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REGULATIONS OF THE EUROPEAN SPACE AGENCY

General Clauses and Conditions for ESA Contracts

The General Clauses and Conditions (GCC) of the European Space Agency (ESA) apply to contracts placed by ESA. Their applicability is defined in Part I, Chapter I, Clause 1.

The GCC were adopted by the ESA Council during its 215th meeting held on 16-17 June 2010 and entered into force on 1st July 2010 (ESA/C(2010)42).

The present document ESA/REG/002, rev. 2 includes the revision of Annex I, adopted by the 250th ESA Council on 10 June 2015, and the update of clauses 49 and 63 of the GCC, as well as Annex IV, as a consequence of the decisions taken by the Council in the frame of the transfer of functions of the Agency Technology and Product Transfer Board to the Industrial Policy Committee (ESA/C/CLX/Res.1, rev.1 of 17 June 2014, attached to ESA/C(2014)89).

It supersedes document ESA/REG/002 rev. 1 issued on 7 February 2013 and comes into force as of 1 July 2015.

GENERAL CLAUSES AND CONDITIONS
FOR EUROPEAN SPACE AGENCY CONTRACTS

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PART I:

Conditions applicable to ESA contracts, with the exception of:

- Contracts for services usually performed by local economic operators, including building and maintenance of infrastructure, which have no industrial policy implications;
- General procurement contracts which have no industrial policy implications;
- Contracts for services for which a public body holds a monopoly;
- The implementation of arrangements by which the Agency delivers supplies or renders services to third parties including public bodies when such arrangements are not the result of an international agreement;
- The implementation of international agreements entered into by the Agency with public bodies (including intergovernmental organisations) that are fully funding the activities to be procured by the Agency.

CHAPTER I GENERAL PROVISIONS

CLAUSE 1: APPLICABILITY OF CLAUSES AND CONDITIONS

The present General Clauses and Conditions shall apply to Contracts placed by the Agency insofar as not stated otherwise in the relevant Contract. Furthermore, specific clauses and conditions may be set out or invoked in a Contract and its annexes and/ or appendices. The annexes and/ or appendices form an integral part of the Contract.

CLAUSE 2: APPROVAL AND ENTRY INTO FORCE

Offers and acceptances with regard to Contracts shall not bind the Agency unless approved In Writing by its Director General or his/ her authorised representative.

The Contract enters into force upon its signature by the Parties. Start of activities may be subject to further conditions laid down in the Contract itself.

CLAUSE 3: LANGUAGES

The Contract shall be drawn up in English unless specific legislation imposes the use of French. Moreover, in accordance with the ESA Procurement Regulations ref. ESA/C (2008)202¹, the use of another language may be accepted if the Invitation to Tender has been drawn up in this other language.

¹ Issued as ESA/REG/001.

CLAUSE 4: ORIGINALS OF THE CONTRACTS

The number of originals of a Contract shall be equal to the number of Parties to the Contract and this number shall be stated in the Contract. These originals are intended for the Parties to the Contract.

CLAUSE 5: THE PARTIES' REPRESENTATIVES

5.1 The Agency's Representatives

5.1.1 Communications and Amendments

Communications related to the Contract affecting its terms and conditions (including Contract Change Notices and Work Orders) shall only bind the Agency if signed by the Agency's representative(s) specifically identified in the Contract (hereinafter referred to as the "Agency's Representatives").

5.1.2 Inspections and Audits

In addition to the representatives mentioned in paragraph 5.1.1 above, the Agency will nominate representatives for the purpose of inspections, audits and for the general purpose of collaboration. Such representatives shall be notified In Writing to the Contractor. Inspections and audits shall be performed as per clause 8 hereunder.

5.2 The Contractor's Representatives

Communications related to the Contract affecting its terms and conditions (including Contract Change Notices and Work Orders) shall only bind the Contractor if signed by the Contractor's representative(s) specifically identified in the Contract.

CLAUSE 6: PUBLICITY RELATING TO CONTRACTS

The content of any publicity material prepared by the Contractor related to an ESA mission or to an activity performed by the Contractor in the context of an ESA Contract, intended for publication in whatever form and through whatever medium, including the internet, shall acknowledge that the mission is indeed an ESA mission and/or that the Contract was carried out "under a programme of and funded by the European Space Agency" and shall display in an appropriate and visible way the Agency's logo.

In addition, all publications, related to the work carried out under an ESA Contract shall also carry a disclaimer with the following wording or wording to the same effect: "The view expressed herein can in no way be taken to reflect the official opinion of the European Space Agency."

For utilisation described above, the ESA logo can be downloaded at the following address:
http://webservices.esa.int/ESA_Logo/index.php.

Any other utilisation of the ESA logo requires the prior approval of the Communication Department of ESA.

CLAUSE 7: TRANSFER OF CONTRACT

The Contractor shall not, unless prior authorisation has been obtained from the Agency, transfer his Contract either in whole or in part to Third Parties nor set up an association with another company for its fulfilment. Furthermore, the Contractor shall not use the Contract as capital to float a company.

CHAPTER II EXECUTION OF THE WORK

CLAUSE 8: GENERAL CONDITIONS OF EXECUTION

- 8.1 The work specified in a Contract shall be performed with the level of skill, care and diligence to be displayed by an expert professional and in accordance with the requirements of the Contract. Workmanship shall conform to the technical standards specified in the Contract.
- 8.2. The Agency shall have the right to inspect the performance of the work under the Contract at the Contractor's Premises and at the premises of his Subcontractors during working hours following a five (5) Day prior notice. In case of visit by the Agency of the Contractor's Subcontractors' premises, a representative of the Contractor shall be invited.
- 8.3. The Agency shall also have the right to perform cost and rate audits as provided for in the Implementing Instruction on audit rights (ref: ESA/IPC(2009)97, rev. 2²).
- 8.4 Any information made available by the Contractor to the Agency's representatives in the frame of the cost and rate audits shall be treated as commercially sensitive information and shall be protected as per the relevant provisions of Part II to the present GCC whether marked as "Proprietary Information" or not.
- 8.5 The Agency shall further have the right to conduct audits itself or through authorised national agents with respect to quality assurance at the Contractor's Premises where the work is/ or shall be carried out and at the premises of his Subcontractors where the work is/ or shall be carried out.
- 8.6 The Contractor shall, in accordance with any applicable security regulations, give the representatives access to his premises and shall give all other necessary assistance in order that they may fulfil their tasks.

² Issued as Annex I to ESA/REG/001

- 8.7 The performance of the activities mentioned in this clause does in no way affect the responsibility of the Contractor, nor does it restrict the right of the Agency or of the inspecting authority acting on its behalf:
- a) to reject supplies offered for Acceptance,
 - b) to apply the warranty provisions after Acceptance of the Deliverables.

CLAUSE 9: KEY PERSONNEL

- 9.1 The work shall be executed by the Contractor's key personnel specified in the Contract or in the applicable documents to the Contract.
- 9.2 The Contractor shall submit prior notification to the Agency of the replacement or re-assignment of such key personnel to the extent that they are not available as foreseen in the Contract. Such notification shall be accompanied by a brief explanation for the replacement, the time allocation and a comprehensive qualification description and professional profile of the new key personnel who shall possess equivalent qualifications to the key person being replaced. The replacement shall be considered accepted by the Agency unless it has raised an objection for justified reasons within ten (10) Days from the relevant notification.
- The procedure described in this clause 9.2 shall be implemented through an exchange of letters.
- 9.3 The Contractor shall ensure that the nomination of key personnel for the execution of the Contract does not lead to any restriction to the rights of the Agency and/or Member States defined in Part II of the present General Clauses and Conditions due to non ESA Member States export control legislation.
- 9.4 The Agency may, for justified reasons linked to the performance of the Contract, ask for a replacement of key personnel. Such request, signed by the Agency's representatives, shall be presented In Writing to the Contractor who shall then, within one (1) Month, remedy the situation, including, if necessary, replacement of such key personnel.

CLAUSE 10: SUB-CONTRACTS

- 10.1 The Contractor shall not place subcontracts other than those specified in the Contract, unless otherwise authorised by the Agency by virtue of a Contract Change Notice.
- 10.2 The Contractor, when entrusted by the Agency with the selection of Subcontractors after the Contract has been placed, shall submit to the Agency for approval the Subcontractor intended for the execution of the work, resulting from the implementation of the selection procedure approved by the Agency.

- 10.3 The Contractor shall be responsible for the proper execution of any sub-contract placed by him.
- 10.4 Unless otherwise authorised by the Agency, the conditions of the sub-contracts shall secure the Agency's rights as provided for under the Contract. The conditions of the sub-contracts shall furthermore reflect the rights and obligations of each Subcontractor tailored to the Subcontractor's area of responsibility.

CLAUSE 11: CUSTOMER FURNISHED ITEMS (CFI)

11.1 Supply of CFIs and Duty of care

If the Contract stipulates that the Agency undertakes to provide items which the Contractor is required to use, accommodate and/or integrate, the Agency shall be responsible for timely Delivery and conformance of the specific CFI to the contractual requirements.

The Contractor shall take responsibility for the CFIs and their proper use, handling, maintenance, transport and storage with the level of care expected from an expert professional and in accordance with the contractual requirements. He shall not alienate them or use them for purposes other than those specified in the Contract.

11.2 Inspection

The Contractor shall make an inspection of the CFIs against the requirements and in accordance with a hand-over procedure, both defined in the Contract.

11.3 Rejection for non-conformance

In the event of non-conformance of the CFI to the requirements agreed in the Contract, the Contractor shall give a notification of rejection to the Agency within ten (10) Days of discovery of the non-conformance. Such notification shall include a detailed justification. All consequences on the Contract due to the late Delivery or non-suitability of the CFI for the performance of the Contract shall be the subject of a Class A CCN subject to the conditions of clause 13.

11.4 Transfer of risk

The risk to any CFI shall lie with the Contractor from the time the CFI is physically delivered to the Contractor at the agreed location until the time specified in the Contract.

The value of the CFI(s) shall be specified in the Contract or added via a CCN, stating the value for which the CFI(s) shall be insured by the Contractor. Upon request by the Agency evidence of such insurance shall be submitted to the Agency by the Contractor.

11.5 Liability for Damage

The Contractor shall assume liability for loss of- or damage to the CFI caused by the Contractor and/or the Subcontractors, agents, consultants or any other entity/natural person appointed by the Contractor from the time the CFI is physically delivered to the Contractor at the agreed location until the time specified in the Contract.

In case of loss of- or damage to a CFI after its Delivery to the Contractor, unless caused by a representative or an employee of the Agency, the CFI shall be replaced or repaired. The appropriate remedy shall be decided by the Agency following consultation with the Contractor and shall be implemented at the Contractor's cost up to the limit of the agreed value as stated in clause 11.4. Alternatively, in case of a total loss of the CFI agreed by the insurers the Parties may agree that the Contractor shall refund the CFI's agreed value to the Agency. However, the Contractor is released from the obligations under this sub-clause if the loss or damage is caused by events excluded from the insurance and listed in Annex V to this document.

11.6 Ownership

Unless otherwise specified in the Contract the ownership of the CFI remains with the Agency or with the identified owner. The Contract shall specify whether any of the CFI(s) supplied to the Contractor shall be returned to the Agency or to the identified owner after the execution of the Contract or not, or if they shall be otherwise disposed of.

11.7 Inventory

The Contractor shall be required to keep a permanent inventory and / or utilisation account of the CFI(s) supplied by the Agency under the present clause and, unless already marked by the Agency, to mark these items in an unambiguous way as being the property of the Agency or of any other identified owner.

11.8 Specific Conditions

In the event the Agency makes specific facilities or equipment available to the Contractor, the conditions of such arrangement shall be determined in the Contract.

CLAUSE 12: ITEMS MADE AVAILABLE BY THE AGENCY

12.1 Supply of items and Duty of Care

If the Agency makes an item (e.g. hardware, software, services) available to the Contractor and the Contractor decides to make use of such items for the purpose of the Contract, the Contractor shall take responsibility for their proper handling, maintenance, transport, storage and ensure their proper use with the level of care to be expected from an expert professional and in accordance with the contractual requirements. Such items shall not be alienated or used for purposes other than those specified in the Contract.

The Contractor shall confirm to the Agency its decision to use the items. The Agency shall make the items timely available to the Contractor but shall have no responsibility for the suitability of the items for their intended purpose under the Contract or for their actual use.

12.2 Transfer of risk

The risk to any item made available by the Agency shall lie with the Contractor from the time the item is physically delivered to the Contractor at the agreed location until the time specified in the Contract. The replacement value for the item shall be specified, for insurance purposes, by the Agency.

12.3 Liability for Damage

The Contractor shall assume liability for loss of- or damage to the item made available by the Agency caused by the Contractor and/or the Subcontractors, agents, consultants or any other entity/natural person appointed by the Contractor from the time the item is physically delivered to the Contractor at the agreed location until the time specified in the Contract.

The measures required from the Contractor in case of loss or damage shall be determined in the Contract and shall be implemented at the Contractor's cost up to the limit of the agreed value as stated in clause 12.2.

12.4 Ownership and Return obligations

Unless otherwise specified in the Contract the ownership of the items remains with the Agency.

The Contract shall specify whether any of the items made available to the Contractor shall be returned to the Agency after the execution of the Contract, or if they shall be otherwise disposed of. The Contract shall further specify whether the item may be returned in a modified state or whether the Contractor is obliged to return the item in the state it was when made available by the Agency.

12.5 Inventory

The Contractor shall be required to keep a permanent inventory and / or utilisation account of the items made available by the Agency under the present clause and, unless already marked

by the Agency, to mark these items in an unambiguous way as being the property of the Agency.

12.6 Specific Conditions

In the event, the Agency makes specific facilities or equipment available to the Contractor, the conditions of such arrangement shall be determined in the Contract.

CLAUSE 13: CHANGES

13.1 Classification of changes

Changes to the Contract will be classified into one of the following two categories.

Class A Changes

Class A Changes are changes which result from:

- a change to the requirements covered by the Contract
- failure by the Agency to execute one of its undertakings as defined in the Contract,

The agreed price of Class A changes, if any, shall be borne by the Agency.

Class B Changes

Class B Changes are all other changes.

The cost for Class B changes, if any, shall be borne by the Contractor.

The Contractor shall also be responsible for any consequences such Class B changes may have on time-limits and/or on other terms of the Contract.

13.2 Implementation of Change- General

The Agency reserves the right at any time to request a change to the requirements covered by the Contract. The Agency may also accept changes and modifications proposed In Writing by the Contractor. The agreed changes shall be ultimately introduced as an amendment to the Contract in the form of a Contract Change Notice (CCN) in accordance with the procedure outlined in the sub-clauses 13.3 and 13.4 depending on the Party that initiates the change. Upon signature of a CCN by both Parties, the CCN enters into force.

13.3. Change procedure initiated by the Agency

- 13.3.1 The Agency reserves the right at any time to request a change to the requirements covered by the Contract in the form of a Contract Change Request (CR) either on its own initiative or following a Contractor's proposal.
- 13.3.2 Within the time-limit specified in the CR and in accordance with its requirements, the Contractor shall provide a committing and detailed quotation of the effects of such change on the contractual work, price, schedule, Deliverables or any other terms and conditions submitted in the format of a CCN.
- 13.3.3 The Contractor shall inform the Agency, within one (1) Month, of any objection it has to the content of the CR.
- 13.3.4 Upon evaluation and acceptance by the Agency of the quotation submitted in response to the CR, any amendment to the Contract shall be introduced in the form of a Rider or a CCN, to be signed by the Parties.

13.4 Change procedure initiated by the Contractor

- 13.4.1 A change proposed by the Contractor shall be submitted in the format of a CCN and contain a detailed proposal describing the work, price, schedule, Deliverables or any other terms and conditions. The CCN shall detail the impact it has on the baseline activities of the Contract.
- 13.4.2 Upon receipt of such proposal signed by the Contractor the Agency shall acknowledge receipt and indicate the respective evaluation schedule. Should the document be approved, it will be signed by the Agency's representatives and a copy of the CCN shall be returned to the Contractor.
- 13.4.3 Should the proposed change be rejected, the Contractor shall be informed accordingly, together with the reasons for the rejection.

13.5 Change procedure under exceptional circumstances

In exceptional circumstances, justified by programmatic constraints and urgency, the Agency reserves the right, to instruct the Contractor In Writing by the Agency's representatives to implement a change to the requirements covered by the Contract, on the basis of a preliminary quotation submitted by the Contractor on the effects of such change on the contractual work, price, schedule, Deliverables or any other terms and conditions by signing an Authorisation to Proceed (ATP) specifying a financial limit of liability, unless covered in a financial limit of liability already released.

When a change is so authorised, the Contractor shall proceed with its implementation in accordance with the Agency's instruction and within the limit of liability specified here above. It shall moreover submit to the Agency a committing and detailed quotation within reasonable time after receipt of the Agency's instruction. The resulting change to the Contract shall be introduced in accordance with sub-clause 13.3.

The Contractor shall immediately inform the Agency of any objection it has to the implementation of the Agency's instruction.

CHAPTER III DELIVERY

CLAUSE 14: TIME-LIMITS FOR THE PROVISION OF DELIVERABLES AND SERVICES

14.1 Provision of Deliverables

All Deliverables shall be delivered at the time or times and in the manner specified in the Contract, and shall be accompanied by the delivery documents.

The Contractor shall inform the Agency immediately upon dispatching the Deliverables.

14.2 Delay in Provision of Deliverables or Services - Respites

The Contractor shall inform the Agency within one (1) Month of any event likely to cause delay in Delivery. The Agency shall determine, in the light of circumstances reported, whether or not any respite or modification of the delivery requirements of the Contract can be permitted on this account as follows:

- An extension of the time-limit for execution or a postponement of Delivery shall be granted only in respect of delay which is not attributable to the fault or the negligence of the Contractor.
- In other cases, and with due regard to the justification provided, the Agency may grant respites.

