GENERAL CLAUSES AND CONDITIONS FOR ESA CONTRACTS
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PENALTY SCALES

1. Fixed price contracts
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PART I:

CONDITIONS APPLICABLE TO ESA CONTRACTS

(with the exception of contracts relating to international agreements with public bodies, contracts for services with public or private bodies such as water, electricity and telephone, contracts for services usually performed by local firms, contracts relating to civil engineering and construction and arrangements by which the Agency delivers, supplies or renders services to external persons.)

CHAPTER I - GENERAL PROVISIONS

CLAUSE 1 - APPLICABLE CLAUSES AND RULES

The following general clauses and conditions shall apply to contracts placed by the Agency insofar as not stated otherwise in the relevant contract. Furthermore, specific clauses and conditions may be set out or invoked in a contract and its annexes. The annexes form an integral part of the contract.

CLAUSE 2 - APPROVAL

Offers and acceptances with regard to contracts are not binding on the Agency unless approved in writing by its Director General or his authorised representative. Unless otherwise stated in the contract the date of such approval shall be the commencing date of the contract.

CLAUSE 3 - LANGUAGES

The contract and the documents attached shall be drawn up in English or in French at the Contractor's choice unless there are special circumstances which warrant the use of another language.

CLAUSE 4 - ORIGINALS OF THE CONTRACTS

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

CLAUSE 5 - AGENCY’S REPRESENTATIVES - INSPECTIONS

The Agency shall have the right to check the technical performance of the contract, and for this purpose, and for the general purpose of collaboration, the Agency shall nominate a representative(s) whose name(s) shall be notified in writing to the Contractor. Any information made available by the Contractor to such representative(s) shall be regarded as commercially confidential.

The Contractor shall, in this respect, and in accordance with any relevant security regulations, give the representative(s) of the Agency access to his premises and shall give all other necessary assistance in order that he (they) may fulfil his (their) task.
CLAUSE 6 - REPORTS

Reports giving details of the progress of the work shall be sent to the Agency at intervals specified in the contract and beginning on a date specified in the contract.

CLAUSE 7 - COMMUNICATIONS

All communications affecting the terms and conditions of the contract and concerning its execution shall be made or confirmed in writing.

CLAUSE 8 - CONTRACTOR'S OBLIGATIONS RELATING TO DOCUMENTATION AND MATERIAL SUPPLIED OR SITES DESIGNATED BY THE AGENCY

The Contractor shall check with the proper care normally used in these fields that technical or other documentation, material or equipment supplied and sites designated by the Agency are satisfactory for the performance of the contract and shall notify the Agency immediately if he is not so satisfied.

CLAUSE 9 - PUBLICITY RELATING TO CONTRACTS

Press releases or other specialised publicity documents, including the Contractor's advertising and news bulletins, which are related to a contract placed by the Agency and are intended by the Contractor for the press, broadcasting, or television, shall be drawn up in consultation with the Agency. Should the Agency wish to give special publicity to a contract, it shall do so in consultation with the Contractor. Similarly, the promotion through exhibitions or otherwise of the Contractor's role in an Agency contract, or of the products resulting therefrom, shall require prior consultation between the parties.
CHAPTER II - SPECIAL GUARANTEES

CLAUSE 10 - EQUIPMENT, SUPPLIES AND TECHNICAL DOCUMENTS MADE AVAILABLE BY THE AGENCY TO THE CONTRACTOR

10.1 If for the execution of the contract the Agency supplies to the Contractor:

a) machines, tools and other equipment,
b) documents, samples and models,
c) finished or semi-finished items or components,

the Contractor shall be responsible for the above equipment and components and their proper maintenance. He shall not alienate them or use them for purposes other than those specified in the contract.

Any pattern, sample or information in documentary or other physical form mentioned in sub-clause 10.1 remains the property of the Agency and shall be returned to the Agency after execution of the contract.

10.2 In the case of loss, destruction or damage, except damage through proper use or caused by a representative or an employee of the Agency, the Contractor shall be required, unless otherwise provided in the contract, to replace or to repair at his own expense any article issued to him, or to refund its value. For this purpose a delivery document shall stipulate the price, with provision for possible revision of that price. The Contractor shall also be required to keep a permanent inventory and/or utilisation account of the articles placed under his control and, unless already marked by the Agency, to mark these articles in an unambiguous way as being the property of the Agency.

10.3 Any other specific conditions relating to such issues shall be determined in the contract.

10.4 The Contractor shall impose the aforesaid provisions on the subcontractor.

CLAUSE 11 - COMPENSATION FOR DAMAGE CAUSED TO PERSONS, GOODS OR PROPERTY

Unless otherwise provided in the contract, claims in respect of damage occurring during the execution of the contract or during the acceptance tests shall be settled in the following manner:

11.1 Claims in respect of damage of any nature sustained by the Agency's or the Contractor's representatives or employees participating in the execution of the contract or in the acceptance tests shall be settled in accordance with the law governing the contract.

11.2 Claims for damage caused to movable or immovable property owned by the Agency or the Contractor shall be settled in accordance with the law governing the contract. However, any damage caused to equipment, supplies and technical documents made available by the Agency to the Contractor shall be governed by the provisions of clause 10.
Liability for damage occurring to the articles covered by the contract shall rest with the Contractor until the time specified in the contract.

CHAPTER III - LEGAL PROVISIONS

CLAUSE 12 - APPLICABLE LAW

The law governing the contract shall be specified in the contract itself.

CLAUSE 13 - ARBITRATION

13.1 Any dispute arising out of the interpretation or execution of the contract shall, at the request of either party, be submitted to arbitration.

13.2 The contract shall specify the country where the Arbitration Tribunal shall sit; normally the Arbitration Tribunal shall have its seat in the country where the Contractor has his legal seat or where the contract is to be executed.

13.3 If no other arbitration is foreseen in the contract, any dispute arising out of the contract shall be finally settled in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators designated in conformity with those rules.

13.4 When arbitration other than in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce is provided for in the contract, the procedure of the Arbitration Tribunal shall be that of the country mentioned in subclause 13.2.

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

CLAUSE 14 - INFRINGEMENTS OF THE LAW

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

CLAUSE 15 - INFRINGEMENTS OF THIRD-PARTY RIGHTS

15.1 Unless otherwise stipulated in Part II of this document, the Contractor shall indemnify the Agency from and against all claims, proceedings, damages, costs and expenses arising from the infringement of patent rights and intellectual property rights of third-parties with respect to the subject of the contract - excluding any infringement resulting from the use of documents, patterns, drawings or goods supplied by the Agency - which may be made, or brought against the Agency, or to which the Agency may be put by reason of such infringement or alleged infringement.
15.2 The Agency shall notify the Contractor immediately of any written claim or notice of infringement of third-party rights which it received concerning the contract.

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

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

15.3 The parties shall notify each other of any known intellectual property rights connected with the use of documents, patterns, drawings and goods supplied by the one party to the other or connected with the execution of the specifications laid down by the other party.

**CLAUSE 16 - DISCLOSURE AND USE OF INFORMATION BY THE CONTRACTOR**

Clause 16 does not apply, if clause 38 or clause 52 of Part II is applicable to the contract.

16.1 If the documents supplied are marked "restricted use" the Contractor shall take all necessary steps to ensure that the conditions of the contract or any specification, plan, drawing, pattern, sample or information supplied by, or on behalf of the Agency in connection therewith shall not be disclosed to any person other than a person employed or engaged by the Contractor, whether under sub-contract or otherwise, for the performance of the contract.

16.2 Any disclosure to any person permitted under sub-clause 16.1 shall be made in confidence and shall extend only so far as may be necessary for the purposes of the contract.

16.3 Except with the written consent of the Agency, the Contractor shall not make use of any specification or other data mentioned in sub-clause 16.1 otherwise than for the purposes of the contract.
CHAPTER IV - GENERAL FINANCIAL PROVISIONS

CLAUSE 17 - PRICING

17.1 The contract shall stipulate the type of price which is applicable by reference to the classification of prices stated in Annex I to these "General Conditions".

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

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

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

CLAUSE 18 - TAXES - CUSTOMS DUTIES

The Contractor shall take all necessary steps in order to facilitate the Agency's exemption from taxes and customs duties resulting from its Protocol on Privileges and Immunities. He will do so:

- by carrying out all necessary formalities in order to bring about the exemption from taxes and duties which might otherwise be levied on the expenses he will incur, before he submits the invoice to the Agency;

- by complying with all necessary formalities in order that the Agency itself may be exempted from paying such taxes and duties, or in order that, if they are paid, the Agency may claim reimbursement from the state / country which levied them.

For this purpose, he shall comply with the instructions given to him by the Agency and provide in due time the information which the Agency requires.

CLAUSE 19 - PACKING AND TRANSPORT EXPENSES

19.1 The Contractor shall arrange to have all the material suitably packed as specified in the contract. 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 non-chargeable.

19.2 Material shall be shipped in accordance with special provisions made in the contract.

19.3 Unless otherwise stated in the contract, the cost of transport shall be deemed to cover delivery to the place fixed by the contract.
19.4 All packing and transport charges and insurance costs, as well as transit handling costs and transport fees of agents employed at the place of delivery or elsewhere, shall be deemed included in the price.

**CLAUSE 20 - ADVANCES AND PROGRESS PAYMENTS**

20.1 The Agency may authorise the payment of advances and/or progress payments in connection with the contract. Where such provision is made the conditions of contract will stipulate

- the total sum to be advanced
- the phasing, amount and method of claiming intermediate payments
- the guarantee required from the Contractor

in relation to advances

in relation to progress payments

- the stages of work at which the progress payments will be paid
- the method of calculating the provisional claim
- the limits of payment
- the documentation to be provided in support of claims.

20.2 Advances or progress payments are not final payments and shall be deducted from the sums due to the Contractor under the contract.

The total amount advanced shall in no case exceed 35 per cent of the value of the contract; the total amount paid in progress payments shall in no case exceed 90 per cent of the value of the contract.

