

Enclosure 2 - DRAFT SERVICE CONTRACT
attached to the Invitation to Tender N°EMSA/NEG/19/2014 for
Legal services in the field of aviation law

CONTRACT NUMBER – *[complete]*

The European Maritime Safety Agency (hereinafter referred to as "EMSA"), which is represented by Bernd Bluhm, Head of Unit – Pollution Response Services,

on the one part, and

[full official name]

[official legal form]

[statutory registration number]

[full official address]

[VAT registration number]

(hereinafter referred to as "the contractor"), *[represented by* [forename, surname and function,]]¹

on the other part,

¹ In the case of a joint offer and provided the invitation to tender so specifies, the following clause should be added below the identification of the parties: "The parties identified above and hereinafter collectively referred to as 'the contractor' shall be jointly and severally liable vis-à-vis EMSA for the performance of this contract".

HAVE AGREED

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

Annex I –Tender specifications (reference No NEG/19/2014 of *[insert date]*)

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

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

- The terms set out in the special conditions shall take precedence over those in the other parts of the contract.
- The terms set out in the general conditions shall take precedence over those in the other parts of the contract.
- The terms set out in the tender specifications (Annex I) shall take precedence over those in the tender (Annex II).

I - SPECIAL CONDITIONS

ARTICLE I.1 – SUBJECT MATTER

- I.1.1** The subject matter of the contract is the provision of legal services in the field of aviation law.
- I.1.2** The contractor shall execute the tasks assigned to it in accordance with the tender specifications annexed to the contract (Annex I).

ARTICLE I.2 - ENTRY INTO FORCE, DURATION AND IMPLEMENTATION

- I.2.1** The contract shall enter into force on the date on which it is signed by the last party. The Contract duration is six months following its entry into force.
- I.2.2** Under no circumstances may performance commence before the date on which the contract enters into force.
- I.2.3** Unless otherwise specified, all periods specified in the contract are calculated in calendar days. Execution of the tasks shall start from the date of entry into force of the contract. The period of execution of the tasks may be extended only with the express written agreement of the parties before the expiration of such period.
- I.2.4.** For the provision of 'ad hoc' advice as per point 2.3.b of the Tender Specifications, within 1 working day of a request for services being sent by EMSA by email to the contractor, EMSA shall receive by email an offer indicating the anticipated maximum number of hours needed and a schedule for the delivery of the requested tasks. In these cases, the execution of the services will be conditioned to the acceptance by email of this contractor's offer by EMSA. The period allowed for the execution of these tasks shall start to run from the date indicated in the request for services but not before the date of acceptance of the offer by EMSA. Within two weeks of completion of these tasks, the contractor shall submit weekly timesheets signed by the performing person(s) mentioning the task to which the time sheet corresponds.

ARTICLE I.3 – PRICE

I.3.1

- a. The maximum total amount to be paid by EMSA under the contract shall be EUR *[amount in figures and in words]* covering all tasks executed.
- b. The amount to be paid by EMSA for the 'initial assignment' as described under point 2.3.a of the Tender Specifications (Annex 1) shall be EUR *[amount in figures and in words]*.
- c. For the provision of 'ad hoc' advice as per EMSA's request, the contractor undertakes not to charge EMSA an hourly rate higher than: EUR *[amount in figures and in words]* for the number of hours that will have been agreed in writing by both parties for each request for services.

ARTICLE I.4 – PAYMENT ARRANGEMENTS

I.4.1 Interim payment

a. Within 15 days following completion of the 'initial assignment' described under point 2.3.a of the Tender Specifications (Annex I), the contractor shall submit an invoice for an interim payment of EUR *[amount in figures and in words]* equal to 100 % of the total amount referred to in Article I.3.1.b.

b. The invoice for interim payment shall be accompanied by hard copies of the revised draft Airplane Availability Contract and Incident Response Contract. EMSA shall make the payment within 30 days from receipt of the invoice. The contractor shall have 15 days in which to submit additional information or corrections or documents if required by EMSA.

c. Payments shall be executed only if the contractor has fulfilled all his contractual obligations (relating to the tasks for which an invoice is submitted) by the date on which the invoice is submitted.

