

# **ASDEFCON Handbook**

**(Shortform Goods)**

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## ASDEFCON (Shortform Goods) Handbook

### 1 When should you use *ASDEFCON (Shortform Goods)*?

*ASDEFCON (Shortform Goods)* is based on Form SP020. Form SP020 contains the standard terms and conditions under which simple procurement is normally conducted by Defence. *ASDEFCON (Shortform Goods)* contains the same standard terms and conditions as Form SP020 with the exception that *ASDEFCON (Shortform Goods)* includes a clause limiting the liability of the Supplier (clause 23). The inclusion of the limitation of liability clause in *ASDEFCON (Shortform Goods)* means any procurement which uses *ASDEFCON (Shortform Goods)* **will be a complex procurement**.

*ASDEFCON (Shortform Goods)* has been drafted in a manner that makes it suitable for a wide range of procurements which, **but for the inclusion of a limitation of liability clause**, would otherwise be classed as simple procurements. However, it will not be suitable for all kinds of procurement and procurement officers are required to assess whether the *ASDEFCON (Shortform Goods)* meets all the requirements of their particular procurement activity.

*ASDEFCON (Shortform Goods)* is suitable for the procurement of:

- **Goods** - commercially available goods comprising equipment, spares, materials, consumables, etc; and/or
- **Repair Services** - being low risk services for the repair of existing Defence equipment, spares, materials, etc. *ASDEFCON (Shortform Goods)* is also suitable where the Supplier supplies Goods which are incidental to the Repair Services, e.g. the replacement of damaged parts.

*ASDEFCON (Shortform Goods)* should only be used where, after undertaking a risk assessment, it is determined that limiting the Supplier's liability is appropriate, and what limits may be suitable. As the principles underpinning the wording of clause 23 have been agreed by Defence and Industry (after an extensive consultation process), clause 23 should not form the subject of negotiations with the Supplier (other than for the insertion of the agreed liability cap). This clause should be amended only in exceptional circumstances and any proposed amendment must be cleared by DMO Legal before the Contract is entered into by the parties.

Simple procurement is a procurement category where the overall level of risk and complexity of the procurement is assessed as being low. Refer to the *Defence Procurement Policy Manual* chapter on simple procurement for further guidance on determining whether a procurement is a simple one.

*ASDEFCON (Shortform Goods)* must **not** be used for procurements which are complex or strategic procurements for any reason other than the inclusion of the limitation of liability clause. Procurements for which the overall level of risk and complexity is assessed as medium or high are at least complex procurements.

Set out below are **some** examples of factors which will result in the level of risk for a procurement being assessed as medium or high:

- procurements which involve design, development or integration work;
- procurements which require detailed planning documentation or the development of a statement of work or other specifications;
- procurements which do not involve the purchase of commercially available off the shelf (COTS) goods or repair services;
- procurements which involve certain hazardous substances. The Occupational Health and Safety Regulations list a number of hazardous substances which are prohibited from use and must not be used in any circumstances unless exempted by the Safety, Rehabilitation and Compensation Commission. Where a procurement potentially involves hazardous materials, procurement officers must refer to the Defence Safety Manual 'SAFETYMAN'. Subject to the foregoing, *ASDEFCON (Shortform Goods)* may be used for the procurement of supplies containing less significant hazardous substances such as paint, certain gases, detergents or cleaning compounds provided that the overall level of risk and complexity of the procurement is assessed as being low;
- procurements which require substantial amendments to *ASDEFCON (Shortform Goods)* or which alter the risk allocation between the Commonwealth and the Supplier; and
- procurements which:
  - require the Commonwealth to obtain intellectual property rights from the Supplier;
  - require the payment of liquidated damages by the Supplier; or
  - involve the provision of Government Furnished Materials to the Supplier.

## 2 Requirements for Complex Procurement

Given that any procurement which uses *ASDEFCON (Shortform Goods)* will be a complex procurement due to the inclusion of a limitation of the Supplier's liability under the Contract, procurement officers will need to comply with the *Defence Procurement Policy Manual* in relation to limitation of liability and complex procurements including:

- ensure that procurement officers have appropriate delegations;
- determine that there is a compelling reason to limit the Supplier's liability;
- undertake a risk assessment in accordance with the [approved methodology](#) and, if appropriate, develop and implement a risk management plan;
- identify the potential costs to the Commonwealth as a result of agreeing to the limitation of liability and incorporate these in the value for money assessment; and

- consider whether FMAR Regulation 10 approval is required as a result of the duration of the Contract or any other potential Commonwealth liability arising under the Contract (e.g. clause 23 (Limitation of Liability)). Note, the template wording of clause 23 should not give rise to a contingent liability for the purposes of FMAR 10. However, a change to the wording of this clause may result in a contingent liability for which FMAR 10 authorisation is required.

