

## FRAMEWORK CONTRACT FOR SERVICES

FRAMEWORK CONTRACT NUMBER – 20XX/EMSA/NEG/34/2020

The European Maritime Safety Agency (hereinafter referred to as "the contracting authority"), with its seat at Praça Europa 4, 1249-206 Lisbon, Portugal, VAT registration no.: 507 685 326, for the purposes of signing this Framework Contract represented by Dominika Łempicka-Fichter, Acting Head of Corporate Services - Department 4,

on the one part, and

*[full official name]*

*[official legal form]*

*[statutory registration number or ID or passport number]*

*[full official address]*

*[VAT registration number]*

(hereinafter referred to as "the contractor"), *[represented by [forename, surname and function,]]*

on the other part,

HAVE AGREED

to the **special conditions**, the **general conditions for framework contracts** for services and the following annexes:

**Annex I** Tender specifications (reference No EMSA/NEG/34/2020 of *[insert date]*)

**Annex II** Contractor's tender (reference No *[complete]* of *[insert date]*)

**Annex III** Model order form

*[Other annexes]*

which form an integral part of this framework contract (hereinafter referred to as “the FWC”).

This FWC sets out:

1. the procedure by which the contracting authority may order services from the contractor;
2. the provisions that apply to any specific contract which the contracting authority and the contractor may conclude under this FWC; and
3. the obligations of the parties during and after the duration of this FWC.

All documents issued by the contractor (end-user agreements, general terms and conditions, etc.) except its tender are held inapplicable, unless explicitly mentioned in the special conditions of this FWC. In all circumstances, in the event of contradiction between this FWC and documents issued by the contractor, this FWC prevails, regardless of any provision to the contrary in the contractor's documents.

## **I - SPECIAL CONDITIONS**

### **ARTICLE I.1 – ORDER OF PRIORITY OF PROVISIONS**

If there is any conflict between different provisions in this FWC, the following rules must be applied:

- (a) The provisions set out in the special conditions take precedence over those in the other parts of the FWC.
- (b) The provisions set out in the general conditions take precedence over those in the order form and specific contract (Annex III)
- (c) The provisions set out in the order form and specific contract (Annex III) take precedence over those in the other annexes.
- (d) The provisions set out in the tender specifications (Annex I) take precedence over those in the tender (Annex II).
- (e) The provisions set out in the FWC take precedence over those in the specific contracts.
- (f) The provisions set out in the specific contracts take precedence over those in the requests for services.

Any reference to specific contracts applies also to order forms.

### **ARTICLE I.2 – SUBJECT MATTER**

The subject matter of the FWC is: Secure destruction of data carriers, electrical equipment and furniture and related services.

### **ARTICLE I.3 – ENTRY INTO FORCE AND DURATION OF THE FWC**

- I.3.1** The FWC shall enter into force on the date on which it is signed by the last party.
- I.3.2** The implementation of the FWC cannot start before its entry into force.
- I.3.3** The FWC is concluded for a period of 48 months with effect from the date on which it enters into force.
- I.3.4** The parties must sign any specific contract before the FWC expires

The FWC continues to apply to such specific contracts after its expiry. The services relating to such specific contracts must be performed no later than six months after the expiry of the FWC.

### **ARTICLE I.4 –IMPLEMENTATION OF THE FWC**

#### **I.4.1 Type of contract**

The contractor is selected for a single FWC.

#### **I.4.2 Period of provision of the services**

The period for the provision of the services starts to run from the date on which the specific contract is signed by the last party.

### **I.4.3 Single FWC**

#### Regular services:

The contracting authority orders services by sending the contractor and order form in paper format. Within 10 working days, the contractor must either:

- send the order form back to the contracting authority signed and dated; or
- send an explanation of why it cannot accept the order.

If the contractor repeatedly refuses to sign the order forms or repeatedly fails to send them back on time, the contractor may be considered in breach of its obligations under this FWC as set out in Article II.18.1 (c).

#### Other services:

Within 10 working days of a request for services being sent by the contracting authority, the contractor must either:

- send a completed formal quotation duly signed and dated, or
- send an explanation of why it cannot accept the request for services.

The contracting authority orders services by sending the contractor an order form in paper format. Within 10 working days, the contractor must either:

- send the order form back to the contracting authority signed and dated; or
- send an explanation of why it cannot accept the order.

If the contractor repeatedly refuses to sign the order forms or repeatedly fails to send them back on time, the contractor may be considered in breach of its obligations under this FWC as set out in Article II.18.1 (c).

## **ARTICLE I.5 – PRICES**

### **I.5.1 Maximum amount of the FWC and maximum prices**

The maximum amount covering all purchases under this FWC is EUR [*amount in figures and in words*]. However, this does not bind the contracting authority to purchase for the maximum amount.

The prices of the regular services are as listed in Annex II. The purchase of other services - as described in the Tender Specifications - is subject to requests for services based on the full catalogue of services provided in Annex II

### **I.5.2 Price revision index**

Price revision is determined by the formula set out in Article II.20 and using the trend in the harmonised indices of consumer prices (HICP) Euro Area (HCIP - EA) available on Eurostat Databases (Theme: Economy and finance; Prices) website: <http://ec.europa.eu/eurostat/data/database>

## **ARTICLE I.6 – PAYMENT ARRANGEMENTS**

### **I.6.1 Pre-financing**

Pre-financing is not applicable to this FWC.

### **I.6.2. Interim payment**

The contractor (or leader in the case of a joint tender) may claim an interim payment equal to the delivered part of the total price referred to in the relevant order form in accordance with Article II.21.6. For regular services, payments shall be done on a quarterly basis.

The contractor (or leader in the case of a joint tender) must send an invoice in paper format or via e-PRIOR for the interim payment as provided for in the tender specifications.

All invoices shall indicate both the contractor's and the contracting authority's VAT number.

The contracting authority must approve any submitted documents or deliverables and pay within 30 days from receipt of the invoice.

If the contracting authority has observations to make, it must send them to the contractor (or leader in the case of a joint tender) and suspend the time limit for payment in accordance with Article II.21.7. The contractor (or leader in case of a joint tender) has [complete] days to submit additional information or corrections or a new version of the documents if the contracting authority requires it.

The contracting authority must give its approval and pay within the remainder of the time-limit indicated unless it rejects partially or fully the submitted documents or deliverables.

### **I.6.3 Payment of the balance**

The contractor (or leader in the case of a joint tender) may claim the payment of the balance in accordance with Article II.21.6.

The contractor (or leader in the case of a joint tender) must send an invoice in paper format or via e-PRIOR for payment of the balance due under a specific contract, as provided for in the tender specifications.

All invoices shall indicate both the contractor's and the contracting authority's VAT number.

The contracting authority must approve the submitted documents or deliverables and pay within 30 days from receipt of the invoice.

If the contracting authority has observations to make, it must send them to the contractor (or leader in the case of a joint tender) and suspend the time limit for payment in accordance with Article II.21.7.

The contractor (or leader in the case of a joint tender) has [complete] days to submit additional information or corrections or a new version of the documents if the contracting authority requires it.

The contracting authority must give its approval and pay within the remainder of the time-limit indicated unless it rejects partially or fully the submitted documents or deliverables.

#### **ARTICLE I.7 – BANK ACCOUNT**

Payments shall be made to the contractor's bank account denominated in euro identified as follows:

Name of bank: *[complete]*  
Full address of branch: *[complete]*  
Exact designation of account holder: *[complete]*  
IBAN code: *[complete]*

#### **ARTICLE I.8 – COMMUNICATION DETAILS**

For the purpose of this FWC, communications must be sent to the following addresses:

**EMSA:**

European Maritime Safety Agency  
Dominika Łempicka-Fichter,  
Acting Head of Corporate Services - Department 4  
Praça Europa 4  
1249-206 Lisbon  
Portugal  
E-mail: EMSA\_Contracts@emsa.europa.eu

**Contractor:**

*[Full name]*  
*[Function]*  
*[Company name]*  
*[Full official address]*  
Email: *[complete]*

Invoices shall be sent to the following address:

**The contracting authority:**

European Maritime Safety Agency  
Invoice Registration (IR)  
Unit 4.2 – Legal, Finance and Facilities  
Praça Europa 4  
1249-206 Lisbon  
Portugal

## **ARTICLE I.9 – PROCESSING OF PERSONAL DATA**

### **I.9.1 Processing of personal data by the contracting authority**

For the purpose of Article II.9,

- (a) the data controller is Head of Unit Legal, Finance and Facilities;
- (b) the data protection notice is available on the EMSA website.

### **I.9.2 Processing of personal data by the contractor**

This clause is not applicable to this FWC.

## **ARTICLE I.10 - EXPLOITATION OF THE RESULTS OF THE FWC**

This clause is not applicable to this FWC.

## **ARTICLE I.11 – TERMINATION BY EITHER PARTY**

Either party may terminate the FWC and/or the FWC and specific contracts by sending formal notification to the other party with three months written notice.

If the FWC or a specific contract is terminated:

- (a) neither party is entitled to compensation;
- (b) the contractor is entitled to payment only for the services provided before termination takes effect.

