DEFENSE BASE ACT
AND
WAR HAZARDS
COMPENSATION ACT
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Chapter 2

Coverage: Categories of Work Within Defense Base Act

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Synopsis

§ 2.01 Overview and Applicable General Principles of Statutory Construction

[1] The Six-Pronged Coverage


[5] Statutory “Presumption” of Coverage

[6] Exclusivity

§ 2.02 Section 1(a)(1)-(2): Employment “At” or “Upon” Bases


[a] In General

[b] “Green Zone” or Other Bases: Relevance of Manner or Permanence of Acquisition

[2] Section 1(a)(2) — “Upon Any Lands Occupied or Used by the United States . . . in Any Territory or Possession”

§ 2.03 Section 1(a)(3)-(4): Employment “Upon” or “Under a Contract With the United States” for “Public Work”

[1] Complementary and Comprehensive Geographical Scope Outside United States


[5] Subcontracts

[6] Insurance-Clause Provision of § 1(a)(4) as Condition of Coverage?
§ 2.01[1]  DBA & WHCA HANDBOOK  2-2

§ 2.04  Section 1(a)(5): Contracts “Approved and Financed by the United States” Under the Foreign Assistance Act
[2] Inapplicability of “Public Work” Requirement
[3] Partial Financing
[4] Insurance Clause or Legislative Due Process as Limitation

§ 2.05  Section 1(a)(6): USO, Red Cross, Etc.

§ 2.06  Final Clause of § 1(a): Situs of Work, Nature of Contract, or Both, Are Determinative, Not Situs of Injury

§ 2.07  Exclusions
[1] Contractors “Engaged Exclusively in Furnishing Materials or Supplies”
[2] Prisoners of War

§ 2.01  Overview and Applicable General Principles of Statutory Construction

[1] The Six-Pronged Coverage
The statutory “coverage” of the Defense Base Act [42 U.S.C.S. §§ 1651-1654] is defined generally by § 1(a) of the Act [42 U.S.C.S. § 1651(a)], as amended in 1942 and 1958. It includes six categories of work. Any employment:

1. At any military, air, or naval base acquired after January 1, 1940, by the United States from any foreign government.
2. On any lands occupied or used by the United States for military or naval purposes in any Territory or possession outside the continental United States.
3. On any public work in any Territory or possession outside the continental United States, if the employee is engaged in employment at such a place under the contract of a contractor (or any subcontractor or subordinate subcontractor with respect to the contract of such contractor) with the United States, but not including any employee of such a contractor or subcontractor who is engaged exclusively in furnishing materials or supplies under his contract.
4. Under a contract entered into with the United States or any executive department, independent establishment, or agency thereof (including any corporate instrumentality of the United States), or any subcontract, or subordinate contract with respect to such a contract, when that contract is to be performed outside the continental United States and at places not within the areas described in 1, 2, or 3, above, for the purpose of engaging in public work, except employees engaged exclusively in furnishing materials or supplies.
5. Under a contract approved and financed by the United States or any executive department, independent establishment, or agency thereof (including any
corporate instrumentality of the United States), or any subcontract or subordinate contract with respect to such contract, when such a contract is to be performed outside the continental United States, under the Mutual Security Act of 1954, as amended (other than title II of chapter II thereof unless the Secretary of Labor, on the recommendation of the head of any department or other agency of the United States, determines a contract financed under a successor provision of any successor Act should be covered by this section), and not otherwise within the coverage of this section, except employees engaged exclusively in furnishing materials or supplies.

6. Outside the continental United States by an American employer providing welfare or similar services for the benefit of the Armed Forces pursuant to appropriate authorization by the Secretary of Defense; irrespective of the place where the injury or death occurs, and includes any injury or death occurring to any such employee during transportation to or from his place of employment, when the employer or the United States provides the transportation or the cost thereof.

Thus, the first two bases of coverage are exclusively defined by the location of the “employment,” “at” a military base “acquired” since 1940 from a foreign government or “upon any lands occupied or used for military purposes in any Territory or possession” of the United States. The second two are defined by the performance of the work under a “contract with the United States” for “public work . . . outside the . . . United States,” in a “Territory or possession” or elsewhere. (Although the text of the subsections refers to the “continental United States,” that term is peculiarly defined by § 1(b)(4) [42 U.S.C.S. § 1651(b)(4)] to include “the States and the District of Columbia,” thus encompassing Hawaii and islands in other states despite the fact that they are not “continental.”) The fifth basis for the Act’s application is work under a contract “approved and financed by the United States” under successor laws to the Mutual Security Act of 1954, i.e., Foreign Assistance legislation. And the sixth applies to work for “an American employer providing welfare or similar services for the benefit of the Armed Forces.”

Each of these clauses presents distinct issues of statutory construction. This chapter examines those issues.


Like the underlying statute that the Defense Base Act incorporates, the Longshore and Harbor Workers’ Compensation Act [as amended (most recently in 1984), 33 U.S.C.S. §§ 901-950], the Defense Base Act’s coverage provisions are to be read expansively. The Supreme Court has reasoned that a “broad” and “expansive” construction of the Longshore Act’s coverage provision is appropriate [Calbeck v. Travelers Insurance Co., 370 U.S. 114, 130 (1962) (“In the application of the act, therefore, the broadest ground it permits of should be taken.”); Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249, 268 (1977) (“The language of the 1972 Amendments is broad and suggests that we should take an expansive view of the extended coverage. Indeed, such a construction is appropriate for this remedial
§ 2.01[3] DBA & WHCA HANDBOOK

legislation.”), and no reason appears to support a different approach to the Defense Base Act.


The original “purpose of the Defense Base Act [was] to provide uniformity and certainty in availability of compensation for injured employees on military bases outside the United States” [Davila-Perez v. Lockheed Martin Corp., 202 F.3d 464, 468 (1st Cir. 2000)]. The motivation for the proposal of the Act in 1940 was “to save [the government] on insurance expenses” of its overseas contractors [O’Keeffe v. Pan American World Airways, Inc., 338 F.2d 319, 322 (5th Cir. 1964)]. Employees who were being recruited to work on the Pacific island bases under construction at the time in 1941, in time of war in which United States involvement was obviously impending, were understandably unwilling to settle for the dubious protection offered by many state compensation laws, and many of such laws would not be applicable in any event because of restrictions on their extraterritorial coverage. The individual contractual protections that the contractor employers had to offer to recruit construction workers were more expensive — ultimately to the taxpayers — than the cost of broad workers’ compensation coverage (and the government’s acceptance of responsibility to provide standardized “detention” benefits under § 1(b) of the War Hazards Compensation Act [42 U.S.C.S. § 1701(b), see Ch. 12]). The extension of the Act’s coverage to “public work” projects at locations other than military bases implicated the same concerns: not only the provision of adequate protection for workers and their families, but also the savings to the public purse from standardization and insurability of such protection.

Construction of the Act’s coverage provisions should accordingly give it the broadest possible application, consistent with its terms, to overseas work that the government wants done and is paying for, whether directly or (as in cases under § 1(a)(5)) indirectly. In addition, any gaps in the comprehensive coverage of such work may expose the employer to unlimited tort liability for damages for an injury or death in which its fault is implicated, from which it would be protected by the “exclusive remedy” provision of DBA § 1(c) [42 U.S.C.S. § 1651(c)] if the Act applied. Even when the contractor-employer would not be able to pass the cost of such liability back to the government, such a situation is likely to lead not only to insurance premiums exceeding those for coverage under the Act, but also to those workers, or their families, who cannot establish a basis for the employer’s tort liability having to turn to public assistance for medical care and avoidance of destitution. Constructions that leave such gaps should accordingly be avoided when possible.


