



David H. Raihle

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DATE: March 7, 1990

TO: Michael Gifford - EPA

FROM: David H. Raihle

NUMBER OF PAGES, INCLUDING THIS COVER SHEET: 24



DEPARTMENT OF THE ARMY
HEADQUARTERS, U.S. ARMY ARMAMENT, MUNITIONS AND CHEMICAL COMMAND
ROCK ISLAND, ILLINOIS 61299-6000



REPLY TO
ATTENTION OF

March 1, 1990

AMSMC-GCS (R)

Mr. David Meier
Chairman, Town of Mallie
Route 9 - Box 173
957 Hagen Road
Chippewa Falls, Wisconsin 54729

Dear Mr. Meier:

This responds to your letter dated January 3, 1990 in which you referenced the Freedom of Information Act (FOIA). Your request was forwarded to this office by the U.S. Army Information Systems Command - Pentagon.

Technically your letter does not constitute a proper FOIA request because you did not volunteer to pay administrative costs or request a fee waiver. However as a matter of courtesy, in response to your request regarding the National Presto Industries site I have enclosed the Decision of the Army Contract Adjustment Board regarding National Defense Corporation's application for relief.

Any questions concerning this matter should be directed to Mr. Joe Kang, Area Code (309) 782-4051.

Sincerely,

Don E. Leppin
Chief, General Law/
Congressional Affairs Division

Enclosure

Town of Hallie

Chippewa County, Wisconsin

From the Office of Town Attorney

March 6, 1990

Michael Gifford
United States Environmental
Protection Agency/Region 5
230 South Dearborn Street
Chicago, IL 60604

Dear Mr. Gifford:

Enclosed find copy of the Department of Defense/National Presto Agreement. Certain facts stated shock the conscience.

(1) National Presto Industries has been aware of the VOCs for many years.

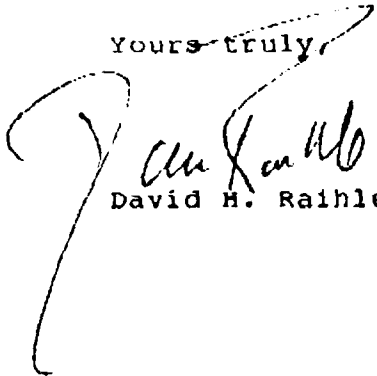
(2) National Presto Industries does not dispute the probability that the bulk of the contamination occurred during their manufacturing.

(3) National Presto Industries threatened to terminate its shell manufacturing unless the Army funded the remedial action of NPI contamination.

(4) The national defense and public interest were placed at risk by National Presto Industries' action.

A final note: The covering letter makes reference to fee waiver. The Town of Hallie did file a proper request for fee waiver as a municipality.

Yours truly,


David H. Rainle

DHR:1mm

Enclosures

Tom
mull

DEPARTMENT OF THE ARMY
OFFICE OF THE GENERAL COUNSEL
WASHINGTON, DC 20310

Tom

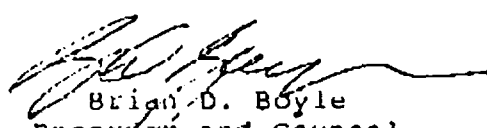
30 March 1988

MEMORANDUM FOR THE COMMAND COUNSEL

SUBJECT: Decision of Army Contract
Adjustment Board; Application
of National Defense
Corporation

The attached decision of the Army
Contract Adjustment Board (ACAB) is
hereby forwarded to you for immediate
implementation.

POC this office is the undersigned.



Brian D. Boyle
Recorder and Counsel
Army Contract Adjustment Board

Attachment



DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
WASHINGTON, DC 20310-0103

25 MAR 1988

ARMY CONTRACT ADJUSTMENT BOARD

MEMORANDUM OF DECISION

Public Law 85-804 Application of)
NATIONAL DEFENSE CORPORATION) ACAB No. 1231
Eau Claire, Wisconsin)

APPLICATION FOR RELIEF

National Defense Corporation, 3925 North Hastings Way, Eau Claire, Wisconsin (NDC)¹, has applied directly to the Army Contract Adjustment Board (Board) for extraordinary relief pursuant to Public Law 85-804 under Contract No. DAAA09-82-E-7000.² In accordance with the terms of an agreement dated 19 February 1988 between NDC, NPI, and the Department of the Army (Army)³, NDC seeks to recover one half of the sum of the firm's expenditures made between 1 January 1984 and 30 September 1987 for environmental restoration of its Eau Claire, Wisconsin site, and 100 percent of the sum of its expenditures made for the same purpose between 1 October 1987 and 17 February 1988.⁴

¹ NDC is a wholly-owned subsidiary of National Presto Industries, Incorporated (NPI). The contract under which NDC has applied for extraordinary relief was formed 1 October 1981 soon after NDC's creation on 31 August 1981.

