



**OCCAR-EA**  
**OCCAR Management Procedure**

Title:	<b><u>Contract Terms and Conditions</u></b>	
Number:	OMP 6	Date: 10/06/14
Computer Ref:	OMP 6_Contract Terms and Conditions_Issue 2_100614.docx	
Current status:	Issue 2	
Contact address:	Central Office, OCCAR-EA Bonn Email: <a href="mailto:questions@occar.int">questions@occar.int</a>	

Approved for issue:	OCCAR File Ref: 47KCW
---------------------	--------------------------

This document replaces: OMP 6 Issue 1 dated 03/08/07

## Record of changes

Date	Issue	Changes
03/08/07	Issue 1	Initial issue
10/06/14	Issue 2	Updated to incorporate new Annex OMP 6-A Issue 4, covering the result of the full review of the OCCAR Standard Articles (changes oriented to allow arrangements for contracts to be placed for services during the In-Service Phase, as well as improvements in the provisions for Health, Safety Hazard Control and Environment protection. Previous Articles 1.8 to 1.10 have been modified and subsumed into a new single Article 1.8), and new Annex OMP 6-B Issue 1, "Cost Analysis Audit and Price Investigation", previously included in OMP 1 as Annex OMP 1-D.

## Table of Contents

<b><u>1. Introduction.....</u></b>	<b><u>3</u></b>
<b><u>2. Scope .....</u></b>	<b><u>3</u></b>
<b><u>3. Related documentation.....</u></b>	<b><u>3</u></b>
<b><u>4. Related forms &amp; templates .....</u></b>	<b><u>3</u></b>
<b><u>5. Use .....</u></b>	<b><u>3</u></b>
<b><u>6. Monitoring, Revision and Review.....</u></b>	<b><u>4</u></b>
<b><u>7. Annexes .....</u></b>	<b><u>4</u></b>

## List of acronyms/definitions/explanations

BoS	Board of Supervisors
OCCAR	Organisation Conjointe de Coopération en matière d'Armement
OCCAR-EA	Organisation Conjointe de Coopération en matière d'Armement – Executive Administration
OMP	OCCAR Management Procedure
PP	Policy Paper

## 1. **Introduction**

This OMP provides at Annex OMP6-A OCCAR's Standard contractual terms and conditions (referred to as Articles) to be included in Contracts awarded by OCCAR when OCCAR acts in the name of or in the name and on behalf of OCCAR Member and Non Member States participating in an OCCAR managed Programme.

Annex OMP 6-A is to be amended accordingly when OCCAR acts in its own name and for the benefit of OCCAR Member and Non Member States participating in an OCCAR managed Programme.

## 2. **Scope**

This OMP covers Contracts (and Contract amendments) let by OCCAR-EA in accordance with the specific Programme Decisions and funded by the Operational Budget.

## 3. **Related documentation**

OCCAR	Convention
OMP 1	Principal Programme Management Procedure
OMP 2	Programme Integration Procedures
OMP 4	Legal Issues
OMP 5	Contract Placement Procedure

## 4. **Related forms & templates**

Form OMP 6-1	OCCAR and National Commercial Points of Contact
--------------	---

This form shall be kept up to date by OCCAR-EA Central Office commercial points of contact upon information sent to him/her by the Member States commercial points of contact.

Changes made to that form do not require re-approval of OMP6 by all OCCAR Member States.

## 5. **Use**

5.1 This OMP should be read and used in conjunction with OMP 5 - Contract Placement Procedure.

5.2 OCCAR Standard Articles are applicable in their entirety unless otherwise decided by the Approving Authority (see OMP 5 – Article 5.4); where the Approving Authority is the Programme Committee, this decision will be taken unanimously by the Programme Participating States that are parties to the Contract only.

When non-applicability, changes, supplements, divergences or additional details, are not compliant with other OCCAR regulations (e.g. OMPs, PP14-2 Global Balance Policy), they will be subject to the express agreement of the BoS.

In any case, non-applicability, changes, supplements, divergences or additional details will be compliant with the OCCAR Convention.

5.3 The Articles will take effect subject to any overriding provisions of the law applicable to the Contract, which should always be stated in the Contract.

5.4 Annex OMP 6-A provides the English language version of the OCCAR Standard Conditions. It has been approved by the BoS.

Where an OCCAR official language is one of the official languages of a Member State, this Member State can decide to translate Annex OMP 6-A into that OCCAR official language. In that case, this Member State will transmit this translation to OCCAR-EA and the national focal point of other Member States (as provided for in form OMP6-1).

Within four months from the receipt of this translation, OCCAR-EA and other Member States may make remarks, if any, on this translation. Those remarks, if validated by the concerned Member States and OCCAR-EA, will be integrated in the translation.

After integration of the validated remarks, the translations will be referred to the FTPC for endorsement on behalf of the BoS.

## **6. Monitoring, Revision and Review**

6.1 This document is subject to continuous monitoring. As experience and best practice impact on it, revisions will be made as appropriate.

6.2 In the course of awarding Contracts should a non-standard Article be frequently used, the Article may be incorporated into the OCCAR Standard Articles. Further, should a Standard Article be consistently altered a revised version may be introduced. Such revisions (amendment to the OMP) shall be subject to BoS approval.

6.3 A review of this OMP will be carried out every three years.

## **7. Annexes**

Annex OMP 6-A	OCCAR Standard Articles
Annex OMP 6-B	Cost Analysis, Audit and Price Investigation



**OCCAR-EA**  
**OCCAR Management Procedure**

Title:	<b><u>OCCAR Standard Articles</u></b>	
Number:	Annex A to OMP 6	Date: 10/06/14
Computer Ref:	Annex OMP6-A_OCCAR Standard Articles_Issue_4_100614.docx	
Current status:	Issue 4	
Contact address:	Central Office, OCCAR-EA Bonn Email: <a href="mailto:questions@occar.int">questions@occar.int</a>	

Approved for issue:	
---------------------	--

This document replaces: OMP6-A Issue 3 dated 27/04/2012

## Record of changes

Date	Issue	Changes
03/08/07	1	Initial issue
23/03/09	2	Implementation of minor changes on the issue 1 as previously published on OCCAR website
29/03/12	3	Light revision
10/06/14	4	Implementation of changes oriented to allow arrangements for contracts to be placed for services during the In-Service Phase, as well as improvements in the provisions for Health, Safety Hazard Control and Environment protection. Previous Articles 1.8 to 1.10 have been modified and subsumed into a new single Article 1.8

## Table of Contents

<b><u>1. General Conditions</u></b> .....	<b><u>6</u></b>
1.1 Applicable Articles and Documents .....	6
1.2 Definitions and Interpretations .....	6
1.3 Waiver .....	16
1.4 Language .....	16
1.5 Notices .....	16
1.6 Publicity Relating to the Contract.....	17
1.7 Entire Agreement.....	17
1.8 Security of Information.....	17
1.8.1 General Aspects.....	17
1.8.2 Security of Classified Information .....	17
1.8.3 Security of OCCAR Sensitive Information.....	21
<b><u>2. Requirement</u></b> .....	<b><u>21</u></b>
2.1 Contractor's Responsibility .....	21
2.2 Quality and Risk Management.....	22
2.2.1 Quality.....	22
2.2.2 Risk Management .....	22
2.3 Contract Amendments and Specification Change Procedures.....	22
2.3.1 Amendment .....	22
2.3.2 Specification Change .....	23
2.4 Express Warranty .....	23
2.5 Supply of Hazardous Materials and Substances.....	25
2.5.1 General.....	25
2.5.2 Health and Safety Hazard Control.....	27

2.5.3	Legal obligations of the Contractor .....	28
2.6	Change in legislation .....	28
2.7	Surge .....	29
<b>3.</b>	<b><u>Delivery.....</u></b>	<b>29</b>
3.1	Delivery, Packaging and Consignment Arrangements .....	29
3.1.1	Delivery .....	29
3.1.2	Packaging .....	30
3.1.3	Consignment and Delivery Documentation .....	30
3.1.4	Import/Export Licences and Import/Export Documentation .....	30
3.2	Penalties for delay; Liquidated Damages and Remedies for failure to meet contractual KPIs .....	31
3.2.1	Penalties for delay .....	31
3.2.2	Liquidated Damages.....	31
3.2.3	Remedies for Failure to meet contractual KPIs.....	32
3.3	Acceptance, Deferment and Rejection.....	32
3.3.1	General .....	32
3.3.2	Acceptance.....	32
3.3.3	Deferment.....	33
3.3.4	Rejection.....	34
3.4	Liability for Loss and Damage .....	36
3.5	Force Majeure .....	36
3.6	Diversion Orders.....	37
<b>4.</b>	<b><u>Performance and Financial Guarantees.....</u></b>	<b>38</b>
<b>5.</b>	<b><u>Price.....</u></b>	<b>38</b>
5.1	Contract Price.....	38
5.2	Variation of Price .....	38
5.3	Price Investigation .....	39
5.4	Price Audit .....	40
5.5	Availability of Information.....	41
5.6	Equality of Information Pricing Statement .....	41
5.7	Privacy of Information.....	42
5.8	Access and Use of Information by the Contracting Authority .....	42
5.9	Import and Export Duties and VAT .....	42
5.9.1	Import and Export Duties .....	42
5.9.2	Value-Added Tax (VAT) .....	42
<b>6.</b>	<b><u>Payment and Vesting.....</u></b>	<b>43</b>
6.1	Payment .....	43
6.1.1	General .....	43
6.1.2	Interim Payments .....	43
6.1.3	Final Payment.....	44
6.1.4	Payment Arrangements .....	44
6.1.5	Late Payment .....	45
6.2	Transfer of Ownership.....	45
6.2.1	Transfer of Ownership through Early Vesting.....	45
6.2.2	Transfer of ownership upon acceptance .....	47
<b>7.</b>	<b><u>Intellectual Property Rights.....</u></b>	<b>47</b>
7.1	General Provisions .....	47
7.2	Disclosure of Information .....	48
7.3	User rights and obligations in Technical Information .....	50
7.3.1	Rights and obligations of the Participating States .....	50
7.3.2	Rights and obligations of the Contracting Authority .....	54
7.3.3	Rights and obligations of the Contractor.....	54
7.4	Inventions.....	56
7.5	Levies .....	58
7.6	Infringement of third party rights / liabilities .....	59

<b><u>8. Government Furnished Information, Facilities, Services and Equipment (GFX) and Special Tools .....</u></b>	<b><u>61</u></b>
8.1 GFX .....	61
8.2 Special Tools .....	64
8.2.1 General .....	64
8.2.2 Property .....	64
8.2.3 Acceptance .....	64
8.2.4 Marking or Similar Obligations .....	64
8.2.5 Repair and maintenance .....	65
8.2.6 Disposal .....	65
8.2.7 Use and Levy .....	65
8.3 Liability at Establishments .....	65
<b><u>9. Progress .....</u></b>	<b><u>65</u></b>
9.1 Inspections .....	66
9.2 Progress Review Procedure .....	66
<b><u>10. Transfer and Sub Contracts .....</u></b>	<b><u>66</u></b>
10.1 Transfer of Contract .....	66
10.2 Sub-Contracts .....	66
10.3 Decoupling .....	67
<b><u>11. Termination .....</u></b>	<b><u>68</u></b>
11.1 Termination in case of Corrupt Gifts and Payments .....	68
11.2 Termination of Contract for Default by the Contractor .....	69
11.3 Termination of Contract Otherwise than for Default .....	72
11.4 Termination of Contract for Bankruptcy and Insolvency .....	74
11.5 Prejudice .....	74
<b><u>12. Law .....</u></b>	<b><u>74</u></b>
12.1 Applicable Law and Jurisdiction .....	74
12.2 Resolution of Disputes .....	75
12.2.1 General .....	75
12.2.2 Conciliation .....	75
12.2.3 Arbitration .....	75
12.3 Infringements of the Law .....	77
12.4 Severability .....	77
12.5 Rights of Third Parties .....	77
<b><u>13. Records .....</u></b>	<b><u>78</u></b>
13.1 Contractor's Record .....	78
13.2 Reporting of the Execution of Work .....	78
<b><u>14. Effectiveness of Contract .....</u></b>	<b><u>79</u></b>
<b><u>15. Provisions upon Expiration or Termination of the Contract. ....</u></b>	<b><u>79</u></b>
15.1 General .....	79
15.2 Specific for ISS activities .....	80
<b><u>16. Contractors on Deployed Operations (CONDO) .....</u></b>	<b><u>81</u></b>
16.1 General .....	81
16.2 Authorization to Deploy .....	81
16.3 Right to Withhold, Withdraw, Move and Remove. ....	82
16.4 Provision of Life Support Facilities. ....	83
16.5 Transportation, Medical Evacuation and Repatriation: .....	83
16.6 Responsibilities of the Contractor .....	84
16.7 Obligations of the Contracting Authority .....	85
16.8 Right of the Contractor to withdraw .....	85
16.9 Performance of the Contract .....	86



## **STANDARD CONTRACT ARTICLES FOR OCCAR PROGRAMME PROCUREMENTS**

This booklet of Standard Articles for OCCAR Programme Contracts has been adopted by the OCCAR Board of Supervisors for the purpose of ensuring uniformity of Contract Articles between OCCAR (acting on behalf of or in the name and on behalf of OCCAR Member and Non Member States participating in an OCCAR managed Programme) and Contractors.

Tender and Contract documents will, as far as these Standard Articles are concerned, contain only a reference to the booklet numbers of the applicable Standard Article together with any Special Articles or amendments to the Standard Articles.

## 1. General Conditions

### 1.1 Applicable Articles and Documents

1.1.1 The Contract comprises:

- (1) The Standard Articles;
- (2) The Special Articles;
- (3) The other documents that are stated in the Special Articles as being part of the Contract.

1.1.2 If not provided otherwise in the Contract in the event of any conflict or inconsistency between a Standard Article and any Special Article the Special Articles shall take precedence. In the event of any conflict or inconsistency between a Special Article and any of the other documents referred to in (3) the Special Articles shall take precedence.

### 1.2 Definitions and Interpretations

1.2.1 In the Contract (as defined below) the following words and expressions shall have the following meanings given to them:

<u>Article</u>	A clause of the Contract.
<u>Authorised Representative</u>	Any person or other entity nominated by the Contracting Authority and notified in writing to the Contractor as being authorised, either permanently or temporarily, to undertake specified functions on behalf of the Contracting Authority in connection with the Contract.
<u>Background Technical Information</u>	The Technical Information which was generated otherwise than in the performance of the Contract.
<u>Classified Background Information</u>	Classified Information not generated in the performance of an OCCAR Programme.
<u>Classified Foreground Information</u>	Classified Information generated in the performance of an OCCAR Programme.
<u>Classified Information</u>	<p>Any Information, document or material determined the unauthorised disclosure of which could cause prejudice to the interests of OCCAR, its Member States or any other State participating in an OCCAR Programme, whether such information originates within OCCAR or is received from its Member States or from States participating in an OCCAR Programme and which has been so designated and marked with a security classification.</p> <p>Classified Information may include information furnished by any other state or International Organisation for purposes of the Programme.</p>
<u>Commercial Item</u>	<p>Any Product or a part of a Product which:</p> <ol style="list-style-type: none"><li>(1) has been sold or licensed in the commercial (civil or military) market;</li></ol>

	<p>(2) has not been sold or licensed, but has been offered for sale or licence in the commercial (civil or military) market;</p> <p>(3) is not yet available in the commercial (civil or military) market, but will be available for commercial delivery in a reasonable period of time; or</p> <p>(4) is described in definitions (1), (2) or (3) above and would require only minor modification in order to meet the requirements of the Contract.</p> <p>For the avoidance of doubt, any Product or a part of a Product developed under the Contract, or in which the Participating States have otherwise secured user rights at least as extensive as those secured under the Contract, is not a Commercial Item.</p>
<u>Compromise (of Classified Information)</u>	Any disclosure of Classified Information to an unauthorised person.
<u>Consignee</u>	The Contracting Authority or the Participating State stipulated in the Delivery Schedule or (where applicable) in a Diversion Order as the party to whom a specified Product is to be delivered.
<u>Contract</u>	The mutually binding written agreement between the Parties as described in Article 1.1 (Applicable Articles and Documents).
<u>Contract Price</u>	The price payable to the Contractor by the Contracting Authority as determined under the provisions of the Contract for the full and proper performance by the Contractor of his obligations under the Contract. The Contract Price is exclusive of VAT (if applicable).
<u>Contracting Authority</u>	OCCAR; the Organisation for Joint Armament Co-operation (Organisation Conjointe de Coopération en Matière d'Armement).
<u>Contractor</u>	The legal entity named as such in the Contract. The expression "Contractor" shall include any legal entity to whom the Contract is assigned with the written consent of the Contracting Authority. For the purpose of this definition "the Contractor" may be joint contracting parties (co-contractors).
<u>CONDO</u>	Contractors on Deployed Operations.
<u>CONDO Personnel</u>	Includes the Contractor's employees and Sub-Contractor's employees who are Deployed in connection with the performance of the Contract, with the exception of Contractor's and Sub-Contractor's Locally Recruited Workers who normally reside in the country (ies) in which the deployment activities are performed.
<u>Declassification</u>	<p><i>Definition included in OMP 11, copied here for ease of reference.</i></p> <p>Declassification means the removal of any classification</p>

<u>Delivery Schedule</u>	The timetable for delivery of each Product as set out in the Contract.
<u>Deploy</u>	Means bringing the CONDO Personnel under the administration of the Contracting Authority or his Authorised Representative on entering/leaving an Establishment for transit to/from the Operation Area (OA); and/or under the administration and control of his Authorised Representative, which will take place: a) on entering the OA at the designated entry point; or b) on reporting to the Contracting Authority or his Authorised Representative when already in the OA, and "Deployed" and "Deploying" shall be construed accordingly.
<u>Deploying Participating State</u>	A Participating State wishing to Deploy a Contractor Employee to an OA.
<u>Deployment</u>	The period during any act of preparing, moving and initial setting up of personnel and equipment to enable the delivery of services within an Identified Work Location, their presence within that location and their subsequent recovery or redeployment.
<u>Designated Security Authority (DSA)</u>	The security authority approved by national authorities to be responsible for the implementation of and compliance with the applicable security regulations and Programme Security Instructions (PSI) within Government establishments and / or industrial facilities.
<u>Diversion Order</u>	A request by the Contracting Authority for urgent delivery to Consignees other than those provided for in the Contract of specified quantities of the Product which are to be supplied under the Contract.
<u>Downgrading</u>	<i>Definition included in OMP 11, copied here for ease of reference.</i> Downgrading means a reduction in the level of classification.
<u>Equality of Information Pricing Statement (EIPS)</u>	A written statement jointly signed by the Contractor and the Contracting Authority in which each confirm that it is not aware of any material omission or inaccuracy in the facts and any material omission or invalidity in the pricing assumptions provided by it, on which the negotiated Contract Price is based, and which are set out in the statement.

<u>EURIBOR</u>	The Euro Interbank Offered Rate published at 11.00 a.m. Central European Time for spot value and displayed to three decimal places by Reuters on each day that the Trans-European Automated Real-Time Gross-Settlement Express Transfer system (TARGET) is open or if the EURIBOR rate ceases to be published then its successor rate or in default thereof such other rate as the Parties agree.
<u>Establishment</u>	Any site, vessel or floating structure of any kind owned or occupied by the Contracting Authority or any Participating State or designated by the Contracting Authority or any Participating State as a government establishment for any purpose connected with the Contract.
<u>Facility Security Clearance (FSC)</u>	Confirmation issued by a NSA/DSA certifying that a facility is under security oversight of the respective NSA/DSA in accordance with national security laws and regulations, having the requisite security cleared personnel and, if appropriate, the capability to handle and store Classified Information up to a certain level.
<u>Force Majeure Event</u>	Any event which is compelling, unpredictable, unavoidable and outside the control of the Parties or the Contracting Authority, or both, and not due to the default or negligence of any of them, and any other event specified as such in the Contract.
<u>Foreground Technical Information</u>	The Technical Information that is generated in the performance of the Contract.
<u>GFX</u>	The collective term for Government Furnished Information (GFI), Facilities (GFF), Services (GFS) and Equipment (GFE) to be made available to the Contractor by the Participating States or the Contracting Authority for the performance of the Contract.
<u>Government Purposes</u>	The use by or for any Participating States' governmental organisation or an administration of their Government.
Identified Work Locations	The locations in the Operations Area specified in the Contract.
<u>In Service Phase</u>	The phase during which a defence system is in use, supported and maintained in order to fulfill operational requirements.
<u>In Service Support (ISS)</u>	The support required for a defence system to fulfill operational requirements during the In Service Phase.
<u>INCOTERMS</u>	The International Chamber of Commerce official rules for the interpretation of trade terms.
<u>Information</u>	Any information in any written, oral, visual, electronic or other form.
<u>Invention</u>	Any Technical Information which can be protected by patent or like legal protection in accordance with the relevant law.

<u>Key Milestone</u>	An agreed event, which is designated as a key milestone in the Contract and whose timely completion by the Contractor provides confidence to the Contracting Authority that the contractual requirements shall be delivered or performed on time.
<u>Key Milestone Achievement Criteria</u>	The set of criteria established in the Contract to assess the achievement of a Key Milestone.
<u>KPI</u>	Key Performance Indicators
<u>Local Military Commander</u>	Means the senior military person of the Deploying Participating State(s) within a specific geographical area who is responsible for discipline, security and administration of that area and who for the purposes of this Article 16 shall be a Authorised Representative.
<u>Local Military Commander's Orders</u>	The orders, instructions, procedures and regulations issued by the Local Military Commander to ensure the security and smooth operation in the specific geographical area under his responsibility within an OA.
<u>Locally Recruited Workers (LRW)</u>	Personnel who is engaged either by the Contractor or by its Sub-Contractors and who reside in the country (ies) where the deployment activities are being performed.
<u>National Security Authority (NSA)</u>	The Government authority having overall responsibility for the security of Classified Information.
<u>Need-to-Know</u>	<i>Definition included in OMP 11, copied here for ease of reference.</i> A determination made by an authorised holder of information that a prospective recipient has a requirement for access to, knowledge of, or possession of the information in order to accomplish a designated and approved task involving the Classified Information required to be accessed.
<u>Non Variable Price</u>	A price not subject to any variation.
<u>Notice</u>	Any written request, approval, demand, consent, direction or other communication required to be given under the Contract or for which the Contract makes provision.
<u>OCCAR Member State</u>	<i>Definition included in OMP 11, copied here for ease of reference.</i> The OCCAR Member States are those European States, which are parties to the Convention on the establishment of OCCAR.
<u>OCCAR Programme</u>	<i>Definition included in OMP 11, copied here for ease of reference.</i> Armaments Programme, project or any other initiatives, e.g. Technical Demonstrator Projects and related contractual pre-activities, managed by OCCAR-EA.

<u>OCCAR Security Regulations</u>	The document referred to as OCCAR Management Procedure (OMP) 11 defining the principles and minimum standards of security including harmonised security procedures to be applied by the Contracting Authority, Participating States or contractors and sub-contractors involved in OCCAR Programmes.
<u>OCCAR Sensitive Information</u>	<i>Definition included in OMP 11, copied here for ease of reference.</i> Any non classified information relating to OCCAR-EA or to a specific OCCAR Programme, which should not be released outside OCCAR-EA or to States (including OCCAR Member States) not involved in the Programme or whose unauthorised disclosure would be disadvantageous to the interests of OCCAR, one of its Member States or any other Originator of such information outside OCCAR and which has been designated by the application of Administrative Markings as stated in OMP 12.
<u>Operations</u>	Any military action or the carrying out of any strategic, operational, tactical, service, training or administrative military mission (including peacekeeping operations) or the process of carrying on combat including any movement, supply, attack, defence and manoeuvre needed to gain the objectives of any battle or campaign.
<u>Operations Area (OA)</u>	An area of land, sea and airspace outside the national boundaries of the Deploying Participating State(s), defined by the Contracting Authority and in which an operational commander plans and conducts military operations or exercises to accomplish a specific mission.
<u>Originator</u>	<i>Definition included in OMP 11, copied here for ease of reference.</i> The State or international organisation under whose authority or on whose behalf information has been classified.
<u>Participating States</u>	The States named as such in the Contract in whose name and on behalf of or on whose behalf the Contracting Authority acts under the Contract.
<u>Parties</u>	Unless otherwise defined in the Contract, the Participating States and the Contractor; the expression "Party" means either of them.

<u>Personal Security Clearance</u>	<p><i>Definition included in OMP 11, copied here for ease of reference.</i></p> <p>A determination by an NSA/DSA that an individual is, in accordance with national security laws and regulations considered suitable to access Classified Information up to a certain security classification level.</p>
<u>Persons Involved in the Arbitration</u>	The parties to the arbitration conducted under Article 12.2.3, their respective legal representatives, the arbitrators, witnesses in the arbitration or any other person necessary to the conduct of the arbitration.
<u>Price Audit</u>	An examination by the relevant national pricing authority/pricing audit services on behalf of the Contracting Authority of all books, records, plans, documents and any other Information relevant to the price negotiation or negotiated price to determine the validity and admissibility of the actual costs including factors and rates under the Contract in relation to that price. Each examination shall be based upon the appropriate national pricing practices/regulations, accounting conventions and arrangements of the country in which the work is performed.
<u>Price Investigation</u>	An examination by the relevant national pricing authority/pricing audit services on behalf of the Contracting Authority of all books, records, plans, documents and any other Information relevant to the quoted price that support the negotiation of a price (whether the Contract Price, the price for Contract amendments or additional orders) to determine the accuracy of the estimates and admissibility of costs including factors and rates applicable to the Contract in relation to that price. Each examination shall be based upon the appropriate national pricing practices/regulations, accounting conventions and arrangements of the country in which the work is performed.
<u>Procurement Plan</u>	The plan for awarding Sub-Contracts.
<u>Product</u>	The item or items, including services, that the Contractor is required to provide under the Contract as specified or referenced in the Schedule of Requirements.
<u>Programme</u>	As specified in the Contract.
<u>Programme Security Instructions (PSI)</u>	The document issued by OCCAR-EA and approved by the Programme Participating States NSA's/DSA's in coordination with other competent national authorities, where appropriate, describing the compulsory security provisions required for the performance of an OCCAR Programme, including details of classification, marking, handling, processing, safeguarding or transmission of Programme related Classified Information or Material. The PSI usually will include a Security Classification Guides (SCG) and may also include a transportation plan.



