

Liability Risk Assessment Template V2.0

Released November 2018

**Scope**

This publication should be considered best practice guidance for all Defence staff undertaking procurement activities.

**Note to External Agencies**

External agencies intending to use this template will need to tailor it in order to meet their specific procurement requirements (including relevant internal guidance) and should seek appropriate professional guidance as required.

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This publication should be attributed as the *Liability Risk Assessment Template* V2.0.

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**Feedback**

All feedback on this publication and suggestions for improvement should be sent to:

Procurement.ASDEFCON@defence.gov.au

**Amendment Record**

|  |  |  |  |
| --- | --- | --- | --- |
| **Version** | **Release Date** | **Closure Date** | **Description of Amendments** |
| 1.1 | 2 August 2011 |  | Attached example from LRMP |
| 1.2 | 16 February 2016 |  | Updates to CASG |
| 2.0 | November 2018 |  | ASDEFCON Liability Reform |

Introduction and Purpose

This template is designed to assist Defence officials to undertake a Liability Risk Assessment (LRA) for the purpose of developing and negotiating contract documentation. Although the template can be used for any type of contract, its focus is the ASDEFCON templates and it should be read in conjunction with the ASDEFCON Liability Handbook and the ASDEFCON Insurance Handbook.

An LRA is not intended to cover all risks associated with a particular project or contract (these risks would be captured in a Project Risk Log or Contract Risk Register). Instead, the LRA focuses on liability-related risks arising from a contractor’s performance of a proposed contract. Conducting an LRA involves:

* identification of liability risks addressed by the liability clauses of the contract;
* assessment of the likelihood and consequences of those liability risks;
* consideration as to how those liability risks should be managed and treated (including whether particular liability risks to the Commonwealth should be capped); and
* quantification of appropriate liability caps (if required) and required insurance limits.

All liability risks require assessment, regardless of whether the resulting liability would be capped or uncapped. Defence’s ASDEFCON templates reflect a corporate Defence position regarding which liability risks may be capped and in which types of contracts it would be expected that liability risks are capped. Risks that could give rise to uncapped liabilities require assessment to allow a project to understand the risk profile of the contract to Defence and the level of risk that the contractor is realistically assuming. This knowledge can be used to assess appropriate insurance types and limits, to support negotiations with the contractor, and to inform delegates.

An LRA should be undertaken prior to the release of any approach to market documentation and should be updated as appropriate during any contract negotiations and maintained throughout the life of any resultant contract.

Template Structure

This template consists of:

* a Contract Liability Risk Log (Table 1);
* a Proposed Liability Caps table (Table 2);
* a Proposed Insurance Types and Limits table (Table 3);
* an Assessment Record Sheet; and
* Annex A: Overview of the Liability Risk Assessment Process.

Table 1 should be completed first by Defence officials conducting an LRA against the nine standard liability risks. Each row in Table 1 refers to a standard liability risk, refers to relevant ASDEFCON liability clause/s and identifies whether the risk may be capped. If a project specific risk exists that is outside the standard nine liability risks it may also be considered here by adding an additional row. Where a risk is subject to a liability cap, the financial impact of the risk will inform the proposed liability cap at Table 2. See Annex A for guidance on conducting an LRA.

Table 2 has been specifically developed for use with the ASDEFCON liability caps, which are Core provisions in the high level ASDEFCON templates. Guidance on what to include at each column of Table 2 is provided with the table in a note to drafters. If you are using a non-ASDEFCON contracting template with a different liability cap regime, Table 2 will require tailoring.

Table 3 covers the types of insurance policies contained in the ASDEFCON insurance clauses and describes the losses that each policy insures against. See the ASDEFCON Insurance Handbook for further guidance.

Defence personnel should only complete Table 2 if liability caps are to be included in the contract, and Table 3 if specific insurance is required. If this document is being developed at pre-contract drafting stages of the procurement lifecycle (i.e. for the Acquisition Strategy), then Tables 2 and 3 may be left blank until a later stage of the procurement process.

Each time an LRA is updated, Tables 1, 2 and 3 should be revisited and the Assessment Record Sheet updated.

CONTEXT

Note to drafters: This section should set out a description of the procurement to which the LRA relates, including the procurement objectives and the procurement environment. For further guidance on establishing the context, refer to Annex A and Chapter 3.3 of the [Project Risk Management Manual (PRMM)](https://objective/id%3AAB10851802).