14.3 Delay in Provision of Deliverables or Services due to Force Majeure

In case a Force Majeure event has occurred, the affected Party shall report to the other Party the Force Majeure event and its immediate consequences within one (1) week after its occurrence. The Party claiming the Force Majeure shall bear the burden of proof for the existence, duration, and consequences of Force Majeure, such proof to be provided within one (1) Month from the occurrence of the Force Majeure event.

The Party affected by the Force Majeure event shall not be considered at default and its obligations under the Contract shall be suspended during the Force Majeure event. The affected Party shall make reasonable efforts to mitigate the impact on the schedule and the performance of its contractual obligations.

In order to invoke the provisions of clause 33.4 and 33.5, the Parties shall conform to the above procedure.

Force Majeure event at Sub-contractor's level shall be considered a case of Force Majeure for the performance of the Contractor's obligations, if the Contractor proves that the delay in the Delivery of the equipment or works covered by the Sub-contract due to the Force Majeure event had an unavoidable impact on the final Delivery dates stipulated in the Contract.

In case of Force Majeure, an extension of the time-limit for execution or a postponement of delivery dates shall be granted.

If the delay due to the Force Majeure exceeds three (3) Months, the Parties are entitled to terminate the Contract in accordance with clauses 33.4 and 33.5, unless the Parties agree to modify the Contract in order to take into account the effects of the Force Majeure.

In case a delay is shorter than three (3) Months but cannot be accommodated due to programme constraints, the Agency may at its discretion attempt to renegotiate the Contract or terminate it in accordance with clauses 33.4 and 33.5.

The occurrence of Force Majeure shall not entitle either Party to any additional payment or compensation.

14.4 Determination of Time Limits

Any contractual time-limit binding either party shall be counted from the Day following that of the event marking the start of the time-limit and shall end on the Day following the last Day of the period laid down.

When the time-limit is expressed in Months, it shall be counted independently from the weekday from date to date.

If the last Day of a time-limit is not a Working Day in the country in which the performance is required, this time-limit shall refer to the first Working Day following.

CLAUSE 15: HANDLING, PACKING AND TRANSPORT, TRANSFER OF OWNERSHIP AND RISK

15.1 Responsibility for Handling, Packing and Transport

The Contractor shall have all Deliverables suitably packed for safe transportation and Delivery and in accordance with the Contract requirements, if any.

The handling, packing and transport of items to be delivered is the Contractor's sole responsibility.

15.2 Cost of Packing, Packing Material and Transport

Material and products used by the Contractor for wrapping and transport shall be non-returnable and deemed included in the price.

All packing and transport charges and insurance costs, as well as transit handling costs and transport fees of agents employed at the place of Delivery or elsewhere, shall be deemed included in the price.

The cost of transport shall be deemed to cover Delivery to the agreed place of destination.

15.3 Import/Export licences/authorisations and related Documentation.

15.3.1 In case the implementation of the Contract is subject to export or import licences/authorisations, the Contractor shall obtain all export licences/authorisations and/or import licences/authorisations in time for all deliverable items and shall prepare and submit the related Documentation and carry out all necessary formalities to that aim.

15.3.2 Notwithstanding the above, the Contractor's responsibility shall be limited to conforming to the applicable legislation and procedures in time for obtaining all export licences/authorisations and/or import licences/authorisations for all Deliverables in the following cases:

(i) in the event that the Parties have agreed that the implementation of the Contract is dependent on a source(s) from outside ESA Member States, and identified them in the Contract, or

(ii) in the event of an unforeseeable change of export/import legislation or its application, or

(iii) in the event of denial or revocation of export licenses/authorisations and/or import licences/authorisations, provided that such denial or revocation was not caused by the failure of the Contractor to comply with the conditions of the license/authorisation.

The consequences of the impossibility of timely obtaining the export licences/authorisations and/or import licences/authorisations in the cases under (i), (ii) and (iii) above shall be regulated as per clause 14.3.

15.3.3 The Agency undertakes to provide the Contractor in due time with certificates necessary for the granting of such export licences/authorisations and/or import licences/authorisations as requested by the Contractor.

15.3.4 The Contractor shall provide a bi-monthly progress report to the Agency on the status of applications where all relevant actions are identified, traced and their criticality assessed.

15.3.5 The Contractor shall flow-down the provisions as described above on each and every of his Subcontractors involved in the execution of the Contract.

15.4 Transfer of Ownership and Risk

Ownership of the Deliverable(s) covered by the Contract shall vest in, or be transferred to, the Agency at the time of Acceptance by the Agency as specified in clause 16. Intellectual Property Rights contained in the Deliverables are governed by Part II of this document.

The point in time for transfer of ownership of Flight Systems shall be defined in the Contract.

The point in time for transfer of risk to the Deliverables shall be defined in the Contract. Failing such definition, the transfer of risk to the Deliverables shall pass to the Agency upon their Delivery to the final destination specified in the Contract.

Transfer of ownership of, and risk to, Customer Furnished Items is regulated under clauses 11.4 and 11.6.

CLAUSE 16: ACCEPTANCE AND REJECTION

16.1 Time Limit for Review

Unless otherwise agreed in the Contract, on completion of a Deliverable as specified in the Contract, the Agency shall review as soon as possible, but in any event within one (1) Month of notification of readiness for Acceptance, whether the Deliverable complies with the Contract requirements.

16.2 Deliverable Documentation

Except when Documentation is the only Deliverable under the Contract and as such submitted to an Acceptance procedure, the Agency's review, approval and/or Acceptance of Documentation submitted by the Contractor under the Contract shall neither constitute an incremental certification of the Contractor's design or analysis nor shall it constitute release from his responsibilities before the performance of the subject of the Contract has been shown to comply fully with the specified requirements and formal Acceptance has been certified by the Agency.

16.3 Acceptance of Deliverable Items

Acceptance shall take place on the Agency's written acknowledgement to the Contractor that it accepts the item in accordance with the procedure agreed In Writing between the Parties (Acceptance procedure).

16.4 Rejection of Deliverables

The Agency may, within the Acceptance procedure, by written notice reject any Deliverable which does not fulfil the requirements of the Contract. The Agency shall supply the Contractor with the reasons for any rejection.

16.5 Removal of Rejected Items

Where all- or part of the Acceptance procedure is performed outside the Contractor's Premises and the Agency rejects any of the Deliverables, the rejected Deliverable(s) shall be removed by the Contractor at his own expense within twenty (20) Working Days after receipt of notice of rejection, or such other time as may be specified in the Contract. If the Contractor fails to carry out his obligation within the specified time, the Agency may have the rejected Deliverable(s) returned on the Contractor's cost and risk.

16.6 Notice of Objection

In the event of rejection of any of the items, whereby the Contractor feels himself aggrieved, the Contractor shall give the Agency's representatives a substantiated notice of objection within eight Days of the receipt of notification of rejection and before such items have been removed from the place of inspection.

16.7 Disposition of Finally Rejected Deliverables

If a Deliverable is finally rejected by the Agency's representative, this Deliverable shall be so marked as to ensure its subsequent identification as rejected Deliverable.

CLAUSE 17: PENALTIES/INCENTIVES

17.1 Penalty

17.1.1 Penalty for Late Delivery

If the Contractor fails to comply with the Delivery date laid down in the Contract, it shall be liable to a penalty according to the scale of penalties attached hereto as Annex III, except where special provisions are made in the Contract.

Penalties for late Delivery are due based on the mere fact of expiry of the time-limit and without formal notice, except when the Agency has formally renounced such penalties.

17.1.2 Basis for Calculation of Penalty for late Delivery

The amount of penalties for late Delivery to be applied shall not exceed ten (10) per cent of the value used as a basis for their calculation specified in the Contract (Penalised Value).

17.1.3 Recovery of Penalty

The total amount of penalties to be recovered from the Contractor shall be deducted from the Contract Price and the Agency shall notify him of the amount to be deducted.

The methodology to recover penalties from Subcontractors, if applicable, shall be specified in the Contract.

17.1.4 Objection to Penalties

The Contractor may object within thirty (30) Days from the date of receipt of notification. Failing such objection within this period, the Contractor shall be deemed to have accepted the penalties.

17.1.5 Sole Recourse for late Delivery

Unless the delay is due to gross negligence or wilful misconduct on the part of the Contractor, and without prejudice to the application of clause 32, no damages other than the penalties provided above can be claimed for late Delivery.

17.2 Performance related Penalties

A penalty scheme linked to performance may be introduced in the Contract. Such scheme shall be linked to the non-fulfilment of performance parameters as specifically defined in the Contract.

17.3 Incentives

In combination with a penalty scheme, an incentive scheme may be introduced in the Contract. Such scheme shall be linked to the fulfilment of contractual requirements including delivery dates and performance parameters as specifically defined in the Contract.

CHAPTER IV LIABILITIES

CLAUSE 18: DAMAGE TO STAFF AND GOODS

18.1 Inter-party cross-waiver of liability

The Parties shall have no claim and no recourse against each other and against the other Party's Sub-contractors, including the Agency's consultants and/or agents involved in the execution of the Contract:

- for injuries to its employees (staff), including death, sustained by virtue of their involvement in the execution of the Contract.
- for damages to goods owned by the Party (excluding items covered by clauses 11 and 12 above and Deliverable(s)), if the occurred damage arises from the execution of the Contract.

18.1.2 Exclusions from the cross-waiver of liability

The cross-waiver shall not be applicable in case a claim for injury to staff or damage to goods as described under 18.1 is based on gross negligence or wilful misconduct of the other Party.

The cross-waiver of liability shall not be applicable to the claims listed below:

- a) claims for injuries to persons or damages to goods arising from testing using ESA owned testing facilities or ESA owned equipment, except for those covered by other specific arrangements;
- b) claims raised by the estate, family, survivors or subrogees (except when such claim is bound by the terms of this cross-waiver) or social security organisation for bodily injury, other impairment of health or death of a staff involved in the execution of the Contract.

18.1.3 Insurance

Each Party shall submit to the other Party a written statement by its respective insurers that they shall have no claim and no recourse against the other Party and its respective insurers for claims specified in clause 18.1 above. In case no insurance is in place, the Contractor shall state this to the Agency, at the time of signature of the Contract.

18.1.4 Flow down of the cross-waiver in the contractual chain

The Contractor shall flow-down the provisions as described above on each and every of its Subcontractors involved in the execution of the Contract.

The Agency shall flow-down the provisions as described above on each and every of its consultants and/or agents involved in the execution of the Contract.

18.1.5 Indemnification/ Hold harmless agreement

Injuries to staff

The Contractor shall indemnify and hold harmless and defend the Agency from all claims, damages, losses, and expenses (including legal fees and expenses) raised by its own and/or its Subcontractors' employees, involved in the execution of the Contract, against the Agency, for bodily injury, sickness or disease except in case of gross negligence or wilful misconduct of the Agency.

The Agency shall indemnify and hold harmless and defend the Contractor from all claims, damages, losses, and expenses (including legal fees and expenses) raised by its own and/or its consultants' and agents' employees involved in the execution of the Contract, against the Contractor, for bodily injury, sickness or disease except in case of gross negligence or wilful misconduct of the Contractor.

Damage to goods

In cases where the cross waiver provisions are not flowed-down by the Contractor, the Contractor shall indemnify and hold harmless the Agency from all claims, damages, losses and expenses (including legal fees and expenses) raised by its Subcontractors against the Agency for damages to goods, except in case of gross negligence or wilful misconduct of the Agency.

In cases where the cross waiver provisions are not flowed-down by the Agency, the Agency shall indemnify and hold harmless the Contractor from all claims, damages, losses and expenses (including legal fees and expenses) raised by its consultants or agents, against the Contractor for damages to goods, except in case of gross negligence or wilful misconduct of the Contractor.

18.1.6 Waiver from insurers' subrogation rights

In cases where the waiver from the insurers' subrogation rights has not been obtained, each Party shall indemnify and hold harmless and defend the other Party from and against all claims, damages, losses and expenses (including legal fees and expenses) raised by its respective insurers against the other Party related to claims specified in clause 18.1 above, except in case of gross negligence or wilful misconduct of the Party claimed against.

18.2 Damage to Deliverables

The Contractor shall be liable for damages to Deliverables, unless caused by a representative or an employee of the Agency or any of its consultants or agents until the time specified in the Contract for the transfer of risk.

The liability of the Contractor under this sub-clause shall in no case exceed an amount equal to the Contract Price.

CLAUSE 19: LIABILITY FOR CONSEQUENTIAL DAMAGE DURING THE EXECUTION OF THE CONTRACT

Except in case of gross negligence and wilful misconduct, the Parties shall not be liable towards each other for consequential damages sustained by the Parties arising from and during the execution of the Contract such as but not limited to:

- losses of contract, income or revenue, profit, interests, financing, loss of customers, loss of availability and use of facilities, employees' productivity or loss of service of such persons, loss of opportunity, rental expenses.

CLAUSE 20: LIABILITY AFTER ACCEPTANCE

After Acceptance of the Deliverable(s) by the Agency, the Agency shall have no claim against the Contractor and/or its Subcontractors and suppliers for any damage resulting from the use of the Deliverable(s) by the Agency.

Furthermore, the Agency shall indemnify and hold the Contractor harmless and/or its Subcontractors and suppliers at whatever level for any such claims damages, losses and expenses (including legal fees and expenses) raised against it by a Third Party.

However, the Contractor shall indemnify and hold the Agency harmless against all claims, damages, losses and expenses (including legal fees and expenses) in case:

- a) such damage occurs to the Agency or a Third Party and arises from gross negligence or wilful misconduct on the part of the Contractor and/or its Subcontractors and suppliers at whatever contractual level; or
- b) the Parties agree at Contract conclusion that the items developed under the Contract shall be made available to consumers against commercial fee by the Contractor.

In case a Third Party brings such a claim against the Agency the Contractor shall be bound to join the Agency as co-defendant in the proceedings. Any action impacting both Parties in the course of the proceedings shall be taken following consultation between the Parties.

The provisions contained in the present clause do not limit the Parties' liabilities as specified in clauses 24, 26, and Part II clauses 38 and 52, which shall continue after Acceptance of the Deliverables by the Agency.

CHAPTER V WARRANTY

CLAUSE 21: SCOPE OF WARRANTY

21.1 The provisions set forth in the present chapter shall be applicable to all items contained in the Deliverables under the Contract with the exception of commercial, off-the-shelf, Third Party products, not integrated in the Deliverable(s). In this case the warranty of this product shall apply.

The Contractor undertakes, within this warranty obligation, to remedy at its own expense and with due diligence any Defect which may appear in the Deliverables during the period stated in clause 22 below.

21.2 The Contractor's warranty obligations for Deliverable hardware shall cover the cost incurred by the Contractor and/or its Subcontractors of removal and replacement or repair at the Contractor's option. The Contractor's warranty obligations for deliverable software shall cover the cost of correcting any Defect to the deliverable software. The warranty for both hardware and software Deliverables shall include the supply and updating of appropriate Documentation, as well as the cost of re-installation and re-testing incurred by the Contractor and/or its Subcontractors.

The warranty shall also cover all travel expenses, packing and transport charges incurred by the Contractor and/or its Subcontractors in connection with repair or replacement.

If the Contract stipulates, in addition, a guarantee for protection and packaging, the warranty prescribed above shall operate from the date of expiry of the packaging guarantee.

21.3 If a Defect observed in the course of the warranty period is due to a technical or design error of a systematic nature within the Deliverable/ or part thereof, the

provisions of this chapter shall apply to all identical, unlaunched Deliverables/or parts thereof. A Defect is considered as systematic if it can be demonstrated that the Defect will be reproduced in a Deliverable/or part thereof, if exposed to representative conditions as applied when the Defect was observed.

- 21.4. The Contractor's liability under the provisions of this chapter shall not extend to:
- a) Defects arising from the misuse of the Deliverables after Acceptance;
 - b) Defects in materials, assemblies or other supplies issued by the Agency for incorporation therein, provided always that the Contractor shall have properly exercised its duties as custodian of such items and shall have incorporated them in accordance with the requirements of the Contract;
 - c) compensation for damage resulting from the use of items covered by the Contract after Acceptance as per clause 20 above;
 - d) Defects resulting from modifications implemented by the Agency without the agreement of the Contractor or caused by remedial actions not approved or validated by the Contractor.
- 21.5 The remedies identified above as may be amended by the Contract constitute the sole remedy for warranty under the Contract, excluding all other warranty remedies expressed or implied by law or otherwise.

CLAUSE 22: WARRANTY PERIOD

- 22.1 The warranty for non-flight items shall run for a period of one (1) year from Acceptance by the Agency of the Deliverable(s) (hardware and software).
- The warranty for flight items shall run for a period of one (1) year from Acceptance by the Agency of the Deliverable(s) (hardware and software) or until lift-off, whichever is earlier.
- 22.2 Where Defects in items are remedied under the warranty, the warranty period shall be extended automatically by a period equal to that during which the Deliverables/or part thereof were not available to the Agency for their intended use. For Deliverables/or part thereof replaced, the warranty period shall recommence at the date of replacement. For Deliverable/or part thereof repaired or modified, the warranty period shall be prolonged automatically by a period equal to that during which the items were unavailable for their intended use.
- 22.3 In the event that, in addition to the nominal warranty stated herein, a post-launch warranty of Flight Systems (hardware and software) is required, conditions of such warranty will be specified in the Contract.

CLAUSE 23: PROCEDURE APPLIED IN THE EVENT OF DEFECTS OR FAILURES

- 23.1 When the Defect or failure is found, it shall be reported In Writing or by electronic mail by the Agency to the Contractor.

The Contractor shall start as soon as possible, but in any case within three (3) Working Days from the date of notification, an action to solve the problem encountered.

- 23.2 After Delivery, defective Deliverables/or part thereof shall be held by the Agency or by an Agency's nominee.

From the date of notification of the Defect as per Sub-clause 23.1 above, the Contractor shall retake possession of the defective Deliverables/or part thereof in order to repair or replace them as agreed between the Parties for that specific case.

