

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS: Timothy J. Muris, Chairman
Mozelle W. Thompson
Orson Swindle
Thomas B. Leary
Pamela Jones Harbour

In the Matter of)
)
 GENCORP INC.,)
 a corporation.)
)
)
_____)

Docket No. C-4099
DECISION AND ORDER

The Federal Trade Commission (“Commission”) having initiated an investigation of the proposed acquisition by Respondent GenCorp Inc. (“GenCorp”) of certain assets of Atlantic Research Corporation (“ARC”), a subsidiary of Sequa Corporation, and Respondent having been furnished thereafter with a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondent with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondent, its attorney, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders (“Consent Agreement”), containing an admission by Respondent of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondent that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission’s Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondent has violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having thereupon issued its Complaint and an Order to Hold Separate and Maintain Assets (“Hold Separate”) and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, and having duly considered

the comment received from an interested person pursuant to Section 2.34 of its Rules, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby makes the following jurisdictional findings and issues the following Decision and Order (“Order”):

1. Respondent GenCorp Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio, with its office and principal place of business located at Highway 50 and Aerojet Road, Rancho Cordova, CA 95670.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the Respondent, and the proceeding is in the public interest.

ORDER

I.

IT IS ORDERED that, as used in this Order, the following definitions shall apply:

- A. “GenCorp” or “Respondent” means GenCorp Inc., its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by GenCorp, including but not limited to Aerojet-General Corporation, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. “Acquirer” means the Person who acquires the ARC In-Space Liquid Propulsion Assets pursuant to Paragraph II or III of this Order.
- C. “Acquisition” means the proposed acquisition of certain assets of ARC by GenCorp, as described in the Purchase Agreement by and between Atlantic Research Corporation and Aerojet-General Corporation dated May 2, 2003, and as amended August 29, 2003.
- D. “ARC” means Atlantic Research Corporation, a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 5945 Wellington Road, Gainesville, VA 20155, and its subsidiaries, divisions, groups and affiliates controlled by ARC, including, but not limited to, ARC UK Limited (“ARC-UK”).
- E. “ARC In-Space Liquid Propulsion Assets” means all assets of ARC, whether tangible or intangible, acquired by Respondent from ARC in the Acquisition and relating to the ARC In-Space Liquid Propulsion Business including, but not limited to:

1. the Niagara Falls Facility;
2. the Westcott Facility;
3. all accounts and notes receivable and other claims for money due to Respondent, relating to the Business, as the same exist on the Effective Date of Divestiture;
4. all raw materials, works in process, supplies, spare parts and finished goods inventories relating to the Business, as the same exist on the Effective Date of Divestiture;
5. all contracts, agreements, commitments (including pending bids and proposals) and instruments to which Respondent is a party relating to the Business as of the Effective Date of Divestiture, all unfulfilled orders outstanding as of the Effective Date of Divestiture for the purchase of raw materials, goods or services by Respondent relating to the Business, and all unfulfilled orders outstanding as of the Effective Date of Divestiture for the sale of goods or services provided by the Business;
6. all machinery, equipment, tools, dies, test equipment, furniture, fixtures, vehicles and other personal property owned or leased by Respondent relating to the Business as of the Effective Date of Divestiture, and, to the extent of Respondent's interest therein, all machinery and equipment relating to the Business, which is owned and/or furnished by any domestic or foreign governmental entity;
7. all patents, patent applications, licenses, trademarks, trade names, domain names, computer software, data, copyrights, documentation, know-how, goodwill, trade secrets, confidential business information (including formulas, compositions, inventions and manufacturing and production processes and techniques, drawings, designs, technical data, customer and supplier data, pricing and cost information), all results and other information related to any research and development project, in each of the foregoing cases owned or licensed by Respondent and relating to the Business, and all other intellectual property rights (in whatever form or medium), to the extent of Respondent's interest therein, relating to the Business as of the Effective Date of Divestiture;

provided, however, that nothing in this paragraph shall require any Person to relinquish the exclusive right to use the name "Atlantic Research Corporation" or "ARC";

provided further, however, that any Acquirer shall have the exclusive right to represent itself as carrying on any business relating to the ARC In-Space Liquid Propulsion Assets in continuation thereof as a going concern and all of the goodwill associated therewith;

