UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548

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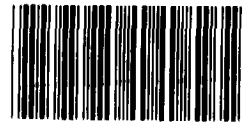
INTERNATIONAL DIVISION

OCTOBER 30, 1980

B-162408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The Honorable Douglas J. Bennet, Jr.
Administrator, Agency for
International Development

Dear Mr. Bennet:

Subject: AID Needs Clarification on Defense Base Act Insurance Requirements (ID-81-08)

We have reviewed insurance requirements of the Defense Base Act (42 U.S.C. 1651) as they relate to AID contractors working overseas and would like to bring several matters to your attention. We believe that by taking certain actions you can help to (1) simplify the work of your contract administrators; (2) correct inequities in worker coverage which may have been created in applying the act's requirements to AID contracts; and (3) ensure availability of DBA coverage to all eligible AID contractors at the least possible cost. We found that

--substantial confusion and misunderstanding exist between AID and the Department of Labor concerning when DBA insurance requirements apply and when they do not;

--the exemption of development loans from the act's requirements may have caused inequities in worker coverage overseas; and

--to obtain the required coverage, some AID-financed contractors must pay DBA premiums which approach or exceed their salary costs. At least $245,000 could have been saved over the last 3 years had AID's blanket DBA contract been extended to these contractors.

We discuss these matters in the attached enclosure. Our recommendations to you and the Secretary of Labor begin on page 6.

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We look forward to hearing what actions you plan to take to resolve the issues outlined in this letter. Your expeditious attention to these matters should greatly assist AID contracting officials in attempting to comply with DBA requirements.

As you know, section 236 of the Legislative Reorganization Act of 1970 requires the head of a Federal agency to submit a written statement on actions taken on our recommendations to the Senate Committee on Governmental Affairs and the House Committee on Government Operations not later than 60 days after the date of this letter and to the House and Senate Committees on Appropriations with the Agency's first request for appropriations made more than 60 days after the date of this letter.

We are sending copies of this letter to the Chairmen of the four above-mentioned committees; the Chairman, Senate Committee on Labor and Human Resources; the Chairman, House Committee on Education and Labor; the Secretary of Labor; and to the Director, Office of Management and Budget.

Sincerely yours,

Frank C. Conahan
for J. K. Fasick
Director

Enclosure

UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548

HUMAN RESOURCES
DIVISION

OCTOBER 30, 1980

B-162408

The Honorable Ray Marshall
The Secretary of Labor

Dear Mr. Secretary:

Subject: AID Needs Clarification on Defense Base Act Insurance Requirements (ID-81-08)

Our International Division has reviewed insurance requirements of the Defense Base Act (42 U.S.C. 1651) as they relate to Agency for International Development (AID) contractors working overseas and would like to bring several matters to your attention. We believe that by taking certain actions you can help to (1) provide AID and other Government agencies a firmer basis upon which to consistently apply Defense Base Act (DBA) requirements to their contracts, and (2) promote certain practices which could ensure availability of DBA coverage to all eligible contractors at the least possible cost. We found that

--substantial confusion and misunderstanding exist between AID and the Department of Labor concerning when DBA insurance requirements apply and when they do not;

--the exemption of development loans from the act's requirements may have caused inequities in worker coverage overseas;

--some Government agencies may not clearly understand DBA requirements; and

--to obtain the required coverage, some AID-financed contractors must pay DBA premiums which approach or exceed their salary costs. At least $245,000 could have been saved over the last 3 years had AID's blanket DBA contract been extended to these contractors.

These matters, outlined in the attached enclosure, were discussed with Labor officials. Our recommendations to you and the Administrator of AID begin on page 6.

(471930)

We look forward to hearing what actions you plan to take to resolve the issues outlined in this letter. Your expeditious attention to these matters should greatly assist AID and other agencies in attempting to comply with DBA requirements.

As you know, section 236 of the Legislative Reorganization Act of 1970 requires the head of a Federal agency to submit a written statement on actions taken on our recommendations to the Senate Committee on Governmental Affairs and the House Committee on Government Operations not later than 60 days after the date of this letter and to the House and Senate Committees on Appropriations with the Agency's first request for appropriations made more than 60 days after the date of this letter.

We are sending copies of this letter to the Chairmen of the four above-mentioned committees; the Chairman, Senate Committee on Labor and Human Resources; the Chairman, House Committee on Education and Labor; the Administrator, Agency for International Development; and to the Director, Office of Management and Budget.