Although courts have often spoken of the provisions defining the scope of application of the Longshore Act and its extensions as matters of “jurisdiction” [e.g., Overseas African Construction Corp. v. McMullen, 500 F.2d 1291, 1294, 1295-1296 (2d Cir. 1974) (re DBA) (“jurisdiction is to be ‘presumed, in the absence of substantial evidence to the contrary’ ”)], this is technically incorrect, and important consequences flow from the distinction. “Subject matter jurisdiction in federal-question cases is sometimes erroneously conflated with a plaintiff’s need and ability to prove the
defendant bound by the federal law asserted as the predicate for relief — a merits-related determination” [2 MOORE’S FEDERAL PRACTICE § 1230[1] (3d ed. 1997); see also, e.g., Bell v. Hood, 327 U.S. 678, 682 (1946) (“failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction”)]. The Act’s coverage of an injury is an element of a compensable claim, but it is not an element of the jurisdiction of the specified tribunals. The latter is provided by Longshore Act § 19(a): upon the filing of a claim for the benefits provided by the Longshore Act or any of its extensions, the Department of Labor “shall have full power and authority to hear and determine all questions in respect of such claim” — i.e., subject-matter jurisdiction [see, e.g., United States ex rel. DRC, Inc. v. Custer Battles, LLC, 376 F. Supp. 2d 617, 634 n.52 (E.D. Va. 2005); Nordan v. Blackwater Security Consulting, LLC, 382 F. Supp. 2d 801, 808 (E.D.N.C. 2005)]. A ruling that the Act does not apply to the injury should result in a denial of the claim, not a “dismissal” for lack of jurisdiction.

So long as the claim is for benefits for which the Act provides (generally, medical care and income replacement), the administrative tribunals have “jurisdiction,” and the question whether the injury or death is one to which the Act applies is one of statutory coverage.

[5] Statutory “Presumption” of Coverage

The distinction between “jurisdiction” and “coverage” is not merely technical. The important consequence of the fact that the Act’s provisions specifying what it applies to concern its “coverage,” rather than the specified tribunals’ “jurisdiction,” is that the burden of going forward with evidence with respect to coverage is on the employer, not the claimant.

It is “presume[d] that federal courts lack jurisdiction ‘unless “the contrary appears affirmatively from the record’ . . .” [e.g., Renne v. Geary, 501 U.S. 312, 316 (1991)], and this principle applies to federal administrative tribunals as well. The “presumption” of § 20(a) of the Longshore Act [33 U.S.C.S. § 920(a)] “that the claim comes within the provisions of this Act,” however, applies to the facts that determine the Act’s coverage. Indeed, the predecessor provision of the New York Workmen’s Compensation Law that was adopted as Longshore Act § 20(a) in 1927 had originally been construed as confined to the question of the law’s coverage (then limited to “extra-hazardous” employment) [e.g., Collins v. Brooklyn Union Gas Co., 171 App. Div. 381, 1916 N.Y. App. Div. LEXIS 9457, 156 N.Y. Supp. 957, 959, (1916) (application of presumption limited to questions of coverage), cited with apparent approval in Eldridge v. Endicott, Johnson & Co., 228 N.Y. 21, 25, 126 N.E. 254, 255 (1920)]. The Supreme Court has repeatedly cited § 20(a) as applicable to coverage questions (even while referring to them as “jurisdictional”), both under the Longshore Act itself and under its extension by the former District of Columbia Workmen’s Compensation Act [36 D.C. Code § 301 Hist. Note; see, e.g., Davis v. Dep’t of Labor & Industries, 317 U.S. 246, 256 (1942); Cardillo v. Liberty Mutual Insurance Co., 330 U.S. 469, 474 (1947)]. As the Second Circuit has put it in discussing § 20(a) as a “statutory ‘presumption’ of jurisdiction,” “[t]he rule, of course, is that so long as any reasonable inference from the facts supports jurisdiction under the statutory presumption that jurisdiction may be
found” [Overseas African Construction Corp. v. McMullen, 500 F.2d 1291, 1294 & n.9, 1296 (2d Cir. 1974)].

To the extent this statement at the time encompassed the proposition that the employer bore the ultimate burden of persuasion as to the coverage-determinative facts, that view has since been overruled by the Supreme Court: once the employer does introduce sufficient “evidence to the contrary” to dispel the force of the presumption, it has no further effect, and the claimant bears the ultimate burden of persuasion, or “risk of non-persuasion” [Director, OWCP v. Greenwich Collieries, 512 U.S. 267 (1994)]. But the Overseas African court’s statement remains entirely valid with respect to the effect of the presumption insofar as the employer has the burden, in order to warrant denial of liability, of going forward with evidence to show that the coverage criteria were not met before the claimant has a burden to produce countervailing evidence that is more convincing. As the same court has said more recently in a Longshore Act coverage case, “we agree with [the claimant and the Director, OWCP] that the ALJ erred by failing to apply the § 920(a) presumption of coverage to questions of fact [determinative of coverage] and by placing the burden of production of evidence on [the claimant]” [Fleischmann v. Director, OWCP, 137 F.3d 131, 135 (2d Cir. 1998), cert. denied sub nom. Seahorse Assistance & Towing v. Fleischmann, 525 U.S. 981 (1988)].

The Benefits Review Board for a brief period took the position that, treating the coverage criteria of the Longshore Act as a matter of “jurisdiction,” the Board had authority (indeed, a duty) to raise any question about it on its own, regardless of whether any party presented it on appeal or even had disputed it before the ALJ. The court of appeals reversed, reinstating the awards the Board had vacated for lack of “jurisdiction” [Ramos v. Universal Dredging Corp., 653 F.2d 1353 (9th Cir. 1981) (Board “obviously confused subject matter jurisdiction with personal coverage under the Act”); Perkins v. Marine Terminals Corp., 673 F.2d 1097 (9th Cir. 1982)]. Although relevant considerations of Congress’s “legislative jurisdiction” may arise in a Longshore Act case [Davis v. Dep’t of Labor & Industries, 317 U.S. 246 (1942); Ramos v. Universal Dredging Corp., 653 F.2d 1353 (9th Cir. 1981)], the Defense Base Act is based on an entirely different source of Federal legislative authority than the admiralty-clause basis of the original Longshore Act, and extends easily to all work in connection with federally-funded projects, regardless of where or by whom they are to be performed.

Of course the presumption controls factual questions on which there is an absence of “evidence to the contrary” on any element of the claim, and has no bearing on an underlying question of statutory construction [e.g., Pittston Stevedoring Corp. v. Dellaventura, 544 F.2d 35, 48 (2d Cir. 1976), aff’d sub nom. Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249 (1977)].

[6] Exclusivity

When the Defense Base Act applies, it provides the exclusive remedy against the employer for employee injury or death. Unlike the exclusive-remedy provision of § 5(a) of the Longshore Act itself [33 U.S.C.S. § 905(a)], DBA § 1(c) forecloses not only tort remedies but also workers’ compensation recoveries under any state,
 territory, “or other jurisdiction.” Thus, state compensation laws, even of a state where the employer and claimant are both based and the contract of hire occurred, are wholly inapplicable to an injury or death covered by the Act.