20.3 Except with the specific agreement of the Agency, the Contractor shall not divert to uses not provided for in the contract any material or services in respect of which advances or progress payments have been made.

The Agency reserves the right to ask the Contractor for a special guarantee in order to safeguard its financial interest.

In the event of any violation of Clause 20.3 the Agency reserves the right to require the return of the advances or progress payments without prejudice to its rights under Clause 33.

**CLAUSE 21 - FINAL SETTLEMENT**

21.1 The Contractor shall be allowed to claim final settlement when all his obligations under the contract have been fulfilled. For the application of this clause, these obligations shall not include those of guarantee. The Contractor shall, in addition, certify whether or not any inventions as defined in Part II hereof, were made in the course of the contract.

He shall submit a final statement in five copies.
If the contract provides for several batches of settlement, each batch is to be paid and settled separately.

21.2 The Contractor shall supply the Agency with all documents specified in Annex I and necessary for payment, without explicit request by the Agency.

21.3 Unless otherwise provided for in the contract, a period of one month shall be granted to the Agency for the execution of the final payment. This period shall begin on a date to be stated in the contract.

21.4 Whenever any sum of money shall be recoverable from, or payable to, the parties, the sum may be deducted from the sum due, or thereafter becoming due, to the parties under any other contract between the parties.

CLAUSE 22 - PLACE AND CURRENCY OF PAYMENT

22.1 The Agency shall discharge its debt in the manner and place specified in the contract.

22.2 The contract shall stipulate the currency in which the payments shall be executed. It shall also state on which official conversion rates the prices have been established and the conditions under which readjustments shall be made in the event of fluctuation of such rates.

CHAPTER V - EXECUTION OF WORK

CLAUSE 23 - GENERAL CONDITIONS OF EXECUTION

23.1 The work specified in a contract shall be performed in accordance with the relevant trade, industrial and technical practice of the country in which the contract is placed. In particular, workmanship shall conform with the modern technical standards required for first class work and shall be strictly in accordance with the technical specifications in the contract.

23.2 As to standard types purchased from specialised catalogues the Contractor shall undertake that goods supplied conform with the details and specifications submitted in his tender.

23.3 During manufacture the Agency's representative(s) in charge of the inspection service under the conditions of Clause 5 shall be entitled, whenever he (they) observe(s) that any material or semi-finished or finished item does not conform with the required specifications, to place, or to cause to be placed, an embargo on the use or incorporation of these items in an assembly. The suspended or rejected items shall be corrected, improved or replaced as may be necessary to meet specification requirements. In case of dispute the Contractor may refer to the Board of officials as provided by Clause 29.1 within three working days.

23.4 The performance of this inspection in no way affects the responsibility of the Contractor nor does it restrict the right of the Agency or of the inspecting authority acting on its behalf:

a) to reject supplies offered for acceptance,
b) to take advantage of guarantee clauses, if any, after acceptance.
CLAUSE 24 - TRANSFER OF CONTRACT

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

CLAUSE 25 - SUB-CONTRACTS

25.1 In any contract providing for separate production batches of the same nature the Contractor shall not without prior approval of the Agency, entrust any such production batches to a sub-contractor.

25.2 Unless otherwise provided in the contract, the Contractor shall, with a view either to the acquisition or manufacture of components or intermediate products to be incorporated in the supply or for the execution of certain manufacturing processes required for the supply, submit for the approval of the Agency the general pattern of sub-contracts to be placed with third-parties.

The Agency shall not refuse to grant approval for the placing of sub-contracts after the main contract has been placed when these sub-contracts were specified in the tender accepted by the Agency.

25.3 The Contractor shall be responsible for the proper execution of any sub-contract placed by him in connection with this contract.

25.4 Unless otherwise authorised by the Agency, the conditions of the sub-contracts shall secure to the Agency any rights provided for it under the terms of the main contract.

CLAUSE 26 - CHANGES AND MODIFICATIONS TO PROJECTS, ENGINEERING AND SPECIFICATIONS

26.1 The Agency reserves the right at any time to modify the specifications, patterns or drawings relating to the work covered by the contract. The Contractor shall inform the Agency, within 30 days, of any objection he has to the modifications required.

26.2 The Agency may also accept modifications proposed by the Contractor on his own initiative or on behalf of sub-contractors.

26.3 Unless the Agency directs otherwise, the Contractor shall, in either case, submit within a reasonable time limit to be specified by the Agency, a preliminary estimate of the effect of any such modification in the cost of the contract and / or on the delivery programme. In the light of these estimates the Agency will decide whether and if so at what stage, the modification is to be introduced and will advise the Contractor in writing.
26.4 When a modification or other change is so authorised, the Contractor shall proceed with manufacture to the modified standards in accordance with the Agency's directions. He shall moreover, as soon as possible after the receipt of such directions, submit to the Agency a firm and detailed estimate showing any decrease or increase in cost entailed by the modification and any effect its introduction will have on the delivery programme.

26.5 Any amendment to the contract which may be necessary in these respects will be established within a reasonable time in the form of a rider to the contract, to be signed by both parties. If the parties do not agree on the amendments to the contract, in particular regarding prices, responsibility, delivery programme, etc., the dispute shall be submitted to the Arbitration Tribunal referred to in Clause 13, which shall take into account all the circumstances of the case.

**CLAUSE 27 - TIME-LIMITS FOR THE PROVISION OF SUPPLIES AND SERVICES**

27.1 All goods shall be delivered at the time or times and in the manner specified in the contract, and shall be accompanied by the delivery documents.

Delivery in this context shall mean the operation by which supplies meeting the contractual specifications are made available to the Agency.
27.2 The Contractor shall inform the Agency immediately upon dispatching the goods.

27.3 The Contractor shall inform the Agency within 30 days of any event likely to cause delay in delivery. The Agency shall determine, in the light of circumstances reported, whether or not any respite or modification of the delivery requirements of the contract can be permitted on this account.

An extension of the time-limit for execution or a postponement of delivery shall be granted only in respect of delay which is not attributable to the fault or the negligence of the Contractor.

An extension of the time-limit for execution shall be granted to the Contractor to the extent that he establishes that force majeure events or any action or inaction on the part of the contracting authority makes the execution of the contract impossible within the time-limit specified therein.

In other cases, and with due regard to the justification provided, the Agency may grant respites.

27.4 In the event that the contract includes a provision for pricerevision, the new time-limit would be taken into consideration in the determination of final prices, basing this revision upon the prices stipulated in the contract.

For a period equal to its duration, the respite has the sole effect of waiving the enforcement of penalties for late delivery as well as the possible cancellation for non-execution of his commitments by the Contractor.

27.5 Any time-limit to which the contract binds the Contractor or the Agency shall be counted from the day following that of the event marking the start of the time-limit and shall end on the day following the last day of the period laid down.

When the time-limit is expressed in months, it shall be counted from date to like date except where a terminal date so fixed exceeds the number of days in a calendar month, in which case, the time-limit shall end on the last day of the month.

When the last day of a time-limit is a Sunday or legal holiday in the country in which the performance is required, this time-limit shall be extended to the first working day following.

**CLAUSE 28 - PENALTIES FOR LATE DELIVERY**

28.1 If the Contractor fails to comply with the delivery date laid down in the contract, he will be liable to a penalty according to the scale of penalties attached hereto as Annex II, except where special provisions are made in the contract.
28.2 The total amount of penalties to be recovered from the Contractor shall automatically be deducted from the contract price and the Agency shall inform him of the amount to be deducted.

28.3 Penalties shall be calculated on that part of the contract's price which is attributable to that portion of the articles and / or services covered by the contract which cannot, owing to the delay, be put to the use intended. If the Contractor considers that the portion of the articles and / or services on which the Agency proposes to base a penalty could have been put to the use intended, it shall be for the Contractor to prove it accordingly.

28.4 The amount of penalties to be applied shall not exceed 10 per cent of the value used as a basis for their calculation.

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

28.6 The detailed amount of the penalties shall be notified to the Contractor, who may object within 30 days from the date of receipt of notification. Failing such objection within this period, the Contractor shall be deemed to have accepted the penalties.

28.7 Unless the delay is due to gross negligence on the part of the Contractor, and without prejudice to the application of Clause 33, no damages other than the penalties provided above can be claimed for late delivery.

CHAPTER VI - ACCEPTANCE

CLAUSE 29 - ACCEPTANCE AND REJECTION

29.1 On completion of the work or part of the work as specified in the contract, the representative of the Agency referred to in Clause 29.2 shall check as soon as possible, but in any event within one month of notification of readiness for acceptance, that the work performed complies with the contract requirements as regards quantity and quality.

In the event of rejection of any of the articles, whereby the Contractor feels himself aggrieved, he may within eight days of the receipt of notification of rejection and before such articles have been removed from the place of inspection, give the Agency notice of objection. Such objection shall be considered by a Board of officials of the Agency who have not had any part in the decision appealed against. The Agency shall, without prejudice to the arbitration clause in the contract, take a decision upon presentation of the Board's findings.

29.2 Subject to the Contractor's guarantee obligations provided for in Clause 30 and / or in the contract, acceptance shall mean the Agency's acknowledgement that it accepts the articles.

The contract shall specify the nature and form of acceptance, the representatives of the Agency and the place of acceptance. The tests to be carried out shall be defined in the contract and / or in the technical specifications which form an integral part thereof.
Unless otherwise provided in the contract, ownership of the articles covered by the contract shall vest in, or be transferred to, the Agency at the time of acceptance.

29.3 Where the tests are made outside the Contractor's premises and the Agency rejects any of the articles delivered, the rejected article or articles shall be removed by the Contractor at his own expense within 15 days after receipt of notice of rejection, or such other time as may be specified by the contract. If the Contractor fails to carry out this obligation within the specified time, no claim shall lie against the Agency in respect of any loss or damage to the rejected material and the Agency may return the rejected article or articles at the Contractor's cost and risk.

29.4 On completion of tests, the members of the inspection service shall prepare a report which must be countersigned by the supplier.