² While NDC's application for relief does not specify a particular contract under which the firm requests extraordinary relief, we believe that only the firm's facility contract that was in force during the period in which the expenditures that are the subject of NDC's application took place is appropriate for consideration in this regard. It is worth noting, however, that the NDC activities which eventually led to the above-referenced expenditures occurred over the course of a number of years during which numerous Army contracts were variously in force. See Appendix I (schedule of Army production and facility contracts with NDC).

³ This agreement is attached as Appendix II. Paragraph XII thereof provides that "with regard to the Army's obligations concerning past and present Site-related environmental restoration costs, this Agreement is expressly conditioned upon an award of extraordinary contractual relief by the Army Contract Adjustment Board on terms consistent with this Agreement."

⁴ NDC represents that it has incurred \$713,656.29 in Site-related environmental restoration costs between 1 January 1984 and 30 September 1987. This figure has yet to be subjected to an Army audit. NDC has not yet officially calculated its

STATEMENT OF FACTS

NDC and its predecessor have for over 32 years operated the Eau Claire, Wisconsin site principally for the manufacture of 105MM HE M1 and 8" M106 projectiles for the Department of the Army. The site, together with the production facilities and Government-owned machinery situated thereon, has played a critical mobilization role in the United States defense establishment. Between 1966 and 1975, for instance, during the height of United States involvement in Southeast Asia, the Eau Claire facility produced and delivered to the Army over 92 million 105MM HE M1 and over 2 million 8" M106 projectiles. Today, although not in active production, the facility remains a critical component of the Army's mobilization base.⁵ Indeed, the Army's willingness to spend \$35 million between 1976 and 1978 on a modernization program at Eau Claire is powerful testimony to the facility's importance as a warm production base for metal parts.

NDC and NPI were not the original owners of the industrial facilities situated at Eau Claire. NPI acquired the 328-acre site from the United States on 1 September 1948. The United States War Department had previously acquired the land in 1940 and in 1942 had constructed a facility designed to produce .30 caliber incendiary and ball ammunition. The Government and at least one lessee operated the facility until 1 November 1945, whereupon the War Department declared the property, then known as the Eau Claire Ordnance Works #2, surplus to the needs of the Government. Its acquisition by NPI soon followed. In 1953 and 1955 respectively, the Army awarded contracts to NPI to install 105MM M1 and 8" M106 metal parts production facilities at Eau Claire.

For many years, NPI has been aware of the existence of deposits of contaminants at the Eau Claire site. In 1983, however, the Wisconsin Department of Natural Resources (DNR) became aware for the first time of deposits of volatile organic compounds at Eau Claire. Soon after, DNR nominated the site to the United States Environmental Protection Agency (EPA) for inclusion on their National Priorities List. While NPI objected strenuously to the nomination, the EPA ultimately approved the site for inclusion on the National Priorities List on 20 May 1986 pursuant to Section 105(8)(B) of the Comprehensive Environmental Response, Compensation, & Liability Act of 1980 (CERCLA), as

expenditures between 1 October 1987 and 17 February 1988, but has volunteered a preliminary estimate of \$130,000.

⁵ Currently, the Eau Claire facility is the Army's only mobilization base producer for the 105MM HE M1 projectile.

amended, 42 U.S.C. Section 9605(8)(B). This action triggered a requirement that NPI perform a Remedial Investigation and Feasibility Study to determine the extent of contamination at the site and to examine the means available to prevent the contamination from posing a threat to human health and the environment. While the Remedial Investigation has not yet been completed, preliminary results indicate the presence of perchloroethylene, trichloroethylene, and 1,1,1 trichloroethane, chlorinated solvents used in the manufacture of metal parts and for other purposes. NPI and NDC do not dispute the probability that the bulk of these solvents were deposited on the site during NPI's manufacture of 105MM M1 and 8" M106 metal parts for the Army during the 1950s, 1960s, and 1970s.

Under Section 107(a)(2) of CERCLA, any party who has owned land upon which hazardous wastes have been deposited during or prior to that party's ownership of the land is potentially responsible for, among other things, the costs of cleaning up the contamination. 42 U.S.C. Section 9607(a)(2). The Army, NPI, and NDC, all of whom are in the chain of title for the Eau Claire site, potentially qualify as responsible parties under CERCLA,⁶ and potentially can be held jointly and severally liable for the costs of remedying the conditions at the site. Of course, if the question of responsibility for the contamination were litigated among the potentially responsible parties, each would be entitled to prove that one or another party was more directly responsible for depositing the contaminants on the premises and should therefore bear a proportionally greater share of the cleanup bill. Nevertheless, the result of such litigation would not alter CERCLA's potential dictate that the Army, NPI, and NDC be held jointly and severally liable for the cleanup.

As early as 1978, NPI, and subsequently NDC,⁷ petitioned the Army to pay for the required cleanup of the site. NPI's theory

⁶ It is by no means clear that the Army is necessarily a potentially responsible party with regard to the Eau Claire contamination, namely because it is not known whether contaminants were deposited on the premises during the Army's ownership of the site.