	The provisions of a PSI supplement the OCCAR Security Regulations or national security laws and regulations.
<u>Radioactive Source</u>	Any source producing ionising radiations, containing one or more radionuclides, whose level of activity or concentration can not be ignored on radioprotection level.
<u>REACH</u>	<b>Registration, Evaluation, Authorisation and Restriction of Chemical substances.</b>
<u>RoHs</u>	Restriction of the use of certain Hazardous Substances in electrical and electronic equipment.
<u>Schedule of Requirements</u>	That part of the Contract which identifies, either directly or by reference, the Products and quantities required to be delivered, the Specification and the price or pricing terms in relation to each Product.
<u>Security Classification Guide (SCG)</u>	The document issued by the Contracting Authority, usually attached to the PSI, identifying the Information or activities under the Contract requiring security protection and the security classifications to be allocated to them.
<u>Software</u>	<p>(1) Software shall mean all or any part of any:</p> <ul style="list-style-type: none"> <li>• Object Code (as defined at 2. below.);</li> <li>• Source Material (as defined at 3. below);</li> <li>• Associated user documentation;</li> <li>• Screen display, instruction steps, the choice and configuration of menus and windows, or</li> <li>• Item otherwise specified as Software in the Contract.</li> </ul> <p>(2) "Object Code" shall mean machine code executable by a data processing system.</p> <p>(3) "Source Material" shall mean that material, taken individually or in any combination of it, which is:</p> <p>(3.1) Source Code, that is to say, a representation of Object Code in or readily translatable into a form suitable for human understanding and transformable into the Object Code;</p> <p>(3.2) a representation or identification of the data processing system configuration, computer programmes, including any tools, procedures, rules and associated documentation, including flowcharts/organigramme, generated by or for the Contractor under the Contract;</p> <p>(3.3) a representation or identification of the data processing system configuration, computer programmes, including any tools, procedures, rules and associated documentation, including flowcharts/organigramme, used to generate the Object Code, but not generated by or for the Contractor under the Contract, when in sufficient</p>

	<p>detail and suitable form, –to permit replication of such data processing system configuration, computer programmes, procedures, rules and associated documentation independently of the Contractor;</p> <p>(3.4) and to the extent necessary to enable modification and testing of the Object Code independently of the Contractor, documentation on the specification, design rules, design, testing, analysis, function, usage and capabilities of the Object Code and of the material at (3.1), (3.2) and (3.3) above;</p> <p>(4) "Relevant Period" shall mean the term of the Contract plus a period of 5 (five) years from the date when all Products have been delivered and accepted or such other period as may be specified in the Contract.</p>
<u>Special Article</u>	Any Article that is not a Standard Article.
<u>Special Tools</u>	The jigs, tools, patterns, moulds, dies, manufacturing gauges and test equipment including software development tools and licences which are special to the requirements of the Contract and for which provision is met as a direct charge to the Contract and which are not available under other contracts placed with the Contractor by the Contracting Authority or Participating State(s).
<u>Specification</u>	Any sample, pattern, technical requirements, plan, drawing or statement of work which, individually or collectively forms part of the Contract.
<u>Standard Articles</u>	Those Articles that are referenced in the Contract from the published OCCAR Standard Articles/1 Edition 1.
<u>Sub-Contract</u>	A contract placed by the Contractor or any of its Sub-Contractors, at any tier of sub-contracting, in or towards fulfilment of any obligation on the part of the Contractor under the Contract. This includes contracts for Commercial Items unless otherwise specified in the Contract.
<u>Sub-Contractor</u>	Any legal entity that enters into a Sub-Contract.
<u>Surge</u>	The right of the Contracting Authority to increase support on exceptional circumstances such as times of tension, transition to war, emergency situations, specific operational needs and war.
<u>Technical Information</u>	The recorded or documented Information of a scientific or technical nature whatever the format, documentary characteristics or other medium of presentation. The Information may include, but is not limited to any of the following: experimental and test data, specifications, designs and design processes, Inventions and discoveries whether or not patentable or otherwise protectable by law, technical

	descriptions and other works of a technical nature, semiconductor topography/mask works, technical and manufacturing data packages, know-how and trade secrets and Information relating to industrial techniques. It may be presented in the form of documents, pictorial reproduction, drawings and other graphic representations, disc and film recordings (magnetic, optical - including laser), computer software both programmatic and database, and computer non volatile memory, printouts or data retained in computer non volatile memory or any other form.
<u>Variable Price</u>	A price subject to variation in accordance with a formula for variation of price (VoP) or for foreign exchange fluctuations or both as provided for in the Contract.
<u>Vendors</u>	Any contractor engaged by the Contractor and not listed in the Contract, performing services on the OA or delivering supplies

1.2.2 The masculine includes the feminine and *vice versa* and words importing the neuter include the masculine and the feminine.

1.2.3 Where a day is stated it is a calendar day unless expressed otherwise.

1.2.4 The singular includes the plural, and *vice versa*.

1.2.5 The heading to any Article shall not affect the interpretation of that Article.

1.2.6 Receipt of Electronic Notices: The time of receipt of Electronic Notices shall be deemed to be on completion of receipt by the sender of verification of the transmission from the receiving instrument if transmitted between 0900 and 1700 hours on a Business Day (recipient's time) or, if transmitted at any other time, at 0900 hours on the first Business Day (recipient's time) following the completion of receipt by the sender of verification of the transmission from the receiving instrument. For the purposes of this Article a Business Day means any day excluding:

- (1) Saturdays, Sundays and public statutory holidays in the jurisdiction of either Party or the Contracting Authority; and
- (2) Privilege days notified in writing by the Contracting Authority to the Contractor at least 10 (ten) business days in advance; and
- (3) Such periods of holiday closure of the Contractors premises of which the Contracting Authority is given written Notice by the Contractor at least 10 (ten) business days in advance.

Notwithstanding the above, for ISS activities covered by the contract the receipt of electronic Notices for the ordering system may be granted as part of the service provided by the Contractor for transmissions outside those hours provided in 1.2.6 above, as required in the Contract. This shall not apply to the submission of invoices; the notification of force majeure cases, warranty claims, or any other aspect of the Contract where legal deadlines start running upon receipt of the Notices.

1.2.7 **Authorised Representative:** Where a non government employee/entity is notified to the Contractor as the Authorised Representative specified to undertake functions on behalf of the Contracting Authority, the Contractor may object to that Authorised Representative within 10 (ten) days if there are reasonable grounds. If there is no reasonable alternative nomination that avoids a conflict of interest with the Contractor then the Contractor, the Contracting Authority and the Authorised Representative shall negotiate appropriate measures to protect sensitive Information that may include confidentiality agreements and isolation of the activity.

1.2.8 All references to Articles are made to those in this Contract unless specifically stated otherwise. For the purposes of this Contract, Annex A to OMP 6 edition **X**, dated **ddmmyy** shall apply.

### 1.3 Waiver

1.3.1 Neither Party nor the Contracting Authority shall be deemed to have waived any right or remedy to which it is entitled unless it has expressly done so by Notice.

1.3.2 No waiver in respect of any right or remedy shall operate as a waiver in respect of any other right or remedy.

### 1.4 Language

1.4.1 The Contract shall specify the authoritative language (s) of the Contract.

1.4.2 All Notices, correspondence, records of meetings and records of inspections necessary for the management and administration of the Contract and for the monitoring of the execution of the Contract shall, unless otherwise specified in the Contract, be in the language of the Standard Articles.

### 1.5 Notices

1.5.1 All Notices shall be in writing and delivered by hand or sent by mail, fax or e-mail to the address specified in the Contract for receipt of Notices or such other address as the Contracting Authority or the Contractor may from time to time communicate to each other as its address for receipt of Notices. A Notice shall be deemed to have been delivered at the time of receipt.

1.5.2 All Notices to be given by or on behalf of the Contracting Authority shall not be valid unless signed by the Director of OCCAR-EA or his Authorised Representative.

1.5.3 Unless excluded within the terms of the Contract or where required by law and provided that a formal method of authentication as agreed between the Parties is employed and the agreed method recorded in the Contract:

- (1) References to submission of documents or communications in writing shall include electronic submission; and
- (2) Any requirement for a document or communication to be signed or references to signatures shall be construed to include electronic signature.

1.5.4 Whenever any documents are required to be served on a Participating State for the purpose of or in connection with any civil proceedings against a

Participating State arising out of or in relation to the Contract or any issue connected with it, the Contractor shall at the time of service send or deliver a copy of those documents to the Contracting Authority by way of Notice to the Contracting Authority in accordance with the provisions of this Article 1.5 relating to Notices to the Contracting Authority.

## 1.6 Publicity Relating to the Contract

1.6.1 The Participating States and the Contracting Authority will where practicable consult with the Contractor prior to making any press release or publishing any publicity material whatsoever relating to the Contract.

1.6.2 The Contractor shall not make any press release or publish any publicity material whatsoever relating to the Contract without the prior written approval of the Contracting Authority, such approval not to be unreasonably withheld. No such approval shall relieve the Contractor of any obligation under Article 7.2 (Disclosure of Information) or be considered as a waiver of that obligation in respect of other Information for which approval has not been given.

## 1.7 Entire Agreement

1.7.1 The Contract shall constitute the sole and entire agreement between the Parties in respect of the subject matter of the Contract and shall supersede all previous communications, representations or understandings, either written or oral.

1.7.2 Any standard sales conditions or any kind of limitations issued by the Contractor shall not apply to the Contract.

## 1.8 Security of Information

### 1.8.1 General Aspects

The Contractor shall ensure that the security provisions as described in sections 1.8.2 and 1.8.3 of this Contract are inserted in any Sub-Contracts let in connection with this Contract. Section 1.8.2 will not apply to those contractors or subcontractors that do not have access to classified information.

### 1.8.2 Security of Classified Information

1.8.2.1 The execution of the Contract may involve handling of or access to OCCAR Classified Information, Programme Participating States' national Classified Information or Classified Information from other international organisations or States.

1.8.2.2 The Contractor shall hold the appropriate Facility Security Clearance for all sites where Classified Information at the level of OCCAR CONFIDENTIAL or above or at equivalent level is handled, issued by its National or Designated Security Authority (NSA/DSA). The Contracting Authority shall have obtained a confirmation to that effect from the NSA/DSA in the country where the Contractor is located.

1.8.2.3 The Contractor shall handle and protect all Classified Information provided to or generated by him in the performance of the Contract in accordance with

- (1) OCCAR Security Regulations (OCCAR Management Procedure 11 – OMP 11) as implemented by the Contractor’s responsible NSA/DSA;
- (2) Applicable national security laws and regulations;
- (3) NATO security regulations, where NATO Classified Information is concerned;
- (4) EU Council Security Rules, where EU Classified Information is concerned;
- (5) The supplementary provisions of Programme Security Instructions (PSI)

The Contractor shall comply with the above regulations in their latest version, and shall further comply with any further security instructions and supplementary security requirements prescribed by the Contractor’s NSA/DSA.

In the event that the Contractor can demonstrate that he has to incur substantial additional costs as a direct result of any future changes of security requirements as described in (1) to (5) above, such additional costs shall be the subject of a contract amendment to be negotiated on fair and reasonable basis.

1.8.2.4 Regarding the protection of Classified Information the Contractor in particular shall:

- (1) Apply the appropriate OCCAR Security Classification to any Classified Information generated in the execution of the Contract (Classified Programme Foreground Information) as prescribed in the PSI and the associated Security Classification Guide;
- (2) Maintain the security classifications of any Classified Information generated by or furnished to the Contractor and not downgrade or declassify it without prior written authorization obtained through the Contracting Authority from the Participating States in the case of Classified Foreground Information or from the Originator in the case of Classified Background Information;
- (3) Respect any specific access or distribution limitations applied by the Contracting Authority or the Originator of any Classified Information furnished to the Contractor;
- (4) Not to use Classified Information for purposes other than those defined by this Contract;
- (5) Disclose Classified Information to personnel to the extent only as necessary for the performance of the Contract (“Need-to-Know” principle);
- (6) Limit the access to Classified Information at the level of OCCAR CONFIDENTIAL or above or at equivalent level to personnel holding a Personnel Security Clearance at the appropriate level and holding the nationality of an OCCAR Member State, a

Programme Participating State or other states as defined in the PSI;

- (7) Ensure that any personnel holding the nationality of countries other than those agreed may only have access to Classified Information at the level of OCCAR CONFIDENTIAL or above or at equivalent level subject to the prior approval by the Participating States or the Originator in accordance with procedures as described in the PSI;
- (8) Move any Classified Information generated by or furnished to the Contractor internationally in accordance with the provisions described in the PSI;
- (9) Seek for approval of communication and information systems processing Classified Information at the level of OCCAR CONFIDENTIAL or above or at equivalent level, or where required also for OCCAR RESTRICTED information or at equivalent level, by its NSA/DSA following relevant security procedures and agreed system-specific security requirements and accreditation strategies;
- (10) Promptly and fully report to its responsible NSA/DSA all cases in which it is known or where it is reasonable to assume that Classified Information provided or generated pursuant to the Contract has been lost, compromised or disclosed to unauthorised persons;
- (11) Continue to protect Classified Information generated or received during the performance of the Contract upon termination of the Contract and for which approval for retention has been given by the Contracting Authority.

1.8.2.5 Notwithstanding any other provision in this Contract on the non-disclosure or the protection of IPR, the Contractor shall not release any Classified Information provided to or generated by the Contractor in the performance of the Contract to

- (1) A Government or a representative thereof of a non-Programme Participating State;
- (2) Another International Organisation;
- (3) A Sub-Contractor located on the territory of a non-Programme Participating State

without the prior written approval of the Contracting Authority or the Originator.

Release approval may be granted or denied subject to the legacy pre-conditions or other restrictions or approval criteria defined in the OCCAR Security Regulations and the PSI.

1.8.2.6 The Contractor and the Contracting Authority shall mutually permit visits by their representatives or by Programme Participating States' Government representatives or other contractors or sub-contractors

involved in a given OCCAR Programme to their establishments as necessary for the performance of the Contract.

For such visits involving Classified Information at the level of CONFIDENTIAL or above or at equivalent level, or where visitors may have access to such Classified Information a formal request for visit certifying that the visitor holds a Personnel Security Clearance at a the required level shall be submitted directly to the establishments to be visited following procedures as described in the PSI.

Notwithstanding the above requirements for submission of visit requests, visitors shall comply with the security requirements of the establishments to be visited. The Contracting Authority shall notify the Contractor about any specific security requirements for visits to their establishments.

- 1.8.2.7 Where sub-contracts involve the handling of Classified Information at the level of OCCAR CONFIDENTIAL or above or at equivalent level by the Sub-Contractor the Contractor in particular shall ensure that the
- (1) Sub-Contractor is capable to handle Classified Information at such level and has been granted a Facility Security Clearance at the appropriate level issued by the Sub-Contractor's NSA/DSA;
  - (2) Specific security requirements and items requiring a security classification in the performance of the Sub-Contract are appropriately identified in relevant documentation;
  - (3) Sub-Contractor is aware of the provisions of the PSI as necessary for the nature of work involving Classified Information to be performed by the Sub-Contractor.
- 1.8.2.8 In cases where a Sub-Contractor requires access to OCCAR RESTRICTED Information only, the Sub-Contractor shall be contractually required to handle OCCAR RESTRICTED Information generated by or provided to the Sub-Contractor in accordance with the provisions set out in the document "Handling of OCCAR RESTRICTED by Contractors" annexed to the OCCAR Security Regulations (OMP11\_Annex C).
- 1.8.2.9 In case the Contracting Authority or the Contractor's responsible NSA/DSA identifies a failure by the Contractor to comply with the security obligations under this Contract, and this failure is of such nature as to result in the withdrawal of the Contractor's Facility Security Clearance or approval to handle Classified Information up to a level necessary for the execution of the Contract, the Contracting Authority shall be entitled to terminate the Contract with immediate effect in accordance with the relevant provisions of this Contract. Such contract termination shall be considered a Contract termination by default of the Contractor, however, without prejudice to criminal proceedings, which may be initiated against the Contractor or its personnel under any applicable national laws and regulations.
- 1.8.2.10 If a Sub-Contractor's FSC to handle Classified Information as necessary for the execution of its Sub-Contract is downgraded or withdrawn by the relevant NSA or DSA, the Contracting Authority shall have the right to



require the Contractor to terminate that Sub-Contract with immediate effect. The exercise by the Contracting Authority of this right shall not prejudice any other rights or obligations of any Party or the Contracting Authority under the Contract.

### 1.8.3 Security of OCCAR Sensitive Information

1.8.3.1 The Contractor shall handle and protect all OCCAR Sensitive Information provided to or generated by him in the performance of the Contract in accordance with the relevant OCCAR rules on the Handling of Unclassified Sensitive Information (OCCAR Management Procedure 12-OMP 12).

1.8.3.2 The Contractor shall explicitly identify any Unclassified commercially sensitive information such as pricing data or other commercial details, which may be contained in Contract deliverables or any other documents provided to the Contracting Authority.

1.8.3.3 In order to highlight the commercial sensitivity of such information the Contractor may apply appropriate administrative markings.

Such administrative markings, however, shall not limit access by individuals on grounds of nationality.

1.8.3.4 The Contracting Authority shall

- (1) Handle and protect such Information in accordance with OMP 12 and supplementary internal handling procedures;
- (2) Not use such Information for purposes other than it has been provided for;
- (3) If appropriate, release such Information, which has been provided by the Contractor to the Programme Participating States Government establishments only.

## **2. Requirement**

### 2.1 Contractor's Responsibility

2.1.1 The Contractor shall provide the Products in accordance with the Contract. The Contractor shall, on the request of the Contracting Authority, provide evidence as specified in the Contract that the Products comply with the Contract. No consideration of that evidence, inspection or approval by the Contracting Authority shall in any way prejudice any rights or release or lessen the obligations of the Contractor under the Contract.

2.1.2 If the Contractor fails to complete the Products or any requirement of the Contract or fails to meet the acceptance criteria stated in the Contract in accordance with Article 3.3 (Acceptance, Deferment and Rejection), the Contractor shall rectify that failure, without prejudice to the Contracting Authority's rights elsewhere in the Contract, at no additional cost to the Contracting Authority.

2.1.3 The Contractor shall notify the Contracting Authority without delay if it has reasonable cause to believe that it will be unable to comply with the Contract in any respect. Without prejudice to any rights of the Contracting Authority under the

Contract, the Contractor shall mitigate the effects of such non-compliance upon the performance of the Contract. Any notification and any subsequent communication or lack of communication by the Contracting Authority or mutual consideration of corrective action shall not prejudice any rights or release the Contractor from any of its obligations under the Contract.

2.1.4 No inspection or approval by the Contracting Authority of any design, drawing or data submitted by the Contractor nor any advice comment or suggestion of the Participating States or the Contracting Authority with regard thereto shall prejudice any rights or release the Contractor from any of its obligations under the Contract. Any identification of risks and any risk assessment, which has been, or may be, undertaken in connection with the Contract has been, or will be, a project management function only and shall not in any way release or lessen the obligations of the Contractor under the Contract.

2.1.5 The Contractor shall plan and perform the Contract and report to the Contracting Authority upon the work under the Contract in accordance with the requirements stated in the Contract. The collection of the data required for the preparation of reports and briefing packs is an obligation of the Contractor under the Contract.

2.1.6 The Contractor shall provide and maintain contractual schedules throughout the course of the contract to a level of detail appropriate to the nature of the activities under the Contract, thus ensuring that the progress against the agreed contractual milestones is reported to an adequate level of detail.

## 2.2 Quality and Risk Management

### 2.2.1 Quality

2.2.1.1 Upon effectiveness of the Contract in accordance with Article 14 (Effectiveness of Contract) the Contractor shall provide to the Contracting Authority's quality assurance representative as stated in the Contract the name of its responsible quality management representative.

2.2.1.2 The Contractor shall ensure that the Contract is carried out in accordance with the quality requirements specified in the Contract.

### 2.2.2 Risk Management

The Contractor shall set up a risk management system to ensure that all potential risks, which may have an impact on the Programme contractual requirements are managed in accordance with the Contract requirements.

## 2.3 Contract Amendments and Specification Change Procedures

### 2.3.1 Amendment

2.3.1.1 Except where otherwise expressly stated in the Contract any amendment to the Contract shall be made in accordance with the provisions of this Article 2.3. Either the Contracting Authority or the Contractor may request an amendment to the Contract. Whoever requests the amendment, the Contractor shall provide to the Contracting Authority a proposal to carry out the amendment of the Contract including if applicable any impact on performance, time and price. In the event that the only way to assess the effect of the amendment results in a technical investigation

then that fact and a proposal to assess that investigation shall be provided at no additional charge to the Contract to the Contracting Authority for their consideration.

2.3.1.2 Except as provided for in this Article 2.3 the Contract may not be amended except by the written agreement of the Contracting Authority and the Contractor. That written agreement shall be in the form of a serially numbered amendment, drawn up by the Contracting Authority and signed by the duly authorised representatives of the Contracting Authority and the Contractor.

2.3.1.3 A Contract amendment shall take effect upon signature by both the Contracting Authority and the Contractor or such later date as is stated in the Contract amendment.

2.3.1.4 Except for specification changes as described in Article 2.3.2, work to implement a proposed change shall not commence until the Contract amendment authorising it has come into effect in accordance with this Article 2.3.1.

## 2.3.2 Specification Change

2.3.2.1 The Contracting Authority may, by Notice, after consultation as appropriate with the Contractor, alter from time to time the Specification as from a date and to the extent specified by the Contracting Authority. The Contractor shall within 1 (one) month of receipt of the Notice advise the Contracting Authority of any impact on the Contract Price or the Delivery Schedule or other part of the work under the Contract affected by the alteration.

2.3.2.2 Any alteration to the Specification shall be the subject of an amendment to the Contract.

2.3.2.3 If any alteration to the Specification causes a change in the cost, or in the period required for the production or completion, of any Products, or any other part of the work under the Contract affected by the alteration, a revision to the Contract Price or the time for delivery, or both, for those Products, or other work attributable to the alteration and its consequences shall be made as may be appropriate. Any revision under this Article 2.3.2.3 shall be the subject of a Contract amendment.

2.3.2.4 If either the Contracting Authority or the Contractor considers that there may be any conflict within the Specification, it shall notify the other.

2.3.2.5 Any acceptance, authorisation, consent, comment, suggestion, requirement, proposal, consideration, audit, inspection or approval of designs, specifications, plans, schedules, annexes, or the issue of any other technical and administrative documents by the Contracting Authority which is not done or given in accordance with the Contract shall not alter the Specification.

## 2.4 Express Warranty

2.4.1 Unless otherwise specified in the Contract the Contractor warrants that all Products supplied (including deliverable software) under the Contract:

- (1) Are free from:
  - i. Faulty materials or workmanship;
  - ii. Any defect arising out of design where design is a requirement of the Contract, in accordance with the provisions of any Special Article of the Contract concerning warranty;
- (2) Are compliant with the Specification and are fit for the purpose stated in the Contract.
- (3) Are compliant with all statutory requirements and regulations applicable at the time of acceptance for Product quality, unless otherwise specified,

for a period specified in the Contract, hereinafter known as the Warranty Period. Unless otherwise specified in the Contract, the Warranty Period shall commence upon acceptance of the Product or delivery whichever is the later.

2.4.2 Where, during the Warranty Period, any of the Products under the Contract are found to be defective, i.e. not in conformity with any of the grounds at Article 2.4.1 (1), 2.4.1 (2) or 2.4.1 (3), the Contractor shall at its own expense, at the written request of the Contracting Authority, remedy the defect. Such remedial action shall be carried out within a period (Turn-Around Time (TAT)) as specified in the Contract.

#### 2.4.3

2.4.3.1 During a remedial action, the Contracting Authority shall be entitled to require the Contractor to prepare and provide to the Contracting Authority progress reports regarding the remedial action (including, but not limited to, analysis data, correction required, revision and updating to resolve the defect), on a regular basis as defined in the Contract.

2.4.3.2 If the Contractor fails to initiate the remedial action to rectify the defect after a period of 2 (two) weeks from the date of written notification by the Contracting Authority or after the period stated in the Contract, the Contracting Authority reserves the right to have the necessary repairs or replacements performed at the Contractor's expense.

2.4.3.3 The Contractor shall be liable for all costs incurred which derive from the shipment of the Product from within the continental territory of the Participating States or any other place agreed by the Contractor and the Contracting Authority, to and from the Contractor's premises. The Contractor shall be liable for any associated costs of removal of the defective Product from a system and reinstallation costs of the said repaired or replaced Products. The Contracting Authority shall ensure, where circumstances permit, the right of access to the Product by the Contractor when the Contractor advises in writing of the need to have qualified personnel investigate and/or repair the Products malfunction *in situ*.

2.4.3.4 The warranty period of the Product so replaced or repaired shall be the period specified for this purpose in the Contract. In this respect, unless specifically stated otherwise in the Contract, the Warranty period for Products repaired under the terms of Warranty shall be extended by a time equivalent to that during which the repaired Product has been not been available for use, starting from the date of issuing of the Contracting Authority's written request, and ending on the date in which the repaired Product is accepted by the Contracting Authority.

2.4.3.5 The provisions of this Article 2.4 are not applicable to the extent that the defect in the Product is attributable to one or more of the following circumstances:

- (1) Failure by the Participating States or their authorised representatives to operate, maintain, store or repair Products in accordance with the documentation provided by the Contractor;
- (2) Fair wear and tear;
- (3) Misuse or negligence by the Participating States or their authorised representatives;
- (4) Failure of GFX, provided that the defect was not caused or contributed to by any non-observance or non-performance by the Contractor of any obligation on the part of the Contractor contained in the Contract in relation to GFX and the Contractor can show that the GFX could not be fully tested until it has been integrated with other items.

2.4.3.6 In the event a warranty claim is not consistent with the Contract obligation, the Contracting Authority shall pay a fair and reasonable price for the removal, collection, transport and any resulted authorised work.

2.4.4 The express warranty as defined in this Article 2.4 or as otherwise specified in the Contract shall take precedence over any warranty implied by the applicable law of the Contract, except in cases where the express warranty does not cover a part of the warranty implied by the applicable law of the Contract.

2.4.5 In the event that any Product which is covered by the terms of Express Warranty is deployed to an Operations Area in which the provisions of Article 16 do not apply, the Contractor grants the application of the provisions in Articles 2.4.1 to 2.4.4 to all the replacements and repairs of such Products, provided that such replacements or repairs have been carried out by

- a) personnel of the Participating States properly trained by the Contractor; or
- b) personnel of the Participating States properly trained by Contractor certified trainers,

to perform these tasks.

## 2.5 Supply of Hazardous Materials and Substances

### 2.5.1 General

2.5.1.1 The Contractor shall ensure that the Products supplied and/or delivered under the Contract are compliant with the applicable legislative and regulatory requirements and good practices relating to environment, safety and health. The Contractor shall provide Information as set out in this Article 2.5.1 to the Contracting Authority about any hazardous materials or substances to be supplied under the Contract immediately he becomes aware that those materials or substances are to be supplied. Wherever personnel of the Contracting Authority or the Participating States or their Authorised Representatives could be exposed to hazardous materials or substances during the performance of services by the Contractor, the Contractor shall provide Information as set out in this Article 2.5.1 to the Contracting Authority about those materials or substances.

#### 2.5.1.2

- (1) If any Product or component of it, in the course of use, maintenance, disposal or in the event of an accident, may release hazardous materials or substances, the Contractor shall provide to the Contracting Authority:
  - i. Before delivery of the Product, a list of each those hazardous materials or substances, that may be released in the course of use, maintenance, disposal of the Product or component of it, or in the event of an accident, and
  - ii. At delivery of the Product, a safety data sheet in accordance with the REACH Regulation No. 1907/2006 and to comply with any future amendment, for each of those hazardous materials or substances, or
- (2) If applicable, the Contractor shall provide to the Contracting Authority a "nil return" no later than delivery where no hazardous materials or substances are to be supplied under the Contract.