I.4.2 Payment of the balance

a. Within one week following either completion of all tasks requested by EMSA within the contract scope or following expiration of the contract, whichever is earliest, the contractor shall submit an invoice for payment of the balance corresponding to the provision of 'ad hoc' advice as per point 2.3.b of the Tender Specifications.

b. EMSA shall make the payment within 30 days from receipt of the invoice. The contractor shall have 15 days in which to submit additional information or corrections or documents if required by EMSA.

c. Payments shall be executed only if the contractor has submitted the weekly time sheets signed by the performing person(s) mentioning the tasks to which the time sheet corresponds as per article I.2.4 and if the contractor has fulfilled all his contractual obligations (relating to the tasks for which an invoice is submitted) by the date on which the invoice is submitted.

ARTICLE I.5 – 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]*

Full account number: *[complete]*

IBAN code: *[complete]*

ARTICLE I.6 – COMMUNICATION DETAILS AND DATA CONTROLLER

For the purpose of Article II.6, the data controller shall be [insert name of entity].

Communications shall be sent to the following addresses²:

EMSA:

European Maritime Safety Agency
Bernd Bluhm
Head of Unit – Pollution Response Services
Praça Europa 4
1249-206 Lisbon
Portugal
Email: *[complete]*

Contractor:

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

ARTICLE I.7 – APPLICABLE LAW AND SETTLEMENT OF DISPUTES

I.7.1 The contract shall be governed by Union law, complemented, where necessary, by the law of Portugal.

I.7.2 Any dispute between the parties in relation to the interpretation, application or validity of the contract which cannot be settled amicably shall be brought before the courts of Lisbon, Portugal.

ARTICLE I.8 - EXPLOITATION OF THE RESULTS OF THE CONTRACT

I.8.1 Modes of exploitation

In accordance with Article II.10.2 whereby EMSA acquires ownership of the results as defined in the tender specifications (Annex I), these results may be used for any of the following purposes:

- (a) use for its own purposes:
 - (i) making available to the staff of EMSA

² Fax number and e-mail accounts may be added. If an e-mail account is given, incoming e-mails should be redirected if the account holder is absent and a clause should be added specifying what is considered to be the reference date of the electronic communication (date of sending, receiving or opening).

- (ii) making available to the persons and entities working for EMSA 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 EMSA or by a third party in the name of EMSA:
- (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 of 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:
 - all official languages of EU,
 - languages of candidate countries,
 - languages of any third country sharing a regional sea basin with the EU.
- (d) the modes of exploitation listed in article II.10.4
- (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 (c) to third parties.

ARTICLE I.9 – TERMINATION BY EITHER PARTY

Either party may, unilaterally and without being required to pay compensation, terminate the contract by notifying the other party by giving three months' notice. Should EMSA terminate the contract, the contractor shall only be entitled to payment corresponding to part-performance of the contract before the termination date. The first paragraph of Article II.14.3 shall apply.

SIGNATURES

For the contractor,

[Company name

forename/surname/function]

For EMSA,

Bernd Bluhm

Head of Unit

signature: _____

signature: _____

Done at _____, on _____

Done at *Lisbon*,

In duplicate in English.

II – GENERAL CONDITIONS FOR SERVICE CONTRACTS

ARTICLE II.1 – PERFORMANCE OF THE CONTRACT

II.1.1 The contractor shall perform the contract to the highest professional standards.

II.1.2 The contractor shall be solely responsible for taking the necessary steps to obtain any permit or licence required for performance of the contract under the laws and regulations in force at the place where the tasks assigned to it are to be executed.

II.1.3 Without prejudice to Article II.4 any reference made to the contractor's personnel in the contract shall relate exclusively to individuals involved in the performance of the contract.

