



COMDTINST 16460.5

SEP 26 1995

COMMANDANT INSTRUCTION 16460.5

Subj: EMERGENCY CONTRACTS FOR RESPONDING TO DISCHARGES WHICH POSE
SUBSTANTIAL THREAT TO PUBLIC HEALTH OR WELFARE

- Ref: (a) Federal Water Pollution Control Act (FWPCA), Section 311 (c) (2)
- (b) The National Oil and Hazardous Substances Pollution Contingency Plan (40 CFR 300)
- (c) COMDTINST 4200.19E, Coast Guard Acquisition Procedures (CGAP)

1. PURPOSE. Section 311(c) (2) of the Federal Water Pollution Control Act (reference (a)), as amended by OPA 90, provides for suspension of the Federal Acquisition Regulations (FAR) to facilitate contracting for emergency response resources when the federal on-scene coordinator (OSC) determines that a discharge of oil or hazardous substances poses a substantial threat to public health or welfare. This Instruction provides policy and guidance to maintenance and logistics commands, districts, Headquarters and field units to facilitate emergency contracting for oil spill and hazardous substance response, as provided for in reference (a), when the OSC makes such a determination.
2. ACTION. Area and district commanders, commanding officers of marine safety offices, contracting officers, and commanding officers of Headquarters units shall ensure compliance with this Instruction. OSCs shall comply with this Instruction and, in accordance with reference (b), determine whether provisions of reference (a) apply.

3. DIRECTIVES AFFECTED. This Instruction augments guidance provided in the preamble to reference (b) (47384 F.R/Vol. 59, No.178/Thursday, Sept. 15, 1994) regarding specific action that may be taken to prevent or mitigate the threat or effect of a substantially harmful discharge of oil or a hazardous substance and by providing guidance for On-Scene Coordinators on when and when not to invoke the provisions of Section 311(c)(2) of FWPCA. This guidance will be incorporated into new Volume IX of the Marine Safety Manual (Marine Environmental Protection) and into the next revision of reference (c).

4. BACKGROUND.

- a. Reference (a) states "if a discharge, or a substantial threat of a discharge, of oil or a hazardous substance from a vessel, offshore facility, or onshore facility is of such a size or character as to be a substantial threat to the public health or welfare of the United States (including but not limited to fish, shellfish, wildlife, other natural resources, and the public and private beaches and shorelines of the United States), the President shall direct all Federal, state, and private actions to remove the discharge or to mitigate or prevent the threat of the discharge" without regard to any other provision of law governing contract procedures or employment of personnel by the Federal Government.
- b. Reference (b) provides for the OSC to be solely responsible for the determination of whether a substantial threat to public health or welfare exists.

5. DISCUSSION.

- a. The intent of reference (a) is to provide the OSC with emergency authority to bypass the FAR and the normal agency contracting process and to execute contracts with response resources when it is necessary to protect human health and welfare from substantial harm, or the threat of substantial harm, caused by a discharge of oil or hazardous substances. It is contrary to the intent of Congress to use this authority to bypass the contracting process for responding to a discharge which does not substantially harm, or pose a substantial threat to, public health or welfare. The OPA 90 Conference Report (House Conf. Rep. No. 101-653) specifically referred to the EXXON VALDEZ, AMERICAN TRADER, and MEGA BORG discharges in 1990 when discussing the "substantial harm" and "threat of substantial harm" provisions of reference (a).