The second, third and fourth paragraphs of Article II.18.4 apply.

## **ARTICLE I.12 – APPLICABLE LAW AND SETTLEMENT OF DISPUTES**

**I.12.1** The FWC shall be governed by Union law, complemented, where necessary, by the law of Portugal.

**I.12.2** Any dispute between the parties in relation to the interpretation, application or validity of the FWC which cannot be settled amicably shall be brought before the courts of Lisbon, Portugal.

## **ARTICLE I.13 – INTER-INSTITUTIONAL FRAMEWORK CONTRACT**

This clause is not applicable to this FWC.

## **ARTICLE I.14 – E-PROCUREMENT**

The execution of the contract between the contracting authority and the contractor may be automated by the use of one or more of the following applications: e-Request, e-Catalogue, e-Ordering and e-Fulfilment and e-Invoicing.

The use of the above applications may be made available by the Contracting Authority during the lifetime of the contract.

## SIGNATURES

For the contractor,

[*Company name*/forename/surname/function]

signature: \_\_\_\_\_

Done at:

Date:

In duplicate in English.

For the contracting authority

Dominika Łempicka-Fichter, Acting Head of Corporate  
Services - Department 4

signature: \_\_\_\_\_

Lisbon,

Date:



## II – GENERAL CONDITIONS FOR THE FRAMEWORK CONTRACT FOR SERVICES

### ARTICLE II.1 – DEFINITIONS

For the purpose of this FWC, the following definitions apply:

**‘Back office’:** the internal system(s) used by the parties to process electronic invoices;

**‘Breach of obligations’:** failure by the contractor to fulfil one or more of its contractual obligations.

**‘Confidential information or document’:** any information or document received by either party from the other or accessed by either party in the context of the implementation of the FWC, that any of the parties has identified in writing as confidential. It may not include information that is publicly available;

**‘Conflict of interest’:** a situation where the impartial and objective implementation of the FWC by the contractor is compromised for reasons involving family, emotional life, political or national affinity, economic interest, any other direct or indirect personal interest, or any other shared interest with the contracting authority or any third party related to the subject matter of the FWC;

**‘Creator’:** means any natural person who contributes to the production of the result;

**‘EDI message’ (electronic data interchange):** a message created and exchanged through the electronic transfer, from computer to computer, of commercial and administrative data using an agreed standard;

**‘e-PRIOR’:** the service-oriented communication platform that provides a series of web services and allows the exchange of standardised electronic messages and documents between the parties. This is done either through web services, with a machine-to-machine connection between the parties’ back office systems (EDI messages), or through a web application (the supplier portal). The Platform may be used to exchange electronic documents (e-documents) such as electronic requests for services, electronic specific contracts, electronic acceptance of services and electronic invoices between the parties.

**‘Force majeure’:** any unforeseeable, exceptional situation or event beyond the control of the parties that prevents either of them from fulfilling any of their obligations under the FWC. The situation or event must not be attributable to error or negligence on the part of the parties or on the part of the subcontractors and must prove to be inevitable despite their exercising due diligence. Defaults of service, defects in equipment or material or delays in making them available, labour disputes, strikes and financial difficulties may not be invoked as force majeure, unless they stem directly from a relevant case of force majeure;

**‘Formal notification’ (or ‘formally notify’):** form of communication between the parties made in writing by mail or email, which provides the sender with compelling evidence that the message was delivered to the specified recipient;

**‘Fraud’:** an act or omission committed in order to make an unlawful gain for the perpetrator or another by causing a loss to the Union's financial interests, and relating to: i) the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the misappropriation or wrongful retention of funds or assets from the Union budget, ii) the non-disclosure of information in violation of a specific obligation, with the same effect or iii) the misapplication of such funds or assets for purposes other than those for which they were originally granted, which damages the Union's financial interests;

**'Grave professional misconduct':** a violation of applicable laws or regulations or ethical standards of the profession to which a contractor or a related person belongs, including any conduct leading to sexual or other exploitation or abuse, or any wrongful conduct of the contractor or a related person which has an impact on its professional credibility where such conduct denotes wrongful intent or gross negligence.

**'Implementation of the FWC':** the purchase of services envisaged in the FWC through the signature and performance of specific contracts;

**'Interface control document':** the guideline document which lays down the technical specifications, message standards, security standards, checks of syntax and semantics, etc. to facilitate machine-to-machine connection. This document is updated on a regular basis;

**'Irregularity':** any infringement of a provision of Union law resulting from an act or omission by an economic operator, which has, or would have, the effect of prejudicing the Union's budget.

**'Notification' (or 'notify'):** form of communication between the parties made in writing including by electronic means;

**'Order form':** a simplified form of specific contract by which the contracting authority orders services under this FWC;

**'Performance of a specific contract':** the execution of tasks and delivery of the purchased services by the contractor to the contracting authority;

**'Personnel':** persons employed directly or indirectly or contracted by the contractor to implement the FWC;

**'Pre-existing material':** any material, document, technology or know-how which exists prior to the contractor using it for the production of a result in the implementation of the FWC;

**'Pre-existing right':** any industrial and intellectual property right on pre-existing material; it may consist in a right of ownership, a licence right and/or right of use belonging to the contractor, the creator, the contracting authority as well as to any other third parties;

**'Professional conflicting interest':** a situation in which the contractor's previous or ongoing professional activities affect its capacity to implement the FWC or to perform a specific contract to an appropriate quality standard.

**'Related person':** any natural or legal person who is a member of the administrative, management or supervisory body of the contractor, or who has powers of representation, decision or control with regard to the contractor;

**'Request for services':** a document from the contracting authority requesting that the contractors in a multiple FWC with re-opening of competition provide a specific tender for services whose terms are not entirely defined under the FWC;

**'Result':** any intended outcome of the implementation of the FWC, whatever its form or nature. A result may be further defined in this FWC as a deliverable. A result may, in addition to newly created materials produced specifically for the contracting authority by the contractor or at its request, also include pre-existing materials;

**‘Specific contract’:** a contract implementing the FWC and specifying details of a service to be provided;

**‘Supplier portal’:** the e-PRIOR portal, which allows the contractor to exchange electronic business documents, such as invoices, through a graphical user interface.

## **ARTICLE II.2 – ROLES AND RESPONSIBILITIES IN THE EVENT OF A JOINT TENDER**

In the event of a joint tender submitted by a group of economic operators and where the group does not have legal personality or legal capacity, one member of the group is appointed as leader of the group.

## **ARTICLE II.3 – SEVERABILITY**

Each provision of this FWC is severable and distinct from the others. If a provision is or becomes illegal, invalid or unenforceable to any extent, it must be severed from the remainder of the FWC. This does not affect the legality, validity or enforceability of any other provisions of the FWC, which continue in full force and effect. The illegal, invalid or unenforceable provision must be replaced by a legal, valid and enforceable substitute provision which corresponds as closely as possible with the actual intent of the parties under the illegal, invalid or unenforceable provision. The replacement of such a provision must be made in accordance with Article II.11. The FWC must be interpreted as if it had contained the substitute provision as from its entry into force.

## **ARTICLE II.4 – PROVISION OF SERVICES**

- II.4.1** Signature of the FWC does not guarantee any actual purchase. The contracting authority is bound only by specific contracts implementing the FWC.
- II.4.2** The contractor must provide services of high-quality standards, in accordance with the state of the art in the industry and the provisions of this FWC, in particular the tender specifications and the terms of its tender. Where the contracting authority has the right to make modifications to the results, they must be delivered in a format and with the necessary information which effectively allow such modifications to be made in a convenient manner.
- II.4.3** The contractor must comply with the minimum requirements provided for in the tender specifications. This includes compliance with applicable obligations under environmental, social and labour law established by Union law, national law and collective agreements or by the international environmental, social and labour law provisions listed in Annex X to Directive 2014/24/EU<sup>1</sup>, compliance with data protection obligations resulting from Regulation (EU) 2016/679<sup>2</sup> and Regulation (EU) 2018/1725<sup>3</sup>.
- II.4.4** The contractor must obtain any permit or licence required in the State where the services are to be provided.

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<sup>1</sup> OJ L 94 of 28.03.2014, p. 65

<sup>2</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, OJ L 119, 4.5.2016, p. 1, [https://eurlex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L\\_.2016.119.01.0001.01.ENG](https://eurlex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2016.119.01.0001.01.ENG)

<sup>3</sup> Regulation (EU) 2018/1725 of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC, OJ L 295/39, 21.11.2018, <https://eurlex.europa.eu/legalcontent/EN/TXT/PDF/?uri=CELEX:32018R1725&from=EN>

- II.4.5** All periods specified in the FWC are calculated in calendar days, unless otherwise specified.
- II.4.6** The contractor must not present itself as a representative of the contracting authority and must inform third parties that it is not part of the European public service.
- II.4.7** The contractor is responsible for the personnel who carry out the services and exercises its authority over its personnel without interference by the contracting authority. The contractor must inform its personnel that:
- (a) they may not accept any direct instructions from the contracting authority; and
  - (b) their participation in providing the services does not result in any employment or contractual relationship with the contracting authority.
- II.4.8** The contractor must ensure that the personnel implementing the FWC and any future replacement personnel possess the professional qualifications and experience required to provide the services, as the case may be on the basis of the selection criteria set out in the tender specifications.
- II.4.9** At the contracting authority's reasoned request, the contractor must replace any member of personnel who:
- (a) does not have the expertise required to provide the services; or
  - (b) has caused disruption at the premises of the contracting authority.
- The contractor bears the cost of replacing its personnel and is responsible for any delay in providing the services resulting from the replacement of personnel.
- II.4.10** The contractor must record and report to the contracting authority any problem that affects its ability to provide the services. The report must describe the problem, state when it started and what action the contractor is taking to resolve it.
- II.4.11** The contractor must immediately inform the contracting authority of any changes in the exclusion situations as declared, according to Article 137 (1) of the Financial Regulation.