29.5 If an article is finally rejected by the Agency's representative, this article shall be so marked as to ensure its subsequent identification as rejected article. The contract may stipulate that such a rejected article or part thereof be rendered unfit for use or destroyed.

**CLAUSE 30 - GUARANTEES**

30.1 a) Unless otherwise specified in the contract, the Contractor undertakes, in contracts involving the supply of equipment or components, notwithstanding inspection and/or acceptance of the items covered by the contract by the Agency, or its nominated representative, to remedy at his own expense and without delay, any defect which may appear in such items, equipment and parts within one year from the date of their delivery.

When the contract stipulates, in addition, a guarantee for protection and packaging, the guarantee prescribed above operates from the date of expiry of the packaging guarantee.

b) The Contractor's guarantee shall not extend to compensation for damage resulting from the use of articles covered by the contract after acceptance. Consequently, the Agency shall have no claim against the Contractor for damage suffered by it and shall indemnify the Contractor in respect of any claim for damage to third parties. However, the Contractor shall be required to indemnify the Agency for any damage to the Agency or to third parties whenever such damage arises from gross negligence on his part. Should a third party make a claim, the party claimed against shall, whenever the other party to the contract is required to bear the cost of the indemnity, be bound to join the latter as co-defendant in the proceedings.

30.2 The Contractor's liability under this clause shall not extend:

a) to defects arising from the misuse of the items after delivery
b) to defects in materials, assemblies or other supplies issued by the Agency for incorporation therein, provided always that the Contractor shall have properly exercised his duties as custodian of such issues and shall have incorporated them in accordance with the requirements of the contract.

30.3 Where defects in items are remedied under this guarantee, the period for which the guarantee operates shall be extended by such period as the items were not available to the Agency. Where defective items are replaced by new ones, the full guarantee period stipulated in the contract shall apply to such replacement items as from the date of their delivery.

30.4 The guarantee shall only cover transportation from and to any place of destination stipulated in the contract. If the defect comes to light elsewhere, the difference between the actual costs of transportation and of transportation to the destination originally intended shall be borne by the Agency.

CHAPTER VII - CANCELLATION

CLAUSE 31 - GENERAL RULE

The Agency shall have the right at any time to cancel a contract either wholly or in part by giving written notice by registered mail. From the time of receipt of the written notice, the Contractor shall undertake to observe the instructions of the Agency as to the winding up of the contract both on his own part and on the part of his sub-contractors.

CLAUSE 32 - CANCELLATION WITHOUT ANY FAULT OF THE CONTRACTOR

32.1 In the case of cancellation of a contract by the Agency without any fault of the Contractor, the Contractor shall on receipt of the Agency's instructions, forthwith take the necessary steps to implement them. The period to be allowed to implement them shall be fixed by the Agency after consultation with the Contractor and, in general, shall not exceed three months.

32.2 Subject to the Contractor conforming with the instructions referred in sub-clause 32.1, the Agency shall take over from the Contractor at a fair and reasonable price all finished parts not yet delivered to the Agency, all unused and undamaged material, bought-out components and articles in the course of manufacture in the possession of the Contractor and properly obtained by or supplied to the Contractor for the performance of the contract, except such materials, bought-out components and articles in the course of manufacture as the Contractor shall, with the agreement of the Agency, elect to retain.
32.3  a) The Agency shall indemnify the Contractor against such part of any loss of profit as is attributable to the cancellation of the contract and against any damage resulting from the cancellation of the contract, in particular against any commitments, liabilities or expenditure which are reasonably and properly chargeable by the Contractor and are related to the contract, in so far as the said commitments, liabilities or expenditure would otherwise represent an unavoidable loss by the Contractor by reason of the cancellation of the contract.

b) The amount of compensation payable under sub-clause 32.3a) shall be fixed on the basis of evidence produced by the Contractor and accepted by the Agency. It shall take account of the proportion of the contract completed and shall be consistent with the provisions of sub-clause 32.4.

32.4 The Agency shall in no circumstances be liable to pay any sum which, when added to the other sums paid, due or becoming due to the Contractor under the contract, exceeds the total price for the work set forth in the contract.

32.5 The ownership of all materials, parts and unfinished work paid for by the Agency under the provisions of this contract shall be vested in or transferred to the Agency as soon as they have been paid for.

**CLAUSE 33 - CANCELLATION WITH FAULT OF THE CONTRACTOR**

33.1 The Agency reserves the right, after full consideration of all relevant circumstances, including the observations of the Contractor, to cancel a contract in any of the following circumstances:

a) in the event of the Contractor's failure to meet

   i) the technical requirements of the contract,  
   ii) the progress and / or delivery requirements.

   to such an extent as to jeopardise seriously the Agency's programme;

b) if the Contractor has not observed the provisions set out in Clause 16 concerning the disclosure and use of information provided for by the Agency;

c) if the Contractor fails to comply with the provisions set out in Clause 10 concerning the equipment, supplies and technical documents made available by the Agency;

d) if the Contractor transfers his contract without the Agency's authorisation or concludes sub-contracts against the Agency's explicit wishes.
33.2 In the event of such a cancellation, the Agency shall, unless otherwise specified in the contract, only pay:

- in the case of a fixed price contract for the supply of equipment or material:
  
  the contractual value of items delivered and accepted under the contract before receipt of notification of cancellation, or to be accepted under the special conditions of cancellation;

- in other cases:
  
  a fair and reasonable price in respect of such work as has been carried out prior to the receipt of notification of cancellation.

33.3 Clause 33.1 shall not apply if failure under a), b) and c) is due to circumstances outside the Contractor's control.

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

a) have the work performed under its direct responsibility in which case the Contractor shall be charged with all additional costs arising out of this solution and shall, in addition, pay compensation in accordance with the scale referred to in Clause 28 for each day the work is not completed after the delivery date laid down in the contract, with a maximum of the ceiling indicated in Clause 28.4;

b) have the work performed by way of a replacement contract with a third party, in which case the Contractor shall be charged with all additional costs arising out of this solution and shall, in addition, pay compensation in accordance with the scale referred to in Clause 28, running from the delivery date laid down in the contract up to the delivery date stipulated in the replacement contract, with a maximum of the ceiling indicated in Clause 28.4;

c) have the work terminated, in which case the Agency shall be entitled to full compensation for the damage caused by lack of delivery. However, the contract may stipulate that this damage shall be liquidated by an amount equal to at least the ceiling indicated in Clause 28.4.

The penalties already due under the provisions of Clause 28 before cancellation of the contract will remain payable, but their amount shall be deducted from the compensation due under the provisions of this clause.
In the cases referred to in paragraphs a) and b) above, and in order to ensure completion of the supply of the goods and/or services, the defaulting Contractor shall, where the use of intellectual property rights is required, do everything in his power to enable the new Contractor or the Agency to use the rights concerned. The defaulting Contractor shall make no claim in respect of such use, and shall bear the cost of the fees due to third parties for the use of their rights.

**CLAUSE 34 - CANCELLATION IN SPECIAL CASES**

34.1 The Agency may at any time cancel the contract by giving written notice with immediate effect in any of the following events:

a) if the Contractor becomes insolvent or if his financial position is such that within the framework of his national law, legal action leading towards bankruptcy may be taken against him by his creditors;

b) if the Contractor resorts to fraudulent practices in connection with the contract, especially by deceit concerning the nature, quality or quantity of the supplies, and the methods or processes of manufacture employed or by the giving or offering of gifts or remuneration for the purpose of bribery to any person in the employ of a Member State or of the Agency or acting on its behalf, irrespective of whether such bribes or remuneration are made on the initiative of the Contractor or otherwise.

34.2 The provisions of sub-clauses 33.2 and 4 shall apply.

**CLAUSE 35 - PROVISIONS TO BE OBSERVED IN SUB-CONTRACTS AS TO CANCELLATION**

Except in the case of sub-contracts of small value or of short duration, the Contractor shall reserve the right to cancel any sub-contract, placed by him for the purposes of the contract, in conditions which, should his contract be cancelled under the provisions of Clause 32, will permit him to comply with the requirements of that Clause.
PART II

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

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

PART II - (Option A): CONDITIONS CONCERNING INTELLECTUAL PROPERTY RIGHTS AND ASSOCIATED RIGHTS FOR STUDY, RESEARCH AND DEVELOPMENT - GENERAL REGIME -

CLAUSE 36  GENERAL

General Rule

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

Definitions for Part II (Option A)

36.2 “Agency’s Own Requirements” means the activities and programmes undertaken by the Agency in the field of space research and technology and space applications in accordance with Article V 1(a) and (b) of the European Space Agency Convention;

“Agency Technology and Product Transfer Board” means the body established by the Agency Council to consider the transfer or licence of any Intellectual Property Rights or product, process, application or result arising from the Contract to an entity not Located in a Member State or to an international organisation;

“Background Intellectual Property Rights” means all Intellectual Property Rights not developed under contract with the Agency either prior to or during execution of the Contract which are used by the Contractor and/or the Agency to complete the Contract or required for use of any product, application or result of the Contract;

"Contractor" means the legal person or body who is party to the Contract;
“Disclose” means the distribution or supply of information or Documentation to a third party without prior authorisation from the proprietor of the information/Documentation;

“Documentation” means all media on which information or data of any description is recorded including all paper documents, and electronic communications whether in electronic or hard copy form;

“Favourable Conditions” means conditions a seller is willing to sell on and a purchaser willing to accept which are more favourable to the purchaser than Market Conditions (and which normally allow reasonable profit for the seller);

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

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

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

“Market Conditions” means conditions a seller is willing to sell on and a purchaser is willing to accept without restrictions or influence by the Agency;

“Member State” means a State which is party to the European Space Agency Convention in accordance with Article XX and XXII of the said Convention;

“Object Code” means the code for a computer programme expressed in machine readable form usually automatically compiled from Source Code by machine;

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

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

“Participating State” means a Member or non-Member State participating in a given Agency programme according to Article V.1 (a) and (b) of the European Space Agency Convention;
“Participating State’s Own Public Requirements” means a public programme in the field of space research and technology and their space applications fully funded or funded to a substantial extent by the Participating State;

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

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

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

“Source Code Agent” means the Agency or an independent body which the parties agree can hold software Source Code secure for release upon the events specified in clause 42;

“Subcontractor” means a third party who enters into a written agreement with the Contractor for a defined research and development task required for completion of the Contract.

