

## **ENCLOSURE T.2 - DRAFT VESSEL AVAILABILITY CONTRACT**

**Procurement procedure: EMSA/CPNEG/1/2018**

**Title:** Service Contracts for Stand-by Oil Spill Recovery Vessel(s): East Mediterranean Sea

Phase II – Invitation to Tender

### **EUROPEAN MARITIME SAFETY AGENCY SERVICE CONTRACT FOR STAND-BY OIL SPILL RECOVERY SERVICES: DRAFT VESSEL AVAILABILITY CONTRACT FOR OIL POLLUTION RESPONSE CONTRACT NUMBER – *[to be completed by EMSA]***

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The European Maritime Safety Agency (hereinafter referred to as "EMSA"), with its seat at Praça Europa 4, 1249-206 Lisbon, Portugal, VAT registration No.: 507 685 326, for the purposes of signing this Contract represented by Markku Mylly, Executive Director, on the one part, and

*[official name in full]*

*[official legal form]*

*[statutory registration number or ID or passport number]*

*[official address in full]*

*[VAT registration number]*

*[appointed as the leader of the group by the members of the group that submitted the joint tender<sup>1</sup>]*

(hereinafter referred to as "the Contractor"), represented by *[forename, surname and function]*, on the other part,

## **HAVE AGREED**

the Terms and Conditions below and the following Annexes:

- Annex I** - Request and Tender Specifications (Invitation to submit a Request to participate and Invitation to Tender No. EMSA/CPNEG/1/2018 of *[complete]* and *[complete]* respectively);
- Annex II** - Contractor's Request to participate and Tender (No. *[complete]* of *[complete]*) and No. *[complete]* of *[complete]* respectively);
- Annex III** - Incident Response Contract-Vessel;
- Annex IV** - Technical Specifications for the Vessel/Pool of Vessels;
- Annex V** - Technical Specifications for Equipment and Dispersants;
- Annex VI** - Technical Specifications for mobilisation procedures;
- Annex VII** - Technical Specifications for the quality and experience of the crew;
- Annex VIII** - Guidelines on Conducting Drills and Exercises;
- Annex IX** - Pre-financing guarantee template;
- Annex X** - Bank account details;
- Annex XI** - Agreement for mobilisation of Equipment and/or Dispersants only.

which form an integral part of this Service Contract for stand-by oil spill recovery services hereinafter referred to as "the Contract".

This Contract sets out the obligations of the parties during and after the duration of this Contract.

All documents issued by the contractor (end-user agreements, general terms and conditions, etc.) except its tender are held inapplicable, unless explicitly mentioned in this Contract. In all circumstances, in the event of a contradiction between this Contract and documents issued by the Contractor, this Contract prevails, regardless of any provision to the contrary in the Contractor's documents.

If there is any conflict between different provisions in this Contract, the following rules must be applied:

- a. The Terms and Conditions below shall take precedence over those in the other Annexes.

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<sup>1</sup> In the case of a joint offer, all parties should be identified and the following clause should be added below: "The parties identified above and hereinafter collectively referred to as 'the contractor' shall be jointly and severally liable vis-à-vis EMSA for the performance of this contract".

- b. The provisions set out in the Request and Tender Specifications (Annex I) and in the Technical Specifications (Annexes III to XI) shall take precedence over those in the Contractor's Tender (Annex II).

Subject to the above, the several documents forming part of the Contract are to be taken as mutually explanatory. Ambiguities or discrepancies within or between such parts shall be explained or rectified by a written instruction issued by EMSA, subject to the rights of the Contractor under Article XVII.8 of the Contract should he dispute any such instruction.

## **TERMS AND CONDITIONS**

### **I. GENERAL PROVISIONS**

#### **I.1. COMMUNICATION DETAILS**

For the purpose of this Contract, communications must be sent to the following addresses:

European Maritime Safety Agency:

EMSA - European Maritime Safety Agency

Frédéric Hébert

Head of Unit - Pollution Response Services

Praça Europa 4

1249 – 206 Lisboa

Portugal

E-mail: *[focal point e-mail address to be inserted]*

Contractor:

Mr/Mrs/Ms *[complete]*

*[Function]*

*[Company name]*

*[Official address in full]*

E-mail: *[focal point e-mail address to be inserted]*

Both parties shall inform the other party in due time and in writing of any changes hereto.

#### **I.1.1. FORM AND MEANS OF COMMUNICATION**

Any communication of information, notices or documents under the Contract must:

- a. be made in writing in paper or electronic format in the language of the Contract;
- b. bear the Contract number;
- c. be made using the relevant communication details set out in Article I.1; and
- d. be sent by mail or email.

If a party requests written confirmation of an email within a reasonable time, the other party must provide an original signed paper version of the communication as soon as possible.

The parties agree that any communication made by email has full legal effect and is admissible as evidence in judicial proceedings.

#### **I.1.2. DATE OF COMMUNICATIONS BY MAIL AND EMAIL**

Any communication is deemed to have been made when the receiving party receives it, unless this Contract refers to the date when the communication was sent.

Email is deemed to have been received by the receiving party on the day of dispatch of that email, provided that it is sent to the email address indicated in Article I.1. The sending party must be able to

prove the date of dispatch. In the event that the sending party receives a non-delivery report, it must make every effort to ensure that the other party actually receives the communication by email or mail. In such a case, the sending party is not held in breach of its obligation to send such communication within a specified deadline.

Mail sent to EMSA is deemed to have been received on the date on which the department responsible referred to in Article I.1 registers it.

Formal notifications are considered to have been received by the receiving party on the date of receipt indicated in the proof received by the sending party that the message was delivered to the specified recipient.

## **I.2. DEFINITIONS**

For the purposes of these Terms and Conditions the following definitions shall apply:

**‘Additional equipment’** means new oil pollution response equipment items to be purchased by the Contractor as detailed under section 1.3 of Annex V ‘Technical Specifications for Equipment and Dispersants’;

**‘Confidential information or document’** means any information or document received by either party from the other or accessed by either party in the context of the performance of the Contract, that any of the parties has identified in writing as confidential. It may not include information that is publicly available;

**‘Conflict of interest’** means a situation where the impartial and objective performance of the Contract by the Contractor is compromised for reasons involving family, emotional life, political or national affinity, economic interest, or any other shared interest with EMSA or any third party related to the subject matter of the Contract;

**‘Day’** means calendar day of 24 hours, unless otherwise specified.

**‘Dispersants’** means approved oil dispersants<sup>2</sup> as described in Annex V ‘Technical Specifications for Equipment and Dispersants’. The dispersants is owned by EMSA and in the Contractor possession during the Contract duration for the purpose of, in case of actual pollution response, carrying out seaborne dispersant application services from the Vessel under the terms and conditions of the Incident Response Contract-Vessel or only for mobilisation by a Requesting Party as per Annex XI ‘Agreement for mobilisation of Equipment and/or Dispersants only’. During storage and transit the dispersants should be stored in intermediate bulk containers (IBCs)

**‘Force majeure’** means any unforeseeable, exceptional situation or event beyond the control of the parties that prevents either of them from fulfilling any of their obligations under the Contract. The situation or event must not be attributable to error or negligence on the part of the parties or on the part of the subcontractors and must prove to be inevitable despite their exercising due diligence. Defaults of service, defects in equipment or material or delays in making them available, labour disputes, strikes and financial difficulties may not be invoked as force majeure, unless they stem directly from a relevant case of force majeure;

**‘Formal notification’** (or ‘formally notify’) means a form of communication between the parties made in writing by mail or email, which provides the sender with compelling evidence that the message was delivered to the specified recipient;

**‘Fraud’** means any intentional act or omission affecting the Union’s financial interests relating to the use or presentation of false, incorrect or incomplete statements or documents or to non-disclosure of information in violation of a specific obligation;

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<sup>2</sup> Normally type 3 dispersants.

**‘Irregularity’** means any infringement of a provision of Union law resulting from an act or omission by an economic operator, which has, or would have, the effect of prejudicing the Union’s budget;

**‘Notification’** (or ‘notify’) means a form of communication between the parties made in writing including by electronic means;

**‘Oil’** means petroleum in any form including crude oil, fuel oil, residual oil, bunker oil, sludge, oil refuse and refined products, as well as any vegetable based products;

**‘Oil pollution response equipment’** means the additional equipment and oil pollution response equipment set transferred listed in Annex V ‘Technical Specifications for Equipment and Dispersants’.

**‘Oil pollution response equipment set transferred’** means the oil pollution response equipment items listed under Section 1.1 of Annex V ‘Technical Specifications for Equipment and Dispersants’;

**‘Performance of the Contract’** means the execution of tasks and delivery of the purchased services by the Contractor to EMSA;

**‘Personnel’** means persons employed directly or indirectly or contracted by the contractor to perform the Contract;

**‘Pre-fitting works’** mean the works listed in Annex IV ‘Technical Specifications for the Vessel/Pool of Vessels’ to be carried out on the Vessel in line with the Contractor’s Tender (Annex II) in order to prepare the Vessel for the services required under this Contract and quick installation of the oil pollution response equipment on board;

**‘Professional conflicting interest’** means a situation in which the Contractor’s previous or ongoing professional activities affect its capacity to perform the Contract to an appropriate quality standard;

**‘Quarter’** means a calendar quarter;

**‘Related person’** means any person who has the power to represent the Contractor or to take decisions on its behalf;

**‘Requesting State’** means any European Union (EU) Member State, EU Candidate Country, Acceding Country, European Free Trade Association (EFTA) Member State, the European Commission or any third country sharing a regional sea basin with the EU, requesting the oil pollution response services under this contract;

**‘Substantial error’** means any infringement of a Contract provision resulting from an act or omission, which causes or might cause a loss to the Union’s budget.

### **I.3. ROLES AND RESPONSIBILITIES IN THE EVENT OF A JOINT TENDER**

In the event of a joint tender submitted by a group of economic operators and where the group does not have legal personality or legal capacity, one member of the group is appointed as leader of the group.

### **I.4. SEVERABILITY**

Each provision of this Contract is severable and distinct from the others. If a provision is or becomes illegal, invalid or unenforceable to any extent, it must be severed from the remainder of the Contract. This does not affect the legality, validity or enforceability of any other provisions of the Contract, which continue in full force and effect. The illegal, invalid or unenforceable provision must be replaced by a legal, valid and enforceable substitute provision which corresponds as closely as possible with the actual

intent of the parties under the illegal, invalid or unenforceable provision. The replacement of such a provision must be made in accordance with Article XVII.9. The Contract must be interpreted as if it had contained the substitute provision as from its entry into force.

## II. PURPOSE OF THE CONTRACT

**II.1.** Pursuant to Article 2 (3) (d) of Regulation 1406/2002<sup>3</sup> as amended, EMSA shall:

*'work with the Member States to support with additional means in a cost efficient way pollution response actions in case of pollution caused by ships as well as marine pollution caused by oil and gas installations, when a request has been presented by the affected Member State under the authority of which the cleaning operations are conducted, without prejudice to the responsibility of coastal States to have appropriate pollution response mechanisms in place while respecting existing cooperation between Member States in this field. As appropriate, requests for mobilisation of anti-pollution actions shall be relayed through the EU Civil Protection Mechanism established by Council Decision N° 2007/779/EC Euratom.'*

Pursuant to Article 2 (5) of Regulation 1406/2002 as amended, EMSA may also:

*'provide assistance in case of pollution caused by ships as well as marine pollution caused by oil and gas installations affecting those third countries sharing a regional sea basin with the Union, in line with the EU Civil Protection Mechanism established by Decision 2007/779/EC Euratom, and by analogy with the conditions applicable to Member States.'*

**II.2.** The purpose of this Contract is to make additional at-sea oil pollution response capacity available through the conclusion of a stand-by agreement with the Contractor. For this purpose, the Contractor agrees to modify and equip the Vessel<sup>4</sup> and train the crew accordingly in order to have a fully equipped and manned Vessel with total net storage and discharge capacity as well as dispersant application capacity available and ready to carry out oil pollution response services in the framework of this Contract, as specified in Annex I (Request and Tender Specifications).

In case of actual oil pollution the Contractor has the obligation to offer the Vessel covered by this Contract at pre-defined conditions to a Requesting State in the framework of an Incident Response Contract-Vessel (Annex III).

### II.3. The Vessel

The Vessel used to perform this Contract is:

**[insert name(s), IMO number(s), call sign(s), flag(s)]** with the characteristics as specified in Annex II, hereinafter referred to as "the Vessel".

### II.4. Storage Capacity

The Contractor agrees to ensure the availability of a net storage capacity for oil recovery, storage and discharging operations of **[complete]** m<sup>3</sup> under the conditions of this Contract through the provision of the Vessel listed under Article II.3. This net storage capacity must be ensured by the Contractor at any time after the acceptance in writing by EMSA of entry of the Vessel into the Contract stand-by phase.

### II.5. Area of operation

This Contract covers **[area to be specified]**. The Contractor agrees to ensure that at any time after the acceptance in writing by EMSA of the Vessel to enter into the Contract stand-by phase, the conditions under point 3.3 of the Request Specifications (Annex I) as detailed by the Contractor in its Tender (Annex II) will be complied with.

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<sup>3</sup> Regulation (EC) No 1406/2002 of the European Parliament and of the Council of 27 June 2002 establishing a European Maritime Safety Agency, OJ L 208, 5.8.2002, p. 1–9, as amended.

<sup>4</sup> **[The word "Vessel" indicating the singular shall include the plural when a pool of vessels is used to perform this Contract.]**

The Contractor shall primarily carry out oil pollution response services in the framework of this Contract within the area of operation defined in Annex I. If so requested, the Vessel shall assist anywhere within the maritime areas under the jurisdiction of the following States:

- European Union (EU) Member States,
- EU Candidate Countries,
- EU Acceding Countries,
- European Free Trade Association (EFTA) Member States, and
- Any third country sharing a regional sea basin with the EU.

Unless otherwise provided for in this Contract, when performing her usual economic activity, the Vessel shall not be ordered by the Contractor (or his Sub-contractor) to sail outside of the agreed mobilisation time range as defined in Annex II (Contractor's Tender).

Without prejudice to the above, EMSA may give its authorisation for the Contractor to employ the Vessel outside the mobilisation time range under the following conditions:

- The Contractor shall request EMSA's authorisation at least 10 days prior to the expected starting date of the voyage;
- The Contractor's request shall as a minimum indicate the duration, routes and destination of the voyage;
- The dates of the Vessel voyage shall not coincide with dates of oil pollution response drills or exercises notified by EMSA;
- The total number of days of employment of the Vessel outside the mobilisation time range shall not exceed 30 days per year;
- The time period to complete each voyage outside the mobilisation time range shall not exceed 10 days per voyage;
- The number of days of voyages outside the mobilisation time range shall not be accumulative from year to year.