- b. In accordance with reference (b) factors to be considered by the OSC in making the determination of "substantial harm" or "threat of substantial harm" include, but are not limited to, the size of the discharge, the character of the discharge, and the nature of the threat to public health or welfare of the United States. As discussed in the preamble to reference (b), in evaluating the size of the discharge the OSC should consider factors such as the quantity discharged, the quantity threatened to be discharged, and the rate of discharge. In considering the character of the discharge the OSC should, as appropriate, consider the toxicity of the discharge, the potential for explosion or fire, and the rate at which the discharged quantity is likely to spread and dissipate considering weather and water conditions. In considering the public health or welfare, the OSC should, as appropriate, consider the threat of serious, irreparable, or immediate harm or damage to human populations, drinking water and food supplies (including subsistence resources), and proximity to environmentally sensitive areas, including fish and wildlife and their habitats (including breeding areas, feeding grounds, nurseries, wetlands, significant concentrations of birds, mammals, threatened or endangered species, and other living resources).
- c. It is expected that most discharges, or threatened discharges, will be of a "routine" nature and not be identified by OSCs as substantial threats to public health or welfare. Invoking the provisions of reference (a) should be the exception, rather than the rule. Generally speaking, a discharge, or a threatened discharge, of oil or hazardous substance may not pose a substantial threat, or may not result in substantial harm, if:
- * it does not impact, or threaten to impact, the intertidal zone (including public and private shoreline), sensitive natural resources, or other critical marine habitat; or
 - * it dissipates, or is likely to dissipate, sufficiently through weathering (photo-degradation, bio-degradation, dissolution, evaporation, etc.) that the actual, or likely, impact volume is less than that which would threaten, or result in, substantial harm to the environment; or
 - * will not result in irreparable, or irrecoverable, damage to natural, scenic, or economic resources; or
 - * can be prevented, or largely mitigated, by available resources, either contracted or publicly owned, without bypassing the normal procurement process as described in the FAR.

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- d. Nothing in reference (a) relieves the OSC of the responsibility to gather sufficient facts to enable him or her to make an informed decision about the likelihood of substantial harm to the environment. Reference (b) gives the OSC both the authority and the responsibility to gather information sufficient to make a supportable "substantial harm" decision. While the public interest may be well served, in exceptional circumstances, by bypassing provisions of the FAR, the overriding public interest is, in all but those exceptional circumstances, best served by conducting acquisition and procurement activities in accordance with the FAR.

6. PROCEDURES.

- a. The OSC is familiar with waterways, resources, and commonly transported cargos within the Captain of the Port (COTP) zone. In assessing a discharge or release, the OSC shall consider factors such as currents, tides, water depths, weather, seasonal patterns, and the locations of natural collection areas, breeding areas and sensitive natural, cultural, and industrial resources (i.e. water intakes) that are critical to predicting the harmful impact of a discharge. The OSC will also consider the grade of the discharged cargo (46 CFR 30) its specific gravity, toxicity, volatility, and any other factors that are critical to predicting harmful impact and estimating the fate and effect of a discharge on the environment.
- b. The standard(s) by which the OSC determines whether a spill has caused, or poses a threat of, substantial harm to the environment must be clearly established in the planning process. Because the OSC's determination may result in incidental suspension of the FAR, it is important that the decision elements be as objective as possible. Predetermined standards for "substantial harm" and "threat of substantial harm" lend validity and supportability to the OSC's determination.
- c. Enclosure (1) is a Coast Guard-approved contract form for use by the OSC to facilitate the contracting process when the OSC determines that the provisions of reference (a) have been met. Other "letter form" contracts, some proprietary, have been employed by OSCs prior to publication of this Instruction. This form has been approved by Headquarters for field use and is preferred for any discharge in which the conditions of reference (a) are invoked. Any other "letter form" contracts should have Headquarters approval before they can be employed for any given incident.

- d. The OSC may delegate on-site contracting authority to a Coast Guard contracting officer who will implement the provisions of this Instruction. On-site contracting authority resides with the OSC so long as the provisions of reference (a) are invoked. The OSC will return contracting authority to the Contracting Officer when he or she determines that the spill no longer causes, or threatens to cause, substantial harm to the environment. Further contracting activity will, therefore, be in accordance with the provisions of the FAR. At all times, whatever the OSC's determination, the Contracting Officer and OSC should work closely together to facilitate effective response, minimize contractual difficulties, and resolve contractual disputes and disagreements quickly, amicably and in the best interests of the public.
- e. When contracting resources through this mechanism, the OSC should ensure sufficient on-scene monitors, or "surveyors", are available to communicate directions and supervise the mobilization, effective use, transfer, and demobilization of contracted resources. Written directions and signed approvals will be necessary to facilitate prompt payment of contractors by the Coast Guard, as well as subsequent government recovery of spill response costs after the response effort is complete.