Interpretation

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

Contractor Employees/Service Providers

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

(a) all Intellectual Property Rights in results, information, data or Documentation arising from work performed during the course of their engagement shall be owned by the Contractor; and

(b) all results information, data and Documentation obtained for the purpose of the Contract will only be circulated under terms which comply with the Contract.

Subcontract Clauses

36.5 If the Contractor requires the services of a Subcontractor for the purposes of fulfilling obligations under the Contract the Contractor may enter into subcontracts with the approval
of the Agency unless otherwise specified in the Contract. Each subcontract shall provide:

(a) the Subcontractor with the same rights and obligations in relation to work performed under the subcontract that the Contractor has agreed to in relation to work performed under this Contract and in particular shall ensure that only the Subcontractor has the rights and obligations set out under clause 36.3 (Interpretation), clause 36.4 (Contractor Employees/Service Providers), clause 39 (Ownership of Intellectual Property Rights), clause 40 (Registration of Intellectual Property Rights), clause 41 (Use of Intellectual Property Rights), clause 42 (Software), clause 43 (Background Intellectual Property Rights), clause 44 (Exploitation), clause 46 (Fees) and clause 49 (Transfer outside Member States);

(b) for the exceptional case when work is carried out jointly by the Contractor and one or more Subcontractors, the parties will agree to normally vest the ownership of the intellectual property rights in the principal contributor to the development, provided the principal contributor is able and willing to exploit such rights and compensation in form of a licence and/or payment is agreed. In such case, the assignment shall be notified to the Agency and the subcontract shall be drafted to comply with these provisions of this Part II (Option A).

36.6 To assist in the identification of Intellectual Property Rights created and owned by the Subcontractor each subcontract shall define in writing the product, application or results arising from work performed under the subcontract.

**CLAUSE 37 INFORMATION TO BE PROVIDED**

Contract Reports

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

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

Access to Information

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

CLAUSE 38 DISCLOSURE

38.1 The Contractor shall not Disclose any Documentation obtained from the Agency which is marked as “Proprietary Information”. The Contractor shall only circulate such Documentation to its employees that require that Documentation for the purposes of complying with the Contract. The Contractor shall never circulate such Documentation to those not employed by the Contractor (other than in compliance with these Clause and Conditions) without prior written consent from the Agency in which case the Agency may require the recipient to sign a non-disclosure agreement.
38.2 The Agency shall not Disclose any Documentation obtained from the Contractor which is marked “Proprietary Information”. The Agency shall only circulate such Documentation to its employees that require that Documentation for the purpose of complying with the Contract or for using, modifying or maintaining any product, application or result of the Contract and the Agency shall never circulate such Documentation to those not employed by the Agency (other than in compliance with these Clauses and Conditions) without prior written consent from the Contractor in which case the Contractor may require the recipient to sign a non-disclosure agreement.

38.3 The obligations in clauses 38.1 and 38.2 shall not apply to Documentation:

(a) which at the time of circulation has already entered the public domain or which after circulation enters the public domain other than through a breach of this Contract;

(b) which at the time of circulation is already known by the receiving party (as evidenced in writing) and is not hindered by any obligation not to circulate;

(c) which is later acquired by the receiving party from another source and is not hindered by any obligation not to circulate;

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

CLAUSE 39 OWNERSHIP OF INTELLECTUAL PROPERTY RIGHTS

39.1 The Contractor shall own all Intellectual Property Rights and have the right to apply for and to own any Registered Intellectual Property Rights arising from work performed under the Contract. At the Contractor’s request and expense the Agency shall carry out all reasonable tasks including executing any document required to vest such title in the Contractor.

39.2 The Agency shall be granted the rights, including the access, to Intellectual Property Rights set out in clauses 39 to 44 and reserves the right to require the Contractor to assign Intellectual Property Rights arising from work performed under the Contract in the case of:

(a) the Contractor’s failure to apply for registration or the Contractor’s abandonment of Registered Intellectual Property Rights arising from work performed under the Contract (as set out in clause 40.4 and 40.5);

(b) the Contractor’s failure to exploit (as set out in clause 44.2);
(c) Operational Software (as set out in clause 42.7);

(d) Open Source Code (as set out in clause 42.9).

39.3 When the Contractor assigns any Intellectual Property Rights arising from work performed under the Contract he shall give notification to the Agency within 4 weeks of the date of assignment.

39.4 The Contractor shall ensure that any assignee of Intellectual Property Rights arising from work performed under the Contract complies with the same obligations (including the obligation to exploit the Intellectual Property Rights) and grants the Agency, Participating States, Persons and Bodies the same rights that the Contractor has agreed to under this Contract.

CLAUSE 40 REGISTRATION OF INTELLECTUAL PROPERTY RIGHTS

Notification

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

40.2 The Contractor shall inform the Agency of any application to register results, information or data arising from work performed under the Contract and within 2 months of the date of filing, provide details of the office where the application was filed, the application number, the filing date, the inventor’s name and applicant’s name, the reference number of the relevant contract and where possible provide a copy of the application (including description, any claims and drawings). Following the filing of the application the Contractor shall inform the Agency whether it has been used as the basis for applications in other countries. Following the grant of such applications the Contractor shall inform the Agency of any proceedings which allege that granted rights are invalid or require amendment.

40.3 The Agency shall have an irrevocable right to use the information in any application for Registered Intellectual Property Rights arising from work performed under the Contract for its Own Requirements on the terms set out in clause 41 but unless agreed otherwise with the Contractor the Agency shall not Disclose such information until publication of the application for registration.

Failure to apply/Abandonment

40.4 If the Contractor does not wish to apply for Registered Intellectual Property Rights (or wishes to abandon Registered Intellectual Property Rights) arising from work performed under the Contract it shall inform the Agency. After such notification the Agency shall consult the Contractor and investigate the reasons for the failure to apply or for the abandonment of such rights. Following this consultation the Agency may inquire whether third parties would be interested in protecting or exploiting such rights the Contractor owns. If the Agency finds a suitable third party, the Agency can require the Contractor to assign to the third party the rights necessary to apply for such Registered Intellectual Property Rights or require the Contractor to license the third party such abandoned Registered Intellectual Property Rights on Favourable Conditions to be agreed between the Contractor, the Agency and the third party. For the avoidance of doubt the Contractor may not unreasonably object to the terms of any such assignment or licence.
40.5 If the Agency cannot find a third party to apply for Registered Intellectual Property Rights arising from work performed under the Contract (or cannot find a party who wishes to exploit such Registered Intellectual Property Rights the Contractor wishes to abandon), then the Agency may require the Contractor to assign those rights to the Agency free of charge.

40.6 If the Contractor assigns rights to a third party under the provisions of Clause 40.4 the provisions of Clause 39.4 shall apply. If the Contractor assigns rights to the Agency under the provisions of Clause 40.5 the Contractor, Participating States and Persons and Bodies shall be entitled to a free, non-exclusive, irrevocable licence to use the said rights without the right to grant sublicences.

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

**CLAUSE 41 USE OF INTELLECTUAL PROPERTY RIGHTS**

Use/Licensing

41.1 All Intellectual Property Rights arising from work performed under the Contract shall be available to:

(a) the Agency, Participating States and Persons and Bodies to use on a free, world wide licence with the right to grant sub-licences for the Agency’s Own Requirements (such licence to be granted by the Contractor or the Agency as set out in the standard licence which the licensee shall enter into if required);

(b) Participating States and Persons and Bodies to use on Favourable Conditions for a Participating State’s Own Public Requirements (such licence to be granted by the Contractor as set out in the standard licence which the licensee shall enter into if required);
(c) academic and research institutions to use on a free licence without the right to grant sublicensees for their own scientific research purposes (excluding commercial purposes) providing the Contractor agrees such use is not contrary to its Legitimate Commercial Interests (such licence to be granted by the Contractor as set out in the standard licence which the licensee shall enter into if required);

(d) any third party on Market Conditions to use for purposes other than the Agency’s Own Requirements or a Participating State’s Own Public Requirements providing the Contractor agrees such use is not contrary to its Legitimate Commercial Interests.

41.2 For the avoidance of doubt the term “use” for the purposes of software includes use to operate, integrate, validate, maintain and modify software developed under the Contract.

41.3 Where the Contractor relies on its Legitimate Commercial Interests, unless specified in the Contract it shall demonstrate those interests continue to apply every 3 years or within any other timeframe specified in the Contract.

CLAUSE 42 SOFTWARE

Ownership/Licensing

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

Supply

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

(a) install the software on hardware specified by the Agency;

(b) provide training to persons to operate the software as specified by the Agency.
Source Code Agent

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

(a) the Contractor becomes insolvent, ceases to carry out its business, has a receiver, liquidator, administrative receiver, administrator, trustee or other similar officer appointed over the whole or part of its assets or an order is made or a resolution passed for the winding up of the Contractor (save for a solvent winding up as part of a bona fide reconstruction or amalgamation); or

(b) the Contractor commits a breach of the Contract which is material and not capable of remedy or which is capable of remedy but which is not remedied within 60 days of notice to the Agency.

(c) the Contractor assigns Intellectual Property Rights protecting the software.

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

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

(b) maintain or modify software developed under the Contract;

(c) operate, integrate, validate, maintain or modify updates, modifications or enhancements to software developed under the Contract.
42.5 Source Code released by the Source Code Agent (under clause 42.3 or 42.4) or by the Contractor (under clause 42.4) shall be available for the Agency's Own Requirements as for any other product, application or result of the Contract (as set out in clause 41.1 (a)). For the avoidance of doubt the Contractor shall own all Intellectual Property Rights in the Source Code as for any other product, application or result of the Contract.