Sincerely yours,

Edward A Densmore

for Gregory J. Ahart
Director

Enclosure

ENCLOSURE

AID NEEDS CLARIFICATION ON DEFENSE BASE ACT (DBA) INSURANCE REQUIREMENTS

WHY HAVE DBA REQUIREMENTS CAUSED PROBLEMS TO AID?

The Defense Base Act (42 U.S.C. 1651) was enacted in 1941 to extend the workers' compensation protection of the Longshoremen's and Harbor Workers' Compensation Act to employees of Government contractors working at defense bases overseas. These workers were thereby afforded uniform protection which had previously been unavailable or inadequate in some countries. DBA was amended in 1958 to extend DBA requirements to foreign assistance contracts financed under the Mutual Security Act of 1954 (or under successor legislation). The effect was to significantly increase DBA's application to AID activities. As a result, AID now requires DBA insurance for employees working overseas, including: (1) those under AID direct contracts; (2) those under contracts between host governments and third parties financed by AID loans (other than development loans which the act specifically exempts); and (3) those under contracts between AID grantees and third parties.

AID contract administrators have experienced a variety of problems in trying to apply DBA requirements. Many problems stem from confusion over which categories of AID contracts and types of employees should be covered by DBA insurance. AID believes that a February 1980 court decision may have further confused the issue of when DBA coverage should be applied to AID-financed contracts overseas. [See footnote, p. 8, describing Vishniac v. University of Rochester, NSF, and NASA (2nd Cir. 1980) (79-4098)].

AID has raised numerous questions with Labor concerning the applicability of DBA to its contracts. AID officials told us that Labor, though responsible for administering DBA as an extension of the Longshoremen's and Harbor Workers' Compensation Act, has not been entirely responsive to AID inquiries. In their opinion, some Labor responses have raised more questions than they have answered. They also said that Labor takes inordinate amounts of time in responding to AID inquiries.

We found some basis for the AID criticism. In discussions with Labor and AID officials, we noted confusion as to exactly what positions Labor had taken on certain questions. AID officials told us, for example, that, based on Labor's advice,

the agency was not requiring DBA coverage of employees under AID grants. Labor officials informed us that they had not provided such advice and stated that, in fact, until the court ruling in the Vishniac case that DBA does not apply to grants, AID should have been requiring DBA coverage of grant employees. In our discussions with AID and Labor officials, we also noted confusion over exactly what position Labor had taken regarding whether a cooperative agreement should be considered a contract for purposes of DBA.

We also found some basis for the AID contention that their inquiries to Labor were not always promptly answered. For example, it took Labor 17 months to respond to AID's inquiry about whether DBA coverage should be required for contractors' consultants working overseas. Three other AID inquiries were answered in an average of 6 months; and one received a tentative, but no final, reply. Labor officials felt the AID criticism was not entirely fair since Labor receives mainly telephone inquiries which they promptly answer.

The lack of written guidelines for applying DBA requirements may be partly responsible for some of the confusion we noted between AID and Labor officials. Labor has not issued substantive regulations, nor provided specific agency guidelines concerning when DBA requirements should be applied to overseas Government contracts. Labor officials told us that they believe they should only offer interpretive opinions on DBA requirements in response to specific agency inquiries. They explained that Labor has no statutory authority under the Longshoremen's and Harbor Workers' Compensation Act to issue binding regulations. Labor also pointed out that it would have no authority to resolve disputed legal questions and that such disputes could be resolved only in the courts.

We disagree that the adjudication process specified in the Longshoremen's Act absolves Labor of the usual responsibilities associated with administering statutes. We believe these responsibilities would include preparation of guidelines, when needed, to assist agencies in complying with the act's requirements. The confusion we noted during our review lead us to conclude that such guidelines would be useful. We believe that if agencies individually interpret when to apply DBA requirements, Government-wide inconsistencies will inevitably result. Accordingly, we are recommending that Labor act to clarify DBA requirements. (See p. 6.)

Because AID believes that the Vishniac case has further confused the issue of when DBA requirements should be applied, we are asking the Secretary of Labor to consider whether application of the act's requirements should be modified in

any way in light of the court ruling. Labor's tentative position at the time of our review was that it would continue to advise agencies that DBA coverage is required on a wide range of Government contracts overseas, including but not limited to, contracts related to construction or national defense. Labor officials told us they believe the best policy for agencies to follow is: when in doubt, insure.

DOES THE DEVELOPMENT LOAN EXEMPTION SERVE A USEFUL PURPOSE?

