626–92—R0030 and future contracts to support CRAF missions, which are awarded prior to September 30, 1994. The 26 contractors requesting indemnification are listed below:

CONTRACTORS TO BE INDEMNIFIED AND PROPOSED CONTRACT NUMBER

Air Transport International (ATN), F11626–93–D0037.

American Int'l Airways (CKS), F11626–93–D0038.

American Trans Air (ATA), F11626–93–D0035.

Arrow Air (ARW), F11626–93–D0039.

AV Atlantic (AVA), F11626–93–D0040.

Buffalo Airways (BVA), F11626–93–D0041.

Continental Airlines (COA), F11626–93–D0042.

Delta Air Lines (DAL), F11626–93–D0043.

DHL Airways (DHL), F11626–93–D0044.

Emery Worldwide (EWW), F11626–93–D0036.

Evergreen International (EIA), F11626–93–D0036.

Federal Express (FDX), F11626–93–D0035.

Hawaiian Airlines (HAL), F11626–93–D0045.

Int'l Charter Xpress (IXX), F11626–93–D0046.

Miami Air (MYW), F11626–93–D0047.

Northwest Airlines (NWA), F11626–93–D0035.

Private Jet (PVJ), F11626–93–D0048.

Rich International (RIA), F11626–93–D0036.

Southern Air Transport (SAT), F11626–93–D0035.

Sun Country Airlines (SCX), F11626–93–D0036.

Tower Air (TWR), F11626–93–D0051.

Trans World Airlines (TWA), F11626–93–D0050.

United Parcel Service (UPS), F11626–93–D0051.

US Air (USA), F11626–93–D0052.

World Airways (WOA), F11626–93–D0036.

Zantop International (ZIA), F11626–93–D0053.

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

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

Justification: The specific risks to be indemnified are identified in the applicable definitions. The Government will not incur a contingency liability as an immediate direct result of this advance indemnification approval; however, if the air carriers suffer losses or damages, exclusive of losses or damages that are within the air carriers' insurance deductible limits are not compensated by the contractors' insurance, the contractors will be indemnified by the Government. The amount of this indemnification can not be predicted, but could entail millions of dollars.

All of the 26 contractors are approved DoD carriers and, therefore, considered to have adequate, existing, and ongoing safety programs. Moreover, AMC has specific procedures for determining that a contractor is complying with government safety requirements. Also, the contracting officer has 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 has certified that its coverage satisfies the minimum level of liability insurance required by the Government. Finally, all

contractors are required to obtain war hazard insurance available under Title XIII of the Federal Aviation Act of 1958 for hull and liability war risk. All but one contractor has obtained this coverage with the Federal Aviation Agency. The remaining firm will obtain it before receiving an Air Force CRAF contract. Additional contractors and subcontractors that conduct or support the conduct of CRAF missions may be indemnified only if they request indemnification, accept the same definition of unusually hazardous risks as identified, and meet the same safety and insurance requirements as the 26 contractors currently seeking indemnification.

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 Title XIII 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 is 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 P.L. 85–804 and Executive Order 10789, as amended, the request was approved on June 2, 1994, to indemnify the 26 air carriers listed above and other yet to be identified air carriers providing airlift services in support of CRAF missions for the unusually hazardous risks as defined. Indemnification under this authorization shall be affected by including the clause in FAR 52.250–1, entitled ''Indemnification Under P.L. 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 AMC Commander will inform the Secretary of the Air Force immediately upon each implementation of the indemnification clause.

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

DEPARTMENT OF THE AIR FORCE, HEADQUARTERS AIR MOBILITY COMMAND MEMORANDUM DATED OCTOBER 11, 1994

Findings: By Memorandum of Decision dated June 2, 1994, SAF granted indemnification to contractors for unusually hazardous risks involved in providing airlift support for CRAF missions. A CRAF mission means airlift services ordered pursuant to CRAF activation or directed by Commander AMC for missions that are deemed to be substantially similar to, or in lieu of, those ordered under CRAF activation.

Contracted civil air missions in support of possible military operations in Haiti could expose contractors to unusually hazardous risks, specifically war risks, because of the hostile environment they will encounter. AMC is requesting the Federal Aviation Administration (FAA) to provide Title XIII insurance for contractors flying missions in support of potential Haiti operations. Based on experience with past contingencies, AMC/DOF advises that commercial insurance may not be available at reasonable rates. Consistent with the SAF approval, indemnification will apply to the extent that the risks are not covered by Title XIII insurance or other insurance. Participation of civil air carriers is essential to successful completion of the mission. Contractors can not be expected to absorb the liability for loss that could arise while performing operations in Haiti. Without indemnification, the ability to support the airlift mission will be jeopardized.

