WORKERS' COMPENSATION CLAUSES FOR OVERSEAS PERFORMANCE

INTRODUCTION

The military is becoming increasingly dependent on U.S. civilian contractors to support its operations overseas.[1] The FAR provisions and clauses which address compensation for detention, injury and death of the civilian contractor workforce outside the United States is the subject of this article.

At the outset of World War II, Japanese forces attacked the strategically important Wake Island in the Pacific Ocean.[2] The island was defended by U.S. Marines and a handful of sailors. [3] Also located on the island were about 1200 civilian construction workers tasked to build bases for the U.S. Navy throughout the Pacific.[4] During the battle numerous contractor employees were killed or wounded; 1146 were captured and detained by Japan for the duration of the war.[5] Of the 1146, about 16 percent died while under Japanese control.[6] A number of legal avenues of relief are currently available for contractor employees (or their survivors) who, like the construction workers on Wake Island, are captured, injured, or killed while supporting military operations.[7]

This article will focus on the application of FAR 52.228-3 and 52.228-4. Both clauses pertain to worker's compensation insurance for contractor employees when the government contract involves "public work" to be performed outside the United States. Essentially, FAR 52.228-3, "Workers' Compensation Act (Defense Base Act)" requires contractors whose work involves public work by employees outside the United States, to provide workers' compensation insurance in compliance with the Defense Base Act (42 U.S.C. 1651 et seq.). FAR 52.228-4(b) provides that if a contractor employs a person who, but for the waiver of the applicability of the Defense Base Act, would be entitled to benefits under the War Hazards Compensation Act (WHCA), then the contractor shall provide the same protection as the WHCA would, subject to certain limitations. It is important for solicitations to include the appropriate clauses in order for offerors to be able to accurately price their proposals.

THE DEFENSE BASE ACT

Pursuant to the Defense Base Act (DBA), 42 U.S.C. § 1651(a) (1994), workers' compensation insurance coverage is required for contractor employees performing public work contracts and certain other contracts outside the United States.[8] The Defense Base Act affords compensation benefits to those engaged in employment at any military, air or naval base acquired after a specified date; upon land occupied or used by the government for military or naval purposes in any territory or possession outside the continental United States; or, with certain exceptions, upon any public work in any territory or possession outside the continental United States if the employee is so engaged under the contract of a contractor with the United States. The Act also affords compensation for injury or death occurring during transportation to or from a worker's place of employment, where the employer or the government provides the transportation or the cost of the transportation.[9]

The DBA was enacted in 1941 "to provide substantially the same relief for injuries or death of employees at bases leased by the United States . . . as existing law affords similar employees in the United States, and to assist contractors employing labor at such bases in obtaining compensation insurance at reasonable rates." [10] "To achieve the indicated objectives of the Act, as stated in the Senate Report, Congress extended 'the provisions of the Longshoremen's and Harbor Workers' Compensation Act to private employment at all

bases acquired after January 1, 1940 . . .' The Defense Base Act has been amended to expand the area of coverage outside the continental United States but the basic compensation act remains the Longshoremen's and Harbor Workers' Compensation Act."[11]

Thus, by the terms of the DBA, the Longshoremen's and Harbor Workers' Compensation Act (LHWCA) applies "in respect to the injury or death of any employee engaged in any employment . . . under a contract entered into with the United States or any executive department, independent establishment, or agency thereof . . . where such a contract is to be performed outside the continental United States . . . for the purpose of engaging in public work."[12] The Act was originally intended to cover civilians employed at overseas military bases, was later extended to cover civilians working on overseas construction projects for the United States government or its allies, and was finally extended to protect employees fulfilling service contracts tied to such a construction project or to a national defense activity. [13]

One of the key terms in § 1651 of the DBA is "public work." The types of work that fall within the meaning of that term have been extensively litigated. The term "public work contract" is defined in FAR 28.305. Generally, public work involves improvement projects, and any service related to the improvement/construction project, and projects related to national defense. Whether an employee is subject to the DBA is a matter of law. Many authorities have interpreted the law, applied it to diverse factual situations, and made determinations as to an employee's entitlement to benefits under the DBA. Since the determinations are fact-specific, this article will not provide a review of the various determinations with regard to the meaning of "public work" for purposes of the DBA.

