

PUBLIC CITIZEN LITIGATION GROUP

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June 30, 2003

Secretary of the Army
ATTN: Office of the General Counsel
104 Army Pentagon
Room 2E725
Washington, D.C. 20310-0104

Re: **FOIA APPEAL** of Denial of Public Citizen's Request Dated March 25, 2003

Dear Sir:

On behalf of Public Citizen, Inc., I hereby appeal the Army's denial of Public Citizen's March 25, 2003, Freedom of Information Act request for information concerning, among other things, the written justifications and approvals for decisions to limit competitive bids for contracts relating to the rebuilding of Iraq's infrastructure. The request was set forth in Mr. Tyson Slocum's letter of March 25, 2003, to Rose Marie Christensen of the Department of the Army's Freedom of Information and Privacy Acts Office, a copy of which is enclosed. The request was denied in a letter dated May 13, 2003, from Sandra O'Sieber, Director of the Army Contracting Agency, a copy of which is also enclosed.

Ms. O'Sieber's letter denies the request on the ground that a "reasonable search of Army Contracting Agency's records ... did not yield any information that was responsive to your request." The letter indicates that the Army's search was restricted to records of the Army Contracting Agency.

The basis of this appeal is that the Army's determination that no responsive records exist is plainly erroneous. The only possible explanation for this determination is either that an inadequate search was conducted or that the search was unreasonably restricted to exclude the bodies of records that would be expected to contain the records requested.

It is widely known as a result of press reports and congressional inquiries that there has been at least one contract awarded by the Army for the reconstruction of Iraqi infrastructure that falls within the description of Public Citizen's March 25, 2003, FOIA request: namely, the contract with Kellogg Brown & Root Services that covers, among other things, the repair and reconstruction of Iraq's petroleum production, refining, and distribution systems, the operation of those systems, and the distribution of Iraqi petroleum products.

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The suggestion that the Army would have no documents whatsoever concerning the justification and approval of the award of that contract without competitive bidding is incredible in light of information provided by the Department of the Army to United States Representative Henry A. Waxman. In particular, the website of the House Government Reform Committee's minority members includes a May 2, 2003, letter to Rep. Waxman from Lt. Gen. Robert B. Flowers, Commanding General, United States Army Corps of Engineers. That letter, a copy of which is enclosed, describes in general terms the process that led to the no-bid contract to Kellogg Brown & Root, and states, among other things, that "[i]n late February 2003 USACE received approval from Headquarters Department of the Army to issue a sole source contract to KBR to perform all services that might be necessary to carry out the contingency plans it had developed, and the contract was awarded March 8, 2003."

General Flowers' letter makes clear that both the Army Corps of Engineers and the Headquarters of the Department of the Army must have documents setting forth the justifications and approvals for the no-bid contract to Kellogg Brown & Root. Such records would clearly be responsive to the March 25, 2003, FOIA request. The only possible explanation for the Army's failure to provide them in response to the request is that the search was restricted to records of the Army Contracting Agency, which apparently was not involved in the process. In light of the Army's obvious awareness of the Kellogg Brown & Root contract and the role of the Corps of Engineers and Headquarters, Department of the Army, in approving it, exclusion of the Corps' and Department of the Army Headquarters' records from the search was clearly unreasonable and improper.

We have no way of knowing what other possibly responsive records may have been excluded due to the restricted scope of the search for responsive records. It is clear, however, that an inadequate search was conducted and that responsive records in fact exist and can be located with a reasonable search. Accordingly, we appeal the Army's denial of our request on the purported ground that a search revealed no responsive records.

Sincerely yours,

Scott L. Nelson