Determination: On September 14, 1994, it was determined that missions in support of possible military operations in Haiti will be in lieu of CRAF activation and that indemnification under P.L. 85–804 is necessary to protect contractors against unusually hazardous risks associated with such missions.

AIR MOBILITY COMMAND DETERMINATION SUPPORTING INDEMNIFICATION UNDER PUBLIC LAW 85–804

Memorandum for SAF/OS dated October 11, 1994, from AMC/CC, subject: Indemnification of Contractors and Subcontractors for Unusually Hazardous Risks Involved in Providing Airlift Support for Civil Reserve Air Fleet (CRAF) Missions (SAF Memorandum of Decision, June 2, 1994).

As the June 2, 1994, memorandum requires, on October 11, 1994, AMC/CC provided notice of implementation of the indemnification clause for civil air missions supporting military operations in Haiti. The AMC staff provided verbal notice to SAF/AQCO during the week of September 12, 1994. The clause was implemented only after air carriers requested indemnification, and after it was determined these missions would be in lieu of CRAF activation and would require indemnification to protect carriers against unusually hazardous risks as defined in the June 2, 1994, memorandum. The indemnified missions began September 19, 1994.

AMC has implemented the indemnification clause for five contractors. Four of them (American Trans Air, Tower Air, World Airways, and Sun Country Airlines) are on the original list of 26 air carriers approved in the June 2, 1994, memorandum. Three additional contractors (Express One, US Air Shuttle, and North American Airlines) received FY 1994 contracts containing the indemnification clause. The indemnification clause was implemented for one of them—North American Airlines.

Contractor: Various.

Type of action: Contingent Liability.

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

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

Description of product of service: FY 1995 Annual Airlift Contracts.

Reference: ''Definitions of Unusually Hazardous Risks Applicable to CRAF FY 1994 and FY 1995 Annual Airlift Contracts'' are described on pages 50 and 51.

Background: Twenty-nine contractors have requested indemnification under P.L. 85–804, as implemented by Executive Order 10789, for the unusually hazardous risks (as defined below) involved in providing airlift services for CRAF missions. In addition, Headquarters Air Mobility Command (HQ AMC) has requested indemnification for subsequently identified contractors and subcontractors who conduct or support the conduct of CRAF missions. The contractors for which indemnification is requested are those contracts awarded as a result of Solicitation F11626–94–R0001, and future contracts to support CRAF missions through September 30, 1995. The 29 contractors requesting indemnification are:

CONTRACTORS TO BE INDEMNIFIED AND CONTRACT NUMBER

Air Transport International (ATN), F11626–94–D0026.

Alaska Airlines (ASA), F11626–94–D0033.

American Airlines (AAL), F11626–94–D0029.

American Trans Air (ATA), F11626–94–D0026.

Arrow Air (ARW), F11626–94–D0030.

Atlas Air (GTI), F11626–94–D0031.

Buffalo Airways (BVA), F11626–94–D0034.

Continental Airlines (COA), F11626–94–D0035.

Delta Air Lines (DAL), F11626–94–D0036.

DHL Airways (DHL), F11626–94–D0037.

Emery Worldwide (EWW), F11626–94–D0027.

Evergreen International (EIA), F11626–94–D0027.

Express One (LHN), F11626–94–D0038.

Federal Express (FDX), F11626–94–D0026.

Int'l Charter Xpress (IXX), F11626–94–D0026.

Miami Air (MYW), F11626–94–D0040.

North American Airlines (NAO), F11626–94–D0041.

Northwest Airlines (NWA), F11626–94–D0026.

Rich International (RIA), F11626–94–D0027.

Southern Air Transport (SAT), F11626–94–D0026.

Sun Country Airlines (SCX), F11626–94–D0027.

Tower Air (TWR), F11626–94–D0044.

Trans World Airlines (TWA), F11626–94–D0043.

United Air Lines (UAL), F11626–94–D0045.

United Parcel Service (UPS), F11626–94–D0046.

US Air (USA), F11626–94–D0047.

