THE DEFENSE BASE ACT: WAR RISK SYNDROME

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Disclaimer

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Abstract

THE DEFENSE BASE ACT: WAR RISK SYNDROME

Significant cost reform exists in the oversight of the Defense Base Act (DBA) and War Hazards Compensation Act (WHCA). The Department of Defense (DoD) through prudent contracting can save billions in this area. DoD wartime contracts pay magnified DBA insurance premiums in which the insurance carriers load high rates based upon risks associated with war for contract services in places like Iraq and Afghanistan. Normally that makes sense, however, DBA insurance carriers concurrently receive full reimbursement for each war related injury or death resultant from war risk hazards in Iraq or Afghanistan, under the WHCA. As a result, DBA insurance carriers double dip. DBA insurance carriers receive a large payout through escalating premiums, under DoD services contracts, while also seeking reimbursement for war risk hazards through the Department of Labor (DOL). I have labeled this predicament the DBA “war risk syndrome.” This DBA war risk syndrome not only drives up high DBA insurance premiums but it benefits a DoD contractor’s payroll with G&A, fees and profit from higher DBA rates. As a result, DBA insurance carriers, brokers, and contractors profit inequitably. In this article, I propose that the federal government has an opportunity through contracting officers and a tighter oversight on WHCA payments to immediately achieve significant DoD cost savings and mitigate the DBA war risk syndrome.


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I. INTRODUCTION

The federal government has left billions of potential savings on the table due to lack of oversight on wartime contracting in Iraq and Afghanistan. As Congress’ power of the purse prompts the Department of Defense (DoD) to wring out billions in chops to its headquarters, administrative and support staff, military retirement plans and reduction of our military over the next few years- they are not only missing the boat on a larger cost savings but weakening the future of our force.¹

In fiscal year 2015, DoD funded over $277 billion in contract awards.² The spending on DoD contract support has become so high that when juxtaposed to the gross domestic product (GDP) of developed countries such as Finland, Chile or Ireland, DoD’s contract awards for fiscal year 2015 were actually higher.³ In fact, DoD contracts awarded during fiscal year 2015 were valued more than the GDP of 153 developed countries around the world.⁴ Contracting for services is booming, wherein just the last decade the cumulative rate of increase in federal procurement spending has been approximately five times the rate of inflation.⁵ Much of these massive numbers are a result of contracting in support of hostile wartime conditions in Iraq and Afghanistan.


⁴ See id. Based upon a total of 194 developed countries analyzed by The World Bank.

Over the last five years, DoD consistently obligated a majority of these contract dollars for service acquisitions. DoD represents the federal government’s largest purchaser of contractor provided services. Examples of DoD outsourcing services range from security services, professional support, linguist, interpretation, translation services or logistical services. There were over 150,000 service contracts and orders awarded or issued in fiscal year 2014. During fiscal year 2014, contract services constituted more than half of DoD’s entire budget. During which time, DoD obligated over $156 billion for contract support services. Of that amount, approximately $39.6 billion was solely obligated for service contracts supporting overseas contingency operations in Iraq and Afghanistan. These enormous buckets of money for wartime services contracting in Southwest Asia portrays a complex challenge for Congress and DoD to find fiscal efficiencies or cost reductions as these contracts directly support and impact the Warfighter. At times, a single DoD contractor may be the single point of mission

University Law School and the Nash & Cibinic Professor of Government Contract Law. Professor, Steven L. Schooner has written extensively on wartime services contracting.


8 See GAO-16-119, supra note 6, at 16.

9 See GAO-15-780, supra note 7, at 1.

10 See GAO-16-119 supra note 6, at 4.

11 Id. at 27.

12 Interview with Mr. Ken Brennan, Deputy Director of Defense Procurement and Acquisition Policy for Services, stated DoD set a target of cutting spending on contracted services… in fiscal year 2016. Jared Serbu, DoD Targets 10 Percent Cut in Service Contracts for ‘Fourth Estate,’ FEDERAL NEWS RADIO (Feb.
failure. DoD must balance cost reform on contracts supporting military operations in Iraq and Afghanistan and the very mission they support.

An area of DoD contract cost reform that peaks Congress’ attention are insurance mechanisms for war related injuries in Iraq and Afghanistan under the Defense Base Act (DBA) and War Hazards Compensation Act (WHCA). DoD service contracts require DBA for contractors performing in Iraq and Afghanistan. It works similarly to workers compensation insurance. The DBA basically covers a contractor’s health injuries sustained while on the job, paid by DoD under the requirements of its services contracts. The WHCA supplements DBA and provides reimbursement for contractors by the Department of Labor (DOL) who specifically sustain an injury or death by a “war-risk hazard” in places like Iraq or Afghanistan.

Significant cost reform exists in the oversight of DBA and WHCA. DoD through its contracts- can save billions in this area. DoD wartime contracts pay magnified DBA insurance premiums in which the insurance carriers load high rates based upon risks associated with war for contract services in places like Iraq and Afghanistan. Normally that makes sense, however, DBA insurance carriers concurrently receive full

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14 Defense Base Act and War-Hazard Insurance, as prescribed by FAR 28.309(a) and 28.309(b), implemented by FAR 52.228-3 and 52.228-4.


reimbursement for each war related injury or death resultant from war risk hazards in Iraq or Afghanistan, under the WHCA.\textsuperscript{17} As a result, DBA insurance carriers double dip. DBA insurance carriers receive large payout through escalating premiums, under DoD services contracts, while also seeking reimbursement for war risk hazards through DOL. I have labeled this predicament the DBA “war risk syndrome.” This DBA war risk syndrome not only drives up high DBA insurance premiums but it benefits a contractor’s payroll with higher fees and profit from a higher DBA rate. DBA insurance carriers, brokers, and the contractors themselves make inequitable profit. In this article, I propose that the federal government has an opportunity through its contracting officers and a tighter oversight on WHCA payments to immediately achieve DoD cost savings and mitigate the DBA war risk syndrome.

Overall, this article discusses the interplay of DoD, private insurance carriers, brokers, contractors, and DOL’s roles on contractor injuries sustained in hostile areas such as Iraq and Afghanistan. This Article is divided into five parts. Part II of this note provides a brief background and overview of the current cost reform need in DoD service acquisitions, the impact of the Defense Base Act and the War Hazard Compensation Act, and the current DBA environment. Part III focuses on the misuse of the DBA and WHCA in wartime contracting. Part IV offers a solution of cost reform strategies and methods immediately available to the DoD. Part V concludes with a discussion on how DOL and DoD can work together to mitigate these complex issues.

\textsuperscript{17} Id.
II. BACKGROUND

A. Balancing National Security Strategies with True Cost Reform in DoD Service Acquisitions

The 2015 National Security Strategy (NSS) prioritizes security efforts that al-Qa’ida, ISIL, and their affiliates pose. The NSS expressly states, “[a] strong military is the bedrock of our national security…and [the military] is postured globally to protect our citizens and interests, preserve regional stability…in meeting security challenges.

Unfortunately, DoD cannot accomplish these national security objectives without contracting a large portion of it, particularly in services. In an era of reducing overall troop numbers, the only way for DoD to accomplish these security objectives, is through procurement vehicles.

At no time in history have so many contract personnel been involved in supporting operations within a war environment. Federal spending reflects the heavy contractor reliance in which federal procurements rose from $219 billion in 2000 to more than $437 billion

19 Id.
billion spent in 2015.\textsuperscript{22} The high costs correlate to a military that must procure goods and services in order to sustain the global fight. In hostile areas like Iraq and Afghanistan, federal agencies not only lack an organic capacity to perform mission-critical functions, but the contractor workforce can actually outnumber the troops in the field.\textsuperscript{23} DoD procurements are an effective mechanism to provide critical services in highly contingent environments to assist the Warfighter and fulfill U.S. national security interests. This reliance on contract support adds complexity to the planning, programming, budgeting, and execution (PPBE) process that DoD utilizes to search for fiscal constraints in forecasting a budget.\textsuperscript{24} Fiscal planning that allocates spending for wartime contracting has cost reform initiatives at the forefront of planning.\textsuperscript{25} The Government Accountability Office (GAO) reported in 2016, that over the last 5 years, DoD consistently obligated the majority of its contract dollars for services.\textsuperscript{26} To some degree, costs to support wartime

\textsuperscript{22} Statistic compiled from USAspending.gov. USAspending.gov is a publicly accessible, searchable website mandated by the \textsc{Federal Funding Accountability and Transparency Act of 2006}, available at \url{https://www.usaspending.gov/transparency/Pages/OverviewOfAwards.aspx} (last visited Feb. 15, 2016).


\textsuperscript{24} \textsc{Department of Defense Directive 7045.14, “The Planning, Programming, Budgeting, and Execution (PPBE) Process”} (Jan. 25, 2013) cited by GAO-16-119, \textit{supra} note 6, at 8. Each year DoD uses the PPBE process to determine and prioritize requirements and allocate resources and funding to the military departments and defense agencies.

\textsuperscript{25} See GAO-16-119, \textit{supra} note 6; \textit{see also} Secretary of Defense Ash Carter, Remarks on “Goldwater-Nichols at 30: An Agenda for Updating” Center for Strategic and International Studies (CSIS) CSIS Building, Washington, D.C., (April 5, 2016). In regards to DoD acquisitions, Sec. Carter stated, “…it’s clear we still can and must do more to deliver better military capability while making better use of the taxpayers’ dollars.”

\textsuperscript{26} \textit{Id.}
contracting like in Iraq and Afghanistan have become a relentless combination of contract reliance along with zealous spending to fulfill national security objectives.

Cost reform in DoD service acquisitions lingers in the backdrop of fiscal planning and budgeting to meet NSS. Meaningful DoD cost reform applied to large services contracts in Iraq and Afghanistan is timely, complex, and often a misunderstood undertaking.\(^\text{27}\) Forecasting meaningful cost reform while planning for future budgets presents a challenge when minimizing impact on mission. Additionally, it takes years of advance planning to formulate a DoD budget. Currently, DoD will plan and develop its budget three to seven years in advance of a fiscal year.\(^\text{28}\) These programming and budgeting phases develop budget submissions as DoD works through execution of its current fiscal year budget.\(^\text{29}\) Thus, trying to find areas to save money, not impact the mission and accomplish this years in advance of execution- is daunting.

Yet, an area exists in which DoD can achieve cost reform in service contracting in Iraq and Afghanistan but not impact national security or reductions in force. The area is cost reform within contracting methods of DBA insurance oversight. DBA insurance started from a somewhat insignificant part of the casualty insurance business, and grew over twentyfold from hostilities in Iraq and Afghanistan.\(^\text{30}\) The DBA mega market now covers almost 200,000 prime and subcontractor employees and generates massive annual government-wide premiums from coverage on government contracts.\(^\text{31}\)

\(^{27}\) See DoD’s Functional Strategy, supra note 20, at 10.

\(^{28}\) See GAO-16-119, supra note 6, at 8.

\(^{29}\) Id.

\(^{30}\) See DoD DBA Report to Congress, supra note 21, at i.

\(^{31}\) Id.
insurance industry has rapidly grown in hostile war torn zones. Consequently, legitimate DBA coverage for service contracts supporting DoD war efforts in Iraq and Afghanistan elicit extraordinary opportunities for insurance profiteering on computation of DBA premiums.32

DBA insurance premiums escalate when contractors perform services in war environments like Iraq and Afghanistan and contractor injuries or death ensues. Distribution of all DBA premiums heavily illustrate the stark figure of premiums in warzones, in which, 88 percent of all DBA premiums were for contractors that performed in Iraq or Afghanistan.33 U.S. government DBA premiums in 2002 totaled $18 million compared to over $400 million in 2008.34 From 2001-2015, over 51,614 DBA cases arose from Iraq and over 35,069 DBA cases from Afghanistan.35 The next closest country for DBA cases is Kuwait with just over 7,698 DBA cases.36 Undoubtedly, DBA rates escalate for contractors performing in these war-zone areas, representing a 90 percent increase and differential compared to rates in non-war zone locations around the world.37

32 Between September 2001 and the end of December 2009, 1,987 contractor deaths were covered by the DBA. Of the 1,987 number reported, 1,459 or 73.4% occurred in Iraq and 289 or 14.5% occurred in Afghanistan. DEP’T OF LABOR, Defense Base Act Case Summary by Nation, available at http://www.dol.gov/owcp/dlhwc/dbaallnation.htm. Contractor operations in Iraq and Afghanistan accounted for 87.9% of all covered contractor deaths from September 2001 and end of December 2009. V. GRASSO, B. WEBEL, S. SZYMENDERA, CONG. RESEARCH SERV., RL34670, THE DEFENSE BASE ACT (DBA): THE FEDERALLY MANDATED WORKERS’ COMPENSATION SYSTEM FOR OVERSEAS GOVERNMENT CONTRACTORS, at 4 (Apr. 9, 2010) [hereinafter CRS RL34670].

33 DEOD DBA REPORT TO CONGRESS, supra note 21, at 29.

34 Id.


36 Id.

37 DEOD DBA REPORT TO CONGRESS, supra note 21, at 37.
Currently, for each service contract performed in Iraq or Afghanistan, DoD pays the DBA insurance premium, associated brokers costs, a general and administrative (G&A) percentage on the contract, and a fee under the terms set within its acquisition.38

When it comes to true DoD cost reform in wartime contracting without an impact to national security objectives- DBA is a prime area to examine. A stream of contractors assisting the military in wartime environments triggered the need for DBA in the first place. However, DBA was not enacted to continue as the mechanism to reimburse war hazard injuries to contractors under current wartime environments.

B. The Defense Base Act and War Hazard Compensation Act

In 1941, an initial spike of civilians accompanying the military during World War II, led to the Defense Base Act (DBA) to provide workers’ compensation benefits to civilian employees injured or killed while working on military bases outside the United States.39 With some regulatory configuration in place, DBA became an extension of coverage under the Longshore and Harbor Workers’ Compensation Act (LHWCA).40 Generally, under the LHWCA, an employer must provide insurance coverage by an approved DOL insurance carrier for claims filed under the LHWCA or any LHWCA extensions.41 The

38 Id. See also SIGAR AUDIT 11-15 DBA, supra note 16.

39 Defense Base Act, 42 U.S.C. §§ 1651-1655 (2012). DBA specifies the injury or death was the result of normal working conditions while working on U.S. Government installation. See also Greta S. Milligan, The Defense Base Act: An Outdated Law and Its Current Implications, 86 U. DET. MERCY L. REV. 407 (2009). Milligan’s article states the number of civilians accompanying the military during World War II was 734,000 compared to 85,000 in World War I.