While any procurement using *ASDEFCON (Shortform Goods)* is a complex procurement, procurement officers with simple procurement competency may conduct and approve a procurement using *ASDEFCON (Shortform Goods)* in certain circumstances.

For example, the template may be used for Supplies that form part of a system (e.g. sonar system, radar system etc) where a risk assessment has previously been undertaken in relation to the entire system by a person with complex procurement competency and an appropriate Supplier liability cap has been determined based on that risk assessment. For subsequent orders in relation to Supplies that form part of that System, a procurement officer with a simple procurement competency is able to issue a contract using *ASDEFCON (Shortform Goods)* that contains the previously agreed limitation of liability.

Similarly, if a risk assessment has previously been undertaken in relation to Supplies by a person with a complex procurement competency and a limitation of liability regime agreed for inclusion in an *ASDEFCON (Shortform Goods)* contract, then a procurement officer with a simple procurement competency may use the template with the same limitation of liability for further orders of the same kind.

### 3 Structure of *ASDEFCON (Shortform Goods)*

*ASDEFCON (Shortform Goods)* comprises the following documents:

- **Purchase Order** - this document includes details of the Supplier, Goods being purchased, Contract Price, etc. The Purchase Order must be completed by the Commonwealth. An outline of the information to be included by the Commonwealth in the Purchase Order is detailed below;
- **General Conditions of Contract for the Supply of Goods and Repair Services (“Conditions of Contract”)** - the Conditions of Contract represent Defence’s standard terms and conditions for simple procurement; and
- **Special Conditions (Optional)** – in some circumstances Special Conditions may be attached to the Purchase Order and will, in accordance with clause 2 of the Conditions of Contract, take precedence over the Conditions of Contract (see paragraph 6, Using Special Conditions in *ASDEFCON (Shortform Goods)* below).

#### **4 Summary of key obligations in *ASDEFCON (Shortform Goods)***

This section provides an outline of the key obligations of the Commonwealth and the Supplier under *ASDEFCON (Shortform Goods)*.

##### **Commonwealth's Key Obligations**

The Commonwealth's key obligations under *ASDEFCON (Shortform Goods)* are to:

- notify the Supplier of its acceptance or rejection of the Supplies within 14 days after delivery of the Supplies to the Delivery Location. If the Commonwealth does not do so, the Commonwealth is taken to have accepted the Supplies (clause 8). Accordingly, procurement officers should ensure that the Supplies are inspected promptly following delivery in order to assess whether the Commonwealth should reject the Supplies. The Supplies may be rejected only if the Supplies do not comply with the requirements of the Contract (including any acceptance tests specified in the Special Conditions);
- deliver or arrange delivery of the Repairable Item (if applicable) to the Supplier; and
- pay the Contract Price in accordance with the requirements of the Contract (clause 10). This includes making payment to the Supplier within 30 days of receipt of a 'correctly rendered invoice'. An invoice is correctly rendered if it claims payment for Supplies that meet the requirements of the Contract and satisfies the other requirements of clause 11 of the Conditions of Contract.

##### **Supplier's Key Obligations**

The Supplier's key obligations under *ASDEFCON (Shortform Goods)* are to:

- deliver the Good(s) and/or repair and deliver the Repairable Item to the Delivery Location by the Delivery Date and in accordance with any special instructions for the delivery of the Supplies specified in the Purchase Order. The Supplier must promptly notify the Commonwealth if it becomes aware that it will be unable to comply with this obligation (clauses 1 and 5);
- keep the Repairable Item safe and secure and not use the Repairable Item for any purpose other than for the provision of the Repair Services. The Supplier must not part with possession or control of the Repairable Item except where specified in the Purchase Order or otherwise agreed by the Commonwealth (clause 7);
- comply with any Special Conditions attached to the Purchase Order (clause 3); and
- provide a 'correctly rendered invoice' for the Contract Price to the Commonwealth together with such supporting documentation and other evidence reasonably required by the Commonwealth (clause 11).

## **5 Key provisions in ASDEFCON (Shortform Goods)**

This section summarises key provisions in *ASDEFCON (Shortform Goods)*.

### **Price Basis**

The Contract Price is a firm price and is inclusive of all GST and all taxes, duties (including any customs duty) and government charges imposed or levied in Australia or overseas. The Contract Price includes the cost of any packaging, marking, handling, freight and delivery, insurance and any other applicable costs and charges (clause 12).

