



State Indemnity Guidance

SIG 03: Use of Contractors

a) Introduction

Delegated State Authorities (DSAs)¹ on occasion employ the services of contractors to carry out specialised work. A contractor is any person or organisation which signs a contract to do certain work for payment within a specified time. This State Indemnity Guidance (SIG) sets out risk management controls which should be considered when engaging contractors on both contracts *of* service and contracts *for* service. This SIG does not offer guidance on employment rights, term or conditions and should not be used for such purposes.

b) Types of contractors

Contractors may be engaged on a contract of service or a contract for service. The difference between a contract of service and a contract for service is set out below:

- **Contract of service:** The contractor is under the control and direction of the DSA e.g. agency nurses, temporary staff and contract IT staff. The DSA directs not only what to do but how to do it. The DSA owes a higher duty of care to these persons as they are controlling the activities. The DSA's duty of care is effectively the same as that owed to an employee and the DSA must ensure that safe systems of work are implemented knowing that it is also vicariously responsible for the contractor's negligent acts. The same risk management controls that a DSA implements for employees should also be applied to those on a contract of service e.g. inductions, training if required, risk assessments etc. There should also be a contract in place (through the agency or directly with the person) for these roles outlining the terms and conditions of their role e.g. work hours, duties and supervision.
- **Contract for service (external contractor):** These are independent contractors employed to undertake a particular job. The DSA tells them what to do but the contractor decides how to complete the job and hires out their services for a fee e.g. contractor hired to build an extension. The following risk management controls should be considered when engaging contractors on a contract for service:
 - Formal processes should be in place for the procurement of contractors to ensure that the contractors engaged are competent;
 - Contracts and formal agreements should be in place with the contractors setting out the roles and responsibilities of all involved and should also include insurance and indemnity clauses;
 - DSAs should have a control of contractor's policy in place setting out how the DSA and the contractor will engage to ensure the work is carried out safely;
 - Formal processes should be in place to ensure all necessary documentation is collected prior to the contract commencing e.g. contractor safety statement, method statements, risk assessments, copies/proof of insurance cover, tax clearance certificate etc.;
 - DSAs should also ensure that a formal risk assessment is conducted before a contractor commences work on the premises which shall identify any risks which may arise for the duration of the work. The necessary controls identified should be implemented e.g. area where the contractors are working is cordoned off so that employees cannot access the area while the works are being carried out. The risk assessment should be proportionate to the level of risk involved;
 - DSAs should provide contractors with an induction prior to the contract commencing to make them aware of the DSA's health and safety policy including

¹Delegated State Authority (DSA) - Refers to all bodies where management of personal injury and third-party property damage claims against the body is delegated to the SCA. This includes State Agencies, healthcare enterprises, community & comprehensive schools and prisons.

accident reporting and emergency procedures;

- Measures should be in place to ensure that contractors are checked regularly for the duration of the contract e.g. inspections, status update meetings etc.

c) Differentiating between a contract of service and a contract for service

It can be difficult to determine whether a contractor is on a contract of service or a contract for service. However, this is an important differentiation as the DSA's duty of care is far greater to those on a contract of service. There are some tests which can be used to determine whether a contractor is on a contract of service or a contract for service;

- **Level of control:** For a contract of service, the DSA have far greater control over the contractor and they direct and control the activities of the contractor e.g. Agency IT staff engaged to work under the control and direction of a DSA IT Manager on temporary contracts. The DSA IT Manager directs what to do and how to do it;
- **Business integration:** If the person is integrated as a key person of the DSA performing an integral role, this may be considered a contract of service even if they are not under the total control and direction of the DSA i.e. the employee is so skilled that they cannot be fully controlled. For example, if a hospital engages a professional to carry out surgical operations, the hospital does not control or direct how to carry out the surgical operations. However, the professional has been contracted to perform key services on behalf of the hospital so would therefore be considered to be on a contract of service. The hospital will be vicariously liable for the professional's negligent acts.

d) General indemnity and insurance

The General Indemnity Scheme (GIS)² indemnifies a DSA, its servants and / or agents, in respect of any claims for personal injury and/or third-party property damage, arising from the negligence of the

²**General Indemnity Scheme (GIS)** - Indemnity is a protection against possible damage or loss, typically a promise of payment should damage or losses occur. The GIS, as operated by SCA, is given to State authorities by the State, to compensate third parties or individuals for any losses that incur as a result of the activities of the State (or State body), where the State has been negligent by act or omission.

