



Australian Government
Department of Defence

ASDEFCON – INSURANCE CASE STUDIES

CASE STUDY #10

MARINE IN SERVICE SUPPORT CONTRACT

NOTES TO READER

This case study has been prepared to assist drafters in the use of the ASDEFCON insurance clauses. This case study is to be used by drafters in conjunction with all other applicable guidance, policies and procedures for procurements including the ASDEFCON Insurance Handbook.

This case study is intended to provide guidance to drafters in respect of what insurances may be required from a contractor. The content of this document is a case study only and is not intended to be prescriptive. Certain contracts, even those with similar facts to that of the fictional contract below may warrant different insurance treatment. Appropriate advice should be sought in relation to any contract involving significant risks to be insured.

If drafters have any questions or comments regarding this case study or the use of the ASDEFCON insurance clauses, please contact the ACIP Management Team at ACIP.ManagementTeam@defence.gov.au.

FICTIONAL CONTRACT

The contract is for maintenance and repair services in Australia in respect of a large RAN ship. Pursuant to the contract, the contractor will perform a variety of maintenance services to the ship including engineering services.

The ship will remain in the water during the performance of the maintenance services. The contractor will not use marine vessels to perform the contract as all repair works are internal or on the deck.

WHAT INSURANCES SHOULD BE REQUIRED?

Based on the fictional facts and circumstances outlined above, the following insurances will be required:

- (a) **Workers' compensation insurance** should be required. As the contract is being performed wholly in Australia, drafters do not need to select the alternative workers' compensation clause that is only to be used where workers engaged by the contractor will be performing work outside of Australia.
- (b) **Motor vehicle insurance** should be required as the contractor will use motor vehicles on and around Defence premises in the course of performing the services.
- (c) **Property insurance** should be required. The contractor should be required to insure its property, plant and equipment that is material to its ability to perform its obligations under the contract. Drafters should note however that in a marine context, damage to Commonwealth property (including the Commonwealth vessel itself) in the care, custody or control of the contractor may be insured under one or more of the contractor's insurance policies. For example (and discussed further below), loss of or damage to the Commonwealth vessel caused by the contractor's repair activities will be insured under the ship repairer's liability policy. Drafters may therefore consider it necessary to amend subparagraph b. of the ASDEFCON insurance clause to reflect this.
- (d) **Public and products liability** insurance should be required. Whilst the contract is primarily marine in nature, the contractor's activities will not be solely limited to marine risks. For example, the contractor will attend planning meetings with Defence on Commonwealth premises. If the contractor accidentally damaged Defence property or injured a Defence employee during the course of those meetings, the contractor's public liability policy would provide cover for the contractor's liability to compensate the Commonwealth or the Defence employee.
- (e) **Ship repairers liability insurance** should be required. As discussed in paragraphs 84 to 88 of Part C of the ASDEFCON Insurance Handbook, ship repairer's liability insurance provides cover to the insured for its legal liability for:
 - (i) loss of, damage to, or loss of use of tangible property; and
 - (ii) bodily injury, disease, illness or death of any person (other than an employee of the insured),

suffered by third parties (including the Commonwealth) as a result of the insured's ship repair or maintenance activities including the supply, repair or installation of products as part of those services.

Ship repairers liability insurance is a complex class of insurance and drafters are encouraged to seek advice from the ACIP Management Team in respect of contracts involving the provision of ship maintenance or repair works.

The ASDEFCON insurance clause includes a number of coverage extensions which may or may not be appropriate depending on the nature of the services being performed by the contractor. In this fictional scenario, all of the subparagraphs (being e. to i. should be required). Drafters should not remove any of the subparagraphs without seeking advice from the ACIP Management Team.

The ship repairer's liability policy should have a limit sufficient to cover the maximum probable liability of the contractor to the Commonwealth and others (i.e. the public) arising out of the contractor's repair and maintenance activities. This limit should include cover for

the contractor's liability to compensate the Commonwealth for damage to the vessel caused by the contractor's repair and maintenance activities.

In this fictional scenario, marine liability insurance is not required. The situation would be different if, for example, the contractor used its own marine vessels in the performance of the contract (eg, to access the external hull). In that situation, it may also be appropriate to require the contractor to have marine hull insurance over the hull(s) of its vessel(s) used in the performance of the contract.

As discussed in paragraphs 72 and 73 of Part C of the ASDEFCON Insurance Handbook, the Commonwealth does not generally insure the hull of its own vessels. It would not usually be appropriate for the contractor to be required to effect marine hull insurance in respect of the RAN ship in this fictional scenario, even in the unlikely scenario that the ship may at times be in the full care, custody or control of the contractor. The liability of the contractor for loss or damage to the ship will usually be limited to loss or damage caused by the wilfully wrongful or negligent acts or omissions of the contractor. For example, the contractor would not usually be liable for an act of god (such as storm damage or lightning strike). The liability of the contractor to compensate the Commonwealth for damage to the ship is appropriately insured under the contractor's ship repairer's liability policy. If the liability regime of the contract was to provide that the contractor was liable for loss or damage beyond that caused by the contractor's wilfully wrongful or negligent acts or omissions (for example, if the contractor is liable for any loss or damage caused while the vessel it is in the care of the contractor or its subcontractors) then the contractor should be expressly required to ensure that its ship repairer's liability policy insures this additional contractual risk.

- (f) **Professional indemnity insurance** should be required. As discussed in paragraphs 30 to 38 of Part C of the ASDEFCON Insurance Handbook, professional indemnity insurance covers the insured for its liability for economic loss suffered by third parties (which would include the Commonwealth) as a result of the negligent performance of professional services by the insured contractor.

Some components of the maintenance services will include the provision of professional services, such as project management, maintenance scheduling and engineering services. In using the professional indemnity insurance clause, drafters will need to select the appropriate subparagraph optional extensions. In this scenario, drafters should select:

- b. software and IT risks – this may be relevant depending on the precise nature of the services being provided by the contractor. If the maintenance services are purely mechanical in nature (eg, wiring) then this extension will not be relevant. If, however, the maintenance services are being provided in respect of the vessel's systems (eg, radar and sonar systems) then this extension will be required;
- c. unintentional breaches of intellectual property rights – allegations could be made that the engineering services include IP;
- d. extend to cover claims for unintentional breaches of trade practices laws – allegations could be made that the contractor has breached liabilities owed pursuant to the Australian Consumer Law (such as misleading or deceptive conduct etc);
- g. worldwide territorial and jurisdictional limits - this extension is relevant as the vessel may be used outside of Australia.

Drafters should note that subparagraph f. retroactive date is a core part of the clause and not an optional extension.

The professional indemnity insurance policy should have a limit sufficient to cover the liability of the contractor to the Commonwealth for a breach of professional duty, noting that the policy limit will likely be an aggregate limit covering all of the contractor's activities and may also be shared with related bodies corporate of the contractor.

As this policy is written on a claims made basis, the Contractor should maintain it for a period after the performance of the contract to allow for claims to arise and be brought. Seven years is usually considered prudent, however, defects in the engine caused by the engineering maintenance services could take longer to manifest so 10 years may be more appropriate for this type of contract.

Other relevant issues: Given that some insurances are required to be maintained for a period after the end of the contract, the insurance clauses should survive the termination or expiry of the contract.

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