Updates/Modifications/Enhancements

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

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

Operational Software

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

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

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

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

CLAUSE 43 BACKGROUND INTELLECTUAL PROPERTY RIGHTS

Notification

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

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

Ownership

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

43.3 Intellectual Property Rights required by the Contractor arising from work performed under another contract with the Agency shall be owned, made available and licensed in accordance with that other contract.

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

43.5 If the Agency requires Source Code protected by Background Intellectual Property Rights owned by the Contractor the Contractor shall make that Source Code available for the Agency’s Own Requirements as set out in clause 42.4.

43.6 If a Subcontractor requires Background Intellectual Property Rights that the Contractor owns the Contractor shall grant the Subcontractor a licence on Favourable Conditions solely to enable the Subcontractor to fulfil its obligations directly relating to the Contract.

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

Proprietary Information

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

Infringement

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

CLAUSE 44 EXPLOITATION

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

Failure to Exploit

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

Exploitation Reports

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

CLAUSE 45 EVALUATION OF TECHNOLOGY

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

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

CLAUSE 46 FEES

46.1 If provided for in the Contract the Contractor shall pay a fee to the Agency for the sale of any product, application or result or any licence or assignment of any Intellectual Property Rights arising from the Contract (including rights in software) which are exploited within 10 years from the date of acceptance of work arising from the Contract.

46.2 When a fee is provided for in the Contract the Contract shall specify when the fee shall be due, how the fee shall be calculated and in what exceptional circumstances it shall be waived. The total fee payable to the Agency shall not exceed the total sum paid by the Agency for provision of the work or rights exploited.

46.3 No obligation to pay a fee shall arise if a product, application or result is sold or rights are assigned or licensed in the field of space research and technology and space
applications in a Participating State and no fee will be payable to the Agency for free licences of Intellectual Property Rights granted in accordance with clauses 41 - 43.

CLAUSE 47  RE-SUPPLY

Process

47.1 The Agency has the right to have a product, application or result of the Contract re-supplied by the Contractor or by a third party selected by the Agency for the Agency’s Own Requirements.

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

Assistance

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

47.4 If the Agency exercises its right to re-supply in favour of the Contractor, the price for re-supply shall be determined in accordance with the process set out in clause 47.2.

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

Licences

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

Background Intellectual Property Rights

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

Proprietary Information

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

47.9 The Agency shall act as intermediary for Participating States who require re-supply of products provided to the Agency for the purposes of a Participating State’s Own Public Requirements in which case the Agency shall assist the Participating States to act in accordance with the terms and conditions set out in this clause 47.
CLAUSE 48 INFRINGEMENT

48.1 The Agency and the Contractor shall notify each other of any dispute arising over ownership or use of Intellectual Property Rights that arises from performance of the Contract or which is required for completion of the Contract or which relates to use of any product, application, or result of the Contract. The Agency and the Contractor shall provide each other with all reasonable assistance required to settle such dispute.

48.2 The Agency may require the Contractor to take such action as the Agency deems necessary (which includes the commencement and enforcement of legal proceedings) to prevent infringement of Intellectual Property Rights arising from the Contract. The Agency shall reimburse the Contractor for all reasonable expenses incurred in taking such action.

48.3 If the Agency commences any proceedings for enforcement of Intellectual Property Rights which have been assigned to the Agency by the Contractor under the Contract, then the Contractor shall provide such reasonable assistance as the Agency may require. The Agency shall reimburse the Contractor for all expenses reasonably incurred in providing such assistance.

CLAUSE 49 TRANSFER OUTSIDE MEMBER STATES

49.1 Any transfer of Intellectual Property Rights or any product, process, application or result arising from work performed under the Contract by the Contractor to any entity in a non-Member State or any international organisation shall comply with all applicable laws including all export control laws, regulations, rules and procedures and any relevant international agreements relating to the export of goods and services.
Property owned by the Contractor

49.2 The Contractor shall not transfer or license any Intellectual Property Rights or any product, process, application or result arising from work performed under the Contract which the Contractor owns to any entity not located in a Member State or any international organisation without seeking the prior written recommendation of the Agency Technology and Product Transfer Board. If the Contractor intends to transfer or license any such Intellectual Property Rights, or any such product, process, application or result to an entity not located in a Member State or any international organisation it shall at its earliest convenience and in any event before making any unconditional commitment provide the Agency with a written request accompanied by a Statement setting out details of:

(a) the proposed transferee or licensee outside the Member States;
(b) the terms of the transfer or licence (together with all countries of destination) and the intended use of the subject matter to be transferred or licensed;
(c) any further information required by the Agency Technology and Product Transfer Board.

49.3 The Contractor shall identify in the Statement all relevant national approval or consent procedures which need to be obtained for the said transfer or licence to comply with national legislation and whether any such approvals or consents have been applied for or granted.

49.4 The Contractor shall wait 5 weeks from submission of the written request to the Agency before entering into any unconditional commitment.

49.5 The Agency shall not disclose the Contractor's written request or Statement but shall promptly circulate the request and Statement to the Agency Technology and Product Transfer Board representatives.

49.6 If the Contractor has assigned Intellectual Property Rights arising from work performed under the Contract to a third party, the Agency may request that the Contractor shall ensure that the assignee complies with clauses 49.2-49.7.
Recommendation

49.7 The Agency Technology and Product Transfer Board’s recommendation shall be communicated to the Contractor. If the Agency has not informed the Contractor of the Agency Technology and Product Transfer Board’s recommendation within 5 weeks from the date the written request was submitted, then the Contractor may treat the request and Statement as recommended.
PART II - (Option B):
CONDITIONS CONCERNING INTELLECTUAL PROPERTY RIGHTS AND ASSOCIATED RIGHTS FOR STUDY, RESEARCH AND DEVELOPMENT
- SPECIAL REGIME FOR PARTLY FUNDED CONTRACTS -

CLAUSE 50  GENERAL

General Rule

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

Definitions for Part II (Option B)

50.2 “Agency Contract” means for these Part II (Option B) conditions a contract partly funded by the Agency (typically 50%) and partly funded by the private sector (typically 50%) for the development of goods/services identified by the Contractor as having the potential for exploitation in space research, technology or space application;

“Agency’s Own Requirements” means the activities and programmes undertaken by the Agency in the field of space research and technology and space applications in accordance with Article V 1(a) and (b) of the European Space Agency Convention;

“Agency Technology and Product Transfer Board” means the body established by the Agency Council to consider the transfer or licence of any Intellectual Property Rights or product, process, application or result arising from the Agency Contract to an entity not located in a Member State or to an international organisation;

“Background Intellectual Property Rights” means all Intellectual Property Rights not developed under contract with the Agency either prior or during execution of the Agency Contract which are used by the Contractor and/or the Agency to complete the Agency Contract or required for use of any product, application or result of the Agency Contract;

"Contractor" means the legal person or body who is party to the Contract;

“Disclose” means the distribution or supply of information or Documentation to a third party without prior authorisation from the proprietor of the information/Documentation;

“Documentation” means all media on which information or data of any description is recorded including all paper documents, and electronic communications whether in electronic or hard copy form;
“Favourable Conditions” means conditions a seller is willing to sell on and a purchaser willing to accept which are more favourable to the purchaser than Market Conditions (and which normally allow reasonable profit for the seller);

“Financial Conditions” means the conditions a seller is willing to sell on and a purchaser willing to accept taking into account Market Conditions but which compensate the parties who paid for development of the subject matter being sold (or licensed) according to the amount each party contributed for development;

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

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

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

“Market Conditions” means conditions a seller is willing to sell on and a purchaser is willing to accept without restrictions or influence by the Agency;

“Member State” means a State which is party to the European Space Agency Convention in accordance with Article XX and XXII of the said Convention;

“Object Code” means the code for a computer programme expressed in machine readable form usually automatically compiled from Source Code by machine;

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

“Participating State’s Own Public Requirements” means a public programme in the field of space research and technology and their space applications fully funded or funded to a substantial extent by the Participating State;

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

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

“Source Code” means the code for a computer programme expressed in human intelligible form which can be compiled automatically into Object Code by machine;
“Source Code Agent” means the Agency or an independent body which the parties agree can hold software Source Code secure for release upon the events specified in clause 56; “Subcontractor” means a third party who enters into a written agreement with the Contractor for a defined research and development task required for completion of the Agency Contract.

Interpretation

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

Contractor Employees/Service Providers

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

(a) all Intellectual Property Rights in results, information, data or Documentation arising from work performed during the course of their engagement shall be owned by the Contractor; and

(b) all results information, data and Documentation obtained for the purpose of the Agency Contract will only be circulated under terms which comply with the Agency Contract.

Subcontract Clauses

50.5 If the Contractor requires the services of a Subcontractor for the purposes of fulfilling obligations under the Agency Contract the Contractor may enter into subcontracts with the approval of the Agency unless otherwise specified in the Agency Contract.
50.6 In subcontracts which a Subcontractor partly funds the subcontract shall provide:

(a) the Subcontractor with the same rights and obligations in relation to work performed under the subcontract that the Contractor has agreed to in relation to work performed under this Contract and in particular shall ensure that only the Subcontractor has the rights and obligations set out under clause 50.3 (Interpretation), clause 50.4 (Contractor Employees/Service Providers), clause 53 (Ownership of Intellectual Property Rights), clause 54 (Registration of Intellectual Property Rights), clause 55 (Use of Intellectual Property Rights), clause 56 (Software), clause 57 (Background Intellectual Property Rights), clause 58 (Exploitation), clause 60 (Fees) and clause 63 (Transfer outside Member States);

(b) for the exceptional case when work is carried out jointly by the Contractor and one or more Subcontractors, the parties will agree to normally vest the ownership of the intellectual property rights in the principal contributor to the development, provided the principal contributor is able and willing to exploit such rights and compensation in form of a licence and/or payment is agreed. In such case, the assignment shall be notified to the Agency and the subcontract shall be drafted to comply with these provisions of this Part II (Option B).

50.7 In the case of subcontracts, which are not funded by the Subcontractor, the present part II B terms and conditions shall be negotiated by the Contractor and Subcontractor subject to the Agency’s prior approval.