## **ARTICLE II.5 – COMMUNICATION BETWEEN THE PARTIES**

### **II.5.1 Form and means of communication**

Any communication of information, notices or documents under the FWC must:

- (a) be made in writing in paper or electronic format in the language of the contract;
- (b) bear the FWC number and, if applicable, the specific contract number;
- (c) be made using the relevant communication details set out in Article I.8; and
- (d) be sent by mail, email or, for the documents specified in the special conditions, via e-PRIOR.

If a party requests written confirmation of an e-mail within a reasonable time, the other party must provide an original signed paper version of the communication as soon as possible.

The parties agree that any communication made by email has full legal effect and is admissible as evidence in judicial proceedings.

#### **II.5.2 Date of communications by mail and email**

Any communication is deemed to have been made when the receiving party receives it, unless this FWC contract refers to the date when the communication was sent.

Email is deemed to have been received by the receiving party on the day of dispatch of that email, provided that it is sent to the email address indicated in Article I.8. The sending party must be able to prove the date of dispatch. In the event that the sending party receives a non-delivery report, it must make every effort to ensure that the other party actually receives the communication by email or mail. In such a case, the sending party is not held in breach of its obligation to send such communication within a specified deadline.

Mail sent to the contracting authority is deemed to have been received by the contracting authority on the date on which the department responsible referred to in Article I.8 registers it.

Formal notifications are considered to have been received by the receiving party on the date of receipt indicated in the proof received by the sending party that the message was delivered to the specified recipient.

#### **II.5.3 Submission of e-documents via e-PRIOR**

1. If provided for in the special conditions, the exchange of electronic documents (e-documents) such as requests for services, specific contracts and invoices between the parties is automated through the use of the e-PRIOR platform. This platform provides two possibilities for such exchanges: either through web services (machine-to-machine connection) or through a web application (the supplier portal).
2. The contracting authority takes the necessary measures to implement and maintain electronic systems that enable the supplier portal to be used effectively.
3. In the case of machine-to-machine connection, a direct connection is established between the parties' back offices. In this case, the parties take the measures necessary on their side to implement and maintain electronic systems that enable the machine-to-machine connection to be used effectively. The electronic systems are specified in the interface control document. The contractor (or leader in the case of a joint tender) must take the necessary technical measures to set up a machine-to-machine connection and at its own cost.
4. If communication via the supplier portal or via the web services (machine-to-machine connection) is hindered by factors beyond the control of one party, it must notify the other immediately and the parties must take the necessary measures to restore this communication.
5. If it is impossible to restore the communication within two working days, one party must notify the other that alternative means of communication specified in Article II.5.1 will be used until the supplier portal or the machine-to-machine connection is restored.
6. When a change in the interface control document requires adaptations, the contractor (or leader in the case of a joint tender) has up to six months from receipt of the notification to implement this change. This period can be shortened by mutual agreement of the parties. This period does not apply to urgent measures required by the security policy of the contracting authority to ensure integrity, confidentiality and non-repudiation of information and the availability of e-PRIOR, which must be applied immediately.

#### **II.5.4 Validity and date of e-documents**

1. The parties agree that any e-document, including related attachments exchanged via e-PRIOR:
  - (e) is considered as equivalent to a paper document;
  - (f) is deemed to be the original of the document;
  - (g) is legally binding on the parties once an e-PRIOR authorised person has performed the 'sign' action in e-PRIOR and has full legal effect; and
  - (h) constitutes evidence of the information contained in it and is admissible as evidence in judicial proceedings.
2. The parties expressly waive any rights to contest the validity of such a document solely on the grounds that communications between the parties occurred through e-PRIOR or that the document has been signed through e-PRIOR. If a direct connection is established between the parties' back offices to allow electronic transfer of documents, the parties agree that an e-document, sent as mentioned in the interface control document, qualifies as an EDI message.
3. If the e-document is dispatched through the supplier portal, it is deemed to have been legally issued or sent when the contractor (or leader in the case of a joint tender) is able to successfully submit the e-document without any error messages. The generated PDF and XML document for the e-document are considered as a proof of receipt by the contracting authority.
4. In the event that an e-document is dispatched using a direct connection established between the parties' back offices, the e-document is deemed to have been legally issued or sent when its status is 'received' as defined in the interface control document.
5. When using the supplier portal, the contractor (or leader in the case of a joint tender) can download the PDF or XML message for each e-document for one year after submission. After this period, copies of the e-documents are no longer available for automatic download from the supplier portal.

#### **II.5.5 Authorised persons in e-PRIOR**

The contractor submits a request for each person who needs to be assigned the role of 'user' in e-PRIOR. These persons are identified by means of the European Communication Authentication Service (ECAS) and authorised to access and perform actions in e-PRIOR within the permissions of the user roles that the contracting authority has assigned to them.

User roles enabling these e-PRIOR authorised persons to sign legally binding documents such as specific tenders or specific contracts are granted only upon submission of supporting documents proving that the authorised person is empowered to act as a legal representative of the contractor.

#### **ARTICLE II.6 – LIABILITY**

- II.6.1** The contracting authority is not liable for any damage or loss caused by the contractor, including any damage or loss to third parties during or as a consequence of implementation of the FWC.
- II.6.2** If required by the relevant applicable legislation or if requested by the contracting authority, the contractor must take out an insurance policy against risks and damage or loss relating to the implementation of the FWC. It must also take out supplementary insurance as reasonably required by standard practice in the industry. Upon request, the contractor must provide evidence of insurance coverage to the contracting authority.

- II.6.3** The contractor is liable for any loss or damage caused to the contracting authority during or as a consequence of implementation of the FWC, including in the event of subcontracting, but only up to an amount not exceeding three times the total amount of the relevant specific contract. However, if the damage or loss is caused by the gross negligence or wilful misconduct of the contractor or of its personnel or subcontractors, as well as in the case of an action brought against the contracting authority by a third party for breach of its intellectual property rights, the contractor is liable for the whole amount of the damage or loss.
- II.6.4** If a third party brings any action against the contracting authority in connection with the implementation of the FWC, including any action for alleged breach of intellectual property rights, the contractor must assist the contracting authority in the legal proceedings, including by intervening in support of the contracting authority upon request. If the contracting authority's liability towards the third party is established and that such liability is caused by the contractor during or as a consequence of the implementation of the FWC, Article II.6.3 applies.
- II.6.5** If the contractor is composed of two or more economic operators (i.e. who submitted a joint tender), they are all jointly and severally liable to the contracting authority for the implementation of the FWC.
- II.6.6** The contracting authority is not liable for any loss or damage caused to the contractor during or as a consequence of implementation of the FWC, unless the loss or damage was caused by wilful misconduct or gross negligence of the contracting authority.

## **ARTICLE II.7 – CONFLICT OF INTEREST AND PROFESSIONAL CONFLICTING INTERESTS**

- II.7.1** The contractor must take all the necessary measures to prevent any situation of conflict of interest or professional conflicting interest.
- II.7.2** The contractor must notify the contracting authority in writing as soon as possible of any situation that could constitute a conflict of interest or a professional conflicting interest during the implementation of the FWC. The contractor must immediately take action to rectify the situation.

The contracting authority may do any of the following:

- (a) verify that the contractor's action is appropriate;
- (b) require the contractor to take further action within a specified deadline;
- (c) decide not to award a specific contract to the contractor.

- II.7.3** The contractor must pass on all the relevant obligations in writing to:

- (a) its personnel;
- (b) any natural person with the power to represent it or take decisions on its behalf;
- (c) third parties involved in the implementation of the FWC, including subcontractors.

The contractor must also ensure that the persons referred to above are not placed in a situation which could give rise to conflicts of interest.

## **ARTICLE II.8 – CONFIDENTIALITY**



**II.8.1.** The contracting authority and the contractor must treat with confidentiality any information or documents, in any format, disclosed in writing or orally, relating to the implementation of the FWC and identified in writing as confidential.

**II.8.2.** Each party must:

- (a) not use confidential information or documents for any purpose other than to perform its obligations under the FWC or a specific contract without the prior written agreement of the other party;
- (b) ensure the protection of such confidential information or documents with the same level of protection as its own confidential information or documents and in any case with due diligence;
- (c) not disclose, directly or indirectly, confidential information or documents to third parties without the prior written agreement of the other party.