8. to the extent legally transferrable, all customer and government approvals, consents, licenses, permits, waivers, or other authorizations, held by Respondent and relating to the Business as of the Effective Date of Divestiture;
9. all books, records, ledgers, files, documents, correspondence, lists, plats, specifications, surveys, invoices, customer and supplier lists, drawings, creative materials, advertising and promotional materials, studies, reports and other materials (in whatever form or medium) owned by Respondent as of the Effective Date of Divestiture, in each case to the extent that they relate to the Business;
10. all real property owned or leased by Respondent relating to the Business as of the Effective Date of Divestiture, together with all buildings, structures, improvements, fixtures and fittings located on or attached to such real property, and all rights, privileges, easements and other appurtenances belonging thereto; and
11. all warranties and guarantees, express or implied, relating to the Business as of the Effective Date of Divestiture;

provided, however, that ARC In-Space Liquid Propulsion Assets does not include:

Hydrazine Actuation Systems; solid/gel side thrust and attitude control propulsion systems, spin motors, high precision motors and gas generators; solid upper stage ejection rocket motors; and all assets, tangible or intangible, primarily related thereto;

information systems equipment and applications, including but not limited to computer hardware and software programs, not physically located at the facilities of the ARC In-Space Liquid Propulsion Business but shared with the Business through local and/or wide area networking systems; and

telecommunications systems equipment and applications, not physically located at the facilities of the ARC In-Space Liquid Propulsion Business but shared with the Business through local and/or wide area telecommunications systems.

- F. “ARC In-Space Liquid Propulsion Business” or “Business” means the ARC and ARC-UK business engaged in the research, design, development, manufacture, fabrication, assembly, marketing, distribution, sale or service of In-Space Liquid Propulsion Products.
- G. “ARC In-Space Liquid Propulsion Business Employees” means all full-time, part-time, or contract employees whose duties primarily relate to the Business or have primarily related to the Business at any time during the period commencing twelve months prior to the Effective Date of Divestiture.
- H. “ARC In-Space Liquid Propulsion Business Key Employees” means those ARC In-Space Liquid Propulsion Business Employees identified in Confidential Appendix A attached to this Order.
- I. “ARC In-Space Liquid Propulsion Hold Separate Employees” means all full-time, part-time, or contract employees whose duties primarily relate to the Business during the Hold Separate Period.
- J. “Commission” means the Federal Trade Commission.
- K. “Effective Date of Divestiture” means the date on which the applicable divestiture of the ARC In-Space Liquid Propulsion Assets occurs.
- L. “Hold Separate Period” means the time period during which the Hold Separate is in effect, which shall begin as of the date the Acquisition occurs and terminate pursuant to Paragraph V of the Hold Separate.
- M. “In-Space Liquid Propulsion Products” means monopropellant, bipropellant and dual mode thrusters, systems thereof, and propellant tanks, for use on satellites and spacecraft.
- N. “Niagara Falls Facility” means the facility that relates to the ARC In-Space Liquid Propulsion Business and that is located at 6686 Walmore Road, Niagara Falls, NY 14303, and all of Respondent’s interests in all assets, whether tangible or intangible, relating to the facility.
- O. “Person” means any individual, partnership, firm, trust, association, corporation, joint venture, unincorporated organization, or other business or governmental entity.

- P. “Westcott Facility” means the facility that relates to the ARC In-Space Liquid Propulsion Business and that is located at Westcott Metro Park, Westcott Aylesbury Buckinghamshire HP180NZ, England, and all of Respondent’s interests in all assets, whether tangible or intangible, relating to the facility.

II.

IT IS FURTHER ORDERED that:

- A. Respondent shall divest, within six (6) months after the Acquisition occurs, the ARC In-Space Liquid Propulsion Assets to a single Acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission, absolutely and in good faith and at no minimum price.
- B. Respondent shall:
1. not later than forty-five (45) days before the Effective Date of Divestiture, (a) provide to the Acquirer a list of all ARC In-Space Liquid Propulsion Business Employees and ARC In-Space Liquid Propulsion Business Key Employees; (b) allow the Acquirer to interview any ARC In-Space Liquid Propulsion Business Employees; and (c) in compliance with all laws, allow the Acquirer to inspect the personnel files and other documentation relating to such ARC In-Space Liquid Propulsion Business Employees;
 2. not later than thirty (30) days before the Effective Date of Divestiture, provide an opportunity for the Acquirer, (a) to meet personally, and outside the presence or hearing of any employee or agent of Respondent, with any one or more of the ARC In-Space Liquid Propulsion Business Employees; and (b) to make offers of employment to any one or more of the ARC In-Space Liquid Propulsion Business Employees;
 3. (a) not directly or indirectly interfere with the Acquirer’s offer of employment to any one or more of the ARC In-Space Liquid Propulsion Business Employees, not directly or indirectly attempt to persuade any one or more of the ARC In-Space Liquid Propulsion Business Employees to decline any offer of employment from the Acquirer, and not offer any incentive to any ARC In-Space Liquid Propulsion Business Employees to decline employment with the Acquirer;
- (b) irrevocably waive any legal or equitable right to deter any ARC In-Space Liquid Propulsion Business Employee from accepting employment with the Acquirer, including, but not limited to, waiving any non-compete

or confidentiality provisions of employment or other contracts with Respondent that relate to the In-Space Liquid Propulsion Products;