2.5.1.3 The Contractor shall, in relation to the performance of services, provide to the Contracting Authority:

- (1) A safety data sheet in accordance with 2.5.1.2 (1) ii above, prior to the performance of those services, when hazardous materials or substances are to be used by the Contractor or when personnel of the Contracting Authority or the Participating States or their Authorised Representatives could be exposed to them; or
- (2) A "nil return" where no hazardous materials or substances are to be used by the Contractor or when no personnel of the Participating States or their Authorised Representatives could be exposed to them in the performance of services under the Contract.

2.5.1.4 Failure by the Contractor to comply with the requirements of this Article 2.5.1 shall be regarded as a breach of Contract for which the Contracting Authority reserves the right, following prior Notice, to withhold payments without prejudice to the Contracting Authority's right to terminate the Contract for such failure in accordance with Article 11.2 (Termination of Contract for Default by the Contractor).

2.5.1.5 In exercising its rights or remedies under this Article, the Contracting Authority shall act in a reasonable and proportionate manner having regard to the gravity of the failure.

#### 2.5.2 Health and Safety Hazard Control

Where the Contractor enters a Contracting Authority's or a Participating State's Establishment for the purpose of performing work under the Contract:

- (1) The Contractor shall immediately notify the person in charge of the Establishment or the site project liaison officer or overseeing officer nominated in the Contract, of:
  - i. Any health and safety hazards associated with the work to be performed by it or any of its representatives;
  - ii. Any foreseeable risks to the health and safety of all persons associated with such hazards; and
  - iii. Any precautions to be taken by it as well as any precautions which, in its opinion, ought to be taken by the Contracting Authority or the Participating State(s), in order to control such risks.
- (2) The Contracting Authority shall immediately notify the Contractor, of:
  - i. Any health and safety hazards which may be encountered by the Contractor or any of its representatives on the Establishment;
  - ii. Any foreseeable risks to the health and safety of the Contractor or any of its representatives, associated with such hazards; and
  - iii. Any precautions to be taken by the Contracting Authority or the Participating State(s) as well as any precautions which, in its opinion, ought to be taken by the Contractor, in order to control such risks.
- (3) The Contractor shall notify its representatives of and, where appropriate, provide adequate instruction in relation to:
  - i. The hazards, risks and precautions notified by it to the Contracting Authority under Article 2.5.2 (1);
  - ii. The hazards, risks and precautions notified by the Contracting Authority to the Contractor under Article 2.5.2 (2); and
  - iii. The precautions which, in its opinion, ought to be taken by its representatives in order to control those risks.
- (4) The Contractor shall provide the person in charge of the Establishment or the site project liaison officer or overseeing officer nominated in the Contract with:
  - i. Copies of the contents of its own and, where appropriate, its representatives' Safety Policies which are relevant to the risks notified under Article 2.5.2 (1);
  - ii. Copies of any related risk assessments; and

- iii. Copies of any notifications and instructions issued by it to its representatives under Article 2.5.2 (3).
- (5) The Contracting Authority shall provide the Contractor with:
- i. Copies of the contents of its own safety policies which are relevant to the risks notified under Article 2.5.2 (2);
  - ii. Copies of any related risk assessments; and
  - iii. Copies of any notifications and instructions issued by it to its employees similar to those called for from the Contractor under Article 2.5.2 (3).

### 2.5.3 Legal obligations of the Contractor

The provisions of this Article 2.5 shall in no way diminish the legal obligations of the Contractor related to hazardous matters. In particular, the Contractor shall where applicable comply with the relevant mandatory Hazardous Materials and Substances regulations, including Radioactive Sources and substances with magnetic properties, applicable to the concerned Participating State(s), including but not limited to

- i. The United Nations Montreal Protocol;
- ii. The European regulation on Registration, Evaluation, Authorisation and Restriction of Chemical Substances ("REACH" ), derogations to which will not be accepted;
- iii. The Restrictions of the use of certain Hazardous Substances in electrical and electronic equipment (RoH);
- iv. Council Directive 96/29/Euratom.

The above provisions also apply to any exported / imported material, components or equipment.

## 2.6 Change in legislation

2.6.1. In the event that changes in the legislation applicable to hazardous materials and substances occur after the signature of the Contract and the agreement of the prices, which may have an impact on costs, time of performance, the Contractor shall prepare and submit a proposal to the Contracting Authority with sufficient detail in respect of:

- i. justification of the need to implement additional measures or to improve existing ones;
- ii. the available alternatives;
- iii. the solution proposed by the Contractor;
- iv. the risks associated with not following the Contractor's proposal; and
- v. the implications in terms of price, time and/or performance of implementing the proposed solution.



2.6.2. If the Contractor's proposal is agreed it will be implemented into the Contract by a Contract Amendment in accordance with Article 2.3. The Contracting Authority reserves the right to perform price investigation of the quoted prices in accordance with Article 5.3.

## 2.7 Surge

2.7.1 If required by the Contract, the Contractor and his Sub-Contractors shall have a surge procedure for the Contract to cope with times of tension, transition to war, other operational needs and war. The Contractor shall make available to the Contracting Authority the surge procedures for review. In such event the relevant Contracting Authority may authorise, via either a Contract Amendment or such other mechanism as may be included in the Contract, an extension to the activities covered by the Contract. The Contractor shall be notified of any such occurrence by the Contracting Authority, who will authorise the Contractor to proceed on the basis that prices shall be agreed in accordance with Article 6 (Price).

2.7.2 Any additional costs incurred which are directly attributed to the authorised extended activities covered by Article 2.7.1 shall be separately identified.

## 3. Delivery

### 3.1 Delivery, Packaging and Consignment Arrangements

#### 3.1.1 Delivery

3.1.1.1 Deliveries shall be made in accordance with the Delivery Schedule. The Contractor shall not deliver any Products before the time stipulated in the Delivery Schedule for delivery of that Product without the prior consent of the Contracting Authority. Where that consent is given delivery shall take place at no additional cost to the Contracting Authority.

3.1.1.2 Deliveries shall be effected in accordance with the specific INCOTERMS stated in the Contract.

3.1.1.3 Unless otherwise provided for in the Contract, where:

- (1) The Contractor is required under the Contract to carry out any service in connection with GFX; or
- (2) The results of a service which the Contractor is required to deliver are to be received by the Consignee in the form of a deliverable, such as a report or computer software,

delivery of the service, or the relevant part of the service, shall occur upon the GFX or the deliverable being delivered in accordance with Article 3.1.1.2.

3.1.1.4 Where the consignment instructions stated in the Contract require the Contractor to deliver any Product self-to-self (to its own premises or to those of a Sub-Contractor), that Product shall be considered as GFX upon delivery and thereafter shall be treated in accordance with Article 8.1 (Government Furnished Information, Facilities, Services and Equipment (GFX)).

### 3.1.2 Packaging

The Contractor shall comply with the packaging and any identification requirements as set out in the Contract. Unless otherwise agreed in the Contract, the Contractor shall ensure that the Products are packaged to enable safe carriage of the goods to the delivery point specified in the Contract and in such a manner as is required for transport and storage to that delivery point. Unless otherwise provided for in the Contract, all containers (including packing cases, boxes, tins, drums and wrappings) used by the Contractor shall be non-returnable and included in the Contract Price.

### 3.1.3 Consignment and Delivery Documentation

3.1.3.1 The Consignee, delivery instruction and marking for each of the Products shall be as specified in the Contract. The Contractor shall notify the Consignee of an estimated date of despatch 15 (fifteen) days prior to the planned date of delivery unless otherwise specified in the Contract.

3.1.3.2. Where the Contracting Authority is responsible for arranging all or any part of the transportation of the Products to be supplied under the Contract, the Contractor shall notify the relevant Participating State's transport office and the Contracting Authority 10 (ten) days in advance of the date upon which the Products shall be ready for collection. Wherever possible, the Contractor shall inform the Contracting Authority at least 30 (thirty) days in advance of that date.

3.1.3.3 Unless otherwise provided for in the Contract, the Contractor shall provide the Consignee with 3 (three) copies of a delivery note. One copy shall remain with the Product; another copy shall be promptly receipted by the Consignee and returned to the Contractor or other party effecting delivery as acknowledgement of delivery. The third copy shall be receipted by the Consignee and shall be returned to the Contractor within 7 (seven) days of the delivery unless specified otherwise in the Contract.

3.1.3.4 Signature on the delivery note by the Consignee shall indicate receipt and shall not be construed as an acceptance of the Products for the purposes of Article 3.3 (Acceptance, Deferment and Rejection) or any other term of the Contract relating to acceptance by the Contracting Authority.

3.1.3.5 For the purposes of Article 3.1.3.4 above, an Electronic Notice of confirmation of receipt by the Consignee may replace the required signature on the delivery note, if specific terms for management of deliveries by electronic means are defined and agreed in the Contract.

### 3.1.4 Import/Export Licences and Import/Export Documentation

3.1.4.1 It shall be the responsibility of the Contractor to obtain from relevant government(s) in a timely manner any import/export licences and import/export documentation required to perform any of its obligations under the Contract.

In the event a licence is sought in the performance of the Contract from a Participating State's government, the Participating States will facilitate the timely granting of any necessary import/export licences.

In the event a licence is sought in the performance of the Contract from a government other than a Participating State's government, the Participating States will, if requested by the Contractor, support the Contractor in the process of obtaining any necessary import/export licences.

3.1.4.2 The Contractor shall inform the Contracting Authority at the earliest opportunity of the route by which it intends to obtain import/export licence approval from that government in order to perform the Contract. In particular, where the Contractor chooses to use a source of supply that requires agreement to export control and end use restrictions on Information disclosed by the source of supply it shall promptly notify the Contracting Authority. The Contractor shall ensure that the content of these agreements shall not lessen the rights of the Participating States in the Product as defined under the Contract. In the event the Contracting Authority or Participating States are required to sign any documents relating to these agreements the Contractor shall seek the prior approval, in a timely manner, from the Contracting Authority of the content of these documents.

### 3.2 Penalties for delay; Liquidated Damages and Remedies for failure to meet contractual KPIs

As applicable, the Contract shall specify which of the following provisions 3.2.1 or 3.2.2, and/or 3.2.3 shall apply to the specific activities under the Contract.

#### 3.2.1 Penalties for delay

3.2.1.1 If the Contractor fails to achieve delivery of any Product within the time specified in the Delivery Schedule and where no extension of that time has been agreed in accordance with Article 3.5 (Force Majeure) or Article 2.3 (Contract Amendment and Specification Change Procedures), the Contractor shall be liable to pay penalties for delay in accordance with the scale of penalties set out in the Contract, provided no relief has been granted by the Contracting Authority in writing.

3.2.1.2 Any limitation to the total amount of penalties that may be applied under the Contract shall be specified in the Contract.

3.2.1.3 Unless otherwise specified in the Contract, the provisions of this Article 3.2.1 are without prejudice to any other rights of the Contracting Authority under the Contract.

3.2.1.4 The amount of the penalty will be paid by the Contractor to the Contracting Authority in accordance with Article 6.1.4.6.

#### 3.2.2 Liquidated Damages

3.2.2.1 It is recognised by the Parties that if any of the Products are not delivered on time the Participating States will suffer loss and damage.

3.2.2.2 Accordingly, unless otherwise specified in the Contract, if any Product is not delivered within the time required by the Delivery Schedule as extended (where applicable) by any period under Article 3.5 (Force Majeure) or Article 2.3 (Contract Amendment and Specification Change Procedures), the Contractor shall be liable to pay to the Contracting

Authority as liquidated damages for delay in delivery in relation to that Product the amount specified in the Contract for each day of such delay up to the maximum amount specified for this purpose in the Contract.

3.2.2.3 Unless otherwise specified in the Contract, the provisions of this Article 3.2.2 are without prejudice to any other rights of the Contracting Authority under the Contract.

3.2.2.4 No concession to the Contractor by the Contracting Authority or other act or omission of the Contracting Authority or the Participating States shall in any way affect the right of the Contracting Authority to recover liquidated damages for delay or be deemed to be a waiver of the right of the Contracting Authority to recover such damages unless a waiver has been expressly given in writing by the Contracting Authority.

3.2.2.5 The amount of the liquidated damages will be paid by the Contractor to the Contracting Authority in accordance with Article 6.1.4.6.

### 3.2.3 Remedies for Failure to meet contractual KPIs

Notwithstanding the Contracting Authority's rights and remedies stated elsewhere in the Contract, the Contracting Authority shall be entitled to recover remedies in the event the Contractor fails to achieve the contractual KPI measures defined in the Contract. The levels of permanent and temporary retention, periodicity and sentencing process will be as identified in the Contract for the failure.

## 3.3 Acceptance, Deferment and Rejection

### 3.3.1 General

As specified in the Contract the Contracting Authority shall be entitled to carry out the procedures for inspection and testing detailed in the Contract for the purpose of ascertaining whether the Product is capable of acceptance.

### 3.3.2 Acceptance

3.3.2.1 Without prejudice to the Contractor's obligation to deliver a Product in accordance with the Delivery Schedule that is in conformity with the Contract, acceptance shall take place on the Contracting Authority's written acknowledgement to the Contractor that it accepts the Product in accordance with the procedures specified in the Contract. If no such procedure is specified in the Contract then the Contracting Authority shall be deemed to have accepted a Product if a reasonable period of time has elapsed since delivery or if the Participating States have taken the Product into use. The Contracting Authority shall be deemed to have accepted a Product if the Contracting Authority has not exercised its right of rejection within the time limit specified for this purpose in the Contract.

Notwithstanding the foregoing in the event the Product is a service the Contracting Authority reserves the right to include in the Contract specific conditions setting out how acceptability of performance is to be evidenced and measured. The Contracting Authority reserves his right in the event of

cumulative failure to apply remedies that may include the withholding of payment.

3.3.2.2 If a Product is not accepted it shall either:

- (1) Within a time agreed by the Contracting Authority and the Contractor or reasonably nominated by the Contracting Authority in default of such agreement be rectified and be resubmitted for acceptance in accordance with Article 3.3.3 (Deferment); or
- (2) In accordance with Article 3.3.4 (Rejection) be rejected and at the Contracting Authority's option be replaced by the Contracting Authority acquiring another Product of the same or similar description from a third party.

3.3.2.3 The Contracting Authority shall not have accepted a Product:

- (1) Merely because the Contracting Authority asks for, or agrees to, its repair by or under an arrangement with the Contractor; or
- (2) Unless otherwise specified in the Contract, merely because the Product has been delivered to a third party.

3.3.2.4 For service activities, the Contract shall specify if partial acceptance of Products is allowable under the Contract and the specific provisions that shall apply in such instances.

### 3.3.3 Deferment

3.3.3.1 The Contracting Authority may notify the Contractor that the time for acceptance of a Product is deferred by a specified period if it is established that a Product is not in conformity with the Contract and when the Contracting Authority considers that any non-compliance in the Product is capable of being rectified by the Contractor within 20 (twenty) days, or such other period stated in the Contract, of receipt of notification of deferment.

3.3.3.2 In the event a deferred Product is rectified and re-submitted for acceptance, the Contracting Authority shall be allowed the period referenced in Article 3.3.2.1 to carry out the inspection and testing in accordance with the Contract and either accept or reject the Product.

3.3.3.3 The work required to rectify the non-compliance in the Product may be executed at the Consignee's premises only with the Contracting Authority's authorisation. This work shall be at the Contractor's expense.

3.3.3.4 In the event that the Contractor is unable or unwilling to rectify the non-compliance in the Product within the period specified in Article 3.3.3.1, the Contracting Authority shall have the right to reject the Product in accordance with Article 3.3.4. Should the Contracting Authority exceptionally accept the Product, then a fair and reasonable reduction in the Contract Price shall be agreed by the Contracting Authority and the Contractor that reflects the diminution in value with respect to the extent of the non-compliance.

3.3.3.5 Neither deferment of acceptance of a Product nor the period required thereafter to re-submit the Product shall be grounds for:

- (1) Granting an extension to the Delivery Schedule; and
- (2) Granting an adjustment of the Contract Price.

3.3.3.6 If the Contractor can demonstrate that the non-compliance in the Product is attributable to defective GFX and the Contractor can show that the GFX could not be fully tested until it has been integrated with other items, and provided that that defect has not been caused or contributed to by any non-observance or non-performance by the Contractor of any obligation on the part of the Contractor contained in the Contract in relation to GFX, then the Contracting Authority shall amend the Contract to extend the Delivery Schedule by a period equivalent to the time solely needed to remedy the defect in the GFX and its consequences, and to adjust the Contract Price to the extent appropriate in the circumstances, in accordance with Article 2.3 (Contract Amendment and Specification Changes Procedure).

### 3.3.4 Rejection

3.3.4.1 The Contracting Authority may by Notice reject any Product which is found, on inspection or testing or both in accordance with the procedures specified in the Contract, not to conform to the requirements of the Contract and shall supply the Contractor with the reasons for that rejection. The Contracting Authority may reject the whole of any consignment of the Products if:

- (1) Inspection in accordance with the procedures specified in the Contract shows that a proportion or percentage of the Products in that consignment as the Contract may specify for the purposes of this Article 3.3, or
- (2) Samples of the Products taken indiscriminately from that consignment as provided for in the Contract do not conform to the requirements of the Contract.

3.3.4.2 Where the Contracting Authority rejects any Product or consignment after delivery the Contractor shall, at its own expense remove all the rejected Products from the place of delivery within 15 (fifteen) days, or other agreed period, of receipt of notification of rejection, subject to the provisions of Article 3.3.4.4.

3.3.4.3 If the Contractor fails to remove the Products or any of them in accordance with Article 3.3.4.2, the Contracting Authority may return the rejected Products or any of them to the Contractor at the Contractor's risk and at the Contractor's expense and may recover from the Contractor all direct costs attributable to the Contractor's liability in respect of the removal of the Products.

3.3.4.4 The Contractor may within 15 (fifteen) days, or other agreed period, of the receipt of notification of rejection and before that Product has been removed from the place of delivery give the Contracting Authority Notice of objection. If the Contractor fails to serve Notice of objection within that 15

(fifteen) days, or other agreed period, he shall be deemed to have accepted the rejection. The objection shall constitute a dispute between the Parties, which shall be dealt with in accordance with the provisions of Article 12.2 (Resolution of Disputes). If the Contractor gives Notice of objection the Products shall not be removed until after the dispute is settled and the Contracting Authority so directs unless agreed otherwise.

3.3.4.5 The Contractor shall, unless otherwise directed by the Contracting Authority, mark any rejected Product to enable it to be identified as a rejected Product.

3.3.4.6 The Contractor shall, if requested by the Contracting Authority, within 30 (thirty) days following this Contracting Authority's request, unless otherwise agreed by the Contracting Authority and the Contractor, repay to the Contracting Authority any payments previously made to the Contractor in respect of the rejected Product.

3.3.4.7 The Product so rejected shall, at the Contracting Authority's option, either:

- (1) Be replaced by the Contractor within a time agreed by the Contracting Authority and the Contractor or reasonably nominated by the Contracting Authority in default of such agreement; or
- (2) Be cancelled when the Contractor is not able to replace the Product in accordance with (1) above. In that case, the Contracting Authority shall have the right to terminate the Contract in whole or in part in accordance with Article 11.2 (Termination of Contract for Default by the Contractor).

In the circumstances of the exercise of Articles 3.3.4.6 and 3.3.4.7 (1), the Contracting Authority shall have regard to the need for the Contractor to be financed in accordance with the principles for interim payments applicable to the rejected Product.

3.3.4.8 Where any tests for the purposes of this Article 3.3 (Acceptance, Deferment and Rejection) are made outside the Contractor's premises and the Contracting Authority rejects the Product, the rejected Product shall be removed by the Contractor at its own expense within 15 (fifteen) days after receipt of a Notice of rejection, or such other time as may be specified in the Contract. If the Contractor fails to carry out this obligation within the specified time, the Contracting Authority shall act as bailee of the rejected Product until collected by, or despatched for return to, the Contractor at the Contractor's cost. The Contracting Authority may return the rejected Product by arranging transports and appropriate insurance all at the Contractor's cost.

Notwithstanding the foregoing, provided that the Contracting Authority has acted properly as bailee of the rejected Product, the risk of loss and damage to the rejected Product shall lie with the Contractor.

3.3.4.9 When after delivery in accordance with Article 3.1 (Delivery, Packaging and Consignment Arrangements) the Product is rejected under this Article 3.3.4, that Product shall for the purposes of the Contract be considered as not having been delivered under the Contract.

3.3.4.10 Neither rejection of a Product nor the period required thereafter to re-submit the Product shall be grounds for:

- (1) In itself granting an automatic extension to the Delivery Schedule; and
- (2) Granting an adjustment of the Contract Price.

#### 3.4 Liability for Loss and Damage

3.4.1 When acceptance occurs prior to or upon delivery of the Product, the Contractor shall be liable for loss or damage in accordance with the specific INCOTERMS stated in the Contract.

3.4.2 When acceptance occurs after delivery of the Product, the Consignee shall be liable as bailee for the period between delivery and acceptance. The Contractor shall be liable as the owner of the Product for any other loss or damage until acceptance of the Product.

3.4.3 Where the Contracting Authority rejects any Product in accordance with Article 3.3.4, the Consignee shall remain liable for loss or damage in accordance with Article 3.4.2 during the period referred to in Article 3.3.4.2 after the Contracting Authority has served upon the Contractor a Notice of rejection. After this period the Contractor shall be liable for loss or damage in accordance with the provisions of Article 3.3.4.8.

3.4.4 The provisions of this Article 3.4 shall apply notwithstanding that the Product may have been inspected in accordance with Article 9.1 (Inspections), or that the Product may have vested in the relevant Participating State in accordance with Article 6.2.1 (Transfer of Ownership Through Early Vesting).

#### 3.5 Force Majeure

3.5.1 The Contractor shall not be liable for any delay in the performance of the Contractor's contractual obligations to the extent that such delay is a Force Majeure Event.

3.5.2 The Contractor shall, without delay upon becoming aware that any delay in the performance of the Contractor's contractual obligations has been or is likely to be caused by a Force Majeure Event, give Notice to the Contracting Authority providing details of the Force Majeure Event and, as soon as practicable, the delay caused or likely to be caused by it.

3.5.3 Without prejudice to the provisions of Article 3.5.1, the Contracting Authority shall be entitled to damages for any legally recognised loss incurred by the Participating States or the Contracting Authority or both resulting from the Contractor's failure to comply with its obligation contained in Article 3.5.2.

3.5.4 If the Contractor is delayed in the performance of the Contractor's contractual obligations by reason of a Force Majeure Event, the Contractor shall be granted an extension of time equivalent to the delay in performing the Contractor's obligations under the Contract that is caused by the Force Majeure Event. Provided always that the Contractor shall not be entitled to any extension of time unless the Contractor shall at all times have used all reasonable endeavours to prevent any such delay and to minimise any such delay and to do all that may be reasonable to proceed with the work.



3.5.5 If the Contracting Authority is delayed in the performance of the Contracting Authority's contractual obligations by reason of a Force Majeure Event, the Contracting Authority shall, without prejudice to any other right or remedy of the Contracting Authority, be granted an extension of time equivalent to the delay in performing the Contracting Authority's or the Participating States obligations under the Contract that is caused by a Force Majeure Event.

3.5.6 The Contracting Authority shall, without delay upon becoming aware that any delay in the performance of the Contracting Authority's contractual obligations has been or is likely to be caused by a Force Majeure Event, give Notice to the Contractor providing details of the Force Majeure Event and, as soon as practicable, the delay caused or likely to be caused by it.

3.5.7 The Contractor shall be entitled to damages for any legally recognised loss incurred by the Contractor resulting from the Contracting Authority's failure to comply with its obligation contained in Article 3.5.6.

3.5.8 Each Party shall bear any additional costs it incurs as a result of Force Majeure Events.

3.5.9 Where either Party or the Contracting Authority becomes aware that any delay in the performance of their respective contractual obligations has been or is likely to be caused by a continuous Force Majeure Event, they shall use their reasonable endeavours to reach agreement about how the Contract requirement can best be taken forward or terminated. If an agreement cannot be reached, and if a specific period has been specified in the Contract for this purpose, the Contract shall be automatically terminated after that period, unless the Parties agree otherwise.

In such an event, the Contractor shall not be entitled to payment of any amount by way of compensation or otherwise in respect of such termination, or in respect of any work which has been left undone. The Contractor shall, however, be entitled to a fair and reasonable payment under the Contract, both in respect of any work done and of any commitments into which he has entered up to the date of such termination, which are reasonably chargeable to the Contract and which represent an unavoidable loss for the Contractor.

### 3.6 Diversion Orders

3.6.1 Provided always that the total quantity of the Products ordered under the Contract is not exceeded, the Contractor shall, subject to Article 3.6.2, meet Diversion Orders in accordance with the requirements of the Diversion Order. The balance of the Product shall be delivered in accordance with the Contract.

#### 3.6.2 Issue/Cancellation of Diversion Orders

3.6.2.1 Diversion Orders may be issued or cancelled by the Contracting Authority using the OCCAR Diversion Form. They will remain in force until the Products have been despatched or until the Contracting Authority has cancelled them in writing.

3.6.2.2 If the Contractor is unable to meet the requirements of a Diversion Order, the Contractor shall seek the advice of the Contracting Authority.

3.6.2.3 A Diversion Order that is beyond the scope of the Contract shall be returned immediately by the Contractor to the Contracting Authority with an appropriate explanation.

### 3.6.3 Delivery, Packaging and Consignment Arrangements

Unless otherwise stated in the Diversion Order deliveries and packaging shall be in accordance with Article 3.1 (Delivery, Packaging and Consignment Arrangements) and the Contractor shall mark the outside of the packaging with the Diversion Order number.

### 3.6.4 Payment for Products and Excess Delivery Charges

3.6.4.1 The bill paying arrangements stipulated in the Contract shall apply.

3.6.4.2 The Contractor shall be entitled to be paid a fair and reasonable price for additional work and costs arising from compliance with each Diversion Order.

3.6.4.3 If the Products despatched against a Diversion Order are packed to a standard other than that for which a price has been agreed under the Contract, the Contractor shall submit a quotation to the Contracting Authority and a price shall be agreed before a bill for the packaging is submitted. The Contract shall be amended accordingly.

## **4. Performance and Financial Guarantees**

Performance or financial guarantees, or both, as specified in the Contract shall apply.

## **5. Price**

### 5.1 Contract Price

The Contract Price shall be as defined in the Contract. Except as otherwise stated in the Contract, the Contract Price is inclusive of any taxes (other than Value-Added Tax (VAT)) or duties. The Contract Price may be subject to variation in accordance with the Contract.

### 5.2 Variation of Price

5.2.1 The Contract Price set out in the Contract is a Variable Price established at the economic conditions stated in the Contract and shall be subject to change only in accordance with the terms of the Contract and the provisions of this Article 5.2.

