

## ENCLOSURE 2 - DRAFT<sup>1</sup> AIRPLANE AVAILABILITY CONTRACT

Enclosed to the Invitation to Tender No EMSA/OP/13/2014

Service Contract for Aerial Dispersant Application Service

CONTRACT NUMBER – [to be completed by EMSA]

The European Maritime Safety Agency (hereinafter referred to as “EMSA”), represented by Markku Mylly, Executive Director,

on the one part, and

[official name in full]

[official legal form]

[statutory registration number]

[official address in full]

[VAT registration number]

(hereinafter referred to as the “Contractor”), represented by [name in full and function],

on the other part<sup>2</sup>,

### HAVE AGREED

to the Terms and Conditions below and the following Annexes which form an integral part of this Service Contract for stand-by service for aerial dispersant application (hereinafter referred to as the “Contract”):

<b>Annex I</b>	Tender Specifications (Invitation to Tender N° EMSA/OP/13/2014 of [complete])
<b>Annex II</b>	Contractor's Tender (N° [complete] of [complete])
<b>Annex III</b>	Incident Response Contract - Airplane (IRC-A)
<b>Annex IV</b>	Pre-financing guarantee template
<b>Annex V</b>	International / National Airplane Exercise Participation Agreement

The Terms and Conditions shall take precedence over the other Annexes. The terms set out in the Annex I shall take precedence over those in the 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 XV.8 of the Contract, should he dispute any such instruction.

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<sup>1</sup> Note: Parts to be completed in final contract are marked in yellow.  
Parts to be adapted to options are marked in green

<sup>2</sup> In 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 the contract”.

## TERMS AND CONDITIONS

### I. GENERAL ADMINISTRATIVE PROVISIONS

Any communication relating to the Contract shall be made in writing and shall bear the Contract number. Communications shall be sent to the following addresses:

European Maritime Safety Agency:  
EMSA - European Maritime Safety Agency  
Mr Bernd Bluhm  
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 contracting parties shall inform the other party in due time and in writing of any changes hereto.

Ordinary mail shall be deemed to have been received on the date on which it is registered at EMSA. Electronic communication shall be deemed to have been received by the parties on the Day of dispatch of that communication provided it is sent to the addressees listed above. Without prejudice to the preceding, if the sending party receives a message of non-delivery to or of absence of the addressee, it shall make every effort to ensure the actual receipt of such communication by the other party.

Electronic communication shall be confirmed by an original signed paper version of that communication. The sender shall send the original signed paper version without unjustified delay.  
Any formal notification shall be made by registered mail with return receipt or equivalent, or by equivalent electronic means.

For the purposes of this Contract the following definitions shall apply:

**Acceptance drill:** First oil pollution response drill observed by EMSA to be carried out by the Contractor after the Completion Report is received by EMSA. The purpose of the Acceptance Drill is to test the Arrangement in order to demonstrate to EMSA that the Contractor has achieved, during the preparation phase of the Contract, suitable and sufficient response capacity according to the requirements of the Contract and that the Arrangement is fully ready for the tasks under this Contract. The Acceptance Drill is accompanied by the assessment of the Arrangement and the relevant certificates.

If the evaluation of the Acceptance Drill by EMSA is satisfactory, the Arrangement is admitted to the next phase of the Contract: stand-by phase.

**Aircrew:** All the crew on board the Airplane, meaning the pilots and the Operating Crew.

**Airplane:** The airplane or airplanes used for the performance of this Contract identified in Article IV.1.4 of this Contract.

**Airworthiness Authority:** Federal Aviation Agency (FAA) and/or European Aviation Safety Agency (EASA) and/or National Authority.

**Arrangement:** The combination of Airplane(s), Equipment set(s) and Aircrew(s) necessary for achieving the Dispersant payload as per Annex II.

**Day(s):** Calendar day(s) of 24 hours.

**Dispersant:** Approved<sup>2</sup> oil dispersant to be efficiently applied by the Airplane over the Oil Spill.

**Equipment:** The dispersant application system to be used on board of the Airplane as per Annexes I and II.

**Equipment Base:** Place where the Equipment is stored, loaded at the beginning of the operations and unloaded at the end of the operations.

**IRC-A:** The Incident Response Contract for the Airplane as per Annex III.

**Notification exercise:** 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. The Arrangement is not used during such an exercise. Participating parties to such exercises usually are: EMSA, the Contractor, Emergency Response Coordination Centre (ERCC DG ECHO) and a Member State requesting assistance.

**Notice of Pollution:** Notice sent by EMSA to the Contractor following receipt of a request for assistance from a Requesting State indicating relevant details of the incident.

**Notice of Readiness:** Notice sent by the Contractor to the Requesting Party or its nominee and to the OSC or its nominee confirming that the Airplane is fully equipped and ready for leaving the Equipment Base in order to go to the Operational Base.

**Oil:** Petroleum in any form including crude oil, fuel oil, residual oil, bunker oil, sludge, or other type of dispersible oil.

**Oil Spill:** The incident which led to the Services of the Contractor being requested by the Requesting Party.

**On Scene Commander (OSC):** A person so called or whoever may for the purpose of the IRC-A be considered as equivalent thereto appointed by the Requesting Party to assume the operational control of flight operations in case of an Oil Spill. The OSC is authorised to delegate one or more tasks to one or more nominees on board the Airplane.

**Operating Crew:** The crew on board the Airplane, responsible for operating the Equipment.

**Operational Base:** The airport where the Dispersant will be loaded on the Airplane. The Operational Base will be indicated by the Requesting State.

**Operational exercise:** planned activity intended to test and to practise cooperation during aerial and/or at sea pollution response actions on a national or international level, involving multiple assets/structures to be used in a coordinated response. The exercise requires the mobilisation of the Airplane, its Aircrew and Equipment, and their coordinated use together with additional assets from national and international parties taking part in the exercise, including other EMSA contracted assets.

**Pollution Response Drill:** planned activity intended to test the Contractor's capability to respond effectively to oil spills at sea as requested by the Contract, observed by EMSA staff. During the drill the main aspects to evaluate are the skills of the Aircrew to operate the Equipment, as well as the overall technical condition of Airplane and Equipment.

**Quarter:** A calendar quarter.

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<sup>2</sup> Normally 'type 3' dispersant

**Requesting Party:** Public body representing the Requesting State, to which the Contractor agrees to render the Services.

**Requesting State:** Any coastal European Union (EU) Member State, European Free Trade Association (EFTA) Member State or the European Commission who requests for assistance in the context of an incident response mobilisation or who organises an International/National exercise.

**Services:** The services required under this Contract.

**Support Crew:** The crew that provides the ground support operations such as loading/offloading of the Equipment.

*[If Storage option included in the offer add: "**Dispersant stored under this contract**": the dispersant stock that EMSA might provide to the Contractor for storage and use under this Contract.]*

## II. PURPOSE OF THE CONTRACT

The purpose of this Contract is to create additional aerial dispersant application capacity available in the coastal European Union (EU) Member States and coastal European Free Trade Association (EFTA) Member States through the conclusion of a stand-by service agreement with the Contractor. For this purpose, the Contractor agrees to adjust and equip the Airplane and train the Aircrew accordingly in order to have a fully equipped and manned Airplane for performing aerial dispersant application services in the framework of this Contract, as specified in Annexes I and II.

In case of actual Oil Spill the Contractor has the obligation to offer the aerial dispersant application services, covered by this Contract at pre-defined conditions, to a Requesting State, in the framework of an IRC-A (Annex III).

