
**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION**

In re:

MURDOCK MACHINE AND
ENGINEERING COMPANY
OF UTAH,

Bankrupt.

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:
: Bankruptcy Number B-75-484
:
:

: [Chapter X]
:
:

LOGAN A. BAGLEY, TRUSTEE
FOR MURDOCK MACHINE &
ENGINEERING COMPANY OF
UTAH,

Plaintiff,

: Adversary Proceeding Number
: 90PB-0601
:
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:
:

v.

UNITED STATES OF
AMERICA,

Defendant.

**FINDINGS OF FACT, CONCLUSIONS OF LAW
AND ORDER**

Robert H. Koehler, Esq. and Jonathan S. Baker, Esq., Patton, Boggs & Blow, Washington, D.C., appeared for Logan A. Bagley, Trustee.

Bernard J. McKay, Esq., U.S. Department of Justice, Washington, D.C., and Ralph E. Avery, Esq., U.S. Army, Arlington, Va., appeared for the United States of America.

This litigation is yet another phase in the resolution of an eighteen year dispute between the bankruptcy estate of Murdock Machine and Engineering Company of Utah (Murdock), and the United States of America (Government). The underlying dispute is whether the Government's improper termination of an anti-submarine rocket (ASROC) launcher contract and ensuing actions related thereto, caused Murdock's financial collapse and led to Murdock's May 23, 1975, declaration of bankruptcy and cessation of business operations.

The context of the dispute arises from Logan A. Bagley's, Murdock's bankruptcy trustee (Trustee), objection to claims filed by the Government. Trial was held on March 1, 1993, through March 5, 1993, and May 27 and 28, 1993.¹ Thereafter the issues were taken under submission. The court heard the testimony of witnesses, including Warren P. Boardman, former president of Murdock, and James B. Sandidge, assistant director for contract financing for the Navy, who each had remarkable recall of the events during the relevant time period. The court considered documentary evidence consisting of a wealth of contracts, correspondence, and contemporaneous file memorandum. The court also considered the arguments of counsel, and has made an independent review of applicable case law. Now, being fully informed, the court enters the following

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Trial was interrupted as a result of the ill-health of one of the attorneys.

I. FINDINGS OF FACT

A. Status of the Case.

1. The objection to claims is brought pursuant to Bankruptcy Act §§ 47(a)(8), 93(f) and (g), and Act Rule 306(c)².

2. Murdock was adjudged a bankrupt as a result of the petition it filed in this court on May 23, 1975.

3. An order appointing a receiver was executed by the court on May 23, 1975.

4. Logan A. Bagley, (Trustee) was appointed as successor Trustee of Murdock's estate on June 26, 1987.

B. The Government's Claims.

5. On September 10, 1975, the Government timely filed with this court preliminary and contingent proof of claim number 559 in the amount of \$3,313,702.80 asserting unsecured priority status. Claim number 559 asserts that Murdock owes \$1,288,139.78 for alleged excess costs of re-procurement, over-payments, and other damages, and \$2,130,563.02 for unliquidated progress payments, recovery of Government property, and other damages. The claim arises under a Department of Army Contract No. DAAA 09-

² Because this bankruptcy case was filed in 1975, the Bankruptcy Act applies, rather than the current Bankruptcy Code. In order to reduce confusion between the Bankruptcy Code, codified as Title 11 of the United States Code and the previously numbered sections of Title 11 of the United States Code, all future references will be to the Bankruptcy Act (Bankruptcy Act § ____) or the former Rules of Bankruptcy Procedure (Act Rule ____).

74-C-0060 (Fin and Nozzle Contract) as a result of Murdock's failure to perform and the resulting default termination by the Government.³

6. On November 7, 1975, the Government filed first amended contingent proof of claim number 559A amending proof of claim number 559, in the total amount of \$3,865,673.95, also asserting unsecured priority status. Amended proof of claim number 559A adds alleged costs and damages under a Department of Army Contract No. DAAA09-74-C-0114 (Delay Plunger Contract), also arising from Murdock's failure to perform and the resulting default termination by the Government. The claim asserts that Murdock owes \$1,288,139.78 for alleged excess costs of re-procurement, over-payments, and other damages, and \$2,683,481.62 for unliquidated progress payments, and Government-furnished equipment under the Fin and Nozzle and Delay Plunger Contracts, less a set-off of \$105,947.45 and possible work in process.

7. On October 7, 1975, the Government filed with this court preliminary and contingent proof of claim number 764 against the estate of Murdock in the amount of \$9,942,889.71, asserting unsecured priority status. Claim number 764 asserts unliquidated progress payments in the amount of \$7,933,291.71 related to Department of Navy Contract No. N00017-71-C-1430 (ASROC Contract), and unliquidated progress payments of \$1,309,598.00 and alleged excess procurement costs estimated to be \$700,000.00 related to Department of Air Force Contract No. F42600-74-C-2534 (Practice Bomb Contract), both

³ The claims at issue were never entered into evidence. However, this court can properly take judicial notice of its own records. *Anderson v. Federal Deposit Ins. Corp.*, 918 F.2d 1139, 1141 n.1 (4th Cir. 1990).

of which arose from Murdock's failure to perform and the resulting default termination by the Government.

8. On November 28, 1975, the Government filed first amended contingent proof of claim number 764A, amending proof of claim number 764. The amended proof of claim number 764A is in the total amount of \$11,728,841.00. It asserts that Murdock owes \$1,927,758.00 as the outstanding balance of a Government loan, unliquidated progress payments of \$9,801,083.98 under four contracts terminated as a result of Murdock's alleged default, and an undetermined amount of excess costs incurred by the Government in reprocurement of materials. Amended proof of claim number 764A adds alleged costs and damages under two other Department of Navy Contracts of No. N00104-75-C-B004 (Zuni Launcher Contract) and N00104-74-C-B431 (A/B Dispenser Contract), also arising from Murdock's failure to perform and the resulting default terminations by the Government. The amended claim asserts both secured status, based upon a lien on all of Murdock's assets, and priority status premised upon Bankruptcy Act §§ 64(a-5), 302 and 337(2).⁴

9. Neither amended claims numbered 559A or 764A have been resubmitted since 1975 to conform to various court rulings, to liquidate any contingent portions of the claims, or to credit Murdock with any assets that may have secured the claims and were obtained by the Government pursuant to its security interest.

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The status of the claims asserted by the Government is not at issue.

10. Each contract referenced in the proofs of claim at issue contained contract clause number 7-103.11 of the Armed Service Procurement Regulations (ASPR), containing a standard clause relating to default (Default Clause). (Gov't. Exh. B.)

11. Each contract referenced in the proofs of claim at issue contained contract clause number 7-103.12 of the ASPR containing a standard clause relating to resolution of disputes (Disputes Clause). (Gov't. Exh. A.)

12. Each contract referenced in the proofs of claim at issue contained contract clause number 7-103.21 of the ASPR that provided that if Murdock's failure to perform was caused by circumstances beyond its control, or by actions of the Government, any resulting default termination would be converted to a termination for the convenience of the Government (Termination for Convenience). (Gov't. Exh. C.)

13. Under the Default Clause of the five contracts at issue, if the Government's default terminations were proper, Murdock would be liable for the Government's excess costs of reprocurement, unliquidated progress payments and other damages. If, however, the default terminations are determined to be improper (*e.g.*, the defaults were excusable and Murdock's failure to perform was beyond its control and without fault or negligence), the Government has no basis for its claims under the Default Clause.⁵

⁵ The Trustee's complaint of July 26, 1990, originally contained a counterclaim for recovery of money damages against the Government under the Termination for Convenience clause for Murdock's contract costs incurred prior to termination, its termination administration costs, plus reasonable profit on all such costs. In separately numbered causes of action, Murdock requested affirmative relief against the Government regarding the non-ASROC contracts for termination costs in the following amounts: 1) Fin and Nozzle Contract, \$2,084,700 plus interest 2) Delay Plunger Contract, \$750,500 plus interest, 3) Practice Bomb Contract, \$532,500 plus interest, 4) A/B Dispenser, \$223,600 plus interest, 5) Zuni Launcher Contract, \$130,700 plus interest. The Trustee's claims for damages were subsequently withdrawn, and the remaining issue in this proceeding is the allowability of the Government's claims.

14. Each contract referenced in the proofs of claim at issue contained clause number 7-104.35 of the ASPR, wherein subparagraph H indicates that the Government's entitlement to reimbursement of progress payments is contingent upon the fact that termination was for default. (Gov't. Exh. AL.)

15. The Trustee alleges that in April and May, of 1975, the Government took certain actions related to the ASROC Contract that made it financially impossible for Murdock to perform on all of its other Government contracts, and forced Murdock to close down its operations and file bankruptcy. The Trustee asserts that, but for such actions by the Government related to the ASROC Contract, Murdock would have had the financial ability to keep its facilities in operation and continue performing on all of its Government contracts. (Complaint p. 4 ¶ 10.)

16. The Government defends that, a) The Trustee cannot prove Murdock's defaults on the non-ASROC contracts were caused solely or primarily by wrongful Government actions, b) wrongful Navy action does not excuse Murdock's defaults, c) a Termination for Convenience would be required if the Trustee's position is adopted, d) the Government had not waived the right to terminate the contracts, e) the terminations are final and not subject to collateral attack, and finally, f) a defense based on the doctrine of laches is available because of the age of this case. (Gov't. Trial Brief.)

C. Murdock Machine and Engineering Company of Utah.

17. In the late 1960's, CCI Aerospace Corporation (CCI Corp.) was created when Marquardt Corporation (Marquardt) merged with CCI Corp. (Tr. Mar. 4, 1993, p. 15.)⁶

18. Murdock was an unincorporated division of CCI Corp. until September 11, 1972, when Murdock was incorporated as a wholly-owned subsidiary of CCI Corp. (Pre-trial Order p. 4, ¶¶ (1), (2).)

19. Prior to incorporation, the major business at Murdock's Utah facility was building landing gears and flat-track assemblies for the 747 airplane, making inlet controllers for the FF-4H phantom jet, and other general ordnance work. Murdock was a machine shop operation that historically produced high volume, low priced items. But during 1972-73, Murdock also produced certain very sophisticated warheads. (Tr. Mar. 1, 1993, p. 27; Tr. Mar. 4, 1993, p. 13; Tr. May 27, 1993, pp. 25, 118-19.)

20. Murdock had a \$500,000 line of credit with Commercial Security Bank of Ogden (Bank) established at the time of incorporation and guaranteed by CCI Corp. (Tr. Mar. 4, 1993, p. 28.)

21. Members of Murdock's management had been involved in the aerospace industry for many years and were skilled and experienced in aerospace manufacturing. Warren P. Boardman (Boardman), who eventually became Murdock's president, began employment with Marquardt in 1949. In 1967, Boardman became assistant

⁶ Future references to the transcript are by date, rather than by volume number.

general manager of the Ogden facility, including the Clearfield, Utah plant. Kazuo Sato (Sato), who eventually became (among other positions) Murdock's operations manager, first joined Marquardt in 1957 as a development engineer. (Tr. Mar. 4, 1993, pp. 7-8, 11; Tr. May 27, 1993, pp. 116-118.)

22. During the time period relevant to this dispute, Murdock encountered managerial problems, including the loss of its controller who returned to Marquardt and delay in locating a replacement, dissention in management including firing of the replacement controller, lack of accuracy in bidding on some of its contracts. Murdock was also slow to react to production problems regarding manpower and control over vendors. Those problems were not the primary source of cost overruns or production problems, and the delay in responding to production problems was due, in part, to the demands of the ASROC Contract. (Tr. Mar. 1, 1993, pp. 62-63; Tr. Mar. 4, 1993, pp. 148-56; Plaintiff's Exhibit 20; Government's Exhibit L, M, AH, AV, AY.)⁷

D. The ASROC Contract.

23. On June 25, 1971, the Government awarded Air Force Contract No. N00017-71-C-1430 (ASROC Contract) to Murdock at a time when Murdock was still an unincorporated division of CCI Corp. The contract was a firm, fixed-price contract, under which Murdock was to deliver 28 ASROC launcher groups and related spare components for the price of \$10,659,612. (Pre-trial Order p. 4, ¶ (1); Tr. Mar. 4, 1993, p. 12.)⁸

⁷ Murdock's trial exhibits are cited hereinafter as "Pltf. Exh. ____". The Government's trial exhibits are cited hereinafter as "Gov't. Exh. ____".

⁸ References to the Pre-trial Order are to facts stipulated as true by the parties.

24. The ASROC launcher was the main antisubmarine warfare weapon for Spruance (DD-963) Class destroyers. Each ASROC launcher cost approximately \$400,000. ASROC designs called for 10,000 discrete parts in the assembly, and the rocket launcher weighed approximately fifty-seven thousand pounds assembled. (Tr. Mar. 1, 1993, p. 28; Tr. Mar 4, 1993, p. 17, 26; Pltf. Exh. 20, 68.)

25. Between 1971 and 1973, Murdock accumulated parts, modified its facilities and prepared for production of the ASROC launcher. (Tr. Mar. 4, 1993, p. 21.)

26. Murdock experienced substantial difficulty producing the ASROC launchers, partially as a result of the Government supplying engineering documentation reproduced from microfilm that contained data that was not completely legible. (Tr. Mar. 3, 1993, p. 166; Tr. Mar. 4, 1993, p. 17.)

27. Portions of the engineering data were also inaccurate, and included superseded specifications. There were approximately two hundred deviations or drawing deviations in the ASROC data. In addition, some vendors specified as suppliers for the ASROC Contract were no longer in business and additional procedures to re-qualify substitute vendors were required, all at no cost to the Government. Murdock also experienced a high turnover of rejected parts received from vendors. (Tr. Mar. 2, 1993, pp. 119-20, 132-33; Tr. Mar. 4, 1993, p. 19, Pltf. Exh. 68.)

28. In May of 1973, Joe Cline (Cline), the president of CCI Corp., told James B. Sandidge (Sandidge), the Navy's assistant director for contract financing, that CCI Corp. anticipated a significant loss on the ASROC Contract. (Tr. Mar. 1, 1993, pp. 24-26.)

29. CCI Corp. was unable to continue production on the ASROC program because to do so would bankrupt its subsidiary, Murdock, and correspondingly, CCI Corp. itself. If CCI Corp. became bankrupt, it could have negatively affected Marquardt, a division of CCI Corp. that was producing the critically needed Rockeye II Missile System; a factor that caused great concern to the Government. (Pltf. Exh. 19, 20; Gov't. Exh. V.)

30. For the fiscal year ended April 30, 1973, Murdock incurred a net loss of approximately \$275,000. Prior to 1973, however, the Clearfield facility was producing Murdock's non-ASROC contracts and generating a pre-tax profit of \$900,000 to \$1,000,000 a year, and profits of roughly \$500,000 a year. (Tr. Mar. 1, 1993, pp. 28-29; Tr. May 4, 1993, p. 45; Pltf. Exh. 20.)

E. The 1973 Settlement Agreement.

31. Murdock believed that it had a \$3,635,000 claim against the Government for equitable price adjustment for defective data on the ASROC Contract. The claim was documented in detail and submitted to the Government on June 29, 1973. (Tr. Mar. 4, 1993, pp. 20, 22, 24; Pltf. Exh. 20, 76.)

32. In the summer and fall of 1973, the Navy considered whether to provide financial assistance to Murdock for the ASROC Contract by means of a guaranteed line of credit under the provisions of Regulation V of the Federal Reserve Board (V-Loan)⁹ and the contract financing section of the ASPR. (Tr. Mar. 1, 1993, p. 28.)

⁹ Current federal government contract V-Loan financing procedures are found in the Federal Acquisition Regulation ("FAR") Part 32 - Contract Financing, 48 C.F.R. § 32.000 *et. seq.* (1992).

33. The dispute between Murdock and the Government relating to Murdock's claim for defective data and the need for additional financing was settled by mutual agreement (1973 Settlement). It was documented in a modification to the ASROC Contract that became effective October 25, 1973. (Tr. Mar 1, 1993, pp. 29-30; Tr. Mar. 4, 1993, p. 22; Pltf. Exh. 76.)

34. The 1973 Settlement and modification provided, among other things, that:

a) CCI Corp. divest itself of eighty-one percent (81%) of ownership of Murdock;

b) Murdock obtain a bank loan of approximately \$2,500,000 (V-Loan) of which CCI Corp. would guarantee repayment of \$500,000 until completion of the ASROC Contract and \$250,000 thereafter for a period not to exceed five years, and that the Government would also guarantee repayment of a percentage of the loan;

c) Murdock would release certain of its claims for upward adjustment in contract price and/or for compensation by way of damages for breach of contract in the approximate amount of \$2,135,000; and

d) Murdock would retain its remaining claim of damages against the Government but limited to no more than \$1,500,000.

(Tr. Mar. 4, 1993, pp. 22-24; Pltf. Exh. 76.)

35. Murdock felt the defective data claim against the Government was worth much more than \$1,500,000, but it agreed to the limitation if the Government agreed to provide financing to Murdock through the 1973 Settlement. Boardman believed the V-Loan was inadequate and was not a substitution for modification of the ASROC Contract, and that a V-Loan just postponed the inevitable need to modify the ASROC Contract. Boardman felt, however, that limiting the claim to \$1,500,000 in exchange for a V-Loan and

other contract relief was the correct decision under the circumstances. (Tr. Mar. 4, 1993, pp. 137-38.)

F. Murdock's Restructure.

36. Pursuant to the 1973 Settlement, on November 6, 1973, Murdock became a separate and independent legal entity upon CCI Corp.'s sale of eighty-one percent (81%) of Murdock's stock to Boardman. (Pre-trial Order p. 5, ¶ (3).)

37. At the time Murdock became a separate entity from CCI Corp., Boardman became president of Murdock and Sato became the operations manager. (Tr. Mar. 4, 1993, p. 25; Tr. May 27, 1993, p. 118.)

38. At the time of the sale of the stock to Boardman, Murdock had a net worth of about \$516,000 and a contractual obligation of several million dollars more than it would be paid for the ASROC Contract, therefore Murdock's stock had no value. (Tr. Mar. 4, 1993, p. 147.)

39. Boardman purchased Murdock's stock because he viewed the production of the ASROC launcher as a challenge, and if the launcher could be made, the Government would entertain further financial relief. (Tr. Mar. 4, 1993, p. 148.)

40. Murdock, now restructured as a small business in order to obtain certain contracting advantages, produced exclusively for the Government. (Tr. May 28, 1993, p. 92; Gov't. Exh. F.)

G. Public Law 85-804.

41. Joe C. Cruden (Cruden), the chairman of the Navy Contract Adjustment Board (NCAB) and a very senior Navy civilian, led Murdock to believe that if Murdock could produce an acceptable ASROC launcher, the Government would entertain Public Law 85-804 (P.L. 85-804) relief on the ASROC Contract and resolve Murdock's remaining \$1,500,000 claim against the Government. (Tr. Mar 1, 1993, pp. 45, 198; Tr. Mar. 4, pp. 24, 42.)

42. P.L. 85-804 grants authority to the head of an agency to grant extraordinary relief to a contractor when a contract is considered essential to the national defense. P.L. 85-804 also permits the correction of mutual mistakes. (Tr. Mar. 1, 1993, p. 41.)

43. Authority to grant extraordinary contractual relief under P.L. 85-804 was delegated by the Secretaries of the Military Departments to their respective Contract Adjustment Board (here the NCAB). (Pre-trial Order p. 5, ¶ (7).)

44. To determine essentiality, the NCAB contacts the contracting agency that originally let the contract and the agency that was to receive delivery under the contract. (Tr. Mar. 1, 1993, p. 42.)

45. A determination of essentiality is a predicate for any consideration of relief by a contract adjustment board. (Tr. Mar. 2, 1993, p. 85.)

H. The V-Loan.

46. Prior to the 1973 Settlement with the Government over Murdock's unliquidated claims for defective data and request for relief on the ASROC Contract, Murdock approached the Bank for a further extension of credit. The Bank turned down Murdock's request because it determined Murdock did not have sufficient financial strength. Murdock then asked if a loan would be granted if it could provide a Government guarantee, and the Bank consented. (Tr. Mar. 3, 1993, pp. 79-80.)

47. The Bank was Murdock's exclusive line of credit, with the exception of vendor financing. (Tr. Mar. 3, 1993, p. 77.)

48. On November 6, 1973, pursuant to the 1973 Settlement, Murdock and the Bank entered into V-Loan No. NOfi 5-VL-393. Under the terms of the V-Loan, Murdock received a \$2,500,000 revolving line of credit, of which ninety percent (90%) repayment was guaranteed by the Navy. (Pre-trial Order p. 5, ¶ (4); Tr. Mar. 1, 1993, p. 32; Pltf. Exh. 46.)

49. Murdock's V-Loan was the first V-Loan the Bank had granted. (Tr. Mar. 3, 1993, p. 72.)

50. The term of the V-Loan was three years. It could be extended at the option of the Bank for two additional periods of one year each. (Pltf. Exh. 46.)

51. Monies were advanced to Murdock from the V-Loan through ninety-day notes that were secured by Murdock's government contracts. (Tr. Mar. 3, 1993, p. 58.)

52. Murdock was required to execute and deliver a chattel mortgage or other lien instrument to the Bank on any inventory retained and to assign to the Bank any account receivable created by the sale of such inventory. (Pltf. Exh. 46.)

53. Progress payments due to Murdock under its Government contracts were also assigned to the Bank as collateral. (Pre-trial Order p. 5, ¶ (5).)

54. When Murdock needed to draw down on the V-Loan, it would request certain amounts of money. A note would be executed and funds placed into Murdock's operating account at the Bank. To satisfy the note, funds received by Murdock, including Government progress payments and delivery payments under the contracts assigned to the Bank, were made jointly payable with, and were forwarded directly to, the Bank. The funds would be applied to the oldest loan note. (Tr. Mar 3, 1993, pp. 77-79, 88; Tr. Mar. 4, 1993, pp. 29-30.)

55. Monies were advanced based upon a formula of ninety percent (90%) of accounts receivable and ninety percent (90%) of inventories, finished goods, work in process, and raw materials on hand. (Tr. Mar. 3, 1993, p. 58; Pltf. Exh. 46.)

56. The V-Loan contained a series of provisions that enabled the Government and the Bank to exercise substantial control over Murdock's management and affairs. The Government and the Bank controlled Murdock's ability to bid on new contracts, or obtain other financing, the use of its line of credit, and compensation of management, or change of ownership or control. The selection of key personnel, such as a comptroller, required Government approval. (Pltf. Exh. 46; Gov't. Exh. L.)

57. The V-Loan provided that Murdock would not accept any new contracts or bid on any new contracts in excess of \$100,000 without first obtaining the consent of the Bank and the Navy. (Tr. Mar. 1, 1993, p. 33.)

58. Under Paragraph 6(b) of the V-Loan, Murdock was prohibited, without the prior written consent of the Bank, from:

Us[ing] the proceeds of the loan for any purpose except as working capital in the performance of the assigned defense production contract or contracts or in the performance of such other defense contracts as may be entered into by Murdock during the life of this [Loan] Agreement.

Funds that Murdock received under the V-Loan were not limited to use on the ASROC Contract. (Pre-trial Order p. 5, ¶ (5); Pltf. Exh. 46.)

59. Under Paragraph 6(b) of the V-Loan, Murdock was prohibited from "borrow[ing] or arrang[ing] to borrow from any other source, except in the usual course of trade credit, or on any terms other than those contained in [the Loan Agreement]" without the prior written consent of the Bank, and from mortgaging or pledging any assets to any entity other than the Bank, guaranteeing or becoming obligated upon the indebtedness of any other individual or corporate entity, disposing of any part of its fixed assets valued in excess of \$15,000, or making any direct or indirect investment in any other company or enterprise without the prior written consent of the Bank. (Pltf. Exh. 46.)

60. Certain reports were required from Murdock by the Bank and the Navy. Some of the reports were delayed, but Murdock supplied the Bank with financial information on a regular basis. Murdock provided the Bank with a monthly balance sheet

and a profit and loss statement. (Tr. Mar. 1, 1993, pp. 33-34; Tr. Mar. 3, 1993, p. 70; Tr. Mar. 4, 1993, p. 49.)

61. Under Paragraph 14 of the V-Loan, if Murdock:

default[ed] in the performance of any of its agreements or breach[ed] any warranty or other provision of its agreements, the Loan [would] become due and immediately payable, upon the consent of the [Navy].

(Pltf. Exh. 46.)

62. Under Paragraph 10 of the V-Loan, in the event that Murdock suspended or discontinued business or was adjudicated bankrupt or insolvent, or made an assignment for the benefit of creditors:

then and in every such event, any obligation of the [Bank] to make any further loan [would] forthwith terminate and all of the obligations incurred by [Murdock] by any instrument evidencing any of the obligations incurred [there]under or otherwise [would] be and become forthwith due and payable without presentment, demand, protest or notice of any kind, all of which [Murdock] waive[d].

(Pltf. Exh. 46.)

63. Under Section 8 of the Guarantee Agreement between the Navy and the Bank, the Bank was prohibited from "exercis[ing] any option to accelerate the maturity of the obligation without the prior written consent of the [Navy]." (Pltf. Exh. 46.)

