GENERAL CLAUSES AND CONDITIONS

FOR ESA CONTRACTS

ESA/C/290,rev.5
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1. Fixed price contracts
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PART I - GENERAL CLAUSES AND CONDITIONS APPLICABLE TO ESA EXTRAMURAL CONTRACTS

(with the exception of contracts relating to civil engineering and construction)

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

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

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

   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 semifinished 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 respite.

27.4 In the event that the contract includes a provision for price revision, 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 - SPECIAL CONDITIONS CONCERNING INTELLECTUAL PROPERTY AND ASSOCIATED RIGHTS FOR STUDY, RESEARCH AND DEVELOPMENT CONTRACTS

CLAUSE 36 - GENERAL RULE AND DEFINITIONS

36.1 General Rule

Contracts to which the special conditions of this Part II apply shall also be governed by the provisions of Part I insofar as the provisions of Part II are not in contradiction.

36.2 Definitions

Member State:
A State which is party to the Convention of the European Space Agency.

Participating State:
A Member State having subscribed a Declaration on an Optional Programme.
For the purposes of these Special Conditions Member States and Participating States shall be deemed to include persons and bodies under their jurisdiction. The extent to which these Special Conditions shall apply to a non-Member State when becoming a Participating State or Associated Member State shall be detailed in the relevant agreement concluded between the Agency and the State concerned.

Agency's own requirements:
Activities and programmes undertaken by the Agency according to Articles V.1.a and V.1.b of the Convention

Patent:
This expression shall be deemed to include any other industrial property right for which application is required such as registered designs and utility models but not trade marks.

Invention:
Any recorded information which can be protected by patent in accordance with applicable laws.

Background Information:
Any recorded information not developed under or resulting from a contract with the Agency.

Operational Software:
Software required for essential spacecraft check-out or space operation purposes and which has been developed with a fundamental intellectual contribution by the Agency's staff (the development, operation and maintenance of this software will normally be performed under contract to the Agency at its facilities and under its technical supervision and responsibility).

CLAUSE 37 - PATENTS AND OTHER FORMS OF LEGAL PROTECTION FOR WHICH APPLICATION IS REQUIRED

37.1 The Contractor shall be the owner of any invention made in the course of or resulting from work undertaken for the purpose of the contract and shall be entitled to protect such invention by patent or other form of industrial property right in accordance with applicable laws.
37.2 In the event of a patent obtained by the Contractor in respect of any invention made in the course of or resulting from work undertaken for the purpose of the contract the Agency and the Member States (or Participating States) shall be entitled to a free of charge, non-exclusive, irrevocable licence to use the invention for their own requirements in the field of space research and technology and their space applications and shall be allowed to grant sub-licences for these purposes within the territory of the Member States (or Participating States). The Agency shall supply to the Contractor a list of the sub-licences it has granted.

37.3 The following provisions shall apply in the case of any invention made in the course of or resulting from work undertaken by the Contractor or any third party employed by him, whether under sub-contract or otherwise, for the purpose of the contract;

a) In order to allow the Contractor to file an application for patent the Agency, on request of the Contractor, shall defer the dissemination of any information relevant to the application for not more than six months from the date that the information was communicated to it.

b) The Contractor shall within two months of the filing of his application notify the Agency of the patent office or offices where the application has been filed, the application number, the filing date, the inventor's and the applicant's name(s), the reference number of the relevant contract and, subject to applicable laws, shall supply it with a copy of the description and drawings filed with the application.

Within nine months following the initial filing the Contractor shall, in addition, provide the Agency with a list of any other countries in which he has filed or intends to file corresponding applications for patent.

c) Except with the agreement of the Contractor the Agency shall not disclose any information related to the patent application as long as the patent, or the application for it, has not been officially published, this restriction being limited to a period of 18 months following the filing of the application. However, the Agency shall have the right to make use or have made use of the information free of charge for its own requirements in the field of space research and technology and their space applications subject to conditions which do not jeopardise the patent application.
d) If the Contractor does not wish to apply for a patent or intends to abandon a patent or patent application he shall without delay notify the Agency and shall, on request, transfer his rights free of charge to the Agency who may take action in his stead. The provisions stipulated above in paragraphs a) and c) first sentence shall, in such event, apply mutatis mutandis to the Contractor.