If the Contractor does not retake possession of the defective Deliverables/or part thereof within one (1) Month from the notification, then the Contractor is deemed to have opted for replacing the defective items by new ones. In that case, the Agency and the Agency's nominee shall have the right to dispose of or scrap the items at the Contractor's cost.

CHAPTER VI COMPLIANCE WITH STATUTORY AND OTHER OBLIGATIONS

CLAUSE 24: DISCLOSURE AND USE OF CLASSIFIED INFORMATION BY THE CONTRACTOR

- 24.1 If the documents supplied by the Agency to the Contractor are marked as "ESA classified information" the Contractor shall conform with the Agency's Security Regulations and shall not Disclose such documents to any person employed or appointed by the Contractor, whether under sub-contract or otherwise, or to any Third Party, unless as foreseen in the Agency's Security Regulations.

If specific Documentation to be provided by the Contractor to the Agency is subject of Security Regulations imposed on the Contractor by National Authorities, the Agency shall conform with such Security Regulations and shall not Disclose such documents to any person employed or appointed by the Agency, whether under sub-contract or otherwise, or to any Third Party, unless foreseen in the said Security Regulations.

- 24.2 Except with the written consent of the Agency, the Contractor shall not make use of any specification or other data mentioned in sub-clause 24.1 otherwise than for the purposes of the Contract.

Except with written consent of the Contractor, the Agency shall not make use of any specification or other data mentioned in sub-clause 24.1 otherwise than for the purposes of the Contract.

CLAUSE 25: INFRINGEMENTS OF THE LAW

The Agency shall not be responsible if the Contractor infringes the laws or statutes of its country or of any other country whatsoever.

CLAUSE 26: INFRINGEMENTS OF THIRD-PARTY RIGHTS

26.1 The Contractor shall indemnify the Agency from and against all claims, proceedings, damages, costs and expenses arising from the infringement or alleged infringement of patent rights and Intellectual Property Rights of Third Parties with respect to the work under the Contract. This obligation does not extend to infringements resulting from the use of documents, patterns or drawings supplied by the Agency, from the use of items supplied by the Agency under clauses 11 and 12 or from a modification or combination of the Deliverables made by the Agency after their Acceptance.

26.2 The Agency shall notify the Contractor immediately of any written claim or notice of infringement of third-party rights which it received concerning the Contract.

The Contractor shall immediately take all necessary steps within its competence to prevent or end a dispute and shall assist the Agency to defend against, or make settlement in respect of, any claim or notice of infringement or suit for infringement.

Written claims or notices of infringement of third-party rights will be accepted or met by the Agency only in agreement with the Contractor.

26.3 The Parties shall notify each other of any known Intellectual Property Rights connected with the use of documents, patterns, drawings and goods supplied by the one Party to the other or connected with the execution of the specifications laid down by the other Party.

CHAPTER VII PRICES AND PAYMENTS

CLAUSE 27: PRICING

27.1 Contract Price

The Contract Price shall be expressed in Euro.

27.2 Contract Price Type

The Contract shall stipulate the type of price which is applicable by reference to the classification of prices stated in Annex II to these “General Conditions”.

The type of price stipulated shall not be varied unless otherwise agreed by the Parties.

27.3 Certifications of Expenses

All statements of expenses, vouchers and bills presented by the Contractor for the purpose of assessment and allowance of his costs and for the fixing of the due price shall be accompanied by a certificate from it that they are true and genuine and established in accordance with the provisions of Annex I to these “General Conditions”.

27.4 Effective Cost Control

The Contractor undertakes to permit the Agency to effect cost control operations as stipulated in Annex I to these “General Conditions”.

CLAUSE 28: PAYMENTS

28.1 General

The Agency shall make payments in the manner and to the place specified in the Contract.

A period of thirty (30) Days shall be granted to the Agency for the execution of payments following receipt of the invoice and required Documentation.

28.2 Usage of Material or Services

Except with the specific agreement of the Agency, the Contractor shall not use any material or services in respect of which Advance- or Progress Payments have been made, in diversion to what has been provided for in the Contract. Notwithstanding the principles described in the sub-clauses below, in the event of any violation of the conditions stated in this sub-clause the Agency reserves the right to require the return of the Advance- or Progress Payments.

28.3 For Fixed Prices as defined in clause 2 of Annex II

Payments shall be made by the Agency upon achievement of milestones as specified in the milestone payment plan in the Contract, following submission of a corresponding invoice and approval by the Agency of the milestone achievement.

The Contract shall further specify any further Documentation to be provided in support of invoices.

28.3.1 Advance Payment

- a) Against the milestone payment plan laid down in the Contract an Advance Payment may be agreed.
- b) Such Advance Payment constitutes a debt of the Contractor to the Agency until the first Progress Payment has been made. Alternatively, if specifically identified in the Contract, the debt is progressively reduced at subsequent Progress Payment milestones of the Contract.
- c) The total amount of Advance Payment shall in no case exceed 35 % of the Contract Price.

28.3.2 Progress Payments

- a) Progress Payments shall be made upon achievement of the related milestone as defined in the Contract.
- b) Progress Payments constitute definitive payments.
- c) The total amount of Advance and Progress Payments shall in no case exceed 90 % of the Contract Price.

28.3.3 Special Guarantee

The Contract shall stipulate the guarantee, if any, required from the Contractor in order to safeguard the Agency's financial interests.

28.3.4 Final Payment

The Contractor shall be allowed to claim the final payment upon achievement of the related milestone and when all its obligations under the Contract have been fulfilled. For the application of this clause, these obligations shall not include those of warranty. The Contractor shall, in addition, certify whether or not any Intellectual Property Rights were generated in the course of the Contract and shall specify the fixed assets acquired during the Contract execution. Additionally, the Contractor shall supply the Agency with all documents specified in the Contract and necessary for payment, without explicit request by the Agency.

28.4 For cost reimbursement prices as defined in clause 4 of Annex II

Payments shall be made by the Agency upon submission of invoice and approval of related cost reports. Such reports shall be submitted at regular intervals to be specified in the Contract. The Contract shall further specify the Documentation to be provided in support of cost reports.

28.4.1 Advance Payment

- a) The Agency may authorise the payment of an Advance in connection with the Contract. Where such provision is made the conditions of the Contract shall stipulate:
 - The total amount advanced
 - The method/procedure of payment
 - The guarantee, if any, required from the Contractor
- b) An Advance Payment is not a definitive payment; it constitutes a debt of the Contractor to the Agency. This debt shall be progressively reduced with subsequent Progress Payments made against approved cost.

28.4.2 Progress Payments

- a) Progress Payments shall be made upon Acceptance by the Agency of the invoice and accompanying cost reports corresponding to allowable cost incurred during the period(s) mentioned in the Contract.
- b) The total amount of Advance- and Progress Payments shall in no case exceed 90% of the Contract Price.
- c) The Contract shall stipulate:
 - Details of the allowable cost
 - The method/procedure of payments
 - The amount to be deducted for progressive reduction of the Advance
 - The regularity of submission of invoices

28.4.3 Final Payment

The Contractor shall be allowed to claim the final payment upon fulfilment of all its obligations under the Contract and when all the relevant Documentation has been provided as mentioned in the Contract. The Contractor shall, in addition, certify whether or not any Intellectual Property Rights were generated in the course of the Contract and shall specify the fixed assets acquired during the Contract execution. Additionally the Contractor shall supply the Agency with all documents specified in the Contract and necessary for payment, without explicit request by the Agency. The final payment shall include, in addition to the reimbursement of allowable cost of the last invoicing period under the Contract, any retained amount from Progress Payments. Any remaining debt from the Advance Payment shall be deducted from the final payment.

28.5 Recovery/Deduction of the amount due

Whenever any sum of money shall be recoverable from, or payable to, the Parties, the sum may be deducted from the sum due, or thereafter becoming due, to the Parties.

CLAUSE 29: AGENCY'S EXEMPTIONS

29.1 The Contractor shall take all the necessary steps in order to facilitate the Agency's exemption from any tax, duties, fee and levies resulting from the Agency's Privileges and Immunities specified in the Convention for the establishment of a European Space Agency ref: ESA SP - 1300.

29.2 The Contractor shall do so, particularly regarding VAT and customs duty exemptions:

- by carrying out all necessary formalities in order to obtain the Agency's exemptions which might otherwise be levied on the expenses the Contractor will incur;
- or, failing that, by complying with all necessary formalities in order to let the Agency claim for their reimbursement from the authority having levied them.

29.3 The Contractor shall ensure that invoices are submitted to the Agency free of VAT when the applicable legislation allows it.
In cases where a VAT exemption certificate is supplied by the Agency, the Contractor shall clearly indicate this in the invoice.

When a VAT exemption is not possible, the Contractor shall indicate separately the amount as the rate corresponding to VAT in the invoice.

29.4 For this purpose, the Contractor shall comply with the instructions given to it by the Agency and provide in due time the information which the Agency requires. The Contractor shall not be responsible, after having complied with above procedure, if the relevant customs authorities reject the benefit of the Agency's exemption.

CHAPTER VIII TERMINATION

CLAUSE 30: GENERAL RULE

The Agency shall have the right at any time to terminate a Contract either wholly or in part by giving written notice by registered mail. From the time of receipt of the written notice, the Contractor shall undertake to observe the instructions of the Agency as to the winding up of the Contract both on its own part and on the part of its Subcontractors.

Notwithstanding clause 15 and only in case of termination of the Contract under the provisions of the present chapter, the ownership of all materials, parts and unfinished work paid for by the Agency under the provisions of the Contract shall be vested in or transferred to the Agency as soon as they have been paid for under the terms of the respective clauses in this chapter.

The Contractor shall reserve the right to terminate any sub-contract, placed by him for the purpose of the Contract, on conditions which, should the Contract be terminated under the provisions of clause 31, will permit him to comply with the requirements of that clause.

CLAUSE 31: TERMINATION WITHOUT FAULT OF THE CONTRACTOR

- 31.1 In the case of termination of a Contract by the Agency without fault of the Contractor, the Contractor shall on receipt of the Agency's instructions, forthwith take the necessary steps to implement them. The Parties shall use their best efforts to mitigate the consequences of the termination. The period to be allowed to implement them shall be agreed between the Parties but shall however, in general, not exceed three (3) Months.
- 31.2 Subject to the Contractor conforming with the instructions referred in sub-clause 31.1, the Agency shall take over from the Contractor at a fair and reasonable price all finished parts not yet delivered to the Agency, all unused and undamaged material, bought-out components and items in the course of manufacture in the possession of the Contractor and properly obtained by or supplied to the Contractor for the performance of the Contract, except such materials, bought-out components and items in the course of manufacture as the Contractor shall, with the agreement of the Agency, elect to retain.
- 31.3 a) The Agency shall indemnify the Contractor against such part of any loss of profit as is attributable to the termination of the Contract and against any damage resulting from the termination of the Contract, in particular against any commitments, liabilities or expenditure which are reasonably and properly chargeable by the Contractor and are related to the Contract, in so far as the said commitments, liabilities or expenditure would otherwise, subject to the conditions stated in sub-clause 31.1 above, represent a loss by the Contractor by reason of the termination of the Contract.
- b) The amount of compensation payable under sub-clause 31.3a) shall be fixed on the basis of evidence produced by the Contractor and accepted by the Agency. It shall take account of the proportion of the Contract completed and shall be consistent with the provisions of sub-clause 31.4.
- 31.4 The Agency shall in no circumstances be liable to pay any sum which, when added to the other sums paid, due or becoming due to the Contractor under the Contract, exceeds the total price for the work set forth in the Contract.

CLAUSE 32: TERMINATION WITH FAULT OF THE CONTRACTOR

32.1 The Agency reserves the right, after full consideration of all relevant circumstances, including the observations of the Contractor, and following a formal notification, to terminate a Contract in any of the following circumstances:

- a) in the event of a material breach of contract or in case of the Contractor's failure to:
 - i) meet the technical requirements of the Contract, or
 - ii) meet the progress and / or delivery requirements;to such an extent as to jeopardise seriously the performance of the Contract;
- b) if the Contractor has not observed the provisions set out in clause 24 and clause 38/clause 52 of Part II, whichever is applicable, concerning the disclosure and use of information provided for by the Agency;
- c) if the Contractor fails to comply with the provisions set out in clauses 11 and 12 concerning the CFIs and the items made available by the Agency;
- d) if the Contractor transfers the Contract without the Agency's authorisation or concludes sub-contracts against the Agency's explicit wishes;
- e) if the Contractor fails to obtain the export licences/authorisations and/or import licences/authorisations as required under clause 15.3.1.

32.2 In the event of such a termination,

- in the case of a fixed price Contract for the supply of equipment or material:

The Contractor shall keep the amounts already paid for achieved milestones, if any, and shall be entitled to claim the cost, properly evidenced, of any items to be accepted under the special conditions of termination set by the Agency; In case Advance Payments effected exceed the cost incurred at the time of termination, the Agency may seek the refund of such excess portion of the Advance Payments.

- in other cases:

The Agency shall pay a fair and reasonable price in respect of such work as has been carried out prior to receipt of notification of termination. In case Advance Payments affected exceed the cost incurred at the time of termination, the Agency may seek the refund of such excess portion of the Advance Payments.

32.3 clause 32.1 shall not apply if failure under a), b) and c) is due to circumstances outside of the Contractor's control.

32.4 In case of termination with fault of the Contractor, the Agency may, at its option and without prejudice to its right of claiming compensation for damage other than the damage already covered by the provisions of sub-paragraphs a), b) and c) below:

- a) have the work performed under its direct responsibility in which case the Contractor shall be charged with all additional costs arising out of this solution and shall, in addition, pay compensation in accordance with the scale referred to in clause 17 for each Day the work is not completed after the delivery date laid down in the Contract with a maximum of the ceiling indicated in clause 17.1.2;
- b) have the work performed by way of a replacement Contract with a Third Party, in which case the Contractor shall be charged with all additional costs arising out of this solution and shall, in addition, pay compensation in accordance with the scale referred to in clause 17, running from the delivery date laid down in the Contract up to the delivery date stipulated in the replacement Contract, with a maximum of the ceiling indicated in clause 17.1.2;
- c) have the work terminated, in which case the Agency shall be entitled to compensation for the damage caused by lack of Delivery.

The penalties already due under the provisions of clause 17 before termination of the Contract will remain payable, but their amount shall be deducted from the compensation due under the provisions of this clause.

In the cases referred to in paragraphs a) and b) above, and in order to ensure completion of the supply of the goods and / or services, the defaulting Contractor shall, where the use of Intellectual Property Rights is required, do everything in its power to enable the new Contractor or the Agency to use the rights concerned. The defaulting Contractor shall make no claim in respect of such use, and shall bear the cost of the fees due to Third Parties for the use of their rights.

The Contractor's liability for all claims under the present sub-clause shall not exceed the Contract Price (including Riders, CCNs and Work Orders), except in cases of gross negligence or wilful misconduct of the Contractor.

CLAUSE 33: TERMINATION IN SPECIAL CASES

- 33.1 The Agency may at any time terminate the Contract by giving written notice with immediate effect in any of the following events:
- a) if the Contractor becomes insolvent or if his financial position is such that within the framework of his national law, legal action leading towards bankruptcy may be taken against him by his creditors;
 - b) if the Contractor resorts to fraudulent practices in connection with the Contract, especially by deceit concerning the nature, quality or quantity of the supplies, and the methods or processes of manufacture employed or by the giving or offering of gifts or remuneration for the purpose of bribery to any person in the employ of a Member State or of the Agency or acting on its behalf, irrespective of whether such bribes or remuneration are made on the initiative of the Contractor or otherwise.

- 33.2 The provisions of sub-clauses 32.2 and 32.4 shall apply to terminations in the special cases mentioned above with the exception of termination under 33.1 b) above to which the Contractor's limitation of liability foreseen in sub-clause 32.4 does not apply.
- 33.3 In cases of termination under clauses 33.1. a) and b), the Contractor shall transfer any rights acquired for the performance of the activity under the Contract and use his best efforts to ensure access for the Agency to Third Party rights as required for continuation of the activity/programme.
- 33.4 In case of Force Majeure and if the Force Majeure event and its consequences continue for more than three (3) Months from the start date of the Force Majeure event, either Party may terminate the Contract by giving not less than two (2) Months notice to the other Party.
- 33.5 In case of termination due to Force Majeure the amount to be paid shall be calculated as per clauses 31.2 and 31.4. No other payments or indemnities shall be due by the Agency to the Contractor.

CHAPTER IX LAW

CLAUSE 34: APPLICABLE LAW

Without prejudice to ESA's special status as an Intergovernmental Organisation with respect to its Privileges and Immunities foreseen in Annex I of the ESA Convention, reference shall be made to a substantive law to be identified in the Contract:

- a) when a matter is not specifically covered by the Contract or the ESA General Clauses and Conditions; or
- b) for the interpretation of a contract provision when such is ambiguous or unclear and not specifically covered by these General Conditions.

CLAUSE 35: DISPUTE RESOLUTION

35.1 Conciliation

The Parties shall use their best efforts to settle any dispute arising out of the Contract amicably. Upon failure of reaching an amicable settlement the dispute may be submitted to arbitration as per the procedure described in sub-clause 35.2.

Referral of a dispute to the Dispute Adjudication Board (DAB) shall not suspend the performance of the Contract or any part of it.

If a dispute (of any kind whatsoever) arises out of the Contract between the Parties, either Party may refer the dispute to the DAB appointed by the Parties to that aim comprising of the following five (5) members; two senior representatives from each Party – one from the technical area and the other representing the area of procurement and the Agency's Industrial Ombudsman. The dispute shall be referred to the DAB In Writing, with the supporting Documentation attached and copy to the other Party. The DAB may, depending on the nature of the dispute, involve appropriate technical expertise or appoint a technical panel composed of technical expertise from both sides to advise on the matter at hand.