In 1958, a section was added to DBA, extending coverage to contracts performed under the Mutual Security Act and funded from U.S. loans and grants to foreign governments. It specifically excluded, however, contracts funded by Title II, Chapter II, Mutual Security Act of 1954--the Development Loan Fund. (See 41 U.S.C. 1651(a)(5).) Appropriations to the Development Loan Fund ceased in 1973. DBA provides, however, that a contract financed by successor legislation be brought under DBA requirements only if the Secretary of Labor determines, upon the recommendation of an agency head, that the contract should be covered. Because such recommendations have not been made, contracts made from development-type loans, for the most part, have not been covered by DBA.

According to AID documents, the reasons for the development loan exemption are not clear from the act's legislative history. One explanation was that the Fund's officials probably secured the exemption because they believed that employees of Development Loan Fund contractors should not be afforded benefits greater than those afforded by multilateral development banks or public or private funding sources in the host countries. Another AID document suggested that because the Fund was to operate much like a bank, extension of DBA requirements would have increased the cost of money made available.

During the past 10 years, AID officials have debated about which AID loans properly fall under the development loan exemption. On separate occasions, AID officials questioned whether the exemption still served a useful purpose pointing out that

--the exemption created an inequitable situation whereby two contractor employees could work together and do the same kind of work yet one be entitled to DBA coverage and the other not;

--with the demise of the Development Loan Fund as a separate entity, the exemption may have disappeared altogether; and

--because 41 U.S.C. 1651(e) gives the Secretary of Labor discretionary authority to waive DBA requirements upon the recommedation of an agency head, there may be no need for the separate exemption in 41 U.S.C. 1651(a)(5).

In February 1977, an AID official completed an analysis of this issue and concluded that the AID application of the exemption had become so inconsistent that the Agency would have difficulty in logically explaining why certain loans, and not others, were exempt. He recommended that AID seek amending legislation in the next Congress to delete the development loan exemption from DBA. To date, AID has not acted on this recommendation.

ARE CONTRACTORS ABLE TO OBTAIN DBA INSURANCE AT REASONABLE RATES?

Small- and medium-sized contractors working directly for host governments on AID-financed projects are having trouble obtaining DBA coverage at reasonable rates due to high minimum premiums charged by insurance companies. The lowest minimum DBA premium charged by any insurance company is $8,500 which sometimes approaches or exceeds the contractors' salary costs for the period employees are working overseas. Until November 1977, AID direct contractors were experiencing similar difficulties. At that time, AID entered into a contract with an insurance company which guarantees DBA coverage to all AID direct contractors at a guaranteed rate with no minimum premium.

AID and its direct contractors have benefited from the blanket contract. The initial rate of $8.75 per $100 of the contract's salary costs guaranteed by the contract was less than had previously been charged. Rates were $13-25 under an earlier informal agreement; before that, rates of $20-30 were not uncommon. Rates for the third year of the contract were reduced to $7.14, and fourth-year rates are projected to be even lower. More importantly, the insurance is now available to all AID direct contractors, regardless of their size and without having to satisfy a minimum premium.

Unfortunately, the blanket contract did not cover contracts made from AID loans and grants to host governments. As a result, these host government contractors are experiencing

the same problems that AID direct contractors faced earlier. Information provided by one insurance broker showed, for example, that

--two contractors paid DBA premiums exceeding their salary costs,

--the average DBA premium for 15 host country contracts was 24 percent of salary costs, and

--one contractor had to pay the $8,500 minimum premium even though he only had one employee traveling overseas for a single month.

AID contracting officials recognize the potential cost savings of a blanket contract to cover host country contracts. One official explained that host country contracts were omitted from the first blanket contract primarily because AID could not provide insurance companies data approximating the number of employees who would be subject to the DBA requirement. After the contract was awarded in November 1977, AID tried to develop data on host country contracts through its overseas missions. AID officials planned to award a second contract by the end of 1979. Preliminary work toward this end was progressing until the Vishniac case came to light. Uncertainty about whether AID is properly applying DBA requirements in light of the court ruling has halted work toward a second contract. We were advised by the insurance broker that unless the uncertainty is cleared up, insurance companies might be hesitant to bid on the proposed contract.

We cannot precisely estimate the total potential savings of a blanket contract due to the incompleteness of the data. Information provided to us by the broker, however, provides some insight into the possible savings. This data showed that since the inception of the blanket contract, 45 host country contractors paid the minimum DBA premium. In total, these contractors paid $362,500. Had there been no minimum premium, as the blanket contract for direct contracts provides, and had the current guaranteed rate of $7.14 been applied to these 45 contracts, premiums would have totaled $116,537. Using this analysis, the broker computes potential savings of $245,963.