Another important aspect of the DBA is that the Secretary of Labor, upon recommendation from the head of any department or agency, may waive the application of the DBA with respect to any contract, subcontract, subordinate contract, work location or classification of employees.[14] In my research I found no circumstances under which this had occurred. However, the Defense Contract Audit Agency in its Contract Audit Manual mentions situations under which waivers should be considered. "Waivers of the DBA should be considered where foreign employees are subject to compensation laws or comparable provisions of their country. In these instances, the benefits provided by the country of the employed foreign national are less than the benefits offered under the DBA and consequently the ultimate cost to the government would be less." [15]

As stated in FAR 28.305(b), the DBA extends the LHWCA to various classes of employees working outside the United States. There are various insurance companies that provide this kind of compensation insurance. For example, the U.S. Agency for International Development (USAID) has contracted with Rutherford International, Inc. to administer its Defense Base Act Insurance program. The premium for the coverage is computed per $100 of employee remuneration. Employee remuneration is defined as direct salary plus overseas recruitment incentives and post differential but excluding per diem, travel expenses, housing allowance, education allowance and other miscellaneous allowances. The current rate used to compute the premium for USAID contracts is $1.84.

FAR 28.309(a) instructs contracting officers to insert the clause at 52.228-3 in solicitations and contracts "when the Defense Base Act applies" (i.e. when its application has not been waived), and when the contract "will be a public-work contract performed outside the United States."

THE WAR HAZARDS COMPENSATION ACT

Where the DBA applies, the benefits of the LHWCA are extended through the operation of the War Hazards Compensation Act, as amended (42 U.S.C. 1701 et seq.), to afford protection to employees against the hazards of war (injury, death, capture, detention). [16] In his opinion to the Secretary of the Army, the Comptroller General discussed the background of the War Hazards Compensation Act. "The War Hazards Compensation Act was enacted December 2, 1942 to supplement the DBA. It provides for the compensation of several categories of persons employed outside the continental United States in the event of injury resulting from a war-risk hazard 'whether or not such person then actually was engaged in the course of his employment . . .' 42 U.S.C. 1701(a). It further provides that as to such persons the provisions of the act . . . shall apply with respect thereto in the same manner and to the same extent as if the person so employed were a civil employee of the United States and were injured while in the performance of his duty, and any compensation found to be due shall be paid from the compensation fund established pursuant to section 35 of [the Federal Employees' Compensation Act]." [17]

The Comptroller General goes on to describe the War Hazards Compensation Act (WHCA) by citing language from a House of Representatives report. " 'It will be noted that the coverage extended by this subsection supplements coverage for injury or death arising out of and in the course of a person's employment under the Defense Base Act. Injuries or deaths sustained by employees of a contractor with the United States at the offshore bases if arising out and in the course of employment are compensable under the provisions of the [DBA]. This includes injuries or deaths proximately resulting from war-risk hazards. This subsection extends similar benefits to such employees for such injuries or deaths when they are not compensable under such act (i.e., not arising out of and in the course of employment). In other words, the coverage of this subsection dovetails with the coverage of the [DBA] and 24-hour protection is therefore provided for such employees.'" [18]

Generally, the purpose of the WHCA is to provide compensation for employees in the event of war hazards. War-risk hazard means any hazard arising during a war in which the United States is engaged; during an armed conflict in which the United States is engaged, whether or not war has been declared; or during a war or armed conflict between military forces of any origin, occurring within any country in which a person covered by the Act is serving, from—(1) The discharge of any missile . . .(2) Action of a hostile force or person, including rebellion or insurrection . . .(3) The discharge or explosion of munitions intended for use in connection with a war . . . 20 CFR 61.4(e) The WHCA provides for reimbursement of workers' compensation benefits paid under the Defense Base Act, or under other workers' compensation laws . . . for injury or death causally related to a war-risk hazard. [19]

"By the [WHCA] the government undertook to assume responsibility for and to self-insure the payment of compensation for injuries resulting from war-risk hazards to employees within the purview of the [DBA] as well as those within the purview of the [WHCA]. It did so because of the difficulty of government contractors in obtaining such coverage for their employees and the problem of determining a fair premium rate. Citation omitted. In cases under the [DBA] involving an injury or death resulting from a war-risk hazard the [WHCA] provides for the reimbursement of an employer or his insurance carrier for the benefits paid, except where a premium was charged." [20]

What the Comptroller General is saying is that there are two sources of entitlement to benefits under the WHCA. One way to derive entitlement is to be a contractor employee for the purposes of the DBA. In that case, the DBA insurance carrier is still liable for the payment of compensation benefits to the insured; however, the carrier would be reimbursed by the government from the Federal Employees' Compensation Act (FECA) fund. These employees remain for the purposes of compensation employees of the government contractor.[21]

The second way to derive entitlement is directly through the WHCA, which provides entitlement to benefits to classes of employees who are not employees within the DBA. This second form of entitlement exists because there are many employees who may be at risk of injury or death from war hazards, but are not doing the type of work that puts them within the purview of the DBA. Under this second form of entitlement, the employee is entitled to benefits paid from the FECA fund for death or injury causally related to a war-risk hazard. Only persons whose entitlement arises under the [WHCA] are for the purposes of compensation to be considered as if they were civil employees of the United States.[22]

It is important to note that the DBA insurance carrier who paid benefits to an employee, or his estate, is entitled to reimbursement through the WHCA only if the premium was not loaded to cover the war-risk hazard. The purpose of the government's "self-insurance" for war hazard risk is to control costs paid to contractors who are required to provide workers' compensation insurance.