During the time period the Vessel is employed outside the mobilisation time range with the authorisation of EMSA the availability fee will be reduced *pro rata temporis* on a 365 days per year basis. The Contractor shall ensure that the vessel position is communicated to EMSA daily.

If the above conditions are not complied with, EMSA will reduce the availability fee *pro rata temporis* and may decide to impose liquidated damages as per article VIII.2.

### **III. PHASES OF THE CONTRACT**

The Contract covers three phases:

- a preparation phase,
- a stand-by phase, and
- a closure phase.

#### **III.1. PREPARATION PHASE**

**III.1.1.** The preparation phase starts on the day the last of the two contracting parties has signed the Contract and continues until the day on which the Vessel(s) *[If pool of vessels add: "all"]* is (are) accepted by EMSA in writing as indicated in the Acceptance Note.

**III.1.2.** During this period, if the Vessel or a Vessel in a pool of Vessels needs technical, logistical, managerial and operational adjustment(s) to perform the service required under this Contract, the Contractor is obliged to:

- Bring the Vessel up to the technical specifications as required in Annex IV 'Technical Specifications for the Vessel/Pool of Vessels', pre-fit and adjust the Vessel so that the required net storage capacity and dispersant application capacity are achieved or are achievable within



the mobilisation time as provided for in Article III.3.6 in case of an oil pollution incident and the oil pollution response equipment is or can quickly be installed on board of the Vessel;

- Purchase and install the additional equipment as required in Annex V 'Technical Specifications for equipment and dispersants';
- Train the crew in line with the requirements of Annex VII – 'Technical Specifications for the quality of the crew';
- Take possession and undertake transportation of the dispersants and of the oil pollution response equipment set transferred in line with Annex V;
- Overhaul and/or service the items of the oil pollution response equipment set transferred, as identified in point 1.2 of Annex V);
- Obtain all certificates required.

A detailed plan for the implementation of the preparation phase is contained in Annex II.

Following signature of the Contract, the Contractor will present to EMSA a detailed pre-fitting plan. The Contractor will report bi-weekly to EMSA about the works that are being carried out. EMSA representatives are entitled to visit the Vessel during the preparation phase and observe work in progress.

During the preparation phase, the Contractor is obliged to immediately and on his own initiative report to EMSA any event or occurrence creating delay in completing the pre-fitting works and oil pollution response equipment purchase and transfer. The report shall include a description of the event, the date on which it occurred and the action taken by the Contractor to remedy the delay.

**III.1.3.** By 30 September 2019 at the latest, the Contractor must submit to EMSA for each Vessel a Completion Report. The Completion Report should be in accordance with Annex I (Request and Tender Specifications).

Should the Completion Report not be submitted within the time limits set by the Contract, the Contractor will submit to EMSA a status report in order to inform EMSA on the works carried out and to be completed. The status report will not be treated as a Completion Report.

**III.1.4.** Within 14 days of receipt of the Completion Report, EMSA representatives will inspect the Vessel(s), the oil pollution response equipment and the relevant certificates provided that:

- the Vessel(s) and the oil pollution response equipment are certified as per Article IV.3.5 for the purpose of this Contract,
- the oil pollution response equipment and the dispersants have been delivered or handed over,
- the Contractor has successfully tested the arrangement.

During the inspection by EMSA representatives, a first oil pollution response drill ("Acceptance Drill") will be carried out by the Contractor on the Vessel observed by EMSA representatives, to demonstrate that the modifications, the oil pollution response equipment and crew training were successful to prepare the Vessel for the tasks under this Contract.

When several Vessels are foreseen, the Contractor will perform an "Acceptance Drill" for each Vessel.

**III.1.5.** If EMSA comes to the conclusion that the contractual conditions and requirements to complete the preparation phase are met, it will issue an Acceptance Note in writing within 10 days after the inspection.

The Contractor is entitled to receive one quarterly availability fee payment as compensation for the preparation phase following the issuing of the Acceptance Note. In case a pool of Vessels is available under this Contract, the Contractor is entitled to receive one quarterly availability fee payment as compensation for the preparation phase provided that all the Vessels forming the pool have been accepted in writing by EMSA. Payment shall be made, on the basis of a duly established invoice, within thirty days of the receipt of the invoice.

The Contractor is entitled to receive the availability fee for the stand-by phase as from the date of acceptance as indicated in the Acceptance Note.

**III.1.6.** If the Contractor does not meet his obligation to complete the preparation of the vessel within the time limits set by the Contract:



- The Contractor shall not receive any payment until the preparation phase is completed and an Acceptance Note is issued by EMSA, and
- The availability fee payment compensating the Contractor for the preparation phase will be reduced *pro rata temporis* according to the number of days of delay in completing the preparation phase. The reduction will be calculated using as basis a year of 365 days.

The above is without prejudice to the Contractor's actual or potential liability incurred in relation to the Contract or to EMSA's right to terminate the Contract, use its call option with regard to the oil pollution response equipment and/or recover all payments made to the Contractor. Termination shall take effect on the date on which a registered letter with acknowledgment of receipt terminating the Contract is received by the Contractor, or any other later date indicated in the letter of termination.

**III.1.7.** If the Vessel or all the vessels in a pool do not need any technical, logistical, managerial or operational adjustment(s) to perform the services required under this Contract, the preparation phase shall be as follows:

- It shall start on the date of entry into force of this Contract as per article V and shall continue until the day on which *[if pool of vessels add: "all"]* the Vessel(s) is *(are)* accepted by EMSA in writing as indicated in the Acceptance Note.
- The Contractor is not entitled to receive the compensation for the preparation phase provided for in article III.1.5.
- During this period, the Contractor is obliged to:
  - Purchase and install the additional equipment as required in Annex V,
  - Take possession and undertake transportation of the dispersants and of the oil pollution response equipment set transferred in line with Annex V;
  - Overhaul and/or service the items of the oil pollution response equipment set transferred, as identified in point 1.2 of Annex V;
- By 30 September 2019 at the latest, the Contractor must submit to EMSA Completion Report(s).

The procedure for the "Acceptance Drill" described under Article III.1.4 will apply.

If EMSA comes to the conclusion that the contractual conditions and requirements to complete the preparation phase are met, it will issue an Acceptance Note in writing within 10 days after the inspection.

## **III.2. STAND-BY PHASE**

### **III.2.1. DURATION OF THE STAND-BY PHASE**

- The stand-by phase begins on the day on which the Vessel(s) *[if pool of vessels add: "all"]* is *(are)* accepted by EMSA in writing as indicated in the Acceptance Note.
- If the Contractor is entitled to receive compensation for the preparation phase as per articles III.1.5 and III.1.6, the stand-by phase lasts for a period of 45 months or until 31 December 2023, whichever is earlier.
- If the Contractor is not entitled to receive compensation during the preparation phase as per article III.1.7, the stand-by phase lasts for a period of 48 months or until 31 December 2023, whichever is earlier.
- During the stand-by phase the Contractor can continue to perform his usual economic activities involving the Vessel provided it does not interfere with the implementation of this Contract.
- During the stand-by phase the Contractor will:
  - Without prejudice to Article II.5, ensure that the Vessel(s) remains within the agreed mobilisation time range;
  - Ensure that the Vessel(s) and crew is ready to react to an emergency oil pollution response request (emergency stand-by);
  - Maintain and ensure that the oil pollution response equipment, the dispersants and the Vessel are ready and fit for the purposes of the Contract;
  - Perform regular oil pollution response drills;
  - Participate in oil pollution response exercises ;

- Cooperate with EMSA to further develop the technical and operational capacity of the Vessel following lessons-learned during oil pollution response drills and oil pollution response exercises or following developments as regards oil pollution response technology;
  - Upon EMSA's request, make the oil pollution response equipment and/or the dispersants available to a Requesting Party;
  - Perform emergency oil pollution response operations following receipt of a Notice of Pollution Response sent by EMSA and under the terms and conditions of the Incident Response Contract-Vessel (Annex III) with the Requesting State.
- f. An emergency oil pollution response operation commenced during the stand-by period shall be completed according to the Incident Response Contract-Vessel. The expiry of the stand-by phase shall not result in the termination of an on-going oil pollution response operation.
- g. The Contractor is entitled to receive the availability fee for the stand-by phase as from the date of acceptance as indicated in the Acceptance Note.

### **III.2.2. PERFORMANCE DURING THE STAND-BY PHASE**

#### **III.2.2.1. USUAL ECONOMIC ACTIVITY**

- a. During the duration of the Contract, the Contractor shall be free to use and employ the Vessel for her usual economic activity, as described in Annex II, unless it is required for an oil pollution response drill, an exercise or actual oil pollution response services.
- b. Without prejudice to Article II.5, the Contractor will not enter into any agreement with a third party for employment of the Vessel which is in any way inconsistent with or interferes with the performance of the Contractor's obligations pursuant to this Contract. In particular, the Contractor shall not enter into any employment commitment or charter with a third party for the Vessel which may lead to a situation in which the Contractor is not able to comply with the mobilisation time range.
- c. The Contractor will duly inform any third party concerned, charterer or other, of his obligations under this Contract. The Contractor also agrees and will make sure that any agreement with any third party during the course of this Contract incorporates a provision which ensures that the Contractor is free to render the services due under this Contract.

#### **III.2.2.2. DRY DOCKING/REPAIRS**

- a. The Contractor shall schedule at the beginning of each year of service, starting from the date on which the stand-by phase of the Contract begins, a dry docking plan for the Vessel. The dry-docking plan shall be communicated to EMSA. EMSA will consider the dry-docking plan and will inform the Contractor whether or not it is accepted. The Contractor will schedule the dry docking during the summer period (June-August), otherwise the Contractor will consult EMSA to identify a suitable period. Dry-docking shall not coincide with planned pollution response exercises.
- b. The Contractor is entitled to make port or dry dock repairs on the Vessel(s). The maximum number of days of unavailability of the agreed storage capacity due to port or dry dock repairs is 40 full days for the whole duration of the stand-by phase without any reduction of the Annual Availability Fee. If this period is exceeded, the Annual Availability Fee will be reduced proportionally to the number of additional days. If the Contract is renewed, the number of dry docking/repairs days used during the first term of the Contract shall not be counted against the 40 full dry docking/repairs days the Contractor is entitled to during the renewed stand-by phase.

#### **III.2.2.3. OIL POLLUTION RESPONSE DRILLS**

The Contractor will perform oil pollution response drills at least quarterly. When several sets of oil pollution response equipment are foreseen, the Contractor will perform at least two oil pollution response drills with each set of oil pollution response equipment per year. When several Vessels are foreseen, the Contractor will perform at least two oil pollution response drills with each Vessel per year. During one of

the quarterly drills, the mobilisation of dispersants, with at least one tank container installed on deck, and associated equipment will have to be verified.

The aim of the oil pollution response drills is to verify the performance of the contracted service. They shall be carried out in line with Annex VIII – ‘Guidelines on Conducting Drills and Exercises’. EMSA shall have the option to update Annex VIII – ‘Guidelines on Conducting Drills and Exercises’ based on experience of implementation.

The first oil pollution response drill, so called ‘Acceptance Drill’, will take place at the end of the preparation phase during the inspection by EMSA representatives. It shall not be considered a completed drill in case EMSA decides not to issue the ‘Acceptance Note’ following the inspection. The dates of the following oil pollution response drills will be fixed at the beginning of the stand-by phase.

At least one of the quarterly drills per year has to be an “extended quarterly drill” over a period of minimum 2 days with the purpose of providing additional relevant training such as seminars to all crew members. The conditions and scope of the extended quarterly drills are further detailed in Annex VIII – ‘Guidelines on Conducting Drills and Exercises’. At the beginning of each year EMSA and the Contractor will establish an annual drill plan.

The Contractor will inform EMSA, at least 2 weeks in advance, of any change in the date of the oil pollution response drill, compared to the initial plan unless otherwise justified. EMSA staff and persons invited by EMSA may attend each oil pollution response drill as observers. If required the Contractor shall provide proper on board accommodation for these observers. The Contractor shall take out insurance as per Article XVI to cover his potential liability with regard to these observers.

### **III.2.2.4. OIL POLLUTION RESPONSE EXERCISES**

The different types of exercises EMSA may request are listed below. The associated purposes and procedures are further detailed in Annex VIII – ‘Guidelines on Conducting Drills and Exercises’.

If appropriate, EMSA staff and persons invited by EMSA may attend an exercise as observers. If required the Contractor shall provide proper on board accommodation for these observers. With a view to cover his potential liability with regard to the presence on board of the observers, the Contractor shall take out insurance as per Article XVI.

After termination of each exercise, the Contractor shall submit to EMSA a report on the exercise including a description of the management structures and an evaluation of the exercise.

#### **1. NOTIFICATION EXERCISES**

- a. At request of EMSA the Contractor and his staff shall participate in notification exercises (up to a maximum of 4 per year).
- b. The aim of the notification exercise is to verify the performance of the agreed emergency and notification procedure and lines of communication for reporting, requesting and providing assistance with reference to Annex VIII – ‘Guidelines on Conducting Drills and Exercises’.
- c. The oil pollution response equipment and the Vessel will not be used during such an exercise.
- d. Any cost linked to the notification exercise sustained by the Contractor is covered by the availability fee.
- e. The time period needed for the performance of the notification exercises shall not be counted against the maximum number of international and/or EMSA exercises days per year that EMSA may request as stipulated in paragraph 2.3 below.

#### **2. OPERATIONAL EXERCISES**

##### **2.1. VESSEL MOBILISATION EXERCISES**

- a. At request of EMSA the Contractor, his staff and the Vessel shall participate in a Vessel mobilisation exercise as described in Annex VIII – ‘Guidelines on Conducting Drills and Exercises’.
- b. From the time the Vessel mobilisation notice is accepted by the Contractor until the end of the Vessel mobilisation exercise when the Vessel is ready to sail with the oil pollution response equipment on board, the Contractor is entitled to receive 75% of the Daily Operational Hire as stipulated in Article IV.1.a. of the Incident Response Contract-Vessel (Annex III).
- c. Besides this rate, EMSA will pay only for the fuel consumed during periods in which the Contractor is entitled to receive the rate.

- d. Payment will be made by EMSA upon approval of the exercise report and the relevant invoices by EMSA in line with Article VI.4.1 points (b) to (e) and Article VI.9.
- e. The time period needed for the performance of the vessel mobilisation exercises shall not be counted against the maximum number of international and/or EMSA exercises days per year that EMSA may request as stipulated in paragraph 2.3 below.