50.8 To assist in the identification of Intellectual Property Rights created and owned by the Subcontractor each subcontract shall define in writing the product, application or results arising from work performed under the subcontract.

**CLAUSE 51 INFORMATION TO BE PROVIDED**

**Contract Reports**

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

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

Access to Information

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

CLAUSE 52 DISCLOSURE

52.1 The Contractor shall not Disclose any Documentation obtained from the Agency which is marked as “Proprietary Information”. The Contractor shall only circulate such Documentation to its employees that require that Documentation for the purposes of complying with the Agency Contract. The Contractor shall never circulate such Documentation to those not employed by the Contractor (other than in compliance with these Clause and Conditions) without prior written consent from the Agency in which case the Agency may require the recipient to sign a non-disclosure agreement.
52.2 The Agency shall not Disclose any Documentation obtained from the Contractor which is marked “Proprietary Information”. The Agency shall only circulate such Documentation to its employees that require that Documentation for the purpose of complying with the Agency Contract or for using, modifying or maintaining any product, application or result of the Agency Contract and the Agency shall never circulate such Documentation to those not employed by the Agency (other than in compliance with these Clauses and Conditions) without prior written consent from the Contractor in which case the Contractor may require the recipient to sign a non-disclosure agreement.

52.3 The obligations in clauses 52.1 and 52.2 shall not apply to Documentation:

(a) which at the time of circulation has already entered the public domain or which after circulation enters the public domain other than through a breach of this Agency Contract;

(b) which at the time of circulation is already known by the receiving party (as evidenced in writing) and is not hindered by any obligation not to circulate;

(c) which is later acquired by the receiving party from another source and is not hindered by any obligation not to circulate;

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

CLAUSE 53 OWNERSHIP OF INTELLECTUAL PROPERTY RIGHTS

53.1 The Contractor shall own all Intellectual Property Rights and have the right to apply for and to own any Registered Intellectual Property Rights arising from work performed under the Agency Contract. At the Contractor’s request and expense the Agency shall carry out all reasonable tasks including executing any document required to vest such title in the Contractor.

53.2 The Agency shall be granted the rights, including the access, to Intellectual Property Rights set out in clauses 53 to 57.

53.3 When the Contractor assigns any Intellectual Property Rights arising from work performed under the Contract he shall give notification to the Agency within 4 weeks of the date of assignment.

53.4 The Contractor shall ensure that any assignee of Intellectual Property Rights arising from work performed under the Agency Contract complies with the same obligations (including
the obligation to exploit the Intellectual Property Rights) and grants the Agency, Participating States, Persons and Bodies the same rights that the Contractor has agreed to under this Agency Contract.

**CLAUSE 54 REGISTRATION OF INTELLECTUAL PROPERTY RIGHTS**

**Notification**

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

**Applications for Registration**

54.2 The Contractor shall inform the Agency of any application to register results, information or data arising from work performed under the Agency Contract and within 2 months of the date of filing, provide details of the office where the application was filed, the application number, the filing date, the inventor’s name and applicant’s name, the reference number of the relevant agency contract and where possible provide a copy of the application (including description, any claims and drawings). Following the filing of the application the Contractor shall inform the Agency whether it has been used as the basis for applications in other countries. Following the grant of such applications the Contractor shall inform the Agency of any proceedings which allege that granted rights are invalid or require amendment.

54.3 The Agency shall have an irrevocable right to use the information in any application for Registered Intellectual Property Rights arising from work performed under the Agency Contract for its Own Requirements on the terms set out in clause 55.1 but unless agreed otherwise with the Contractor the Agency shall not Disclose such information until publication of the application for registration.
CLAUSE 55  USE OF INTELLECTUAL PROPERTY RIGHTS

Use/Licensing

55.1 All Intellectual Property Rights arising from work performed under the Agency Contract shall be available to:

(a) the Agency to use on a free, world wide licence for the Agency’s Own Requirements (such licence to be granted by the Contractor as set out in the standard licence which the licensee shall be entered into if required);

(b) Participating States and Persons and Bodies to use on Financial Conditions for the Agency’s Own Requirements (such licence to be granted by the Contractor as set out in the standard licence which the licensee shall enter into if required);

(c) any third party on Market Conditions to use for purposes other than the Agency’s Own Requirements providing the Contractor agrees such use is not contrary to its Legitimate Commercial Interests.

55.2 For the avoidance of doubt the term “use” for the purposes of software includes use to operate, integrate, validate, maintain and modify software developed under the Agency Contract.

55.3 Where the Contractor relies on its Legitimate Commercial Interests, unless specified in the Contract it shall demonstrate those interests continue to apply every 3 years or within any other timeframe specified in the Contract.

CLAUSE 56  SOFTWARE

Ownership/Licensing

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

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

(a) install the software on hardware specified by the Agency; and

(b) provide training to persons to operate the software as specified by the Agency.

Source Code Agent

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

(a) the Contractor becomes insolvent, ceases to carry out its business, has a receiver, liquidator, administrative receiver, administrator, trustee or other similar officer appointed over the whole or part of its assets or an order is made or a resolution passed for the winding up of the Contractor (save for a solvent winding up as part of a bona fide reconstruction or amalgamation); or

(b) the Contractor commits a breach of the Agency Contract which is material and not capable of remedy or which is capable of remedy but which is not remedied within 60 days of notice to the Agency;

(c) the Contractor assigns Intellectual Property Rights protecting the software.
56.4 As specified in the Agency Contract the Contractor shall release, under confidentiality terms to be agreed, the Source Code for software developed under the Agency Contract to the Agency (or require the Source Code Agent to release such Source Code to the Agency) in the event it is required for use for the Agency’s Own Requirements to:

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

(b) maintain or modify software developed under the Agency Contract;

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

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

Updates/Modifications/Enhancements

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

56.7 All updates, modifications or enhancements undertaken by the Contractor after the software has been developed under the Contract shall be made available to the Agency on a world wide licence with the right to grant sublicences for the Agency’s Own Requirements on Market Conditions with access to the Source Code as set out in the clauses 56.3 to 56.5.
CLAUSE 57    BACKGROUND INTELLECTUAL PROPERTY RIGHTS

Notification

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

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

Ownership

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

Use/Licensing

57.3 Intellectual Property Rights required by the Contractor arising from work performed under another contract with the Agency shall be owned, made available and licensed in accordance with that other contract.
57.4 If the Agency requires Background Intellectual Property Rights owned by the Contractor for the Agency project specified in the Agency Contract, the Contractor shall grant the Agency an irrevocable, world wide licence to enable the Agency to use and modify any product, application or result of the Agency Contract for that project on Favourable Conditions. If any party requires Background Intellectual Property Rights owned by the Contractor to use and modify any product, application or result of an Agency Contract for the Agency’s Own Requirements other than for the project specified in the Contract the Contractor shall grant a licence to that party on Market Conditions unless contrary to the Contractor’s Legitimate Commercial Interests.

57.5 If the Agency requires Source Code protected by Background Intellectual Property Rights owned by the Contractor the Contractor shall make that Source Code available for the Agency’s Own Requirements as set out in clause 56.4.

57.6 If a Subcontractor requires Background Intellectual Property Rights that the Contractor owns the Contractor shall grant the Subcontractor a licence on Favourable Conditions solely to enable the Subcontractor to fulfil its obligations directly relating to the Agency Contract.

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

Proprietary Information

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

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

CLAUSE 58 EXPLOITATION

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

Failure to Exploit

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

Exploitation Reports

58.3 Following the Agency’s acceptance of any product, application or result arising from work performed under the Agency Contract the Contractor shall provide written reports (and updates if required) on exploitation of the Intellectual Property Rights arising from work performed under the Agency Contract as specified in the Agency Contract (and in any event within 3 and 10 years from the date of acceptance).
CLAUSE 59 EVALUATION OF TECHNOLOGY

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

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

CLAUSE 60 FEES

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

CLAUSE 61 RE-SUPPLY

Process

61.1 The Agency has the right to have a product, application or result of the Agency Contract re-supplied by the Contractor or by a third party selected by the Agency for the Agency’s Own Requirements.

61.2 The Agency shall offer the original contractor the right to re-supply products that the contractor has already provided under an earlier Agency Contract when the contractor is able and willing to undertake the work at a fair and reasonable price the Agency is satisfied as to quality and the original contractor can make delivery as required by the Agency. If the original contractor and the Agency do not enter into an agreement for re-supply the Agency may put the Agency Contract out to competitive tender in which case the original contractor shall be awarded the tender if the Agency is satisfied as to quality and that the original contractor’s proposed conditions (including price and delivery terms) are at least equal to or better than other bidders.
Assistance

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

Price/Expenses

61.4 If the Agency exercises its right to re-supply in favour of the Contractor, the price for re-supply shall be determined in accordance with the process set out in clause 61.2.

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

Licences

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

Background Intellectual Property Rights

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

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

CLAUSE 62 INFRINGEMENT

62.1 The Agency and the Contractor shall notify each other of any dispute arising over ownership or use of Intellectual Property Rights that arises from performance of the Agency Contract or which is required for completion of the Agency Contract or which relates to use of any product, application, or result of the Agency Contract. The Agency and the Contractor shall provide each other with all reasonable assistance required to settle such dispute.

62.2 The Agency may require the Contractor to take such action and provide any reasonable assistance as the Agency deems necessary (which includes the commencement and enforcement of legal proceedings) to prevent infringement of Intellectual Property Rights arising from the Agency Contract. The Agency shall reimburse the Contractor for all expenses incurred in taking such action.

62.3 If the Agency commences any proceedings for enforcement of Intellectual Property Rights which have been assigned to the Agency by the Contractor under the Agency Contract, then the Contractor shall provide such reasonable assistance as the Agency may require. The Agency shall reimburse the Contractor for all expenses reasonably incurred in providing such assistance.

CLAUSE 63 TRANSFER OUTSIDE MEMBER STATES

63.1 Any transfer of Intellectual Property Rights or any product, process, application or result arising from work performed under the Agency Contract by the Contractor to any entity in a non-Member State or any international organisation shall comply with all applicable laws including all export control laws, regulations, rules and procedures and any relevant international agreements relating to the export of goods and services.