(c) not interfere with the employment by the Acquirer of any ARC In-Space Liquid Propulsion Business Employee; and

(d) continue employee benefits to ARC In-Space Liquid Propulsion Hold Separate Employees until the Effective Date of Divestiture consistent with the requirements of the Purchase Agreement by and between Atlantic Research Corporation and Aerojet-General Corporation dated May 2, 2003, and as amended August 29, 2003, including regularly scheduled or merit raises and bonuses, regularly scheduled vesting of all pension benefits, and reimbursement of relocation expenses;

4. provide a retention incentive bonus to ARC In-Space Liquid Propulsion Business Key Employees, who accept employment with the Commission-approved Acquirer, equal to ten (10) percent of such employee's annual salary under the following terms: (a) five (5) percent of the incentive to be paid upon the employee's completion of six (6) months of continuous employment with the Commission-approved Acquirer after the Effective Date of Divestiture; and (b) the remaining five (5) percent to be paid upon the employee's completion of one (1) year of continuous employment with the Commission-approved Acquirer after the Effective Date of Divestiture;
5. subject to the provisions of Paragraph II.B.6. below, for a period of one (1) year from the Effective Date of Divestiture, not, directly or indirectly, solicit, induce, or attempt to solicit or induce any ARC In-Space Liquid Propulsion Business Employees who have accepted offers of employment with the Acquirer to terminate their employment relationship with the Acquirer; *provided, however*, a violation of this provision will not occur if: (1) the individual's employment has been terminated by the Acquirer, (2) Respondent advertises for employees in newspapers, trade publications, or other media not targeted specifically at the employees, or (3) Respondent hires employees who apply for employment with Respondent, as long as such employees were not solicited by Respondent in violation of this paragraph; and
6. notwithstanding the provisions of Paragraph II.B.5. above, for a period of six months from the Effective Date of Divestiture, not employ or offer to employ any ARC In-Space Liquid Propulsion Business Employees who have accepted offers of employment with the Acquirer unless any such individual's employment has been terminated by the Acquirer.

- C. In the event that Respondent is unable to satisfy all conditions necessary to divest any intangible asset that is a permit, license or right granted by any domestic or foreign governmental entity, Respondent shall provide such assistance as the Acquirer may reasonably request in the Acquirer's efforts to obtain a comparable permit, license or right.
- D. The purpose of the divestiture of the ARC In-Space Liquid Propulsion Assets, and of the other provisions of this paragraph, is to ensure the continued operation of the ARC In-Space Liquid Propulsion Business as a viable, on-going business by a firm that has the ability and incentive to invest and compete in the research, design, development, manufacture, fabrication, assembly, marketing, distribution, sale and service of In-Space Liquid Propulsion Products, and to remedy the lessening of competition as alleged in the Commission's Complaint.

III.

IT IS FURTHER ORDERED that:

- A. If Respondent has not, within the time period required, complied with the requirements of Paragraph II, absolutely and in good faith, the Commission may appoint a Trustee to effectuate the divestiture required by Paragraph II, consistent with the purpose stated in Paragraph II.D.
- B. In the event that the Commission or the United States Attorney General brings an action pursuant to § 5(l) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the Commission, Respondent shall consent to the appointment of a Trustee in such action. Neither the appointment of a Trustee nor a decision not to appoint a Trustee under this paragraph shall preclude the Commission or the United States Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed Trustee, pursuant to § 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the Respondent to comply with this Order.
- C. If a Trustee is appointed by the Commission or a court pursuant to Paragraph III.A or III.B of this Order, Respondent shall consent to the following terms and conditions regarding the Trustee's powers, duties, authority, and responsibilities:
 - 1. the Commission shall select the Trustee, subject to the consent of Respondent, which consent shall not be unreasonably withheld. The Trustee shall be a person with experience and expertise in acquisitions and divestitures. If Respondent has not opposed, in writing, including the reasons for opposing, the selection of any proposed Trustee within ten (10) days after notice by the staff of

the Commission to Respondent of the identity of any proposed Trustee, Respondent shall be deemed to have consented to the selection of the proposed Trustee;

