

## Iraq – Law Firms

# War Risk Insurance Alert: Legal Requirements And Issues On Insurance For Contractor Employees Working Abroad

By Raymond S.E. Pushkar and Christopher Bouquet

Due to the increasing volume of overseas contracts made in connection with the war in Iraq and anti-terrorism, contractors can expect to face an increasing number of questions concerning war risk protections and liabilities. In this regard, there is new policy guidance from the Office of the Under Secretary of Defense for Acquisition, Technology and Logistics, concerning requirements for insurance for contractor employees working overseas. In a memo dated December 8, 2003, the Director for Defense Procurement and Acquisition Policy issued a memorandum to DOD procurement chiefs emphasizing that the Federal Acquisition Regulation (“FAR”) requirements for insurance for contractor employees working overseas should be included in DOD contracts for services to be performed overseas. By issuing this memorandum, DOD signaled a renewed intent to enforce these requirements, notwithstanding the high cost to contractors in obtaining insurance for employees working overseas, especially in dangerous areas such as Iraq and other places in the Middle East. Accordingly, contractors must review these requirements to ensure they are in compliance.

### Governing Statutes

Understanding the Federal Acquisition Regulations requirements for insurance for employees working overseas requires an understanding of two statutes: the Defense Base Act (“DBA”), 42 U.S.C. §§ 1651, *et. seq.*, and the War Hazards Compensation Act (“WHCA”), 42 U.S.C. §§ 1701, *et. seq.*

### The Defense Base Act

Under the DBA, government contractors must provide to nearly all of their employees working outside the United States the workers’ compensation benefits that employers are required to provide by the Longshore and Harbor Workers Compensation Act, 33 U.S.C. § 901, *et. seq.*, for death or injury arising out of or from their employment. Employer liability under the DBA is exclusive and supersedes all other liability, including liability under the law of torts. However, if an employer fails to provide the required coverage, the employee or his survivors may elect to sue the employer for tort damages and, in such an action, the defendant may not plead as a defense that the injury was caused by the negligence of a fellow employee, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee. The DBA also provides that, if a subcontractor at any tier does not secure payment for the



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required compensation, the contractor will be liable for, and required to secure the payment of, such benefits.

Employers who fail to secure the payment of the required compensation are guilty of a misdemeanor and may be punished by a fine of \$10,000 or by imprisonment for not more than one year. If the employer is a corporation, the president, secretary, and treasurer are severally liable for the fine and imprisonment. In addition, the president, secretary, and treasurer of the corporation are severally and personally liable, jointly with the corporation, for any compensation or other benefits payable under the Act.

### War Hazards Compensation Act

In general terms, benefits for death or injury occurring as a result of certain “war risk hazards” are payable to certain contractor employees under the WHCA, in circumstances in which the DBA does not apply because the event giving rise to the claim was outside the scope of the employee’s employment or because the injury or death was attributable to an act of war excluded from insurance coverage obtained pursuant to the DBA. In these circumstances, the contractor employees are treated as federal civil servants and entitled to benefits under the Federal Employees’ Compensation Act, 5 U.S.C. § 8116. Compensation is paid directly by the government from the Federal Employees’ Compensation Fund.

In most cases, benefits payable under the WHCA are also payable under the DBA. Thus, the WHCA provides for reimbursement of employer or insurance carrier expenses in cases of overlapping coverage. However, where the insurance carrier charged a premium for its promise to pay these benefits, the insurance carrier will not receive reimbursement.

The WHCA also provides special benefits for captured and detained employees.

### Waivers

The DBA permits the Secretary of Labor to waive the application of the DBA upon the written request of the head of any department or other agency. Requests for waiver must be made to DOL’s Office of Worker Compensation



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Programs (“OWCP”). DOL routinely grants DBA waiver requests. However, DOL’s policy is that the waiver does not apply to citizens or legal residents of the U.S. or to employees hired in the U.S. In addition, a condition of all waivers granted by DOL is that the contractor must provide alternative workers’ compensation benefits to the waived employees pursuant to applicable local law. DOL also takes the position that a waiver of the DBA operates as a waiver of the WHCA. Waivers are generally requested where the benefits provided under local law cost less than the benefits under the DBA would cost. This is problematic in Iraq since there is no formal Iraqi local government or law in place yet.