## III. ENTRY INTO FORCE, DURATION AND RENEWAL OF THE CONTRACT

**III.1.** The Contract shall enter into force on the date on which it is signed by the last party and shall last until the end of the stand-by phase *[In case of option for storage of dispersants replace by: until the end of the closure phase]*. The execution of the tasks is divided in two phases *[In case of option for storage of dispersants replace by: in three phases]* as follows:

**III.1.1. The preparation phase:** The preparation phase starts on the Day the last of the two contracting parties signs the Contract. The Contractor should perform all its tasks linked to the preparation phase within 9 (nine) months following its starting date. The preparation phase will end on the Day on which the Arrangement *[In case of a pool of Airplanes and several Equipment sets add: and each airplane part of the pool (with different crews if applicable) are]* is accepted by EMSA in writing as indicated in the Acceptance Note as per Article IV.2.10.

**III.1.2. The stand-by phase:** The stand-by phase begins on the Day following the acceptance of the Arrangement as per Article IV.2.10 and lasts for a period of 24 months subject to Article IV.3.5. *[In case of a pool of Airplanes and several Equipment sets add: Acceptance of the other Airplanes in the pool and Equipment sets should then take place no later than 9 (nine) months following the preparation phase starting date as per article IV.2.8.]*

*[In case of option for storage of dispersants add: **III.1.3. The closure phase:** The closure phase represents the final phase of the contract. It starts the Day the stand-by phase ends and lasts for a maximum period of three months or earlier if all tasks are completed.]*

**III.2.** A description of each of the Contract phases is presented in Annex I.

**III.3.** The Contract may be renewed twice, with the explicit written agreement signed by the parties, for a maximum additional stand-by phase of 12 months in each renewal. Renewal does not imply any modification or deferment of existing obligations relating to the Services.

**III.4.** Six months before the renewal date, the Contractor should confirm in writing its intention to renew. By then the Contractor shall have carried out a review of technological evolution in order to propose any improvement upgrade of the technical and operational response capacities. Should EMSA come to the conclusion that a substantial change is needed, EMSA will decide whether to initiate a procurement procedure in line with its Financial Regulation in order to implement an upgraded project. Three 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.

**III.5.** In case of renewal, the Availability Fee as stipulated in this Contract and the Daily Operational and Hourly Flight Rates as stipulated in Article IV.2 of the IRC-A, for the renewed contract will be based on the current Contract amounts and an indexation determined by the trend in the harmonised indices of consumer prices (HICP) European Index of Consumer Prices (EICP) published for the first time by the Eurostat monthly 'Data in Focus' publication at <http://www.ec.europa.eu/eurostat/>. Prices revision upwards or downwards for the renewed contractual period shall be calculated in accordance with the following formula:

$$Ar = Ao \times \frac{Ir}{Io}$$

where,

Ar = Revised total amount;

Ao = Total amount in the original tender;

Io = Index for the month when the Contract was signed;

Ir = Index for the month, six months prior to the expiry date of the first term of the Contract.

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

### **IV.1. GENERAL PERFORMANCE**

**IV.1.1.** The Contractor shall perform the Services under the Contract to the highest professional standards. The Contractor shall have sole responsibility for complying with any legal obligation incumbent on a service provider of services of the kind of the ones mentioned in this Contract, including but not limited to those resulting from employment, tax and social legislation.

**IV.1.2.** The Contractor shall neither represent EMSA nor behave in any way that would give such an impression. The Contractor shall avoid creating the impression to third parties that he belongs to the European public service.

**IV.1.3.** The Contractor shall execute the tasks assigned to it in accordance with Annex I.

**IV.1.4.** The Airplane used to perform the Contract is: *[aircraft type, serial number, registration number]*.

*[If two or more Airplanes and Equipment sets add: "The Arrangement that can be mobilised at any time should guarantee the necessary Dispersant payload as per Annex II."]*

**IV.1.5.** The Contractor undertakes that the Airplane and its Equipment shall be in good order and condition and in every way fit to operate effectively at all times for the performance of the Services as stated in this Contract and its Annex III.

**IV.1.6.** The Contractor undertakes that the Airplane, when performing any activity under the scope of this Contract or related to it, must be kept free from any cargo which may interfere with the execution of any task in relation to the Contract or may affect the payload capacity of the Airplane. Furthermore, at all times, the Airplane shall be able to provide the payload capacity required to accommodate the Equipment and the quantity of dispersant in line with Annex II. This Airplane payload must be ensured by the Contractor at any time upon request for Services during the stand-by phase.

**IV.1.7.** Without prejudice to Article XV.1, any reference made to the Contractor's staff in the Contract shall relate exclusively to individuals involved in the performance of the Contract.

**IV.1.8.** The Contractor must ensure that the personnel performing the Contract possess the professional qualifications and experience required for the execution of the tasks assigned to it.

The Contractor shall make provision for the following employment or service relationships with his staff in general and the Aircrew in particular:

- During operations, staff executing the Services assigned to the Contractor may not be given and may not accept orders directly by EMSA and/or staff appointed by EMSA.
- EMSA is not and may not under any circumstances be considered to be the staff's employer and the said staff shall undertake not to invoke in respect of EMSA any right arising from the contractual relationship between EMSA and the Contractor. The Contractor shall ensure that the necessary provisions to that effect are included in the employment or service contracts with staff or contractors.

**IV.1.9.** The Contractor undertakes that the Aircrew shall comply with the following conditions:

- The Operating Crew will be responsible for the spraying operations and accordingly will operate the Equipment.
- The Aircrew must be proficient in English, notably in the technical terms associated with rendering and performance of the Services.
- The Aircrew 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 Airplane and the Equipment.

**IV.1.10.** The Contractor shall have sole responsibility for the staff that executes the Services assigned to the Contractor.

**IV.1.11.** The Contractor shall ensure that the Equipment is in line with the requirements set in Annex I and Annex II.

**IV.1.12.** *[If storage option included in the offer add: The Contractor shall receive, maintain the possession and exercise proper custody, care, and safekeeping of the Dispersant provided by EMSA in order for it to be readily available at all times.]*

**IV.1.13.** The Contractor undertakes that the Equipment, during the term of the Contract, will not be used for other services than required under this Contract, therefore being readily available at all times for all purposes of this Contract and the Services.

**IV.1.14.** The Contractor shall have sole responsibility for taking the necessary steps to obtain permits, licences or certificates required for performance of the Contract under the laws and regulations in force except for those under the responsibility of the Requesting State as per Article III.1.1 of the IRC-A. The Contractor must also comply with all standards and regulations applicable to the Airplane and its operation under this Contract, including the health, safety and labour regulations.

**IV.1.15.** During the entire term of the Contract, if any unforeseen event (e.g. incident, accident, near miss), force majeure, action or omission, may directly or indirectly hamper or delay the 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. The reporting shall include a description of the problem, the date on which it started and the remedial action taken by the Contractor to ensure full and timely compliance with his obligations under the Contract. In such event the Contractor shall give full priority to solving the problem rather than determining liability.

**IV.1.16.** EMSA staff is entitled to carry out ground inspections including visit of the Airplane, the Equipment and the Contractor's premises and offices. The date of such visits will either coincide with the agreed date for a drill or be agreed on each occasion with the Contractor. EMSA may decide to delegate the visit to the Airplane to any suitable person. EMSA will provide the Contractor, 10 Days before the agreed date of the visit, with information regarding the person(s) assigned by EMSA for this purpose. Access to the Airplane and to the Contractor's premises should be granted to the person(s) designated by EMSA.

## **IV.2. PERFORMANCE DURING THE PREPARATION PHASE**

**IV.2.1.** An indicative plan for the implementation of the preparation phase is contained in Annex II. Following signature of the Contract, the Contractor will report monthly to EMSA about the activities that are being carried out.