US Air Shuttle (USS), F11626–94–D0048.

World Airways (WOA), F11626–94–D0027.

Zantop International (ZIA), F11626–94–D0049.

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

Desert Shield/Storm 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.

The specific risks to be indemnified are identified in the definitions. The Government will not incur a contingent liability as a direct result of this advance indemnification approval; however, if the air carriers 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 are within the air carriers' insurance deductible limits are not compensated by the contractors' insurance, the contractors will be indemnified by the Government. The amount of this indemnification can not be predicted, but could entail millions of dollars.

All of the 29 contractors are 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 has 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 has certified that its coverage satisfies the minimum level of liability insurance required by the government. Finally, all contractors are required to obtain war hazard insurance available under Title XIII of the Federal Aviation Act of 1958 for hull and liability war risk. All but one contractor has obtained, and is required to maintain, this coverage under the Federal Aviation Act. The remaining firms will obtain it before receiving an Air Force CRAF contract. Additional contractors and subcontractors that conduct or support the conduct of CRAF

missions may be indemnified only if they request indemnification, accept the same definition of unusually hazardous risks as defined, and meet the same safety and insurance requirements as the 29 contractors currently seeking indemnification.

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 Title XIII 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 is found that incorporating the indemnification clause in current and future contracts for airlift services for CRAF missions would facilitate the national defense.

Therefore, under authority of P.L. 85–804 and Executive Order 10789, as amended, the request to indemnify the 29 air carries and other yet to be identified air carriers providing airlift services in support of CRAF missions for the unusually hazardous risks, as defined, was approved on September 30, 1994. Indemnification under this authorization shall be affected by including the clause in FAR 52.250–1, entitled ''Indemnification Under P.L. 85–804 (Apr 1984),'' in the contracts for these services. This approval is contingent upon the air carriers complying with all applicable Government safety requirements and maintaining insurance coverage as detailed above. The HQ AMC Commander will inform the Secretary of the Air Force immediately upon each implementation of the indemnification clause.

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

DEFINITIONS OF UNUSUALLY HAZARDOUS RISKS APPLICABLE TO CRAF FY 1994 AND FY 1995 ANNUAL AIRLIFT CONTRACTS

1. Definitions:

a. ''Civil Reserve Air Fleet (CRAF) Mission'' means the provision of airlift services under this contract (1) ordered pursuant to authority available because of the activation of CRAF, or (2) directed by Commander, Air Mobility Command (AMC/CC), or his successor for 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 P.L. 85–804 (APR 1984),'' it is agreed that all war risks resulting from the provisions 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 Title XIII of the Federal Aviation Act of 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 contractor's 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 Title XIII of the Federal Aviation Act 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.

Contractor: Boeing Defense and Space Group, Seattle, WA.

Type of action: Contingent Liability.

Actual or estimated potential cost: The amount the Contractor will be indemnified by the Government can not be predicted, but entail missions of dollars.

Service and activity: Department of the Air Force, AFMC/CC.

Description of product or service: Inertial Upper Stages (IUS) Program.

Background: Boeing Defense and Space Group, Seattle, WA, has requested indemnification for themselves and their major subcontractors, United Technologies Chemical Systems Division (CSD), and Lockheed Missiles & Space Company (LMSC), under P.L. 85–804, as implemented by Executive Order 10789, for the unusually hazardous risks as defined below. This indemnification request is applicable to performance of contract F04701–91–C–0011. An accident resulting from launch or landfall of the IUS or its components could be catastrophic.

The Administrative Contracting Officer (ACO) has reviewed Boeing's safety program and deemed it to be in compliance with the applicable safety requirements and acceptable for performance of this contract. In addition, Boeing currently has insurance coverage in force, and complete details of the exclusions and deductibles are contained in the schedule attached to their request. The cognizant ACO has reviewed the insurance policies and found them satisfactory and reasonable under normal business conditions. No significant changes in these insurance coverages are expected to occur during the course of this contract, except for annual updates of insurance in force and monetary limits. If the dollar value of coverage varies by more than 10 percent from that stated in the schedules provided, the contractor shall immediately submit to the contracting officer a description of the changes. It was found that the insurance coverage identified in the schedules represents an appropriate level of financial protection to permit indemnification.

