



US RESPONSECON

US Spill Response Contract

(for use only in the United States of America)

Explanatory Notes

Background

Spills involving oil or hazardous substances can occur for a wide variety of reasons and where pollution occurs, clean-up operations are carried out by appointed spill responders.

In a maritime context the incident giving rise to the spill may also involve salvage operations to save property and prevent damage to the marine environment. Such operations will be undertaken by salvors appointed under Lloyd's Open Form (LOF) or other appropriate contract.

Salvage and clean-up are different operations and, although an adapted LOF is sometimes used, the LOF form is not suited to spill response requirements. As a result, contractors have developed their own individual agreements but the lack of uniformity can lead to protracted negotiations and in turn delay the commencement of clean-up activity.

In response to a suggestion made by the International Salvage Union (ISU), the International Spill Control Organization (ISCO) approached BIMCO for assistance in developing a standard contract for the deployment of spill response equipment and personnel. A subcommittee was formed comprising representatives from the International Group of P&I Clubs, ISCO and ISU. A representative of the Spill Control Association of America (SCAA) participated in discussions relating to provisions applicable in the USA. Advice and guidance was also provided by the International Tanker Owners' Pollution Federation Ltd (ITOPF).

BIMCO would like to thank the following subcommittee members for their work in the development process:

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BIMCO also acknowledges, with thanks, assistance from Swire Emergency Response Services (SERS) for their support and agreement to use their company contract as the preliminary template for the BIMCO/ISCO document.

Two contracts have been developed. The following notes relate to US RESPONSECON US Spill Response Contract (for use only in the United States of America). Separate notes address the content of RESPONSECON International Spill Response Contract (for use outside the United States).

Commentary on Content

The Oil Pollution Act 1990 (OPA 90) requires shipowners trading to the USA to maintain pre-agreed contractual arrangements with approved Oil Spill Removal Organizations (OSROs) able to provide the necessary resources for clean-up operations in the event of an incident. Shipowners will, therefore, already have the necessary contracts in place with OSROs to enable response action to be taken if required. However, further resources or requirements for locally-based contractors might be required as a means of enhancing operational efficiency. The US RESPONSECON has therefore been developed as a contract of necessity (and not an OPA 90 OSRO contingency plan agreement) for use by contractors requiring additional capabilities or other support.

The contract has been developed to conform with the International Group Guidelines for Vessel Response Plan Contracts in the United States of America.

It should be noted that, while distinct from salvage, spill clean-up may often be carried out in parallel with ship salvage related operations. This may raise issues about site access and security. However, tensions between the different interests can be overcome through contact and liaison between the parties so as to achieve the common objective of a successful outcome.

Application of the contract is not limited to shipping incidents or shipowner counterparties. Requesting Parties may include pipeline operators, oil companies, regional and national government authorities, and other entities that may have a requirement to initiate spill response. The contract has therefore been designed for use in, but also beyond, the traditional maritime setting.

The contract is a framework agreement covering the essential elements of the parties' relationship based on the Contractor's provision of equipment and personnel. Nevertheless, and while it is likely to occur less frequently, the contract provides an option for hire of equipment only, although this can be converted to include personnel if party needs subsequently change.

In recognition of the urgency of mobilising equipment to an incident, the contract can be signed before rates have been settled for the agreed scope of services to be provided. If negotiations with the Contractor subsequently fail, the Requesting Party can terminate the contract at 24 hours' notice subject to any costs already incurred.

A pollution incident can be expected to create public interest. In order to maintain control over the information flow, detailed provisions require all media and press communications to be channelled through the Requesting Party.

This is a contract for spills occurring in US jurisdiction. It follows, therefore, that any dispute between the parties should be subject to resolution only in the US. Accordingly, the BIMCO Dispute Resolution Clause has been modified to provide for New York as the only identified forum.

Detailed provisions

Part I (Box Layout)

The box layout is for the insertion of variable information including party details, date of commencement, whether the agreement is for equipment and personnel or equipment only, scope of work, rates payable, basis of hire, frequency of invoicing, threshold for expedited payment procedures, bank details (which if confidential should be set out in a separate document), interest rate for late payments, dispute resolution procedures and any additional clauses. As the contract provides for New York as the only forum for arbitration, the customary box for insertion of dispute resolution procedures is unnecessary.