64. If the Navy consented and the Bank declared the loan in default, the Navy was required to pay its guarantee of ninety percent (90%) of the loan's outstanding balance. (Pltf. Exh. 46.)

65. Under Paragraph 9 of the V-Loan, the Navy had:

recourse to any and all assets of [Murdock] to indemnify [the Navy] for any and all losses sustained by [the Navy] under or in connection with the Guarantee Agreement [between the Navy and the Bank].

(Pltf. Exh. 46.)

66. Under Section 6 of the Guarantee Agreement between the Navy and the Bank, all proceeds of any accounts receivable, inventories, and collateral for the V-Loan were to first be applied to full payment of the V-Loan before they were to be applied to payment of any other indebtedness of Murdock to the Bank. (Pltf. Exh. 46.)

67. After execution of the V-Loan, the Navy and Murdock modified the ASROC Contract (Modification P000033) to incorporate certain provisions of the V-Loan into the contract. (Pltf. Exh. 76.)

68. In the latter part of 1974, and early part of 1975, the Bank became concerned that there was some financial deterioration within Murdock. (Tr. Mar. 3, 1993, pp. 60-61.)

69. The Navy did not provide the Bank with audit reports or other financial information related to Murdock that the Navy had developed. (Tr. Mar. 1, 1993, pp. 172-73.)

70. The Bank was not told by Murdock or the Navy that Murdock was encountering production difficulty on the ASROC Contract when the loan was granted. (Tr. Mar. 3, 1993, pp. 80-81.)

I. Other Government Financing.

71. The V-Loan was designed to supplement other Government financing. (Tr. Mar. 1, 1993, p. 37.)

72. Generally, progress payments under Government contracts were payments for progress achieved by the contractor. They were cost-based, in that the contractor was entitled to a payment of a certain percentage of the cost incurred under the contract. The progress payments were usually treated by the contractor as a liability to the Government that must eventually be liquidated through contract performance. (Tr. Mar. 1, 1993, p. 37; Gov't. Exh. AL.)

73. When a contractor who had received progress payments delivered an item, the contractor billed the Government for the full amount of the contract price, but a certain amount of the completion payments would be used to offset and liquidate the outstanding progress payments. (Tr. Mar. 1, 1993, p. 37.)

74. On a small business contract, the standard progress payment rate was 85 percent (85%) of costs incurred, not paid costs. (Tr. Mar. 1, 1993, p. 38.)

75. If a contractor failed to make satisfactory progress, progress payments could be suspended or terminated. From 1973 forward, the Government did not stop progress payments payable to small businesses if progress was unsatisfactory, but instead a loss-ratio factor was applied and calculated on costs incurred and estimated costs to complete the contract. Application of the factor resulted in reduction of the progress payments level to a rate that was less than the standard rate of 85 percent (85%). (Tr. Mar. 1, 1993, p. 39; Gov't. Exh. AL.)

76. It is possible to over-bill on progress payments if the contractor is overrunning the costs of the contract. (Tr. Mar. 1, 1993, p. 40.)

J. Progress on the ASROC Contract.

77. Murdock continued to encounter production difficulties with ASROC from October of 1973 through 1974. Murdock encountered similar design data problems that had previously resulted in Murdock's alleged claim against the Government for defective data. The Naval Ordnance Station in Louisville, Kentucky, had been assembling parts for the ASROC training circle¹⁰ by selective assembly, that is selecting parts and putting them together until they finally found one that would fit. Murdock found that procedure unacceptable and asked that the assembly be redesigned. If the training circle problem, which was a Government problem that had held up production in March or April of 1975, could have been solved, the launchers could have been produced on time. (Tr. Mar. 4, 1993, pp. 31-33; Tr. May 27, 1993, p. 15.)

78. The Navy jealously demanded Murdock's attention to the ASROC Contract at the expense of other defense contracts. For example, Captain Moody (Moody), the Navy procurement officer at Naval Sea Systems Command (NAVSEA Command), was concerned that if Murdock was "given even the slightest chance to get out from under our (the Navy's) control, i.e., in this case by being made financially whole and thereby able to pursue new endeavors, he (Murdock) will pay little attention to the ASROC Contract and

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A training circle is a device that allows the unit to rotate.

the need to meet a delivery schedule will receive the same contemptuous¹¹ treatment as up to now." (Gov't. Exh. BF, BB.)

79. Many individuals from the Navy were monitoring the progress of ASROC production. Multiple meetings were held and Murdock was asked to provide an acceleration plan, as well as a computer program that would allow instant tracking of shortages. Murdock was also to assemble parts in its inventory so a full inventory for all 28 launchers would be available prior to assembly. Between 1973 and 1974, Murdock built an additional building to house the ASROC production. (Tr. Mar 4, 1993, pp. 27-28; 31-34.)

80. To assist in the completion of the ASROC Contract, the Navy installed engineers from Defense Contract Administration Service (DCAS) at Murdock's facility almost daily until its doors closed. (Tr. Mar 2, 1993, pp. 122-25; Tr. Mar. 3, 1993, p. 168.)

81. Boardman and eight or ten managers comprising the senior staff of Murdock were completely occupied by the ASROC Contract. Some of the managerial time should have been devoted to other non-ASROC contracts. It was not until after the end of 1974 that Murdock's management could turn some of its attention to production problems on the non-ASROC contracts, and management of its approximately 350 employees. (Tr. Mar 3, 1993, pp. 168-69; March 4, 1993, p. 34; Tr. May 27, 1993, p. 43.)

82. Because of Murdock's delayed performance on ASROC, Bill Weir (Weir), the Administrative Contracting Officer (ACO) at Defense Contract Administration Service District, Salt Lake City, Utah (DCSAD), held back progress payments on other contracts because he felt that Murdock was over-billing. Weir's action affected Murdock's

¹¹ Definition: insolently abusive and humiliating. Webster's Ninth New Collegiate Dictionary, 1990.)

cash flow, its ability to pay vendors and, consequently, its ability to obtain materials from vendors for the ASROC and non-ASROC contracts. (Tr. Mar. 3, 1993, pp. 169-70, 171-3.)

83. Murdock's senior contract administrator complained to Weir's supervisor that Weir was holding back progress payments, but was told that it was Weir's decision. (Tr. Mar. 3, 1993, pp. 172-73.)

84. Much of Murdock's retained earnings and extraordinary income went to support the ASROC Contract. That factor, compounded with necessary expenditures of funds to establish a long range contract base, severely impacted Murdock's cash flow. (Gov't. Exh. F.)

85. In spite of these difficulties, Murdock did in fact complete and deliver one launcher. Murdock was told by individuals at the Louisville, Kentucky, Naval Ordnance Station and members of the Government inspection team, that it was the best launcher they had ever seen. (Tr. Mar. 4, 1993, p. 42.)

K. The Request for P.L. 85-804 Relief.

86. The V-Loan did not, and was not intended to, solve Murdock's financial problems created by the ASROC Contract. Boardman felt it was now time to follow up on the original premise arrived at with the 1973 Settlement. Since Murdock had complied with the condition that it deliver an ASROC launcher, the Government would now consider Murdock's request for P.L. 85-804 relief. (Tr. Mar. 4, 1993, p. 42.)

87. On August 26, 1974, Murdock submitted to NAVSEA Command a Request for Extraordinary Contractual Relief under the ASROC Contract pursuant to P.L. 85-804. Murdock's request, as amended on September 9, 1974, sought relief to complete

the ASROC Contract in the approximate amount of \$9,139,632 above the fixed-price ASROC Contract value. (Pre-trial Order p. 5, ¶ (6).)

88. At the time the request for P.L. 85-804 relief was submitted, Murdock had drawn down its \$2,500,000 V-Loan line of credit to approximately \$1,500,000, leaving an available balance of approximately \$1,000,000. Murdock had trade credits or accounts payable of approximately \$500,000, and was not past due on these accounts in excess of sixty days. Murdock reported that it had a net equity of \$533,203. In mid-1974, the ASROC Contract produced a negative cash flow in excess of \$100,000 a month. (Tr. Mar. 4, 1993, pp. 43-45; Pltf. Exh 1.)

89. Murdock's request for P.L. 85-804 relief advised that since its net equity was \$553,203, the company required relief in order to continue satisfactory performance on the ASROC and other military contracts. Murdock also advised that to date it had incurred \$8,887,880 in costs on the ASROC Contract and an additional \$4,202,000 was due on purchase orders. It also informed NAVSEA Command that if the relief requested was denied, Murdock would have no alternative other than to file bankruptcy. (Tr. Mar. 1, 1993, pp. 136-40; Pltf. Exh. 1, 2.)

90. The application for P.L. 85-804 relief reflected a total probable cost of completion of the ASROC Contract of \$20,110,868. The total original contract price was \$10,971,236, leaving a difference of \$9,139,632: the amount of relief requested. (Pltf. Exh. 1).

91. If costs are exceeded under a fixed-price contract, the Government cannot be billed for the additional costs. Under a cost-reimbursable contract, the

Government can be billed for whatever cost is incurred to produce the product. (Tr. Mar. 4, 1993, p. 84.)

92. If the ASROC Contract was converted from a fixed-price contract to a cost-reimbursable/no-fee contract, Murdock's cost overrun would be eliminated. (Tr. Mar. 4, 1993, p. 84.)

93. In the latter part of 1974, Boardman informed the Bank of the application for P.L. 85-804 relief and that Murdock could not continue on the ASROC Contract if it was not granted. (Tr. Mar. 3, 1993, pp. 83-85.)

94. By the end of 1974, Murdock was using funds from other contracts, including the payment of \$685,000 from a previous claim against the Government, to support the ASROC Contract. (Tr. Mar. 4, 1993, p. 46.)

95. Murdock was paying its ASROC vendors but not paying its non-ASROC vendors at the same rate. (Tr. Mar. 4, 1993, pp. 144, 160.)

96. The negative cash flow on the ASROC Contract would eventually exhaust Murdock's available credit line. However, Murdock managed to maintain the funds available through the V-Loan line of credit such that it still had approximately \$500,000 in available funds in May of 1975. (Tr. Mar. 1, 1993, p. 135; Tr. Mar. 4, 1993, p. 45.)

97. By communication dated December 1, 1974, NAVSEA Command requested further clarification from Murdock of its P.L. 85-804 request. None of the Government audit reports indicate that Murdock refused to comply with requests from the Government for financial information. (Tr. Mar. 1, 1993, pp. 47, 183; Gov't. Exh. AW.)

98. In the fall of 1974, Moody represented that if Murdock put in a computer plan that allowed him to track shortages, he would submit the P.L. 85-804 relief application in the first week of December. (Tr. May 27, 1993, p. 43.)

99. NAVSEA Command, as the contracting agency for the ASROC launcher, did not officially submit the request for P.L. 85-804 relief to the NCAB until January of 1975. (Tr. Mar. 1, 1993, p. 42.)

100. Once the request for P.L. 85-804 relief was submitted by Moody, Murdock's management, formerly consumed by the ASROC Contract, was able to turn its attention to other substantial production problems occurring on other defense contracts. (Tr. May 27, 1993, p. 43.)

101. As of February 3, 1975, Murdock's cash position was such that it could not meet the payroll for the end of the week. NAVSEA Command responded by authorizing an increase in the progress payment limit from sixty-five percent (65%) to eighty percent (80%), and released progress payments of \$600,788 previously not allowed and expedited payment. The \$600,788, along with \$400,000 in progress payments on other contracts carried Murdock through the month of February and was used to pay ASROC payroll and ASROC vendors. (Tr. Mar. 1, 1993, pp. 156-164; Tr. Mar. 4, 1993, p. 50; Gov't. Exh. BD, BJ.)

102. The Government's intent in modifying the progress payment rate was to keep Murdock viable pending determination of its P.L. 85-804 request. (Tr. Mar. 1, 1993, pp. 162-63.)

L. Non-ASROC Contracts - Nature of the Contracts and Production Difficulties.

103. After the 1973 Settlement, modification of the ASROC Contract, and the V-Loan agreement, Murdock was awarded five other Government fixed-price contracts. (Gov't. Exh. BO, BP, BQ, BR, BS.)

104. The ordnance contracts were of a type that Murdock was familiar with and capable of manufacturing. (Tr. Mar. 4, 1993, p. 40.)

105. Initial costs of the contracts based on the first production units were very high because funds required for tooling would be spent at the beginning of the contract as Murdock established its production line. Profit for contracts such as these would likely occur in production of the very last units due to the applicable learning curve. (Tr. Mar. 4, 1995, pp. 61-67.)

106. The ordnance contracts awarded to Murdock were of such a nature that there was a very "legitimate" possibility of follow-on contracts¹². Murdock sought such contracts partially for that reason. (Tr. Mar. 4, 1993, p. 40.)

107. Murdock's performance on a number of the ordnance contracts resulted in waivers or deviations from the original contracts. A request for wavier (RFW) applies to a certain quantity or certain lot numbers. A request for deviation (RFD) applies to a procedure process requirement and is applicable for the life of the contract. (Tr. Mar. 2, 1993, p. 140.)

¹² Follow-on contracts are related to the original contract and usually provide for an additional quantity. Because the production line is already established and the personnel trained, follow-on contracts have fewer costs and are proportionately more profitable.

The Fin and Nozzle Contract.

► *Description of the contract and the ordnance.*

108. Murdock was awarded Army Contract No. DAAA09-74C-0060 (Fin and Nozzle Contract) on January 18, 1974. (Pre-trial Order p. 9, ¶ (11); Gov't. Exh. BO.)

109. Beginning in the 1960s, Marquardt produced over ten million units of the predecessor to the Fin and Nozzle Contract assembly. Sato set up that original production line at the Clearfield plant. (Tr. Mar. 4, 1993, pp. 15, 37; Tr. May 27, 1993, pp. 117-18).

110. The Fin and Nozzle Contract involved making a base plate, which is a machined assembly that had four small nozzles on it, to which four floating fins are attached. The assembly was to be placed on the back of the 2.75 rocket. The unit weighed approximately a pound and a half to two pounds. A little piece of wire ran down through a piston that was manufactured with a hole in it, and then glass beads were dropped around the wire. The piston was then run through a furnace, the glass beads melted, and the glass and the wire sealed. The wire then became a conductor that fired the rocket. (Tr. Mar. 2, 1993, p. 138; Tr. Mar. 4, 1993, pp. 36-37; Tr. May 27, 1993, pp. 123-24.)

111. The equipment for manufacture of the Fin and Nozzle Contract had been kept in the plant from prior production and Murdock had an established production line. Most of the personnel involved with prior production were still employed at Murdock. However, Murdock had problems getting critical bearings for the old production equipment. (Tr. Mar. 2, 1993, pp. 156-57; Tr. Mar. 3, 1993, p. 161; Tr. May 27, 1993, p. 119.)

112. The bid on the Fin and Nozzle Contract was tight, but Murdock's contract administrator believed the bid price could be achieved and would be profitable. Sato was satisfied with the pricing of the contract. (Tr. Mar. 3, 1993, p. 147; Tr. May 28, 1993, pp. 120-21.)

113. Shortly after the award of the contract, Boardman was told by the previous supplier of the item to the Government that Murdock had bid the contract too low. (Tr. Mar. 2, 1993, pp. 154-55.)

► *Murdock's production difficulties.*

114. Murdock encountered two significant production problems; one in the fall of 1974, and one in the spring of 1975. The first difficulty related to a metal part that had a wire fused in it with glass bead insulation and carried the wire to initiate the ignition of the rocket charge. Ray Chem, the vendor for the glass bead assembly, failed to perform because it had subcontracted the metal parts to another contractor. Murdock arranged to machine the metal parts for Ray Chem so Murdock could, in turn, obtain the glass bead assembly. Murdock would machine the part and send it to Ray Chem for completion, who would in turn supply the glass bead assembly to Murdock. The task consisted of drilling a very small hole through a part that was about three inches long. The hole was drilled from each end and had to meet in the middle. The drill bits that would actually work for the contract were available from only one vendor. The production difficulty produced a shortage of drill bits and was not resolved until November of 1974. Murdock encountered other production difficulties of keeping the broaching machines, the tooling and the fixtures in tolerance. The second vendor problem in the spring of 1975, involved Ray Chem's delay

in obtaining the porcelain that went into the glass beaded piston that was a proprietary item of Coors Brewery. The second problem created some portion of a month's delay in production. (Tr. Mar. 2, 1993, pp. 103-04, 126; Tr. Mar. 3, 1993, pp. 157, 176-77; Tr. Mar. 4, 1993, pp. 58-60; Tr. May 27, 1993, pp. 22-32, 121-122.)

115. Murdock also encountered production problems because a vendor supplied it with steel that contained latent internal cracks that Murdock was unable to detect until it started to use the steel in production. (Tr. May 27, 1993, pp. 30-32.)

116. Many of the fin and nozzle units were rejected. The parts would then have to be reworked, which escalated costs. The age of the equipment also made it difficult to hold tolerances and impacted the quality of the units produced. (Tr. Mar. 2, 1993, pp. 104-05, 138-40; Tr. May 28, 1993, p. 53-54.)

117. The cumulative evidence indicates that the majority of the production problems related to the Fin and Nozzle Contract were attributable to vendors.

► *Murdock's production performance prior to April 8, 1975.*

118. Murdock's production difficulties were reflected in a series of cure notices, explanations as to the cause of the delay in production and contract modifications.

a. On November 8, 1974, the Army issued a 10-day cure notice to Murdock pursuant to the Default Clause of the Fin and Nozzle Contract. (Pre-trial Order p. 9, ¶ (2); Tr. Mar. 2, 1993, p. 179; Tr. Mar 3, 1993, pp. 157-58; Gov't. Exh. X.)

b. On November 15, 1974, Murdock responded to the Army cure notice by advising that the late delivery problems had been resolved. Murdock suggested a revised delivery schedule of 192,000 fin and nozzle assemblies per month starting January

1975, and offered to pay the Government \$4,500 per day for each day that Baldwin Electronics, the entity that would install the fin and nozzle unit in the missile, was delayed. The Baldwin Electronics production line had been shut down twice, for a total of 14 days. (Pre-trial Order p. 9, ¶ (3); Tr. Mar. 2, 1993, pp. 179-80; Gov't. Exh. Y, AA.)

c. On January 17, 1975, Murdock and the Army entered into Contract Modification No. P00010, that established a monthly delivery requirement of 192,000 units per month starting on January 31, 1975. (Pre-trial Order p. 10, ¶ (5); Gov't. Exh. Z.)

d. The Contract Modification No. P00010 resolved a problem identified in a January 10, 1975, letter from the Army related to slippage in delivery of the fin and nozzle assemblies. (Pre-Trial Order p. 9, ¶ (4), p. 10, ¶ (6); Tr. Mar. 3, 1993, p. 160.)

e. Murdock could not meet the requirements of the January 17, 1975, contract modification. Therefore, Murdock requested and received on February 26, 1975, a new contract modification that reduced the monthly delivery requirements to 134,400 units for February 1975, and 144,000 units per month thereafter until the last month of contract performance. Murdock gave consideration for this modification, and it was the last official delivery schedule modification of the Fin and Nozzle Contract. The modification acknowledged that Murdock had delivered 452,592 fin and nozzle units out of the total

contract requirement of 1,390,937¹³ units to the Army through January 31, 1975. (Pre-Trial Order p. 10, ¶ (7).)

f. Murdock's production report for February, 1975, dated March 3, 1975, indicated that Murdock was ahead of delivery on the Fin and Nozzle Contract as modified. (Tr. Mar. 3, 1993, pp. 184-85; Pltf. Exh. 11.)

g. In February 1975, Murdock delivered 136,896 fin and nozzle units to the Government. (Pre-trial Order p. 10, ¶ (8).)

h. In March 1975, Murdock delivered 133,440 fin and nozzle units out of a required 134,400 to the Government. (Pre-trial Order p. 10, ¶ (9).)

119. As of February 20, 1975, the Government planned to solicit for an additional quantity of fin and nozzle units on a sole source basis, from a source that was not presently producing. (Tr. Mar. 2, 1993, pp. 188-89; Gov't. Exh. AA.)

120. The Government had three other suppliers at the time of default. (Tr. Mar. 2, 1993, p. 187.)

► *Projected Losses.*

121. By March of 1975, the major part of the loss on the Fin and Nozzle Contract had already occurred and by April, 1975, Murdock was close to reaching its target costs per unit. (Tr. Mar. 4, 1993, pp. 58, 60.)

¹³ In preparation of the pretrial order, both Government and Trustee counsel mistakenly stated that this contract modification identified the total contract requirement as 938,354 units. In fact, however, this contract modification identified 938,354 units as remaining to be delivered on the contract which had a total requirement of 1,390,937 units. Counsel have agreed to make this correction in the stipulation.

122. As of March 5, 1975, based on an actual cost-to-complete scenario, the DCAS analyst projected that the comparison of Murdock's and DCAS's completion cost were as follows:

	Murdock	DCAS
Labor	\$ 147,729	\$ 190,611
Direct material	\$1,541,082	\$1,539,161
Freight	\$ 80,507	\$ 89,272
Tooling and other	\$ 1,947	\$ 35,000

(Tr. Mar. 2, 1993, pp. 112-117; Tr. May 28, 1993, pp. 81-82; Pltf. Exh. 61.)

123. The result of the DCAS analyst's projections were included in a March 14, 1975, audit that estimated a loss of \$1,344,400 on the Fin and Nozzle Contract. Though there is conflicting testimony, the most credible evidence indicates this figure is accurate. (Tr. Mar. 2, 1993, pp. 133-34; Tr. May 27, 1993, p. 102.)

► *Murdock's production in April and May, 1975.*

124. In April 1975, Murdock delivered 82,560 fin and nozzle units to the Government and reported subcontractor failure as the reason for failure to deliver the entire month's quantity. (Pre-trial Order p. 11, ¶ (11).)

125. Murdock's production report for April, 1975, dated May 5, 1975, indicated that Murdock was approximately 70,000 units behind schedule. Murdock had a cumulative delivery of 805,000 units, and a shortfall of 69,000 units out of a total of 1,390,000 units. The report reflected that the shipment was delayed due to lack of the glass beaded pistons obtained from Coors, but that the vendor problem was solved by a complete parts shipment on April 28, 1975. (Tr. Mar. 3, 1993, pp. 175, 188, 195-96; Tr. May 27, 1993, pp. 98-99; Pltf. Exh. 31.)

126. A request for progress payment submitted by Murdock dated April 25, 1975, indicated that the costs incurred to date and estimated costs to complete the contract totalled the contract price. It did not reflect any loss on the contract. An indication of loss on the contract may have constituted a suspected irregularity in the request for progress payments. (Tr. May 28, 1993, p. 27-30; Pltf. Exh. 83.)

127. On May 5, 1975, Murdock shipped 19,200 fin and nozzle units to the Government and on May 9, 1975, shipped an additional 21,270 fin and nozzle units to the Government. The total fin and nozzle units shipped in May 1975 was 40,470. (Pre-trial Order p. 11, ¶ (12).)

128. Though the number of units shipped to the Government in May of 1975, the month Murdock filed bankruptcy, was less than the contract required, the production line was running smoothly, and was producing 7,000 units a day without difficulty. (Tr. May 27, 1993, pp. 126-27.)

The Delay Plunger Contract.

► *Description of the contract and the ordnance.*

129. On May 3, 1974, Murdock was awarded Army Contract No. DAAA09-74-C-0114 (Delay Plunger Contract). (Pre-trial Order p. 11, ¶ (1); Gov't. Exh. BP.)

130. The delay plunger was installed with the fuses in artillery rounds. When projectiles in the unit started spinning, the delay plunger armed the fuses. The delay plunger was a brass assembly, with very small parts that required fifty-eight machine operations to produce. The Delay Plunger Contract was a high volume contract and, in

comparison to other items produced by Murdock, was relatively simple. (Tr. Mar. 3, 1993, p. 148; Tr. Mar. 4, 1993, p. 37; Tr. May 27, 1993, p. 132.)

131. Murdock manufactured the delay plunger on four ACME multi-spindle machines. The cycle time on the machines was about seven seconds, so that ten items could be manufactured per minute, or six hundred an hour. (Tr. May 27, 1993, pp. 132-33.)

132. The delay plunger had been in production for several years, though not by Murdock. In consideration of the termination of the Vietnam War and the corresponding decline in the need for Government weapons stockpiling, Murdock sought new ordnance work. The delay plunger ordnance appeared to have a four or five year potential. (Tr. Mar. 3, 1993, p. 149; Tr. May 27, 1993, pp. 131-32.)

133. Murdock's contract administrator felt that the contract price was properly bid. (Tr. Mar. 3, 1993, p. 150.)

► *Murdock's production difficulties.*

134. Murdock encountered production difficulties through the use of a Kingsbury machining center supplied by the Government that had been reconditioned and tooled to fit this part. Murdock realized that "you take what you get" when machinery was supplied from Government stores when it made its bid for this contract. (Tr. May 27, 1993, pp. 40-41.)

135. Murdock encountered some difficulty in setting up production at the beginning of the contract. However, in May of 1975, Murdock was producing the delay plungers at a rate of 12,000 to 13,000 a day. (Tr. May 27, 1993, p. 135.)

