The Defense Base Act: War Risk Syndrome
C. Jason Bromley

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I. INTRODUCTION

The federal government left billions of potential savings on the table due to lack of oversight of wartime contracting in Iraq and Afghanistan.¹ As Congress’s power of the purse prompts the Department of Defense (DoD) to wring out billions in reductions to its headquarters, administrative and support staff, military retirement plans, and the total number of service members, they not only miss the boat on a larger cost savings but also weaken the future of our force.²

In fiscal year 2015, the DoD funded over $277 billion in contract awards.³ The spending on DoD contracts became so high that when juxtaposed with the gross domestic product (GDP) of developed countries, such as Finland, Chile, or Pakistan, the DoD’s contract awards for fiscal year 2015 were actually higher.⁴ In fact, DoD contracts awarded during fiscal year 2015 valued more than the GDP of 154 countries around the world.⁵

Over the last five years, the DoD consistently obligated a majority of its contract dollars for service acquisitions.⁶ The DoD is the federal government’s largest purchaser of contractor provided services.⁷ These enormous buckets of money represent an opportunity for Congress and the DoD to find potential cost reductions.⁸ Reforms for better oversight of claim reimbursements under

⁵. See id. (based upon a total of 195 developed countries analyzed by the World Bank).
the Defense Base Act (DBA) and War Hazards Compensation Act (WHCA) could yield dramatic efficiencies without negatively impacting the Warfighter. All DoD service contracts in Iraq or Afghanistan require contractors to obtain DBA insurance coverage. Under the terms of the contract, the contractor invoices its DBA premiums to the government for full reimbursement. The DBA works similarly to workers’ compensation insurance and covers a contractor employee’s health injuries sustained while performing in Iraq or Afghanistan. The WHCA supplements an Iraq or Afghanistan DBA claim if an employee’s injury or death occurs as a result of a “war-risk hazard.” Pursuant to the WHCA, an employer will be reimbursed by the Department of Labor (DoL) for the full amount of the original DBA claim.

Lack of existing oversight of the interplay between the DBA and WHCA represents an opportunity for significant cost reform. The DoD’s wartime contracts pay magnified DBA insurance premiums to the insurance carriers that charge high rates based upon the war risks associated with Iraq and Afghanistan. But the DBA insurance carriers are eligible under the WHCA to receive full reimbursement for each war related injury or death resultant from war-risk hazards in Iraq or Afghanistan; hence, they should have no need to raise premiums for this risk. As a result, DBA insurance carriers disproportionately inflate premiums. Not only do DBA insurance carriers receive large payouts through inflated premiums, ultimately paid by the DoD, they may also seek reimbursement for the covered war-risk hazards through the DoL. I have labeled this predicament: the DBA “war risk syndrome.” This war risk syndrome can also benefit a contractor by increasing its general and administrative expenses, which can then be marked up for a profit. Thus, DBA insurance carriers, brokers, and contractors can reap an inequitable profit. In this Article, I propose that the federal government has an opportunity to immediately achieve DoD cost savings and mitigate

Procurement and Acquisition Policy for Services, stating DoD set a target of cutting spending on contracted services in fiscal year 2016).


10. Defense Base Act and war-hazard insurance is required, as prescribed by FAR 28.309(a) and implemented by FAR 52.228-3 and 52.228-4.

11. See FAR 28.309(a)-(b).

12. See id.


14. See id.


17. See id.

18. See id. at 17

19. See id.
the DBA war risk syndrome through its contracting officers and better oversight of WHCA payments.

II. BACKGROUND

A. The Defense Base Act and War Hazard Compensation Act

In 1941, the initial spike of civilians accompanying the military during World War II led to the creation of the DBA to provide workers’ compensation benefits to civilian employees injured or killed while working on military bases outside the United States.20 Congress implemented the DBA as an extension of coverage already existing under the Longshore and Harbor Workers’ Compensation Act (LHWCA).21 Generally, under the LHWCA, an employer must provide insurance coverage to its employees through an approved DoL insurance carrier for LHWCA claims or any LHWCA extensions.22 The intention of both the enactment of the LHWCA in 1927 and then DBA in 1941 was to fill a gap in state workers’ compensation coverage.23

The DBA provides relief to injured civilian contractor employees on overseas military bases similar to what they would receive working in the United States.24 Prior to the DBA, if a civilian contractor was injured while working at an overseas military installation, U.S. workers’ compensation rights would generally not apply.25 To fill this gap, the DBA extended under the LHWCA’s system to these employees.26

A significant addition to the DBA occurred in 1942 when Congress enacted the WHCA.27 The intent of the WHCA was to shift to the U.S.

20. See 42 U.S.C. § 1651(a) (2012) (specifying the injury or death was the result of normal working conditions while working on a U.S. Government installation); Greta S. Milligan, The Defense Base Act: An Outdated Law and Its Current Implications, 86 U. DET. MERCY L. REV. 407, 411 (2009). Milligan’s article states that the number of civilians accompanying the military during World War II was 734,000 compared to 85,000 in World War I. Id.


23. Milligan, supra note 20, at 411–12.

24. Id. at 412–13.


government the costs of compensating injured or killed civilian employees of private companies working overseas in furtherance of U.S. foreign policy. The WHCA provides reimbursement for these 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 from a hostile force or person. The WHCA enables a DBA insurance carrier to receive reimbursement from the DoL for paid benefits to a DBA claimant who suffered a war-risk hazard injury. The WHCA authorizes the DoL to reimburse up to 115% of the amount paid under a DBA claim.

However, there is a distinction between DBA and WHCA regarding reimbursement and liability. Unlike the DBA, where payments are made by the employers or carriers privately, the WHCA imposes liability on the DoL. Reimbursement from the DoL covers the amount of the benefits paid for medical, compensation, death benefits, burial expenses, investigation costs, and reasonable and necessary claims expenses. As a result, for any war-risk hazard injury or death under the WHCA, a DBA insurance carrier or employer receives a full reimbursement from the DoL plus any additional, reasonable, and necessary claims expenses.

28. See Defense Base Act and War Hazards Compensation Act Handbook § 12.02 (Roger A. Levy ed., 2010) (detailed handbook on DBA and the WHCA with further background on the inception of these laws) [hereinafter DBA AND WHCA HANDBOOK]; see also 42 U.S.C. § 1711(b).

29. For a scholarly article on the LHWCA, DBA, and WHCA, see Hugh Barrett McLean, Defense Base Act Insurance: Allocating Wartime Contracting Risks Between Government and Private Industry, 41 PUB. CONT. L.J. 635, 638 (2012). McLean’s article is a comprehensive look at risks between government and private industry approaches to DBA coverage. Id. The article compares open market, single and multiple provider, and self-insurance strategies for DBA coverage. Id.


31. See 42 U.S.C. § 1704. “Section 101(a) and 101(b) claims are made by a “specified person” or their beneficiary,” while “Section 104 claims are made by employers or carriers seeking reimbursement for benefits and reasonable claims expenses.” Jon B. Robinson, The War Hazards Compensation Act: A Primer, 14 LLOY. MAR. L.J. 264, 276 (2015).

32. See Robinson, supra note 31, at 284.

33. See Karen C. Yotis, Reimbursement Under the War Hazard Compensation Act: An Interview with Roger A. Levy, LEXISNEXIS (Aug. 11, 2011) LexisNexis 2011 Emerging Issues 5833. Levy states the WHCA integrates with workers’ compensation law to accomplish the purposes of the WHCA, but WHCA is not a workers’ compensation statute, strictly speaking. Id.

34. See 42 U.S.C. § 1704(a). The Secretary has the authority once the reimbursement claim is accepted to pay the benefits directly to the employee. 20 C.F.R. § 61.105(a) (2015); see also Office of Workers’ Comp. Programs, OWCP BULL. NO. 05-01, War Hazard Compensation Act—Claims for Reimbursement and Detention Benefit Procedures (2004) [hereinafter OWCP BULL. NO. 05-01], available at https://www.dol.gov/owcp/dfe/regs/compliance/DFECFolio/OWCPBulletin05-01.pdf [https://perma.cc/3PG8-778W].