41 3 U.S.C. § 932(a). An employer can also request to be self-insured or obtain a waiver, as approved by Department of Labor.
The DBA provides civilian employees on overseas American bases similar compensation relief had they been working in the United States. Prior to DBA, if a civilian worked at an overseas military installation and became injured on the job, U.S. workers compensation rights would generally not be covered. The scope of DBA coverage now covers civilians working at overseas military bases, overseas construction projects for the U.S. government or allies, and contractors working under service contracts that tie to a U.S. National Defense activity. Soon thereafter, DBA coverage incorporated contractors. DBA coverage now compensates contractors for accidental injury or death arising out of and in the course of employment under the LHWCA’s system.

A significant addition to the DBA occurred in 1942 when Congress enacted the War Hazards Compensation Act (WHCA) to supplement the DBA. The WHCA provides

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42 Milligan, supra note 39.

43 Id.


47 See War Hazards Compensation Act, 42 U.S.C. § 1701.
reimbursement for government contractors who sustain injury or death by a war-risk hazard outside of the United States. A war-risk hazard is defined as any hazard arising during a war or armed conflict in which the United States is engaged and the hazard is derived from an explosive, weapon or other noxious thing by a hostile force or person. Liability imposed on the DOL, under the WHCA, enables a DBA insurance carrier that paid benefits to a DBA claimant who suffered a war risk hazard injury- to full reimbursement. The WHCA permits up to 115% reimbursement of the amount paid under a DBA claim.

DBA and WHCA are distinct between reimbursement and liability. Unlike the DBA, where payments are made by the employers or carriers privately, the WHCA is an Act that imposes liability on the DOL. Reimbursement under DOL covers the amount of the benefits paid for medical, compensation, death benefits, burial expenses and investigation costs and reasonable and necessary claims expenses. As a result, for any war risk hazard

48 Id.


50 See 42 U.S.C. § 1704 and Section 104(a) of the WHCA. Section 101(a) and 101(b) claims are made by a “specified person” or their beneficiary, Section 104 claims are made by employers or carriers seeking reimbursement for benefits and reasonable claims expenses. See also Jon B. Robinson, The War Hazards Compensation Act: A Primer; 12 LOY. MAR. L.J. 12, 264 (2015).

51 Id.


53 See 42 U.S.C. § 1704(a)(3) and 20 C.F.R. § 61.105. The Secretary has the authority once the reimbursement claim is accepted to pay the benefits directly to the employee. See also OFFICE OF WORKERS’ COMP. PROGRAMS, OWCP BULLETIN NO. 05-01, WAR HAZARD COMPENSATION ACT-CLAIMS
injury or death under the WHCA, a DBA insurance carrier or employer receives from the DOL a full reimbursement plus any additional, reasonable and necessary claims expenses. If a DBA claims reimbursement occurs for a war risk hazard, an insurance carrier may not increase its DBA premiums [based upon] war risk hazards.

C. The DBA Environment

DBA brokers and DBA insurance carriers drive the DBA market. The relationships, business practices and multiple government players outline a multifaceted DBA environment. It is an environment where government agencies face challenges as a market flourishes on war environment premiums for DoD services in Iraq and Afghanistan.

1. DoD Searching for Prudent Acquisition Strategy

Hostilities in Iraq and Afghanistan over the years resulted in a surge of DBA claims and increase of DBA costs under DoD contracts. Increases of DBA insurance premiums for DoD contracts performed in Iraq and Afghanistan prompted Congressional oversight related to DBA in 2008. On May 15, 2008, the House Committee on Oversight and

FOR REIMBURSEMENT & DETENTION BENEFIT PROCEDURES (Oct. 18, 2004) [hereinafter OWCP BULLETIN NO. 05-01].


56 Defense Base Act Insurance: Are Taxpayers Paying Too Much?: Hearing Before the H. Comm. on Oversight & Gov’t Reform, 110th Cong. 30 (2008) [hereinafter H. COMM HEARING ON DBA].
Government Reform held a hearing on the DBA probing whether U.S. taxpayers pay too much for DBA through DoD contract vehicles.\(^{57}\)

A few months later, on October 14, 2008, the National Defense Authorization Act (NDAA) for fiscal year 2009 required DoD to adopt an acquisition strategy for DBA insurance.\(^{58}\) The 2009 NDAA specified a DoD acquisition strategy shall occur for DBA insurance to minimize costs to DoD and defense contractors.\(^{59}\) The 2009 NDAA also provided that, not less often than once every 3 years, the Secretary of Defense shall review and, as necessary, update the acquisition strategy adopted related to DBA.\(^{60}\) In 2009, the DoD provided Congress its acquisition strategy.\(^{61}\) Nonetheless, an effective DBA acquisition strategy to minimize DBA costs remains undiscovered. In 2016, DoD continues to test and search for DBA acquisition strategies, but ultimately the current DBA environment for DoD remains a difficult one to breach.

2. Department of Labor’s Role in Processing DBA and WHCA Claim

The DBA and WHCA both fall under a DOL paradigm. Under the authority and control of the DOL, the Office of Workers’ Compensation Programs (OWCP) has the full

\(^{57}\) Id.


\(^{59}\) Id.

\(^{60}\) Id.

undertaking to administer all Federal Employees’ Compensation Act (FECA) claims, which the OWCP pays from federal appropriations controlled within the Employees’ Compensation Fund. The DOL rightfully owns FECA claims because it functions as a workers’ compensation law for all federal civilian employees who suffered work-related injuries or occupational diseases.

The OWCP itself is organized into four separate programs: the Division of Federal Employees’ Compensation (DFEC); the Division of Longshore and Harbor Workers’ Compensation (DLHWC); the Division of Coal Mine Workers’ Compensation; and the Division of Energy Employees’ Occupational Illness Compensation. As discussed further below, DFEC and DLHWC handle DBA and WHCA issues. As a federally funded workers’ compensation program, the Longshore and Harbor Workers’ Compensation Act (LHWCA) regulatory system that extends to DBA as supplemented by WHCA, fit appropriately under this OWCP framework.

The composition of the OWCP programs are significant in understanding claims reimbursement under the LHWCA, particularly since WHCA claims do not attach to the

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62 See DFEC PROCEDURAL MANUAL, supra note 49, at 0-0100. The Employees’ Compensation Fund is the same pot of money for benefits paid under DBA and reimbursed under the WHCA. Id.


65 DFEC PROCEDURAL MANUAL, supra note 49.

ancillary DLHWC.\textsuperscript{67} OWCP’s the Division of Federal Employees’ Compensation (DFEC) administers WHCA claims reimbursement.\textsuperscript{68} Alternatively, OWCP’s Division of Longshore and Harbor Works Compensation (DLHWC) administers DBA claims.\textsuperscript{69} This may not be a bad thing, but it does however, contribute to various misunderstandings of the DBA and WHCA reimbursement process. The DBA, LHWCA and WHCA can work in unison or unintentionally against each other during the processing of a claim.\textsuperscript{70} With claims filed at offices in two separate geographical locations, diversity of filing locations increases may friction between the DBA and WHCA relationships.\textsuperscript{71}

3. Mechanics of a WHCA Claim Reimbursement

Equally relevant to the overall processes are the nuts and bolts mechanics of how DFEC administers a WHCA claim reimbursement once a DBA insurance company files a WHCA reimbursement for DBA. DOL assists in DBA and WHCA reimbursement for each claimant.

In principle, costs paid by an insurance carrier for a WHCA claimant’s war risk hazard injury or death, are fully reimbursable.\textsuperscript{72} Thus, a DBA insurance carrier receives full

\textsuperscript{67} The DBA really has no substantive provisions but provides procedural and definitional provisions specifically formulated to DBA claimants. The DBA’s substantive provisions are under the LHWCA. See Anzalone, \textit{supra} note 44.

\textsuperscript{68} See DEP’T OF LABOR website on OWCP framework \url{https://www.dol.gov/owcp/index.htm} (last visited June 19, 2016).

\textsuperscript{69} \textit{Id}.

\textsuperscript{70} \textit{Id.}, see also Yotis, \textit{supra} note 52.

\textsuperscript{71} \textit{Id}.

\textsuperscript{72} See War Hazards Compensation Act, 42 U.S.C. § 1701.
reimbursement for not only the corresponding claim but administration costs and litigation costs incurred during the investigation of the claim.\textsuperscript{73} For example, if a DoD contracted linguist suffers a war risk hazard injury while performing services in Afghanistan, the injury is first covered through the contractor’s DBA insurance.\textsuperscript{74} This claim becomes processed as a DBA claim.\textsuperscript{75} So, instead of paying a claim to the linguist out of pocket, the contractor exercises its DBA insurance coverage under its policy.\textsuperscript{76} Consequently, the DBA insurance carrier pays the claim to the claimant and in turn, the DBA insurance carrier seeks full reimbursement of its DBA claim through the WHCA, since it’s a war risk injury, located at the DOL’s DFEC office.\textsuperscript{77}

The WHCA reimbursement amount includes up to fifteen percent of all unallocated expenses associated with the linguist’s war risk claim.\textsuperscript{78} It is a fairly low burden of proof to increase unallocated expense reimbursement determinations.\textsuperscript{79} DFEC has the authority to increase fifteen percent of the sum of the unallocated reimbursable payments, on a reasonability determination.\textsuperscript{80}

\textsuperscript{73} See 20 C.F.R. § 61.104.

\textsuperscript{74} Id. § 61.101.

\textsuperscript{75} Id.

\textsuperscript{76} Id., see also OWCP BULLETIN 05-01, supra note 53.

\textsuperscript{77} For WHCA fact patterns see Yotis, supra note 52.

\textsuperscript{78} See 20 C.F.R. § 61.104(c); see also 42 U.S.C. 1704(a).

\textsuperscript{79} See Robinson, supra note 50, at 15.

Currently, DFEC’s unallocated claims expense language applies to present and future unallocated claims expenses. In practice, DFEC could apply the fifteen percent (15%) to an insurance carrier’s entire reimbursable payments for unallocated claims expenses for past and proposed future expenses. For example, if DFEC applies the “15% of all of [insurance] carrier’s payments” calculation to unallocated claims expenses for a settlement payment, it includes the carrier’s forecast number based on a settled “future liability.” Such unallocated claims expenses can use the “all payments to be considered” verbiage to receive a larger reimbursement. Thus, full reimbursement under WHCA are both allocated and unallocated costs in a war risk hazard claim.

Direct payment of a claim acts as another DFEC mechanism towards beneficiary efficiency that assists an insurance carrier for WHCA reimbursement. Once an ongoing entitlement has been established, OWCP may assume direct payment of benefits rather than continue to reimburse the insurance carrier or employer. Direct payment(s) could incorporate the reimbursement, future indemnity, death benefits and future medical benefits. A DFEC claims adjuster arranges with the DBA insurance carrier to pay

81 Id. “Allocate means to assign an item of cost, or a group of items of cost, to one or more cost objectives. This term includes both direct assignment of cost and the reassignment of a share from an indirect cost pool.” See FAR 31.001.

82 Id.

83 Id.

84 The author recognizes a DFEC adjudicator evaluates location, time, cause of death or injury to include hostile force, medical evidence and specific fact patterns involved in a WHCA claim. For procedures to be used in the adjudication and payment of claims under WHCA see DFEC PROCEDURAL MANUAL, supra note 49, at Part 4-0300.

85 Id. Upon DFEC accepting a claim for reimbursement under 42 U.S.C. § 1704(a) of the WHCA, DFEC may choose to pay benefits directly to an entitled beneficiary, in lieu of reimbursement to an insurance carrier or employer under 42 U.S.C. § 1704(a)(3) and described in 20 CFR 61.105.

86 Id. DFEC started an automatic reimbursement for medical expenses that cost $300.00 or less. To screen for fraud, DFEC randomly audits automatic application packets for WHCA compliance. See also Federal
If DFEC takes over direct payment of reimbursement cases, a notice to the carrier or employer will be provided and the person to receive direct payment will be informed of being placed on the periodic roll. A beneficiary will then be compelled to communicate directly with DFEC for all of their ensuing claims issues. Should the direct payment become tremendously multifarious for DFEC, they reserve a regulatory right to reassign a direct payment case back to the carrier for it to pay benefits. A statutory provision exists that protects the beneficiary, carrier or employer’s attachment to hearing or adjudicatory rights established under DBA under a transfer of direct payment.

4. The DBA Brokers and DBA Insurance Carriers

To understand the breadth of the DBA environment for insurance carriers, it is critical to recognize the market players and business relationships. When a DoD contractor negotiates a DBA rate, the DBA premium appraisal begins with a quote negotiated by an authorized DBA broker. Methods of negotiating a DBA rate for DoD contracts remains

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88 Id.

89 Id.

90 Id.

91 See 20 C.F.R. § 61.105(e).
unclear. Under current business practices, a government entity or contractor will not receive a DBA quote directly from a DBA insurance carrier, but must negotiate rates through an independent broker. A contractor obtains a DBA broker, yet, receives a commission based upon the premium amount quoted by the insurance carrier. Generally, DBA brokers receive a commission of approximately one to four percent of the total quoted DBA premium. A commission earned by a broker provides assurances that the broker worked to find the most favorable DBA quote for its client, the contractor. The broker works to reduce a contractor’s total cost of risk to make the insurance carrier more profitable while ensuring adequate coverage. A DBA broker’s bilateral relationship impinges a responsibility for issuing not only the DBA policies but can sometimes include billing the contractors for the cost of their DBA premiums.

As a broker negotiates with the DBA insurance carrier, a DBA carrier sets the premium rate. Facts drive a DBA rate, comparatively to a car insurance rate.

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92 DoD has paid much higher rates for DBA than any other government agency. For comparison of DBA rates between DoD, DOS and USAID, see GAO-15-194, supra note 61.