 […INSERT DETAILS AS REQUIRED…]

Table 1 – Contract Liability Risk Log

Note to drafters: The Contract Liability Risk Log at Table 1 should address at least the nine standard liability risks outlined below. Additional project specific liability risks can be included should they not fall within the standard liability risks and specific contractual drafting should be included in the contract if necessary to address them. The worked examples provided below are provided as examples only. Drafters should refer to Annex A for guidance on Risk Categories and the Likelihood and Consequence ratings, and Residual Risk Level evaluations in accordance with the Standard Risk Matrix.

| **Risk**  | **Source**  | **Category**  | **Impact**  | **Controls and/or Treatment** | **Likelihood**  | **Consequence**  | **Residual Risk Level**  |
| --- | --- | --- | --- | --- | --- | --- | --- |
| 1. The contractor fails to complete the contract

(e.g. the contractor goes into liquidation) Note to drafters: Related liability cap – losses suffered by the Commonwealth other than those referred to in the other liability caps | * Lack of expertise in the company
* Unproven solution
* Financial viability of the company
 | Schedule CostPerformance | * Re-tendering costs of finding alternative supplier to complete estimated at $6m (inc project office costs).
* Costs of keeping existing equipment operating for longer estimated at $24m for 2 years.
 | * Tender allows for evaluation of experience and capacity of key personnel.
* Tender allows for assessment of maturity of the tendered solution.
* Tender allows for evaluation of financial viability and projected viability if contract is awarded.
* Payment schedule is designed to reflect the value delivered to the Commonwealth (i.e. it is not front-loaded).
* Bank guarantee will be obtained to secure contract performance and any mobilisation payment paid.
* Deed of guarantee and indemnity requires parent to ensure performance of contractor.
 | Rare  | Moderate  | Low  |
| 1. The contractor completes the contract but the supplies provided are not fit for purpose, are defective or do not provide the capability contracted for

Note to drafters: Related liability cap – loss of use of supplies | * Lack of expertise in the company
* Unproven solution
 | PerformanceCost | Costs for loss of use of supplies include:* wasted crewing costs estimated at $20k a day for 365 days ($7.3m)
* providing alternate capability or extending existing capability until the supplies are rectified estimated at $1m a month for 12 months ($12m)

The project considers that issues with the supplies would be resolved within 12 months or the contract would otherwise be terminated. | * Tender allows for evaluation of experience and capacity of key personnel.
* Tender allows for assessment of maturity of the tendered solution.
* Contract provides for design reviews, acceptance testing and defect rectification period to address defects.
* Contract includes requirement to obtain third party warranties for Commonwealth benefit.
* Contract contains a clear description of purpose of supplies, with objective specifications to be met.
 | Possible  | Moderate  | Medium  |
| 1. The contractor completes the contract but not on time or one or more milestone dates are not met

Note to drafters: Related liability cap – liquidated damages | * Capacity issues given competing projects
* Poor management skills
* Unproven solution
* Contractor damages supplies before they are accepted
 | Schedule Cost | Liquidated damages for delayhave been assessed as:* cost of standing up a project office estimated at $50k a week for 26 weeks ($1.3m)
* cost of keeping existing equipment in operation estimated at $6m for 26 weeks

The maximum delay that the project will accept is 26 weeks. Contract could be terminated if the liability cap is reached or under clause 13.3.  | * Tender allows for assessment of proposed management plans and skills, and proposed resourcing.
* Tender allows for assessment of maturity of the tendered solution.
* Contract allows for liquidated damages.
* Contract allows for termination for default if delay reaches liquidated damages cap.
* Bank guarantee will be obtained to secure contract performance.
* Deed of guarantee and indemnity requires parent to ensure performance by contractor.
 | Possible  | Moderate  | Medium  |
| 1. The contractor injures or kills people in the course of performing the contract or as a result of defects in supplies after acceptance

Note to drafters: Related liability cap – none as third party claims for death, personal injury, disease or illness cannot be capped | * Unsafe work practices
* Unsafe contractor premises
* Lack of technical expertise in performing the work, leading to defects in supplies
 | Cost  | Potential claims against the Commonwealth by contractor employees, Commonwealth employees or third parties. Estimated Maximum Probable Loss scenario is 10 people are killed as a result of an accident, estimated claims cost of $45m ($4.5m per person[[1]](#footnote-1)). Legal fees and other Commonwealth management overheads, estimated cost of $3m. | * Contract contains indemnities from the contractor in respect of Commonwealth and contractor employees and third party death or personal injury.
* Liability is uncapped.
* Contract requires contractor to have insurance.
* Contractor required to be appropriately licensed and comply with WHS requirements.
* Contract includes obligations to comply with safety procedures while on Commonwealth property.
* Tender allows evaluation of proposed system safety plan.
 | Rare  | Moderate  | Low  |
| 1. The contractor loses or damages supplies owned by the Commonwealth in the course of performing the contract