## **2.2. OIL POLLUTION RESPONSE EQUIPMENT MOBILISATION EXERCISES**

- a. At request of EMSA the Contractor and his staff shall participate with the oil pollution response equipment but without the Vessel in an oil pollution response equipment mobilisation exercise as described in Annex VIII – ‘Guidelines on Conducting Drills and Exercises’.
- b. From the time the equipment mobilisation notice is accepted by the Contractor until the end of the equipment mobilisation exercise when the oil pollution response equipment is ready to be loaded and installed on board, the Contractor is entitled to receive 60% of the full operational rate as stipulated in Article IV.1.a. of the Incident Response Contract-Vessel (Annex III).
- c. Payment will be made by EMSA upon approval of the exercise report and the relevant invoice by EMSA. EMSA shall have 60 days to approve or reject the report and to pay the Contractor. The Contractor shall have 30 days in which to submit additional information or corrections or a new report or documents if required by EMSA.
- d. The time period needed for the performance of the oil pollution response equipment mobilisation exercises shall not be counted against the maximum number of international and/or EMSA exercises days per year that EMSA may request as stipulated in paragraph 2.3 below.

## **2.3. INTERNATIONAL AND/OR EMSA EXERCISES**

- a. At request of EMSA the Contractor shall participate in International and/or EMSA exercises within the waters under jurisdiction of EU Member States, EFTA coastal States as well as third countries sharing a regional sea basin with the EU, with:
  - the Vessel(s) and the oil pollution response equipment,
  - or
  - the oil pollution response equipment only.
- b. EMSA may request 10 International and/or EMSA exercise days per year (steaming days included). EMSA may decide to request more than 10 days exercise per year but these additional days will be subject to the Contractor's consent. The provisions related to participation to exercises remain applicable when the Contractor agrees to perform more than 10 days exercise per year.
- c. EMSA may request the participation in an International and/or EMSA exercise at least 30 days prior the starting date of the exercise.
- d. The Contractor is remunerated for his participation in International and/or EMSA exercises according to Article VI.4.

### **III.2.2.5. UPGRADE OF THE POLLUTION RESPONSE CAPABILITY OR CAPACITY**

- a. EMSA will analyse the results of the oil pollution response drills and oil pollution response exercises with a view to a potentially warranted upgrade of the technical and operational pollution response capacity or capability in addition to the initial Technical Specifications.
- b. EMSA will also monitor the legal, technical and scientific evolution in the field of pollution response and analyse whether developments require an upgrade of the existing capability or capacity.
- c. Once per year, EMSA may issue an upgrade discussion paper summarising its findings and seek the comment of the Contractor that should be provided within four weeks from receipt of the upgrade discussion paper. Considering the comments of the Contractor EMSA will decide as to whether or not a technical upgrade of the Vessel and/or the pollution response equipment is warranted. Should EMSA come to the conclusion that an upgrade is warranted, EMSA will decide whether to initiate a procurement procedure in line with its Financial Regulation in order to implement a technical upgrade project.
- d. At EMSA's discretion, one or several oil pollution response equipment item(s) may be replaced by similar oil pollution response equipment item(s) or may be overhauled by the relevant

manufacturers at EMSA's initiative and expenses. The Contractor, his Vessel and his staff shall co-operate with EMSA for the integration of the replaced or overhauled oil pollution response equipment item(s) into the existing arrangement without EMSA being obliged to make additional payments than those initially agreed under this Contract. This includes but is not limited to the performance of an oil pollution response equipment drill for the purpose of the oil pollution response equipment item(s) commissioning and/or training of the crew, equipment handover and receipt and equipment labelling. All other provisions of the Contract related to the oil pollution response equipment shall apply *mutatis mutandis* to the new or overhauled oil pollution response equipment items.

#### **III.2.2.6. UPGRADE OF THE MANAGEMENT CAPACITY**

- a. EMSA will analyse the results of the oil pollution response drills and oil pollution response exercises as well as the overall management/implementation of the Contract by the Contractor with a view to a potentially warranted upgrade or modification of the managerial capacity in addition to the initial arrangements.
- b. EMSA will also monitor the evolution in the field of asset and operation management, as well as the relevant evolution of the communication and IT technologies and analyse whether developments require an upgrade of the existing managerial capacity.
- c. Once per year, EMSA may issue an upgrade discussion paper summarising its findings and seek the comment of the Contractor that should be provided within four weeks from receipt of the upgrade discussion paper. Considering the comments of the Contractor EMSA will decide whether to initiate a procurement procedure in line with its Financial Regulation in order to implement a managerial upgrade project.

#### **III.2.2.7. AD HOC MOBILISATION REQUEST**

EMSA may, at its own discretion, issue an Order for Mobilisation in the following cases:

- EMSA is of the opinion that an oil spill risk arises;
- To verify the performance of the contracted service;
- Following early termination of an Incident Response Contract-Vessel (Annex III) by a Requesting State and only as from the time the Vessel has sent a Notice of Redelivery to the Requesting State.

Under the Order for Mobilisation, the Vessel is to proceed to its Port of Departure where it is to mobilise.

Unless otherwise agreed between EMSA and the Contractor, the mobilisation period will last:

- 3 days, or
- until the day an Incident Response Contract-Vessel (Annex III) is concluded whichever is the earliest.

As from the time the Vessel is fully equipped, manned and ready to carry out oil pollution response services until the end of the indicated mobilisation period, EMSA shall pay the Daily Operational Hire as per Article IV.1.a of the Incident Response Contract-Vessel and costs as per Article IV.2 of the Incident Response Contract-Vessel. If so agreed between EMSA and the Requesting State, the Contractor irrevocably agrees to receive payments for the ad hoc mobilisation from the Requesting State which will actually honour the contractual obligation of EMSA.

The ad hoc mobilisation days shall not be counted against the time period of services and duties under the Incident Response Contract-Vessel.

#### **III.3. ACTUAL OIL POLLUTION RESPONSE**

**III.3.1.** At receipt of a request for assistance from a Requesting State, EMSA may decide to send a Notice of Pollution Response to the Contractor including all details EMSA considers relevant.

**III.3.2.** The Contractor irrevocably undertakes to comply with Annex VI 'Technical Specifications for mobilisation procedures' and to enter into the Incident Response Contract-Vessel (Annex III) with a Requesting State as indicated in EMSA's Notice on Pollution Response.



**III.3.3.** The Contractor continues to be entitled to receive the Vessel Availability fee for the period oil recovery operations are performed under an Incident Response Contract-Vessel with a Requesting State.

**III.3.4.** Upon EMSA's request, the Contractor shall enter into contract with any third party, not being a Requesting State, that requires assistance of an equipped response vessel and/or one or several oil pollution response equipment items and/or dispersants to operate within the waters under jurisdiction of EU Member States, EU Candidate Countries, EU Acceding Countries and European Free Trade Association (EFTA) coastal Member States.

EMSA will set the conditions for the performance of the service to the third party in particular with regard to the maximum duration of the activity and the terms of the contract to be concluded with the third party. The Contractor undertakes not to be paid from the third party a rate higher than the rate agreed in the Incident Response Contract-Vessel (Annex III). In addition to the Incident Response Contract-Vessel rate, the Contractor may charge the third party, as specified in EMSA's request, for costs corresponding to the use of the elements financed by EMSA within the framework of this Contract namely the oil pollution response equipment, the Vessel pre-fitting and the Vessel availability fee. The Contractor recognises that these costs have initially been financed by EMSA. If so requested by EMSA, the Contractor undertakes to reimburse to EMSA proportion of payments received from the third party corresponding to these costs.

**III.3.5.** The Contractor shall appoint a Duty Officer available to receive the Notice of Pollution Response throughout the year (24 hours a day). The Contractor shall inform EMSA in due time and in writing of any changes in the Duty Officer contact details.

#### **III.3.6. MOBILISATION OF THE EQUIPPED VESSEL**

Following the receipt of a Notice of Pollution Response, the overall time period for the Contractor to complete the Vessel mobilisation procedures and send the Notice of Readiness to the Requesting Party is **[complete]** hours.

**III.3.7.** The Vessel and/or the oil pollution response equipment and the dispersants subject to this Contract shall not be used for any other pollution response activities unless authorised by EMSA. EMSA may give its written authorisation under conditions, namely with regard to the maximum duration of the activity and the terms of the contract to be concluded with the third party.

**III.3.8.** EMSA staff and person(s) invited by EMSA may attend the operation on board as observer(s). The Contractor shall provide proper on board accommodation for those observers. EMSA may invite a maximum number of 3 persons unless otherwise agreed with the Contractor.

With a view to cover his potential liability in regard of the observers, the Contractor shall take out insurance as per Article XVI.

#### **III.3.9. CONTINGENCY LIGHTERING SERVICES**

Following the conclusion of an Incident Response Contract-Vessel, at request of EMSA, the Contractor shall identify one or more suitable Vessels to provide lightering services and arrange an offer for the provision of the services to be made to the Requesting State. The service to arrange for such offer shall be free of charge for EMSA and the Requesting State in question. The lightering services costs shall be borne by the Requesting State which enters into the lightering service contract.

#### **III.3.10. MOBILISATION OF EQUIPMENT AND/ OR DISPERSANTS ONLY**

- a. Upon EMSA's request the Contractor shall enter into agreement for mobilisation of Equipment and/or Dispersants only with a requesting party for the availability of dispersants and/or oil pollution response equipment item(s).
- b. Upon receipt of EMSA's request, the Contractor irrevocably undertakes to comply with point III of Annex VI 'Technical Specifications for the mobilisation procedures'.

- c. The costs related to the mobilisation and demobilisation of the equipment and/or dispersants including the demobilisation of any unused dispersants returned by the requesting party in its original sealed IBC shall be covered by the vessel availability fee.

## **IV. PERFORMANCE OF THE CONTRACT**

### **IV.1. THE CONTRACTOR**

**IV.1.1.** The Contractor must provide services of high quality standards, in accordance with the state of the art in the industry and the provisions of this Contract, in particular the Request and Tender specifications and the terms of its tender.

**IV.1.2.** The Contractor must comply with the minimum requirements provided for in the Request and Tender Specifications. This includes compliance with applicable obligations under environmental, social and labour law established by Union law, national law and collective agreements or by the international environmental, social and labour law provisions listed in Annex X to Directive 2014/24/EU<sup>5</sup>.

**IV.1.3.** The Contractor must obtain any permit or licence required in the State where the services are to be provided except for delivery of recovered oil and provision of oil recovery services within the framework of the Incident Response Contract-Vessel, which establishes specific rules in its articles III.6 and III.10.

**IV.1.4.** In case of any unforeseen event, Force Majeure, action or omission or any problem that affects the Contractor's ability to provide the services, or which directly or indirectly interferes or hampers execution of the services under this Contract, either partially or totally, the Contractor shall immediately and on his own initiative record it and report it to EMSA. This includes but is not limited to accident, port or flag State detention. The report shall include a description of the problem and an indication of the date on which it started and of the remedial action taken by the Contractor to ensure full compliance with his obligations under the Contract. In such event the Contractor shall give priority to solving the problem rather than determining liability.

**IV.1.5.** EMSA staff and/or third parties accompanying EMSA staff are entitled to visit the Vessel and the Contractor's premises and offices. The dates of such visits will be agreed on each occasion with the Contractor giving one week prior notice. The Contractor is obliged to cooperate with EMSA in facilitating access to the oil pollution response equipment and check of the oil pollution response equipment conditions without any additional costs charged to EMSA. EMSA may decide to delegate the visit to the Vessel to any suitable person. Before the agreed date of the visit, EMSA will provide to the Contractor information regarding the person(s) assigned by EMSA for this purpose. Access to the Vessel and to the Contractor's premises should be granted to the person(s) designated by EMSA.

**IV.1.6.** The Contractor must ensure that the personnel performing tasks in relation to the Contract and any future replacement personnel possess the professional qualifications and experience required for the execution of the Services assigned to him/her, as the case may be on the basis of the selection criteria set out in the Request and Tender specifications.

**IV.1.7.** The Contractor must not present itself as a representative of EMSA and must inform third parties that it is not part of the European public service.

**IV.1.8.** The Contractor is responsible for the personnel who carry out the services and exercises its authority over its personnel without interference by EMSA. The Contractor must inform its personnel in general and the Master and the Crew in particular that:

- a. they may not accept any direct sailing instructions from EMSA and its staff; and

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<sup>5</sup> OJ L 94 of 28.03.2014, p. 65



- b. their participation in providing the services does not result in any employment or contractual relationship with EMSA.

**IV.1.9.** At EMSA's reasoned request, the Contractor must replace any member of personnel who:

- a. does not have the expertise required to provide the services; or
- b. has caused disruption at the premises of EMSA.

The Contractor bears the cost of replacing its personnel and is responsible for any delay in providing the services resulting from the replacement of personnel.

**IV.1.10.** The Contractor shall send to EMSA an annual comprehensive report on 30 November of each year.

The annual comprehensive report will include at least:

- a summary of each drill,
- a summary of each exercise,
- a summary of maintenance of the oil pollution response equipment,
- details of oil pollution recovery and/or dispersant application services performed,
- recognised deficiencies,
- description of other incidents relevant to the performance of this Contract,
- dry-docking repair plan as indicated in Article III.2.2.2,
- a presentation of planned activities such as drills,
- description of other activities performed by the Contractor under this Contract.

**IV.1.11.** The Contractor shall upon request furnish EMSA with:

- Annual balance sheets for the last year for which accounts have been closed,
- Annual statement of overall turnover and profit & loss account for the last year for which accounts have been closed.

EMSA may at its discretion request any other document enabling it to assess the Contractor's economic and financial capacity.

The documentation shall be evaluated according to international rating practice.

## **IV.2. THE CREW**

**IV.2.1.** The Contractor must prepare and perform a Crew Training Programme in accordance with Annex VII – 'Technical Specifications for the quality of the crew'.

**IV.2.2.** The Crew taking part in an Exercise or in oil pollution response services, shall comply with the following conditions:

- a. There will be on each Vessel a Coordinator for pollution response operations, who will be responsible for the Oil Pollution Response Activities. Such Coordinator shall not have any other responsibility on the Vessel at the time of oil pollution response drills, oil pollution response exercises and actual oil pollution response. In no case can the Coordinator for Oil Pollution Response Operations be the Master of the Vessel.
- b. The necessary number of Crew members shall be trained to deploy and operate professionally and efficiently the oil pollution response equipment on board.
- c. The Master, the Officers and the Coordinator for oil pollution response operations must have a very good command of English in order to clearly understand or report to the competent authorities or coordination staff.

**IV.2.3.** The Master and the Crew shall carry out the services and duties required under this Contract promptly and with due care as well as with utmost dispatch within the capabilities of the Vessel and the oil

pollution response equipment. The Master and Engineer shall keep full and correct logs accessible to EMSA or its agents for at least a period of 3 years after the end of the Contract or any renewed Contract.

### **IV.3. THE VESSEL(S)**

**IV.3.1.** The available Vessel, when performing any activity under the scope of this Contract or related to it must comply with the technical requirements as specified in Annex IV.

**IV.3.2.** The Vessel shall, throughout the Contract period, be seaworthy, tight, staunch, strong in good order and condition and in every way fit to operate effectively at all times for the services as stated in the Contract as well as in the Incident Response Contract-Vessel.