2. subject to the prior approval of the Commission, the Trustee shall have the exclusive power and authority to divest the ARC In-Space Liquid Propulsion Business, assign the agreements required to be assigned, and enter into the required agreements, thereby binding Respondent, all on such terms and conditions as are necessary to comply with the requirements of the applicable paragraph, to comply with all applicable laws, and to effectuate the remedial purposes of this Order;
3. within ten (10) days after appointment of the Trustee, Respondent shall execute a trust agreement that, subject to the prior approval of the Commission and, in the case of a court-appointed Trustee, of the court, transfers to the Trustee all rights and powers necessary to permit the Trustee to effect the divestiture required by this Order;
4. the Trustee shall have six (6) months from the date the Commission approves the trust agreement described in Paragraph III.C.3 to accomplish the divestiture to an Acquirer that receives the prior approval of the Commission and in a manner that receives the prior approval of the Commission. If, however, at the end of the six-month period, the Trustee has submitted a plan of divestiture or believes that divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission or, in the case of a court-appointed Trustee, by the court;
5. subject to all applicable laws and regulations, the Trustee shall have full and complete access to the personnel, books, records and facilities related to the ARC In-Space Liquid Propulsion Business or to any other relevant information, as the Trustee may request. Respondent shall develop such financial or other information as the Trustee may request and shall cooperate with the Trustee. Respondent shall take no action to interfere with or impede the Trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondent shall extend the time for divestiture under this paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed Trustee, by the court;

6. the Trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondent's absolute and unconditional obligation to divest expeditiously at no minimum price. The divestiture shall be made in the manner and to an Acquirer as required by this Order; *provided, however*, if the Trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the Trustee shall divest to the acquiring entity selected by Respondent from among those approved by the Commission; *provided further, however*, that Respondent shall select such entity within five (5) business days of receiving notification of the Commission's approval;
7. the Trustee shall serve, without bond or other security, at the cost and expense of Respondent, on such reasonable and customary terms and conditions as the Commission or a court may set. The Trustee shall have the authority to employ, at the cost and expense of Respondent, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are reasonably necessary to carry out the Trustee's duties and responsibilities. The Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed Trustee, by the court, of the account of the Trustee, including fees for his or her services, all remaining monies shall be paid at the direction of the Respondent, and the Trustee's power shall be terminated. The Trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the Trustee's divesting the assets to be divested;
8. Respondent shall indemnify the Trustee and hold the Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from misfeasance, gross negligence, willful or wanton acts or omissions, or bad faith by the Trustee or his or her agents;

9. if the Commission determines that the Trustee has ceased to act or failed to act diligently, a substitute Trustee shall be appointed in the same manner as provided in Paragraph III of this Order;
10. the Commission or, in the case of a court-appointed Trustee, the court, may on its own initiative or at the request of the Trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this Order;
11. the Trustee shall have no obligation or authority to operate or maintain the assets required to be divested by this Order;
12. the Trustee shall report in writing to Respondent and the Commission every sixty (60) days concerning the Trustee's efforts to accomplish the divestiture; and
13. Respondent may require the Trustee to sign a confidentiality agreement; *provided, however,* such agreement shall not restrict the Trustee from providing any information to the Commission.

IV.

IT IS FURTHER ORDERED that within thirty (30) days after the date this Order becomes final and every thirty (30) days thereafter until Respondent has fully complied with the provisions of Paragraphs II and III of this Order, Respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which it has complied, is complying, and will comply with this Order. Respondent shall include in its compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with this Order, including a description of all substantive contacts or negotiations for the divestiture and the identity of all parties contacted. Respondent shall include in its compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning divestiture.

V.

IT IS FURTHER ORDERED that Respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate Respondent such as dissolution, assignment, sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change in the corporation that may affect compliance obligations arising out of the Order.

VI.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request with reasonable notice to Respondent made to its principal United States offices, Respondent shall permit any duly authorized representative of the Commission:

- A. Access, during office hours of Respondent and in the presence of counsel, to all facilities, and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and all other records and documents in the possession or under the control of Respondent relating to any matters contained in this Order; and
- B. Upon five (5) days' notice to Respondent and without restraint or interference from Respondent, to interview officers, directors, or employees of Respondent, who may have counsel present, regarding any such matters.

By the Commission.

Donald S. Clark
Secretary

SEAL:

ISSUED: December 19, 2003

Confidential Appendix A

[Redacted From Public Record Version]