Both Parties shall promptly make available to the DAB, all information, Documentation, access to the facilities and the Parties' sites as the DAB may require for the purposes of making a decision on such dispute, subject to national or international security restrictions.

The DAB shall issue its decision within two (2) Months from the submission of the written notification of the dispute to the DAB. In case the DAB fails to issue its decision within the above deadline, or in case either Party is dissatisfied with the DAB's decision, such Party may give written notice to the other Party of its dissatisfaction. In either event, this notice of dissatisfaction shall state that it is submitted under the present sub-clause and shall set out the matter in dispute and the reason(s) for dissatisfaction.

If the DAB has given its decision within the above mentioned deadline and no notice of dissatisfaction has been submitted by either Party within ten (10) Working Days after receiving the DAB's decision, the Parties shall proceed in compliance with the decision of the DAB.

Neither Party shall be entitled to submit a dispute to arbitration as per the provisions of the present sub-clause below, unless a notice of dissatisfaction has been given in accordance with the present sub-clause.

35.2 Arbitration

The Contract shall specify the country and location within that country where the Arbitration Tribunal shall sit; normally the Arbitration Tribunal shall have its seat in the country where the Contractor has its legal seat or where the Contract is to be executed.

Arbitration proceedings shall be conducted in English unless otherwise agreed between the Parties.

If no other arbitration is foreseen in the Contract, any dispute arising out of the Contract shall be finally settled in accordance with the Rules of Arbitration of the International Chamber of Commerce (ICC) by one or more arbitrators appointed in conformity with those rules. Conduct of such proceedings shall be in accordance with the ICC rules in force at the time arbitration is requested by either of the Parties.

The award shall be final, conclusive and binding on the Parties; no appeal shall lie against it. The enforcement of the award shall be governed by the rules of procedure in force in the state/country in which it is to be executed.

PART II:

CONDITIONS CONCERNING INTELLECTUAL PROPERTY RIGHTS FOR ESA STUDY, RESEARCH AND DEVELOPMENT CONTRACTS

(applicable to those contracts concerned by Part I with the exception of contracts with little or no space research and development effort such as service contracts or studies in the non-technical field)

PART II – (Option A): CONDITIONS CONCERNING INTELLECTUAL PROPERTY RIGHTS AND ASSOCIATED RIGHTS FOR STUDY, RESEARCH AND DEVELOPMENT CONTRACTS

- GENERAL REGIME -

CLAUSE 36: GENERAL

General Rule

36.1 These Part II (Option A) Clauses and Conditions apply to Contracts which are also governed by the Clauses and Conditions set out in Part I. In the event of conflict between the General Clauses and Conditions in Part I and Part II (Option A) the clauses in Part II (Option A) shall prevail.

Interpretation

36.2 If an issue arises over the interpretation of Favourable Conditions, Market Conditions and/or Legitimate Commercial Interest any party requiring access and use of Intellectual Property Rights arising from work performed under the Contract may request a reasoned binding opinion from a forum agreed by the Parties (and if the Parties cannot agree on a forum the matter shall be referred to the Agency).

Contractor Employees/Service Providers

36.3 The Contractor shall ensure that all work to be performed under the Contract is carried out by persons who have a written agreement with the Contractor and that when lawful the agreement includes provisions that ensure:

- a) all Intellectual Property Rights in results, information, data or Documentation arising from work performed during the course of their engagement shall be owned by the Contractor; and
- b) all results information, data and Documentation obtained for the purpose of the Contract will only be circulated under terms which comply with the Contract.

Subcontract Clauses

- 36.4 If the Contractor requires the services of a Subcontractor for the purposes of fulfilling obligations under the Contract the Contractor may enter into subcontracts with the approval of the Agency unless otherwise specified in the Contract. Each subcontract shall provide:
- a) the Subcontractor with the same rights and obligations in relation to work performed under the subcontract that the Contractor has agreed to in relation to work performed under the Contract and in particular shall ensure that only the Subcontractor has the rights and obligations set out under clause 36.2 (Interpretation), clause 36.3 (Contractor Employees/Service Providers), clause 39 (Ownership of Intellectual Property Rights), clause 40 (Registration of Intellectual Property Rights), clause 41 (Use of Intellectual Property Rights), clause 42 (Software), clause 43 (Background Intellectual Property Rights), clause 44 (Exploitation), clause 46 (Fees) and clause 49 (Transfer outside Member States);
 - b) for the exceptional case when work is carried out jointly by the Contractor and one or more Subcontractors, the Parties will agree to normally vest the ownership of the Intellectual Property Rights in the principal contributor to the development, provided the principal contributor is able and willing to exploit such rights and compensation in form of a licence and/or payment is agreed. In such case, the assignment shall be notified to the Agency and the subcontract shall be drafted to comply with these provisions of this Part II (Option A).
- 36.5 To assist in the identification of Intellectual Property Rights created and owned by the Subcontractor each subcontract shall define in writing the product, application or results arising from work performed under the subcontract.

CLAUSE 37: INFORMATION TO BE PROVIDED

Contract Reports

- 37.1 The Contractor shall provide regular reports detailing all work performed under the Contract as specified in the Contract. The reports shall provide details of all work undertaken and completed, any current or anticipated problems in completing the Contract, the progress achieved and whether any results or Intellectual Property Rights arising from work performed under the Contract have been (or are expected to be) exploited.
- 37.2 The Contractor shall draft a final report detailing all results of the Contract as specified in the Contract. The Agency may make the report available to Participating States and Persons and Bodies. For the purpose of the report the Contractor shall provide the Agency with relevant commercially sensitive information, data, results and Documentation which shall be included in a separate part of the report marked "Proprietary Information" only to be circulated with prior written consent from the Contractor (such consent not to be unreasonably withheld taking into account the Contractor's Legitimate Commercial Interest).

- 37.3 If requested by the Agency, and at the Agency's reasonable expense, the Contractor shall provide the Agency with any additional information, results, data or Documentation arising from work performed under the Contract not included in reports provided to the Agency together with any related information the Agency may reasonably require for the Agency to use or make available in accordance with the Contract.

Access to Information

- 37.4 Information, data and results arising from work performed under the Contract shall be reported to the Agency who may make such information, data and results available for Participating States and Persons and Bodies to use on the condition that Participating States and Persons and Bodies comply with the terms on Use of Intellectual Property Rights (set out in clause 41) and on Disclosure (set out in clause 38).

CLAUSE 38: DISCLOSURE

- 38.1 The Contractor shall not Disclose any Documentation obtained from the Agency which is marked as "Proprietary Information". The Contractor shall only circulate such Documentation to its employees that require that Documentation for the purposes of complying with the Contract. The Contractor shall never circulate such Documentation to those not employed by the Contractor (other than in compliance with these Clauses and Conditions) without prior written consent from the Agency in which case the Agency may require the recipient to sign a non-disclosure agreement.
- 38.2 The Agency shall not Disclose any Documentation obtained from the Contractor which is marked "Proprietary Information". The Agency shall only circulate such Documentation to its employees that require that Documentation for the purpose of complying with the Contract or for using, modifying or maintaining any product, application or result of the Contract and the Agency shall never circulate such Documentation to those not employed by the Agency (other than in compliance with these Clauses and Conditions) without prior written consent from the Contractor in which case the Contractor may require the recipient to sign a non-disclosure agreement.
- 38.3 The obligations in clauses 38.1 and 38.2 shall not apply to Documentation:
- a) which at the time of circulation has already entered the public domain or which after circulation enters the public domain other than through a breach of the Contract;
 - b) which at the time of circulation is already known by the receiving party (as evidenced in writing) and is not hindered by any obligation not to circulate;
 - c) which is later acquired by the receiving party from another source and is not hindered by any obligation not to circulate;

- d) which is required to be circulated by law or order of a court of competent jurisdiction.

CLAUSE 39: OWNERSHIP OF INTELLECTUAL PROPERTY RIGHTS

- 39.1 The Contractor shall own all Intellectual Property Rights and have the right to apply for and to own any Registered Intellectual Property Rights arising from work performed under the Contract. At the Contractor's request and expense the Agency shall carry out all reasonable tasks including executing any document required to vest such title in the Contractor.
- 39.2 The Agency shall be granted the rights, including the access, to Intellectual Property Rights set out in clauses 39 to 44 and reserves the right to require the Contractor to assign Intellectual Property Rights arising from work performed under the Contract in the case of:
- a) the Contractor's failure to apply for registration or the Contractor's abandonment of Registered Intellectual Property Rights arising from work performed under the Contract (as set out in clause 40.4 and 40.5);
 - b) the Contractor's failure to exploit (as set out in clause 44.2);
 - c) Operational Software (as set out in clause 42.7);
 - d) Open Source Code (as set out in clause 42.9).
- 39.3 When the Contractor assigns any Intellectual Property Rights arising from work performed under the Contract he shall give notification to the Agency within 4 weeks of the date of assignment.
- 39.4 The Contractor shall ensure that any assignee of Intellectual Property Rights arising from work performed under the Contract complies with the same obligations (including the obligation to exploit the Intellectual Property Rights) and grants the Agency, Participating States, Persons and Bodies the same rights that the Contractor has agreed to under the Contract.

CLAUSE 40: REGISTRATION OF INTELLECTUAL PROPERTY RIGHTS

Notification

- 40.1 The Contractor shall as soon as possible report to the Agency any results arising from work performed under the Contract which may in the Contractor's opinion be protected as Registered Intellectual Property Rights and state whether it intends to apply for such protection. At the Contractor's specific request in order to allow for filing of patent applications the Agency shall not Disclose any information, data or results supplied for a period of 12 Months from the date it was reported to the Agency.

Applications for Registration

- 40.2 The Contractor shall inform the Agency of any application to register results, information or data arising from work performed under the Contract and within 2 Months of the date of filing, provide details of the office where the application was filed, the application number, the filing date, the inventor's name and applicants name, the reference number of the relevant Contract and where possible provide a copy of the application (including description, any claims and drawings). Following the filing of the application the Contractor shall inform the Agency whether it has been used as the basis for applications in other countries. Following the grant of such applications the Contractor shall inform the Agency of any proceedings which allege that granted rights are invalid or require amendment.
- 40.3 The Agency shall have an irrevocable right to use the information in any application for Registered Intellectual Property Rights arising from work performed under the Contract for its Own Requirements on the terms set out in clause 41 but unless agreed otherwise with the Contractor the Agency shall not Disclose such information until publication of the application for registration.

Failure to apply/Abandonment

- 40.4 If the Contractor does not wish to apply for Registered Intellectual Property Rights (or wishes to abandon Registered Intellectual Property Rights) arising from work performed under the Contract it shall inform the Agency. After such notification the Agency shall consult the Contractor and investigate the reasons for the failure to apply or for the abandonment of such rights. Following this consultation the Agency may inquire whether Third Parties would be interested in protecting or exploiting such rights the Contractor owns. If the Agency finds a suitable Third Party, the Agency can require the Contractor to assign to the Third Party the rights necessary to apply for such Registered Intellectual Property Rights or require the Contractor to license the Third Party such abandoned Registered Intellectual Property Rights on Favourable Conditions to be agreed between the Contractor, the Agency and the Third Party. For the avoidance of doubt the Contractor may not unreasonably object to the terms of any such assignment or licence.
- 40.5 If the Agency cannot find a Third Party to apply for Registered Intellectual Property Rights arising from work performed under the Contract (or cannot find a party who wishes to exploit such Registered Intellectual Property Rights the Contractor wishes to abandon), then the Agency may require the Contractor to assign those rights to the Agency free of charge.
- 40.6 If the Contractor assigns rights to a Third Party under the provisions of clause 40.4 the provisions of clause 39.4 shall apply. If the Contractor assigns rights to the Agency under the provisions of clause 40.5 the Contractor, Participating States and Persons and Bodies shall be entitled to a free, non-exclusive, irrevocable licence to use the said rights without the right to grant sublicences.

- 40.7 If the Contractor does not wish to apply for Registered Intellectual Property Rights (or wishes to abandon Registered Intellectual Property Rights) arising from work performed under the Contract it shall not take any action which jeopardises or affects the ability of the Agency or a Third Party to apply for registered rights or to exploit abandoned rights.

CLAUSE 41: USE OF INTELLECTUAL PROPERTY RIGHTS

Use/Licensing

- 41.1 All Intellectual Property Rights arising from work performed under the Contract shall be available to:
- a) the Agency, Participating States and Persons and Bodies to use on a free, worldwide licence with the right to grant sublicences for the Agency's Own Requirements (such licence to be granted by the Contractor or the Agency as set out in the standard licence which the licensee shall enter into if required);
 - b) Participating States and Persons and Bodies to use on Favourable Conditions for a Participating State's Own Public Requirements (such licence to be granted by the Contractor as set out in the standard licence which the licensee shall enter into if required);
 - c) academic and research institutions to use on a free licence without the right to grant sublicenses for their own scientific research purposes (excluding commercial purposes) providing the Contractor agrees such use is not contrary to its Legitimate Commercial Interests (such licence to be granted by the Contractor as set out in the standard licence which the licensee shall enter into if required);
 - d) any Third Party on Market Conditions to use for purposes other than the Agency's Own Requirements or a Participating State's Own Public Requirements providing the Contractor agrees such use is not contrary to its Legitimate Commercial Interests.
- 41.2 For the avoidance of doubt, the term "use" for the purposes of software includes use to operate, integrate, validate, maintain and modify software developed under the Contract.
- 41.3 Where the Contractor relies on its Legitimate Commercial Interests, unless specified in the Contract it shall demonstrate those interests continue to apply every 3 years or within any other timeframe specified in the Contract.

CLAUSE 42: SOFTWARE

Ownership/Licensing

42.1 Intellectual Property Rights for software arising from work performed under the Contract shall be owned by the Contractor (as set out in clause 39) and may be used as for other products, applications or results of the Contract (as set out in clause 41) except for Source Code where the provisions of this clause apply (as set out in clauses 42.3 to 42.6).

Supply

42.2 The Contractor shall supply the Agency (Participating States and Persons and Bodies as specified by the Agency) with software developed under the Contract in Object Code form, together with all information, data and Documentation and Background Intellectual Property Rights required by the Agency (Participating States and Persons and Bodies) to operate the software in accordance with the licence relating to use of the software and if required by the Agency and at the Agency's reasonable expense:

- a) install the software on hardware specified by the Agency;
- b) provide training to persons to operate the software as specified by the Agency.

Source Code Agent

42.3 As specified in the Contract, the Contractor shall deposit the Source Code for software developed under the Contract with a Source Code Agent to be made available (together with Documentation required to operate the Source Code) to the Agency when:

- a) the Contractor becomes insolvent, ceases to carry out its business, has a receiver, liquidator, administrative receiver, administrator, trustee or other similar officer appointed over the whole or part of its assets or an order is made or a resolution passed for the winding up of the Contractor (save for a solvent winding up as part of a bona fide reconstruction or amalgamation);
- b) the Contractor commits a breach of the Contract which is material and not capable of remedy or which is capable of remedy but which is not remedied within 60 Days of notice to the Agency; or
- c) the Contractor assigns Intellectual Property Rights protecting the software.

42.4 As specified in the Contract the Contractor shall release, under confidentiality terms to be agreed, the Source Code for software developed under the Contract to the Agency (or require the Source Code Agent to release such Source Code to the Agency) in the event it is required for use for the Agency's Own Requirements to:

- a) operate, integrate or validate software developed under the Contract with other Agency systems;

- b) maintain or modify software developed under the Contract;
- c) operate, integrate, validate, maintain or modify updates, modifications or enhancements to software developed under the Contract.

42.5 Source Code released by the Source Code Agent (under clause 42.3 or 42.4) or by the Contractor (under clause 42.4) shall be available for the Agency's Own Requirements as for any other product, application or result of the Contract (as set out in clause 41.1 a)). For the avoidance of doubt the Contractor shall own all Intellectual Property Rights in the Source Code as for any other product, application or result of the Contract.

Updates/Modifications/Enhancements

42.6 For 5 years from the date of Acceptance of software developed under the Contract each party shall inform the other and provide details of all updates, modifications or enhancements for software supplied to the Agency.

42.7 All updates, modifications or enhancements undertaken by the Contractor after the software has been developed under the Contract shall be made available to the Agency on a worldwide licence with the right to grant sublicences for the Agency's Own Requirements on Favourable Conditions with access to the Source Code as set out in this clause 42.3 to 42.5.

Operational Software

42.8 The Agency can require the Contractor to assign (or license) to the Agency all Intellectual Property Rights in Operational Software developed under the Contract as provided for in Special Conditions for the Contract.

42.9 If the Contractor assigns such Intellectual Property Rights to the Agency, the Agency (if requested) shall grant the Contractor a non-exclusive, irrevocable, free, worldwide licence to use the Operational Software without the right to grant sublicences for purposes specified in the Contract.

Open Source Code

42.10 The Agency may require the Contractor to assign to the Agency all Intellectual Property Rights in the Open Source Code developed under the Contract. The Agency may distribute the Open Source Code as specified in the Contract.

42.11 If the Contractor assigns such Intellectual Property Rights to the Agency, unless agreed otherwise, the Agency shall grant the Contractor a non-exclusive, free, worldwide licence to use the Open Source Code for the purpose specified in the Contract.

The granting of sublicences requires special authorisation by the Agency.

CLAUSE 43: BACKGROUND INTELLECTUAL PROPERTY RIGHTS

Notification

- 43.1 When negotiating the Contract or during the Contract if the Contractor intends to use Background Intellectual Property Rights it may first identify the Background Intellectual Property Rights to the Agency in which case the Contractor shall provide details of the rights to be used.

If the Contractor has not identified Background Intellectual Property Rights by the end of the Contract, all intellectual Property Rights used during the execution of the Contract are treated as arising from work performed under the Contract, unless and until the Contractor provides the Agency with evidence of the relevant Background Intellectual Property Rights.

Ownership

- 43.2 The Background Intellectual Property Rights owned by the Contractor, Agency or a Third Party shall remain the property of the owning party and no representation or act by a party during performance of the Contract shall indicate or be construed as providing any other right, title or interest in such Background Intellectual Property Rights other than in accordance with these Clauses and Conditions.