35. See 42 U.S.C. § 1704. For critique of DBA insurance improperly managing combat risk and not sufficiently compensating injured contractors, see William Burke, Note, Cry Havoc: Are
B. Department of Labor’s Role in Processing DBA and WHCA Claims

The DoL administers the DBA and WHCA.36 The Office of Workers’ Compensation Programs (OWCP) bears the responsibility for administering all Federal Employees’ Compensation Act (FECA) claims, which the OWCP pays for from federal appropriations controlled within the Employees’ Compensation Fund.37 The Employees’ Compensation Fund is the pot of money for benefits reimbursed under the WHCA.38

Two different OWCP divisions control DBA and WHCA issues: the Division of Longshore and Harbor Workers’ Compensation (DLHWC) and the Division of Federal Employees’ Compensation (DFEC).39 Specifically, DLHWC administers DBA claims while DFEC administers WHCA claims reimbursement.40 The separation of these OWCP programs can sometimes yield inefficiencies, since separate offices in two separate locations file and process the WHCA claims.41 This may not be a bad thing, but it does contribute to various misunderstandings of the DBA and WHCA reimbursement process.42 The DBA, LHWCA, and WHCA can work in unison or unintentionally against each other during the processing of a claim.43

In principle, costs paid by a DBA insurance carrier for a WHCA claimant’s war-risk hazard injury or death are fully reimbursable.44 Thus, a DBA insurance carrier may receive full reimbursement for not only the corresponding claim but also for litigation costs incurred during the investigation of the claim.45 For example, if a DoD contracted linguist suffers a war-risk hazard injury while performing services in Afghanistan, a claim against the contractor’s DBA insurance first covers the injury.46 This claim is processed as a DBA claim.47 After the DBA insurance carrier pays the DBA

37. See DFEC Procedure Manual, supra note 30, at ch. 0-0100. The Employees’ Compensation Fund is the same pot of money for benefits paid under DBA and reimbursed under the WHCA. See id. The DoL rightfully owns FECA claims because it functions as a workers’ compensation law for all federal civilian employees who suffer work-related injuries or occupational diseases. See Federal Employees’ Compensation Act, 5 U.S.C. §§ 8101–8147 (2006) (providing for wage-loss compensation, schedule award benefits, vocational rehabilitation, medical care, and survivors’ benefits, but not retirement benefits); see also DFEC Procedure Manual, supra note 30, at ch. 0-0100.
38. DFEC Procedure Manual, supra note 30, at ch. 0-0100.
39. Id.
40. Id.
41. Anzalone, supra note 25. 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. Id.
42. See id.; see also Yotis, supra note 33.
43. See Yotis, supra note 33.
46. See § 61.1.
47. § 61.101.
claim to the claimant, the carrier then seeks reimbursement of the DBA payment under the WHCA, by filing a claim with the DFEC office.\textsuperscript{48}

Currently, DFEC allows for the reimbursement of both allocated and unallocated costs associated with the DBA claim.\textsuperscript{49} The DFEC’s unallocated claims expense language applies to present and future unallocated claims expenses.\textsuperscript{50} In practice, the DFEC could apply the fifteen percent to an insurance carrier’s entire reimbursable payments for unallocated claims expenses for past and proposed future expenses.\textsuperscript{51} For example, if the 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.”\textsuperscript{52} Thus, full reimbursement under the WHCA includes both allocated and unallocated costs in a war-risk hazard claim.\textsuperscript{53}

The DFEC has the option of reimbursing the DBA insurance carrier or directly assuming the carrier’s payments to the injured party.\textsuperscript{54} Once an ongoing entitlement has been established, the OWCP may assume direct payment of benefits rather than continue to reimburse the insurance carrier or employer.\textsuperscript{55} Direct payment(s) could incorporate the reimbursement, future indemnity, death benefits, and future medical benefits.\textsuperscript{56} A DFEC claims

\textsuperscript{48} Id.; see also OWCP Bull. No. 05-01, supra note 34, at 3. For WHCA fact patterns, see Yotis, supra note 33.

\textsuperscript{49} See 20 C.F.R. § 61.104(a).

\textsuperscript{50} See Office of Workers’ Comp. Programs, FECA Bull. No. 12-01, Reimbursement of Unallocated Claims Expenses for Commuted Awards Under the War Hazards Compensation Act (2011), https://www.dol.gov/owcp/dfec/regs/compliance/DFECfolio/bctfy12/#FECAB1201 [https://perma.cc/AS7K-3LWM]; see also FAR 31.001 (“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.”).


\textsuperscript{52} Id.

\textsuperscript{53} For procedures to be used in the adjudication and payment of claims under WHCA, see DFEC Procedure Manual, supra note 30, at ch. 4-0300. A DFEC adjudicator evaluates location, time, and cause of death or injury, and evaluates the hostile force, medical evidence, and specific fact patterns involved in a WHCA claim. See id.

\textsuperscript{54} 20 C.F.R. § 61.105(c). DFEC will not assume direct payment unless the rate of compensation and period of payment are “relatively fixed and known.” Id.

\textsuperscript{55} Id. § 61.105(a). Upon DFEC accepting a claim for reimbursement under 42 U.S.C. § 1704(a) (2012) of the WHCA, DFEC may choose to pay benefits directly to an entitled beneficiary, in lieu of reimbursement to an insurance carrier or employer as under 42 U.S.C. § 1704(a) and described in 20 C.F.R. § 61.105(a).

adjuster arranges with the DBA insurance carrier to pay benefits directly to an entitled beneficiary. 57

C. DBA Brokers and DBA Insurance Carriers

DBA brokers and DBA insurance carriers drive the DBA market. 58 When a DoD contractor negotiates a DBA rate, the DBA premium appraisal begins with a quote negotiated by an authorized DBA broker. 59 Methods of negotiating a DBA rate for DoD contracts remain unclear. 60 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. 61 A contractor obtains a DBA broker, who receives a commission based upon the premium amount quoted by the insurance carrier. 62 A commission earned by a broker provides assurances that the broker worked to find the most favorable DBA quote for its client, the contractor. 63 The broker works to reduce a contractor’s total cost of risk to make the insurance carrier more profitable while ensuring adequate coverage. 64 A DBA broker’s bilateral relationship includes a responsibility for not only issuing the DBA policies but can also include billing contractors for the cost of their DBA premiums. 65

Because a broker negotiates with the DBA insurance carrier, a DBA carrier sets the premium rate. 66 Estimated payout risks and facts should drive a DBA rate, similar to a car insurance rate. 67 Determination of a premium starts with contract performance labor estimates for the full year of coverage combined with the risk exposure of each contract. 68 A DBA carrier evaluates elements of risk exposure based upon the requirements of the performance work statement (PWS) in the contract. 69 The PWS provides job descriptions, locations,
and duration of services.\textsuperscript{70} Next, the DBA insurance carrier defines a DBA rate upon risk exposure, calculated by multiplying the projected labor by the DBA rates.\textsuperscript{71}

The DBA mega market now spans across 200,000 prime and subcontractor employees and generates massive annual government-wide premiums from coverage on government contracts in hostile locations, particularly Iraq and Afghanistan.\textsuperscript{72} With this large market comes the potential for inflated costs for profiteering.\textsuperscript{73} As a result, DoD cost reform opportunities may exist in increased DBA insurance oversight of service contracting in Iraq and Afghanistan.\textsuperscript{74}

D. Cost Reform in DoD Service Acquisitions

DBA insurance premiums escalate when contractors perform services in war environments, like Iraq and Afghanistan, and contractor injuries or deaths ensue.\textsuperscript{75} Contractors performing in Iraq or Afghanistan paid eighty-eight percent of all DBA premiums.\textsuperscript{76} U.S. government DBA premiums in 2002 totaled $18 million compared to over $400 million in 2008.\textsuperscript{77} From 2001 to 2015, over 51,614 DBA cases arose from Iraq, and over 35,069 DBA cases derived from Afghanistan.\textsuperscript{78} Kuwait is the next closest country for DBA cases, with just over 7,698 DBA cases.\textsuperscript{79} In general, DBA premium rates in war-zones are ninety percent higher than rates in non-war zone locations around the world.\textsuperscript{80}

Increases of DBA insurance premiums paid for DoD contracts performed in Iraq and Afghanistan prompted a congressional inquiry in 2008.\textsuperscript{81} On May 15, 2008, the House Committee on Oversight and Government Reform held a hearing to examine whether U.S. taxpayers pay too much for DBA

