



REPLY TO
ATTENTION OF:

UNCLASSIFIED
DEPARTMENT OF THE ARMY
HEADQUARTERS, U.S. ARMY SUSTAINMENT COMMAND
1 ROCK ISLAND ARSENAL
ROCK ISLAND, IL 61299-6500

August 14, 2009

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VIP
Elizabeth
Ben
Dennis
Brian
Gabriel
DPC
DR

Office of the Commanding General

Honorable Byron Dorgan
United States Senate
419 Hart Senate Office Building
Washington, DC 20510-7050

Dear Senator Dorgan:

Attached is a response to your letter of June 18, 2009, in which you requested information about the manner in which KBR Inc. was compensated for electrical work performed under the LOGCAP III contract. The response provides detailed answers to all of the questions raised in your letter.

Please contact me if you have any further questions or concerns, or need more information on this matter. I appreciate your commitment to seeing that our men and women receive the best support possible, and I thank you for your service to our nation.

Sincerely,

Robert M. Radin
Major General, US Army
Commanding

Enclosure

UNCLASSIFIED

1. Was KBR paid for labor and material costs in instances where KBR failed on one or more occasions to fix an electrical problem in Iraq? Were such costs included in the calculation of KBR's base fees and award fees?

Response: The base fees and award fees are calculated by applying the appropriate percentage to the negotiated estimated amount for performing the task order. Rework was not an element included in the negotiated baseline for the task order, thus it was not considered in the calculation of KBR's base and award fees. As of October 2008, costs associated with electrical services and rework are being segregated and captured under special codes to allow for accurate data on which to base future decisions regarding allowability and award fee determinations.

2. More specifically, has KBR been paid for costs associated with the multiple failed attempts in 2007 and 2008 to fix the electrical problems reported at the shower facility in the Radwaniyah Palace Complex where Staff Sergeant Ryan Maseth died? Were these costs included in the calculation of KBR's base fees and award fees?

Response: KBR has been paid for performance of a full range of services on task order 0139, including performance of electrical services. As stated by Mr. Shay Assad, Director of the Defense Procurement, Acquisition Policy and Strategic Sourcing (DPAP), during your meeting with him on 26 June 2009, we are committed to reviewing the 2007 and 2008 electrical O&M data to determine whether excessive costs for rework were paid to KBR. The DODIG report resulting from the review of the electrocution, the CID report concerning the electrocution, and the AAA audit report concerning award fees paid on task order 0139 will be considered. The base fees and award fees are calculated by applying the appropriate percentage to the negotiated estimated amount for performing the entire scope of services required under the task order, thus it is accurate to assume that award fees included payments for electrical work. Electrical rework was not included as a specific element in the negotiated estimated amount to perform the task order.

3. Upon completion of the contract, will the Defense Contract Audit Agency (DCAA) audit the costs associated with all rework performed by KBR and issue a determination as to whether these costs were reasonably incurred? If DCAA determines that costs were not reasonably incurred, will the contracting office recover those costs?

Response: DCAA performs audits of incurred costs on a calendar year basis. They are currently completing the CY04 audit. In addition, at the PCO's request, DCAA is reviewing the current method for capturing costs for electrical services that was incorporated by Modification 03 to task order 0159. When DCAA determines costs to be unreasonable, unallowable, or

unallocable, they may suspend or disallow those costs using a DCAA form 1 (Notice of Contract Costs Suspended and/or Disapproved). DCAA refers irregularities to DCIS on a Form 2000 when necessary.

Questions regarding Modification 3 to T.O. 0159:

1. On page two of this modification under paragraph six, where the capture of costs for electrical work is discussed, a distinction is made between re-work and O&M work. In signing the contract modification and agreeing that rework could be considered O&M upon acceptance by the Government, did DoD agree to allow KBR to seek base fees and award fees for work that had been done incorrectly the first time? What is the Army's reasoning for capturing costs in the manner provided in the contract modification?

Response: The modification defines rework and O&M terms to ensure the mutual understanding of both parties. Rework costs are being captured under a special project code. Capturing the costs in this manner will enhance the comprehensive review currently underway on electrical matters and will allow for more informed recommendations and decisions on base and award fee applications.

2. What was the benefit to the government of agreeing to the modification provisions that provide that "beneficial use or occupancy by the Army equals acceptance of KBR's work, and that "questions cannot be raised at a later date" with respect to such work? If the Army has waived the ability to find latent defects, issue Corrective Action Requests, and require re-work after acceptance, why has this been done?