136. Murdock was able to reduce the labor hours necessary to produce the item down to an appropriate number, but the reduction required three months. (Tr. Mar. 4, 1993, p. 69.)

137. Assembly, operation and inspection of the ordnance was basically satisfactory to the Government. (Tr. Mar. 2, 1993, p. 105.)

► *Murdock's production performance prior to April 8, 1975.*

138. On January 23, 1975, Murdock requested a reduction of the monthly deliveries under the Delay Plunger Contract from 762,000 units per month to 508,000 units per month. (Pre-trial Order p. 12, ¶ (2).)

139. On February 28, 1975, Murdock and the Army entered into Contract Modification No. P00005, that modified the delivery schedule on the Delay Plunger Contract. The new delivery schedule reduced monthly deliveries to 508,000 units per month through the last month of contract performance. This was the last official delivery schedule modification of the Delay Plunger Contract. The modification also acknowledged that a total of 1,016,064 units out of a total requirement of 3,777,025 units had already been delivered under the contract. (Pre-trial Order p. 12, ¶ (3).)

140. During the period from March to April of 1975, Murdock was meeting its production requirements and reducing its personnel requirements each month. (Tr. May 27, 1993, p. 46-47.)

141. On March 14, 1975, Murdock delivered 254,016 delay plungers to the Government. (Pre-trial Order p. 12, ¶ (4).)

142. On April 1, 1975, Murdock delivered 254,016 delay plungers to the Government (the balance of the March shipment). (Pre-trial Order p. 12, ¶ (5).)

143. On April 24, 1975, Murdock delivered 254,016 delay plungers to the Government. (Pre-trial Order p. 12, ¶ (7).)

► *Projected losses.*

144. At least half the costs resulting in losses Murdock projected on the Delay Plunger Contract were due to the escalating cost of copper used in the brass necessary to produce the assembly. The loss as a result of the price escalation in brass comprised as much as \$300,000 to \$400,000 of the projected loss on the contract. The balance of the loss was a result of an increase in labor hours needed to produce the part. (Tr. Mar. 2, 1993, pp. 161-62; Tr. Mar. 4, 1993, pp. 68, 142; Tr. May 27, 1993, pp. 40-41.)

145. As a result, the delay plunger had not been produced at Murdock's should-cost price. (Tr. May 27, 1993, p. 36.)

146. As of March 5, 1975, based on an actual cost-to-complete scenario, the DCAS analyst projected that the comparison of Murdock's and DCAS's completion costs were as follows:

	Murdock	DCAS
Labor	\$ 51,286	\$ 61,738
Direct material	\$ 226,280	\$ 213,079
Freight	\$ (340)	\$ 1,500
Tooling and other	\$ 1,116	\$ as proposed

(Tr. Mar. 2, 1993, pp. 112-117; Tr. May 28, 1993, pp. 81-82; Pltf. Exh. 61.)

147. The result of the DCAS analyst's projections were included in a March 14, 1975, audit that estimated a loss of \$537,900 on the Delay Plunger Contract. (Tr. Mar. 2, 1993, pp. 133-34.)

148. Murdock assumed its figures for projected loss it submitted in April of 1975 were the most recent and current data. (Tr. May 27, 1993, p. 102.)

149. On May 7, 1975, Murdock delivered 190,516 delay plungers to the Government. This shipment, made in the month Murdock filed bankruptcy, failed to meet the required monthly delivery and placed Murdock in default on the Delay Plunger Contract. (Pre-trial Order p. 12, ¶ (8).)

150. It appears that the majority of the anticipated loss related to the Delay Plunger Contract was as a result of escalating brass prices.

The A/B Dispenser Contract.

► *Description of the contract and the ordnance.*

151. On January 17, 1974, Murdock was awarded Contract No. N00104-74-C-B431 (A/B Dispenser Contract). (Pre-trial Order p. 13, ¶ (1); Gov't. Exh. BQ.)

152. The A/B dispenser was an aluminum container approximately twelve to twenty inches in diameter and six to eight feet long, that had a bulkhead on one end and a bulkhead with attachment for fins on the other end. It was located under the wing of an airplane and held three devices that, when dropped from an airplane, created great over-pressure on the ground. (Tr. Mar 4, 1993, p. 36; Tr. May 27, 1993, p. 127.)

153. The A/B Dispenser Contract was a follow-on contract. Murdock had manufactured hundreds of a similar product and still had the tooling from the first contract.

The first contract was just being completed when the new contract was awarded. (Tr. Mar. 3, 1993, p. 151; Tr. May 27, 1993, pp. 128, 157-58.)

154. The device was used in the Vietnam War and in Operation Desert Storm, and there was a continuing demand for the ordnance. (Tr. Mar. 4, 1993, p. 36.)

155. The A/B Dispenser Contract contained an escalation provision that was limited to aluminum only and did not compensate for other inflation costs, but the A/B dispenser was all aluminum. (Tr. Mar 4, 1993, pp. 144-45; Tr. May 27, 1993, p. 157; Gov't. Exh. F.)

156. Murdock's contract administrator believed that Murdock had an extremely "good" price on the follow-on contract, and that Murdock was delivering according to schedule when he left Murdock. (Tr. Mar. 3, 1993, pp. 151, 163.)

157. The difference between the original device and the current device was that the original fins on the outside were opened by hand. The new one had a spring loaded fin and a .45 caliber cartridge that exploded and made the fins spring into place. (Tr. Mar. 3, 1993, pp. 179-81; Tr. May 27, 1993, pp. 155-56.)

158. Although the evidence is somewhat contradictory, the more credible evidence indicates that the A/B Dispenser Contract was not significantly more complicated to build than its predecessor. (Tr. Mar. 3, 1993, p. 179; Tr. Mar. 4, 1975 p. 145; Tr. May 27, 1993, p. 158; Gov't. Exh. F.)

► *Murdock's production difficulties.*

159. Murdock had a vendor problem related to a latch assembly attachment on the fin. At the time of the bankruptcy filing, Murdock had three to four

hundred of the A/B dispensers that were completed and ready to ship except for the delivery of the attachment. (Tr. May 27, 1993, pp. 129-30.)

► *Murdock's production performance prior to April 8, 1975.*

160. On April 1, 1975, Murdock and the Navy entered into Contract Modification No. P00007 that revised the delivery schedule under the A/B Dispenser Contract. This was the last official schedule modification of the A/B Dispenser Contract. (Pre-trial Order p. 13, ¶ (2).)

161. In April 1975, Murdock delivered 300 A/B dispenser units to the Government, in 100-unit lots. The 100-unit lots equalled a semi-truck load. (Pre-trial Order p. 13, ¶ (3); Tr. May 27, 1993, pp. 127-28.)

► *Projected losses.*

162. As of March 5, 1975, based on an actual cost-to-complete scenario, the DCAS analyst projected that the comparison of Murdock's and DCAS's completion costs were as follows:

	Murdock	DCAS
Labor	\$ 34,780	\$ 48,878
Direct material	\$ 448,967	\$ 450,590
Freight	\$ 11,857	\$ as proposed
Tooling and other	\$ 20,559	\$ 25,000

(Tr. Mar. 2, 1993, pp. 112-117; Tr. May 28, 1993, pp. 81-82; Pltf. Exh. 61.)

163. The result of the DCAS analyst's projections was included in a March 14, 1975, audit that estimated a loss of \$124,300 on the A/B Dispenser Contract. (Tr. Mar. 2, 1993, pp. 133-34; Tr. May 28, 1993, pp. 81-82.)

164. It appears that the majority of the production problems related to the A/B Dispenser Contract were a result of vendor delays.

The Zuni Launcher Contract.

▶ *Description of the contract and the ordnance.*

165. On August 1, 1974, Murdock was awarded Navy Contract No. N00104-75-C-B004 (Zuni Launcher Contract). (Pre-trial Order p. 14, ¶ (1); Gov't. Exh. BR.)

166. The Zuni Launcher was a very large item. It had cubes where the ASROC missiles were stored. The Zuni Launcher sat on a large training circle, or cable that allowed the launcher to rotate. The launcher had sector gears so that it could elevate and lower, so the azimuth and the zenith could be controlled. The Zuni Launcher Contract was a repair and maintenance contract. (Tr. May 27, 1993, p. 148-51.)

167. The Zuni launchers had been out of production for some time and Murdock had no prior experience with the launcher. (Tr. May 27, 1993, p. 149.)

▶ *Murdock's production difficulties.*

168. The hydraulic drive motor used in the Zuni launcher was produced by a vendor in Long Island, New York, that had difficulty meeting Murdock's delivery requirements because the item had been out of production for a long time. (Tr. May 27, 1993, p. 149.)

169. In April to May of 1975, Murdock received shipments of the hydraulic motors and the vendor problem was solved. (Tr. May 27, 1993, pp. 149-50.)

170. Murdock encountered cost problems on the Zuni Launcher Contract because the contract only had an escalation clause for the cost of aluminum. (Tr. Mar. 4, 1993, p. 67.)

► Murdock's production performance prior to April 8, 1975.

171. In February 1975, Murdock and the Navy entered into Contract Modification No. P00004 to the Zuni Launcher Contract which revised the delivery schedule under the contract. This was the last official delivery schedule modification of the Zuni Launcher Contract. The new schedule required 500 units in March, 1975, with generally increasing monthly quantities thereafter. A total of 8000 units were required for contract completion. (Pre-trial Order p. 14, ¶ (2); Gov't. Exh. BR.)

172. By a message dated April 15, 1975, Murdock was informed that the first article test samples for the Zuni launcher passed all tests. (Tr. Mar. 3, 1993, p. 164; Tr. May 27, 1993, p. 151; Gov't. Exh. BR.)

173. Murdock's contract administrator did not remember any show cause notices being received by Murdock prior to his leaving the company. (Tr. Mar. 3, 1993, p. 164.)

► Projected profit or losses.

174. Murdock's contract administrator thought the bid for the Zuni Launcher Contract was an extremely safe bid, that Murdock would have no problem with the contract and that it would be very profitable. (Tr. Mar. 3, 1993, p. 155.)

175. As of March 5, 1975, based on an actual cost-to-complete scenario, the DCAS analyst projected that the comparison of Murdock's and DCAS's completion costs were as follows:

	Murdock	DCAS
Labor	\$ 23,052	\$ 29,367
Direct material	\$ 106,051	\$ 106,054
Freight	\$ 126,464	\$ as proposed
Tooling and other	\$ (7513)	\$ 17,513

(Tr. Mar. 2, 1993, pp. 112-117; Tr. May 28, 1993, pp. 81-82; Pltf. Exh. 61.)

176. The result of the DCAS analyst's projections were included in a March 14, 1975, audit that estimated a profit of \$132,200 on the Zuni Launcher Contract. (Tr. Mar. 2, 1993, pp. 133-34.)

The Practice Bomb Contract.

► *Description of the contract and the ordnance.*

177. On May 30, 1974, Murdock was awarded Air Force Contract No. F42600-74-C-2534 (Practice Bomb Contract). (Pre-trial Order p. 15, ¶ (1); Tr. Mar. 3, 1993, p. 10; Gov't. Exh. BS.)

178. The practice bomb was a 25-pound bomb, about four and a half inches in diameter and about eighteen inches tall, that has been in the Air Force inventory for many years and was used for bombardier practice. The devise had fins and a small fuse with a black powder smoke devise that exploded on impact marking the hit. (Tr. Mar. 4, 1993, p. 38; Tr. Mar. 27, 1993, p. 136.)

179. Awards of practice bomb contracts were set aside for small business and other minority businesses. (Tr. Mar. 3, 1993, p. 21.)

180. At the time the contract was awarded to Murdock, two other entities were making the product: one under P.L. 85-804 relief and the other ready for first-article inspection. Murdock decided it would employ a different manufacturing procedure not employed by any other contractor whereby a piece of low carbon steel would be formed or pressed into shape, as opposed to bomb bodies machined from castings. (Tr. Mar. 3, 1993, pp. 22-24, 153; Tr. Mar. 4, 1993, pp. 38, 138.)

181. After a slug of steel was placed in the press, the press activated and the slug was shaped into a bomb. Additional machine assembly was required to place the fins on the bomb, and then the bomb was phosphate coated to prevent corrosion. (Tr. Mar. 2, 1993, pp. 141-42.)

182. The practice bomb had originally been made using gray cast iron, but grey cast iron had become very expensive. Manufacture with gray cast iron also caused environmental and safety hazards. (Tr. Mar. 3, 1993, p. 152; Tr. Mar. 4, 1993, p. 38.)

183. The Air Force desperately needed practice bombs at the time the contract was awarded and was interested in Murdock's novel approach to manufacturing the practice bombs. (Tr. Mar. 3, 1993, pp. 24, 165.)

184. Murdock wanted to obtain the Practice Bomb Contract because the Vietnam War was over and the Air Force used thousands of practice bombs during peace time. The Government was buying approximately 1,200,000 practice bombs annually. (Tr. Mar. 3, 1993, pp. 6, 153; Tr. May 27, 1993, p. 137.)

► *Murdock's production difficulties.*

185. A 300,000 square foot warehouse and manufacturing facility was constructed for production of the practice bomb. (Tr. May 27, 1993, pp. 138, 146.)

186. Murdock installed a large hydraulic press and encountered difficulty getting it aligned. As a result, when the bombs were punched out in the press, the thickness of the walls of the bomb varied in thickness. If the practice bombs contained this kind of variance, they required additional machining that was very expensive to perform. (Tr. Mar. 2, 1993, p. 106; Tr. May 28, 1993, pp. 58-59.)

187. Murdock obtained fin assemblies from a subcontractor in Paramount, California, some of which were not to specifications. As a result, Murdock requested a deviation/waiver that was granted by the Government. (Tr. May 27, 1993, pp. 139-41; Pltf. Exh. 8.)

► *Murdock's production performance prior to April 8, 1975.*

188. Modifications of the Practice Bomb Contract increased the quantity from the original contract amount. (Tr. Mar. 3, 1993, p. 12.)

189. On October 13, 1974, Murdock and the Air Force entered into Contract Modification No. P00003 that altered the delivery schedule under the Practice Bomb Contract. The initial monthly production delivery was extended for three months and was scheduled to start in January 1975. This was the last official delivery schedule modification of the Practice Bomb Contract. (Pre-trial Order p. 15, ¶ (2); Tr. Mar. 3, 1993, p. 12; Pltf. Exh. 3.)

190. From January to March, 1975, it was the Air Force's opinion that Murdock was approaching a point where Murdock could start to fabricate and deliver bombs. (Tr. Mar. 3, 1993, p. 30.)

191. In February and March of 1975, Murdock submitted various RFWs and RFDs to modify production requirements. These requests were all approved by the Air Force. (Pre-trial Order p. 15, ¶¶ (3), (4).)

192. None of these RFWs and RFDs were based on defective specifications. All waivers and deviations were granted for Murdock's convenience and for the Government's convenience to facilitate performance of the contract, and resulted in a nominal price adjustment on the Practice Bomb Contract. (Tr. Mar. 3, 1993, pp. 13-16; Tr. May 27, 1993, pp. 143-45.)

193. The other contractors who were awarded practice bomb contracts had not requested waivers or deviations, but Murdock's approach to manufacturing the practice bomb was unique and could have accounted for the fact that the deviations came only from Murdock. It is not unusual for contractors in a manufacturing setting to have waivers and deviations. (Tr. Mar. 3, 1993, pp. 23-24, 28.)

194. On April 10, 1975, Murdock shipped 1600 practice bombs to the Government. Sixteen hundred practice bombs equalled a semi-truck load full. (Pre-trial Order p. 15, ¶ (5); Tr. May 27, 1993, p. 143)

195. The April 10, 1975, shipment was less than Murdock's required monthly delivery quantity. (Tr. Mar. 3, 1993, pp. 32-33.)

196. The fact that a contractor is late in delivery does not necessarily mean the Air Force will default the contract. If the contractor appears to be making progress and deliveries could begin in a relatively reasonable amount of time, the Air Force could extend the schedule. (Tr. Mar. 3, 1993, pp. 26-27.)

197. Without the assistance of a contract file, which the Government was unable to locate, the Air Force contracting officer could not recall whether the Air Force issued a show cause or cure notice on the Practice Bomb Contract during February to April of 1975. Murdock's contract administrator testified that no cure notice was issued on the Practice Bomb Contract during the time he was employed by Murdock. (Tr. Mar. 3, 1993, pp. 8, 33, 165.)

► *Projected losses.*

198. Cost overruns for the Practice Bomb Contract were partially a result of Murdock underestimating the cost of refurbishing a conveyerized facility used for plating phosphates on the practice bombs. (Tr. Mar. 4, 1993, p. 69; Tr. May 27, 1993, p. 58.)

199. Murdock incurred additional, unanticipated costs resulting from a delivery of lower cost, dirty or scaly steel, that was unsuitable for production of practice bombs. Of the 959,000 pounds of steel delivered under the Practice Bomb Contract, 400,000 pounds were rejected. Some of the steel was resold to a third party, but the \$120,000 cost of the scaly steel was not fully recouped. (Tr. Mar. 2, 1993, p. 110; Tr. Mar. 4, 1993, pp. 70-71; Tr. May 27, 1993, pp. 49-54.)

200. The Practice Bomb Contract contained a twenty-five percent (25%) escalation clause that allowed Murdock to recoup the excess cost of an increase in steel

prices. The escalation clause in the contract was inadequate to cover the increased cost of material. Murdock was going to lose the difference of two thousandths of a dollar per pound times seventeen million pounds. (Tr. Mar. 3, 1993, pp. 153-54, 178; Tr. May 27, 1993, pp. 54-57.)

201. Murdock's contract administrator believed that the bid price for the Practice Bomb Contract was an accurate price. The Practice Bomb Contract was projected to just about break-even. (Tr. Mar. 1, 1993, p. 57; Tr. Mar 3, 1993, p. 154.)

202. As of March 5, 1975, based on an actual cost-to-complete scenario, the DCAS analyst projected that the comparison of Murdock's and DCAS's completion costs were as follows:

	Murdock	DCAS
Labor	\$ 61,764	\$ 90,740
Direct material	\$3,604,046	\$3,604,995
Freight	\$ 428,380	\$ as proposed
Tooling and other	\$ 49,912	\$ as proposed

(Tr. Mar. 2, 1993, pp. 112-117; Tr. May 28, 1993, pp. 81-82; Pltf. Exh. 61.)

203. The result of the DCAS analyst's projections were included in a March 14, 1975, audit that estimated a loss of \$177,400 on the Practice Bomb Contract. (Tr. Mar. 2, 1993, p. 133-34.)

204. The labor hours projected to complete the Practice Bomb Contract used by the DCAS analyst and included in the audit, were based on the machining concept, not on the pressing concept. (Tr. Mar. 2, 1993, p. 118.)

205. Sandidge believed the actual loss on the Practice Bomb Contract would be in excess of \$700,000, but Boardman was unaware of any data in March of 1975

that indicated a loss of \$700,000 on the Practice Bomb Contract. The more credible loss projection was \$177,400. (Tr. Mar. 2, 1993, pp. 86-87; Tr. May 27, 1993, p. 103.)

206. It appears that the majority of the production problems related to the Practice Bomb Contract were a result of attempting a new method of production, and that the increased costs were the result, in part, of the loss on the scaly steel.

Murdock's Facilities Claim.

207. Under Facility Contract DAAA09-74-C-0110 (Facilities Contract), Murdock had responsibility for maintenance, layaway and refurbishment of Government industrial production equipment approaching fourteen million dollars in value. (Pltf. Exh. 1.)

208. It is unclear from the record if Murdock had more than one facilities contract. (Tr. Mar. 1, 1993, pp. 130-34.)

209. The Facilities Contract was not assigned as collateral on the V-Loan. (Tr. Mar. 1, 1993, p. 64.)

210. Murdock had a claim against the Government for the quarterly abnormal maintenance and repair of Government-owned equipment at the Ogden facility over a period of time during the 1960's. (Tr. Mar. 4, 1993, pp. 51-52.)

211. Murdock was paid \$684,932 on the facilities claim, and the funds were deposited with the Bank. (Tr. Mar. 4, 1993, pp. 51-52.)

212. By correspondence dated in March of 1975, the Government indicated that the continued operation as a source of supply under Facilities Contract DAAA09-74-C-0110 remained essential to the national defense. (Gov't. Exh. AE.)

Initiator Contract.

► *Description of the contract and the ordnance.*

213. An initiator is a small device made of chromatic steel used primarily in charges. It is an explosive device used to blow a marker attached to certain sonobouys to the surface of the water to enable them to be located. (Tr. Mar. 4, 1993, pp. 71-72; Pltf. Exh. 19.)

► *Murdock's projected losses.*

214. Murdock submitted a bid for the Initiator Contract and the Government had sixty days to accept. The Government requested an extension of another sixty days, which Murdock granted. During the time the Initiator Contract bid was pending, Murdock did not have the option to increase or modify its bid. The Government accepted Murdock's bid ten days into the extension period in May of 1974. During the same ten days, the price of chromatic steel doubled. (Tr. Mar. 4, 1993, pp. 72-73.)

215. During March of 1975, Murdock had not begun production on the Initiator Contract, although much of the required material had been ordered from vendors. (Pltf. Exh. 20.)

216. Losses were projected on the Initiator Contract of \$796,900. (Pltf. Exh. 61.)

M. The Total Solution.

217. The Navy determined it would review Murdock's entire operation involving all Department of Defense contracts and not just its request for relief on the ASROC Contract. Cruden was trying to effectuate a total solution to Murdock's financial

problems, including talking to the other branches of the armed services, because Murdock required additional financing under their non-ASROC contracts. (Tr. Mar. 1, 1993, pp. 68-69; Tr. Mar. 4, 1993, p. 77; Pltf. Exh. 56.)

218. The NCAB's draft Memorandum of Decision concerning P.L. 85-804 relief to Murdock under the ASROC Contract expressed the view that "unless [P.L. 85-804] relief is forthcoming on [Murdock's Army and Air Force] contracts . . . Murdock will not have the necessary financial resources to complete ASROC." The NCAB noted that the Army and Air Force Contract Adjustment Boards had not yet received requests for relief from Murdock. (Pre-trial Order p. 6, ¶ (10).)

Essentiality.

219. The Navy considered Murdock essential to the national defense, and it was not the essentiality of the contract, but the essentiality of Murdock for the Navy's program that was important. The fact that the other services may or may not determine that their contracts were essential to the national defense did not have any impact on the determination by the Navy that Murdock was essential to the national defense and that the ASROC Contract itself was essential to the national defense. (Tr. Mar. 2, 1993, pp. 27-29.)

220. In September of 1974, Weir, the ACO in Salt Lake City, Utah, proceeded to gather information related to Murdock's P.L. 85-804 relief request. He requested from the other branches of the service a determination of whether Murdock was considered essential to the national defense. (Pltf. Exh. 13.)

221. The record is unclear whether the Army responded regarding Murdock's essentiality in relation to the Fin and Nozzle Contract. An Army fact sheet dated

February 20, 1975, indicated the Army planned to solicit for an additional quantity on a sole source basis from another contractor who was the only other mobilization base source. In June of 1975, the Army indicated the supplies were available from three other sources. (Tr. Mar. 2, 1993, pp. 186-91; Pltf. Exh. 50; Gov't. Exh. AA.)

222. By correspondence dated mid-October of 1974, DCASD was informed by the Army that Murdock *was essential* to the national defense in relation to the Delay Plunger Contract, (as well as DAAA09-74-C-0110, a facilities contract). (Tr. Mar. 2, 1993, pp. 196-98; Pltf. Exh. 13; Gov't. Exh. AM.)

223. By Navy correspondence dated October 24, 1974, DCASD was informed by the Navy that Murdock was *not essential* to the national defense in relation to the A/B Dispenser Contract. (Gov't. Exh. AU.)

224. By correspondence dated October 24, 1974, DCASD was informed by the Navy that Murdock was *not essential* to the national defense in relation to the Zuni Contract. (Gov't. Exh. AU.)

225. Hill Air Force Base, Ogden, Utah, responded on October 10, 1974, that Murdock was *not essential* to the national defense on the Practice Bomb Contract. Hill AFB contracting officials never changed their position that Murdock was not essential to the national defense. (Tr. Mar. 3, 1993, pp. 18-19; Gov't. Exh. AQ, AS, AT.)

226. By memorandum dated March 11, 1975, in response to an inquiry from the Assistant General Counsel, Army Contract Adjustment Board (ACAB), the procuring contract officer indicated that, due to inventory build-up and other factors, Army Munitions Command (ARMCOM) was withdrawing its position that Murdock was essential

to the national defense on the Delay Plunger Contract, but that Murdock remained essential on the Facilities Contract. (Tr. Mar. 2, 1993, pp. 201-02, 205-08; Pltf. Exh. 13; Gov't. Exh. AN.)

227. In spite of having received information from the Air Force that Murdock was not essential on the Practice Bomb Contract, from the Army that Murdock was not essential on the Delay Plunger Contract, and knowing it was not essential on the Zuni Contract, both drafts of the April 1975 decision of the NCAB indicated that most of Murdock's non-ASROC contracts were essential to the national defense. It was noted, however, that the Navy's A/B dispenser could be procured elsewhere. (Pltf. Exh. 19, 20.)