5.2.2. The Contract Price shall be subject to price revision by application of the price revision formula (e) specified in the Contract as soon as possible after publication of the relevant indices or rates, whether provisional or final. In the event of changes to the basis of any of the indices or rates specified in the price revision formula during the period of the Contract and before price revision to produce the final Contract Price, or should the indices or rates cease to be published or the index or rate value is subsequently amended, the Contracting Authority and the Contractor shall agree a fair and reasonable adjustment to the relevant index or rate or, if appropriate, shall agree revised formula (e) which shall have substantially the same effect as the original index or rate. The Contract shall be amended accordingly.

5.2.3 The variation of price shall be based on the Delivery Schedule or the actual date of delivery, whichever is the earlier.

5.2.4 The Contractor shall notify the Contracting Authority of any factor that may have a material bearing on the operation of the provisions of this Article 5.2 such as to cause a significant divergence from their intended purpose, in order that the Contracting Authority and the Contractor may consider whether any alternative arrangements would be appropriate.

5.2.5 The formula (e) shall be used to adjust relevant payments due and identified under the Contract and in claiming that payment the calculation for variation of price shall be shown separately. If an index or rate is no longer available then pending agreement of a revised index or rate the last published index or rate shall be used for the purposes of claiming payments on a provisional basis.

### 5.3 Price Investigation

5.3.1 The Contractor shall permit Price Investigation in the following cases:

- (1) For the purpose of agreeing the Contract Price when the Contract Price has not been agreed prior to Contract award; and
- (2) For the purpose of agreeing the price of Contract amendments and/or additional orders for the same or similar Products.

5.3.2 For the purpose set out in Article 5.3.1 the Contractor shall, at all times before the Contract Price or Contract amendment price has been agreed, and subject to the time period specified in the Contract for this purpose:

- (1) Maintain a record of such particulars of the costs of the Product (including, for example, details of times taken and of wage rates paid and records of Contractor's support personnel) as may be available from its normal accounting procedures and any other particulars specified in the Contract;
- (2) When requested by the relevant national pricing authority/pricing audit services on behalf of the Contracting Authority furnish a summary of any of the costs mentioned in Article 5.3.2 (1) in such form and detail as they may reasonably require;
- (3) Afford such facilities as the relevant national pricing authority/pricing audit services on behalf of the Contracting Authority may reasonably require to visit the Contractor's premises and examine:
  - i. Any or all of the processes involved in the performance of the Contract in order to estimate the costs; and
  - ii. The records maintained under Article 5.3.2 (1).
- (4) Maintain and on request furnish such particulars of its plans for the manufacture of the Product as the relevant national pricing authority/pricing audit services on behalf of the Contracting Authority may reasonably require;
- (5) Maintain and on request furnish such particulars as the relevant national pricing authority/pricing audit services on behalf of the Contracting Authority

may reasonably require in order that it may be satisfied that the prices paid by the Contractor to its direct Sub-Contractors are fair and reasonable; and

- (6) On request provide the relevant national pricing authority/pricing audit services on behalf of the Contracting Authority with access to and the right to examine, all books, records, plans, documents and any other Information relating to the Contractor's costs, costs estimates, or both in relation to the Contract or the Contract amendment for the proper purposes of the Price Investigation.

5.3.3 The Contracting Authority reserves the right in the case of non-competitive Sub-Contracts and non-competitive amendments whose individual value exceeds, unless otherwise specified in the Contract, €250 000 (two hundred and fifty thousands Euro) to have such Price Investigations conducted at the Sub-Contractors' premises and the Contractor shall ensure that appropriate provisions that conform to the provisions of this Article 5.3, including this Article 5.3.3, are included in those direct non-competitive Sub-Contracts. The Contracting Authority shall report the outcome of the Price Investigation to the Contractor and the buyer shall take due account of that Information in negotiating and agreeing with the Sub-Contractor the price for the Sub-Contract concerned. The Contractor's overall responsibility for the performance of the work under the Contract shall in no way be diminished by the exercise of this right by the Contracting Authority.

5.3.4 The charging rates applicable shall be those agreed for similar work undertaken on behalf of the relevant national defence administration unless otherwise agreed. If the overhead rates of the Contractor for similar contracts placed by national or international public services have not been established or approved by a government authority or the Contracting Authority, the Contractor shall provide such data as the relevant national pricing authority/pricing audit services on behalf of the Contracting Authority may reasonably require to support the rates claimed by the Contractor.

5.3.5 In the event of delay in agreeing the Contract Price or Contract amendment price, the Contracting Authority shall determine fair and reasonable provisional prices which may from time to time be altered by the Contracting Authority, subject to the maximum price agreed in the Contract if applicable. When the Contract Price or Contract amendment price is agreed, the Contracting Authority shall pay to the Contractor the amount by which any sum payable on the basis of the agreed Contract Price or Contract amendment price exceeds any sum paid on the basis of the provisional prices or the Contractor shall pay to the Contracting Authority the amount by which any sum paid on the basis of provisional prices exceeds the sum payable on the basis of the agreed Contract Price or Contract amendment price.

#### 5.4 Price Audit

5.4.1 When the Contract is placed without competition, the Contracting Authority shall have the right to have Price Audits conducted in relation to the Contract at any time during the performance of the Contract and for a period of 5 (five) years from the date of final delivery or completion of services under the Contract. The Contractor shall provide a cost statement certified as true and fair by the Contractor of its costs as may be available from its normal accounting records if the Contracting Authority exercises this right within that period.

5.4.2 The cost statement shall be in a form and with such content as requested by the relevant national pricing authority/pricing audit services on behalf of the Contracting Authority and contain particulars of all the Contractor's expenditure actual and committed as may be available from its normal accounting records, as required by the relevant national pricing authorities.

5.4.3 The Contractor shall on request provide the relevant national pricing authority/pricing audit services on behalf of the Contracting Authority with access to, or the right to examine, all books, records, plans, documents and any other Information relevant to the Contractor's costs in relation to the Contract for the proper purposes of the Price Audit.

5.4.4 The charging rates applicable shall be those agreed for similar work undertaken on behalf of the relevant national defence administration unless otherwise agreed. If the overhead rates of the Contractor for similar contracts placed by national or international public services have not been established or approved by a government authority or the Contracting Authority, the Contractor shall provide such data as the relevant national pricing authority/pricing audit services on behalf of the Contracting Authority may reasonably require to support the rates claimed.

## 5.5 Availability of Information

5.5.1 When the Contract is placed without competition, the Contractor shall ensure that proper accounts and records (including invoices, receipts and vouchers) are kept of the cost of carrying out the Contract and of all expenditures or commitments made by the Contractor and non-competitive Sub-Contractors in connection with the Contract. The Contractor shall ensure that appropriate provisions that conform with the provisions of Article 5.4 (Price Audit), this Article 5.5, including this Article 5.5.1, Articles 5.6 (Equality of Information Price Statement), 5.7 (Privacy of Information) and 5.8 (Access and Use of Information by the Contracting Authority) are included in non-competitive direct Sub-Contracts that, unless otherwise provided in the Contract, exceed €250,000 (two hundred and fifty thousand Euro).

5.5.2 The Contractor shall not, without the prior written consent of the Contracting Authority, dispose of any of those accounts, records, invoices, receipts and vouchers during the course of the Contract and for a period expiring at the end of the period stated in Article 5.4.1.

## 5.6 Equality of Information Pricing Statement

5.6.1 Unless otherwise stated in the Contract an Equality of Information Pricing Statement (EIPS) shall be compiled for all Contracts in excess of €1,000,000 (one million Euro) placed without competition and Contract amendments in excess of €1,000,000 (one million Euro).

5.6.2 The EIPS shall be signed after price agreement at the same time as the Contract or Contract amendment is signed. If it appears to the Contracting Authority or the Contractor from the Information referred to in the EIPS that the achievement of a fair and reasonable price was frustrated because the Information in the EIPS at the time of signature has proved to be materially inaccurate or incomplete or if there is any misrepresentation, negligence or other breach of legal duty in or in connection with the EIPS (other than a breach of confidence), a Price

Audit conducted in accordance with Article 5.4 (Price Audit) may indicate a basis for a claim.

5.6.3 If a claim is made by either the Contractor or the Contracting Authority and they cannot reach agreement by negotiation, then neither the Contractor nor the Contracting Authority shall have any right or remedy against one another except that either of them may make a reference to arbitration for determination of what adjustment (if any) should be made to the Contract Price and whether any payment or repayment by the Contractor or the Contracting Authority should as a consequence be made.

5.6.4 Except in the case of fraudulent misrepresentation, neither party shall be entitled to rescission or avoidance of the Contract by reason of misrepresentation or breach of the EIPS.

#### 5.7 Privacy of Information

Subject to Articles 7.2.6 and 7.2.7, all costing and pricing Information disclosed by the Contractor shall be held in confidence by the Contracting Authority and/or its Authorised Representative.

#### 5.8 Access and Use of Information by the Contracting Authority

5.8.1 The Contractor recognises that the Contracting Authority shall, subject to the provisions of Article 5.7 (Privacy of Information), have access to any Information arising from any Price Investigation or Price Audit performed by the relevant national pricing authority/pricing audit services on behalf of the Contracting Authority, for the purpose of:

- (1) Recording the pricing assumptions in an EIPS, subject to Articles 5.6.1 and 5.6.2;
- (2) Negotiation of the Contract Price;
- (3) Negotiation of the prices of any Contract amendment; and
- (4) Negotiation of the prices of future contracts.

#### 5.9 Import and Export Duties and VAT

##### 5.9.1 Import and Export Duties

5.9.1.1 The Contractor shall be responsible for complying with all applicable national import and export customs regulations, including the payment of any duty arising there from, and for obtaining any licences, customs declarations and other documents which are required concerning deliveries to or from the Contractor's premises.

##### 5.9.2 Value-Added Tax (VAT)

5.9.2.1 The Contractor shall be responsible for applying as appropriate the relevant national law derived from the European Directive n°2006/112/EC dated 28/11/06 as may be amended from time to time or its successors. The EC VAT Registration Number(s) stated in the Contract shall be provided in each invoice raised by the Contractor under the Contract. The Contractor shall specify in its invoice any VAT to be paid on each item on

the invoice that is subject to VAT. The invoice shall also specify the applicable VAT rate. If, during the term of the Contract the applicable VAT rate increases or decreases by operation of the relevant national law, that change shall be taken into account in subsequent invoices.

5.9.2.2 The Contractor is responsible for the determination of the VAT liability in accordance with the applicable national law. The Contracting Authority shall pay to the Contractor a sum equal to the output VAT chargeable on the tax value of any item of the invoice according to the applicable national law at the relevant tax point.

## **6. Payment and Vesting**

### **6.1 Payment**

#### **6.1.1 General**

Payments shall be due for each Product as specified in the Contract. Payment may also be due on an interim basis where and to the extent provided for in the Contract. All payments to the Contractor under the Contract shall be made in the currency (ies) specified in the Contract.

#### **6.1.2 Interim Payments**

6.1.2.1 The Contractor may claim interim payments, less any applicable remedies or retentions, in accordance with the interim payment schedule and conditions specified in the Contract. The Contracting Authority shall not be bound to make payment until the contractually due date.

6.1.2.2 Where the Contract stipulates interim payments are to be paid according to milestones, the Contractor shall not receive an interim payment where a milestone is not achieved in accordance with the criteria defined in the Contract for that milestone.

6.1.2.3 The Contracting Authority shall not be obliged to make a payment to the Contractor in respect of completed milestones if the Contracting Authority has credible evidence that the Contractor will not render complete performance of his obligations in respect of the Contract. Where the Contracting Authority intends to rely on this Article 6.1.2.3 as the basis for rejecting any claim for an interim payment which the Contractor may make, the Contracting Authority shall give to the Contractor Notice in writing of its intention together with the Contracting Authority's reasons for the rejection.

6.1.2.4 If at any time overpayment to the Contractor occurs, such overpayments shall be recoverable by the Contracting Authority and interest shall be due to the Contracting Authority calculated 31 days from the date of overpayment at a rate of "EURIBOR at 3 (three) months" plus 3% at that 31st day. Any period of delay in payment attributable or caused by the default of the Contracting Authority shall not be taken into account for the calculation of the interest to be paid by the Contractor.

6.1.2.5 In the event of a default by the Contractor causing termination or in the event of rejection of the Product the Contracting Authority reserves the right to require the return of interim payments without prejudice to its

rights under Article 11 (Termination) and interest shall be due in accordance with the provisions of Article 6.1.2.4 where the date of overpayment is calculated from the date the interim payments are due to be returned.

#### 6.1.3 Final Payment

The Contractor shall be entitled to claim final payment less all permanent retentions on successful completion or performance of the Contract as specified in the Contract. Final payment for each Product shall be as specified in the Contract payment schedule. The final payment shall be abated in full by any interim payments not previously liquidated made to the Contractor under Article 6.1.2.

#### 6.1.4 Payment Arrangements

6.1.4.1 In order to obtain payment the Contractor shall, upon completion or performance of the Contract (or any part of the Contract for which the Contractor is entitled to payment) submit its invoice to the Contracting Authority, unless stated otherwise in the Contract, for the attention of the OCCAR Programme Division as defined in the Contract. A copy of each invoice shall be sent by the Contractor to OCCAR Central Office at the address specified in the Contract.

6.1.4.2 Invoices submitted by the Contractor under the Contract shall be originals and shall be signed by the Contractor verifying that the invoice is in compliance with the Contract and that the sum is due. Invoices shall be accompanied by relevant documents required by the Contract substantiating the basis of the payment.

6.1.4.3 The OCCAR Programme Division will determine whether the invoice is prima facie valid and shall promptly notify the Contractor if there is any error in the invoice that will result in non-payment giving the reasons for the determination.

6.1.4.4 A valid invoice is one that satisfies the Contractor's national statutory requirements concerning the form and content and is in accordance with the Contract requirement as to time and substance.

6.1.4.5 All valid, properly completed invoices submitted to the OCCAR Programme Division in accordance with this Article 6.1.4 shall be paid on or before the Relevant Day. For the purpose of this Article 6.1.4 the last day of payment by the Contracting Authority shall be defined as the "Relevant Day" which means the day which is 30 (thirty) days after the day upon which a valid invoice is received by the Contracting Authority in accordance with Article 6.1.4.1. Payment shall be made in the currency and into the bank account specified in the Contract in good funds immediately available for drawing by the Relevant Day. Non-valid or incomplete invoices shall not be paid.

6.1.4.6. The Contract shall specify which of the following provisions shall apply.

6.1.4.6.1. Whenever under the Contract any sum of money shall be recoverable from or payable by the Contractor to the Contracting Authority an official request for payment shall be raised by the Contracting Authority and if not paid (by credit or other means) within 30 (thirty) days of receipt



the same may be deducted from any sum then due, or which at any time thereafter may become due, to the Contractor under the Contract. The provisions of Article 6.1.5 (Late payment) shall apply to any sums due from or payable by the Contractor to the Contracting Authority.

6.1.4.6.2. Whenever under the Contract any sum of money shall be recoverable from or payable by the Contractor to the Contracting Authority an official request for payment shall be raised by the Contracting Authority and if not paid (by credit or other means) within 30 (thirty) days of receipt the same may be deducted from any sum then due, or which at any time thereafter may become due, to the Contractor under the Contract or under any other contract placed by the Contracting Authority in the name and on behalf of the Participating States. The provisions of Article 6.1.5 (Late Payment) shall apply to any sums due from or payable by the Contractor to the Contracting Authority.

6.1.4.7 Notwithstanding any statement to the contrary on the invoice, payment shall not be construed as acceptance by the Contracting Authority of the performance of the Contractor's obligations nor as a waiver of its rights and remedies either under the Contract or otherwise.

#### 6.1.5 Late Payment

6.1.5.1 From the day after the Relevant Day and thereafter until payment is made by the Contracting Authority in accordance with Article 6.1.4.5 simple interest shall be due and payable and may be claimed by the Contractor on the value of all valid claims for payment (or unpaid parts thereof). That rate of interest shall be the EURIBOR rate at 3 (three) months plus 3% at the Relevant Day.

6.1.5.2 Any period of delay in payment attributable or caused by the default of the Contractor shall be excluded from the calculation of the interest to be paid by the Contracting Authority in accordance with Article 6.1.5.1.

6.1.5.3 All claims for interest made pursuant to this Article 6.1.5 shall be recorded on an invoice and notified in writing to OCCAR Central Office at the address specified in the Contract.

6.1.5.4 Any interest pursuant to this Article 6.1.5 shall not form a part of the Contract Price and, as a remedy for late payment, shall not be subject to VAT.

#### 6.2 Transfer of Ownership

The transfer of ownership may apply either through early vesting or by acceptance. The Contract shall specify which of the following provisions shall apply.

##### 6.2.1 Transfer of Ownership through Early Vesting

6.2.1.1 All materials, parts and equipments acquired or allocated and required for incorporation in any of the Products shall vest in and become the property of the Participating States in accordance with the Contract from the time they are acquired or allocated by the Contractor for the

purposes of the Contract and shall not from that time be the property of the Contractor. Notwithstanding ownership in the Participating States, where they have a right of disposal the Contracting Authority shall provide all disposal instructions, if any, to the Contractor on behalf of the Participating States. Neither the Contractor nor a Sub-Contractor or any other person shall have a lien on or charge over any of the Products which have vested in the Participating States under the terms of this Article 6.2.1. The Contractor shall take all reasonable steps necessary to ensure that the provisions of this Article 6.2.1 are brought to the notice of all Sub-Contractors and other persons dealing with the Products.

6.2.1.2 The Contractor shall place a mark on those materials, parts and equipments or, where this is not practicable, make a record in an appropriate account to ensure that they are readily identifiable as being the property of the Participating States.

6.2.1.3 Prior to delivery in accordance with the terms of the Contract, the Contractor shall be responsible for the maintenance, upkeep and storage of the Products and associated materials, parts and equipments for incorporation in the Products. All associated costs shall be considered as included in the Contract Price.

6.2.1.4 In the event of rejection of a Product under the terms of Article 3.3 (Acceptance, Deferment and Rejection), and recovery of all payments previously made to the Contractor relating to that Product, that Product shall thereupon re-vest in the Contractor.

6.2.1.5 In the event of deferment of acceptance of a Product in accordance with Article 3.3.3 (Deferment), that Product shall continue to vest in the Participating States.

6.2.1.6 In the event of termination of the Contract other than under Article 11.3 (Termination of Contract otherwise than for Default), the Products which have not been accepted in accordance with Article 3.3 (Acceptance, Deferment and Rejection) shall re-vest in the Contractor 30 (thirty) days after termination takes effect except to the extent that, within that 30 (thirty) day period, the Contracting Authority exercises its rights under Article 6.2.1.7 to retain those Products. Any payment made by the Contracting Authority for the Product that has re-vested with the Contractor shall be recoverable from the Contractor.

6.2.1.7 If the Contracting Authority has given the Contractor Notice, within the 30 (thirty) day period referred to in Article 6.2.1.6, that the Contracting Authority elects to retain the property in the materials, parts and equipments for incorporation in the Products, the Contractor shall hand over to the Contracting Authority any materials, parts and equipments in which the Contracting Authority has by that Notice elected to retain the property. The Contracting Authority shall pay a fair and reasonable price for any materials, parts and equipments for which it had elected to retain the property.

6.2.1.8 The Contractor shall not use or permit to be used any Product otherwise than for performance of the Contract except subject to and in accordance with the prior written approval of the Contracting Authority. No

approval for this purpose shall relieve the Contractor of any of its obligations under the Contract except as expressly provided for in that approval.

#### 6.2.2 Transfer of ownership upon acceptance

Each Product shall vest in, become the property of, and be at the disposal of the relevant Participating State to whom delivery of each Product is to be made upon acceptance in accordance with Article 3.3 (Acceptance, Deferment and Rejection).

## **7. Intellectual Property Rights**

### 7.1 General Provisions

7.1.1 This Article 7 applies to Technical Information specified as to be delivered in the Contract, whether or not that Technical Information is Foreground Technical Information or Background Technical Information, or as later specified as required in accordance with the Contract. The Contractor shall grant the rights to Technical Information as specified in the intellectual property rights Articles in the Contract for the benefit of the Participating States, acting individually, jointly or in any combination of them and rights to the Contracting Authority as defined in this Article 7.

7.1.2 Intellectual property rights provisions in the Contract are subject to the rights of third parties and are in addition to any rights previously secured by the Contracting Authority or the Participating States, or both, or otherwise available to the Participating States under their national laws.

7.1.3 Ownership of Foreground Technical Information shall vest in the Contractor or Sub-Contractor generating that Technical Information.

7.1.4 Ownership of Background Technical Information will not be acquired by the Participating States or the Contracting Authority under the Contract.

7.1.5 To avoid doubt, Background Technical Information for which pre-existing rights have not been acquired by the Participating States or which are not specified as an independent deliverable item cannot in any event be disclosed or used by Participating States and/or the Contracting Authority otherwise than with deliverable Foreground Information.

7.1.6 Unless otherwise agreed in the Contract, neither the Contracting Authority nor any of the Participating States will have the right to use or have used Technical Information to manufacture or modify Commercial Items.

7.1.7 The Contract shall specify which of the following provisions shall apply:

- (1) The Contractor shall include all relevant requirements of this Article 7 in its direct Sub-Contracts that involve Technical Information specified in the Contract to be delivered and shall ensure that all those relevant requirements are included in any subsequent tier Sub-Contracts that involve Technical Information specified to be delivered; or
- (2) The Contractor shall:

i. Include in its direct Sub-Contracts that involve Technical Information specified in the Contract to be delivered provisions that provide that the rights of the Participating States set out in this Article 7 shall be directly enforceable by each Participating State, unless the Contractor has secured ownership in that Technical Information to the benefit of the Participating States and the Contracting Authority as defined in the Contract,

ii. Ensure that all these requirements are included in Sub-Contracts at subsequent tiers.

7.1.8 The Contractor shall not enter into a direct Sub-Contract that restricts the user rights granted under the Contract to the Participating States and the Contracting Authority with respect to Technical Information specified as to be delivered, except if authorised by Notice by the Contracting Authority.

7.1.9 Nothing in the Contract shall take precedence over mandatory national laws applicable in the country where the work which generates intellectual property is carried out.

## 7.2 Disclosure of Information

7.2.1 Subject to Articles 7.2.5, 7.2.6 and 7.2.7 each Party and the Contracting Authority:

(1) Shall treat in confidence all Information it receives from the other under or in connection with the Contract;

(2) Shall not disclose any of that Information to any third party, without the prior written consent of the disclosing Party or the Contracting Authority, which consent shall not be unreasonably withheld, except that the Contractor may disclose Information in confidence to those persons and to the extent necessary for the performance of the Contract;

(3) Shall not use any of that Information otherwise than for the purposes set out in the Contract;

(4) Shall not reproduce any of that Information except to the extent necessary for the purpose of exercising its rights of use and disclosure under the Contract; and

(5) Shall disclose that Information only on terms that maintain the confidentiality of that Information and as far as possible, shall limit that disclosure to that part of the Information relevant to the purpose.

7.2.2 The Contractor shall take all reasonable precautions necessary to ensure that all Information disclosed to the Contractor by or on behalf of the other Party or the Contracting Authority under or in connection with the Contract:

(1) Is disclosed to its employees and direct Sub-Contractors, only to the extent necessary for the performance of the Contract; and

(2) Is treated in confidence by them and not disclosed or used except with prior written consent by the Contracting Authority or the appropriate Participating State other than for the purpose of performing work or having work performed for the Contracting Authority under the Contract or any Sub-Contract under it.

The Contractor shall include provisions that conform to the provisions of this Article 7.2 in its direct Sub-Contracts and shall ensure that such provisions are adequately covered in Sub-Contracts at subsequent tiers.

7.2.3 The Contractor shall ensure that its employees are aware of its arrangements for discharging the obligations at Articles 7.2.1 and 7.2.2 before they receive Information and take such steps as may be reasonably practical to enforce those arrangements.

7.2.4 Notwithstanding Article 7.2.1, for Information that is delivered to each other, the disclosing party shall mark it with an appropriate legend, including any legend specified in the Contract, consistent with the rights granted under the Contract, regarding further disclosure and the right of use of such Information.

7.2.5 Provided the relationship to any other Information is not revealed Articles 7.2.1 and 7.2.2 shall not apply to any Information to the extent that either Party or the Contracting Authority:

- (1) Exercises rights of use or disclosure granted otherwise than in consequence of, or under, the Contract; or
- (2) Has the right to use or disclose the Information in accordance with other conditions of the Contract; or
- (3) Can prove:
  - i. That the Information was or has become published or is publicly available for use otherwise than in breach of any provision of the Contract or any other agreement between the Parties or between the Contracting Authority and any one of the Parties; or
  - ii. That the Information was already known to it (without restrictions on disclosure or use) prior to it receiving the Information under or in connection with the Contract; or
  - iii. That the Information was received without restriction on further disclosure from a third party who lawfully acquired it and who is itself under no obligation restricting its disclosure; or
  - iv. From its records that the same Information was derived independently of that received under or in connection with the Contract.

7.2.6 Neither Party shall be in breach of the Contract where it can show that any disclosure of Information was made solely and to the extent necessary to comply with a statutory, judicial or parliamentary obligation. Where that disclosure is made, the Party or the Contracting Authority making the disclosure shall ensure that the recipient of the Information is made aware of and required to respect its confidentiality. That disclosure shall in no way diminish the obligations of the Parties and the Contracting Authority under this Article 7.2.

7.2.7 Further to Article 7.2.6, to comply with statutes requiring public disclosure of the Information, neither the Contracting Authority nor a Participating State shall be in breach of the Contract where it can show that any disclosure of Information is made solely and to the extent necessary to comply with those statutes. To the extent permitted by the time for compliance under the applicable statutory

provisions, the Contracting Authority or the Participating State shall consult the Contractor where it is considering the disclosure of Information under the applicable statutory provisions and, in any event, shall provide prior Notice to the Contractor of any decision to disclose the Information. The Contractor acknowledges and accepts that its representations on disclosure during consultation may not be determinative and that the decision whether to disclose Information in order to comply with the applicable statutory provisions is a matter in which the Contracting Authority or the Participating State shall exercise its own discretion, subject always to the provisions of the applicable statutory provisions. For the avoidance of doubt, nothing in this Article shall affect the Contractor's rights at law.

7.2.8 Nothing in this Article 7 shall affect the Parties' and the Contracting Authority's obligation of confidentiality where Information is disclosed orally or visually in confidence. If Information is disclosed orally or visually in confidence it shall be identified as such at the time of disclosure to the recipient and the Information shall be treated in accordance with this Article 7.

7.2.9 Nothing in this Article 7 shall affect any security requirements contained in the Contract.

### 7.3 User rights and obligations in Technical Information

#### 7.3.1 Rights and obligations of the Participating States

7.3.1.1 Unless otherwise specified in the Contract, each of the Participating States shall have the irrevocable non exclusive right to copy, use and have used, through a right to sub-licence, and modify Technical Information specified to be delivered under the Contract, in whole or in part, subject to Article 7.1.5, for each of its Government Purposes, as provided in this Article 7.