7. REPORTING.

- a. When a discharge, or a substantial threat of a discharge, is of such a size or character as to cause the OSC to invoke the provisions of this Instruction and issue an emergency contract by completing enclosure (1), the OSC shall classify the discharge, or threatened discharge, as "major" in the next POLREP, note the contracting action, provide the name of the private contractor and the contract amount. The POLREP must include as INFO addressees COMDT (G-MRO), COMDT (G-CPM), COMCOGARD NPFC, and the respective MLC Contracting Branch.

KENT H. WILLIAMS
CHIEF OF STAFF

Encl: (1) Emergency Contractor Agreement for Response to Discharges that Pose a Substantial Threat to Public Health or Welfare.

**EMERGENCY CONTRACTOR AGREEMENT
FOR RESPONSE TO DISCHARGES THAT POSE A SUBSTANTIAL THREAT TO
PUBLIC HEALTH OR WELFARE (OPA 90 311(c)(2))**

This agreement, (contract number) _____, is made effective as of the _____ day of _____, 19 ____, by and between The United States Coast Guard (USCG) and _____ having its offices at _____ for labor, material, equipment and/or services to be provided for the purpose of performing response activities in accordance with the scope of work hereinafter specified.

ARTICLE 1. SCOPE OF WORK

1.1 Contractor Work. The USCG hereby contracts with the contractor as an independent contractor to perform the portion of the Work which is described in the Contractor's Scope of Work attached hereto as Exhibit A (hereinafter called the "Contractor Work"), under the general direction of the USCG and in accordance with this Agreement.

ARTICLE 2. SCHEDULE OF WORK

2.1 Conduct of Contractor Work. The Contractor shall cooperate with the USCG in scheduling and performing the Contractor Work to avoid conflicts, delays in or interference with the Contractor Work. The Contractor shall promptly commence the Contractor Work upon receiving from USCG oral notice to proceed, and diligently and efficiently prosecute Contractor's Work until its completion or termination pursuant to the terms of Article 10. Oral notice will be confirmed in writing within 48 hours.

ARTICLE 3. COMPENSATION

3.1 Fee Schedule. Contractor Work will be compensated at the rates and charges set forth in the Contractor's published price list attached to this Agreement as Exhibit B.

3.2 Payment Requests. On or before the first (1st) and fifteenth (15th) day of each month, the Contractor will submit to the USCG a request for payment, which shall include a detailed description of unpaid amounts earned by the Contractor since the previous invoice period and such other supporting documentation as reasonably requested by the USCG.

3.3 Payments. Requests for payment that are received from the Contractor by the first (1st) and fifteenth (15th) day of the month shall be paid to the Contractor within fourteen (14) days following USCG's receipt of said payment request from the Contractor. Should the USCG deem the request for payment deficient, written notice must be given to the Contractor within seven (7) days of receiving the request for payment specifying

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the deficiency and the remedy or information required by the USCG to process the request for payment.

3.4 Release of Liens. The Contractor shall defend, indemnify and hold harmless the USCG from all claims of lien for labor, materials and equipment furnished under this Agreement. Prior to the final payment, the Contractor shall furnish to the USCG, as a part of its final payment request: (1) a certification, satisfactory to the USCG, that all the Contractor's obligations, monetary claims and indebtedness relating to the Contractor's Work have been satisfied and paid; and (2) complete and legally effective releases or waivers, satisfactory to the USCG, of all liens which could arise out of, arising out of or filed in connection with the Contractor Work, including liens of Contractor's suppliers of materials and labor.