\textsuperscript{70} FAR 37.602.
\textsuperscript{71} See Acquisition Strategy for DBA Insurance, \textit{supra} note 61, at 4.
\textsuperscript{72} Cf. id. at 3; Heidi M. Peters, Moshe Schwartz & Lawrence Kapp, Cong. Research Serv., R44116, Department of Defense Contractor and Troop Levels in Iraq and Afghanistan: 2007–2016 1–2 (2016). As of June 2015, there were almost 29,000 DoD contractor personnel in Afghanistan, representing 76% of the total DoD presence. See id. at 5. All require DBA coverage. See CRS RL34670, \textit{supra} note 25.
\textsuperscript{73} See CRS RL34670, \textit{supra} note 25, at 4.
\textsuperscript{74} See Acquisition Strategy for DBA Insurance, \textit{supra} note 61, at 53.
\textsuperscript{76} Acquisition Strategy for DBA Insurance, \textit{supra} note 61, at 29. “Between September 2001 and the end of December 2009, there were 1,987 contractor deaths covered by the DBA.” CRS RL34670, \textit{supra} note 25, at 4. Of the 1,987 reported, “1,459 or 73.4% occurred in Iraq and 289 or 14.5% occurred in Afghanistan.” Id.
\textsuperscript{77} See Acquisition Strategy for DBA Insurance, \textit{supra} note 61, at 1.
\textsuperscript{79} Id.
\textsuperscript{80} Acquisition Strategy for DBA Insurance, \textit{supra} note 61, at 37.
\textsuperscript{81} See H. Comm. Hearing on DBA, \textit{supra} note 75, at 1.
insurance premiums through DoD contract vehicles. As a result of the hearing, the DoD was required to look for DBA cost saving methods. A few months later, on October 14, 2008, the National Defense Authorization Act (NDAA) for fiscal year 2009 required the DoD to adopt an acquisition strategy for DBA insurance. The 2009 NDAA specified that the DBA acquisition strategy seek to minimize costs to DoD and defense contractors. The 2009 NDAA also mandated the Secretary of Defense to review this strategy, at minimum, once every three years; and, as necessary, update the DBA acquisition strategy adopted related to DBA. In 2009, the DoD provided Congress its acquisition strategy. Since 2009, the DoD continued to search for viable DBA acquisition strategies to combat rising DBA and WHCA costs, which appear difficult to stem. Currently, for each service contract performed in Iraq or Afghanistan, the 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. The large amount paid presents a good potential for reform and savings.

III. CURRENT DBA DILEMMAS IN IRAQ AND AFGHANISTAN

A. The DBA War Risk Syndrome—WHCA Reimbursement

Insurance carriers can receive generous reimbursement under the WHCA for each war-risk hazard claim that they pay under the DBA. An insurance carrier can receive the full benefits it paid to the DBA claimant plus “reasonable and necessary” claim expenses. A perplexing question not answered by DBA insurance carriers is why high premiums in war zones based on war-risk hazards are charged if WHCA provides full reimbursement for war-risk injuries or death. Why should the DoD pay high DBA premiums supposedly justified by war risks, when DoL will fully reimburse insurance carriers that meet WHCA criteria? I label this inimitable problem the “war risk syndrome.”

82. Id.
84. See id.
85. Id.
86. Id.
87. Acquisition Strategy for DBA Insurance, supra note 61, at iii; see also GAO-15-194, supra note 58, at 5. USACE “had a single insurer program from 2005 to 2013, and then transitioned to an open market system.” Id.
89. See id. at 6; see also SIGAR Audit 11-15, supra note 15, at 3–4.
90. See GAO-15-194, supra note 58, at 31–32.
92. Id.
94. See 20 C.F.R. § 61.104.
The DBA war risk syndrome occurs when an insurance carrier justifies escalation of DBA premiums in Iraq or Afghanistan based on war-risk hazards, yet either receives or is eligible for full reimbursement under the WHCA. Under this scenario, an insurance carrier knowingly inflates its DBA premiums despite the availability of WHCA reimbursement, resulting in a windfall. Since war related claim payments are reimbursable, an insurance carrier should not be permitted to include those payments in calculating its expected losses for claims to overemphasize the insurance purposes of setting DBA premiums. Technically, this double recovery is illegal: in accordance with 42 U.S.C. § 1711(b) (2012) and DFEC’s CA 278, “no reimbursement is allowed if the insurance carrier charges additional premium for the war-risk hazard.” Despite the self-certifying nature of a WHCA claim reimbursement through a Form CA 278, the DFEC’s enforcement measures rely heavily on DFEC scrutiny of the DBA insurance policies, with few disincentives for violation.

1. War Risk Syndrome—Claims and Loss Ratio

The U.S. Court of Federal Claims (COFC) Senior Judge Smith acknowledged this war risk syndrome in 2016’s WorldWide Language Resources, LLC. v. United States. This case comports with the analysis that DBA insurance carriers add expected payments for war-risk hazards to calculate premiums, with combat zones becoming a main driver for high prices. 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. In fact, Judge Smith called it the “main driver” behind the high DBA insurance rates. The cost of DBA insurance will rapidly increase for offerors competing to

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95. See 42 U.S.C. § 1704(a).

96. “Premium” is used in this article to refer to the premium rate. Premium rate is “[t]he price of insurance, typically stated in dollars per $100 of covered payroll.” GAO-15-194, supra note 58, at 21. Minimum premium is “[t]he minimum dollar amount necessary to receive coverage under an insurance policy.” Id. Total premium is “equal to the larger of (1) the premium rate multiplied by payroll or (2) the minimum premium.” Id. Effective premium rate is the “[t]otal premium divided by $100 of payroll.” Id. Due to the minimum premium, the effective premium rate may be higher than the premium rate. Id.


98. See DBA AND WHCA HANDBOOK, supra note 28, § 12.04; see also 42 U.S.C. § 1711(b) (2012). The Act requires DBA insurers to manage WHCA claims until they are fully settled. See DBA AND WHCA HANDBOOK, supra note 28, § 12.05. The DoL reimburses the insurers for all expenses in settling the WHCA claim. Id. Thus, DBA insurers may not additionally charge a premium for anticipated war-risk hazards losses. Id. §12.04. Premium rates with war risk losses, therefore, overstate the likely actual loss experience of the insurer. See id. §12.04–05.

99. DBA AND WHCA HANDBOOK, supra note 28, § 12.05; see also 42 U.S.C., §§ 1701–1717 (2012). The Act does not impose liability on an employer other than when the United States is the employer. DBA AND WHCA HANDBOOK, supra note 28, § 12.02.


101. See id. at 135.

102. Id. at 130

103. Id. at 135.
perform work in Afghanistan with the expected increased losses associated with performance in the war zone.  

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

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 is attempting 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.  

The COFC recognized that DBA costs are typically outside of the contractors' control, particularly contractors acting in combat zones. Essentially, DBA insurance carriers control DBA prices.

At the same time, insurers appear to file relatively few WHCA claims originating from Iraq and Afghanistan. The 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 two percent of all DBA claims filed in 2010. Since 2003, the DoL paid $12.1 million for WHCA compensation and benefits and only $19.7 million to reimburse insurers for itemized and non-itemized expenses associated with those claims. The prolonged combat efforts in Iraq and Afghanistan compel DBA and WHCA regulation under a

104. Id. at 130.
105. Id. at 134–35 (citations omitted).
106. Id. at 135.
107. DoD prime contractors typically pay significantly higher DBA rates than DoS and USAID contractors; comparatively, in 2008, the DoD paid $10 to $21 per $100 where DoS and USAID paid $2 to $5 per $100 of salary cost on DBA rates in same locations under their DBA programs. U.S. Gov't Accountability Office, GAO 08-772T, Defense Contracting: Progress Made in Implementing Defense Base Act Requirements, but Complete Information on Cost Is Lacking 3 (2008) (testimony of John K. Needham, Director of Acquisition and Sourcing Management Issues, before the H. Comm. on Oversight & Gov't Reform). In 2017, some DoD agencies pay DBA insurance rates higher than $50 per $100 for services in Afghanistan. Interview with an anonymous DoD Contracting Officer (Jan. 18, 2017).
108. See CRS RL34670, supra note 25, at 11.
110. See CRS RL34670, supra note 25, at 11.
111. Id.
112. Id. Under the DBA, a company must report any injury or death to the DoL within ten days; any knowing and willful failure to report can subject the employer to a civil penalty. U.S. Department of Labor Reaches Settlement with Contractor on Failure to Report Injuries and Fatalities
paradigm of DoD service contracts.113 Between 2003 and 2008, the four largest DBA insurers made underwriting profits of nearly forty percent, almost $600 million from underwriting profits alone.114 The DBA insurance carrier often computes DBA premiums while ignoring DBA reimbursement mechanisms of the federally mandated WHCA.115 As a result, profits soar.116

The DBA war risk syndrome creeps into areas of premium calculations. Often the DBA insurance carrier loads what should be WHCA reimbursable claims into its loss ratio, a fundamental basis for establishing premium rates.117 “Loss ratios measure the relationship between claims payments (losses or benefits) and premiums paid; ratios are expressed as percentages, benefits to premiums.”118 Loss ratio can be calculated by dividing incurred claims by earned premium.119 The higher a loss ratio, the higher the premium rates an insurance carrier will charge.120 Essentially, the DBA carriers padded DBA loss ratio numbers with cases eligible for reimbursement under the WHCA into its premium.121 This results in a form of DBA premium loading.