Justification: The specific risks for this indemnification of Boeing have been identified below. No actual cost to the Government is anticipated as a result of the actions to be accomplished under a memorandum signed by the Secretary of the Air Force on November 4, 1994. However, if the contractor suffers losses or incurs damages as a result of the occurrence of a risk as defined below, and if those losses or damages, exclusive of losses or damages that are within the contractor's insurance deductible limits, are not compensated by the contractor's insurance, the contractor will be indemnified by the Government. It is recognized that the amount of this indemnification can not be predicted, but could entail many millions of dollars.

Aside from their importance to the IUS program, Boeing is a prime contractor for other major programs. A catastrophic financial impact on Boeing could have implications on their ability to produce launch vehicle upper stages, and ultimately on the existing defense system. Accordingly, it was found that the incorporation of an indemnification clause in this contract would facilitate the national defense.

Decision: Therefore, under the authority of P.L. 85–804 and Executive Order 10789, as amended, the indemnification of Boeing against those unusually hazardous risks, as defined below, to the extent claims arising thereunder are not covered by self-insurance or compensated by insurance coverage, facilitates the national defense was approved. Indemnification under this authorization shall be effected by including the clause at FAR 52.250–1, entitled ''Indemnification Under P.L. 85–804 (Apr 1984)'' and Attachment 1 in contract F04701–91–C–0011. This approval is contingent upon Boeing maintaining their aggressive safety program and current insurance coverage.

Boeing has requested indemnification be extended to their major subcontractors, United Technologies Chemical Systems Division (CSD), and Lockheed Missiles and Space Company (LMSC), with respect to the same

risks as defined below. Approval to indemnify these subcontractors was granted exclusive of any insurance coverage amounts provided the contracting officer approves inclusion of the clause in each subcontract. This approval may only be granted in the case where the contracting officer determines that the subcontractors' insurance coverage represents an appropriate level of financial protection, and that, based upon a safety inspection, the subcontractors adhere to good safety practices.

DEFINITION OF UNUSUALLY HAZARDOUS RISKS CONTRACT F04701–91–C09911 (APPLICABLE TO BOEING DEFENSE AND SPACE GROUP, UNITED TECHNOLOGIES CHEMICAL SYSTEMS DIVISION, AND LOCKHEED MISSILES AND SPACE COMPANY ONLY)

For the purpose of contract clause entitled ''Indemnification Under Public Law 85–804 (APR 1984),'' it is agreed that all risks resulting from, or in connection with:

a. The burning, explosion, or detonation of launch vehicles or components thereof during preparation, casting, and testing of Solid Rocket Motor (SRM) propellant, shipment of SRMs, launch processing liftoff or flight, abort landing or subsequent return of the Inertial Upper Stage (IUS) to the launch site; and

b. The landfall of launch vehicles or components or fragments thereof, are unusually hazardous risks, unless it is proven that the contractor's liability arose from causes entirely independent of the design, fabrication, testing or furnishing of products or services under this contract.

EXECUTIVE COMMUNICATIONS, ETC.

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

576. A letter from the Director, Administration and Management, Office of the Secretary of Defense, transmitting the calendar year 1994 report on ''Extraordinary Contractual Actions to Facilitate the National Defense,'' pursuant to 50 U.S.C. 1434; to the Committee on National Security.

577. A letter from the Chairman, Defense Environmental Response Task Force, transmitting a report of the Defense Environmental Response Task Force for fiscal year 1994; to the Committee on National Security.

578. A letter from the Acting Director, Defense Security Assistance Agency, transmitting notification concerning the Department of the Army's proposed Letter(s) of Offer and Acceptance [LOA] to Greece for defense articles and services (Transmittal No. 95–08), pursuant to 22 U.S.C. 2776(b); to the Committee on International Relations.

579. A letter from the Acting Director, Defense Security Assistance Agency, transmitting the Department of the Navy's proposed lease of defense articles to Brazil (Transmittal No. 15–95), pursuant to 22 U.S.C. 2796a(a); to the Committee on International Relations.

580. A communication from the President of the United States, transmitting an update of events in Haiti (Operation ''Uphold Democracy'') consistent with the War Powers Resolution to ensure that the Congress is kept fully informed regarding events in Haiti (H. Doc. No. 104–50); to the Committee on International Relations and ordered to be printed.

581. A letter from the Chairman, Administrative Conference of the United States, transmitting the 1994 annual report in compliance with the Inspector General Act Amendments of 1988, pursuant to Public Law 95–452, section 5(b) (102 Stat. 2526); to the Committee on Government Reform and Oversight.