II.1.4 The contractor must ensure that the personnel performing the contract possesses the professional qualifications and experience required for the execution of the tasks assigned to it.

II.1.5 The contractor shall neither represent EMSA nor behave in any way that would give such an impression. The contractor shall inform third parties that it does not belong to the European public service.

II.1.6 The contractor shall be solely responsible for the personnel who executes the tasks assigned to the contractor.

The contractor shall stipulate the following employment or service relationships with its personnel:

- (a) personnel executing the tasks assigned to the contractor may not be given orders directly by EMSA;
- (b) EMSA may not under any circumstances be considered to be the employer of the personnel referred to in point (a) and the personnel shall undertake not to invoke against EMSA any right arising from the contractual relationship between EMSA and the contractor.

II.1.7 In the event of disruption resulting from the action of one of the contractor's personnel working on EMSA's premises or in the event that the expertise of a member of the contractor's personnel fails to correspond to the profile required by the contract, the contractor shall replace him without delay. EMSA shall have the right to make reasoned request for the replacement of any such personnel. The replacement personnel must have the necessary qualifications and be capable of performing the contract under the same contractual conditions. The contractor shall be responsible for any delay in the execution of the tasks assigned to it resulting from the replacement of personnel.

II.1.8 Should the execution of the tasks be directly or indirectly hampered, either partially or totally, by any unforeseen event, action or omission, the contractor shall immediately and on its own initiative record it and report it to EMSA. The report shall include a description of the problem and an indication of the date on which it started and of the remedial action taken by the contractor to ensure full compliance with its obligations under this contract. In such an event the contractor shall give priority to solving the problem rather than determining liability.

II.1.9 Should the contractor fail to perform its obligations under the contract, EMSA may-without prejudice to its right to terminate the contract-reduce or recover payments in proportion to the scale of the unperformed obligations. In addition, EMSA may claim compensation or impose liquidated damages in accordance with Article II.12.

ARTICLE II.2 – MEANS OF COMMUNICATION

II.2.1 Any communication relating to the contract or to its performance shall be made in writing and shall bear the contract number. Any communication is deemed to have been made when it is received by the receiving party unless otherwise provided for in this contract.

II.2.2 Electronic communication shall be deemed to have been received by the parties on the day of dispatch of that communication provided it is sent to the addressees listed in Article I.6. Without prejudice to the preceding, if the sending party receives a message of non-delivery to or of absence of the addressee, it shall make every effort to ensure the actual receipt of such communication by the other party.

Electronic communication shall be confirmed by an original signed paper version of that communication if requested by any of the parties provided that this request is submitted without unjustified delay. The sender shall send the original signed paper version without unjustified delay.

II.2.3 Mail sent using the postal services is deemed to have been received by EMSA on the date on which it is registered by the department responsible referred to in Article I.6.

Any formal notification shall be made by registered mail with return receipt or equivalent, or by equivalent electronic means.

ARTICLE II.3 – LIABILITY

II.3.1 The contractor shall be solely responsible for complying with any legal obligations incumbent on it.

II.3.2 EMSA shall not be held liable for any damage caused or sustained by the contractor, including any damage caused by the contractor to third parties during or as a consequence of performance of the contract, except in the event of wilful misconduct or gross negligence on the part of EMSA.

II.3.3 The contractor shall be held liable for any loss or damage sustained by EMSA in performance of the contract, including in the event of subcontracting, and for any claim by a third party, but only to an amount not exceeding three times the total amount of the contract. Nevertheless,

if the damage or loss is caused by the gross negligence or wilful misconduct of the contractor or of its personnel or subcontractors, the contractor's liability shall be limited to the amount of the damage or loss.

II.3.4 The contractor shall indemnify and hold EMSA harmless for all damages and costs incurred due to any claim. The contractor shall provide compensation in the event of any action, claim or proceeding brought against EMSA by a third party as a result of damage caused by the contractor during the performance of the contract. In the event of any action brought by a third party against EMSA in connection with performance of the contract, including any alleged breach of intellectual property rights, the contractor shall assist EMSA. Such expenditure incurred by the contractor may be borne by EMSA.