**IV.2.2.** During the preparation phase the Contractor is obliged to perform the activities detailed in Annexes I and II, notably:

- Pre-fit and adjust the airplane within the time-limits set in the Contract in order to efficiently install, store, deploy and operate the Equipment;
- Ensure that the Equipment is available for the service, as well as surveyed, tested, and its function and installation in the basic airplane type is approved and certified to comply with the applicable airworthiness and operational requirements by a relevant authority;
- Ensure that the Aircrew have received or will receive the appropriate training before the beginning of the Stand-by Phase and that this training has been approved by the competent authority;
- Finalise all amenities, facilities and conditions required for the receipt and storage of the Equipment;
- *[If option included in the offer add: Finalise all amenities, facilities and conditions required for the receipt, storage and management of Dispersant, as required in Annex I], and*
- Obtain all certificates and authorisations required;
- Deliver to EMSA, at its premises in Lisbon, a 1:50 scale model of one Airplane and the Equipment, free of charge. As from delivery and after Contract expiration or early termination, the model shall remain the property of EMSA.



**IV.2.3.** Whenever applicable, the Contractor must complete the works to pre-fit and adjust the Airplane within the time-limits set by the Contract.

**IV.2.4.** The Contractor shall ensure that the Equipment is surveyed, tested, approved and certified by a competent authority in order to comply with all relevant regulations.

**IV.2.5.** The Contractor shall ensure that the Equipment manufacturer certifies the construction and safe and efficient functioning of the Equipment before submission of the **Completion Report** as defined in Annex I.

**IV.2.6.** The Contractor must submit to EMSA (for each Arrangement) a Completion Report within the time limits set in Article III.1 for the preparation phase. The Completion Report should be in accordance with Annex I and reflect that all the tasks as per Article IV.2.2 have been complied with and represents a warranty from the Contractor that the Equipment has been successfully tested. EMSA will have 14 Days to accept or reject this Completion Report from its receipt.

**IV.2.7.** Should the preparation phase not be completed within the period referred to in Article III.1, 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. In any event, if it is reasonably foreseeable that the preparation phase will not be completed, the Contractor will as soon as possible provide written notice to EMSA.

**IV.2.8.** Within 14 Days from the acceptance of the Completion Report, a first Oil Pollution Response Drill ("**Acceptance Drill**"), as described in Annex I, will be carried out by the Contractor and could be attended by EMSA representatives, in order to demonstrate that all activities undertaken during the preparation phase were successful in preparing the Arrangement for the tasks under this Contract.

When more than one Arrangement is foreseen, the Contractor will perform an Acceptance Drill for each Arrangement.

*[In case of a pool of Airplanes and several Equipment sets add: The contractor shall perform an Acceptance Drill for each airplane part of the pool (with different crews if applicable) in order to prove the compatibility with the Equipment and its functioning on board. However, for the airplanes that already received an official statement and/or documentation (e.g. certificate, approved project documentation, approved flight test) from a relevant airworthiness authority, demonstrating their testing with regard to the on-board installation and operation of the equipment, EMSA shall accept this as equivalent proof and will not request to perform any additional Acceptance Drills other than the minimum Acceptance Drill(s) that is required for each Equipment set included in the offer.]*

**IV.2.9.** Following the Acceptance Drill as defined in Annex I, the Contractor must submit a drill report. In case of rejection of the report, EMSA will request the Contractor to revise the report or repeat the Acceptance Drill, if either the drill or the report is not considered satisfactory by EMSA.

**IV.2.10.** 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 from the receipt by EMSA of the report corresponding to the Acceptance Drill.

**IV.2.11.** The acceptance of the Completion Report by EMSA does not represent a waiver from EMSA for any liability that may arise due to the Contractor obligations to have the Airplane and Equipment properly fit for the purposes of the Contract.



### IV.3. PERFORMANCE DURING THE STAND-BY PHASE

**IV.3.1.** During the stand-by phase and subject to Article IV 3.3., the Contractor shall be free to use and employ the Airplane for its usual activity, as described in Annex II, unless it is required for an incident response mobilisation following a request for assistance, an exercise or a Pollution Response Drill.

**IV.3.2.** During this stand-by phase period, the Contractor undertakes to, in accordance with Annexes I and II:

- maintain the Arrangement ready and fit for the purposes of the Contract and in particular ensure the continued airworthiness of the airplane;
- ensure that the Airplane and Aircrew are, at all times, ready to react to an emergency Oil pollution response request (emergency stand-by);
- perform emergency Oil pollution response operations upon request and in accordance with the IRC-A;
- perform regular Pollution Response Drills;
- participate in pollution response exercises;
- arrange annual training programs on aerial dispersant application for all the personnel engaged in the performance of the Services;
- store the Equipment;

• *[If storage option is included add: and store the Dispersant supplied by EMSA].*

**IV.3.3.** The Contractor is obliged not to enter into any agreement with a third party for employment of the resources (Airplane, Aircrew, Equipment, Support Crew. *[in case of storage of Dispersant add: Dispersant]*), which may in any way, interfere with the good and timely performance of the Contractor's obligations pursuant to this Contract.

**IV.3.4.** 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.

**IV.3.5.** An emergency Oil pollution response operation commenced during the stand-by phase shall be completed according to the IRC-A signed with the Requesting State concerned. The expiry of the stand-by phase shall not result in the termination of an on-going Oil pollution response or aerial dispersant application operation.

**IV.3.6.** *[In case of Dispersant storage option add: Within three months following the issue of the Acceptance Note as per Article IV.2. 10, EMSA will provide the Contractor with labels, related supporting fittings as well as guidelines for marking the Dispersant containers. Upon receipt of the labels, the Contractor shall physically fit each label to its associated Dispersant container. If labels are lost or damaged during Contract implementation, the Contractor shall inform EMSA which will provide new labels for the relevant Dispersant container(s). All costs including but not limited to labour costs related to the physical marking of Dispersant container(s) with labels shall be borne by the*

*Contractor and are covered by the Availability Fee as agreed under this Contract. Upon completion of the marking service, the Contractor shall inform EMSA in writing and submit to EMSA photographic evidence.*

**IV.3.7.** The Contractor shall inform of any audits/inspections carried out on their operations by the relevant airworthiness authority and of the outcomes of those audits.

The Contractor shall immediately inform EMSA about any maintenance, damage or loss sustained by the Airplane and/or Equipment that affects the Services. The Contractor shall replace lost or damaged Airplane and/or Equipment at his own expense, cost and risk.

**IV.3.8.** The Contractor is entitled to make all routine/scheduled and unscheduled maintenance works for the Airplane (e.g. A, B, C level checks) or Equipment, leading to an unavailability of the Services for up to 20 Days for the whole duration of the stand-by phase, without any reductions of the annual Availability Fee. If this period is exceeded, the annual Availability Fee will be reduced proportionally (*pro rata temporis*) to the number of additional Days. If the Contract is renewed, the number of Days for maintenance/repairs used during the first term of the Contract shall not be counted against the 10 full Days of maintenance/repairs the Contractor is entitled to during each renewed stand-by phase of 12 months. Accordingly, the contractor shall provide at the beginning of each year the planning of the scheduled maintenance programme for each airplane included in the offer. In addition, the contractor shall inform EMSA without delay each time when the need for an unscheduled maintenance has been identified for one of the airplanes included in the offer. In this case EMSA should be informed about the start of the down time and the estimated duration. Upon completion of the unscheduled maintenance the contractor shall confirm the airplane's availability to EMSA.

**IV.3.9.** As from the starting date of the stand-by phase, the Contractor shall send to EMSA quarterly reports in accordance with Annex I.

**IV.3.10.** Within 30 Days after expiration of the stand-by phase, the Contractor shall send a Final Report in paper and electronic format to EMSA including all templates of documents or procedures developed or improved for the performance of this Contract, and an evaluation of the Contract performance, including lessons learned and proposals for improvement of the Services.