**II.8.3** The confidentiality obligations set out in this Article are binding on the contracting authority and the contractor during the implementation of the FWC and for as long as the information or documents remain confidential unless:

- (a) the disclosing party agrees to release the receiving party from the confidentiality obligation earlier;
- (b) the confidential information or documents become public through other means than a breach of the confidentiality obligation;
- (c) the applicable law requires the disclosure of the confidential information or documents.

**II.8.4** The contractor must obtain from any natural person with the power to represent it or take decisions on its behalf, as well as from third parties involved in the implementation of the FWC a commitment that they will comply with this Article. At the request of the contracting authority, the contractor must provide a document providing evidence of this commitment.

## **ARTICLE II.9 – PROCESSING OF PERSONAL DATA**

### **II.9.1 Processing of personal data by the contracting authority**

Any personal data included in or relating to the FWC, including its implementation, shall be processed in accordance with Regulation (EU) No 2018/1725. Such data shall be processed solely for the purposes of the implementation, management and monitoring of the FWC by the data controller.

The contractor or any other person whose personal data is processed by the data controller in relation to this FWC has specific rights as a data subject under Chapter III (Articles 14-25) of Regulation (EU) No 2018/1725, in particular the right to access, rectify or erase their personal data and the right to restrict or, where applicable, the right to object to processing or the right to data portability.

Should the contractor or any other person whose personal data is processed in relation to this FWC have any queries concerning the processing of its personal data, it shall address itself to the data controller. They may



also address themselves to the Data Protection Officer of the data controller. They have the right to lodge a complaint at any time to the European Data Protection Supervisor.

Details concerning the processing of personal data are available in the data protection notice referred to in Article I.9.

## **II.9.2 Processing of personal data by the contractor**

The processing of personal data by the contractor shall meet the requirements of Regulation (EU) No 2018/1725 and be processed solely for the purposes set out by the controller.

The contractor shall assist the controller for the fulfilment of the controller's obligation to respond to requests for exercising rights of person whose personal data is processed in relation to this FWC as laid down in Chapter III (Articles 14-25) of Regulation (EU) No 2018/1725.

The contractor shall inform without delay the controller about such requests.

The contractor may act only on documented written instructions and under the supervision of the controller, in particular with regard to the purposes of the processing, the categories of data that may be processed, the recipients of the data and the means by which the data subject may exercise its rights.

The contractor shall grant personnel access to the data to the extent strictly necessary for the implementation, management and monitoring of the FWC. The contractor must ensure that personnel authorised to process personal data has committed itself to confidentiality or is under appropriate statutory obligation of confidentiality in accordance with the provisions of Article II.8.

The contractor shall adopt appropriate technical and organisational security measures, giving due regard to the risks inherent in the processing and to the nature, scope, context and purposes of processing, in order to ensure, in particular, as appropriate:

- a) the pseudonymisation and encryption of personal data;
- b) the ability to ensure the ongoing confidentiality, integrity, availability and resilience of processing systems and services;
- c) the ability to restore the availability and access to personal data in a timely manner in the event of a physical or technical incident;
- d) a process for regularly testing, assessing and evaluating the effectiveness of technical and organisational measures for ensuring the security of the processing;
- e) measures to protect personal data from accidental or unlawful destruction, loss, alteration, unauthorised disclosure of or access to personal data transmitted, stored or otherwise processed.

The contractor shall notify relevant personal data breaches to the controller without undue delay and at the latest within 48 hours after the contractor becomes aware of the breach. In such cases, the contractor shall provide the controller with at least the following information:

- a) nature of the personal data breach including where possible, the categories and approximate number of data subjects concerned and the categories and approximate number of personal data records concerned;
- b) likely consequences of the breach;
- c) measures taken or proposed to be taken to address the breach, including, where appropriate, measures to mitigate its possible adverse effects.

The contractor shall immediately inform the data controller if, in its opinion, an instruction infringes Regulation (EU) 2018/1725, Regulation (EU) 2016/679, or other Union or Member State data protection provisions as referred to in the tender specifications.

The contractor shall assist the controller for the fulfilment of its obligations pursuant to Article 33 to 41 under Regulation (EU) 2018/1725 to:

- a) ensure compliance with its data protection obligations regarding the security of the processing, and the confidentiality of electronic communications and directories of users;
- b) notify a personal data breach to the European Data Protection Supervisor;
- c) communicate a personal data breach without undue delay to the data subject, where applicable;
- d) carry out data protection impact assessments and prior consultations as necessary.

The contractor shall maintain a record of all data processing operations carried on behalf of the controller, transfers of personal data, security breaches, responses to requests for exercising rights of people whose personal data is processed and requests for access to personal data by third parties.

The contracting authority is subject to Protocol 7 of the Treaty on the Functioning of the European Union on the privileges and immunities of the European Union, particularly as regards the inviolability of archives (including the physical location of data and services as set out in Article I.9.2) and data security, which includes personal data held on behalf of the contracting authority in the premises of the contractor or subcontractor.

The contractor shall notify the contracting authority without delay of any legally binding request for disclosure of the personal data processed on behalf of the contracting authority made by any national public authority, including an authority from a third country. The contractor may not give such access without the prior written authorisation of the contracting authority.

The duration of processing of personal data by the contractor will not exceed the period referred to in Article II.24.2. Upon expiry of this period, the contractor shall, at the choice of the controller, return, without any undue delay in a commonly agreed format, all personal data processed on behalf of the controller and the copies thereof or shall effectively delete all personal data unless Union or national law requires a longer storage of personal data.

For the purpose of Article II.10, if part or all of the processing of personal data is subcontracted to a third party, the contractor shall pass on the obligations referred to in Articles I.9.2 and II.9.2 in writing to those parties, including subcontractors. At the request of the contracting authority, the contractor shall provide a document providing evidence of this commitment.

## **ARTICLE II.10 – SUBCONTRACTING**

- II.10.1** The contractor must not subcontract and have the FWC implemented by third parties beyond the third parties already mentioned in its tender without prior written authorisation from the contracting authority.
- II.10.2** Even if the contracting authority authorises subcontracting, the contractor remains bound by its contractual obligations and is solely responsible for the implementation of the FWC.

**II.10.3** The contractor must ensure that the subcontract does not affect the rights of the contracting authority under this FWC, particularly those under Articles II.8, II.13 and II.24.

**II.10.4** The contracting authority may request the contractor to replace a subcontractor found to be in a situation provided for in points (d) and (e) of Article II.18.1.

## **ARTICLE II.11 – AMENDMENTS**

**II.11.1** Any amendment to the FWC or a specific contract must be made in writing before all contractual obligations have been fulfilled. A specific contract does not constitute an amendment to the FWC.

**II.11.2** Any amendment must not make changes to the FWC or a specific contract that might alter the initial conditions of the procurement procedure or result in unequal treatment of tenderers or contractors.

## **ARTICLE II.12 – ASSIGNMENT**

**II.12.1** The contractor must not assign any of the rights and obligations arising from the FWC, including claims for payments or factoring, without prior written authorisation from the contracting authority. In such cases, the contractor must provide the contracting authority with the identity of the intended assignee.

**II.12.2** Any right or obligation assigned by the contractor without authorisation is not enforceable against the contracting authority.

## **ARTICLE II.13 – INTELLECTUAL PROPERTY RIGHTS**

### **II.13.1 Ownership of the rights in the results**

The contracting authority acquires irrevocably worldwide ownership of the results and of all intellectual property rights under the FWC. The intellectual property rights so acquired include any rights, such as copyright and other intellectual or industrial property rights, to any of the results and to all technological solutions and information created or produced by the contractor or by its subcontractor in performance of the FWC. The contracting authority may exploit and use the acquired rights as stipulated in this FWC. The contracting authority acquires all the rights from the moment it approves the results delivered by the contractor. Such delivery and approval are deemed to constitute an effective assignment of rights from the contractor to the contracting authority.

The payment of the price includes any fees payable to the contractor about the acquisition of ownership of rights by the contracting authority including for all forms of exploitation and of use of the results.

### **II.13.2 Licensing rights on pre-existing materials**

Unless provided otherwise in the special conditions, the contracting authority does not acquire ownership of pre-existing rights under this FWC.

The contractor licenses the pre-existing rights on a royalty-free, non-exclusive and irrevocable basis to the contracting authority, which may use the pre-existing materials for all the modes of exploitation set out in this

FWC or in specific contracts. All pre-existing rights are licensed to the contracting authority from the moment the results are delivered and approved by the contracting authority.