II.3.5 The contractor shall take out an insurance policy against risks and damage relating to the performance of the contract, if required by the relevant applicable legislation. It shall take out supplementary insurance as reasonably required by standard practice in the industry. A copy of all the relevant insurance contracts shall be sent to EMSA should it so request.

ARTICLE II.4 - CONFLICT OF INTEREST

II.4.1 The contractor shall take all necessary measures to prevent any situation of conflict of interest. Such situation arises where the impartial and objective performance of the contract is compromised for reasons involving economic interest, political or national affinity, family or emotional ties, or any other shared interest.

II.4.2 Any situation consisting or likely to lead to a conflict of interests during the performance of the contract shall be notified to EMSA in writing without delay. The contractor shall immediately take all the necessary steps to rectify the situation. EMSA reserves the right to verify that the steps taken are appropriate and may require that additional steps be taken within a specified deadline.

II.4.3 The contractor declares that he has not granted and will not grant, has not sought and will not seek, has not attempted and will not attempt to obtain, and has not accepted and will not accept, any advantage, financial or in kind, to or from any party whatsoever, when such advantage constitutes an illegal practice or involves corruption, either directly or indirectly, in so far as it serves as an incentive or reward relating to the performance of the contract.

II.4.4 The contractor shall pass on all the relevant obligations in writing to its personnel and to any natural person with power to represent it or take decisions on its behalf and ensure that it is not placed in a situation which could give rise to conflicts of interest. The contractor shall also pass on all the relevant obligations in writing to third parties involved in the performance of the contract including subcontractors.

ARTICLE II.5 – CONFIDENTIALITY

II.5.1 EMSA and the contractor shall treat with confidentiality any information and documents, in any form, disclosed in writing or orally in relation to the performance of the contract and identified in writing as confidential.

The contractor shall:

- (a) not use confidential information and documents for any purpose other than fulfilling its obligations under the contract without prior written agreement of EMSA;
- (b) ensure the protection of such confidential information and documents with the same level of protection it uses to protect its own confidential information, but in no case any less than reasonable care;
- (c) not disclose directly or indirectly confidential information and documents to third parties without prior written agreement of EMSA.

II.5.2 The confidentiality obligation set out in Article II.5.1 shall be binding on EMSA and the contractor during the performance of the contract and for five years starting from the date of the payment of the balance unless:

- (a) the disclosing party agrees to release the other party from the confidentiality obligation earlier;
- (b) the confidential information becomes public through other means than in breach of the confidentiality obligation, through disclosure by the party bound by that obligation;
- (c) the disclosure of the confidential information is required by law.

II.5.3 The contractor shall 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 performance of the contract, an undertaking that they will comply with the confidentiality obligation set out in Article II.5.1.

ARTICLE II.6 – PROCESSING OF PERSONAL DATA

II.6.1 Any personal data included in the contract shall be processed pursuant to Regulation (EC) 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data. Such data shall be processed by the data controller solely for the purposes of the performance, management and monitoring of the contract without prejudice to its possible transmission to the bodies charged with monitoring or inspection tasks in application of Union law.

II.6.2 The contractor shall have the right of access to its personal data and the right to rectify any such data. The contractor should address any queries concerning the processing of its personal data to the data controller.

II.6.3 The contractor shall have right of recourse at any time to the European Data Protection Supervisor.

II.6.4 Where the contract requires the processing of personal data by the contractor, the contractor may act only under the supervision of the data controller, in particular with regard to the purposes of the processing, the categories of data which may be processed, the recipients of the data, and the means by which the data subject may exercise his rights.

II.6.5 The contractor shall grant its personnel access to the data to the extent strictly necessary for the performance, management and monitoring of the contract.