Use/Licensing

- 43.3 Intellectual Property Rights required by the Contractor arising from work performed under another Contract with the Agency shall be owned, made available and licensed in accordance with that other Contract.
- 43.4 If the Agency requires Background Intellectual Property Rights owned by the Contractor for the Agency project specified in the Contract, the Contractor shall grant the Agency an irrevocable, free, worldwide licence to enable the Agency to use and modify any product, application or result of the Contract for that project. If any party requires Background Intellectual Property Rights owned by the Contractor to use and modify any product, application or result of a Contract for the Agency's Own Requirements other than for the project specified in the Contract the Contractor shall grant a licence to that party on Market Conditions unless contrary to the Contractor's Legitimate Commercial Interests.
- 43.5 If the Agency requires Source Code protected by Background Intellectual Property Rights owned by the Contractor the Contractor shall make that Source Code available for the Agency's Own Requirements as set out in clause 42.4.
- 43.6 If a Subcontractor requires Background Intellectual Property Rights that the Contractor owns the Contractor shall grant the Subcontractor a licence on Favourable Conditions solely to enable the Subcontractor to fulfil its obligations directly relating to the Contract.

- 43.7 If the Agency, the Contractor or a Subcontractor requires Background Intellectual Property Rights owned by a Third Party the Contractor shall use its reasonable endeavours to ensure that the owner of such Background Intellectual Property Rights grants a licence to the Agency, Contractor or Subcontractor to enable the completion of the Contract. In addition the Contractor shall use its reasonable endeavours to ensure that the Third Party owner of such Background Intellectual Property Rights grants the Agency a licence to the Background Intellectual Property Rights for the Agency to use and modify any product, application or result of the Contract in accordance with these Clauses and Conditions for the Agency project specified in the Contract. For the avoidance of doubt the Agency shall pay any reasonable licence fee.

Proprietary Information

- 43.8 The Agency shall comply with all requirements on use and circulation of information and Documentation that relates to Background Intellectual Property Rights. Where such Documentation is marked "Proprietary Information" it shall be treated in accordance with the provisions on Disclosure (set out in clause 38) and not be circulated outside the Agency without the owner's prior written consent.

Infringement

- 43.9 The Contractor warrants that to the best of its knowledge information and belief that the use of Background Intellectual Property Rights by the Agency and/or the Contractor for the purposes identified in the Contract will not infringe any Intellectual Property Rights owned by Third Parties.

CLAUSE 44: EXPLOITATION

- 44.1 The Contractor shall use its reasonable endeavours to exploit all Intellectual Property Rights arising from work performed under the Contract so as to promote space research and technology and space applications and if feasible in other industry sectors.

Failure to Exploit

- 44.2 If the Contractor does not intend to exploit or does not effectively exploit Intellectual Property Rights arising from work performed under the Contract it shall inform the Agency within the period prescribed in the Contract (in accordance with clause 44.4). After such notification the Agency shall consult the Contractor and investigate the reasons for the failure to exploit. Following the consultation the Agency may investigate whether Third Parties would be interested in exploiting such rights the Contractor owns. If the Agency finds a suitable Third Party the Agency can require the Contractor to grant the Third Party a licence to the rights not effectively exploited on Favourable Conditions to be agreed between the Contractor, Agency and the Third Party. For the avoidance of doubt the Contractor may not unreasonably object to the terms of such licence. If the Agency cannot find a suitable Third Party to exploit such rights it can require the Contractor to assign such rights to the Agency.

- 44.3 If the Contractor does not intend to exploit or does not effectively exploit Intellectual Property Rights arising from work performed under the Contract it shall not take any action which jeopardises or affects the ability to exploit such rights by the Agency or a Third Party.

Exploitation Reports

- 44.4 Following the Agency's Acceptance of any product, application or result arising from work performed under the Contract the Contractor shall provide written reports (and updates if required) on exploitation of the Intellectual Property Rights arising from work performed under the Contract as specified in the Contract (and in any event within 3 and 10 years from the date of Acceptance).

CLAUSE 45: EVALUATION OF TECHNOLOGY

- 45.1 During the Contract the Contractor shall use its reasonable endeavours to assist the Agency in assessing and evaluating results arising from work performed under the Contract with a view to use or re-use in new programmes both public and commercial and to promote space research and technology and space applications and if feasible in other industry sectors.
- 45.2 Following completion of the Contract and at the Agency's reasonable expense the Contractor shall use its reasonable endeavours to continue assisting the Agency to assess and evaluate results and exploitation arising from work performed under the Contract with a view to use or re-use in programmes to promote space research and technology and space applications and other industry sectors.

CLAUSE 46: FEES

- 46.1 If provided for in the Contract the Contractor shall pay a fee to the Agency for the sale of any product, application or result or any licence or assignment of any Intellectual Property Rights arising from the Contract (including rights in software) which are exploited within 10 years from the date of Acceptance of work arising from the Contract.
- 46.2 When a fee is provided for in the Contract the Contract shall specify when the fee shall be due, how the fee shall be calculated and in what exceptional circumstances it shall be waived. The total fee payable to the Agency shall not exceed the total sum paid by the Agency for provision of the work or rights exploited.
- 46.3 No obligation to pay a fee shall arise if a product, application or result is sold or rights are assigned or licensed in the field of space research and technology and space applications in a Participating State and no fee will be payable to the Agency for free licences of Intellectual Property Rights granted in accordance with clauses 41 to 43.

CLAUSE 47: RE-SUPPLY

Process

- 47.1 The Agency has the right to have a product, application or result of the Contract re-supplied by the Contractor or by a Third Party selected by the Agency for the Agency's Own Requirements.
- 47.2 If the Agency intends to re-supply a product, which is requested by the Agency to be fully identical to the product developed under an earlier Agency Contract, the Agency shall offer the original Contractor the right to re-supply the product when the Contractor is able and willing to undertake the work at a fair and reasonable price the Agency is satisfied as to quality and the original Contractor can make Delivery as required by the Agency. If the original Contractor and the Agency do not enter into an agreement for re-supply the Agency may put the Agency Contract out to competitive tender in which case the original Contractor shall be awarded the tender if the Agency is satisfied as to quality and that the original Contractor's proposed conditions (including price and Delivery terms) are at least equal to or better than other bidders.

Assistance

- 47.3 The Contractor shall provide all the assistance, results, technical know-how, and Documentation which the Agency may reasonably require to enable a Third Party selected by the Agency to re-supply products originally provided under the Contract. In the event that the Third Party selected by the Agency is not as equally skilled as the Contractor in the relevant technology, the Contractor may object to providing such assistance, results, technical know-how and Documentation.

Price/Expenses

- 47.4 If the Agency exercises its right to re-supply in favour of the Contractor, the price for re-supply shall be determined in accordance with the process set out in clause 47.2.
- 47.5 If the Agency exercises its right to re-supply in favour of a party other than the Contractor and the Contractor is required to provide assistance, technical know how or Documentation, the Agency shall reimburse the Contractor for its costs at reasonable rates to be agreed.

Licences

- 47.6 The Contractor shall, if required by the Agency, take such actions as are reasonably required including the signing of Documentation to confirm licences a Third Party selected by the Agency may require in order to re-supply products originally provided under the Contract.

Background Intellectual Property Rights

- 47.7 The Contractor shall use its reasonable endeavours to obtain any licences of Background Intellectual Property Rights owned by a Third Party which may be required for the re-supply of products originally provided under the Contract.

Proprietary Information

- 47.8 The Agency shall ensure the appointed Contractor does not Disclose any results, information, data and Documentation which is marked “Proprietary Information” and only use such results, information, data and Documentation for the purpose of its Contract with the Agency for the re-supply. The Agency shall require the appointed Contractor to return all results, information, data and Documentation supplied by the Contractor to either the Agency or the Contractor on completion of its Contract with the Agency. Any such results, information, data and Documentation returned to the Agency shall be promptly forwarded to the Contractor.
- 47.9 The Agency shall act as intermediary for Participating States who require re-supply of products provided to the Agency for the purposes of a Participating State’s Own Public Requirements in which case the Agency shall assist the Participating States to act in accordance with the terms and conditions set out in this clause 47.

CLAUSE 48: INFRINGEMENT

- 48.1 The Agency and the Contractor shall notify each other of any dispute arising over ownership or use of Intellectual Property Rights that arises from performance of the Contract or which is required for completion of the Contract or which relates to use of any product, application, or result of the Contract. The Agency and the Contractor shall provide each other with all reasonable assistance required to settle such dispute.
- 48.2 The Agency may require the Contractor to take such action as the Agency deems necessary (which includes the commencement and enforcement of legal proceedings) to prevent infringement of Intellectual Property Rights arising from the Contract. The Agency shall reimburse the Contractor for all reasonable expenses incurred in taking such action.
- 48.3 If the Agency commences any proceedings for enforcement of Intellectual Property Rights which have been assigned to the Agency by the Contractor under the Contract, then the Contractor shall provide such reasonable assistance as the Agency may require. The Agency shall reimburse the Contractor for all expenses reasonably incurred in providing such assistance.

CLAUSE 49: TRANSFER OUTSIDE MEMBER STATES

Any transfer of Intellectual Property Rights or any product, process, application or result arising from work performed under the Contract by the Contractor to any entity in a non-Member State or any international organisation shall comply with all

applicable laws including all export control laws, regulations, rules and procedures and any relevant international agreements relating to the export of goods and services.

**PART II – (Option B): CONDITIONS CONCERNING INTELLECTUAL
PROPERTY RIGHTS AND ASSOCIATED RIGHTS FOR
STUDY, RESEARCH AND DEVELOPMENT
CONTRACTS**

**- SPECIAL REGIME FOR PARTLY FUNDED
CONTRACTS-**

CLAUSE 50: GENERAL

General Rule

50.1 These Part II (Option B) Clauses and Conditions apply to Contracts which are also governed by the Clauses and Conditions set out in Part I. In the event of conflict between the General Clauses and Conditions in Part I and Part II (B) the clauses in Part II (B) shall prevail.

Interpretation

50.2 If an issue arises over the interpretation of Favourable Conditions, Market Conditions, Financial Conditions and/or Legitimate Commercial Interest any party requiring access and use of Intellectual Property Rights arising from work performed under the Agency Contract may request a reasoned binding opinion from a forum agreed by the Parties (and if the Parties cannot agree on a forum the matter shall be referred to the Agency).

Contractor Employees/Service Providers

50.3 The Contractor shall ensure that all work to be performed under the Agency Contract is carried out by persons who have a written agreement with the Contractor and that when lawful the agreement includes provisions that ensure:

- a) all Intellectual Property Rights in results, information, data or Documentation arising from work performed during the course of their engagement shall be owned by the Contractor; and
- b) all results information, data and Documentation obtained for the purpose of the Agency Contract will only be circulated under terms which comply with the Agency Contract.

Subcontract Clauses

50.4 If the Contractor requires the services of a Subcontractor for the purposes of fulfilling obligations under the Agency Contract the Contractor may enter into subcontracts with the approval of the Agency unless otherwise specified in the Agency Contract.

- 50.5 In subcontracts which a Subcontractor partly funds the subcontract shall provide:
- a) the Subcontractor with the same rights and obligations in relation to work performed under the subcontract that the Contractor has agreed to in relation to work performed under the Contract and in particular shall ensure that only the Subcontractor has the rights and obligations set out under clause 50.2 (Interpretation), clause 50.3 (Contractor Employees/Service Providers), clause 53 (Ownership of Intellectual Property Rights), clause 54 (Registration of Intellectual Property Rights), clause 55 (Use of Intellectual Property Rights), clause 56 (Software), clause 57 (Background Intellectual Property Rights), clause 58 (Exploitation), clause 60 (Fees) and clause 63 (Transfer outside Member States);
 - b) for the exceptional case when work is carried out jointly by the Contractor and one or more Subcontractors, the Parties will agree to normally vest the ownership of the Intellectual Property Rights in the principal contributor to the development, provided the principal contributor is able and willing to exploit such rights and compensation in form of a licence and/or payment is agreed. In such case, the assignment shall be notified to the Agency and the subcontract shall be drafted to comply with these provisions of this Part II (Option B).
- 50.6 In the case of subcontracts, which are not funded by the Subcontractor, the present part II B terms and conditions shall be negotiated by the Contractor and Subcontractor subject to the Agency's prior approval.
- 50.7 To assist in the identification of Intellectual Property Rights created and owned by the Subcontractor each subcontract shall define in writing the product, application or results arising from work performed under the subcontract.

CLAUSE 51: INFORMATION TO BE PROVIDED

Contract Reports

- 51.1 The Contractor shall provide regular progress reports detailing all work performed under the Agency Contract as specified in the Agency Contract. The reports shall provide details of all work undertaken and completed, any current or anticipated problems in completing the Agency Contract, the progress achieved and whether any results or Intellectual Property Rights arising from work performed under the Agency Contract has been (or is expected to be) exploited.
- 51.2 The Contractor shall draft a final report detailing all results of the Agency Contract as specified in the Agency Contract. The Agency may make the report available to Participating States and Persons and Bodies. For the purpose of the report the Contractor shall provide the Agency with relevant commercially sensitive information, data, results and Documentation which shall be included in a separate part of the report marked "Proprietary Information" only to be circulated with prior written consent from the Contractor (such consent not to be unreasonably withheld taking into account the Contractor's Legitimate Commercial Interest).

- 51.3 If requested by the Agency, and at the Agency's reasonable expense, the Contractor shall provide the Agency with any additional information, results, data or Documentation arising from work performed under the Agency Contract not included in reports provided to the Agency together with any related information the Agency may reasonably require for the Agency to use or make available in accordance with the Agency Contract.

Access to Information

- 51.4 Information, data and results arising from work performed under the Agency Contract shall be reported to the Agency who may make such information, data and results available for Participating States and Persons and Bodies to use on the condition that Participating States and Persons and Bodies comply with the terms on Use of Intellectual Property Rights (set out in clause 55) and on Disclosure (set out in clause 52).

CLAUSE 52: DISCLOSURE

- 52.1 The Contractor shall not Disclose any Documentation obtained from the Agency which is marked as "Proprietary Information". The Contractor shall only circulate such Documentation to its employees that require that Documentation for the purposes of complying with the Agency Contract. The Contractor shall never circulate such Documentation to those not employed by the Contractor (other than in compliance with these Clause and Conditions) without prior written consent from the Agency in which case the Agency may require the recipient to sign a non-disclosure agreement.
- 52.2 The Agency shall not Disclose any Documentation obtained from the Contractor which is marked "Proprietary Information". The Agency shall only circulate such Documentation to its employees that require that Documentation for the purpose of complying with the Agency Contract or for using, modifying or maintaining any product, application or result of the Agency Contract and the Agency shall never circulate such Documentation to those not employed by the Agency (other than in compliance with these Clauses and Conditions) without prior written consent from the Contractor in which case the Contractor may require the recipient to sign a nondisclosure agreement.
- 52.3 The obligations in clauses 52.1 and 52.2 shall not apply to Documentation:
- a) which at the time of circulation has already entered the public domain or which after circulation enters the public domain other than through a breach of this Agency Contract;
 - b) which at the time of circulation is already known by the receiving party (as evidenced in writing) and is not hindered by any obligation not to circulate;

- c) which is later acquired by the receiving party from another source and is not hindered by any obligation not to circulate;
- d) which is required to be circulated by law or order of a court of competent jurisdiction.

CLAUSE 53: OWNERSHIP OF INTELLECTUAL PROPERTY RIGHTS

- 53.1 The Contractor shall own all Intellectual Property Rights and have the right to apply for and to own any Registered Intellectual Property Rights arising from work performed under the Agency Contract. At the Contractor's request and expense the Agency shall carry out all reasonable tasks including executing any document required to vest such title in the Contractor.
- 53.2 The Agency shall be granted the rights, including the access, to Intellectual Property Rights set out in clauses 53 to 57.
- 53.3 When the Contractor assigns any Intellectual Property Rights arising from work performed under the Contract he shall give notification to the Agency within 4 weeks of the date of assignment.
- 53.4 The Contractor shall ensure that any assignee of Intellectual Property Rights arising from work performed under the Agency Contract complies with the same obligations (including the obligation to exploit the Intellectual Property Rights) and grants the Agency, Participating States, Persons and Bodies the same rights that the Contractor has agreed to under this Agency Contract.

CLAUSE 54: REGISTRATION OF INTELLECTUAL PROPERTY RIGHTS

Notification

- 54.1 The Contractor shall as soon as possible report to the Agency any results arising from work performed under the Agency Contract which may in the Contractor's opinion be protected as Registered Intellectual Property Rights and state whether it intends to apply for such protection. At the Contractor's specific request in order to allow for filing of patent applications the Agency shall not Disclose any information, data or results supplied for a period of 12 Months from the date it was reported to the Agency.

Applications for Registration

- 54.2 The Contractor shall inform the Agency of any application to register results, information or data arising from work performed under the Agency Contract and within 2 Months of the date of filing, provide details of the office where the application was filed, the application number, the filing date, the inventor's name and applicant's name, the reference number of the relevant Agency Contract and where possible provide a copy of the application (including description, any claims and drawings). Following the filing of the application the Contractor shall inform the

Agency whether it has been used as the basis for applications in other countries. Following the grant of such applications the Contractor shall inform the Agency of any proceedings which allege that granted rights are invalid or require amendment.

- 54.3 The Agency shall have an irrevocable right to use the information in any application for Registered Intellectual Property Rights arising from work performed under the Agency Contract for its Own Requirements on the terms set out in clause 55.1 but unless agreed otherwise with the Contractor the Agency shall not Disclose such information until publication of the application for registration.

