

# **INVITATION TO TENDER**

**ECMWF/2014/216**

## **Call-Off Contract for the Acquisition of Disk Systems and Servers**

**Volume III:  
DRAFT AGREEMENT**

**14 July 2014**

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Under this Contract made and entered into this \_\_\_\_\_ day of \_\_\_\_\_ 2014 by and between the European Centre for Medium-Range Weather Forecasts (ECMWF), governed by its Convention and associated Protocol on Privileges and Immunities which came into force on 1 November 1975 and was amended on 6 June 2010, and \_\_\_\_\_ (the Contractor), ECMWF agrees to acquire and the Contractor agrees to provide the products and services described in this Contract on the terms and conditions provided herein.

IN WITNESS WHEREOF this Contract has been duly executed as of the date set forth above.

Signed for and on behalf of ECMWF

Signed for and on behalf of the Contractor

by: \_\_\_\_\_  
name in capitals

by: \_\_\_\_\_

its \_\_\_\_\_

its \_\_\_\_\_

in the presence of:

in the presence of:

\_\_\_\_\_  
(Signature of witness)

\_\_\_\_\_  
(Signature of witness)

\_\_\_\_\_  
(Names of witnesses in BLOCK LETTERS)

\_\_\_\_\_

## SECTION 1 INTRODUCTION AND SCOPE OF CONTRACT

### 1.1. CONTRACT DOCUMENTS

1.1.1 The Contract comprises this document which includes the terms and conditions, and Exhibits 1 to 6 (the “Agreement”) and the following documents; in the event of any conflict between any such documents, the order of priority shall be:

- The Agreement.
- The Letter of Acceptance of Tender dated [\*\*\*\*\*].
- The Contractor’s Tender, comprising the Contractor’s response dated [\*\*\*\*\*] 2014 to the ITT Documentation together with the Contractor’s subsequent clarifications as listed in Exhibit 4 in date order (later documents taking priority over earlier ones). Where the clarifications extend the rights of either party, then such clarifications shall be deemed to be part of the Agreement.
- The ITT Documentation and its subsequent amendments and clarifications (later documents taking priority over earlier ones). Where the subsequent clarifications extend the rights of either party, then such clarifications shall be deemed to be part of the Agreement.

1.1.2 This Contract constitutes the entire understanding between the parties relating to the subject matter thereof and it shall supersede all prior negotiations, understandings or agreements with respect to such subject matter. The parties acknowledge that neither is relying on any statement, representation, warranty or understanding (whether negligently or innocently made) of any person, whether a party to this Contract or not, other than is expressly set forth in this Contract. Nothing in this Clause shall, however, operate to limit or exclude any liability for fraudulent misrepresentation.

### 1.2. DEFINITIONS

In this Contract, the following words and phrases shall have the meanings ascribed to them as follows except where the context requires otherwise:

Acceptance Date	the date or dates on which the Works successfully complete the relevant Acceptance Tests as defined in Section 6.
Acceptance Tests	the tests as described in Section 6.
Acceptance Test Certificate	the certificate to be issued by ECMWF when a Batch has successfully completed its relevant Acceptance Test.
Background IPR	the Intellectual Property Rights in existence prior to the Effective Date and either owned by or licensed to one of the parties and any amendments, developments or additions to such pre-existing Intellectual Property Rights.
Change	a change of all or part of the Works agreed in accordance with Section 7.
Claim	any action, claim, demand, proceeding, filing, objection or complaint of any nature or kind or any IPR Claim.
Batch	all the Machines ordered by a single Purchase Order.
Batch Price	the sum noted on a Purchase Order as the total price payable to the Contractor for the supply of the products/services noted on a Purchase Order as may be amended by agreement in writing.



Committed Delivery Date	the latest date, as specified on a Purchase Order, by which the Machines shall be delivered to the Site.
Confidential Information	information which has either been designated as confidential by either party in writing or that ought to be considered as confidential (however it is conveyed or on whatever media it is stored) including commercially sensitive information, information which relates to the business, affairs, properties, assets, trading practices, goods, services, developments, trade secrets, Intellectual Property Rights such as ECMWF software source code, know-how, personnel, or customers and suppliers of either party.
Contractor Personnel	the Contractor's employees, agents, contractors and Sub-contractors who provide or who are involved in the delivery of the Works.
Day or Days	a calendar day or days unless specified otherwise.
Default	any act, statement, failure to meet the Specification, the Performance Criteria or the Service Levels, non performance of contractual obligations, omission or negligence by a party including in the case of the Contractor by the Contractor Personnel and in the case of ECMWF by its employees in connection with, or in relation to, the subject matter of this Contract as a result of which the party is legally liable to the other whether in contract, tort or otherwise.
Delivery Date	the date on which the Machines are physically delivered to the Site.
Disk	A rewritable storage device where data are recorded persistently by various electronic, magnetic, optical, or mechanical changes to a surface layer of one or more rotating disks, or by the use of integrated circuit assemblies as memory to store data persistently, and its associated infrastructure.
Disk System	A self-contained piece of equipment, connectable to computer hosts, and able to provide to these hosts access to one or more logical Disks, or LUN. <i>Such equipment could for example include controller units, to which disk containers such as disk trays are connected. A controller unit would include one or more disk controllers, in charge of organizing disk space and distributing it across connected servers, providing read and write cache and protecting the storage against disk or power failures. A disk container would include a collection of physical disk devices.</i>
Documentation	the manuals and documentation relevant to the use, maintenance or support of the Works.
Effective Date	the date when the Contract enters into force which shall be the date stated on the signature page.
Foreground IPR	Intellectual Property Rights or other proprietary rights created by the Contractor, or by the Contractor Personnel, whether directly or indirectly, in the performance of, or for the purposes of providing the Works and including any IPR created by the Contractor during ECMWF's procurement process for the Works prior to entering into the Contract, but excluding the Contractor's Background IPR.

Force Majeure	<p>the occurrence of any cause or event that is beyond the reasonable control of the affected party, provided that the affected party is without fault in causing or failing to prevent such occurrence; and the effect of such occurrence on the affected party could not have been circumvented by reasonable precautions or by the use of commercially reasonable alternative sources, workaround plans or other means. Force Majeure may include:</p> <ul style="list-style-type: none"> <li>(a) war, riot, civil commotion or terrorist attack;</li> <li>(b) fire, flood, or storm;</li> <li>(c) strikes, lockouts or other industrial disputes excluding any relating to or induced by the workforce of the affected party (or, where the affected party is the Contractor, by the workforce of any Sub-contractor).</li> </ul>
Functional Test	For Disk Systems the test described in Exhibit 5.
Good Industry Practice	the exercise of that degree of skill, care, diligence, prudence, efficiency, foresight and timeliness as would be expected from a leading and experienced company providing similar products.
Guarantee	the deed of guarantee (in a form to be agreed) in favour of ECMWF entered into by the Guarantor on or about the date of this Contract or any guarantee acceptable to ECMWF that replaces it from time to time.
Guarantor	[***], a company registered in [***] and whose registered office is at [***].
Insolvency Event	where a person ceases or threatens to cease to carry on business, is found unable to pay its debts within the meaning of the Insolvency Act 1986 Section 123, has an administrator, receiver, administrative receiver or manager appointed over the whole or any part of its assets, enters into any composition with creditors generally, or has an order made or resolution passed for it to be wound up (otherwise than in furtherance of any scheme for solvent amalgamation or solvent reconstruction) or undergoes any similar or equivalent process in any jurisdiction.
Intellectual Property Rights (IPR)	patents, petty patents, utility models, trade marks, design rights, applications for any of the foregoing, copyright, moral rights, database rights, semi-conductor topography rights, trade or business names, domain names, website addresses whether registrable or otherwise, (including applications for and the right to apply for registration of any such rights), and any similar rights in any country whether currently existing or created in the future, in each case for their full term, together with any renewals or extensions.
IPR Claim	any claim of infringement or alleged infringement (including the defence of such infringement or alleged infringement) of any IPR used to provide the Works (including the Foreground IPR and the Contractor's Background IPR) or as otherwise provided by the

	Contractor (or to which the Contractor has provided access) to ECMWF in the fulfilment of its obligations.
ITT Documentation	the various documents forming part of ECMWF's Invitation To Tender number ECMWF/2014/216, being a Letter of Invitation, Volumes I and II including its Annexes and any clarifications issued prior to the closing date for receipt of Tender.
Laws	statutes, statutory instruments, regulations, orders, and other legislative provisions in any relevant jurisdiction applicable to the Contractor including any delegated or subordinate legislation, and any judgment of a relevant court of law or decision of a tribunal or competent authority.
Loss	any losses arising from any Claims and/or any costs, damages, demands, expenses, fines, liabilities, losses, penalties and sanctions (including amounts paid in settlement, legal costs, disbursements, out-of-pocket expenses and interest).
Machine	each item of equipment (but not Software Products) shown in a Purchase Order. Machine includes Disk System and Server.
Maintenance Services	the services to be provided by the Contractor pursuant to Section 11, Section 12 and Section 13.
Malicious Code	software or firmware intended to perform an unauthorized process that will have adverse impact on the confidentiality, integrity, or availability of any of ECMWF's computer systems (including the System) or data, whether or not the malicious code is introduced wilfully, negligently or without knowledge of its existence.
Purchase Order	the document to be raised by ECMWF in the format of Exhibit 1 for the ordering of Machines, such document when signed by the parties to become part of this Contract.
Performance Criteria	the requirements for performance contained in the ITT Documentation and committed to by the Contractor in its Tender.
Reliability Test	For Disk Systems the test described in Exhibit 5.
Server	A computer in a network, capable of running a multiprocessing operating system and used to provide services to other computers in the network.
Services	all the services to be provided by the Contractor to ECMWF under this Contract.
Service Credit	any sum payable by the Contractor for failure to meet a Service Level as set out in Section 13 and Exhibit 6.
Service Level	the level of service required to be provided in respect of certain Services, as set out in Section 13 and Exhibit 6.
Site	ECMWF's premises at Shinfield Park, Reading, Berkshire. RG2 9AX.
Software Products	all those items of software referred to in a Purchase Order together with any embedded software such as microcode and firmware.

Specification	the technical specifications and functional description for each part of the Works as set out in the Contract as may be amended, together with other functional items which the Contractor has committed to provide in its Tender.
Sub-contractor	any person, firm or company engaged by the Contractor to perform some of the Works.
System	from time to time all Software Products and Machines installed by the Contractor under this Contract.
Term	the period beginning on the Effective Date and ending on the expiry of this Contract, unless terminated earlier pursuant to the provisions of this Contract.
Working Day	any day other than Saturday, Sunday or a bank or public holiday in England.
Works	all tangible items and Software Products, and software licences furnished and all Services performed by the Contractor under the terms of this Contract.

- 1.2.1 The headings in the Contract shall not be deemed to be part thereof or to be taken into consideration in the interpretation or construction thereof.
- 1.2.2 The singular includes the plural and vice versa, and reference to any gender includes the other genders.
- 1.2.3 Any reference to an enactment is to an enactment in England (which term shall include any directly applicable EC legislation) and includes that enactment under English law as amended, extended, consolidated, re-enacted or applied by or under any other enactment before or after this Contract; and any subordinate legislation made (before or after this Contract) under that or any other applicable enactment.