93 See DoD DBA REPORT TO CONGRESS, supra note 21, at iii.

94 Id. at 6.

95 Id.

96 Id. at 43.

97 MARSH DBA CENTER OF EXCELLENCE, RISK MANAGEMENT CAPABILITIES AND OVERVIEW OF RUTHERFOORD/MMA HANDOUT. Marsh and McLennan Companies (2015).


99 Id.

100 See DoD DBA REPORT TO CONGRESS, supra note 21, at 28-38.
Inception of DBA policies derive from projected labor estimates for the full year of coverage (contract performance) combined with the risk exposure of each contract. A DBA carrier evaluates elements of risk exposure based upon the requirements of the performance work statement (PWS) in the contract. The PWS provides job descriptions, locations and duration of services. Next, the DBA insurance carrier defines a DBA rate upon risk exposure, calculated by multiplying the projected labor by the DBA rates.

Each DBA policy also contains a minimum policy guarantee, for example 80% of the total amount of the policy. If a DBA carrier requires minimum earned premiums of $20,000 for example, this minimum premium could be charged even though work is for only for one or two weeks or only one or two employees. In situations where the labor significantly drops below the projected labor, the DBA minimum policy guarantee comes into effect. This may make the individual contract DBA rates higher (i.e. the same DBA cost spread across less labor dollars creates a higher "rate" per $100 of

\[\text{DBA rate} = \frac{\text{Projected labor}}{\text{DBA rates}}\]

\[\text{Minimum policy guarantee} = 80\% \times \text{total amount of the policy}\]

\[\text{Minimum earned premiums} \geq \$20,000\]

\[\text{DBA rates} \times \text{minimum policy guarantee}\]

\[\text{DBA insurance carrier}

101 Id. 
102 Id. 
103 Id. 
104 Id. 
105 Id. 
106 Id. at i-ii. 
107 Id. at 24.
Insurance carriers generally base premiums on specified labor costs incurred by the contractor. Each DBA insurance carrier and brokerage firm retain a considerable amount of resources for its business. Configuration of the top major DBA brokers and insurance carriers encompass the largest and most sophisticated insurance firms in the world. Rutherfoord and Lockton Affinity are known as two of the major DBA brokers. Both brokerage firms are extensions of FORTUNE 500 companies, with revenues approaching $1 billion. Examples of two of the top prevailing DBA insurance carriers for DoD acquisitions are: ACE-USA (acquired Chubb Limited in 2016, an S&P 500 company); CNA Financial, 90% owned by Loews Corporation, a FORTUNE 500 company; and American International Group (AIG), another FORTUNE 500 company. Revenues for AIG were approximately $58.3 billion in 2015. Of the 55,988 new DBA cases between

108 See SIGAR AUDIT 11-15 DBA, supra note 98.

109 Id. For example, if the contract was for construction services in Iraq, a DBA rate could be $7.50 for every $100 paid to employees.


September 2001 and the end of December 2009, 54,449 or 97.3% were insured by one of these three insurance companies or their subsidiaries. AIG is the largest, between 2001 and 2015, with over 73,671 total DBA cases. These insurance companies and brokers may not make all revenues from DBA. Nevertheless, the revenues of these corporations illustrate an extraordinary bandwidth and motivation energizing each respective DBA division.

Alliances between DBA brokers and DBA insurance carriers may at times confound the DBA market. The business relationship, along with common DBA business practices outlines a multifaceted DBA environment. An environment where DBA and WHCA collide, DoD faces acquisition challenges and a market flourishes on war environment premiums for DoD services in Iraq and Afghanistan. It serves as context for an opportunity to examine the problems this multifaceted environment created.

III. CURRENT DBA DILEMNAS: WHITE COLLAR LOOTING IN IRAQ AND AFGHANISTAN

A. The DBA War Risk Syndrome- WHCA Reimbursement

114 See CRS RL34670, supra note 32, at 7. CNA’s Continental Casualty Company received nearly 14% and ACE about 6% of DoD premiums., Id at 12.


Top tier DBA brokers and insurance carriers intersect as powerful allies in the private market. It is not clear whether a DBA broker represents the best interests of the contractor, the insurance carrier or the government. One thing is clear, however, high DBA insurance premiums benefit a DBA broker. DBA coverage under DoD service contracts provides the DBA market to thrive. Prolonged war efforts in Iraq and Afghanistan foster additional opportunities for DBA cost manipulation with insurance carriers. As a result, insurance companies that provide DBA coverage to contract support services in Iraq and Afghanistan, financially benefitted over many years. These DBA carriers have premium loaded without an increased risk of loss and then also included war risk hazards to dramatically inflate its premiums. Beginning in 2003 through 2008, the four largest DBA insurers made underwriting profits of nearly 40 percent, almost $600 million in underwriting profits. Often the case, the DBA insurance carrier computes DBA premiums while ignoring DBA reimbursement mechanisms of the federally mandated WHCA. As a result, profits soar.

Insurance carriers weigh profitable reimbursement options under WHCA for each war risk hazard that DBA pays. An insurance carrier could receive full benefits it paid to the

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117 The use of premium in this note is the premium rate. *Premium Rate* is the price of insurance, typically stated in dollars per $100 of covered payroll. Minimum premium is the minimum dollar amount necessary to receive coverage under an insurance policy. *Total premium* is equal to the larger of (1) the premium rate multiplied by payroll or (2) the minimum premium. *Effective premium rate* is the total premium divided by $100 of payroll. Due to the minimum premium, the effective premium rate may be higher than the premium rate; see also GAO-15-194, supra note 61, at 42.

118 Comparatively, U.S. State Dep’t from July 2008 to April 2014, expended over $212 million to reimburse contractors for the cost of DBA premiums see GAO-15-194, supra note 61, at 3.

119 See H. COMM HEARING ON DBA supra note 56, Congressman John P. Sarbanes.

120 Id., see also SIGAR AUDIT 11-15 DBA, supra note 98; see also DoD DBA REPORT TO CONGRESS, supra note 21.
DBA claimant under a valid WHCA claim. This reimbursement includes the entire DBA claim amount, plus, “reasonable and necessary” DBA claim expenses that fall under the WHCA. A perplexing question not answered by DBA insurance carriers is why they charge high premiums in war zones based on war risk hazards, in addition to receiving full reimbursements under the WHCA for war risk hazard injuries and death.

This is an inequitable convergence of costs as DoD pays high DBA prices justified by war risks, yet, DOL fully reimburses insurance carriers that meet WHCA criteria. I have labeled this inimitable predicament the “war risk syndrome.” A DBA “war risk syndrome” occurs when a DBA insurance carrier justifies escalation of DBA premiums in Iraq or Afghanistan on war risk hazards, yet, receives full reimbursement under the WHCA. Under this scenario, an insurance carrier gets paid twice from the U.S. government and pays fewer claims then it received in premiums. Such a DBA war risk syndrome becomes a windfall for DBA insurance carrier. Since war related claims under WHCA are reimbursable to the insurance carrier, an insurance carrier should not be permitted to then use those costs to overemphasize the insurance carrier’s losses.

1. War Risk Syndrome- Claims

In 2008, Congress touched on the war risk syndrome’s impact on claims during a hearing on DBA led by the Committee on Oversight and Government Reform. Committee Chairman, Honorable Henry A. Waxman stated, “insurers offering Workers’

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121 See 20 C.F.R. § 61.104.

122 See H. COMM HEARING ON DBA supra note 56, Hon. Henry A. Waxman (chairman of the committee) presiding.
Compensation pay out as much in claims and expenses as they take in through premiums. The carriers make their real money off of investment returns they earn during the interval between when they receive premiums and pay claims and expenses.”

Chairman Waxman further expressed:

Data shows that from 2002 through 2007 the top four insurance companies received $1.5 billion in premiums under contracts negotiated with private contractors in Iraq and Afghanistan. These companies will pay out $928 million in claims and expenses, and they will retain net underwriting gains of $585 million. In other words, these four insurance companies have retained as profit 39 percent of the premiums they receive.

Comparatively, the domestic ratio of profit averages closer to one percent. The DBA war risk syndrome demonstrates that DBA rates were unwarranted because insurance carriers used costs potentially attributable to war risks incidents to confer new rates.

WHCA claims make up a very small percentage of total DBA claims that originate from Iraq and Afghanistan. This is alarming because the WHCA claims should represent a large percent of claims that originate from Southwest Asia. DOL documented over 37,000 DBA claims originating from Iraq and Afghanistan between 2001 and 2009. Yet, between 2003 and 2009 only 823 WHCA claims were filed, 781 from Iraq and 42 from Afghanistan. Astoundingly, WHCA claims made up just over 2% of all

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123 Id.
124 Id.
125 Id. Congressman Cooper.
126 Id.
127 See CRS RL34670, supra note 32, at 11.
129 See CRS RL34670, supra note 32, at 11.
DBA claims filed in 2010. Since 2003, $12.1 million has gone for WHCA compensation and benefits and $19.7 million has gone to reimburse insurers for itemized and non-itemized expenses associated with those claims.

2. War Risk Syndrome- Loss Ratio

The DBA war risk syndrome creeps into areas of premium calculations. Often the DBA insurance carrier loads WHCA reimbursable claims into its loss ratio, a fundamental for establishing premium rates. Loss ratios measure the relationship between claims payments (losses or benefits) and premiums paid; ratios are expressed as percentages, benefits to premiums. Loss ratio can be calculated by dividing incurred claims by earned premium. The higher a loss ratio, the higher the premium rates an insurance carrier will charge. Essentially, the DBA carriers pad DBA loss ratio numbers with cases eligible for reimbursement under the WHCA into its premium. This results in DBA premium loading.

130 Id.
131 Id.
132 See SIGAR AUDIT 11-15 DBA, supra note 98.
134 Id.
135 See SIGAR AUDIT 11-15 DBA, supra note 98.
Insurance carriers charge a premium for benefits on account of injury, detention or death that arose from a war-risk hazard.\textsuperscript{136} The insurance carrier charges a premium that either loads the war-risk hazard or charges it under its DBA coverage.\textsuperscript{137} Incurred claims should exclude all claims eligible for reimbursement under the WHCA.\textsuperscript{138} If the insurance carrier includes WHCA reimbursable expenses into its loss ratio, the premium will continue to increase and subsequently be unfairly loaded.\textsuperscript{139} Since insurance is generally a form of risk management used to avoid the risk of potential financial loss, this manipulation impacts future rates.\textsuperscript{140} Thus, practice is also to cumulative these account loss ratios to determine its future rates.\textsuperscript{141} Exemplifying a vicious cycle of high DBA rates.

An illustration of the war risk syndrome affecting loss ratio showed up in a USAID investigation. A DBA carrier reported from March 1, 2010, through March 31, 2013, USAID paid $45.4 million in DBA insurance premiums.\textsuperscript{142} During this period, the DBA carrier reported total incurred losses (both paid and expected to be paid) of $22.3 million.\textsuperscript{143} Of this total, non-war hazard losses totaled $9.1 million from 287 non-war

\begin{footnotes}
\footnote{136 Id. at 5.}
\footnote{137 Id. at 1-11.}
\footnote{139 See DoD DBA REPORT TO CONGRESS, supra note 21, at 6.}
\footnote{140 Id. at 3-6.}
\footnote{141 See DoD DBA REPORT TO CONGRESS, supra note 21, at 55.}
\footnote{142 See USAID DBA AUDIT, supra note 133.}
\footnote{143 Id.}
\end{footnotes}
hazard claims. This is a loss ratio of approximately 20 percent. As a result, for every dollar in premiums received, the carrier paid or expected to pay claimants 20 cents in non-war hazard losses. As you can see $9.1 million of non-war hazard losses occurred while the carrier intentionally padded its loss ratio to include war hazard losses in order to justify an increase of its premiums.

In a DoD case, a DBA insurance carrier collected $114 million from DoD in premiums between November 2005 and September 2009. Based on the insurance carrier’s quarterly loss data, its incurred losses for non-WHCA cases between November 2005 and September 2009, totaled $42 million. The differential of $114 million paid for DBA coverage versus only $42 million paid to DBA claimants represents a 37 percent loss ratio. Here, the insurance carrier profited approximately $72 million from justifying high DBA premiums of $114 million on risk of injury or death on war hazards. Yet, only $42 million paid in losses for non-WHCA cases. This illuminates a significant problem and another example of the DBA war risk syndrome on loss ratios affecting premiums.

As highlighted by these audits, the lack of awareness of loss ratios results in paying unnecessarily and unreasonably high DBA premiums. In SIGAR’s audit, they confirmed with DOL officials that once a claimant becomes approved for WHCA reimbursement, it

144 Id.
145 Id.
146 See SIGAR AUDIT 11-15 DBA, supra note 98, at 11.
147 Id.
148 Id.
“literally guarantees” that the insurance carrier will receive commutation amount. As illustrated by these examples and many like it, it is unclear why DBA insurance carriers remove WHCA cases from its loss ratio along with its methodology for doing such. This cost manipulation prompts a prime area for reform to combat war risk syndrome.

3. War Risk Syndrome- Claims Reserves

DBA war risk syndrome sneaks into the DBA insurance carriers claim reserves totals skewing premium figures even more. Claim reserves are accounts the carrier sets aside to pay for future losses. DBA insurers profit from investing premiums held in reserves, rather than from underwriting gains (the difference between premiums earned and losses incurred).