This irrevocable right shall be exercisable by or on behalf of each the Participating States in any part of the world.

7.3.1.2 The right defined in Article 7.3.1.1 shall include, without being limited to, the following rights for each of the Participating States:

- (1) To copy, use itself or to have used by another contractor and disclose Technical Information specified to be delivered under the Contract, for the study, evaluation, assessment, maintenance, repair, refurbishment, modification, disposal, and product acceptance and certification, operation, deployment and training (including production and use of ancillary items such as simulators and training aids) and other post design services of the Product;
- (2) To copy, use itself or have used by another contractor and to disclose Technical Information specified to be delivered under the Contract necessary to manufacture the developed Product for Government Purposes, or to modify the design of the Product including manufacture in accordance with that modified design;
- (3) To copy, use, modify and circulate any reports expressly produced for information purposes, for example abstracts of technical reports,

including disclosure to the Participating State's other defence suppliers, bidders for contracts and other governments.

7.3.1.3 When exercising their 'have used' rights, as defined in Articles 7.3.1.1 and 7.3.1.2 the Participating States concerned shall notify the Contractor of each sub-licence intended to be granted providing sufficient Information to identify the prospective licensee and the scope and duration of the sub-licence.

If the Contractor demonstrates to the Contracting Authority that the granting of that sub-licence would lead to a significant commercial harm / substantial economic loss arising after the signature of the Contract for the Contractor, the Parties shall consult on the need for contractual restrictions on the use of that Information while ensuring appropriate utilisation of the Technical Information by the Participating States.

7.3.1.4 Any modification not undertaken by the Contractor or to the extent not involving the Contractor shall not be at the risk of the Contractor.

7.3.1.5 In respect of Technical Information required to be delivered under the Contract, except as specifically set out in this Article 7, no additional payments (over and above the Contract Price) shall be made to the Contractor for its copying, modification or use of that Technical Information by or on behalf of the Participating States in accordance with the terms of this Article 7.

7.3.1.6 If Background Technical Information delivered or to be delivered under the Contract concerning the Product is:

- (1) To be used by or on behalf of a Participating State for that Participating State's Government Purpose for manufacturing or modification purposes or any purposes especially identified in the Contract otherwise than by the Contractor; and
- (2) Is not Background Technical Information in respect of which the Contracting Authority and/or the Participating States may exercise any pre-existing rights of use or disclosure for the purposes of Article 7.3.1.6 (1) above; and
- (3) Identified and established as self-standing Background Technical Information to which Article 7.3.1.5 shall not apply, or is identified and established as such during the performance of the Contract when the Contractor can demonstrate that prior identification was not feasible,

its copying, modification or use shall be subject to prior agreement of fair and reasonable terms.

7.3.1.7 Should agreement on those terms not be reached between the Parties by the time that the Technical Information is to be used in accordance with Article 7.3.1.6 (1) failure to agree those terms shall not prevent the use by the Participating States or the Contracting Authority on behalf of the Participating States of the Background Technical Information pending resolution of those terms, which shall be agreed or determined as soon as possible thereafter, except that a reasonable provisional fee as

defined by the Contracting Authority shall be paid by the Contracting Authority pending agreement or determination of the actual fee to be paid and other terms. In the case of manufacture those terms will take into account inter alia the technology, the intended size of any production order for the Product concerned as well as the extent to which the order may have been fulfilled before the licence is exercised. In the case of modification, those terms will take into account the extent and value of the Background Technical Information required.

7.3.1.8 Nevertheless, no payment for the exercise of those rights described in Article 7.3.1.6 shall be due in the event of work placed with the Contractor or with the owner or licensee of the intellectual property rights legally connected to the Contractor.

7.3.1.9 Subject to the provisions of Article 7.3.1.6, the Participating States and agents on their behalf shall have the right to seek tenders to carry out tasks in exercise of rights under Article 7.3.1.2, and may, after having informed the Contractor, provide such Technical Information received under Article 7.3.1.1, as they consider necessary to be provided for the purpose of the invitation to tender. The Participating States shall ensure that any recipient of Technical Information shall be bound not to use that Technical Information for any other purpose except as may otherwise be provided by the rights under Article 7 and to avoid conflicts of interest with the owner or licensee of that Technical Information. Unless otherwise agreed, in seeking to manufacture or modify the Product, the Participating States and agents on their behalf shall invite the Contractor to tender. Any tender shall be considered either in competition with other tenders or alone, at the discretion of the Participating States and agents on their behalf.

7.3.1.10 The Participating States and agents on their behalf may also release Technical Information for the purpose of securing independent technical advice, including that relating to health and safety, air- and seaworthiness matters and the acceptability of the Product in meeting the technical requirements of the Participating States concerned, relating to the Product. The Participating States shall ensure that any recipient of Technical Information under this Article 7.3.1.10 shall be bound not to use that Technical Information for any other purpose except as may otherwise be provided by the rights under Article 7 and to avoid conflicts of interest with the owner or licensee of that Technical Information. If the Contractor demonstrates to the Contracting Authority that the disclosure or dissemination of sensitive Technical Information would lead to a significant commercial harm / substantial economic loss arising after the signature of the Contract for the Contractor, the Parties shall consult on the need for contractual restrictions on the use of that Technical Information while ensuring appropriate utilisation of the Technical Information by the Participating States.

7.3.1.11 The Participating States rights in Technical Information and in the Product include the right:

(1) To sell, transfer, dismantle or dispose of obsolete or surplus Product;



- (2) To pass to any purchaser of equipment sold, transferred or disposed of as obsolete or surplus, such Technical Information deliverable under the Contract concerning the Product in the possession of the Participating States or the Contracting Authority as is necessary to enable the purchaser to operate and maintain the equipment concerned.

The Participating States shall give Notice to the Contractor as early as possible of their intention on each occasion to exercise any one of these rights.

7.3.1.12 The Contractor shall co-operate with the Participating States and at the request of the Participating States other nations and contractors in providing such assistance on fair and reasonable terms as may be required to achieve the interoperability of Products supplied under the Contract with third party equipments. Such assistance shall include the provision of Technical Information to relevant nations and contractors for the purpose of their assessing and performing interoperation.

7.3.1.13 For international cooperation agreements or arrangements between the Participating States and third party state(s), the Participating States may communicate under confidentiality agreements and for information purpose only, Technical Information strictly necessary for the recipient to evaluate the interest of participating in the co-operation. Such Participating State(s) may require the Contractor, subject to export control regulations, to enter into bona fide negotiations with third party states for the grant of a licence to use the deliverable Technical Information for use in international co-operation agreements and arrangements. Any such co-operation agreements or arrangements and related negotiations will provide for the preservation of confidentiality in that Technical Information and for the need to negotiate a licence with the Contractor.

7.3.1.14 When the Product includes Software developed at the expense of the Participating States, the Technical Information specified as to be delivered under the Contract shall include sufficient Technical Information, including Source Material to enable the Software to be copied, used, have used or modified in connection with anything done under this Article 7.3. This right includes the right to observe, study and/or test the functioning of the Software and also to decompile and/or recompile, translate, adapt or transform, correct errors, improve, incorporate parts, interface with other Software or systems or have it made, in whole or in part, original or altered.

Source Material shall be delivered on request to the Contracting Authority acting on behalf of Participating States.

If computer software that is a Commercial Item is supplied as part of a Product the Contracting Authority may secure by negotiation rights to use the software.

Subject to any limitation noted under Articles 7.1 and 7.3.1 the Participating States shall have the right, free of charge, to use or have used in any manner and for any purpose any Technical Information which has been produced by or for the Participating States with the aid of the Product.

### 7.3.2 Rights and obligations of the Contracting Authority

The Contracting Authority shall have the right to use Technical Information furnished under the Contract for the management of the Programme including the right to receive and copy, modify or disclose that Technical Information for that purpose.

When exercising these rights and other rights, on behalf of the Participating States, granted to them under Article 7.3.1, the Contracting Authority shall have the same obligations as those of the Participating States with regard to the Technical Information.

### 7.3.3 Rights and obligations of the Contractor

7.3.3.1 Subject to security and national export regulations and to any provision concerning commercial exploitation as defined in Article 7.5, the Contractor shall have the right to disclose, reproduce or use in whole or in part Foreground Technical Information owned by the Contractor, and to permit others to do so.

7.3.3.2 The Contractor shall have a right to use and have used free of charge any Technical Information specified in the Contract to be delivered by the Participating States to the Contractor for the necessary performance of its obligations under the Contract.

7.3.3.3 In addition to the requirements of national export control laws and regulations, the Contractor shall not disclose Technical Information owned by any of the Participating States to a non-Participating State without having first obtained the written agreement of the Contracting Authority on behalf of each of those Participating States.

The Contracting Authority shall keep the Contractor informed about the progress of any outstanding agreement.

7.3.3.4 Subject to any security or export control restrictions, the Contractor shall inform the Contracting Authority of the occurrence of improvements which it has made to the Product for a period of 10 (ten) years from the date of final delivery under the Contract. Upon request, the Contractor shall offer to grant a licence on fair and reasonable terms and conditions to be negotiated.

7.3.3.5 The Contractor shall retain all Technical Information delivered under the Contract for 5 (five) years from the date of final delivery under the Contract or for such other time specified elsewhere in the Contract. The Contractor shall retain for the Relevant Period a copy of such deliverable Software as is required for the performance of its obligations under this Article 7. Before disposing of Technical Information delivered under the Contract, the Contractor shall inform the Contracting Authority and, if the Contracting Authority shall so require, shall surrender the deliverable Technical Information to the Contracting Authority or its agent. The Contracting Authority shall be entitled to request the Contractor to deliver deliverable Technical Information at any time during which it is held by the Contractor. The costs for delivering retained Technical Information in the form available at the time of request are to be borne by the Contracting Authority. In respect of such delivery the costs shall be limited to fair and reasonable costs of conversion, if requested by the Contracting Authority, collation, reproduction and transmission.

7.3.3.6 The Contractor shall make all reasonable endeavours to provide assistance to the Participating States in the interpretation or clarification of any Technical Information required to be delivered. Such assistance shall be limited to that required to enable the staff of the Participating States or a third party of similar skill to the Contractor in the relevant area of technology to interpret any Technical Information supplied under the terms of this Article 7 for so long as the Contractor is required to hold Technical Information under the Contract.

The Contractor shall be entitled to payment by or on behalf of the Participating States on fair and reasonable terms for any such assistance provided.

7.3.3.7 The Contractor shall ensure that a copy of Technical Information specified to be delivered under the Contract is available, by ensuring that at least one copy of that Technical Information is legally owned by the Participating States and is clearly designated as such to identify ownership by the Participating States. The Contracting Authority shall provide instructions to the Contractor if required on behalf of the Participating States, in respect of that copy of Technical Information under joint ownership of the Participating States. The Contracting Authority shall be entitled to arrange for that copy to be delivered to the Participating States promptly on request.

7.3.3.8 When the Technical Information specified in the Contract as to be delivered is not sufficient to allow the Participating States or the Contracting Authority to exercise their rights as defined in Articles 7.3.1 and 7.3.2 above, the Contractor shall, subject to the right of third parties, provide the Participating States or the Contracting Authority with additional Technical Information necessary for the Contractor to make the Product, and which could be reasonably required by an "expert in the field" belonging to a Participating State, an agent or a contractor of a Participating State, having a level of competence similar as the one of the Contractor in the related technological field. That additional Technical Information shall be provided within 2 (two) months after the request made by the Participating States or the Contracting Authority and at no additional cost (over and above the Contract Price).

This obligation applies during the performance of the Contract and the period of retention of documents specified in Article 7.3.3.5.

Upon delivery, that additional Technical Information shall be deemed as being Technical Information, in its existing form and content, specified to be delivered under the Contract.

Notwithstanding the foregoing, in the event that Technical Information to which this Article 7.3 applies is used by or for the Participating States or the Contracting Authority otherwise than for the purpose for which the Technical Information was supplied in accordance with the relevant Contract requirement, the Contractor shall have no liability whatsoever for any direct or indirect consequences, including losses, damages or injuries caused to the Participating States or the Contracting Authority or any third party, arising from its use.

## 7.4 Inventions

7.4.1 The following provisions shall apply in the case of any Invention arising from work undertaken by the Contractor or any third party employed by it, whether under Sub-Contract or otherwise for the purpose of the Contract:

- (1) The Contractor shall ensure, to the extent that he is legally able to do so, that any Invention to which this Article 7.4 relates and which is made by an employee of the Contractor in the course of his duties, shall belong to the Contractor.
- (2) The Contractor shall have the right in accordance with relevant laws to apply for legal protection in respect of any Inventions generated in the performance of the Contract.
- (3) The preparation and filing of applications for legal protection of those Inventions shall be carried out in accordance with national security procedures. Subject to its national laws and regulations, the Contractor shall make the first application in the country where the Invention was made and shall inform the relevant patent office, quoting the number of the Contract concerned. In addition to the foregoing where the Invention has arisen from work of a classified nature the Contractor shall advise the patent office of any applicable security classification. Should the Contractor decide to file through a private patent agent or attorney that agent or attorney must be approved by the relevant national authority for the purposes of handling Classified Information.
- (4) The Contractor shall within 45 (forty five) days of the filing of an application for patent or like legal protection report to the Contracting Authority any of those Inventions. The notification shall identify the application by its date, application number, the inventor's and the applicant 's name, and the country(ies) of filing and shall be accompanied by a copy of the patent, registered design, or like specification and the reference of this Contract under which the Invention was made, and stating where and when it was invented. Notwithstanding the foregoing, if the application is subject to national security restrictions, the notification shall be made as soon as those restrictions permit.
- (5) In order to allow the Contractor to file an application for patent or like legal protection, the Contracting Authority and Participating States shall on request of the Contractor keep any Technical Information relevant to the application in confidence until the filing date. The continuation of the data confidentiality as of the filing date is dependent on the respective national patent law where the application was filed.

7.4.2 In addition the Contractor shall within 8 (eight) months of the initial filing provide the Contracting Authority with a list of any other countries in which he has filed, or intends to file, corresponding applications for patent or like legal protection. After consultation with the Contractor, the Participating States shall be entitled to file applications for a patent or like legal protection in any country in which the Contractor itself does not wish to apply for patent or like legal protection.

7.4.3 Where an employee of any Participating State or the Contracting Authority is a joint inventor in any Invention arising during the performance of the Contract,

and where that Invention has arisen as part of its duties, the Contractor shall take all steps necessary to ensure that the employee or the Participating State concerned or the Contracting Authority is registered as a joint applicant in any related patent application.

7.4.4 Except as otherwise provided in the Contract, in the event of a patented Invention or like legal protection or registered design being granted to the Contractor, or any third party, whether under Sub-Contract or otherwise in respect of an Invention or design arising during the performance of the Contract, the Participating States shall be entitled to a free of charge, non-exclusive, irrevocable licence to use and have used that patented Invention or like legal protection or registered design in the countries where the Contractor has been granted a patent or like legal protection or registered design, for their respective Government Purposes and shall be allowed to grant sub-licences free of charge for these purposes. The Contractor shall at the request and the expense of the Participating States take all reasonable steps within its power to enable the Participating States to register those rights and interest in the patented Invention or like legal protection or registered design.

The Participating States shall notify the Contractor of each sub-licence intended to be granted providing sufficient Information to identify the prospective licensee and the scope and duration of the sub-licence.

If in exceptional cases, the Contractor demonstrates to the Contracting Authority that the granting of that sub-licence would lead to a significant commercial harm/substantial economic loss arising after the signature of the Contract for the Contractor, the Parties shall consult on the need for contractual restrictions on the use of that Information while ensuring appropriate utilisation by the Participating States of their rights on that patented Invention or like legal protection or registered design.

7.4.5 The Contractor shall be responsible for the application for and maintenance of a patent or like legal protection arising from the Contract that it decides to file. If after consultation with the Contracting Authority it wishes not to apply for, or to withdraw a patent application or to discontinue the maintenance of a patent it shall, without delay, give prior notification to the Contracting Authority and at its request, assign these rights free of charge to the Participating States named by the Contracting Authority. Any reasonable administrative costs related to the assignment of rights, the application for or maintenance of that patent and like legal protection shall be borne by those Participating States. After informing the Contracting Authority the Contractor may in the absence of any reply within 4 (four) months assign its rights to a third party on condition that the latter undertakes to safeguard any rights of the Participating States arising under the Contract.

7.4.6 In respect of any patent or like protection secured by or assigned to the Participating States under the terms of this Article 7.4 the Contractor shall be entitled to a free of charge, non-exclusive, irrevocable licence, including the right to grant sub licences. Any reasonable administrative costs related to the application for or maintenance of that licence shall be borne by the Contractor.

The Contractor shall notify the Participating States of each sub-licence intended to be granted providing sufficient Information to identify the prospective licensee and the scope and duration of the licence.

7.4.7 During the performance of the Contract the Contractor shall notify the Contracting Authority of patents or like legal protection, together with any application for them, owned or controlled by the Contractor that have not arisen from the Contract but are necessarily used in its execution or use of the Product. Where the Contractor has not notified the Contracting Authority before the award of the Contract, the Participating States shall be entitled to a free of charge, irrevocable, non-exclusive licence to use and have used those patented Inventions and like legal protection or registered designs when exercising the rights granted under this Article 7, except when the Contractor can demonstrate to the Contracting Authority that use was not foreseeable and therefore a notification before the award of the Contract was not possible; in that case, the use shall be subject to fair and reasonable terms.

## 7.5 Levies

7.5.1 The Contractor shall not sell the Product, use the Special Tools, or use or license the use of the Foreground Technical Information for any other purposes other than those of the Contracting Authority or the Participating States without first obtaining the written approval of the Contracting Authority and in accordance with the terms and conditions, including payment, specified in the Contract, or if not stated in the Contract, with any other agreement between the Contractor and the Contracting Authority in respect of commercial exploitation of Products, Foreground Technical Information or Special Tools.

Subject to security and national export regulations, and to the extent that the Participating States are allowed to do so, the Technical Information specified in the Contract to be delivered by the Participating States to the Contractor in accordance with Article 7.3.3.2 may be used free of charge by the Contractor for the purposes of those sales, licences and uses.

7.5.2 Levies shall be agreed on a percentage basis and applied in accordance with the Contract or, if not stated in the Contract, in accordance with the agreement referred to in Article 7.5.1 above in respect of the commercial exploitation of Products, Foreground Technical Information generated under the Contract or Special Tools, and shall be collected by the Contracting Authority on behalf of the Participating States as follows:

- (1) A levy calculated at the agreed percentage of the selling price, VAT excluded and Ex-Works (as defined in INCOTERMS) in the event of sales to a third party of Product developed under the Contract and not substantially modified. In the event of an underestimated selling price or no charge, the levy may be recalculated with the aid of an independent valuer where necessary.
- (2) A levy calculated at the agreed percentage of the sums collected by the Contractor, excluding any costs of sales as agreed by the Contracting Authority, where a third party is assigned or granted a licence of the right to use Technical Information arising from the Contract. In the event of granting the right of use free of charge or at an underestimated price, the levy may be recalculated with the aid of an independent valuer where necessary.
- (3) A levy calculated at the agreed percentage of the payment price, VAT excluded, in the event of leasing of Products or utilising the Products or parts of them to deliver a service for the benefit of a third party.

- (4) A levy calculated at the agreed percentage of the payment price, VAT excluded, for the use of Special Tools funded under the Contract.

7.5.3 Within 1 (one) month of the conclusion of any contract from which a levy may arise the Contractor shall notify the Contracting Authority of that contract and the applicable levy.

7.5.4 Within one month following the end of each calendar year the Contractor shall provide a statement of the contracts for sales, leasing or granting of licences, where levy is applicable, concluded in the course of the year. This statement shall provide detailed Information on the prices for which levy is applicable and the applicable levy rates and value. The Contractor may be required to provide to the Contracting Authority or its Authorised Representatives reasonable access to supporting documentation in order for them to verify the validity of the levy amounts.

7.5.5 On the basis of the statement provided by the Contractor under Article 7.5.4, the Contracting Authority shall issue a formal request for payment and payment shall be made by the Contractor within 30 (thirty) days of the request. The principles of Article 6.1.5 (Late Payment) shall apply for any failure to pay in this period.

7.5.6 For the avoidance of doubts levies shall be payable in respect of commercial exploitation of Product, Foreground Technical Information or Special Tools by the contractors' mother company (ies), constitutive companies and sub-contractors and their subsidiaries. Consequently the provisions of this Article 7.5 shall also be applicable for the Contractor in respect of such commercial exploitation by contractors' mother company (ies), constitutive companies and sub-contractors and their subsidiaries.

## 7.6 Infringement of third party rights / liabilities

7.6.1 Except as otherwise provided in the Contract, during the performance of the Contract and thereafter, the Contracting Authority and the Contractor shall notify each other as soon as they become aware of any third-party intellectual property rights which may restrict the use of documents, patents, drawings, software and goods supplied by either the Contracting Authority, the Participating States or the Contractor to the other in connection with the Contract.

7.6.2 The Contracting Authority and the Contractor shall notify each other immediately of any written claim or notice of infringement of third-party rights which they have received either concerning the Contract or from the use of the Product arising from the Contract after completion of the Contract, or both. The notification shall include particulars of the demands, damages and liabilities claimed or made of which the notifying party has notice. The Contracting Authority shall procure that, where possible, the Participating States will provide Information available to them that may assist in defending the claim.

7.6.3 The Contractor shall indemnify the Contracting Authority and the Participating States in respect of liabilities arising from the infringement or alleged infringement of third party intellectual property rights resulting from the use, retention or disposal of any material, equipment, document or Information provided by the Contractor under the Contract where such liability arises from a breach of intellectual property rights over which the Contractor or its Sub-Contractors exercised control or otherwise had reasonable grounds for believing

was in breach of the intellectual property rights of a third party. This indemnity shall not apply and the Contractor shall not be liable if:

- (1) The Contracting Authority or a Participating State has made or makes a voluntary admission of any sort relevant to an allegation of infringement, that undermines the ability of the Contractor to defend a claim, in respect of the Contracting Authority or the Participating State concerned;
- (2) The Contracting Authority or a Participating State has entered or enters into any discussions other than referring the matter to the Contractor, that undermine the ability of the Contractor to defend a claim, on an allegation of infringement with any third party without the prior written agreement of the Contractor, in respect of the Contracting Authority or the Participating State concerned;
- (3) The Contracting Authority or a Participating State has entered or enters into negotiations in respect of any relevant claim for compensation in respect of use authorised by statute in their jurisdiction, in respect of the Contracting Authority or the Participating State concerned;
- (4) Legal proceedings have been commenced against the Contracting Authority or a Participating State or the Contractor in respect of use authorised by statute in its jurisdiction, but only to the extent that the infringing use has been properly authorised under any applicable statutory provision, in respect of the Contracting Authority or the Participating State concerned;
- (5) A particular use by the Contracting Authority or a Participating State of anything supplied under the Contract was expressly forbidden by the Contractor prior to or at the time of the Contract.

7.6.4 The Contracting Authority and each Participating State shall:

- (1) Indemnify the Contractor and the Sub-Contractors against all liabilities for infringement or alleged infringement of third party intellectual property rights arising directly from the use, retention or disposal, under the Contract, of any material, equipment, document or Information provided by it or the Participating States, or both, or resulting directly from a specific instruction from the Contracting Authority to use that third party intellectual property, or both;
- (2) Employ those powers as are reasonable in the circumstances to minimise all liabilities of the Contractor and each Sub-Contractor in respect of third party intellectual property rights.

The Contracting Authority or a Participating State shall not indemnify the Contractor and any Sub-Contractor, where Article 7.6.3, (1) - (2) applies, mutatis mutandis, or where specific limitations of use have been identified in the Contract.

7.6.5

7.6.5.1 The provisions of Articles 7.6.2 to 7.6.4 represent the total liability of each Party and the Contracting Authority to the other under the Contract in respect of any infringement or alleged infringement of patent or other intellectual property owned by a third party.



7.6.5.2 Neither Party nor the Contracting Authority shall be liable, one to the other, for any consequential loss or damage arising as a result, directly or indirectly, of a claim for infringement or alleged infringement of any patent or other intellectual property owned by a third party.

7.6.5.3 The party benefiting from the indemnity or authorisation shall allow the other party, at its own expense, to conduct any negotiations for the settlement of the same, and any litigation that may arise from it and shall provide such Information as the other party may reasonably require.

7.6.5.4 Following a notification under Article 7.6.2, the party notified shall advise the other party in writing within 30 (thirty) days whether or not it is assuming conduct of the negotiations or litigation. In that case the party against whom a claim is made or action brought shall not make any statement that might be prejudicial to the settlement or defence of such a claim without the written consent of the other party.

7.6.5.5 The party conducting negotiations for the settlement of a claim or any related litigation shall, if requested, keep the other party fully informed of the conduct and progress of those negotiations.

7.6.5.6 The Parties and the Contracting Authority will co-operate with one another to mitigate any claim or damage which may arise from use of third party intellectual property rights.

7.6.6. If at any time a claim or allegation of infringement arises as a result of the provision of any item by the Contractor to the Contracting Authority or to a Participating State, the Contractor may at its own expense replace the item and associated deliverables with an item and associated deliverables of equivalent functionality and performance so as to avoid infringement or breach.

## **8. Government Furnished Information, Facilities, Services and Equipment (GFX) and Special Tools**

### **8.1 GFX**

8.1.1 The GFX listed in the Contract shall be of the quality and quantity, specified, and provided at the times, for the periods and at the locations stated in the Contract, free of charge to the Contractor by the Contracting Authority unless otherwise specified in the Contract.

8.1.2 All GFX shall remain the property of the providing Participating State. It shall be used in the execution of the Contract and for no other purpose, unless the prior approval in writing of the Contracting Authority has been given.

8.1.3 Neither the Contractor, nor any Sub-Contractor, nor any other person, shall have a lien on GFX, for any sum due to the Contractor, Sub-Contractor or other person, and the Contractor shall take all steps as may be necessary to ensure that the title of the providing Participating State and the exclusion of any lien are brought to the notice of all Sub-Contractors and other persons dealing with any GFX.

8.1.4 The Contractor shall be responsible for checking on receipt through appropriate inspection that the GFX provided by the Contracting Authority is in conformity with the Contract. Subject to Articles 8.1.5 and 8.1.8 below, within 14

(fourteen) days of receipt of GFX, or any other period specified in the Contract, the Contractor shall:

- (1) Check the GFX to verify that it corresponds with the GFX specified in the Contract;
- (2) Conduct a reasonable visual inspection; and
- (3) Conduct any additional inspection and testing as may be necessary and practicable to check that the GFX is not defective or deficient for the purpose for which it has been provided,

and notify the Contracting Authority by Notice of any defects, deficiencies or discrepancies discovered.

8.1.5 Where GFX is provided in preservation packaging it shall not be unpacked earlier than is necessary. The period identified at Article 8.1.4 above shall count from the date on which packages are opened.

8.1.6 The Contracting Authority shall within a reasonable time after receipt of any Notice under Article 8.1.4 above replace, re-issue or authorise repair of GFX agreed to be defective or deficient. If appropriate, the Contracting Authority shall also issue written instructions for the return or disposal of the defective or deficient GFX.