### **1.3. SCOPE OF CONTRACT**

- 1.3.1 This Contract provides for the initial acquisition by ECMWF of Disk Systems and Servers which will be specified on Purchase Orders in the form of Exhibit 1 to this Contract. Additionally, by this Contract, ECMWF has the option to require the Contractor to supply ECMWF with further appropriate Disk Systems, Servers and related products/services on the terms of this Contract pursuant to a Purchase Order that will be signed on behalf of the Contractor and ECMWF in the form of Exhibit 1 to this Contract. The parties agree that ECMWF's option shall be enforceable as many times as ECMWF wishes prior to the expiry of five years from the Effective Date of Contract, and thereafter as agreed by the parties. Prices for additional Disk Systems and Servers must be in accordance with Exhibit 2. In the event that the parties want to agree upon an extension of the call-off option they shall agree an appropriate amendment to the Contract in accordance with Section 7.
- 1.3.2 The Works include all items listed in the ITT Documentation as acknowledged in the Contractor's Tender. The Prices referred to in each signed Purchase Order are the only amounts payable by ECMWF for the Works under this Contract and include all charges for the Works provided under this Contract, and there shall be no other charges for any of:
- Shipment, insurance, duties, taxes (except VAT) and installation costs for the Works;

- Carrying out all necessary tests;
- Supply and delivery of the Works to the Site;
- All labour, materials and plant required for off-loading all items of the Works and placing into position;
- Connection of the Works to ECMWF's infrastructure;
- Maintenance of Machines, including any stockholding on the Site of an agreed set and level of spares;
- Licences for Software Products, including licences for Successor Software (as defined in Clause 9.7);
- Support and maintenance of Software Products, including on-Site analyst support and migration aid where agreed in this Contract;
- Documentation and training;
- All other items that are part of the Works from time to time.

#### **1.4. USE BY ECMWF AND OTHERS**

- 1.4.1 The acquisition by ECMWF shall be for exclusive and unlimited use by: ECMWF; the government and national agencies of ECMWF Member States as are parties from time to time to the Convention signed on 11 October 1973 and amended on 6 June 2010 or any successor Convention thereto; and other authorised users of ECMWF products and services who require access to ECMWF's computer systems. Such use shall be limited to use of the Machines at the Site or by remote access to the Machines at the Site. If ECMWF performs services for others that access the Machines or Software Products at the Site, it may disclose to authorised users or contractors any external or interface detail as may be reasonably necessary to enable due access to the Machines.
- 1.4.2 References throughout this Contract to use of the Machines by ECMWF shall be deemed to include use by all users and entities referred to in this Clause 1.4.

#### **1.5. CONTRACTOR'S OBLIGATIONS**

The Contractor shall ensure that the Works:

- comply with the Specification, the Performance Criteria, the Service Levels; and
- are otherwise supplied in accordance with this Contract.

The Contractor shall carry out the Works with reasonable care and skill as may be expected of a supplier in the Contractor's business.

### **SECTION 2 GENERAL PROVISIONS**

#### **2.1. DUE DILIGENCE**

The Contractor confirms that it:

- 2.1.1 has made and shall make its own enquiries to satisfy itself as to the accuracy and adequacy of any information supplied to it by or on behalf of ECMWF;
- 2.1.2 has raised all relevant due diligence questions with ECMWF before the Effective Date;
- 2.1.3 and has entered into this Contract in reliance on its own due diligence alone.

The Contractor confirms that it has obtained information about the Site, and no claim for additional payment will be allowed on the grounds of misinterpretation of any matter relating to the Site that could reasonably have been clarified by a visit to the Site or reference to ECMWF. ECMWF shall

make available such information as may reasonably be required by the Contractor regarding Site conditions.

The Contractor accepts that the ECMWF working and other environment is adequate for the purpose of connecting and supporting the Works.

## **2.2. AUTHORITY**

During the Term, the Director-General of ECMWF will represent ECMWF in its relations with the Contractor. Changes to or instructions under this Contract will not be contractually binding on ECMWF unless they are given in writing in accordance with the terms of this Contract by ECMWF's Director-General or his authorised representative. The Director-General upon request of the Contractor will confirm details of his representative.

## **2.3. CORRESPONDENCE AND NOTICES**

Except as otherwise expressly provided no communication from one party to the other shall have any validity under the Contract unless made in writing by or on behalf of ECMWF or as the case may be by or on behalf of the Contractor. Any notice or other communication whatsoever which either party gives or makes to the other shall be written in English and given or made either by post in a prepaid letter or by facsimile transmission, addressed to the other party at the address specified in this Clause 2.3 and that notice or communication shall be deemed for the purposes of the Contract to have been given or made after two days for a letter if that letter is not returned as being undelivered, or four hours for a facsimile transmission provided the sender shall have received a signal to that effect and that a copy of such fax shall be mailed within 12 hours of the sending of such telefax. Any correspondence sent by e-mail must be confirmed by posting a copy of such correspondence within one Working Day of the sending of such e-mail. The Contractor is responsible for notifying ECMWF of any changes to the contact details in this Clause 2.3. The relevant addresses etc are as follows:

ECMWF:

ECMWF

Shinfield Park

Reading RG2 9AX

UK

Attention: The Director-General

Telephone: 0118 949 9000

Fax: 0118 986 9450

Contractor:

Contractor address

Attention:

Telephone:

Fax:

## **2.4. PUBLICITY**

Any Contractor publicity material, including press releases and the Contractor's advertising and news bulletins, which are related to this Contract and/or to ECMWF which are intended by the Contractor for the press, broadcasting or television or to be issued or publicised to third parties in any other way, whether in writing or orally shall be drawn up in consultation with ECMWF and shall require approval in writing by ECMWF prior to publication.

## **2.5. RELATIONSHIP OF THE PARTIES**

Nothing in this Contract is intended to create a partnership or legal relationship of any kind that would impose liability upon a party for the act or failure to act of the other party, or to authorise either party to act as agent for the other party. Neither party shall have authority to make representations, act in the name of or on behalf of, or to otherwise bind the other party.

## **2.6. TAXES AND DUTIES**

2.6.1 The Contractor shall take all necessary steps so as to facilitate ECMWF's exemption from taxes and customs duties resulting from its Protocol on Privileges and Immunities (published London, Her Majesty's Stationery Office, Cmnd. 5632)<sup>1</sup>. It will do so by carrying out necessary formalities so as to bring about the exemption from taxes and duties which might otherwise be levied on the expenses it will incur, before it submits the invoice to ECMWF; and by complying with all necessary formalities so that ECMWF itself may be exempt from paying such taxes and duties. For these purposes, it shall request the necessary instructions from ECMWF and provide in due time the information which ECMWF requires.

2.6.2 The Batch Price excludes VAT and/or any tax, duty, levy or fee the Contractor is required by law to impose, at the rate and in the manner prescribed by law from time to time, which shall be added to invoices at the rate applicable at the tax point, being the date of invoice. The Contractor shall be liable for all other taxes, assessments, fees, licences, administrative customs charges or other governmental assessments or charges that are applicable to the performance of this Contract. It is each party's responsibility to inform itself of its liabilities in each country where such liabilities may arise. The Contractor shall indemnify ECMWF on a continuing basis against any liability including any interest, penalties or costs incurred, which is levied, demanded or assessed on ECMWF at any time in respect of the Contractor's failure to account for or to pay any other taxes, assessments, fees, licences, administrative charges, customs charges or any other governmental assessments or charges.

## **2.7. DELAYS**

2.7.1 Subject always to Clause 2.7.3 below, if the Contractor fails to complete delivery by the Committed Delivery Date shown on a Purchase Order or any agreed revised date, notwithstanding the provisions of clauses 2.8 and 2.13 regarding liquidated damages and termination, ECMWF shall be entitled to terminate this Contract or the Works covered by the relevant Purchase Order and/or the outstanding provisions of this Contract and clause 2.15.1 shall apply.

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<sup>1</sup>Can be obtained from ECMWF on request

- 2.7.2 In the event that the Contractor encounters difficulty in meeting the Specification or Performance Criteria, or it anticipates difficulty in complying with delivery schedules or the relevant dates specified in this Contract, it shall immediately notify ECMWF in writing, giving pertinent details; provided, however, that this data shall be informational only in character and that this provision shall not be construed as a waiver by ECMWF of any delivery schedules or the relevant dates, or of any rights or remedies provided by law or under the Contract.
- 2.7.3 If the Contractor shall have been delayed or impeded by Force Majeure as defined in clause 2.19, or by any act or omission of ECMWF or otherwise beyond the reasonable control of the Contractor or its subcontractors, ECMWF shall grant the Contractor from time to time in writing such extension of time as may be reasonable, such extension period to be at least equal to the period of the Force Majeure, and the relevant date or dates shall be amended accordingly.

## **2.8. LIQUIDATED DAMAGES FOR DELAYS**

- 2.8.1 If the Contractor fails to deliver any part of the Works by the relevant Committed Delivery Date or the Batch fails to complete the Acceptance Test as defined in 6.1 within 45 Days for Servers or 75 Days for Disk Systems of the applicable Committed Delivery Date, then ECMWF shall have the right to deduct from the Batch Price by way of liquidated damages as a genuine pre-estimate of ECMWF's loss and not as a penalty 0.1% of the Batch Price or of such portion or portions only of the Works as cannot in consequence of the said failure be put to the use intended for each day's delay, but the amount so deducted shall not in any case exceed 10% of the Batch Price and such deduction shall be in full and final satisfaction of the Contractor's liability for the said failure subject to the provisions of Clause 2.13.
- 2.8.2 Liquidated damages will not be ECMWF 's sole financial remedy in respect of any Loss suffered by ECMWF as a result of the Contractor's delay or the Contractor's failure to meet the Specification or Performance Criteria:
- 2.8.2.1 to the extent that the delay arises from the Contractor's wilful Default of this Contract; or
- 2.8.2.2 where ECMWF is entitled to terminate this Contract as a result of the Contractor's material breach, or where ECMWF accepts a repudiatory breach on the part of the Contractor.
- 2.8.3 The parties acknowledge that all liquidated damages set out in this Contract are a genuine pre-estimate of ECMWF's Loss for the relevant breach and have been negotiated and agreed between the parties.
- 2.8.4 Liquidated damages shall be a debt due from the Contractor to ECMWF and shall not be subject to, nor count towards, the limit of liability set out in Section 5, and shall be paid in accordance with Clause 8.6.

## **2.9. ACCESS**

- 2.9.1 While the personnel of the Contractor, or of any Sub-contractor of the Contractor, are attending ECMWF's premises, such personnel will conform to ECMWF's normal codes of staff practice which ECMWF has notified the Contractor of in writing prior to attendance.
- 2.9.2 ECMWF shall afford to the authorized personnel of the Contractor at all reasonable times and with prior agreement such access to the Site (but not necessarily exclusive access) as may be necessary for the inspection thereof and for the execution of the Works, provided always that ECMWF shall have the right to refuse to admit to, or order the removal from, the Site of any person employed by or acting on behalf of the Contractor or any Sub-contractor of the



Contractor who, in the opinion of ECMWF (which shall be final), is not a fit and proper person to be on the Site, such opinion not to be unreasonably exercised. Such action shall not relieve the Contractor of its obligations under the Contract. If ECMWF exercises its rights under this clause, subject to the Contractor promptly taking all reasonable steps to provide a replacement employee as soon as possible, the Contractor will not, in that event, be liable under this Contract for delay in performance of any of its obligations, which arises from the refusal of admission by ECMWF, as aforesaid.