Notes to drafters: Related liability cap – loss of or damage to supplies. Loss of use of supplies is not to be captured here as that risk is captured above under Risk 2. | * Unsafe work practices
* Inadequate or unsafe contractor storage facilities
* Inadequate or unsafe contractor transport practices
* Lack of technical expertise in performing the work
* Accidents etc. and natural disasters
 | Cost | Cost for loss of or damage to supplies owned by the Commonwealth (other than loss of use of the supplies)estimated at Maximum Probable Loss of half the total number of supplies ($50m).  | * Tender allows for evaluation of skills and experience of the key personnel.
* Contract requires contractor to have insurance.
* Contractor has appropriate systems to minimise accidental loss and damage, theft, fire etc.
* Contractor has risk of supplies prior to delivery and after delivery if contractor retakes possession.
* Contractor liable for loss or damage caused by defects during defect rectification period or caused by contractor default after defect rectification period.
 | Unlikely  | Major  | Medium  |
| 1. The contractor loses or damages Defence property (other than supplies) in the course of performing the contract

Note to drafters: Related liability cap – loss of or damage to Defence property (other than supplies) | * Unsafe work practices
* Lack of technical expertise in performing the work
* Inadequate or unsafe contractor storage facilities
* Inadequate or unsafe contractor transport practices
* Accidents etc. and natural disasters
 | Cost | Cost for loss of or damage to Defence property (other than supplies) estimated at Maximum Probable Loss of $75m. | * Tender allows for evaluation of skills and experience of the key personnel.
* Contract requires contractor to have insurance.
* Contractor has appropriate systems to minimise accidental loss and damage, theft, fire etc.
* Contractor has risk of Defence property while in its possession and an obligation to take reasonable care of Defence property otherwise.
* Contractor liable for loss or damage to Defence property caused by defective supplies during defect rectification period or by contractor default after defect rectification period.
* Contractor has obligations to keep GFF in good repair.
 | Unlikely  | Major  | Medium  |
| 1. The contractor damages the property of a third party or Commonwealth property (other than Defence property) in the course of performing the contract

Note to drafters: Related liability cap – none as third party property claims and the loss of or damage to non-Defence Commonwealth Property cannot be capped | * Unsafe work practices
* Lack of technical expertise in performing the work
* Inadequate or unsafe contractor storage facilities
* Inadequate or unsafe contractor transport practices
* Accidents etc. and natural disasters
 | Cost  | Cost for loss of or damage to third party or Commonwealth property (other than Defence property) estimated at Maximum Probable Loss of $25m. | * Tender allows for evaluation of skills and experience of the key personnel.
* Contract contains an indemnity from the contractor in respect of third party property damage.
* Contractor liable for damage to Commonwealth property caused by defective supplies during defect rectification period or by contractor default after defect rectification period.
* Contract requires contractor to have insurance.
* Liability is uncapped.
 | Rare  | Moderate  | Low  |
| 1. The contractor causes a third party to suffer pure economic loss in the course of performing the contract

Note to drafters: Related liability cap – losses suffered by the Commonwealth other than those referred to in the other liability caps | * Unsafe work practices
* Lack of technical expertise in performing the work
 | Cost  | The Commonwealth may be liable to pay the third party for pure economic loss the third party suffers.Cost for pure economic loss to third party estimated at Maximum Probable Loss of $30m (as a result of severing an underground power cable to an industrial area). | * Tender allows for evaluation of skills and experience of the key personnel.
* Contract contains an indemnity in respect of third party claims. Losses referred to in the indemnity includes economic loss, however, pure economic loss is not excluded from the liability caps and therefore can be capped.
* Contract requires contractor to have insurance.
 | Unlikely | Moderate | Medium |
| 1. The contractor fails to comply with intellectual property rights, confidentiality, Defence security or privacy obligations under the contract resulting in damage to the Commonwealth or a third party

Note to drafters: Related liability cap – none as IP, confidentiality, Defence security and privacy cannot be capped | * Failure to secure IP rights
* Failure to secure confidential information
* Failure to protect personal information
* Failure to meet security obligations
 | Cost  | IP* Commonwealth loss as a result of a third party claim. Estimated loss $10m including damages, cost of defending claim and securing alternate IP rights.

Confidentiality* Commonwealth loss as a result of a third party claim. Given nature of likely confidential information, estimated loss $5m.

Defence security* Commonwealth expends amounts to investigate and address loss of classified information at a cost of $35,000.