**IV.3.3.** The Vessel must be pre-fitted in such a way that the installation, storage, deployment and operation of the oil pollution response equipment are made in a safe, fast and efficient way.

**IV.3.4.** Whenever applicable, the Contractor must complete the works to pre-fit and adjust the necessary Vessel to achieve the total net oil storage capacity in accordance with Article II.4.

**IV.3.5.** The competent authority and/or the Recognised Organisation (according to Regulation (EC) No 391/2009<sup>6</sup> as amended and Directive 2009/15/EC<sup>7</sup> as amended) which certifies the Vessel shall be requested to survey, approve and extend the appropriate certificate to the Vessel, if necessary, according to the oil recovery and storage services as well as dispersant application services to be performed and certify the safe operation of the oil pollution response equipment on board. In addition, the competent authority and/or the Recognised Organisation shall be requested to class the Vessel as (Occasional) Oil Recovery Vessel (or equivalent) indicating whether it is appropriate for operations with materials that have a flashpoint below 60°C. The Contractor shall submit to EMSA a proof of such Certificates for the Vessel with the Completion Report.

**IV.3.6.** The Vessel, when performing any activity under the scope of this Contract or related to it, must be free from any cargo which interferes with the execution of any task in relation to the Contract.

**IV.3.7.** The Contractor must comply with all standards applicable to the Vessel according to the flag State's regulations including health and safety regulations.

### **IV.4. THE OIL POLLUTION RESPONSE EQUIPMENT AND THE DISPERSANTS**

#### **IV.4.1. TRANSFERRED OIL POLLUTION RESPONSE EQUIPMENT AND DISPERSANTS**

- a. EMSA owns the oil pollution response equipment set and dispersants transferred. The Contractor will receive possession of the oil pollution response equipment set and dispersants transferred for the purpose of performing the Contract. The Contractor shall, during the whole Contract duration, act as *bona fide possessor* and exercise proper custody, care, and safekeeping of the oil pollution response equipment set transferred and of the dispersants. All terms of this Contract related to the oil pollution response equipment, except article IV.4.3 shall apply to it.
- b. The handover of the oil pollution response equipment set and dispersants transferred is described in Section 2 of Annex V – 'Technical Specifications for Equipment and Dispersants'.

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<sup>6</sup> Regulation (EC) No 391/2009 of the European Parliament and of the Council of 23 April 2009 on common rules and standards for ship inspection and survey organisations, OJ L 131, 28.5.2009, p. 11.

<sup>7</sup> Directive 2009/15/EC of the European Parliament and of the Council of 23 April 2009 on common rules and standards for ship inspection and survey organisations and for the relevant activities of maritime administrations, OJ L 131, 28.5.2009, p 47.

#### **IV.4.2. ADDITIONAL OIL POLLUTION RESPONSE EQUIPMENT**

- a. The Contractor will purchase the additional equipment and will obtain ownership of it until EMSA exercises its call option right in accordance with article IV.4.3 below.
- b. The purchasing and delivery procedure must be finalised before the agreed date of submission of the Completion Report.

#### **IV.4.3. TRANSFERABLE CALL OPTION**

- a. EMSA may (but shall not be obliged to) by written notice to the Contractor, at any time during the Contract period, preferably upon completion of the clearance of equipment purchase and cost of pre-fitting works as per article VI.3 but no later than prior to or within one month of the expiration of the Contract or on the date of early termination of this Contract require the Contractor to sell to it the additional equipment at a purchase price of EUR 1 (one euro), the sufficiency of which the Contractor acknowledges.
- b. Pursuant to such sale and purchase, EMSA will obtain title to the additional equipment. The oil pollution response equipment will remain in the Contractor's possession for the purpose of performing the Contract. The Contractor shall act as *bona fide possessor* and exercise proper custody, care, and safekeeping of the oil pollution response equipment.
- c. EMSA may transfer and/or cede its call option.

#### **IV.4.4. OIL POLLUTION RESPONSE EQUIPMENT AND DISPERSANTS TITLE AND POSSESSION**

- a. The oil pollution response equipment and dispersants will only be used for the services to be provided by the Contractor under this Contract. They will not be used for other purposes unless the Contractor obtains prior written permission from EMSA as under Article III.3.7.
- b. The Contractor warrants that the dispersants and the oil pollution response equipment from the date of purchase or handover and during the whole period of the Contract will be free of any lien or encumbrance whatsoever and that no third party has or will obtain any interests or rights in relation to the oil pollution response equipment and dispersants. The Contractor will warrant and defend the title and the possession of the oil pollution response equipment and of the dispersants against claims and demands of all persons whatsoever. In any event the Contractor shall indemnify EMSA against the consequences of any claims made by third parties in relation to the oil pollution response equipment and dispersants.

#### **IV.4.5. PERFORMANCE IN RESPECT OF THE OIL POLLUTION RESPONSE EQUIPMENT AND OF THE DISPERSANTS**

- a. The Contractor shall request the oil pollution response equipment to be surveyed, tested, approved and certified by a competent authority and/or a Recognised Classification Society in order to comply with all relevant regulations.
- b. The Contractor shall ensure that the oil pollution response equipment manufacturer certifies the installation, commissioning and safe and efficient working of the oil pollution response equipment within usual technical parameters before submission of the Completion Report.
- c. The Contractor shall carry out the oil pollution response equipment Maintenance Plan as submitted to EMSA together with the Completion Report.
- d. The Contractor shall preserve and maintain the oil pollution response equipment in good order and replace lost or damaged oil pollution response equipment at his own expense, cost and risk.
- e. The Contractor shall exercise due diligence to maintain the oil pollution response equipment in line with the Maintenance Plan referred to in paragraph (c) above and in every way fit for the service requested under this Contract throughout the Contract period. The Contractor shall immediately inform EMSA about any damage or loss sustained by the oil pollution response equipment.

- f. By the 5<sup>th</sup> day of each calendar month, the Contractor shall send to EMSA a monthly report on the actions carried out in accordance with the oil pollution response equipment Maintenance Plan. This report shall at least contain a checklist of the maintenance actions undertaken on each item of the inventory of the oil pollution response equipment accompanied by pictures and/or video supporting such maintenance actions.
- g. If the oil pollution response equipment is not permanently stowed on board, the Contractor must inform EMSA in which conditions and in which port/facilities it will be stored. The Contractor will be responsible for the storage of the oil pollution response equipment and dispersants. Special care must be taken by the Contractor regarding security and safety in the storage area to avoid any loss and/or damage to the oil pollution response equipment and to the dispersants and to have them ready for rapid installation. The Contractor will be liable for loss and/or any damage caused to or by the oil pollution response equipment or dispersants. In case of damage and/or loss the Contractor is to arrange for new oil pollution response equipment or dispersants with utmost dispatch.

#### **IV.4.6. EQUIPMENT AND DISPERSANTS LABELLING**

- a. Within six months following the issue of the Acceptance Note, EMSA will provide the Contractor with labels, related supporting fittings as well as guidelines for marking the additional equipment.
- b. Upon receipt of the labels, the Contractor shall physically fit each label to its associated equipment item.
- c. The oil pollution response equipment set transferred as listed in Annex V and dispersants IBCs are already marked with labels.
- d. If labels are lost or damaged during the Contract implementation, the Contractor shall inform EMSA which will provide new labels for the relevant equipment item(s) and IBC(s).
- e. All costs including but not limited to labour costs related to the physical marking of the oil pollution response equipment and IBCs with labels shall be borne by the Contractor and are covered by the vessel availability fee as agreed under this Contract.
- f. Upon completion of each marking service, the Contractor shall inform EMSA in writing and submit to EMSA photographic evidence.

#### **IV.4.7. CLOSURE PHASE**

- a. The closure phase represents the final phase of the contract. It starts the day following the date of early termination of the Contract or the day following expiration of the stand-by phase (as per article III.2.1 in case the Contract is not renewed or at expiration of the second term of the Contract if a renewal has been agreed in accordance with article V.2). The closure phase lasts for a maximum period of three months or earlier if all tasks are completed.
- b. During the closure phase the Contractor will continue to maintain, insure and store the oil pollution response equipment and the dispersants. The oil pollution response equipment and dispersants must be packed and be ready for transportation.
- c. Prior to or within one month of the expiration of the stand-by phase or by the date of early termination of the Contract, EMSA may notify to the Contractor the date on which the oil pollution response equipment shall be made available to EMSA or its representative for handover and transportation. The handover of the oil pollution response equipment and dispersants shall not take place earlier than the day following expiration or early termination of the stand-by phase but not later than three months after the Contract expiry or termination date (end of the closure phase). Prior to such handover, risks related to the possession and the use of the oil pollution response equipment and dispersants shall remain with the Contractor.
- d. If at the time of delivery the oil pollution response equipment (or any part of it) and/or the dispersants has not been maintained in the condition as required by the Contract the Contractor shall indemnify EMSA for all costs reasonably incurred by it in restoring the oil pollution response equipment or any part of it or to replace the oil pollution response equipment (or any part of it) and/or the dispersants if it cannot be so restored at a cost below the cost of replacement. This provision shall be in addition to any other rights which EMSA may have arising from the Contractor's failure to maintain the oil pollution response equipment and/or the dispersants during the period of the Contract.

- e. The costs incurred by the Contractor during the closure phase shall be included in the availability fee and paid by EMSA as per the payment scheme under article VI.1.

#### **IV.5. EMSA LOGO**

- a. As part of the Pre-fitting works the EMSA logo must be applied on a visible position of the hull or superstructure of the vessel(s) and of the storage area.
- b. During the preparation phase, the EMSA logo must be applied on a visible position of certain items of the oil pollution response equipment as specified in Annex V – ‘Technical Specifications for Equipment and Dispersants’.
- c. For the purpose of applying the EMSA logo, EMSA will provide the Contractor with “EMSA Logo Visibility Guidelines” including the characteristics, proportion and size of the EMSA logo.
- d. The Contractor shall keep the EMSA logo thus displayed during the duration of this Contract. The EMSA logo remains the property of EMSA, only to be used by the Contractor with the agreement of EMSA.
- e. On expiration, any cost related to the removal of the EMSA logo from the vessel hull or superstructure or storage place shall be borne by the Contractor. The EMSA logo shall not be removed from the oil pollution response equipment.

#### **IV.6. VESSEL MODEL**

Within two months following the end of the preparation phase, the Contractor will deliver to EMSA, at its premises in Lisbon, model of the Vessel, free of charge, with the characteristics detailed in Annex V – ‘Technical Specifications for Equipment and Dispersants’. As from delivery and after Contract expiration or early termination, the vessel model remains the property of EMSA.

### **V. ENTRY INTO FORCE AND DURATION OF THE CONTRACT**

**V.1.** The Contract shall enter into force on the date on which it is signed by the last party and last until the end of the closure phase as per article IV.4.7.

#### **V.2. CONTRACT RENEWAL**

- a. The Contract may be renewed once, for a maximum additional stand-by phase of four years with the express written agreement of the parties.
- b. Renewal does not imply any modification or deferment of existing obligations. Modifications to the initial Terms and Conditions and Annexes having no financial impact and not constituting substantial changes can be mutually agreed by the contracting parties as per Article XVII.9.
- c. The availability fee, Daily Operational Hire and Daily Non-operational Hire as stipulated in Article IV.1 of the Incident Response Contract-Vessel for a renewed contract will be based on the current Contract amounts and an indexation in accordance with the Harmonised Index of Consumer Prices (HICP) – EA available on Eurostat Databases (Theme: Economy and finance; Prices) website: <http://ec.europa.eu/eurostat/data/database/>.  
Revision for the renewed contractual period shall be calculated in accordance with the following formula:

$$Pr = Po \times \frac{Ir}{Io}$$

where

- Pr: revised price;
- Po: price in the original tender;
- Ir: index for the month in which the request to revise prices is received;
- Io: index for the month in which the contract enters into force.

- d. Six months prior to the expiry date of the first term of the Contract, EMSA will communicate to the Contractor an indicative opinion regarding renewal. Within two weeks of receipt of that communication the Contractor will send to EMSA a binding, firm and non-revocable offer regarding the contract renewal should he wish so.
- e. If mutually agreed by both parties in writing and within the framework of the contract renewal process, the contracted Vessel may be relocated to a different area of operation from the initial one as defined in Annex I (Request and Tender Specifications) taking into consideration the distribution of the EMSA network of pollution response vessels along the EU coastline, specific area coverage necessities identified by EMSA and the economic viability of the commercial exploitation of the contracted Vessel. Subject to EMSA's approval, EMSA and the Contractor will enter into a Contract renewal amendment covering the new area of operation.
- Any costs, expenses related to the relocation of the Vessel shall be borne by the Contractor and the availability fee and rates for a renewed Contract will be established in accordance with paragraph (c) above.

## VI. CONTRACT PRICE, PAYMENT PERIODS AND FORMALITIES

### VI.1. THE INDICATIVE PAYMENT SCHEME

The table below is a mere indication of the expected payment scheme. Depending on the actual date of acceptance of the vessel to enter into the Contract stand-by phase, the time of service performed during a quarter and the actual Contract expiry date, actual payment periods and amounts might be adapted within the Contract maximum budget ceilings for equipment, Vessel Availability Fee and pre-fittings.

Year of payment	Period/related event	Concept	Amount <sup>8</sup>
2019	Following the Contract Signature	Pre-financing for Oil Pollution Response equipment (maximum 100%)	Maximum EUR <i>[tbc]</i> (100%) (max. EUR <i>[tbc]</i> )
		Pre-financing for Pre-fitting Works (maximum 80%)	Maximum EUR <i>[tbc]</i> (80%) (max. EUR <i>[tbc]</i> )
	End of Preparation Phase Certificates + Acceptance Drill(s)	Balance payment for Oil Pollution Response equipment	Variable: it depends on the pre-financed amount and on the total eligible costs finally submitted. Up to contract ceiling for equipment.
		Balance payment for Pre-fitting Works	Variable: it depends on the pre-financed amount and on the total eligible costs finally submitted. Up to contract ceiling for pre-fitting.

<sup>8</sup> Quantity will be in proportion to the duration of the service performed during the relevant quarter.