The Agency shall, furthermore, be entitled to file applications for a patent in any country in which the Contractor himself does not wish to apply for such protection.

In respect of any patent secured by the Agency under the terms of this paragraph the Contractor shall be entitled to a free of charge, non-exclusive, irrevocable licence, without the right to grant sublicences in addition to those which he may have granted already.

CLAUSE 38 - PROTECTION OF INFORMATION OTHER THAN THROUGH PATENT; COPYRIGHT, PROTECTION OF BACKGROUND INFORMATION, PROTECTION OF COMPUTER SOFTWARE

38.1 Copyright

38.1.1 The Contractor shall furnish the Agency with comprehensive information in documentary or other appropriate form giving full details concerning the work performed for the purpose of the contract and the results achieved. Information, for the purposes of Clause 38.1, is defined as any recorded technical result provided in order to meet the objectives of the contract, e.g. documentation, know-how, detailed drawings and designs, etc. but excluding computer software.

38.1.2 The Contractor shall be the owner of any information generated in the course of or resulting from work undertaken for the purpose of the contract and shall be entitled to protect such information by copyright in accordance with applicable laws.

38.1.3 Notwithstanding the copyright of the Contractor, and with due respect to the existence of any rights of third parties arising otherwise than from work performed for the purpose of the contract, the Agency and the Member States (or Participating States) shall be entitled to a free of charge, non-exclusive, irrevocable right to use, copy and disseminate the information for their own requirements in the field of space research and technology and their space applications.
Information produced under the contract shall, consequently, not contain any copyright statements restricting the rights of the Agency or the Member States (or Participating States) under this paragraph. Where the contract requires a specific form of copyright statement, this shall be used.

38.1.4 The Contractor may, nevertheless, request the Agency to accept a more restrictive dissemination and use of the information than that to which it would be entitled by virtue of paragraph 1.3 above. The Agency has the right to refuse such request if the information concerned is the result of work performed for the purpose of the contract. If the information, however, is of a proprietary nature and not the result of an Agency contract, or if the dissemination of the information would prejudice the justified interests of the Contractor, the Agency shall accept a restriction of the dissemination.

38.1.5 In regard to information the dissemination of which it is agreed under paragraph 1.4 should be restricted, the right of the Agency to disseminate and use such information shall, except if otherwise agreed, be limited:

a) to the extent required to achieve the purpose of the contract, including integration, operation, testing or maintenance of any equipment or software to be studied, designed or developed under the contract,

b) to the extent required for the exercise by the Agency itself of any reproduction right provided for by the contract.

38.1.6 When disseminating any information under the provisions of paragraph 1.5, the Agency shall ensure that it is used only for the purpose of the contract and that it is not disseminated to third parties without securing written undertakings in advance protecting the information against any unauthorised use and further dissemination.

38.2 Protection of Background Information

Prior to any contract being placed the Contractor shall inform the Agency of the existence of any background information or inventions which do not result from an Agency contract and which he intends to use for the purpose of the contract. Except if otherwise agreed the Agency's right to disseminate and use such information shall be subject to the provisions of paragraphs 1.5 and 1.6 above.
If the Contractor in the course of the contract provides any further background information necessary to achieve the purpose of the contract and has immediately notified the Agency thereof, this shall not affect any rights which the Contractor may have with respect to such information provided he can demonstrate that such information was not the result of an Agency contract. The rights of the Agency in respect of such additional background information shall be as described in paragraphs 1.5 and 1.6 above.

38.3 Protection of Computer Software

38.3.1 The right to apply for and enjoy legal protection in accordance with applicable laws in respect of computer software developed in the course of or resulting from work undertaken for the purpose of the contract shall belong to the Contractor.

38.3.2 Notwithstanding any legal protection obtained by the Contractor, the Agency and the Member states (or Participating States) shall be entitled to a free of charge, non-exclusive, irrevocable right to use and copy the software for their own requirements in the field of space research and technology and their space applications and shall be allowed to grant sub-licences for these purposes within the territory of the Member States (or Participating States). The Agency shall, in addition, have the right to modify the software for the purposes described above. A copy of the modified software shall be made available free of charge to the Contractor. The above rights shall be subject to the provisions of Clauses 38.1.4, 38.1.5 and 38.1.6 above.