II.6.6 The contractor undertakes to adopt appropriate technical and organisational security measures having regard to the risks inherent in the processing and to the nature of the personal data concerned in order to:

- (a) prevent any unauthorised person from gaining access to computer systems processing personal data, and especially:
 - (i) unauthorised reading, copying, alteration or removal of storage media;
 - (ii) unauthorised data input as well as any unauthorised disclosure, alteration or erasure of stored personal data;
 - (iii) unauthorised using of data-processing systems by means of data transmission facilities;
- (b) ensure that authorised users of a data-processing system can access only the personal data to which their access right refers;
- (c) record which personal data have been communicated, when and to whom;
- (d) ensure that personal data being processed on behalf of third parties can be processed only in the manner prescribed by EMSA;
- (e) ensure that, during communication of personal data and transport of storage media, the data cannot be read, copied or erased without authorisation;
- (f) design its organisational structure in such a way that it meets data protection requirements.

ARTICLE II.7 – SUBCONTRACTING

II.7.1 The contractor shall not subcontract without prior written authorisation from EMSA nor cause the contract to be de facto performed by third parties.

II.7.2 Even where EMSA authorises the contractor to subcontract to third parties, it shall nevertheless remain bound by its contractual obligations and shall be solely responsible for the proper performance of this contract.

II.7.3 The contractor shall make sure that the subcontract does not affect rights and guarantees granted to EMSA by virtue of this contract, notably by Article II.18.

ARTICLE II.8 – AMENDMENTS

II.8.1 Any amendment to the contract shall be made in writing before fulfilment of any new contractual obligations and in any case before the date of payment of the balance.

II.8.2 The amendment may not have the purpose or the effect of making changes to the contract which might call into question the decision awarding the contract or result in unequal treatment of tenderers.

ARTICLE II.9 – ASSIGNMENT

II.9.1 The contractor shall not assign the rights, including claims for payments, and obligations arising from the contract, in whole or in part, without prior written authorisation from EMSA.

II.9.2 In the absence of such authorisation, or in the event of failure to observe the terms thereof, the assignment of rights or obligations by the contractor shall not be enforceable against EMSA and shall have no effect on it.

ARTICLE II.10 – OWNERSHIP OF THE RESULTS – INTELLECTUAL AND INDUSTRIAL PROPERTY RIGHTS

II.10.1 Definitions

In this contract the following definitions apply:

- (1) 'results' means any intended outcome of the performance of the contract which is delivered and finally accepted by EMSA.
- (2) 'creator' means any natural person who contributed to the production of the result and includes personnel of EMSA or a third party.
- (3) 'pre-existing rights' means any industrial and intellectual property rights, including background technology, which exist prior to EMSA or the contractor ordering them for the purpose of the contract execution and include rights of ownership and use by the contractor, the creator, EMSA and any third parties.

II.10.2 Ownership of the results

The ownership of the results shall be fully and irrevocably acquired by EMSA under this contract including any rights in any of the results listed in this contract, including copyright and other intellectual or industrial property rights, and all technological solutions and information contained therein, produced in performance of the contract. EMSA may exploit them as stipulated in this contract. All the rights shall be acquired by EMSA from the moment the results are delivered by the contractor and accepted by EMSA. Such delivery and acceptance are deemed to constitute an effective assignment of rights from the contractor to EMSA.

The payment of the price as set out in the order forms or specific contracts is deemed to include any fees payable to the contractor in relation to the acquisition of ownership of rights by EMSA including all forms of use of the results.

The acquisition of ownership of rights by EMSA under this contract covers all territories worldwide.

Any intermediary sub-result, raw data, intermediary analysis made available by the contractor cannot be used by EMSA without the written consent of the

contractor, unless the contract explicitly provides for it to be treated as self-contained result.

II.10.3 Licensing of pre-existing rights

EMSA shall not acquire ownership of the pre-existing rights.

The contractor shall license the pre-existing rights on a royalty-free, non-exclusive and irrevocable basis to EMSA which may use the pre-existing right as foreseen in Article I.8.1 or in order forms or specific contracts. All the pre-existing rights shall be licensed to EMSA from the moment the results were delivered and accepted by EMSA.