CLAUSE 55: USE OF INTELLECTUAL PROPERTY RIGHTS

Use/Licensing

- 55.1 All Intellectual Property Rights arising from work performed under the Agency Contract shall be available to:
- a) the Agency to use on a free, worldwide licence for the Agency's Own Requirements (such licence to be granted by the Contractor as set out in the standard licence which the licensee shall be entered into if required);
 - b) Participating States and Persons and Bodies to use on Financial Conditions for the Agency's Own Requirements (such licence to be granted by the Contractor as set out in the standard licence which the licensee shall enter into if required);
 - c) any Third Party on Market Conditions to use for purposes other than the Agency's Own Requirements providing the Contractor agrees such use is not contrary to its Legitimate Commercial Interests.
- 55.2 For the avoidance of doubt the term "use" for the purposes of software includes use to operate, integrate, validate, maintain and modify software developed under the Agency Contract.
- 55.3 Where the Contractor relies on its Legitimate Commercial Interests, unless specified in the Contract it shall demonstrate those interests continue to apply every 3 years or within any other timeframe specified in the Contract.

CLAUSE 56: SOFTWARE

Ownership/Licensing

- 56.1 Intellectual Property Rights for software arising from work performed under the Agency Contract shall be owned by the Contractor (as set out in clause 53) and may be used as for other products, applications or results of the Agency Contract (as set out in clause 55) except to Source Code where the provisions of this clause apply (as set out in clauses 56.3 to 56.5).

Supply

- 56.2 The Contractor shall supply the Agency (and Participating States and Persons and Bodies if specified under the Special Conditions of Contract) with software developed under the Agency Contract in Object Code form, together with all information, data, Documentation and Background Intellectual Property Rights required by the Agency (or Participating States and Persons and Bodies) to operate the software in accordance with the licence relating to use of the software and if required by the Agency and at the Agency's reasonable expense:
- a) install the software on hardware specified by the Agency; and
 - b) provide training to persons to operate the software as specified by the Agency.

Source Code Agent

- 56.3 As specified in the Agency Contract, the Contractor shall deposit the Source Code for software developed under the Agency Contract with a Source Code Agent to be made available (together with Documentation required to operate the Source Code) to the Agency when:
- a) the Contractor becomes insolvent, ceases to carry out its business, has a receiver, liquidator, administrative receiver, administrator, trustee or other similar officer appointed over the whole or part of its assets or an order is made or a resolution passed for the winding up of the Contractor (save for a solvent winding up as part of a bona fide reconstruction or amalgamation);
 - b) the Contractor commits a breach of the Agency Contract which is material and not capable of remedy or which is capable of remedy but which is not remedied within 60 Days of notice to the Agency; or
 - c) the Contractor assigns Intellectual Property Rights protecting the software.
- 56.4 As specified in the Agency Contract the Contractor shall release, under confidentiality terms to be agreed, the Source Code for software developed under the Agency Contract to the Agency (or require the Source Code Agent to release such Source Code to the Agency) in the event it is required for use for the Agency's Own Requirements to:
- a) operate, integrate or validate software developed under the Agency Contract with other Agency systems;
 - b) maintain or modify software developed under the Agency Contract;
 - c) to operate, integrate, validate maintain or modify updates, modifications or enhancements to software developed under the Contract.

- 56.5 Source Code released by the Source Code Agent (under clause 56.3 or 56.4) or by the Contractor (under clause 56.4) shall be available for the Agency's Own Requirements as for any other product, application or result of the Agency Contract (as set out in clause 55.1 a)). For the avoidance of doubt the Contractor shall own all Intellectual Property Rights in the Source Code as for any other product, application or result of the Agency Contract.

Updates/Modifications/Enhancements

- 56.6 For 5 years from the date of Acceptance of software developed under the Agency Contract each party shall inform the other and provide details of all updates, modifications or enhancements for software supplied to the Agency.
- 56.7 All updates, modifications or enhancements undertaken by the Contractor after the software has been developed under the Contract shall be made available to the Agency on a worldwide licence with the right to grant sublicences for the Agency's Own Requirements on Market Conditions with access to the Source Code as set out in the clauses 56.3 to 56.5.

CLAUSE 57: BACKGROUND INTELLECTUAL PROPERTY RIGHTS

Notification

- 57.1 When negotiating the Agency Contract or during the Agency Contract if the Contractor intends to use Background Intellectual Property Rights it may first identify the Background Intellectual Property Rights to the Agency in which case the Contractor shall provide details of the rights to be used.

If the Contractor has not identified Background Intellectual Property Rights by the end of the Contract, all intellectual Property Rights used during the execution of the Contract are treated as arising from work performed under the Contract, unless and until the Contractor provides the Agency with evidence of the relevant Background Intellectual Property Rights.

Ownership

- 57.2 The Background Intellectual Property Rights owned by the Contractor, Agency or a Third Party shall remain the property of the owning party and no representation or act by a party during performance of the Agency Contract shall indicate or be construed as providing any other right, title or interest in such Background Intellectual Property Rights other than in accordance with these Clauses and Conditions.

Use/Licensing

- 57.3 Intellectual Property Rights required by the Contractor arising from work performed under another Contract with the Agency shall be owned, made available and licensed in accordance with that other Contract.
- 57.4 If the Agency requires Background Intellectual Property Rights owned by the Contractor for the Agency project specified in the Agency Contract, the Contractor

shall grant the Agency an irrevocable, worldwide licence to enable the Agency to use and modify any product, application or result of the Agency Contract for that project on Favourable Conditions. If any party requires Background Intellectual Property Rights owned by the Contractor to use and modify any product, application or result of an Agency Contract for the Agency's Own Requirements other than for the project specified in the Contract the Contractor shall grant a licence to that party on Market Conditions unless contrary to the Contractor's Legitimate Commercial Interests.

- 57.5 If the Agency requires Source Code protected by Background Intellectual Property Rights owned by the Contractor the Contractor shall make that Source Code available for the Agency's Own Requirements as set out in clause 56.4.
- 57.6 If a Subcontractor requires Background Intellectual Property Rights that the Contractor owns the Contractor shall grant the Subcontractor a licence on Favourable Conditions solely to enable the Subcontractor to fulfil its obligations directly relating to the Agency Contract.
- 57.7 If the Agency, the Contractor or a Subcontractor requires Background Intellectual Property Rights owned by a Third Party the Contractor shall use its reasonable endeavours to ensure that the owner of the Background Intellectual Property Rights grants a licence to the Agency, Contractor or Subcontractor to enable the completion of the Agency Contract. In addition the Contractor shall use its reasonable endeavours to ensure that the Third Party owner of the Background Intellectual Property Rights grants the Agency a licence to the Background Intellectual Property Rights for the Agency to use and modify any product, application or result of the Agency Contract in accordance with these Clauses and Conditions for the Agency project specified in the Agency Contract. For the avoidance of doubt the Agency shall pay any reasonable licence fee.

Proprietary Information

- 57.8 The Agency shall comply with any requirements on use and circulation of information and Documentation that relates to Background Intellectual Property Rights. Where such Documentation is marked "Proprietary Information" it shall be treated in accordance with the provisions on Disclosure (set out in clause 52) and not be circulated outside the Agency without the owner's prior written consent.

Infringement

- 57.9 The Contractor warrants that to the best of its knowledge information and belief that the use of Background Intellectual Property Rights by the Agency and/or the Contractor for the purposes identified in the Agency Contract will not infringe any Intellectual Property Rights owned by Third Parties.

CLAUSE 58: EXPLOITATION

- 58.1 The Contractor shall use its reasonable endeavours to exploit all Intellectual Property Rights arising from work performed under the Agency Contract so as to promote

space research and technology and space applications and if feasible in other industry sectors.

Failure to Exploit

58.2 If the Contractor does not intend to exploit or does not effectively exploit Intellectual Property Rights arising from work performed under the Agency Contract it shall inform the Agency within the period prescribed in the Agency Contract (in accordance with clause 58.4). After such notification the Agency shall consult the Contractor and investigate the reasons for the failure to effectively exploit, this may include auditing the Contractor's records relating to exploitation. Following the consultation the Agency may investigate whether Third Parties would be interested in exploiting such rights the Contractor owns. If the Agency finds a suitable Third Party the Agency can require the Contractor to grant the Third Party a licence to the rights not effectively exploited on Favourable Conditions to be agreed between the Contractor, Agency and the Third Party. For the avoidance of doubt the Contractor may not unreasonably object to the terms of such licence. If the Agency cannot find a suitable Third Party to exploit such rights it can require the Contractor to assign such rights to the Agency.

Exploitation Reports

58.3 Following the Agency's Acceptance of any product, application or result arising from work performed under the Agency Contract the Contractor shall provide written reports (and updates if required) on exploitation of the Intellectual Property Rights arising from work performed under the Agency Contract as specified in the Agency Contract (and in any event within 3 and 10 years from the date of Acceptance).

CLAUSE 59: EVALUATION OF TECHNOLOGY

59.1 During the Agency Contract the Contractor shall use its reasonable endeavours to assist the Agency in assessing and evaluating results arising from work performed under the Agency Contract with a view to use or re-use in new programmes both public and commercial and to promote space research and technology and space applications and if feasible in other industry sectors.

59.2 Following completion of the Agency Contract and at the Agency's reasonable expense the Contractor shall use its reasonable endeavours to continue assisting the Agency to assess and evaluate results and exploitation arising from work performed under the Agency Contract with a view to use or re-use in programmes to promote space research and technology and space applications and other industry sectors.

CLAUSE 60: FEES

The Contractor shall not required to pay a fee to the Agency if it sells a product, application, or result developed under the Agency Contract or if it licenses or assigns Intellectual Property Rights arising from work performed under the Agency Contract.

CLAUSE 61: RE-SUPPLY

Process

- 61.1 The Agency has the right to have a product, application or result of the Agency Contract re-supplied by the Contractor or by a Third Party selected by the Agency for the Agency's Own Requirements.
- 61.2 The Agency shall offer the original Contractor the right to re-supply products that the Contractor has already provided under an earlier Agency Contract when the Contractor is able and willing to undertake the work at a fair and reasonable price the Agency is satisfied as to quality and the original Contractor can make Delivery as required by the Agency. If the original Contractor and the Agency do not enter into an agreement for re-supply the Agency may put the Agency Contract out to competitive tender in which case the original Contractor shall be awarded the tender if the Agency is satisfied as to quality and that the original Contractor's proposed conditions (including price and Delivery terms) are at least equal to or better than other bidders.

Assistance

- 61.3 The Contractor shall provide all the assistance, results, technical know how and Documentation which the Agency may reasonably require to enable a Third Party selected by the Agency to re-supply products originally provided under an Agency Contract. In the event that the Third Party selected by the Agency is not as equally skilled as the Contractor in the relevant technology, the Contractor may object to providing such assistance, results, technical know-how and Documentation.

Price/Expenses

- 61.4 If the Agency exercises its right to re-supply in favour of the Contractor, the price for re-supply shall be determined in accordance with the process set out in clause 61.2.
- 61.5 If the Agency exercises its right to re-supply in favour of a party other than the Contractor and the Contractor is required to provide assistance, technical know how or Documentation, the Agency shall reimburse the Contractor for its costs at reasonable rates to be agreed.

Licences

- 61.6 The Contractor shall, if required by the Agency, take such actions as are reasonably required including the signing of Documentation to confirm licences a Third Party selected by the Agency may require in order to re-supply products originally provided under the Agency Contract.

Background Intellectual Property Rights

- 61.7 The Contractor shall use its reasonable endeavours to obtain any licences of Background Intellectual Property Rights owned by a Third Party which may be required for re-supply of products originally provided under the Agency Contract.

Proprietary Information

- 61.8 The Agency shall ensure the appointed Contractor not to Disclose any results, information, data and Documentation which is marked "Proprietary Information" and only use such results, information, data and Documentation for the purpose of its Contract with the Agency for re-supply. The Agency shall require the appointed Contractor to return all results, information, data and Documentation supplied by the Contractor to either the Agency or the Contractor on completion of its Agency Contract with the Agency. Any such results, information, data and Documentation returned to the Agency shall be promptly forwarded to the Contractor.

CLAUSE 62: INFRINGEMENT

- 62.1 The Agency and the Contractor shall notify each other of any dispute arising over ownership or use of Intellectual Property Rights that arises from performance of the Agency Contract or which is required for completion of the Agency Contract or which relates to use of any product, application, or result of the Agency Contract. The Agency and the Contractor shall provide each other with all reasonable assistance required to settle such dispute.
- 62.2 The Agency may require the Contractor to take such action and provide any reasonable assistance as the Agency deems necessary (which includes the commencement and enforcement of legal proceedings) to prevent infringement of Intellectual Property Rights arising from the Agency Contract. The Agency shall reimburse the Contractor for all expenses incurred in taking such action.
- 62.3 If the Agency commences any proceedings for enforcement of Intellectual Property Rights which have been assigned to the Agency by the Contractor under the Agency Contract, then the Contractor shall provide such reasonable assistance as the Agency may require. The Agency shall reimburse the Contractor for all expenses reasonably incurred in providing such assistance.

CLAUSE 63: TRANSFER OUTSIDE MEMBER STATES

Any transfer of Intellectual Property Rights or any product, process, application or result arising from work performed under the Agency Contract by the Contractor to any entity in a non-Member State or any international organisation shall comply with

all applicable laws including all export control laws, regulations, rules and procedures and any relevant international agreements relating to the export of goods and services.

ANNEX I: DETERMINATION OF INDUSTRIAL RATES AND COST CONTROL

PART I – RIGHT TO AUDIT

SECTION 1 - RIGHT TO AUDIT, VERIFY & NEGOTIATE, LABOUR,
FACILITY AND OVERHEAD RATES

SECTION 2 - RIGHT TO AUDIT COST REIMBURSEMENT TYPE CONTRACTS

PART II - COST GROUPINGS

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PART III – LABOUR, FACILITY AND OVERHEAD RATES

SECTION 4 - ALLOWABILITY OF COSTS IN THE COST BASE

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SECTION 6 - ALLOWABILITY OF COSTS

SECTION 7 - DEVELOPMENT COST PLAN

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SECTION 9 - ACCOUNTING REQUIREMENTS

SECTION 10 - CONTROL OPERATIONS

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PART I – RIGHT TO AUDIT

SECTION 1 - RIGHT TO AUDIT, VERIFY & NEGOTIATE, LABOUR, FACILITY AND OVERHEAD RATES

- 1.1 In line with the Procurement Regulations Article 10.8 the Agency reserves the right to audit, the labour facility and overhead rates claimed by a Contractor. The information given shall be treated as confidential within the ESA Procurement Process on a need to know basis.

This right includes the verification and negotiation of the tenderer's hourly labour rates and overheads, equally in anticipation of rates to be used for future tenders within the time-limits as agreed for the ESA / Industry concluded industrial rates agreement, irrespective of the type of price concerned, according to the principles set forth in this Annex 1, sections 3 and 4 below.

- 1.2 When the Contractor has established rates, authorised by national or international public services or approved by a government agency or an agency accepted by its government, it shall state the name and address of the agency recommending the rates and the period for which they were established. The ESA rate will be derived from the National Audit Authority that conducted the audit to accommodate the generally and equally applicable ESA principles of allowability of cost. The Contractor shall allow in a trilateral process (i.e. ESA, National Audit Authority and Contractor) that Agency, or National Authority to provide information on the establishments of the rates and shall provide to ESA the required visibility / transparency on its industrial rates.

In cases where such National Authority does not exist or does not participate to the process, ESA will perform the audit, or alternatively will invite the designated National Authority to a joint audit process.

The generic term “rates” in this document refers to any element that constitutes part or all of the labour, facility and overhead rates.

SECTION 2 - RIGHT TO AUDIT COST REIMBURSEMENT TYPE CONTRACTS

- 2.1 The Agency reserves the right to audit the claim of the Contractor, for cost incurred in the execution of any cost-reimbursement type contract or any contract with ceiling price to be converted into a fixed price which according to the provisions of GCC Annex II Section 3 is to be treated as a cost reimbursement contract.
- 2.2 The Contractor shall allow ESA representatives to perform inspections and audits necessary to determine the fixed price to be converted from a ceiling price type contract.

PART II - COST GROUPINGS

SECTION 3 - COST GROUPINGS FOR THE DETERMINATION OF RATES

3.0 General

It is recognised that the cost accounting structures of Industry will follow generally accepted cost accounting principles. The descriptions of direct and indirect cost below only serve to identify those costs, but do not prescribe a definitive structure to be followed.

The determination of the hours or other suitable recovery base(s) for the direct and indirect costs used in ascertaining the rates, will be representative of a business operating in a competitive and steady environment, corresponding to the size and structure of other companies operating in that sector.

3.1 Direct Cost

- a) Direct Material Cost means the cost of materials, which can be specifically identified and measured as having been used or to be used on specific Contracts and which are so identified and measured consistently by the Contractor's cost accounting practices
- b) Direct Labour Cost are that portion of gross wages or salaries incurred for work, which can be specifically identified and measured as having been performed or to be performed on a Contract and, which is so identified and measured consistently by a Contractor's cost accounting practices. These costs (Salaries, Social Charges, Pension Costs and other payroll related charges) are allocated to the Contract by means of hourly rates. Where a cost centre structure exists, a contractor may charge elements described as "Industrial Overhead" under Chapter 3.2.2.b) i) establishing cost centre rates.
- c) Supplies of similar low-value and high-usage, when meeting the definition of Direct Material Costs, but for which it is economically expensive to account for them in the manner prescribed for direct costs, may be deemed to be indirect costs.

The hours charged directly to a contract must be consistent with the activity levels established and the costing methodologies agreed during the rates audit.

3.2 Indirect costs

3.2.1 An indirect cost is one which has not been treated as a direct cost.

Indirect Costs (overhead) are those costs, which, though necessarily having been incurred for the conduct of a Contractor's business in general, cannot be identified and measured as directly applicable to contracts.

3.2.2 Indirect costs, which as a rule are to be allocated to all work of a Contractor shall be accumulated by logical cost groupings in accordance with sound cost accounting principles and a Contractor's established practices and presented as rates referred to as "overhead rates", to be applied to the related direct cost groupings.