582. A letter from the Chairman, Federal Deposit Insurance Corporation, transmitting a copy of the annual report in compliance with the Government in the Sunshine Act during the calendar year 1994, pursuant to 5 U.S.C. 552b(j); to the Committee on Government Reform and Oversight.

583. A letter from the Director, Office of Government Ethics, transmitting a report of activities under the Freedom of Information Act for calendar year 1994, pursuant to 5 U.S.C. 552(d); to the Committee on Government Reform and Oversight.

584. A letter from the Vice President and General Counsel, Overseas Private Investment Corporation, transmitting a report of activities under the Freedom of Information Act for calendar year 1994, pursuant to 5 U.S.C. 552(e); to the Committee on Government Reform and Oversight.

585. A letter from the Adjutant General, Veterans of Foreign Wars of the United States, transmitting the financial audit for the fiscal year ended August 31, 1994, together with the auditor's opinion, pursuant to 36 U.S.C. 1101(47), 1103; to the Committee on Judiciary.

586. A letter from the Comptroller General of the United States, transmitting a report addressing the deficit entitled ''Budgetary Implications of Selected GAO Work for FY 1996'' (GAD/OCG–95–2); jointly, to the Committee on Government Reform and Oversight and the Budget.

PUBLIC BILLS AND RESOLUTIONS

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

By Mr. BUYER:

H.R. 1288. A bill to amend the Solid Waste Disposal Act to permit Governors to limit the disposal of out-of-State solid waste in their States, and for other purposes; to the Committee on Commerce.