⁷ As noted above, see supra note 1, NDC was created as a wholly-owned subsidiary of NPI on 31 August 1981. While NPI's motivation in taking this action remains unclear, it may have intended to shield its principal commercial operations from liabilities created by its defense production activities. Whatever NPI's motivation, the creation of NDC is of no significance under CERCLA, as NPI retained ownership of the land underlying the Eau Claire facility. Even if NPI had dispensed with the land, it would have remained a "potentially responsible party" under CERCLA. See 42 U.S.C. Section 9607(a)(2).

of Army liability was that NPI had dedicated the facility to the production of Army munitions and had produced munitions for the Army under accelerated schedules during the Southeast Asian conflict; because the Army was the principal beneficiary of production at the site, NPI argued that the Army should properly bear the costs of contamination that such production entailed. The Army considered NPI's request under the former sites component of the Department of Defense Installation Restoration Program and found it wanting. According to Army and DoD environmental officials, there was little or no evidence that the Army's activities on the site during the period of its ownership contributed to the contamination. Furthermore, these officials concluded that NPI's "beneficial" theory of liability had no basis in environmental statutes or judicial decisions.

As the prospects for settlement of the question of responsibility for the Eau Claire contamination grew dim, NDC officials represented that failure by the Army to reach an understanding with the firm on paying for the required cleanup could have disastrous consequences for the Army's mobilization base for 105MM and 8" metal parts. Specifically, NDC referred to provisions in its facility contract with AMCCOM that permitted the firm to terminate its relationship with the Army and direct the Army to dismantle and remove the nearly \$100 million in Government-owned equipment presently located on the site. Such action, NDC observed, would cost the Army a minimum of \$8 million, not to mention the costs of locating the equipment in a production mode at another site.⁸ Faced with the prospect of losing a facility critical to the United States' defense establishment, the Army entered into the above-referenced agreement to participate in the environmental restoration of the site.⁹ In entering into this agreement, the parties were careful

⁸ Officials in the Office of the Assistant Secretary of the Army (Research, Development & Acquisition), after consulting with the Office of the Army General Counsel, determined that only two alternatives to NPI's threatened action were legally available, neither of which was particularly palatable. The first is condemnation of the facility under the power of eminent domain, an action that would require specific Congressional authorization. The second is abandonment of the Government-owned equipment in place at the site, an action that admittedly would save \$8 million in relocation costs but would involve the forfeiture of over \$100 million in United States property.

⁹ This agreement essentially requires the Army to initially fund nearly 100 percent of "site-related environmental restoration costs" up to a total of \$5 million (or greater if Congress authorizes expenditures for such purposes in excess of that amount). See Appendix II at Paragraph III. NDC, for its part, has agreed to reimburse the Army for 50 percent of these

not to purport to dispose of the question of responsibility under environmental laws for the contamination at Eau Claire. Instead, the agreement preserves whatever rights the parties have under statutes or at common law to sue for or recover the costs of participating in the environmental restoration of the Eau Claire facility.

It is pursuant to this agreement that NDC now comes forward for extraordinary relief. Paragraph III of the agreement requires the Army to pay to NDC 50 percent of the sum of its "past" environmental restoration costs (defined in the agreement as those costs paid between 1 January 1984 and 30 September 1987) and 100 percent of its "present" restoration costs (defined as those costs paid between 1 October 1987 and 19 February 1988, the date of the agreement's execution). See Appendix II at Paragraphs I(B) & III. NDC seeks relief in the above amounts.¹⁰

DECISION

Public Law 85-804, Executive Order 10789, as amended, and Part 50 of the Federal Acquisition Regulation empower the Board to amend or modify Army contracts "without regard to . . . provisions of law relating to the making, performance, amendment, or modification of contracts, whenever [the Board] deems that

expenditures (up to a limit of \$3.5 million) out of its negotiated profit on future production contracts for 105MM and 8" metal parts. See Appendix II at Paragraph IV. However, NDC's reimbursement obligation expires precisely 10 years after the date of execution of the agreement, or 19 February 1998. See id.

To a large degree, Congressional sentiment guided the Army in agreeing to participate financially in the environmental restoration of the Eau Claire site. The Conference Report on the Fiscal Year 1988 DOD Appropriations Act authorizes the Army to expend up to \$5 million out of the "Procurement of Ammunition, Army" account for participation in the environmental restoration of the NDC facility "pursuant to an agreement governing the conduct of such restoration entered into by the current owner of the site and the Department of the Army." H.R. Rep. No. 100-410, 100th Cong., 1st Sess. 119 (1987); see also H.R. Rep. No. 100-498, 100th Cong., 1st Sess. 516 (1987) (affirming House and Senate Report language); S. Rep. No. 100-235, 100th Cong., 1st Sess. 131 (1987).

¹⁰ In order to preserve the discretion of the Board to grant or withhold relief under Public Law 85-804, the agreement expressly conditions the Army's obligation to pay any portion of NDC's past and present Site-related environmental restoration costs on an award of relief by the Board. See Appendix II at Paragraph XII.

such action would facilitate the national defense." PUB. L. 85-804, 72 Stat. 972, Section 1.11 For the reasons outlined below, the Board approves NDC's request for extraordinary relief in the amount of 50 percent of past and 100 percent of present Site-related environmental restoration costs, as defined in the Army-NPI-NDC agreement of 19 February 1988, and finds that such action will facilitate the national defense.