3.5 Final Payment. Upon completion of all the Contractor Work under this Agreement, the Contractor shall certify to the USCG, in writing, that it has fully performed its obligations pursuant to this Agreement and shall request final payment. Upon receipt of such certification, the USCG will inspect the Contractor Work and, if the Contractor Work is acceptable, the USCG shall pay to the Contractor all remaining monies due it under the provisions of this Agreement within thirty (30) days of receiving an acceptable final payment request from the Contractor. The acceptance by the Contractor of the final payment shall release the USCG or its contractors related to all things done or furnished in connection with the Contractor Work, from all claims which could be brought by the Contractor or its subcontractors related to all things done or furnished in connection with the Contractor Work, unless the Contractor has provided to the USCG, in writing, the nature and amount of the dispute prior to acceptance of the final payment. If there is a dispute between the USCG and/or the Contractor, such dispute shall be settled prior to said releases being granted. No payment, however, final or otherwise, shall operate to release the Contractor or its sureties from obligations under this Agreement, the performance bond, payment bond, if any, and warranties made by the Contractor.

ARTICLE 4. CHANGES AND DELAY

4.1 Changes. The USCG may order changes in the Contractor Work not inconsistent with the general scope of this Agreement.

4.2 Change Orders. As provided in Section 4.1, all additions to or deductions from the Contractor Work shall be performed only pursuant to an approved change order signed by the USCG. Adjustments in the compensation, if any, resulting from such changes shall be set forth in said change order. No claim for compensation shall be valid unless changes in the Contractor Work are properly authorized by a change order signed by the USCG as provided herein. The Contractor must assert its right to an adjustment under this clause within 10 days after receipt of a

written change order. No proposal by the Contractor for an adjustment shall be allowed if asserted after final payment under this agreement. Failure to agree to any adjustment shall be a dispute under Article 12, Section 12.8. However, nothing in this clause shall excuse the Contractor from proceeding with the contract as changed.

4.3. Claims for Compensation. Any claim by the Contractor for an equitable adjustment in compensation resulting from a change in the Contractor Work under this Article must be asserted, in writing, within ten (10) days from the date of receipt by the Contractor of any written change order authorization from the USCG. Said claim shall be supplemented and supported by such factual information as may be reasonably requested by USCG.

4.4 Time of the Essence. It is expressly understood and agreed that the time of prompt initiation and prosecution of the Contractor Work are the essence of this Agreement. The Contractor Work shall be prosecuted at such time and in or on such parts of the project as may be required to complete the project as contemplated by this Agreement and further specified in schedules attached hereto and made a part hereof.

4.5 Delays. If the progress of the Contractor Work is delayed by any act or omission of the USCG, any separate contractor employed by the USCG or by occurrence of Force Majeure events beyond Contractor's reasonable control, such as fires, floods, strikes, riots, explosions, adverse weather conditions not reasonably anticipated, unavoidable casualties, acts of God or of the public enemy, and if the Contractor, within twenty-four (24) hours of the start of the occurrence of the delay, gives written notice to the USCG of the cause of the potential delay and an estimate of the possible time of extension involved, and, within seven (7) days after the cause of the delay has been remedied, the Contractor gives written notice to the USCG of any actual time extension requested as a result of the aforementioned occurrence, then the time for the Contractor Work may be extended by change order for such reasonable time as USCG determines. It is agreed that no claims shall be made or allowed for any damages or additional compensation which may arise out of any delay caused by the occurrences of Force Majeure events, other than claims for the appropriate extension of time.

ARTICLE 5. CONTRACTOR'S OBLIGATIONS

5.1 Laws and Permits. The Contractor shall give all required notices and perform the Contractor Work in conformance with the Agreement and in compliance with all applicable federal, state and local laws, executive orders, rules, regulations and ordinances, the Site safety and health plan, and any safety program established by the USCG. The Contractor shall secure and pay for all permits and governmental approvals, licenses and inspections necessary for proper execution and completion of the Contractor Work, as required by law and/or by this Agreement.