38.3.3 In the specific case of "operational software" as defined in Clause 36.2 above, the Agency may in the conditions of contract reserve to itself ownership of intellectual property rights. In such case the Contractor shall however be entitled to a right of use of the software, this right being subject to the provisions of the clause entitled "Royalties".

CLAUSE 39 - RIGHT OF REPRODUCTION

39.1 For the purpose of the contract the right of reproduction is defined as the right to manufacture or have manufactured an article or design or part thereof, or any modifications or derivatives thereof that do not substantially alter their identity.
39.2 Subject to the provisions of this clause the Agency shall have the right of reproduction in respect of any article or design (including - designs of - special tooling and the like) produced or offered by the Contractor in satisfaction of the requirements of the contract, except proprietary items not developed under the contract and for which the Contractor does not hold transmissible rights of reproduction;

a) The right of reproduction shall be exercisable in respect of any invention or other proprietary item incorporated in the said article for which the Contractor holds transmissible rights.

b) In the case of an invention or other proprietary item which belongs to a third party and in respect of which the Contractor does not hold transmissible rights, he shall use his best endeavours in collaboration with the Agency to obtain any clearance necessary for the exercise of the reproduction right.

c) If any article or design developed under the contract is found to infringe a third party right the Contractor shall use his best endeavours, in collaboration with the Agency, to obtain any clearance necessary to permit the exercise of the reproduction right. If, however, the Contractor cannot obtain such clearance and if the Agency nevertheless proceeds with the reproduction, the Agency will hold the Contractor free from any damages which are the direct result of such action by the Agency.

39.3 The reproduction right shall be exercisable by the Agency for its own purposes in the field of space research and technology and their space applications. The Agency may exercise the right of reproduction either itself, or through the Contractor or through a third party.

39.4 Before exercising itself the right of reproduction, the Agency undertakes to inform the Contractor. Before exercising the reproduction right through a third party, the Agency undertakes to inform the Contractor and - provided that he is able and willing to undertake the work at a fair and reasonable price, and to make delivery as required by the Agency - to place the work with him subject to the Agency's industrial policy requirements.

39.5 If the reproduction right is exercised other than through the Contractor, the Agency undertakes:
a) to ensure that the Contractor will be informed of any improvements or modifications introduced and that such improvements or modifications will be available to the Contractor for his use,

b) to make payment to the Contractor on commercially reasonable non-discriminatory terms having regard, inter alia to:

- the relative importance of the Contractor's intellectual property rights, if any, in inventions or proprietary items not developed under the contract,

- obligations of the Contractor to third parties,

- the financial risks incurred by the Contractor in the course of the development work,

- the extent to which the Contractor has been or will be compensated otherwise than by undertaking the work for which the reproduction right is exercised.

As far as practicable, the terms of the exercise of the right of reproduction shall be fixed in the contract; in the settlement of such terms any third party included in it shall be identified.

39.6 If the reproduction right is exercised other than through the Contractor, the Contractor undertakes:

a) to supply at any time all documentation in his possession, or which he may be able to obtain, and which he has the right to supply, which is necessary to enable the reproduction to be undertaken by a person equally skilled in the art as the Contractor. The Contractor shall be entitled to a fair price for the supply of such documentation, based on the cost of establishing it;

b) to supply against a fair price any technical assistance and know-how, including information about planning and control of manufacturing operations and quality, in conformity with commercial and industrial practice, that may be needed to facilitate the reproduction.

The above obligations shall, unless otherwise agreed, extend for a period of five years after final acceptance of the work performed under the contract.
The Agency shall impose on the recipient of documentation and information provided for in this paragraph the obligation to use and communicate it only for the purpose of the exercise of the reproduction right.

39.7 The right of reproduction shall be available to Member States (or Participating States) for purposes in the field of space research and technology and their space applications on terms equivalent to those on which it is available to the Agency under the provisions of this clause.

If an above-mentioned State desires to exercise the reproduction right, the Agency shall notify the Contractor and thereupon the Contractor shall supply, or permit the Agency to supply, to such State the documentation and technical assistance provided for in paragraph 6, the State being subject to the same obligations as those laid down for the Agency under paragraph 5.