The licensing of pre-existing rights to the contracting authority under this FWC covers all territories worldwide and is valid for the duration of intellectual property rights protection. Under observance of the limitations, if any, provided by applicable law, the pre-existing materials may be used for any of the following purposes:

- (a)** use for its own purposes:
  - I. making available to the staff of the contracting authority
  - II. making available to the persons and entities working for the contracting authority or cooperating with it, including contractors, subcontractors whether legal or natural persons, Union institutions, agencies and bodies, Member States' institutions
  - III. installing, uploading, processing
  - IV. arranging, compiling, combining, retrieving
  - V. copying, reproducing in whole or in part and in unlimited number of copies
  
- (b)** distribution to the public:
  - I. publishing in hard copies
  - II. publishing in electronic or digital format
  - III. publishing on the internet as a downloadable/non-downloadable file
  - IV. broadcasting by any kind of technique of transmission
  - V. public presentation or display
  - VI. communication through press information services
  - VII. inclusion in widely accessible databases or indexes
  - VIII. otherwise in any form and by any method
  
- (c)** modifications by the contracting authority or by a third party in the name of the contracting authority:
  - I. shortening
  - II. summarizing
  - III. modifying of the content
  - IV. making technical changes to the content:
    - necessary correction of technical errors
    - adding new parts or functionalities
    - changing functionalities
    - providing third parties with additional information concerning the result (e.g. source code) with a view to making modifications
  - V. addition of new elements, paragraphs titles, leads, bolds, legend, table of content, summary, graphics, subtitles, sound, etc.
  - VI. preparation in audio form, preparation as a presentation, animation, pictograms story, slide-show, public presentation etc.
  - VII. extracting a part or dividing into parts
  - VIII. use of a concept or preparation of a derivate work
  - IX. digitisation or converting the format for storage or usage purposes
  - X. modifying dimensions

XI. translating, inserting subtitles, dubbing in different language versions (including, but not limited to all official languages of the EU and languages of candidate countries)

(d) the modes of exploitation listed in article II.13.3

(e) rights to authorise, license, or sub-license in case of licensed pre-existing rights, the modes of exploitation set out in any of the points (a) to (d) to third parties.

Where the contracting authority becomes aware that the scope of modifications exceeds that envisaged in the contract or specific contract, the contracting authority shall consult the contractor. Where necessary, the contractor shall in turn seek the agreement of any creator or other right holder. The contractor shall reply to the contracting authority within one month and shall provide its agreement, including any suggestions of modifications, free of charge. The creator may refuse the intended modification only when it may harm his honour, reputation or distort integrity of the work.

The payment of the price as set out in this contract is deemed to also include any fees payable to the contractor in relation to the licensing of pre-existing rights to the contracting authority, including for all forms of exploitation and of use of the results.

Where the implementation of the FWC requires that the contractor uses pre-existing materials belonging to the contracting authority, the contracting authority may request that the contractor signs an adequate licence agreement. Such use by the contractor will not entail any transfer of rights to the contractor and is limited to the needs of this FWC.

### **II.13.3 Exclusive rights**

The contracting authority acquires the following exclusive rights:

- (a) reproduction: the right to authorise or prohibit direct or indirect, temporary or permanent reproduction of the results by any means (mechanical, digital or other) and in any form, in whole or in part;
- (b) communication to the public: the exclusive right to authorise or prohibit any display, performance or communication to the public, by wire or wireless means, including the making available to the public of the results in such a way that members of the public may access them from a place and at a time individually chosen by them; this right also includes the communication and broadcasting by cable or by satellite;
- (c) distribution: the exclusive right to authorise or prohibit any form of distribution of results or copies of the results to the public, by sale or otherwise;
- (d) rental: the exclusive right to authorise or prohibit rental or lending of the results or of copies of the results;
- (e) adaptation: the exclusive right to authorise or prohibit any modification of the results;
- (f) translation: the exclusive right to authorise or prohibit any translation, adaptation, arrangement, creation of derivative works based on the results, and any other alteration of the results, subject to the respect of moral rights of authors, where applicable;
- (g) where the results are or include a database: the exclusive right to authorise or prohibit the extraction of all or a substantial part of the contents of the database to another medium by any means or in any form; and the exclusive right to authorise or prohibit the re-utilization of all or a substantial part of the contents of the database by the distribution of copies, by renting, by on-line or other forms of transmission;

- (h) where the results are or include a patentable subject-matter: the right to register them as a patent and to further exploit such patent to the fullest extent;
- (i) where the results are or include logos or subject-matter which could be registered as a trademark: the right to register such logo or subject-matter as a trademark and to further exploit and use it;
- (j) where the results are or include know-how: the right to use such know-how as is necessary to make use of the results to the full extent provided for by this contract, and the right to make it available to contractors or subcontractors acting on behalf of the contracting authority, subject to their signing of adequate confidentiality undertakings where necessary;
- (k) where the results are documents:
  - (i) giving access upon individual requests without the right to reproduce or exploit, as provided for by Regulation 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents;
  - (ii) the right to store and archive the results or copies of the results in line with the document management rules applicable to the contracting authority, including digitisation or converting the format for preservation or new use purposes;
- (l) where the results are or incorporate software, including source code, object code and, where relevant, documentation, preparatory materials and manuals, in addition to the other rights mentioned in this Article:
  - (i) end-user rights, for all uses by the contracting authority or by subcontractors which result from this FWC and from the intention of the parties;
  - (ii) the rights to decompile or disassemble the software;
- (m) to the extent that the contractor may invoke moral rights, the right for the contracting authority, except where otherwise provided in this FWC, to publish the results with or without mentioning the creator(s)' name(s), and the right to decide when and whether the results may be disclosed and published.

The contractor warrants that the exclusive rights and the modes of exploitation may be exercised by the contracting authority on all parts of the results, be they created by the contractor or consisting of pre-existing materials.

Where pre-existing materials are inserted in the results, the contracting authority may accept reasonable restrictions impacting on the above list, provided that the said materials are easily identifiable and separable from the rest, that they do not correspond to substantial elements of the results, and that, should the need arise, satisfactory replacement solutions exist, at no additional costs to the contracting authority. In such case, the contractor will have to clearly inform the contracting authority before making such choice and the contracting authority has the right to refuse it.

#### **II.13.4 Identification of pre-existing rights**

When delivering the results, the contractor must warrant that, for any use that the contracting authority may envisage within the limits set in this FWC, the results and the pre-existing material incorporated in the results are free of claims from creators or from any third parties and all the necessary pre-existing rights have been obtained or licensed.

To that effect, the contractor must establish a list of all pre-existing rights to the results of this FWC or parts thereof, including identification of the rights' owners. If there are no pre-existing rights to the results, the contractor must provide a declaration to that effect. The contractor must provide this list or declaration to the contracting authority together with the invoice for payment of the balance at the latest.

#### **II.13.5 Evidence of granting of pre-existing rights**

Upon request by the contracting authority, the contractor must provide evidence that it has the ownership of or the right to use all the listed pre-existing rights, except for the rights owned or licensed by the contracting authority. The contracting authority may request this evidence even after the end of this FWC.

This evidence may refer, for example, to rights to: parts of other documents, images, graphs, fonts, tables, data, software, technical inventions, know-how, IT development tools, routines, subroutines or other programmes ('background technology'), concepts, designs, installations or pieces of art, data, source or background materials or any other parts of external origin.

This evidence must include, as appropriate:

- (a) the name and version number of a software product;
- (b) the full identification of the work and its author, developer, creator, translator, data entry person, graphic designer, publisher, editor, photographer, producer;
- (c) a copy of the licence to use the product or of the agreement granting the relevant rights to the contractor or a reference to this licence;
- (d) a copy of the agreement or extract from the employment contract granting the relevant rights to the contractor where parts of the results were created by its personnel;
- (e) the text of the disclaimer notice if any.

Provision of evidence does not release the contractor from its responsibilities if it is found that it does not hold the necessary rights, regardless of when and by whom this fact is revealed.

The contractor also warrants that it possesses the relevant rights or powers to execute the transfer and that it has paid or has verified payment of all due fees including fees due to collecting societies, related to the final results.

#### **II.13.6 Quotation of works in the result**

In the result, the contractor must clearly point out all quotations of existing works. The complete reference should include as appropriate, the following: name of the author, title of the work, date and place of publication, date of creation, address of publication on the internet, number, volume and other information that allows the origin to be easily identified.

#### **II.13.7 Moral rights of creators**

By delivering the results, the contractor warrants that the creators will not object to the following on the basis of their moral rights under copyright:

- (a) that their names be mentioned or not mentioned when the results are presented to the public;
- (b) that the results be divulged or not after they have been delivered in their final version to the contracting authority;
- (c) that the results be adapted, provided that this is done in a manner which is not prejudicial to the creator's honour or reputation.

If moral rights on parts of the results protected by copyright may exist, the contractor must obtain the consent of creators regarding the granting or waiver of the relevant moral rights in accordance with the applicable legal provisions and be ready to provide documentary evidence upon request.

#### **II.13.8 Image rights and sound recordings**

If natural persons appear in a result or their voice or any other private element is recorded in a recognisable manner, the contractor must obtain a statement by these persons (or, in the case of minors, by the persons exercising parental authority) giving their permission for the described use of their image, voice or private element and, on request, submit a copy of the permission to the contracting authority. The contractor must take the necessary measures to obtain such consent in accordance with the applicable legal provisions.

#### **II.13.9 Copyright notice for pre-existing rights**

When the contractor retains pre-existing rights on parts of the results, reference must be inserted to that effect when the result is used as set out in Article I.10.1, with the following disclaimer: '© — year — the contracting authority. All rights reserved. Certain parts are licensed under conditions to the contracting authority', or with any other equivalent disclaimer as the contracting authority may consider best appropriate, or as the parties may agree on a case-by-case basis. This does not apply where inserting such reference would be impossible, notably for practical reasons.