8.1.7 In the event that the Contracting Authority fails to provide GFX within the timescale stated in the Contract, or fails to replace, or repair defective or deficient GFX within a reasonable time of receipt of a Notice in accordance with Article 8.1.4 above and to the extent that the failure has not been caused or contributed to by any non-observance or non-performance by the Contractor of any obligation on the part of the Contractor contained in the Contract, the Contractor shall be granted fair and reasonable revisions of the Delivery Schedule and/or the Contract Price as may be appropriate. The Contractor shall take all reasonable measures to mitigate the consequences of any delay.

8.1.8 Articles 8.1.4 to 8.1.7 above do not apply in the following circumstances:

- (1) Where GFX is issued for the purpose of its repair, overhaul, conversion or other work to be performed on that GFX, inspection of that GFX shall be as specified in the Contract;
- (2) Where the Contractor can show that the GFX cannot be fully tested until it has been integrated with other items, inspection of that property shall be as specified in the Contract;
- (3) Where Special Tools become GFX under Article 8.2 (Special Tools).

8.1.9 Subject to Article 8.1.12 below and any limitation or exclusion of liability as may be specified in the Contract, the Contractor shall be responsible for the safe custody and due return of GFX, whether or not incorporated into the Product, and shall be liable for all loss or damage to it, until re-delivered in accordance with the Contracting Authority's instructions or until the expiry of a period of 3 (three) months from the Contractor's request for disposal.

8.1.10 Unless otherwise specified in the Contract, in the event of loss, destruction or damage of GFX otherwise than in the normal performance of the Contract while the GFX is in the possession and control of the Contractor or any of its Sub-Contractors, no extension to the Delivery Schedule shall be granted for that reason.

8.1.11 The Contractor shall be responsible for calibration and maintenance of the GFX to the extent specified in the Contract.

8.1.12 The Contractor shall not be liable in respect of:

- (1) Defects or deficiencies notified to the Contracting Authority in accordance with Article 8.1.4 above or latent defects which the Contractor can show could not reasonably have been discovered by means of the activities described at Article 8.1.4 above;
- (2) Fair wear and tear in GFX resulting from its normal and proper use in the execution of the Contract (except insofar as the deterioration is contributed to by any misuse, lack of care or want of maintenance by the Contractor);
- (3) GFX rendered unserviceable as a direct result of ordinary performance of the Contract;
- (4) Any loss or damage to GFX arising from any Force Majeure Events.

8.1.13 The Contractor shall confirm to the Contracting Authority the requirement for GFX 3 (three) months prior to the due date of delivery specified in the GFX list. The Contracting Authority shall confirm the availability of the GFX within 14 (fourteen) days after receipt of the Contractor's confirmation.

8.1.14 The Contractor shall keep a register and utilisation account of the GFX placed under his control and, unless already marked by the providing Participating State, to mark such GFX or otherwise identify, where appropriate, in an unambiguous way as being the property of the providing Participating State. The register shall be maintained in accordance with national standards applicable on the territory of the Contractor in that respect and in force at the date of the Contract, or with such other requirements specified in the Contract. The register shall be available in accordance with those standards for audit and inspection by the Authorised Representative.

8.1.15 The register shall be retained for 3 (three) years after return or disposal of the items of GFX, or for such other period as is specified in the Contract.

8.1.16 At Contract completion the Contractor shall forward to the Contracting Authority a list of GFX still held by the Contractor. Return or disposal of that GFX shall be as specified in the Contract, or as instructed by the Contracting Authority at Contract completion. If no disposal instructions are specified in the Contract the Contracting Authority shall provide such instructions within 2 (two) months of the Contractor's written request to do so.

8.1.17 The provision of GFX which conforms with the provisions of Article 8.1.1 shall in no way diminish the Contractor's responsibility under the Contract.

8.1.18 If requested by the Contractor, the Contracting Authority shall, within a reasonable time and where practicable before delivery of each item of GFX, notify the Contractor of their value.

## 8.2 Special Tools

### 8.2.1 General

8.2.1.1 The Contract Price shall include the provision of Special Tools. That provision shall include the cost of maintenance and calibration under Article 8.2.5 below, unless otherwise specified in the Contract.

8.2.1.2 The Contractor shall not claim any other financial assistance from the Participating States towards the costs of any Special Tools.

### 8.2.2 Property

8.2.2.1 Unless otherwise specified in the Contract, the Special Tools shall become the property of the Participating States:

- (1) Where Article 6.2.1 (Transfer of Ownership through Early Vesting) forms part of the Contract, in accordance with that Article 6.2.1 as if they were Products;
- (2) Where the Contracting Authority authorises the Contractor to utilise the Special Tools for the production of goods for a third party in advance of their being used for the production of Products under the Contract, upon delivery of the first goods so produced for the third party;
- (3) In all other cases upon acceptance of the first Product delivered under the Contract or upon Contract completion, whichever is the earlier,

8.2.2.2 Where property in the Special Tools passes to the Participating States while they are still required to complete the Contract they shall be treated thereafter as if they were GFX and entered into the GFX register in accordance with Article 8.1.14 above.

8.2.2.3 Notwithstanding the passing of property to the Participating States pursuant to this Article 8.2, the Contractor shall be free to modify the Special Tools as he may deem to be necessary in order to perform the Contract, and the Contracting Authority's approval of such modifications shall not be required.

### 8.2.3 Acceptance

Acceptance of Special Tools shall occur at the time the first Product produced with the Special Tools is accepted in accordance with Article 3.3 (Acceptance, Deferment and Rejection) or at such other time as shall be stated in the Contract.

### 8.2.4 Marking or Similar Obligations

The Contractor shall mark or, where marking is not possible, otherwise designate the Special Tools as being the property of the Participating States upon the transfer of property in accordance with Article 8.2.2.1. At the reasonable request of the Contracting Authority the Contractor shall allow the Contracting Authority or its Authorised Representative access to the Special Tools.

#### 8.2.5 Repair and maintenance

The Contractor shall be responsible for the safe custody, maintenance and calibration necessary to retain the Special Tools in good order until transferred to GFX when the provisions of Article 8.1 (GFX) shall apply.

#### 8.2.6 Disposal

Notwithstanding the classification of Special Tools as GFX, the Contracting Authority shall not be entitled to require the Contractor to dispose of the Special Tools to the prejudice of contracts held by the Contractor with the Contracting Authority or with another customer, provided the Contracting Authority's approval for such use has been given in accordance with Article 8.2.7 below. Where the Contractor holds no such contracts, but having received the Contracting Authority's approval in accordance with Article 8.2.7 below has made a firm written offer to a third party based on the use of Special Tools, the Contracting Authority shall not be entitled to dispose of the Special Tools until such time as the Contractor's offer to the third party has expired.

#### 8.2.7 Use and Levy

Neither the Contractor nor the Sub-Contractors shall use the Special Tools for any purposes other than for the performance of the Contract except as provided by special terms, including payment, as stated in Article 7.5 (Levies).

### 8.3 Liability at Establishments

8.3.1 The Contractor shall make good or, at the option of the Contracting Authority, pay compensation for all damage to any property of the Contracting Authority or of any Participating State which is caused by the Contractor, its personnel, agents or any Sub-Contractor and arises from its or their presence on an Establishment in connection with the Contract, except where and to the extent that the Contractor is able to demonstrate that:

- (1) The damage was not caused or contributed to by any circumstances within its or their reasonable control; or
- (2) Any other provision of the Contract expressly provides otherwise.

8.3.2 The total liability of the Contractor under Article 8.3.1 may be subject to limitation as specified in the Contract.

8.3.3 All property of the Contractor or of its personnel, agents or any Sub-Contractor shall not be at the risk of the Contracting Authority or any Participating State whilst that property is at any Establishment, and neither the Contracting Authority nor any Participating State shall be liable for any loss of or damage to that property, except:

- (1) Where and to the extent that the damage was caused or contributed to by any circumstances within the reasonable control of the Contracting Authority or the Participating States; or
- (2) Any other provision of the Contract expressly provides otherwise.

## 9. Progress

## 9.1 Inspections

9.1.1 The Contracting Authority shall have the right to inspect or have its Authorised Representative inspect the Product and the performance of the Contract at any reasonable time. For this purpose, the Contracting Authority shall nominate a representative, and provide the Authorised Representative's terms of reference to the Contractor. The Contracting Authority will seek to supply such Information 14 (fourteen) days before any proposed visit. Any Information, notified or marked as commercially sensitive and made available by the Contractor to that Authorised Representative shall be treated accordingly.

9.1.2 The Contractor shall in accordance with the provisions of the Contract give the Authorised Representative sufficient access to premises as and when required for this purpose, and shall ensure that similar provisions are included in Sub-Contracts identified in an annex to the Contract. The Contractor's responsibilities in respect of the inspection process shall include provision of accommodation, facilities, appliances, materials, documents and labour as reasonably required by the Contracting Authority. Such resources as specified in the Contract shall be provided at no additional cost to the Contracting Authority.

## 9.2 Progress Review Procedure

The Contractor shall provide reports and attend progress meetings as required by the Contract. The provision and acceptance of these reports shall be without prejudice to the rights or obligations of either Party under the Contract.

## **10. Transfer and Sub Contracts**

### 10.1 Transfer of Contract

Neither Party to the Contract shall sell, assign, transfer or otherwise dispose of this Contract either in whole or in part, or use it as capital to float a company, unless prior authorisation has been obtained from the other Party. Any breach of this Article 10.1 shall entitle the Contracting Authority to terminate the Contract by right (*ipso jure*) due to default by the Contractor in accordance with Article 11.2 (Termination of Contract for Default by the Contractor.)

### 10.2 Sub-Contracts

10.2.1 The Contractor shall be responsible for the fulfilment of all obligations resulting from the Contract including those performed by Sub-Contractors.

10.2.2 The Contractor shall not enter into any direct Sub-Contract which does not secure the rights of the Participating States and the Contracting Authority under the Contract without having first consulted with the Contracting Authority. The Contractor shall ensure that the same commitment shall apply to any Sub-Contractor at subsequent tiers. Except as otherwise agreed during the consultation, such consultation shall be without prejudice to the right of the Contracting Authority to terminate the Contract in accordance with Article 11.2 (Termination of Contract for Default by the Contractor) for failure to comply with its obligations under this Article 10.2.2.

10.2.3 The Contractor shall, on request, supply copies of its direct Sub-Contracts to the Contracting Authority for information purposes only. The Contractor shall

ensure that such right of the Contracting Authority shall be adequately covered in Sub-Contracts at subsequent tiers.

10.2.4 Unless the Contractor secures ownership and rights of use over intellectual property arising in any direct Sub-Contract(s) to enable to grant the rights to the Participating States and the Contracting Authority as defined in the Contract, the Contractor shall not award any direct Sub-Contract or order involving design or development work under the Contract without the prior written approval of the Contracting Authority. In cases where new intellectual property is likely to be created, that approval shall be conditional on the Sub-Contractor having first entered into a direct agreement with the Contracting Authority in respect of Intellectual Property Rights.

The Contractor shall ensure that the provisions of this Article 10.2.4 are included in Sub-Contracts at subsequent tiers.

10.2.5 The Contractor shall give as much written Notice as possible to the Contracting Authority of its proposal to place any of its direct Sub-Contracts for any work referred to in Article 10.2.4. The request for approval in accordance with Article 10.2.4 shall be accompanied by two copies of the proposed direct agreement referred to in Article 10.2.4 signed by the Sub-Contractor.

The Contractor shall ensure that the provisions of this Article 10.2.5 are included in Sub-Contracts at subsequent tiers.

10.2.6 Any modification to the Procurement Plan shall require mutual agreement by the Contracting Authority and the Contractor to come into effect, and may require an amendment to the Contract in accordance with the provisions of Article 2.3 (Contract Amendments and Specification Change Procedures).

10.2.7 Monitoring of the implementation of the Procurement Plan by the Contracting Authority shall not diminish the obligations of the Contractor under the Contract.

### 10.3 Decoupling

10.3.1 In this Article the expression "Other Contract" means any Sub-Contract, relating in any way to the performance of the Contract, which is made by the Contractor or a Sub-Contractor with or any one or more of the Participating States acting as a Sub-Contractor.

10.3.2 Where the Other Contract shall be placed upon order from the Contracting Authority or any one or more of the Participating States, if any one or more of the Participating States is not prepared to enter into an Other Contract on a commercial basis the Contractor shall notify the Contracting Authority of the circumstances without delay; the Contracting Authority shall notify the relevant Participating State of the circumstances and seek to resolve the matter. Where the matter cannot be resolved, the Contractor shall have the right to request the Contracting Authority to insert in the Contract by means of a Contract amendment appropriate provisions to enable the Contractor to obtain relief or remedy where any one or more of the Participating States is in breach or default of the Other Contract terms.

10.3.3 In any case, and subject to Article 10.3.2, no breach by the Contracting Authority or any Participating State(s) of any Other Contract or act or omission,

written or oral statement or representation of or by the Contracting Authority or the Participating State(s), or the servants, agents or other contractors of theirs or of any of theirs relating to or connected with any Other Contract, whether or not involving negligence on its or their part, shall:

- (1) Give the Contractor any right under the Contract to an extension of time or additional payment or damages or any other relief or remedy whatsoever against the Contracting Authority; or
- (2) Affect, modify, reduce or extinguish either the obligations of the Contractor or the rights or remedies of the Contracting Authority or the Participating States (including but not limited to any form of compensation under the Contract); or
- (3) be taken to amend, add to, delete or waive any term or condition of the Contract.

## **11. Termination**

### **11.1 Termination in case of Corrupt Gifts and Payments**

11.1.1 The Contractor warrants that in entering into the Contract he has not done and shall not do any of the following prohibited acts:

- (1) Give, promise or offer any bribe, gift or other inducement to any official or employee of the Contracting Authority, its Authorised Representative or the Participating States as reward for:
  - i. Any act in relation to the obtaining or execution of the Contract, any Sub-Contract, any other contract with the Contracting Authority or any other contract with the Participating States that has a direct link with the Contract; or
  - ii. Any advantage in connection with the Contract, any Sub-Contract, any other contract with the Contracting Authority or any other contract with the Participating States that has a direct link with the Contract.
- (2) Employ any person to solicit or secure the Contract or any other contract with the Contracting Authority or any other contract with the Participating States that has a direct link with the performance of the Contract or any advantage in connection therewith upon any agreement for a commission, percentage, brokerage or contingent fee, except commercial or selling agents maintained by the Contractor for the purposes of securing business in a bona fide manner.

11.1.2 Any breach of this Article 11.1.1 shall entitle the Contracting Authority to terminate the Contract by right (*ipso jure*) due to default by the Contractor in accordance with Article 11.2 (Termination of Contract for Default by the Contractor) and to recover from the Contractor the amount of any loss resulting from that termination and to recover from the Contractor the amount or value of any bribe, gift or other inducement charged in any way directly or indirectly to the Contract without prejudice to any other right or remedy.

11.1.3 In exercising its rights or remedies under this Article 11.1, the Contracting Authority shall:



- (1) Act in a reasonable and proportionate manner having regard to such matters as the gravity of, and the identity of the person performing, the prohibited act;
- (2) Give all due consideration, where appropriate, to action other than termination of the Contract, including (without being limited to):
  - i. Requiring the Contractor to procure the termination of a Sub-Contract where the prohibited act is that of a Sub-Contractor or anyone acting on its or their behalf;
  - ii. Requiring the Contractor to procure the removal from public procurement related activities of an employee (whether its own or that of a Sub-Contractor or anyone acting on its behalf) where the prohibited act is that of such employee.

11.1.4 Where the Contracting Authority seeks the termination of a Sub-Contract or removal of a Sub-Contractor employee, the Contracting Authority shall provide to the Contractor sufficient evidence of the prohibited acts in Article 11.1.1 (1) to support the case against the Sub-Contractor.

## 11.2 Termination of Contract for Default by the Contractor

11.2.1 The Contracting Authority shall have the right to terminate the Contract by reason of default by the Contractor in part in respect of the Products which have not been delivered or performed in accordance with the Contract at the time of termination or in whole, upon occurrence of any of the following:

11.2.1.1 Failure by the Contractor to comply with a Key Milestone by the date specified in the Contract, subject to the provisions of Articles 11.2.1.1.1 to 11.2.1.1.6 inclusive.

11.2.1.1.1 Where the Contractor fails to achieve a Key Milestone by the date specified in the Contract and has not previously failed to achieve that Key Milestone or any other Key Milestone by the specified date specified in the Contract for that other Key Milestone, the Contractor shall provide the Contracting Authority with a rectification plan as defined in Article 11.2.1.1.2. within 30 (thirty) days of such failure unless another period is mutually agreed between the Contracting Authority and the Contractor.

11.2.1.1.2 The rectification plan shall:

- (1) Describe the areas of difficulty in achieving a Key Milestone;
- (2) Detail the investigation that has been carried out or will be carried out by the Contractor to analyse the difficulties;
- (3) Describe how the Contractor intends to remedy the difficulties;
- (4) Detail the criteria proposed by the Contractor for measuring its successful progress of the rectification plan leading to successful completion of the relevant Key Milestone and the period of time within which the rectification plan shall be performed together with any other Programme implications;
- (5) Contain a detailed assessment of the effects of the Contractor's proposals in the rectification plan upon the execution of the Contract in all respects.

11.2.1.1.3 Pending the Contracting Authority's decision on the rectification plan, the Contractor shall continue to carry out its obligations under the Contract.

11.2.1.1.4 Approval of the rectification plan shall be at the discretion of the Contracting Authority. If approved by the Contracting Authority, a Contract amendment shall be drawn up in accordance with Article 2.3 (Contract Amendments and Specification Change Procedures).

11.2.1.1.5 If the Contractor refuses to provide a rectification plan in accordance with Articles 11.2.1.1.1 and 11.2.1.1.2, or fails to do so within the required period, or if the Contracting Authority rejects the rectification plan, the Contracting Authority may, by Notice to the Contractor, terminate the Contract by right (*ipso jure*).

11.2.1.1.6 Where the Contractor fails to achieve a Key Milestone by the date specified in the Contract and has previously failed to achieve any Key Milestone by the date specified in the Contract the Contracting Authority may, by Notice to the Contractor:

- (1) Require the Contractor to provide a rectification as defined in Article 11.2.1.1.2, whereupon the provisions of Articles 11.2.1.1.1 to 11.2.1.1.5 inclusive shall apply; or
- (2) Terminate the Contract in accordance with Article 11.2.1.1.5.

11.2.1.2 Where the Contractor has failed to comply with:

- (1) The time specified in the Contract for delivery or performance of the Products or any of them in accordance with Article 3 (Delivery);
- (2) Article 2.5 (Supply of Hazardous Materials and Substances), subject to Article 2.5.1.5;
- (3) Article 3.3.4.7 (Rejection);
- (4) Article 10.1 (Transfer of Contract);
- (5) Article 10.2.2 (Sub-Contracts);
- (6) The provisions of any Special Articles where the Articles expressly provide for a right of termination for default under Article 11.2.1;
- (7) Its obligations to guarantee the Contracting Authority or the Participating States against all the claims made by a third party with regard to the intellectual property relating to the Product, and the processes, methods and the means of manufacture related to this Product,

the following provisions shall apply:

i. Where such a failure occurs for the first time on any of the grounds listed, the Contracting Authority shall by Notice to the Contractor require the failure to be rectified by the Contractor within 30 (thirty) days of that Notice, or such other period as is mutually agreed between the Contracting Authority and the Contractor, to restore performance to that required under the Contract in that respect. If the Contractor refuses to rectify the failure or fails to do so within the period specified or agreed, the right of the Contracting Authority to terminate the

Contract for such failure shall be exercisable by right (*ipso jure*) by the Contracting Authority giving the Contractor a Notice of termination.

ii. Where such a failure re-occurs on any of the grounds listed in any Notice issued as first mentioned in Article 11.2.1.2.i above, the Contracting Authority shall be under no obligation to grant or agree a period for rectification, and the right of the Contracting Authority to terminate the Contract for such failure shall be exercisable by right (*ipso jure*) by the Contracting Authority giving the Contractor a Notice of termination.

11.2.1.3 Where the Contractor has failed to comply with:

- (1) Article 1.8 (Security of Information); or
- (2) Article 11.1 (Termination in case of Corrupt Gifts and Payments),

the right of the Contracting Authority to terminate the Contract in such circumstances shall to the extent provided in those Articles be exercisable by right (*ipso jure*) by the Contracting Authority giving the Contractor a Notice of termination.

11.2.1.4 For the avoidance of doubt, the powers of termination provided to the Contracting Authority under Articles 11.2.1.1, 11.2.1.2 and 11.2.1.3 do not extend to Products accepted by the Contracting Authority in accordance with the Contract before the date of termination.

11.2.2 Where the Contracting Authority has terminated the Contract in accordance with Article 11.2.1, at the request of the Contracting Authority, the Contractor shall repay to the Contracting Authority, within 60 (sixty) days of such termination by the Contracting Authority, all applicable payments (including VAT on them, if paid) except those payments relating to accepted Products, received from the Contracting Authority under the Contract, unless otherwise agreed.

11.2.3 In the event of repayment to the Contracting Authority under Article 11.2.2 above then all that which vested in the Participating States under the provisions of Article 6.2.1 (Transfer of Ownership through Early Vesting) shall re-vest in and become the absolute property of the Contractor to the extent provided in Article 6.2.1.6. Similarly, all rights which may have accrued under the Contract to the Participating States in respect of its Intellectual Property Rights or in respect of Special Tools under Article 8.2 shall be surrendered by the Participating States to the Contractor.

11.2.4 Where the Contracting Authority has terminated the Contract under this Article 11.2 or in any other case where the Contract expressly provides for a right of termination for default and termination has occurred, and without prejudice to any other of its remedies, the Contracting Authority:

- (1) May replace any of the Products in respect of which the Contract has been terminated by itself or any of the Participating States purchasing or manufacturing other products or services of the same description or of the description that most closely meets the contractual requirements, or by itself or any of the Participating States allocating other products of the same description or of the description that most closely meets the contractual requirements in the possession or control of itself or any of the Participating States to the purposes for which the Products replaced are required; and

- (2) Shall be entitled to recover from the Contractor the amount by which the aggregate of the reasonable cost of purchasing and of manufacturing other products or services in this way exceeds the amount which would have been payable to the Contractor in respect of all the Products so replaced if they had been delivered or performed in accordance with the Contract.

11.2.5 In the cases referred to in Article 11.2.4 above, the Contractor shall:

- (1) In order to ensure completion of the supply of the Products so terminated; and
- (2) Where the use of intellectual property rights is required,

do everything in its power to enable the replacement contractor or the Contracting Authority or any of the Participating States to use the rights concerned. Subject to the provisions of Article 11.2.4 (2), the Contractor shall make no claim in respect of such use and shall bear the cost of any fees due to third parties for the use of their rights.

### 11.3 Termination of Contract Otherwise than for Default

11.3.1 The Contracting Authority shall in addition to any other right to terminate expressly set out in the Contract, have the right to terminate the Contract in whole or in part at any time by right (*ipso jure*). Termination under this Article 11.3 shall be by Notice given by the Contracting Authority to the Contractor.

11.3.2 The effect of any Notice of termination under this Article 11.3 shall be that the Contract, or part of it which is the subject of the Notice, shall be terminated at the end of the period, if any, specified elsewhere in the Contract as the period for expiration. If no period is so specified, the Contract or part of it, which is the subject of the Notice, shall be terminated at the end of whatever period is specified in the Notice as the termination date. If no period is so specified in the Notice or elsewhere in the Contract, it shall take effect 3 (three) months after receipt of the Notice by the Contractor.

11.3.3 This termination shall be without prejudice to the rights of the Parties accrued to the date of termination but subject to the operation of the following provisions of this Article 11.3.

11.3.4 If a Notice is given, the Contracting Authority may, at any time before the Contract or part thereof terminates pursuant to that Notice, exercise any of the following rights:

- (1) The right to direct the Contractor, where production has not been commenced, to refrain from commencing production;
- (2) The right to direct the Contractor to complete in accordance with the Contract all or any of the Products, or any of their parts or components in course of manufacture or performance at the termination date and to deliver the same at such time or times as may be agreed with the Contractor, or, in default of agreement, at the time or times provided for by the Contract. All Products or parts or components delivered by the Contractor in accordance with such directions and accepted shall be paid for at the price set out in the Contract for those Products or parts or

components or, in the absence of such an established price, at a fair and reasonable price;

- (3) The right to require that the Contractor shall, as soon as may be reasonably practicable after the receipt of such Notice, do any or all of the following:
  - i. Take such steps as will ensure that the production rate of the Products and their parts and components is reduced as rapidly as possible;
  - ii. As far as possible, consistent with Article 11.3.4 (3) i, concentrate work on the completion of parts and components already in a partly manufactured state;
  - iii. Terminate on the best possible terms its direct Sub-Contracts and orders for materials and parts and components bought out in a partly manufactured or wholly manufactured state as have not been completed, observing in this connection any direction given by the Contracting Authority under Article 11.3.4 (1) and Article 11.3.4 (2) as far as may be possible.

11.3.5 If a Notice as is provided for in Article 11.3.1 is given, the Contractor shall:

- (1) Prepare and deliver to the Contracting Authority within an agreed period, or in default of agreement as soon as practicable, a list comprising firstly all unused and undamaged material and Products to which the Notice relates and which are in course of manufacture (other than Products comprising services) and secondly all equipment or parts supplied to the Contractor as GFX;
- (2) Deliver in accordance with the directions of the Contracting Authority the material, Products and GFX so listed, for which the Contracting Authority shall pay to the Contractor a fair and reasonable price for them including handling and delivery charges incurred in complying with those directions.

11.3.6 The Contracting Authority shall take over from the Contractor all unused and undamaged material and Products (other than Products including services) to which the Notice relates and which are in the course of manufacture or in the possession of the Contractor at the termination date and properly provided by or supplied to the Contractor for the performance of the Contract except any material and Products in course of manufacture as the Contractor shall, with the agreement of the Contracting Authority, elect to retain.

11.3.7 The Contracting Authority shall indemnify the Contractor against any commitments, liabilities or expenditure which are reasonable and properly chargeable by the Contractor in connection with the Contract to the extent to which those commitments, liabilities or expenditure would otherwise represent an unavoidable loss by the Contractor by reason of the termination of the Contract or part thereof under this Article 11.3.

11.3.8 The amount of compensation payable under Article 11.3.7 shall:

- (1) Be established and agreed by the Contractor and the Contracting Authority on the basis of evidence produced by the Contractor. The Contracting Authority shall have the right to have a Price Investigation or a Price Audit performed on that evidence. In default of that agreement, the matter shall be resolved under the terms of Article 12.2 (Resolution of Disputes);

- (2) Take account of the proportion of the Contract completed, and applicable overhead costs not fully absorbed as a direct result of the termination to the extent permitted by the relevant national principles and practices, the instructions of the Contracting Authority and work required to close the Contract and account for the materials and be consistent with the provisions of Article 11.3.10;
- (3) Be abated in full by any interim payments made to the Contractor under Article 6.1.2;
- (4) Include a sum for profit on any costs established under Article 11.3.8 (1) and (2).