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5.2 Warranty. The Contractor warrants that all Contractor Work to be performed under this Agreement shall be performed in a manner and according to methods and procedures consistent with applicable professional standards and the level of care and skill ordinarily exercised under similar circumstances. Unless otherwise specified, the Contractor warrants that all materials shall be good quality.

5.3 Contractor Responsibilities. The Contractor shall independently perform all Contractor Work under this Agreement and shall not be considered as an agent of the USCG, nor shall the Contractor's subcontractors, materialmen or suppliers or employees of any of them be considered subagents of the USCG. The Contractor shall be responsible for the payment of all applicable taxes covering its employees, including withholding, social security deductions and unemployment taxes. The Contractor shall furnish, at its own cost and expense, all of the labor, materials, equipment, services, transportation, tools, machinery, appliances, fuel, heat, utilities and other facilities and items, including such health protection devices and training which are reasonably necessary for the lawful and proper performance and completion of the Contractor Work. The Contractor shall be solely responsible for the safety of its employees.

5.4 Inspections. The USCG, its agents and any person as authorized by law, may inspect Contractor Work performed at the Site and off-site at any reasonable time, and Contractor shall maintain the areas of the Site where it is performing Contractor Work in a safe condition for inspections.

5.5 Deliverables. The Contractor shall promptly furnish to the USCG all such deliverables required by this Agreement.

a. Delivery Orders

Where USCG has placed a delivery order for resources for a designated project which has been accepted by the Contractor, the Contractor will agree not to release any additional resources to another environmental contractor who may be servicing the same project without first contacting USCG. USCG will be allowed a reasonable time, for at least five (5) and not to exceed eight (8) hours, to either issue a delivery order for those resources or release resources to another contractor.

b. Standby Orders

In the event that USCG places a standby order to possibly provide resources, the Contractor will be required not to release any services to another environmental contractor responding to the same incident without first contacting USCG. USCG will be allowed, up to a five (5) hour period, to either release the resources or issue a delivery order.

The aforementioned conditions will not apply when Contractor has received a delivery order directly from USCG's customer, provided Contractor receives verification of the status as customer from USCG. In the event Contractor is a vendor of supplies and has committed to maintain an allotment of supplies attached as Exhibit C, Contractor warrants it will not release said allocation to any party without first receiving permission from USCG.

5.6 Site Cleanliness. The Contractor shall, at all times, keep the Contractor Work area clean and orderly and keep the Site and adjacent property free from accumulations of waste material or rubbish caused by its employees or by the Contractor Work. At the completion of the Contractor Work, the Contractor shall remove all of its tools, temporary structures, vehicles, equipment, machinery, surplus materials, debris and rubbish from and around the Site. The Contractor shall properly decontaminate all its personnel, equipment, material or vehicles which have been located or working in an area of potential hazardous materials.

5.7 Accidents. If death or serious injuries or serious damages occur in connection with the Contractor Work, such accident shall be immediately reported by telephone or messenger to the USCG. In addition, the Contractor must promptly report in writing to the USCG all accidents of any nature whatsoever arising out of, or in connection with, the performance of the Contractor Work, whether on, adjacent to or off the Site, giving full details and statements of witnesses.

5.8 Performance and Payment Bonds. Where applicable, the Contractor shall provide the performance bonds and/or payment bonds described in Exhibit A attached hereto.

ARTICLE 6. INSURANCE

6.1 Workers' Compensation and Employer's Liability Insurance. The Contractor shall maintain during the Contractor Work: (a) workers' compensation insurance in the statutory amount; and (b) employer's liability insurance in an amount not less than \$500,000 for all employees engaged in Contractor Work under this Agreement.