1. Essentiality to the National Defense.

We discuss this issue first primarily because the essentiality of NDC's Eau Claire facility to the national defense cannot be questioned. While the Army's stocks of 105MM and 8" projectiles are plentiful at present, the Army has now and will continue to have for the foreseeable future a significant mobilization requirement for both items. For instance, the current mobilization requirement for 105MM projectiles is 31.2 million units per year. The comparable rate for 8" shell is 3.96 million units. NDC is the Army's single mobilization base producer for 105MM projectiles; no other producer can be counted on to accelerate to full production of projectiles in the event of a national emergency with acceptable technical and schedule risk. With regard to 8" projectiles, NDC's production lines form a critical part of the Army's industrial base for that item. Without doubt, NDC's "continued operation as a source of supply" for 105MM and 8" projectiles is "essential to the national defense." FAR 50.302-1(a).

2. Impairment of Productive Capability.

NDC's request, by its terms, presents a threatened loss of the facility's productive capability; quite simply, unless the Army agrees to pay a substantial portion of NPI's past and present environmental restoration expenses, NPI has assured the Army that it cannot count on the availability of Eau Claire as a

11 The subject request for relief is concededly unusual in that it does not appear to fit squarely within any of the enumerated examples of contract adjustments deemed permissible under FAR 50.302. The closest analogue is found at FAR 50.302-1(a), which states that it may be proper to award relief "[w]hen an actual or threatened loss under a defense contract, however caused, will impair the productive ability of a contractor whose continued performance on any defense contract or whose continued operation as a source of supply is found to be essential to the national defense. . . ." We do not believe it is useful to discuss NDC's request in terms of the elements set forth in this provision. We note, in this connection, that the FAR's enumerated examples "are not intended to exclude other cases in which the approving authority determines that the circumstances warrant relief." FAR 50.301.

mobilization base producer for 105MM and 8" projectiles. In this very crude sense, NPI's prospective liability for environmental restoration expenses at Eau Claire "threatens" the loss of a facility critical to the United States defense establishment.

Against this background, and in view of the fact that the Army previously owned the Eau Claire facility, NPI, NDC, and the Army entered into the agreement, discussed above, to share environmental restoration expenses. As mentioned above, see supra note 9, the Army was guided in reaching this agreement by strong Congressional sentiment that the Army participate in restoration activities at Eau Claire in order to preserve the facility's production capability. That NDC has submitted this request to the Board despite the existence of the agreement owes only to limitations inherent in the Army's contracting powers; simply stated, in implementing the agreement's obligations the Army may, through its contracting powers, reimburse only NDC's future environmental restoration expenses.¹² In order to implement the Army's obligations under the agreement with respect to "past" and "present" "Site-related environmental restoration expenses", the Army requires an instrument which can legally support the obligation of appropriated funds. Under the present circumstances, this can be accomplished only through a grant of extraordinary relief on terms consistent with the agreement.

After closely examining the agreement and the circumstances surrounding the creation of contamination at the Eau Claire facility, we endorse the agreement as an acceptable compromise of a complex, multifarious set of contractual and environmental problems. In view of the unquestionably critical role that NDC's Eau Claire facility plays within the Army's mobilization base for 105MM and 8" projectiles, we cannot risk a sudden withdrawal of the facility from the defense establishment, a withdrawal that might well follow from a failure of the Army, NPI, and NDC to put the above-described problems to rest. Of course, it might be said that the Army maintains active relationships with numerous contractor-owned, contractor-operated facilities, some of which form a critical part of the Army's mobilization base for selected munitions and some of which may face hazardous waste problems.¹³

¹² In order to fund NDC's future "Site-related environmental restoration costs", the Army intends to enter into a production base support modification to NDC's facility contract. The statement of work in this modification will include environmental restoration activities at Eau Claire.

¹³ NPI and NDC contend that the Eau Claire facility is unique among mobilization base production facilities. It is, they contend, the only contractor-owned, contractor-operated large caliber metal parts facility that has been dedicated solely to defense production throughout its history. NDC points out

What distinguishes Eau Claire from other contractor-owned, contractor-operated munitions facilities, however, is the fact of prior Government ownership. While the Army's legal responsibility for the contamination deposited on the site is far from clear, we believe that it is in the public interest for the Army to share in the resolution of the environmental problems at Eau Claire at the present time.