		<i>[Annual Availability Fee]<sup>9</sup></i>	<i>[25% EUR [tbc] (max. EUR [tbc])]</i>
	Exercises	Arranged exercise based on pre-fixed rates	*
2020	After end Q4 and 2 <sup>nd</sup> Drill in 2019	Annual Availability Fee	25% EUR [tbc] (max. EUR [tbc])
	After end Q1 and 1 <sup>st</sup> Drill in 2020	Annual Availability Fee	25% EUR [tbc] (max. EUR [tbc])
	After end Q2 and 2 <sup>nd</sup> Drill in 2020	Annual Availability Fee	25% EUR [tbc] (max. EUR [tbc])
	After end Q3 and 3 <sup>rd</sup> Drill in 2020	Annual Availability Fee	25% EUR [tbc] (max. EUR [tbc])
	Exercises	Arranged exercise based on pre-fixed rates	*
2021	After end Q4 and 4th Drill in 2020	Annual Availability Fee	25% EUR [tbc] (max. EUR [tbc])
	After end Q1 and 1st Drill in 2021	Annual Availability Fee	25% EUR [tbc] (max. EUR [tbc])
	After end Q2 and 2 <sup>nd</sup> Drill in 2021	Annual Availability Fee	25% EUR [tbc] (max. EUR [tbc])
	After end Q3 and 3 <sup>rd</sup> Drill in 2021	Annual Availability Fee	25% EUR [tbc] (max. EUR [tbc])
	Exercises	Arranged exercise based on pre-fixed rates	*

<sup>9</sup> *[If the Vessel or all the vessels in a pool do not need any technical, logistical, managerial or operational adjustment(s) to perform the services required under this Contract, this payment is not applicable as the Contractor is not entitled to receive compensation for the preparation phase under article III.1.7 and, the stand-by phase lasts for a period of 48 months or until 31 December 2023, whichever is earlier.]*



2022	After end Q4 and 4 <sup>th</sup> Drill in 2021	Annual Availability Fee	25% EUR [tbc] (max. EUR [tbc])
	After end Q1 and 1 <sup>st</sup> Drill in 2022	Annual Availability Fee	25% EUR [tbc] (max. EUR [tbc])
	After end Q2 and 2 <sup>nd</sup> Drill in 2022	Annual Availability Fee	25% EUR [tbc] (max. EUR [tbc])
	After end Q3 and 3 <sup>rd</sup> Drill in 2022	Annual Availability Fee	25% EUR [tbc] (max. EUR [tbc])
	Exercises	Arranged exercise based on pre-fixed rates	*
2023	After end Q4 and 4 <sup>th</sup> Drill in 2022	Annual Availability Fee	25% EUR [tbc] (max. EUR [tbc])
	After Q1 and 1 <sup>st</sup> Drill 2023	Annual Availability Fee	25% EUR [tbc] (max. EUR [tbc])
	After end Q2 and 2 <sup>nd</sup> Drill in 2023	Annual Availability Fee	25% EUR [tbc] (max. EUR [tbc])
	[After end Q3 and 3 <sup>rd</sup> Drill in 2023]	Annual Availability Fee <sup>10</sup>	[25% EUR [tbc] (max. EUR [tbc])]

<sup>10</sup> [Quarterly payment applicable only if the Vessel or all the vessels in a pool did not need any technical, logistical, managerial or operational adjustment(s) to perform the services required under this Contract, the preparation phase was not compensated and where the stand-by phase lasts for a period of 48 months or until 31 December 2023, whichever is earlier.]

	Total value	Oil pollution response equipment:	Up to a maximum of EUR [tbc] (EUR [tbc])
		Full costs for pre-fitting of vessel:	Up to a maximum of EUR [tbc] (EUR [tbc])
		Availability fee:	Up to a maximum of EUR [tbc] (EUR [tbc])
		Total value of the contract:	Up to a maximum of EUR [tbc] (EUR [tbc])

\* These costs are variable based on daily rates and rules for reimbursement of fuel costs according to the provisions of article VI.4 below.

- a. Payments shall be executed only if the Contractor has fulfilled all his contractual obligations by the date on which the invoice is submitted. Invoices will not be admissible if payments for previous periods have not yet been executed as a result of default or negligence on the part of the Contractor.
- b. The Contractor will open a separate current bank account at a commercial bank which will serve solely to receive payments by EMSA under Article VI.2 and Article VI.3 and to make payments by the Contractor linked to the purchase of the additional equipment, transport of the oil pollution response equipment set transferred and of the dispersants, overhauling and/or servicing on the oil pollution response equipment set transferred and pre-fitting works. This current bank account may not be closed until all payments made from this account to pay the Vessel pre-fitting adjustments, to purchase the additional equipment, to transport the oil pollution response equipment set transferred and the dispersants, to overhaul and/or service the oil pollution response equipment set transferred are cleared and approved by EMSA. Details of this current bank account are stated in Annex X. The Contractor will instruct the bank to send to EMSA copies of the monthly bank statements covering all transactions recorded regarding this current bank account. The Contractor will, by the end of each calendar month, inform EMSA on all payments made from this current bank account and submit to EMSA the invoices to which those payments relate.

## VI.2. BASIS FOR PRE-FINANCING

- a. EMSA will pre-finance:
  - 100% of the costs to purchase the additional equipment, to transport the oil pollution response equipment set transferred and the dispersants and to undertake overhauling and/or servicing on the oil pollution response equipment set transferred (maximum [complete in figures and in words] EUR), and
  - 80% of the total value of the pre-fitting works. The maximum total value of the pre-fitting works equals to [complete in figures and in words] EUR, the maximum amount of the pre-financing for pre-fitting works is therefore equal to [complete in figures and in words] EUR.

Unless already submitted as part of the bid at the procurement stage, the Contractor is obliged to submit for approval to EMSA, within 10 working days following the signature of this Contract by the last contracting party, offers of potential suppliers of works and equipment including detailed itemised pricing and a maximum overall price, before contracting. When the price of one equipment item is above EUR 50,000 (fifty thousand euro), the offer of the equipment supplier must also be signed by the supplier representative. Prices have to be quoted net and gross in euro this being clearly indicated in the offers submitted. When several options are foreseen in an offer the Contractor must clearly indicate to EMSA which option he intends to accept.

- b. Offers from suppliers shall be valid until 31 March 2019.
- Offers shall include a clear indication of the delivery time of goods/services after order. Offers need to include technical specifications. Offers should also include a clear indication of the company/companies which will undertake the work and/or provide the oil pollution response equipment. Offers for pre-fitting works on the one hand and for oil pollution response equipment on the other hand shall be strictly separate even if coming from the same supplier. Offers submitted after signature of the contract shall correspond to the offers presented together with the bid as part of the tender procedure and will in particular not cover less or lower quality works and equipment. EMSA will verify the offers submitted and inform the Contractor within 10 working days after receipt whether they are approved for the purpose of this Contract ('EMSA approved offers'). The Contractor shall then proceed to accept the offers, i.e. enter into binding contractual agreement with the respective supplier.
- c. Within 5 working days after approval by EMSA, the Contractor (or leader in case of a joint tender) shall submit to EMSA two invoices covering, the first one 100% of the value of the 'EMSA approved offers' for the oil pollution response equipment and, the second one, 80% of the value of the 'EMSA approved offers' for pre-fitting works.
- These invoices have to be accompanied by the financial guarantee as stipulated in Article VI.8. These invoices will serve as a basis for the payment of the pre-financing by EMSA within 30 days after receipt of the invoices, provided that EMSA has approved the bank supplying the financial guarantee, that the invoices are complete, indicate the reference number of the Contract and correspond to the provisions of this Article.
- The Contractor (or leader in case of a joint tender) should submit one invoice for pre-financing for the oil pollution response equipment and one separate invoice for pre-fitting works. Both types of expenditure have to be kept strictly separate. Oil Pollution response equipment purchases, overhauling and/or servicing, transport of oil pollution response equipment and dispersants and pre-fitting works will be subject to clearance (see Article VI.3). At the end of the clearance process as per Article VI.3. below, the balance payment will be established by EMSA.
- d. Within 4 weeks following Contract signature, the Contractor shall send to EMSA copy of the confirmation order of the oil pollution response equipment item(s) with price(s) above EUR 50,000 (fifty thousand euro).

### **VI.3.CLEARANCE OF EQUIPMENT PURCHASE AND COST OF PRE-FITTING WORKS**

Following the acceptance of the Vessel(s) by EMSA to enter into the Contract stand-by phase, EMSA will proceed to the clearance of the pre-financing. The Contractor is obliged to co-operate in the clearance and to provide any information, documentation and explanation requested by EMSA in this regard.

The clearance covers the verification that all 'EMSA approved offers' have been followed by a contractual commitment of the Contractor, that the works and supplies related to these contracts have been carried out and supplied and that the total amount invoiced and paid corresponds to the 'EMSA approved offers'.

To this end, within 30 days following issue of the Acceptance Note by EMSA, the Contractor (or leader in case of a joint tender) shall submit to EMSA two invoices for payment of the balance for the oil pollution response equipment and for pre-fitting works accompanied by:

- invoices for all purchased additional equipment, for all pre-fitting works, for the oil pollution response equipment set transferred and dispersants transportation and overhauling and/or servicing expenses as identified in the Contractor's Tender (Annex II) if these documents have not yet been submitted; and
- Copies of bank statements proving the payment of these invoices.

Within 30 days following receipt by EMSA of the invoice, EMSA shall make the payment based on the invoices not exceeding the relevant Contract ceiling. The Contractor shall have 10 days in which to submit additional information or corrections or other documents if required by EMSA.

In case of an overpayment through the pre-financing, EMSA will recover the amount in question as per article VI.10.

## VI.4. REMUNERATION FOR THE PARTICIPATION IN OIL POLLUTION RESPONSE EXERCISES

### VI.4.1. REMUNERATION FOR THE PARTICIPATION IN NATIONAL AND INTERNATIONAL EXERCISES WITH THE VESSEL AND THE OIL POLLUTION RESPONSE EQUIPMENT

- a. The Contractor is entitled to receive 75% (seventy five per cent) of the Daily Operational Hire as stipulated in Article IV.1.a. of the Incident Response Contract for the Vessel participating, at the request of EMSA, according to the conditions of Article III.2.2.4 paragraph 2.3 in an International and/or EMSA exercise. This includes sailing to and from the exercise location and installing and removing the oil pollution response equipment. The rate will be paid only for hours indicated in the Notice for exercises sent by EMSA to the Contractor.

When a drill and an exercise are conducted back to back, the hours needed for performing the drill will not be compensated as such as it is considered as a normal quarterly drill which costs are covered by the annual vessel availability fee. The hours needed to complete the exercise elements will be compensated as per the above paragraph. These elements are installing the equipment on board, sailing to and from the exercise location, executing the exercise and removing the oil pollution response equipment.

The Contractor is entitled to receive 75% (seventy five per cent) of the Daily Operational Hire as stipulated in Article IV.1.a. of the Incident Response Contract-Vessel for the time needed for additional vessel preparation for the exercise if so requested by the State organising the exercise in order to berth at the exercise location and/or to participate to the exercise e.g. gas free certification operations. EMSA may bear costs and expenses for additional Vessel preparation. For this purpose, the Contractor is obliged to submit for approval to EMSA, prior to the exercise date, one quotation for each potential provider of services. Prices have to be quoted net and gross in euro this being clearly indicated in the quotation submitted. EMSA will verify the offer submitted and inform the Contractor whether the offer is approved or not. EMSA will reimburse the works for additional Vessel preparation up to the maximum amount indicated in the approved offer.

- b. Following completion of the exercise, the Contractor (or leader in the case of a joint tender) shall submit to EMSA an invoice for rate, for fuel consumption and when applicable for costs necessary for additional vessel preparation indicating the reference number of the contract. These invoices shall be accompanied by the Report on the exercise, suppliers' invoices and proofs of payment of these invoices. The Report on exercise should be in accordance with the Report on Exercise Template enclosed in Annex VIII – 'Guidelines on Conducting Drills and Exercises'.

Any other costs related to the Exercise performance (such as pilot or port fees) shall be borne by the Contractor and will not be reimbursed by EMSA.

- c. EMSA shall pay actual fuel costs incurred based on actual documented consumption. For this purpose, the Contractor must send an invoice for fuel consumption expressed in Euro accompanied by a copy of the bunker supplier invoice covering the fuel consumed for the purpose of the exercise performance. If the bunker supplier invoice is not expressed in Euro, the Contractor shall convert the relevant amount into Euro in accordance with Article VI.9.5.
- d. If the fuel costs invoiced are not duly justified they will be calculated on the basis of documented engine operating hours, based on the log book of the Vessel and the average fuel consumption per Vessel per 24 hours as below:

#### Main engine:

Vessel mode	Grade of bunkers	Consumption
Proven consumption at service speed at [tbc] knots (engine operating at 80% continuous rating)	[tbc]	[tbc] metric ton / 24 hours
Proven consumption at full speed of [tbc] knots (maximum continuous rating)	[tbc]	[tbc] metric ton / 24 hours
Proven consumption when manoeuvring at low speed	[tbc]	[tbc] metric ton / 24 hours
Proven consumption whilst in port	[tbc]	[tbc] metric ton / 24 hours

#### Auxiliaries:

Vessels mode	Grade of bunkers	Consumption
Vessel during sea passage	[tbc]	[tbc] metric ton / 24 hours
Vessel manoeuvring	[tbc]	[tbc] metric ton / 24 hours
During cargo operations	[tbc]	[tbc] metric ton / 24 hours

#### Boiler:

Vessels mode	Grade of Bunkers	Consumption
Boiler low capacity	[tbc]	[tbc] metric ton / 24 hours
Boiler high capacity	[tbc]	[tbc] metric ton / 24 hours

If so requested, the Contractor must submit to EMSA certified copies of the log book and historical record of consumption.

From the beginning of the second year of the Contract, the average fuel consumption per vessel referred to above may be revised subject to EMSA written agreement where the Contractor is able to provide evidence such as copy of the log book proving that the consumption referred to above is out of date.

- e. EMSA shall have 60 days from receipt to approve or reject the report on exercise and to pay to the Contractor the exercise hire, the fuel consumed during the exercise and when applicable the costs necessary for additional vessel preparation. The Contractor shall have 30 days in which to submit additional information or corrections or a new report or documents if required by EMSA.

#### **VI.4.2. REMUNERATION FOR THE PARTICIPATION IN EMSA EXERCISES WITH THE VESSEL AND THE OIL POLLUTION RESPONSE EQUIPMENT**

- a. For the participation of the vessel with the oil pollution response equipment in an exercise organised by EMSA, the Contractor is entitled to receive 75% (seventy five per cent) of the Daily Operational Hire as stipulated in Article IV.1.a. of the Incident Response Contract for the Vessel for participating in the exercise, for additional vessel preparation for the exercise if so requested in order to berth at the exercise location and/or to participate to the exercise and reimbursement of the fuel costs as per article VI.4.1 above.
- b. In addition, EMSA will pay for the following costs:
- all port charges, (un)berthing, lightening charges and agents charges;
  - all pilotage and boatmen and canal steersmen fees;
  - any tug assistance for boom deployment or any other support vessel as required by EMSA;
  - customs duties, all permits, import duties (including costs involved in establishing temporary or permanent importation bonds), and clearance expenses, both for the Vessel and/or oil pollution response equipment required for or arising out of the Contract;
  - consular charges appertaining to the Master, Officers and Crew of the Vessel.
- c. For this purpose, upon EMSA requests, the Contractor will submit to EMSA offers from potential suppliers of services. Offers need to be valid until the expected exercise date, for fixed (total) prices. Prices have to be quoted net and gross in euro this being clearly indicated in the offers submitted. EMSA will verify the offers submitted and inform the Contractor within 10 days after receipt whether they are approved for the purpose of this Contract. Reimbursement will be made as per point d. below on the basis of suppliers' invoices.
- d. Following completion of the exercise, the Contractor (or leader in the case of a joint tender) shall submit to EMSA an invoice for rate, for fuel consumption and exercise costs as per point b above accompanied by:
- suppliers' invoices corresponding to the offers approved by EMSA as per c. above,
  - proofs of payment of the suppliers' invoices,

- the Report on the exercise.
- e. EMSA shall have 60 days from receipt to approve or reject the report on exercise and to pay to the Contractor the exercise rate, the fuel consumed during the exercise and costs related to the exercise. The Contractor shall have 30 days in which to submit additional information or corrections or a new report or documents if required by EMSA.