The text above the signature boxes provides that the contract consists of Part I, Part II, any additional clauses and (because details might not have been settled before mobilisation begins) the content of Annexes A, B and C "once they have been agreed". It is further provided that in the event of any conflict, Part I and any additional clauses prevail over Part II and Annexes A, B and C.

Part II (Terms and Conditions)

Definitions

As explained above, the contract is designed for spill incidents where the client might not be a shipowner. In order to reflect the range of potential client users, the Contractor's counterparty is defined as the "Requesting Party". This phrase avoids confusion with the "Responsible Party" concept under the US Oil Pollution Act 1990 and reflects the fact that the contract is intended for widespread use and not just in a shipping context.

The terms “Contractor’s Group” and “Requesting Party’s Group” have been used respectively to cover, and where appropriate reflect, the involvement or liability of associated companies, contractors, sub-contractors and other connected entities.

Clause 1 (Nature of Contract)

Subclause (a) acknowledges that the Requesting Party has hired the Contractor to undertake the agreed services;

Subclause (b) prohibits assignment or transfer of the agreement without the other party’s written approval;

Subclause (c) the Requesting Party is responsible for informing relevant Federal and State law authorities of the discharge although notification can be given by the Contractor;

Subclause (d) the Requesting Party must have a fully authorised representative available during performance of the contractual services. In a maritime context this would normally be the Qualified Individual (QI);

Subclause (e) on receipt of written authority from the Requesting Party or its representative and acting in accordance with instructions given, the Contractor must use its “best endeavours” to deploy necessary resources in a timely manner;

Subclause (f) sets out procedures for liaison between the Requesting Party, the Contractor, the Federal On-scene Coordinator (FOSC) and the State On-scene Coordinator (SOSC). The Requesting Party retains overall control of operations as between themselves and the Contractor but the Contractor may decline any instruction that might contravene any regulations or put personnel at risk;

Subclause (g) daily progress reports are to be provided by the Contractor; and

Subclause (h) unless agreed by the Contractor, the Requesting Party may not sub-let or loan any of the hired equipment or personnel.

Clause 2 Mobilisation and Demobilisation

Subclause (a) the urgency of an incident means that preparing Equipment and Personnel in readiness (“mobilisation”) to be moved to the required on-site location will be one of the first steps in beginning the clean-up process. However, the scope of Equipment and Personnel might not be clear at first with discussions continuing between the parties on the actual requirements. Nevertheless, in order to avoid delay while protecting the Contractor’s need for cash-flow, 80% of the estimated mobilisation charges must be paid within three working days of the start of mobilisation services and the balance within three working days of subsequent agreement of the total sum due;

Subclause (b) sets out procedures for demobilisation of Personnel on completion of the services;

Subclause (c) arrangements for demobilisation of Equipment are to be mutually agreed. Hire ceases on return to the original base with the Requesting Party responsible for the cost of cleaning or, at its option, replacing Equipment; and

Subclause (d) demobilisation charges are payable in accordance with the invoicing procedures in Clause 4 (Invoicing).

Clause 3 Warranty and Permits

Unless the Contract is for Equipment hire only, the Contractor:

Subclause (a) must deliver and warrant the Equipment's quality, condition and fitness for purpose; and

Subclause (b) is responsible for obtaining, maintaining and paying for all necessary licences and approvals covering the movement and use of Equipment and visas required by Personnel. The Requesting Party must reimburse the costs incurred and provide the Contractor with any assistance required to procure the necessary documentation and approvals.

Clause 4 Invoicing

Subclause (a) the parties are free to determine the frequency at which invoices are to be issued (with details to be inserted at Box 10). This offers greater flexibility than a set figure stated in the contract's terms. It will also assist parties where, in response to a developing situation, it is agreed that the frequency of issuing invoices should be changed. Invoices are to be issued in the currency stated in Box 11. The exchange rate for expenses in other currencies will be the figure quoted by the Contractor's bank;

Subclause (b) in order to assist a Contractor's need to maintain cash-flow where large sums of money are involved, an expedited payment process is provided where invoices exceed the agreed figure stated in Box 12. In such circumstances, 80% of the value must be paid within ten calendar days of the invoice. Unless subject to the dispute procedure set out at subclause (f), the balance is payable within thirty calendar days of the invoice;

