



RESPONSECON

International Spill Response Contract

(for use outside the United States of America)

Explanatory Notes

Background

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

In a maritime context the incident giving rise to the spill may also involve salvage operations to save property and prevent damage to the marine environment. Such operations will be undertaken by salvors appointed under Lloyd's Open Form (LOF) or other appropriate contract. However, where pollution occurs, cleaning-up operations are carried out by separately appointed spill responders.

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

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

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

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

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

It should be noted however that RESPONSECON may not be appropriate for use in those countries which require vessels to pre-contract with an OSRO before arrival. These currently include Argentina, Canada, China and Uruguay but others may be added to this list in the future. Specific agreements have often been developed for these countries and may contain provisions required under local legislation which are not found in RESPONSECON. Honduras also requires pre-contractual arrangements, but the local Maritime Administration has indicated that it will expect a shipowner to agree a RESPONSECON contract with the local OSRO(s).

It should be further noted that US RESPONSECON is not intended for use in an OPA '90 vessel response plan. Shipowners entered in an International Group P&I Club should consult with the Club on an appropriate wording for use in these countries.

Commentary on Content

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

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

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

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

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

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

This is a contract for spills outside of the USA. It would, therefore, be not only inappropriate, but legally and technically difficult, to include a New York option for the dispute resolution procedures. The BIMCO Dispute Resolution Clause has therefore been modified and provides for arbitration in London (which is the default option in the absence of a declared choice), Singapore or as agreed and stated by the parties. (It should be noted that New York is the only dispute resolution forum in the US RESPONSECON).

Detailed provisions

Part I (Box Layout)

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

The text above the signature boxes provides that the contract consists of Part I, Part II, any additional clauses and (because details might not have been settled before mobilisation begins) the content of Annexes A, B and C "once they have been agreed". It is further provided that in the event of any conflict, Part I and any additional clauses prevail over Part II and Annexes A, B and C. This reflects the order of precedence in English law. However, the position may vary in other jurisdictions and users should confirm the position and standing of additional clauses and annexed provisions according to the chosen governing law.

Part II (Terms and Conditions)

Definitions

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

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

Clause 1 (Nature of Contract)

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

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

Subclause (c) while the Requesting Party retains overall control of operations, the Contractor may decline any instruction that might contravene any regulations or put personnel at risk;

Subclause (d) requires a representative of the Requesting Party, with decision-making authority, to be available if required by the Contractor;

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

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

Clause 2 Mobilisation and Demobilisation

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

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

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

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

Clause 3 Warranty and Permits

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

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

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

Clause 4 Invoicing

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

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

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

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

Subclause (e) in default of payment, the Contractor may charge interest at the rate agreed in Box 13 or, if no figure has been inserted, at an annual rate of 4% above the LIBOR rate. (Note: shipowners entered in an International Group P&I Club should consult their Club on the question of the applicable rate of interest);

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

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

Subclause (h) provides for "non-waiver" of the Contractor's rights in respect of late payment.

Clause 5 Charges

The Requesting Party pays the Contractor for:

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

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

Subclause (c) reasonable charges for mobilisation and demobilisation;

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

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

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

Subclause (g) import and export duties; and

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

Clause 6 Equipment Hire

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

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

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

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

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

Clause 7 Early Termination

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

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

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

Clause 8 Liabilities and Indemnities

The Clause is based on a standard provision used by the International Group of P&I Clubs. It has been modified to reflect the particular requirements of this specialised contract.

Subclause (a) exonerates the Contractor (and the Contractor's Group) from loss, damage, legislative breach or regulatory contravention caused by the Requesting Party or the Requesting Party's Group or due to the actions of the Contractor or the Contractor's Group unless the Contractor (or the Contractor's Group) has been negligent and has no contractual or legal defence or immunity;

Subclause (b) provides that the Requesting Party must indemnify the Contractor and the Contractor's Group for all claims and losses connected with their obligations under the contract except where the Contractor (or the Contractor's Group) has been negligent or where the Contractor has a contractual or statutory exoneration from liability;

Subclause (c) unless able to rely on any defences or immunities, the Contractor must indemnify the Requesting Party or the Requesting Party's Group for any claims or losses arising from the Contractor's or the Contractor's Group's negligence;

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

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

Subclause (f) the Requesting Party is responsible for disposal of oil or other hazardous substances even if physically performed by the Contractor whose undertaking in this respect is expressly stated to be one of agency only; and

Subclause (g) a standard provision entitling either party to limit its liability in accordance with applicable law.

Clause 9 Insurance

Subclause (a) as the Contract has been drafted to respond to clean-up requirements in a range of situations, the obligation to obtain and maintain adequate insurance is stated in general terms leaving parties to determine their arrangements on a case by case basis. P&I Club cover is likely to be the main, but not the only, system of insurance for the Requesting Party for incidents arising in the maritime sector;

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

Subclause (c) sets out the Contractor's obligation to maintain suitable insurance and mirrors the Requesting Party's obligations under subclause (a); and

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

Clause 10 Health and Safety

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

Clause 11 Media and Confidentiality

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

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

Clause 12 Notices

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

Clause 13 Severance

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

Clause 14 Entire Agreement

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

Clause 15 Dispute Resolution Clause

As the Contract is for incidents arising other than in the USA, the standard BIMCO Clause has been modified to remove the New York arbitration forum. The remaining three alternatives (and

accompanying option to refer any dispute to mediation) provide for dispute resolution in London (which is the default option in the absence of a declared choice in Box 14); Singapore; or an open choice where parties must agree both the governing contractual law **and** the seat of arbitration.

Copyright and availability

Copyright in RESPONSECON is held by BIMCO and ISCO.

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