If a price adjustment is required due to exchange rate variations use of a Special Condition is required. Special Conditions take precedence over the Conditions of Contract.

### **Late Payment**

If the Supplier is a Small Business and the Contract Price is valued up to A\$1million, the Supplier is entitled to claim simple interest calculated in accordance with clause 10 in the event of late payment by the Commonwealth of a 'correctly rendered invoice'.

A Small Business is defined as being an enterprise that employs less than the full time equivalent of 20 persons on the day that the Contract is entered into. If the enterprise forms part of a group, this test is applied to the group as a whole.

### **Limitation of Liability**

As outlined above, the Supplier's liability under the Contract is limited (with a number of important 'carve outs' (clause 23(b)) to an agreed aggregate amount (clause 23). These 'carve outs' ensure the Supplier's liability for claims involving personal injury or death, loss of or damage to third party property, IP infringement, breach of confidentiality, security or privacy obligations, and fraudulent, dishonest, unlawful or illegal acts remains unlimited.

The relevant amount of the liability cap will need to be inserted by procurement officers in clause 23. This amount must be determined based on the outcome of a liability risk assessment conducted in accordance with the approved risk assessment methodology described in the paper entitled "[Liability Risk Management Process](#)" which is available from the Office of Special Counsel website. As mentioned in clause 2, for Supplies that form part of a wider system, a risk assessment may be conducted at the system level, rather than for the individual procurement.

The wording of clause 23 is based on a number of key principles that have been agreed by Defence and Industry following an extensive consultation process. This clause must not be amended except in exceptional circumstances. Any proposed amendments to the clause must be cleared by DMO Legal before the Contract is entered into by the parties. Further details

on the key principles underpinning the wording of clause 23 can be found in the paper [“Liability Risk Management Process”](#).

### **Title and Risk**

*ASDEFCON (Shortform Goods)* contains provisions dealing with the timing of transfer of title in the Goods to the Commonwealth and who bears the risk of loss of damage to the Supplies:

- the Repairable Items at all times remain the property of the Commonwealth (clause 7);
- title to the Goods transfers to the Commonwealth upon acceptance of the Goods by the Commonwealth (clause 9);
- the risk of any loss or damage to the Goods remains with the Supplier until their delivery at the Delivery Location following which the Commonwealth bears the risk of any loss or damage to the Goods (clause 9); and
- the Supplier bears the risk of any loss or damage to a Repairable Item from the date upon which the Repairable Item is delivered to the Supplier until delivery of the Repairable Item to the Commonwealth at the Delivery Location. The Commonwealth bears the risk of loss or damage to a Repairable Item at all other times (clause 9).

### **Intellectual Property**

The Supplier warrants that it has all intellectual property rights and moral rights necessary to provide the Supplies to the Commonwealth and to allow the Commonwealth to have the full benefit of the Supplies and that the provision of the Supplies in accordance with the Contract will not infringe any third party’s intellectual property or moral rights (clause 14). ***It should be noted that the Supplier does not transfer or grant a licence of intellectual property rights to the Commonwealth.*** *ASDEFCON (Shortform Goods)* is not suitable where the Commonwealth has identified a requirement for the grant of intellectual property rights in connection with the use of the Supplies.

### **Quality**

*ASDEFCON (Shortform Goods)* contains a number of requirements and warranties in relation to the quality of the Supplies:

- the Supplier warrants that the Goods are new, free from deficiencies in design, manufacture and workmanship and are fit for the purposes for which goods of a similar nature to the Goods are commonly supplied and for any other purposes notified by the Commonwealth to the Supplier (clause 13);
- the Supplier must provide the Repair Services to the satisfaction of the Contract Officer and in accordance with any requirements specified in the Purchase Order (clause 6); and
- the Supplier warrants that in providing the Repair Services, it will use workmanship of a standard consistent with best industry standards for

work of a similar nature to the provision of the Repair Services and which is fit for its intended purpose (clause 13).

### **Termination for Convenience**

The Commonwealth may at any time terminate the Contract or reduce the scope of the Contract by notifying the Supplier in writing. Following termination for convenience, the Commonwealth will be liable for payments to the Supplier for Supplies accepted before the date of termination and any reasonable costs incurred by the Supplier that are directly attributable to the termination (clause 17).

### **Hazardous Substances**

Generally, *ASDEFCON (Shortform Goods)* should not be used for Supplies containing hazardous substances and unless the Commonwealth otherwise agrees in writing, the Supplier warrants that the Supplies do not contain any hazardous substances as defined in Part 6 of the *Occupational Health and Safety (Safety Standards) Regulations 1994 (Cth)*. Where the Commonwealth agrees that the Supplies may contain hazardous substances, the Supplier must comply with the Hazardous Substance policy as detailed in the *Defence Procurement Policy Manual* (clause 27).