A U.S. Agency for International Development (USAID) investigation revealed one example of how this process works. A DBA carrier reported that from March 1, 2010, through March 31, 2013, the USAID paid it $45.4 million in DBA insurance premiums.122 During this period, the DBA carrier reported total incurred losses (both paid and expected to be paid) of $22.3 million.123 The non-war hazard losses arose out of 287 non-war hazard claims, totaling $9.1 million.124 This is a loss ratio of approximately twenty percent.125 As a result, for every dollar in premiums received, the carrier paid or expected to pay claimants twenty cents in non-war hazard losses.126 The remaining $13.2 million in premiums went to cover war hazard losses that should have been fully compensable under the WHCA.127 Therefore,
had the carrier used a loss ratio based on the $9.1 million figure of non-war hazard losses, its premiums (and profits) would have been far less.

In a DoD case, a DBA insurance carrier collected $114 million from the 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 thirty-seven percent loss ratio. Here, the insurance carrier charged approximately $72 million in premiums largely to cover war hazard losses with DBA premiums of $114 million on risk of injury or death on war hazards. This illuminates a significant problem of slanted loss ratios affecting premiums.

As highlighted by recent audits, the lack of awareness of WHCA coupled with the loss ratios is one result in paying unnecessarily high DBA premiums. The Special Investigator for Afghanistan Reconstruction’s (SIGAR) audit confirmed with DoL officials “that, once a claimant is approved for WHCA reimbursement, it is ‘literally guaranteed’ that the insurance carrier will receive the commutation amount.” It is unclear why DBA insurance carriers include WHCA cases in their loss ratios. Doing so inflates the premiums the government pays.

2. War Risk Syndrome—Claims Reserves

Carriers also inflate DBA premiums with inflated claim reserves. Claim reserves are accounts the carrier sets aside to pay for future losses. DBA insurers profit from investing premiums held in reserves, as well as from underwriting gains (the difference between premiums earned and losses incurred). Some DBA insurance companies keep reserve totals that equal twice as much as they actually pay for claims. Again, the WHCA is intended to offset much of this; yet, it is more advantageous for a DBA insurance carrier to load WHCA claims into its premiums to grow its reserves.

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 Henry A. Waxman stated, “insurers offering Workers’ Compensation pay out as much in claims and expenses as

129. Id.
130. See id. at ii.
131. Id. at 12.
132. Id. at 13.
133. See id. at ii.
134. See id. at 3.
135. See id.
136. See USAID DBA AUDIT, supra note 118, at 4.
139. See id. at 7,
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 stated, “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 posits that DBA rates were unwarrantedly high because insurance carriers used costs potentially attributable to war risk incidents and thus reimbursable through the WHCA to determine premiums going forward. Whether claims are filed in addition to premium loading should not shift the concern. One thing is clear: WHCA claim reimbursement does not offset high DBA insurance premiums.

DBA insurance carriers will often point the finger back at the DoL. One DBA carrier said it takes several years for the DoL to determine whether claims are reimbursable under the WHCA. Therefore, during that time the insurance carrier has to pay out such claims while setting aside reserves. However, a major audit of a DBA insurance carrier found that between 2002 and 2009, fifty-nine percent of the DBA carrier’s forecasted ultimate incurred losses would be recovered as WHCA from the DoL.

Furthermore, DFEC policy contradicts the insurance companies’ assertions. A DFEC adjudication of a WHCA claim notice occurs within sixty to ninety days of a WHCA reimbursement submittal. In fact, the

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140. Id. at 2.
141. Id. at 89.
142. Id. at 91 (statement of Rep. Jim Cooper, Member, H. Comm. on Oversight & Gov’t Reform).
143. See id.; see also U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-16-28R, WORKERS’ COMPENSATION: HEALTH BENEFIT PROGRAMS FOR RETURNED PEACE CORPS VOLUNTEERS AND FOR EMPLOYEES OF U.S. AGENCY FOR INTERNATIONAL DEVELOPMENT CONTRACTORS 6 (2015), available at http://www.gao.gov/assets/680/673466.pdf [https://perma.cc/5KJT-9BUT]. From 2010 to 2015, USAID paid DBA premiums of $67 million for its overseas contractors. Id. Of that amount, the DBA insurer paid $11.4 million to cover injuries not caused by a war-risk hazard and $11.7 million for injuries or illnesses caused by a war-risk hazard (with the $11.7 million expected to be reimbursed by the DoL). Id. From $67 million collected in premiums, the insurer ultimately only paid out $11.4 million. Id.
144. H. Comm. Hearing on DBA, supra note 75, at 91; see also McClean, supra note 29, at 652 (stating that controverted claims involving WHCA reimbursements contribute to inefficiencies in the claims processing system, resulting in tremendous economic waste).
146. See USAID DBA AUDIT, supra note 118, at 6.
148. See id.
149. See id.
150. See id.
151. See DEFENSE BASE ACT AND WAR HAZARDS COMPENSATION ACT HANDBOOK § 12.05 (Roger A. Levy ed., 2015)
DFEC can even assume responsibility for future direct WHCA payments to the injured worker or dependents.\textsuperscript{152} If approved, the DoL reimburses the insurance carrier for any allocable costs associated with the WHCA claim plus an additional fifteen percent of unallocable costs.\textsuperscript{153} The DFEC also monitors its periodic rolls directly with a DBA carrier.\textsuperscript{154}

A SIGAR audit illustrates the point further. On April 2, 2009, a DBA carrier filed for a WHCA reimbursement of $150,437.64.\textsuperscript{155} DoL approved the WHCA reimbursement approximately five months later and paid the carrier $150,939.18.\textsuperscript{156} A few months later, the insurance carrier increased its reserves for this single claim to $1.8 million.\textsuperscript{157} The claim’s file showed the DBA insurance carrier actually paid the beneficiaries a one-time lump sum payment—meaning they commuted the claim “and in November 2009 estimated the total commutation at $1.8 million.”\textsuperscript{158} Here, the DBA carrier inflated its reserve numbers for one DBA claim to $1.8 million.\textsuperscript{159} By doing such, it profited from investing premiums held in reserves, keeping reserve totals that equal over five times higher than it paid out for the claim.\textsuperscript{160} Since the claim had been accepted for WHCA reimbursement, the insurance carrier knew that it would receive reimbursement for the commuted amount from DoL, and it should have a net loss to the carrier in its claims file as $0.\textsuperscript{161}

3. War Risk Syndrome—Incurred But Not Reported Percentages

Carriers also pad loss ratio percentages (and premiums) and manipulate reserve numbers by including losses known as “Incurred But Not Reported” (IBNR) in their reserves.\textsuperscript{162} IBNR are the reserves for claims that become due with the occurrence of the events covered under the insurance policy


\textsuperscript{153} See SIGAR Audit 11-15, supra note 15, at 4.


\textsuperscript{155} See SIGAR Audit 11-15, supra note 15, at 12.

\textsuperscript{156} Id.

\textsuperscript{157} Id. Another example of the questionable reserves increase: DBA insurance carrier “reported reserves of $6.8 million for 58 claims reported during 2005–2006 contract year.” Id. For the same 58 claims, this DBA carrier increased its reserves to $11 million the following year. Id. “According to [an] expert, this type of increase on the same claims 3 years after they were reported was striking.” Id.

\textsuperscript{158} Id.

\textsuperscript{159} See id.

\textsuperscript{160} See id.

\textsuperscript{161} See id. 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. Id. at 15. The data showed roughly ninety percent of reserves were for WHCA cases. Id.

\textsuperscript{162} Id. at 7.
but have not been reported yet. IBNR refers to two categories of losses: (1) “claims that have occurred, but have not yet been reported” to the insurance carrier and (2) “future development on known claims.” IBNR amounts increase reserves and, accordingly, premiums.

A 2011 SIGAR audit found that a DBA insurance carrier incurred a year of claims worth $3.7 million. 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. The DBA insurance carrier attributed the increase to IBNR and argued it is standard practice “to include IBNR in the calculation of the total incurred losses associated with a particular set of claims.” As a result, the percent loss ratio dramatically escalated with no verifiable or factual support. With a higher loss ratio number, unjustifiable increases occur in premiums. 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 IBNRs are manipulated for profit.

B. Inadequate Oversight

DBA war risk syndrome influences the DBA market. The limited scope of DBA oversight compounds the problem. The system relies largely on self-regulation. It is also unclear whether the onus falls to the DoD or the DoL to find and correct alleged premium loading.

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 WHCA reimbursement that states DBA premium loading has not occurred. In exceptional cases, the DFEC may scrutinize a reimbursement claim’s full DBA insurance policy to confirm there has been no

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165. Id.
166. Id.
167. Id.
168. Id.
169. See id.
170. See id.
171. See id.
172. See id.
173. See H. Comm. Hearing on DBA, supra note 75, at 41 (statement of Shelby Hallmark, Director, Office of Workers’ Comp. Programs).
174. See id.
175. See id.
176. See OWCP BULL. NO. 05-01, supra note 34.
premium loading. Yet, the DoL admits it does not perform those checks regularly due to a lack of workforce.