#### **IV.3.11. POLLUTION RESPONSE DRILLS**

a. The Contractor shall organise, as a minimum every six months a Pollution Response Drill. *If two or more equipment sets are included in the offer, the Contractor shall perform a minimum of one Pollution Response Drill for each equipment set every year. In case of several equipment sets, crews and airplanes, the Contractor should endeavour to involve all these resources in the drills in order to be compliant with a minimum level of testing and training.* Each drill shall last for a maximum of one Day at the Equipment Base. The aim of the Pollution Response Drill(s) is, in accordance with Annex I, to verify the performance of the contracted Services.

b. At the beginning of each year of service, EMSA and the Contractor will set the date(s) in which the drill(s) will take place. The Contractor will inform EMSA, at least 2 weeks in advance, of any change in the date of the drill, compared to the initial plan. EMSA staff and persons invited by EMSA may attend each Pollution Response Drill as observers. The costs related to the performance of the Pollution Response Drills are included in the annual Availability Fee paid in accordance with Article V.2.

c. For each drill performed, the Contractor shall prepare a detailed drill report, containing all relevant details and the evaluation of the drill's performance. The Contractor shall submit the drill report within 14 Days from the date of the performed drill. EMSA shall have 30 Days from receipt to approve or reject the report. In case of rejection of the drill report, EMSA will request the Contractor to revise the drill report or repeat the drill, if either the drill or the report is not appropriate. If additional information or a new report is requested, the Contractor shall have 14 Days to submit it from the date of EMSA request.

#### **IV.3.12. POLLUTION RESPONSE EXERCISES**

a. The aim of the pollution response exercises is, in accordance with Annex I, to verify the performance of the contracted Services in conjunction with other private, national or international Services and resources, and the inter-connection with such Services. The costs related to the performance of the exercises are paid as detailed below in Articles IV.3.12.1 and IV.3.12.2 and in Article V.3.

b. For each type of exercise, the Contractor shall prepare a detailed exercise report, containing all relevant details and the evaluation of the exercise performance. Clear action points with timelines for closure and follow-up to ensure close-out are to be included in the exercise report. Unless otherwise agreed by the parties, the Contractor shall submit the exercise report within 14 Days from the date of the performed exercise. EMSA shall have 30 Days from receipt to approve or reject the report. If additional information is required or the report is rejected, the Contractor shall have 14 Days to submit a new exercise report, starting from the date of EMSA's request.

c. EMSA may request notification exercises and (International/National and/or EMSA) operational exercises, as set forth under Articles IV.3.12.1. and IV.3.12.2.

##### **IV.3.12.1. NOTIFICATION EXERCISES**

At request of EMSA the Contractor and his staff shall participate in notification exercises (up to a maximum of 2 per year). Any cost linked to the notification exercise sustained by the Contractor is covered by the annual Availability Fee.

The time period needed for the performance of the notification exercises shall not be counted against the maximum number of international/national and/or EMSA exercises Days per year that EMSA may request as stipulated in Article IV.3.12.2 below.

##### **IV.3.12.2. INTERNATIONAL/NATIONAL AND/OR EMSA OPERATIONAL EXERCISES**

a. At request of EMSA the Contractor shall participate, with the Arrangement, in International/National and/or EMSA operational exercises. The request should be made at least 30 Days prior to the starting date of the exercise.

b. The Contractor shall participate in operational exercises (maximum 6 Days in total or 3 Days per year per set of Equipment, whichever is greater) under the co-ordination of the Requesting State organising the exercise and as per the conditions of this Contract as complemented by the International/National Airplane Exercise Participation Agreement (Annex V) signed between EMSA, the Contractor and the Requesting State organising the exercise. The Contractor irrevocably agrees to enter into an International/National Airplane Exercise Participation Agreement with EMSA and the Requesting State organising the exercise.

c. The Contractor is remunerated for his participation in International/National and/or EMSA operational exercises according to Article V.3.

#### IV.3.13. INCIDENT RESPONSE MOBILISATION

- a. At receipt of a request for assistance from a Requesting State, EMSA may decide to send a Notice of Pollution to the Contractor including all details EMSA considers relevant.
- b. The Contractor irrevocably undertakes to enter into the IRC-A with a Requesting State as indicated in EMSA's Notice of Pollution.
- c. The Contractor, following the receipt of the Notice of Pollution from EMSA, shall have a maximum of 6 hours to sign the IRC-A and send it to the Requesting State.
- d. The Contractor continues to be entitled to receive the annual Availability Fee for the period the Services are performed under an IRC-A with a Requesting State.
- e. Upon mutual agreement between EMSA and the Contractor, the Contractor will endeavour to enter into contract with any third party, not being an EU Member State or an EFTA country that requires assistance of an equipped Airplane. EMSA will set the conditions for the performance of the Services to the third party, in particular with regard to the rates, maximum duration of the Services and the terms of the contract to be concluded with the third party.
- f. The Contractor shall appoint a contact point available to receive the Notice of Pollution 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.
- g. Following the receipt of the IRC-A signed by the Requesting State, the maximum overall time period, in which the Contractor is expected to have the Equipment installed on board the Airplane, the Airplane refilled in fuel **[if the Dispersant is stored at the same airport as the Equipment, add: have the Dispersant loaded]**, be ready to take off to the oil spill site and send a Notice of Readiness, to the Requesting State and the OSC, is 12 hours as per Article III.2.1.a of the IRC-A.
- h. The resources subject to this Contract shall not be used for any other pollution response activities which might undermine the performance of the Services.

#### IV.4. PERFORMANCE DURING THE CLOSURE PHASE

**[If storage of dispersant option is included in offer add: Prior to or within one month of the expiration of the Contract or on the date of early termination of this Contract, EMSA may by written notice require the Contractor to make available and ready for transportation any remaining stock of Dispersant stored under this Contract at its storage location and on a date specified in the notice, but no later than 3 months after the end of the stand-by phase. The potential associated costs and/or expenses will be borne by the Contractor and are covered by the payment in the closure phase stipulated under article V.4 below.]**

### V. CONTRACT PRICE, PAYMENT PERIODS AND FORMALITIES

#### V.1. Compensation Fee

##### V.1.1. Compensation Fee for the preparation phase

The maximum total amount to be paid as compensation for the preparation phase under the Contract shall be XXXXXX EUR<sup>3</sup> [amount in figures and in words].

#### **V.1.2. Pre-financing of compensation for the preparation phase**

If pre-financing is requested by the Contractor, a pre-financing payment of XXXXEUR [amount in figures and in words] equal to 50% of the compensation for the preparation phase shall be made by EMSA within 30 Days of the receipt of an invoice. *[Depending on the assessment of the Financial and Economic capacity of the offer, EMSA might require a guarantee for the pre-financing. In that case add: as well as of a duly constituted financial guarantee in accordance with Annex IV securing XXXX EUR [amount in figures and in words].]*

#### **V.1.3. Payment of the balance of compensation for the preparation phase**

At the end of the preparation phase, the Contractor will submit an invoice for the payment of the balance of the compensation for the preparation phase referred to in Article V.1.1.

In case pre-financing was granted, invoice for balance payment has to indicate separately the amount of balance payment and the amount of pre-financing.

The invoice for balance payment of the compensation for the preparation phase shall be accompanied by the Completion Report (as per Article IV.2.6) and the Acceptance Drill report (as per Article IV.2.9). EMSA shall make the payment within 30 Days from receipt of the invoice. The Contractor shall have 30 Days in which to organise a new Acceptance Drill, submit additional information or corrections, or a new progress report or documents if required by EMSA.

If the Contractor does not meet his obligation to complete the preparation of the Arrangement by the time referred to in Article III.1.1, EMSA may impose liquidated damages as per Article VII.

In that case, any pre-financing payment as per Art.V.1.2 paid in excess of the due compensation fee should be recovered by EMSA. For that purpose any value of the pre-financing paid in excess shall be off-set from the next payment due under the Contract.

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 and/or recover all payments made to the Contractor as per Article VI.1.