Neither the DBA nor the Longshore Act, however, extends tort immunity up or down the subcontractor chain, as many states’ compensation laws do. The Supreme Court interpreted the relevant Longshore Act provisions, which had been unchanged in relevant respects since their original enactment in 1927, as extending the employer’s tort immunity to the general contractor to whom the employer stood in the relation of an insured subcontractor, if the general contractor had secured a single “wrap-up” insurance policy covering all its subcontractors [Washington Metropolitan Area Transit Authority v. Johnson, 467 U.S. 925 (1984)]. But Congress immediately amended §§ 4(a) and 5(a) of that Act to their present terms, so as to clarify that the general contractor is immune to its subcontractors’ employees’ suits for damages only if the immediate employer has defaulted on its insurance obligation, so that under § 4(a) the general contractor itself must bear liability under the Act (and the employer is subject to tort liability, as an uninsured employer, under Longshore Act § 5(a)). Nevertheless, it has been held that when a case is concurrently within the coverage of the Longshore Act and a state law [see generally Sun Ship, Inc. v. Pennsylvania, 447 U.S. 715 (1980)], and the injury has happened on dry land so that any tort action must be based on state tort law rather than federal maritime law, the scope of the state compensation law’s tort immunity, not that of the Longshore Act, governs. Thus, a general contractor (or another subcontractor) who is immune to tort liability under the state law is entitled to that immunity notwithstanding that the Longshore Act also applies and would not extend the immunity [e.g., Garvin v. Alumax, Inc., 787 F.2d 910 (4th Cir. 1986), cert. denied, 479 U.S. 914 (1986).] When the injury occurs aboard a vessel, within admiralty tort jurisdiction, however, even if the state workers’ compensation law may nevertheless be concurrently applicable, its tort-immunity law cannot override the Longshore Act’s [Garris v. Norfolk Shipbuilding & Drydock Co., 210 F.3d 209, 220-222 (4th Cir. 2000), aff’d, 532 U.S. 811 (2001)].

The statutory provisions on which these results were reached, however, are inapplicable to Defense Base Act cases. Because of the difference between Longshore Act § 4(a) and DBA § 1(c), state compensation laws are wholly inapplicable under the latter, even though they may apply concurrently under the former. Neither the DBA exclusive-remedy provision nor that of the Longshore Act extends tort immunity up or down the subcontract ladder.

PRACTICE TIP: Some courts have simply overlooked the difference between the exclusive-remedy provisions of the Longshore Act and the DBA in holding that the same concurrent-coverage principle applies to Defense Base Act cases as to Longshore Act cases, so that local law can immunize a party against tort liability in a case within the DBA [Vega-Mena v. United States, 990 F.2d 684, 692 (1st Cir. 1993); Ladd v. Research Triangle Institute, 2006 U.S. Dist. LEXIS 66781, on recon., 2006 U.S. Dist. LEXIS 77780 (D. Colo. 2006)].

The Act’s remedy is also exclusive of any right of action that would otherwise exist in tort against any fellow employee [33 U.S.C.S. § 933(i)].
§ 2.02 Section 1(a)(1)-(2): Employment “At” or “Upon” Bases

[a] In General

DBA § 1(a) provides comprehensive coverage of employment “at” any overseas military base. (No case appears to have arisen involving a base “acquired . . . from a foreign government” before 1940, but presumably work there would be covered by the Act only if it was within one of the subsequent clauses.) The manner in which the base was “acquired” is not relevant. Although territory is “acquired” within the meaning of international law only if it is either ceded by agreement or taken and annexed, so as to effect a “transfer of sovereignty,” the broader ordinary meaning of “acquired” governs in § 1(a)(1) [Republic Aviation Corp. v. Lowe, 164 F.2d 18 (2d Cir. 1947), cert. denied, 333 U.S. 845 (1948) (island captured by military and used as air base was “acquired” within the meaning of § 1(a)(1)]. The “lend-lease” bases acquired from Great Britain in 1940 and early 1941 were the very impetus for passage of the Act, yet would not satisfy the narrower, technical definition of “acquired.”

The coverage of “any employment at” an overseas American base is comprehensive. Such bases are often equivalent to medium-sized cities. Banks or credit unions, restaurants and fast-food franchises, and educational institutions are contracted or licensed to operate within them. Aside from the amenities provided by “non-appropriated fund instrumentalities” of the armed forces themselves — PXs, laundries, golf courses, cafeterias, movie theaters, and so on, whose civilian employees are covered by a different extension of the Longshore Act (the Nonappropriated Fund Instrumentalities Act [5 U.S.C.S. §§ 8171-8173]) — all such businesses and their employees are covered by the Act. Many of such activities would fall within the definition of “public work” under a “contract” with the United States, and hence would be within § 1(a)(4) anyway [see § 2.03[2]], but the terms of the “public work” clauses exclude employment at places within § 1(a)(1)-(3), so there appears to be no overlap. But the application of § 1(a)(1) is not limited to contracts that constitute “public work” and turns instead simply on the location of the employment.

There is no authority on the question of whether the coverage of § 1(a)(1) applies to employees temporarily working “at” a base — to take an extreme example, a driver for a local business making a delivery of flowers within the base. In the absence of any applicable exclusion (compare Longshore Act § 2(3)(D) [33 U.S.C.S. § 902(3)(D)], excluding employees “of suppliers, transporters, or vendors . . . temporarily doing business on the premises of [a covered maritime] employer”), a claim for an injury or death suffered by such a worker within an overseas base would appear to be compensable. The practicality of that result, however, is questionable, as the employer is highly unlikely to have the required insurance against DBA liability. But the explicit exception from coverage repeated in clauses (3), (4), and (5) of § 1(a) for employees of contractors whose only role is “furnishing materials or supplies” [see § 2.07[1]] does not appear in § 1(a)(1)].
Current events suggest the importance of the question whether the walled-off section of Baghdad referred to as the “Green Zone,” in which thousands of military personnel and further thousands of civilian workers for government contractors are based, is a “base acquired . . . from [a] foreign government” within the coverage of § 1(a)(1).

In the only decision that has considered the question, an ALJ concluded that it is not:


Although there is evidence that lends itself to the plausibility that the United States used the Green Zone for military purposes, there is no definitive evidence of official military status. Furthermore, there is no evidence that the United States acquired the Green Zone for purposes of the statute.

[Note: the author is appellate counsel for the claimant in Z.S.]

COMMENTARY: The recognition of the “plausibility” that the Green Zone is “used for military purposes” is a gross understatement; that proposition is beyond reasonable question. The concluding prong of the ALJ’s reasoning is rather clearly inconsistent with prior authority. The Pacific island airbases captured from Japan and used by the Allies in World War II were held to have been “acquired” within the meaning of § 1(a)(1), on the ground that “acquired” should be given its ordinary, non-technical meaning; acquisition by conquest is still “acquisition,” regardless of the lack of intent to exercise permanent “sovereignty” over it [Republic Aviation Corp. v. Lowe, 164 F.2d 18 (2d Cir. 1947), cert. denied, 333 U.S. 845 (1948)]. The ALJ’s distinction of Republic Aviation on the ground that the captured island involved there had been an air base before it was taken is surely invalid; many of the United States military bases established around the world since World War II were not military bases before they were leased and built by the United States, but that has not furnished grounds for their exclusion from the Act, nor would such exclusion make any sense in view of the purposes of the Act [but cf. Berven v. Fluor Corp., 171 F. Supp. 89 (S.D.N.Y. 1959) (stating without explanation that U.S. Army airfield under construction in Saudi Arabia was not within § 1(a)(1), but finding project covered by § 1(a)(4)); Losch v. Curtiss-Wright Corp., 275 A.D. 1, 87 N.Y.S.2d 714, 1949 N.Y. App. Div. LEXIS 3692 (1949) (stating without explanation that an airfield staffed and run entirely by the U.S. Army in India during the war “had not been ‘acquired’ by the United States”).