Some DBA insurance companies keep reserve totals that equal twice as much as it actually pays for claims. In a SIGAR audit, a DBA insurance carrier reported $137 million in losses since the inception of the USACE DBA program. Of the $137 million, $90 million (66 percent) were funds held in its reserve. SIGAR scrutinized these totals of what represented actual loss. The data gathered is alarming. For 333

149 Id.
150 Id at 13.
151 See USAID DBA AUDIT, supra note 133, at 4.
152 Id.
153 Id.
154 Id.
155 Id.
DBA cases that closed by September 2009, the DBA carrier reported reserves up to $4.3 million.\textsuperscript{156} Yet, the DBA insurance carrier only paid out $2 million.\textsuperscript{157}

Additionally, SIGAR determined the DBA carrier kept reserve amounts higher than what it actually paid in 84 percent of the closed cases.\textsuperscript{158} Of 282 closed claims, only 45 cases closed out for more than their reported reserves.\textsuperscript{159} To measure the high number for its reserve adequacy, SIGAR asked the insurance carrier to provide analysis of its cases under this one DBA contract to measure its reserve adequacy.\textsuperscript{160} Incredibly, the DBA insurance analysis demonstrated it missed its 95 percent target by a wide margin.\textsuperscript{161}

DBA insurance carriers try pointing the finger back at DOL. One DBA carrier said it takes several years for DOL to determine whether claims are reimbursable under the WHCA.\textsuperscript{162} Therefore, during that time the insurance carrier has to pay out such claims while setting aside reserves. However, during a major audit of a DBA insurance carrier, it found that between years 2002-2009, 59 percent of the DBA carrier’s forecasted ultimate incurred losses would be recovered as WHCA from DOL.\textsuperscript{163} Data contradicts the DBA

\textsuperscript{156} Id.
\textsuperscript{157} Id.
\textsuperscript{158} Id.
\textsuperscript{159} Id.
\textsuperscript{160} Id.
\textsuperscript{161} Id.
\textsuperscript{162} Id.
\textsuperscript{163} See SIGAR AUDIT 11-15 DBA, supra note 98, at 11.
insurance carrier’s claim that DBA claims are reported well after the expiration of a contract year.\textsuperscript{164}

A SIGAR audit illustrates the point further. On April 2, 2009, a DBA carrier filed for a WHCA reimbursement of $150,437.64.\textsuperscript{165} DOL approved the WHCA reimbursement approximately five months later and paid the carrier $150,939.18.\textsuperscript{166} A few months later, the insurance carrier increased its reserves for this claim to $1.8 million.\textsuperscript{167} The claims file showed the DBA insurance carrier actually paid the beneficiaries a one-time lump sum payment (commuted the claim) and in November 2009 estimated the total commutation at $1.8 million.\textsuperscript{168} Here, the DBA carrier inflated its reserve numbers for one DBA claim to $1.8 million. By doing such, it profited from investing premiums held in reserves, keeping reserve totals that equal over five times much as it pays for claims.

When asked why it did this, the DBA carrier stated it increased the amount because that was its best “estimate” of the amount that would eventually be paid on the claim.\textsuperscript{169} SIGAR responded in their audit, however, that because the claim had been accepted for WHCA reimbursement, the insurance carrier knew that it would receive reimbursement for the commuted amount from DOL and showed the net loss to the carrier in its claims file as $0.\textsuperscript{170}

\begin{flushleft}
\footnotesize
\textsuperscript{164} Id.
\textsuperscript{165} Id at 12.
\textsuperscript{166} Id.
\textsuperscript{167} Id.
\textsuperscript{168} Id.
\textsuperscript{169} Id.
\textsuperscript{170} Id.
\end{flushleft}
This insurance carrier’s reserves for 2009 were 316.8 percent of the final paid amounts for cases closed that year, and 2010 reserves were 139.7 percent of the paid amounts for cases closed in that year. These numbers show a significant differential between reserves and paid amounts where the DBA insurance carrier closes out cases for far less than maximum amount reserved whereas the reserved almost doubled the amount paid for its closed claims.

These reserve calculations and subsequent increases are not only problematic but represent a small piece of the overall WHCA pie. The data showed roughly 90 percent of reserves were for WHCA cases, yet, DBA insurance carriers are not permitted to include WHCA cases when calculating loss ratio and also seek WHCA reimbursement. As outlined, reserve adequacy needs overhaul to mitigate DBA war risk syndrome.

4. War Risk Syndrome- Incurred But Not Reported Percentages

Another method used to pad loss ratio percentages (and premiums) and manipulate reserve numbers is when actuaries include losses known as “Incurred But Not Reported” (IBNR) in its reserves. IBNR are the reserves for claims that become due with the occurrence of the events covered under the insurance policy, but have not been reported.

171 Id.

172 Another example of the questionable reserves increase: DBA insurance carrier reported reserves of $6.8 million for just 58 claims reported during 2005-2006 contract year. For the same 58 claims this DBA carrier increased its reserves to $11 million the following year. Insurance carrier could not provide a factual explanation for the increase. Id at 15.

173 Id.
yet.\textsuperscript{174} These DBA insurance carriers charge higher premiums based on a war environment to exaggerate future loss. IBNR refers to two categories of losses- a) claims that have occurred, but not yet reported to the insurance carrier and b) future development on known claims.\textsuperscript{175}

During a 2011 SIGAR audit, a DBA insurance carrier incurred a year of claims worth $3.7 million.\textsuperscript{176} However, one year later the DBA insurance carrier changed the number from $3.7 million to $7.3 million for the same exact time period.\textsuperscript{177} The DBA insurance carrier attributed the increase to IBNR and argued it is standard practice to include IBNR in its calculation of total incurred losses associated with a particular set of claims.\textsuperscript{178} As a result, the percent loss ratio dramatically escalates, with no verifiable or factual support.\textsuperscript{179} With a higher loss ratio number, unjustifiable increases in premiums occur. Equally troubling is that many of these IBNR cases are also eligible for reimbursement under the WHCA. This skews the numbers even further. IBNR reserves are for situations where existing reserves may be insufficient for claims that are understated. Yet, in these scenarios IBNR’s become manipulated for profit.

B. Inadequate Oversight


\textsuperscript{175} See SIGAR AUDIT 11-15 DBA, supra note 98, at 7.

\textsuperscript{176} Id.

\textsuperscript{177} Id.

\textsuperscript{178} Id.

\textsuperscript{179} Id.
DBA war risk syndrome plagues the DBA market. The limited scope of DBA oversight compounds the problem. Such limited oversight is not enough to counter DBA premium escalations and manipulations where war risk syndrome crept in. As a self-regulating system, it is even unclear which government entity vets DBA premiums against the claims for alleged premium loading. Thus, a breakdown has occurred on whether DoD actively vets against premium loading through its contracting mechanisms or DOL vets premium loading scenarios.

Generally, current oversight measures at the DOL are self-checking. They may include a requirement for insurance carriers to file a self-certifying document for reimbursement that states DBA premium loading has not occurred.\textsuperscript{180} In exceptional cases, DFEC actually scrutinizes a reimbursement claim’s full DBA insurance policy to confirm premium loading had not transpired. Yet, DOL admittedly states this doesn’t happen regularly due to lack of workforce.\textsuperscript{181} No oversight exists to counter this practice. The intent is for DBA to act as a true self-regulating system.

DOLs’ offices were not created to act as regulators.\textsuperscript{182} In fact, the DOL has no true authority to regulate insurance premiums under the Longshore, DBA and WHCA statutes, making it, self-regulating.\textsuperscript{183} Therefore, the market determines premiums, and

\textsuperscript{180} See OWCP BULLETIN 05-01, supra note 53; see also 42 U.S.C. 1711(b).

\textsuperscript{181} Id.

\textsuperscript{182} See H. COMM HEARING ON DBA supra note 56 (statement of Mr. Shelby Hallmark, DIRECTOR, OWCP, U.S. DEP’T OF LABOR).

purchasers, contractors, or DoD contracting agencies can attempt to negotiate for better DBA prices.\footnote{184 See H. COMM HEARING ON DBA supra note 56 (statement of Mr. Shelby Hallmark, DIRECTOR, OWCP, U.S. DEP’T OF LABOR).}

Due to lack of oversight, better prices in this market are tough to come by. Surprisingly, DOL does not track how many employees become DBA covered or how DBA rates are set, or even the overall cost of DBA to an employer. It is no secret that DOL’s role is limited.\footnote{185 Id.} DOL oversees the delivery of claims through the insurance companies, oversees issuance of payments and resolves disputes between insurers and employees when they arise.\footnote{186 Id.} Equally problematic is how a self-regulating system fosters an environment for cost manipulation garnered by very influential, powerful and opulent companies. If DOL does not have the authority to regulate DBA insurance premiums, a greater burden rests on DoD’s shoulders to mitigate these escalating costs.

C. The Contractor

Iraq and Afghanistan account for approximately 88% of DoD’s total DBA insurance premiums.\footnote{187 See CRS RL34670, supra note 32, at 12.} A contractor performing service contracts in Iraq and Afghanistan profit from DBA war risk syndromes. No incentives exist for a contractor to limit its billable DBA costs. So long as a contractor can obtain DBA coverage, a DBA insurance carrier that premium loads does not concern a contractor. Unless specified in the language of the solicitation, the contractor actually profits from higher DBA premiums.
Generally, for a large DoD service contract performed in Iraq or Afghanistan, the higher a DBA rate, the better. For example, a contractor applies general and administrative (G&A) expenses to all of its other direct costs (ODC’s). A G&A expense is any management, financial, or other expense incurred by a business for the general management and administration of the entire business.\textsuperscript{188} Examples of G&A include indirect, overhead expenses, executive compensations, legal and accounting services. G&A expenses are grouped in a separate indirect cost pool, assigned to final cost objectives.\textsuperscript{189} Essentially, G&A costs impact the entire company’s organization.

The G&A costs are allocated to every cost in the company that cannot be segregated. As a result, the indirect and direct rates drive the G&A rate applied. When a company incurs more costs, the G&A increases. Under DoD contracts, a G&A rate may drop when the overall cost base increases in order to ensure fair pricing. However, when a G&A pool rises as a result of increased DBA rates, there may be an issue. If the costs in the G&A pool are not equitable with the costs in the base, undue profit ensues from high DBA rates. Thus, a contractor pulls in more G&A due to higher DBA rates with no added benefit to the government. The question becomes how DoD counters the fray of DBA cost reform with no actual authority to regulate the DBA market.

IV. DBA COST REFORM STRATEGIES AND OVERSIGHT METHODS

\textsuperscript{188} See FAR-Appendix Cost Accounting Preambles and Regulations, Cost Accounting Standards (CAS) 9904.410-30(a)(6).

\textsuperscript{189} See CAS 420.40(a) states that business unit general and administrative (G&A) expenses shall be grouped in a separate indirect cost pool, which shall be allocated only to final cost objectives.
As a self-regulating system with premium loading scenarios, DBA war risk syndromes and DOL’s limited scope of oversight; DoD cost reform with DBA feels improbable. More accountability is drastically needed with mechanisms in place to assist these wartime service contracts. Mitigation of war risk syndromes has to be figured out, particularly since DoD operates ninety percent of the total DBA market. Although DoD socializes overall approach reform for the purchase of DBA insurance, there has been no conclusive resolution. With due diligence, DoD continues to evaluate open market, single insurer and self-insurance DBA options in order to contemplate prudent methods of purchasing DBA insurance in its procurements. Unfortunately, each fiscal year that passes while the issue is socialized, the more money squandered. These important decisions are backed by research and must continue inside the upper echelons of DoD and Capitol Hill. However, there may be immediate reform opportunities already in front of us. Immediate DBA cost reform mechanisms may currently exist in the arduous hands of its DoD contracting officers. With current tactful, prudent, and legal contracting techniques, the yielding innovative formation of DoD procurements may strike an offensive blow into DBA profiteering in Iraq and Afghanistan.

A. DoD Contracting Can Mitigate the DBA War Risk Syndrome


191 See DoD DBA REPORT TO CONGRESS, supra note 21, at i.

192 See Id; see also CRS RL34670, supra note 32; see also GAO-15-194, supra note 61.

193 See Id.
Warranted authority vests in a DoD contracting officer to enter into, administer, or terminate contracts and make related determinations and findings.\(^{194}\) A contracting officer has authority to legally bind the government, regulate, negotiate and engender enduring responsibility and authority over DoD services contracts performing in Iraq or Afghanistan.\(^{195}\) In accordance with FAR 1.602-2, a contracting officer is provided wide latitude to exercise business judgment, on behalf of the U.S. government.\(^{196}\) Thus, a potential swell of cost reform may be successful if the agency contracting officer implements prudent contracting methods and oversight on DBA to counter the war risk syndrome in places like Iraq or Afghanistan. Codified authority exists for the DoD contracting officer to utilize contracting techniques during contract formation and contract performance to mitigate the persistent war risk syndrome. Here is a discussion of methods and techniques to do such.

1. Contract Formation
   
   During the DoD acquisition planning phase all personnel responsible for an acquisition will plan out an overall strategy.\(^{197}\) During the acquisition planning and strategy phase, formation of the solicitation or requirements takes shape. The solicitation contains the government’s request for proposals that includes provisions for contract award.\(^{198}\) The contracting officer has authority to make changes or additions to the

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\(^{194}\) See FAR 1.602-1.

\(^{195}\) See FAR 1.602-2.

\(^{196}\) Id.

\(^{197}\) See FAR 2.101.

\(^{198}\) Id.
solicitation formation and ensure all applicable clauses are included in the government contract. A contracting officer has a plethora of authorities, legal precedence, clauses and business judgment to do what is reasonable and in the best interest for the DoD. During this critical phase of formation DoD has an opportunity to shape its contract to mitigate DBA war risk syndrome in Iraq and Afghanistan.

i. Federal Acquisition Regulation (FAR) Requirements

FAR Part 28.3 prescribes insurance coverage for specific circumstances under government contracts. FAR 28.305 describes insurance coverage extending the LHWCA to DBA. These clauses require the contractor to provide workers’ compensation insurance in accordance with the DBA. Additionally, FAR 28.305(c) provides the protection of the WHCA against the risk of war hazards for those covered under DBA.

A DBA clause inserted into a solicitation is a requirement for each DoD services contract with a place of performance in Iraq or Afghanistan, unless a waiver is obtained. The FAR contains two contracts clauses for DBA and War-Hazard Insurance, as prescribed by FAR 28.309(a) and 28.309(b), implemented by FAR 52.228-3 and 52.228-4, for contracted public-work performed outside the United States. Therefore, a contracting

199 It is DoD policy that acquisition of contracted services is a command responsibility: unit, organization, and installation commanders are responsible for the appropriate, efficient, and effective acquisition of contracted services by their organizations. [DoD] contracted services are procured by means that are in the best interests of the DoD. See DEPARTMENT OF DEFENSE INSTRUCTION (DoDI) 5000.74, DEFENSE ACQUISITION OF SERVICES, UNDER SECRETARY OF DEFENSE FOR ACQUISITION, TECHNOLOGY, AND LOGISTICS (USD(AT&L)), (Jan. 5, 2016) available at http://www.dtic.mil/whs/directives/corres/pdf/500074p.pdf.