While NDC's request surely does not present circumstances which we have found to warrant relief prior to this occasion, we nevertheless approve NDC's request and endorse the Army-NPI-NDC agreement as providing an acceptable means of preserving the Eau

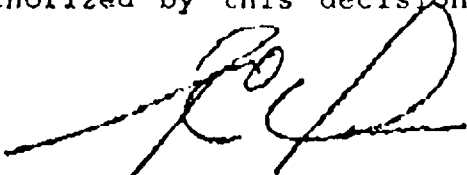
That while the land is contractor-owned, all of the production equipment located at the facility is Government-owned; in fact, many of the structures located at the facility are Government-owned as well. NDC argues that the only thing that distinguishes its Eau Claire facility from a Government-owned, contractor-operated (GOCO) ammunition plant is the fact that NPI owns the land underlying the facility. NDC is convinced that were the Eau Claire facility a GOCO plant, the Army would surely finance the required restoration. We agree, although we do not believe NDC's observation is of particular relevance to its application for relief. If Eau Claire were a GOCO, the Army, as owner of the real property, would be required to take the lead in conducting restoration activities under CERCLA. Moreover, if the Army's GOCO contractor were in some way responsible for the release of contaminants on the premises, the Army might choose to compel the contractor to share in the costs of restoration. Nevertheless, the fact remains that NDC is the owner of the land in this case, and we have no reason to doubt that NDC included a charge for the land in its production and facility contracts with the Army. Presumably, this charge bore some relation to the risk NDC was undertaking in using the land for purposes of munitions production.

There is a more basic response to the applicant's claim that the Eau Claire facility is unique. Quite simply, it is not unique at all. Indeed, the posture of the Eau Claire facility seems more reflective of the norm in munitions production facilities than suggestive of uniqueness. It would be far easier for us to list the facilities that are distinguishable from Eau Claire than to itemize those that share Eau Claire's characteristics. Most large, integrated companies do not mix commercial and Government work in the same plant. Moreover, the Government work they do undertake is invariably accomplished with significant assistance from Government-owned equipment. In short, except as noted in our opinion, we do not share NDC's belief that it maintains a unique posture within the Army's contractor-owned, contractor-operated mobilization base.

Claire facility as a mobilization base producer for critical ammunition items. We take this action in part out of substantial doubt that it will ever be scientifically possible to determine with precision which party or parties in the chain of title at Eau Claire should properly bear a greater or lesser percentage of responsibility for the contamination on the site under established principles of environmental law. In addition, we grant NDC's request out of grave concern for the maintenance of a sound defense posture in the event of a national emergency and out of the sober realization that entering into litigation with NPI and NDC on certain of these issues would present significant risks to that posture. We acknowledge that the Army has limited options available to it, but believe that NDC's request for relief provides an acceptable accomodation of a number of competing concerns.

The Board hereby grants NDC's request for recovery of 50 percent of NDC's "Site-related environmental restoration costs" paid between 1 January 1984 and 30 September 1987 and 100 percent of NDC's "Site-related environmental restoration costs" paid between 1 October 1987 and 19 February 1988. Accordingly, the contracting officer is hereby authorized and directed to enter into a supplemental agreement under Contract No. DAAA09-82-E-7000 providing for payment by the Army of the above-described costs and for reimbursement by NDC of a portion of these costs on terms consistent with the 19 February 1988 agreement. The contracting officer is directed to audit NDC's costs in accordance with established cost accounting principles before making payments under authority of this decision.

The action authorized by this decision will facilitate the national defense.



George E. Dausman
Chairman
Army Contract Adjustment Board

AGREEMENT

This Agreement between National Presto Industries, Inc. (NPI), National Defense Corporation (NDC), and the United States Department of the Army (Army), shall become effective upon execution by the parties hereto.

WHEREAS, NPI is the sole shareholder of NDC; and

WHEREAS, NPI owns certain land and improvements which it leases to NDC, herein collectively referred to as "leased facilities"; and

WHEREAS, situated on the leased facilities is certain Government-owned equipment, tooling, and related support items, herein referred to collectively as "equipment", said equipment having a replacement value approximating \$100,000,000; and

WHEREAS, NDC has had in the past and presently maintains a contract with the Army (under its Industrial Preparedness Program) for the maintenance of the leased facilities and equipment pursuant to which said leased facilities and equipment are maintained in a high state of readiness for the production of 105mm and 8" projectiles; and

WHEREAS, the leased facilities and equipment have been and continue to be an integral part of the Army's mobilization base; and

WHEREAS, the leased facilities have been identified as a potential source of environmental contamination and as a consequence, since January 1, 1984, NPI and NDC have been expending their own funds for environmental investigation related to the leased facilities, and it is anticipated that additional funds will be expended in the future for environmental matters related to the leased facilities, including, but not limited to, those activities required as a result of the Administrative Agreement effective as of July 8, 1986, between the United States Environmental Protection Agency, the Wisconsin Department of Natural Resources and NPI, providing for a Remedial Investigation/Feasibility Study (RI/FS); and

WHEREAS, it is anticipated that environmental restoration costs provided for herein relating to the leased facilities may require the expenditure of funds which as of the date of this Agreement are not anticipated to exceed \$5,000,000, but which could be greater than that amount; and

WHEREAS, NDC may at any time terminate its participation in the Army's Industrial Preparedness Program for any reason; and

WHEREAS, should NDC terminate its participation in the Army's Industrial Preparedness Program, the Army would, upon request of NDC, be obligated to: (1) abandon the equipment in place (in which event the Army would no longer have ownership of equipment having a replacement value of approximately \$100,000,000 and would lose a critical component of its 105mm and 8" mobilization base); (2) dismantle, remove, and preserve the equipment and restore the leased facilities (in which event the Army's costs for dismantling, removal, preservation, and rehabilitation of the buildings alone would be in excess of \$8,000,000, without giving consideration to the cost of relocating and setting up the equipment in a production mode at another location); or (3) seek to condemn by power of eminent domain the leased facilities and assume ownership and control thereof.