The licensing of pre-existing rights to EMSA under this contract covers all territories worldwide and is valid for the whole duration of intellectual property rights protection.

II.10.4 Modes of exploitation

EMSA shall acquire ownership of each of the results produced as an outcome of this contract which may be used for any of the following purposes:

- (a) 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;
- (b) storage of the original and copies made in accordance with this contract;
- (c) archiving in line with the document management rules applicable to EMSA.

II.10.5 Identification and evidence of granting of pre-existing rights and rights of third parties

When delivering the results, the contractor shall warrant that they are free of rights or claims from creators and third parties including in relation to pre-existing rights, for any use envisaged by EMSA. This does not concern the moral rights of natural persons.

The contractor shall establish to that effect a list of all pre-existing rights and rights of creators and third parties on the results of this contract or parts thereof. This list shall be provided no later than the date of delivery of the final results.

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

Upon request by EMSA, the contractor shall provide evidence of ownership or rights to use all the listed pre-existing rights and rights of third parties except for the rights owned by EMSA.

This evidence may refer, inter alia, to rights to: parts of other documents, images, graphs, tables, data, software, technical inventions, know-how etc.

(delivered in paper, electronic or other form), IT development tools, routines, subroutines and/or other programs ("background technology"), concepts, designs, installations or pieces of art, data, source or background materials or any other parts of external origin.

The evidence shall 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 in case it is found that it does not hold the necessary rights, regardless of when and by whom this fact was 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.10.6 Creators

By delivering the results the contractor warrants that the creators undertake not to oppose that their names be recalled when the results are presented to the public and confirms that the results can be divulged. Names of authors shall be recalled on request in the manner communicated by the contractor to EMSA.

The contractor shall obtain the consent of creators regarding the granting of the relevant rights and be ready to provide documentary evidence upon request.

II.10.7 Persons appearing in photographs or films

If natural, recognisable persons appear in a result or their voice is recorded the contractor shall submit a statement of these persons (or of the persons exercising parental authority in case of minors) where they give their permission for the described use of their image or voice on request by EMSA. This does not apply to persons whose permission is not required in line with the law of the country where photographs were taken, films shot or audio records made.

II.10.8 Copyright for pre-existing rights

When the contractor retains pre-existing rights on parts of the results, reference shall be inserted to that effect when the result is used as set out in Article I.8.1 with the following disclaimer: © - year – EMSA. All rights reserved. Certain parts are licensed under conditions to EMSA.

II.10.9 Visibility of EMSA funding and disclaimer

When making use of the results, the contractor shall declare that they have been produced within a contract with EMSA and that the opinions expressed are those of the contractor only and do not represent EMSA's official position. EMSA may waive this obligation in writing.

ARTICLE II.11 – FORCE MAJEURE

II.11.1 'Force majeure' means any unforeseeable and exceptional situation or event beyond the parties' control which prevents either of them from fulfilling any of their obligations under the contract, which was not attributable to error or negligence on their part or on the part of a subcontractors and which proves to be inevitable in spite of exercising due diligence. Any default of a service, defect in equipment or material or delays in making them available, unless they stem directly from a relevant case of force majeure, as well as labour disputes, strikes or financial difficulties, cannot be invoked as force majeure.

II.11.2 A party faced with force majeure shall notify the other party without delay, stating the nature, likely duration and foreseeable effects.

II.11.3 The party faced with force majeure shall not be held in breach of its contractual obligations if it has been prevented from fulfilling them by force majeure. Where the contractor is unable to fulfil its contractual obligations owing to force majeure, it shall have the right to remuneration only for the tasks actually executed.

II.11.4 The parties shall take all the necessary measures to limit any damage due to force majeure.

ARTICLE II.12 – LIQUIDATED DAMAGES

EMSA may impose liquidated damages should the contractor fail to complete its contractual obligations, also with regard to the required quality level, according to the tender specifications.