200 See FAR 28.3.

201 See FAR 28.305(c).

202 See FAR 28.309.
 officer inserts these FAR clauses into all DoD solicitations where DBA and War-Hazard Insurance are applicable.\footnote{See FAR 52.228-3 (Workers’ Compensation Insurance- Defense Base Act) and FAR 52.228-4 (Workers’ Compensation and War-Hazard Insurance Overseas).} At a minimum, DoD contracting for services in Iraq and Afghanistan should entail the inclusion of these FAR clauses during contract formation.

The Workers’ Compensation and War-Hazard Insurance Overseas language of 52.228-4, prescribed by 28.309(b), provides waiver and subcontractor requirements for a prime contractor.\footnote{Id.} It also memorializes that contractors shall separately apply DBA and WHCA benefits when it comes to war-hazard risks in places like Iraq or Afghanistan. With respect to the WHCA, it states, “the standards of the War Hazards Compensation Act shall apply; e.g., the definition of war-hazard risks (injury, death, capture, or detention as the result of a war hazard as defined in the Act), proof of loss, and exclusion of benefits otherwise covered by workers’ compensation insurance or the equivalent.”\footnote{Id.}
The applicability of such a clause coupled with the WHCA itself enables a contracting officer to question war-hazard risks costs loaded into a DBA premium. A contracting officer can use the authority of 52.228-4 and the WHCA to apply standards towards vetting against war risk syndromes.

Inserting these clauses into the solicitation triggers a contractual coverage requirement that places the contractor on notice of both the DBA and WHCA. Upon contract award, these clauses are binding. A contractor shall provide workers’ compensation benefits for injury or death sustained in the course of their employment under DBA.\footnote{Id., see also FAR 28.309.} This includes
uniform benefits, limitations on eligible beneficiaries, and maximum payments without regard to safety risks that may be unique to countries like Iraq or Afghanistan.\textsuperscript{207} As such, this language provides notice in which DBA benefits resulting from acts of war known as “war hazard risks” are reimbursed wholly pursuant to the WHCA.\textsuperscript{208} This is an important point of emphasis since war hazard risks are highlighted as full reimbursement language under WHCA under the terms of the contract. Having this foundational language in the contract not only meets a requirement, but places a contractor on notice. Identifying proper contract terms provides an initial level of enforceability, notice and consistency for an agency contracting officer during the formation phase.

\textit{ii. DBA as a Cost Reimbursable}

In addition to inserting proper clauses during formation, the solicitation must contain language on DBA payment. When it comes to DBA, the solicitation should explain to each offeror how DBA costs are incurred and paid by the government under the terms of the contract. This presents an opportunity to build a layer of contractual oversight of DBA cost incurrence during the formation phase of a contract.

Generally, DBA costs can fall under a subset of proposed direct labor costs, labeled other-direct-costs (ODC’s).\textsuperscript{209} The structure of DBA costs under an ODC paradigm is


\textsuperscript{208} See War Hazards Compensation Act, 42 U.S.C. § 1701.

\textsuperscript{209} See FAR 2.101 (describes a direct cost as any cost associated specifically to the services (i.e. labor, travel, material, etc.) being proposed. A direct cost is any cost identified specifically with a particular final cost objective).
that those DBA costs are fully cost-reimbursable and directly charged to the contract.\textsuperscript{210} In other words, the full cost of the DBA insurance as charged by the insurance carrier becomes fully reimbursed by the government. As a cost-reimbursement, the government can remunerate the total costs of both the broker and the DBA insurance carrier under the terms of its own contract.\textsuperscript{211} As an ODC, DBA can be evaluated for reasonableness.\textsuperscript{212} In doing a reasonableness evaluation, it encourages contractors to do some leg-work for its DBA rate.\textsuperscript{213} In breaking out DBA costs into ODC’s during the formation phase, contracting methods will help with the DBA war risk syndrome.

As an ODC, breaking out DBA costs into a separate cost contract-line-item-number (CLIN) within the solicitation is valuable.\textsuperscript{214} The CLIN for a DoD contract follows guidance from both the FAR and the Department of Defense FAR Supplement (DFARS) for recording.\textsuperscript{215} A CLIN requires a contractor to break out the invoice for a separate identifiable deliverable.\textsuperscript{216} As a result, a contractor will account for its DBA costs

\begin{footnotes}
\item[\textsuperscript{210}] See FAR Table 15-2 (other direct cost is a cost that can be identified specifically with a final cost objective that the offeror does not treat as a direct material cost or a direct labor cost).
\item[\textsuperscript{211}] See FAR 16.301-1.
\item[\textsuperscript{212}] See FAR 31.201-3.
\item[\textsuperscript{213}] Should a DCAA audit report affirmatively state that a contractor solicited adequate competitive DBA quotes to ensure the DBA premium was reasonable and the contracting officer does not question reasonableness at the basis of the premium calculation, it will most likely be found reasonable. See Appeal of – Kellogg Brown & Root Servs., ASBCA Nos. 59357, 59358, 2015-1 ¶ BCA P36, 071.
\item[\textsuperscript{214}] See \textit{DEPARTMENT OF DEFENSE LANGUAGE INTERPRETATION AND TRANSLATION ENTERPRISE (DLITE II) REQUEST FOR PROPOSAL (RFP)- SOLICITATION NUMBER: W911W415R0021 (Nov. 23, 2015)} available at \url{https://www.fbo.gov/index?s=opportunity&mode=form&tab=core&id=6620e3f5164dc8a4596b5af8ea72f959&_cview=0} [hereinafter DLITE II RFP]. A CLIN identifies in contract the items or services to be acquired as separately identified line items. CLIN’s should provide unit prices or lump sum prices for separately identifiable contract deliverables, and associated delivery schedules or performance periods. See FAR 4.1001.
\item[\textsuperscript{215}] See DFARS 204.7103; see also PGI 204.7103 (describes contract line items).
\item[\textsuperscript{216}] See FAR 4.1001.
\end{footnotes}
separately from other costs in its invoices. The payment office confirms this when reviewing an invoice it assigns payment to by the appropriate accounting classification or CLIN.\textsuperscript{217}

There are several advantages to making DBA as its own contract CLIN. First, capturing this level of detail in DoD’s contracting systems will minimize data errors and enable linkage of contracting and financial data systems.\textsuperscript{218} Office of the Under Secretary of Defense for Acquisition, Technology and Logistics (USD(AT&L)) officials have stated that improving and linking data within its contract and financial systems could help enable DoD to determine: what it planned to spend on a particular service; what it actually spent for that service; and which organizations bought the service.\textsuperscript{219} Moreover, for administrative purposes, a separate DBA CLIN provides for traceable accounting classification citations that contribute with subsequent audits.\textsuperscript{220} An additional benefit to adding a separate CLIN for DBA is that a cost type line item shall contain the appropriate elements in accordance with FAR 16.\textsuperscript{221} FAR 16 establishes an estimate of total cost for the purpose of obligating funds and establishing a ceiling that the contractor may not

\textsuperscript{217} See PGI 204.7108 (describes DoD payment instructions).

\textsuperscript{218} See GAO-16-119 supra note 6, at 8.

\textsuperscript{219} Id.

\textsuperscript{220} See FAR 4.1001.

\textsuperscript{221} See PGI 204.7103(b). Separately identifiable contract line and subline items (i.e., all except those with characteristics described in DFARS 204.7103-1(a)(2)(iii) or 204.7104-1(a)) shall include a description of the item or service being procured, the associated Product or Service Code (PSC), the quantity, a unit of measure, defined acceptance and inspection locations and requirements, and the delivery schedule or performance period. Contracts for contingency operations shall include the project code at the line item level on each contract action. See PGI 204.7102(a).
exceed (except at its own risk) without the approval of the contracting officer.\textsuperscript{222} Thus, for a cost-reimbursable CLIN, limitations prescribed by FAR 16 are useful.\textsuperscript{223}

\textit{iii. Oversight on Contractor Profit from Higher DBA Rates}

With DBA as a fully cost reimbursable ODC, a contractor obtains DBA coverage and charges the government for its costs.\textsuperscript{224} A contractor has no obligation to vet whether the DBA premium is loaded and unreasonably high. Unless the solicitation limits fees and G&A on DBA, a contractor actually benefits from escalated DBA premiums. When the contractor incurs more costs on its contracts, its G&A increases.\textsuperscript{225} If DBA rates escalate, its G&A increases while also possibly collecting fee off high DBA costs.\textsuperscript{226} A contracting officer has the authority to scrutinize cost manipulation to his or her contract.\textsuperscript{227} He can determine whether DoD receives additional work or benefits as a result of an increased G&A pool that resulted from higher DBA rates.\textsuperscript{228} If the DBA rate goes up for same amount of coverage, those cost pools do not increase equitably with DBA. Therefore, if a G&A rate of 5\% is applied on a cost type contract worth $200 million and its DBA premium increases from $10 million to $20 million per year, a contractor’s G&A pool increases with no added benefit.

\textsuperscript{222} See FAR 16.301-1.

\textsuperscript{223} See FAR 16.301-3.

\textsuperscript{224} See FAR 16.301-1; see also FAR 16.301-1.

\textsuperscript{225} See FAR 31.203.

\textsuperscript{226} See FAR 15.404-4.

\textsuperscript{227} See FAR 1.602-1.

\textsuperscript{228} Id. at 1.602-2.
Another example of how higher DBA rates assist the contractor is exemplified in the increase of direct and indirect costs. The government pays a contractor indirect costs that includes groupings such as G&A expenses and overhead, a cost pool that supports the ODC’s.\(^{229}\) For example, if indirect costs are $10 million with direct costs of $100 million, direct costs of $100 million escalate due to higher DBA rates, resulting in an increase of indirect costs, too. This results in higher final cost objectives.\(^{230}\) Higher direct costs results in overall higher incurred indirect costs with respect to its final cost objectives.\(^{231}\) Appreciably, a contractor with high DBA rates will also accumulate higher indirect rates that subsequently increase total costs before G&A.\(^{232}\) Thus, a contractor does not perform additional work but reaps profit by the mere fact that DBA rates escalated.

One of these scenarios occurred in the U.S. Army’s Logistics Civil Augmentation Program (LOGCAP) contract.\(^{233}\) Here, the Army procured a large services contract with KBR for work performed in Iraq and Afghanistan.\(^{234}\) The Army paid KBR for its DBA insurance under a cost-reimbursable basis.\(^{235}\) KBR subsequently paid the DBA insurance

\(^{229}\) Id.

\(^{230}\) See FAR 31.203 and CAS 406; see also CAS 410 and CAS 418 (describes government contract standards on the selection of allocation bases and methods). Cibinic & Nash, Cost-Reimbursement Contracting, 3.d edition, 2004, at 593 “the contractor has significant discretion to select an accounting system that most accurately allocates indirect costs to work being performed.” Citing Ford Aerospace & Communications Corp., ASBCA 23822, 83-2 BCA ¶ 16,813.

\(^{231}\) See CAS 406, 48 C.F.R. § 99.406 (indirect costs are accumulated over a period of time, usually by contractor’s year, and uniformly charged as a percentage of an allocation base to all of the contractor’s work during that period).

\(^{232}\) See Cibinic & Nash, supra note 230, at 593-594.

\(^{233}\) See DoD DBA REPORT TO CONGRESS, supra note 21, at 37.

\(^{234}\) Id. at 30.

\(^{235}\) See H. COMM HEARING ON DBA supra note 56 (Chairman Waxman).
company, AIG, $284 million for its DBA coverage. However, KBR charged the Army $292 million by KBR, in which KBR profited $8 million with no added benefit to the government. To add extra insult, AIG paid only $73 million in claims. As a result, the Army paid over $292 million for DBA coverage to deliver less than $75 million in benefits to injured contractors. And the contractor took no issue with the DBA carrier since it profited $8 million with no added benefit to the government.

Contractor profit from high DBA rates can be mitigated with oversight provisions inserted into the solicitation during the formation phase. First, during the crafting of the solicitation a contracting officer can insert terms to limit fee or burdens on DBA. Fee is straight profit. The contracting officer can specify that no burdens or fee can be allocated to the cost of DBA through confirmatory solicitation language. Under cost and price language of section L, insert affirmative language such as, “DBA shall be a cost reimbursable item with no burdens or fee applied.” This single authoritative sentence draws a clear line in the sand that a contractor will not make profit from its DBA rates. Without such language, a contractor can retain an inequitable profit from escalating DBA premiums through fee off the rates.

A contracting officer receives a warranted authority to integrate cost saving methods to control DBA costs. Such cost saving methods begin with sensible language in the

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236 Id.
237 Id.
238 Id.
239 Id.
240 See DLITE II RFP, supra note 214, at L.5.5.5.3.4.
241 See FAR 1.602-1.
solicitation. Here, a procuring agency provides each offeror notice in the solicitation that a fee on DBA is disallowed.\textsuperscript{242} An offeror can choose to submit a proposal, protest the solicitation clause or simply not propose. Solicitation language that limits G&A on DBA such as, “offerors shall not allocate G&A to the cost of DBA insurance,” is worth exploring.\textsuperscript{243}

Another DBA cost oversight measure to consider may be to include DBA into expenditure report language of the solicitation. Expenditure reports provide a by-order summary of labor, travel, ODC expenditures for each effort.\textsuperscript{244} Including DBA into these weekly or bi-weekly expenditure reports is another avenue of contract oversight. These expenditure reports are deliverables under the contract terms-CDRL or CLIN.\textsuperscript{245} If a contractor fails to include DBA information into the expenditure report, it will not meet the deliverable requirements of the contract. This language could be helpful if annotated within the solicitation.

Establishing boundaries in the Cost Control section of the Performance Work Statement (PWS) will also assist a contracting officer with oversight on soaring DBA rates.\textsuperscript{246} One such method is to include DBA into the cost variance notification of its ODCs.\textsuperscript{247} Generally, a cost variance notification is a contract requirement for a contractor

\textsuperscript{242} \textit{See} DLITE II RFP, \textit{supra} note 214, at L.5.5.5.3.4.