### The FAR Clauses

FAR 52.228-3, Workers’ Compensation Insurance (Defense Base Act), which should be included in all contracts requiring performance outside of the U.S., requires the contractor to obtain and maintain the insurance coverages required by the DBA and to flow the clause down to all subcontracts to which the DBA applies. This clause is just a reminder, though, because the DBA applies regardless of the inclusion of the clause.

FAR 52.228-4, Workers’ Compensation and War Hazard Insurance Overseas, is used where the Secretary of Labor has waived the applicability of the Defense Base Act. It requires the contractor to provide workers’ compensation insurance to the waived employees in accordance with the laws of the country in which the employees are nationals and the same protection afforded by the WHCA except that the level of benefits is to be set according to any controlling law or international agreements.

The December 8, 2003 DOD memorandum requested procurement chiefs throughout the services to cure implementation “inconsistencies” within the Department by including FAR 52.228-3 in all DOD service contracts to be performed outside the United States, as well as in all supply contracts that also require the performance of services overseas, and FAR 52.228-4 whenever a waiver is granted for foreign nationals hired outside the U.S. Both clauses should be included “if any services will be performed overseas by employees to whom

the waiver does not apply, such as United States citizens or foreign nationals hired within the United States.”

Where a DOD agency uses FAR 52.228-4 and the head of the contracting agency makes a determination that the contractor may not buy insurance for war hazard losses, the Defense Federal Acquisition Regulation Supplement (“DFARS”) prescribes use of DFAR 252.228-7000, Reimbursement for War Hazard Losses. This clause makes war hazard benefits allowable costs under certain circumstances.

DFARS 252.228-7003, Capture or Detention, may be inserted into contracts in circumstances in which the contractor’s employees are not covered by the WHCA. This clause provides that certain benefits payable under agreement with the employee or that would have been paid had the WHCA applied (whichever is less) are allowable costs.

### Other Regulations

DOL’s implementing regulations for the DBA and WHCA are set forth at 20 CFR 61, 701 through 704. These regulations contain elaborate procedures for the making and processing of DBA and WHCA claims. These regulations provide that DBA insurance must be obtained from DOL-authorized carriers. Contractors should note that the language used on such insurance policies is important. These regulations also provide that contractors may only self insure with the approval of DOL.

### Current Issues

There are a number of questions currently arising within the federal procurement community:

- Are DBA waivers issued for State Department contracts in Iraq valid? According to a DOL official at a recent public seminar, these waivers may not be valid because contractors may not be in compliance with the waiver condition that the contractor supply workers’ compensation benefits that are in accordance with local law. This official thought that the absence of local law in Iraq on this question might invalidate these waivers.

- Can contractors rely on Contracting Officer opinions concerning DBA requirements? Some federal Contracting Officers may not have a good understanding of DBA and WHCA requirements and may have advised contractors (erroneously) that DBA requirements are not applicable to contractor employees who are citizens of the foreign country in which they are working. Contractors who rely on such opinions do so at their own peril, since COs do not have authority to waive statutory requirements.

- Does the DBA apply to United States-funded contracts negotiated by the Coalition Provisional Authority (“CPA”) in Iraq but executed by an official of an Iraqi government agency?

- Are contractors entitled to price adjustments to fixed-price contracts to cover DBA insurance premiums that were not included in the price due to the government’s failure to include the required FAR clause in the contract?

Careful assessment of all of these matters is essential for those involved in overseas government work.

*Raymond S. E. Pushkar is a Partner and Christopher Bouquet is an Associate in the Government Contracts Practice of McKenna Long & Aldridge LLP. Mr. Pushkar can be reached at [rpushkar@mckennalong.com](mailto:rpushkar@mckennalong.com) and Mr. Bouquet can be reached at [cbouquet@mckennalong.com](mailto:cbouquet@mckennalong.com) with questions about this article.*