#### **II.13.10 Visibility of the contracting authority funding and disclaimer**

When making use of the results, the contractor must declare that they have been produced under a contract with the contracting authority and that the opinions expressed are those of the contractor only and do not represent the contracting authority's official position. The contracting authority may waive this obligation in writing or provide the text of the disclaimer.

#### **II.13.11 Trade secrets**

Under observance of the limitations, if any, provided by applicable laws, the contracting authority shall have the right to disclose trade secrets which are incorporated in the results and/or pre-existing rights to a third party who is modifying the results and/or pre-existing rights in the name of the contracting authority provided that the trade secrets are used solely in connection with the modification of the result and/or the pre-existing rights on behalf of the contracting authority. The contracting authority shall ensure that the third party is bound by the confidentiality obligations contained in this FWC or by essentially corresponding confidentiality terms.

### **ARTICLE II.14 – FORCE MAJEURE**



**II.14.1** If a party is affected by force majeure, it must immediately notify the other party, stating the nature of the circumstances, their likely duration and foreseeable effects.

**II.14.2** A party is not liable for any delay or failure to perform its obligations under the FWC if that delay or failure is a result of force majeure. If the contractor is unable to fulfil its contractual obligations owing to force majeure, it has the right to remuneration only for the services actually provided.

**II.14.3** The parties must take all necessary measures to limit any damage due to force majeure.

## **ARTICLE II.15 – LIQUIDATED DAMAGES**

### **II.15.1 Delay in delivery**

If the contractor fails to perform its contractual obligations within the applicable time limits set out in this FWC or the relevant specific contract, the contracting authority may claim liquidated damages for each day of delay using the following formula:

$$0.3 \times (V/d)$$

where:

V is the price of the relevant purchase or deliverable or result;

d is the duration specified in the FWC or relevant specific contract for delivery of the relevant purchase or deliverable or result or, failing that, the period between the date specified in Article I.4.2 and the date of delivery or performance specified in the relevant specific contract, expressed in days.

Liquidated damages may be imposed together with a reduction in price under the conditions laid down in Article II.16.

### **II.15.2 Procedure**

The contracting authority must formally notify the contractor of its intention to apply liquidated damages and the corresponding calculated amount.

The contractor has 30 days following the date of receipt to submit observations. Failing that, the decision becomes enforceable the day after the time limit for submitting observations has elapsed.

If the contractor submits observations, the contracting authority, taking into account the relevant observations, must notify the contractor:

(a) of the withdrawal of its intention to apply liquidated damages; or

(b) of its final decision to apply liquidated damages and the corresponding amount.

### **II.15.3 Nature of liquidated damages**

The parties expressly acknowledge and agree that any amount payable under this Article is not a penalty and represents a reasonable estimate of fair compensation for the damage incurred due to failure to provide the services within the applicable time limits set out in this FWC or the relevant specific contract.

#### **II.15.4 Claims and liability**

Any claim for liquidated damages does not affect the contractor's actual or potential liability or the contracting authority's rights under Article II.18.

### **ARTICLE II.16 – REDUCTION IN PRICE**

#### **II.16.1 Quality standards**

If the contractor fails to provide the service in accordance with the FWC or a specific contract ('unperformed obligations') or if it fails to provide the service in accordance with the expected quality levels specified in the tender specifications ('low quality delivery'), the contracting authority may reduce or recover payments proportionally to the seriousness of the unperformed obligations or low-quality delivery. This includes in particular cases where the contracting authority cannot approve a result, report or deliverable as defined in Article I.6 after the contractor has submitted the required additional information, correction or new version.

A reduction in price may be imposed together with liquidated damages under the conditions of Article II.15.

#### **II.16.2 Procedure**

The contracting authority must formally notify the contractor of its intention to reduce payment and the corresponding calculated amount.

The contractor has 30 days following the date of receipt to submit observations. Failing that, the decision becomes enforceable the day after the time limit for submitting observations has elapsed.

If the contractor submits observations, the contracting authority, taking into account the relevant observations, must notify the contractor:

- (a) of the withdrawal of its intention to reduce payment; or
- (b) of its final decision to reduce payment and the corresponding amount.

#### **II.16.3 Claims and liability**

Any reduction in price does not affect the contractor's actual or potential liability or the contracting authority's rights under Article II.18.

### **ARTICLE II.17 – SUSPENSION OF THE IMPLEMENTATION OF THE FWC**

#### **II.17.1 Suspension by the contractor**

If the contractor is affected by force majeure, it may suspend the provision of the services under a specific contract.

The contractor must immediately notify the contracting authority of the suspension. The notification must include a description of the force majeure and state when the contractor expects to resume the provision of services.

The contractor must notify the contracting authority as soon as it is able to resume performance of the specific contract, unless the contracting authority has already terminated the FWC or the specific contract.

#### **II.17.2 Suspension by the contracting authority**

The contracting authority may suspend the implementation of the FWC or performance of a specific contract or any part of it:

- (a) if the procedure for awarding the FWC or a specific contract or the implementation of the FWC proves to have been subject to irregularities, fraud or breach of obligations;
- (b) in order to verify whether the presumed irregularities, fraud or breach of obligations actually occurred.

The contracting authority must formally notify the contractor of the suspension and the reasons for it. Suspension takes effect on the date of formal notification, or at a later date if the formal notification so provides.

The contracting authority must notify the contractor as soon as the verification is completed whether:

- (a) it is lifting the suspension; or
- (b) it intends to terminate the FWC or a specific contract under Article II.18.1(f) or (j).

The contractor is not entitled to compensation for suspension of any part of the FWC or a specific contract.

The contracting authority may in addition suspend the time allowed for payments in accordance with Article II.21.7.

### **ARTICLE II.18 – TERMINATION OF THE FWC**

#### **II.18.1 Grounds for termination by the contracting authority**

The contracting authority may terminate the FWC or any on-going specific contract in the following circumstances:

- (a) if provision of the services under an on-going specific contract has not actually started within 15 days of the scheduled date and the contracting authority considers the new date proposed, if any, unacceptable, taking into account Article II.11.2;
- (b) if the contractor is unable, through its own fault, to obtain any permit or licence required for implementation of the FWC;
- (c) if the contractor does not implement the FWC or perform the specific contract in accordance with the tender specifications or request for service or is in breach of another substantial contractual obligation or repeatedly refuses to sign specific contracts. Termination of three or more specific contracts in these circumstances also constitutes grounds for termination of the FWC;

- (d) if the contractor or any person that assumes unlimited liability for the debts of the contractor is in one of the situations provided for in points (a) and (b) of Article 136(1) of the Financial Regulation<sup>4</sup>;
- (e) if the contractor or any related person is subject to any of the situations provided for in points (c) to (h) of Article 136(1) or to Article 136(2) of the Financial Regulation.
- (f) if the procedure for awarding the FWC or the implementation of the FWC prove to have been subject to irregularities, fraud or breach of obligations;
- (g) if the contractor does not comply with applicable obligations under environmental, social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X to Directive 2014/24/EU;
- (h) if the contractor is in a situation that could constitute a conflict of interest or a professional conflicting interest as referred to in Article II.7;
- (i) if a change to the contractor's legal, financial, technical, organisational or ownership situation is likely to substantially affect the implementation of the FWC or substantially modify the conditions under which the FWC was initially awarded or a change regarding the exclusion situations listed in Article 136 of the Financial Regulation that calls into question the decision to award the contract;
- (j) in the event of force majeure, where either resuming implementation is impossible or the necessary ensuing amendments to the FWC or a specific contract would mean that the tender specifications are no longer fulfilled or result in unequal treatment of tenderers or contractors;
- (k) if the needs of the contracting authority change and it no longer requires new services under the FWC; in such cases ongoing specific contracts remain unaffected;
- (l) if the termination of the FWC with one or more of the contractors means that the multiple FWC with reopening of competition no longer has the minimum required level of competition;
- (m) if the contractor is in breach of the data protection obligations resulting from Article II.9.2;
- (n) if the contractor does not comply with the applicable data protection obligations resulting from Regulation (EU) 2016/679.

### **II.18.2 Grounds for termination by the contractor**

The contractor may terminate the FWC or any on-going specific contract if the contracting authority fails to comply with its obligations, in particular the obligation to provide the information needed for the contractor to implement the FWC or to perform a specific contract as provided for in the tender specifications.

### **II.18.3 Procedure for termination**

A party must formally notify the other party of its intention to terminate the FWC or a specific contract and the grounds for termination.

The other party has 30 days following the date of receipt to submit observations, including the measures it has taken or will take to continue fulfilling its contractual obligations. Failing that, the decision to terminate becomes enforceable the day after the time limit for submitting observations has elapsed.

If the other party submits observations, the party intending to terminate must formally notify it either of the withdrawal of its intention to terminate or of its final decision to terminate.

In the cases referred to in points (a) to (d), (g) to (i), (k) to (n) of Article II.18.1 and in Article II.18.2, the date on which the termination takes effect must be specified in the formal notification.