NOW THEREFORE, in consideration of the foregoing premises and other good and valuable consideration, the parties agree as follows:

I. DEFINITION OF TERMS

For purposes of this Agreement, the terms set forth below shall be defined as follows:

- A. "Site" shall mean the leased facilities which comprise the former Army installation known variously as the "Eau Claire Ordnance Plant, Area II," or the "Eau Claire Ordnance Works #2, Wisconsin." The Site encompasses approximately 320 acres and is situated east of Highway 53 on the north side of the City of Eau Claire, in the State of Wisconsin.
- B. "Site-related environmental restoration costs" shall include past, present, and future costs for Site-related environmental investigations (including the preparation of work plans; installation, sampling, and analysis of monitoring wells; and soil and related sampling and analysis); site-related environmental studies (including technical and professional oversight, evaluations, and opinions); Site-related professional and technical costs arising due to legislation, negotiations, public and community inquiries,

administrative agency inquiries, responses, claims, actions, or proceedings from Site-related environmental matters (including costs and payments relating to the final resolution of such items and oversight costs); Site-related judgment and settlement costs of third-party actions; Site-related remedial actions; applicable general and administrative costs (which shall apply to past costs as well as present and future costs); and like items. Site-related environmental restoration costs shall in no event include profits or fees, regardless of their allowability, to NPI or NDC in connection with their performance of the site restoration effort or incurrence of the costs described in this paragraph. For purposes of this Agreement, past Site-related environmental restoration costs (which are defined as those costs paid between January 1, 1984 and September 30, 1987) shall not exceed the sums identified in Annex A to the Agreement, which sums the Army expressly reserves the right to audit. Likewise for purposes of this Agreement, the Army expressly reserves the right to audit present Site-related environmental restoration costs (which are defined as those costs paid between October 1, 1987 and the date of execution of this Agreement) and future Site-related environmental restoration costs (which are defined as those costs accrued or paid after the date of execution of this Agreement). It is understood that present and future Site-related environmental restoration costs shall in no event include Site-related environmental restoration costs paid prior to September 30, 1987.

- C. "Sustained substantial production" shall mean units of production under prime contract(s) with the Army of twelve consecutive months' duration or longer at a rate equal to or greater than the minimum sustaining rate of production, as defined herein, after the first twelve consecutive months of production under one or more contracts with the Army accomplished at a rate equal to or greater than the minimum sustaining rate of production following reactivation of the leased facilities and applicable equipment.
- D. "Minimum sustaining rate" shall mean in the case of 105mm HE M1 projectiles MPTS 760,000 units over a period of twelve consecutive months at an approximate average rate of 66,000 units per

month, and in the case of 8" M106 projectiles MPTS 210,000 units over a period of twelve consecutive months at an approximate average rate of 18,000 units per month.

E. "Accelerated sustaining rate" shall mean:

- (1) in the case of 105mm HE M1 projectiles, MPTS, 1,650,000 units over a period of twelve consecutive months at an approximate average rate of 142,000 units per month;
- (2) in the case of 8" M106 projectiles MPTS, 414,000 units over a period of twelve consecutive months at an approximate average rate of 36,000 units per month; or
- (3) in the case of simultaneous production of 105mm HE M1 and 8" M106 projectiles MPTS at an approximate average rate of production for each at the minimum sustaining rate as defined herein.

F. "Unrecovered Executive Costs" shall mean those costs of NPI for executive personnel since January 1, 1984, for management of Site-related environmental restoration activities in excess of the past amounts recovered and future amounts recoverable under NDC standby contracts for services provided or to be provided by NPI personnel.

G. "Reimbursable Amount" shall mean 50 percent of the Army's payments made under this Agreement up to a maximum of \$3,500,000, less the sum of NDC's credits or contributions in reimbursement of the Army.

II. PERIOD OF APPLICABILITY

This Agreement shall be applicable to all Site-related environmental restoration costs incurred by NPI or NDC after January 1, 1984, as a result of all past production and production-related activities at the Site. This Agreement shall not be applicable to Site-related environmental restoration costs resulting from production and production-related activities at the Site after the effective date of this Agreement, unless production or production-related activities at the Site are directed by the Army pursuant to an express environmental waiver.