\textsuperscript{243} \textit{Id.}

\textsuperscript{244} \textit{Id.} at C.2.3.8.2.1.2.

\textsuperscript{245} \textit{See} FAR 4.1001.

\textsuperscript{246} \textit{See} FAR 37.602. A PWS defines the work in terms of the required results and enables assessment of work performance against measurable performance standards. \textit{Id.}

\textsuperscript{247} FAR 31.201.
to notify the contracting officer if a cost-reimbursable exceeds an established cost baseline.\textsuperscript{248} In a cost variance situation, contract costs exceed budgeted costs.\textsuperscript{249} This situation arises with DBA if DBA rates increase during contract performance or a contractor attempts to shift a different cost element into the DBA pool. Solicitation language for variance notification with DBA would state, “Any variance from baseline in ODCs, travel, or DBA exceeding 5% shall be reported to the Government within two (2) working days”.\textsuperscript{250} In addition to the notice, it acts as added oversight into the contract vehicle.

An additional method of oversight to evaluate profit on excessive DBA rates is utilization of the excessive pass-through charges clause under FAR 52.215-23. An excessive pass-through charge is considered an indirect cost or profit/fee on work (typically performed by a subcontractor) that adds no or negligible value to a contract or subcontract.\textsuperscript{251} A contracting officer can effectively monitor excessive pass through charges occur by inserting the FAR 52.215-23 clause in the solicitation. The limitations on pass-through charges clause provides language, definitions, recovery, and access to contractor’s records and also identifies excessive pass-through charges on other than

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{248} See FAR 31.001. Variance means the difference between a preestablished measure and an actual measure. \textit{Id.}
\item \textsuperscript{250} See DLITE II RFP, supra note 214, at C.2.3.6.1.
\item \textsuperscript{251} See FAR 52.215-23.
\end{itemize}
\end{footnotesize}
fixed-price contracts, as unallowable.\textsuperscript{252} Such unallowable costs are evaluated in accordance with FAR Subpart 31.2.\textsuperscript{253} The government is entitled to a price reduction for the amount of excessive pass-through charges included in a contract price.\textsuperscript{254}

A contracting officer’s authority permits a determination on whether G&A or fee on DBA costs demonstrates an effort that adds value to the contract or subcontract.\textsuperscript{255} G&A on DBA for services in Iraq or Afghanistan can be scrutinized to determine whether any value was added to the contract through G&A on DBA. Thus, a limit on excessive pass-through charges remains one method to sift excessive costs associated with high DBA rates. If profit is determined to be an “excessive pass-through charge” part of the cost may be disallowed or a price reduction may be reached. During formation the solicitation can request: (i) the amount of the offeror’s indirect costs and profit applicable to the work to be performed by the proposed DBA insurance carrier; and (ii) a description of the added value provided by the offeror as related to the work to be performed by the proposed DBA insurance carrier.\textsuperscript{256}

A DoD solicitation adds oversight on DBA billing through its invoicing instructions to each offeror. Invoicing instructions in a DoD solicitation provides invoicing procedures on documentation received and reviewed for final approval. The outlined procedures

\textsuperscript{252} See FAR 31.2 and 15.408(n)(2)(i)(B) (the government shall be entitled to a price reduction for the amount of excessive pass through charges included in the contract price); see also FAR 52.215-23(d) (describes recovery of excessive pass-through charges).

\textsuperscript{253} FAR 31.2.

\textsuperscript{254} See FAR 52.215-23.

\textsuperscript{255} Id.

\textsuperscript{256} See DFARS 252.215-7009 (describes a proposal adequacy checklist).
streamline approval of invoices and facilitate DFAS disbursement of funds for each contractor. A solicitation’s invoicing instructions may require contractors to submit a DBA invoice separate from the labor invoice each month. Moreover, language can require a copy of the DBA insurance company’s billing for the period, as back up documentation. Confirmatory terms of the solicitation offer significant avenues for immediate DBA cost oversight.

iv. **DBA Risk Control Terms in Solicitation**

During contract formation, the solicitation may require offerors to provide DBA risk control practices in its proposal to help lower underwriter’s rates. In section L of a solicitation, language such as, “Offeror's shall participate in a risk assessment and reduction program sponsored by their DBA insurer” may be useful. Yet, it is unclear to what degree this measure formally reduces rates. Solicitation language for DBA should encourage a contractor to specify processes to mitigate a DBA underwriter’s apprehensions, which drive up DBA costs. One suggestion may be for a contractor to respond in its proposal how quickly it can return an employee to work after an injury and how it recruits or screens healthy candidates.

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257 See DLITE II RFP, supra note 214, at G.6.1.6.

258 See DLITE II RFP, supra note 214, at L.5.5.3.4.

259 Author interview with major DBA broker (asked to remain anonymous) on Nov. 9, 2015. An example provided is a contractor hiring an individual who is 75 of age or older and not medically fit for duty but is cheaper than a healthy 35 year old. Recommendation from broker is to have a demonstrated medical screening process, prior to CRC, that screens for health defects and either provides remedy or disqualifies a candidate. This would include post and pre-deployment mental and physical evaluations.
Risk control measures proposed by a contractor include documenting and implementing a mitigation plan to fix negative trends happening downrange. A contractor could propose not concentrating its personnel movement during a transition (i.e., 200 contractors on a single aircraft into Iraq or Afghanistan). In feasible, a contractor could assess its time and resources and attempt to split up its employees on different air movements as a method of risk control. Another risk control mitigation tool a DBA underwriter requests is providing a full time “Safety Engineer” position.\(^{260}\)

Even if an offeror proposes risk control methods in its proposal to obtain a lower rate, if war risk syndrome continues to plague the DBA market, this will be merely illusory.\(^{261}\) Illusory risk control methods apply to an offeror that does not have a history of performing in combat zones like Iraq and Afghanistan. Such an offeror will have a relatively small current loss history and perhaps a low initial DBA insurance premium.\(^{262}\)

Considering the DBA insurance carriers control the market rates, it is unclear to what extent risk control 1) lowers a high DBA rate and 2) sustains a low DBA rate. Nonetheless, it’s an area that DBA insurance carriers and brokers express concerns.

v. Methods to Mitigate the War Risk Syndrome

Escalating DBA premiums due to lack of exclusion of war risk hazards amasses as the largest DBA war risk syndrome that produces unnecessary costs.\(^{263}\)

\(^{260}\) Agencies may establish risk-pooling arrangements. These arrangements are designed to use the services of the insurance industry for safety engineering and handling of claims at minimum cost to the Government. See FAR 28.304.

\(^{261}\) See WWLR GAO PROTEST, infra note 219; see also WorldWide, 16-424 Fed. Cl. 843 infra note 293.

\(^{262}\) Id.

\(^{263}\) See SIGAR AUDIT 11-15 DBA, supra note 16 at 23.
carrier includes war risk hazards within its insurance premium, yet seeks WHCA reimbursement, it wrongfully premium loads.264 At times, a DBA insurance carrier will muddy its loss ratio methodologies and definition by including war risk hazards in order to skew the overall DBA premium.265 Due to these inappropriate WHCA inclusions, SIGAR reported that one major DBA insurance carrier’s overall loss ratio methodology became so unclear, inconsistent and not reliable.266 Loss ratio and premium figures are generally located in each DBA binder, which shows the agreement between the DBA insurance carrier, contractor and the broker.267

If an insurance carrier includes WHCA reimbursable expenses into its loss ratio, the premium is unfairly loaded.268 War related injuries must be fully segregated when a DBA insurer computes its loss ratio, which would result in immediate decreases in DBA premiums.269 In addition, true loss ratios should be used to set rates, not IBNR numbers or open market rates.270 Practice is to cumulative account loss ratios to pad the determination of future rates.271

264 See OWCP BULLETIN NO. 05-01, supra note 53.
265 See SIGAR AUDIT 11-15 DBA, supra note 16 at 7.
266 See CRS RL34670, supra note 32, at 18.
267 See SIGAR AUDIT 11-15 DBA, supra note 16.
268 See DoD DBA REPORT TO CONGRESS, supra note 21.
269 See CRS RL34670, supra note 32, at 18
270 Id. at 8.
271 Id.
Contracting officers can screen IBNR calculations to certify they do not include WHCA cases. Subsequently, explanations of the loss ratio calculations may be requested. An IBNR explanation should demonstrate consistency with corresponding loss ratio calculations. Loss ratio calculations must also be consistent with explanations of any inconsistent calculations.\textsuperscript{272} In other words, a contracting officer may examine inconsistent calculations and then request an explanation from the DBA insurance carrier.

Thus, prior to contract award, a contracting officer may request a copy of the DBA binder from the contractor. A DBA binder must contain language that certifies no premiums are charged by the insurance company for war-risk hazards. This represents an oversight opportunity for a contracting officer to confirm, prior to award. In addition, a contracting officer may examine the DBA insurance carrier’s loss ratio methodology and definition.\textsuperscript{273} The loss ratio definition used by the DBA insurance carrier may be an area of emphasis to concentrate efforts on.\textsuperscript{274}

For instance, it would not be in the government’s best interest if a DBA insurance carrier defined its loss ratio on a “standard insurance industry” definition.\textsuperscript{275} A loss ratio defined on a “standard insurance industry” definition creates a much higher loss ratio number that manipulates premium numbers in favor of a DBA carrier.\textsuperscript{276} An example of this occurred when a DBA insurance carrier argued their loss ratio was 57.7 percent

\textsuperscript{272} Id at 10.

\textsuperscript{273} See SIGAR AUDIT 11-15 DBA, supra note 98.

\textsuperscript{274} Id.

\textsuperscript{275} Id.

\textsuperscript{276} Id.
based on a standard insurance industry definition of loss ratio. These DBA rates were set above a 50 percent loss ratio tier. The SIGAR audit found this misapplication of the loss ratio definition resulted in the DBA insurance carrier receiving $9.9 million more in premiums than had it used the actual contract definition of loss ratio. Therefore, a contracting officer can heavily scrutinize the DBA rates, methodologies, and definition of loss ratio found in each DBA insurance binder. If a binder contains missing information, the contracting officer has authority to request it.

Additional contract provisions that require a contractor to maintain data on its quarterly loss reports submitted by the DBA insurance carrier can help mitigate DBA war risk syndrome. A log of loss reports from each quarter helps track development of claims over time and assess impacts of WHCA on the loss history. Solicitation requirements for war hazard reports can detail: a) each war hazard claim; b) a statistical report of all claims and labor reimbursement approvals; and c) denials, amounts, and information on direct payments of war hazard benefits to beneficiaries. This information permits a contracting officer an opportunity to view DBA insurance carriers’ methodology for loss ratio numbers while confirming carriers’ reports that reflect approved WHCA reimbursement. Essentially, this data details the war risk syndrome and could be a key to help unlock loss ratio manipulation.

Moreover, DBA reserve adequacy needs contracting officer scrutiny to prevent a DBA war risk syndrome. Oversight language helps mitigate a DBA insurance carrier from

277 Id.
278 Id.
279 Id.
280 Id. at 5-9.
maintaining a reserve total that equals twice as much as it pays for claims. DBA insurance carriers will close out cases for far less than maximum amount reserved yet, the reserve doubles the amount actually paid for closed claims.\textsuperscript{281} For example, a DBA insurance carrier reports reserves of $6.8 million for just 58 claims reported during 2005-2006 contract year. For the same 58 claims the DBA carrier increases reserves to $11 million the following year. A contracting officer can request a contractor to gather information from the DBA insurance carrier to explain such an increase. Particularly, since a majority of these reserves wrongly applied war hazards when calculating its loss ratio then sought WHCA reimbursement.\textsuperscript{282}

During a 2011 audit, SIGAR discovered a DBA insurance carrier’s internal standard for its reserve amount was only 95 percent adequate, 12 months after it learns of the claim. As described by SIGAR, “in other words, one year after a claim is reported to [the DBA insurance carrier], the company aims to have reserves in place that are 95 percent of the total amount that is ultimately paid when the case is closed.”\textsuperscript{283} This depicts significant padding, profit and misuse of WHCA claims by a DBA insurance carrier.

Tracking DBA refunds also mitigates war risk syndrome. At the end of each year a broker or DBA insurance carrier is supposed to apply credit from contracts that overestimated labor costs to contracts with underestimated labor costs. These DBA refunds from the insurance carrier are a form of reimbursement that rightfully belongs to the government. Yet, DBA refunds are sent directly to the contractor, not to the

\textsuperscript{281} \textit{Id} at 15 (describes another example of questionable reserves increase).

\textsuperscript{282} \textit{Id}.

\textsuperscript{283} \textit{Id} at 14.
government. Unfortunately, the government has not tracked these DBA refunds. Under the U.S. Army Corps of Engineers (USACE) DBA pilot program, DBA refunds were not tracked. Since 2005, contractors received approximately $58.5 million in refunds.\textsuperscript{284} Contracting officers must track refunds by examining whether an initial estimated cost of DBA insurance is different than the actual number for an end of year audit. In section L of the solicitation inserting language such as, “Any reimbursement of DBA costs from the insurer back to the contractor shall be reimbursed to the Government,” is sensible.\textsuperscript{285}

\textit{vi. A DBA Cost Evaluation not Included in Total Evaluated Price is Permissible}

The process of evaluating DBA for reasonableness, in accordance with terms of the solicitation is an emerging area in contract law. In a $9.8 billion DoD IDIQ for contract linguist support, to include Afghanistan, a protest ensued on the solicitation’s evaluation methodology of DBA.\textsuperscript{286} The agency’s solicitation stated it would evaluate DBA for realism, reasonableness, and completeness but did not include DBA costs in the total evaluated price.\textsuperscript{287} The agency determined that although it needed to evaluate DBA, including DBA costs in the total evaluated price, would not be a level playing field.\textsuperscript{288} Protester asserts the solicitation scheme improperly failed to consider DBA in the total

\textsuperscript{284} \textit{Id} at 18.

\textsuperscript{285} See DLITE II RFP, \textit{supra} note 214, at L.5.5.3.4.