Response: Government inspections of contractor work should be performed and documented prior to occupancy. If inspections occur after occupancy, and a non-compliance is discovered, the contractor may question whether occupant tampering was a cause. The purpose of including these terms, and this process, was to protect the interests of the Government. The Army has not waived its ability to find latent defects by including these terms. However, the burden of proving that a latent defect existed at the time of "delivery" or acceptance would rest with the Government.

3. To date, what is the dollar amount and percentage of work completed that has been captured as re-work and as O&M under the modification?

Response: As of the reporting period that ended July 11, 2009, KBR had captured \$94,518,364 under the code for electrical services. \$50,502 had been captured as rework. Please note that

the contracting officer is revising methods for capturing these costs and this may have an impact on current totals.

4. Has DoD rendered legal opinions or other interpretations of this modification? What were the conclusions of these opinions or interpretations?

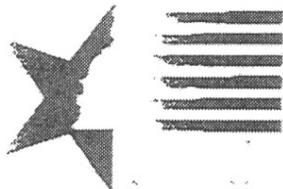
Response:

The modification was reviewed by attorneys in Army Sustainment Command and Army Contracting Command Office of Counsel. The conclusion was that Mod 3 does not limit any Governmental rights under the contract.

5. Who wrote the contract modification on behalf of the government? Who in the chain of command approved the modification?

Response: Contract modifications are prepared by contract specialists and contracting officers and staffed through the ASC legal office for review. A warranted LOGCAP Contracting Officer signed the modification.

D E M O C R A T I C P O L I C Y C O M M I T T E E



BYRON L. DORGAN
CHAIRMAN

June 18, 2009

Via Facsimile: (309) 782-4236

Major General Robert M. Radin
Commanding General
U.S. Army Sustainment Command
1 Rock Island Arsenal
Rock Island, IL 61299-6500

Dear General Radin:

As you know, the Department of Defense (DoD) has already determined that much of KBR's electrical work in Iraq is defective and will require major re-work to ensure that installations comply with applicable code and are safe for our troops.

I am writing to request information related to the manner in which Kellogg, Brown and Root Services (KBR) was compensated for this electrical work, which was performed under the LOGCAP III contract, particularly in instances where KBR failed on one or more occasions to do the work properly.

Please provide me with answers to the following questions regarding this re-work:

- 1) Was KBR paid for labor and material costs in instances where KBR failed on one or more occasions to fix an electrical problem in Iraq? Were such costs included in the calculation of KBR's base fees and award fees?
- 2) More specifically, has KBR been paid for costs associated with the multiple failed attempts in 2007 and 2008 to fix the electrical problems reported at the shower facility in the Radwaniyah Palace Complex where Staff Sergeant Ryan Maseth died? Were these costs included in the calculation of KBR's base fees and award fees?
- 3) Upon completion of the contract, will the Defense Contract Audit Agency (DCAA) audit the costs associated with all re-work performed by KBR and issue a determination as to whether these costs were reasonably incurred? If DCAA determines that costs were not reasonably incurred, will the contracting office recover those costs?

Also, I have reviewed Amendment/Modification 03 to LOGCAP III Task Order 159 dated October 21, 2008. Provisions in this contract modification raise serious questions concerning DoD's commitment to efficient performance under this contract:

- 1) On page two of this modification under paragraph six, where the capture of costs for electrical work is discussed, a distinction is made between re-work and O&M work. In signing the contract modification and agreeing that re-work could be considered O&M upon acceptance by the government, did DoD agree to allow KBR to seek base fees and award fees for work that had been done incorrectly the first time? What is the Army's reasoning for capturing costs in the manner provided in the contract modification?
- 2) What was the benefit to the government of agreeing to the modification provisions that provide that "beneficial use or occupancy by the Army equals acceptance" of KBR's work, and that "questions cannot be raised at a later date" with respect to such work? If the Army has waived the ability to find latent defects, issue Corrective Action Requests, and require re-work after acceptance, why has this been done?
- 3) To date, what is the dollar amount and percentage of work completed that has been captured as re-work and as O&M under the modification?
- 4) Has DoD rendered legal opinions or other interpretations of this modification? What were the conclusions of these opinions or interpretations?
- 5) Who wrote the contract modification on behalf of the government? Who in the chain of command approved the modification?

I appreciate your assistance in answering these questions. Please provide me with your response as soon as possible, but no later than June 26, 2009. If you have any questions or comments, please contact me or Leslie Gross-Davis at the Democratic Policy Committee at (202) 224-3571. I look forward to your prompt attention to this important matter.

Sincerely,



Senator Byron L. Dorgan
Chairman, Democratic Policy Committee

cc: Secretary Robert M. Gates
Secretary of Defense

Secretary William J. Lynn
Deputy Secretary of Defense

Under Secretary Ashton B. Carter
Under Secretary of Defense for
Acquisition, Technology & Logistics