6.2 Liability Insurance. The Contractor shall maintain during the Contractor Work commercial general liability and automobile liability insurance as will provide coverage for claims for personal injury, including accidental death, as well as claims for property damage which may arise directly or indirectly from performance of the Contractor Work under this Agreement. The Contractor shall comply with applicable Federal and State workers' compensation and occupational disease statutes. Employer's liability coverage of at least \$100,000 is

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required, except in States with exclusive or monopolistic funds that do not permit workers' compensation to be written by private carriers. The Contractor shall obtain bodily injury liability insurance coverage written on the comprehensive form of policy of at least \$500,000 per occurrence. The Contractor shall obtain automobile liability insurance written on the comprehensive form of policy. The policy shall provide for bodily injury and property damage liability covering the operation of all automobiles used in connection with performing the Contractor Work. Policies covering automobiles shall provide coverage of at least \$200,000 per person and \$500,000 per occurrence for bodily injury and \$20,000 per occurrence for property damage. The Contractor shall obtain vessel collision liability and protection and indemnity liability insurance. The amount of liability coverage on other policies shall be commensurate to meet normal and customary claims.

6.3 Coverage. Coverage for property damage shall be on a "broad form" basis, with no exclusion for "X,C&U." The amount of commercial general liability insurance to be provided shall be not less than \$500,000 combined single limit, plus umbrella excess liability insurance in an amount not less than \$1,000,000. The commercial general liability insurance shall include a broad form contractual liability endorsement applicable to Contractor's obligations under Article 9.

6.4 Notice of Cancellation. The Contractor shall maintain in effect all insurance coverage required under this Agreement at the Contractor's sole expense and with insurance companies acceptable to the USCG. All insurance policies and each certificate of insurance furnished hereunder shall contain a provision that the coverages afforded thereunder shall not be canceled, not renewed, materially altered or restrictively modified until thirty (30) days' prior written notice has been given to the USCG.

6.5 Certificates. Certificates of insurance showing the type, amount, class of operations covered, effective dates and expiration dates or certified copies of all policies required under this Article 6, acceptable to the USCG, shall be furnished to the USCG Federal On-Scene Coordinator prior to the commencement of the Contractor Work.

6.6 Waiver of Subrogation. The Contractor waives all rights against USCG and its employees, and any separate contractors and any of their subcontractors, sub-subcontractors, agents and employees for damages caused by fire or other perils to the extent covered by property insurance provided under this Agreement or other property insurance applicable to the Contractor Work. In the event any cost is associated with issuance of a waiver, said cost shall be invoiced at direct cost to the USCG.

ARTICLE 7. RECORDS, CONFIDENTIALITY AND PUBLICITY

7.1 Records. Contractor shall maintain such reports, records, drawings, plans, maps and other documents as are appropriate and as required by law or this Agreement regarding: (a) the Contractor Work; and (b) all testing, sampling and investigatory services of the Contractor performed pursuant to the Contractor Work. All such documents will be available at reasonable times for review by the USCG and shall be turned over to the USCG upon request or upon completion of the Contractor Work.

7.2 Samples. The Contractor shall preserve such soil, rock, water and other samples collected during the Contractor Work for forty-five (45) days after the issuance to the USCG of any document that includes the data obtained from those samples. After the forty-five (45) day period has expired, the Contractor may lawfully dispose of such samples if it first notifies the USCG in writing of its intent to dispose and the USCG does not object. If the USCG so requests or orders, the Contractor shall preserve the samples beyond the stated forty-five (45) day period, and the Contractor shall be reimbursed by change order for all costs associated with the storage and preservation of such samples.