\textsuperscript{287} \textit{Id}. at 5 (RFP stated, total Evaluated Price’ for each offeror’s proposal by adding together the evaluated price of all [contract line item numbers (CLINs)], except those CLINs for DBA, including options).

\textsuperscript{288} \textit{Id}. at 6.
evaluated price.\textsuperscript{289} GAO denied the protest, stating that although the agency must consider the costs, it was reasonable to exclude DBA in the total evaluated price to promote competition.\textsuperscript{290} The GAO found the combination of proper notice in the solicitation along with a cost evaluation of DBA helpful and while considering the cost of DBA, the agency is not limiting competition.\textsuperscript{291}

In a substantial ruling in 2016 at the Court of Federal Claims (COFC), Senior Judge Smith memorialized the war risk syndrome in his opinion.\textsuperscript{292} This case comports with the analysis that DBA insurance carriers add war risk hazards to escalate its premiums, with combat zones as the main driver for high prices.\textsuperscript{293} Senior Judge Smith agreed with the contracting officer that offerors with a history of performance in combat zones will have a significantly higher DBA insurance quote than those offerors with limited experience in combat zones.\textsuperscript{294} In fact, Judge Smith called it the “main driver” behind the high DBA insurance rates.\textsuperscript{295} The low cost of a DBA insurance will rapidly increase for offerors with lower DBA quotes with the increased losses associated with performance in Afghanistan.\textsuperscript{296}

With respect to DBA in the total evaluated price, Judge Smith states:

\textsuperscript{289} Id. at 5.
\textsuperscript{290} Id. at 6.
\textsuperscript{291} Id.
\textsuperscript{293} Id. at 24.
\textsuperscript{294} Id.
\textsuperscript{295} Id.
\textsuperscript{296} Id. at 10.
The Plaintiff’s argument that excluding DBA insurance from total evaluated price is misleading centers around its opinion that DBA premiums can be controlled through risk mitigation, as only part of DBA insurance deals with death as a result of “war-risk hazard.” War-risk hazard is differentiated from death by other causes, and defined as “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 [from various hostilities].” In highlighting the difference between types of loss, WorldWide attempted to argue that DBA rates can be controlled by the offeror. They even posit that “MEP can control its non-war-risk hazard losses, but has apparently elected not to do so Plaintiff further posits that WorldWide has significantly lower DBA premiums due to its successful implementation of comprehensive risk mitigation for non-war-risk hazards. This argument is wrong.297

The COFC recognized that DBA costs are typically outside of the control of contractors, particularly those contractors acting in combat zones.298 Having sound federal case law that supports evaluating DBA but not including it in the total evaluated price will help agencies.

Contract formation presents many occasions for a contracting officer to have impact on DBA solicitation language prior to receipt of proposals. There is ample opportunity during the contract performance phase of a contract to also mitigate the DBA war risk syndrome.

2. Contract Performance

Contract performance occurs after contract formation and award of the contract. It encompasses the contract administration functions from time of contract award until completion of the contract, in accordance with the terms of the solicitation.299 Although the contract terms during formation and award have been agreed upon, opportunities exist

297 Id. at 24.

298 Id.

299 See FAR 42.302.
for contract oversight on DBA war risk syndromes during the performance phase of a contract.

i. DBA in DoD’s Synchronized Predeployment & Operational Tracker (SPOT)

SPOT is a single, joint enterprise system employed for the management, tracking, and visibility of contractors accompanying U.S. armed forces overseas. SPOT tracks information about contracts and task orders and deployments of contractors and produces the Letter of Authorization (LOA) for deployed DoD contractor personnel. A LOA is required for every defense contractor that works outside the U.S. and before a DoD contractor deploys to Iraq or Afghanistan. In order for a contractor to obtain an LOA, DBA must first be verified. In fact, DBA information in SPOT provides a contracting officer: a) additional ways to contact a contractor’s DBA insurance holder; b) method for contractor to submit DBA claim while the in-theater; and c) tool to clarify insurance coverage information. Each deployment entered for a contractor requires re-entry of their DBA insurance information.

If used correctly, SPOT can become an oversight tool for government contracting personnel. SPOT may help a contracting officer verify missing links in DBA coverage.

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301 Id. A LOA provides a government organization, in its mission support capacity under the contract, written authorization for the individual employee identified in the LOA, to proceed to the location(s) listed for the designated deployment period set forth in the contract. Id. at 116.

302 See PGI 225.7402-3.

303 See SPOT MANUAL, supra note 300, at 146.

304 Id.
Under the terms of FAR 52.228-3, the contractor is responsible to procure DBA insurance coverage before commencing any performance under the contract in volatile areas such as Iraq or Afghanistan. \(^{305}\) Failure to provide DBA in accordance with time specified in the contract, is a material breach of contract. \(^{306}\) Proof of obtaining DBA insurance must be submitted directly to the contracting officer. \(^{307}\) Proof can be a copy of the DBA binder that reflects the rate structure. \(^{308}\) The DBA policy number becomes proof of coverage prior to issuance of an LOA. \(^{309}\) Only the “bound DBA policy” acts as proof. \(^{310}\) Therefore, contracting officers can use information in SPOT to track how much a contractor paid for its DBA insurance. Moreover, if SPOT can track DBA, this tracking tool can be modified to start tracking WHCA reimbursements.

**ii. The Options of an Audit**

Nothing precludes a contracting officer from conducting an independent audit on a contractor’s DBA at any time during contract performance. Many governmental agencies lack the internal mechanisms, manpower or expertise to conduct detailed audits. An

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\(^{305}\) See FAR 52.228-3; see also Appeal of Gargoyles, Inc., ASBCA No. 57515, 2013-1 BCA, ¶ 35,330 (May 28, 2013) (describes failure to provide DBA in time, material breach of contract).

\(^{306}\) Id.

\(^{307}\) See SPOT MANUAL, *supra* note 300, at 146.


\(^{309}\) See SPOT MANUAL, *supra* note 300, at 146.

\(^{310}\) See Appeal of Gargoyles, Inc., ASBCA No. 57515, 2013-1 BCA, ¶ 35,330 (May 28, 2013) (describes how KO entered zeroes into the SPOT system to issue the LOAs and once the policy number was issued the LOAs could be amended. However, prior to commencement of services- higher government approval required a “bound DBA policy” for contractor to enter a government facility in Baghdad, Iraq….rendering the SPOT entry a dangerous maneuver by the government).
Army contracting officer may utilize auditing services of DCAA, Defense Contract Management Agency (DCMA), Army Auditing Agency (AAA), and SIGAR at any time during contract performance. Audits may be a critical component to capture DBA war risk syndrome.

AAA auditors looked into escalating DBA premiums of LOGCAP and found DBA premiums increased steadily each fiscal year from $4.7 million in fiscal year 2003 to approximately $164.7 million in fiscal year 2005.\textsuperscript{311} Army auditors found the Department of Army paid “substantially” more in DBA premiums than what they paid out in DBA claims.\textsuperscript{312} Auditors also found that while $284.3 million in DBA premiums were paid, less than 26% of these premiums went towards paying $73.1 million in DBA claims and potential future claims during the period.\textsuperscript{313}

DCAA performs contract audits for the DoD and provides accounting and financial advisory services regarding DoD contracts.\textsuperscript{314} DCAA can provisionally approve G&A rates to assist contracting officers on large service contracts supporting Iraq or Afghanistan.\textsuperscript{315} Increased DBA costs can be incorporated into these yearly provisionally approved G&A rates.\textsuperscript{316} A contractor may argue it requires some of its corporate effort to

\textsuperscript{311} See CRS RL34670, supra note 32, at 18 (discusses a contingent for escalating the premiums were the war risk hazards within Iraq).

\textsuperscript{312} Id.


\textsuperscript{314} Information on DCAA capabilities, guidance, checklists and tools, available at http://www.dcaa.mil/.


\textsuperscript{316} Id. at 6-705.1.
procure and manage DBA, keep rates down, and manage claims. However, the contracting officer can request DCAA to perform an audit on whether the level of effort is commensurate with the costs.\textsuperscript{317} Supporting documentation to substantiate actual workflow that supports a contractor’s effort to manage DBA may be requested.\textsuperscript{318}

A Cost Accounting Standards (CAS) compliance audit from DCAA helps determine if a contractor’s practices used to report costs on its contract comply with CAS requirements.\textsuperscript{319} A CAS 410 audit checks a contractor’s compliance for allocation of G&A expenses to final cost objectives.\textsuperscript{320} It also establishes that G&A expenses shall be allocated on a cost input base which best represents the total activity of the business.\textsuperscript{321} As such, an auditor can assist a contracting officer determine whether total G&A costs are material.\textsuperscript{322} Specifically, if DBA rates escalate, a CAS 410 audit evaluates whether allocation of G&A costs is equitable amongst its contracts.\textsuperscript{323} Potentially, a contractor could be CAS non-compliant if proved that the spike of DBA costs produces an inequitable allocation of its G&A cost pool. Challenging unreasonable G&A costs resultant from escalating DBA costs with CAS 410 is new ground, with no precedence.

\textsuperscript{317} Id. at 10-500; see also Id. at 6-103.

\textsuperscript{318} Id.


\textsuperscript{320} Id., see also FAR 52.230-2 (requires contractor to comply with the CAS 410 criteria).

\textsuperscript{321} Id.

\textsuperscript{322} See DCAA CAM, supra note 315, at 8-410.

\textsuperscript{323} Id.
Issues to consider whether G&A is equitable on an escalating DBA rates is: 1) whether the level of effort is commensurate with the costs; and 2) whether costs in the pool are equitable with costs in base.

Ultimately, it is up to a contractor to change its disclosed accounting practice. In accordance with CAS 410-50(d), its allocation base must either be (a) total cost input, (b) value-added cost input, or (c) single element cost input. The determination of which allocation base best represents the total activity of a business unit is determined on the basis of the circumstances of each business unit. Thus, a few alternatives exist under CAS 410-50(d) on the best method to limit profit from G&A off escalating DBA rates. In a single element cost input, a contractor may allocate G&A based on a single element, move to a labor base G&A where DBA is taken out completely. Alternatively, a contractor could use a value added base, strip out the sub-contractors and materials, DBA still in but DBA not charged against a sub-contractor. If so, a contracting officer can trigger FAR 52.215-23 excessive pass through charges clause with solid footing.

Lastly, a CAS 410 audit also provides an opportunity to document and examine any fraud risk indicators found with excessive DBA costs related to a contractor’s accounting practice. A risk of noncompliance due to fraud includes incentives, opportunities to

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324 See CAS 410-50(d). “A total cost base is generally acceptable as an appropriate measure of the total activity of a business unit except when the inclusion of material or subcontract costs would significantly distort the allocation of G&A expenses in relation to benefits received. A value-added base is used where the inclusion of material and subcontract costs would significantly distort the allocation of G&A expenses in relation to benefits received, and where costs other than direct labor are significant measures of total activity. A single-element base may be used when it produced equitable results. However, a single-element cost input base is inappropriate where that element is an insignificant part of the total cost of some of the final cost objectives.” Id.

325 Id.

326 See DCAA CAS 410 AUDIT, supra note 319.
commit and conceal fraud, and propensity to rationalize misstatements.\textsuperscript{327} Thus, legally supportable CAS oversight and accountability is available through a CAS 410 audit. These audits can serve the public interest while providing accounting and financial advisory to all DoD Components responsible for procurement and contract administration.\textsuperscript{328} DCAA provides these services in connection with negotiation, administration, and settlement of contracts and subcontracts to ensure taxpayer dollars are spent on fair and reasonable contract prices.\textsuperscript{329}

\textit{iii. Negotiating Rates}

Without prudent solicitation language in place, negotiating a cost reduction from high DBA costs after a contract award may be challenging.\textsuperscript{330} If a contracting officer has an ongoing requirement with high DBA rates, one tactic to lower indirect rates off of DBA is to negotiate a reasonable indirect burden rate and modify pursuant to the changes clause.\textsuperscript{331} A pre-negotiation and price-negotiation memorandum (a.k.a. POM) documents the analysis for future audits that captures negotiation objectives.\textsuperscript{332}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{327} \textit{Id.; see also} DoDIG’s Contract Audit Fraud Scenarios and Resources website \textit{available at} http://www.dodig.mil/resources/fraud/resources.html.
\item \textsuperscript{328} \textit{See} DCAA CAM, \textit{supra note} 315, at Enclosure I (Jun. 26, 2012).
\item \textsuperscript{329} \textit{Id.}
\item \textsuperscript{330} \textit{See} FAR 15.404-4(a)(3) (negotiations, aimed merely at reducing prices by reducing profit, without proper recognition of the function of profit, are not in the Government’s interests).
\item \textsuperscript{331} \textit{See} FAR 52.243-1 (the changes clause authorizes the contracting officer to make changes to the description of the services, time of performance, and place of performance).
\item \textsuperscript{332} \textit{See} FAR 15.406-1; \textit{see also} FAR 15.406-3 and FAR 15.405 (cost or price analysis develops a negotiation position that permits the contracting officer and the offeror an opportunity to reach agreement on a fair and reasonable price).
\end{itemize}
\end{footnotesize}
In negotiations, a contracting officer engages the contractor in negotiating the application of a reasonable indirect burden.\(^{333}\) In the PNM/POM the contracting officer should document that to purchase insurance the contractor uses a brokerage firm with broker fees charged to the government as part of the overall DBA premium invoice. Ultimately, a negotiation related to an ongoing requirement should attempt to recoup a contractor’s profit made from escalating DBA rates on its G&A.

B. *Interface with Department of Labor*

In the past, DOL educated DBA players such as, insurers, contracting agencies, contractors, and attorneys, on their roles and responsibilities.\(^{334}\) DOL geared its past DBA towards coverage and delivery of its reimbursement services to workers as opposed to DBA oversight.\(^{335}\) A new wave of DOL education is needed on DBA oversight mechanisms along with a more deliberate interface between DoD and DOL. The ultimate crosswalk occurs between DoD and DOL on DBA war risk syndromes.