Privacy* Commonwealth expends amounts to investigate, address and defend claims in respect of breach of Australian Privacy Principles at a cost of $100,000.
 | * Tender evaluation will consider source of IP rights.
* Contract contains an indemnity in respect of third party claims for IP infringement and breach of confidence.
* Contract contains an indemnity for third party claims which includes breach of privacy.
* Contract contains obligations to comply with privacy law and Commonwealth security requirements.
* Liability is uncapped.
 | Unlikely  | Minor  | Low  |
| 1. [INSERT PROJECT SPECIFIC RISKS]
 |  |  |  |  |  |  |  |

Table 2 – Proposed Liability Caps

Note to drafters: The Proposed Liability Caps in this Table 2 should assess the risks from the Contract Liability Risk Log in Table 1 that are relevant to the ASDEFCON liability caps. In performing this assessment, drafters should consider the Maximum Probable Loss that could be suffered under any one cap for the life of the proposed contract. Liability for risks which are identified in Table 1 but not included in Table 2 (being liability risks 4, 7 and 9) cannot be capped. Further guidance on what can and cannot be capped can be found in the ASDEFCON Liability Handbook.

The following describes the purpose of each column in Table 2:

Liability Cap: This column sets out the different types of liability cap in the contract. This template adopts the three separate aggregate liability caps from the ASDEFCON Strategic Materiel V3.1 template. There is also an option of including an overall aggregate liability cap.

Assessment: The purpose of this column is to set out the financial impact assessment of liability for each type of loss covered by the liability cap. Drafters should group the relevant Maximum Probable Loss(es) from Table 1, calculate the total cumulative Maximum Probable Loss where there is more than one type of loss and then state whether they propose a liability cap that is equal to or less than the total cumulative Maximum Probable Loss and why that amount is appropriate.

Maximum Probable Loss: This column sets out the total cumulative Maximum Probable Loss for the liability cap derived from the Assessment column.

Proposed Liability Cap: This column should set out the dollar amount that is proposed to be included in the Details Schedule of the contract for each liability cap. Liability caps provide certainty to contractors regarding their assumption of risk and have a direct influence on overall value for money. As a starting proposition, the liability cap should be equal to or less than the Maximum Probable Loss. To avoid contracts becoming unaffordable, drafters should consider whether it is appropriate to include a lesser amount (e.g. by taking into account the potential likelihood of all the cumulative risk events occurring) and whether it is value for money to seek to recover the full loss of delay or loss of use of supplies.

As a general position, an overall liability cap should be no less than the sum of the individual liability caps, as otherwise the Commonwealth may not be able to recover from the Contractor the full amount under each of the individual caps.

Likelihood of exceeding proposed cap: Each proposed cap is given a rating for the Likelihood of it being exceeded. Given the Commonwealth will bear the financial risk above the cap once a liability cap is reached, this likelihood assessment is a final check that the Proposed Liability Cap is appropriate. Having regard to the Maximum Probable Loss, if the likelihood of exceeding the Proposed Liability Cap is greater than unlikely, then potentially the Proposed Liability Cap is too low.

| **Liability Cap** | **Assessment** | **Maximum Probable Loss** | **Proposed Liability Cap** | **Likelihood of exceeding proposed cap**  |
| --- | --- | --- | --- | --- |
| Loss of or damage to Defence property (other than supplies)  | As assessed at liability **risk 6** in Table 1 above, the Maximum Probable Loss is assessed as $75m.The project proposes a liability cap that is equal to the Maximum Probable Loss.  | $75m | $75m | Rare |
| Liquidated damages | As assessed at liability **risk 3** in Table 1 above, the Maximum Probable Loss is assessed as $7.3m in total for a 26 week delay.The project proposes a liability cap that is equal to the Maximum Probable Loss as this is the maximum delay the project will accept. | $7.3m | $7.3m | Rare |
| Loss of or damage to supplies (including loss of use of supplies) and losses suffered by the Commonwealth other than those referred to in the above two liability caps | The Maximum Probable Loss for loss of or damage to supplies (including loss of use of supplies) includes:* costs associated with the loss of or damage to supplies, as assessed at liability **risk 5** in Table 1 above, $50m; and
* costs associated with loss of use of supplies, as assessed in liability **risk 2** in Table 1 above, $19.3m.

In addition to this amount, the Maximum Probable Loss for all other losses suffered by the Commonwealth other than those referred to in the above two liability caps includes: * costs associated with the contractor failing to complete the contract, as assessed at liability **risk 1** in Table 1 above, $30m;
* costs associated with the contractor causing pure economic loss to a third party, as assessed at liability **risk 8** in Table 1 above, $30m; and
* costs associated with [insert other project specific risks] as assessed at liability **risk** **10** in Table 1 above, $Xm.