Property owned by the Contractor
63.2 The Contractor shall not transfer or license any Intellectual Property Rights or any product, process, application or result arising from work performed under the Agency Contract which the Contractor owns to any entity not Located in a Member State or any international organisation without seeking the prior written recommendation of the Agency Technology and Product Transfer Board. If the Contractor intends to transfer or license any such Intellectual Property Rights any such product, process, application or result to an entity not Located in a Member State or any international organisation it shall at its earliest convenience and in any event before making any unconditional commitment provide the Agency with a written request accompanied by a Statement setting out details of:

(a) the proposed transferee or licensee outside the Member States;

(b) the terms of the transfer or licence (together with all countries of destination) and the intended use of the subject matter to be transferred or licensed;

(c) any further information required by the Agency Technology and Product Transfer Board.

63.3 The Contractor shall identify in the Statement all relevant national approval or consent procedures which need to be obtained for the said transfer or licence to comply with national legislation and whether any such approvals or consents have been applied for or granted.

63.4 The Contractor shall wait 5 weeks from submission of the written request to the Agency before entering into any unconditional commitment.

63.5 The Agency shall not Disclose the Contractor's written request or Statement but shall promptly circulate the request and Statement to the Agency Technology and Product Transfer Board representatives.

63.6 If the Contractor has assigned Intellectual Property Rights arising from work performed under the Agency Contract to a third party, the Agency may request that the Contractor shall ensure that the assignee complies with clauses 63.2-63.7.
Recommendation

63.7 The Agency Technology and Product Transfer Board’s recommendation shall be communicated to the Contractor. If the Agency has not informed the Contractor of the Agency Technology and Product Transfer Board’s recommendation within 5 weeks of the date the written request was submitted, then the Contractor may treat the request and Statement as recommended.
ANNEX I to the GENERAL CONDITIONS FOR ESA CONTRACTS

PART I - DETERMINATION OF PRICES

CLAUSE 1 - TYPES OF PRICES

1.1 A reference in the contract to one of the types of price, mentioned under sub-clause 1.2 shall have the meaning and include the provisions stipulated in the relevant article of Part I of this Annex.

1.2 The types of price referred to in sub-clause 1.1 are:

   a) fixed price
      - firm fixed price
      - fixed price with price variation
      - fixed unit price
   
   b) ceiling price to be converted into fixed price
   
   c) cost reimbursement price
      - cost-plus fixed fee
      - cost-plus-incentive fee
      - time and material.

CLAUSE 2 - FIXED PRICE CONTRACT

2.1 Firm fixed price contract

   The price of the contract is not subject to any adjustment or revision by reason of the actual costs incurred by the Contractor in the performance of the contract.

2.2 Fixed price contract with price variation

   a) The price of the contract is not subject to any adjustment or revision by reason of the actual costs incurred by the Contractor in the performance of the contract save upon occurrence of certain contingencies specifically stated in the contract and within the limits defined in paragraphs b) to d) inclusive.
b) The contract with price variation clause shall define:

1) the price factors whose variations shall determine revision of the contract price; these factors shall generally be raw material prices, rates of remuneration for categories of labour incorporated in the contract, relevant social charges;

2) the manner in which the variation of a price factor shall be established. This shall be done as far as possible on the basis of official indices published by authority of the Contractor's government or generally used for similar purposes in the contract placed by that government on its own behalf;

3) the formula based upon the indices indicated above for determining the effect on the contract price of a variation in such price factor.

c) Where the delivery of the supply or service by the Contractor is overdue by the latter's own fault, price fluctuations during the overdue period shall be assessed separately according to a formula specified in the contract.

In this case no allowance shall be made to the Contractor for price increases occurring after the contractual delivery dates for the supply or service; the Agency shall be given the benefit of any decreases in price after this date.

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

2.3 Fixed unit price contract

a) When at the time of concluding the contract the quantity of the supplies or services cannot be precisely determined, a fixed price contract or a fixed price contract with variation clause may establish the unit price of the various supplies and services or their component parts.

b) The price to be paid shall be arrived at by applying the unit prices to the quantities of supplies or services delivered. No other charge may be added thereto.
c) Such contracts shall stipulate:

1) the period of their validity;

2) the minimum quantities of supplies or services which the contracting authority undertakes to order from the Contractor and the maximum quantities which the latter agrees to delivery;

3) the terms and conditions on which firm orders will be placed for each supply or service.

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

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

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

3.2 Such a contract shall stipulate a ceiling which the contract price shall not exceed and for which the Contractor shall be required to deliver in full the supplies and services stipulated in the contract.

The fixed price shall be established as soon as a basis for assessing an equitable price exists and wherever possible, before the contract is completed.

3.3 Independent of the ceiling mentioned in paragraph 3.2, the Contractor shall provide at the time of concluding the contract the following cost information and specify which items thereof are estimates and which are firm:

i) Material Cost
   - issued from store
   - purchased

ii) Material Overhead (if not included in iv)

iii) Direct Labour Cost
    Category       Man Hours        Hourly Rates
    (Engineering, Manufacturing, etc.)

iv) Labour Overhead Rate or Rates
v) Jigs and Tools

vi) Total Prime Cost (Sum of i, ii, iii, iv and v)

vii) General and Administrative Overhead Rate on (vi) (if not already included in iv) 

viii) Other Direct Costs  
(Bought-out equipment, services, consultancies, licence fees, etc.)

ix) Special Overhead Rate on viii), if any

x) Profit

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

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

3.5 If the Agency so requires, the Contractor shall afford all facilities to the Agency's representatives to visit the Contractor's factory or workshops in order to examine the processes of manufacturing and control the direct costs of the contract in order to estimate or ascertain the cost of production on the basis of which the fixed price shall be determined.

If the overhead rates of the Contractor for similar contracts placed by national or international public services have been established or approved by a government agency or an agency accepted by his government and the Contractor proposes the application of these rates, he shall state the name and address of the agency recommending the rates and the period for which they were established. If he proposes rates which vary from the rates mentioned above, he shall furthermore provide a justification for the differences.

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 agency or an agency accepted by his government, he shall provide the necessary back-up data to support the proposed rates.
CLAUSE 4 - COST-REIMBURSEMENT PRICE CONTRACT

The price of the contract is the total of all the costs insofar as they are allowable within the terms of Clause 6 of this Annex, and a profit as defined hereunder in this clause.

The contract shall stipulate:

- either a maximum amount as the limit of liability referred to in Clause 9 of this Annex;
- or a maximum price (ceiling) which the Contractor may not exceed, while still being required to deliver in full the supplies and services stipulated in the contract.

4.1 Cost-plus-fixed-fee contract

The cost-plus-fixed-fee contract is a cost-reimbursement type of contract which provides for the payment of a fixed fee to the Contractor. This fixed fee does not vary with actual cost, but can be adjusted as a result of changes in the contract specifications made at the Agency's request under the provisions of Clause 26.1 of the General Conditions, likely to substantially vary the estimated cost.

4.2 Cost-plus-incentive-fee contract

This contract is a cost-reimbursement type of contract which provides for the payment of a Target Fee which is the fee to be paid to the Contractor if the contract is executed in accordance with targets specified in the contract. Its amount shall be adjusted depending on whether the Contractor's execution of the contract is below or above the specifications fixed for the above mentioned targets.

These targets usually consist of:

a) A Target Cost meaning an amount which, if reached but not exceeded by the actual cost, shall give the Contractor a right to the Target Fee; if on the other hand the actual costs are higher or lower than the Target Cost the contract shall mention the proportion by which the Target Fee shall be increased or reduced.

b) A Target Schedule for the attainment of which the Contractor shall be paid the Target Fee and the proportion by which the Target Fee will be increased or decreased for improving upon or not meeting this Target Schedule.

c) A Target Performance for the attainment of which the Contractor shall obtain the Target Fee and the proportion by which the Target Fee shall be increased or decreased for improving or not obtaining Target Performance.
The specifications of these targets can be adjusted as a result of changes in the contract specifications made under the provisions of Clause 26.1 of the General Conditions.

4.3 Time and material contract

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

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

b) material and supplies at cost, possibly increased by a percentage for material handling charges to the extent that they are clearly excluded from the hourly rate;

c) disbursements or payments made to third parties for services rendered in the fulfilment of the contract to the extent that they are clearly excluded from the hourly rate (e.g. travel expenses, transport, computer charges, etc.). Disbursements must be approved by the Agency and, unless otherwise provided in the contract, shall be reimbursed at their invoice value without any additional charges.

CLAUSE 5 - PROVISIONS APPLICABLE TO COST-REIMBURSEMENT TYPE CONTRACTS

The provisions of Clauses 6, 7 and 8 of this Annex shall apply to all contracts concluded on the basis of cost-reimbursement price and in the case referred to in Clause 3.4.

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

CLAUSE 6 - ALLOWABILITY OF COSTS

6.1 Allowable cost

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

a) it is incurred specifically for the contract or benefits both the contract and other work and is distributed to them in respective proportion according to the benefit received; or is necessary to the overall operation of the business although a direct relationship to any particular product or service cannot be established;
b) it is reasonable and expedient in its nature and amount, and does not exceed that which would be incurred by an ordinary prudent person in the conduct of competitive business;

c) it is not liable to any limitations or exclusion as to types or amounts of cost-items set forth in sub-clauses 6.2 and 6.3.

However, the applicable portion of any income, rebate, allowance and other credits relating to any allowable cost (e.g. resale of scrap and unusable materials) received by, or accruing to, the Contractor shall be credited to the Agency.