III. FUNDING AND PAYMENT OF COSTS

Subject to the reimbursement provisions set forth in this Agreement and subject to a limitation on Army payments of \$5,000,000 (which limitation shall be increased by the Army only upon such congressional action as is specified in Section IV below), the Army agrees to fund and pay to NDC 50 percent of past Site-related environmental restoration costs and 100 percent of present and future Site-related environmental restoration costs incurred since January 1, 1984 as a result of past production and past production-related activities at the Site. It is recognized by the parties hereto that it will be necessary to obtain congressional authorization (in the form of conference report language) earmarking Army funds to carry out the provisions of this Agreement and the obligations of the parties hereunder are expressly conditioned upon such authorization. The parties therefore agree to cooperate with each other in obtaining the necessary congressional authorization. The parties anticipate that the aforementioned congressional authorization will provide for Army financing of the "restoration" of the Site consistent with protection of human health and the environment. The parties agree that the term "restoration" as used in the congressional authorizing language shall mean "Site-related environmental restoration costs" as defined herein. It is understood by NPI and NDC that, subsequent to receipt of congressional authorization, the Army must formally program the funds necessary to finance this Agreement. It is further understood that the Army's payment obligations shall not be subject to interest, except as required by law with respect to obligations undertaken in such contracts or modifications to contracts as are executed in furtherance of this Agreement. Finally, it is understood by the parties that approximately \$230,000 of the sum of past Site-related environmental restoration costs may be recovered by NDC independently of this Agreement. Upon recovery of this or any other part or of such past costs by NPI or NDC, net of unreimbursed expenses incurred in seeking such recovery, total past Site-related environmental restoration costs shall be reduced accordingly, and to the extent the Army has made payments to NDC in the amount of one-half of such past costs under the Agreement, NDC shall disburse one-half of the amount of its recovery to the Army.

IV. PROVISION FOR REIMBURSEMENT

Subject to the Army's payment of Site-related environmental restoration costs as provided for in this Agreement and pursuant to the contribution procedure out-

lined in this section below, NDC agrees to reimburse the Army in the amount of 50 percent of the first \$5,000,000 of such payments. It is understood that NDC's reimbursement obligation shall not be subject to interest. In the event site-related environmental restoration costs exceed \$5,000,000, the parties agree to cooperate with each other in seeking congressional authorization earmarking additional funds. After receiving such approval for use of additional Army funds and provided the Army subsequently makes payments in excess of the first \$5,000,000 of such payments under this agreement, NDC shall reimburse the Army in the amount of 50 percent of the Army's additional payments pursuant to the contribution procedure outlined in this section below, provided, however, that in no event shall the aggregate reimbursement of NDC to the Army pursuant to this Agreement exceed \$3,500,000. It is understood by the parties that any obligation of the Army to make payments to NDC in excess of the first \$5,000,000 is expressly conditioned upon congressional authorization of such payments (in such form as the parties mutually agree).

NDC's reimbursement to the Army as provided for in the above paragraph shall be in the form of contributions equal to a sum of 5 percent of its pre-tax negotiated profit on any future units produced under sustained substantial production at a rate equal to or greater than the minimum sustaining rate as those terms are defined in this Agreement, and equal to a sum of 10 percent of its pre-tax negotiated profit on any future units produced under sustained substantial production at a rate equal to or greater than the accelerated sustaining rate as that term is defined in this Agreement. It is understood that NDC will be accounting for these contributions as production costs. However, these contributions shall not be included as costs of any kind or otherwise taken into account in determining prices under any production contracts. NDC shall be entitled to an immediate credit against the reimbursable amount equal to one-half of past site-related environmental restoration costs identified in Annex A.

After determination of any contributions payable to the Army pursuant to the provisions of this Section IV, but prior to disbursement to the Army, such amounts shall be allocated between the Army and NDC in proportion to the relationship between its unrecovered executive costs as defined herein and the Army's reimbursable portion of the aggregate site-related environmental restoration costs as provided for herein, provided that the aggregate

amount of reimbursement then owing shall be reduced by a sum no greater than the actual amount disbursed to the Army after the above-described allocation.

The obligation of NDC to reimburse the Army in accordance with this Section IV shall expire and any remaining reimbursable amount then owing shall be extinguished in its entirety upon the earlier of January 5, 1998, or termination of the facility contract (Contract No. DAAA-09-82-E-7000 or its successor) by the Army.

If, during the ten-year term set forth immediately above, NDC should terminate its relationship with the Army under the existing facility or layaway, storage and maintenance contracts, including any modifications thereto, or successor facility or layaway, storage and maintenance contracts, including modifications thereto, the reimbursable amount then owing shall become due and payable to the Army, provided, however, that this paragraph shall not apply to a decision by NDC to terminate its participation in the Army's Industrial Preparedness Program by reason of a good faith dispute over the terms and conditions of continuing such participation. Any decision to terminate by NDC because of an offer by the Army of terms or conditions less favorable than those in effect in the current facility contract (Contract Number DAAA09-82-E-7000) and the October 1, 1987, layaway, storage, and maintenance contract, including an offer which does not allow for accumulated inflation since that date, calculated in the same fashion as does the Army for the purpose of seeking budgets from Congress, shall be deemed a termination by reason of a good faith dispute for the purposes of this paragraph.