7.3 Confidentiality. All information, technical data, discussions, reference documents and other materials involved in the performance of the Contractor Work, including, but not limited to, any confidential business information received from government agencies, are strictly confidential. The Contractor agrees not to reproduce or distribute internally any such materials except as necessary to perform the Contractor Work, and not to divulge any such material either verbally or in writing to any third party without the prior written consent of the USCG, except as may be required by law. The Contractor shall obtain the written consent of the USCG prior to entering into any subcontract that will involve the disclosure of confidential business information by the Contractor to its subcontractor. The Contractor shall include this Section 7.3 in all subcontracts awarded that require the furnishing of confidential business information to its subcontractor.

7.4 Publicity. No publicity or advertising, including releasing any information, except as required by law, to the news media or publishing or delivering technical papers, regarding any Contractor Work shall be released by either party without the prior written approval of the other party.

ARTICLE 8. LIMITATION OF LIABILITY

8.1 No Consequential Damages. In no event shall the USCG be liable for consequential damages, including, without limitation, loss of use or loss of profits, incurred by the Contractor or its subsidiaries or successors, regardless of whether such claim is based upon alleged breach of contract, willful misconduct or negligent act or omission of the USCG or its employees, agents or subcontractors.

ARTICLE 9 INDEMNIFICATION

9.1 Indemnity to USCG. To the fullest extent permitted by law, the Contractor shall indemnify, hold harmless, protect and defend the USCG and its employees from any and all claims, demands, actions, causes of action, liabilities, losses, fines, damages, penalties, costs or expenses of any kind or nature (including, but not limited to, court costs, consultants, experts and attorneys' fees) [hereinafter in this Article 9 collectively referred to as "Claims"], including, without limitation, those arising from any bodily injury to or death of any person or destruction or damage to any property arising, in whole or in part, out of or in any way connected with: (1) the Contractor's breach of its warranties, representations, certifications or obligations under this Agreement; (2) spills and releases of hazardous or toxic wastes, substances or chemicals caused by the negligent acts or omissions of Contractor; (3) contamination of subsurface areas or damage or injury to subsurface objects as the result of drilling or sampling processes negligently performed by Contractor or resulting from Contractor's willful misconduct; or (4) the negligent performance of Contractor Work by the Contractor, its subcontractors or anyone employed by any of them or anyone for whose acts any of them may be liable; provided, however, Contractor shall have no liability for any such Claims to the extent such Claims are directly caused by the USCG's negligence or willful misconduct or USCG's breach of its obligations under this Agreement.

9.2 Indemnity to Contractor. USCG shall, subject to the availability of funds therefore, indemnify, hold harmless protect and defend Contractor and any of its affiliates, directors, officers and employees from any and all Claims, including, without limitation, those arising from any bodily injury to or death of any person or destruction or damage to any property to the extent such Claims are directly caused by USCG's negligence or willful misconduct or USCG's breach of its obligations under this Agreement. USCG's liability hereunder shall apply only if Contractor notifies USCG in writing of its claim for indemnity' within one (1) year of the completion of the Contractor Work and such claim sets forth in reasonable detail all the facts upon which it is based.

ARTICLE 10. TERMINATION

10.1 Termination for Default. Without prejudice to any other right or remedy, either party may terminate, in whole or in part, this Agreement for default in the event that the other party fails to perform any of the provisions of this Agreement; provided, however, that the terminating party provides the defaulting party forty-eight (48) hours' notice of its intent to terminate this Agreement and said notice sets forth sufficient details describing the alleged breach and provides the breaching party an opportunity to cure the alleged breach within this forty-eight (48) hour period. In the event that the breaching

party fails to cure said breach within this forty-eight (48) hour period or longer, if mutually agreed to by the parties, then this Agreement shall terminate.

ARTICLE 11. REMEDIES

11.1 Change Orders. If any dispute arises under this Agreement with respect to the Contractor Work, and the dispute is not promptly resolved and, in the USCG's Judgment, further delays would adversely affect performance under this Agreement, USCG may, in its discretion, in addition to and without prejudice to any other rights or remedies, issue a separate change order with respect to the matter in dispute, subject to a reservation of rights as to resolution of the dispute, and the Contractor will promptly perform and furnish the services covered by the change order. Subject to USCG's reservation of rights, the change order shall provide for payment at the rates or prices specified in this Agreement or at Contractor's quoted price if the rates are not specified in this Agreement.