228. Cruden indicated in correspondence dated April 9, 1975, that "[i]nformal contact with the Army indicates that essentiality exists on certain of their contracts on which Murdock is likewise filing an application for relief under P.L. 85-804." (Pltf. Exh. 60.)

October, 1974 Through March, 1975.

229. The projected P.L. 85-804 ASROC Contract relief was not without opposition within the Navy. It is apparent that certain Navy departments were dissatisfied with the effort of other departments to grant P.L. 85-804 relief to Murdock. (Gov't. Exh. AY, BB, BF.)

230. In February of 1975, Moody considered as an alternative that all work at Murdock on the ASROC launchers be cancelled, or that the number of launchers produced by Murdock be reduced, and that production instead proceed at Naval Ordnance

Station in Louisville, Kentucky. That suggestion was considered to be uneconomical by the NCAB. (Pltf. Exh. 20; Gov't. Exh. BF.)

231. In February of 1975, Murdock was projecting a loss on the ordnance contracts of \$2,757,200. This figure included the Fin and Nozzle Contract (-\$1,344,400), the A/B Dispenser Contract (-\$124,300), the Delay Plunger Contract (-\$537,900), the Practice Bomb Contract (-\$177,400), and the Initiator Contract (-\$796,900)¹⁴. Murdock was projecting a profit on the Zuni Launcher Contract (+\$132,200), the M148 Adaptor Contract¹⁵ (+\$75,700) and the 2.75 Rework Contract (+\$15,800). (Tr. Mar. 4, 1993, p. 56; Pltf. Exh. 61; Gov't. Exh. BE.)

232. In March of 1975, the Government audit report prepared by the Defense Contract Audit Agency (DCAA), reflected losses on the various ordnance contracts that were the same as the amounts Murdock projected by its February 1975 in-house status of contracts report. (Pltf. Exh. 61; Gov't. Exh. BE.)

233. In considering and issuing its draft Memorandum of Decision concerning P.L. 85-804 relief to Murdock under the ASROC Contract, the Navy reviewed and considered Government technical and audit reports, and Murdock's financial and status reports on all of its existing Government contracts, including the ASROC Contract as well as the five non-ASROC contracts showing projected losses. (Pre-trial Order p. 5, ¶ (7).)

¹⁴ The amount of loss on this contract was significantly altered by conversion to a no-cost termination.

¹⁵ Neither the M148 Adaptor nor the 2.75 Rework Contracts are at issue here. By correspondence dated October 24, 1974, DCAS was informed that Murdock was not essential to the national defense in relation to the M148 Adapter. (Gov't. Exh. AU.)

234. Sandidge believed the losses would be closer to \$3,000,000, but there is no credible evidence to support the \$3,000,000 figure and it is inconsistent with the DCAA report. (Tr. Mar. 1, 1993, pp. 58, 70.)

235. Immediately prior to a March 24, 1975, meeting with the NCAB, Boardman and Cruden met to discuss Murdock's application for P.L. 85-804 relief and solutions on the other defense contracts. (Tr. Mar. 4, 1993, pp. 74-75.)

236. Cruden indicated that he wanted to make Murdock financially whole and wanted to know the best way to accomplish that goal. Boardman indicated that Murdock needed P.L. 85-804 relief on the Fin and Nozzle and Delay Plunger Contracts, that the Initiator Contract should be terminated at no cost, and that no Government action was required on the A/B Dispenser and Practice Bomb Contracts because Murdock could absorb those losses. (Tr. Mar. 4, 1993, pp. 74-77.)

237. The Navy was trying to make a determination of whether to buy some amount of ASROC launchers less than the twenty-eight called for in the contract. Regardless of how many launchers the Navy decided to buy, the underlying solution proposed was conversion of the ASROC Contract to a cost reimbursement/no-fee contract, and conversion of about \$7.8 million dollars into recoverable costs. (Tr. Mar. 2, 1993, p. 30; Gov't. Exh. L.)

238. On March 24, 1975, Murdock representatives met with the NCAB officials to discuss the requested ASROC P.L. 85-804 relief. Murdock advised that it had experienced numerous personnel problems, and that an intensive review conducted in preceding months revealed numerous examples of performance and financial problems

concerning the non-ASROC contracts. Various problems were discussed in detail with the Government, but the problems concerning the non-ASROC contracts did not affect the Navy's decision to grant P.L. 85-804 relief, or its commitment to a global solution. (Tr. Mar. 1, 1993, pp. 62-63, 150; Tr. Mar. 4, 1993, pp. 91-97, 148-58; Pltf Exh. 62; Gov't. Exh. L, AH.)

Fin and Nozzle Contract Solution.

239. The solution proposed for the Fin and Nozzle Contract was either conversion from a fixed-price to a cost-plus contract, or the length of the contract would be adjusted in order to make the contract profitable. (Tr. May 27, 1993, pp. 35-36, 72, 85-88.)

240. At the March 24, 1975, meeting, Murdock understood that Army Missile Command (MICOM) was waiting for contact from Murdock relative to a solution for the Fin and Nozzle Contract. (Tr. Mar. 4, 1993, p. 89; Gov't. Exh. L.)

Delay Plunger Contract Solution.

241. In spite of the Army's determination that Murdock was not essential on the Delay Plunger Contract, Boardman's notes from the March 24, 1975, meeting with Cruden and others, reflect that he was told by John Krohn (Krohn), chief of civilian procurement for ARMCOM, that a solution on the Delay Plunger Contract would be worked out and Cruden would be notified on Monday via Mr. Hammond. Hammond was the ombudsman for the command who assisted civilian contractors. Hammond died five years ago. (Tr. Mar. 2, 1993, pp. 202-03; Tr. Mar. 4, 1993, pp. 88-89; Gov't. Exh. L.)

242. The solution proposed for the Delay Plunger Contract was that Murdock would seek P.L. 85-804 relief from the Army and the contract would either be canceled at no cost, as was planned for the Initiator Contract, or that there would be

additional units ordered to enable Murdock to recoup its losses. The only way to add additional quantities was to exercise any existing options available on the initial contract, or to run a procurement exercise to advertise for additional quantities. Boardman believed that the second option was not possible, and that a solution on the Delay Plunger Contract would require some extraordinary method outside of the ordinary contractual procedures. (Tr. Mar. 4, 1993, p. 76; Tr. May 27, 1993, pp. 72-73, 78-79.)

243. The original quantity of items awarded on the Delay Plunger Contract was 2,810,725 units. In May of 1974, the Government exercised an option to increase by 966,300 units for total units under the contract of 3,777,025. An option clause in the contract provided for an increase up to 1,610,725 units. After the Government exercised its option, the balance remaining under the option clause was 644,425 units. (Stipulation of the parties reached in open court contained in Tr. May 27, 1993, pp. 84-85.)

244. Boardman's notes regarding the actions of ARMCOM and MICOM for a solution of the Fin and Nozzle and the Delay Plunger Contracts were given to Cruden in anticipation that he would use them in some manner relative to Murdock's P.L. 85-804 applications on those contracts. (Tr. Mar. 4, 1993, p. 89.)

A/B Dispenser Contract Solution.

245. The total solution did not anticipate P.L. 85-804 relief on the A/B Dispenser Contract. (Tr. Mar. 2, 1993, p. 12; Tr. Mar 4, 1993, p. 102.).

246. If Murdock was successful in getting a new follow-on contract, Murdock would probably break even on this contract, or could absorb the \$124,000 anticipated loss. (Pltf. Exh. 22.)

Zuni Launcher Contract Solution.

247. P. L. 85-804 relief was not necessary for the Zuni Launcher Contract because it showed a projected profit of \$132,000. (Tr. Mar. 4, 1993, pp. 76, 102; Gov't. Exh. M.)

Practice Bomb Contract Solution.

248. The more credible evidence is that in March of 1975, Boardman did not reach an understanding with Cruden that P.L. 85-804 relief would be filed on the Practice Bomb Contract, and such relief was not necessary in order to solve Murdock's financial problems. (Tr. Mar. 2, 1993, p. 11; Tr. Mar. 4, 1993, pp. 77, 165-68.)

249. The Air Force could not give P.L. 85-804 relief on the practice bomb because it had already determined in October of 1974 that Murdock was not essential to the national defense. (Tr. May 28, 1993, pp. 122-23.)

250. Murdock was informed that the Air Force would not take any action regarding the Practice Bomb Contract in March of 1975, but that if further difficulties arose, they would consider P.L. 85-804 relief. (Tr. Mar. 4, 1993, p. 101; Gov't. Exh. M.)

Initiator Contract Solution.

251. Boardman discussed the Initiator Contract with Cruden at the March 24, 1975, meeting and indicated there was no way Murdock could perform. Cruden indicated that the Government would make a no-cost termination on the Initiator Contract and took steps to eliminate the Initiator Contract. (Tr. Mar. 4, 1993, pp. 76, 82; Gov't. Exh. M.)

252. The initiator could be procured from sources other than Murdock.
(Pltf. Exh. 19.)

253. The NCAB decided to terminate the Navy Initiator Contract as a no-cost termination. The decision was to be the subject of a separate memorandum decision.
(Pltf. Exh. 20.)

N. The April 7-8, 1975, NCAB Meeting.

254. On April 7, 1975, ten or twelve people from the NCAB staff and from DCAS, including Cruden and Sandidge, met with Boardman to continue discussions of the ASROC P.L. 85-804 request for relief. A draft Memorandum of Decision prepared earlier by the NCAB staff was provided to Murdock in order to discuss the details of a possible relief package should the NCAB decide to grant relief. (Tr. Mar. 1, 1993, pp. 66-67; Tr. Mar. 4, 1993, pp. 78-79; Pltf. Exh. 19.)

255. In preparation for the April 7, 1975, meeting, the NCAB and its staff reviewed and considered Government technical and audit reports and Murdock's financial and status reports on all of its existing Government contracts. Boardman indicated that the provisions in the Draft Memorandum of Decision were absolutely not acceptable because of allegations of wrongdoing contained in the document. Cruden agreed and instructed that the document be redrafted to omit those allegations. (Tr. Mar. 4, 1993, pp. 80-81.)

Interface With Other Services.

256. Boardman believed that in the months of January to March, 1975, the Navy, including Cruden, was discussing the P.L. 85-804 relief with the Army Contract Adjustment Board (ACAB). (Tr. Mar. 1, 1993, p. 201; Tr. Mar. 4, 1993, pp. 174-75.)

257. Mr. Muse, the secretary of the NCAB, as well as Cruden and Joe Duffy, legal counsel from the Navy General Counsel's Office, were discussing with the other board members the possibility of P.L. 85-804 relief. The Navy would not go forth with extraordinary relief on the ASROC contract unless its sister services also granted relief in order to accomplish a total solution. (Tr. Mar. 1, 1993, pp. 71, 100, 197-98.)

258. Murdock was instructed by Cruden to submit P.L. 85-804 applications to the Army for the Fin and Nozzle and the Delay Plunger Contracts. (Tr. Mar. 1, 1993, pp. 203-04; Tr. Mar. 4, 1993, pp. 76-77, 82.)

ASROC Contract Solution.

259. On April 7, 1975, the NCAB issued a draft Memorandum of Decision concerning extraordinary contractual relief to Murdock. As stated by the United States Court of Appeals for the Federal Circuit, the April 7, 1975, the NCAB Memorandum of Decision was:

final and converted the fixed-priced [ASROC] contract to a cost reimbursement/no-fee contract that obligated the Government to pay Murdock its cost incurred in performing the contract. The Government materially breached the contract by failing to reimburse Murdock. That breach relieved Murdock of the default termination and its consequences . . . The termination for default clause in Murdock's contract . . . automatically converted Murdock's wrongful default termination into a termination for convenience. . . .

Murdock Machine & Engineering Co. of Utah v. United States, 873 F.2d 1410, 1413 (Fed. Cir. 1989). (Pre-trial Order p. 6, ¶ (8).)

260. On April 8, 1975, the NCAB reconvened and again presented Murdock with a copy of a draft Memorandum of Decision. (Pre-trial Order p. 6, ¶ (9).)

261. On April 8, 1975, the Office of the Navy Controller authorized NAVSEA Command to amend the ASROC Contract to increase the progress payment rate to one hundred percent (100%) progress payments. (Tr. Mar. 1, 1993, p. 78; Tr. Mar. 4, 1993, p. 82.)

262. During the meetings on April 7 and 8th, 1975, Boardman was never told that the Navy was seeking alternative sources for procurement of the ASROC launchers. (Tr. Mar. 2, 1993, pp. 15-16, 31.)

263. In the April 8, 1975, meeting, Cruden said that the Navy would take care of talking to the other services in the interest of a total solution, that Boardman was not to contact them, and that Cruden would take care of it. Murdock was not to discuss the Delay Plunger Contract with Krohn, but was to allow Cruden or his staff to do so. Boardman was only to prepare the two P.L. 85-804 applications for the Fin and Nozzle and the Delay Plunger Contracts and submit them. (Tr. Mar. 4, 1993, p. 105; Tr. May 27, 1993, pp. 71-72.)

264. The NCAB did not have the authority to evaluate or determine that the Fin & Nozzle and Delay Plunger Contracts with the Army were essential to the national defense under P.L. 85-804. (Tr. Mar. 1, 1993, pp. 70-71.)

265. One of the initial drafts of the Memorandum of Decision of the NCAB recited that the Contract Adjustment Boards had indicated that such relief as may be necessary under those contracts will be forthcoming. That phrase was lined through and, instead, the revised draft indicated that the Contract Adjustment Boards had not yet

received a request for relief from Murdock. (Tr. Mar. 1, 1993, pp. 198-200; Pltf. Exh. 19, 20.)

266. The NCAB was not going to provide a lump-sum payment to Murdock upon conversion to cost reimbursement/no-fee status, but rather was going to provide incremental payments on the ASROC Contract tied to further performance. (Tr. May 27, 1993, p. 13.)

267. As a result of the incremental payments, Boardman believed that a cumulative total of \$12,000,000 would be received by Murdock in calendar year 1975. The acceleration plan requested by Moody of NAVSEA Command would accelerate the procurement of all the hardware by July, 1975, and the last ASROC launcher would be produced by November of 1975. (Tr. May 27, 1993, pp. 14-15.)

268. One of the provisions of the agreement was that all future payments by the Government under the ASROC Contract would be deposited into a controlled special bank account administered by the Office of the Comptroller of the Navy (NAVCOMPT). Withdrawals would be limited to expenditures for costs that were approved or concurred in by NAVCOMPT as necessary for the performance of the contract. (Tr. Mar. 4, 1993, p. 171; Pltf. Exh. 20.)

Underbidding.

269. All drafts of the NCAB proposed P.L. 85-804 relief on the ASROC Contract stated that "one of the most disturbing facets of this case is the fact that Murdock underbid on several solicitations after the guaranteed [V-Loan] was provided." (Pltf. Exh. 19, 20.)

270. Murdock did not purposely underbid the contracts (a buy-in) in hope of winning the contracts and subsequent contracts which would allow it to come out whole. (Tr. Mar. 1, 1993, pp. 72-73; Tr. Mar. 4, 1993, p. 164.)

271. Murdock usually bid contracts at an anticipated profit of ten percent (10%), in addition to general administrative costs, burden, labor and material. (Tr. Mar. 3, 1993, p. 145.)

Conclusion of the NCAB Meeting.

272. The April 8, 1975, meeting concluded with the NCAB advising Boardman to return to Utah to prepare the two P.L. 85-804 applications for the Fin and Nozzle and Delay Plunger Contracts. The Government would prepare the paper work for the ASROC Contract modifications. A team from NCAB would travel to Utah the following week with between \$1,300,000 to \$1,400,000, specific instructions regarding how to administer the money, and instructions regarding the conversion of the ASROC Contract to a cost reimbursement/no-fee contract. (Tr. Mar. 4, 1993, p. 83; Gov't. Exh. M.)

273. By letter dated April 15, 1975, Murdock did in fact submit the application for P.L. 85-804 relief to the Army on the Fin and Nozzle Contract requesting relief in the amount of \$1,362,678. (Pre-trial Order p. 10, ¶ (10); Tr. Mar. 4, 1993, p. 109; Tr. May 27, 1993, pp. 20-21, 79; Pltf. Exh. 23.)

274. By letter dated April 16, 1975, Murdock did in fact submit the application for P.L. 85-804 relief to the Army on the Delay Plunger Contract requesting relief in the amount of \$584,049.12. (Pre-trial Order p. 12, ¶ (6); Tr. Mar. 4, 1993, p. 109; Pltf. Exh. 24.)

275. Murdock was informed that within thirty days from the April 8, 1975, meeting, the Navy was expecting an Army decision that the Fin and Nozzle Contract would be converted from fixed-price to cost-plus. (Tr. Mar. 4, 1993, p. 100, 174; Gov't. Exh. M.)

276. Murdock was informed that within thirty days from the April 8, 1975, meeting, the Navy was expecting an Army decision that the Delay Plunger Contract would either be cancelled at no cost or that sufficient quantity would be added to the contract by contract amendment to absorb the initial losses and make the contract profitable. (Tr. Mar. 4, 1993, pp. 100-101; Gov't. Exh. M.)

277. On April 9, 1975, Cruden indicated in a memorandum to the Comptroller of the Navy, that informal contact with the Army indicated that essentiality existed on certain of the Army's contracts, and Cruden requested the progress payments on the ASROC Contract be increased to one-hundred percent (100%). (Tr. Mar. 2, 1993, pp. 10-11; Pltf. Exh. 60.)

Elimination of Murdock's claim against the Government.

278. In conformity with the original 1973 Settlement that P.L. 85-804 relief would be provided in exchange for Murdock's waiver of its \$1,500,000 claim for defective data, one of the provisions of the draft agreement was that the amendment to the ASROC Contract granting P.L. 85-804 relief would include a general release of all claims, arising prior to the date of amendment, and related to the performance of the ASROC Contract. (Pltf. Exh. 20.)

O. Failure of the Total Solution.

279. On April 11, 1975, F. J. Burchfield (Burchfield), Director of Banking and Contract Financing for the Department of the Navy and Sandidge's supervisor, indicated in a memorandum to the Assistant Secretary of the Navy, that the Procuring Contract Officer for the ASROC Contract had requested that the NCAB hold up issuance of the decision for 30 days in order to determine if the ASROC launcher was available from some other source. This request was made even though the ASROC Contract had been converted to a cost reimbursement/no-fee contract, and that NAVCOMPT had authorized an increase to one-hundred percent (100%) progress payments. In the meantime, NAVSEA Command wanted Murdock to continue in business. Burchfield indicated that the Government was no longer in a position to keep assuring the Bank that Murdock would receive P.L. 85-804 relief, and that the Bank might construe the lack of assurance as grounds to call the V-Loan. If the Bank called the notes due under the V-Loan, the only way NAVCOMPT could keep Murdock in business for 30 days would be to purchase one-hundred percent (100%) of the V-Loan. (Pltf. Exh. 79.)

The April 14, 1975, Meeting.

280. In spite of the Procuring Contract Officer's April 11, 1975, request to hold up issuance of its decision, on April 14, 1975, Sandidge, Burchfield and William Ferguson (Ferguson), the Senior Contracting Officer in Salt Lake City, Utah, traveled to Clearfield, Utah, to discuss with Murdock increasing ASROC Contract progress payments to one-hundred percent (100%) as an interim measure until the cost contract mechanism could be put in place. (Tr. Mar. 1, 1993, pp. 78-79.)

281. On April 14, 1975, the Navy representatives presented the proposed ASROC Contract Modification P00064 (ASROC Contract Modification) to Murdock that allowed the Government to make one-hundred percent (100%) progress payments, or to authorize the payment up to the face value of the contract. (Tr. Mar. 1, 1993, pp. 79-80; Tr. Mar. 4, 1993, p. 107; Pltf. Exh. 22, 80.)

282. Sandidge made a presentation regarding how the monies would flow, how much money would be made available, how it would be utilized, and the controls that would be implemented. (Tr. Mar. 1, 1993, pp. 80-81.)

283. The ASROC Contract Modification anticipated immediate payment to Murdock for deposit to a special bank account apart from the V-Loan account. The special bank account would require a counter-signature by a Government representative to make a withdrawal. (Tr. May 28, 1993, p. 107.)

284. The ASROC Contract Modification indicated that the funds made available would be used solely for the purpose of making payment for direct materials, direct labor and administrative and overhead expenses required for the performance of the ASROC Contract and for such other purposes as the Office of the Navy Comptroller may approve. (Pltf. Exh. 20, 78, 80; Gov't. Exh. AZ.)

285. Sandidge first testified that the \$1,200,000-\$1,400,000 would only be available for future costs incurred. The more credible testimony is that the money made available through the ASROC Contract Modification could have been used to pay for past expenses related to the ASROC Contract. There is nothing in the documents that indicated that financial control meant that the Government was not going to pay existing unpaid

ASROC-related costs, even though Sandidge indicated that was his understanding of the Government's intent. Sandidge also admitted that he would have been very selective as to which vendors would be paid and who would not, but that the essential requirements would be paid on a case by case basis. If a cost needed to be paid that was not entirely related to the ASROC Contract, Sandidge would have been consulted and payment would have been at his discretion. (Tr. Mar. 2, 1993, p. 32; Tr. May 28, 1993, pp. 106, 108-10, 111, 123-27.)

286. Immediately upon execution of the ASROC Contract Modification, Murdock would have been entitled to invoice the Government for approximately \$1,200,000 that would have been made payable to the special bank account. (Tr. May 28, 1993, p. 124.)

287. Boardman was told that the Government representatives had brought the check with them, but that prior to its delivery the ASROC Contract Modification had to be executed. The Navy representatives did not have the check with them. (Tr. Mar. 2, 1993, pp. 23-24; Mar. 4, 1993, p. 107.)

288. On or shortly before April 14, 1975, NAVSEA Command learned that ASROC launchers could be obtained (and refurbished) from ships scheduled to be taken out of active service. Therefore, NAVSEA Command determined that Murdock was no longer essential to the national defense under P.L. 85-804. NAVSEA Command informed the NCAB of this new determination on the same or following day and withdrew its request and recommendation to the NCAB to grant Murdock relief. (Tr. Mar. 1, 1993, pp. 82-83; Tr. Mar. 2, 1993, pp. 35-36.)

289. The Navy was obtaining or could obtain ASROC launchers from strike ships or other sources, and had been "borrowing" launchers from the fleet refurbishment pool and overhauling them at the Naval Ordnance Station, Louisville, Kentucky. ASROC launchers were also on strike ships that were obtained by foreign governments and Moody asserted that if support could be obtained at a high enough level, the ASROC launchers could have been obtained from the same source. (Pltf. Exh. 19; Gov't. Exh. BF.)

290. On April 14, 1975, NAVSEA Command personnel in Washington, D.C., called Navy representatives during the meeting with Murdock personnel in Clearfield, Utah, and instructed them to not go forward with the one-hundred percent (100%) progress payment change to the ASROC Contract, to stop all further discussions with Murdock for the time being, and to wait further instructions. The Navy representatives retrieved the ASROC Contract Modification from Murdock and abruptly left the meeting without explanation. (Tr. Mar. 2, 1993, p. 34; Tr. Mar. 4, 1993, pp. 107-108; Pltf. Exh. 22.)

Withdrawal of ASROC Contract P.L. 84-805 Relief.

291. On April 15, 1975, neither the Bank nor Murdock knew that the Navy was withdrawing P. L. 85-804 relief. (Tr. Mar. 2, 1993, p. 38.)

292. On April 16, 1975, the Navy representatives waiting in Utah were advised that NAVSEA Command had withdrawn the ASROC P.L. 85-804 request from the NCAB's consideration, and that the NCAB had concurred with NAVSEA Command's withdrawal of the ASROC P.L. 85-804 request. The Navy representatives, still in Utah, also were instructed to inform Boardman that NAVSEA Command was "withdrawing [Murdock's] P.L. 85-804 case from the Navy Contract Adjustment Board" and that on the following day

Murdock would receive a 10-day "cure" notice for possible default termination of the ASROC Contract. (Tr. Mar. 2, 1993, pp. 40-41; Pltf. Exh. 22.)

293. NAVSEA Command made the decision to withdraw the P.L. 85-804 relief and did not take into consideration whether any sister armed service would grant P.L. 85-804 relief. (Tr. Mar. 2, 1993, pp. 54-55.)

294. On April 16, 1975, the Navy informed DCAS and DCAA, as well as the Bank of the fact that the Navy was withdrawing P.L. 85-804 relief to Murdock because the Navy had determined that it had a new source for the ASROC launchers, and that it was forwarding a 10-day "cure" notice to Murdock pursuant to the Default Clause of the ASROC Contract. (Pre-trial Order p. 7, ¶ (12).)

295. On April 16, 1975, by telephone, Ferguson notified Boardman of the Navy's actions. (Tr. Mar. 2, 1993, p. 43.)

296. The Navy also determined that no further progress payments on the ASROC Contract would be paid to Murdock, because Murdock was not entitled to additional progress payments without amending the contract to increase the rate to one-hundred percent (100%). (Tr. Mar. 2, 1993, pp. 42, 89-90.)

297. However, had Murdock continued to work on the ASROC launchers and achieve additional progress, Murdock would have been entitled to additional progress payments, even though they did not cure the default completely. (Tr. Mar. 2, 1993, pp. 90-91.)