11.3.9 If the Contractor does not observe any direction given to it by the Contracting Authority under Article 11.3.4, the Contracting Authority shall not under this Article 11.3 be obliged to pay to the Contractor any sums in excess of those which would be payable by the Contracting Authority had the Contractor observed that direction.

11.3.10 The Contracting Authority shall not in any case be liable to pay under the provisions of this Article 11.3 any sum which, when taken together with any sums paid or due or becoming due to the Contractor under the Contract, shall exceed the total Contract Price for the Products to which the Notice of termination relates and would have been payable under the Contract in respect of those Products if no Notice had been given.

11.3.11 Unless specified otherwise in the Contract, the Contractor shall ensure that:

- (1) Any of its direct Sub-Contracts made or placed in connection with or for the purpose of the Contract contains powers of termination corresponding with the rights of termination under Articles 11.3.1 to 11.3.10 inclusive for the benefit of the Contractor; and
- (2) Those powers of termination in Article 11.3.11 (1) are adequately covered in Sub-Contracts at subsequent tiers.

#### 11.4 Termination of Contract for Bankruptcy and Insolvency

The provisions governing termination of the Contract for bankruptcy and insolvency shall be as defined in the Contract.

#### 11.5 Prejudice

Termination shall be without prejudice to and shall not affect any other right of action or remedy which shall have accrued or shall accrue thereafter to the Contracting Authority or to the Contractor.

### **12. Law**

#### 12.1 Applicable Law and Jurisdiction

12.1.1 The applicable law of the Contract shall be, and the Contract shall be interpreted in accordance with, the laws of the country specified in the Contract.

Neither the United Nations Convention on Contracts for the International Sale of Goods (1980) nor any modification or re-enactment of it shall apply.

12.1.2 Each Party agrees that the provisions of this Article 12.1 shall survive completion or any termination of the Contract for any reason and shall remain fully enforceable as between the Parties notwithstanding that completion or termination.

## 12.2 Resolution of Disputes

### 12.2.1 General

12.2.1.1 The Parties shall endeavour, by negotiations in good faith, to settle any dispute between them arising out of or relating to the Contract including the breach, termination or invalidity of the Contract, in this Article 12.2 referred to as a Dispute. Any Dispute, which cannot be settled by negotiation, may, with the agreement of the Parties, be referred to conciliation. Any Dispute, which cannot be settled by negotiation or conciliation, or both, shall be referred, on the application of either Party, to arbitration for a final and conclusive determination.

12.2.1.2 During any negotiation, conciliation or arbitration, the Parties shall continue to meet their respective obligations in accordance with the provisions of the Contract.

12.2.1.3 Either Party shall have the right to initiate arbitration at any time during a negotiation or conciliation process, notwithstanding that a negotiation or conciliation may continue concurrently with an arbitration process.

### 12.2.2 Conciliation

Either Party may invite the other to conciliate the Dispute under the International Chamber of Commerce (ICC) Optional Conciliation Rules in effect on the date of the Contract unless the Parties agree on other rules and procedures. Agreements reached are to be recorded in writing and the Contract modified as appropriate. Any Party not wishing to use conciliation shall give its reasons in writing to the other Party.

### 12.2.3 Arbitration

12.2.3.1 All Disputes which can not be settled by negotiation or conciliation or both shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce ("ICC Rules") by three arbitrators appointed in accordance with those Rules, unless the Parties agree on other rules and procedures within 30 (thirty) days of the giving of a Notice of arbitration in accordance with Article 12.2.3.2.

12.2.3.2 Notwithstanding the provisions of Article 1.5.4, the Contracting Authority shall act solely and exclusively on behalf of the Participating States concerned with the arbitration for any arbitration proceedings. The Contractor or the Contracting Authority when instituting the arbitration proceedings shall give Notice of Request for Arbitration in accordance with the ICC Rules. The Contractor and the Contracting Authority are known as "the parties to the arbitration" in this Article 12.2.3.

12.2.3.3 The ICC Rules and any other rules and procedures agreed between the Parties in accordance with Article 12.2.3.1 are supplemented by the following provisions.

- (1) The parties to the arbitration shall procure that the Persons Involved in the Arbitration shall keep in confidence and not disclose to anyone other than the Persons Involved in the Arbitration any Information provided by the Parties as defined in Article 1.2.1 and, if appropriate, shall be bound by the security requirement contained in Article 1.8 (Security of Information ) where specified in the Contract, as if they were "the Contractor".
- (2) For the avoidance of doubt, it is agreed that the arbitration process and anything said, done or produced in or in relation to the arbitration process (including any awards) shall be held in confidence as between the parties to the arbitration, except as may be lawfully required in judicial proceedings relating to the arbitration or otherwise. No disclosure relating to anything said, done or produced in or in relation to the arbitration process may be made to anyone other than the Persons involved in the Arbitration outside the arbitration tribunal, the parties to the arbitration, their legal representatives or any person necessary to the conduct of the proceedings, without the concurrence of the parties to the arbitration.
- (3) The arbitration tribunal shall sit in the capital city of the country whose laws apply to the Contract referred to under Article 12.1.1 unless otherwise specified in the Contract.
- (4) All oral or written pleadings before the arbitration tribunal and all documents and communications in connection with the arbitration shall be in the language in which the Standard Articles referred to in the Contract are written. The award shall be in the same language. The parties to the arbitration shall procure that the arbitrators shall keep a verbatim transcript of all hearings and provide a copy for both parties to the arbitration as soon as possible after each hearing.
- (5) The law of the country specified in the Contract, as provided for in Article 12.1.1, shall apply to the arbitration proceedings.
- (6) The parties to the arbitration shall procure that the arbitration tribunal shall have the power to make awards of cost in relation to any pre-arbitration matter.
- (7) The parties to the arbitration shall procure that:
  - i. Taking into account the provisions of Article 24 (or its successor provisions having the same effect) of the ICC Rules, the arbitration tribunal shall render its award within 30 (thirty) days, unless otherwise specified in the Contract, after final submissions by them as determined by the arbitration tribunal.
  - ii. The award shall be taken by a majority vote and that the reasons on which it is based shall be stated.
  - iii. Once the award has been made the text signed by the President of the arbitration tribunal shall be notified to them.



12.2.3.4 The award of the arbitration tribunal shall be final and binding and there shall be no right of appeal or recourse of any kind. The award shall determine the apportionment of the arbitration expenses (costs of hearings, expert witnesses, witnesses, translators and the arbitrators' expenses) and the parties to the arbitration' costs in accordance with the ICC Rules or any other rules and procedures agreed between the Parties in accordance with Article 12.2.3.1.

### 12.3 Infringements of the Law

12.3.1 Subject to the provisions of Article 2.4.1 (3), the Contractor shall in the performance of its obligations under the Contract have sole and entire responsibility for compliance by it or any Sub-Contractor or any employee of any of them with all laws, statutes, decrees or regulations whatsoever and howsoever applicable in relation to that performance.

12.3.2 Unless otherwise specified in the Contract, the Contractor shall not be relieved of any responsibility under the Contract as a consequence of any change in the applicable law as stated in Article 12.1 (Applicable Law and Jurisdiction).

### 12.4 Severability

If any provision of the Contract is held to be invalid, illegal or unenforceable to any extent then:

- (1) That provision shall (to the extent it is invalid, illegal or unenforceable) be given no effect and shall be deemed not to be included in the Contract but without invalidating any of the remaining provisions of the Contract; and
- (2) The Contracting Authority and the Contractor shall use all reasonable endeavours to replace the invalid, illegal or unenforceable provision by a valid, legal and enforceable substitute provision the effect of which is as close as possible to the intended effect of the invalid, illegal or unenforceable provision.

### 12.5 Rights of Third Parties

12.5.1 Except as provided in Article 12.5.2 below and notwithstanding anything to the contrary elsewhere in the Contract, no right is granted to any persons or entities other than the Parties and the Contracting Authority to enforce any term of the Contract in their own right and the Parties declare that they have no intention to grant any such right of that kind.

12.5.2 Where, and only where, either by a term in an Article which has been expressly included in the Contract or by another term which specifically refers to this Article 12.5, the Contract expressly states that a third party shall be entitled to enforce a term of the Contract:

- (1) That third party shall be entitled to enforce that term in his own right;
- (2) The Contractor shall inform that third party as soon as is reasonably practicable of the existence of the relevant right together with any other terms (including the terms of this Article 12.5) relevant to the exercise of that right; and
- (3) The third party's rights shall be subject to any provision in the Contract:

- i. That provides for the submission of disputes under the Contract generally or the third party's rights in particular to arbitration (such as Article 12.2. (Resolution of Disputes)); and
- ii. That stipulates the law and jurisdiction that will govern the Contract (such as Article 12.1 (Applicable Law and Jurisdiction)).

## **13. Records**

### **13.1 Contractor's Record**

13.1.1 The Contractor shall maintain such those records as that are specified in the Contract and make them available to the Contracting Authority as the Contracting Authority may reasonably require when requested to do so upon reasonable notice.

13.1.2 Subject to the provisions of Article 7.2 (Disclosure of Information), the Contractor shall permit all records referred to in this Article 13.1 to be examined by the Contracting Authority or its Authorised Representative.

13.1.3 The records referred to in this Article 13.1 shall be retained by the Contractor for a period of 4 (four) years after final payment of all sums due under the Contract, unless the Contract specifies otherwise.

### **13.2 Reporting of the Execution of Work**

In this Article 13.2, VAT shall not be taken into account for the calculation of the concerned amounts.

13.2.1 Where the Contract Price exceeds €100,000 (one hundred thousand Euro) the Contractor shall deliver to the Contracting Authority, within 3 (three) months of the date on which the Contract becomes effective in accordance with Article 14 (Effectiveness of Contract), a report forecasting the location and value of where work under the Contract may be executed. The report shall declare the level or levels of confidence in placing the work (expressed in terms of a percentage) on which it is based and shall provide a forecast as follows:

13.2.1.1 The forecast value and location of where work may be executed by the Contractor (including inter-company orders); and

13.2.1.2 The forecast value and location of where work may be executed by Sub-Contractors (including the Contractor's intra-company orders) where the Contract Price:

- (1) Is less than €7,500,000 (seven million five hundred thousand Euro), for each Sub-Contract with a value likely to exceed €100,000 (one hundred thousand Euro) and representing at least 10% of the Contract Price;
- (2) Is equal to or greater than €7,500,000 (seven million five hundred thousand Euro), for each Sub-Contract with a value likely to exceed €750,000 (seven hundred and fifty thousand Euro);
- (3) Exceeds €100,000,000 (one hundred million Euro) for each Sub-Contract:
  - i. Either, with a value likely to exceed an amount higher than €750,000 (seven hundred and fifty thousand Euro) specified in the Contract and; or

- ii. If no specific amount is specified in the Contract, with a value likely to exceed €750,000 (seven hundred and fifty thousand Euro).

13.2.2 The Contractor shall deliver to the Contracting Authority by 31 January of each year during the duration of the Contract a report updating the report delivered under Article 13.2.1 to notify any changes to the forecast and to notify the actual value and location of where work is being executed.

The reporting criteria specified in Article 13.2.1 shall apply to these annual reports and the following Information shall be supplied by the Contractor in relation to actual value and location:

- i. Product;
- ii. Description of work;
- iii. Contractor/Sub-Contractor;
- iv. Value of the Contract (including the Contractor's inter-company orders) / Sub-Contract (including the Contractor's intra-company orders);
- v. Location of execution of work.

13.2.3 The Contractor shall deliver to the Contracting Authority within 3 (three) months of the date of final delivery under the Contract a final report on the actual value and location of where work under the Contract was executed. The criteria specified in Article 13.2.1 shall apply to the final report and the Information shall be supplied in the form specified in Articles 13.2.2. i to 13.2.2.v inclusive.

13.2.4 Where two or more Sub-Contracts each with a value lower than the relevant threshold specified in Article 13.2.1 are let to the same Sub-Contractor, but the cumulative value of those Sub-Contracts exceeds or equals that relevant threshold, the Contractor shall aggregate those Sub-Contracts together for the purposes of the annual report required under Article 13.2.2 and the final report required under Article 13.2.3.

13.2.5 The Contractor shall include in each of its direct Sub-Contracts terms requiring reports described in Articles 13.2.1 – 13.2.4, including this Article 13.2.5, and shall ensure that such terms are adequately covered in Sub-Contracts at subsequent tiers.

## **14. Effectiveness of Contract**

The Contract shall become effective on and from the date specified in the Contract.

## **15. Provisions upon Expiration or Termination of the Contract.**

### **15.1 General**

15.1.1 Upon the expiry or termination of the contract, the Contractor shall ensure that:

15.1.1.1 all GFX that have been provided by the Participating States for the execution of the Contract have been duly returned in good working conditions subject to:

- a) fair wear and tear; and
- b) the terms in Article 8.1;

15.1.1.2 if applicable, any agreed set of technical and logistic data required for continued airworthiness / seaworthiness has been provided to the Contracting Authority, in a format compatible with standard software used by the concerned Participating States. The Parties shall meet to agree the set of technical and logistic data by a date 3 (three) months prior to the Contract expiry date or as soon as is reasonably practicable after the Contracting Authority has issued a Notice of Termination. A fair and reasonable price shall be agreed with the Contractor for the provision of such data except in the event of termination of the Contract under Article 11.2 (Termination of Contract for Default by the Contractor) in which case the provision of such data shall be free of charge;

15.1.1.3 the ownership of the Products and the transfer of rights to the Contracting Authority is guaranteed from the time they are acquired or allocated by the Contractor for the purposes of the Contract.

## 15.2 Specific for ISS activities

15.2.1 Upon the expiry or termination of the contract the Contractor shall co-operate with the entity(ies) responsible for the future support of the Product, to such extent as he may be reasonably required to do so, for a period not to exceed 6 (six) months from the date of expiry or termination of this Contract, such period to be determined by the Contracting Authority in co-operation with the new contractor or entity(ies), to ensure an orderly and efficient transition from the management by the Contractor to the management by the new contractor or entity(ies) as identified by the Contracting Authority.

15.2.2 The Contractor shall agree with the new contractor a fair and reasonable price for satisfying the above provisions.

15.2.3 Upon the expiry or termination of the contract, the Contractor shall provide to the Contracting Authority:

15.2.3.1 a price proposal for each Participating State in relation to the implementation of mandatory activities such as Service Bulletins, which are required to be implemented within six months on the termination or expiry date;

15.2.3.2 if so required by the Contracting Authority, a price proposal for a stock of expendables for each Participating State allowing for support of average fleet activity for a period of six months;

15.2.3.3 reasonable assistance to ensure that the transfer of any supply chain responsibilities to the Contracting Authority is done in a smooth and seamless manner under arrangements to be agreed between the Parties at such time.

15.2.4 In the event that the Contracting Authority notifies the Contractor of his intention to extend the Contract or to continue support under a different Contract with the Contractor, the Contractor undertakes to provide a dedicated financial offer within a period of 3 calendar months after the receipt of the Contracting Authority notification, on the basis of the same contractual arrangements applicable to this Contract or as they may be amended by the Contracting Authority as stated in the notification.

## **16. Contractors on Deployed Operations (CONDO)**

### **16.1 General**

16.1.1 This Article 16 shall become effective only when the Contract requires the Contractor or its Subcontractors or both, to Deploy to undertake tasks at Identified Work Locations in an Operations Area (OA). It applies only to CONDO Personnel under a contract placed by OCCAR and to Vendors while performing work on behalf of the Contractor in the OA to the extent that the conduct of the Vendors must comply with Local Military Commander's Orders. The Contractor shall ensure the Vendors are made aware of their obligations with respect to the Local Military Commander's Orders. This Article 16 does not apply to contractors engaged directly by the Participating States or by any other authorities.

16.1.2 Notwithstanding the above, the Contract may include specific conditions in accordance with the national CONDO arrangements; in that case, such specific conditions will take precedence over this Article 16.

16.1.3 The Contracting Authority may designate an Authorised Representative to act on his behalf in respect of this Article 16. Any such designation will be notified in writing to the Contractor as soon as it is practicable.

The Contractor shall ensure that the designation of the Contracting Authority's Authorised Representative is communicated without delay to the Subcontractor involved in the Deployment. A possibility to object is given according to article 1.2.7.

16.1.4 The overarching principles that must be followed by the Contractor are:

16.1.4.1 The Contractor must provide an assured service for the Contracting Authority or his Authorised Representative under normal operating and threat levels.

16.1.4.2 The Contractor must undertake the contracted tasks on a priority basis; disputes of a contractual nature must not affect the Contractor's obligation in this respect;

16.1.4.3 Disputes related to the application of the above principles shall be dealt with in accordance with Articles 12.2 ("Resolution of Disputes") and, where applicable Article 2.3 ("Contract Amendments and Specification Change Procedures").

### **16.2 Authorization to Deploy**

16.2.1 The Contractor shall not move into or within the OA in connection with the performance of the Contract until the Contractor has received the written authorisation to Deploy from the Contracting Authority. The Contractor shall use all reasonable efforts to ensure that the CONDO Personnel comply with the above requirement.

16.2.2 In order to allow the issuing of the authorisation to Deploy, the Contractor shall provide in advance to the Contracting Authority all the information required by the national regulations and practices for Deployment of the Deploying Participating State(s). The information to be provided shall include in all the cases

the confirmation that the CONDO Personnel in connection with the performance of the Contract have satisfied all the pre-requisites in respect of:

16.2.2.1 deployment training;

16.2.2.2 medical and dental fitness;

16.2.2.3 notification to the CONDO Personnel of their status in the OA;

16.2.2.4 security clearance to the levels stated in the Contract or in the Authorisation to Deploy;

16.2.2.5 availability of adequate personnel insurance in respect of life and personal effects

in accordance with the national regulations and practices for Deployment of the Deploying Participating State(s).

16.2.3 The Contracting Authority retains the right to veto the deployment of any individual designated by the Contractor or any of its Subcontractors. The Deploying Participating State(s) reserves the right to remove the CONDO Personnel should any of the foregoing requirements be found not to have been met after Deployment to the OA.

### 16.3 Right to Withhold, Withdraw, Move and Remove.

16.3.1 The Contracting Authority may at any time and from time to time for any operational reason which the Contracting Authority in its absolute discretion shall determine:

16.3.1.1 withhold or withdraw the Authority to Deploy issued to the Contractor;

16.3.1.2 move or require the removal of the Contractor or a Subcontractor from its current location to a location determined to be appropriate by the Contracting Authority;

16.3.1.3 move or require the removal of any of the CONDO Personnel or Locally Recruited Workers (LRW) from their current location to a location determined to be appropriate by the Contracting Authority either

a) in discharging its obligations under Article 16.7, or

b) in response to the CONDO Personnel or LRW not acting in accordance with Articles 16.6 or 16.2.3.

The Contractor shall, as soon as reasonably practicable, move or remove any CONDO Personnel or LRW whom the Contracting Authority requires to be moved or removed. Where such action is due to non performance or the conduct of CONDO Personnel or LRW, it shall be solely at the Contractor's expense.

16.3.2 Where practicable and subject to operational constraints, the Contracting Authority will inform the Contractor of its intentions prior to moving the CONDO Personnel and LRW in accordance with Article 16.3.1. Where the Contracting Authority moves the CONDO Personnel and/or LRW in accordance with Article 16.3.1 without informing the Contractor, the Contracting Authority shall, as soon as reasonably practicable within operational constraints, notify the Contractor of the location to which the CONDO Personnel and LRW have been moved.

16.3.3 The Contracting Authority shall not be obliged to give reasons for taking any action in accordance with Article 16.3.1 but may, in its sole discretion, indicate its reasons.

16.3.4 Notwithstanding the provisions of Article 16.3.3, in the event that the Contractor is involved in any employment claim or dispute arising in connection with any action taken by the Contracting Authority under Article 16.3.1, the Contracting Authority shall, where reasonably practicable, provide to the Contractor any relevant information that the Contractor may reasonably request for the purpose of addressing any such claim or dispute, except any such information the provision of which would be contrary to the interests of national security of the Deploying Participating State(s), in breach of a confidentiality or contractual obligation of the Contracting Authority, contrary to a statutory requirement or policy of the Deploying Participating State(s) or as otherwise reasonably specified by the Contracting Authority.

16.3.5 Where the Contracting Authority requires the CONDO Personnel and LRW to move to undertake tasks at new work locations which are not Identified Work Locations, the Contracting Authority will request the Contractor's prior written approval of the movement, such approval not to be unreasonably withheld. The Contractor shall provide such approval or the reasons for declining to provide such approval within 72 hours of the Contracting Authority's request or within such other time period as is specified in the Contract. When a new work location is agreed, the Contract shall be amended to add that new work location to the list of Identified Work Locations and to make any associated adjustments to the Contract that may be required.

#### 16.4 Provision of Life Support Facilities.

16.4.1 Unless otherwise agreed with the Contracting Authority, the provision of living accommodation, laundry facilities, feeding, potable water, medical treatment, emergency dental treatment, transport and fuel for the CONDO Personnel shall be made in accordance with the regulation and practices for Deployment of the Deploying Participating State(s).

16.4.2 The Contracting Authority will provide, where available and in accordance with the national regulations and practices for Deployment of the Deploying Participating State(s), access for the CONDO Personnel to any existing facilities for personal welfare, communications, entertainment and recreation, which are provided for the use of military personnel, unless otherwise agreed with the Contractor.

16.4.3 The Contractor shall pay any specified charges for the use of the facilities specified in Articles 16.4.1 and 16.4.2. The Contracting Authority may, at its discretion, provide chaplaincy services to the CONDO Personnel without charge where such services are available.

#### 16.5 Transportation, Medical Evacuation and Repatriation:

16.5.1 The responsibility under the Contract for the:

16.5.1.1 transportation of the CONDO Personnel and LRW and their equipment to, from and within the Operations Area;

16.5.1.2 medical evacuation of CONDO Personnel; and

16.5.1.3 repatriation of deceased CONDO Personnel;

shall be in accordance with the national regulations and practices for Deployment of the Deploying Participating State(s), unless otherwise notified by the Contracting Authority.

16.5.2 In the cases where the responsibility in Articles 16.5.1.2 and 16.5.1.3 lies on the Contractor and it is not safe or practicable for the Contractor to discharge such responsibility, the Contracting Authority will, where reasonably practicable, move CONDO Personnel to a safe area from which the Contractor is able to take over the medical evacuation and / or repatriation of the deceased CONDO Personnel, on either a repayment basis or, at the Contracting Authority's discretion, free of charge.

## 16.6 Responsibilities of the Contractor

16.6.1 The Contractor shall require the CONDO Personnel and LRW to act in a responsible manner and shall require the CONDO Personnel and LRW to make themselves aware of and comply with the Local Military Commander's Orders. In addition, CONDO Personnel shall adhere to the national law of the OA at all times.

16.6.2 If the Contracting Authority, in its absolute discretion, restricts the movement, within the Operations Area, of the Contractor, the CONDO Personnel and LRW, the Contractor shall inform the CONDO Personnel and LRW as soon as practicable and require the CONDO Personnel and LRW to comply with any such restriction.

16.6.3 The Contractor shall, during the Deployment, ensure that the CONDO Personnel and LRW:

16.6.3.1 have appropriate equipment and clothing for the climate and the tasks which the Contractor is contracted to undertake;

16.6.3.2 avoid wearing clothes which detracts from their civilian status;

16.6.3.3 avoid the use of vehicles, equipment and property that could be confused with military vehicles, equipment and property, unless they have been provided to the Contractor by the Contracting Authority for the purposes of the Contract or as otherwise directed by the Local Military Commander;

16.6.3.4 undertake all work in a manner comparable with the requirements of the health, safety and environmental legislation of the Deploying Participating State(s), or in accordance with the equivalent requirements of the host nation where these are more stringent;

16.6.3.5 do not make any press statement or undertake any publicity, advertising or marketing campaigns, as stated in Article 1.6;

16.6.3.6 can be at all times identified as CONDO personnel by wearing ID cards as required by the national regulations and practices for Deployment of the Deploying Participating State(s).

16.6.4 The Contractor shall provide to the Contracting Authority all information required prior to the Deployment and will provide periodic reports in accordance with the national regulations and practices for Deployment of the Deploying Participating State(s).



16.6.5 The Contractor shall ensure that all information, including that specified in the Local Military Commander's Orders required for the issue of day security passes to the Contractor's and Subcontractor's LRW, is provided to the Contracting Authority in accordance with the processes set out in the Local Military Commander's Orders.

16.6.6 The Contractor shall ensure that the terms of Article 16 are incorporated as appropriate into any Subcontract the Contractor may enter into which involves the undertaking of tasks at Identified Work Locations in an Operations Area.

16.6.7 The obligations of the Contractor in Articles 16.6.1 to 16.6.6 above may be subject to further details or to the inclusion of additional obligations for the Contractor in direct application of the national regulations and practices for Deployment of the Deploying Participating State(s). Such details and additional obligations as applicable shall be stated in the Contract. The Deploying Participating State(s) reserves the right to remove the CONDO Personnel should any of the foregoing requirements be found not to have been met after Deployment to the OA.

#### 16.7 Obligations of the Contracting Authority

16.7.1 The Contracting Authority shall afford appropriate protection commensurate with the threat for the CONDO Personnel and the Contractor's and Subcontractor's property whilst Deployed and for LRW whilst they are at an Identified Work Location or travelling between Identified Work Locations in support of the Contract and take such steps as are reasonable to ensure their safety, including, if necessary, removing or evacuating them from the area under threat.

16.7.2 The Contracting Authority shall make the Local Military Commander's Orders available to the Contractor's representative in the Operations Area in such a manner as to facilitate compliance by the Contractor with its obligations.

16.7.3 The responsibilities of the Contracting Authority in Articles 16.7.1 and 16.7.2 above may be subject to further details or to the inclusion of additional responsibilities in direct application of the national regulations and practices for Deployment of the Deploying Participating State(s). Such details and additional responsibilities as applicable shall be stated in the Contract.

16.7.4 The obligations of the Contracting Authority in Article 16 shall not apply for CONDO Personnel during the periods of time spent outside the OA.

16.7.5 On cessation of the deployment period by the CONDO Personnel, the obligations of the Contracting Authority in this Article 16 shall no longer apply.

#### 16.8 Right of the Contractor to withdraw

16.8.1 If the result of a risk assessment performed by the Contractor demonstrates that the safety environment at an Identified Work Location within the OA or in respect of the expected modes of transport to and between the Identified Work Locations provides justification either not to Deploy the CONDO Personnel or to withdraw the CONDO Personnel and LRW from an existing Deployment; or the Contractor does not have sufficient information to undertake a proper risk assessment on the aforementioned safety environment, the Contractor

may decline to provide personnel for a task or withdraw them from an existing Deployment.

16.8.2 In the circumstances described in Article 16.8.1, the Contractor shall inform the Contracting Authority or its Authorised Representative at the earliest opportunity and undertake to maintain with the Deploying Participating State(s) an informed exchange of information to discuss the Contractor's concerns. The Deploying Participating State(s) will support the discussions and provide the Contractor with any additional information that may become available and might be useful for the assessment of the risks by the Contractor.