The determinative question, therefore, is whether the Green Zone is a “base” within the meaning of § 1(a)(1) — an undefined term. The ALJ in Z.S. gave no reason for requiring “definitive evidence of official military status” before a location can be found to be such a “military base.” The question awaits definitive resolution.

COMMENTARY: A court has construed § 1(a)(5) broadly in order to avoid the need to decide whether international antinarcotics activities are “in connection with national defense” within the meaning of § 1(b)(1), and hence the work was within § 1(a)(4) [Ross v. DynCorp, 362 F. Supp. 2d 344, 357 n.7 (D.D.C. 2005); see
§ 2.02[2] DBA & WHCA HANDBOOK

§§ 2.03[2], 2.04[2]]. For the same apparent reasons — a combination of political sensitivity and secrecy — the “official military status” of the areas in which U.S. troops are stationed in Iraq as “bases” is an awkward one, which the United States has every reason to avoid resolving (at least publicly) for as long as possible. How many hundreds of millions of dollars need to be spent on military infrastructure on a “camp” before it has the “official military status” of a “base”? Does such an “official status” even exist? The question could readily be avoided by construing “military base” to be any defined parcel of land at which U.S. armed forces are currently . . . based. The American military installations within the Green Zone are more firmly implanted than the encampments denominated “Forward Operating Bases” located both in Baghdad and throughout Iraq. The issue is currently pending on review before the Benefits Review Board in that case, and is likely to be reviewed by the Ninth Circuit.

The ALJ also concluded, less questionably, that the Green Zone “is not a Territory or possession” of the United States so as to come within the coverage of § 1(a)(2), which does not require characterization of the “lands occupied or used by the United States for military purposes” as a “base” for coverage to attach to all work there [see § 2.02[2]].

[2] Section 1(a)(2) — “On Any Lands Occupied or Used for Military . . . Purposes in Any Territory or Possession”

The coverage of § 1(a)(2), like that of § 1(a)(1), is comprehensive of all employment within the geographical areas within its description. Its first component, “lands occupied or used for military or naval purposes,” has never occasioned any litigation. The phrase “Territory or possession” is not limited to any particular kind of “territory.” Besides Puerto Rico and the U.S. Virgin Islands, the “Territories and possessions” where military installations would be covered by § 1(a)(2) include Guam and the Northern Marianas, American Samoa, Wake Atoll and the Midway Islands, and eight other “minor outlying islands” and atolls in the Caribbean and the Pacific. Although several of the latter have had military installations in the past, only Johnson Island currently does [see Kalama Services v. Director, OWCP, 354 F.3d 1085 (9th Cir. 2003), cert. denied, 543 U.S. 809 (2004)]. Although it might well not otherwise qualify, the Naval Operating Base at Guantanamo Bay, Cuba, is explicitly included in § 1(a)(2).

Despite the changes in its “organic” status since the Act’s adoption, Puerto Rico is still a “Territory” within this provision [Davila-Perez v. Lockheed Martin Corp., 202 F.3d 464 (1st Cir. 2000)].

United States embassies have been considered “possessions” of the United States, and the large military garrison within the confines of the new United States Embassy compound in Baghdad looks, walks, and quacks like “lands occupied or used for military purposes.” Thus, any private employment “upon [such] lands” should be regarded as within § 1(a)(2), even if it does not qualify as a “base” within § 1(a)(1). It is doubtful that any work there would fail to qualify as “public work” under a contract with the United States, within the coverage of § 1(a)(4), in any event. But the Green Zone of Baghdad is not a “Territory or possession” [Z.S. v. Science Application
§ 2.03 Section 1(a)(3)-(4): Employment “Upon” or “Under a Contract With the United States” for “Public Work”

[1] Complementary and Comprehensive Geographical Scope Outside United States

Clauses (3) and (4) of § 1(a) both relate to employment on “public work” contracts with the United States. The former applies in “any [United States] Territory or possession” (including, as under § 1(a)(2), Guantanamo [see § 2.02[2]), and the latter applies where the “contract is to be performed outside the United States and at places not within the areas described in subparagraphs (1), (2), and (3).” Between them, § 1(a)(3) and (4) encompass all contracts with the United States for “public work” that is not on military bases.


Government procurement law distinguishes between “procurement contracts” and “grant agreements,” specifying that the latter are to be used when the “principal purpose” of the government’s payment for a service is “to carry out a public purpose of support or stimulation authorized by a law of the United States instead of acquiring (by purchase, lease, or barter) property or services for the direct benefit or use of the United States Government” [31 U.S.C.S. § 6304]. The Benefits Review Board has held that a grant to a university employer for a professor to conduct research in Antarctica, though distinguished from a procurement contract, is within the ordinary legal meaning of the unqualified term “contract” in § 1(a)(4). The parties to a grant assume mutual obligations — the grantor to transfer money (or something else of value) and the grantee to perform the work described in the grant. Thus, the Board held, the grant was a “contract” for public work. The majority of the court of appeals panel reversed not only the Board’s conclusion that the research was “public work” [see § 2.03[4]], but also its holding that a grant is a “contract” within the meaning of § 1(a)(4). (The concurring member of the panel observed that the discussion of “whether a grant may be a contract is wholly unnecessary to the result,” and declined to join in it.) The majority did not address the basis for the Board’s ruling on the point — the scope of the ordinary legal meaning of the term “contract” — nor the fact that the distinction on which it relied was not between a contract, but between a “procurement contract,” and a grant. The court was strongly influenced by a “survey” documenting a “long-standing, universal practice among federal agencies” not to include DBA insurance requirements, as required by § 1(a)(4), in grants, apparently even when they involved overseas work [University of Rochester v. Hartman, 618 F.2d 170, 174-176 (2d Cir. 1980)].

No other court has considered the issue whether a grant is a “contract” within the meaning of the Act. The Second Circuit majority’s resolution of it is subject to serious question, particularly in view of the ordinary legal meaning of the broad term “contract” and the principle that limitations should not be read into remedial statutes whose terms do not impose them.
§ 2.03[3]  DBA & WHCA HANDBOOK


Whether a contract is or is not a “contract entered into with the United States or any executive department, independent establishment, or agency thereof” might be thought beyond dispute. The contract itself should reveal without difficulty who the parties who “entered into” it are. Until recently, no such question had arisen. The current situation — or at least the period of the “Coalition Provisional Authority” — in Iraq has changed that.

U.S. military contracting officers “detailed” to the CPA executed hundreds of contracts, both relatively small and huge, in a rush in 2003. They used Department of Defense contract forms and signed them on behalf of the “United States of America” without alteration of the forms, regardless of where the funds to pay the contractors were to come from. Although all such funds were disbursed from the United States Treasury on orders of the United States Army (or from cash held by the Army itself), some of the money “belonged” to the people of Iraq for one reason or another. This has led to presentation of the question of whether such contracts are “contracts with the United States” within § 1(a)(4).