- 2.9.3 In the event that the Contractor is not provided with exclusive access to the Site, the Contractor must take reasonable care to ensure that, in the execution of the Works, it does not interfere with the operations of ECMWF, its employees or any other contractor employed on the Site.
- 2.9.4 The Contractor acknowledges that, as at the date of this Contract, it has sufficient information about ECMWF's working environment to enable it to comply with its obligations hereunder but ECMWF undertakes to give the Contractor access to the Site at all reasonable times to enable the Contractor to prepare for delivery, installation and testing hereunder.

## **2.10. CONFIDENTIALITY**

- 2.10.1 Each party hereby warrants that:
  - 2.10.1.1 it shall treat all Confidential Information belonging to the other party as confidential and safeguard it accordingly;
  - 2.10.1.2 any person employed or engaged by either the Contractor or ECMWF (in connection with the Contract in the course of such employment or engagement) shall use Confidential Information only for the purposes of the Contract;
  - 2.10.1.3 any person employed or engaged by either the Contractor or ECMWF (in connection with the Contract in the course of such employment or engagement) shall not disclose any Confidential Information to any third party without the prior written consent of the other party; and
  - 2.10.1.4 it shall take all necessary precautions to ensure that all Confidential Information is treated as confidential and not disclosed (save as aforesaid) or used other than for the purposes of the Contract by its employees, servants, agents or sub-contractors.
- 2.10.2 The provisions of Clause 2.10.1 shall not apply to any information which:
  - 2.10.2.1 is or becomes public knowledge other than by breach of this Clause 2.10; or
  - 2.10.2.2 is in the possession of the receiving party without restriction in relation to disclosure before the date of receipt from the disclosing party; or
  - 2.10.2.3 is received from a third party who lawfully acquired it and who is under no obligation restricting its disclosure; or
  - 2.10.2.4 is independently developed without access to the Confidential Information; or
  - 2.10.2.5 which must be disclosed pursuant to a statutory, legal or parliamentary obligation placed upon the party making the disclosure.
- 2.10.3 Where it is considered necessary in the opinion of ECMWF, the Contractor shall ensure that its Contractor Personnel sign a confidentiality undertaking before commencing work in connection with the Contract.
- 2.10.4 Nothing in this Clause 2.10 shall be deemed or construed to prevent ECMWF from disclosing any Confidential Information obtained from the Contractor on a need to know basis in

accordance with Clause 1.4 or to any auditor, consultant, contractor or other person engaged by ECMWF or to members of ECMWF's governing body or committees.

2.10.5 The restrictions contained in this Clause 2.10 shall continue to apply for a period of five years after the end of the Contract.

## **2.11. WARRANTIES AND REPRESENTATIONS**

2.11.1 ECMWF and the Contractor each warrant, represent and undertake that:

2.11.1.1 it has full capacity and authority and all necessary consents to enter into and perform this Contract and that this Contract is executed by a duly authorised representative of the party;

2.11.1.2 there are no actions, suits or proceedings or regulatory investigations pending or, to that party's knowledge, threatened against or affecting that party before any court or administrative body or arbitration tribunal that might affect the ability of that party to meet and carry out its obligations under this Contract; and

2.11.1.3 once duly executed this Contract will constitute its legal, valid and binding obligations.

2.11.2 The Contractor warrants, represents and undertakes that:

2.11.2.1 by the relevant Committed Delivery Date, it shall deliver Machines capable of passing the appropriate Acceptance Tests, and all relevant components of such Machines shall operate in accordance with their respective Specifications and Performance Criteria;

2.11.2.2 with effect from the relevant Delivery Date, the relevant manuals and other documentation will provide adequate instruction to enable ECMWF to make full and proper use of the Machines;

2.11.2.3 ECMWF's use and operation of the Machines and the provision of the Works shall not infringe any intellectual property rights of any third party;

2.11.2.4 it has the full capacity and authority to grant any software licences included as part of the Works;

2.11.2.5 the Works shall be supplied and rendered by appropriately experienced, qualified and trained personnel with all due skill, care and diligence;

2.11.2.6 it shall discharge its obligations hereunder with all due skill, care and diligence including but not limited to Good Industry Practice and (without limiting the generality of this Clause 2.11) in accordance with its own established internal procedures or with recognised international standards;

2.11.2.7 the period of warranty coverage for each Machine shall be as specified on the relevant Purchase Order regardless of the termination of this Contract. The Contractor shall provide warranty service with a call-out response time for each Machine as specified on the Purchase Order.

2.11.2.8 neither the Contractor nor any Contractor Personnel or any person acting on its behalf has offered, given or agreed to give any person any inducement or reward (or anything which might be considered an inducement or reward) in connection with ECMWF entering into this Contract;

2.11.2.9 it will comply with (and procure that the Contractor Personnel comply with) ECMWF's reasonable requests in carrying out and delivering the Works.

2.11.3 The Contractor shall perform its obligations under this Contract in a manner that complies with all Laws in force during the Term and shall not cause ECMWF to breach any Laws in force during the Term.

- 2.11.4 If Malicious Code is found to have been introduced into any item of software or system by the Contractor or by any Contractor Personnel (whether or not the Contractor has fully complied with its obligations under this Clause 2.11), the Contractor will, at ECMWF's request, take remedial action to eliminate the Malicious Code in consultation with ECMWF; and if the Malicious Code causes loss of data or a loss of operational efficiency in such item of software or system used and/or owned by ECMWF, at ECMWF's request mitigate such loss and restore the efficiency and integrity of such data, software and system to the same state as before the introduction of the Malicious Code.
- 2.11.5 Notwithstanding inspection and acceptance by ECMWF or any provision concerning the conclusiveness thereof, the Contractor warrants that during the warranty periods the Works shall perform in all material respects in accordance with the technical specifications and functional description as provided in this Contract and as contained in the then current release of the relevant technical manuals.
- 2.11.6 During the warranty periods the Contractor shall provide all routine and remedial maintenance for the Machines and keep the Machines in conformance with their published specifications, including routine maintenance and all necessary repairs. The warranty service shall cover the furnishing of replacement parts and/or Machines. The Contractor guarantees that replacement parts for each Machine in the Batch will be available for a period of five years from the relevant Committed Delivery Date.
- 2.11.7 If the Contractor is required to provide routine or remedial maintenance during the warranty period, it shall be at no cost to ECMWF. Any supplies or services corrected or replaced by the Contractor pursuant to this Clause 2.11 shall be subject to all provisions of this Contract to the same extent as were the original Works.
- 2.11.7.1 If the Contractor fails or refuses to provide routine or remedial maintenance within a reasonable time, ECMWF is authorized to remedy the defect itself or to have it remedied for the account of the Contractor, or to demand payment in respect to the value of the supplies or services that have not been corrected.
- 2.11.8 The Contractor shall perform remedial services after notification that any Machine is not operating correctly. The Contractor shall provide ECMWF with (a) designated point(s) of contact and make arrangements to enable its maintenance representative or an answering service to receive such notification.
- 2.11.9 The Contractor shall furnish malfunction incident reports to ECMWF upon completion of each intervention under the warranty service. The Contractor may, at no additional charge, make modifications to any Machine to improve its operation and/or reliability or to comply with legal requirements subject always to the prior concurrence of ECMWF that will not be unreasonably withheld.
- 2.11.10 The warranty service does not cover any damage or failure caused by:
- 2.11.10.1 Site conditions that do not conform to Contractor's specifications; or
- 2.11.10.2 neglect, improper use, fire or water damage, damage during transportation by ECMWF, or other causes beyond the Contractor's control.
- 2.11.11 If requested by ECMWF, the Contractor shall provide for on-site modification of Machines on the same terms as may be granted to other customers for the same type of Machines as supplied under this Contract. The Contractor shall also be permitted reasonable access to the Machines to carry out necessary modifications at the Contractor's request, the times and

duration of access to be mutually agreed between the parties taking into consideration ECMWF's operational requirements. The Contractor shall keep ECMWF informed of such modifications as they occur.

- 2.11.12 Failure to agree upon any determination to be made under this clause shall be a dispute concerning a question of fact within the meaning of Clause 2.17 of this Contract.
- 2.11.13 All costs relating to the transportation of Works covered under this warranty Clause 2.11 shall be wholly the responsibility of the Contractor.
- 2.11.14 Except as expressly stated in this Contract, all warranties and conditions whether express or implied by Statute, Common Law or otherwise (including but not limited to fitness for purpose) are hereby excluded to the extent permitted by law.
- 2.11.15 The Contractor warrants that the releases of Software Products are current when supplied by the Contractor and will, when properly used:
  - 2.11.15.1 enable the Machine to pass all Acceptance Tests and relevant standards of performance in accordance with the Specification and as provided in Section 6 and as committed in the Contractor's tender; and
  - 2.11.15.2 fully support the release levels of other vendors' software as specified on a Purchase Order.

## **2.12. ASSIGNMENT AND SUB-CONTRACTING**

- 2.12.1 The Contractor shall not assign, pledge or transfer the Contract or any of the rights or obligations therein without the prior written consent of ECMWF.
- 2.12.2 The Contractor shall not, without the prior written consent of ECMWF, which shall not be unreasonably withheld, sub-contract any part of the Contract for the execution of any part of the Works and any such consent shall not relieve the Contractor from any of its obligations under the Contract. The restriction contained in this Clause 2.12 shall not apply to the supply of equipment or materials or minor details or to any part of the Works for which a Sub-contractor is named in the Contract.

## **2.13. TERMINATION BY ECMWF**

ECMWF may at any time in any of the following events, immediately issue a notice of termination of the Contract in whole or in part or cancel any outstanding Works relating thereto by notice in writing without compensation to the Contractor provided always that such termination or cancellation shall not prejudice or affect any right of action or remedy which shall have accrued or shall accrue thereafter to ECMWF whether under this Contract, at common law or otherwise:

- 2.13.1 if the Contractor being a company or (if it is a subsidiary company) the parent company of the Contractor is subject to an Insolvency Event; or
- 2.13.2 if the Contractor, having been given notice by ECMWF in writing that any part of the Works has not been performed in accordance with the Contract (such notice to contain a warning of ECMWF's intention to terminate or cancel), shall omit to comply with the reasonable requirements of such notice for a period of 30 Days thereafter; or
- 2.13.3 If Clause 2.7.1 applies; or
- 2.13.4 If the Batch fails to pass the Acceptance Test as provided for in Section 6; or
- 2.13.5 If, within 30 days of the Acceptance Date of a Batch, more than 50% of the Machines comprising the Batch fail to meet the Specification and/or Performance Criteria as provided in this Contract, and the failure has not been rectified by the Contractor within 30 days of being

requested in writing so to do (such request to contain a warning of ECMWF's intention to terminate or cancel); or

- 2.13.6 a Force Majeure event occurs which affects all or a substantial part of the Machines or the supply of the Works for a continuous period of more than 30 Days; or
- 2.13.7 if the Contractor commits a material Default or series of Defaults which together constitute a material breach of the terms of the Contract and such breach is irremediable; or
- 2.13.8 if the Contractor commits any remediable material Default or series of Defaults which together constitute a material breach of the terms of the Contract and shall have failed, in the case of any Default capable of being remedied, to remedy such Default or series of Defaults within 30 Days of being requested in writing so to do (such request to contain a warning of ECMWF's intention to terminate or cancel).

The Contract shall terminate on the day indicated in the termination notice issued by ECMWF.