<sup>4</sup> Regulation (EU, EURATOM) No 2018/1046 on the financial rules applicable to the general budget of the Union.

In the cases referred to in points (e), (f) and (j) of Article II.18.1, the termination takes effect on the day following the date on which the contractor receives notification of termination.

In addition, at the request of the contracting authority and regardless of the grounds for termination, the contractor must provide all necessary assistance, including information, documents and files, to allow the contracting authority to complete, continue or transfer the services to a new contractor or internally, without interruption or adverse effect on the quality or continuity of the services. The parties may agree to draw up a transition plan detailing the contractor's assistance unless such plan is already detailed in other contractual documents or in the tender specifications. The contractor must provide such assistance at no additional cost, except if it can demonstrate that it requires substantial additional resources or means, in which case it must provide an estimate of the costs involved and the parties will negotiate an arrangement in good faith.

#### **II.18.4 Effects of termination**

The contractor is liable for damage incurred by the contracting authority as a result of the termination of the FWC or a specific contract including the additional cost of appointing and contracting another contractor to provide or complete the services, except the damage was caused by the situation specified in Article II.18.1(j), (k) or (l) or in Article II.18.2. The contracting authority may claim compensation for such damage.

The contractor is not entitled to compensation for any loss resulting from the termination of the FWC or a specific contract, including loss of anticipated profits, unless the loss was caused by the situation specified in Article II.18.2.

The contractor must take all appropriate measures to minimise costs, prevent damage and cancel or reduce its commitments.

Within 60 days of the date of termination, the contractor must submit any report, deliverable or result and any invoice required for services that were provided before the date of termination.

In the case of joint tenders, the contracting authority may terminate the FWC or a specific contract with each member of the group separately on the basis of points (d), (e), (g), (m) and (n) of Article II.18.1, under the conditions set out in Article II.11.2

### **ARTICLE II.19 – INVOICES, VALUE ADDED TAX AND E-INVOICING**

#### **II.19.1 Invoices and value added tax**

Invoices must contain the contractor's (or leader's in the case of a joint tender) identification data, the amount, the currency and the date, as well as the FWC reference and reference to the specific contract.

Invoices must indicate the place of taxation of the contractor (or leader in the case of a joint tender) for value added tax (VAT) purposes and must specify separately amounts not including VAT and amounts including VAT.

All invoices shall indicate both the contractor's and the contracting authority's VAT number.

The contracting authority is exempt from all taxes and duties, including VAT, in accordance with Articles 3 and 4 of the Protocol on the privileges and immunities of the European Union.

The contractor (or leader in the case of a joint tender) must complete the necessary formalities with the relevant authorities to ensure that the supplies and services required for implementation of the FWC are exempt from taxes and duties, including VAT.

### **II.19.2 E-invoicing**

If provided for in the special conditions, the contractor (or leader in the case of a joint tender) submits invoices in electronic format if the conditions regarding electronic signature specified by Directive 2006/112/EC on VAT are fulfilled, i.e. using a qualified electronic signature or through electronic data interchange.

Reception of invoices by standard format (pdf) or email is not accepted.

### **ARTICLE II.20 – PRICE REVISION**

If a price revision index is provided in Article I.5.2, this Article applies to it.

Prices are fixed and not subject to revision during the first year of the FWC.

At the beginning of the second and every following year of the FWC, each price may be revised upwards or downwards at the request of one of the parties.

A party may request a price revision in writing no later than three months before the anniversary date of entry into force of the FWC. The other party must acknowledge the request within 14 days of receipt.

At the anniversary date, the contracting authority must communicate the final index for the month in which the request was received, or failing that, the last provisional index available for that month. The contractor establishes the new price on this basis and communicates it as soon as possible to the contracting authority for verification.

The contracting authority purchases on the basis of the prices in force at the date on which the specific contract enters into force.

The price revision is calculated using the following formula:

$$Pr = Po \times \left( \frac{Ir}{Io} \right)$$

where: Pr = revised price;

Po = price in the tender;

Io = index for the month in which the FWC enters into force;

Ir = index for the month in which the request to revise prices is received.

### **ARTICLE II.21 – PAYMENTS AND GUARANTEES**

### **II.21.1 Date of payment**

The date of payment is deemed to be the date on which the contracting authority's account is debited.

### **II.21.2 Currency**

Payments are made in euros or in the currency provided for in Article I.7.

### **II.21.3 Conversion**

The contracting authority makes any conversion between the euro and another currency at the daily euro exchange rate published in the Official Journal of the European Union, or failing that, at the monthly accounting exchange rate, as established by the European Commission and published on the website indicated below, applicable on the day when it issues the payment order.

The contractor makes any conversion between the euro and another currency at the monthly accounting exchange rate, established by the Commission and published on the website indicated below, applicable on the date of the invoice.

[http://ec.europa.eu/budget/contracts\\_grants/info\\_contracts/inforeuro/inforeuro\\_en.cfm](http://ec.europa.eu/budget/contracts_grants/info_contracts/inforeuro/inforeuro_en.cfm)

### **II.21.4 Costs of transfer**

The costs of the transfer are borne as follows:

- (a) the contracting authority bears the costs of dispatch charged by its bank;
- (b) the contractor bears the costs of receipt charged by its bank;
- (c) the party causing repetition of the transfer bears the costs for repeated transfer.

### **II.21.5 Pre-financing, performance and money retention guarantees**

If, as provided for in Article I.6, a financial guarantee is required for the payment of pre-financing, as performance guarantee or as retention money guarantee, it must fulfil the following conditions:

- (a) the financial guarantee is provided by a bank or a financial institution approved by the contracting authority or, at the request of the contractor and with the agreement of the contracting authority, by a third party; and
- (b) the guarantee shall have the effect of making the bank or financial institution or the third party provide irrevocable collateral security or stand as first-call guarantor of the contractor's obligations without requiring that the contracting authority has recourse against the principal debtor (the contractor).

The contractor bears the cost of providing such guarantee.

Pre-financing guarantees must remain in force until the pre-financing is cleared against interim payments or payment of the balance. Where the payment of the balance takes the form of a debit note, the pre-financing guarantee must remain in force for three months after the debit note is sent to the contractor. The contracting authority must release the guarantee within the following month.

Performance guarantees cover compliance with substantial contractual obligations until the contracting authority has given its final approval for the service. The performance guarantee must not exceed 10 % of the total price of the specific contract. The contracting authority must release the guarantee fully after final approval of the service, as provided for in the specific contract.

Retention money guarantees cover full delivery of the service in accordance with the specific contract including during the contract liability period and until its final approval by the contracting authority. The retention money guarantee must not exceed 10 % of the total price of the specific contract. The contracting authority must release the guarantee after the expiry of the contract liability period as provided for in the specific contract.

The contracting authority must not request a retention money guarantee for a specific contract where it has requested a performance guarantee.

#### **II.21.6 Interim payments and payment of the balance**

The contractor (or leader in the case of a joint tender) must send an invoice for interim payment, as provided for in Article I.6 or in the tender specifications or in the specific contract.

The contractor (or leader in the case of a joint tender) must send an invoice for payment of the balance within 60 days of the end of the period of provision of the services, as provided for in Article I.6, in the tender specifications or in the specific contract.

Payment of the invoice and approval of documents does not imply recognition of the regularity, authenticity, completeness and correctness of the declarations and information they contain.

Payment of the balance may take the form of recovery.

#### **II.21.7 Suspension of the time allowed for payment**

The contracting authority may suspend the payment periods specified in Article I.6 at any time by notifying the contractor (or leader in the case of a joint tender) that its invoice cannot be processed. The reasons the contracting authority may cite for not being able to process an invoice are:

- (a) because it does not comply with the FWC;
- (b) because the contractor has not produced the appropriate documents or deliverables; or
- (c) because the contracting authority has observations on the documents or deliverables submitted with the invoice.

The contracting authority must notify the contractor (or leader in the case of joint tender) as soon as possible of any such suspension, giving the reasons for it. In cases b) and c) referred above, the contracting authority shall notify the contractor (or leader in case of a joint tender) the time limits to submit additional information or corrections or a new version of the documents or deliverables if the contracting authority requires it.

Suspension takes effect on the date the contracting authority sends the notification. The remaining payment period resumes from the date on which the requested information or revised documents are received or the



necessary further verification, including on-the-spot checks, is carried out. Where the suspension period exceeds two months, the contractor (or leader in the case of a joint tender) may request the contracting authority to justify the continued suspension.

Where the payment periods have been suspended following rejection of a document referred to in the first paragraph of this Article and the new document produced is also rejected, the contracting authority reserves the right to terminate the specific contract in accordance with Article II.18.1(c).

#### **II.21.8 Interest on late payment**

On expiry of the payment periods specified in Article I.6, the contractor (or leader in the case of a joint tender) is entitled to interest on late payment at the rate applied by the European Central Bank for its main refinancing operations in euros (the reference rate) plus eight points. The reference rate is the rate in force, as published in the C series of the Official Journal of the European Union, on the first day of the month in which the payment period ends.

Suspension of the payment period as provided for in Article II.21.7 is not considered as giving rise to late payment.