### **V.2. Availability Fee during stand-by phase**

**V.2.1.** The Contractor is entitled to receive the annual Availability Fee during the stand-by phase as from the date of acceptance as indicated in the Acceptance Note issued as per Article IV.2.10.

The maximum total amount for the annual Availability Fee is XXXX EUR (in words)<sup>4</sup>, covering all tasks executed during the stand-by phase during a period of one year, except for the performance of emergency Oil pollution response operations in accordance with the IRC-A and for the participation in exercises.

**V.2.2.** EMSA will pay the Contractor the annual Availability Fee in four instalments.

<sup>3</sup> The amount will be set in accordance with the offer in the tender and the ceiling of EUR 50,000 (EUR fifty thousand) as established in the tender specifications for this compensation of the initial investment costs of the contractor for the establishment of the service.

<sup>4</sup> In case of option for storage the amount reflected here will include the additional cost for the storage and maintenance during the preparation phase.

- a. The acceptance of the quarterly reports and performance of the tasks relevant to the Quarter in accordance with the Contract will be the condition for the payment of the proportional part of the annual Availability Fee for the preceding Quarter. The last payment of the annual Availability Fee is also conditioned to the provision by the Contractor of the documents required under Article IV.3.10.
- b. Following each Quarter, the Contractor shall submit to EMSA, within 10 Days the quarterly 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 own discretion request the Contractor to submit the invoice and the quarterly report before expiration of the relevant Quarter and decide to pay the quarterly Availability Fee before the end of the relevant Quarter.
- c. EMSA shall have 30 Days from receipt to approve or reject the quarterly report and to pay to the Contractor the proportional part of the annual Availability Fee. The Contractor shall have 30 Days in which to submit additional information or corrections, a new quarterly report or other documents if it is required by EMSA.
- d. In case the Contract is renewed as per Article III.3., the annual Availability Fee to be paid by EMSA during the renewed period shall be calculated in proportion to the renewed period.

### **V.3. Remuneration for participation in international/national and EMSA exercises with the Airplane and the Equipment**

- a. The Contractor is entitled to receive 75% (seventy five per cent) of the **Daily Operational Rate** and 100% (one hundred per cent) of the **Hourly Flight Rate** as stipulated in Article IV.2.a and b. of the IRC-A for the Airplane participating in an exercise, as well as full reimbursement of the fuel costs as per point d. below subject to the conditions of Article IV.3.12 of this Contract. This includes flying from the Equipment Base to the exercise location and back, but does not include installing and unloading the Equipment. The Hourly Flight Rate will be paid only for actual flight hours indicated in the notice for exercises sent by EMSA to the Contractor.
- b. The Contractor is entitled to receive 75% (seventy five per cent) of the Daily Operational Rate as stipulated in Article IV.2.a. of the IRC-A for the time needed for **additional services** related to the exercise if so requested by the State organising the exercise.  
EMSA may bear costs and expenses for such additional services. For this purpose, the Contractor will be requested in due time to submit for approval to EMSA, at least 60 Days prior to the exercise date, one offer including quotations or estimations for each potential additional service. 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 within 10 Days after receipt whether they are approved for the purpose of this Contract. EMSA will reimburse the costs and expenses for such additional services based on suppliers' invoices and up to the maximum amount indicated in the approved offer.
- c. **Other costs directly related to the exercise performance** (such as all airport charges, customs duties, flight permits, clearance expenses, consular charges appertaining to the Aircrew and accommodation and meals for the Aircrew) will be reimbursed by EMSA or the Requesting State in accordance with the Exercise Participation Agreement. For this purpose, the Contractor will submit to EMSA at least 60 Days prior to the exercise date, one offer with quotations or detailed estimations of such other costs. 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. Actual costs will be reimbursed by EMSA on the basis of suppliers' invoices.

d. 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 fuel supplier invoice covering the fuel consumed for the purpose of the exercise performance. If the fuel supplier invoice is not expressed in Euro, the Contractor shall convert the relevant amount into Euro through using the exchange rate applicable on the date of the fuel supplier invoice as published under the European Union website (<http://ec.europa.eu/budget/inforeuro/>).

e. Following completion of the exercise, the Contractor shall submit to EMSA the invoices for the pro rata temporis of the Daily Operational Rate, the Hourly Flight Rate, for fuel consumption and if so agreed between the Requesting State organising the exercise and EMSA for the costs related to the exercise performance as per paragraphs b. and c. above. These invoices shall be accompanied by the report on the exercise and suppliers invoices.

f. If the fuel costs invoiced are not duly justified they will be calculated on the basis of documented operating hours of the Airplane, based on flight records of the Airplane and the average hourly fuel consumption as follows:

Airplane mode	Type of fuel	Consumption
At cruising speed of [tbc] knots	[tbc]	[tbc] / hour
At full speed of [tbc] knots	[tbc]	[tbc] / hour
At operational speed of [tbc] knots (non-pressurised)	[tbc]	[tbc] / hour
During ground operations	[tbc]	[tbc] / hour

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

g. EMSA shall have 30 Days from receipt to approve or reject the report on exercise and complete invoices to pay the Contractor. In case of rejection, the Contractor shall have 30 Days in which to submit additional information or corrections or a new report or documents if required by EMSA.

*[In case of option to store Dispersant add:*

#### ***V.4. Payment for the storage and hand over of Dispersant during the closure phase***

*The maximum total amount to be paid as compensation for the storage and hand-over of Dispersant during the closure phase under the Contract shall be EUR<sup>5</sup> [amount in figures and in words].*

*The invoice for payment of the compensation in the paragraph above shall be accompanied by the inventory list of the Dispersant. EMSA shall make the payment within 30 Days from receipt of the invoice. The Contractor shall have 30 Days in which to submit additional information, or corrections, or documents if required by EMSA.*

## **V.5. INVOICES and TAXATION**

a. Invoices shall contain the Contractor's identification, the amount, the currency and the date, as well as the Contract reference.

<sup>5</sup> The amount will be set in accordance with the offer in the tender and the ceiling of EUR 50,000 as established in the tender specifications.



- b. Invoices shall indicate the Contractor's place of taxation for VAT purposes and shall specify separately the amounts not including VAT and the 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. The Contractor recognises that EMSA is, as a rule, exempt from all taxes and duties, including value added tax (VAT), pursuant to the provisions of Articles 3 and 4 of the Protocol on the Privileges and Immunities of the European Union.
- e. The Contractor shall accordingly 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 exemption.

#### **V.6. BANK ACCOUNT**

Payments shall be made to the Contractor's bank account denominated in [euro]<sup>6</sup>, identified as follows:

Name of bank: [complete]  
Full address of branch: [complete]  
Exact designation of account holder: [complete]  
Full account number: [complete]  
[IBAN<sup>7</sup> code: [complete]

*[Depending on the assessment of the Financial and Economic capacity of the offer, EMSA might require a guarantee for the pre-financing. In that case the following article will apply:*

#### **V.7. PRE-FINANCING GUARANTEE**

*If a pre-financing is requested by the Contractor, pre-financing guarantee shall remain in force until 1 September 2016 or until the pre-financing is cleared (whichever occurs first) against payment of the balance and, in case the latter takes the form of a debit note, three months after the debit note is notified to the Contractor. EMSA shall release the guarantee within the following month.*

*Where, in accordance with Article V.1.2, a financial guarantee is required for the payment of pre-financing it shall fulfil the following conditions:*

- a. the financial guarantee is provided by a bank, or, at the request of the Contractor and in agreement with EMSA, by a third party;*
- b. the guarantor stands as first-call guarantor and does not require EMSA to have recourse against the principal debtor (the Contractor);*

*For this purpose the Contractor will use the Pre-financing Guarantee template attached to the Invitation to Tender (Annex IV).*

*The cost of providing such guarantee shall be borne by the Contractor.]*

#### **V.8. GENERAL PROVISIONS FOR PAYMENTS**

<sup>6</sup> Or local currency where the receiving country does not allow transactions in EUR.