The legal status of the CPA remains shrouded in the secrecy of the national security state. It may well have been created by an Executive Order of the President of the United States that remains classified. Congress, in appropriating funds to it, referred to it as “an entity of the United States Government” [Emergency Supplemental Appropriations Act for the Defense and Reconstruction of Iraq, Pub. L. No. 108-106, 117 Stat. 1209, 1225 (Nov. 6, 2003)]. On the other hand, the “coalition” that it represented also included not only Great Britain but nearly three dozen other countries, whose contributions to it ranged from small to minuscule.

This issue has not yet been answered in any forum. In one case, an ALJ made an award to an American managerial employee of a Kuwaiti company that held itself out as American owned and managed, and was performing such a contract that showed that it was to be paid for with “DFI” funds (Development Fund for Iraq), without addressing coverage, but the Board reversed the award on procedural grounds, and rather than resolving the question (raised by the employer on appeal) of whether the contract was one “with the United States,” it simply remanded the case for the ALJ to consider that question in the first instance [J.T. v. American Logistics Services, 41 BRBS 41 (2007).] The ALJ has not yet ruled, as of this writing. [Note: the author serves as co-counsel to the claimant in J.T.]

The closest thing to judicial guidance on the question appears to be a district court’s decision in a False Claims Act (“FCA”) action against a major security contractor for presenting false billings to the U.S. Army for payment, under a contract issued by a U.S. contracting officer, after bid proposals issued by Ministries of Iraq (then functions of the CPA), out of money from the Development Fund for Iraq. The district court initially reasoned, in a long and convoluted opinion, that “if the CPA was not a U.S. entity, then those U.S. employees detailed to the CPA were acting in their capacity as officers of the CPA, not as employees of the United States government,” but that “it now appears unnecessary to reach and decide at this time whether the CPA is an instrumentality of the United States,” which “is not an easy task.” It passed quickly
over the fact that the contracting officer executed the contract in the name of the United States [United States ex rel. DRC, Inc. v. Custer Battles, LLC, 376 F. Supp. 2d 617, 648 n.86, 649 (E.D. Va. 2005) ("DRC I").]

The case then went to a jury, which returned verdicts under two alternative assumptions: “that the CPA was a U.S. government agency and the CPA’s employees were U.S. government officials acting in their official capacity; and second, that the CPA was not a U.S. government agency and thus, the CPA’s employees were not U.S. government employees acting in their official capacity.” The jury found the defendant liable on either assumption. But the district court then set aside the verdict and granted judgment as a matter of law. Whereas in ruling on summary judgment it had found the question “not an easy one,” a year later it found that [United States ex rel. DRC, Inc. v. Custer Battles, LLC, 444 F. Supp. 2d 678, 684-685 (E.D. Va. 2006),], appeal pending, No. 07-1220 (4th Cir. filed Mar. 2, 2007) (argument postponed pending decision in Allison Engine v. United States, 2008 U.S. LEXIS 4704 (June 9, 2008)):

. . . [T]he result of that analysis is clear—although the CPA was principally controlled and funded by the U.S., this degree of control did not rise to the level of exclusive control required to qualify as an instrumentality of the U.S. government. In fact, the evidence clearly establishes that it was created through and governed by multinational consent. This result is as compelling now as it was on summary judgment. Thus, it follows that because the CPA was not a U.S. government entity, and therefore U.S. employees of the CPA were not working in their official capacity as employees or officers of the United States government, relators have demonstrably failed to provide sufficient evidence to enable a jury to find presentment [of the fraudulent billings to an officer or employee of the United States].

COMMENTARY: The Allison Engine holdings that “getting a false or fraudulent claim ‘paid . . . by the Government’ is not the same as getting a false or fraudulent claim paid using ‘Government funds,’ ” but that the defendant need not have been the one who “presented” it to the Government for that payment, rather surely invalidates the district court’s dismissal in Custer Battles, but appears to render the question whether the CPA is an instrumentality of the United States moot in that context (since it is the Government identity of the payor that is critical under Allison Engine, not that of the owner of the funds, as the district court reasoned, or of the party to the contract, as under DBA § 1(a)(4)).

The court never explained why a U.S. officer acting in the “capacity” of a detailee to the CPA was not concurrently and simultaneously acting in the capacity of an officer of the United States as well as of the CPA. The United States military personnel and civilian employees who were detailed or hired by the U.S. to work for the CPA — who the court found constituted 87 percent of the CPA’s staffing — were not granted leaves of absence from their regular assignments, but “detailed” (or hired directly) to work for it. Perhaps the jury verdict on the court’s second “assumption” resulted from its common-sense perception that that assumption contained a non sequitur: that if the CPA was not entirely a U.S. “agency,” “thus, the CPA’s employees were not U.S. government employees acting in their official capacity.” And the fact that the CPA “was created through and governed by multinational
consent” does not negate the proposition that it was created and governed by the United States by multinational consent.

In any event, however, the question presented in that False Claims Act context is readily distinguishable from the DBA question of whether a contract entered into in the name of the United States is a “contract with the United States” within § 1(a)(4), which would not appear to depend at all on the source of the funds with which the United States intends to pay. If the U.S. contracting officer executing a contract on a U.S. contract form did not intend to enter into the contract on behalf of the United States, it would appear to have required him or her merely to strike out “United States of America” in the signature block of the form and write in “CPA” (assuming the contractor did not mind entering into a contract with an ill-defined entity of untested credit). Contractors did not do so. On their face, such contracts are “entered into with the United States.”


The term “public work” is defined by § 1(b)(1) of the Act [42 U.S.C.S. § 1651(b)(2)] as:

Any fixed improvement or any project, whether or not fixed, involving construction, alteration, removal or repair for the public use of the United States or its allies, including but not limited to projects or operations under service contracts and projects in connection with the national defense or with war activities, dredging, harbor improvements, dams, roadways, and housing, as well as preparatory and ancillary work in connection therewith at the site or on the project.[

The italicized phrases were inserted (and “war activities” was substituted for “the war effort”) in 1958. “Allies,” appearing in this definition, are in turn defined by § 1(b)(2) [42 U.S.C.S. § 1651(b)(2)] to include “any nation with which the United States is engaged in a common military effort or with which the United States has entered into a common defensive military alliance.”

Five days after Emperor Hirohito announced that Japan would accept the unconditional terms of surrender demanded by the Allies, and 13 days before the formal surrender aboard the battleship Missouri in Tokyo Bay, a test pilot for the manufacturer of the new P-47 took off from the airfield at Ia Shima. That island was a former Japanese air base recently captured by Allied forces. The flight was intended to test the plane’s fuel consumption and range, pursuant to the manufacturer’s contract with the War Department. The plane crashed on takeoff, and the pilot was killed. The deputy commissioner awarded benefits to his widow, based on the administrative construction of § 1(a)(4) and particularly the definition of “public work” in § 1(b)(1):

Such definition embraces three general work categories or situations which are

(1) employments related to fixed improvements or related to any projects involving construction, alteration, removal, or repair for public use of the United States or its allies,

(2) employments related (a) to any projects in connection with the war effort, and (b) any projects which fall specifically within such categories as dredging, harbor improvements, dams, roadways, and housing, [and]
(3) employments related to preparatory and ancillary work in connection with work under any of the foregoing (fixed improvements or other projects), at the site or on the project.

