

## **Annex E – Additional Questions to Industry**

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The Government of Canada is consulting with industry as part of an effort to determine how best to address the following issues: viability of In-Service Support Contract scope, prompt payment, limitation of liability, deployment payment, and Gender Based Analysis (GBA) + as explained below.

### **A. Viability of In-Service Support Contract Scope: KINGSTON Class Life Extension**

The 12 Kingston Class ships, which represent approximately 65% of the scope of the MWAV ISSC, are reaching the end of their design life between 2020 and 2024. The RCN is seeking approval to extend the operational capabilities that those ships provide beyond their current end of design life. At the time of release of this RFI, the outcome of this approval process remains unknown. There is therefore a possibility that only some of the 12 ships will have a life extension, for a period of between one (1) to three (3) five-year cycles.

**Industry is asked to answer the following questions:**

1. What would be the threshold, in number of hulls and number of extended cycles, beyond which the MWAV IV ISSC would still be considered an attractive business opportunity for Industry? Please explain your rationale.
2. Should none of the Kingston class ships be extended past 2024, does industry have recommendations to keep the MWAV ISSC a viable and affordable vehicle to sustaining the remainder of the MWAV fleet? Please consider the following elements, as applicable:
  - a. Scope (platforms, additional services, division of responsibilities between Canada and Industry);
  - b. Basis of Payment, incentives;
  - c. ITB/VP, performance management
  - d. Contract duration.

### **B. Prompt Payment**

In the construction industry throughout Canada, mandatory prompt payment legislation has been implemented for the entire supply chain of construction projects. For MWAV, the Government of Canada is considering a similar approach whereby:

- i. The MWAV contractor would only have to guarantee prompt payment to their immediate subcontractors; not for any other part of their supply chain;
- ii. Payment by the MWAV contractor would have to be made to its subcontractors within seven (7) days of receiving payment from Canada;
- iii. Canada would continue to implement its payment procedures to effect payment within thirty (30) days of receiving the contractor's invoice; and
- iv. The MWAV contractor would have to provide a monthly report to Canada identifying which subcontractors were not paid within the prompt payment deadline and provide the reasoning.

**Industry is asked to answer the following questions:**

1. What would be the implication(s) to your company as well as your subcontractors, if Canada adopted a Prompt Payment requirement in MWAV?
2. What would be the additional costs you would foresee should this initiative be taken?
3. Would you recommend we adopt this approach? Why or why not?

**C. Limitation of Liability**

The current MWAV Contract has used the standard Limitation of Liability Clause detailed below, similar to other marine contracts. This was implemented in 2010 based on industry's feedback that they could not take on infinite liabilities under their accounting and governance constraints. It does force companies who wish to become an MWAV subcontractor to take on \$10M of insurance, which Canada has discovered is excessive for Small and Medium companies who normally carry \$2M to \$5M insurance policies. In some cases, medium-sized companies have teamed with smaller companies in order for the smaller companies to take advantage of the larger companies' insurance policies.

There currently exists a PWGSC contract that requires the Contractor cover the insurance for all of its subcontractors under its own overhead, without flowing through the costs of insurance to its subcontractors. For some MWAV equipment with very low risk of any damage to Canada or to personnel, repairs could cost less than \$200 but the insurance to be carried is still \$10M.

Canada has the ability to use more than one Limitation of Liability clause including a) one for major work and b) for lower risk work. The lower risk work could have a Limitation of Liability equal to the Contract Value, with that being defined as the value of that individual Work Order.

For ship dockings and refits, the MWAV Contractor is required to flow-through the requirement for Ship Repairer's Liability Insurance which include the limitation of liability provisions below:

**Limitation of Contractor's Liability for Damages to Canada (10-20-40 clause):**

1. This section applies despite any other provision of the Contract and replaces the section of the general conditions entitled "Liability". Any reference in this section to damages caused by the Contractor also includes damages caused by its employees, as well as its subcontractors, agents, and representatives, and any of their employees.
2. Whether the claim is based in contract, tort, negligence, or another cause of action, the Contractor's liability for all damages suffered by Canada caused by the Contractor's performance of or failure to perform the Contract is limited to \$10 million per incident or occurrence to an annual aggregate of \$20 million for losses or damage caused in any one year of carrying out the Contract, each year starting on the date of coming into force of the Contract or its anniversary. This limitation of the Contractor's liability does not apply to:
  - a) any infringement of intellectual property rights,
  - b) any breach of warranty obligations,
  - c) any liability of Canada to a third party arising from any act or omission of the Contractor in performing the Contract; or
  - d) claims based in gross negligence and/or malfeasance.