<sup>7</sup> BIC or SWIFT code for countries with no IBAN code.

#### **V.8.1. Date of payment**

Payments shall be deemed to be effected on the date when they are debited from EMSA's account.

#### **V.8.2. Currency**

The currency of the Contract is Euros. Payments shall be executed in Euros.

Conversion between the Euro and another currency shall be made according to the daily Euro exchange rate published in the Official Journal of the European Union or, failing that, at the monthly accounting exchange rate established by the European Commission and published on its website, applicable on the Day on which the payment order is issued by EMSA.

#### **V.8.3. Costs of transfer**

The costs of the transfer shall be borne in the following way:

- a. costs of dispatch charged by the bank of EMSA shall be borne by EMSA;
- b. cost of receipt charged by the bank of the Contractor shall be borne by the Contractor;
- c. costs for repeated transfer caused by one of the parties shall be borne by the party causing repetition of the transfer.

#### **V.8.4. Suspension of the time allowed for payment**

EMSA may suspend the payment periods specified in Article V at any time by notifying the Contractor that its invoice cannot be processed, either because it does not comply with the provisions of the Contract, or because the appropriate documents have not been produced.

EMSA shall inform the Contractor in writing as soon as possible of any such suspension, giving the reasons for it. Suspension shall take effect on the date the notification is sent by EMSA. The remaining payment period shall start to run again from the date on which the requested information or revised documents are received or the necessary further verification, including on-the-spot checks, is carried out. Where the suspension period exceeds two months, the Contractor may request EMSA to justify the continued suspension.

Where the payment periods has been suspended following rejection of a document referred to in the first paragraph and the new document produced is also rejected, EMSA reserves the right to terminate the Contract in accordance with Article VI.

#### **V.8.5. Interest on late payment**

On expiry of the payment periods specified in Article V, and without prejudice to Article V.8.4, the Contractor 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 percentage points. The reference rate shall be the rate in force on the first Day of the month in which the payment period ends, as published in the C series of the Official Journal of the European Union.

The suspension of the payment periods in accordance with Article V.8.4 may not be considered as a late payment. Interest on late payment shall cover the period running from the Day following the due date for payment up to and including the date of actual payment as defined in Article V.8.1.

However, when the calculated interest is lower than or equal to EUR 200, it shall be paid to the Contractor only upon request submitted within two months of receiving late payment.

### **V.9. RECOVERY**

**V.9.1.** If an amount is to be recovered under the terms of the Contract, the Contractor shall repay EMSA the amount in question according to the terms and by the date specified in the debit note.

**V.9.2.** If the obligation to pay the amount due is not honoured by the date set by EMSA in the debit note, the amount due shall bear interest at the rate indicated in Article V.8.5. Interest on late payments shall cover the period from the Day following the due date for payment, up to and including the date when EMSA receives full payment of the amount owed.

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

**V.9.3.** If payment has not been made by the due date, EMSA may, after informing the Contractor in writing, recover the amounts due by offsetting them against any amounts owed to the Contractor by EMSA or by calling in the financial guarantee, where provided for in Article V.7.

## **VI. TERMINATION OF THE CONTRACT**

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

Without prejudice to any other facts or circumstances expressly provided for under this Contract EMSA is also entitled to terminate the Contract upon the following:

- a. if the preparation phase has not been completed, due to the Contractor's failure to fulfil its contractual obligations, within 12 (twelve) months following entry into force of the Contract;
- b. if the Contractor is declared bankrupt, is being wound up, is having its affairs administered by the courts, has entered into an arrangement with creditors, has suspended business activities, is the subject of proceedings concerning those matters, or is in any analogous situation arising from a similar procedure provided for in national legislation or regulations;
- c. if the Contractor or any natural person with the power to represent it or take decisions on its behalf has been found guilty of professional misconduct proven by any means;
- d. if the Contractor is not in compliance with its obligations relating to the payment of social security contributions or the payment of taxes in accordance with the legal provisions of the country in which it is established or with those of the country of the applicable law of this Contract or those of the country where the Contract is to be performed;
- e. if EMSA has evidence that the Contractor or natural persons with the power to represent it or take decisions on its behalf have committed fraud, corruption or are involved in a criminal organisation, money laundering or any other illegal activity;
- f. if EMSA has evidence that the Contractor or natural persons with the power to represent it or take decisions on its behalf have committed substantial errors, irregularities or fraud in the award procedure or the performance of the Contract, including in the event of submission of false information;
- g. if a change to the Contractor's legal, financial, technical or organisational or ownership situation is likely to affect the performance of the Contract substantially or calls into question the decision to award the Contract;
- h. if the Contractor is unable, through its own fault to obtain or maintain any permit or licence required for performance of the Contract;
- i. if the Contractor fails to perform the Contract as established in the tender specifications or fails to fulfil another substantial contractual obligation;

- j. if the government of the state of registry of the Airplane, or any agency thereof, requisitions for hire or title or otherwise takes possession of the Airplane during the Contract;
- k. if any government, individual or group, different from the Requesting State, 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 Airplane during the Contract;
- l. if the Airplane is lost, actually or constructively, or missing. In the case of termination, payment shall cease from the date the Airplane 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 Airplane is missing, payment shall cease from the date the Airplane was last reported;
- m. if, at any time during the term of this Contract, a breakdown and/or malfunctioning of the Equipment or the Airplane results in the Contractor being unable to perform its obligations hereunder for a period exceeding twenty Days (consecutive).

When EMSA intends to terminate the Contract it shall so notify the Contractor specifying the grounds thereof. EMSA shall invite the Contractor to make any observations and, in the case of point (i) of this Article, to inform EMSA about the measures taken to continue the fulfilment of its contractual obligations, within 30 Days from receipt of the notification.

If EMSA does not confirm acceptance of these observations by giving written approval within 30 Days of receipt, the termination procedure shall proceed. In any case of termination EMSA shall notify the Contractor about its decision to terminate the Contract. In the cases referred to in points (a), (b) (d), (g), (h) and (i) of this Article the formal notification shall specify the date on which the termination takes effect.

In the cases referred to in points (c), (e), (f), (j), (k), (l) and (m) of this Article the termination shall take effect on the Day following the date on which notification of termination is received by the Contractor.

**VI.2.** In case of force majeure, notified in accordance with Article VIII, 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.

### **VI.3. EFFECTS OF TERMINATION BY EMSA**

In the event of EMSA terminating the Contract as per Article VI.1 above, and without prejudice to any other measures provided for in the Contract, the Contractor shall waive any claim for damages, including claims for consequential damages, any loss of anticipated profits for uncompleted work. On receipt of the notification of termination, the Contractor shall take all appropriate measures to minimise the costs, prevent damage, and cancel or reduce his commitments.

The contractor shall have 60 days from the date of termination to draw up the documents required by the Contract for the tasks already executed on the date of termination and produce an invoice if necessary.

EMSA may claim compensation for any damage suffered and recover any sums paid to the Contractor under the Contract with the exception of cases of early termination of the Contract specified under Article VI.1 points j), k) and l). These sums include compensation fee for the preparation phase provided that the Contract is terminated by EMSA during the first term of the Contract before a renewal has been mutually agreed.

On termination EMSA may engage any other Contractor to complete the Services. EMSA shall be entitled to claim from the Contractor all extra costs incurred in making good and completing the Services.

The above compensation is established without prejudice to any other rights or guarantees EMSA has under the Contract.

#### VI.4. TERMINATION BY EITHER PARTY

**VI.4.1.** Either party may, unilaterally and without being required to pay compensation, terminate the Contract by notifying the other party by giving 9 months' prior written notice. Should EMSA terminate the Contract, the Contractor shall only be entitled to payment corresponding to part-performance of the Contract before the termination date.