DSA, its servants and/or agents. Those on a contract of service are considered servants of a DSA and are therefore covered by this indemnity. This indemnity does not, however, extend to a third party's negligent act and therefore the DSA must ensure that contractors engaged on a contract for service have adequate insurance in place to cover liabilities associated with their negligence. Please refer to "Guidance on Indemnity and Insurance SCA-GD-01" for guidance on determining insurance requirements and checking insurance documentation.

e) Practical examples of a contract of service versus a contract for service

The examples below are for illustrative purposes only.

Example 1:

A hospital has engaged agency nurses, through a professional Agency, for eight weeks who will be working under the control and direction of the Hospital's Clinical Nurse Manager.

Both a **contract of service** and a **contract for service** relationship exist here. A **contract for service** relationship exists between the DSA and the Agency company. The DSA should ensure that the Agency have the necessary insurance cover in place to cover liabilities associated with their negligence. The Agency is responsible for ensuring that the staff they provide are competent to perform the services. The Agency company should have employer's liability, public liability and professional indemnity insurance in place. A formal agreement should also be in place between the DSA and the Agency company setting out the terms and conditions and the roles and responsibilities of all involved e.g. insurance and indemnity clauses, training requirements, working hours, vetting requirements etc.

A **contract of service** relationship also exists between the DSA and the Agency staff as the Clinical Nurse Manager is directing and controlling the Agency staff members. The duty of care owed to the Agency staff is effectively the same as if the Agency staff were DSA employees. The DSA should ensure that any risk controls in place for its staff, are also applied to the Agency company's staff.

Example 2:

A DSA has engaged an engineering contractor to carry out repair works to DSA premises. The contractor will control and direct the project themselves.

This contractor is on a **contract for service** as they are not working under the control and direction of the DSA. The DSA has hired the contractor to manage and perform the works and the contractor will decide how best to do this. The DSA should ensure that the contractor is competent and has employer's liability, public liability and professional indemnity insurance in place. A formal agreement should also be in place setting out the responsibilities of all involved. The DSA should conduct a risk assessment to identify any control measures which may be required e.g. cordon off areas, notifying DSA employees and other relevant persons that works are being carried out.

Example 3:

A DSA has engaged a cleaning contractor to carrying out cleaning of DSA offices on a daily basis. The contractor will control and direct the cleaning activities themselves and will not be directed by the DSA on how to conduct the cleaning activities.

This contract is a **contract for service** as the contractor is controlling and directing the work activities themselves. Unlike example 1, the contractor is not directed and controlled by the DSA. The DSA tells them what to do but the contractor decides how to complete the job and it controls and trains its own staff. The risk management controls listed in example 2 are also relevant to this example.

Example 4:

A DSA has engaged temporary contract staff to assist with a children's summer programme. The temporary contract staff will report into the DSA Programme Co-ordinator who will control and direct the temporary staff.

A **contract of service** relationship exists between the DSA and the temporary staff as the DSA Programme Co-ordinator is directing and controlling the temporary staff. The duty of care owed to the temporary staff is effectively the same as that owed to full time employees. There should also be a contract in place for these temporary staff member setting out the terms and conditions of the role.

f) When to contact the SCA?

Queries on contracts should be forward to your DSA legal advisers for advices. The SCA do not need to be updated on each contract a DSA are entering. The SCA are available to advise on insurance and indemnity queries at stateclaims@ntma.ie.

This State Indemnity Guidance is solely for the use of members of the State indemnity schemes managed by the State Claims Agency, in accordance with its mandate under the National Treasury Management Agency (Amendment) Act, 2000 (Delegated State Authorities or DSAs). The SCA does not bear responsibility for use of or reliance on the guidance by any party other than a DSA.