The employer appealed, contending that the work was not within the coverage of the Defense Base Act. The district court rejected the widow’s argument that the case was within § 1(a)(1), reasoning that the United States had not “acquired” the island by its conquest because it did not “annex” it as United States territory — the restricted meaning of “acquisition” under international law [see § 2.02[1]]. But it affirmed the award on the basis on which it was made, finding that “projects in connection with the war effort” was “a very broad term and should be liberally construed in line with the public policy of protection for the employees,” and approved the administrative construction [Republic Aviation Corp. v. Lowe, 69 F. Supp. 472 (S.D.N.Y. 1946)].

On the employer’s further appeal, the court of appeals did not reach the “public work” question, because it affirmed on the alternative ground that “acquired” in § 1(a)(1) should not be given the restricted meaning it has in international law, but its ordinary meaning, under which the United States had “acquired” the air base by conquest [Republic Aviation Corp. v. Lowe, 164 F.2d 18 (2d Cir. 1947), cert. denied, 333 U.S. 845 (1948)].


The application of the Act to a highway-construction contract in Alaska, before it achieved statehood and was removed from express inclusion in the phrase “Territory or possession outside the continental United States” in § 1(a)(3), was sustained against the argument that the project was not “public work.” Satisfaction of the phrase “for the public use of the United States” was held not to depend on whether the United States government, as opposed to the citizens of the nation and the territory, would be the primary users of the highway [Rogers Construction Co. v. Alaska Industrial Board, 116 F. Supp. 65 (D. Alaska 1953)].

The 1958 amendment to § 1(b)(1) added “whether or not fixed” to its reference to any “project,” and also added “operations under service contracts” to the definition. The question of whether it included air transportation contracts arose again. A contract for air transportation of materials and military personnel from a California airbase to a U.S. airbase in Japan was held by the district court to be within the amended definition. During the pendency of the employer’s appeal before the court of appeals, however, the survivors’ rights under the Act were forfeited, under Longshore Act § 33(g) [as since amended, 33 U.S.C.S. § 933(g)], by their acceptance of settlements with the operator of the Alaska airfield where the crash occurred during a stopover, and the court vacated the district court’s ruling for mootness [Alaska Airlines, Inc. v.
O’Leary, 216 F. Supp. 540 (W.D. Wash. 1963) vacated as moot, 336 F.2d 668 (9th Cir. 1964).

The same question came before the court of appeals two years later, however, and it squarely held that air transportation of military personnel or materials is within the amended definition, whose legislative history showed disapproval of the New York decisions [Flying Tiger Lines, Inc. v. Landy, 370 F.2d 46 (9th Cir. 1966)].

The question of whether scientific research may constitute “public work,” even if it is not related to national defense, has been resolved by one court in the negative. Dr. Wolf Vishniac, an eminent microbiology professor and researcher, secured a grant from NASA and the National Science Foundation to attempt to discern microbial life in the Dry Valleys of Antarctica, thought to be the most sterile place on the planet. It was a test of the efficacy of a device of his design, the “Wolf trap,” for collecting any microbes that might be present in the soil — a device intended for NASA’s Viking lander on Mars. Vishniac died in a fall on his trip under the NASA-NSF grant. An ALJ denied his widow’s claim under the DBA, reasoning that “public work” included only “defense related employments.” The Benefits Review Board reversed, reading the references to “projects or operations under service contracts and projects in connection with the national defense” in § 1(b)(1) as independent of one another, so that a service contract with the government for work overseas was “public work” as redefined in 1958 regardless of any lack of connection with national defense. The court of appeals, however, in turn reversed the Board, reinstating the ALJ’s denial of the claim. Without claiming either textual support or any indication of such an intent in the 1958 legislative history of the amendment, the court reasoned that the definition extends only to “a construction project, work connected with national defense, or employment under a service contract supporting either activity.” (Perhaps recognizing the unsoundness of its reliance on nothing more than an unelaborated “holistic reading of the DBA’s history,” the court went on to state a second, independent ground for the same result: that a “grant” is not a “contract” [University of Rochester v. Hartman, 618 F.2d 170, 173-174 (2d Cir. 1980); see § 2.03[2]].) This restrictive reading of “public work” has not been tested since.

The Benefits Review Board, again reversing an ALJ’s denial of a claim, held that a service contract under which an educational institution provided teachers to give classes in Asian history and culture to Navy personnel aboard ships in the Pacific fleet was for “public work” [Casey v. Chapman College, PACE Program, 23 BRBS 7 (1989)].

In a recent decision, the court engaged in an extended analysis of whether a contract for counter-narcotics activity in Colombia was adequately “approved and financed under” the Foreign Assistance Act to come within § 1(a)(5) when it was not exclusively so funded [see § 2.04[2]], even though the contract was with the United States State Department. The court explained that it wished to avoid “entanglement” in the question of whether “certain kinds of foreign counter-narcotics activities should be regarded as ‘national defense’ related activities,” which it assumed would be determinative of § 1(a)(4) coverage [Ross v. DynCorp, 362 F. Supp. 2d 344, 357 n.7 (D.D.C. 2005)].
COMMENTARY: The terms of the definition of “public work” explicitly “includ[e] projects or operations under service contracts and projects in connection with the national defense or with war activities [or fixed infrastructure improvements].” The University of Rochester court’s holding (and the Ross court’s assumption) that “projects or operations under service contracts” is somehow modified by “in connection with the national defense or with [infrastructure improvements]” appears to be contradicted by the structure and syntax of the entire “including but not limited to” clause of § 1(b)(1). To be sure, the structure of the initial part of the definition is peculiar, attaching the entire “including” clause to “any fixed improvement or any project, whether or not fixed, involving construction, alteration, removal or repair for the public use of the United States or its allies.” But there is nothing in that to support imposing the initial clause on service projects otherwise within the inclusion, given that the function of “including but not limited to” clauses is often to include items that would not otherwise fall within the general terms that precede them, so that the rule of *ejusdem generis* is not applicable. In any event, the issue should not be considered finally resolved by the single decision in *University of Rochester* [University of Rochester v. Hartman, 618 F.2d 170 (2d Cir. 1980); see § 2.03[2]].

[5] **Subcontracts**

The terms of §§ 1(a)(3) and 1(a)(4) both include not only contracts directly with the United States but also “any subcontract, or subordinate contract with respect to such [a] contract.” The Board reversed an ALJ’s denial of a claim when there was an inadequate evidentiary foundation for the finding that the employer’s contract to service aircraft sold to Saudi Arabia was not a “subordinate contract” to a covered sales contract [Cornell v. Lockheed Aircraft Int’l, 23 BRBS 253 (1990)].