Currently, the intent is for DBA to act as a true self-regulating system. The DoL’s offices were not created to act as regulators. The DoL has no authority to regulate insurance premiums directly under the LHWCA, DBA, or WHCA. The major DBA insurance companies determine market premiums and make it very difficult to negotiate better DBA premium prices. The DoL only oversees the delivery of claims through the insurance companies, oversees issuance of payments, and resolves disputes between insurers and employees when they arise. Surprisingly, the DoL does not track how many employees become DBA covered, how DBA rates are set, or even the overall cost of DBA to an employer. Such a self-regulating system fosters an environment for cost manipulation by influential and powerful companies. Since the DoL does not have the authority to regulate DBA insurance premiums, I posit the burden rests on the DoD’s shoulders to mitigate these escalating costs through prudent contracting practices.

C. The Contractor

Iraq and Afghanistan account for approximately eighty-eight percent of the DoD’s total DBA insurance premiums. DBA insurance is a requirement under DoD service contracts in Iraq and Afghanistan. Typically, the DoD fully reimburses the contractor for all DBA costs. Therefore, a contractor performing service contracts in Iraq and Afghanistan may also profit from the DBA war risk syndromes.

Generally, for a large DoD service contract performed in Iraq or Afghanistan, a contractor has no incentive to negotiate a low DBA rate. In fact, the higher a DBA rate, the better. A high DBA rate can benefit a contractor that applies G&A expenses to all of its other direct costs (ODCs). 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. G&A

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177. Id.
178. See id.
179. See H. Comm. Hearing on DBA, supra note 75, at 41 (statement of Shelby Hallmark, Director, Office of Workers’ Comp. Programs).
180. See id.
182. See H. Comm. Hearing on DBA, supra note 75, at 41 (statement of Shelby Hallmark, Director, Office of Workers’ Compensation Programs).
183. Id.
184. Id. at 100.
185. Id. at 41.
186. Id.
187. See CRS RL34670, supra note 25, at 12.
188. Id. at 2.
190. Id. at ii.
191. CAS 9904.410-30(a)(6).
expenses are grouped in a separate indirect cost pool, assigned to final cost objectives.192

The G&A costs include every cost in the company that cannot be allocated to a particular contract.193 When a company incurs more costs, the G&A increases.194 Under DoD contracts, a G&A rate may drop when the overall cost base increases in order to ensure fair pricing.195 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 overall cost base, undue profit ensues as a result of high DBA rates.196 Thus, a contractor has a higher G&A pool due to higher DBA rates with no added benefit to the government. The question becomes how the DoD can affect this process without authority to regulate the DBA market directly.

IV. DBA COST REFORM STRATEGIES AND OVERSIGHT METHODS

Since DoD contracts generate ninety percent of the total DBA insurance market, the DoD must take the lead in exploring mechanisms to ensure accountability in wartime service contracts.197 Routinely, the DoD evaluates different DBA reform options, including open market, single insurer, and self-insurance schemes, to test prudent methods of purchasing DBA insurance in its procurements.198 Yet, without significant change, each fiscal year that passes sees more taxpayer money squandered.199 But there may be immediate and impactful DBA cost reform mechanisms already available to DoD contracting officers.200 Since carrying DBA insurance is a contract requirement, current tactful, prudent, and legal contracting techniques could yield results.

A. DoD Contracting Can Mitigate the DBA War Risk Syndrome

A contracting officer has authority to legally bind the government, regulate, negotiate, and exercise responsibility and authority over DoD services contracts performing in Iraq or Afghanistan.201 In accordance with FAR

192. See CAS 9904.410-40(a).
193. CAS 9904.410-30(a)(3).
194. Id.
195. CAS 9904.410-40.
196. See CAS 9903.201-4.
197. See Scott Cox, Acquisition Policy Reforms Permeate Upcoming Defense Law, VIRTUAL ACQUISITION OFF. (Nov. 13, 2015), https://www.gotovao.com/index.cfm?action=comment&v2&id=0680058197000443 (discussing new mechanisms, such as the Nunn-McCurdy breach—proposed penalties on each military department for cost overruns—under fiscal year 2016 National Defense Authorization Act, to ensure accountability in the defense acquisition process); see also ACQUISITION STRATEGY FOR DBA INSURANCE, supra note 61, at 3.
198. See Cox, supra note 197; CRS RL34670, supra note 25, at 25; see also GAO-15-194, supra note 58, at 5.
200. See ACQUISITION STRATEGY FOR DBA INSURANCE, supra note 61, at ii.
201. See FAR 1.602-2.
1.602-2, a contracting officer is provided “wide latitude to exercise business judgment” on behalf of the U.S. government.\textsuperscript{202} 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.\textsuperscript{203} This section discusses the methods and techniques used to accomplish this goal.

1. Contract Formation

During the DoD acquisition planning phase, all personnel responsible for an acquisition plan an overall strategy.\textsuperscript{204} During the acquisition planning and strategy phase, formation of the solicitation or requirements takes shape.\textsuperscript{205} The solicitation contains the government’s request for proposals and includes provisions for contract award.\textsuperscript{206} A contracting officer has a plethora of authorities, legal precedents, and clauses available to help ensure the best interest of the DoD.\textsuperscript{207}

\textit{a. Federal Acquisition Regulation (FAR) Requirements}

FAR Part 28.3 prescribes insurance coverage for specific circumstances under government contracts.\textsuperscript{208} FAR 28.305 describes insurance coverage extending the LHWCA to the DBA.\textsuperscript{209} These clauses require the contractor to provide workers’ compensation insurance in accordance with the DBA.\textsuperscript{210} Additionally, FAR 28.305(c) provides the protection of the WHCA against the risk of war hazards for those covered under the DBA.\textsuperscript{211} The FAR contains two contract 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.\textsuperscript{212} At a minimum, DoD contracting for services in Iraq and Afghanistan should entail the inclusion of these FAR clauses during contract formation.\textsuperscript{213}
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.\textsuperscript{214} 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.\textsuperscript{215} 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.”\textsuperscript{216}

The applicability of such a clause coupled with the WHCA itself enables a contracting officer to question war-hazard risk 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.\textsuperscript{217} Inserting these clauses into the solicitation triggers a contractual coverage requirement to place the contractor on notice of both the DBA and the WHCA.\textsuperscript{218} A contractor must provide workers’ compensation benefits for injury or death sustained in the course of employment under the DBA.\textsuperscript{219} This includes “uniform benefits, limitations on eligible beneficiaries, and maximum payments \textit{without regard to safety risks} that may be unique” to countries like Iraq or Afghanistan.\textsuperscript{220} 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{221} Identifying proper contract terms provides an initial level of enforceability, notice, and consistency for an agency contracting officer during the formation phase.\textsuperscript{222}

\textbf{b. DBA as a Cost Reimbursable}

Since the government pays a contractor for DBA coverage pursuant to the terms of the contract, the solicitation must contain language on actual DBA payment.\textsuperscript{223} Invoicing and payment are opportunities to provide oversight through contracting officer scrutiny of monthly DBA payments.\textsuperscript{224} The solicitation can outline how DBA costs are incurred and paid by the

\begin{thebibliography}{9}
\bibitem{214} FAR 52.228-4(a).
\bibitem{215} FAR 52.228-4(b).
\bibitem{216} \textit{Id.}
\bibitem{217} See FAR 52.228-4.
\bibitem{218} See FAR 52.228-3(a)(1); FAR 52.228-4(b).
\bibitem{219} See FAR 28.305(c) (explaining that when DBA applies, the contractor “provides the workers’ compensation coverage required” by DBA, and employees “automatically receive war-hazard risk protection” for hazards, including injury and death); See FAR 28.309.
\bibitem{220} Abt Assocs. Inc., ASBCA No. 54871, 06-1 BCA ¶ 33,218 (emphasis added).
\bibitem{221} See 42 U.S.C. § 1701 (2012).
\bibitem{222} FAR 1.602-2.
\bibitem{223} FAR 28.309.
\bibitem{224} FAR 15.408.II.A; FAR 15.404-1(b)–(c).
\end{thebibliography}
government. This presents an opportunity to build a layer of DBA cost oversight into the formation phase of a contract.