**VI.4.2.** In the event of termination, under the preceding Article V.I.4.1., the Contractor shall waive any claim for damages, including claims for consequential damages and for any loss of anticipated profits for uncompleted work. On receipt of the notification of termination, the Contractor shall take all appropriate measures to minimise costs, prevent damage, and cancel or reduce its commitments. The Contractor shall have 60 Days from the date of termination to draw up the documents required for the tasks already executed on the date of termination and produce an invoice if necessary. EMSA may recover any amounts paid under the Contract.

### VII. FAILURE TO PERFORM CONTRACTUAL OBLIGATIONS

Should the Contractor fail to perform his obligations under the Contract also with regard to the required quality level, according to the tender specifications, 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 reduce or recover payments in proportion to the scale of the failure.

Should a reduction *pro rata temporis* be decided during the stand-by or the closure phase, the reduction will be calculated using as basis a year of 365 Days.

In addition, EMSA may decide to impose liquidated damages of:

- **EUR 25,000 per month of delay** to be applied *pro rata temporis* the delay comparing the number of Days of delay and a month of 30 Days if the Contractor does not meet his obligation to complete the preparation phase by the time referred to in Article III.1.1;
- **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 the annual Availability Fee where the Contractor or its subcontractor sells or otherwise transfers possession of the Equipment or Airplane during the Contract period;
- **100%** of the amount that equals the annual Availability Fee if failing to react to a request to provide the actual aerial dispersant application services to a Requesting Party to respond to an Oil Spill under an IRC-A.

The Contractor may submit arguments against this decision within 30 (thirty) Days of notification by registered letter with acknowledgement of receipt or equivalent. In the absence of reaction on his part or of written withdrawal

by EMSA within 30 (thirty) Days of the receipt of such arguments, the decision imposing the liquidated damages shall become enforceable. EMSA and the Contractor expressly acknowledge and agree that any sums payable under this Article are in the nature of liquidated damages and not penalties, and represent a reasonable estimate of fair compensation for the losses incurred to due failure to fulfil obligations which may be reasonably anticipated.

## **VIII. FORCE MAJEURE**

**VIII.1.** Force majeure shall mean any unforeseeable and exceptional situation or event beyond the control of the contracting parties which prevents either of the contracting parties from performing any of their obligations under the Contract, was not due to error or negligence or omission on their part or on the part of a subcontractor, could not have been avoided by the exercise of due diligence and cannot be rectified. Any default of the Services, defects in Equipment or material or delays in making it available, labour disputes, strikes or financial problems cannot be invoked as force majeure unless they stem directly from a relevant case of force majeure.

**VIII.2.** Without prejudice to the provisions of Article VI.1, if either contracting party is faced with force majeure, it shall notify the other party without delay by registered letter with acknowledgment of receipt or equivalent and by email, stating the nature, likely duration and foreseeable effects.

**VIII.3.** Neither contracting party shall be held in breach of its contractual obligations if it has been prevented from performing them by force majeure. Where the Contractor is unable to perform his contractual obligations owing to force majeure, he shall have the right to remuneration only for Services actually executed or the time the Airplane was effectively available.

**VIII.4.** The contracting parties shall take the necessary measures to reduce damage to a minimum.

## **IX. WAR**

**IX.1.** Unless the consent of the Contractor be first obtained, the Airplane shall not be ordered nor continue to any airport or place or on any voyage nor be used on any Services which will bring the Airplane within a zone which is dangerous as a result of any actual or threatened act of war, war, hostilities, warlike operations, acts of hostility or malicious damage against the Airplane or any other Airplane 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 the Airplane 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.

**IX.2.** Should the Airplane approach or be brought within such zone when performing activities under the scope of this Contract, or be exposed in any way to the said risks, it shall do so at the Contractor's own risk. Notwithstanding, the availability and/or exercises fee shall be payable for all time lost including time lost owing to loss of or injury to the Aircrew or to refusal by any of them to proceed to such zone or to be exposed to such risks.

**IX.3.** The Airplane shall have liberty to comply with any orders or directions as to departure, arrival, routes, airports of call, stoppages, destination, delivery or in any other way whatsoever given by the government of the Airplane's state of registry 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 Airplane the right to give any such orders or directions.

**IX.4.** In the event of the Airplane's state of registry becoming involved in war (whether there be a declaration of war or not) either the Contractor or EMSA may terminate this Contract.

## **X. LIABILITIES AND INDEMNITIES**

**X.1.** EMSA's liability is limited to the obligation undertaken herein by EMSA to contract and pay the Services as agreed under this Contract. Accordingly EMSA shall not be liable for damage caused or sustained by the Contractor, including any damage caused by the Contractor to third parties during or as a consequence of performance of the Contract, except if they were caused by an event of wilful misconduct or gross negligence on the part of EMSA.

**X.2.** The Contractor shall be held liable for any loss or damage sustained by EMSA as a consequence of the performance of the Contract, including if the event of loss or damage is caused by a subcontractor, and for any claim by a third party, but only to an amount not exceeding three times the total amount of the Contract, except if the damage or loss is caused by the gross negligence or wilful misconduct of the Contractor, in which case the Contractor shall have unlimited liability for the amount of the damage or loss.

**X.3.** For the avoidance of doubt, in case of error, negligence, action or omission from the Contractor during performance of this Contract, the Contractor is also liable for any loss or damage subject to and in the terms of Article 18 of the Montreal Convention the limit of liability of the Contractor being increased to the value of three times the value of the Contract as provided for in Article X.2 above.

**X.4.** The Contractor shall indemnify and hold EMSA harmless for all damages and costs incurred due to any claim. 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 during the performance of the Contract. In the event of any action brought by a third party against EMSA in connection with performance of the Contract, the Contractor shall assist EMSA. Such expenditure incurred by the Contractor may be borne by EMSA.

**X.5.** For the purpose of this Contract the liability of the Contractor includes any damage or loss caused by (i) the Contractor's representatives and personnel, service providers (if any), any third party subcontracted by the Contractor and (ii) by the Airplane, staff, Aircrew and Support Crew during the performance of the Contract.

## **XI. LIMITATIONS**

Except as provided for under Articles X.2 and XII, nothing contained in this Contract shall be construed or held to deprive the Contractor or EMSA, as against any person or third party, including as against each other, of any right to claim limitation of liability provided by any applicable law, statute or convention. Where the Contractor or EMSA may seek an indemnity under the provisions of this Contract against each other in respect of a claim brought by a third party, the Contractor or EMSA shall seek to limit their liability before such third party.

## **XII. HIMALAYA CLAUSE**



The limitation of liability provided for under Article X.2. applies to and is for the benefit of the Contractor's parent, affiliated, related and subsidiary companies, the Contractor's subcontractor, the owner of the Airplane and Contractor, servant or agent (including Aircrew and Support Crew) and their respective employees and their 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.

### **XIII. OPERATIONAL COMMAND AND CONTROL**

The entire operation, including navigation and management, of the Airplane shall be in the exclusive control and command of the Contractor and the Aircrew. The Airplane will be operated and the Services hereunder will be rendered as requested by EMSA or the Requesting State, subject always to the exclusive right and obligation of the Contractor or the pilot of the Airplane to operate the Airplane safely.

### **XIV. INSURANCES**

**XIV.1.** The Contractor shall take out insurance against any risks relating to the performance of the Contract, if required by the relevant applicable legislation. It shall take out supplementary insurance as reasonably required by standard practice in the industry. A copy of any of the insurance policies entered into pursuant to this clause shall be sent to EMSA upon the latter's request.

**XIV.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. Insurances (as applicable) to be procured and maintained by the Contractor:

- a. All-risks of loss or damage to the Equipment during installation, deployment, drilling, handling, spraying or any other activity in which loss or damage can occur.
- b. Hull all-risks of loss or damage whilst flying and on the ground with respect to the Airplane.
- c. Comprehensive aviation general liability insurance, including comprehensive general liability and third party liability insurance. EMSA shall be included as additional insured, with a severability of interests clause being included in the policy.
- d. Workers compensation and/or employer's liability insurance for employees covering non-employees for statutory benefits as set out and required by applicable law.

