



Australian Government
Department of Defence

ASDEFCON – INSURANCE CASE STUDIES

CASE STUDY #9

MARINE ACQUISITION 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 the supply of a special type of aviation fuel, not normally stored in Australia, for helicopters used on board Navy ships.

The contractor is an overseas based entity who will import a large quantity of fuel to its storage depot in Australia and then deliver that fuel to Navy ships at sea as required. The contractor will use its own vessels to import the fuel and then to deliver the fuel to the ships. Risk and ownership in the fuel passes to the Commonwealth upon delivery of the fuel into the tank of the ship.

For the purposes of this case study, it is assumed that the aviation fuel is not considered an aviation product under the contractor's insurances.

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 partly performed outside of Australia, drafters should 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) **Transit insurance** should be required. As discussed in paragraphs 47 to 51 of Part C of the ASDEFCON Insurance Handbook, transit insurance is a first party loss policy which covers property of the insured (or property for which the insured is responsible to insure) which is lost or damaged during transit.

As the contractor will be responsible for importing the fuel and delivering the fuel to the ships, the contractor will be required to insure the fuel whilst in transit from the overseas oil refinery to its storage depot in Australia, and then from the storage depot to the Navy ships. The limit of the policy should be the replacement cost of the fuel.

- (c) **Motor vehicle insurance** should be required. The contractor will use motor vehicles to transit the fuel from its storage depot to its marine vessels.
- (d) **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. In this fictional scenario, property insurance for the storage depot facility and fuel while in storage at the depot will be particularly relevant.
- (e) **Public and products liability** insurance should be required. Whilst the contract is marine in nature, not all of the contractor's activities will involve the use or ownership of marine vessels and thus non marine public and products liability insurance will be necessary.

The provision of fuel will involve the risk of pollution. Public and products liability insurance policies will ordinarily include cover for sudden and accidental pollution, but not gradual pollution. In this fictional scenario, only sudden and accidental insurance will be required. To ensure cover for this risk, drafters should amend the ASDEFCON insurance clause to provide that the insurance policy must include cover for sudden and accidental pollution in respect of the discharge or escape of oil or any other substance during the course of the contractor performing the contracted services. As discussed below, this amendment should be made to the marine liability clause as well. Depending on the nature of the contractor's activities, the contractor will probably be under a legal obligation (pursuant to Commonwealth legislation and some international treaties) to effect insurance for pollution caused by oil spills.

- (f) **Marine hull insurance** should be required, in respect of the contractor's own vessels that will be used in the performance of the contract.
- (g) **Marine liability insurance** should be required. As discussed in paragraphs 75 to 78 of Part C of the ASDEFCON Insurance Handbook, marine 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 ownership or use of marine vessels.

Marine liability insurance is required as the contractor will use marine vessels in the performance of the contract. The marine 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 use of marine vessels. This limit should include cover for the contractor's liability to compensate the Commonwealth for damage to Navy ships and helicopters caused by the contractor's use of marine vessels.

Drafters should amend the ASDEFCON insurance clause to provide that the insurance policy must include cover for sudden and accidental pollution.

Other relevant issues: As this contract relates to the supply of aviation fuel, the obligations in respect of marine liability, motor vehicle and public and products liability insurances should include a term to ensure that those policies do not exclude cover for liabilities arising from dangerous or hazardous goods (including oil/fuel) manufactured, used, handled or stored in compliance with legal requirements. The transit, marine hull and property insurance clause should include a term to ensure those policies do not exclude cover for the storage and transit of dangerous or hazardous goods (including oil/fuel) manufactured, used, handled or stored in compliance with legal requirements.

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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