#### **VI.4.3. REMUNERATION FOR THE PARTICIPATION IN INTERNATIONAL AND/OR EMSA EXERCISES WITH THE OIL POLLUTION RESPONSE EQUIPMENT**

- a. For the participation with the oil pollution response equipment only in an international and/or EMSA exercise, the Contractor is entitled to receive reimbursement of the costs incurred in performing the exercise. These may include but are not limited to:
  - Transportation of the oil pollution response equipment to and from the exercise location including loading and unloading;
  - Storage of the equipment at the exercise location;
  - Operation of the oil pollution response equipment by the Contractor staff;
  - Full risks insurance cover for the oil pollution response equipment when operated outside the Vessel;
  - Management costs for the exercise preparation and performance.
- b. Prior to the exercise date, EMSA will communicate to the Contractor the exercise details and scenario. Within 15 days of this communication, the Contractor shall submit to EMSA a project timetable, detailed description of activities and a price breakdown supported by offers from potential suppliers of services. Prices have to be quoted net and gross in euro this being clearly indicated in the offers submitted. EMSA will verify the offers submitted and inform the Contractor within 5 days after receipt whether they are approved for the purpose of this Contract.
- c. Within 10 days following the exercise performance, the Contractor (or leader in the case of a joint tender) shall submit an invoice. The invoice shall be accompanied by the exercise report, suppliers' invoices corresponding to the offers approved by EMSA as per b. above and proofs of payment of these invoices. EMSA shall make the payment within 60 days from receipt of the invoice. The Contractor shall have 30 days in which to submit additional information or corrections, a new final report or other documents if it is required by EMSA.

#### **VI.5. PAYMENT OF ANNUAL AVAILABILITY FEE**

- a. EMSA will pay the Contractor an annual availability fee at the amount of **[complete]** in four instalments as indicated in Article VI.1.
- b. A report describing the successful performance of each Oil Pollution Response drill will be the condition for the invoicing of the proportional part of the annual availability fee for the preceding quarter.
- c. Following expiration of the relevant quarter, the Contractor (or leader in the case of a joint tender) shall submit to EMSA the drill report accompanied by the invoice for the proportional part of the annual availability fee indicating the reference number of the Contract.

With regard to the payment of the last quarter of the year, EMSA may at its discretion request the Contractor (or leader in case of a joint tender) to submit the invoice and the report before the end of the relevant quarter.
- d. EMSA shall have 60 days from receipt to approve or reject the drill report and to pay to the Contractor the proportional part of the annual availability fee provided that the Contractor has fulfilled all his contractual obligations during the relevant quarter. The Contractor shall have 30 days in which to submit additional information or corrections, a new drill report or other documents if it is required by EMSA.

With regard to the payment of the last quarter of the year, EMSA may at its own discretion decide to pay the quarterly availability fee before the end of the relevant quarter.
- e. In case the Contract is renewed as per Article V.2., the annual availability fee to be paid by EMSA during the renewed period shall be calculated in proportion to the renewed period.



## **VI.6. INVOICES and VALUE ADDED TAX**

- a. Invoices must contain the Contractor's (or leader in the case of a joint tender) identification data, the amount, the currency and the date, as well as the contract reference.
- b. Invoices must indicate the place of taxation of the Contractor (or leader in the case of a joint tender) for value added tax (VAT) purposes and must specify separately amounts not including VAT and amounts including VAT.
- c. The Contractor shall have sole responsibility for compliance with the tax laws which apply to him. Failure to comply shall make the relevant invoices invalid.
- d. EMSA is exempt from all taxes and duties, including value added tax (VAT), in accordance with Articles 3 and 4 of the Protocol on the Privileges and Immunities of the European Union.
- e. The Contractor (or leader in the case of a joint tender) must complete the necessary formalities with the relevant authorities to ensure that the supplies and services required for performance of the Contract are exempt from taxes and duties, including VAT.
- f. All invoices shall indicate both the contractor's and EMSA's VAT number.

## **VI.7. BANK ACCOUNT**

Payments shall be made to the Contractor's current bank accounts (two separate) denominated in Euro, identified<sup>11</sup> in Annex X.

## **VI.8. PRE-FINANCING GUARANTEE**

- a. A duly constituted financial guarantee supplied by a bank (guarantor) approved by EMSA which equals the maximum amount for the purchase of the additional equipment, transport and overhauling and/or servicing of the oil pollution response equipment set transferred and of the dispersants and 80% of the pre-fitting works as quoted in the bid must be provided by the Contractor before a pre-financing payment by EMSA will be made. If applicable, following the determination of "EMSA approved offers", the Contractor can reduce the level of the pre-financing guarantee to the same amount.
- b. For this purpose, the Contractor will use the Pre-financing Guarantee template (Annex IX).
- c. Any cost related to the financial guarantee shall be borne by the Contractor.
- d. The guarantor shall pay to EMSA, upon its first demand, any amount covered by the financial guarantee if the Contractor fails to fulfil its contractual obligations in accordance with the terms specified in the Contract and any subsequent amendments, as the case may be.
- e. The guarantor shall stand as first-call guarantor and shall not require EMSA to have recourse against the principal debtor (the Contractor).
- f. The pre-financing guarantee must remain in force until the pre-financing is cleared as per article VI.3. Where the payment of the balance takes the form of a debit note, the pre-financing guarantee must remain in force for three months after the debit note is sent to the Contractor. EMSA must release the guarantee within the following month.

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<sup>11</sup> By a document issued or certified by the bank.



## **VI.9. GENERAL PROVISIONS FOR PAYMENTS**

### **VI.9.1. DATE OF PAYMENT**

Payments shall be deemed to have been made on the date on which the EMSA account is debited.

### **VI.9.2. INTEREST ON LATE PAYMENT**

On expiry of the payment periods specified in Article VI, the Contractor (or leader in the case of a joint tender) is entitled to interest on late payment at the rate applied by the European Central Bank for its main refinancing operations in euros (the reference rate) plus eight points. The reference rate is the rate in force, as published in the C series of the Official Journal of the European Union, on the first day of the month in which the payment period ends.

Suspension of the payment period as provided for in Article VI.9.3 is not considered as giving rise to late payment.

Interest on late payment covers the period running from the day following the due date for payment up to and including the date of payment as defined in Article VI.9.1.

However, when the calculated interest is EUR 200 or less, it must be paid to the Contractor (or leader in the case of a joint tender) only if it requests it within two months of receiving late payment.

### **VI.9.3. SUSPENSION OF THE TIME ALLOWED FOR PAYMENT**

The payment periods referred to in Article VI and corresponding payment obligations may be suspended by EMSA any time by notifying the Contractor (or leader in the case of a joint tender) that its invoice cannot be processed. The reasons EMSA may cite for not being able to process an invoice are:

- (i) because it does not comply with the Contract;
- (ii) because the Contractor has not produced the appropriate documents or deliverables; or
- (iii) because EMSA has observations on the documents or deliverables submitted with the invoice including rejection of a drill report because the Contractor has failed to perform the drill in line with the requirements set in Annex VIII – ‘Guidelines on Conducting Drills and Exercises’.

EMSA must notify the Contractor (or leader in the case of joint tender) as soon as possible of any such suspension, giving the reasons for it.

Suspension takes effect on the date EMSA sends the notification. The remaining payment period resumes from the date on which the requested information or revised documents are received or the necessary further verification, including on-the-spot checks, performance of a new oil pollution response drill demonstrating that the drill is in line with the requirements set in Annex VIII – ‘Guidelines on Conducting Drills and Exercises’ and approval by EMSA of the associated new Report on the oil pollution response drill.

Where the suspension period exceeds two months, the Contractor (or leader in the case of a joint tender) may request EMSA to justify the continued suspension.

Where the payment periods have been suspended following rejection of a document referred to in the first paragraph of this Article and the new document produced is also rejected, EMSA reserves the right to terminate the contract under Article VII.1(c).

### **VI.9.4. CURRENCY AND COSTS OF TRANSFER**

Payments shall be executed in euros. Costs of the transfer are borne in the following way:

- EMSA bears the costs of dispatch charged by its bank ;
- The Contractor bear the costs of receipt charged by its bank;
- The party causing repetition of the transfer bears the costs for repeated transfer.

#### **VI.9.5. CONVERSION**

EMSA makes any conversion between the euro and another currency at the daily euro exchange rate published in the Official Journal of the European Union, or failing that, at the monthly accounting exchange rate, as established by the European Commission and published on the website indicated below, applicable on the day when it issues the payment order.

The Contractor makes any conversion between the euro and another currency at the monthly accounting exchange rate, established by the Commission and published on the website indicated below, applicable on the date of the invoice.

[http://ec.europa.eu/budget/contracts\\_grants/info\\_contracts/infoeuro/infoeuro\\_en.cfm](http://ec.europa.eu/budget/contracts_grants/info_contracts/infoeuro/infoeuro_en.cfm)

#### **VI.10. RECOVERY**

**VI.10.1.** If an amount is to be recovered under the terms of the Contract, the Contractor must repay EMSA the amount in question.

#### **VI.10.2. RECOVERY PROCEDURE**

Before recovery, EMSA must formally notify the Contractor of its intention to recover the amount it claims, specifying the amount due and the reasons for recovery and inviting the Contractor to make any observations within 30 days of receipt.

If no observations have been submitted or if, despite the observations submitted, EMSA decides to pursue the recovery procedure, it must confirm recovery by formally notifying a debit note to the Contractor, specifying the date of payment. The Contractor must pay in accordance with the provisions specified in the debit note.

If the Contractor does not pay by the due date, EMSA may, after informing the contractor in writing, recover the amounts due:

- a. by offsetting them against any amounts owed to the Contractor by EMSA;
- b. by calling in a financial guarantee if the Contractor has submitted one to EMSA;
- c. by taking legal action.

#### **VI.10.3. INTEREST ON LATE PAYMENT**

If the Contractor does not honour the obligation to pay the amount due by the date set by EMSA in the debit note, the amount due bears interest at the rate indicated in Article VI.9.2. Interest on late payments will cover the period starting on the day after the due date for payment and ending on the date when EMSA receives the full amount owed.

Any partial payment is first entered against charges and interest on late payment and then against the principal amount.

#### **VI.10.4. RECOVERY RULES IN THE CASE OF JOINT TENDER**

If the Contract is signed by a group (joint tender), the group is jointly and severally liable under the conditions set out in Article XI (liability). EMSA first claims the full amount to the leader of the group.

If the leader does not pay by the due date and if the amount cannot be offset in accordance with Article VI.10.2 (a), EMSA may claim the full amount to any other member of the group by notifying the debit note already sent to the leader under Article VI.10.2.

## **VI.11. SUSPENSION OF THE PERFORMANCE OF THE CONTRACT**

### **VI.11.1 SUSPENSION BY THE CONTRACTOR**

If the Contractor is affected by force majeure, it may suspend the performance of the Contract.

The Contractor must immediately notify EMSA of the suspension. The notification must include a description of the force majeure and state when the Contractor expects to resume the provision of services.

The Contractor must notify EMSA as soon as it is able to resume performance of the Contract, unless EMSA has already terminated the contract

### **VI.11.2 SUSPENSION BY EMSA**

EMSA may suspend the performance of the Contract or any part of it:

- a. if the procedure for awarding the Contract or the performance of the Contract proves to have been subject to substantial errors, irregularities or fraud;
- b. in order to verify whether the presumed substantial errors, irregularities or fraud actually occurred.

EMSA must formally notify the Contractor of the suspension. Suspension takes effect on the date of formal notification, or at a later date if the formal notification so provides.

EMSA must notify the Contractor as soon as possible whether:

- a. it is lifting the suspension; or
- b. it intends to terminate the Contract under Article VII.1(f) or (j).

The Contractor is not entitled to compensation for suspension of any part of the Contract.

## **VII. TERMINATION OF THE CONTRACT**

### **VII.1. GROUNDS FOR TERMINATION BY EMSA**

EMSA may terminate the Contract in the following circumstances:

- a. if the stand-by phase has not actually started within 3 months of the scheduled date and EMSA considers the new date proposed, if any, unacceptable, taking into account Article XVII.9.2;
- b. if the Contractor is unable, through its own fault, to obtain any permit or licence required for performance of the Contract;
- c. if the Contractor does not perform the Contract in accordance with the Request and Tender specifications or is in breach of another substantial contractual obligation;
- d. if the Contractor or any person that assumes unlimited liability for the debts of the Contractor is in one of the situations provided for in points (a) and (b) of Article 106(1) of the Financial Regulation<sup>12</sup>;
- e. if the Contractor or any related person is subject to any of the situations provided for in points (c) to (f) of Article 106(1) or to Article 106(2) of the Financial Regulation;
- f. if the procedure for awarding the contract or the performance of the contract prove to have been subject to substantial errors, irregularities or fraud;

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<sup>12</sup> Regulation (EU, Euratom) 2015/1929 of the European Parliament and of the Council of 28 October 2015 amending Regulation (EU, Euratom) No 966/2012 on the financial rules applicable to the general budget of the Union, available at: <https://eacea.ec.europa.eu/sites/eacea-site/files/financial-regulation-adopted-28-10-2015-en.pdf>

- g. if the Contractor does not comply with applicable obligations under environmental, social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X to Directive 2014/24/EU;
- h. if the Contractor is in a situation that could constitute a conflict of interest or a professional conflicting interest as referred to in Article XVII.1;
- i. if a change to the Contractor's legal, financial, technical, organisational or ownership situation is likely to substantially affect the performance of the Contract or substantially modify the conditions under which the Contract was initially awarded;
- j. in the event of force majeure, where either resuming implementation is impossible or the necessary ensuing amendments to the Contract would mean that the Request and Tender Specifications are no longer fulfilled or result in unequal treatment of tenderers or Contractors;
- k. if the government of the State of registry and/or the flag of the Vessel, or any agency thereof, requisitions for hire or title or otherwise takes possession of the Vessel during the Contract;
- l. if any government, individual or group, whether or not purporting to act as a government or on behalf of any government, confiscates, requisitions, expropriates, seizes or otherwise takes possession of the Vessel during the Contract;
- m. if the Vessel is lost, actually or constructively, or missing. In the case of termination, payment shall cease from the date the Vessel was lost or, in the event of a constructive total loss, from the date of the event giving rise to such loss. If the date of loss cannot be ascertained or the Vessel is missing, payment shall cease from the date the Vessel was last reported;
- n. If, at any time during the term of this Contract, a breakdown of the Contractor's oil pollution response equipment or Vessel, results in the Contractor being unable to perform its obligations hereunder for a period exceeding twenty days.