Interest on late payment covers the period running from the day following the due date for payment up to and including the date of payment as defined in Article II.21.1.

However, when the calculated interest is EUR 200 or less, it must be paid to the contractor (or leader in the case of a joint tender) only if it requests it within two months of receiving late payment.

### **ARTICLE II.22 – REIMBURSEMENTS**

**II.22.1** If provided for in the special conditions or in the tender specifications, the contracting authority must reimburse expenses directly connected with the provision of the services either when the contractor provides it with supporting documents or on the basis of flat rates.

**II.22.2** The contracting authority reimburses travel and subsistence expenses on the basis of the shortest itinerary and the minimum number of nights necessary for overnight stay at the destination.

**II.22.3** The contracting authority reimburses travel expenses as follows:

- (a) Travel by air: up to the maximum cost of an economy class ticket at the time of the reservation;
- (b) Travel by boat or rail: up to the maximum cost of a first-class ticket;
- (c) Travel by private car at the rate of EUR 0.28 per kilometre (calculated on the basis of a google map tool on internet) and any motorway toll charges on presentation of supporting documents;
- (d) Extra costs (e.g. seat reservations, luggage, supplements for high speed trains) shall be reimbursed up to a maximum amount of EUR 40.00;
- (e) Travel agency costs shall be reimbursed up to a maximum amount of EUR 30.00;
- (f) Taxi or airport/hotel shuttles fares are not reimbursed.

In addition, the contracting authority reimburses travel outside Union territory if it has given its prior written approval for the expenses.

**II.22.4** The contracting authority reimburses subsistence expenses on the basis of a daily subsistence allowance as follows:

- (a) for journeys of less than 200 km for a return trip, no subsistence allowance is payable;
- (b) the daily subsistence allowance is payable only on receipt of supporting documents proving that the person concerned was present at the destination;
- (c) the daily subsistence allowance takes the form of a flat rate payment to cover all subsistence expenses, including meals, local transport including transport to and from the airport or station, insurance and sundries;
- (d) the daily subsistence allowance is reimbursed at the flat rates specified in Article I.5.3;
- (e) accommodation is reimbursed on receipt of supporting documents proving the necessary overnight stay at the destination, up to the flat rate ceilings specified in Article I.5.3.

**II.22.5** The contracting authority reimburses the cost of shipment of equipment or unaccompanied luggage if it has given prior written approval for the expense.

## **ARTICLE II.23 – RECOVERY**

**II.23.1** If an amount is to be recovered under the terms of the FWC, the contractor must repay the contracting authority the amount in question.

### **II.23.2 Recovery procedure**

Before recovery, the contracting authority must formally notify the contractor of its intention to recover the amount it claims, specifying the amount due and the reasons for recovery and inviting the contractor to make any observations within 30 days of receipt.

If no observations have been submitted or if, despite the observations submitted, the contracting authority decides to pursue the recovery procedure, it must confirm recovery by formally notifying a debit note to the contractor, specifying the date of payment. The contractor must pay in accordance with the provisions specified in the debit note.

If the contractor does not pay by the due date, the contracting authority may, after informing the contractor in writing, recover the amounts due:

- (a) by offsetting them against any amounts owed to the contractor by the contracting authority;
- (b) by calling in a financial guarantee if the contractor has submitted one to the contracting authority;
- (c) by taking legal action.

### **II.23.3 Interest on late payment**

If the contractor does not honour the obligation to pay the amount due by the date set by the contracting authority in the debit note, the amount due bears interest at the rate indicated in Article II.21.8. Interest on late payments will cover the period starting on the day after the due date for payment and ending on the date when the contracting authority receives the full amount owed.

Any partial payment is first entered against charges and interest on late payment and then against the principal amount.

#### **II.23.4 Recovery rules in the case of joint tender**

If the contract is signed by a group (joint tender), the group is jointly and severally liable under the conditions set out in Article II.6 (liability). The contracting authority shall send the debit note first to the leader of the group.

If the leader does not pay by the due date and if the amount cannot be offset or can only be offset partially in accordance with Article II.23.2 (a), then the contracting authority may claim the amount still due to any other member or members of the group by respectively notifying them with a debit note in conformity with the provisions laid down in Article II.23.2.

#### **ARTICLE II.24 – CHECKS AND AUDITS**

**II.24.1** The contracting authority and the European Anti-Fraud Office may check or require an audit on the implementation of the FWC. This may be carried out either by OLAF's own staff or by any outside body authorised to do so on its behalf.

Such checks and audits may be initiated at any moment during the provision of the services and up to five years starting from the payment of the balance of the last specific contract issued under this FWC

The audit procedure is initiated on the date of receipt of the relevant letter sent by the contracting authority. Audits are carried out on a confidential basis.

**II.24.2** The contractor must keep all original documents stored on any appropriate medium, including digitised originals if authorised under national law, for a period of five years starting from the payment of the balance of the last specific contract issued under this FWC.

**II.24.3** The contractor must grant the contracting authority's staff and outside personnel authorised by the contracting authority the appropriate right of access to sites and premises where the FWC is implemented and to all the information, including information in electronic format, needed to conduct such checks and audits. The contractor must ensure that the information is readily available at the moment of the check or audit and, if so requested, that information is handed over in an appropriate format.

**II.24.4** On the basis of the findings made during the audit, a provisional report is drawn up. The contracting authority or its authorised representative must send it to the contractor, who has 30 days following the date of receipt to submit observations. The contractor must receive the final report within 60 days following the expiry of the deadline to submit observations.

On the basis of the final audit findings, the contracting authority may recover all or part of the payments made in accordance with Article II.23 and may take any other measures which it considers necessary.

**II.24.5** In accordance with Council Regulation (Euratom, EC) No 2185/96 of 11 November 1996 concerning on-the-spot checks and inspection carried out by the Commission in order to protect the European Union's financial interests against fraud and other irregularities and Regulation (EU, Euratom) No 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning

investigations conducted by the European Anti-Fraud Office, the European Anti-Fraud Office may carry out investigations, including on the spot checks and inspections, to establish whether there has been fraud, corruption or any other illegal activity under the contract affecting the financial interests of the Union. Findings arising from an investigation may lead to criminal prosecution under national law.

The investigations may be carried out at any moment during the provision of the services and up to five years starting from the payment of the balance of the last specific contract issued under this FWC.

- II.24.6** The Court of Auditors and the European Public Prosecutor's Office established by Council Regulation (EU) 2017/1939<sup>5</sup> ('the EPPO') have the same rights as the contracting authority, particularly right of access, for the purpose of checks, audits and investigations.

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<sup>5</sup> Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office

## **ANNEX I**

**Tender specifications** (reference No. EMSA/NEG/34/2020 of *[insert date]*)



## ANNEX II

Contractor's Tender (No. [complete] of [complete])



## ANNEX III

 European Maritime Safety Agency	<b>FRAMEWORK SERVICE CONTRACT ORDER FORM</b>			
<b>European Maritime Safety Agency</b> Praça Europa 4 1249-206 Lisbon, Portugal Tel.: +351 211 209 200 VAT: 507 685 326	Order number:	(Name and address of contractor)		
	Currency of payment: EUR			
	Offer (date and reference):			
	Asset reference: (optional)			
This order is governed by the provisions of Framework Contract No. _____ in force from _____ to _____				
<b>LISTING OF THE SERVICES</b>	<b>UNIT</b>	<b>QUANTITY</b>	<b>PRICE in EUR</b>	
			<b>UNIT PRICE</b>	<b>TOTAL</b>
In accordance with Articles 3 and 4 of the Protocol on the Privileges and Immunities of the European Union, the contracting authority is exempt from all taxes and dues, including value added tax, on payments due in respect of this contract. This applies to the contracting authority pursuant to the Regulation 1406/2002/EC. Companies with Portuguese VAT number shall include VAT amount on their invoices. All invoices shall indicate both the contractor's and the contracting authority's VAT number.	<b>Net Total</b>			
	Packaging Insurance Transport Assembly VAT			
	<b>TOTAL:</b> <span style="float: right;">XX,XX.</span>			
Place of delivery or performance: Praça Europa 4, 1249-206 Lisbon, Portugal  Final date of delivery or performance: Terms of payment in accordance with the Framework Contract: Article I.6	<div style="text-align: center; border: 1px solid black; padding: 10px;"> <b>Contractor's signature</b> </div>			
Initiating agent:				
Budgetary item (BL):				
Commitment no.:				
<b>Signature by EMSA:</b> Date of issue: [Name and title Authorising Officer]: The invoice shall be paid only if the contractor has returned the signed order form. Implementation of the contract may not start before it is signed by the last contracting party.				
<b>For further information concerning this order form, please contact:</b> The contracting authority – European Maritime Safety Agency Praça Europa 4, 1249-206 Lisbon, Portugal Tel: [Phone number Project Officer], E-mail: [E-mail address Project Officer] <b>Invoices shall be sent to the following address:</b> European Maritime Safety Agency, Invoice Registration (IR), Unit 4.2 – Legal, Finance and Facilities, Praça Europa 4, 1249-206 LISBOA, Portugal.				