CLAUSE 40 - ROYALTIES

40.1 Should the Contractor sell to a third party the results of any research or development work paid for by the Agency under the contract, or articles or parts thereof developed under the contract and not substantially modified, or should he assign or licence to a third party the right to use drawings or other documentation resulting from the contract relating to the manufacture of such articles or parts thereof, or assign or grant a licence under a patent for an invention generated under the contract, the Contractor shall pay royalties to the Agency.

Unless otherwise agreed by the Agency, the following rates of royalties shall apply:

a) for sales of articles or parts thereof: 3% of the ex-works value of each sale,

b) for a licence agreement or the assignment of rights: 30% of the gross payment agreed less any tax paid by the Contractor thereon or, where a licence is granted or rights are assigned free of charge or in return for any non-monetary advantage, an amount to be negotiated between the Agency and the Contractor.

The total amount of royalty paid shall not, however, exceed the total of the research and development costs paid by the Agency under the contract.
40.2 The obligation to pay royalties shall not arise in the case where the articles, licences or rights are required for purposes in the field of space research and technology and their space applications in the Member States (or Participating States).

40.3 The obligation of the Contractor under the contract to pay royalties shall cease ten years after the date of final acceptance of the work performed under the contract.

40.4 If the provisions of this clause apply to a contemplated sale, licence agreement or assignment of rights, or if the Contractor wishes to request a reduction or waiver of royalties, he shall immediately notify the Agency. Where the Agency confirms that royalties are to be paid, the Contractor shall within one month of concluding the sale contract, licence agreement or assignment of rights, inform the Agency of the value thereof following which the parties shall agree the payment conditions.

CLAUSE 41 - EVALUATION OF TECHNOLOGY

On request by the Agency and on conditions to be agreed with the Contractor including the reimbursement of reasonable costs, the Contractor shall assist the Agency or a third party nominated by the Agency, in assessing the commercial applications for space and non-space purposes of the results of his work performed under contract to the Agency. Such assessment shall be performed with due regard to the intellectual property rights owned by the Contractor and his intended use of the results of the work.

CLAUSE 42 - TRANSFER OF CONTRACT RESULTS OUTSIDE THE MEMBER STATES

42.1. Any transfer by the Contractor to a non-Member State or to an international organisation, of inventions, information or other assets ownership of which he has acquired by virtue of a contract with the Agency, shall respect the applicable export control laws and procedures in force in the State under whose jurisdiction the Contractor is placed.

Such transfers shall furthermore be subject to prior review by the Agency and the Member States (or Participating States). The review procedure shall be conducted under conditions of strict confidentiality.
42.2. The Contractor shall without delay inform the designated Point of Contact at the Agency of any proposed transfer and of the relevant particulars including the customer, the final destination and the intended use of the subject of the transfer. The Contractor shall, furthermore, state whether the transfer is subject to any control or approval procedures in the country of his jurisdiction and whether such approval has been applied for.

42.3. The Agency shall treat all information received from the Contractor pursuant to paragraph 2 above as strictly confidential and in compliance with the applicable security requirements. The Agency shall notify without delay the designated Point of Contact of each Member State (or Participating State) of such proposed transfer on the basis that Member States (or Participating States) shall treat all information received as strictly confidential. The Agency shall make such information known only to the Member States' (or Participating States') designated and authorised Government officials.

42.4. If, within six weeks of such notification, the Agency has not received a request from a Member State (or Participating State) that the proposed transfer be submitted to a delegate committee, the Agency shall immediately inform the Contractor that there are no objections to the intended transfer on the part of the Agency and the Member States (or Participating States).

42.5. If, within six weeks of such notification, a Member State (or Participating State) requests, however, a proposed transfer to be submitted to a delegate committee, the Agency shall convene a meeting within 8 weeks after the notification of the proposed transfer.

   The Agency shall without delay inform the Contractor of the recommendations of the delegate committee on the intended transfer accompanied by the reasons for such recommendations. In the event that the recommendations contain specific objections or comments to protect the objectives of the Agency or the interests of the Member States the Contractor shall use best endeavours to address such comments or objections.

42.6. Before having obtained any recommendation, the Contractor shall not enter into an unconditional commitment with respect to any transfer.
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

tax) 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 uneven 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.