#### **2.14. TERMINATION BY CONTRACTOR**

The Contractor may terminate the Contract with a 30 days notice period by notice in writing (such notice to contain a warning of the Contractor's intention to terminate) to ECMWF if ECMWF shall fail to pay any sum due under the terms of the Contract (otherwise than in consequence of any Default on the part of the Contractor) and such sum remains unpaid for 120 Days after written notice from the Contractor that such sum has not been paid.

#### **2.15. CONSEQUENCES OF TERMINATION**

- 2.15.1 Without prejudice to all other rights which may accrue to ECMWF under this Contract, if this Contract is terminated in accordance with its terms by either party for any reason, then, if required by ECMWF, the Contractor shall, at its own cost, remove the Batch that has not passed its Acceptance Tests from the Site and return to ECMWF any monies owed to ECMWF. ECMWF shall not be responsible for any de-installation costs, freight or shipping insurance. If applicable, the Contractor shall reimburse to ECMWF any taxes and duties related to the sale of the Works and its removal from the Site in accordance with this Contract.
- 2.15.2 Any termination of this Contract (however occasioned) shall not affect any accrued rights or liabilities of either party nor shall it affect the coming into force or continuance in force of any provision hereof which is expressly or by implication intended to come into or continue in force on or after such termination.

#### **2.16. DISPUTES AND ARBITRATION**

The law of England shall govern the validity, construction and performance of the Contract. In the event of a dispute arising in connection with the Contract, the parties shall attempt to settle their differences in an amicable manner. If any dispute cannot be so settled, it shall be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by three arbitrators appointed in accordance with the said rules. The arbitrators shall sit in London England and the proceedings shall be in English and for the avoidance of doubt this arbitration agreement shall also be governed by the law of England. In accordance with Clauses 45 and 69 of the Arbitration Act 1996, the right of appeal by either party to the High Court on a question of law arising in the course of any arbitral proceedings or out of an award made in any arbitral proceedings is hereby agreed to be excluded.

#### **2.17. SEVERABILITY**

If any provision of this Contract is held invalid, illegal or unenforceable for any reason such provision shall be severed without effect to the remainder of the provisions. In the event of a holding of

invalidity so fundamental as to prevent the accomplishment of the purpose of this Contract, ECMWF and the Contractor shall immediately commence good faith negotiations to remedy such invalidity.

## **2.18. WAIVER AND CUMULATIVE RIGHTS**

- 2.18.1 The failure of either party to insist upon strict performance of any provision of this Contract, or the failure of either party to exercise any right or remedy to which it is entitled hereunder, shall not constitute a waiver thereof and shall not cause a diminution of the obligations established by this Contract.
- 2.18.2 A waiver of any Default shall not constitute a waiver of any subsequent Default.
- 2.18.3 No waiver of any of the provisions of this Contract shall be effective unless it is expressly stated to be a waiver and communicated to the other party in writing in accordance with the provisions of Clause 2.3.
- 2.18.4 ECMWF's rights and remedies provided by this Contract are cumulative and are not exclusive of any right or remedy provided at law or in equity or otherwise under this Contract.

## **2.19. FORCE MAJEURE**

- 2.19.1 Neither party shall in any circumstances be liable to the other for any loss of any kind whatsoever including but not limited to any damages or abatement of charges whether directly or indirectly caused to or incurred by the other party by reason of any failure or delay in the performance of its obligations hereunder which is due to Force Majeure. Notwithstanding the foregoing, each party shall use all reasonable endeavours to mitigate the impact of such Force Majeure event and to continue to perform, or resume performance of, such obligations hereunder for the duration of such Force Majeure event.
- 2.19.2 If either of the parties shall become aware of circumstances of Force Majeure which give rise to or which are likely to give rise to any such failure or delay on its part, it shall forthwith notify the other by the most expeditious method then available and shall inform the other of the period which it is estimated that such failure or delay shall continue.
- 2.19.3 It is expressly agreed that any failure by the Contractor to perform or any delay by the Contractor in performing its obligations under this Contract which results from any failure or delay in the performance of its obligations by any person, firm or company with which the Contractor shall have entered into any contract, supply arrangement or sub-contract or otherwise shall be regarded as a failure or delay due to Force Majeure only in the event that such person firm or company shall itself be prevented from or delayed in complying with its obligations under such contract, supply arrangement or sub-contract or otherwise as a result of circumstances of Force Majeure.
- 2.19.4 For the avoidance of doubt it is hereby expressly declared that only an event qualifying for Force Majeure shall afford relief from liability for failure or delay.

## **2.20. AMENDMENTS TO THIS CONTRACT**

This Contract shall not be varied or amended unless such variation or amendment is carried out in accordance with Section 7.

## **2.21. THIRD PARTY RIGHTS**

Without prejudice to the operation of Clause 1.4, only ECMWF shall be entitled to enforce the Contractor's obligations under this Contract. A person who is not a party to this Contract has no rights under the Contracts (Rights of Third Parties) Act 1999 to enforce any term of this Contract but this

does not affect any right or remedy of any person that exists or is available otherwise than pursuant to that Act.

## **2.22. ANTI-BRIBERY**

2.22.1 The Contractor undertakes to ECMWF that it:

2.22.1.1 will fully comply with, and will procure that all Contractor Personnel fully comply with the Bribery Act 2010 (the "Anti-Bribery Requirements");

2.22.1.2 will not do, or omit to do, any act that will cause ECMWF to be in breach of the Anti-Bribery Requirements;

2.22.1.3 has in place, and shall maintain in place throughout the term of this Contract, policies and procedures to ensure compliance with the Anti-Bribery Requirements and will enforce them where appropriate. At ECMWF's request, the Contractor will disclose such policies and procedures to ECMWF;

2.22.1.4 will make it clear to those providing services for the Contractor, including Contractor Personnel, that the Contractor does not accept or condone the payment of bribes on the Contractor's behalf.

## **SECTION 3 DELIVERY AND TITLE**

### **3.1. DELIVERY DATE**

The Contractor will deliver the Works to the Site on dates to be agreed in advance between the parties in sufficient time to enable the delivery to be completed by the Committed Delivery Date as specified on a Purchase Order.

### **3.2. FREIGHT AND OTHER COSTS**

Where the Works consist of equipment to be delivered, such equipment will be delivered to the Site with the prior permission of ECMWF, and the Contractor is responsible for transport to the site together with the labour, materials and plant required for off-loading and placing into position.

### **3.3. TITLE**

Title to all items of equipment delivered as part of the Works and any documents and materials provided as part of the Works, shall pass to ECMWF in respect of each item on receipt by the Contractor of payment therefor by ECMWF following the relevant Acceptance Date.

## **SECTION 4 INSTALLATION**

4.1.1 The Contractor shall be responsible for the installation of the Works if specified on a Purchase Order and shall provide all labour, plant, equipment and tackle necessary therefor. The Contractor shall arrange and supervise the offloading, placement and connection of the Works to ECMWF's network and environment as specified on the relevant Purchase Order. The Contractor shall provide all necessary on site adjustment of the Works to complete the installation. In the presence of an authorized representative of ECMWF, the Contractor shall carry out the Contractor's standard installation test on each Machine that has been installed and shall certify the Works to be ready for trial by ECMWF.

4.1.2 At any time during the Term, at ECMWF's sole discretion, any or all of the System may be powered from an unconditioned mains electrical supply or via an Uninterruptible Power Supply (UPS) or by a combination of both sources of electrical supply.

4.1.3 Acceptance Tests on the Machines will be carried out as described in Section 6.

- 4.1.4 During the Term ECMWF may request the Contractor to provide the Works and to deploy the Machines at an alternative or additional location(s) to the Site. Such alternative or additional location(s) would be in a Member State of ECMWF as defined on the ECMWF website. Such a request will be subject to change control in accordance with Section 7 of the Contract.

## **SECTION 5 LIABILITY FOR LOSS OR DAMAGE**

### **5.1. UNLIMITED LIABILITIES**

Neither party limits or excludes its liability for:

- 5.1.1 death or personal injury caused by its negligence, or in the case of the Contractor by that of the Contractor Personnel, or in the case of ECMWF by that of its employees;
- 5.1.2 fraud or fraudulent misrepresentation by it or its employees and in the case of the Contractor by the Contractor Personnel;
- 5.1.3 any breach of its confidentiality obligations.

The Contractor does not limit its liability for breach of any obligation as to title implied by Section 12 of the Sale of Goods Act 1979 or breach of any obligation under Section 2 of the Supply of Goods and Services Act 1982.

### **5.2. CONTRACTOR'S TOTAL AGGREGATE LIABILITY**

Subject to Clause 2.8 and Clause 5.1, the Contractor's total aggregate liability:

- 5.2.1 in respect of the indemnities in Clauses 10.1, 10.2.2, 10.2.3 and 10.2.4 shall be unlimited and no amount payable in respect of the indemnities in Section 10 shall count towards the caps on liability under Clause 5.2.5;
- 5.2.2 for Losses occasioned by wilful repudiation of all or part of this Contract by the Contractor, or abandonment of work by the Contractor in breach of the terms of this Contract, shall be unlimited;
- 5.2.3 for all Loss to the Site, ECMWF's property or assets (including technical infrastructure, assets or equipment but excluding any Loss or damage to ECMWF's data or any other data) caused by Contractor's Default shall not exceed £2,000,000;
- 5.2.4 in respect of Service Credits shall be limited in each calendar year to the relevant annual maintenance charges as set out in the relevant Purchase Orders; and
- 5.2.5 in respect of all other Loss, whether arising from tort (including negligence), breach of contract or otherwise under or in connection with this Contract and/or the Works shall not exceed £2,000,000.

### **5.3. ECMWF'S TOTAL AGGREGATE LIABILITY**

Subject to Clause 5.1 ECMWF's sole liability towards the Contractor is its obligation to pay the amounts in Section 8 as and when they fall due for payment.

### **5.4. EXCLUDED LIABILITY**

Subject to Section 10 and Clause 5.6 neither party will be liable to the other party for:

- 5.4.1 any indirect special or consequential loss or damage;
- 5.4.2 any loss of profits, turnover, business opportunities, or damage to goodwill (whether direct or indirect).

### **5.5. ECMWF DEFAULT**

The Contractor shall not have any liability under this Contract to the extent that:



- 5.5.1 any Claim or Loss is directly and solely caused by a failure by ECMWF to meet its responsibilities; and
- 5.5.2 the Contractor has mitigated any Loss and consequences of such failure; and
- 5.5.3 the Contractor has promptly notified ECMWF of such failure setting out the consequences of such failure on the Works.

#### **5.6. CATEGORIES OF DIRECT LOSS**

Notwithstanding Clause 5.4 ECMWF shall be entitled to recover as a direct loss:

- 5.6.1 any additional operational and/or administrative costs and expenses arising from the Contractor's Default, including costs relating to the time spent by ECMWF 's management and employees in dealing with the consequences of such Default;
- 5.6.2 any expenditure or charges incurred by ECMWF yet rendered unnecessary and/or wasted by or as a consequence of the Contractor's Default; and
- 5.6.3 reasonable costs and expenses incurred by ECMWF in rectifying the Contractor's Default and/or procuring replacement Machines.