298. During the Navy's April 14, 15, and 16, 1975, discussions, there was never any mention regarding Murdock's financial condition as a factor taken into consideration regarding withdrawal of P.L. 85-804 relief. (Tr. Mar. 2, 1993, pp. 50-51.)

299. Murdock's financial position would not have been considered in determining essentiality, but would have been a consideration regarding a determination to grant P.L. 85-804 relief. (Tr. Mar. 2, 1993, pp. 91-92.)

300. On April 17, 1975 the Navy sent by electronic message the 10-day cure notice to Murdock related to the ASROC Contract. (Tr. Mar. 4, 1993, p. 111; Pltf. Exh. 25.)

301. Murdock responded to the ASROC 10-day cure notice. (Tr. Mar. 4, 1993, p. 112; Gov't. Exh. BU.)

302. On April 21, 1975, Murdock announced the temporary layoff of 445 of its employees. (Pre-trial Order p. 7, ¶ (13); Pltf. Exh. 26.)

303. Boardman intended to continue operation on the non-ASROC contracts. (Tr. Mar. 4, 1993, p. 116.)

Costs of Termination.

304. Withdrawal of the ASROC Contract P.L. 85-804 relief converted a current asset of \$7,800,000 in un-billed accounts receivable to an unrecoverable bottom line loss. Termination of the ASROC Contract made Murdock liable for another \$7,900,000 in unliquidated progress payments. (Tr. Mar. 2, 1993, pp. 30, 31, 47, 68-70.)

305. Murdock responded to the 10-day cure notice on the ASROC Contract and requested termination for convenience, rather than default. The Navy was

considering a no-cost termination settlement on the ASROC Contract that would mean no-cost to either party. The \$7.8 million dollars in progress payments that the Government would otherwise have been entitled to recoup would have been eliminated, but the Government would receive the work in process inventory. (Tr. Mar. 2, 1993, pp. 45-47.)

306. Sandidge indicated in an April 29, 1975, memorandum, that in a no-cost termination, Murdock's liability to subcontractors would be approximately \$3,832,711, rather than the \$2,757,00 projected by DCAA. The difference in the DCAA estimates and Sandidge's estimates were in projected losses for the Practice Bomb Contract. DCAA projected a \$177,000 loss and Sandidge projected a \$712,000 loss. Using his own estimate of projected liability, Sandidge determined that if the ASROC Contract were terminated for convenience, the unexpended contract balance of \$1,436,821 could possibly be used to partially cover Murdock's liability to subcontractors, but a shortfall would remain. (Tr. Mar. 1, 1993, pp. 86-87, 93-95; Tr. Mar. 2, 1993, pp. 47-48; Gov't. Exh. Q.)

307. There is no credible evidence to support Sandidge's belief that the projected loss on the Practice Bomb Contract was greater than that projected by Murdock or the DCAA. (Tr. Mar. 1, 1993, pp. 189-94.)

308. According to Ferguson's April 18, 1975, trip report, the current cost estimates for keeping the ASROC Contract with Murdock were \$1,500,000 presently remaining to be paid from the ASROC Contract which was sufficient to meet all necessary obligations through May 15, 1975, \$6,400,000 needed to operate from June 30 to September 30, 1975, assuming completion of three launchers, \$10,400,000 total required through

September 30, 1975, and \$8,900,000 needed to take the contractor to September 30, 1975. (Tr. Mar. 2, 1993, p. 22; Pltf. Exh. 22.)

309. Ferguson's trip report indicated it would cost approximately \$5,000,000 to \$6,450,000 more to terminate for convenience rather than default for cause. (Pltf. Exh. 22.)

310. After April 25, 1973, the DCAA recommended suspension of progress payments under all Government contracts, but Sandidge recommended that the Government not discontinue the non-ASROC progress payments in view of the various actions that were under consideration by the Navy at that time. (Tr. May 28, 1993, p. 89; Pltf. Exh. 63.)

311. Sandidge indicated that with a cash deficit on the non-ASROC contracts, there was only a slim possibility that Murdock could have avoided bankruptcy without the ASROC Contract P.L. 85-804 relief. (Tr. Mar. 2, 1993, p. 73.)

P. Acceleration of the V-Loan.

312. Roy Nelson (Nelson), Senior Vice-President of the Bank, called Sandidge at his hotel at 1:30 a.m. the morning after the April 15, 1975, meeting to ascertain what had transpired, and to inquire why Murdock was not going to receive P.L. 85-804 relief. Sandidge confirmed that Murdock would not receive the requested relief. (Tr. Mar. 1, 1993, pp. 84-85; Tr. Mar. 2, 1993, pp. 49-50; Tr. Mar. 4, 1993, p. 48.)

313. On April 23, 1975, and as required by the guarantee, the Bank requested the Navy's consent to accelerate the maturity of Murdock's V-Loan. If the Navy had not approved the Bank calling the loan, the Navy would have been obligated to buy the entire note. (Pre-trial Order p. 7, ¶ (14); Tr. Mar. 2, 1993, p. 61; Pltf. Exh. 27, 32, 46.)

314. On May 2, 1975, the Navy gave its written consent to the Bank to either accelerate the maturity of the V-Loan or to continue the loan. In doing so, the Navy correspondence stated that: "It must be recognized that, if the loan is called and funds to Murdock are cut off, the company may have no alternative but to cease operations in their entirety." (Pre-trial Order p. 8, ¶ (15); Tr. Mar. 1, 1993, pp. 88-90; Pltf. Exh. 32.)

315. After receiving the Navy's consent to accelerate the V-loan, the Bank issued a \$33,685 note on May 9, 1975, and a \$175,000 note on May 14, 1975, but the record is unclear whether those were renewal notes or the issuance of additional funds. (Tr. Mar. 3, 1993, p. 67; Gov't. Exh. BN.)

316. On May 14, 1975, Murdock requested that the Bank renew a \$900,000 note due May 15, 1975, with a balance due of \$196,176.55, and a \$400,000 note due May 16, 1975. On May 19, 1975, Murdock requested the Bank renew a \$300,000 note due May 25, 1975. (Pltf. Exh. 81, 82.)

317. The request for extension of the notes was customary in the business practices of Murdock and the Bank and was intended by Murdock to keep in effect the working capital of the company. The Bank had never refused a request from Murdock for funds from the V-Loan prior to May of 1975. (Tr. Mar. 3, 1993, pp. 74, 104; Tr. Mar. 4, 1993, pp. 122-23.)

318. On May 16, 1975, the Navy Contracting Officer terminated the ASROC Contract for default. Murdock intended to contest the termination of the ASROC Contract for default, and to request a no-cost termination. (Pre-trial Order p. 8, ¶ (16); Tr. Mar. 2, 1993, p. 67; Tr. Mar. 4, 1993, p. 124; Pltf. Exh. 39.)

319. Sandidge telephoned the Bank some time on or about May 16, 1975, and told Bank officials that even though the ASROC Contract was terminated for default, the Navy expected Murdock to appeal. Although demand would be made for payment of the unliquidated progress payments of \$7,800,000 to \$7,900,000, there would be no collection if the decision was appealed. Sandidge did not tell Murdock there would be no collection action if the decision was appealed. (Tr. Mar. 2, 1993, pp. 68-70.)

320. A Memorandum for the Record dated May 22, 1975, details a telephone conversation between Nelson and Robert Sullivan¹⁶ (Sullivan), Bank officials, and Burchfield and Sandidge. Murdock had requested the Bank to disburse the remaining balance of \$500,000 from the V-Loan and indicated an intent to file bankruptcy. It is apparent that the Bank was concerned as to whether it should renew the notes due May 15 and 16, 1975, as it had in the past, and whether it should advance the \$500,000 balance. A discussion ensued as to whether the Navy considered Murdock to be insolvent, which it did. The Navy wanted the Bank to continue to fund on-going contracts to the extent there was equivalent income. The Bank indicated an intent to fund payroll and essential payments on the on-going contracts. (Pltf. Exh. 43.)

321. However, on May 22, 1975, Boardman requested from Nelson that the Bank release \$35,000 in Murdock's checking account to meet Murdock's payroll. Nelson refused to release the funds because a lien had been placed upon them. (Tr. Mar. 4, 1993, p. 125-26; Pltf. Exh. 45.)

¹⁶

The commercial loan officer assigned to Murdock's account.

322. The lien against Murdock's funds was in the form of a writ of attachment issued by Square Tool and Machine Company, an ASROC vendor. (Tr. May 27, 1993, p. 103.)

323. On May 22, 1975, the Bank sent a telegram to the Federal Reserve Bank calling upon the guarantor to purchase its guaranteed percentage of the unpaid principal amount of the V-Loan plus any unpaid interest to date of settlement. (Tr. Mar. 3, 1993, pp. 109-110; Pltf. Exh. 44.)

324. Once demand had been made on May 22, 1975, upon the guarantor to purchase its guaranteed percentage of the unpaid principal of the V-Loan, no further funds would be forthcoming from the V-Loan. (Tr. Mar. 3, 1993, p. 110.)

325. On May 22, 1975, Murdock appealed the default termination of the ASROC Contract to the Armed Services Board of Contract Appeals (ASBCA) pursuant to the Disputes Clause of the Navy contract. (Pre-trial Order p. 8, ¶ (17).)

326. On May 23, 1975, the Bank advised Murdock that it would not release any more funds to Murdock at that time under the V-Loan. (Pre-trial Order p. 8, ¶ (18); Pltf. Exh. 45.)

327. On May 29, 1975, the Navy honored its ninety percent (90%) V-Loan guarantee by paying \$1,750,311 to the Bank. At that time, the outstanding balance of the V-Loan was \$1,944,790. (Pre-trial Order p. 8, ¶ (20).)

328. The V-Loan Guarantee Agreement provided at Section 4, that whenever the Guarantor became the owner of any part of the V-Loan, upon demand, the Bank would assign the collateral for the account of the Guarantor. (Pltf. Exh. 46.)

329. On May 29, 1975, the Bank made formal demand on CCI Corp. for payment of its V-Loan guarantee of \$500,000. (Pre-trial Order p. 8, ¶ (21).)

330. On November 5, 1975, the Navy made demand on CCI for payment of its V-Loan guarantee of \$500,000. On December 5, 1975, in satisfaction of CCI Corp.'s V-Loan guarantee, the Navy received Treasury Check No. 299072 in the amount of \$500,000 which had been deducted from payments of invoices due to Marquardt, a CCI Corp. subsidiary. This payment, together with other deductions and payments, subsequently reduced the outstanding V-Loan balance to \$952,000. (Pre-trial Order p. 9, ¶ (22).)

The Primary Cause and Timing of the V-Loan's Acceleration, and the Navy's Influence on the Bank.

331. Acceleration of the V-Loan presents three issues: 1) what was the primary reason that the Bank accelerated the V-Loan, 2) why was the V-Loan accelerated when it was, and 3) did the Government unduly influence the Bank's decision to accelerate the V-Loan.

332. Sullivan's testimony as to the reason for acceleration of the V-Loan is internally inconsistent and at odds with some of the available documentation. He isolated three reasons for the acceleration of the V-Loan: 1) Murdock's financial deterioration, 2) that Murdock needed to request P.L. 85-804 relief at all, and 3) that the writ of attachment had been served attaching the funds in Murdock's account. The Bank knew Murdock's financial position had deteriorated as evidenced by a February 7, 1975, letter to Sandridge (sic) where Sullivan indicated that as of January 1975, accounts payable had slipped from an average of seventeen percent (17%) in the 60-days and over category to twenty-nine percent (29%) as of January, 1975, and that cash flow requirements were such that interim

funds must be made available pending final settlement of the ASROC Contract. Even with that knowledge, the Bank didn't accelerate the V-Loan at that time.

Sullivan's second stated reason for accelerating the V-Loan was Murdock's request for P.L. 85-804 relief, either on ASROC, or on the other contracts. The Bank knew in the latter part of 1974 that Murdock sought relief on the ASROC Contract, and that if relief was not granted, Murdock couldn't continue in business. But the Bank didn't accelerate the V-Loan at that time. If the Bank knew that Murdock sought P.L. 85-804 relief on the Fin and Nozzle and Delay Plunger Contracts (and the record does specifically so indicate), it nevertheless thought Murdock could continue to operate with only the non-ASROC contracts and was unaware that there were any losses on the non-ASROC contracts. Therefore, the fact that Murdock sought P.L. 85-804 relief on two of the non-ASROC contracts could not be the reason for acceleration of the V-Loan.

The remaining reason is that a writ of attachment for \$33,142.00 was served upon the Bank by an ASROC vendor. That event apparently coincided with Murdock's final attempt to have funds released to meet its payroll. (Tr. Mar. 3, 1993, pp. 63-67, 79-80, 83, 85-87, 122; Pltf. Exh. 45; Gov't. Exh. BC.)

333. The more credible evidence, viewing the evidence as a whole and the timing of the events, indicates that the significant financial impact of the denial of the ASROC Contract P.L. 85-804 relief and termination of the ASROC Contract on May 16, 1975, were the primary reasons the Bank accelerated the V-Loan. (Mar. 3, 1975, pp. 95-96, 114.)

334. But for the actions of the Navy on April 16, 1975, in improperly failing to proceed to convert the ASROC Contract to a cost reimbursement/no-fee contract and the May 16, 1975, default termination of the ASROC Contract, the Bank would not have refused to advance funds or otherwise taken action to accelerate the maturity of the V-Loan.

335. The second issue concerns why the Bank waited from the denial of P.L. 85-804 relief on the ASROC Contract to six days after actual termination of the ASROC Contract to accelerate the V-Loan. Sullivan indicated that the Bank had not decided it would call the V-Loan when it requested the Navy's consent to accelerate the note. The more credible interpretation of the evidence is that the delay related to the time necessary for the Bank to satisfy itself that it had properly administered the V-Loan and that the Navy would honor its guarantee. (Tr. Mar. 3, 1993, p. 122.)

336. The Bank had administrative responsibility for the loan. The Bank believed that if it followed the terms of the agreement under the V-Loan, it would have properly administered the V-Loan and there would be no difficulty with the Navy honoring its guarantee. (Tr. Mar. 1, 1993, p. 36; Tr. Mar. 3, 1993, p. 109.)

337. Section 13 of the V-Loan Guarantee Agreement stated that if the Bank violated or failed to comply with the terms of the agreement, or any terms or conditions of the loan, it would become liable to the guarantor in an amount equal to the damages sustained. (Pltf. Exh. 46.)

338. The Bank questioned whether it had somehow violated the terms of the V-Loan agreement such that it would cause the Government to reject its guarantee and make the Bank responsible for the entire amount of the V-Loan if the loan was in default.

For example, if the Bank was imprudent in taking actions contradictory to some provision of the loan agreement, the Bank may have become liable to the guarantor. (Tr. Mar. 3, 1993, pp. 109, 125.)

339. It is evident that the Bank was very concerned that it not make any mistake in administering the loan, or take any imprudent action, that may have the legal consequences of absolving the Navy of responsibility for its guarantee. (Tr. Mar. 2, 1993, pp. 74-75, 93; Tr. Mar. 3, 1993, p. 107-110.)

340. Sullivan and Nelson met with the Bank's attorneys to discuss the V-Loan agreement, the Bank's position, whether the Bank was justified in calling the V-Loan, and to ensure itself that the Bank had performed under the terms of the V-Loan and guarantee. (Tr. Mar. 3, 1993, p. 107.)

341. During the May 22, 1975, telephone conversation between Burchfield, Sandidge, Nelson and Sullivan, the Bank was concerned whether it had or was properly administering the loan to an insolvent borrower, and whether it should advance the remaining \$500,000. The Navy replied that it would be imprudent to advance the balance of the loan proceeds. (Tr. Mar. 2, 1993, p. 71; Tr. Mar. 3, 1993, pp. 62-66; Pltf. Exh. 43-45.)

342. Shortly thereafter, by 4:05 p.m. on May 22, 1975, and after the Bank had satisfied itself that the Navy approved its administration of the V-Loan, the Bank requested the Navy to honor its guarantee. (Pltf. Exh. 44.)

343. The third issue is whether the Navy improperly influenced the Bank's actions in accelerating the V-Loan. The evidence indicates it did not.

344. Nelson and Sullivan were told that the Navy expected them to administer the V-Loan as they would any other loan and mitigate the losses of the Bank and the Navy. Sandidge did not recommend to the Bank that it call the V-Loan. (Tr. Mar. 1, 1993, pp. 88, 91-92; Pltf. Exh. 43.)

345. The decision to stop lending funds under the V-Loan was at the discretion of the Bank. The Bank made its own decision regarding calling the V-Loan, and did not have any doubts that the Navy would honor its guarantee if the loan was properly administered. (Tr. Mar. 3, 1993, pp. 61, 65.)

346. The remaining \$500,000 balance on the V-Loan could have provided Murdock with working capital for a considerable time. (Tr. Mar. 2, 1993, p. 74.)

347. If the Bank had granted Murdock's request for the additional \$500,000, the Navy would have had to pay \$450,000 whenever the V-Loan was called. (Tr. Mar. 1, 1993, p. 92.)

348. Murdock believed that as long as the V-Loan was not tied contractually to the ASROC Contract, but was a source of funds for operating capital, Murdock had enough money to accommodate all of the losses on the non-ASROC contracts because the Initiator Contract had been terminated at no-cost. Murdock could continue for as long as the V-Loan was in effect and funds were available through the V-Loan. Boardman felt that Murdock would have been in "good shape" if the V-Loan had remained in place. (Tr. Mar. 4, 1993, p. 124, 132.)

349. At the time the V-Loan was called, the outstanding principal balance of the \$2,500,000 line of credit was \$1,944,790, leaving approximately \$555,000 available for release to Murdock for use as operating funds. (Tr. Mar. 1, 1993, p. 91-92.)

350. The balance available under the V-Loan represented the only source of money available to Murdock to sustain its business operations; thus, acceleration of the V-Loan and refusing to release any more funds to Murdock denied the company any cash flow upon which to sustain its operations. (Tr. Mar. 4, 1993, p. 130.)

Q. Bankruptcy.

351. On May 23, 1975, the Bank informed Murdock that the Bank would not release any further funds. Upon receiving this information, Murdock filed a petition for bankruptcy and ceased operations. (Pre-trial Order p. 8, ¶ (19).)

352. Murdock's statement of affairs drafted for the bankruptcy filing proposed to continue operation of five of the seven major contracts. (Gov't. Exh. V.)

353. The procuring commands insisted that Boardman and CCI Corp. not be associated with any reorganization. (Tr. Mar. 3, 1993, pp. 180-81.)

354. Subsequent to the bankruptcy filing, new officers were elected, and Sato became Murdock's president. (Tr. Mar. 3, 1993, p. 192.)

355. Sato performed a cost analysis that showed that without the ASROC Contract, Murdock could continue to operate. He considered assuming some of the contracts and continuing operation after the bankruptcy filing, but determined that one person could not do it all and that it was just too big a task. (Tr. May 27, 1993, p. 155.)

356. Other officers also attempted to reorganize the company after it filed its bankruptcy petition. One proposal included funding to be provided by Superior Air Conditioning up to \$500,000. The officer proposing this reorganization was unaware that ownership of stock comes with commensurate liabilities of the company, and thought the proposed reorganizers could leave the liability behind. (Tr. Mar. 3, 1993, pp. 179-80, 189, 191.)

357. Some of the reorganizers wished to reinstate the A/B Dispenser and the Fin and Nozzle Contracts, but did not want to assume the Practice Bomb Contract because all of the engineering difficulties had not been resolved. (Tr. Mar. 3, 1993, pp. 180, 190.)

358. Boardman took no action to prevent employees or officers of Murdock from reorganizing or reviving the company once bankruptcy had been filed. (Tr. Mar. 4, 1993, p. 133.)

359. CCI Corp. refused to release its stock as a condition of reorganization. (Tr. Mar. 3, 1993, p. 181.)

R. Assumptions if the Government had Granted and Consummated P.L. 85-804 Relief on the ASROC Contract.

360. Boardman believed that the ASROC Contract would be in abeyance pending appeal of the termination of the contract, but the ability to do business was based on Murdock's line of credit with the Bank, therefore Murdock could proceed as long as its line of credit existed. (Tr. May 27, 1993, p. 61.)

361. Murdock's ability to stay in business was contingent upon relief being granted under the ASROC Contract, because the estimated cost to complete the ASROC

Contract was essentially twice the contract value, and Murdock's assets were approximately \$700,000 to \$800,000, plus the V-Loan of \$2,500,000. (Tr. May 27, 1993, pp. 79-80.)

362. If Murdock had received P.L. 85-804 relief on the Fin and Nozzle and the Delay Plunger Contracts, but had not received relief on the ASROC Contract, it could not have continued in business because Murdock would not have been financially able to compensate for the ASROC deficiency. (Tr. May 27, 1993, p. 80.)

363. Conversion of the ASROC Contract to a cost reimbursement/no-fee contract, but denial of P.L. 85-804 relief on the Fin and Nozzle and Delay Plunger Contracts, would have enabled Murdock to stay in business because Murdock had assets of \$700,000 to \$800,000, a no-cost termination on the Initiator Contract, and the majority of the \$2,500,000 V-Loan after application of the \$1,200,000. Murdock would have been in a deficit position for a period of time, but could have recovered in the future. (Tr. May 27, 1993, pp. 80-81.)

364. With the ASROC Contract converted to a cost reimbursement/no-fee contract, if the Army declined either to terminate the Delay Plunger Contract on a no-cost basis or to extend the number of units on options, Murdock would still have been able to perform because it would have had a line of credit that would have been available for the costs of production. (Tr. May 27, 1993, pp. 83-84.)

365. In a cost reimbursement/no-fee contract, Murdock would have been entitled to recover all the costs that it incurred, assuming that they were reasonable and followed regulations, including material, labor, and overhead. Murdock would have been

able to submit progress billings or invoices to the Government as costs were incurred. (Tr. May 27, 1993, p. 82.)

366. Conversion of the ASROC Contract to a cost reimbursement/no-fee contract meant that the balance of the V-Loan would have been reduced by application of cash from the Navy on the ASROC Contract, and Murdock would have had the ability to draw down on the V-Loan to off-set losses. (Tr. May 27, 1993, pp. 81-82.)

367. With the ASROC Contract converted to a cost reimbursement/no-fee contract, Murdock would not have had to draw down on the V-Loan to cover the losses on the contract, and the V-Loan would have been available for other performance contracts, except for the interest on the borrowed money which was not an allowable expense. (Tr. May 27, 1993, pp. 82-83.)

368. The conversion of the ASROC Contract to a cost reimbursement/no-fee contract would not have generated a profit to offset losses from the Fin and Nozzle, Delay Plunger, Practice Bomb and A/B Dispenser Contracts. (Tr. May 27, 1993, pp. 106-108.)

369. Historically, Murdock, as an ongoing business, had generated annual pre-tax profits of a million dollars or more on similar ordnance contracts. Murdock could bid competitively in the future for follow-on contracts, and should have reasonably expected to make a profit as it had in the past. Murdock had in excess of \$500,000 balance in the V-Loan line of credit, that could be used to service the loan and continue on other programs. (Tr. May 27, 1993, pp. 108-09.)

370. The assumption that Murdock would have survived is based on the premise that it would receive profitable contracts in the future. This premise is not unreasonable because Murdock was selective with the kind of programs in which it became involved and attempted to select ordnance on which to bid that had a long term usefulness: e.g., the A/B dispenser used in Operation Desert Storm, the delay plunger that was used in every artillery round the Army makes, and the practice bomb. Murdock expected to compete for each contract award. (Tr. May 27, 1993, pp. 109-111.)

371. Sandidge projected on April 29, 1993, using data current as of March 31, 1975, that Murdock would have a projected cash deficit of \$3,069,130. That projection was based on Sandidge's estimation that certain portions of the March 14, 1975, DCAA report were flawed. He indicated at the April 1975 meeting of the NCAB that he objected to the audit report, but the board went forward in spite of his objections. (Tr. May 28, 1993, pp. 97-98, 117-119; Gov't. Exh. Q.)

372. On April 30, 1975, after notice of termination for default of the ASROC Contract, Boardman proposed that the Government, 1) terminate the ASROC Contract for its convenience and pay Murdock the face value of the contract, 2) settle the claims presently outstanding under Contract Modification no. P00033 dated October 25, 1973, for defective data on ASROC Contract, and 3) negotiate with Murdock for additional costs under the contract associated with the accelerated production plan approved by the Navy. In so doing, Murdock would aggregate approximately \$4,100,000 and would pay off the V-Loan of \$2,500,000, pay ASROC vendors \$823,000, and have \$775,000 of remaining cash for other creditors. (Gov't. Exh. BU.)

373. Instead of Sandidge's projected losses illustrated by Government Exhibit Q of \$3,069,130, the correct projected losses were less than \$2,000,000. The amount of the V-Loan was \$2,500,000. (Tr. May 27, 1993, p. 103.)

S. Production Status of the Non-ASROC Contracts Immediately Prior to Filing and After, and the Cause of the Defaults.

Fin and Nozzle Contract.