By Mr. ACKERMAN (for himself, Ms. ROS-LEHTINEN, Mr. MCCOLLUM, Mrs. SCHROEDER, Mr. SMITH of New Jersey, Mr. LEWIS of Georgia, Mr. DELAY, Mr. MCDERMOTT, Ms. MOLINARI, Mr. TAUZIN, Mr. GILMAN, Mr. MFUME, Mrs. KENNELLY, Mr. ABERCROMBIE, Mr. ANDREWS, Mr. BAESLER, Mr. BALDACCI, Mr. BARRETT of Wisconsin, Mr. BEILENSEN, Mr. BENTSEN, Mr. BERMAN, Mr. BEVILL, Mr. BILBRAY, Mr. BISHOP, Mr. BOEHLERT, Mr. BORSKI, Mr. BOUCHER, Mr. BREWSTER, Mr. BROWDER, Ms. BROWN of Florida, Mr. BROWN of Ohio, Mr. BRYANT of Tennessee, Mr. BRYANT of Texas, Mr. BURTON of Indiana, Mr. CALLAHAN, Mr. CALVERT, Mr. CANADY, Mr. CHAPMAN, Mrs. CHENOWETH, Mr. CLAY, Mrs. CLAYTON, Mr. CLEMENT, Mr. CLYBURN, Mr. COLEMAN, Miss COLLINS of Michigan, Mrs. COLLINS of Illinois, Mr. CONDUIT, Mr. CONYERS, Mr. COSTELLO, Mr. COYNE, Mr. CRAMER, Mr. DEFAZIO, Mr. DE LA GARZA, Mr. DELLUMS, Mr. DEUTSCH, Mr. DIAZ-BALART, Mr. DICKS, Mr. DIXON, Mr. DORNAN, Mr. DOYLE, Mr. EDWARDS, Mr. ENGEL, Ms. ESHOO, Mr. EVANS, Mr. EVERETT, Mr. FARR, Mr. FATTAH, Mr. FAZIO of California, Mr. FIELDS of Louisiana, Mr. FILNER, Mr. FOGLIETTA, Mr. FOLEY, Mr. FORBES, Mr. FORD, Mr. FOX, Mr. FRISA, Mr. FROST, Mr. FUNDERBURK, Ms. FURSE, Mr. GALLEGLY, Mr. GEJDENSON, Mr. PETE GEREN of Texas, Mr. GIBBONS, Mr. GILLMOR, Mr. GORDON, Mr. GOSS, Mr. GENE GREEN of Texas, Mr. GREENWOOD, Mr. GUTIERREZ, Mr. GUTKNECHT, Mr. HALL of Ohio, Mr. HALL of Texas, Ms. HARMAN, Mr. HASTINGS of Florida, Mr. HAYES, Mr. HEFNER, Mr. HILLIARD, Mr. HINCHEY, Mr. HOLDEN, Mr. HOUGHTON, Mr. HOYER, Mr. INGLIS of South Carolina, Ms. JACKSON-LEE, Mr. JACOBS, Mr. JEFFERSON, Ms. EDDIE BERNICE JOHNSON of Texas, Mr. SAM JOHNSON, Mr. JOHNSTON of Florida, Mr. KANJORSKI, Ms. KAPTUR, Mr. KILDEE, Mr. KING, Mr. KINGSTON, Mr. KLECZKA, Mr. KLINK, Mr. LAFALCE, Mr. LANTOS, Mr. LAUGHLIN, Mr. LAZIO of New York, Mr. LEVIN, Mrs. LINCOLN, Mr. LIPINSKI, Ms. LOFGREN, Ms. LOWEY, Mr. MANTON, Mr. MANZULLO, Mr. MARTINEZ, Mr. MARTINI, Mr. MASCARA, Mr. MATSUI, Ms. MCCARTHY, Mr. MCHALE, Mr. MCHUGH, Ms. MCKINNEY, Mr. MCNULTY, Mr. MEEHAN, Mrs. MEEK of Florida, Mr. METCALF, Mr. MENENDEZ, Mr. MILLER of Florida, Mr. MILLER of California, Mr. MINETA, Mr. MINGE, Mrs. MINK of Hawaii, Mr. MOAKLEY, Mr. MONTGOMERY, Mr. MORAN, Mr. MURTHA, Mr. NEAL of Massachusetts, Mr. OBERSTAR, Mr. ORTIZ, Mr. ORTON, Mr. PALLONE, Mr. PARKER, Mr. PASTOR, Mr. PAXON, Mr. PAYNE of Virginia, Mr. PAYNE of New Jersey, Mr. PETERSON of Florida, Mr. PICKETT, Mr. POMBO, Mr. POMEROY, Mr. POSHARD, Ms. PRYCE, Mr. QUINN, Mr. RAHALL, Mr. RANGEL, Mr. REYNOLDS, Mr. RICHARDSON, Ms. RIVERS, Mr. ROHRABACHER, Mr. ROSE, Mrs. ROUKEMA, Ms. ROYBAL-ALLARD, Mr. ROYCE, Mr. RUSH, Mr. SABO, Mr. SAWYER, Mr. SCHIFF, Mr. SCOTT, Mr. SHAW, Mr. SKELTON, Mrs. SMITH of Washington, Mr. SOLOMON, Mr. SOUDER, Mr. STARK, Mr. STEARNS, Mr. STENHOLM, Mr. STOCKMAN, Mr. STOKES, Mr. STUMP, Mr. TANNER, Mr. TAYLOR of Mississippi, Mr. TEJEDA, Mr. THOMAS, Mr. THOMPSON, Mrs. THURMAN, Mr. TORKILDSEN, Mr. TORRES, Mr. TORRICELLI, Mr. TOWNS, Mr. TRAFICANT, Mr. TUCKER, Mr. UNDERWOOD, Mr. UPTON, Mr. VENTO, Mr. VISCLOSKY, Mr. VOLKMER, Mrs. WALDHOLTZ, Ms. WATERS, Mr. WATT of North Carolina, Mr. WELLER, Mr. WILLIAMS, Mr. WILSON, Mr. WISE, Ms. WOOLSEY, Mr. WYDEN, Mr. WYNN, Mr. YATES, Mr. YOUNG of Alaska, and Mr. ZIMMER):

H.R. 1289. A bill to require in certain circumstances that States disclose the HIV status of newborn infants to legal guardians of the infants, and for other purposes; to the Committee on Commerce.

By Mr. COOLEY:

H.R. 1290. A bill to reinstate the permit for, and extend the deadline under the Federal Power Act applicable to the construction of, a hydroelectric project in Oregon, and for other purposes; to the Committee on Commerce.

By Mr. GREENWOOD (for himself, Mr. FRANKS of New Jersey, Mr. FRANK of Massachusetts, and Mr. HORN):

H.R. 1291. A bill to amend title 39, United States Code, to provide that the provisions of law preventing Members of Congress from sending mass mailings within the 60-day period immediately before an election be expanded so as to prevent Members from mailing any unsolicited franked mail within that period, and for other purposes; to the Committee on House Oversight, and in addition to the Committee on Government Reform