#### **5.7. UNFAIR CONTRACT TERMS ACKNOWLEDGMENT**

The parties have considered the exclusions and limitations of liability in this Contract in the context of all the circumstances of the transaction to which this Contract relates (including the parties' respective insurance cover) and the Unfair Contracts Terms Act 1977. The parties consider that such exclusions and limitations of liability are fair and reasonable and that, but for such exclusions and limitations, the parties would not have entered into this Contract. For the purposes of the Unfair Contracts Terms Act 1977 each party acknowledges and agrees that every provision of this Contract has been the subject of negotiations between the parties, even if the words used in any provision of this Contract have been used by a party in other contractual arrangements and/or in standard form contract documentation used by that party. The parties agree that each Clause in this Section 5 is a separate and independent term of this Contract.

#### **5.8. MITIGATION OF LOSS**

Nothing in this Section 5 shall act to reduce or affect a party's general duty to mitigate its Loss.

#### **5.9. CONTRACTOR'S INSURANCE OBLIGATIONS**

- 5.9.1 The Contractor shall effect and maintain the following insurances with insurers who are at all times of good financial standing and reputation and for a period of insurance which includes the period from the Effective Date of the Contract until at least the expiry or termination of this Contract but shall provide cover for obligations that survive expiry or termination of this Contract.
- 5.9.2 The Contractor shall maintain:
  - 5.9.2.1 products liability insurance for an amount of not less than £2,000,000 for any one occurrence and unlimited in the aggregate annually as to the number of occurrences in respect of any liability for:
    - a) bodily injury and/or illness (including death) of any person; and
    - b) loss of, damage to, loss of use of, or destruction of property (including ECMWF property),arising out of or in connection with the provision of the Machines and/or the Works or this Contract;

- 5.9.2.2 third party property damage insurance for an amount not less than £5,000,000 for any single occurrence and unlimited in the aggregate as to the number of occurrences in respect of liability for all plant, equipment and motor vehicles owned or used by the Contractor Personnel directly or indirectly engaged in providing the Works; and
- 5.9.3 The Contractor shall provide to ECMWF copies of evidence from the Contractor's broker endorsed by the Insurer of the insurances set out in this Clause 5.9.

## **5.10. ECMWF RESPONSIBILITY**

- 5.10.1 ECMWF is responsible for insuring the Machines from the relevant Acceptance Date, except that the Contractor shall be responsible for any loss or damage occasioned by the default, act, omission or negligence of the Contractor, its agents, employees or Sub-contractors.
- 5.10.2 Subject to Clause 5.3, if ECMWF is liable to the Contractor for loss of or damage to the Works, the full extent of its liability shall be to pay the Contractor for the time and materials reasonably required by the Contractor to restore such Works to its previous condition at the Contractor's then current prices less the agreed discount, or, if a Machine is lost or damaged beyond repair before its Acceptance Date and ECMWF is liable, ECMWF shall pay the Contractor the same price for such Machine as ECMWF would have been required to pay the Contractor had it purchased such Machine under this Contract on the day prior to the loss or damage.

## **SECTION 6 ACCEPTANCE**

### **6.1. ACCEPTANCE TEST**

The Acceptance Test for each Machine will consist of:

- verification that it conforms to the specifications as detailed in the ITT Documentation and on the relevant Purchase Order and is in all material respects in accordance with the manufacturer's specifications and functional descriptions;
- powering on each Machine and successfully executing the diagnostic procedures provided by the manufacturer for that Machine;
- for Disk Systems only there will be a 24 hour Functional Test followed by a 30 day Reliability Test as set out in Exhibit 5.

The Acceptance Test shall be completed successfully when ECMWF has tested all or any number of Machines comprising a Batch to its satisfaction and ECMWF shall then issue a certificate to the Contractor confirming the Acceptance Date of the Batch.

### **6.2. FAILURE OF THE BATCH TO PASS THE ACCEPTANCE TESTS**

If a Server Machine within the Batch fails to meet the standards of the Acceptance Test within 30 days after the applicable Committed Delivery Date or a Disk System within the Batch fails to meet the standards of the Acceptance Test within 65 days after the applicable Committed Delivery Date then ECMWF may at its option but with regard to suggestions made by the Contractor of other reasonable remedies:

- 6.2.1.1 Fix (without prejudice to ECMWF's other rights and remedies) a new date for carrying out the Acceptance Test on the same conditions (save that all costs, losses, expenses and liabilities that ECMWF may incur as a result of the delay and by virtue of carrying out such repeat test shall be reimbursed by the Contractor subject to Clause 2.8). If such further test shall fail, then ECMWF shall be entitled to proceed under this Clause 6.2; or
- 6.2.2 Require the Contractor to replace each Machine which has failed the Acceptance Test, in whole or in part, at no additional cost to ECMWF after which the Acceptance Test will be repeated; or

- 6.2.3 Terminate this Contract for default in accordance with the provisions herein and require the immediate removal of the relevant Batch; or
- 6.2.4 Cancel the Order for the relevant Batch and require the immediate removal of the Batch; or
- 6.2.5 Provided that 20% or more Machines comprising the Batch have failed the Acceptance Test ECMWF has the right to send back the whole Batch and to require a new Batch at no additional cost to ECMWF.

### **6.3. LIQUIDATED DAMAGES FOR FAILURE OF THE BATCH TO PASS THE ACCEPTANCE TEST**

If, after a period of 45 days following the Committed Delivery Date for Server Machines or after a period of 75 days following the Committed Delivery Date for a Disk System and the procedures described in Clause 6.2 have been followed, 20% or more of the Machines comprising the Batch have failed to pass the Acceptance Test, ECMWF shall be entitled to liquidated damages in accordance with Clause 2.8 and shall be entitled to terminate the Contract.

## **SECTION 7 CHANGE CONTROL PROCEDURE**

### **7.1. GENERAL**

The Contractor shall not be obliged to consider or make any alterations to the Specification of or Performance Criteria for any of the Works save in accordance with the under-mentioned procedure.

### **7.2. REQUEST FROM ECMWF**

If, at any time, ECMWF wishes to alter any part of this Contract, including (without limitation) the Specifications or Performance Criteria of any part of the Works, then ECMWF shall provide the Contractor with full written particulars of such alterations and with such further information as the Contractor may reasonably require.

### **7.3. CONTRACTOR'S QUOTATION**

7.3.1 The Contractor shall submit to ECMWF as soon as reasonably practicable a full written quotation for such requested alterations specifying what implications the alterations will have for ECMWF and the Contractor's ability to meet its other obligations under the Contract and any variation to the terms of the Contract that will be required as a result of that impact including, without limitation:

- 7.3.1.1 what delays (if any) will arise;
- 7.3.1.2 what adjustments will be required to the Specification and/or the performance Criteria, the Works, ECMWF's working environment and any user Documentation;
- 7.3.1.3 any changes to the System and the Service Levels;
- 7.3.1.4 details of the cost of implementing the Change;
- 7.3.1.5 a timetable for the implementation, together with any proposals for the acceptance of the Change;
- 7.3.1.6 such other information as ECMWF may reasonably request in relation to (or in response to) the Change.

### **7.4. ECMWF ACTION ON QUOTATION**

Upon receipt of such quotation, ECMWF may elect:

- 7.4.1 to accept such quotation, in which case this Contract (including any agreed dates) and, if appropriate, the Specifications and/or the Performance Criteria and/or the adequacy of ECMWF's working environment and/or any Documentation shall be amended accordingly; or

- 7.4.2 to negotiate the quotation with the Contractor. Should ECMWF then choose to accept the revised quotation then Clause 7.4.1 shall apply; or
- 7.4.3 to withdraw the proposed alterations in which case this Contract shall continue in force unchanged.

## **7.5. AGREEMENT OF CHANGES**

All such Changes shall only be effected if approved in writing by duly authorised representatives of ECMWF and the Contractor.

## **SECTION 8 TERM, PRICES, INVOICES AND PAYMENT**

### **8.1. PRICES**

The Batch Price of the Works, including for the initial acquisition, together with the charges for the warranty, for any extended warranty and for any Maintenance Services is shown on the relevant Purchase Order. The Batch Price for each subsequent purchase by ECMWF of goods and services under this Contract shall be shown on the relevant Purchase Order (completed in the form of Exhibit 1) provided that unit prices shall all be in accordance with Exhibit 2.

### **8.2. PAYMENT SCHEDULE**

- 8.2.1 Invoices in respect of the Batch shall be raised upon receipt from ECMWF of the certificate confirming the Acceptance Date for each Batch.
- 8.2.2 All invoice amounts under the Contract are exclusive of VAT and all other import, sales and other taxes and duties. Either party shall be entitled to charge interest to the other party at the rate of 2% over the Bank of England base rate (from time to time) in respect of any delay in payment of any correct invoice beyond 60 Days from receipt of such invoice.

### **8.3. INVOICE AND PAYMENT**

The Contractor shall submit its invoices to ECMWF as indicated above. Payment will be made within 30 Days of receipt on or after the due date by ECMWF of an invoice correct in all material respects.

### **8.4. ECMWF'S RIGHT TO SUSPEND PAYMENT AND SET OFF**

- 8.4.1 If the Contractor fails to comply with its obligations under this Contract including a failure to meet the Service Levels, ECMWF has the right to suspend any payment due under this Contract until the Contractor remedies the failure to comply and no interest will accrue on the suspended payment amount.
- 8.4.2 ECMWF may retain or set off any amount owed to it by the Contractor against any amount due to the Contractor under this Contract.

### **8.5. PAYMENT OF CREDITS**

ECMWF may retain or set off any amount owed to it by the Contractor against any amount due to the Contractor under this Contract. Any Service Credits due to ECMWF under Section 13 or any other amounts due to ECMWF shall be credited by means of a written credit note. The Contractor shall issue the credit note and send it to ECMWF within 30 days of the relevant Service Credits arising under Section 13 or the relevant sum becoming due to ECMWF. The credit note shall be redeemable by ECMWF against any outstanding or future Contractor's invoice. ECMWF also reserves the right to issue a demand for settlement against one or more of the Contractor's credit notes, in which case the Contractor will pay the demand within 30 Days of receiving it.

### **8.6. PAYMENT OF LIQUIDATED DAMAGES**

Any liquidated damages due to ECMWF under Clause 2.8 shall be credited by means of a written credit note. The Contractor shall issue a credit note for the liquidated damages due for each calendar

month, or part thereof, and send it to ECMWF within 30 days of the end of the relevant month. The credit note shall be redeemable by ECMWF against any outstanding or future Contractor's invoice. ECMWF also reserves the right to issue a demand for settlement against one or more of the Contractor's credit notes, in which case the Contractor will pay the demand within 30 Days of receiving it.

## **SECTION 9 LICENCES**

### **9.1. FOREGROUND IPR**

- 9.1.1 All Foreground IPR shall vest in ECMWF on creation. The Contractor hereby assigns to ECMWF all rights in Foreground IPR with full title guarantee and free from all encumbrances together with the right to sue for and recover damages or other relief in respect of the infringement of any Foreground IPR.
- 9.1.2 The assignment under Clause 9.1.1 shall take effect as a present assignment of future rights.
- 9.1.3 At ECMWF's request, the Contractor shall execute (or procure the execution of) any document and/or do anything else necessary to give full effect to the assignment under Clause 9.1.1.
- 9.1.4 The Contractor shall procure that those Contractor Personnel who are entitled to moral rights pursuant to the Copyright Designs and Patents Act 1988 (or equivalent or analogous rights under the laws of other jurisdictions), which exist or may arise in relation to any Foreground IPR shall unconditionally and irrevocably waive all such rights in favour of ECMWF.
- 9.1.5 ECMWF grants to the Contractor and to those Sub-contractors appointed in accordance with this Agreement a worldwide, fully paid-up, non-exclusive, non-transferable licence during the Term to copy and modify the Foreground IPR only to the extent necessary and for the purpose of:
- 9.1.5.1 carrying out the Works for ECMWF; and
- 9.1.5.2 performing the Contractor's other obligations under this Contract, and for no other purpose whatsoever.
- 9.1.6 The licence granted by ECMWF under Clause 9.1.5 will take effect from the date of assignment of the relevant Foreground IPR to ECMWF pursuant to Clause 9.1.1.