Subclause (c) sets out the Contractor's obligation to issue invoices;

Subclause (d) unless the expedited payment provision in subclause (b) applies, payment must be made within thirty calendar days (referred to as the "Due Date" for payment) of an invoice. Bank charges, taxes and all other costs are for the Requesting Party's account;

Subclause (e) in default of payment, the Contractor may charge interest at the rate agreed in Box 13 or, if no figure has been inserted, at an annual rate of 4% above the US Prime Rate. (Note:

shipowners entered in an International Group P&I Club should consult their Club on the question of the applicable rate of interest);

Subclause (f) provides a regime for resolving disputed amounts where, subject to specifying reasons, up to a maximum of 20% of an invoice may be withheld, i.e. if say 10% of an invoice is disputed then 10% may be withheld but if 50% is disputed only a maximum of 20% may be withheld. The intention behind this provision is to ensure that the Requesting Party has some measure of security against disputed invoices whilst the Contractor's cash flow is maintained. If the Contractor's position is upheld, the balance together with any interest due becomes payable within three working days of a demand for settlement while a correction must be made if the outcome is in favour of the Requesting Party;

Subclause (g) in the absence of receipt of payment due, the Contractor may terminate the Contract and withdraw Equipment and Personnel without prejudice to any other rights the Contractor may have; and

Subclause (h) provides for "non-waiver" of the Contractor's rights including the ability to make a claim to the Oil Spill Liability Trust Fund (OSLTF).

Clause 5 Charges

The Requesting Party pays the Contractor for:

Subclause (a) hire of Equipment and Personnel from the time of mobilisation until returned in accordance with the provisions of the Contract. Hire of Personnel includes personal protective equipment such as reusable clothing, shoes and hard hats whereas items such as disposable gloves and respirators are consumables and paid for in accordance with subclause (f). Hire of Equipment ceases if it is lost or becomes a constructive total loss;

Subclause (b) the replacement cost of lost Equipment unless due to the Contractor's fault or negligence;

Subclause (c) reasonable charges for mobilisation and demobilisation;

Subclause (d) standby rates when mobilised Equipment is not on active use. However, where the contract is for Equipment only, the Requesting Party bears the risk of any downtime and standby rates do not apply;

Subclause (e) the costs, with an uplift of 15%, of cleaning and rehabilitating Equipment;

Subclause (f) out of pocket costs, third party expenses and consumables at cost plus an uplift of 15% unless the Contract is for Equipment hire only (when the Requesting Party will be directly responsible for all costs incurred);

Subclause (g) import and export duties; and

Subclause (h) security for the Contractor's costs in a form acceptable to both parties. It is expressly provided that a letter of undertaking from the Requesting Party's P&I Club or financial security provider will satisfy the requirement.

Clause 6 Equipment Hire

This clause applies only if the parties have agreed, and indicated at Box 5(b), that the Contract is limited to hire of Equipment only.

Subclause (a) the Contractor must deliver the Equipment and warrant its condition and quality but any warranties as to fitness for purpose are expressly excluded. On delivery, the Requesting Party must carry out a full inspection and advise the Contractor of any defects in the Equipment, failing which it will be deemed to have been received in good working condition subject to the warranties given by the Contractor;

Subclause (b) the Equipment must be redelivered in the same good condition. If, however, it is lost or damaged other than as a result of normal wear and tear or due to the Contractor's negligence, hire will continue to be payable until the Equipment has been replaced or reinstated by the Requesting Party. Alternatively, the Requesting Party may, at its option, discharge its further obligations and liability for hire by paying the Contractor the value of the Equipment;

Subclause (c) sets out the Requesting Party's obligations in relation to use of the Equipment; and

Subclause (d) lists the Requesting Party's obligations in relation to the preservation, maintenance and operation of the Equipment, protection of the Contractor's interests and compliance with all applicable regulatory and customs requirements.