16.8.3 If, following such discussion and further consideration, the Contractor decides that the safety environment is such that the CONDO Personnel will not be Deployed or the CONDO Personnel and LRW will be withdrawn, the Contractor shall notify the Contracting Authority of its decision without delay.

#### 16.9 Performance of the Contract

16.9.1 In the event that the Contractor is unable to perform certain or all of its obligations under the Contract in accordance with its terms, either in the manner or at the time intended or at all and, subject to Article 16.9.2, to the extent that it can be established that the exercising by the Contracting Authority of its rights under Articles 16.3.1 or 16.6.2, or the Contractor withdrawal of the CONDO Personnel and LRW in accordance with Article 16.8, have directly caused:

- a) the Contractor's non-performance of an obligation under the Contract; or
- b) the Contractor's delay in performing an obligation under the Contract; or
- c) a change in the Contractor's costs of performing its obligations under the Contract which is directly attributable to the exercise of those rights by the Contracting Authority or the withdrawal of the CONDO Personnel and LRW;

the Contractor shall be entitled to submit a claim:

- i. for relief from performing that obligation;
- ii. to delay its performance of that obligation;
- iii. for a corresponding adjustment to the Contract in relation to price or delivery.

16.9.2 Notwithstanding the provisions of Article 16.9.1, the Contractor shall not be entitled to be granted relief from performing an obligation under the Contract, or to delay its performance of an obligation, or to a corresponding adjustment to the Contract in relation to price or delivery, where and to the extent that the Contractor:

- a) failed to comply with its obligations under Articles 16.2 and 16.6 and such failure gave rise to the exercise by the Contracting Authority of its rights under Articles 16.3.1 or 16.6.2; or
- b) invalidly exercised its right to withdraw under Article 16.8.



**OCCAR-EA**  
**OCCAR Management Procedure**

Title:	<b><u>Cost Analysis, Audit and Price Investigation</u></b>	
Number:	Annex B to OMP 6	Date: 10/06/14
Computer Ref:	Annex OMP6-B_Cost Analysis, Audit and Price Investigation_Issue1_100614.docx	
Current status:	Issue 2	
Contact address:	Central Office, OCCAR-EA Bonn Email: <a href="mailto:questions@occar.int">questions@occar.int</a>	

Approved for issue:

This document replaces: Annex OMP 1-D issue 1, dated 06/11/09

## Record of changes

<b>Date</b>	<b>Issue</b>	<b>Changes</b>
01/99	OMP 1.01 - Issue 1	Creation of the document. OMP approved by the BoS.
02/02	OMP 1.01 - Issue 2	Revision of the main document and of annexes. Document not entered into force.
03/03	OMP 1.01 - Issue 3	Revision of the main document and of annexes i.a.w. comments from the nations. Document not entered into force.
11/03	OMP 1.01 - Issue 4	Document issue further to the approval of OMP 1.01 issue4 draft1 dated 08/03 by the BoS on 5/12/03.
24/05/05	OMP 1 - Issue 1	Revision: including "Programme Board" Document issue further to the approval of OMP 1 issue1 draft3 by the BoS on 19/05/05.
01/07/06	OMP 1 - Issue 2	Conversion to the OCCAR-EA graphical house style.
06/11/09	OMP 1 - Issue 3	Updated to insert Annex OMP 1-D on cost analysis, audit and price investigation and to make reference within the OMP 1. Integration of OMP 1 Addendum 1 as Annex OMP 1-C.
15/12/10	OMP 1 - Issue 4	Update to align with OMP 2, Issue 6. Addition of Annex OMP 1-E, issue 1 "Management of Technology Demonstrator Programmes". Implementation of changes as agreed at the 34 <sup>th</sup> FTPC meeting on 8-9/11/10.
10/06/14	Annex OMP 6-B - Issue 1	Transferred from Annex OMP 1-D to Annex OMP6-B as a result of the full review revision producing OMP 1 Issue 5. Templates included at the end of the document as part of the Annex.

## Table of Contents

<b>1. Introduction.....</b>	<b>4</b>
<b>2. Scope .....</b>	<b>4</b>
<b>3. Related documentation.....</b>	<b>4</b>
<b>4. Principles .....</b>	<b>4</b>
4.1 General.....	4
4.2 Initial price estimate .....	5
4.3 Price quotations - competitive.....	6
4.4 Price quotations - non competitive – Non-Revisable Prices, Revisable Prices and Maximum Prices (to be converted to Non-Revisable or Revisable Prices)	6
4.5 Cost Re-imbusement Contracts under Maximum Price .....	7
4.6 Sub-Contractors.....	8
4.7 Cost attribution/charging rates.....	8
4.8 Post costing .....	9
<b>5. Use of national administration expertise .....</b>	<b>10</b>
5.1 General.....	10
5.2 Cost of price investigation or price audit services performed by National Administrations.....	11
5.3 Treatment of Information provided upon Price Audit/Price Investigation .....	11

## List of acronyms/definitions/explanations

CFF	Call For Funds
CO	OCCAR-EA Central Office
GFE/GFF	Government Furnished Equipment/Government Furnished Facility
ITT	Invitation To Tender
NATO	The North Atlantic Treaty Organisation
NPC	National Programme Coordinator
OCCAR	The Organisation for Joint Armament Co-operation (Organisation Conjointe de Coopération en matière d'Armement)
OCCAR-EA	The OCCAR Executive Administration
OMP	OCCAR Management Procedure
PC	Programme Committee
PD	Programme Division
PM	Programme Manager
PMC	Programme Management Cell
ProcS	Procurement Strategy
ProgD	Programme Decision
PS	Participating State
PSs	Participating States

## **1. Introduction**

- 1.1 This annex addresses the audit and investigation of contractors' price information at different stages of a contracting process.
- 1.2 It is also applicable to the assessment of contractor's costs in the event of contract amendment or cancellation or in respect of claims for additional costs made by a contractor in accordance with the contract provisions. It does not cover the methodology for evaluation of proposals, tender assessment (see OMP 5), contract terms and conditions relating to pricing (see Annex OMP 6-A) nor application of negotiating techniques.

## **2. Scope**

- 2.1 The instruction is applicable to OCCAR-EA PDs or PMCs responsible for managing contracts.
- 2.2 The instruction applies to all OCCAR-EA requirements (whether funded under the Programme Operational or Programme Administrative Budgets).

## **3. Related documentation**

OMP 5	Contract Placement Procedure
Form OMP 6-B-1	OCCAR Request for Price Audit/Price Investigation
Form OMP 6-B-2	OCCAR Acceptance of Price Audit/Price Investigation Request
Form OMP 6-B-3	OCCAR Rejection of Price Audit/Price Investigation Request

## **4. Principles**

### **4.1 General**

- 4.1.1 Throughout the procurement process, the PM has full responsibility for negotiating the price with industry taking into account the results of a formal price investigation and/or audit undertaken by the relevant national pricing authorities/pricing audit services on behalf of OCCAR-EA.
- 4.1.2 The PM will also be required to provide up to date estimates of procurement cost for the purposes of Programme approvals, financial planning and in support of contract price negotiations. The initial basis for these estimates will often be information from contractors in the form of price estimates, price quotations (competitive and non-competitive), price audits/investigations performed in respect of previous contracts or external estimate (Nations). This annex explains the types of activity the PM and his/her division (or management cell) shall undertake to analyse the reasonableness of contractors' price estimates and quotations.
- 4.1.3 Price investigations/audits shall be based upon the appropriate national pricing practices/regulations, accounting conventions and arrangements of the country in which the work is performed and will normally be undertaken by the relevant national pricing authorities/pricing audit services. In exceptional cases, national pricing authorities/pricing audit services, and/or OCCAR-EA after confirmation by the relevant national

pricing authorities/pricing audit services, may task other agencies or enterprises to act on behalf of OCCAR-EA.

#### 4.2 Initial price estimate

4.2.1 In the early stages of the procurement process, prior to issuing of ITTs or single tenders, the PM will need to prepare estimates of the price of a potential contract. These will be required in support of the Programme Management process (ProcS, preparation of ProgD) and financial planning processes and will need to be reviewed and updated regularly to ensure that estimated cost is kept within approved levels. This estimate will also be the basis of the target price for the negotiation process and for the analysis of the future offers in the competitive process.

4.2.2 Whether or not there are estimates available from industry, the PM shall establish and maintain an OCCAR-EA estimate of the price of the potential contract taking into account where possible:

- Estimates from contractors received on request by OCCAR-EA (where estimates are obtained from industry, it must be made clear that the request is without commitment and is not a request for a formal quotation);
- Modelling techniques and methods appropriate to the relevant procurement;
- Estimates available within the administrations of the PSs;
- Prices paid for previous orders or for similar equipment on other Programmes (national or collaborative);
- Catalogue/commercial prices;
- Expertise or knowledge available within the PD (or PMC) or national administrations specific to the type of work involved (level of technical effort required, risk factors) and the potential contractors involved (e.g. knowledge of record of estimating accuracy, agreed charging rates etc);
- Analysis of the level of confidence in the estimate that may depend, for example, on the level of definition of the requirement when the estimate is made;
- OCCAR-EA's market share in the product and its consequent influence on OCCAR EA's ability to negotiate a keen price;
- The likely field of competition.

4.2.3 The extent to which the PM is able to apply such factors will determine the level of confidence in the estimate.

4.2.4 Where information is available from industry, the PM shall assess the realism of such estimates which is likely to involve further discussion of the requirement with the contractor concerned. A formal investigation of the contractor's estimate is not usually appropriate given that such estimates are not binding on the contractor, and are not requested for use as a basis

for price negotiation.

- 4.2.5 The PM shall use the internal estimate and the information underpinning it in his/her decisions or, for Major Contracts, recommendations he/she shall make to the PC regarding proceeding to the subsequent phase e.g. to issue ITTs.

#### 4.3 Price quotations - competitive

- 4.3.1 The proper and effective application of competition should produce a price which precludes a requirement for further analysis. But in practice, an assessment should be required to confirm that the competition has been effective and an analysis may be required to check the realism of tenders where doubt exists. A request in ITTs for a breakdown of price by major item and by main sub-contract should be requested where appropriate.
- 4.3.2 Such analysis does not ordinarily involve examination of information beyond that within the quote but should take into account other tenders in the competition, previous prices paid for the same or similar products and may involve further discussion with tenderers.
- 4.3.3 The PM may request the assistance of national administration experts to assess proposed stage payment plans to ensure that they are commensurate with the intended progress of work. For tenders that appear unrealistically low, it may be appropriate to clarify with the tenderer and/or request the assistance of representatives of national pricing authorities/pricing audit services or other agencies or enterprises to help verify the realism of the tender, whilst ensuring strict impartiality.
- 4.3.4 Where a competition is not deemed to have been effective and the decision is to proceed to a negotiated non-competitive contract (see OMP 5), the provisions of paragraph 4.4 apply.
- 4.3.5 Negotiation will normally be based on information in the tender and any additional information (further price breakdowns to sub-level) willingly provided by the contractor in support of the competitive quote.

#### 4.4 Price quotations - non competitive – Non-Revisable Prices, Revisable Prices and Maximum Prices (to be converted to Non-Revisable or Revisable Prices)

- 4.4.1 Price quotations will be requested either a) prior to letting a contract for the purposes of agreeing prices or setting maximum prices, whether non-revisable or revisable, or b) during the course of the contract to convert a maximum price to a non-revisable or revisable price.
- 4.4.2 Unless there is recent information available on similar prices paid either after competition or which had been fully investigated and deemed to be fair and reasonable, formal investigation may be required. The PM shall decide a threshold above which formal price investigation and/or audit of all information relevant to the build of the quotation shall normally be required. This threshold will also need to take into account any constraints that national pricing authorities/pricing audit services may also impose on their involvement where this is to be requested. For quotations under this value, the analysis will normally be conducted through direct discussions between the PD (or PMC) and the contractor without resort to formal price



investigation and/or audit.

- 4.4.3 The contractor and, where appropriate, sub-contractors (see paragraph 4.6) shall be required to confirm formally in writing that all information relevant to the quotation build shall be made available to OCCAR-EA and its authorised representatives in the price negotiation process and that those representatives shall have full access to and visibility of all relevant information for that purpose i.e. that there will be equality of information giving full transparency to OCCAR-EA or its representatives of all relevant information available to the contractor. For contracts with a maximum price to be converted into a non-revisable or revisable price, a contract condition shall be included to ensure that all information on actual costs to date is available to OCCAR-EA at the time of price fixing (see Annex OMP 6-A).

#### 4.5 Cost Re-imbusement Contracts under Maximum Price

- 4.5.1 As a general policy such contracts should be avoided in OCCAR and, if essential, should be subject to a maximum price limit. Usually the risk associated with such contracts is very high and the resources required to manage them are so important that OCCAR will have to request a strong support of the PSs.
- 4.5.2 Under cost reimbursement type contracts, the contract price is based on actual costs incurred on the work plus a margin for profit within a maximum price and is consequently agreed after contract completion after receipt of a final cost certificate. Contract terms and conditions shall ensure that the contractor provides periodic certified statements showing costs to date, estimated costs to completion, and on completion of contract, a final cost certificate. The PM shall need to examine the periodic statements to ensure that they are reasonable and consistent with the level of work performed.
- 4.5.3 For contracts over the threshold as decided by the PM in accordance with paragraph 4.4.2, the PM will normally request the assistance of the relevant national pricing authorities/pricing audit services or other agencies or enterprises to investigate the costs presented on interim and final cost statements produced by the contractor and to provide advice on whether they have been reasonably and properly incurred. For contracts under this threshold, the PM will use internal resources to conduct such an assessment of cost statements.
- 4.5.4 The contractor and, where appropriate sub-contractors (see paragraph 4.6) shall be required to confirm formally in writing that all information relevant to the interim and final cost statements shall be made available to OCCAR-EA and its authorised representatives in the price negotiation process and that those representatives shall have full access to and visibility of all relevant information for that purpose i.e. that there will be equality of information giving full transparency to OCCAR-EA or its representatives of all relevant information available to the contractor.
- 4.5.5 There are other specific cases where prices are agreed on the basis of costs incurred by the contractor (e.g. in the event of contract cancellation, in the event of additional costs incurred/damages claims as a result of non-conformity or delay in delivery of GFE/GFF, in the event of very urgent

supplementary work). In such cases, the PM shall ensure that the contractor is reminded that such costs should be properly accounted for. Prices exceeding the threshold as decided in accordance with paragraph 4.4.2 will normally be subject to formal price audit. The PM shall decide case by case on whether to request assistance from national pricing authorities/pricing audit services or other agencies or enterprises in auditing accounts where the value falls below the threshold in the previous paragraph 4.4.2.

#### 4.6 Sub-Contractors

- 4.6.1 In order to minimise the potential for transfer of pricing risk to OCCAR-EA, the responsibility for negotiating fair and reasonable prices for sub-contracts should rest with the prime contractor. In principle, OCCAR-EA should address any queries with regard to sub-contract prices directly to the prime contractor. However, in the pursuit of best value for money it is equally important for OCCAR-EA to behave as an intelligent customer and to satisfy itself that the prices agreed for sub-contracts are indeed fair and reasonable. To this end, the PM shall agree contractual terms and conditions with the prime contractor that reserve OCCAR-EA's right to investigate non-competitive sub-contract prices directly with sub-contractors and to report the outcome to the prime contractor. Those contractual terms shall require the prime contractor to take due account of that reported outcome in negotiating and agreeing with the sub-contractor the price for the sub-contract concerned. Such right should also extend to the post costing of such sub-contracts (see Annex OMP 6-A), although this right shall only be exercised exceptionally in specific circumstances and shall require PM approval in all cases. Such investigations and/or audits shall be conducted in accordance with the principles set below. The PM shall verify that similar contract terms within the prime contract related to equality of information and access to costing records are included in non-competitive sub-contracts.
- 4.6.2 The thresholds relating to formal investigations and/or audits as agreed under the terms of paragraph 4.4.2 apply to sub-contracts whatever the level of sub-contracting.
- 4.6.3 Approved investigations with sub-contractors shall be arranged with the agreement of the prime contractor(s) in a way that:
- Ensures full accessibility and visibility of relevant information to the PM;
  - Addresses commercial confidentiality concerns that sub-contractors may have with regard to their prime contractor;
  - Ensures that the prime contractor is kept fully informed of the process and is involved to the extent it requires to be able to take due account of the outcome of the investigation and/or audit in negotiating and agreeing the sub-contract price;
  - Ensures that the prime contractor accepts responsibility for the sub-contract price agreed and liability for any amount by which that price exceeds the outcome of the investigation and/or audit.

#### 4.7 Cost attribution/charging rates

4.7.1 Contractors' charging rates for elements such as labour and overheads are usually agreed periodically for government defence work with national audit administrations. These rates are ordinarily more favourable than those rates that contractors charge to commercial customers as those commercial rates include elements of cost that are not attributable to national defence work. Consequently, PMs shall ensure that in negotiation involving consideration of charging rates (usually all non-competitive contracts), it is understood and formally accepted by contractors (and non-competitive sub-contractors) that costs are attributed according to the costing structures and attribution agreed for national defence work and that those nationally agreed charging rates shall apply to OCCAR-EA work except where agreed to the contrary. Such latter cases shall be limited to those cases where, in total, it can be demonstrated that more favourable terms may be reached through application of alternative arrangements. Where national rates apply, the PM shall arrange for charging rates to be checked.

#### 4.8 Post costing

- 4.8.1 To verify the effectiveness and accuracy of price investigation and negotiation activities, on non-competitive contracts and as an aide for future pricing activity, terms and conditions should be included in all non-competitive non-revisable/revisable price contracts, and sub-contracts over 250 k Euro, to ensure that contractors maintain records of actual costs incurred against the contract for a period of five years from the date of final delivery or completion of services under the contract (Annex OMP 6-A) to allow for post costing i.e. the establishment of final actual costs incurred.
- 4.8.2 Post costing shall only be applied selectively to contracts and sub-contracts on the decision of the PM and/or PC. CO may also instruct a post costing exercise to be undertaken where the results may be of benefit in the pricing of other OCCAR-managed Programmes. The outcome of all post costing exercises shall be made available to CO (to the Commercial & Policy Section).
- 4.8.3 When post costing is to apply, the PM shall obtain such statement of final costs from the contractor and shall arrange for their investigation by the relevant national pricing authorities/pricing audit services or other agencies or enterprises.
- 4.8.4 The contractor and, where appropriate, sub-contractors (see paragraph 4.6) shall be required to confirm formally in writing that all information relevant to the final cost statement shall be made available to OCCAR-EA and its authorised representatives in the post costing process and that those representatives shall have full access to and visibility of all relevant information for that purpose i.e. that there will be equality of information giving full transparency to OCCAR-EA or its representatives of all relevant information available to the contractor.

## 5. Use of national administration expertise

### 5.1 General

- 5.1.1 The services of national administrations' price investigation or price audit experts are provided to assist the PM in negotiating a price. He shall not be bound by the outcome of such investigation.
- 5.1.2 The following instruction applies to requests for the services of national pricing authorities/pricing audit services of the OCCAR Member States:
- for a contractor of a PS, the PM shall pass the request to the relevant NPC,
  - for a contractor not of a PS but of a Member State, the PM shall pass the request to the focal point of the relevant Member State.
  - for a contractor of a Non-Member State but of a NATO member nation, utilise reciprocal NATO arrangements. A national co-ordinator of a PS who is also a NATO member shall lead discussions with the national administrations.
  - for contractors of Non-Member State, non-NATO member nation, endeavour to utilise any reciprocal arrangements that may exist with any OCCAR Member State. Otherwise, assess the value of utilising other national estimating services or bought in assistance.
- 5.1.3 Any request for such services is to be made using Form OMP 6-B-1. The national pricing authorities/pricing audit services should be given as much advance notice of future requests as is possible. The national pricing authority/pricing audit shall acknowledge the receipt of the request without unnecessary delay. The acknowledgment signifies that the request has been received and is being processed.
- 5.1.4 When accepting a request, the national pricing authority/pricing audit service should notify promptly its acceptance using the form set out in Form OMP 6-B-2, together with any comments or proposed amendments to the request. Any comments or proposed amendments should be dealt with to the mutual satisfaction of OCCAR-EA and the national pricing authority/pricing audit service before the price investigation or price audit commences. The PM is to ensure that the national pricing authority/pricing audit service is provided promptly with any amendments or changes in the documents forwarded with the original request.
- 5.1.5 When rejecting a request, the national pricing authority/pricing audit service should notify promptly and provide the reasons for rejection using the form set out in Form OMP 6-B-3.
- 5.1.6 As a principle, the national pricing authority/pricing audit service shall only investigate work performed in the country in which it is located.
- 5.1.7 The PM shall ensure that final discussion of analyses or reports with the contractor and, where appropriate, sub-contractors (where this practice applies) takes place in the presence of a member of the PD (or PMC) with negotiating responsibility. National price investigation or price audit experts

may assist in subsequent price negotiations covering the work in such reports in the role of advisors to the PD (or PMC) negotiators where deemed useful by the PM and where such assistance has been requested and accepted by the relevant national pricing authorities/pricing audit services.

## 5.2 Cost of price investigation or price audit services performed by National Administrations

- 5.2.1 Normally, services of national administrations' price investigation or price audit experts shall be provided by each PS at no additional cost to the Programme.
- 5.2.2 Where a PS intends to charge OCCAR for such services in relation to an administrative procurement it shall advise on the ceiling amount of those services prior to commencement of the tendering process which shall be charged to the associated Programme Administrative Budget.
- 5.2.3 Where a PS intends to charge OCCAR for such services in relation with a Programme, it shall, prior to the signature of the PD (or PMC), advise on the ceiling amount of those services for the duration of the ProgD, so that each PS can cover its own share in its Programme Operational Budget. The ceiling costs shall be defined in the ProgD.
- 5.2.4 Where price investigation or price audit services are provided by a Member State not involved in the Programme or by a Non-Member State and Non PS, the additional costs where applicable shall be distributed by mutual agreement on a case-by-case basis.
- 5.2.5 Where applicable, the cost of the service to be charged to PSs shall be identified in part 7 of Form OMP 6-B-2. The share of each PS of the above costs shall be included in the maximum financial commitments defined in the ProgD. OCCAR shall apportion the costs arising from price investigation or price audit service, in accordance with the regulations in the ProgD and integrate these costs in the CFFs.

## 5.3 Treatment of Information provided upon Price Audit/Price Investigation

- 5.3.1 The information provided upon price audit/price investigation shall be considered commercially sensitive and, consequently, this information shall be treated in accordance with OMP 12 (Handling of Unclassified Sensitive Information). No such commercially sensitive information shall be disclosed outside the PSs and OCCAR-EA without the express agreement of the relevant national pricing authorities/pricing audit services and the concerned contractor or sub-contractor.
- 5.3.2 Subject to the agreement of the relevant national pricing authorities, a summary of the result of the pricing audit/pricing investigation of sub-contractor may be released by OCCAR-EA to the prime contractor for negotiation purposes.

*Page left blank intentionally*



## Form OMP 6-B-1

### OCCAR REQUEST FOR PRICE AUDIT / PRICE INVESTIGATION

**From:**

Name:  
Organisation:  
Mailing Address:

**To:**

Name:  
Organisation:  
Mailing Address:

**OCCAR-EA Requesting Authority**

**Point of Contact:**

Name:  
Mailing Address:

Telephone No:  
Fax No:  
E-mail Address:

**Contractor / Sub-Contractor**

**Point of Contact:**

Name:  
Mailing Address:

Telephone No:  
Fax No:

**Contract / Invitation to Tender Details**

**OCCAR Contract / Invitation to Tender No (ITT):**

Type of Contract:

Name of Contractor / Sub-Contractor (if applicable):

Description of the Goods or Services:

Total Contract Value (state currency):

Contractor's Proposal No:

Date:

Price of Proposal:

Period of Performance:

Audit Purposes:

<b>Price Audit / Price Investigation Required:</b>			
Overhead Rates:	<input type="checkbox"/>	Labour Rates	<input type="checkbox"/>
Review of Sub-Contracts	<input type="checkbox"/>	Technical Review of Materials / Labour Hours	<input type="checkbox"/>
Other Direct Costs (Travel, Data, Tooling etc.):	<input type="checkbox"/>	Incurred Cost	<input type="checkbox"/>
Variation of Price (VOP):	<input type="checkbox"/>	Exchange Rate Variation	<input type="checkbox"/>
Other (Please Specify):			
Previous Audit / Review (dates)			
<b>Audit required by (date):</b>			
<b>Enclosures:</b>			
ITT:	<input type="checkbox"/>	Contract:	<input type="checkbox"/>
Statement of Work	<input type="checkbox"/>	Proposal / Bid	<input type="checkbox"/>
Statement of Agreement to Audit	<input type="checkbox"/>		
<b>Additional Comments:</b>			
<b>Costs:</b>			
Administrative Procurement	<input type="checkbox"/>	Operational Procurement	<input type="checkbox"/>
Price authority / audit services to advise if charge applicable and, if so, on the associated costs via Form OMP 6-B-2			<input type="checkbox"/>
Charge applicable in accordance with the associated Programme Decision	<input type="checkbox"/>	YES	<input type="checkbox"/> No
Price authority / audit services to advise on associated costs via Form OMP 6-B-2	<input type="checkbox"/>	YES	<input type="checkbox"/> No
<b>Signature (OCCAR-EA Requesting Authority):</b>			
Name:		Date:	
Signature:		Title:	





## Form OMP 6-B-2

### OCCAR ACCEPTANCE OF PRICE AUDIT / PRICE INVESTIGATION REQUEST

**From:**

Name:  
Organisation:  
Mailing Address:

**To:**

Name:  
Organisation:  
Mailing Address:

**1. I acknowledge receipt of your request for price audit / price investigation as follows:**

Your Reference:

Company:

Location:

Subject:

Proposal value:

**2. Your request was received by this Office on:**

Date:

**3. We expect to be able to issue our Report by:**

Date:

**4. The person responsible for this audit / audit investigation is:**

Name:  
Branch:  
Telephone No:  
Fax No:  
E-Mail Address

**5. Our reference number for this audit is:****6. This acceptance is subject to the following reservations and remarks:****7. Costs:**

Where applicable, Cost of the price audit / price investigation

**8. Signature:**

Name:

Date:

Signature:

Title:

*Page left blank intentionally*



## Form OMP 6-B-3

### OCCAR REJECTION OF PRICE AUDIT / PRICE INVESTIGATION REQUEST

**From:**

Name:  
Organisation:  
Mailing Address:

**To:**

Name:  
Organisation:  
Mailing Address:

**1. I acknowledge receipt of your request for price audit / price investigation as follows:**

Your Reference:

Company:

Location:

Subject:

Proposal value:

**2. Your request was received by this Office on:**

Date:

**3. It is decided to reject your request:****4. This rejection is based on the following reasons:****5. Signature:**

Name:

Date:

Signature:

Title:

Telephone No:

Fax No:

E-Mail Address:

*Page left blank intentionally*