### **9.2. BACKGROUND IPR**

- 9.2.1 ECMWF and its licensors shall retain all right, title and interest in and to ECMWF Background IPRs. For the avoidance of doubt, the ECMWF software is part of the ECMWF Background IPR.
- 9.2.2 The Contractor and its licensors shall retain all right, title and interest in and to the Contractor Background IPRs.

### **9.3. LICENCE OF ECMWF BACKGROUND IPR**

ECMWF grants to the Contractor a worldwide, fully paid-up, non-exclusive, non-transferable licence during the Term to use, copy and modify ECMWF Background IPR only to the extent necessary and for the purpose of:

- 9.3.1 carrying out the Works for ECMWF; and
- 9.3.2 performing the Contractor's other obligations under this Contract, and for no other purpose whatsoever.

#### **9.4. LICENCE TO ECMWF OF CONTRACTOR BACKGROUND IPR**

The Contractor grants to ECMWF, its authorised users, and all its personnel, contractors and sub-contractors a worldwide, fully paid-up, non-exclusive, irrevocable, perpetual, royalty-free and transferable right to copy and modify the Contractor's Background IPR (and to sub-license third parties to copy and modify the Contractor's Background IPR) for the purpose of receipt of the Works by ECMWF and to enable ECMWF to obtain the full benefit of the Works.

#### **9.5. LICENCE OF CONTRACTOR SUPPLIED SOFTWARE PRODUCTS**

The Contractor will provide to ECMWF the Software Products detailed in each Purchase Order, under the terms and conditions of the licences contained within the Contractor's Tender. The provisions in this Contract shall take priority over the licence terms in the Contractor's Tender.

#### **9.6. COPIES OF THE SOFTWARE PRODUCTS**

ECMWF agrees that it will not make or have made any more copies of the Software Products or any parts thereof than it is licensed to use hereunder, including a reasonable number of copies for the purposes of backup, security and archiving, and that it will cause such copies upon reproduction to have the same copyright or proprietary legends that appear on the Software Products or any part thereof.

#### **9.7. SUCCESSOR SOFTWARE**

As and when the Contractor expressly designates and generally offers any software that it deems a successor to any Software Product licensed hereunder ("Successor Software") and the Contractor ceases to support and maintain the existing Software Product, ECMWF may obtain the Successor Software and its licence at no additional fee, provided that the provisions of this Section 9 shall apply to this Successor Software and it shall hereinafter be deemed to be a Software Product for the purposes of this Contract.

#### **9.8. NEW RELEASES OF THIRD PARTY SOFTWARE**

As and when any third party makes a new release of any of the Software Products or any software embedded in the Software Products generally available to its customers, the Contractor will make any changes to the Software Products necessary for the Software Products to function together with said new releases in accordance with the Specification. ECMWF may obtain the thus modified version of the Software Products at no charge.

### **SECTION 10 INDEMNITIES**

#### **10.1. CONTRACTOR'S IPR INDEMNITY**

- 10.1.1 The Contractor shall indemnify and hold harmless ECMWF for and against all Losses together with all reasonable legal costs and disbursements suffered or incurred by ECMWF and that may be finally awarded by a court or arbitration body in respect of any IPR Claim.
- 10.1.2 The provisions of this Clause 10.1 shall not apply to the extent that the IPR Claim is caused by:
  - 10.1.2.1 ECMWF's unauthorised modification of the System; or
  - 10.1.2.2 ECMWF's use of the System in combination with any item of equipment not authorised by the Contractor.
- 10.1.3 If an IPR Claim is made, or the Contractor anticipates that an IPR Claim might be made, the Contractor may, at its own expense and ECMWF's option, either:

- 10.1.3.1 procure for ECMWF and all users the right to continue using the relevant item which is subject to the IPR Claim; or
- 10.1.3.2 replace or modify the relevant item with non-infringing substitutes provided that:
- a) the performance and functionality of the replaced or modified item is at least equivalent to the performance and functionality of the original item;
  - b) the replaced or modified item does not have an adverse effect on the Services or the Works;
  - c) there is no additional cost to ECMWF or users; and
  - d) the terms of the Contract shall apply to the replaced or modified Works.
- 10.1.4 If (a) the Contractor elects to modify or replace an item or to procure a licence in accordance with Clause 10.1.3 but this has not avoided or resolved the IPR Claim, or that (b) neither Clause 10.1.3.1 nor Clause 10.1.3.2 can be complied with within a reasonable time, the Contractor shall notify ECMWF in writing, in which case ECMWF, in its sole discretion, shall be entitled to terminate this Contract by written notice with immediate effect and, without prejudice to the indemnity set out in Clause 10.1, the Contractor shall be liable for all reasonable and unavoidable costs of the substitute items and/or services including the additional costs of procuring, implementing and maintaining the substitute items.
- 10.1.5 The Contractor shall consider and defend the IPR Claim diligently using competent counsel and in such a way as not to damage the reputation of ECMWF.

## **10.2. GENERAL INDEMNITIES**

The Contractor shall also indemnify and hold harmless ECMWF for and against all Losses together with all reasonable legal costs and disbursements suffered or incurred by ECMWF as a result of:

- 10.2.1 a breach of the Contractor's obligations under its confidentiality obligations set out in Clause 2.10;
- 10.2.2 a breach of the Contractor's obligations to comply with any Laws set out in Clause 2.11.3;
- 10.2.3 death or personal injury caused by any act or omission by the Contractor or any Contractor Personnel;
- 10.2.4 any Loss of third party property caused by any act or omission of the Contractor or any Contractor Personnel;
- 10.2.5 any Claim by a third party arising from the Contractor's Default.

## **10.3. CLAIM**

Upon becoming aware of a Claim:

- 10.3.1 ECMWF shall notify the Contractor in writing and will, at the Contractor's expense, give to the Contractor such authority, information and assistance as it shall reasonably require for the defence or settlement of such Claim.
- 10.3.2 The Contractor shall undertake at its own expense all negotiations and other work to defend or settle any such Claim.

## **SECTION 11 SOFTWARE MAINTENANCE AND SUPPORT SERVICE**

### **11.1. PERIOD OF SERVICE**

The Contractor shall provide the software support and maintenance services as described in this Section 11 and Exhibit 6 commencing except as stated otherwise on the Acceptance Date of each Batch and shall continue for the period specified in the relevant Purchase Order.

### **11.2. GENERAL**

The Contractor shall correct as soon as possible during the Term, at no additional cost to ECMWF, errors, malfunctions, or defects in the Software Products. For the purposes of this Contract, the term "errors, malfunctions or defects" shall mean deviations between the programs and the Specification relating to them supplied pursuant to this Contract, such deviations being in the sole opinion of ECMWF material to ECMWF; "to correct" shall mean solely to publish corrections which will eliminate by-pass or restrict the deviation of the relevant program from the Specification relating to them (and if such Specification is in error to such amended Specification as is necessary). The Contractor shall be permitted remote access for the diagnosis and correction of software problems only in accordance with ECMWF's IT security regulations. The Contractor shall amend the relevant Documentation for the purpose of removing errors, providing consistency of interpretation and/or describing improvements made in the Software Products. In addition, the Contractor shall provide a service to ECMWF in respect of the Software Products in accordance with Clause 11.4 and shall notify ECMWF of any such errors, malfunctions or defects of which it becomes aware.

### **11.3. RANGE OF COVER AND RESPONSE TIMES**

In addition to routine software maintenance and support, the Contractor shall provide remedial maintenance support in respect of the Software Products as specified in the relevant Purchase Order and Exhibit 6 from the Acceptance Date of the relevant Machine.

### **11.4. SOFTWARE SUPPORT**

During the Term the Contractor shall provide a support service ("Support Service") in respect of the Software Products by delivering to ECMWF free of charge any update or release incorporating amendments that are made generally available to licensees of such Software Products, and by performing the following functions:

- 11.4.1 The Contractor shall notify ECMWF of the availability of each release as it becomes available and distribute to ECMWF one copy including release notes and Documentation.
- 11.4.2 The Contractor shall discuss and agree with ECMWF the consequences of installing or not installing each release. If ECMWF approves the installation of the release, the Contractor shall develop an installation plan for agreement with ECMWF.
- 11.4.3 The Contractor shall provide access to a support centre via telephone and/or telecommunications access where suitably trained personnel will answer questions during Working Days concerning documentation or usage of Software Products.
- 11.4.4 The Contractor shall provide to ECMWF before the relevant Delivery Date, and revise from time to time, the procedure for proper notification to the Contractor of software problems. This will include, but not be limited to:
  - 11.4.4.1 The names and telephone numbers of authorized representatives of the Contractor for ECMWF to contact to report Software Products problems and to request Support Service;
  - 11.4.4.2 The form and content of software problem reports;
  - 11.4.4.3 The mechanism for formal transmission to the Contractor of software problem reports;



- 11.4.4.4 The procedure to be followed in agreeing on the priority of the software problem.
- 11.4.5 The Contractor shall provide software problem resolution as follows:
- 11.4.5.1 For each problem, the Contractor shall respond with an analysis and, if required by ECMWF, a fix or workaround within a reasonable time.
- 11.4.5.2 ECMWF may request a root cause analysis for any problem notified to the Contractor. If ECMWF deems it necessary, it will work with the Contractor to develop and agree a remedial plan to achieve a long term resolution to the problem.
- 11.4.5.3 For any problem for which the Contractor has installed a workaround in-lieu of a permanent fix, the Contractor will develop and agree with ECMWF a remedial plan to achieve the long term resolution of the problem.
- 11.4.6 The Contractor shall provide ECMWF with access to the Contractor's customer software problem report and support database.
- 11.4.7 The Contractor shall maintain the latest release of a Software Product for as long as ECMWF wishes to use that Software Product in accordance with the terms of this Contract. When the Contractor offers Successor Software the earlier product may be identified as obsolete. ECMWF will be given at least six months advance written notice in the event that the Contractor identifies a product as obsolete. The Contractor shall continue to support such obsolete product for no less than 12 months following the effective date of obsolescence. The Contractor shall not be entitled to identify any Software Product as obsolete unless Successor Software is available from and installed by the Contractor and any required hardware upgrade is supplied free of charge under the Maintenance Services.
- 11.4.8 The Contractor shall provide Documentation for maintenance of Software Products and updates to such Documentation as necessitated by the provisions of this Contract.

## **11.5. ECMWF OBLIGATIONS**

To permit and facilitate the supply of the Support Service as set out in this Section 11 ECMWF will provide adequate remote access to the Software Products running on the Machines.

## **11.6. CONTRACTOR'S RIGHTS**

The Contractor reserves the right to charge, at rates agreed in advance by ECMWF, for the repair of problems that are caused by modifications to the Software Products made by ECMWF and that were not previously authorised by the Contractor.

## **SECTION 12 HARDWARE MAINTENANCE SERVICE**

### **12.1. PERIOD OF SERVICE**

The hardware maintenance service shall commence on the Acceptance Date of each Batch and shall continue for the period specified in the relevant Purchase Order.