V. DENIAL OF LIABILITY

The Army, NPI, and NDC by entering into this Agreement, do not admit, accept, or intend to acknowledge any liability or fault with respect to any matter arising out of or relating to the Site. This express denial of any liability or fault attaches to any and all matters related to or arising out of the Site, including, but not limited to, responsibility for any environmental contamination associated with the Site.

VI. AUTHORITY OF THE PARTIES

Each of the parties to this Agreement hereby acknowledges that it is duly authorized to enter into this Agreement, has full authority to carry out the respective

obligations and duties as provided for herein, and has fully authorized the signator to sign this Agreement on its behalf.

VII. RIGHTS AGAINST THIRD PARTIES

The Army, NPI, and NDC recognize that each may have rights (including the right of contribution and indemnification) against insurers and other potentially responsible parties (collectively referred to herein as "Third Parties"). Each of the parties to this Agreement hereby agrees not to sue, execute judgment or take any civil, judicial, or administrative action against Third Parties without first advising and seeking the concurrence of the other parties to this Agreement. In the event the Army, NPI, and NDC mutually agree to institute any action or actions against such Third Parties, all costs associated with such action or actions shall be deemed Site-related environmental restoration costs and shall be accounted for as such under the terms of this Agreement. Documented proof of costs shall be submitted by the party bearing such costs. Any and all recoveries as a result of such mutual action shall be paid to the Army and credited to the balance of total Army payments under this Agreement for purposes of determining the reimbursable amount.

In the event a party or parties to this Agreement (Moving Party) wishes to institute an action or actions against Third Parties but the other party or parties to this Agreement (Non-moving Party) does not desire to participate in such action or actions, then, the Non-moving Party, upon written request by the Moving Party, shall assign or subrogate its interest to the Moving Party. The Moving Party shall then be responsible for all costs associated with the action or actions, including all costs associated with indemnifying and holding harmless the Non-moving Party, and shall similarly be entitled to all recoveries.

VIII. ENFORCEMENT

Nothing in this Agreement shall prevent or restrict the parties from bringing a civil action in a court of competent jurisdiction for enforcement of this Agreement. In the event of such action, this Agreement shall be construed in accordance with the laws of the State of Wisconsin. Except for the matters covered by this Agreement, nothing herein shall modify the respective rights and obligations of the parties as set forth in contracts

between the Army and NDC. This Paragraph shall not be effective if the congressional authorization described in Section III of this Agreement is not provided.

IX. NO RIGHTS IN NON-PARTIES

Nothing in this Agreement shall create or be deemed to create any rights or defenses in favor of any persons or entities who are not parties hereto.

X. DISPUTE RESOLUTION

In the event any of the parties to this Agreement disagree as to whether any other party or parties to this Agreement have properly performed their obligations hereunder upon written request of any party, each of the parties will, within 45 calendar days from receipt of such request, designate an authorized representative with decision making authority to meet and seek to resolve their disagreement. These authorized representatives shall make their best efforts within 45 days of their designation to negotiate a good faith agreement resolving their disagreement.

XI. SUPPLEMENTAL AGREEMENT

The parties hereto recognize that due to time constraints beyond their control, there are some items that have not been incorporated into this Agreement, but will be included in a supplement to this Agreement. It is the mutual intent of the parties hereto that the supplemental agreement be completed and signed no later than six weeks after the date of this Agreement or the date of congressional authorization as provided for herein, whichever is later. It is further agreed by the parties that the subject matters to be included in the supplemental agreement shall include, but not be limited to, the following:

- A. Procedure for reimbursement of funds by the Army to NDC and NPI (consistent with the provisions of the existing facility contract between NDC and the Army);
- B. Procedure for reimbursement by NDC to the Army; and
- C. Procedure for ensuring Army input into and consent to settlements of Site-related third-party actions.

XII. NATURE OF AGREEMENT

This Agreement is not a contract to provide supplies or services under the Federal Acquisition Regulation and does not, by itself, obligate appropriated funds of the United States Government. With regard to the payment of future Site-related environmental restoration costs, the Army shall enter into a contract with NDC to implement the provisions of this Agreement. With regard to the Army's obligations concerning past and present Site-related environmental restoration costs, this Agreement is expressly conditioned upon an award of extraordinary relief by the Army Contract Adjustment Board on terms consistent with this Agreement. Upon the making of such award, the Army shall enter into a supplemental agreement with NDC to implement the provisions of this Agreement for the payment of past and present Site-related environmental restoration costs.

United States Department of the Army

By: *J.R. Aulley*
Title: Assistant Secretary of the Army

Date: 17 FEB 88

National Presto Industries, Inc.
By: *[Signature]*
Title: Chairman and President

Date: 19 Feb 1988

National Defense Corporation

By: *[Signature]*
Title: Vice-President

Date: 17 February 1988

ANNEX A

Post Site-related environmental restoration costs
from January 1, 1984 through September 30, 1987 \$713,656.29 *

* Includes \$64,878 of general and administrative costs