Generally, DBA costs fall under a subset of proposed direct labor costs, labeled other-direct-costs (ODCs). As ODCs, DBA costs are fully cost-reimbursable and directly charged to the contract. In other words, the full cost of the DBA insurance, as charged by the insurance carrier, is fully reimbursed by the government. The government can set the terms of a carrier and broker costs in the contract. As an ODC, DBA premiums can be evaluated for reasonableness. A reasonableness evaluation would encourage contractors to do some legwork to obtain the best possible DBA premium rate. By breaking out DBA costs into ODCs during the formation phase, various contracting methods may help minimize the DBA war risk syndrome.

Breaking out DBA costs into a separate cost contract line item number (CLIN) within the solicitation would be valuable. The CLIN for a DoD contract follows guidance from both the FAR and the Department of Defense FAR Supplement (DFARS) for recording. A CLIN requires a contractor to break out the invoice for a separate identifiable deliverable. As a result, a contractor will account for its DBA costs separately from other costs in its invoices.

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225. See, e.g., FAR 28.309.
226. See FAR 2.101(b) (describing a direct cost as any cost associated specifically to the services (e.g., labor, travel, material) being proposed). A direct cost is any cost identified specifically with a particular final cost objective. Id.
227. See FAR 15.408.II.B (defining other direct cost as 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).
228. See id.
229. See FAR 16.301-1.
230. See FAR 31.201-3. DBA can be evaluated for realism, reasonableness, and completeness but should not be included in the total evaluated price. WorldWide Language Res., Inc., B-412495.2, 2016 CPD ¶ 97, at 5 (Comp. Gen. Mar. 23, 2016). Contractors that have not performed in high-risk areas may initially have lower rates than contractors that have performed in Afghanistan or Iraq.
231. 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 Kellogg Brown & Root Servs., ASBCA No. 59557, 15-1 BCA ¶ 35,865, at 175,347.
233. See U.S. DEP’T OF THE ARMY, DEPARTMENT OF DEFENSE LANGUAGE INTERPRETATION AND TRANSLATION ENTERPRISE (DLITE II) REQUEST FOR PROPOSAL (RFP)—PRE-SOLICITATION NOTICE, SOLICITATION NO. W911W415R0021, at L.5.5.5.3.4 (2015) [hereinafter DLITE II RFP], available at https://www.fbo.gov/index?s=opportunity&mode=form&tab=core&id=6620e3f5164dc8a4596b5af8ea72f9598&cview=0 [https://perma.cc/UL7H-CMQU]. A CLIN identifies in contract the items or services to be acquired as separately identified line items. See FAR 4.1001. CLINs should provide unit prices or lump sum prices for separately identifiable contract deliverables and associated delivery schedules or performance periods. Id.
234. See DFARS 204.7103; see also PGI 204.7103 (describing contract line items).
235. See FAR 4.1001; see also PGI 204.7108 (describing DoD payment instructions).
There are several advantages to assigning DBA insurance premiums to their own CLIN. First, capturing this level of detail in the DoD’s contracting systems will minimize data errors and enable linkage of contracting and financial data systems. Officials from the Office of the Under Secretary of Defense for Acquisition, Technology and Logistics (USD(AT&L)) 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. Moreover, for administrative purposes, a separate DBA premium CLIN provides for traceable accounting classification citations that contribute to subsequent audits. An additional benefit to making a separate CLIN for DBA premiums is that a cost type line item will contain the appropriate elements in accordance with FAR 16. FAR 16 establishes an estimate of total cost for the purpose of obligating funds and establishing a ceiling that the contractor may not exceed (except at its own risk) without the approval of the contracting officer. Thus, for a cost-reimbursable CLIN, limitations prescribed by FAR 16 may be useful for oversight when a DBA carrier manipulates premiums.

c. 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. 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 may benefit from escalated DBA premiums. Indirectly, this may help escalate the war risk syndrome. To help combat the issue, the DoD needs to remove a contractor’s incentive to gain profit from increasing DBA premiums.

When the contractor incurs more costs on its contracts, its G&A increases. If DBA rates escalate, its G&A increases while also possibly collecting fees off high DBA costs. Contracting officers have the authority to

236. See GAO-16-119, supra 6, at 7–8.
237. Id. at 8.
238. See FAR 4.1001.
239. 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 204.7103(a).
240. See FAR 16.301-1.
241. See FAR 16.301-3.
242. See FAR 16.301-1.
243. See CRS RL34670, supra note 25, at 15.
244. See id.
245. See FAR 31.203(d).
246. See generally CAS 410 (discussing the allocation and application of G&A expenses); CAS 418.
scrutinize cost manipulation to their contracts. They can determine whether the DoD receives additional work or benefits as a result of an increased G&A pool that resulted from higher DBA rates. If the DBA rate goes up for the same amount of coverage, those cost pools do not increase equitably with DBA. Therefore, if a G&A rate of five percent 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 to the government.

The increase of direct and indirect costs acts as another example of how higher DBA rates assist the contractor. The government pays a contractor indirect costs that include groupings such as G&A expenses and overhead—a cost pool that supports the ODCs. For example, if indirect costs are $10 million with direct costs of $100 million, the direct costs escalate due to higher DBA rates, resulting in an increase of indirect costs, as well. This results in higher final cost objectives. Higher direct costs result in overall higher incurred indirect costs with respect to its final cost objectives. Appreciably, a contractor with high DBA rates can accumulate higher indirect rates that subsequently increase total costs before G&A. Thus, a contractor does not perform additional work but reaps profit by the mere fact that DBA rates escalated.

One of these scenarios occurred within a U.S. Army’s Logistics Civil Augmentation Program (LOGCAP) contract. Here, the Army signed a large services contract with KBR for logistical support in Iraq and Afghanistan. The Army paid KBR for its DBA insurance on a cost-reimbursable basis. KBR subsequently paid the DBA insurance company, AIG, $284 million for its DBA coverage. However, KBR charged the Army $292 million, for which KBR profited $8 million with zero added benefit to the government.

247. See FAR 1.602-1.
248. See FAR 1.602-2.
249. See generally CAS 410; CAS 418 (discussing the allocation and application of direct costs, like DBA).
250. FAR 31.203(c).
251. See FAR 31.203(b) (explaining that indirect costs are allocated to final cost objectives after direct costs have been determined); CAS 402-40; see also CAS 402-30; CAS 418-50 (describing government contract standards on the selection of allocation bases and methods); JOHN CIBINIC, JR. & RALPH C. NASH, JR., COST-REIMBURSEMENT CONTRACTING 594 (3d ed. 2005) (“[T]he contractor has significant discretion to select an accounting system that most accurately allocates indirect costs to work being performed.”) (citing Ford Aerospace & Commc’ns Corp., ASBCA 23822, 83-2 BCA ¶ 16,813, at 83,575).
252. See CAS 402-40; CAS 418-40 (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).
253. See CIBINIC & NASH, supra note 251, at 593–94.
254. See Kellogg Brown & Root Servs., ASBCA No. 59557, 15-1 BCA ¶ 35,865, at 175,343.
255. Id.
257. Id. at 88.
258. Id.
add extra insult, AIG paid only $73 million in claims.259 As a result, the Army paid over $292 million for DBA coverage to deliver less than $75 million in benefits to injured contractors.260

Contractor profits from high DBA premium 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 on DBA costs.261 The contracting officer can specify that no fee can be allocated to the cost of DBA through confirmatory solicitation language. Under cost and price language of section L, a contracting officer could insert affirmative language, such as “DBA shall be a cost reimbursable item with no burdens or fee applied.”262 This single authoritative sentence draws a clear line in the sand that a contractor will not make profit from its DBA rates. Confirmatory terms of the solicitation offer significant avenues for immediate DBA cost oversight.

d. Methods to Mitigate the War Risk Syndrome

The failure of carriers to exclude WHCA compensable claims from their loss ratios inflates the government’s costs the most.263 If a DBA insurance 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 obscure 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 unclear, inconsistent, and unreliable.266 Loss ratio and premium figures are generally located in each DBA binder, which is the agreement among the DBA insurance carrier, contractor, and the broker.267

War related injuries must be fully segregated when a DBA insurer computes its loss ratio, leading to immediate decreases in DBA premiums.268 In addition, true loss ratios should be used to set rates, not IBNR numbers or open market rates.269
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. 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 certifying that 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. The loss ratio definition used by the DBA insurance carrier may be an area to concentrate efforts on.

Solicitation requirements for war hazard reports can detail: (1) each war hazard claim; (2) a statistical report of all claims and labor reimbursement approvals; and (3) 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 can reveal the existence of the war risk syndrome and could be a key to identifying loss ratio manipulation.