The total cumulative Maximum Probable Loss is $129.3m. The project proposes a liability cap that is lower than the total cumulative Maximum Probable Loss as the likelihood of realising all these Maximum Probable Losses is unlikely. However, it is possible that loss or damage to half the supplies could lead to a failure to complete the contract. Hence the cumulative total of the costs associated with the loss of or damage to supplies and the contractor failing to complete the contract has been used as the Proposed Liability Cap ($50m + $30m = $80m) and costs associated with loss of use of supplies and the contractor causing pure economic loss to a third party have been excluded from the calculation of the Proposed Liability Cap. Note to drafters: Although the Maximum Probable Loss for loss of use of supplies and pure economic loss have not been included in the calculation for setting this liability cap, these losses are nonetheless covered by this cap in the event these risks occur. | $129.3m | $80m | Unlikely |
| OPTIONALThe maximum amount that the contractor is liable to pay as compensation or damages under the contract (including at general law, in negligence or in equity) in respect of loss suffered by the Commonwealth of any kind | The project has included the optional aggregate liability cap in the liability caps clause. The cumulative total for the above liability caps is $162.3m.  | $211.6m | $162.3m | Rare |

Table 3 – Proposed Insurance Types and Limits

Note to drafters: The Proposed Insurance Types and Limits at Table 3 covers the types of insurance policies contained in the ASDEFCON insurance clause and the losses each policy insures against. Drafters should select the insurance policies relevant to their contract and detail the loss scenario relevant to determining the Maximum Probable Loss under the policy. Additional project specific insurances may be included for losses not covered by the ASDEFCON insurance policy options. Drafters only need to look at contractor insurances under the contract and not Commonwealth insurances (i.e. Comcover) except in exceptional circumstances (i.e. lease of ships) where special arrangements may be made.

Drafters should note that when determining insurance limits, they ensure that the loss scenarios are realistic so that the Commonwealth does not pay for more insurance than is necessary.

The standard liability risks in the Contract Liability Risk Log in Table 1 do not easily translate into completing Table 3 because liability risks may have multiple insurances identified as being required to cover it. For example, liability risk 4 may be covered by nine insurance types. This is because insurance policies are structured to cover different industries and types of activities, different components of loss or damage suffered and different parties. The fact that a liability risk is covered by one insurance type does not mean that another identified insurance type is not required. Drafters should have regard to the ASDEFCON Insurance Handbook, which fully describes the differences in the types of insurances and why multiple insurance types for the same liability risk are required.

Guidance on the ASDEFCON insurance clause can be found in the [ASDEFCON Insurance Handbook](https://objective/id%3AAB23626233) and the insurance case studies found on the [ACIP Initiative webpage](http://drnet.defence.gov.au/DMO/PP/ASDEFCONandContracting/ACIPInitiative/pages/ACIP%20Initiative.aspx).