6.2 Partly allowable cost

The following cost-items are examples of costs which are normally partially allowable only as indirect costs within the limitations described below provided that such costs are reasonable in nature and amount and are allocated as indirect costs to all work of the Contractor:

a) advertising costs, except those for particular advertising campaigns (see sub-clause 6.3a);

b) contributions or donations;

c) hospitality and representation expenses;

d) bonuses paid either in cash or in stock, pursuant to an agreement entered into before the contract was made or pursuant to a plan established and consistently followed since before the contract was concluded;

e) depreciation of plant equipment or other capital assets, except for those items which are specifically required for the execution of the contract and which, with the prior approval of the Agency, are accepted as a direct charge either in the contract or in a rider thereto; the depreciation shall be calculated in accordance with accounting principles generally accepted and applied in the Contractor's country for the purpose of fixing prices for government contracts;

f) costs of normal maintenance and repair of plant, equipment and other capital assets, except for those excluded under subclause 6.2e), which costs of normal maintenance and repair are accepted as a direct charge to the contract;

g) the costs of general research and development work which are not chargeable directly to the contract and which are not aimed at the preparation or development of a specific product.
These costs may be accepted only insofar as they arise from the operation of a system of general research and development which has existed for a reasonable time within the firm prior to the contract, and provided that the costs were shared in a uniform manner over the total turnover of the firm or of the industrial department of the firm within which it is constituted, and that a more costly distribution is not applied to the contract. In no case, shall the amount of these costs exceed a rate determined in the call for tender;

h) travel costs, except those which, according to the terms of the contract, are to be charged directly to it;

i) pre-contract cost (cost prior to the effect date stated in the contract) in anticipation of the award of the contract or pursuant to its negotiation.

6.3 Unallowable cost

In general all expenses which cannot be shown by the Contractor to be directly or indirectly of benefit to the contract are totally unallowable, and in particular the expenses listed below.

a) Cost of particular advertising campaign without prior agreement of the Agency, or having no connection with the contract.

b) Cost of remuneration, having the nature of profit sharing.

c) Capital cost of plant, equipment or other capital assets, which are amortized in accordance with the provisions of subclause 6.2e). This does not apply to items specifically required for the execution of the contract, which, with the prior approval of the Agency, are accepted as a direct charge either in the contract or in a rider thereto.

d) Cost of maintaining, repairing and housing idle and excess facilities, except those reasonably necessary for standby purposes.

e) Fines and penalties as well as legal and administrative expenses resulting from a violation of laws and regulations.

f) Excesses of costs over income under any other contract.

g) Charges in respect of creation of reserves for general contingencies or other reserves (e.g. for bad debts) not proper to current operations.

h) Losses on bad debts, including legal expenses and collection costs in connection with bad debts.

i) Expenditure in connection with raising capital.

j) Profits and losses of any nature arising from the sale or exchange of plant, equipment
or other capital assets not directly paid for by the Agency including the sale or exchange of either short- or long-term investments, except as a part of normal depreciation rates.

k) Taxes on profits.

l) Contractual penalties incurred by the Contractor under the contract.

m) Commissions and gratuities in connection with obtaining or negotiating a contract.

n) Interest on the capital required by the firm for the execution of the contract, which shall be deemed to be included in the fee.

CLAUSE 7 - COST GROUPINGS

7.1 In estimating or calculating the costs of the supplies to be furnished and the services to be performed under the contract, the Contractor shall distinguish the following cost groupings:

a) Direct costs

A direct cost is any cost which can be identified specifically with the contract. Direct costs are not limited to items which are incorporated in the end product as materials or labour.

b) Indirect costs

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

7.2 The Contractor shall specify the allocation of cost items to either of the cost groupings. The method by which charges are accumulated as part of direct or indirect cost cannot be modified during the duration of the contract.

CLAUSE 8 - OVERHEAD RATES

8.1 Indirect costs, which as a rule are to be allocated to all work of the Contractor, shall be accumulated by logical cost groupings in accordance with sound accounting principles and the Contractor's established practices and presented as rates referred to as "overhead rates", to be applied to the related direct cost groupings.
8.2 The Contractor must inform the Agency of his overhead rates and the basis to which they apply.

The term "provisional overhead rate" means a tentative overhead rate established for interim billing purposes pending negotiation of the final overhead rate.

An overhead rate is final if it has been mutually agreed upon as final by the Agency and the Contractor.

8.3 An overhead rate is predetermined if it is fixed before or during a certain period and based on (estimated) costs to be incurred during this period. An overhead rate is postdetermined, if it is fixed after a certain period and based on costs actually incurred during this period.

a) Predetermined overhead rates shall be agreed upon whenever possible before the start of the period during which the rates will apply. If this is not possible, the contract shall state a number of days within which the rates must be agreed. In this case, the contract shall also state upper and lower limits within which the rates must be agreed. If an agreement is not reached within the specified number of days and/or the agreed limits, the overhead rates shall be postdetermined.

Predetermined overhead rates shall be agreed upon either for the entire duration of the contract or for a shorter period, determined by a common agreement.

b) Postdetermined overhead rates shall be negotiated as soon as possible after each financial year of the Contractor. The Contractor shall submit to the Agency, as soon as possible after the expiration of each financial year, a proposal for final overhead rates for that period based on the Contractor's actual cost experience with supporting cost data.

8.4 The results of each negotiation shall be set forth in a rider to the contract which shall specify:

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

CLAUSE 9 - LIMITATION OF LIABILITY

9.1 The limit of liability is an amount to be stated in the contract which shall be the maximum amount to which the Agency is committed and which can only be increased by a written agreement of the Agency.
9.2 If at any time the Contractor has reason to believe that the commitments which he will incur in the performance of the contract in the next succeeding sixty (60) days, when added to all costs previously incurred, will exceed seventy-five percent (75%) of the limit of liability, the Contractor shall notify the Agency in writing to that effect, giving the revised estimate of the total cost.

9.3 The Agency shall not be obliged to reimburse the Contractor for costs incurred in excess of the limit of liability and the Contractor shall not be obliged to continue performance under the contract or to incur costs in excess of the limit of liability, unless and until the Agency shall have notified the Contractor in writing that such limit has been increased up to a revised amount. Any costs incurred by the Contractor in excess of such limit prior to the approval of the increase shall be allowable to the same extent as if such costs had been incurred after the increase.
PART II - COST CONTROL

CLAUSE 10 - RIGHT TO AUDIT

The Agency reserves the right to audit, either itself or through an authorised representative, the claim of the Contractor, for cost incurred in the execution of any cost-reimbursement type contract or any contract with ceiling price to be converted into a fixed price which according to the provisions of Clause 3.4 is to be treated as a cost reimbursement contract.

CLAUSE 11 - DEVELOPMENT COST PLAN

11.1 The contractor shall present a Development Cost Plan, which is a detailed costed programme up to completion of work entailed in the project, analysed into items of technical work, milestones of expected achievement within these items, and related estimates of cost in such a form that during the course of the project, programme and costs to a given date can be compared with the original estimates up to that date.

11.2 When stated in the contract the Development Cost Plan must be annexed to the contract.

11.3 The Development Cost Plan should show the estimated cost up to completion for each of the technical areas in the Development Plan, sub-divided into quarterly periods. The estimates of cost shall be related to the technical programme and under no circumstances shall the Contractor include a factor for a general contingency. The estimates for the various technical items should, however, cover work which can only be vaguely defined or assessed. They should also include allowances, based on experience, for delays and difficulties of the sort which it is known are likely to arise in programmes of this nature, insofar as these occur in development work.

CLAUSE 12 - QUARTERLY FINANCIAL REPORTS

The Contractor shall provide the Agency not later than three weeks after the end of each quarter with a quarterly financial report, showing as far as possible, the actual costs, properly incurred for the execution of the contract up to the end of the quarter, and his latest estimate of total cost (with date of estimation), sub-divided in the same form as the breakdown of costs given in the Development Cost Plan.

CLAUSE 13 - ACCOUNTING REQUIREMENTS

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

CLAUSE 14 - CONTROL OPERATIONS
14.1 The Contractor agrees to make available on request to the Agency or the persons or bodies designated by him in the contract any documents necessary for the proper execution of the audits and accounting investigations. He undertakes to furnish, if requested by the Agency, all information and justification regarding costs, prices, stocks, supplies and services relevant to the contract. This information should be provided in writing if so requested. The control shall normally take place at the Contractor's premises.

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

14.3 All information given will be treated as confidential.

**CLAUSE 15 - PRESERVATION OF VOUCHERS**

Unless otherwise provided in the contract, the supporting documents referred to in Clause 13 shall be preserved by the Contractor for five years following completion of the contract.
ANNEX II to the GENERAL CONDITIONS FOR ESA CONTRACTS

PENALTY SCALES

Pursuant to Clause 28, the following penalty scales will be applied to the various types of contracts:

1  FIXED PRICE CONTRACTS

1.1 Supply of equipment or material:

   for each day's delay:
   0.5 per thousand from the first to the fortieth day, inclusive;
   1 per thousand for each subsequent day, up to a maximum of 10% of the "penalised value" as defined in Clause 28.3.

1.2 Development of specific prototype articles:

   for each day's delay:
   0.3 per thousand from the first to the sixtieth day;

   1 per thousand for each subsequent day, up to a maximum of 10% of the "penalised value" as defined in Clause 28.3.

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

2.  COST REIMBURSEMENT PRICE CONTRACTS

2.1 Cost plus fixed fee contract:

   a) Development of a prototype:

      for each day's delay in submitting the prototype for the qualification tests:
      0.4 per thousand from the first to the fortieth day inclusive;

      1 per thousand for each subsequent day, up to a maximum of 10% of the total estimate stipulated in accordance with the provisions of Clause 28.

   b) Supply of production units:

      for each day's delay in the delivery of production units:
      0.4 per thousand from the first to the fortieth day inclusive;

      1 per thousand for each subsequent day to a maximum of 10% of the total estimate
stipulated in the contract in accordance with the provisions of Clause 28.

c) Where the prototype and production units are delivered under one and the same contract, the scale laid down in b) above will be modified so that the rate of 0.4 per thousand per day will apply for forty days less the number of days for which a penalty was applied for late delivery of the prototype.

2.2 Cost plus incentive fee contract:

The penalties are defined within the provisions of Clause 4.2 of Annex I.

3. TECHNICAL ASSISTANCE AND SERVICE CONTRACTS

Penalties will be determined on a case by case basis.