- a) The costs included in a particular indirect cost pool should have such a similarity of relationship with each other, that the allocation of the total costs in the pool provides a result similar to what would be achieved if each cost within that pool were separately distributed;
- b) the allocation basis for each indirect cost pool should reflect, as far as possible, the causal relationship of the pooled costs to the direct labour rate category, cost centre, division or department to which these costs are distributed. The costing methodology shall be maintained in a consistent manner and according to Generally Accepted Cost Accounting Principles. The allocation structure (rate structure) might be any combination of the following, including the possibility to group all indirect costs into one rate. In any event, indirect costs, must not appear more than once. Notwithstanding a company's existing cost accounting structure, indirect costs (including labour and/or external costs) may be grouped as follows:
 - i. Industrial Overhead – typically, though not necessarily exclusively
 - Depreciation/Amortization of tangible assets
 - Maintenance (third-party materials and/or services);
 - Market rated rental fees for premises, plant and machinery;
 - Energy consumption (Power, Water, Gas, etc..);
 - Cleaning and Security services;
 - Internal transport;
 - Postal, Telecommunication and Internet, expenses;
 - Journals, technical publications;
 - Stationery and printed matter;
 - Indirect Travel expenses;
 - Hire of motor-vehicles;
 - Leasing;
 - Accident, civil liability for employees, fire and theft, car insurance;
 - Advertising, Shows and Fairs;
 - Entertainment;
 - Congresses, symposia and study seminars and so on;
 - Personnel training, recruitment and selection;
 - Healthcare expenses for the benefit of employees;

- Membership fees;
- Professional & Legal Fees;
- Auditors' and Non executive Board Directors' fees;
- Duties and taxes;
- Stamp duty, certification charges, road tax;
- Financial and bank charges.

ii. Facility unit rates

These may be used where the major cost driver is the cost of the facility and its operation, rather than the man hours associated with using it.

The recovery base(s) for the calculation facility rates should represent a normalisation of the throughput associated with the individual facilities.

iii. Overhead % on other cost elements - Procurement %

Cost centres associated with the placement of purchase orders on the basis of standard documents and the handling of goods received, stored and distributed thereafter may be recovered as a % against items such as raw materials, mechanical parts, semi-finished products, travel costs, electric and electronic components and directly procured high reliability (hire) parts.

The recovery base for the calculation of a procurement overhead % are the annual average purchases, normally excluding free-issue hire parts procured by a third party and subcontracts, as defined in 3.2.2 b) vi below.

iv. General and Administrative Overhead (G&A) %

Costs included are for example, though not necessarily exclusively

- Proposal & Tender / Bidding pre-contract cost (cost prior to the effect date stated in the Contract) in anticipation of the award of the Contract or pursuant to its negotiation. These include all expenditure (hours and costs) related to the preparation of a proposal (engineering, administrative and legal) and its subsequent negotiation, prior to contract signature. As such these costs cannot be a direct charge to the contract;
- Corporate fees, management fees, head office fees or shared services agreements;

All major European primes and also many of the major national and cross-border equipment suppliers use the notion of management fees, corporate charges and/or shared services.

These charges originate from the mother company and are cascaded down to its operating entities, including space, where additional space head office management charges are then included, to be further cascaded down to the operating business units, thus ending

up in the cost base of the entity being audited in any of the Member States.

The shared services concept is the pooling of common activities such as HR, Payroll, Accountancy, Legal Affairs, Public Relations and others, where those activities are no longer directly performed by, or directly accounted for, inside the individual legal entities or business units of the mother company, but where such costs are grouped in one central service centre, from which the costs are recharged to the legal entities or business units by means of service level agreement;

- Management and Administration Functional Cost Centres;
- Other General Charges as defined by individual company.

The recovery base for the calculation of the G&A % should normally be the total Labour cost and Internal Special Facilities cost including the relevant overheads. Where suitably justified, the normalised annual amount of other direct costs, excluding subcontracts, as defined in 3.2.2 b) vi below, may be taken into consideration.

v. General Research & Development (R&D) %.

This covers the costs of general research and development work, which are not chargeable directly to a Contract and which are not aimed at the preparation or development of a specific product.

These costs may be accepted only insofar as they arise from the operation of a system of general research and development which has existed for a reasonable time within the firm prior to any specific Contract, and provided that the costs are shared in a uniform manner over the total turnover of the firm or of the industrial department of the firm within which it is constituted.

vi. Indirect cost related to the handling of subcontractors

A subcontract is a contract to be entered into by the tenderer with a Third Party for a clearly defined task related to the tenderer's offer and which is sufficiently non-standard to require specifications/task descriptions to be generated specifically. A Subcontractor can himself place subcontracts.

A subcontract is distinct from External Major Products which are defined as fully manufactured items such as assemblies, devices, modules etc., normally produced for other customers by the tenderer, or by another manufacturer and which are intended to be fitted readily, without major processing (machining, modifications, etc.), into the deliverable items, or constitute as such a deliverable item by itself and would be addressed under 3.2.2 b) iii, above.

Costs associated with the handling of subcontractors are considered allowable as direct labour cost charges associated to applicable contracts, or shall be recovered via the G&A where any such costs, though necessarily having been incurred for the conduct of a Contractor's business in general, cannot be identified and measured as directly applicable to contracts.

3.2.3 Notwithstanding that some indirect costs may have been incurred, they are subject to Section 4.2, whereby some costs are deemed unallowable.

3.3 Cost Centres or Rate Categories

A Contractor shall specify the method of allocation of cost items to the cost groupings. The method by which charges are accumulated as part of direct or indirect cost shall not be modified by industry during the duration of the rates agreement, without giving prior notification to the Agency and National Authority where applicable. The notification should include a written assurance that such modifications will not adversely impact any existing or subsequent contract, or proposal.

Should the method of allocation of cost groupings as proposed by the Contractor have an impact on the industrial rates in force, the Contractor and the Agency will conclude a revision to the industrial rates agreement, in cooperation with National Authorities, as necessary.

Any element (direct hours, units or costs) used in establishing agreed rates must not be directly included in proposal or contract pricing.

PART III – LABOUR, FACILITY AND OVERHEAD RATES

SECTION 4 - ALLOWABILITY OF COSTS IN THE COST BASE

4.1 Allowable cost

A cost is generally allowable in as far as the following conditions are fulfilled:

- a) it is necessary to the overall operation of the core business although a direct relationship to any particular product or service cannot be established;
- b) it is reasonable and expedient in its nature and amount, and does not exceed that which would be incurred by an ordinary prudent person in the conduct of normal business. Consideration shall be given to;
 - (i) whether the cost is of a type generally recognised as normal and necessary for the conduct of a contractor's core business
 - (ii) the restraints and requirements by such factors as generally accepted sound business practices, arm's length bargaining, Monetary value, provincial and local laws and regulations the action that prudent business persons would take in the circumstances, considering their responsibilities to all shareholders and stake-owners of the business;
- c) it is not liable to any limitations or exclusion as to types or amounts of cost items set forth in sub-section 4.2; and
- d) it complies with the internal procedures and policies of the company.

However, the applicable portion of any income, rebate, allowance and other credits relating to any allowable cost received by, or accruing to, a Contractor shall either be directly credited to the Agency where related to an Agency cost-reimbursement type contract, or, if not related to a specific contract, credited through the indirect cost pool if the cost related to this income was initially charged through the indirect cost pool.

4.2 Unallowable cost

In general all expenses which cannot be shown by a Contractor to be directly or indirectly of benefit to the company and those directly attributable to a funded or co-funded contract, are unallowable

The unallowable cost are listed below.

- a) In principle the expenses associated with advertising through any media are not an acceptable cost. For this purpose, advertising media are: magazines, newspapers, television and radio programs or "commercials", brochures, direct mail, outdoor advertising, free goods and samples. However, reasonable advertising of an industrial or institutional character placed in trade, technical or professional journals for the

dissemination of information for the industry, or institution are acceptable costs. Conventions and exhibitions are only allowable to the extent that they are reasonable and relate to aerospace activities.

- b) Contributions and donations to political parties.
- c) Unreasonable expenses for amusement, diversion, social activities and incidentals relating thereto.
- d) Cost of remuneration, having the nature of distribution of profits.
- e) Cost of maintaining, repairing and housing idle and excess facilities if there is no future utilisation expected.
- f) Fines and penalties as well as legal and administrative expenses resulting from a violation of laws and regulations.
- g) Contract losses and penalties incurred by a Contractor under a contract.
- h) Charges in respect of creation of reserves for general contingencies or other reserves.
- i) Losses on bad debts, including legal expenses and collection costs in connection with bad debts, including debt and debt service charges and excessive or reckless expenditure, in relation to failed legal actions.
- j) Legal, accounting and consulting fees in connection with:
 - a. financial reorganisation, takeovers, mergers, security issues, capital stock issues are acceptable when it can be demonstrated that future benefits are expected to accrue;
 - b. obtaining of patents and licences are only acceptable after deduction of related income generated; and
 - c. prosecution of claims against the Agency.
- k) Profits and losses of any nature arising from the sale or exchange of plant, equipment or other capital assets not directly paid by the Agency including the sale or exchange of either short or long term investments, except as part of normal depreciation rates.
- l) Corporate income taxes.
- m) Commissions and gratuities paid to Third Parties in connection with encouraging the sale of specific products and obtaining or negotiating a contract.
- n) Interest on the capital required by the firm for the execution of its business, which shall be deemed to be included in the fee.

- o) Interest cost related to the measurement of other liabilities e.g. pension liabilities, shall be deemed to be included in the fee.
- p) Restructuring costs, associated with planned and formerly announced major reorganisation for which an agreement has been reached with Trade Union or other official Staff representation, in relation to the consolidation of a business. However, in discussion with the designated National Authority, such costs may in exceptional cases be considered as allowable to the extent that they are balanced by demonstrated future savings and in doing so these costs may be amortized over a three to five year period in the indirect cost base.

In addition where costs are incurred as a result of State intervention and or national legislation, such costs may, on a case by case basis, be considered as allowable and in doing so may be amortized over a three to five year period in the indirect cost base, in discussion with the designated National Authority.

- q) Attributable cost (i.e. direct costs & overheads) incurred under projects partially funded (co-funded) by any European or national public authority or organisation.
- r) Depreciation or rental of assets paid for by the Agency and/or State funds.

Contractors are required to maintain a separate register of such assets and exclude them from the depreciation calculation for inclusion in the indirect cost pool.

- s) Unreasonable rental/lease costs arising from a sale & leaseback arrangement to the extent that any rent/lease exceeds substantially the average rental market price of comparable assets of that area.
- t) In addition to 4.2 s) unreasonable property rental/lease costs payable to related companies to the extent that any rent/lease exceeds substantially the average rental market price of comparable assets of that area.
- u) Amortisation of unrealised appreciation of assets as it represents a financial statement adjustment and does not represent an addition to the incurred cost base.
- v) The expenses associated with membership, either of the company as a whole or individual officers or employees in associations whose prime purpose is to provide entertainment or recreation, are not an acceptable cost to the Agency.
- w) Unreasonable compensation for officers and employees, measured against industry and sector norms within the Member State. Furthermore, expenses related to take over/change in ownership, abnormal executive severance pay and special compensation for retaining an employee, are not allowable.
- x) Corporate fees, management fees, head office fees or shared services agreements that do not correspond to effectively rendered services at market prices.

More specifically:

- (i) Costs of shared services agreements for which the efficient impact to the net cost of the entity under audit cannot be established.
 - (ii) Corporate charges / management fees in excess of a reference amount established for each firm. For multinational firms such reference amount is to be discussed and agreed between the firms, ESA and NAA every three years in a meeting chaired by ESA, with documentation provided by the firm prior to the meeting. Such documentation will substantiate the value, content, allocation mechanism and evolution over time of the Corporate Charges / Management fees. This reference amount will be applicable to future audits done by NAA and/or ESA. In absence of such a meeting and/or an agreement on the amounts, ESA in consultation with the National Audit Authorities reserves the right to limit and/or exclude the corporate charges / management fees from the industrial rates.
- y) The companies own funded General Research and Development expenses in excess of the ESA maximum contribution limitation of 5% for Large System Integrators and 7.5% for others, based on the total Labour cost, Internal Special Facilities cost and Material cost including the relevant overheads
- z) Specific product development or improvement expenses.
- aa) Depreciation of capitalised R&D is not allowed in the rates.
 - bb) Cost incurred as a result of accidental damage or resulting from necessary re-work of damaged equipment under a contract.
 - cc) Insurance fees for loss of profits estimated as a result of losing a production facility due to fire, flood etc.
 - dd) Profits or losses on foreign currency exchange movements, are considered as direct charges to contract and not part of the rates.
 - ee) The costs of external, or overseas offices are only allowable to the extent that they are reasonable and can be demonstrated to be in the interest of developing the space activities.
 - ff) Premiums for insuring penalties or incentives.
 - gg) Significant deviations from the established practices of a Contractor, which may be considered to cause an unreasonable increase to the cost base.

SECTION 5 – RATE NEGOTIATION PROMULGATION

The results of each rate negotiation shall be set forth in a promulgation letter to be signed by both the ESA and Contractors official representatives, which shall specify:

- the agreed rates,
- the bases to which the rates apply, and
- the periods for which the rates apply.

- 5.1 The term "provisional rate" means a tentative rate established for interim purposes pending negotiation of a fixed and final rate.
- 5.2 A rate is fixed and final if it has been mutually agreed upon as fixed and final by the Agency and the Contractor.
- 5.3 A rate is predetermined if it is fixed before or during a certain period and based on (estimated) costs to be incurred during this period. A rate is post determined, if it is fixed after a certain period and based on costs actually incurred during this period.
- 5.4 Predetermined rates shall be agreed upon whenever possible before the start of the period during which the rates will apply.
- 5.5 Predetermined rates shall be agreed upon for a fixed period of up to three (3) years with an option of prolongation of two further years, determined by a common agreement.
- 5.6 Once the base year is agreed, the predetermined multi year agreement inflation figures are based on available macro economic forecast indicators and the companies own business plans as agreed by all parties.
- 5.7 In case of disagreement the issue will be brought forward to ESA and Industry management levels, during which conciliation process Industry can call upon the advice and expertise services of the Industrial Ombudsman.

PART IV - COST- REIMBURSEMENT TYPE CONTRACTS

The provisions of all sections prior to Part IV of this Annex shall apply to rates proposed in all Contract Price Type Proposals and CCN's.

Furthermore in PART IV they apply for those costs and rates incurred and charged on the basis of cost-reimbursement type contracts and in the case referred to in GCC Annex II Section 3 i.e. the Ceiling Price contract definition.

The Contractor shall incorporate provisions corresponding to those mentioned therein, in all sub-contracts concluded with a Subcontractor on the cost-reimbursement basis.

SECTION 6 - ALLOWABILITY OF COSTS

6.1 Allowable cost

Further to the conditions laid out under Annex 1 section 4.1 a direct cost charge to contract is only allowable if it is incurred specifically for the Contract or benefits both the Contract and other work and is distributed to them in respective proportion according to the benefit received and has not already been incorporated in the labour, facility and overhead rates charged to the Contract.

6.2 Unallowable cost

In general all expenses which cannot be shown by the Contractor to be directly or indirectly of benefit to the Contract are totally unallowable.

Costs identified under Annex 1 section 4.2 are excluded from contract costs, unless prior approval in writing from the Agency is obtained.

SECTION 7 - DEVELOPMENT COST PLAN

7.1 The Contractor shall prepare and present to the Agency a Development Cost Plan, detailed over the entire duration of the project, providing detailed analysis of the:

- a) items of technical work;
- b) milestones of expected achievements; and
- c) related estimates of cost.

In addition, the Agency shall be able to compare, at all times during the course of the project, programme and cost to a given date, with the original estimates up to that date.

7.2 The Development Cost Plan shall show the estimated cost up to completion at total project level and for each of the technical areas in the Development Plan, sub-divided into quarterly periods. The estimates of cost shall be related to the technical programme and the Contractor shall not include a factor for a general contingency.

The estimates for the various technical items shall, however, cover work which can only be vaguely defined or assessed. They shall also include allowances, based on experience, for delays and difficulties of the sort which it is known are likely to arise in programmes of this nature, insofar as these occur in development work.

SECTION 8 - QUARTERLY FINANCIAL REPORTS

The Contractor shall provide the Agency not later than one month after the end of each quarter with a quarterly financial report, showing as far as possible, the actual costs, properly incurred for the execution of the Contract up to the end of the quarter. In addition the Contractor shall provide on a quarterly or six-monthly intervals his latest estimate of total cost (with date of estimation), sub divided in the same form as the breakdown of costs given in the Development Cost Plan.

SECTION 9 - ACCOUNTING REQUIREMENTS

The Contractor shall be required to have an adequate accounting system and to keep records pertaining to the costs and expenses of the Contract to the extent and in such details as will properly reflect all direct and indirect costs of labour, materials, equipment, supplies and services and other costs and expenses of whatever nature for which reimbursement may be claimed, as well as all rebates and other credits relating to the Contract.

SECTION 10 - CONTROL OPERATIONS

10.1 The Contractor agrees to make available on request to the Agency or the persons or bodies designated by it in the Contract any documents necessary for the proper execution of the audits and accounting investigations. The Contractor undertakes to furnish, if requested by the Agency, all information and justification regarding costs, prices, stocks, supplies and services relevant to the Contract. This information shall be provided in writing if so requested. The control shall normally take place at the Contractor's premises.

Rates agreements applicable at that time of the audit will not be modified as a result of cost control audits. The questions raised during this control shall be relevant to the contract being audited, whilst the relation between the cost reimbursement charges and rate assumptions, when material, must be explainable by industry.

10.2 While observing any relevant security regulations the Contractor undertakes to permit the Agency and the persons or bodies designated by the Agency in the Contract to inspect the facilities and premises executed, and also the stores in which the stocks and goods are housed, to the extent that there are stocks and goods necessary to the execution of the Contract.