*e. [If storage of Dispersant option included in offer add: all-risks of loss or damage to the dispersant during storage and transportation. EMSA shall be included as additional insured under the insurance policy with respect to the dispersant and the insurance policy shall indicate that EMSA may (but is not obliged to) pay the insurance premium in case of default by the Contractor.]*

**XIV.3.** Each policy shall contain a provision confirming that the policy is primary without right of contribution and the liability of the insurers will not be affected by any other insurance of which any insured has the benefit so as to reduce the amount payable to or on behalf of the insured under such policies.

**XIV.4.** Each policy shall contain a waiver of subrogation by the insurers in the Contractor's or any third party's rights against EMSA.

**XIV.5.** Compliance with this clause is of the essence to the Contract. EMSA may terminate the Contract in the event of default, unless the Contractor corrects any identified non-compliance with the relevant stipulations within 10 (ten) Days of notice.

## **XV. OTHER ISSUES**

### **XV.1. CONFLICT OF INTERESTS**

**XV.1.1.** The Contractor shall take all necessary measures to prevent any situation of conflict of interest. Such situation arises where the impartial and objective performance of the Contract is compromised notably for reasons involving economic interest, political or national affinity, family or emotional ties, or any other shared interest.

**XV.1.2.** Any situation consisting or likely to lead to a conflict of interests during the performance of the Contract shall be notified to EMSA in writing without delay. The Contractor shall immediately take all the necessary steps to rectify the situation. EMSA reserves the right to verify that the steps taken are appropriate and may require that additional steps be taken within a specified deadline.

**XV.1.3.** The Contractor declares that he has not granted and will not grant, has not sought and will not seek, has not attempted and will not attempt to obtain, and has not accepted and will not accept, any advantage, financial or in kind, to or from any party whatsoever, when such advantage constitutes an illegal practice or involves corruption, either directly or indirectly, in so far as it serves as an incentive or reward relating to the performance of the Contract.

**XV.1.4** The Contractor shall pass on all the relevant obligations in writing to its personnel and to any natural person with power to represent it or take decisions on its behalf and ensure that it is not placed in a situation which could give rise to conflicts of interest. The Contractor shall also pass on all the relevant obligations in writing to third parties involved in the performance of the Contract including subcontractors.

### **XV.2. CONFIDENTIALITY**

**XV.2.1.** Without prejudice to IV.3.4, 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.

The Contractor shall:

- a. not use confidential information and documents for any purpose other than fulfilling its obligations under the Contract without prior written agreement of EMSA;
- b. ensure the protection of such confidential information and documents with the same level of protection it uses to protect its own confidential information, but in no case any less than reasonable care;
- c. not disclose directly or indirectly confidential information and documents to third parties without prior written agreement of EMSA.

**XV.2.2.** The confidentiality obligation set out in Article XV.2.1. shall be binding on EMSA and the Contractor during the performance of the Contract and for five years starting from the date of the payment of the balance unless:

- a. the disclosing party agrees to release the other party from the confidentiality obligation earlier;
- b. the confidential information becomes public through other means than in breach of the confidentiality obligation, through disclosure by the party bound by that obligation;
- c. the disclosure of the confidential information is required by law.

**XV.2.3.** The Contractor shall 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 written undertaking that they will comply with the confidentiality obligation set out in Article XV.2.1.

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

**XV.3.1.** Any results or rights thereon, including copyright and other intellectual or industrial property rights, except rights related to developing, building and certifications of the Equipment and adaptations of the Airplane(s), 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.

**XV.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 Airplane, the Equipment, the subject matter, the duration, the amount paid and the reports. Where personal data is concerned Article XV.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.

**XV.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.

**XV.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.

**XV.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.

### **XV.4. SUBCONTRACTING**

**XV.4.1.** The Contractor shall not subcontract without prior written authorisation from EMSA nor cause the Contract to be performed in fact by third parties.

**XV.4.2.** Even where EMSA authorises the Contractor to subcontract to third parties, he shall none the less remain bound by his obligations to EMSA under the Contract and shall bear exclusive liability for proper performance of the Contract.

**XV.4.3.** The Contractor shall make sure that subcontracting does not affect rights and guarantees to which EMSA is entitled by virtue of the Contract, notably Article XV.6.

## **XV.5. ASSIGNMENT**

- a. The Contractor shall not assign the rights and obligations arising from the Contract, in whole or in part, without prior written authorisation from EMSA.
- b. In the absence of the authorisation referred to in a) above or in the event of failure to observe the terms thereof, assignment by the Contractor shall not be enforceable against and shall have no effect on EMSA.

## **XV.6. CHECKS AND AUDITS**

**XV.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 its own staff or by any other outside body authorised to do so on its behalf.

Such checks and audits may be initiated during the performance of the Contract and during a period of five years which starts running from the date of the payment of the balance.

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

**XV.6.2.** The Contractor shall keep all original documents stored on any appropriate medium, including digitised originals when they are authorised by national law and under the conditions laid down therein, for a period of five years which starts running from the date of payment of the balance.

**XV.6.3.** The Contractor shall allow 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 shall 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.

**XV.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.

**XV.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 1073/1999 of the European Parliament and

the Council of 25 May 1999 concerning investigation conducted by the European Anti-Fraud Office (OLAF), the OLAF may also carry out on-the-spot checks and inspections in accordance with the procedures laid down by Union law for the protection of the financial interests of the Union against fraud and other irregularities. Where appropriate, the findings may lead to recovery by EMSA.

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

## **XV.7. DATA PROTECTION**

**XV.7.1.** Any personal data included in the Contract, including its execution, or relating to the Contract or the implementation thereof shall be processed pursuant to Regulation (EC) No 45/2001 on the protection of individuals with regard to the processing of personal data by the Union 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 without prejudice to possible transmission to the bodies charged with a monitoring or inspection task in application of Union law.

**XV.7.2.** The Contractor shall have the right of access to his/her personal data and the right to rectify any such data. Should the Contractor have any queries concerning the processing of his/her personal data, s/he shall address them to the entity acting as data controller.

**XV.7.3.** The Contractor shall have right of recourse at any time to the European Data Protection Supervisor.

**XV.7.4.** Where the Contract requires the processing of 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 his/her rights.

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

**XV.7.6.** The Contractor undertakes to 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:
  - aa. unauthorised reading, copying, alteration or removal of storage media;
  - ab. unauthorised data input as well as any unauthorised disclosure, alteration or erasure of stored personal data;
  - ac. unauthorised using 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.

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

**XV.8.1.** The Contract shall be governed by Union law, complemented, where necessary, by the law of Luxembourg, except for the IRC-A, which establishes specific rules in its Article VI.

**XV.8.2.** Any dispute between the parties resulting from the interpretation or application of the Contract which cannot be settled amicably shall be brought before the Court of Justice of the European Union in Luxembourg.

## **XV.9. AMENDMENTS**

**XV.9.1.** Any amendment to the Contract shall be the subject of a written agreement signed by the contracting parties before fulfilment of any new contractual obligations and in any case before the date of last payment. An oral agreement shall not be binding on the contracting parties.

The amendment may not have the purpose or the effect of making changes to the Contract which might call into question the decision awarding the Contract or result in unequal treatment of tenderers.

**XV.9.2.** If mutually agreed by both parties in writing, the Equipment *[in case of option to store Dispersant add: and/or the Dispersant stored by the Contractor]* may be relocated to a new location different from the initial one as defined in Annex II.

**XV.9.3.** Any costs, expenses related to the relocation under paragraph XV.9.2 shall be borne by the contracting party requesting the amendment.

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