ARE ALL AFFECTED AGENCIES COMPLYING WITH DBA REQUIREMENTS?

Our review was generally limited to the handling of DBA insurance requirements by AID. However, we made limited inquiries to identify other agencies affected by DBA. We found that information at Labor headquarters was insufficient

to identify what agencies require DBA coverage of their overseas contractors. Our review of Labor files related to DBA revealed only isolated correspondence from agencies other than AID and the military departments.

In pursuing the matter, we contacted contracting officials at several departments and agencies which we believed might have contractors working overseas. Based on our limited inquiries, we question whether all affected agencies clearly understand DBA requirements and whether they are properly applying these requirements to their overseas contracts.

RECOMMENDATIONS TO THE SECRETARY OF LABOR

Guidance concerning DBA requirements

In view of the apparent confusion over DBA requirements, we believe there is a need for formal clarification of Labor opinions concerning the act's requirements. Such clarification would provide agencies a firmer basis upon which to apply DBA requirements to their contracts and reduce inconsistencies in their application on a Government-wide basis.

For these reasons, we recommend that you direct appropriate Labor officials to (1) formalize the Department's positions concerning DBA requirements; (2) prepare either broad agency guidelines or a written statement of the Department's opinions on when DBA requirements should be extended to overseas Government contracts; and (3) disseminate the guidelines or statement to all agencies which the Department believes to be affected by DBA. In developing the guidelines or statement, we believe that you should consider such questions as

- --whether DBA coverage should be required of grantees, contractors' consultants, and employees working under cooperative agreements;
- --whether application of DBA requirements should be modified in light of the Vishniac decision; and
- --what constitutes a defense- or construction-related activity for purposes of DBA.

In the interim, we believe a meeting between appropriate officials of Labor, AID, Defense, and other agencies affected by DBA would be helpful in clearing up any misunderstandings that may have arisen between agencies regarding DBA requirements.

Promoting the use of blanket contracts

Based on the potential cost savings to AID, we are recommending that AID proceed with its work toward a second blanket contract for DBA coverage of host country contracts. We, therefore, urge that you advise AID at the earliest possible date of the Department's opinion on whether the ruling in the Vishniac case would modify application of DBA requirements with respect to host country contracts. Also, your early advice concerning the Department position on the development loan exemption would allow AID to provide DBA coverage for these loans, if warranted, under the appropriate blanket contract.

We also recommend that you seek to identify those agencies which are substantially affected by DBA requirements and urge their consideration of the blanket contract approach used by AID. In doing so, you can ensure that (1) all affected agencies are aware of DBA requirements, and (2) DBA coverage is available to all affected contractors at the lowest possible cost.

RECOMMENDATIONS TO THE ADMINISTRATOR, AID

Development loan exemption

In view of past AID analyses that have questioned whether the act's exemption of development loans was still useful, we recommend that you decide whether the exemption in fact creates inequitable coverage not intended by the act. If so, we recommend that you exercise the option specified in section 1 (a)(5) of the act by requesting that the Secretary of Labor bring individual development loans under the DBA requirements. Your early attention to this issue would enable your contract administrators to provide for these loans in the appropriate blanket contract and thereby achieve savings on DBA premiums.

Blanket contract for DBA coverage on host country contracts

We note that the ruling in the Vishniac case has caused confusion in AID over the proper handling of DBA and that AID has asked Labor for clarification. In the interim, we believe AID should ensure that DBA coverage is available to all affected contractors at the lowest possible cost. We therefore recommend that you proceed with work toward a blanket contract for DBA coverage on host country contracts.

We also recommend that you contingently plan for inclusion of contracts under development loans in the appropriate blanket contract should you decide to request that these loans be brought under DBA. We are asking the Secretary of Labor to advise you at the earliest possible date of the Labor position on this issue.

Note:

Professor Vishniac was killed in Antarctica while conducting microbiological research under Government-funded grants. The Court of Appeals rejected a claim for DBA benefits because his research activities did not constitute public work as required by section 1651(a)(4) and as defined by section 1651(b)(1). The Court interpreted the definiton of public work as including only Government-related construction projects, work connected with national defense, or related service contracts. The Court further denied benefits because Professor Vishniac was working under a grant to support pure research rather than under a contract as section 1651(a)(4) specifies. AID is unsure how the Court's rulings concerning public works and grants apply to its contracts since they may fall under sections of the act other than section 1651(a)(4).