Moreover, DBA reserve adequacy needs contracting officer scrutiny. Oversight language could help mitigate a DBA insurance carrier from 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 the maximum amount reserved yet they may face no consequences and may continue to over-reserve going forward. A contracting officer can request a contractor to provide information from the DBA insurance carrier to explain reserve levels,

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270. See id. at 9.
271. See id. at 7.
272. See id.
273. See id.
274. See id.
275. See id.
276. See id.
277. See id.
278. See id. at 23.
279. Id. at 5, 7.
280. See id. at 6.
281. See id. at 14, 24.
282. See id. at 22–23.
283. Id. at 15 (describing another example of questionable reserve increases).
especially since a majority of these reserves wrongly applied war hazards when calculating its loss ratio and then sought WHCA reimbursement.\textsuperscript{284} The government should also request information about any DBA premium refunds the contractor receives.\textsuperscript{285} At the end of each year, brokers or DBA insurance carriers are supposed to apply credit from contracts that overestimated labor costs to contracts with underestimated labor costs.\textsuperscript{286} These DBA refunds from the insurance carrier—a form of reimbursement—rightfully belong to the government.\textsuperscript{287} Yet, DBA refunds are sent directly to the contractor, not to the government.\textsuperscript{288} Under the U.S. Army Corps of Engineers (USACE) DBA pilot program, DBA refunds were not tracked.\textsuperscript{289} Since 2005, contractors received approximately $58.5 million in refunds.\textsuperscript{290} 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.\textsuperscript{291} In section L of the solicitation, it is sensible to insert language such as “[a]ny reimbursement of DBA costs from the insurer back to the contractor shall be reimbursed to the Government.”\textsuperscript{292}

Contract formation presents many occasions for a contracting officer to have impact on DBA solicitation language prior to receipt of proposals.\textsuperscript{293} There is ample opportunity during contract performance to mitigate the DBA war risk syndrome.

2. Contract Performance

Contract performance occurs after contract formation and the award of the contract. It encompasses the contract administration functions from the time of contract award until completion of the contract, in accordance with the terms of the solicitation.\textsuperscript{294} Although the contract terms during formation and award have been agreed upon, opportunities exist for contract oversight on DBA war risk syndromes during the performance phase of a contract.

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

The Synchronized Predeployment and Operational Tracker (SPOT) is a single, joint enterprise system employed for the “management, tracking, and
visibility of contractors accompanying U.S. armed forces overseas. \(^{295}\) SPOT tracks information about contracts and task orders and deployments of contractors by producing a letter of authorization (LOA) for deployed DoD contractor personnel. \(^{296}\) A LOA is required for every defense contractor working outside the United States and must be obtained before a DoD contractor deploys to Iraq or Afghanistan. \(^{297}\) In order for a contractor to obtain an LOA, DBA coverage must first be verified. \(^{298}\) In fact, DBA information in SPOT provides a contracting officer: (1) additional ways to contact a contractor’s DBA insurance holder, (2) a method for a contractor to submit a DBA claim while in-theater, and (3) a tool to clarify insurance coverage information. \(^{299}\) “Each deployment entered for a contractor requires re-entry of DBA insurance information.” \(^{300}\)

If used correctly, SPOT can become an oversight tool for government contracting personnel and may help a contracting officer verify missing links in DBA coverage. \(^{301}\) 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. \(^{302}\) Failure to obtain DBA coverage in accordance with the contract is a material breach of contract. \(^{303}\) Proof of DBA insurance must be submitted directly to the contracting officer. \(^{304}\) Proof can be a copy of the DBA binder that reflects the rate structure. \(^{305}\) The DBA policy number becomes proof of coverage prior to issuance of an LOA. \(^{306}\) Only the “bound DBA policy” acts as proof. \(^{307}\) Therefore, contracting officers can use information in SPOT to track how much a contractor paid for its DBA insurance. Moreover, if SPOT

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296. SPOT MANUAL, supra note 295, at 1. 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.

297. See DFARS 225.371-3.


299. See SPOT MANUAL, supra note 295, at 126.

300. Id.

301. See DoD BUSINESS RULES, supra note 298, at 11.

302. See FAR 52.228-3; see also Gargoyles, Inc., ASBCA No. 57515, 13-1 BCA ¶ 35,330, at 173,408.


304. See SPOT MANUAL, supra note 295, at 113.


306. See SPOT MANUAL, supra note 295, at 126.

307. See Gargoyles, Inc., 13-1 BCA ¶ 35,330, at 173,408–09 (describing how KO entered zeroes into the SPOT system to issue the LOAs and once the policy number was issued the LOAs could be amended; but prior to commencement of services, higher government approval
can track DBA, this tracking tool can be modified to start tracking WHCA reimbursements.

b. Options of an Audit

Nothing in DFARS 242.3 precludes a contracting officer from conducting an independent audit on a contractor’s DBA to look for war risk syndromes during contract performance. Many governmental agencies lack the internal mechanisms, manpower, or expertise to conduct detailed audits. An Army contracting officer may utilize auditing services of the Defense Contract Audit Agency (DCAA), Defense Contract Management Agency (DCMA), Army Auditing Agency (AAA), or SIGAR at any time during contract performance to identify and prevent against DBA war risk syndrome.

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

The DCAA performs contract audits for the DoD and provides accounting and financial advisory services regarding DoD contracts. The DCAA can provisionally approve G&A rates to assist contracting officers on large service contracts supporting Iraq or Afghanistan. Increased DBA costs can be incorporated into these yearly provisionally approved G&A rates. A contractor may argue that it requires some of its corporate effort to procure and manage DBA insurance, keep rates down, and manage claims. However, the contracting officer can request the DCAA perform an audit on whether the level of

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308. See DFARS 242.302.
310. See CRS RL34670, supra note 25, at 19 (illustrating increase in premiums from $4.7 million in 2003 to $164.7 million in 2005 and discussing a contingent for escalating the premiums were the war-risk hazards within Iraq).
311. Id.
315. Id. at 6-705.1.
effort is commensurate with the costs. Supporting documentation to substantiate actual workflow that supports a contractor's effort to manage DBA may be requested.

A Cost Accounting Standards (CAS) compliance audit from DCAA helps determine if a contractor's cost reporting practices comply with CAS requirements. A CAS 410 audit checks a contractor's compliance for allocation of G&A expenses to final cost objectives. “It also establishes that G&A expenses shall be allocated on a cost input base which best represents the total activity of the business.” As such, an auditor can assist a contracting officer in determining whether total G&A costs are material. Specifically, if DBA rates escalate, a CAS 410 audit evaluates whether the allocation of G&A costs is equitable amongst its contracts. Potentially, a contractor could be CAS non-compliant if a spike in DBA insurance costs produced an inequitable allocation of its G&A cost pool. Challenging unreasonable G&A costs resultant from escalating DBA costs with CAS 410 may be new ground. Issues to consider whether G&A is equitable on escalating DBA rates include whether the level of effort commensurate with the costs and 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 (1) total cost input, (2) value-added cost input, or (3) 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

316. Id. at 6-103.
317. Id. at 6-405.3.
319. See COMPLIANCE AUDIT CAS 410, supra note 318, at 1; see also FAR 52.230-2 (requiring contractor to comply with the CAS 410 criteria).
320. See COMPLIANCE AUDIT CAS 410, supra note 318, at 1.
322. Id.
323. See COMPLIANCE AUDIT CAS 410, supra note 318, at 12.
324. See id. at 9.
325. See FAR 30.603–1.
326. See CAS 410-50(d). “A total cost input 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 the G&A expense pool in relation to the benefits received.” Id. (emphasis added). A value-added base is used where inclusion of material and subcontract costs would significantly distort the allocation of the G&A expense pool in relation to the benefits received, and where costs other than direct labor are significant measures of total activity,” Id. (emphasis added). A single-element base may be used when it “produces equitable results.” Id. (emphasis added). 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. 327. See id.
410-50(d) on the best method to limit profit from G&A based on escalating DBA rates.\footnote{328} In a single element cost input, a contractor may allocate G&A based on a single element by moving to a labor base G&A where DBA is taken out completely.\footnote{329} Alternatively, a contractor could use a value added base, strip out the sub-contractors and materials, or retain the DBA but not charge the DBA against a sub-contractor.\footnote{330} If so, a contracting officer will have a solid basis for invoking FAR 52.215-23, which bars excessive pass through charges.\footnote{331}

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.\footnote{332} A risk of noncompliance due to fraud includes “incentives, pressures and opportunities to commit and conceal fraud, and the propensity to rationalize misstatements.”\footnote{333} Thus, legally supportable CAS oversight and accountability is available through a CAS 410 audit.\footnote{334} These audits can serve the public interest while providing accounting and financial oversight to all DoD components responsible for procurement and contract administration.\footnote{335}

B. Interface with Department of Labor

In the past, the DoL educated DBA players, such as insurers, contracting agencies, contractors, and attorneys, on their roles and responsibilities.\footnote{336} The DoL geared its past DBA training towards coverage and delivery of its reimbursement services to workers as opposed to DBA oversight.\footnote{337} A new wave of DoL education is needed on DBA and WHCA oversight, along with a more deliberate partnership between the DoD and the DoL.