### **12.2. DESCRIPTION**

During the period of the hardware maintenance service, the Contractor shall provide all routine and remedial hardware maintenance for the Works and keep such in good operating condition, including routine maintenance and all necessary repairs. The hardware maintenance service shall cover the furnishing of replacement parts and/or Machines.

### **12.3. RANGE OF COVER**

12.3.1 The Contractor shall furnish ECMWF with a maintenance service in respect of the Works as specified on the relevant Purchase Order and in Exhibit 6.

12.3.2 Remedial maintenance shall be performed by the Contractor after notification that any Machine is inoperative; the Contractor shall provide ECMWF with (a) designated point(s) of contact, and make arrangements to enable its maintenance representative to receive such notification 24 hours per day every day of the year.

12.3.2.1 ECMWF may request a root cause analysis for any problem notified to the Contractor. If ECMWF deems it necessary, it will work with the Contractor to develop and agree a remedial plan to achieve a long term resolution to the problem.

12.3.2.2 For any problem for which the Contractor has installed a workaround in-lieu of a permanent repair, the Contractor will develop and agree with ECMWF a remedial plan to achieve the long term resolution of the problem.

#### **12.4. RESPONSE TIME**

The Contractor shall provide remedial hardware maintenance within a response time as specified in the relevant Purchase Order and in Exhibit 6.

#### **12.5. TIME TO FIX**

The Contractor shall provide remedial hardware maintenance within a time to fix as specified in the relevant Purchase Order and in Exhibit 6.

#### **12.6. SCHEDULED MAINTENANCE**

The Contractor shall specify in writing prior to the Delivery Date of the Batch, the frequency, duration and quality of Scheduled Maintenance for each Machine and System which shall be consistent with the availability requirements in Section 13. The frequency and duration of Scheduled Maintenance may be changed on the mutual written agreement of the parties in accordance with Section 7. The duration of the Scheduled Maintenance shall be the time between the handover of the Machine or System to the Contractor and the successful start of the first job or the successful access by connected hosts to the data stored on the Disk System after the Contractor has notified ECMWF computer operators that the Machine or System is ready for use.

Scheduled Maintenance will take place at a time and for a duration agreed in advance by ECMWF. The Contractor will give at least seven Days' notice of its requirement to carry out Scheduled Maintenance. The notice shall include a description of the nature of the work to be carried out, a risk analysis and, if appropriate, a rollback plan.

#### **12.7. MALFUNCTION REPORTS**

The Contractor shall furnish malfunction incident reports to ECMWF upon completion of each maintenance intervention. The report shall include as a minimum:

- a) Date and time notified, together with call reference number;
- b) Date and time of arrival;
- c) Type(s) and model number(s) of Machine(s);
- d) Time spent for repair;
- e) Description of malfunction;
- f) Description of remedial action taken.

#### **12.8. RESPONSIBILITY OF ECMWF AND CONTRACTOR**

12.8.1 ECMWF personnel shall neither perform maintenance nor attempt repairs to any Machine maintained by the Contractor under this Contract unless agreed to by the Contractor. Subject to Clause 2.9.2, ECMWF shall permit necessary access to any Machine that is to be maintained.

- 12.8.2 ECMWF shall provide adequate storage space for spare parts. ECMWF shall not be liable for any Loss, except malicious damage caused by ECMWF or its agents, to any spare parts held by the Contractor in the storage space provided by ECMWF.
- 12.8.3 ECMWF will have a representative on Site whenever the Contractor provides hardware maintenance service.
- 12.8.4 ECMWF will notify the Contractor if equipment is being used in an environment which ECMWF could reasonably be expected to know may pose a health hazard to the Contractor's employees or Sub-contractors; on such notification to the Contractor by ECMWF, the parties shall mutually agree the procedure and responsibility for and the conditions under which the maintenance will be performed.

## **12.9. ELIGIBILITY AND EXCLUSIONS**

- 12.9.1 The Contractor may, at no additional charge, make modifications to the Machines to improve their operation and/or reliability or to comply with legal requirements subject always to the prior concurrence of ECMWF that will not be unreasonably withheld.
  - 12.9.1.1 The hardware maintenance service does not cover any damage or failure caused by neglect, improper use, fire or water damage, or other causes beyond the Contractor's control.

## **12.10. REPLACEMENT PARTS AVAILABILITY**

- 12.10.1 The Contractor guarantees that replacement parts for each Machine in the System will be available for at least five years from the relevant Acceptance Date.
- 12.10.2 The Contractor shall maintain a supply of spares at the Site during the Term.
- 12.10.3 Parts additional to those held on-Site must be delivered to the Site by the next Working Day after being required.

## **12.11. AVAILABILITY OF HARDWARE MAINTENANCE**

- 12.11.1 For the purposes of this Contract, "Circumstances" shall be defined to be any of the following:
  - 12.11.1.1 if the Contractor being a company or (if it is a subsidiary company) the parent company of the Contractor or the Guarantor is subject to an Insolvency Event; or
  - 12.11.1.2 if the Contractor or its parent company ceases to manufacture, market and support the type of Works to be supplied under this Contract and is unable to identify another supplier willing and able to assume its maintenance and support obligations within a reasonable period of time; or
  - 12.11.1.3 if the Contractor commits a fundamental breach of its obligation to provide Maintenance Services (including a failure to meet the Service Levels) in respect of any Machines or Software Products and such fundamental breach of its maintenance obligations, if capable of remedy, shall continue unremedied for 30 Days after written notice thereof shall have been given to the Contractor by ECMWF, and the Contractor has not exerted reasonable efforts to remedy the breach.
- 12.11.2 Forthwith upon the occurrence of Circumstances or any circumstances analogous to the Circumstances defined in Clause 12.11 in relation to a Machine manufactured by the Contractor, ECMWF shall have the right to arrange third party hardware maintenance of the Machines.
- 12.11.3 Forthwith upon the occurrence of Circumstances or any circumstances analogous to the Circumstances defined in Clause 12.11 in relation to the manufacturer of a Machine not manufactured by the Contractor, unless the Contractor shall immediately confirm in writing

its willingness and ability to continue to provide all necessary hardware maintenance services under this Contract, ECMWF shall have the right to arrange third party hardware maintenance of such Machine.

12.11.4 In the event of ECMWF obtaining the right referred to in Clause 12.11.2 and/or Clause 12.11.3, ECMWF shall be entitled to:

12.11.4.1 terminate this Contract in part or in whole pursuant to Clause 2.13; and/or

12.11.4.2 continue to receive Maintenance Services from the Contractor, a Sub-contractor (where the Contract has not been terminated pursuant to this Clause 12.11), or a third party.

## **SECTION 13 MAINTENANCE PERFORMANCE**

### **13.1. INTRODUCTION**

The Contractor shall ensure that the Maintenance Services are performed in accordance with the Contract and in a manner which meets the Service Levels specified in Exhibit 6 to ensure that the System can, at all times, meet the Specification and Performance Criteria. If the Maintenance Services or any of them are not performed in accordance with the Contract or the Service Levels, then ECMWF shall be entitled to Service Credits payable by the Contractor in respect of those Services.

Without prejudice to ECMWF's right to claim Service Credits in accordance with this Section 13, if the Contractor believes that it is reasonably likely that the Services or any of them might not be performed in accordance with the Contract the Contractor shall notify ECMWF as soon as reasonably practicable.

This Section 13 describes the procedure and measures to be taken by the parties in the event that the Contractor fails to meet the standards of hardware and software maintenance as set out in this Contract.

The Contractor shall be responsible for monitoring performance of the System and the Maintenance Services against the Service Levels. The Contractor shall provide ECMWF with a report as soon as reasonably practicable after (but in any event within two weeks of) the end of each month specifying the Contractor's performance that month against each of the Service Levels and including full details of any Machine Downtime and a statement of any Service Credits due.

ECMWF shall have the right to run part or all of the Functional Test at any time to verify that any Disk System can meet the Specification and the Performance Criteria.

### **13.2. STANDARDS AND DEFINITIONS**

13.2.1 The maintenance that the Contractor is required to perform is defined in Section 11 and Section 12.

13.2.2 Definitions used for Service Levels and Service Credits.

Machine Downtime	is that period during which any Machine is inoperable due to a malfunction in such Machine and/or in the Software Products utilised in connection with such Machine or during which the Machine is unavailable because it is released to the Contractor for remedial maintenance. In the event of Force Majeure, including but not limited to a power outage, there will be an allowance of up to one hour to allow work necessary for the re-establishment of the System to be carried out, which time shall not be considered Machine Downtime.
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Machine Availability	For the purpose of this Section 13, "Machine Availability" is defined as the total time in a given period less Machine Downtime in such given period.
Percentage of Machine Availability	For the purpose of this Section 13, the percentage of Machine Availability for a given period is a percentage figure determined by dividing the Machine Availability by the total time in such given period.
Mean Time Between Failures	Mean Time Between Failures for a Machine is computed by dividing the time in the relevant three calendar months, by one plus the total number of failures of the Machine which occur during use by ECMWF and which result in Machine Downtime or the loss of any scheduled or simulated workload.

### **13.3. SERVICE LEVELS**

Service Levels (Critical and Normal) are defined in Exhibit 6 for Maintenance Service response time, Scheduled Maintenance duration, Machine Downtime, Mean Time Between Failures and time to fix.

### **13.4. ESCALATION PROCEDURE**

13.4.1 If the Contractor Personnel fail to meet the response times as set out herein, or if averaged over any 12 consecutive calendar months of Maintenance Services, the percentage of Machine Availability has been less than that specified on a Purchase Order or in Exhibit 6, then ECMWF shall consider this to be less than satisfactory performance of maintenance; should this unsatisfactory performance not be remedied or solved at normal working level by the parties, then ECMWF shall be entitled to commence the following escalation procedure:

13.4.1.1 Refer the matter in writing in the first instance (by ECMWF's Director of Computing) for resolution to the Contractor's National Service Delivery Manager; should the matter not be resolved within 7 Days; then

13.4.1.2 ECMWF may refer the matter to a Director of the Contractor.

### **13.5. PAYMENT OF SERVICE CREDITS**

13.5.1 Service Credits shall be a debt due from the Contractor to ECMWF and shall be paid in accordance with Section 8 following the determination of Service Credits in accordance with this Section 13 and Exhibit 6.

13.5.2 The parties agree that the Service Credits represent a price adjustment and not a pre-estimate of ECMWF's losses and that nothing in this Section 13 shall restrict ECMWF's right to claim damages or any other remedy or to terminate this Contract (in part or in whole) under Clause 2.8 or Clause 2.13 respectively.

## **SECTION 14 MODIFICATIONS, ALTERATIONS AND ATTACHMENTS TO WORKS**

### **14.1. ON-SITE MODIFICATIONS**

If requested by ECMWF, the Contractor shall provide for on-Site modification of Works on the same terms as may be granted to other customers for the same type of Works as supplied under this Contract. The Contractor shall also be permitted reasonable access to the Works to carry out necessary modifications at the Contractor's request (Scheduled Maintenance), the times and duration of access to be mutually agreed between the parties taking into consideration ECMWF's operational requirements.