[6] **Insurance-Clause Provision of § 1(a)(4) and (5) as Condition of Coverage?**

Unlike §§ 1(a)(1) to (3), clauses (4) and (5) apply to work in locations over which the United States exercises no form of territorial control. Each contains a specification that any contract or subcontract for public work within it “shall contain provisions requiring” that the contractor or subcontractor comply with the insurance-or-self-insurance requirements of Longshore Act §§ 4(a) and 32(a) [33 U.S.C.S. §§ 904(a), 932(a)]. Nothing in the statute suggests that that is a *condition of coverage* of work under the contract or subcontract. If, for example, a contract that is with, or approved and financed by, the United States for public work does not include the DBA insurance requirement, injuries and deaths sustained in the course of work on the contract appear to be compensable, nonetheless. But the absence of such a provision may be taken as an indication that the contracting officer, rather than having simply overlooked the propriety of including it, did not regard the contract as within the Act [Losch v. Curtiss-Wright Corp., 275 App. Div. 1, 4,87 N.Y.S.2d 714, 717, 1949 N.Y. App. Div. LEXIS 3692 (1949) (“The fact that the contract in question is silent on this score is at least somewhat indicative of the intent of the parties.”), *aff’d mem.*, 300 N.Y. 682, 91 N.E.2d 332 (1950); University of Rochester v. Hartman, 618 F.2d 170, 176 (2d Cir. 1980); see § 2.03[2])]. This inference, however, would rather clearly be unwarranted.
with respect to contracts issued in Baghdad early in the U.S. presence there, during which the Department of Defense has acknowledged that many contracting officers assigned there, with no experience with contracts for performance overseas, inappropriately failed to include the DBA-insurance clause in contracts that should have included it.

§ 2.04 Section 1(a)(5): Contracts “Approved and Financed by the United States” Under the Foreign Assistance Act


Section 1(a)(5) brings within the Act any work “under a contract approved and financed by the United States,” for work outside the U.S., “under the Mutual Security Act of 1954, as amended (other than Title II of chapter II thereof unless [a particular such contract is brought within the Act by the Secretary of Labor at the recommendation of the financing agency].” The Mutual Security Act was succeeded by the Foreign Assistance Act in 1961, which appears generally as 22 U.S.C.S. § 2151 et seq., and subsequent Foreign Assistance Acts, and statutory references to the former statute are to be read as to the successors. The United States “approves and finances” a wide variety of contracts with foreign governments — military, infrastructure-improvement, and technical services — under Foreign Assistance Act programs. Title II of chapter II of the earlier law, contracts financed under which are generally excluded from coverage, comprised the “development load fund” provisions, whose current versions appear as 22 U.S.C.S. §§ 2151-2152h.

It is not always a simple matter to determine whether the source of U.S. financing of a foreign government’s contract was an appropriation under the Foreign Assistance Act and, if so, whether it was financed under the Development Loan Fund provisions. It is thus sometimes of critical, outcome-determinative importance that the presumption of Longshore Act § 20(a) puts the burden of going forward with evidence showing the absence of coverage on the employer. If the employer does not trace the lineage of the funding provision and show either that it was not a successor to the Mutual Security Act or that it was a successor to that Act’s development loan fund program, the contract will be held to be within § 1(a)(5) [see Overseas African Construction Corp. v. McMullen, 500 F.2d 1291, 1294, 1295-1296 (2d Cir. 1974); see § 2.01[5]].

[2] Inapplicability of “Public Work” Requirement

The requirement that a contract have been for “public work” within the definition provided by § 1(b)(1) of the Act, and that the country for whom a project is undertaken be an “ally” within § 1(b)(2), applies only to § 1(a)(3) and (4); “public work” does not appear in § 1(a)(5). Thus, for example, even if § 1(b)(1) is properly construed not to include service contracts that lack a connection to national defense or to construction, a contract with no such relationship is within § 1(a)(5). Likewise, even if the country for whom the United States funds a project is not an “ally” within § 1(b)(2), it may fall within § 1(a)(5). All that is required is that the contract be “approved and financed by” the United States under foreign-assistance appropriations.
[3] Partial Financing

The fact that a contract was not funded entirely by the United States under the Foreign Assistance Act is irrelevant, so long as it was at least partially so funded. The word “exclusively” does not appear in the funding-source provision, and a limiting term may not legitimately be read into it [Ross v. DynCorp, 362 F. Supp. 2d 344 (D.D.C. 2005)].

[4] Insurance Clause or Legislative Due Process as Limitation

The requirement of § 1(a)(5) that any contract within it is to contain provisions that the contractor will secure and maintain insurance against its liability under the Act, like the parallel provision of § 1(a)(4), is not an element of the coverage, which will apply even if a contracting officer fails to insert the required clause, although its absence may be taken as some indication that the contract is not otherwise within the provision [see § 2.03(6)]. The authority, or “legislative jurisdiction,” of the United States to apply its law on the basis of its financing of the contract seems clear, but has never been challenged. When the insurance clause is included in the contract and complied with, the insurance carrier would probably be held estopped to deny coverage [cf., e.g., Hall v. Spurlock, 310 S.W.2d 259, 261 (Ky. 1957) (“liability for workmen’s compensation may be based on estoppel, not only as regards mutual compliance with the provisions of the law, but as regards assurance given a workman that he was covered as an employee”); Tri-Union Express v. Workers’ Compensation Appeal Bd. (Hickle), 703 A.2d 558, 562-563 (Pa. Commw. 1997) (same); Bowen v. Cra-Mac Cable Services, Inc., 60 N.C. App. 241, 244-245 (N.C. App.), cert. denied, 307 N.C. 696, 301 S.E.2d 388 (1983) (same); Middleton v. David A. Cantley Construction, 278 S.C. 154, 155-156 (1982) (same); Herndon v. Slayton, 263 Ala. 677, 682-683, 83 So.2d 726, 730-731 (Ala. 1955) (same)]. But the only court that has considered the question, while opining that “a strong argument can be made” for such estoppel, declined to “rende[r] [its] decision on this basis” because it found the insurer’s attempt to show the absence of coverage insufficient anyway [Overseas African Construction Corp. v. McMullen, 500 F.2d 1291, 1295 (2d Cir. 1974)].

§ 2.05 Section 1(a)(6): USO, Red Cross, Etc.

The most recent addition to the Act’s coverage is employment outside the United States “by an American employer providing welfare or similar services for the benefits of the Armed Forces pursuant to appropriate authorization by the Secretary of Defense.” This somewhat obscure language was intended to encompass the USO, the Red Cross, and similar organizations. Its scope has not been the subject of controversy.

It should be noted that this is the only provision of the Act whose application depends on the nationality of the employer. This highlights the intent that every other provision applies irrespective of such nationality. No provision limits the Act’s coverage by reference to the nationality of the injured or killed worker.

§ 2.06 Final Clause of § 1(a): Situs of Work, Nature of Contract, or Both, Are Determinative, Not Situs of Injury

The concluding clause of § 1(a), applicable to employment within any of the
numbered clauses, provides that the Act applies to such employment “irrespective of
the place where the injury or death occurs,” and furthermore to injuries “occurring to
any such employee during transportation to or from his place of employment, where
the employer or the United States provides the transportation or the cost thereof.”

Preparatory activities stateside, after signing the employment contract but before
leaving, are part of the employment and within the Act’s coverage; “waiting in
preparation for his trip overseas was so clearly bound up with it as to be reasonably
considered as part of his transportation, just as a stopover en route might be” [Phoenix

One district court has held that when a public-work contract is “mixed[,] requiring
performance both inside and outside the continental United States, to determine
applicability of the Act, the contract must be geographically characterized by the
performance engaged in at the time of the accident.” It thus determined that a crash in
Alaska in the course of performing an air transportation contract from a California
airbase to an airbase in Japan was not within the Act. The decision, however, was
540 (W.D. Wash. 1963) vacated as moot, 336 F.2d 668 (9th Cir. 1964); see § 2.03[4]].