A Defense Procurement Acquisition Policy (DPAP) to enforce reform measures across the DoD could reap immediate cost savings. Such a policy could (1) require DBA and WHCA classes for all contracting officers requiring DBA insurance as part of their contracts; (2) establish a DoD DBA/WHCA task force to collect all DBA premium rates paid for work in Iraq

\footnote{328. See \textit{Compliance Audit} CAS 410, \textit{supra} note 318, at 10.}
\footnote{330. \textit{Id.}}
\footnote{331. FAR 52.215-23.}
\footnote{332. See \textit{Compliance Audit} CAS 410, \textit{supra} note 318, at 7.}
\footnote{333. \textit{Id.; see also Auditor Fraud Resources, Dep’t of Def. Inspector Gen.}, http://www.dodig.mil/resources/fraud/resources.html [https://perma.cc/6FJH-8ZBT].}
\footnote{334. See \textit{Compliance Audit} CAS 410, \textit{supra} note 318, at 1.}
\footnote{336. See \textit{H. Comm. Hearing on DBA}, \textit{supra} note 75, at 41 (statement of Shelby Hallmark, Director, Office of Workers’ Comp. Programs).}
\footnote{337. \textit{Id.}}
and Afghanistan and to analyze and compile this data for distribution to the DoD Acquisition workforce; (3) work with the 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; or (5) implement contracting officer oversight measures to verify DBA insurance carrier’s loss figures during contract performance.

A potent alliance between the DoL and the DoD would hold DBA insurance carriers more accountable. With DoD prompting through an agency contracting officer, the DoL may 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. A DBA insurance carrier receiving both WHCA reimbursement and high DBA premiums for war-risk hazards must refund any excess premium paid by the government. This type of accountability needs further development and maturation.

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. If a relationship with the DoL evolves, perhaps, a contracting officer could confirm with DoL counterparts the accuracy of such reports. An annual or quarterly loss experience report of war hazards could then be cross-walked with the DFEC against a WHCA filed claim or compensation order.

The DoL prequalifies each DBA insurance carrier. As such, the DoL closely monitors the DBA market through tracking DBA claims filed, the location of origin of claims, the amounts involved, the contractors involved, the insurers involved, and the time to resolve the claims, along with other DBA data points. The DoL could take a more active role in denying WHCA reimbursement and searching historical records to determine if both WHCA reimbursement and high premiums are paid to the insurance carrier.

Perhaps a joint WHCA tracking mechanism between the DoL and the DoD could be created. In practice, WHCA claims that begin in Iraq and Afghanistan can be difficult to process 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.\textsuperscript{348} DBA claims can also be processed through other LHWCA regional offices in Boston, Houston, Honolulu, and Seattle.\textsuperscript{349} These offices, along with DoD counterparts, may benefit from a focal point.

The actual mechanism behind a WHCA reimbursement or settlement for associated DBA costs presents another potential area for financial manipulation. The DFEC’s current mechanics for administering WHCA reimbursement claims are designed to take care of claimants.\textsuperscript{350} However, the DFEC’s generous reimbursement measures can unfairly favor the DBA insurance carriers.\textsuperscript{351} The DBA settlement applications (with plausible WHCA reimbursement) are approved “within thirty days of receipt unless the settlement sum is inadequate or procured by duress.”\textsuperscript{352} The DFEC reviews settlements under the WHCA for reasonableness.\textsuperscript{353} Reasonable and supportable settlements requesting WHCA reimbursement are commonly approved.\textsuperscript{354} Under current practice, even excessive settlement amounts are not necessarily disapproved.\textsuperscript{355} An excessive settlement may trigger an independent DFEC review that constitutes extraordinary circumstances; however, a final reimbursement sum is still apportioned.\textsuperscript{356} The insurance carrier weighs the decision of the WHCA settlement process, with liability and corporate revenue as a precursor.\textsuperscript{357} Even if a DBA case settles or is resolved with an open running award of compensation, the DFEC still reimburses under the WHCA.\textsuperscript{358}

Low thresholds for settlements on WHCA coupled with lack of oversight on premium increases propels the war risk syndrome. It is disconcerting when insurance carriers may 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 continue to escalate DBA insurance premiums in Iraq or Afghanistan.\textsuperscript{359} The DoL and the DoD must work together to mitigate these war risk syndromes.

\textsuperscript{348} Id.
\textsuperscript{349} See CRS RL34670, supra note 25, at 9.
\textsuperscript{350} See SIGAR AUDIT 11-15, supra note 15, at 4.
\textsuperscript{351} See id. at ii.
\textsuperscript{352} See OWCP BULL. NO. 05-01, supra note 34 (noting that settlement applications must be in accordance with 20 C.F.R § 702.241-243 (2016)).
\textsuperscript{353} OWCP BULL. NO. 12-01, supra note 152.
\textsuperscript{354} See SIGAR AUDIT 11-15, supra note 15, at 12.
\textsuperscript{355} Id.
\textsuperscript{356} See 20 C.F.R. § 61.102(d) (2015) (stating that a denied WHCA reimbursement claim can be appealed); 33 U.S.C. § 908(f)(2) (2012) (stating that a DBA claim may request a hearing before a DoL administrative law judge); see also CRS RL34670, supra note 25, at 10.
\textsuperscript{357} See DBA AND WHCA HANDBOOK, supra note 28, § 11.03.
\textsuperscript{358} See OWCP BULL. NO. 05-01, supra note 34 (noting that DFEC has right to review a settlement for reasonableness but encourages reasonable settlements).
\textsuperscript{359} See id.
V. CONCLUSION

The DoD’s efforts to meet threats posed by al-Qa’ida, ISIL, and their affiliates continue to keep the U.S. military actively engaged. Given that the U.S. Army is at its smallest since before World War II, these efforts will continue to require reliance on military contractors.

In order to protect the vast amount of contractor personnel in Iraq and Afghanistan, contractors must continue to be required to obtain DBA insurance. However, the DBA insurance companies profiting off the necessity of this insurance must be regulated. Holding the DBA insurance carriers accountable while maintaining coverage for contractors continues to be a difficult undertaking, particularly when DoD contractors pay over seventy-six percent of their DBA insurance premiums to a single DBA insurance carrier, AIG.

Nevertheless, available contract provisions may help the DoD mitigate surging DBA premiums during contract formation and performance. Decisive language throughout contract formation and ensuing communication with auditing agencies and the DoL during the administration phase can promote DBA cost reform. Simple steps could reap instant DoD costs savings. This begins with sound guidance for mitigating the nuisances of DBA in services contracting that can address key areas amidst a complex landscape. It continues with leveraging existing contracting methods to mitigate the DBA war risk syndrome, achieve cost savings, and impose accountability.

Significantly, DoD agencies’ contracting officers and the DoL have existing authority to hold insurance carriers accountable for escalating insurance premiums based on war hazard injuries. At no point should the DoD accept a position that operating in Iraq or Afghanistan justifies excessive DBA


364. See CRS RL34670, supra note 25, at 7, 12 (noting that between 2001 and 2009, AIG had 43,901 of the 54,449 DBA cases).

365. See supra Section IV.A.1.i.

366. See Stan Soloway, DoD’s Missed Opportunity to Improve Services Acquisition, WASH. TECH. (Jan. 21, 2016), https://washingtontechnology.com/articles/2016/01/21/insights-soloway-dod-instruction.aspx [https://perma.cc/P3BG-FB5F] (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).

367. See supra Part IV.A.

368. See supra Part IV.A.2.
premium increase when the WHCA covers most claims. In all of its current contracts for services in Iraq and Afghanistan, the DoD should search for DBA war risk syndromes and, if found, require DBA carriers to refund excess premiums paid.

Most significant tools for achieving cost savings for the DoD contracts in Iraq or Afghanistan may be in the hands of contracting officers. The contracting officers play a fundamental role with employing prudent contract provisions. The DoD can moderate DBA war risk syndromes 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 should think outside the box on measures to achieve reasonable DBA premiums. As a result, improvements to the DoD’s acquisition strategy, formation, and performance associated with DoD services contracts in Afghanistan and Iraq will effectively obtain cost savings.

369. See supra Part IV.A.2. 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 in weapons is in my favor and I let the fellow with the ball do the fretting.” Doug Mead, 50 Most Quotable Figures in Baseball History, BLEACHER REP. (Mar. 2, 2012), http://bleacherreport.com/articles/108727850mostquotablefiguresinbaseballhistory [https://perma.cc/ZZP4-BR5V].

370. See generally FAR 1.602-1.