



REPLY TO  
ATTENTION OF

**DEPARTMENT OF THE ARMY**  
FORT WORTH DISTRICT, CORPS OF ENGINEERS  
P. O. BOX 17300  
FORT WORTH, TEXAS 76102-0300

November 18, 2011

Subject: Contract No. DACA63-03-D-0005, Request for Indemnification, Meeting with Contracting Officer and Counsel on August 3, 2011

Mr. Michael K. Morrow  
Contracts Manager  
Kellogg, Brown & Root Services, Inc.  
4100 Clinton Drive  
Houston, TX 77020

Dear Mr. Morrow:

I have reviewed carefully the verbal and written information which you presented in the subject meeting concerning your request for indemnification in the on-going litigation between Kellogg, Brown & Root Services, Inc. (KBR), and U.S. National Guard and British Military Personnel under the classified indemnity clause granted by the Secretary of the Army under Public Law 85-804.

My counsel also has reviewed this information along with the cases which have been decided to date involving both KBR and other contractors in Iraq and has provided his evaluation to both Headquarters U.S. Army Corps of Engineers (USACE) and the Office of the Army General Counsel.

As you know, KBR originally sought indemnification from the Army for risks which were considered unusually hazardous under standard industry practice. After negotiations between KBR and the Army, the Army approved the classified indemnity clause. It remains my opinion that this clause does not extend to the chemical and industrial hazards resulting in the alleged exposure of U.S. National Guard and British Military Personnel who provided site security at Qarmat Ali to sodium dichromate.

I note that by law, the Secretary of the Army may authorize indemnity only for unusually hazardous risks. There appears to be nothing about the repair of a water injection facility which presents any such unusually hazardous risks. Although there certainly were some unusual risks involved in operations at Qarmat Ali, those involved combat-related activities; not any of the alleged activities giving rise to these suits.

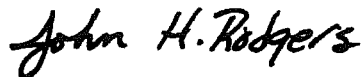
I disagree with your claim that the Army failed to provide benign conditions as required by the contract. Both parties to the contract fully understood the conditions in Iraq and the Army interpretation of this provision. It was not until well after this litigation had been filed that KBR complained that the Army had failed to provide benign conditions. Assuming that the Army failed to comply with this provision, KBR waived that failure by continuing to perform without complaint.

KBR, as the subject matter expert in oil field issues, was responsible for assessing conditions at each site to which it was sent and taking appropriate action to prevent exposure of any personnel at the site to industrial and environmental hazards. Although the general remediation of pre-existing environmental hazards was beyond the scope of work contemplated by the contract, it was fully within the authority of KBR to take any actions necessary to protect personnel at the site from exposure to such hazards. KBR obviously understood this, as they moved out with corrective action without receiving prior consent from the contracting officer once they identified the hazards presented by sodium dichromate at Qarmat Ali.

For all these reasons, I continue to believe that any litigation costs that KBR incurs as a result of this litigation are not covered by the classified indemnity agreement. Furthermore, as you know, the Army has taken the position that it will remain neutral in these lawsuits. Accordingly, I must again decline your request that the USACE acknowledge that any recovery will be covered by the classified indemnity agreement and request the Department of Justice to assume responsibility for defense of these suits.

I recognize that KBR was operating in less than ideal conditions and that it may choose to file a claim under the Contract Disputes Act for its litigation costs and any resulting judgment or settlement. Should KBR desire to do so, it must comply with applicable FAR provisions. Specifically, it must consult with me sufficiently in advance of any settlement so that I, in coordination with counsel, may fully evaluate the risks of litigation.

Sincerely,



John H. Rodgers  
Contracting Officer

Copies Furnished:

U.S. Army Office of the General Counsel  
U.S. Army Litigation Division (ATTN: CPT Bendaw)  
U.S. Army Corps of Engineers Office of the Chief Counsel