In a subsequent case on essentially indistinguishable facts, in which a contract
provided for air transportation of military cargo from California to Okinawa, and the
plane crashed in Alaska at an airfield where it made a stopover, the court sustained an
award under the Act. The transportation contract was clearly within the “approved . . .
liberal reading of the phrase ‘public work,’ ” particularly in view of the clarifying
amendment explicitly including “service contracts” and projects “whether or not
fixed.” Furthermore, the fact that the contract was partly performed within the United
States, and indeed that the crash occurred in the state of Alaska, did not affect its
satisfaction of the requirement that the “contract is to be performed outside the . . .
United States”: “the statute does not say that all aspects of performance under the
contract have to occur outside of the continental United States. . . . The statute should
be read liberally in order to carry out its remedial purposes.” The court cited Alaska
Airlines, immediately supra, in support of its ruling that air transportation is “public
work,” but did not mention the holding of that case that, as to work under a “mixed”
contract calling for services both within and beyond U.S. territory, the Act applies only
to injuries sustained outside the United States [Employers’ Mutual Liability Insurance

Even though an employee’s principal work in Europe was on his employer’s State
Department contract, where the injury occurred on a business trip that was not related
to that contract, it was not within the Act’s coverage [Rosenthal v. Statistica, Inc., 31
BRBS 215 (1998)].

§ 2.07 Exclusions

[1] Contractors “Engaged Exclusively in Furnishing Materials or Supplies”

In each of clauses 1(a)(3), (4), and (5), the Act explicitly excludes from coverage
“any employee of . . . a contractor or subcontractor who is engaged exclusively in
furnishing materials or supplies under his contract.” Unsurprisingly, air transportation
has been held not to be within the exclusion [Employers’ Mutual Liability Insurance Co. v. McLellan, 304 F. Supp. 321 (S.D.N.Y. 1969)]. Likewise, the Board has reversed an ALJ’s denial of a claim on the basis of the exclusion when the worker was engaged in services incidental to a military aircraft-sales contract in Saudi Arabia [Fitz Alan-Howard v. Todd Logistics, Inc., 21 BRBS 70 (1988)].

It should be noted that the terms of the exclusion do not encompass employees of a contractor who are themselves engaged only in “furnishing” materials or supplies, as part of their employer’s broader contractual responsibilities. It is only employees of contractors whose contracts are “exclusively” for such “furnishing” that are excluded.

[2] Prisoners of War

Section 1(f) of the Act specifies that liability under the Act “does not apply with respect to any person who is a prisoner of war or a protected person under the Geneva Conventions of 1949 and who is detained or utilized by the United States.” The status of United States detainees captured in Iraq and Afghanistan is, to put it mildly, unsettled and controversial. Nevertheless, it appears to be doubtful that any such persons have been or are being “utilized” as employees on any contracts within the Act, so (fortunately for practitioners under the Act) it does not seem likely that any such issue will be presented. If, however, as the Bush administration has contended, they are not POWs or “protected persons,” and if they should be used as labor on any otherwise covered contract, they or their survivors would be entitled to Defense Base Act benefits.


Section 4 of the Act [42 U.S.C.S. § 1654] excludes three groups of employees, two of which are also excluded from the scope of the Longshore Act itself.

First, it excludes “an employee subject to the provisions of the Federal Employees’ Compensation Act.” That act [5 U.S.C.S. §§ 8101-8193] is the workers’ compensation law applicable to civilian Federal employees (not including employees of “nonappropriated fund instrumentalities” of the Armed Forces [see § 2.02[1]]), and to certain others under particular circumstances. This is not entirely parallel to the Longshore Act’s exclusion of “an officer or employee of the United States, or any agency thereof, or of any State or foreign government, or any subdivision thereof” [Longshore Act § 3(b), 33 U.S.C.S. § 903(b)]. Although under the Supreme Court’s current jurisprudence [see generally Alden v. Maine, 527 U.S. 706 (1999)], the Act could not be made applicable to employees of the states, because of their sovereign immunity, as a matter of Tenth Amendment principle [U.S. const. amend. X], it is less clear whether a state’s contractual agreement with the federal government to carry DBA insurance, and its compliance with that agreement, would allow an insurance carrier to rely on its insured’s sovereign status. In any event, a state’s “subdivisions” do not enjoy such status, and are subject to federal law that does not explicitly exempt them. Thus, regardless of the scope of the term “subdivisions” in the Longshore Act, only “arms of the state” enjoy immunity from DBA coverage when they engage in work otherwise covered by the Act.

Second, § 4 excludes “an employee engaged in agriculture, domestic service, or any
employment that is not in the usual course of the trade, business, or profession of the employer.” The Longshore Act contains no such exclusion, but it was once a very common feature of state workers’ compensation laws, and the last two categories remain in about half of the states’ laws. There is an established body of law applicable to exclusions in those terms [see Larson’s Workers’ Compensation Law §§ 72.03, 73, 75], and no doubt the courts would apply the contours of that law under the DBA if the question were to arise. It has not, however, done so.

And last, § 4 excludes “a master or member of a crew of any vessel.” This is the same exclusion as that in the Longshore Act [§ 2(3)(G), 33 U.S.C.S. § 902(3)(G)], on which the Supreme Court has spilled much judicial ink. Although the meaning of “vessel” is very broad (including, for example, dredges large and small, lacking any motive power of their own [Stewart v. Dutra Construction Co., 543 U.S. 481 (2005)]), “crew” membership requires a “relationship to a vessel” that is “substantial in duration and nature,” rather than including all who perform the ship’s work; it thus distinguishes between “sea-based” and “land-based” maritime employees [e.g., Chandris, Inc. v. Latsis, 515 U.S. 347 (1995)].

It should be noted that the inclusion in § 4 of the DBA of two groups of employees who are also explicitly excluded from the Longshore Act itself strongly suggests that none of the various other exclusions from Longshore coverage has any application to the DBA.


A provision of the United States Information Agency’s authorizing statute states [22 U.S.C.S. § 1475d]:

A cultural exchange, international fair or exposition, or other exhibit or demonstration of United States economic accomplishments and cultural attainments, provided for under this chapter . . . shall not be considered a “public work” as that term is defined in Section 1651 of Title 42.

A worker died while working on the construction of a Voice of America relay station, under his employer’s contract with the USIA, in São TomÉ, an island nation in the Gulf of Guinea, West Africa. The employer moved to dismiss his widow’s wrongful-death action against it on the basis of the Defense Base Act’s exclusive-remedy provision. The widow argued that the work was excluded from the Act by this provision. Unsurprisingly, the court found that “building a permanent radio transmission antenna is neither a ‘cultural exchange, international fair or exposition or other exhibit or demonstration of United States economic accomplishment and cultural attainments . . . .’ These are the kind of episodic activities, undertaken in foreign lands and invariably involving the temporary employment of expatriates and aliens, that would be extremely difficult to undertake if the full panoply of federal employment and purchasing regulations and laws applied.” Indeed, the exclusion’s precision was instructive: “While broadcasting activities receive more attention than any other USIA activity in [22 U.S.C.S.] Chapter 18, § 1475d omits them. Certainly Congress knew how to list those USIA activities it wanted to exclude from the Defense Base Act, for it did so with considerable precision. Its concomitant failure to include any mention of broadcasting-related activities seems likewise precise” [Davis v.
Morganti National, Inc., 1997 U.S. Dist. LEXIS 5014 (W.D.N.C. 1997)]. The sole remedy was that provided by the Act.