374. Whether the Army ever took official action on Murdock's Fin & Nozzle Contract P.L. 85-804 request is unknown. The Fin & Nozzle Contract records have been lost or destroyed, and no record of any formal action on the P.L. 85-804 request has been located. (Gov't. Exh. BX.)

375. On May 19, 1975, Murdock received a 10-day cure notice issued by the Army pursuant to the Default Clause of the Fin and Nozzle Contract. Murdock did not reply to the cure notice. (Pre-trial Order p. 11, ¶ (13); Gov't. Exh. BO.)

376. On May 23, 1975, (the date the Bank informed Murdock it would release no more funds and that Murdock filed its petition for bankruptcy) Murdock ceased performance of the Fin and Nozzle Contract. Murdock did not resume performance of the Fin and Nozzle Contract after filing for bankruptcy. (Pre-trial Order p. 11, ¶ (14).)

377. On June 5, 1975, the Army elected to terminate the Fin & Nozzle Contract for default. The stated reasons were that, 1) Murdock did not reply to the May 19, 1975, (10-day) cure notice, 2) Murdock had failed to cure its financial condition thus endangering contract performance and filing bankruptcy, and 3) the supplies were still needed and available elsewhere from three other sources. (Tr. Mar. 2, 1993, pp. 184-85, 190; Pltf. Exh. 50.)

378. On June 12, 1975, the Army terminated the Fin and Nozzle Contract for default. (Pre-trial Order p. 11, ¶ (15); Pltf. Exh. 51.)

379. Murdock did not appeal the default termination of the Fin and Nozzle Contract pursuant to the Disputes Clause of the Army contract. (Pre-trial Order p. 11, ¶ (16).)

380. As of the time Murdock submitted its request for P.L. 85-804 relief on the Fin and Nozzle Contract, and at a time when Murdock had completed fifty-one percent (51%) of the contract, Murdock was less than one percent (1%) within its "should-cost" price for labor. Labor was between fifteen (15%) and twenty percent (20%) of the total cost of the contract. The overwhelming majority of the costs associated with the contract were material costs. (Tr. May 27, 1993, pp. 33, 90-92; Pltf. Exh. 23.)

381. There were no material or vendor problems forecasted for the future production of the Fin and Nozzle Contract, and the technical and supplier problems were solved. Production of the Fin and Nozzle into May of 1975 was on stream and going very well. (Tr. Mar. 3, 1993, p. 161; Tr. May 27, 1993, pp. 95, 154.)

382. Most of the production problems had been resolved when P.L. 85-804 relief was requested. On May 9, 1975, Murdock requested and was granted permission to bid on a follow-on contract to the Fin and Nozzle Contract, with an anticipated profit of between \$305,020 through \$696,776. The projected loss on the current contract was \$1,344,400. (Tr. Mar. 1, 1993, pp. 102-06; Pltf. Exh. 61, 64.)

383. In the absence of Murdock's bankruptcy and cessation of operations, and in spite of the default history of the contract, the Army had no established plan to

terminate the Fin and Nozzle Contract for default. (Tr. Mar. 2. 1993, p. 190; Pltf. Exh. 4; Gov't. Exh. X, AA.)

384. Murdock's failure to perform the Fin and Nozzle Contract was caused by its bankruptcy which, in turn, was caused by acts of the Government under and related to the ASROC Contract.

Delay Plunger Contract.

385. By correspondence dated May 8, 1975, Murdock was notified that its April 16, 1975, request for P.L. 85-804 relief for the Delay Plunger Contract, that was received by the Government on April 21, 1975, was denied. The decision was made at an ARMCOM Contract Adjustment Board meeting on April 29, 1975, with the recommendation that Murdock was not essential to the national defense as a current or viable source of supply. (Gov't. Exh. AF.)

386. On May 23, 1975, (the date the Bank informed Murdock it would release no more funds and that Murdock filed its petition for bankruptcy) Murdock ceased performance of the Delay Plunger Contract. Murdock did not resume performance of the Delay Plunger Contract after filing for bankruptcy. (Pre-trial Order p. 12, ¶ (9).)

387. On June 10, 1975, the Government issued a 10-day cure notice to Murdock pursuant to the Default Clause of the Delay Plunger Contract. (Pre-trial Order p. 13, ¶ (10).)

388. On June 19, 1975, Sato, Murdock's acting president, responded to the cure notice and requested additional time before the Army undertook termination action of the Delay Plunger Contract. (Gov't. Exh. AG.)

389. On July 18, 1975, the Government terminated the Delay Plunger Contract for default. (Pre-trial Order p. 13, ¶ (11).)

390. The termination findings indicated that pervasive financial difficulties had prompted Murdock to apply for relief on the ASROC Contract, that such relief had been denied, and that Murdock had filed bankruptcy and ceased production. The Government deemed the contract had, in fact and by operation of law, been abandoned and rejected. (Pltf. Exh. 54.)

391. At the time of termination, Murdock's total performance of the Delay Plunger Contract was approximately sixty-five percent (65%) of the contract requirement (i.e., 2,476,656 units delivered/3,777,025 total units required). Under the revised delivery schedule, Murdock supplied the required 508,000 units in February, 243,016 units in March (shortfall), 508,032 units in April, and 190,516 units on May 7, 1975. (Tr. May 27, 1993, pp. 134-35; Pltf. Exh. 54.)

392. Murdock did not appeal the default termination of the Delay Plunger Contract pursuant to the Disputes Clause of the Army contract. (Pre-trial Order p. 13, ¶ (12).)

393. At the time of the submission of the P.L. 85-804 relief application, the number of people necessary to produce the product was dropping consistently. Labor, which was fifteen (15%) to twenty percent (20%) of the contract cost, would be reduced below the "has-cost" line as production went on. The reduction in number of people necessary to produce this item was not unusual for this type of contract. (Tr. May 27, 1993, pp. 44-45, 90, 94-95.)

394. There were no material or vendor problems anticipated in future production of the delay plunger. (Tr. May 27, 1993, p. 95.)

395. The option clause in the Delay Plunger Contract had a remaining balance left of 644,425 units. (Stipulation of the parties, Tr. May 27, 1993, pp. 84-85.)

396. On May 2, 1975, Murdock had requested and received permission to bid on a follow-on contract to the Delay Plunger Contract that anticipated a profit of \$146,000. The request indicated that the anticipated profit would be applied to the \$537,900 anticipated loss on the existing contract. (Tr. Mar. 1, 1993, pp. 102-06; Pltf. Exh. 61, 65.)

397. There is no evidence that in the absence of Murdock's bankruptcy and cessation of operations, the Army planned to terminate the Delay Plunger Contract for default.

398. Murdock's failure to perform the Delay Plunger Contract was caused by its bankruptcy which, in turn, was caused by acts of the Government under and related to the ASROC Contract.

A/B Dispenser Contract.

399. Murdock did not resume performance of the A/B Dispenser Contract after filing bankruptcy. (Pre-trial Order p. 13, ¶ (4).)

400. The Navy terminated the A/B Dispenser Contract for default by written notice dated July 1, 1975. (Pre-trial Order p. 13, ¶ (5).)

401. Murdock did not appeal the default termination of the A/B Dispenser Contract pursuant to the Disputes Clause of the Navy contract. (Pre-trial Order p. 14, ¶ (6).)

402. Production of the A/B dispenser had been delayed, but the delay did not stop the production line. Murdock was awaiting parts from a new vendor. With twenty-nine and one-half percent (29.5%) of the contract completed, Murdock had not yet produced the A/B dispenser at its "should-cost" price. (Tr. May 27, 1993, pp. 33-34, 89, 154.)

403. The Navy was told during the April 14, 1975, visit that Murdock was attempting to bid on an add-on contract to the A/B Dispenser Contract. Murdock's March 18, 1975, request for approval from Sandidge to bid on the follow-on contract indicated an anticipated profit if the contract were awarded of \$150,000. The anticipated loss on the existing contract was \$124,300. (Tr. Mar. 1, 1993, pp. 102-06; Pltf. Exh. 22, 61, 66.)

404. There is no evidence that, in the absence of Murdock's bankruptcy and cessation of operations, the Navy planned to terminate the A/B Dispenser Contract for default.

405. Murdock's failure to perform the A/B Dispenser Contract was caused by its bankruptcy which, in turn, was caused by acts of the Government under and related to the ASROC Contract.

Zuni Launcher Contract.

406. Murdock did not resume performance of the Zuni Launcher Contract after filing bankruptcy. (Pre-trial Order p. 14, ¶ (4).)

407. On June 12, 1975, a telegraph terminated the balance of the Zuni Launcher Contract. (Pltf. Exh. 53.)

408. On July 1, 1975, the Navy terminated the Zuni Launcher Contract for default. (Pre-trial Order p. 14, ¶ (5).)

409. The reason stated for termination was that the Navy was advised that Murdock had filed for voluntary bankruptcy on May 23, 1975, resulting in the closing of the plant. Therefore, the Navy found that Murdock was in default. (Pltf. Exh. 53.)

410. Murdock did not appeal the default termination of the Zuni Launcher Contract pursuant to the Disputes Clause of the Navy contract. (Pre-trial Order p. 14, ¶ (6).)

411. On May 20, 1975, Murdock had 204 Zuni Launchers ready for shipment to the Government pending first article approval. This quantity was less than the monthly requirement of the contract. (Pre-trial Order p. 14, ¶ (3); Tr. May 27, 1993, p. 152; Pltf. Exh. 40; Gov't. Exh. BR.)

412. Murdock never took progress payments on the Zuni Launcher Contract because it was self-floating. (Tr. Mar. 4, 1993, pp. 50-51.)

413. There is no evidence that in the absence of Murdock's bankruptcy and cessation of operations, the Navy planned to terminate the Zuni Launcher Contract for default.

414. Murdock's failure to perform on the Zuni Launcher Contract was caused by its bankruptcy which, in turn, was caused by acts of the Government under and related to the ASROC Contract.

Practice Bomb Contract.

415. Murdock did not resume performance of the Practice Bomb Contract after filing bankruptcy. (Pre-trial Order p. 16, ¶ (9).)

416. On May 23, 1975, (the date the Bank informed Murdock it would release no more funds and the date of the bankruptcy filing), Murdock and the Air Force entered into Contract Modification No. P00009 to the Practice Bomb Contract that incorporated into the contract a number of requests for waivers and requests for deviations of contract specifications. (Pre-trial Order p. 15, ¶ (8).)

417. On June 19, 1975, the Air Force terminated the Practice Bomb Contract for default. (Pre-trial Order p. 16, ¶ (10); Gov't. Exh. BS.)

418. The findings of the Air Force indicated that Murdock had 1) failed to perform in accordance with the contract terms and conditions, 2) permitted its financial position to deteriorate to the point that performance was impossible, and 3) had ceased all efforts towards performance. (Pltf. Exh. 52.)

419. In spite of having shipped 1600 practice bombs on May 3, 1975, and 1600 practice bombs on May 6, 1975, at the date of termination Murdock had completed only 4,800 units and was delinquent 166,800 units. (Pre-trial Order p. 15, ¶¶ (6), (7); Pltf. Exh. 52.)

420. Murdock did not appeal the default termination of the Practice Bomb Contract pursuant to the Disputes Clause of the contract. (Pre-trial Order p. 16, ¶ (11).)

421. The evidence is conflicting as to whether Murdock was ever able to manufacture the practice bombs through the new pressing technique without the necessity of further expensive machining, and whether the shipments of 1600 bombs just prior to filing bankruptcy were machined or pressed. The more credible evidence indicates that Murdock was producing pressed bomb bodies, but that they were not being produced at a rate

commensurate with the contract requirements. The more credible evidence indicates that Murdock's production line engineering was completed, and would have been able to produce through this technique in the future. By May 1975; production problems had been resolved, Murdock was prepared to start more rapid production and was at the leading edge of opening up the production line. (Tr. Mar. 2, 1993, pp. 106-07, 117, 140-41; Tr. Mar. 4, 1993, p. 71; Tr. May 27, 1993, pp. 58-59, 145-47, 154, 159-60; Tr. May 28, 1993, pp. 36-39, 57-65; Pltf. Exh. 55; Gov't. Exh. AI.)

422. In the absence of Murdock's bankruptcy and cessation of operations, the Air Force had no established plan to terminate the Practice Bomb Contract for default. In late April or early May of 1975, the Air Force was very pleased with Murdock's efforts. (Depo. Tr. Marriott, May 20, 1992, pp. 44-45, 83-84.)

423. It is unlikely, given the Air Force's interest in the new production method and its lack of attempts to terminate the Practice Bomb Contract prior to Murdock's bankruptcy even though the contract was substantially behind schedule, that the Practice Bomb Contract would have been terminated but for Murdock's bankruptcy filing. (Tr. Mar. 3, 1993, p. 165; Depo. Tr. Marriott, May 20, 1992, pp. 45-45.)

424. Murdock's prospects for follow-on contracts for the practice bomb would have been excellent, even under competitive procurement bidding. (Tr. May 27, 1993, pp. 146, 160.)

425. Murdock's failure to perform the Practice Bomb Contract was caused by its bankruptcy which, in turn, was caused by acts of the Government under and related to the ASROC Contract.

Initiator Contract.

426. Murdock never submitted an application for P.L. 85-804 relief on the Initiator Contract, and there were never any meetings of the NCAB on a P.L. 85-804 application on the Initiator Contract. (Tr. May 28, 1993, pp. 113-16.)

427. Nevertheless, by memorandum dated April 29, 1975, Sandidge indicated that a contract amendment that provided for a no-cost termination of the Initiator Contract had been forwarded to Murdock for execution. (Gov't. Exh. Q.)

428. The evidence is contradictory as to whether the Initiator Contract was officially terminated. In order to achieve termination, it was necessary for Murdock to sign the amendment and return it, but prior to signing, Murdock was required to conduct an inventory of all its materials, tools and inventory. Murdock's bankruptcy intervened and it is unclear whether Murdock signed the document terminating the contract. (Tr. Mar. 1, 1993, p. 206; Tr. Mar. 2, 1993, pp. 6-7; Tr. May 27, 1993, pp. 105-06, 112-13; Pltf. Exh. 88; Gov't. Exh. U.)

429. Whether Murdock actually signed the contract modification and completed the inventory is immaterial to this litigation because no claim has been made by the Government related to the Initiator Contract. However, the cumulative evidence indicates that it was the intent of all parties that the Initiator Contract be terminated at no-cost.

430. Once the Initiator Contract was terminated, any costs expended by Murdock would have been borne by Murdock, and Murdock would have kept any monies

that Murdock had received. The difference between the two amounts would have been a net loss. (Tr. May 27, 1993, p. 12.)

431. The evidence is conflicting as to the amount of loss Murdock would have sustained once a no-cost termination occurred. The more credible evidence indicates that Murdock's liability on the Initiator Contract after no-cost termination would be \$288,000. The loss of roughly \$288,000, is substantially less than the loss of \$796,900 originally projected. (Tr. Mar. 4, 1993, p. 76; Tr. May 27, 1993, p. 13; Tr. May 28, 1993, pp. 18-26, 43-44, 100-101; Pltf. Exh. 61, 87; Gov't. Exh. Q.)

T. The Government's Defense Under the Doctrine of Laches.

432. Several Government employees who participated in or were familiar with Murdock's contracts and these events are now dead, including Weir, the contracting officer, and Joe Morgan, the price analyst. (Tr. Mar. 3, 1993, pp. 38-41.)

433. Nelson, the Bank's Senior Vice-President, who was not called to testify, lives in Ogden, Utah. (Tr. Mar. 3, 1993, p. 75.)

434. Portions of the Navy's contract files have been destroyed. (Tr. Mar. 2, 1993, pp. 87-88, 177, 193-95; Tr. Mar. 3, 1993, pp. 39-40.)

435. However, if a contract is under litigation, files pertaining to the contract should be taken off a list of files that would be retired (destroyed) and such files should be retained. (Tr. Mar. 2, 1993, p. 19.)

U. Appeal.

436. After the ASROC Contract was terminated for default, Murdock appealed the default to the ASBCA. The appeal was docketed as ASBCA No. 20409. By

complaint no. 20409, Murdock asserted that the improper default termination of the ASROC Contract was the sole cause of Murdock's inability to perform the non-ASROC Contracts. (Pltf. Exh. Exh. 68; Gov't. Exh. BY, CC.)

437. In 1981 and 1983, Murdock appealed the failure of the contracting officer to issue a final decision, which appeal was docketed as ASBCA No. 27860, and a final decision related thereto was docketed as ASBCA No. 28031. In these appeals, Murdock elected application of the Contract Disputes Act of 1978 (CDA) for the new dispute. (Pltf. Exh. 68.)

438. Murdock's October 14, 1981, claim for damages incurred as a result of the ASROC Contract termination asserted that the Government's breach of its obligation to provide funding caused Murdock's inability to perform its other government contracts. (Gov't. Exh. BZ.)

439. Murdock asserted in its submission to the ASBCA direct costs on the Fin and Nozzle Contract of \$6,580,900, general and administrative expenses of \$329,000, vendor termination claims of \$674,800, ten percent (10%) profit of \$758,500, less cash received of \$6,258,500, for a remaining balance of \$2,084,700. (Pltf. Exh. 87.)¹⁷

440. In a December 1986 Government audit of Murdock's claim, the Government questioned Murdock's costs as follows: direct costs of \$482,499, general and administrative expenses of \$284,615, vendor termination claims of \$45,713, profit of \$1,766,082, and questioned cash received of \$507. Based thereon, the Government established a loss ratio of 16.4. (Gov't. Exh. AJ.)

¹⁷

Pltf. Exh. 87 was not formally received but was used by both parties.

441. Murdock asserted in its submission to the ASBCA direct costs on the Delay Plunger Contract of \$2,198,900, general and administrative expenses of \$109,900, vendor termination claims of \$5,200, ten percent (10%) profit of \$231,400, less cash received of \$1,794,900, for a remaining balance of \$750,500. (Pltf. Exh. 87.)

442. In a December 1986 Government audit of Murdock's claim, the Government questioned Murdock's costs as follows: direct costs of \$168,199, general and administrative expense of \$97,761, vendor termination claims of \$661, profit of \$667,491, and questioned cash received of \$62,880. Based thereon, the Government established a loss ratio of 21.3. (Gov't. Exh. AJ.)

443. Murdock asserted in its submission to the ASBCA direct costs on the A/B Dispenser Contract of \$805,700, general and administrative expenses of \$40,300, vendor termination claims of \$7,000, ten percent (10%) profit of \$85,300, less cash received of \$714,700, for a total claim of \$223,600. (Pltf. Exh. 87.)

444. In a December 1986 Government audit of Murdock's claim, the Government questioned Murdock's costs as follows: direct costs of \$62,648, general and administrative expense of \$34,202, profit of \$145,036, and payments of \$182. Based thereon, the Government established a loss ratio of 7.9. (Gov't. Exh. AJ.)

445. Murdock asserted in its submission to the ASBCA direct costs on the Zuni Launcher Contract of \$263,000, general and administrative expenses of \$13,200, vendor termination claims of \$4,000, ten percent (10%) profit of \$28,000, less cash received of \$177,500, for a remaining balance of \$130,700. (Pltf. Exh. 87.)

446. In a December 1986 Government audit of Murdock's claim, the Government questioned Murdock's costs as follows: direct costs of \$26,082, general and administrative expenses of \$11,728, profit of \$3,781, and payments of \$238. (Gov't. Exh. AJ.)

447. Murdock asserted in its submission to the ASBCA direct costs on the Practice Bomb Contract of \$1,545,000, general and administrative expenses of \$77,300, vendor termination claims of \$83,800, ten percent (10%) profit of \$170,600, less cash received of \$1,344,200, for a remaining balance of \$532,500. (Pltf. Exh. 87.)

448. In a December 1986 Government audit of Murdock's Practice Bomb Contract claim, the Government questioned Murdock's costs as follows: direct costs of \$105,349, general and administrative expenses of \$68,612, vendor claims of \$77,513, and profit of \$212,784. Based thereon, the Government established a loss ratio of 2.9. (Gov't. Exh. AJ.)

449. The Government's December 1986 audit indicated that it may include costs for which Murdock's estate was no longer liable, that because of the disarray of records available for review and time constraints, the DCAA was unable to perform certain accounting steps, and that many subcontractor claims were unaudited. The DCAA stated that the audit was intended to provide assistance in negotiating a termination proposal and recommended that the audit not be used for any other purpose without further discussion with the auditor. Accordingly, the court makes no finding that the loss ratios contained in the audit are accurate for the purpose of determining allowance of these claims. (Gov't. Exh. AJ.)

450. Murdock's 1975 ASROC Contract appeal, and its subsequent 1981 and 1983 appeals under the CDA, were consolidated and tried on the merits before the ASBCA in 1986. By ruling dated November 20, 1987, the ASBCA denied all of Murdock's appeals. In its decision, the ASBCA found that the Trustee had failed to prove that any Government act or omission had caused the performance problems or contract losses suffered by Murdock on the ASROC Contract, and that because the NCAB decision did not become final until communicated to an appropriate official and documentation signed, it was not binding on the Government. The ASBCA decision did not specifically address the merits or make findings on the non-ASROC contract terminations or claims presented by the Trustee. (Pltf. Exh. 68,)

451. In 1988, the Trustee appealed to the United States Court of Appeals for the Federal Circuit ASBCA appeals Nos. 20409, 27860 and 28031. The Federal Circuit ruled in *Murdock Machine and Engineering Co. v. United States*, 873 F.2d 1410 (Fed. Cir. 1989), that the ASROC Contract had been converted into a cost reimbursement/no-fee contract, that the Government breached the ASROC Contract by failing to provide sufficient funds, and for that reason the Navy's termination for default was improper. The Federal Circuit remanded to the ASBCA for a recalculation of liability. The Federal Circuit did not rule on any issue related to entitlement to non-ASROC costs, or the merits of the non-ASROC default terminations. (Pltf. Exh. 69.)

452. Upon remand, the ASBCA determined that all jurisdictional arguments had been resolved against the Government, and that Murdock was to submit its termination for convenience settlement proposal to the contracting officer consistent with

the terms of the ASROC Contract as modified. *Murdock Machine and Engineering Company of Utah*, ASBCA No. 27,860, 90-1 BCA ¶ 22,604 (1990) (Pltf. Exh. 70.)

453. Murdock then objected to the proof of claim number 764A filed by the Government on the ASROC Contract and moved for partial summary judgment based on the Federal Circuit ruling. This court granted partial summary judgment in favor of Murdock and disallowed that portion of the Government's claim number 764A for unliquidated progress payments related to the ASROC Contract. *Murdock Machine and Engineering Co. of Utah*, 1991 WL 180084 (Bankr. D. Utah 1991).

454. That decision was appealed, affirmed by the district court, and appealed to the Tenth Circuit Court of Appeals. *United States of America v. Bagley (In re Murdock Machine and Engineering Co. of Utah)* 990 F.2d 567 (10th Cir. 1993). During the pendency of the appeal to the Tenth Circuit, the ASBCA determined that under a cost reimbursement contract, the contractor has no obligation to continue performance after the funding limits are reached, whether the required product has been completed or not. Therefore, it ruled that Murdock would not have sustained a loss on the entire contract, and there was no basis for application of a loss adjustment. *Murdock Machine and Engineering Co. of Utah*, ASBCA No. 42,891, 93-1 BCA ¶ 25,329 (1992). The Tenth Circuit declined to assert jurisdiction over the non-ASROC claims, and did not reverse this court's ruling disallowing the ASROC portion of claim number 764A. *Murdock Machine*, 990 F.2d at 573.

II. CONCLUSIONS OF LAW

A. Jurisdiction.

This court has jurisdiction to adjudicate these non-ASROC claims pursuant to Bankruptcy Act § 2(a)(2). This court's "duty to timely determine and quantify creditors' claims" was reiterated in the Tenth Circuit's 1993 decision. *Murdock Machine*, 990 F.2d at 572. This court has exclusive jurisdiction over Murdock and all of its assets.

B. Burden of Going Forward and Standard of Proof.

The Government's non-ASROC claims are *prima facie* evidence of their validity and amount unless challenged. Bankruptcy Act § 57(a). Once the Trustee presents evidence of a sufficient probative value to refute the claims, the burden of going forward shifts to the Government to prove its claims. *Fullmer v. United States (In re Fullmer)*, 962 F.2d 1463, 1466 (10th Cir. 1992); *In re Stoecker*, 143 B.R. 118, 129 (Bankr. N.D. Ill. 1992). The Trustee raised a defense to the non-ASROC claims, and it is not inconsistent that once the Government has proved its non-ASROC claims, that the burden of going forward once again shifts back to the Trustee to establish his defense to the non-ASROC claims. This approach is also consistent with Government contract law. *TGC Contracting Corp. v. United States*, 736 F.2d 1512, 1514 (Fed. Cir. 1984)("[T]he burden is on the contractor to establish that the progress payments were erroneously withheld and that the withholding of such progress payments was the *primary or controlling cause* of the contractors default."). The Government, not the Trustee as objector, bears the ultimate burden of establishing a valid claim. *Stoecker*, 143 B.R. at 129. In any event, both parties presented substantial evidence

in their attempts to establish their cases. Which party had the burden of going forward is not particularly critical under the circumstances of this case.

