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February 23, 2010

BY E-MAIL

J. Mackey Ives, Esquire
Litigation Attorney
General Litigation Branch
Army Litigation Center
901 N. Stuart Street, Suite 400
Arlington, VA 22203

Re: Request for Reconsideration of Denial of Use of LGEN (Ret.) Ricardo S. Sanchez as Expert Witness

Dear Mackey:

Pursuant to our discussion of yesterday, on behalf of our client, Kellogg Brown & Root Services, Inc. (“KBR”), we hereby respectfully request that the U.S. Army reconsider its January 15, 2010 denial of KBR’s December 4, 2009 request to use Lieutenant General Ricardo S. Sanchez, U.S. Army (Retired), to provide expert testimony in the three convoy tort suits currently pending against KBR in the United States District Court for the Southern District of Texas (*Fisher, Lane, and Smith-Idol*). This request is based both on KBR’s exceptional need for Lieutenant General Sanchez’s testimony and the unique circumstances in which KBR now finds itself in these lawsuits — where an organic change in the litigation posture of these cases has occurred since our original request making Lieutenant General Sanchez’s live trial testimony absolutely essential to KBR. *See* 32 C.F.R. § 96.6(e).

At the time of our December request, KBR had some reasonable expectation that all or a substantial part of the litigation would be dismissed as a result of four then-pending dispositive motions. But KBR now faces the near certainty of a protracted, difficult trial of the three cases — with potential damages exposure exceeding \$700 million — as a result of the District Court’s denial of three of KBR’s dispositive motions based upon the Political Question Doctrine, the combatant activities exception to the Federal Tort Claims Act, and the government contractor defense (and given these troubling rulings by the Court, we must recognize the possibility that the Court will also soon deny KBR’s fully meritorious and dispositive motion to dismiss based on the Defense Base Act). This exposure could lead to financial liability of the government under the LOGCAP III Contract and controlling regulations.

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It is important to remember that KBR is in this position now because of the conduct of the United States. First, as the Army's own AR 15-6 Report clearly admits, but for the Army's failures in its own processes and procedures on April 9, 2004, the attack, injuries, and deaths associated with the *Fisher* case would never even have occurred. Second, but for the United States' refusal to support KBR's effort in the Fifth Circuit Court of Appeals to uphold the District Court's 2006 total dismissal of the lawsuits passed on the Political Question Doctrine, there is every reason to believe the Fifth Circuit would have sustained the dismissal. Instead, KBR (and indeed the United States itself in any future Political Question Doctrine dispute) is saddled with a very troublesome Fifth Circuit standard.¹

Accordingly, KBR must be able to present the live trial expert testimony of Lieutenant General Sanchez, and to do so in precisely the form and content in which his report was submitted to the Court. This need was exacerbated by Judge Miller's blatant disregard of the four military declarations submitted in his denial of KBR's Political Question Doctrine motion, making the General's live trial testimony possibly the only evidence that will sway Judge Miller. Further, his testimony, including his statement reiterating the AR 15-6 Report's admission of Army fault, will provide precisely the type of evidence needed to prove on appeal that these cases should have been dismissed on the basis of the Political Question Doctrine — that is, among other things, the failure to do so caused Army officers to present public criticism of each other at trial!

As we made clear in our original December 4, 2009 request, as a result of his senior military leadership position in Iraq during the relevant time period, Lieutenant General Sanchez has unique relevant expertise that is not available from any other source. As reflected in his report, the General will testify from that expertise about the circumstances in Iraq in April 2004, the Army's prosecution of the war, KBR's logistics support mission, and the actual events up to and on April 8 and 9, 2004 upon which these lawsuits are based. This expert testimony is crucial to KBR's ability to defend itself on key issues such as state of mind, causation, and various affirmative defenses.

Lastly, as you know, throughout the five years of these lawsuits, KBR has carefully refrained from pointing its finger at the United States as the culpable entity. One result of KBR's restraint in this regard has been that plaintiffs in these cases have gained a huge advantage in the public airing of these lawsuits. Plaintiffs have co-opted the Houston media and other press into presenting only the damning evidence plaintiffs allege prove that KBR intended to injure and kill its own employees for profit. As trial looms, KBR can no longer sit silent, and instead intends to aggressively make its case to the public, hopefully to prevent the entire jury pool from being

¹ We also urge the United States to support KBR in the litigation of these defenses in any appeal that KBR files in these cases.

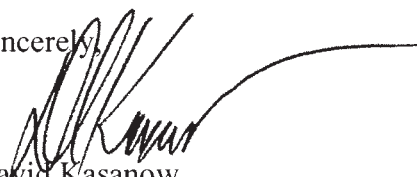
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prejudiced against the company. Towards this end, KBR intends to release Lieutenant General Sanchez's expert report and deposition testimony to the press as part of this campaign.

KBR greatly appreciates the support the Army has provided the company in these (and other) lawsuits. But given the untenable posture of the cases and enormous exposure faced by KBR, we cannot overstate the need for the Army to approve this request for reconsideration. We trust that you will give this matter your full, serious, and immediate attention.

Please let us know if you have any questions or require any further information.

Sincerely,



David Kasanow
Raymond B. Biagini

cc: Richard O. Hatch, Esq.