11.2 Costs. Should Contractor incur attorneys' fees in order to enforce the terms and conditions of this Agreement, whether or not a legal action is instituted, Contractor may be entitled to reimbursement of such attorneys' fees. Reimbursement shall be at rates not to exceed those allowable under existing authority to pay attorneys' fees as set forth in Equal Access to Justice Act and costs in addition to all other remedies either party may have at law or in equity. Should any legal action be instituted, the Contractor, if it prevails, shall be entitled to recover all litigation costs, including reasonable attorneys' fees subject to the limitations set forth above.

11.3 Non-Exclusive Rights. The rights and remedies of USCG pursuant to Articles 10 and 11 hereof shall not be exclusive and are in addition to any other rights and remedies provided by law or equity.

ARTICLE 12. MISCELLANEOUS PROVISIONS

12.1 Waiver. Any waiver by either party of any provision or condition of this Agreement shall not be construed or deemed to be a waiver of any other provision or condition of this Agreement, or a waiver of a subsequent breach of the same provision or condition, unless such waiver be so expressed in writing and signed by the party to be bound.

12.2 Construction. The validity, interpretation and performance of this Agreement shall be governed and construed in accordance with the federal acquisition laws and the precedents of the Department of Transportation Board of Contract Appeals. All Article and Section headings herein are for convenience only and are in no way to be construed as part of this Agreement or as a limitation of the scope of the particular provisions to which they may refer.

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12.3 Severability. The invalidity or unenforceability of any provision of this Agreement shall not affect or impair any other provisions contained herein.

12.4 Successors and Assigns. The covenants, agreements obligations contained in this Agreement shall apply to, inure to the benefit of and be binding upon the parties hereto and upon their respective successors and assigns. No assignment shall be made without written permission and written acceptance from the USCG.

12.5 Assignment. Contractor shall not assign or further subcontract its duties and obligations hereunder without the prior written consent of the USCG, which consent shall not be unreasonably withheld.

12.6 Notice. Any notice, communication or statement required or permitted to be given hereunder shall be in writing and deemed to have been sufficiently given when delivered in person or by registered or certified mail, postage prepaid, return receipt requested, to the address of the respective party listed above or by filled-in telefacsimile acknowledgment. Either party may, by ten (10) days' advance written notice to the other, change the addresses set forth above.

12.7 Entire Agreement. This Agreement, with its Exhibits, represents the entire understanding and agreement between the parties hereto and supersedes any and all prior agreements whether written or oral, that may exist between the parties regarding same. No terms, conditions, prior courses of dealing, courses of performance, usage or trade, understandings, purchase orders or agreements purporting to modify, vary, supplement or explain any provision of this Agreement shall be effective unless in writing and signed by each party's representative who is authorized to amend this Agreement. Other than properly signed change orders, this Agreement may be amended or modified only by a written amendment to this Agreement signed by both parties.

12.8 Dispute Resolution. Every attempt shall be made to settle all disputes arising under this agreement between the parties to this agreement. At the time a claim by the Contractor is presented to the USCG contracting officer, the parties, by mutual consent, shall agree on the means of dispute resolution. The Contractor shall proceed diligently with performance of the Contractor Work pending final resolution of any claim arising under this agreement.

12.9 Survival. The terms and conditions of Article 6 and Sections 3.5, 5.2, 7.1, 7.3, 7.4, 8.1, 9.1, 9.2, 11.2 and 12.1 through and including Section 12.9 shall survive the completion, termination or expiration of this Agreement.

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed by their duly authorized representatives as of the day and year first above written.

UNITED STATES COAST GUARD _____

BY _____

By _____

Its _____

Its _____