The court's independent research of Government contract law does not reveal, nor have the parties directed the court to, the applicable evidentiary standard by which the Government must prove its claims and the Trustee must prove his defense. Generally, claims must be proved against a bankruptcy estate by a preponderance of the evidence and that standard should be equally applicable to a defense to a proof of claim. *In re Chateaugay Corp.*, 154 B.R. 29, 32 (Bankr. S.D.N.Y. 1993); *Stoecker*, 143 B.R. at 129. The evidence presented in this case, in relation to the Trustee's defense is, however, clear and convincing.

C. The Navy's Breach of the ASROC Contract Caused Murdock's Financial Inability to Perform the Non-ASROC Contracts. Therefore, Murdock's Failure to Perform Arose out of Causes Beyond its Own Control and not from Murdock's Fault or Negligence.

The Court of Claims isolated the applicable tests for determining whether default based on financial incapacity is excusable in *Southeastern Airways Corp. v. United States*, 230 Ct. Cl. 47, 673 F.2d 368 (1982):

The litmus test in these default termination cases is to determine whether or not the causes which precipitated the default were "beyond the control of the contractor." *National Eastern Corp. v. United States*, 201 Ct. Cl. 776, 477 F.2d 1347 (1973); *Appeal of Thermodyne Int'l, Ltd.*, ASBCA Nos. 21997, 22096, 80-1 BCA ¶ 14,333. Financial incapacity to perform is not ordinarily regarded as "beyond the control of the contractor." *Consolidated Airborne Sys., Inc. v. United States*, 172 Ct. Cl. 588, 348 F.2d 941 (1965); *Kennedy, Trustee in Bankruptcy of Greenstreet, Inc., Bankrupt v. United States*, 164 Ct. Cl. 507 (1964); *Appeal of Office Equipment Co.*, ASBCA No. 4648, 58-1 BCA ¶ 1717. One who submits a bid for and accepts the award of a contract is deemed to have the financial capacity to perform it. *Appeal of H & H Mfg. Co., Inc.* ASBCA No. 4353, 59-2 BCA ¶ 2425; *aff'd on review*, 168 Ct. Cl. 873 (1964)).

Southeastern Airways, 673 F.2d at 377-78. The opinion in *Southeastern Airways* also set forth the exception to the rule:

An exception to this general rule is presented when the financial incapacity is itself precipitated by factors "beyond the control of the contractor."

Id. at 377-78 (citations omitted)(the contractor's financial incapacity pre-dated commencement of performance). If the contractor's financial problems are caused by the Government's actions, the contractor's default may be justified. *Boston Shipyard Corp. v. United States (In re Boston Shipyard Corp.)*, 886 F.2d 451, 457 (1st Cir. 1989) (citing *Southeastern Airways*, 673 F.2d at 377-78, and *National Eastern Corp. v. United States*, 201 Ct. Cl. 776, 477 F.2d 1347, 1356 (1973)(a contractor's incapacity is *a fortiori* beyond the control of the contractor if caused by actions of the Government)).

When the contractor's financial incapacity to perform is caused by the acts or omissions of the Government and where the contract contains a termination for convenience clause, the default is excused and the contract is deemed to have been terminated for the convenience of the Government. *TGC Contracting Corp.*, 736 F.2d at 1514-15 (citing *National Eastern Corp.*, 477 F.2d at 1356).

The Applicable Causation Standard.

The standard that should be used to determine if the Government's improper actions excuse a default depends upon the nature of the contract and, to a large degree, the particular court articulating the test. The case law exhibits an evolution from application of a "proximate cause" test to application of a test employing a more relaxed causation

standard where the terms of the contract control¹⁸. However, a common thread runs through the various decisions: If the Government's improper action over which the contractor had no control had a significant, controlling or overriding impact on the contractor's ability to perform, as opposed to other factors that are within the contractor's control, the default will be excused.

Early Government contract cases articulated a remedy for a common law breach of contract and applied a proximate cause standard to determine causation. *Myerle v. United States*, 33 Ct. Cl. 1 (1897).¹⁹ Since *Myerle*, the proximate cause standard has evolved into application of a foreseeability standard based on the facts and circumstances at the time the contract was entered into by the parties. *Prudential Insur. Co. of America v. United States*, 801 F.2d 1295 (Fed. Cir. 1986), *cert. denied* 479 U.S. 1086 (1987)(in absence of explicit contract provision, court adopted general contract rule that damages for breach

¹⁸ Part of the difficulty of articulating an applicable causation standard is probably attributable to the impossibility of predicting a contractor's future ability to complete a contract when faced with so many future variables. From an evidentiary standpoint, prediction of ability to complete becomes mere speculation when due consideration is given to potential future changes in finance, production, management, or labor.

¹⁹ In *Myerle*, the contractor entered into a contract with the Navy to build one of the first iron warships, the monitor christened *Monadnock*. Repeated delays over seven years, caused solely by the Navy, resulted in substantial additional costs to the contractor and it pressed its claims against the Government. The Court held:

[T]he plaintiff can only recover those items of damage which are the proximate result of the acts of the Government. What those items are is somewhat difficult to determine. For a damage to be direct there must appear no intervening incident (not caused by the defaulting party) to complicate or confuse the certainty of the result between the cause and the damage; the cause must produce the effect inevitably and naturally, not possibly nor even probably. The damage must be such as was to have been foreseen by the parties who are assumed to have considered the situation, the contract, and the unusual course of events; but eliminated from this consideration must be any condition of affairs peculiar to the contractor individually in the particular case and not of general application under similar conditions. There must not be two steps between cause and damage.

Myerle, 33 Ct. Cl. at 27.

of implied covenant must be foreseeable at the time the lease was executed). *See also, CCM Corp. v. United States*, 15 Cl. Ct. 670 (1988); *DeBarros v. United States*, 5 Cl. Ct. 391 (1984); *Northern Helex Co. v. United States*, 207 Ct. Cl. 862, 524 F.2d 707 (1975), *cert denied* 429 U.S. 866 (1976).

In instances where the common law right to recover against the Government has been superseded by a contractual remedy, the common law rules of contract damages based on either proximate cause or foreseeability do not apply. The appropriate standard was discussed in *William Green Construction Co., Inc. v. United States*, 201 Ct. Cl. 616, 477 F.2d 930 (1973), *cert. denied* 417 U.S. 909 (1974). In *Green Construction*, the contractor was awarded three separate GSA contracts, one of which was improperly terminated by the Government. The Government indicated an intent to set off damages from the first contract against amounts owing on the other two contracts. The contractor failed to complete the other contracts and ceased business operations. The court determined that no claim for a supplemental award based on common law breach of contract existed: only the right to a convenience-type termination or equitable adjustment and that the convenience termination subsumed and obviated an independent, common law, breach of contract claim. Since termination of the first contract was improper, there were no liquidated damages and excess costs that could properly be offset against the other two projects.

Had a common law remedy based on a proximate cause standard been the only remedy available to the contractor, it is likely that the threat of set off would have been characterized as an intervening cause, not the proximate cause of the contractor's default. In *Green Construction*, the only cause of the contractor's stoppage on the two remaining

contracts was the menace of set-off. Contrary to the likely result if proximate cause were the applicable standard, the *Green Construction* court ruled that the contractor's refusal to proceed on the remaining contracts was excused. "A serious threat in these circumstances to withhold necessary progress payments because of an erroneous off-set claim on another contract is an act of the Government, not attributable to the contractor, which excuses whatever technical default there may be." *Green Construction*, 477 F.2d at 938. *But see National Eastern Corp.*, 477 F.2d at 1357 (both decisions dated in May of 1973, with five of seven judges the same as *Green Construction* court, but *National Eastern* court applied common law proximate cause standard to find excuse of default where contract contained Termination for Convenience clause).

Many of the reported cases involve circumstances where the Government improperly failed to make progress payments. Some courts have indicated that the applicable causation standard that the contractor must meet is proof that the Government's actions were the *primary or controlling* cause of the contractor's default. *TGC Contracting Corp.*, 736 F.2d at 1514.²⁰ Indeed, in the 1987 ASBCA ruling in the present case, the standard applied

²⁰ See also *Guenther Mfg. Co., Inc.*, ASBCA No. 15,755, 73-2 BCA ¶ 10,327, (1973)(Government's improper denial of a claim was not proved to be linked to the contractor's bank's denial of extension of funds, and the contractor's expenditures on non-Government contracts was equally a cause of contractor's ultimate lack of funds and thus not the *primary or controlling cause* of the contractor's failure to perform). *But see J.M.T. Machine Co., Inc.*, ASBCA No. 23,928, 85-1 BCA ¶ 17,820 (1984)(contractor was excused from its failure to perform because of defective Government specifications, but evidence did not support a finding that inability to continue manufacturing was attributable *solely* to defective specifications or length of time its claim was pending). See also *Spiritual Sky Scented Products*, ASBCA No. 24,507, 82-2 BCA ¶ 15,948 (1982)(contractor's failure to perform was excusable where Government had no right to delay payment for supplies purchased, thus *causing* the contractor's financial stress that prevented the contractor from performing); *R.C. Hudson & Assocs., Inc.*, ASBCA No. 20,711 76-2 BCA ¶ 12,201 (1976) (not even the *slightest* evidence appeared in the record that payment of the disputed sum by the Government would have had any appreciable effect on the status of the contractor's performance as of the date of termination); *Curtis L. Holt d/b/a Advance Maintenance Co.*, HUDBCA No. 75-11, 76-2 BCA ¶ 11,999 (1976)(Government's failure to inspect work as required and to make timely payments resulted in contractor's financial difficulties); *Contract* (continued...)

was the Trustee's inability to show a *cause and effect* relationship between the alleged wrongful acts of the Government, and Murdock's financial failure. *Murdock Machine and Engineering Co. of Utah*, 88-1 BCA ¶ 20,354, 20,355 (1987), *rev'd in part Murdock Machine & Engineering Co. of Utah v. United States*, 873 F.2d 1410 (Fed. Cir. 1989).

In *Bristol Electronics Corp.*, ASBCA No. 24,792, 84-3 BCA ¶ 17,543, *aff'd on reconsideration* 85-1 BCA ¶ 17,821 (1985), the ASBCA tried to articulate the appropriate standard. The Government argued that the use of a "but for" standard was fundamentally different from the standard of proximate cause previously applied in financial inability to complete cases. The prior standard required that the Government's action must be the "sole or even controlling cause" of the contractor's financial inability to perform. In *Bristol Electronics*, the ASBCA rejected a proximate cause standard and indicated that "but for" the Government's failure to equitably adjust the contract in the amount the contractor was entitled to receive, the contractor would have been able to continue to perform. The ASBCA also indicated that it was mere speculation to decide whether the contractor could have ultimately completed the contract since no evidence was before it to permit a determination of the extent of the salutary effects upon the contractor's performance of a timely and proper equitable adjustment. The ASBCA found the evidence sufficient to

²⁰(...continued)

Maintenance, Inc., ASBCA No. 19,409, 75-1 BCA ¶ 11,207 (1975) (Government's refusal to pay amounts known to be due relieved contractor from continuing performance); *Pacific Intermodal Corp.*, ASBCA No. 15,089, 73-2 BCA ¶ 10,151 (1973) (default was excused where evidence was clear that contractor was reaching a break-even point in its contract, and had its claims that were caused by shortages and delays caused by Government's actions been settled, contractor would have had the financial resources to have carried the performance of the contract through ensuing slow-downs caused by union jurisdictional disputes and strikes).

conclude that the contractor's financial inability was caused by the Government's actions.

Bristol Electronics., 84-3 BCA ¶ 17,543.

Since proximate cause is not the standard applied in cases where the contract provides a remedy for breach, there can be circumstances where the improper default on one contract is the controlling cause of default on other contracts. The intervention of an additional contract does not, *per se*, sever the causation chain as it might if a proximate cause standard were applied. Government breach under one contract excuses default terminations of other contracts when the "snowballing" effect of that breach was the *operative* cause of the contractor's inability to continue its other obligations, regardless of whether the passage of time would have left the contractor vulnerable to default termination in any event. *R-D Mounts, Inc.*, ASBCA No. 14,827, 71-1 BCA ¶ 8643 (1970)(contractor proved that a causal relation existed that the financial distress caused the contractor by improper Government action under one contract directly caused the default position of other contracts); *see also Southeastern Airways*, 673 F.2d at 378. In *Southeastern Airways*, the Court of Claims considered whether termination of a second contract was excused because of the circumstances of the Postal Service's termination of a first contract. Although the court found the termination was not excused, it considered whether the contractor could have continued to perform satisfactorily on the second contract had the Postal Service not discontinued payments on the second route as an offset against damages it anticipated collecting as a result of the first default.

The Government's actions were the Primary or Controlling Cause of Murdock's Default.

In this case, the extent of the snowballing effect of the Government's actions on the ASROC Contract in relation to the non-ASROC contracts, is tied to the amount of control Murdock had over its own affairs. The evidence indicates Murdock had little control. From the time of Murdock's incorporation as an independent entity pursuant to the 1973 Settlement, the Government controlled the selection of Murdock's management, the nature and source of Murdock's financing, as well as what new contracts Murdock was allowed to bid. The Navy also controlled and directed the time and energy of Murdock's management toward the ASROC Contract to the exclusion of the non-ASROC contracts.

The Government's control over Murdock's financing was pivotal. Even though the Bank administered the V-Loan, the Bank's actions were driven by its concern over its liability if the Government perceived that the Bank had not properly administered the loan. The Government's control over the Bank's actions is further evidenced by the Bank's immediate act to call upon the guarantor once it had been cautioned that further advances would be viewed as imprudent. The Government's statement regarding potential imprudent acts sent a clear message to the Bank; a message that was outside Murdock's control.

Murdock had no capacity to sever the effect of the termination of the ASROC Contract and its corresponding impact on the V-Loan, from the Bank's decision to accelerate the V-Loan. Termination of the ASROC Contract was central in the Bank's decision to accelerate the V-Loan, and the Bank would not allow the continued credit line to remain in existence for the non-ASROC contracts. Had the \$500,000 line of credit remained in place, Murdock would have been able to pay its employees and to continue to

produce on the non-ASROC contracts. Although the Navy's control over Murdock is not, by itself, sufficient grounds to find that Murdock's defaults are excused, it is a factor in determining whether Murdock had the ability to halt the cumulative effect of the Government's breach of the ASROC Contract.

It is also clear from the evidence that Murdock had projected losses on its non-ASROC contracts and prior production problems, but those factors did not cause Murdock's termination of production on the non-ASROC contracts. The evidence related to production indicates that, in spite of production defaults, none of the contracting agencies had decided to terminate any of the non-ASROC contracts prior to termination of the ASROC Contract. The cumulative evidence also indicates that Murdock was willing and able to continue production on all the non-ASROC contracts except the Initiator Contract and that contract is not at issue here. Murdock had an experienced management team, a trained work force, adequate facilities, historical experience in defense production, had solved production and vendor problems, and was anticipating follow-on contracts or increased contract quantities in its attempt to regain profitability. Production was one area over which Murdock could exercise control and the evidence indicates Murdock had the capacity to continue performance on the non-ASROC contracts.

The termination notices in evidence on the non-ASROC contracts refer both to financial difficulties and production cessation: they cite Murdock's failure to cure its financial condition, the "denial" of P.L. 85-804 relief on ASROC, and Murdock's bankruptcy filing, as well as failure to respond to 10-day cure notices and termination of production. The stated reasons for termination relate, in large part, to the ASROC Contract. The more

credible evidence is that Murdock had the ability to continue to produce on the non-ASROC contracts , but that the Government's actions in breaching the ASROC Contract by failing to make funds available pursuant to the conversion to a cost reimbursement/no-fee contract and subsequent default termination of the ASROC Contract, were the causes not only of the Bank's acceleration of the V-Loan, but of the contracting agencies declarations of default on the non-ASROC contracts.

Applying the causation standards set forth in the above cited case law to all of the facts of this case, the court concludes that Murdock's inability to continue to manufacture was caused by circumstances that were beyond its control. Murdock's failure to perform was directly caused by Murdock's inability to retain its employees after the Bank refused to advance funds from the V-Loan to meet payroll. The Bank refused to advance V-Loan funds because the Government improperly terminated the ASROC Contract after the Navy converted the contract to a cost reimbursement/no-fee contract, and because funds were not made available to satisfy the ASROC vendor who had attached Murdock's accounts. The consequences of the Government's breach of the ASROC Contract and failure to deliver funds as promised, and the Bank's resulting acceleration of the V-Loan effectively eliminating Murdock's remaining \$500,000 line of credit, was beyond Murdock's control and made Murdock's performance on the non-ASROC contracts financially impossible. Murdock was caught in the tug-of-war between the Navy and its need to have the ASROC launchers manufactured, and Murdock's need to complete the contracts for the other branches of the armed services. When the Navy's needs related to the ASROC Contract and Murdock's needs for survival as a corporate entity conflicted, Murdock lost. Measuring the evidence

by either a preponderance or a clear and convincing standard, the Trustee established the causal connection between the Government's actions and Murdock's cessation of production and proved its defense to the Government's claims.

In reaching this conclusion, it is not necessary to determine that Murdock would have become a Fortune 500 company. It is not necessary to determine when Murdock would have attained profitability, or a positive net worth. It is not necessary to find that Murdock would have been awarded follow-on contracts. It is only necessary to determine that with its line of credit in place, Murdock would have had the financial and technical capacity to continue in business, and to continue production on the non-ASROC contracts. The Government's actions made continuation of production impossible. In the present case, as in *R-D Mounts*, since "the Government may not escape responsibility for the necessary consequences of its action . . . [the defaults are] legally excusable." *R-D Mounts*, 71-1 BCA at 40,170.²¹

²¹ The Government argues that *R-D Mounts, Inc.*, besides being wrongly decided, is not on point because the contractor's secondary contracts in that case were much smaller than the "causational" contract, as opposed to Murdock's non-ASROC contracts that totaled a value of \$19,774,000, as opposed to the \$10,659,612 value of the ASROC Contract. Why this is important is not articulated, only that the facts are not similar.

The Government contends that the case with facts most similar to the case at bar is *Green Construction*, discussed above. In that case, the contractor held three contracts with the federal Government and three contracts with non-federal entities. The Government improperly terminated one of the contracts, and then threatened to withhold payments properly due under the other contracts to cover damages under the improperly terminated contract. This threatened withholding of funds under the non-terminated contracts made it impossible for Green to complete those contracts and resulted in the collapse of its business. The court held that the contractor did not have a breach of contract claim, but that it did have the right to a convenience-termination type of equitable adjustment. It also held that there was no factual linkage between the threat of set off and the remaining contracts, because they were mere threats, not actions. *Green Construction*, 477 F.2d at 936-37.

The Government's actions in the case at bar were far from mere threats. The Government's actions in denying ASROC related P.L. 85-804 relief and termination of the ASROC Contract resulted in the Bank's acceleration of the V-loan and elimination of Murdock's line of credit which caused Murdock's financial collapse.

D. The Government's Pre-Petition Administration of the Non-ASROC Contracts does not Waive Post-Petition Termination, but such Termination is Subject to the Provisions of the Bankruptcy Act and Equitable Principles.

As an alternative theory, Murdock argues that, under Government contract law, a contractor's failure to strictly adhere to a delivery schedule does not create an absolute Government right to terminate a contract. Rather, if Government action (or inaction) encourages a contractor to continue performance beyond delivery dates, and the contractor continues to perform, the Government waives its right to default terminate for failure to meet those delivery dates. *E.g., Kitco, Inc.*, ASBCA No. 38,184, 91-3 BCA ¶ 24,190; *DeVito v. United States*, 188 Ct. Cl. 979, 413 F.2d 1147, 1153 (1969)("[W]here the Government elects to permit a delinquent contractor to continue performance past a due date, it surrenders its alternative and inconsistent right under the Default clause to terminate, assuming the contractor has not abandoned performance and a reasonable time has expired for a termination notice to be given."). The necessary elements of an election by the Government to waive default in delivery under a contract are (1) failure to terminate within a reasonable time after the default under circumstances indicating forbearance, and (2) reliance by the contractor on the failure to terminate and continued performance by him under the contract, with the Government's knowledge and consent. *DeVito*, 413 F.2d at 1153-54.

Prior to filing bankruptcy, Murdock kept the Government informed of its performance on all of the non-ASROC contracts by submission of the appropriate reports to the contracting agencies. Murdock's various failures to meet delivery schedules were

resolved by contract modifications, explicit waivers or were implicitly condoned by the Government.

Regardless of the Government's actions in not terminating the non-ASROC contracts for Murdock's failure to comply with the various delivery schedules, an independent ground for termination would have arisen as a result of Murdock's eventual post-petition failure to perform the non-ASROC contracts. *Tubular Aircraft Prods., Inc.*, 213 Ct. Cl. 749, 566 F.2d 1190 (1977)(default termination predicated upon contractor's failure to meet delivery schedule was not sustainable because there was no enforceable delivery schedule, but the default termination was sustainable based on the contractor's failure to make progress so as to endanger contract performance). If the Government has waived a contract delivery schedule, and thus lost its right to terminate for non-compliance therewith, subsequent abandonment by the contractor provides a separate and independent ground supporting termination of the contract for default. *Tubular Aircraft Prods.*, 566 F.2d at 1190; *Universal Fiberglass Corp. v. United States*, 210 Ct. Cl. 206, 537 F.2d 393 (1976); *United States v. Russell Elec. Co.*, 250 F. Supp. 2, 18 (S.D.N.Y. 1965); *Herlo Corp.*, ASBCA No. 19,198, 77-2 BCA ¶ 12,820.

The Government may have had independent grounds to terminate the non-ASROC contracts because of Murdock's post-petition failure to perform. Those grounds for termination, however, had to have been exercised within the framework of the protection provided to Murdock and its creditors by the provisions of the Bankruptcy Act, as well as other controlling equitable principles. While a contractor's "abandonment" of performance may be grounds for default termination, the court is required to examine whether it resulted

from Government action beyond the fault or control of the contractor. If so, the contractor's "abandonment" is excusable and cannot provide a grounds to support default termination. *See, e.g., U.S. Optics Corp., ASBCA No. 18,972, 75-2 BCA ¶ 11,603 (1975)*(where Government action brought about financial collapse of the contractor, failure to continue performance is excusable and not grounds for default termination); *R-D Mounts, Inc., 71-1 BCA ¶ 8643*. In this case, Murdock's post-bankruptcy failure to perform the non-ASROC contracts resulted from Government action that was beyond Murdock's control and cannot be the basis for a default termination.

E. The Non-ASROC Contract Terminations are not Final and this Court has Jurisdiction to Determine the Government's Claims.

The Government asserts that the decisions of the contracting officers to terminate the non-ASROC contracts are final, and this court has no jurisdiction to review either the merits of the Government's claims or Murdock's defenses. Absent the intervening bankruptcy, non-bankruptcy law would have supported the Government's position. *Crown Coat Front Co. v. United States, 386 U.S. 503 (1967)*(contracting officer decisions are final if not appealed according to the disputes clause of the contract).

The general rule is that non-bankruptcy substantive law should be applied in claims litigation.²² However, once Murdock filed bankruptcy, the Bankruptcy Act's procedural protection afforded to the assets of the estate, as well as the Act's procedures for determining entitlement to distribution from the estate, superseded non-bankruptcy law. There are three independent reasons for rejecting the Government's arguments that the

²² *In re Norwalk Tire & Rubber Co., 100 F. Supp. 706, 711 (D. Conn. 1951)* (questions of substantive law in the allowance of claims in bankruptcy should normally be governed by the law of the appropriate state jurisdiction, and the measure of proof is a matter of substantive law).

contracting officers' decisions are final. First, the decisions of the contracting officers are void because they were made in violation of the stay, § 11(e) of the Bankruptcy Act and former Act Rules 401 and 601. Second, Murdock is not time-barred to raise its defenses to the Government's claims. Third, this court has authority to determine the Government's entitlement to a distribution of funds from this estate and to adjudicate Murdock's asserted defenses against the Government's claims.

The Contracting Officers' Decisions are Void.

The record is unclear as to the specific dates of some of the Government's actions in terminating the non-ASROC contracts.²³ Regardless of whether the actions were pre- or post-petition, the eventual terminations were in violation of the protections afforded the estate by the Bankruptcy Act. If the 10-day cure periods were running when Murdock filed its petition, they were all extended by operation of Bankruptcy Act § 11(e) and until a date well after the date the contracts were actually terminated.²⁴ If the 10-day cure notices were served after Murdock filed its petition, such service constituted affirmative

²³ The 10-day cure notice on the Fin and Nozzle Contract was received by Murdock on May 19, 1975. Within four days, Murdock filed its bankruptcy and running of the 10-day period was tolled. On June 10, 1975, approximately two weeks after Murdock filed, the Government issued the 10-day notice on the Delay Plunger Contract. The record does not reflect when the 10-day cure notice on the A/B Dispenser and Zuni Launcher Contracts were served, if at all, but the contracts were terminated July 1, 1975, approximately 39 days after filing. The record is also silent as to when the Air Force served its 10-day notice, if at all, on the Practice Bomb Contract, but the contract was terminated on June 19, 1975, approximately 27 days after filing.