## **6 Using Special Conditions in ASDEFCON (Shortform Goods)**

Procurement officers may attach Special Conditions to the Purchase Order. Special Conditions often relate to matters such as specific packaging requirements, the shelf life of the goods being purchased or special delivery instructions. Special Conditions should only be included where the procurement warrants the inclusion of Special Conditions and the Special Conditions have been pre-approved by Procurement and Contracting Branch.

Care needs to be taken in attaching any Special Conditions to the Purchase Order in order to ensure that they are consistent with the Conditions of Contract or, where they are inconsistent, the inconsistency is intentional and fully understood. This is because the Special Conditions have priority over the Purchase Order and the Conditions of Contract to the extent of any inconsistency.

Before including any Special Conditions procurement officers should assess if the inclusion of the Special Condition changes the procurement from a simple procurement to a complex or strategic procurement, e.g. where the Special Conditions change the risk allocation under the Contract or alters the nature of the Commonwealth's obligations under the Contract.

## **7 Failure to provide the Supplies**

If the Supplier fails to deliver the Supplies in accordance with the terms of the Contract, the Commonwealth may:

- if the Supplies do not comply with the requirements of the Contract (including any acceptance tests specified in the Special Conditions), reject the Supplies within 14 days after delivery of the Supplies to the

Delivery Location in which case the Commonwealth may require the Supplier to provide replacement Supplies at the Supplier's cost or terminate the Contract (clauses 8 and 16);

- if the Supplies contain defects, require the Supplier to remedy any defects in the Supplies notified by the Commonwealth to the Supplier within the period of 90 days (or the manufacturer's standard warranty period (if longer)) following acceptance of the Supplies by the Commonwealth. The Supplier will be responsible for any costs of removing the Goods or the Repairable Item and delivering repaired or replacement Supplies or the Repairable Item to the Commonwealth together with any associated or incidental costs (clause 15). Accordingly, procurement officers should ensure that the Supplies are monitored for defects during this 90 day period. Any defects identified during this period should be promptly brought to the attention of the Supplier. If defects are identified in the Supplies after expiry of the 90 day period, there is scope to make a claim against the Supplier for breach of the warranties in relation to quality. Procurement officers should contact the Contracting Help Desk if you are considering making a claim for breach of warranty;
- if the Supplier does not, or notifies the Commonwealth that it will be unable to, deliver the Goods or the Repairable Item to the Delivery Location by the Delivery Date, terminate the Contract (clause 16);
- if the Supplier breaches the Contract and such breach is not capable of remedy, terminate the Contract (clause 16);
- if the Supplier fails to remedy a breach of the Contract which is capable of remedy within the period specified by the Commonwealth, terminate the Contract (clause 16); and
- if the Supplier becomes bankrupt or insolvent, terminate the Contract (clause 16).

## **8 Amendments to ASDEFCON (Shortform Goods)**

Amendments to clauses in the Conditions of Contract must not be made unless they are approved by a person with a complex procurement competency; and where they are proposed to be a standard Special Condition clause, approved by Procurement and Contracting Branch.

## **9 How to complete ASDEFCON (Shortform Goods)**

In order to complete *ASDEFCON (Shortform Goods)*, the following information **must** be included in the relevant sections of the Purchase Order:

- **Supplier** - details of the name and address of the supplier. Where the Supplier is a company, the full company name and Australian Company Number (ACN) should be included. Avoid using business names which may confuse the actual legal entity involved;
- **Item(s)** - details of the items requested, including the number of each type of Good and/or Repair Service and an item description;

- **Delivery Date** - the date for delivery of the Goods or the date by which the Repairable Item must be repaired and returned to Defence;
- **Delivery Location** - details of the location for delivery of the Goods or the Repairable Item to Defence;
- **Contract Officer** - details of the name, address, phone number and facsimile number of the Defence contact for the procurement; and
- **Contract Price** - details of the total contract price. This should include the GST exclusive price and the GST inclusive price. Note that the *ASDEFCON (Shortform Goods)* requires the agreement of the Contract Price upfront.

The Commonwealth **must** also complete clause 23 of the Conditions of Contract in relation to the limitation of the Supplier's liability by inserting the agreed amount of the Supplier's liability under the Contract.

## 10 Further Information

For further information please see the *Defence Procurement Policy Manual* (and its related *Departmental Procurement Policy Instructions*) or contact the Contracting Help Desk on 1800 100 605 or via [contracting@defence.gov.au](mailto:contracting@defence.gov.au).