



**Australian Government**  
**Department of Defence**

**ASDEFCON – INSURANCE CASE STUDIES**

**CASE STUDY #12**

**SOFTWARE DEVELOPMENT SERVICES 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](mailto:ACIP.ManagementTeam@defence.gov.au).

**FICTIONAL CONTRACT**

The contract is for the development of a new database to hold and manage Defence health information.

The contractor is being engaged to build a new information management system which will allow Australian Defence Force (ADF) personnel to store and update their health details. The proposed information to be stored includes the ADF member's personal details, next of kin information, vaccination records and other medical history relevant to Defence.

The database is to be managed by Defence People Group (DPG) and will be accessible by authorised DPG and ADF personnel. To enable its development, Defence has provided the Contractor with sensitive personal data of ADF personnel. The contractor will not be working on Defence premises but the network on which they will be working has been security accredited. The Contractor will not provide any hardware. The contract has a strict development timeline of six months.

## **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** is only required if the Contractor's workers will work at Defence premises or Defence personnel will work at the Contractor's premises. 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, if required, 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. 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 database development services will involve the provision of professional services and advice by the contractor. If, for example, the contractor provides negligent advice or the software fails to perform as expected, 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 this scenario, drafters should select:

- b. software and IT risks – the contract is for the provision of software and IT services by the contractor and thus this extension is relevant;
- c. unintentional breaches of intellectual property rights - allegations could be made that the software infringes third party patents or copyright;
- 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); and
- g. worldwide territorial and jurisdictional limits - this extension is usually relevant when b. (software and IT risks) and c. (intellectual property rights) are selected as software events and allegations of breaches of intellectual property rights could happen anywhere in the world. Drafters will need to make a judgement call as to whether this extension is relevant in this particular contract. The risk of allegations of breach of a third party's intellectual property rights happening outside of Australia and claims being brought outside of Australia may be considered remote, and the confidential nature of the software minimises the likelihood that third parties outside of Australia will be aware of any potential breaches. On that basis it may be commercially acceptable not to require

worldwide territorial and jurisdictional limits.

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 Liability Risk Assessment (LRA) should be consulted to ascertain the risks associated with the training services.

As this policy is written on a claims made basis, the contractor should maintain it for a period of up to 3/5/7 years after the performance of the contract to allow for claims to arise and be brought.

- (d) **Cyber insurance** should be required. Cyber insurance covers losses suffered and liabilities incurred by the contractor arising from cyber incidents.

Cyber insurance is required where the compromise of information held by the contractor could cause serious damage to national security, the Australian Government, nationally important economic and commercial interests, threaten life, or impede the Contractor completing a time sensitive contract. The data required for the performance of this contract is sensitive personal information and its compromise could reveal the location of ADF members or put their family members at risk. Accordingly, cyber insurance is appropriate in this scenario.

In using the cyber insurance clause, drafters will need to determine whether the non-physical business interruption optional extension is appropriate. Considering the tight contract deadline and the contractor being heavily reliant on properly functioning computer systems, coverage for non-physical business interruptions would be appropriate in this scenario.

In some cases, contractors may cover cyber liability risks under their general professional indemnity policy. Subject to the limit of cover being adequate, this is acceptable.

**Other relevant issues:** Given that some insurances are required to be maintained for a period after the end of the contract and insurance obligations under all policies can continue after the end of the contract (for example, obligations in relation to claims), the insurance clauses should survive the termination or expiry of the contract.

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