## **14.2. ALTERATIONS REQUESTED BY THE CONTRACTOR**

Having received approval by ECMWF pursuant to Section 7, which will not be unreasonably withheld, the Contractor shall be entitled to make alterations to the System. The Contractor shall not be liable for any damage caused by the rejection by ECMWF of any alteration or modification reasonably requested by the Contractor or for any breach of the Contract, which would otherwise have been rectified by such alteration, or modification. Where such alterations are made following the date of successful completion of the Functional Test for the System but prior to the Acceptance Date for the System, then full acceptance of the System on the Acceptance Date shall be subject to any still outstanding Acceptance Tests plus a repeat of any Acceptance Tests already passed by or in progress on the System.

## **SECTION 15 COMPUTER SECURITY**

### **15.1. GENERAL**

ECMWF operates its computer facility in a manner designed to prevent unauthorized access to its computer systems and to safeguard the integrity and confidentiality of the readable data stored on its systems.

### **15.2. CONTRACTOR'S RESPONSIBILITY**

The Contractor Personnel must take every reasonable precaution to ensure that they do not compromise ECMWF's computer security. The Contractor Personnel shall comply with ECMWF's IT security regulations which will be provided to the Contractor. If any of the Contractor Personnel become aware of potential or actual security vulnerabilities in ECMWF's systems, they must report such vulnerabilities without delay to their normal contact points within ECMWF. The Contractor will ensure that the Contractor Personnel are made aware of the provisions of this Section 15.

### **15.3. DATA SECURITY**

The Contractor acknowledges that data on ECMWF's systems, including data on the System, are the property of ECMWF and/or its licensors and/or other third parties. All Intellectual Property Rights in such data shall be retained by the relevant data owner. The Contractor shall not delete or remove any copyright notices contained within or relating to such data. The Contractor and ECMWF shall each take reasonable precautions (having regard to the nature of their other respective obligations under this Contract) to preserve the integrity of such data and to prevent any corruption or loss of such data, except that ECMWF and/or third parties shall be solely responsible for the back up of the data on ECMWF's systems.

## **SECTION 16 TRAINING AND MANUALS**

### **16.1. TRAINING**

The Contractor shall provide training as shown in Exhibit 3. Scheduling of courses for the training will be subject to mutual agreement between the Contractor and ECMWF. All instructors will be experienced and training will be geared to the Works and not to basic concepts. The attendees will be provided by the Contractor with all appropriate manuals, text material and course outlines necessary for the specified training. The language used for training shall be English.

### **16.2. MANUALS**

16.2.1 On or before the relevant Delivery Date, the Contractor shall provide to ECMWF, and shall regularly update as necessary at no charge, access to all Documentation and other publications for all Works provided by the Contractor under this Contract. All Documentation shall be in the English language.

16.2.2 ECMWF may copy the Documentation or parts thereof for its own use but must include all copyright and proprietary notices included in the original and must ensure that partial copies include sufficient copyright and proprietary notices. ECMWF undertakes to distribute Documentation only to users as defined in Clause 1.4, and ECMWF's contractors and subcontractors where appropriate.

16.2.3 The Contractor has the right to correct errors in the Documentation due to typographical or clerical errors and to update specifications and Documentation with future releases.

## **SECTION 17 CONTRACT MANAGEMENT AND MONITORING**

### **17.1. KEY PERSONNEL**

Each of the parties shall appoint a representative to represent its interests in day-to-day discussions and meetings. The initial appointments of such representatives shall be made by notice in writing to the parties not later than the Effective Date of this Contract. The appointing party may change such appointments from time to time by notice in writing.

### **17.2. PROGRESS MEETINGS**

In addition to regular contact between the representatives, at least annually, representatives of the Contractor and ECMWF will meet for the Contractor to provide an updated product road map to enable ECMWF to plan future acquisitions of Machines under this Contract.

### **17.3. DISPUTE RESOLUTION PROCEDURE**

The parties shall attempt to resolve any disputes arising out of or in connection with this Contract in accordance with the following:

17.3.1 any dispute or difference between the parties in connection with this Contract shall first be reviewed by the Project Managers who will attempt to provide a resolution;

17.3.2 the Contractor shall continue to provide the Works in accordance with the terms of this Contract until such dispute has been resolved;

17.3.3 in particular, if the level of any part of the Services falls below the requirements as set out in this Contract and the Contractor does not remedy such failure as required by this Contract, then ECMWF shall be entitled to commence the following procedure:

17.3.3.1 refer the matter in writing in the first instance (by ECMWF's Director of Computing) for resolution to the Contractor's client director; should the matter not be resolved within seven calendar Days, then

17.3.3.2 ECMWF may refer the matter to a senior director of the Contractor.

17.3.4 No dispute or difference between the parties in connection with this Contract shall be referred to arbitration in accordance with the provisions of Clause 2.16 unless the procedure above has been followed.

## EXHIBIT 1 PURCHASE ORDER

ORDER NUMBER \*\* EFFECTED UNDER THE TERMS AND CONDITIONS OF CONTRACT NUMBER ECMWF/2014/216 FOR THE SUPPLY OF ADDITIONAL PRODUCTS AND SERVICES

1. **Committed Delivery Date:**

2. **Deliverables:**

Item	Description	Quantity	Cost per item	Total cost	Service Level as defined in Exhibit 6
	<b>Training</b>				
	<b>Delivery</b>				
	<b>Installation</b>				
<b>Total</b>					

Signed by ECMWF:

Date:

Name in capitals:

Director-General

Accepted by Contractor:

Date:

Name in capitals:

Appointment:

Enquiries should be addressed to:

Tel:

Fax:

e-mail:

ECMWF

Shinfield Park

Reading

Berkshire

RG2 9AX



**EXHIBIT 2 METHOD FOR CALCULATING PRICES FOR FUTURE EQUIPMENT PURCHASES**

### **EXHIBIT 3 TRAINING AND DOCUMENTATION**

Training Programme:

List of Documentation:

**EXHIBIT 4 CONTRACTOR'S CLARIFICATIONS**

In date order

## **EXHIBIT 5 ACCEPTANCE TESTS FOR DISK SYSTEMS**

### **1. FUNCTIONAL TEST**

The Functional Test for a Disk System will take place within a 24 hour period starting on the next Working Day after the Contractor has declared the Machine(s) ready for Acceptance Tests. During the Functional Test it will be verified that the Specification and Performance Criteria, including those related to High Availability of the Disk System, are met. This will be followed by a 30 day Reliability Test which will start on the next Working Day after successful completion of the Functional Test.

### **2. RELIABILITY TEST**

During the 30 day Reliability Test the Disk System must meet the following criteria:

- No loss or corruption of data; and
- No component failure except for Disks; and
- No more than one in 100 Disks per Disk System may fail during the Reliability Test period, and this must not result in loss of data (if the Disk System includes less than 100 disks, only one Disk failure during the Reliability Test for that Disk System is acceptable).

In the event that the Reliability Test is not successfully completed during the first 30 consecutive days from its commencement the Reliability Test may be restarted once.

## **EXHIBIT 6 SERVICE LEVELS AND SERVICE CREDITS**

### **Critical Service Level**

The Contractor must provide Maintenance Services for 24 hours per day, every day of the week for software and hardware support with a response time of less than four hours. Where remedial action is required, the Contractor must commence such remedial action within these four hours.

#### **1. SERVICE CREDIT FOR EXCEEDING RESPONSE TIME**

If suitably qualified Contractor Personnel fail to arrive on Site or commence problem diagnosis to perform on-call maintenance within the time specified the Contractor shall grant ECMWF a pro rata Service Credit of £500 for each hour or portion thereof between the end of the committed response time and the actual arrival time.

#### **2. SERVICE CREDIT FOR EXCEEDING SCHEDULED MAINTENANCE TIME**

If during any calendar month, the time taken for Scheduled Maintenance as detailed in Clause 12.6, exceeds the agreed values the Contractor shall grant ECMWF a pro rata credit of 0.1% of the total annual maintenance charges for each hour or portion thereof in excess of the agreed Scheduled Maintenance hours. The amount of creditable hours or parts of hours shall be accumulated for each month and adjusted to the nearest tenth of an hour. The total response time credit during any month shall not exceed one twelfth of the total annual maintenance charges.

#### **3. REMEDY FOR MACHINE DOWNTIME**

If any Machine acquired by ECMWF from the Contractor as a component of the System fails to achieve a percentage of Machine Availability of at least 99.99% in any calendar month, ECMWF may at its option, require the Contractor to replace such Machine at no additional cost to ECMWF, provided that the Contractor and ECMWF agree after consultation with each other that such replacement would be likely to increase the percentage of Machine Availability to at least 99.99%, and the configuration of the replacement Machine shall be the same as the one replaced, or to otherwise seek its remedies as provided under this Contract.

#### **4. MEAN TIME BETWEEN FAILURES**

If the Mean Time Between Failures for a Machine is less than 30 Days in a period of three calendar months ECMWF may at its option, require the Contractor to replace such Machine at no additional cost to ECMWF, provided that the Contractor and ECMWF agree after consultation with each other that such replacement would be likely to increase the percentage of Machine Availability to at least 99.99%, and the configuration of the replacement Machine shall be the same as the one replaced, or to otherwise seek its remedies as provided under this Contract.

#### **5. TIME TO FIX**

For any problems identified by ECMWF as causing a critical impact on operations the Contractor shall provide a resolution or workaround within 12 hours of notification by ECMWF.

## **Normal Service Level**

The Contractor must provide Maintenance Services for software and hardware support with a response time of next Working Day. Where remedial action is required, the Contractor must commence such remedial action no later than this next Working Day.

### **1. SERVICE CREDIT FOR EXCEEDING RESPONSE TIME**

If suitably qualified Contractor Personnel fail to arrive on Site or commence problem diagnosis to perform on-call maintenance within the time specified the Contractor shall grant ECMWF a pro rata Service Credit of £500 for each hour or portion thereof between the end of the committed response time and the actual arrival time.

### **2. SERVICE CREDIT FOR EXCEEDING SCHEDULED MAINTENANCE TIME**

If during any calendar month, the time taken for Scheduled Maintenance as detailed in Clause 12.6, exceeds the agreed values the Contractor shall grant ECMWF a pro rata credit of 0.1% of the total annual maintenance charges for each hour or portion thereof in excess of the agreed Scheduled Maintenance hours. The amount of creditable hours or parts of hours shall be accumulated for each month and adjusted to the nearest tenth of an hour. The total response time credit during any month shall not exceed one twelfth of the total annual maintenance charges.

### **3. REMEDY FOR MACHINE DOWNTIME**

If any Machine acquired by ECMWF from the Contractor as a component of the System fails to achieve a percentage of Machine Availability of at least 99.9% in any calendar month, ECMWF may at its option, require the Contractor to replace such Machine at no additional cost to ECMWF, provided that the Contractor and ECMWF agree after consultation with each other that such replacement would be likely to increase the percentage of Machine Availability to at least 99.9%, and the configuration of the replacement Machine shall be the same as the one replaced, or to otherwise seek its remedies as provided under this Contract.

### **4. MEAN TIME BETWEEN FAILURES**

If the Mean Time Between Failures for a Machine is less than 30 Days in a period of three calendar months ECMWF may at its option, require the Contractor to replace such Machine at no additional cost to ECMWF, provided that the Contractor and ECMWF agree after consultation with each other that such replacement would be likely to increase the percentage of Machine Availability to at least 99.9%, and the configuration of the replacement Machine shall be the same as the one replaced, or to otherwise seek its remedies as provided under this Contract.

### **5. TIME TO FIX**

For any problems identified by ECMWF as causing an impact on operations the Contractor shall provide a resolution or workaround by the next Working Day. ECMWF's notification of such problems must be acknowledged by the Contractor within four hours.