## **VII.2. GROUNDS FOR TERMINATION BY THE CONTRACTOR**

The Contractor may terminate the Contract if:

- a. it has evidence that EMSA has committed substantial errors, irregularities or fraud in the procedure for awarding the contract or the performance of the contract;
- b. EMSA fails to comply with its obligations, in particular the obligation to provide the information needed for the Contractor to perform the contract as provided for in the Request and Tender Specifications.

## **VII.3. PROCEDURE FOR TERMINATION**

A party must formally notify the other party of its intention to terminate the contract and the grounds for termination.

The other party has 30 days following the date of receipt to submit observations, including the measures it has taken to continue fulfilling its contractual obligations. Failing that, the decision to terminate becomes enforceable the day after the time limit for submitting observations has elapsed.

If the other party submits observations, the party intending to terminate must formally notify it either of the withdrawal of its intention to terminate or of its final decision to terminate.

In the cases referred to in points (a) to (d) and (g) to (i) and (k) to (n) of Article VII.1 and in Article VII.2, the date on which the termination takes effect must be specified in the formal notification.

In the cases referred to in points (e), (f) and (j) of Article VII.1, the termination takes effect on the day following the date on which the Contractor receives notification of termination.

In addition, at the request of EMSA and regardless of the grounds for termination, the contractor must provide all necessary assistance, including information, documents and files, to allow EMSA to complete, continue or transfer the services to a new contractor or internally, without interruption or adverse effect on the quality or continuity of the services. The parties may agree to draw up a transition plan detailing the Contractor's assistance unless such plan is already detailed in other contractual documents or in the Request and Tender Specifications. The Contractor must provide such assistance at no additional cost, except if it can demonstrate that it requires substantial additional resources or means, in which case it must provide an estimate of the costs involved and the parties will negotiate an arrangement in good faith.

#### **VII.4 EFFECTS OF TERMINATION**

The Contractor is liable for damage incurred by EMSA as a result of the termination of the contract including the cost of appointing another contractor to provide or complete the services, unless the damage was caused by the situation specified in Article VII.1 (j) or in Article VII.2. EMSA may claim compensation for such damage. In addition, EMSA may claim compensation of a sum equal to the residual value of the vessel pre-fitting costs in EMSA's balance sheets at the date on which the termination takes effect. The parties expressly acknowledge and agree that the residual value of the pre-fitting costs which can be recovered by EMSA under this Article are not penalties, and represent a reasonable estimate of fair reimbursement for the loss incurred by EMSA due to early termination of the Contract while the Contractor continues to have the economic benefit of the pre-fittings works carried out with EMSA's funds on board the Vessel.

The Contractor is not entitled to compensation for any loss resulting from the termination of the Contract, including loss of anticipated profits, unless the loss was caused by the situation specified in Article VII.2.

The Contractor must take all appropriate measures to minimise costs, prevent damage and cancel or reduce its commitments.

Within 60 days of the date of termination, the Contractor must submit any report, deliverable or result and any invoice required for services that were provided before the date of termination.

In the case of joint tenders, EMSA may terminate the contract with each member of the group separately on the basis of points (d), (e) or (g) of Article VII.1, under the conditions set out in Article XVII.9.2.

In all cases, EMSA will have the right to use its call option with regard to the oil pollution response equipment.

#### **VII.5. TERMINATION BY EITHER PARTY**

Either party may, terminate the Contract by sending formal notification to the other party with one year written notice. If the contract is terminated:

- (a) neither party is entitled to compensation;
- (b) the Contractor is entitled to payment only for the services provided before termination takes effect.

#### **VII.6. CONSEQUENCES OF TERMINATION BY EITHER PARTY**

The Contractor is not entitled to compensation for any loss resulting from the termination of the Contract, including loss of anticipated profits.

The Contractor must take all appropriate measures to minimise costs, prevent damage and cancel or reduce its commitments.

Within 60 days of the date of termination, the Contractor must submit any report, deliverable or result and any invoice required for services that were provided before the date of termination.

EMSA may recover the residual value of the vessel pre-fitting costs in EMSA's balance sheets at the date on which the termination takes effect. The parties expressly acknowledge and agree that the residual value of the pre-fitting costs which can be recovered by EMSA under this Article are not penalties, and represent a reasonable estimate of fair reimbursement for the loss incurred by EMSA due to early termination of the Contract while the Contractor continues to have the economic benefit of the pre-fittings works carried out with EMSA's funds on board the Vessel.

In all cases, EMSA will have the right to exercise its call option with regard to the oil pollution response equipment.

## **VIII. FAILURE TO PERFORM CONTRACTUAL OBLIGATIONS**

### **VIII.1. REDUCTION IN PRICE**

#### **VIII.1.1 QUALITY STANDARDS**

If the Contractor fails to provide the service in accordance with the Contract ('unperformed obligations') or if it fails to provide the service in accordance with the expected quality levels specified in the tender specifications ('low quality delivery'), EMSA may reduce or recover payments proportionally to the seriousness of the unperformed obligations or low quality delivery. This includes in particular cases where EMSA cannot approve a report or deliverable as defined in Article VI.9 after the Contractor has submitted the required additional information, correction or new version. Should a reduction *pro rata temporis* be decided, the reduction will be calculated using as basis a year of 365 days.

A reduction in price may be imposed together with liquidated damages under the conditions of Article VIII.2.

#### **VIII.1.2. PROCEDURE**

EMSA must formally notify the Contractor of its intention to reduce payment and the corresponding calculated amount.

The Contractor has 30 days following the date of receipt to submit observations. Failing that, the decision becomes enforceable the day after the time limit for submitting observations has elapsed.

If the Contractor submits observations, EMSA, taking into account the relevant observations, must notify the Contractor:

- a. of the withdrawal of its intention to reduce payment; or
- b. of its final decision to reduce payment and the corresponding amount.

#### **VIII.1.3. CLAIMS AND LIABILITY**

Any reduction in price does not affect the Contractor's actual or potential liability or EMSA's rights under Article VII.1.

### **VIII.2. LIQUIDATED DAMAGES**

Should the Contractor fail to perform his obligations under the Contract within the time limits set by the Contract, then, without prejudice to the Contractor's actual or potential liability incurred in relation to the Contract or to EMSA's right to terminate the Contract, EMSA may claim liquidated damages using the following formula:

- $2 \times V \times d / 365$

Where:

V equals the annual availability fee,

d equals to the number of days the vessel is outside of the mobilisation time range without EMSA authorisation and based on the conditions as specified in article II.5.

Liquidated damages may be imposed together with a reduction in price under the conditions laid down in Article II.5.

Should the Contractor fail to perform any of its obligations detailed below then, without prejudice to the Contractor's actual or potential liability incurred in relation to the Contract or to EMSA's right to terminate the Contract, EMSA may decide to impose liquidated damages of:

- **2%** of the amount that equals the oil pollution response equipment purchasing price (including the purchase value of the oil pollution response equipment set transferred as per point 5 of Annex V (Technical Specifications for Equipment and Dispersants) and the purchase value of the additional equipment as per Annex II (Contractor's Tender) if failing to be in compliance with the oil pollution response equipment maintenance plan;
- **25%** of the amount that equals the annual availability fee if failing to attend a scheduled exercise properly noticed;
- **50%** of the amount that equals three times the annual availability fee where the Contractor or its sub-contractor sells or otherwise transfers possession of the Vessel during the Contract period;
- **50%** of the amount that equals four times the annual availability fee if failing to react to a request to provide oil pollution response services.

Liquidated damages may be imposed together with a reduction in price under the conditions laid down in Article VIII.1.

EMSA must formally notify the Contractor of its intention to apply liquidated damages and the corresponding calculated amount.

The Contractor has 30 days following the date of receipt to submit observations. Failing that, the decision becomes enforceable the day after the time limit for submitting observations has elapsed.

If the Contractor submits observations, EMSA, taking into account the relevant observations, must notify the Contractor:

- a. of the withdrawal of its intention to apply liquidated damages; or
- b. of its final decision to apply liquidated damages and the corresponding amount.

The parties expressly acknowledge and agree that any amount payable under this Article is not a penalty and represents a reasonable estimate of fair compensation for the damage incurred due to failure to provide the services within the applicable time limits and obligations set out in this Contract.

Any claim for liquidated damages does not affect the Contractor's actual or potential liability or EMSA's rights under Article VII.

## **IX. FORCE MAJEURE**

**IX.1.** If a party is affected by force majeure, it must immediately notify the other party, stating the nature of the circumstances, their likely duration and foreseeable effects.

**IX.2.** A party is not liable for any delay or failure to perform its obligations under the Contract if that delay or failure is a result of force majeure. If the Contractor is unable to fulfil its contractual obligations owing to force majeure, it has the right to remuneration only for the services actually provided.

**IX.3.** The parties must take all necessary measures to limit any damage due to force majeure.

**IX.4.** In case of force majeure, notified in accordance with Article IX.1, either contracting party may terminate the Contract, where performance thereof cannot be ensured for a period corresponding to at least one fifth of the stand-by phase.

## **X. WAR**

**X.1.** Unless the consent of the Contractor be first obtained, the Vessel shall not be ordered nor continue to any port or place or on any voyage nor be used on any service which will bring the Vessel within a zone which is dangerous as a result of any actual or threatened act of war, war, hostilities, warlike



operations, acts of piracy or of hostility or malicious damage against the Vessel or any other Vessel or its cargo by any person, body or state whatsoever, revolution, civil war, civil commotion or the operation of international law, nor be exposed in any way to any risks or penalties whatsoever consequent upon the imposition of sanctions, nor carry any goods that may in any way expose her to any risks of seizure, capture, penalties or any other interference of any kind whatsoever by the belligerent or fighting powers or parties or by any government or rulers.

**X.2.** Should the Vessel approach or be brought or ordered within such zone when performing activities under the scope of this Contract, or be exposed in any way to the said risks, the availability and/or exercises fee shall be payable for all time lost including any loss owing to loss of or injury to the Master, Officers, Crew or passengers or to refusal by any of them to proceed to such zone or to be exposed to such risks.

**X.3.** The Vessel shall have liberty to comply with any orders or directions as to departure, arrival, routes, ports of call, stoppages, destination, delivery or in any other way whatsoever given by the government of the nation under whose flag the Vessel sails or any other government or any person (or body) acting or purporting to act with the authority of such government or by any committee or person having under the terms of the war risks insurance on the Vessel the right to give any such orders or directions.

**X.4.** In the event of the nation under whose flag the Vessel sails becoming involved in war (whether there be a declaration of war or not) either the Contractor or EMSA may terminate this Contract.

## **XI. LIABILITIES AND INDEMNITIES**

### **XI.1. EMSA**

Unless there is wilful misconduct or gross negligence on the part of EMSA and notwithstanding any other provision contained in this Contract, EMSA shall not be liable or responsible for any loss or damage to any property of the Contractor or of its sub-contractor(s), including the Vessel, or for personal injury or death of the employees of the Contractor or of its sub-contractor(s), arising out of or in any way connected with the performance of this Contract, even if such loss, damage, injury or death is caused wholly or partially by the act, neglect, or default of EMSA, its employees, contractor(s) or sub-contractor(s), and even if such loss, damage, personal injury or death is caused wholly or partially by unseaworthiness of any Vessel; and the Contractor shall indemnify, protect, defend and hold harmless EMSA from any and against all claims, costs, expenses, actions, proceedings, suits, demands and liabilities whatsoever arising out of or in connection with such loss, damage, personal injury or death.

### **XI.2. THE CONTRACTOR**

**XI.2.1.** The Contractor is liable for any loss or damage caused to EMSA during or as a consequence of performance of the Contract, including in the event of subcontracting, but only up to an amount not exceeding three times the total amount of the contract. However, if the damage or loss is caused by the gross negligence or wilful misconduct of the Contractor or of its personnel or subcontractors, the contractor is liable for the whole amount of the damage or loss.

**XI.2.2.** The Contractor shall be liable and responsible for any and all loss or damage caused by himself, his Vessel, Staff, Master and Crew or sub-contractor in performance of the Contract, including in the event of subcontracting under Article XVII.4. EMSA shall not be liable for any act, omission or default on the part of the Contractor, his Vessel, Staff, Master and Crew or sub-contractor in performance of the Contract. EMSA is not liable for any damage or loss caused by the Contractor, including any damage or loss to third parties during or as a consequence of performance of the contract.

**XI.2.3.** The Contractor shall provide compensation in the event of any action, claim or proceeding brought against EMSA by a third party as a result of damage caused by the Contractor, his Vessel, Staff, Master and Crew or Subcontractor in performance of the Contract.

**XI.2.4.** If a third party brings any action against EMSA in connection with the performance of the Contract, including any action as a result of damage caused by the Contractor, his Vessel, Staff, Master and Crew or Subcontractor or any action for alleged breach of intellectual property rights, the Contractor must assist EMSA in the legal proceedings, including by intervening in support of EMSA upon request. If EMSA's liability towards the third party is established and that such liability is caused by the Contractor during or as a consequence of the performance of the contract, Article XI.2.1 applies.

**XI.2.5.** If the Contractor is composed of two or more economic operators (i.e. who submitted a joint tender), they are all jointly and severally liable to EMSA for the performance of the Contract.

### **XI.3. LIMITATIONS**

Nothing contained in this Contract shall be construed or held to deprive the Contractor or EMSA, as against any person or party, including as against each other, of any right to claim limitation of liability provided by any applicable law, statute or convention, save that nothing in this Contract shall create any right to limit liability. Where the Contractor or EMSA may seek an indemnity under the provisions of this Contract or against each other in respect of a claim brought by a third party, the Contractor or EMSA shall seek to limit their liability against such third party.

### **XI.4. HIMALAYA CLAUSE**

All exceptions, exemptions, defences, immunities, limitations of liability, indemnities, privileges and conditions granted or provided by this Contract or by any applicable statute, rule or regulation for the benefit of the Contractor shall also apply to and be for the benefit of the Contractor's parent, affiliated, related and subsidiary companies, the Contractor's sub-contractor, the Vessel, its Master, Officers and Crew, its registered owner, its operator, its demise charterer(s), their respective employees and their respective underwriters. The Contractor shall be deemed to be acting as agent or trustee of and for the benefit of all such persons and parties set forth above, but only for the limited purpose of contracting for the extension of such benefits to such persons and parties.