Clause 7 Early Termination

Subclause (a) the Contract may be terminated by the Requesting Party at 24 hours' notice. While this brings the agreement to an end, the Requesting Party nevertheless remains liable for prior outstanding costs and other contractual commitments; and

Subclause (b) lists causes giving rise to termination by either party including requisition, confiscation, bankruptcy, force majeure, repudiatory breach and, for Equipment hire contracts, loss of such Equipment. The Requesting Party remains liable for its obligations up to the time of termination.

Note: early termination might not be permitted by local regulatory or other supervisory authorities. Any decision to cancel a contract should be carefully considered and appropriate advice taken.

Clause 8 Liabilities and Indemnities

Subclause (a) the Contractor is liable to and must indemnify the Requesting Party for any losses or liabilities resulting from the Contractor's failure to comply with its obligations under the agreement, or to comply with any laws or regulations, or their gross negligence or wilful misconduct unless caused by failure of compliance with obligations under the agreement, or to comply with any laws or regulations, or the gross negligence or wilful misconduct on the part of the Requesting Party, the Requesting Party's Group or third parties;

Subclause (b) is the mirror image of subclause (a) with the Requesting Party liable to indemnify the Contractor unless the losses are due to the latter's act, failure, gross negligence or wilful misconduct;

Subclause (c) provides that the Requesting Party is to indemnify the Contractor against liabilities incurred in relation to removal costs and damages except where: responder immunity applies, there is gross negligence or wilful misconduct on the Contractor's part, the Requesting Party would not be liable if sued directly or, if liable, would be entitled to limit such liability, or liability arises for death or personal injury;

Subclause (d) waives both contracting parties' rights to claim punitive, special or consequential damages;

Subclause (e) where the Contract is for Equipment hire only and unless due to its negligence, the Contractor's liability to the Requesting Party is limited to suspension of hire;

Subclause (f) the Requesting Party is responsible for disposal of oil or other hazardous substances even if physically undertaken by the Contractor except for liabilities resulting from the Contractor's negligent handling or disposal; and

Subclause (g) sets out the Contractor's responder immunity and the parties' rights to limit liability in accordance with applicable law.

Clause 9 Insurance

Subclause (a) sets out the Requesting Party's obligation to maintain P&I Club cover or other acceptable evidence of financial responsibility as required by law or USD 1 million, whichever is greater;

Subclause (b) while P&I Clubs in the International Group will not accept the Contractor as co-insured or waive subrogation rights, such arrangements may be available through other insurers or for clean-up operations that are not ship-related;

Subclause (c) sets out the Contractor's obligation to maintain required liability cover of not less than USD 2 million per incident; and

Subclause (d) requires the parties to provide each other with proof of compliance with the insurance obligations.

Clause 10 Contractor Warranties and Classification

This clause confirms the Contractor's maintenance of all necessary authorisations and compliance with the provisions of Federal and State law.

Clause 11 Health and Safety

This clause sets out the Contractor's obligations to comply with all applicable health and safety legislation and provisions.

Clause 12 Media and Confidentiality

Subclause (a) the Requesting Party has exclusive control over all media and press communications. The Contractor is expressly required to channel all enquiries through the Requesting Party and must make reasonable efforts to prevent unauthorised release or leaking of any information in any form or of any kind; and

Subclause (b) other than for purposes connected with performance of the Contract, information which is not in the public domain must be treated as private and confidential and not disclosed without the other party's written approval. Express exceptions from the disclosure restrictions cover directions by FOSC and SOSC, the Requesting Party's responsibility under subclause (a) for media and press communications, liaison with insurers and due legal process.

Clause 13 Notices

This is a standard provision for giving and exchanging notices. It explains that all notices must be given in writing and defines what "in writing" means.

Clause 14 Severance

This is a standard provision to avoid the entire agreement being held invalid because an arbitrator or other competent authority has declared a particular provision to be illegal, invalid or unenforceable.

Clause 15 Entire Agreement

The clause provides that the Contract contains the agreement between the parties to the exclusion of prior discussions and exchanges.

Clause 16 Dispute Resolution Clause

The Contract is for spill incidents in US jurisdiction and any dispute therefore falls to be determined by arbitration in New York in accordance with the rules of the Society of Maritime Arbitrators Inc.

Copyright and availability

Copyright in US RESPONSECON is held by BIMCO and ISCO.

A copy of the contract can be obtained from BIMCO at www.bimco.org or email to contracts@bimco.org.