- 10.3 All information given will be treated as confidential within the ESA Procurement Process on a need to know basis.

SECTION 11 - PRESERVATION OF VOUCHERS

Unless otherwise provided in the Contract, the supporting documents referred to in Section 9 shall be preserved by the Contractor for seven (7) years following completion of the Contract.

SECTION 12 – STATUS OF RATES

Where not already in possession of audited and agreed rates from the Agency, the Contractor must inform the Agency of his rates and the basis to which they apply and which will also be evaluated by the Agency.

PART V – CO - FUNDED CONTRACTS

SECTION 13 – CO-FUNDED PRINCIPLE

- 13.1 Under an ESA co-funded contract, the Contractor agrees to fund a portion of the required cost, while ESA agrees to fund the remaining cost. The proportion in which the costs are shared between the Contractor and ESA is referred to as the co-funding percentage.
- 13.2 Costs incurred by the Contractor under a Co-funded contract shall be incurred in accordance with Annex 1 Parts II and III and unless otherwise stated in the Contract, be subject to the conditions of Annex 1 Part IV.
- 13.3 Costs incurred by the Contractor shall be equal to, or above, the contractually agreed co-funded part and shall not be re-introduced to the rates and overhead calculations described in Annex 1 Parts II and III.
- 13.4 ESA audit rights, as stated under Section 2, shall apply equally to Co-funded contracts and shall be applied in order to verify that the cost incurred meets the conditions described under 13.2 and 13.3.

ANNEX II: CLASSIFICATION OF PRICES

SECTION 1 - TYPES OF PRICES

- 1.1 A reference in the Contract to one of the types of price, mentioned under paragraph 1.2 shall have the meaning and include the provisions stipulated in the relevant section of this Annex.
- 1.2 The types of price referred to in paragraph 1.1 are:
- a) fixed price
 - firm fixed price
 - fixed price with price variation
 - fixed unit price
 - b) ceiling price to be converted into fixed price
 - c) cost reimbursement price
 - cost-plus fixed fee
 - cost-plus-incentive fee
 - time and material.

SECTION 2 - FIXED PRICE CONTRACT

- 2.1 Firm fixed price Contract
The price of the Contract shall not be subject to any adjustment or revision by reason of the actual costs incurred by the Contractor in the performance of the Contract.
- 2.2 Fixed price Contract with price variation
- a) The price of the Contract shall not be subject to any adjustment or revision by reason of the actual costs incurred by the Contractor in the performance of the Contract save upon occurrence of certain contingencies specifically stated in the Contract and within the limits defined in paragraphs b) to d) inclusive.
 - b) A Contract with price variation shall define the factors (such as material prices, labour and social security rates) whose variation shall revise the contract price as well as the variation formula and official indexes to be used for the calculation.
 - c) Unless otherwise specified in the Contract, price variation shall apply on the basis of the economic conditions as specified in the Contract and the contractual delivery dates.

- d) The price variation formula shall be applied in relation to the price variation mechanisms laid down in the Contract which may be based on one of two approaches:

1. Fixed scheduled milestone

Escalation will be based on the arithmetic mean of cost indices defined in the Contract, related to the period of price revision, determined by the month of the contractual scheduled milestone date of the current milestone and the month succeeding that of the previous milestone.

The indices applicable to the first milestone are the arithmetic means of the indices from the start of the work to the month of the first payment milestone.

2. Development Cost Plan (DCP)

Escalation will be based on the arithmetic mean of cost indices defined in the Contract, related to the period of price revision, determined by the period of the DCP being escalated.

Unless otherwise stated in the Contract, the DCP will be escalated on a quarterly basis.

Where labour is costed by means of annual average labour rates, no revision shall apply to the labour coefficient for the year of the economic condition specified in the Contract.

- e) The Contract may stipulate that if price variations are below a certain absolute value they shall not be taken into account; in the same way it may determine an initial period during which no account shall be taken of fluctuations in the stipulated price factors.

2.3 Fixed unit price Contract

- a) When at the time of concluding the Contract the quantity of the supplies or services cannot be precisely determined, a fixed price Contract or a fixed price Contract with variation clause may establish the unit price of the various supplies and services or their component parts.
- b) The price to be paid shall be arrived at by applying the unit prices to the quantity of supplies or services delivered. No other charge may be added thereto.
- c) Such Contracts shall stipulate the validity period; the minimum units that ESA will order, the maximum units that the Contractor agrees to deliver and the terms and conditions to place orders for units.

- d) The Contractor shall state the exact quantity of goods supplied or services performed under the Contract, and shall communicate all information and afford all facilities required in order to verify the correctness of such statement.

SECTION 3 - CONTRACT WITH CEILING PRICE TO BE CONVERTED INTO A FIXED PRICE

- 3.1 When the Parties intend to conclude a firm fixed price Contract (Section 2.1) or a fixed price Contract with price variation (Section 2.2) and if at the time of concluding the Contract there is not sufficient basis for assessing a fixed price, they may conclude a Contract with ceiling price to be converted into a fixed price.

- 3.2 Such a Contract shall stipulate a ceiling which the Contract Price shall not exceed and for which the Contractor shall be required to deliver in full the supplies and services stipulated in the Contract. A Contract entered into under a ceiling price shall be executed under cost reimbursement conditions until the conversion to Fixed Price has taken place.

The fixed price shall be established before the Contract is completed, as soon as basis for determination exists.

- 3.3 Independent of the ceiling mentioned in paragraph 3.2, the Contractor shall provide at the time of concluding the Contract the cost information in accordance with the requirements under Annex 1, specifying which items thereof are estimates and which are firm.

At the time of determining the fixed price, the Contractor shall provide an up-dating of those items mentioned as estimates.

Profit must be identified separately in the initial cost information as well as in the up-date.

- 3.4 If agreement on the fixed price cannot be reached prior to completion of the Contract, the Contract Price shall, within the limit of the ceiling defined in paragraph 3.2, be determined in accordance with the procedure of cost reimbursement Contracts.

SECTION 4 - COST-REIMBURSEMENT PRICE CONTRACT

The price of the Contract is the total of all the costs insofar as they are allowable within the terms of Annex I, and a profit as defined hereunder in this clause.

The Contract shall stipulate:

- a maximum amount as the limit of liability referred to in Section 5 of this Annex,

- a maximum price (ceiling) which the Contractor may not exceed, while still being required to deliver in full the supplies and services stipulated in the Contract.

4.1 Cost-plus-fixed-fee Contract

The cost-plus-fixed-fee Contract is a cost-reimbursement type of Contract which, provides for the payment of a fixed fee to the Contractor.

4.2 Cost-plus-incentive-fee Contract

This is a cost-reimbursement type of Contract which provides for the payment of a Target Fee which is to be paid to the Contractor if the Contract is executed in accordance with targets specified in the Contract. While the Fee will be a fixed amount, the actual profit of the Contractor will vary as a function of the cost/ profit sharing scheme defined in the Contract depending on whether the Contractor's execution of the Contract is below or above the specifications fixed for the above mentioned target.

This price type will include:

- a) A Target Cost meaning an amount identified at Contract signature that will serve as a threshold amount. Actual cost incurred below this threshold amount will be reimbursed fully and actual cost incurred above the threshold amount may be subject to a cost/ profit sharing scheme as defined below.
- b) A Target Fee meaning an agreed fixed fee amount in Euro that is to be paid irrespective of whether the actual cost incurred is within the target cost or beyond (the variable aspect of the fee is described under 4.2 above).
- c) The Target Cost and Target Fee compose the Target Price.
- d) A Cost sharing scheme defining the Parties respective contribution to the actual cost incurred. While actual cost within the Target Cost will be fully paid by the Agency, the Contract shall define a proportion of contribution of the Contractor beyond the Target Cost. Such scheme may include a neutral zone as well as a maximum price ceiling as defined in section 4 here above.

4.3 Escalation of the Target or Fee

Reference is here made to clauses 2.2 b) to e), excluding clause 2.2 d) 1 above.

4.4 Time and material Contract

A time and material Contract is a cost-reimbursement type of Contract of which the price is determined on the basis of the following elements:

- a) Average hourly rates or hourly rates per category, including direct as well as indirect charges, general administrative overhead and profit, either for personnel or for the hire of facilities including operating personnel;

- b) Material and supplies at cost, possibly increased by a percentage for material handling charges to the extent that they are clearly excluded from the hourly rate;
- c) Disbursements or payments made to Third Parties for services rendered in the fulfilment of the Contract to the extent that they are clearly excluded from the hourly rate (e.g. travel expenses, transport, computer charges, etc.). Disbursements must be approved by the Agency and, unless otherwise provided in the Contract, shall be reimbursed at their invoice value without any additional charges.

SECTION 5 – LIMIT OF LIABILITY FOR COST REIMBURSEMENT TYPE CONTRACTS

- 5.1 The limit of liability is an amount to be stated in the Contract which shall be the maximum amount to which the Agency is committed and which can only be increased by a written agreement of the Agency.
- 5.2 If at any time the Contractor has reason to believe that the commitments which he will incur in the performance of the Contract in the next succeeding sixty (60) Days, when added to all costs previously incurred, will exceed seventy-five percent (75%) of the limit of liability, the Contractor shall notify the Agency In Writing to that effect, giving the revised estimate of the total cost.
- 5.3 The Agency shall not be obliged to reimburse the Contractor for costs incurred in excess of the limit of liability and the Contractor shall not be obliged to continue performance under the Contract or to incur costs in excess of the limit of liability, unless and until the Agency shall have notified the Contractor In Writing that such limit has been increased up to a revised amount. Any costs incurred by the Contractor in excess of such limit prior to the approval of the increase shall be allowable to the same extent as if such costs had been incurred after the increase.

ANNEX III: PENALTY SCALES

Pursuant to clause 17, the following penalty scales will be applied to the various types of Contracts described in Annex III to the General Clauses and Conditions.

1. FIXED PRICE CONTRACT

1.1 Flight items or critical schedule items:

For each Day's delay:

0.5 per thousand from the first to the fortieth Day, inclusive;

1 per thousand for each subsequent day, up to a maximum of 10% of the "penalised value" stipulated in the Contract.

1.2 Technology or R&D items:

For each Day's delay:

0.3 per thousand from the first to the sixtieth Day, inclusive;

1 per thousand for each subsequent Day, up to a maximum of 10% of the "penalised value" stipulated in the Contract.

Exceptionally, and if expressly stipulated in the Contract, the Agency may defer the application of penalties for a period of not more than forty (40) Days, nevertheless, if the delay exceeds that period, the penalty will be applied in its entirety.

2. COST REIMBURSEMENT PRICE CONTRACTS

2.1 Cost plus fixed fee Contract:

For each Day's delay:

0.4 per thousand from the first to the fortieth Day, inclusive;

1 per thousand for each subsequent Day, up to a maximum of 10% of the total estimate stipulated in the Contract.

2.2 Cost plus incentive fee Contract:

The penalties are defined within the provisions of Section 4.2 of Annex II to the General Clauses and Conditions.

3. TECHNICAL ASSISTANCE AND SERVICE CONTRACTS

Penalties will be determined on a case by case basis.

ANNEX IV: DEFINITIONS

“Acceptance”	means the Agency’s written certification that Deliverable(s) meet the requirements of the Contract.
“Advance Payment”	means a payment foreseen in the Contract intended to provide the Contractor with liquidity to allow the initiation of the contractual works.
“Agency Contract”	means for the Part II (Option B) conditions a contract partly funded by the Agency (typically 50%) and partly funded by the private sector (typically 50%) for the development of goods/services identified by the Contractor as having the potential for exploitation in space research, technology or space application.
“Agency’s Own Requirements”	means the activities and programmes undertaken by the Agency in the field of space research and technology and space applications in accordance with Article V 1(a) and (b) of the European Space Agency Convention.
“Background Intellectual Property Rights”	means all Intellectual Property Rights not developed under contract with the Agency either prior to or during execution of the Contract which are used by the Contractor and/or the Agency to complete the Contract or required for use of any product, application or result of the Contract.
“CFI” = “Customer Furnished Item “	means any item provided by the Agency to the Contractor to enable the performance of the contractual work.
“Contract”	means an agreement established in writing the subject of which is any activity carried out to- or for the Agency in exchange of a price or another consideration, including any amendment to such agreement via a Contract Change Notice (CCN) or Rider.
“Contractor”	means the natural or legal person who has entered into a Contract with the Agency.

“Contractors’ Premises”	means the premises under the Contractor’s control.
“Contract Price”	means the price specified in the Contract, including the price of any amendments via a CCN or Rider.
“Day”	means calendar day.
“Defect”	means any failure to meet the requirements of the Contract and shall be deemed to include any errors or failures in design, material or workmanship.
“Deliverable(s)”	mean(s) all items, goods, products, Documentation to be delivered by the Contractor to the Agency as specified in the Contract.
“Delivery”	means the physical delivery of the Deliverable at the agreed destination.
“Disclose”	means the distribution or supply of information or Documentation to a third party without prior authorisation from the proprietor of the information/Documentation.
“Documentation”	means all media on which information or data of any description is recorded including all paper documents and electronic communications whether in electronic or hard copy form.
“Favourable Conditions”	means conditions a seller is willing to sell on and a purchaser willing to accept which are more favourable to the purchaser than Market Conditions (and which normally allow reasonable profit for the seller).
“Financial Conditions”	(Part II, option B) means the conditions a seller is willing to sell on and a purchaser willing to accept taking into account Market Conditions but which compensate the parties who paid for development of the subject matter being sold (or licensed) according to the amount each party contributed for development.
“Flight System”	means a system which includes the spacecraft and all equipment, including software, to control

automatically the flight of a spacecraft and its operation in space.

“Force Majeure”

means an event which is, unforeseeable, unavoidable and external at the time of Contract signature, occurs beyond the control of the affected Party and renders the performance of the Contract impossible for the affected Party, including but not limited to:

Acts of God, Governmental Administrative Acts or omissions, consequences of natural disasters, epidemics, war hostilities, terrorist attacks.

“GCC” or “General Conditions”

means the present General Clauses and Conditions for ESA Contracts.

“Intellectual Property Rights”

means all Registered Intellectual Property Rights, and all unregistered intellectual property rights granted by law without the need for registration with an authority or office including all rights in information, data, blueprints, plans, diagrams, models, formulae and specifications together with all copyright, unregistered trade marks, design rights, data base rights, topography rights, know how and trade secrets or equivalent rights or rights of action anywhere in the world.

“Legitimate Commercial Interest”

means an interest the Contractor can demonstrate which is important to its ability to commercially exploit Intellectual Property Rights arising from work performed under the Contract for a defined period of time which includes but is not limited to an economic position vis-à-vis a competitor, loss of profits or survival of an undertaking.

“Located”

means belonging to a State according to the criteria set out in Article II (3) of Annex V of the European Space Agency Convention.

“Market Conditions”

means conditions a seller is willing to sell on and a purchaser is willing to accept without restrictions or influence by the Agency.

“Member State”

means a State which is Party to the Convention of the European Space Agency in accordance

with Articles XX and XXII of the said Convention.

“Month”

means a time period to be calculated as per sub-clause 14.4.

“Object Code”

means the code for a computer programme expressed in machine readable form usually automatically compiled from Source Code by machine.

“Open Source Code”

means Source Code for computer software developed under the Contract which the Contract specifies as Source Code which the Agency will distribute to members of the public free of charge.

“Operational Software”

means computer programs used or required on the ground to validate and control a space mission, for calibration of data derived from a space mission or for any other Agency purpose including all updates, modifications and enhancements of such programmes which (1) are developed (or are in the process of being developed), modified, enhanced or maintained by more than one party and (2) which have an expected use for the Agency’s essential purposes over a period of more than 5 years.

“Participating State”

means a Member or non-Member State participating in a given Agency programme according to Article V.1 (a) and (b) of the European Space Agency Convention.

“Participating State’s Own Public Requirements”

means a public programme in the field of space research and technology and their space applications fully funded or funded to a substantial extent by the Participating State.

“Parties”

means the parties signing the Contract.

“Persons and Bodies”

means any individual, partnership, company, research organisation or legal entity under the jurisdiction of a Participating State which, when relevant, meets the criteria set out in Article II (3) of Annex V to the European Space Agency Convention.

“Progress Payment”

means a payment that is made against:
(a) Successful achievement, certified in writing by the Agency’s representatives, of a milestone defined in the milestone payment plan of a fixed price contract;
(b) Cost reports approved by the Agency in a cost reimbursement contract for a period agreed in the Contract.

“Registered Intellectual Property Rights”

means all rights granted by law through registration with an authority or office (whether actually registered or in the form of applications) including all registered patents, utility models, designs, topography rights, domain names and trade marks or equivalent rights and rights of action anywhere in the world.

“Source Code”

means the code for a computer programme expressed in human intelligible form which can be compiled automatically into Object Code by machine.

“Source Code Agent”

means the Agency or an independent body which the Parties agree can hold software Source Code secure for release upon the events specified in clause 42 or 56.

“Subcontractor”

means the economic operator who is under contract to a Contractor of the Agency to provide supplies or services in support of a contract placed by the Agency.

“Third Party”

means a natural or legal person not having signed the Contract.

“Working Day”

means a Day which is not a Saturday, Sunday or an official, public holiday.

“In Writing”

means by signed letter or fax.

**ANNEX V: DAMAGE TO ITEMS COVERED BY CLAUSES 11 AND 12 – EVENTS
RELEASING THE CONTRACTOR FROM LIABILITY FOR
DAMAGE**

- War, invasion, hostile or warlike action in time of peace or war
- Insurrection, riots, civil commotion, rebellion, revolution, civil war, usurpation or action taken by a government authority in hindering, combating or defending against such occurrence.
- Nuclear reaction, nuclear radiation or radioactive contamination of any nature.
- Attacks for political- or terrorist purposes by one or more persons that are not under the Contractor's control.
- Floods in Germany that are not covered by natural hazard insurance due to extent or location.
- Floods in the Netherlands resulting from breaking or overflowing of sea walls