### **XI.5. POLLUTION**

**XI.5.1.** The Contractor shall be liable for, and agree to indemnify, defend and hold harmless EMSA against all claims, costs, expenses, actions, proceedings, suits, demands and liabilities whatsoever arising out of actual or potential pollution damage and the cost of clean-up or control thereof arising from acts or omissions of the Contractor or their personnel which cause or allow discharge, spills or leaks from the Vessel.

**XI.5.2.** EMSA shall not be liable for damage sustained by the Contractor in performance of the Contract except in the event of wilful misconduct on the part of EMSA.

## **XII. OPERATIONAL COMMAND AND CONTROL**

The entire operation, navigation, and management of the Vessel shall be in the exclusive control and command of the Contractor, the Master, Officers and Crew. The Vessel will be operated and the services hereunder will be rendered as requested by EMSA, subject always to the exclusive right and obligation of the Contractor or the Master of the Vessel to operate the Vessel safely.

## **XIII. SAVING OF LIFE**

When performing activities under the scope of this Contract, the Vessel shall be permitted to deviate for the purpose of saving life at sea without prior approval of or notice to EMSA and without loss of rights provided however that notice of such deviation is given as soon as possible.

#### **XIV. COLLISION CLAUSE**

If, when performing activities under the scope of this Contract, the Vessel comes into collision with another ship and/or structure as a result of the negligence of the other ship and/or structure and/or any act, neglect or default of the Master, mariner, pilot or the servants of the Contractor in the navigation or the management of the Vessel, EMSA will not indemnify the Contractor against loss or liability. The foregoing provisions shall also apply where the owners, operators or those in charge of any ship or ships or objects other than or in addition to the colliding ships or objects are at fault in respect of a collision or contact.

#### **XV. WRECK REMOVAL**

If the Vessel sinks when performing any activity under the scope of this Contract and becomes a wreck and an obstruction to navigation and has to be removed upon request by any compulsory law or authority having jurisdiction over the area where the wreck is placed, the Contractor shall be liable for any and all expenses in connection with the raising, removal, destruction, lighting or marking of the wreck and shall have no recourse against EMSA.

#### **XVI. INSURANCES**

**XVI.1.** The Contractor shall take out insurance against risks, liabilities, and damages relating to performance of the Contract. He shall take out supplementary insurance as reasonably required by standard practice in the industry. A copy of all the relevant insurance certificates shall be sent to EMSA as part of the Completion Report and at any time during the Stand-by phase should it so request.

**XVI.2.** The Contractor shall at minimum procure and maintain in effect for the duration of this Contract, with reputable insurers, the insurances set forth below. Reasonable deductibles are acceptable and shall be for the account of the Contractor. Insurance policies (as applicable) to be procured and maintained by the Contractor:

- a. Full risk insurance to the oil pollution response equipment to cover any damage, loss, theft or liability during installation, deployment, drilling, storage, handling or any other activity in which damage can occur;
- b. Hull and Machinery Insurance shall be provided with limits equal to those normally carried by the Contractor for the Vessel;
- c. Protection and Indemnity (Marine Liability) Insurance shall be provided for the Vessel and shall include but not be limited to coverage for specialist operations (pollution response), for crew liability, third party bodily injury and property damage liability, including collision liability, towers liability (unless carried elsewhere) and liability arising out of this Contract and any Incident Response Contract-Vessel signed.
- d. General Third Party Liability Insurance.
- e. Workmen's Compensation and Employer's Liability Insurance for Employees - Covering non-employees for statutory benefits as set out and required by local law in area of operation or area in which the Contractor may become legally obliged to pay benefits.
- f. Liability for Passenger and others (for observers on behalf of EMSA and/or a Requesting State).
- g. Full risk insurance to the dispersants to cover any damage to or caused by the application of the dispersant, loss, theft or liability during storage, handling and transportation or any activity during which damage can occur.

The Contractor shall include the following minimum policy requirements in the full risk insurance policy for oil pollution response equipment and dispersants:

- Name EMSA as additional insured.
- Include a waiver of subrogation of the Contractor's insurers' rights against EMSA. Furthermore, the Contractor's insurers shall also waive their rights to any set-off or counter claim or any other deduction, whether by attachment or otherwise, in respect of any liability to or on behalf of the additional insured.

- Include provision for response on a primary and non-contributing basis with respect to any other insurance that may be available to EMSA.
- Provide that EMSA shall receive thirty (30) days' written notice from the insurance Contractor, underwriter, or provider prior to any cancellation or change of insurance coverage provided under the insurance policy or policies concerned.

**XVI.3.** The Contractor shall, upon request, furnish EMSA with certificates of insurance which provide sufficient information to verify that the Contractor has complied with the insurance requirements of the Contract.

**XVI.4.** Compliance with this clause is to be essential to the Contract and in case of non-compliance the Contract will be terminated, unless rectified within 10 days of notice.

## **XVII. OTHER ISSUES**

### **XVII.1. CONFLICT OF INTERESTS**

**XVII.1.1.** The Contractor must take all necessary measures to prevent any situation of conflict of interest or professional conflicting interest.

**XVII.1.2.** The Contractor must notify EMSA in writing as soon as possible of any situation that could constitute a conflict of interest or a professional conflicting interest during the performance of the contract. The contractor must immediately take action to rectify the situation.

EMSA may do any of the following:

- verify that the Contractor's action is appropriate;
- require the Contractor to take further action within a specified deadline.

**XVII.1.3.** The Contractor must pass on all the relevant obligations in writing to:

- its personnel;
- any natural person with the power to represent it or take decisions on its behalf;
- third parties involved in the performance of the contract, including subcontractors.

The Contractor must also ensure that the persons referred to above are not placed in a situation which could give rise to conflicts of interest.

### **XVII.2. CONFIDENTIALITY**

**XVII.2.1.** Without prejudice to III.2.2.1.c, EMSA and the Contractor shall treat with confidentiality any information and documents, in any form, disclosed in writing or orally in relation to the performance of the Contract and identified in writing as confidential.

Each party must:

- not use confidential information or documents for any purpose other than to perform its obligations under the Contract without prior written agreement of the other party;
- ensure the protection of such confidential information or documents with the same level of protection as its own confidential information and in any case with due diligence;
- not disclose directly or indirectly confidential information and documents to third parties without prior written agreement of the other party.

**XVII.2.2.** The confidentiality obligation set out in this Article are binding on EMSA and the Contractor during the performance of the Contract and for as long as the information or documents remain confidential unless:

- a. the disclosing party agrees to release the receiving party from the confidentiality obligation earlier;
- b. the confidential information or documents become public through other means than a breach of the confidentiality obligation;
- c. the disclosure of the confidential information is required by law.

**XVII.2.3.** The Contractor must obtain from any natural person with the power to represent it or take decisions on its behalf, as well as from third parties involved in the performance of the Contract, a commitment that they will comply with this Article. At the request of EMSA, the Contractor must provide a document providing evidence of this commitment.

### **XVII.3. OWNERSHIP OF THE RESULTS AND USE, DISTRIBUTION & PUBLICATION OF INFORMATION**

**XVII.3.1.** Any results or rights thereon, including copyright and other intellectual or industrial property rights, obtained in performance of the Contract, shall be owned solely by EMSA, which may use, publish, assign or transfer them as it sees fit, without geographical or other limitation, except where industrial or intellectual property rights exist prior to the Contract being entered into force.

**XVII.3.2.** The Contractor shall authorise EMSA to process, use, distribute and publish, for whatever purpose, by whatever means and on whatever medium, pictures/media material or any data contained in or relating to the Contract, in particular the identity of the Contractor, the Vessel, oil pollution response equipment, the subject matter, the duration, the amount paid and the reports. Where personal data is concerned Article XVII.7. shall apply.

If natural, recognisable persons appear in a result or their voice is recorded the contractor shall submit a statement of these persons (or of the persons exercising parental authority in case of minors) where they give their permission for the described use of their image or voice on request by EMSA. This does not apply to persons whose permission is not required in line with the law of the country where photographs were taken, films shot or audio records made.

**XVII.3.3.** Unless otherwise provided for in this Contract, EMSA shall not be required to distribute or publish documents or information supplied in performance of the Contract. If it decides not to publish the documents or information supplied, the Contractor may not have them distributed or published elsewhere without prior written authorisation from EMSA.

**XVII.3.4.** Any distribution or publication of information relating to the Contract by the Contractor shall require prior written authorisation from EMSA. It shall state that the opinions expressed are those of the Contractor only and do not represent EMSA's official position. EMSA may waive this obligation in writing.

**XVII.3.5.** The use of information obtained by the Contractor in the course of the Contract for purposes other than its performance shall be prohibited, unless EMSA has specifically given prior written authorisation to the Contractor.

### **XVII.4. SUBCONTRACTING**

**XVII.4.1.** The Contractor must not subcontract or have the Contract performed by third parties beyond the third parties already mentioned in its tender without prior written authorisation from EMSA.

**XVII.4.2.** In the event of subcontracting, the Contractor remains bound by its contractual obligations and is solely responsible for the performance of the Contract.

**XVII.4.3.** The Contractor must ensure that the subcontract does not affect the rights of EMSA under this Contract, particularly those under Articles XVII.2, XVII.3 and XVII.6.

**XVII.4.4.** EMSA may request the Contractor to replace a subcontractor found to be in a situation provided for in points (d) and (e) of Article VII.1.

## **XVII.5. ASSIGNMENT**

- a. The Contractor must not assign the rights and obligations arising from the Contract, including claims for payments or factoring, without prior written authorisation from EMSA. In such cases, the Contractor must provide EMSA with the identity of the intended assignee.
- b. Any right or obligation assigned by the contractor without authorisation is not enforceable against EMSA.

## **XVII.6. CHECKS AND AUDITS**

**XVII.6.1.** EMSA and the European Anti-Fraud Office may check or carry out an audit on the performance of the contract. It may be carried out either directly by OLAF's own staff or by any other outside body authorised to do so on its behalf.

Such checks and audits may be initiated at any moment during the performance of the contract and up to five years starting from the payment of the balance.

The audit procedure is initiated on the date of receipt of the relevant letter sent by EMSA. Audits shall be carried out on a confidential basis.

**XVII.6.2.** The Contractor shall keep all original documents stored on any appropriate medium, including digitised originals if authorised by national law, for a period of five years starting from the payment of the balance.

**XVII.6.3.** The Contractor must grant EMSA's staff and outside personnel authorised by EMSA the appropriate right of access to sites and premises where the contract is performed and to all the information, including information in electronic format, needed in order to conduct such checks and audits. The Contractor must ensure that the information is readily available at the moment of the check or audit and, if so requested, that information be handed over in an appropriate form.

**XVII.6.4.** On the basis of the findings made during the audit, a provisional report shall be drawn up. It shall be sent to the Contractor, which shall have 30 days following the date of receipt to submit observations. The final report shall be sent to the contractor within 60 days following the expiry of that deadline.

On the basis of the final audit findings, EMSA may recover all or part of the payments made and may take any other measure which it considers necessary.

**XVII.6.5.** By virtue of Council Regulation (Euratom, EC) No 2185/96 of 11 November 1996 concerning on-the-spot checks and inspection carried out by the Commission in order to protect the European Communities' financial interests against fraud and other irregularities and Regulation (EC) No 883/2013 of the European Parliament and the Council of 11 September 2013 concerning investigation conducted by the European Anti-Fraud Office (OLAF), the OLAF may also carry out investigations, including on-the-spot checks and inspections, to establish whether there has been fraud, corruption or any other illegal activity under the contract affecting the financial interests of the Union. Findings arising from an investigation may lead to criminal prosecution under national law.

The investigations may be carried out at any moment during the provision of the services and up to five years starting from the payment of the balance.

**XVII.6.6.** The Court of Auditors has the same rights as EMSA, notably right of access, for the purpose of checks and audits.



## **XVII.7. PROCESSING OF PERSONAL DATA**

**XVII.7.1.** Any personal data included in the Contract must be processed in accordance with Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movements of such data. The data shall be processed solely for the purposes of the performance, management and monitoring of the Contract by the Head of Unit – Pollution Response Services acting as data controller. This does not affect its possible transmission to bodies entrusted with monitoring or inspection tasks in application of Union law.

**XVII.7.2.** The Contractor has the right to access its personal data and the right to rectify any such data. The Contractor should address any queries concerning the processing of its personal data, to the data controller.

**XVII.7.3.** The Contractor has right of recourse at any time to the European Data Protection Supervisor.

**XVII.7.4.** Where the Contract requires the processing of any personal data by the Contractor, the Contractor may act only under the supervision of the data controller, in particular with regard to the purposes of the processing, the categories of data which may be processed, the recipients of the data, and the means by which the data subject may exercise its rights.

**XVII.7.5.** The Contractor must grant personnel access to the data to the extent strictly necessary for the performance, management and monitoring of the Contract.

**XVII.7.6.** The Contractor must adopt appropriate technical and organisational security measures having regard to the risks inherent in the processing and to the nature of the personal data concerned in order to:

- a) prevent any unauthorised person from having access to computer systems processing personal data, and especially:
  - (i) unauthorised reading, copying, alteration or removal of storage media;
  - (ii) unauthorised data inputting as well as any unauthorised disclosure, alteration or erasure of stored personal data;
  - (iii) unauthorised use of data-processing systems by means of data transmission facilities;
- b) ensure that authorised users of a data-processing system can access only the personal data to which their access right refers;
- c) record which personal data have been communicated, when and to whom;
- d) ensure that personal data being processed on behalf of third parties can be processed only in the manner prescribed by EMSA;
- e) ensure that, during communication of personal data and transport of storage media, the data cannot be read, copied or erased without authorisation;
- f) design its organisational structure in such a way that it meets data protection requirements.

## **XVII.8. APPLICABLE LAW AND SETTLEMENT OF DISPUTES**

**XVII.8.1.** The Contract shall be governed by Union law, complemented, where necessary, by the law of Portugal, except for the Incident Response Contract-Vessel, which establishes specific rules in its article III.12.

**XVII.8.2.** Any dispute between the parties resulting from the interpretation, application or validity of the Contract which cannot be settled amicably shall be brought before the courts of Lisbon, Portugal.

## **XVII.9. AMENDMENTS**

**XVII.9.1** Any amendment to the Contract must be made in writing before all contractual obligations have been fulfilled.

**XVII.9.2** Any amendment must not make changes to the Contract that might alter the initial conditions of the procurement procedure or result in unequal treatment of tenderers.

For **[company name]**,

Done at ,on

Signature:

For the European Maritime Safety Agency,

Done at Lisbon, on

Signature:

**[Forename, surname]**

**[Function]**

Markku Mylly

Executive Director

In duplicate in English