1. DoD and DOL

A Defense Procurement Acquisition Policy (DPAP) policy to enforce reform measures would reap actual DBA cost savings immediately. DoD is in the position to enforce immediate DBA reform. A new DBA policy to push out to the entire DoD acquisition workforce would properly inform all DoD contracting officers. Such a policy

\(^{333}\) *See* FAR 15.402.

\(^{334}\) *See* H. COMM HEARING ON DBA *supra* note 56 (statement of Mr. Shelby Hallmark, DIRECTOR, OWCP, U.S. DEP’T OF LABOR).

\(^{335}\) *Id.*
could: 1) require DBA classes for all contracting officer’s requiring DBA on their contracts; 2) establish a DoD DBA task force to collect all DBA rates paid for Iraq and Afghanistan to analyze and compile this data to distribute to the DoD Acquisition workforce; 3) work with DFAR/FAR council to prohibit burden, profit, G&A or fee on DBA as a FAR deviation; 4) demand that DBA insurance carriers not include eligible WHCA claims as part of their loss ratio in determining premiums; 5) contracting officer oversight measures to verify DBA insurance carrier’s loss figures during contract performance. An agency can look for alternatives such as entering into a contract or BPA with a DBA broker for consultation to advise crafting smart language for future solicitation clauses.\(^\text{336}\)

Nonetheless, DoD’s building relationship with DOL counterparts is an integral component of enforcing change. If a DBA insurance rate dramatically increases with no recourse from a DBA insurance carrier, DoD can request DOL to investigate premium loading. A potent alliance can form between DOL and DoD to hold DBA insurance carriers more accountable. With DoD prompting through an agency contracting officer, DOL can examine a DBA insurance carrier seeking WHCA reimbursement while it simultaneously premium loads. The burden is on a DBA carrier to show what is directly attributable to the WHCA injury or injuries for any WHCA reimbursement.\(^\text{337}\) A DBA insurance carrier that receives both WHCA and high DBA premiums for war risk hazards must refund any excess premium paid by the government.\(^\text{338}\)


\(^{337}\) See OWCP BULLETIN NO. 05-01, \textit{supra} note 53.
As discussed previously, under the contract terms, a contracting officer may require submittal of an annual or quarterly loss experience report that provides total loss to date of war hazards. A contracting officer can confirm with DOL counterparts, the accuracy of such reports. An annual or quarterly loss experience report of war hazards can then be cross-walked with DFEC against a DFEC WHCA filed claim or compensation order. A DFEC adjudication of a WHCA claim notice occurs within 60 to 90 days of submittal. DFEC assumes responsibility for future direct WHCA payments to the injured worker or dependents of a death case. If the claimant dies, survivor benefits are commuted (paid in full) or paid on a regular bi-weekly basis. If approved, DOL reimburses the insurance carrier for any allocable costs associated with the WHCA claim, plus an additional 15 percent of unallocable costs. DFEC also monitors its periodic rolls directly with a DBA carrier. Thus, for WHCA oversight, direct communication with DFEC is fundamental. At the very least, open communication between DOL and DOD needs to occur to effectively flush out premium loading.

2. DOL and Claims Reimbursements

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339 See FAR 32.905.

340 See DBA AND WHCA HANDBOOK, supra note 55 (describes claim itself and supporting documentation to support the relationship of death or injury to the war-risk hazard).

341 See OWCP BULLETIN 12-01, supra note 87.

342 Id.

343 See SIGAR AUDIT 11-15 DBA, supra note 98, at 4.

344 See OWCP BULLETIN 12-01, supra note 87.
DOL prequalifies each DBA insurance carrier. As such, DOL closely monitors the DBA market through tracking DBA claims filed, location of origin of claim, amounts involved, contractor involved, insurers involved, time to resolve the claims, along with other DBA data points. Department of Labor’s strength comes in denial of WHCA reimbursement and searching historical records to determine if both WHCA and high premiums are paid to the insurance carrier. Unfortunately, with multiple geographic offices it leads to less efficiency, client confusion and ultimately a weak spot for misusing. DFEC’s reimbursement mechanics for WHCA is an area to monitor when looking at overall DBA cost reform.

A joint WHCA tracking mechanism between DOL and DoD can be created. In practice, WHCA claims that began in Iraq and Afghanistan can be difficult due to origin and separate DOL geographical office locations. DBA claims belong to the DLHWC New York District Office and WHCA claims to the DFEC Cleveland District Office. Confusion may occur between WHCA and DBA actions from Iraq and Afghanistan because most claims originating in Iraq and Afghanistan are processed through the New York office. DBA claims can also be processed through other LHWCA regional offices in Boston, Houston, Honolulu, and Seattle. These offices, along with DoD counterparts need a focal point.

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345 See DoD DBA REPORT TO CONGRESS, supra note 21, at 13.

346 See DFEC PROCEDURAL MANUAL, supra note 49.


348 See CRS RL34670, supra note 32, at 9.
As an example, in practice, a DBA compensation order from DLHWC is the preferred method of confirmation before seeking a WHCA reimbursement filing from DFEC.\footnote{See OWCP BULLETIN NO. 05-01, supra note 53; see also OWCP BULLETIN 12-01, supra note 87.} However, nothing precludes a WHCA reimbursement filing prior to receipt of a DBA compensation order.\footnote{See DBA AND WHCA HANDBOOK, supra note 55.} The DBA compensation order step yields expediting a WHCA claim but does not meet any mandatory statutory or regulatory requirement.\footnote{See OWCP BULLETIN 12-01, supra note 87.} DFEC confirms, however, whether the employer or insurer actually paid benefits to the employee or employee’s dependents before it processes a WHCA reimbursement claim.\footnote{See OWCP BULLETIN 05-01, supra note 53.}

This confusing process contributes to various misunderstandings of the DBA and WHCA reimbursement process. DBA, LHWCA and WHCA can work in unison or unintentionally against each other during the processing of a claim. With claims filed at offices in two separate geographical locations, diversity of filing locations increases friction between the shaky DBA and WHCA relationships.

Lack of oversight adds to the confusion on claim legitimacy for WHCA reimbursement. For a DBA claim requesting WHCA reimbursement, evidence of the actual war risk hazard is required.\footnote{Id. (describes procedure and reimbursement remedy for insurance companies).} Factors such as the remote nature of Iraq and Afghanistan, its hostile war environments, poor line of communications, and lack of governmental stability increase the propensity of inaccuracies in each DBA claim for
WHCA reimbursement. Specifically, for denied claims legitimacy a measure of oversight must occur. A 2013 RAND research report on DBA cited that a minority of contractors surveyed (16 percent) had ever made a DBA claim.\textsuperscript{354} Most DBA claims were approved (57 percent),\textsuperscript{355} although a large proportion (37 percent) of DBA claims were either denied or still being processed at the time of the survey.\textsuperscript{356} Six percent of claimants did not even know the outcome of their claim.\textsuperscript{357} Not only do insurance carriers exaggerating DBA premiums for profit, they may be engaging in a denial of claims on the other end, to help maximize profits.\textsuperscript{358} Thus, it’s another area to monitor for efficiency when considering cross-walking quarterly loss experience reports with war hazards claims.

The actual mechanism behind a WHCA reimbursement for associate DBA costs presents another soft spot for financial manipulation. The current mechanics of how DFEC administers WHCA reimbursement claims intends to take care of claimants. However, DFEC’s generous reimbursement measures can unfairly work for the insurance carriers.

Under current DFEC practices it is well known that a permissive nature of settlements under the WHCA claims process exists. The DBA settlement applications (with plausible WHCA reimbursement) are approved within thirty days of receipt unless the settlement


\textsuperscript{355} Id.

\textsuperscript{356} Id.

\textsuperscript{357} Id.

\textsuperscript{358} Id.
sum is inadequate or procured by duress.\textsuperscript{359} A copy of the settlement application and the compensation order approving settlement must then be submitted to DFEC for WHCA reimbursement. DFEC reviews settlements under the WHCA for reasonableness. Reasonable and supportable settlements requesting WHCA reimbursement are frequently approved.\textsuperscript{360} Under current practice, even excessive settlement amounts are not disapproved prima facie.\textsuperscript{361} An excessive settlement may trigger an independent DFEC review that constitutes extraordinary circumstances, however, a final reimbursement sum is still apportioned.\textsuperscript{362} The WHCA settlement process is a decision weighed by the insurance carrier, with liability and corporate revenue as a precursor. Even if a DBA case settles or is resolved with an open running award of compensation, DFEC still reimburses under WHCA.\textsuperscript{363}

Low thresholds for settlements on WHCA coupled with lack of oversight on premium increases propels war risk syndrome. It is disconcerting when insurance carriers experience full war risk hazard reimbursement of its DBA allocated expenses, plus unallocated expenses, a direct payment option for ongoing entitlements coupled with a permissive settlement environment, yet, escalate DBA insurance premiums in Iraq or

\textsuperscript{359} See OWCP BULLETIN 05-01, \textit{supra} note 53 (settlement application must be in accordance with 20 CFR § 702.241-243).

\textsuperscript{360} See SIGAR AUDIT 11-15 DBA, \textit{supra} note 98.

\textsuperscript{361} Id.

\textsuperscript{362} See 20 C.F.R. § 61.102(d)(2014) (a denied WHCA reimbursement claim can be appealed); see also 42 U.S.C. § 1715 (2012) (DBA claim may request a hearing before a Department of Labor Administrative Law Judge (ALJ)); see also CRS RL34670, \textit{supra} note 32, at 10.

\textsuperscript{363} See OWCP BULLETIN 05-01, \textit{supra} note 53 (discusses DFEC has right to review a settlement for reasonableness but DFEC encourages reasonable settlements).
Afghanistan. DoL and DoD can work together to quickly mitigate these war risk syndromes. Developing solutions are obtainable and the time to act is now.

V. CONCLUSION

The DoD’s strategic objectives to prioritize security efforts to meet threats posed by al-Qa’ida, ISIL, and affiliates continue to keep the U.S. military actively engaged. In 2016, the U.S. Army is the smallest Army since before World War II. Therefore, we rest much of the fate to sustain U.S. national security objectives on military contractors.

To protect the vast amount of contractors in Iraq and Afghanistan with insurance rights, DBA insurance is the right thing to do. The individual contractor should not suffer any loss of DBA entitlements in any cost reform tug and pull. However, the DBA insurance companies that profit off death and injuries of our contractors in Iraq and Afghanistan must be regulated.

DBA has become a self-inflicted statutory requirement, misused by contractors, paid by the U.S. government in a complex web of industry led risk assessments that results in


a systemic loss of U.S. taxpayer money and the DBA war risk syndrome. Holding the DBA insurance carriers accountable while maintaining coverage for our contractors continues to be a difficult undertaking, particularly when DoD contractors pay over 76% of their DBA insurance premiums to a single DBA insurance carrier like AIG.\textsuperscript{367} As Defense Secretary Carter recently stated about the DoD acquisition system, “there’s still a constant need for improvement.”\textsuperscript{368}

Nevertheless, available contract provisions may assist DoD mitigate surging DBA cost manipulation efforts during the formation of a services contract for Iraq or Afghanistan. Decisive language throughout contract formation and ensuing communication with auditing agencies and DOL during the administration phase can trigger DBA cost reform. Simple steps could reap instant DoD costs savings. Rethinking DoD’s approach to monitoring DBA insurance costs during contract formation, may generate immediate cost savings to offset escalating DBA rates in Iraq and Afghanistan. This begins with sound guidance for mitigating the nuisances of DBA in services contracting that can address key areas amidst the swirl of a complex landscape.\textsuperscript{369} It continues with leveraging existing contracting methods to mitigate the DBA war risk syndrome, achieve cost

\textsuperscript{367} See CRS RL34670, supra note 32, at 12 (between 2001 and 2009, AIG had 43,901 of the 54,449 DBA cases).

\textsuperscript{368} Secretary of Defense Ash Carter, Remarks on “Goldwater-Nichols at 30: An Agenda for Updating” CENTER FOR STRATEGIC AND INTERNATIONAL STUDIES (CSIS) (Apr. 5, 2016). In regards to improving the DoD acquisition system, specifically the Better Buying Power 3.0, Sec. Carter stated, “And while we’re seeking compelling indications of positive improvements, including in areas like reduced cost growth and reduced cycle time, there’s still a constant need for improvement- particularly as technology, industry, and our own missions continue to change.”

\textsuperscript{369} See Stan Soloway, DoD’s Missed Opportunity to Improve Services Acquisition, WASHINGTON TECHNOLOGY (Jan. 21, 2016) (Soloway is former Deputy Under Secretary of Defense and former Chief Executive of the Professional Services Council who purports that current DoD guidance on service acquisitions does not address some key areas).
savings and exert accountability. This is true DoD cost reform that will not detrimentally impact NSS.

Significantly, DoD agencies’ contracting officers and DOL have existing authority to hold insurance carriers accountable for escalating insurance premiums based on war hazard injuries. At no point should DoD accept a position that operating in Iraq or Afghanistan justifies excessive DBA rates when most claims are covered by the WHCA. In all of its current contracts for services in Iraq and Afghanistan, DoD should search for DBA war risk syndromes, if confirmed, have DBA carriers refund excess premiums paid. The largest DBA chunk of cost savings for DoD contracts in Iraq or Afghanistan may be in the hands of a contracting officer.370

The contracting officers plays a fundamental role leveraging fully reimbursed claims by the DOL under WHCA along with employing prudent contract provisions. DBA war risk syndromes can be moderated by DoD with rapid contract reform and tighter regulation over WHCA payments through existing provisions in a contracting officer’s kitbag. With available contracting methods the contracting officer thinks outside the box on measures to achieve a reasonable DBA price.371 As a result, improvements to DoD’s acquisition strategy, formation, and performance associated to DoD services contracts in Afghanistan and Iraq will effectively obtain instant DoD cost saving objectives towards DBA.

370 Hall of Fame and Major League Baseball player, Hank Aaron once said, “The pitcher has got only a ball. I’ve got a bat. So the percentage of weapons is in my favor and I let the fellow with the ball, do the fretting.” See Hank Aaron and Lonnie Wheeler, I Had a Hammer: The Hank Aaron Story (2007).

371 See DoD DBA REPORT TO CONGRESS, supra note 20, at 22-24 (discusses key factors for controlling or mitigating cost drivers and recommended claims management practices).