FAR 52.228-4

FAR 52.228-4, "Workers' Compensation and War-Hazard Insurance Overseas" applies when the contract will be for public work performed outside the United States, and the Secretary of Labor waives the applicability of the DBA (see discussion above about the guidance by DCAA regarding DBA waivers).

The first paragraph of the clause applies to persons who, but for the waiver, would be entitled to/subject to workers' compensation insurance under the DBA. The clause requires contractors employing persons under these circumstances to provide worker's compensation insurance. The insurance shall be at least the level of insurance as the laws of the country of which the employees are nationals would require. The same requirements are imposed on subcontractors under relevant circumstances. Thus, even though the Secretary of Labor waived the applicability of the DBA to a group or class of contractor employees who would, but for the waiver, have been protected under the DBA, the contractor is still required to provide workers' compensation insurance.

The second paragraph of the clause requires the contractor to afford the same protection as that provided in the WHCA, except that the level of benefits shall be subject to the terms of any law or international agreement which controls the entitlement to benefits. To reiterate, a contractor employee who qualifies for coverage under the DBA, by operation of law, is subject to the WHCA. FAR 52.228-4(b) provides that if a contractor employs a person whom, but for the waiver of the applicability of the DBA, would be entitled under the WHCA, then the contractor shall provide the same protection as the WHCA would, subject to certain limitations. The clause includes provisions for applicability to subcontracts.

CONCLUSION

The purpose of FAR 52.228-4 is to require certain contractors to provide some level of workers' compensation insurance if there is a waiver of the applicability of the DBA, and hence loss of coverage under the WHCA. The contractors who would be required to comply with this clause are those who are engaged in contracts for "public work" to be performed outside the United States, and employ persons to whom applicability of the DBA has been waived.

The DBA is an extension of the Longshoreman's and Harbor Workers' Compensation Act. It requires workers' compensation insurance for contractor employees engaged in "public

work" outside the United States. "Public work" is any project for the public use of the United States or its allies, involving construction, alteration, removal or repair, including projects in connection with the national defense or with war activities. The Act allows the Secretary of Labor to waive the applicability of the DBA to a group or class or employees, upon the recommendation of the head of an agency. By operation of law, an employee entitled to benefits under the DBA is subject to protection under the WHCA. The WHCA provides compensation to a contractor employee (if already within the purview of the DBA) for death or injury caused by a war-risk hazard, where such death or injury was not already compensated for through the DBA (e.g. if the death or injury occurred during the employee's non-work hours.) FAR 52.228-3 requires contractors in applicable circumstances to provide workers' compensation insurance pursuant to the DBA. FAR 52.228-4 requires contractors to provide some level of workers' compensation insurance even in the instance where the applicability of the DBA has been waived.

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[1] Michael J. Davidson, *Ruck-Up: An Introduction to the Legal Issues Associated with Civilian Contractors on the Battlefield,* Public Contract Law Journal, Winter 2000, Vol.29, No.2, at 233.
[2] *Id.* at 248.
[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] Matter of: Fidelity and Casualty Company of New York, B-281281, January 21, 1999.
[9] 32B Am. Jur.2d Federal Employer's Liability and Compensation Acts § 146 (1996).

[10] 51 Comp. Gen. 125, To the Secretary of the Army, B-162408, August 26, 1971 citing S. Rept. No. 540, 77th Cong. 1st sess. 51 Comp. Gen. 125, To the Secretary of the Army, B-162408, August 26, 1971 citing S. Rept. No. 540, 77th Cong. 1st sess.

[11] 51 Comp.Gen. 125, B-162408, August 26, 1971.

[12] 42 U.S.C. 1651.
[13] University of Rochester v. Hartman, 618 F.2d 170 (2d Cir. 1980).
[14] 42 U.S.C. 1651(e).
[15] DCAA Contract Audit Manual, sec. 7-507.4, Vol.1; July 2000
[16] DCAA Manual 7-507.4, July 2000.
[17] 51 Comp. Gen. 125, B-162408, August 26, 1971.

[18] 51 Comp. Gen. 125, B-162408 citing H.Rpt. No. 2581, 77th Cong., 2d Sess.12.

[19] 20 CFR 61.1(a)
[20] 51 Comp. Gen. 125, B-162408.
[21] 51 Comp. Gen. 125, B-162408.
[22] 51 Comp. Gen. 125, B-162408.