| **Insurance Types** | **Assessment** | **Maximum Probable Loss** | **Proposed insurance limit** |
| --- | --- | --- | --- |
| Workers compensation OR workers compensation where work will be performed outside of Australia | To insure the contractor against liability for bodily injury, disease, illness or death of the contractor's employees and officers.  | No insurance limit required to be specified | No insurance limit required to be specified |
| Public and products liability OR public liabilityNote to drafters: Liability risks 2, 3, 4, 5, 6 and 7 may be relevant | To insure the contractor against liability to third parties (including the Commonwealth) for loss, damage or loss of use of tangible property (other than contractor property) or bodily injury, disease, illness or death of any person (other than contractor employees and officers) as a result of the contractor’s operations or activities or the manufacture, processing, alteration, repair, installation, supply, distribution or sale of products.This insurance excludes liabilities covered by other liability insurance policies such as aviation liability, hangarkeepers, marine liability, ship builder's liability, ship repairer's liability, motor vehicle and professional indemnity.The Maximum Probable Loss would be **[drafter to detail loss scenario]**.The project proposes an insurance amount that is **[equal to/higher than/lower than]** the Maximum Probable Loss as **[drafter to justify proposed insurance amount]**. The sublimit for loss or damage to GFF, GFE and any other Commonwealth property in the care, custody or control of the Contractor or its Subcontractors is based on **[drafter to detail]**.  | $Xm  | $Xm for public liability $Xm for product liability $Xm sublimit for Commonwealth Property |
| Professional indemnityNote to drafters: Liability risks 1, 2, 3, 4, 5, 6, 7, 8 and 9 may be relevant | To insure the contractor against economic loss as a result of the contractor’s negligent performance of professional services (including project management, design, engineering, training). Economic loss includes loss, damage or loss of use of tangible property (other than contractor property) or bodily injury, disease, illness or death of any person (other than contractor employees and officers) and pure economic loss (including unintentional breaches of intellectual property and trade practices laws, and software and IT risks). The Maximum Probable Loss would be **[drafter to detail loss scenario]**.The project proposes an insurance amount that is **[equal to/higher than/lower than]** the Maximum Probable Loss as **[drafter to justify proposed insurance amount]**.  | $Xm | $Xm |
| Property OR industrial special risks | To insure the contractor against loss of or damage to tangible property owned by the contractor (including property for which the contractor is responsible to insure).The industrial special risks business interruption insurance period that will be required by the contract is **[XX]** weeks based on **[drafter to justify proposed weeks required to resume normal business]**.  | No insurance limit required to be specified  | No insurance limit required to be specified  |
| Transit | To insure the contractor against loss or damage to tangible property owned by the contractor (including property for which the contractor is responsible to insure) in transit or storage during transit.  | No insurance limit required to be specified | No insurance limit required to be specified |
| Motor vehicleNote to drafters: Liability risks 4, 5, 6 and 7 may be relevant | To insure the contractor against loss or damage to tangible property (other than contractor property) or bodily injury, disease, illness or death of any person (other than contractor employees and officers) as a result of the contractor’s use or ownership of registered and unregistered motor vehicles.The Maximum Probable Loss would be **[drafter to detail loss scenario]**.The project proposes an insurance amount that is **[equal to/higher than/lower than]** the Maximum Probable Loss as **[drafter to justify proposed insurance amount]**.  | $Xm | $Xm |
| Aircraft hull | To insure the contractor against loss of or damage to an aircraft owned by the contractor (including aircraft for which the contractor is responsible to insure) to be used in the performance of the work under the contract.  | No insurance limit required to be specified | No insurance limit required to be specified |
| Aviation liabilityNote to drafters: Liability risks 4, 5, 6 and 7 may be relevant | To insure the contractor against loss, damage or loss of use of tangible property (other than contractor property) or bodily injury, disease, illness or death of any person (other than contractor employees and officers) as a result of the contractor’s use or ownership of an aircraft or supply of aircraft or aviation products.The Maximum Probable Loss would be **[drafter to detail loss scenario]**.The project proposes an insurance amount that is **[equal to/higher than/lower than]** the Maximum Probable Loss as **[drafter to justify proposed insurance amount]**. The sublimit for loss of or damage to GFF, GFE and any other Commonwealth property in the care, custody or control of the Contractor or its Subcontractors is based on **[drafter to detail]**.  | $Xm | $Xm for aviation liability$Xm sublimit for Commonwealth Property |
| HangarkeepersNote to drafters: Liability risks 4, 5, 6 and 7 may be relevant | To insure the contractor against loss or damage to tangible property (other than contractor property) or bodily injury, disease, illness or death of any person (other than contractor employees and officers) as a result of the contractor’s occupation, use or ownership of any hangar, runways or related infrastructure and facilities.The Maximum Probable Loss would be **[drafter to detail loss scenario]**.The project proposes an insurance amount that is **[equal to/higher than/lower than]** the Maximum Probable Loss as **[drafter to justify proposed insurance amount]**.  | $Xm | $Xm |
| Marine hull | To insure the contractor against loss of or damage to a marine vessel owned by the contractor (including vessels for which the contractor is responsible to insure) to be used in the performance of the work under the contract.  | No insurance limit required to be specified | No insurance limit required to be specified |
| Marine liabilityNote to drafters: Liability risks 4, 5, 6 and 7 may be relevant | To insure the contractor against loss, damage or loss of use of tangible property (other than contractor property) or bodily injury, disease, illness or death of any person (other than contractor employees and officers) as a result of the contractor’s use or ownership of a marine vessel.The Maximum Probable Loss would be **[drafter to detail loss scenario]**.The project proposes an insurance amount that is **[equal to/higher than/lower than]** the Maximum Probable Loss as **[drafter to justify proposed insurance amount]**. The sublimit for loss of or damage to GFF, GFE and any other Commonwealth property in the care, custody or control of the Contractor or its Subcontractors is based on **[drafter to detail]**.  | $Xm | $Xm for marine liability$Xm sublimit for Commonwealth Property |
| Ship builder's Note to drafters: Liability risks 4, 5, 6 and 7 may be relevant | To insure the contractor against loss of or damage to the hull under construction (and the plant, equipment and facilities used in the construction). No insurance limit is required for this property component of the ship builders insurance policy.To insure the contractor against loss, damage or loss of use of tangible property (other than contractor property) or bodily injury, disease, illness or death of any person (other than contractor employees and officers) as a result of the contractor’s ship building activities.The Maximum Probable Loss would be **[drafter to detail loss scenario]**.The project proposes an insurance amount that is **[equal to/higher than/lower than]** the Maximum Probable Loss as **[drafter to justify proposed insurance amount]**.  | $Xm | $Xm |
| Ship repairer's liabilityNote to drafters: Liability risks 4, 5, 6 and 7 may be relevant | To insure the contractor against its liability for loss of or damage to tangible property (other than contractor property) or bodily injury, disease, illness or death of any person (other than contractor employees and officers) as a result of the contractor’s ship repair or maintenance activities.The Maximum Probable Loss would be **[drafter to detail loss scenario]**.The project proposes an insurance amount that is **[equal to/higher than/lower than]** the Maximum Probable Loss as **[drafter to justify proposed insurance amount]**.The sublimit for loss of or damage to GFF, GFE and any other Commonwealth property in the care, custody or control of the Contractor or its Subcontractors is based on **[drafter to detail]**.  | $Xm | $Xm for ship repairer’s liability$Xm sublimit for Commonwealth Property |
| Contract works OR contract works with advanced consequential loss | To insure the contractor against loss of or damage to buildings under construction, and plant and equipment and any other property on site or in transit to and from the site. The advanced consequential loss insurance period that will be required by the contract is **[XX]** weeks based on **[drafter to justify proposed weeks required to cover delay in completing the works]**. | No insurance limit required to be specified | No insurance limit required to be specified |
| [Project specific insurances] | To insure the contractor against the consequences of liability **risk 10** in Table 1 above.The Maximum Probable Loss would be **[drafter to detail loss scenario]**.The project proposes an insurance amount that is **[equal to/higher than/lower than]** the Maximum Probable Loss as **[drafter to justify proposed insurance amount]**.  | $Xm | $Xm |

