



Australian Government
Department of Defence

ASDEFCON – INSURANCE CASE STUDIES

CASE STUDY #6

SUPPLY OF SERVICES ON DEFENCE PROPERTY

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 the provision of training services that will be carried out on Defence premises in Australia.

The contractor is being engaged to provide training services in respect of deployable thermal surveillance equipment and the software program that monitors and controls the equipment when deployed (the software is on a closed network which is not connected to the internet). The software, manuals and equipment to be used in the training were supplied by the contractor pursuant to an acquisition contract.

The training is to be undertaken in a two week block, and there is provision for the contractor to return and perform supplementary training as required. The contractor's presence on Defence premises is as an invitee and there is no need for a GFF licence to be granted.

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 wholly performed 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) **Public liability insurance** should be required. As discussed in paragraphs 15 to 29 of Part C of the ASDEFCON Insurance Handbook, public liability insurance provides cover to the insured for its 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 (which would include the Commonwealth) as a result of the operations or activities of the insured.

The public 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 activities performed on Defence premises.

- (c) **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.

The training services will involve the provision of professional services and advice by the contractor. If, for example, the contractor provides negligent advice or instruction as to the operation of the software that monitors the equipment, or how to use the equipment itself, the contractor's professional indemnity insurance will be the policy that responds to provide cover.

In using the professional indemnity insurance clause, drafters will need to select the appropriate subparagraph optional extensions. In particular, in this scenario, drafters should select:

- b. software and IT risks – the training services extend to the use of the software that monitors and controls the equipment and thus this extension is relevant; and
- 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).

Subparagraph g. worldwide territorial and jurisdictional limits is not required in this scenario as the software risk is contained to 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. The LRA should be consulted to ascertain the risks associated with the training services.

In the usual course, the Commonwealth will need to consider whether the cost of the PI insurance represents a value for money option.

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. In a training context, claims could potentially be brought against the contractor many years after the initial training services were provided as deficiencies in the operation of the equipment (which arise from the instructions provided by the contractor) could take many years to materialise. Seven years is usually considered prudent. A shorter time period (say, 3 or 5 years) may be acceptable if the risk of inadequacies in the training instructions being discovered after 3 or 5 years is considered remote and for reasons of commerciality.

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.

Disclaimer

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