²⁴ Bankruptcy Act § 11(e) provides:

Where . . . in any proceeding, judicial or otherwise, a period of limitation is fixed . . . for taking any action, filing any claim or pleading, or doing any act, and where in any such case such period had not expired at the date of the filing of the petition in bankruptcy, the . . . trustee . . . may . . . take any such action or do any such act, required of or permitted to the bankrupt, within a period of sixty days subsequent to the date of adjudication. . . .

actions of the Government in violation of the stay such as it existed at the time this case was filed.²⁵

The Government's affirmative actions against Murdock were designed, through the Default Clause of the contracts, to allow re-procurement and to liquidate the excess costs thereof, and to obtain the transfer of title to the Government of certain property. Upon filing the bankruptcy, Murdock's estate enjoyed the protection of the stay provided by Bankruptcy Act § 148 and Act Rules 401(a) and 601(a), and any action against Murdock or to enforce the Government's lien against its assets were stayed.²⁶ Any actions taken in violation of that stay are void. *Ellis v. Consolidated Diesel Elec. Corp.*, 894 F.2d 371, 372 (10th Cir. 1990)(citing *Kalb v. Feuerstein*, 308 U.S. 433, 438 (1940) and *Meyer v. Rowen*, 181

²⁵ It is undisputed that the Government is subject to the provisions of the automatic stay. *United States v. Hollowell (In re Delta Food Processing)*, 446 F.2d 437 (5th Cir. 1971). Although in certain circumstances the Government will be allowed to recoup claims against the estate without violating the stay, those circumstances are not involved in the Government's action to terminate these contracts. See *Styler v. Jean Bob Inc. dba Studebakers (In re Concept Clubs. Inc.)*, 154 B.R. 581 (D. Utah 1993).

²⁶ The Bankruptcy Act and the 1973 Act Rules (prescribed by the Supreme Court, April 24, 1973, 411 U.S. 989 (1973)) contained various automatic stay provisions related to cases filed under Chapter X as follows:

Section 148: Until otherwise ordered by the judge, an order approving a petition shall operate as a stay of . . . any act or other proceeding to enforce a lien against the debtor's property.

Act Rule 401: Petition as Automatic Stay of Certain Actions on Unsecured Debts

(a) *Stay of Actions.* The filing of a petition shall operate as a stay of the commencement or continuation of any action against the bankrupt, or the enforcement of any judgment against him, if the action or judgment is founded on an unsecured provable debt other than one not dischargeable under clause (1), (5), (6), (7) of § 17a of the Act.

Act Rule 601: Petition as Automatic Stay Against Lien Enforcement

(a) *Stay Against Lien Enforcement.* The filing of a petition shall operate as a stay of any act or the commencement or continuation of any court proceeding to enforce (1) a lien against property in the custody of the bankruptcy court, or (2) a lien against the property of the bankrupt obtained within 4 months before bankruptcy by attachment, judgment, levy, or other legal or equitable process or proceedings.

F.2d 715, 716 (10th Cir. 1950)).²⁷ Act Rules 401 and 601 automatically stayed pending actions or actions commenced against the debtor after bankruptcy upon the date of filing.²⁸

The Government, relying on *In re Trigg*, 630 F.2d 1370, 1374 (10th Cir. 1980), argues that its actions were not precluded by the provisions of the stay. In *Trigg*, the court considered whether Bankruptcy Act § 11(e), as implemented by Act Rule 11-44²⁹, forbade a default termination of a contract after the bankruptcy filing. The Chapter XI debtors' federal and state oil and gas leases expressly provided that, absent oil and gas production, the debtors' failure to pay an advance annual delay rental on or before the anniversary date would automatically terminate the lease. Termination of the lease took no action on the part of the lessor, or any "proceeding" within the meaning of the Bankruptcy Act. *Trigg*, 630 F.2d at 1373.

The facts in the present case are to the contrary. Each non-ASROC contract provides procedures through the Default and Disputes Clauses to terminate the contracts. Under these provisions of the non-ASROC contracts, the Government must give written notice specifying a failure to perform and it must be served on the contractor. The

²⁷ The holding in *Kalb v. Feurstein* was called into question by *In re Schwartz*, 119 B.R. 207, 209-11 (9th Cir. BAP 1990). In *Schwartz*, the Ninth Circuit Bankruptcy Appellate Panel (BAP) noted the general rule that any actions taken in violation of the automatic stay are void. The BAP determined, however, that the prevailing Ninth Circuit decisions compelled it to adopt the rule that all violations of the automatic stay are voidable and subject to cure in the sense that the act is unenforceable and can be avoided or declared invalid when the question is properly presented. This court has considered this distinction and determined that, as applied to the facts in the present case, whether the Government's post-petition actions are void or voidable makes no difference to the effect of this ruling.

²⁸ See discussion of Rule 401 in 12 Collier, Bankruptcy ¶¶ 401.1-401.7 (14th ed. 1977), and Rule 601 in 13 Collier, Bankruptcy, ¶¶ 601.01-601.10 (14th ed. 1977).

²⁹ Act Rule 11-44 applied only to Chapter XI and was not in effect on the date Murdock filed its petition. 13A Collier, Bankruptcy ¶ 10.1.03 (14th ed. 1977)

Government must allow a 10-day period for the contractor to cure the failure and then the Government must give written notice of default. If a factual dispute arises, the contracting officer must issue a written decision and serve a copy on the contractor, and thirty (30) days must lapse without appeal for the decision of the contracting officer to become final. That procedure is substantially different from the circumstances in *Trigg* where the contract lapsed without any action on the part of the lessor.

The Government asserts that it was unable to locate any relevant reported case law where a court reached a conclusion opposite to the holding in *Trigg*. This failure may have been caused by the dissimilarities between the termination provisions at issue in *Trigg* and the present case. Cases involving contracts that did not terminate by their own provisions, even though decided under Bankruptcy Code § 362, are substantively more similar to this case than *Trigg*.

In *Adana Mortgage Bankers, Inc.*, 12 B.R. 989 (N.D. Ga. 1980), the Government made a post-petition default determination of an elective nature, i.e., the Government was required to declare certain occurrences as events of default. Although the debtor was making payments as and when due, the Government stated that its actions were necessary in light of the uncertain financial situation of the debtor and the absolute necessity of timely payments under the terms of a guaranty agreement. The Government served the debtor with a termination letter and attempted to seize the debtor's assets without obtaining bankruptcy court approval. The court found that the Government's actions were wilful, deliberate and knowing violations of the stay. The facts surrounding the Government's termination of the non-ASROC contracts are more similar to the attempted termination in

Adana Mortgage than the termination of the lease agreements in *Trigg* which did not require the parties to perform an affirmative act before termination. See also *In re McLouth Steel Corp.*, 20 B.R. 688 (Bankr. E.D. Mich. 1982)(agreement to remove slag required affirmative act of post-petition termination notice and did not terminate upon its own terms).

The Government also argues that its actions of issuing 10-day cure notices and then proceeding to termination for default on the executory non-ASROC contracts were not "proceedings" within the scope of Act Rule 601(a), indicating that the scope of the stay does not reach contract termination actions. Although the Government has found no case directly on point, it asserts that at least one court has ruled that a restaurant liquor license revocation action did not violate Act Rule 11-44 because such action was not a commencement or continuation of any action. *Colonial Tavern Inc. v. Byrne*, 420 F. Supp. 44 (D. Mass. 1976). In *Colonial Tavern*, decided under the Bankruptcy Act, the district court held that the bankruptcy court could not enjoin a city licensing board from enforcing the suspension of a liquor license for violations of the midnight closing hour. That holding is wholly consistent with Bankruptcy Code § 362(b)(4) that excepts government actions to enforce police or regulatory powers from application of the stay. Congress said that the concept of police or regulatory actions should be narrowly construed in order to prevent a mere pecuniary interest of the government from being used to bulldoze other creditors. H.R. Rep. No. 595, 95th Cong., 1st Sess. 343 (1977). Under the circumstances of this case, the *Colonial Tavern* holding is completely distinguishable, and the Government is just another creditor whose claim should be given no special status in bankruptcy. Accordingly, the Government's argument that default terminations of the non-ASROC contracts did not

contravene the primary purpose of the stay, which is to prevent interference and diminution of the debtor's property during reorganization proceedings, lacks any basis. *Power-Pak Prods. Inc. v. Royal Globe Insur. Co.*, 433 F. Supp. 684, 686 (W.D.N.Y. 1977)(the automatic stay prevents interference with estate property but may be lifted upon request under appropriate circumstances).

The non-ASROC contracts were executory contracts at the time of filing. Bankruptcy Act § 70(b) allows the trustee a period of sixty days after adjudication or within thirty days after the qualification of the trustee, whichever is later, to assume or reject an executory contract. All the non-ASROC contracts were ostensibly terminated by the Government prior to the expiration of this period.³⁰ Viewed in their totality, the acts of the contracting officers in terminating the non-ASROC contracts were accomplished in violation of a variety of the provisions of the statute.³¹

The ultimate effect of the Government's violation of the stay and other provisions of the Act, however, is not significant except with respect to the running of any limitation period. Even though the Government's default terminations are void, and therefore do not trigger any appeal period, the executory contracts would have been rejected by operation of law for failure to accept them within the applicable time. Nevertheless, if the non-ASROC contracts were terminated improperly, the Government cannot now be heard to complain that Murdock did not properly appeal those terminations.

³⁰ Murdock was adjudicated as bankrupt and an order appointing a receiver was entered on May 23, 1975. The non-ASROC contracts were all terminated prior to sixty (60) days after Murdock's adjudication, the longer period allowed by Bankruptcy Act § 70(b).

³¹ The non-ASROC contracts, as executory contracts, terminated automatically upon expiration of the time set forth in the statute, but at a time that fell after the contracting officer's ostensible terminations.

Murdock's Defenses are not Time-Barred.

The Government, relying on *In re Wallace*, 840 F.2d 762, 764-65 (10th Cir. 1988), argues that the Trustee is time-barred from asserting a defense against the Government's claims and that this proceeding constitutes a collateral attack upon a final judgment. In *Wallace*, a judgment obtained pre-petition in a non-jury trial on the merits collaterally estopped further litigation, but only because: (1) the issue was the same as that involved in prior action, (2) the issue was actually litigated, and (3) the prior determination was necessary to the resulting final and valid judgment. The Government further argues that a judgment debtor who does not appeal state court rulings regarding damages cannot later challenge the correctness of the rulings on damages in bankruptcy. *In re Tsamasfyros*, 940 F.2d 605, 608 (10th Cir. 1991)(action was actually and necessarily litigated in state court).

The cases cited by the Government are instructive, but inapplicable to the instant case. In both *Wallace* and *Tsamasfyros*, the judgments were rendered pre-petition and on the merits. In this case, the Government's collateral estoppel argument rests on post-petition termination by default. There has never been a final adjudication of the merits of the Trustee's defense that the non-ASROC contracts were terminated improperly as a result of the Government's breach of the ASROC Contract. The Trustee raised an affirmative claim against the Government in the ASROC Contract action that was actually litigated. Those issues are not the same as the issues raised here. The Trustee's objection to the Government's non-ASROC claims raise defenses, not affirmative claims against the Government that are independent of the remedies available under the contracts. These particular defenses have never been litigated. Likewise, even though a claim for affirmative

relief may be barred by a statute of limitations, if the Default and Disputes Clauses of the non-ASROC contracts are so construed, such a claim can still be employed defensively in adjudication of a claim. "While a statute of limitations may bar an affirmative claim against [the claimant], this Court can discern no policy or statutory reasons that would prevent [the debtor] from raising the [affirmative claims] in defense to [the claimant's] claim." *In re Larsen*, 80 B.R. 784, 791 (Bankr. E.D. Va. 1987); accord, *MBank Fort Worth, N.A. v. Trans Meridian, Inc.*, 820 F.2d 716, 720 (5th Cir. 1987); *Lawler v. Guild, Hagen & Clark, Ltd. (In Re Lawler)*, 106 B.R. 943, 962 (N.D. Tex. 1989).

Furthermore, both the Bankruptcy Code and the Bankruptcy Act are silent regarding a limitations period for objecting to claims. *In re Stoecker*, 143 B.R. 118, 131 (Bankr. N.D. Ill. 1992). Act Rule 306 did not set any time period within which an objection to allowance for purpose of distribution must be filed and the Trustee may object at any time to claims pending before this court. Bankruptcy Act § 57(f); see also, *In re SMS, Inc., d/b/a The Bookworm*, 15 B.R. 496, 501 (Bankr. D. Kan. 1981)(trustee should not object to claims unless there are assets to be distributed). Courts have treated the claims allowance process as a defensive measure to reducing claims that could have been otherwise avoided and recovered under other sections. *In re Stoecker*, 143 B.R. at 135. Bankruptcy Act § 11(e)'s time limitation is not applicable to the Trustee's objection under Bankruptcy Act § 57. *In re Cushman Bakery*, 526 F.2d 23 (1st Cir. 1975), cert. denied sub nom., *Agger v. Seaboard Allied Milling Corp.*, 425 U.S. 937 (1976); *Stoecker*, 143 B.R. at 135.

This Court has Jurisdiction to Determine the Government's Non-ASROC Claims and the Trustee's Defenses.

Murdock's failure to appeal the non-ASROC terminations in accordance with the Disputes Clause of the contracts has no bearing on whether the Government is entitled to recover its claims against the estate. By filing proofs of claim against Murdock's estate, the Government subjected itself to the equitable power of this court to disallow those claims. *E.g., Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 59 n.14 (1989). The holding in *Granfinanciera* was reiterated in *In re Mercury Masonry Corp.*, 114 B.R. 35 (Bankr. S.D.N.Y. 1990):

[B]y filing a proof of claim, [the creditor] has submitted to the jurisdiction of this court for purposes of determining this adversary proceeding, because a determination of the claims and objections set forth in the adversary proceeding would necessarily involve an adjudication of the validity and amount of the claim set forth in [the creditor's] proof of claim.

Mercury Masonry, 114 B.R. at 38; *see also Langenkamp v. Culp*, 498 U.S. 42, 45 (1990)(creditor's claim triggers the process of allowance and disallowance of claims, thereby subjecting itself to the bankruptcy court's equitable power). Furthermore, the claims objection presently before the court is a proceeding which falls within the confines of Bankruptcy Act § 2(a)(2) because it affects the allowance or disallowance of claims against the estate, the debtor-creditor relationship and ultimately, the administration of this estate. In addition, portions of the Government's claims recite that they are unliquidated. Bankruptcy Act § 57(d) requires an unliquidated claim to be liquidated or estimated prior to sharing in the estate.

F. Murdock's Objections to the Government's Non-ASROC Claims are not Barred by the Doctrine of Laches.

The Government has asserted the equitable doctrine of laches as a defense to the Trustee's objection to claims.³² The application of the doctrine of laches is within the discretion of the trial court and requires satisfaction of a two-pronged test: (1) there has been unreasonable delay in bringing suit, and (2) the party asserting the defense has been prejudiced by the delay. See e.g., *Park County Resource Council, Inc. v. United States Dept. of Agric.*, 817 F.2d 609, 617 (10th Cir. 1987).

The Government has not met the first prong of the test. Under Bankruptcy Act § 57(f), objections to claims shall be heard and determined as soon as the convenience of the court and the best interest of the estate and the claimants will permit. Under Act Rule 306 the Trustee should refrain from objecting to claims if no purpose would be served by the objection. Under bankruptcy law, "[a] purpose is served when there *are assets that will be distributed.*" *SMS, Inc*, 15 B.R. at 501 (emphasis in original). On remand from the Federal Circuit, the Government filed a motion to dismiss the ASROC litigation on various jurisdictional grounds. The motion was denied by the ASBCA on January 5, 1990. *Murdock Machine and Engineering Co. of Utah*, 90-1 BCA ¶ 22,604 (1990). The Government moved for reconsideration and the motion was denied by the ASBCA on May 30, 1990. Until a

³² The Government cites the following cases to support its contention that Murdock's objection is subject to the defense of the doctrine of laches. *E.g., In Re American S.S. Nav. Co.*, 14 F. Supp. 106, 107 (E.D. Pa.), *aff'd*, 82 F.2d 1005 (3d Cir. 1936); *In re Werth*, 29 B.R. 220 (Bankr. D. Colo. 1983); *McBride v. Farrington*, 60 F. Supp. 92 (D. Or. 1945), *judgment aff'd by*, 156 F.2d 971 (9th Cir. 1946). In each of the foregoing cases, the court determined that equity required application of the doctrine of laches to avoid an unjust result. In the present case, the Government cannot stand on its claim that it would be inequitable to allow the Trustee to object to its claims in this protracted litigation. From the inception of the case, the Government has been on notice that the amount and validity of its claims based on default terminations of the non-ASROC contracts had been challenged as evidenced by the Murdock's complaint filed as early as 1976 alleging the Government's actions as the cause of its failure to complete the non-ASROC contracts.

determination had been made whether the ASROC Contract termination was proper, it was useless for the Trustee to object to the non-ASROC contract claims by raising the defense that the Government caused the financial impossibility of continuing with the contracts. Litigation of these non-ASROC contract claims where the defense to the claims rests on the improper termination of the ASROC Contract, would have been duplicative and wasteful prior to a determination by the Federal Circuit, and would certainly have been met with strenuous objection by the Government.

The Government also argues that several key Government witnesses, including Weir, the ACO and the Secretary of the Navy Contract Adjustment Board, have died in the eighteen (18) years since the relevant events took place. The memories of others involved in this case have understandably faded. Some documents have been lost or destroyed, including the contract administration files for the contracts in litigation. Conversely, the record contains a wealth of contemporaneous memoranda, copies of relevant documents, and many days of testimony where witnesses recalled events with remarkable clarity. Some of the witnesses in this case, including Boardman and Sandidge, have exceptional memories regarding the events described at trial. Whether attributable to personal trauma, refreshed recollection through reference to documents, or just the protracted nature of this litigation over the last eighteen (18) years, a wealth of first hand knowledge is still available.

The Government asserts that it has been met the second prong of the test and claims that it has been prejudiced, but fails to indicate in what manner. Whereas it is true that several pieces to the puzzle are missing, their inclusion in the record would only serve

to satisfy curiosity rather than provide critical or dispositive evidence.³³ The absence of complete files and some of the persons involved also works to the detriment of the Trustee because all of the Government's files are not available and they may contain informative material.³⁴ Since there were many witnesses with clear recollection of the events still available, additional, cumulative evidence would not have assisted the Government's case.

G. Disallowance of the Government's Claims.

The remedy sought by the Trustee is the total disallowance of the Government's claims based on the Government's improper termination of the non-ASROC contracts.³⁵ Since Murdock's defaults were excusable, the contract terminations are hereby converted to terminations for the convenience of the Government. The Government, therefore, loses its right to a claim for excess costs of re-procurement under the Default Clause. *See* Armed Services Procurement Regulations found at CFR § 7-103.11(c)(1979);

³³ As an example, it would be interesting to know why the NCAB instructed Murdock to apply for P.L. 85-804 relief on the Delay Plunger Contract knowing that the Army had already determined Murdock was not essential. The most cynical view is that the NCAB orchestrated this elaborate circumstance in order to obtain waiver of Murdock's \$1,500,000 claim against the Government. The most optimistic view is that Cruden believed he could convince the Army to change its determination at some level higher than had already been reached. It would also be interesting to know why, in spite of the Government's on-going search to find a difference source of supply for the ASROC Launcher, Murdock was never warned that if the Navy's search was successful, it would eliminate Murdock's essentiality and its hopes for P.L. 85-804 relief. Instead, the Government continued to attempt to keep Murdock viable in short increments without indication that its real desire was to obtain the ASROC Launchers elsewhere.

But motivation and intent are irrelevant to the causal connection between the improper termination of the ASROC Contract, the Bank's actions regarding Murdock's line of credit, and Murdock's forced closure. The only possible evidentiary link that would have been helpful for the Government would have been proof of issuance of show-cause notices on the non-ASROC contracts prior to termination of the ASROC Contract and that such issuance had no relation to the ASROC Contract. The clear evidence indicates to the contrary. Show-cause notices were not issued, rather than issuance being accomplished and the documentation missing.

³⁴ For example, Vice Admiral Gooding's memo to Admiral Kidd of December 23, 1974, referred to in Gov't. Exh. BF.

³⁵ The claims have no documentation attached that would establish the amounts on the face of the claims, but the parties apparently do not contest the amounts.

Pacific Intermodal Corp., ASBCA No. 15,089, 73-2 BCA 10,151 (1973). Therefore, to the extent the Government's claims contain excess re-procurement costs based on ASPR 7-103.11, those amounts are disallowed. The Government also loses its right to recover unliquidated progress payments under ASPR 7-104.35 of the Progress Payment for Small Business Concerns portion of the contract regulations. Therefore, to the extent the Government's claims contain unliquidated progress payments under ASPR 7-104.35, those amounts are disallowed.

The Government asserts, however, that it has claim rights under the Termination for Convenience of the Government portion of the contract regulations. CFR § 7-103.21 (1979). Since the non-ASROC contracts are hereby converted to terminations for the convenience of the Government, recalculations under ASPR 7-103.21 may be appropriate. The Government argues that convenience terminations permit the contractor to claim its incurred and allowed costs from the Government against which the Government recoups its contract financing (loans and progress payments).³⁶ The Government also asserts that the Trustee incorrectly assumes that no loss adjustment applies to the non-ASROC contract. This court makes no determination at this time whether a loss adjustment calculation applies to any of the non-ASROC contracts.

Since the Government asserts that under each contract's fixed price Termination for Convenience clause, ASPR 7-103.21, the Government recovers all progress payment financing advanced to a contractor, it is appropriate to allow the provisions of

³⁶ Convenience terminations permit the contractor to claim its incurred and allowed costs from the Government against which the Government recoups its contract financing (loans and progress payments) as part of the termination for convenience processing. *Green Construction*, 477 F.2d at 936-37; *Dewey Elec. Corp.*, ASBCA No. 33,869, 91-1 BCA ¶ 23,433 (1990).

ASPR 7-103.21 to run their course, and to establish what, if any, remaining claim the Government may have against this estate.

III. CONCLUSION

From the foregoing Findings of Fact and Conclusions of Law, it is hereby **ORDERED**,

1. Murdock's failure to perform the Fin and Nozzle Contract, Army Contract No. DAAA-09-74-C-0060, was excusable under the Default Clause of the contract.
2. The Fin and Nozzle Contract termination is hereby converted to one for the convenience of the Government.
3. Murdock's failure to perform the Delay Plunger Contract, Army Contract No. DAAA-09-74-C-0114, was excusable under the Default Clause of the contract.
4. The Delay Plunger Contract termination is hereby converted to one for the convenience of the Government.
5. Murdock's failure to perform the A/B Dispenser Contract, Navy Contract No. N00104-74-C-B431, was excusable under the Default Clause of the contract.
6. The A/B Dispenser Contract termination is hereby converted to one for the convenience of the Government.
7. Murdock's failure to perform the Zuni Launcher Contract, Navy Contract No. N00104-74-C-B004, was excusable under the Default Clause of the contract.
8. The Zuni Launcher Contract termination is hereby converted to one for the convenience of the Government.

9. Murdock's failure to perform the Practice Bomb Contract, Air Force Contract No. F42600-74-C-2534, was excusable under the Default Clause of the contract.

10. The Practice Bomb Contract termination is hereby converted to one for the convenience of the Government.

11. The Government's claim number 559A is disallowed to the extent inconsistent with this opinion.

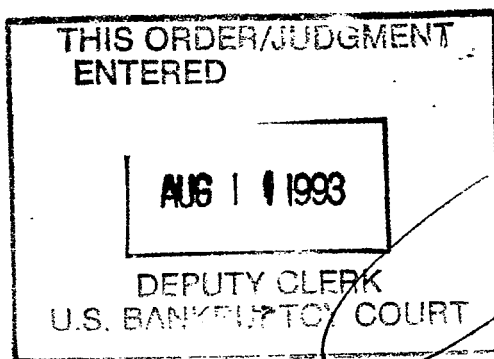
12. The Government is hereby ordered to amend its claim number 559A consistent with this opinion.

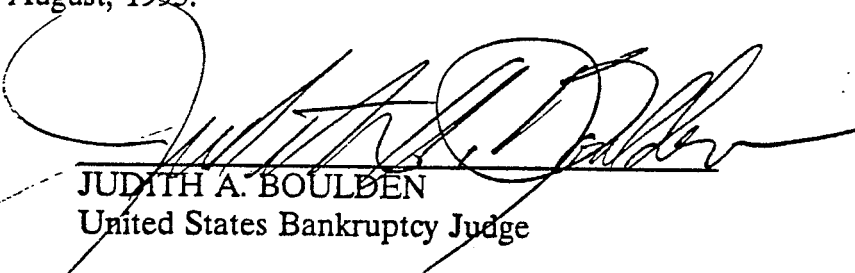
13. The Government's claim number 764A is disallowed to the extent inconsistent with this opinion.

14. The Government is hereby ordered to amend its claim number 764A consistent with this opinion.

15. Upon resubmission of the Government's claims and allowance thereof, final judgment will be entered.

DATED this 11 day of August, 1993.




JUDITH A. BOULBEN
United States Bankruptcy Judge