ASSESSMENT RECORD SHEET

|  |  |  |  |
| --- | --- | --- | --- |
| **Date** | **Version** | **Author** | **Major Change Summary** |
|  | Acquisition Strategy |  |  |
|  | Endorsement to Proceed |  |  |
|  | Contract Negotiation Directive |  |  |
|  | Section 23 |  |  |
|  | Contract Change Proposal |  |  |

**Annex A - Overview of Liability Risk Assessment Process**

The LRA should be undertaken using this document with the outcomes recorded in a Contract Liability Risk Log (in the form of Table 1) and Proposed Liability Caps (in the form of Table 2). Defence officials should also refer to the Project Risk Management Manual (“PRMM”) - DMM (PROJ) 11-0-002 which sets out the process for undertaking risk assessments in relation to project risks more generally. The principles outlined in the PRMM should be applied to liability-related risks in undertaking the LRA as contemplated under this document.

The following diagram sets out the key steps to be undertaken as part of the LRA and recorded in the Contract Liability Risk Log.



Further detail on each step is set out below:

* **Step 1 – Establish the context**: The context for the proposed contract should be considered and recorded in the Contract Liability Risk Log. This should take into account the objectives of the contract, the nature of the goods or services to be provided under the contract and any internal or external stakeholders impacted by the contract or risks that may arise in relation to the contract.
* **Step 2 – Identify the risks:** The Contract Liability Risk Log should identify all the liability-related risks relating to the proposed contract. This may involve the use of historical data, theoretical analysis, empirical data and analysis, informed opinions of experts and the concerns of stakeholders. The Project Risk Register may also be a useful source of information for identifying liability-related risks. A common method to identify relevant risks is to conduct a workshop using personnel with different areas of expertise involved in the procurement. In order to facilitate and streamline the LRA process, Table 1 identifies nine standard liability risks that apply to all Defence contracts.
* **Step 3 – Categorise each risk:** Each risk should be categorised to assist in the assessment of the risk and consideration of treatments and liability caps. Most risks will fall into one or more of the following categories:
	+ **Safety**: The risk could cause injury or death to persons.
	+ **Performance**: The risk could affect the performance of the supplies.
	+ **Supportability**: The risk could affect whether the supplies are supportable.
	+ **Reputation**: The reputation of Defence could be negatively affected if the risk eventuates.
	+ **Schedule**: The risk could cause a delay in the schedule for delivery of the supplies.
	+ **Cost**: The risk could cause the total actual contract costs, taking into account liabilities incurred by the Commonwealth, to exceed the currently approved cost.
	+ **Environment**: The risk could cause damage to the environment if it occurs.
	+ **Compliance**: The risk could cause a breach of procedures, guidelines, Defence policies, licences, regulations, legislation, or regulatory intervention or prosecution.
	+ **Security**: The risk could cause a security incident that impacts on classified or sensitive information, equipment, strategy or tactics, capability and functionality or on Australia's national security, interests, economy, stability, integrity or international relations.