3. Each Party agrees that it is fully liable for any damages that it causes to any third party in connection with the Contract, regardless of whether the third party makes its claim against Canada or the Contractor. If Canada is required, as a result of joint and several liability, to pay a third party in respect of damages caused by the Contractor, the Contractor must reimburse Canada for that amount.
4. The Parties agree that nothing herein is intended to limit any insurable interest of the Contractor nor to limit the amounts otherwise recoverable under any insurance policy. The Parties agree that to the extent that the insurance coverage required to be maintained by the Contractor under this Contract or any additional insurance coverage maintained by the Contractor, whichever is greater, is more than the limitations of liability described in sub article (2), the limitations provided herein are increased accordingly and the Contractor shall be liable for the higher amount to the full extent of the insurance proceeds recovered.
5. If, at any time, the total cumulative liability of the Contractor for losses or damage suffered by Canada caused by the Contractor's performance of or failure to perform the Contract, excluding liability described under subsection 2(a), (b), (c) and (d) exceeds \$40 million, either Party may terminate the Contract by giving notice in writing to the other Party and neither Party will make any claim against the other for damages, costs, expected profits or any other such loss arising out of the termination, but no such termination or expiry of the Contract shall reduce or terminate any of the liabilities that have accrued to the effective date of the termination.
6. The date of termination pursuant to this Article, shall be the date specified by Canada in its notice to terminate, or, if the Contractor exercises the right to terminate, in a notice to the Contractor from Canada in response to the Contractor's notice to terminate. The date of termination shall be in Canada's discretion to a maximum of 12 months after service of the original notice to terminate served by either Party pursuant to sub article 5, above.
7. Canada's notice to the Contractor specifying the date of termination will supersede the provisions of Article 1.7 Option to Extend Contract and the Contract will automatically remain in force subject to all of the same terms and conditions until the date of termination and the Contractor agrees that it will be paid in accordance with the applicable provisions as set out in the Basis of Payment, Annex B and that the Contractor's liability remains as specified in sub articles (1) through (4), above.
8. Nothing shall limit Canada's other remedies, including Canada's right to terminate the Contract for default for breach by the Contractor of any of its obligations under this Contract, notwithstanding that the Contractor may have reached any limitation of its liability hereunder.

**Industry is asked to answer the following questions:**

1. From the information provided above, please provide your recommendation on an optimum means of applying Limitation of Liability.
2. Please advise of your concerns, if any, in implementing a contract clause whereby the contractor covers the insurance for all of its subcontractors as mentioned above. Please advise if you foresee any additional costs with this approach.
3. For the possibility of having two Limitations of Liability, one for higher risk work (the 10-20-40 clause above) and another (Contract Value) for lower risk work, please advise on the implications you foresee for taking this approach.

## **D. Deployment Payment**

During MWAV III, through feedback, Industry asked for additional amounts to be provided to the contractor to cover additional costs not associated with travel costs for sending persons away to manage or perform work on naval vessels. Often this travel included trips to countries with some security and health concerns such as Africa or Central America. It was suggested this amount would be used by companies to pay for additional costs associated with these usual long-term trips but not included in their regular travel entitlements. This amount was agreed to be: for foreign deployments, after 24 hours, \$200 a day; and for deployments within Canada, after 48 hours, \$200 a day. It is recognized that without this payment, there could be a number of companies reluctant to send their employees on these deployments.

### **Industry is asked to answer the following questions:**

1. Please provide feedback on this this proposed deployment payment and if this amount is appropriate for the risk involved.
2. Are there other recommendations on this proposed payment such as scalability based on location?

## **E. Gender Based Analysis (GBA) +**

GBA+ is an analytical process used to assess how diverse groups of women, men and non-binary people may experience policies, programs and initiatives. The “plus” in GBA+ acknowledges that GBA goes beyond biological (sex) and socio-cultural (gender) differences. We all have multiple identity factors that intersect to make us who we are; GBA+ also considers many other identity factors, like race, ethnicity, religion, age, and mental or physical disability.

### **Industry is asked to answer the following questions:**

1. What would Industry propose to meet the intent of the GBA+ policy throughout the implementation of the Work, or elements of the Work in the MWAV contract?