The nine standard liability risks identified in Table 1 are described at a high level and are intended to focus on the ultimate liability impacts on Schedule, Cost and Performance.

* **Step 4 – Consider the impact of the risk:** Theimpact of each risk should be considered, including the financial impact of each risk for the Commonwealth. The impact of the risk is not affected by the likelihood of the risk occurring. The estimated financial impact to the Commonwealth of a risk event occurring (after taking into account any risk treatments that mitigate the consequences of a risk) is known as the Maximum Probable Loss. The Maximum Probable Loss should be used when considering the proposed liability caps under Table 2 and insurance limits under Table 3.
* **Step 5 –** **Determine likelihood of each risk occurring:** Each risk should be given a rating for likelihood, being the probability of the risk event occurring. The following likelihood ratings should be used:

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| --- | --- |
| **Almost Certain** | 90 - 99% likelihood of event occurring. |
| **Likely** | 70 - 89% likelihood of event occurring. |
| **Possible** | 30 – 69% likelihood of event occurring. |
| **Unlikely** | 10 - 29% likelihood of event occurring. |
| **Rare** | 1 - 9% likelihood of event occurring. |

These ratings have a different meaning in a technical context, and technical guidance is not to be used for the purposes of Table 1. Where available data exists, drafters can use quantitative scales. However, in many cases the likely extent of damage or costs or statistical data on the rate of occurrence is not available. In these circumstances drafters need to make the best educated qualitative judgment that they can.

* **Step 6 - Assess the consequences for each risk:** The consequences ofeach identified risk should be assessed. The consequence is the severity of the impact if the risk event occurs, and is measured in terms of Maximum Probable Impact. The following consequence ratings should be used:

|  |
| --- |
| Severe |
| Major |
| Moderate |
| Minor |
| Insignificant |

The PRMM provides specific guidance against these ratings for each of the categories of risk. Where available data exists, drafters can use quantitative scales. However, in many cases the likely extent of damage or costs or statistical data on the rate of occurrence is not available. In these circumstances drafters need to make the best educated qualitative judgment that they can. Realistic worst case consequences should be used.

* **Step 7: Determine a risk rating for each risk:** A single risk rating should be calculated for each risk by assessing the likelihood and consequence of that risk. The rating is used to allocate a priority to each risk and identify the risks that can be accepted and those that must be managed. The risk level ratings and descriptions of those ratings are:

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| --- | --- |
| **Extreme** | The impact of this risk occurring would be so severe that the related activity would need to cease immediately. Extreme risks need immediate mitigation strategies to be implemented. Risk must be treated unless it is not cost effective to do so. |
| **High** | This type of risk cannot be accepted. Treatment strategies aimed at reducing the risk level should be developed and implemented as soon as possible. Risk must be treated unless it is not cost effective to do so. |
| **Medium** | This level of risk can be accepted if there are no treatment strategies that can be easily and economically implemented. The risk must be regularly monitored to ensure that any change in circumstances is detected and acted upon appropriately. |
| **Low** | This level of risk can be accepted if there are no treatment strategies that can be easily and economically implemented. The risk must be periodically monitored, however, to ensure that any change in circumstances is detected and acted upon appropriately.  |

The risk level ratings are determined in accordance with the following matrix:



Once the risks have been analysed, they can be evaluated against each other to determine the priority of treatment. The criteria used will depend on the procurement, but generally speaking higher risks are treated before lower risks. Some risks will need to be priorities in all circumstances, for example safety risks and compliance with government legislation. For further guidance on risk analysis, refer to Chapter 3.5 of the PRMM.

* **Step 8: Identify risk controls and treatments**: The last step in the process is to identify an appropriate treatment or controls for each risk. This involves planning for how each identified risk will be handled. Some risks may not need to be treated as the likelihood of occurrence is so improbable or the cost of treating the risk outweighs the probable consequence of the risk. Other risks may require immediate treatment, particularly safety risks or the risk of non-compliance with legislation. Yet other risks may not be treatable by Defence, but a contractor may be able to provide an effective treatment. To select an appropriate risk treatment, Defence personnel should:
* identify risk treatment options;
* estimate the effect of treatment on the assessed likelihood and consequence;
* estimate the residual risk exposure;
* appraise the cost-effectiveness; and
* select the preferred treatment option.
1. [Best Practice Regulation Guidance Note: Value of statistical life, December 2014](https://www.pmc.gov.au/resource-centre/regulation/best-practice-regulation-guidance-note-value-statistical-life), adjusted to June 2018 CPI. [↑](#footnote-ref-1)