Should the contractor fail to perform its contractual obligations within the time-limits set by the contract, then, without prejudice to the contractor's actual or potential liability or to EMSA's right to terminate the contract, EMSA may impose liquidated damages for each and every calendar day of delay according to the following formula:

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

V is the amount specified in Article I.3.1.a;

d is the duration specified in Article I.2.1 expressed in calendar days.

The contractor may submit arguments against this decision within 30 days of receipt of the formal notification. In the absence of a reaction on its part or of written withdrawal by EMSA within 30 days of the receipt of such arguments, the decision imposing the liquidated damages shall become enforceable.

The parties expressly acknowledge and agree that any sums payable under this article are in the nature of liquidated damages and not penalties, and represent a reasonable estimate of fair compensation for the losses incurred due to failure to fulfil obligations which may be reasonably anticipated.

ARTICLE II.13 – SUSPENSION OF THE PERFORMANCE OF THE CONTRACT

II.13.1 Suspension by the contractor

The contractor may suspend the performance of the contract or any part thereof if a case of force majeure makes such performance impossible or excessively difficult. The contractor shall inform EMSA about the suspension without delay, giving all the necessary reasons and details and the envisaged date for resuming the performance of the contract.

Once the circumstances allow resuming performance, the contractor shall inform EMSA immediately, unless EMSA has already terminated the contract.

II.13.2 Suspension by EMSA

EMSA may suspend the performance of the contract or any part thereof:

- (a) if the contract award procedure or the performance of the contract prove to have been subject to substantial errors, irregularities or fraud;
- (b) in order to verify whether presumed substantial errors, irregularities or fraud have actually occurred.

Suspension shall take effect on the day the contractor receives formal notification, or at a later date provided in the notification. EMSA shall give notice as soon as possible to the contractor to resume the service suspended or inform the contractor that it is proceeding with the termination of the contract. The contractor shall not be entitled to claim compensation on account of suspension of the contract or of part thereof.

ARTICLE II.14 – TERMINATION OF THE CONTRACT

II.14.1 Grounds for termination

EMSA may terminate the contract in the following circumstances:

- (a) if a change to the contractor's legal, financial, technical or organisational or ownership situation is likely to affect the performance of the contract substantially or calls into question the decision to award the contract;
- (b) if execution of the tasks has not actually commenced within three months of the date foreseen, and the new date proposed, if any, is considered unacceptable by EMSA, taking into account Article II.8.2;
- (c) if the contractor does not perform the contract as established in the tender specifications or fails to fulfil another substantial contractual obligation;
- (d) in the event of force majeure notified in accordance with Article II.11 or if the performance of the contract has been suspended by the contractor as

a result of force majeure, notified in accordance with Article II.13, where either resuming performance is impossible or the modifications to the contract might call into question the decision awarding the contract or result in unequal treatment of tenderers;

- (e) if the contractor is declared bankrupt, is being wound up, is having its affairs administered by the courts, has entered into an arrangement with creditors, has suspended business activities, is the subject of proceedings concerning those matters, or is in any analogous situation arising from a similar procedure provided for in national legislation or regulations;
- (f) if the contractor or any natural person with the power to represent it or take decisions on its behalf has been found guilty of professional misconduct proven by any means;
- (g) if the contractor is not in compliance with its obligations relating to the payment of social security contributions or the payment of taxes in accordance with the legal provisions of the country in which it is established or with those of the country of the applicable law of this contract or those of the country where the contract is to be performed;
- (h) if EMSA has evidence that the contractor or natural persons with the power to represent it or take decisions on its behalf have committed fraud, corruption, or are involved in a criminal organisation, money laundering or any other illegal activity;
- (i) if EMSA has evidence that the contractor or natural persons with the power to represent it or take decisions on its behalf have committed substantial errors, irregularities or fraud in the award procedure or the performance of the contract, including in the event of submission of false information;
- (j) if the contractor is unable, through its own fault, to obtain any permit or licence required for performance of the contract.

II.14.2 Procedure for termination

When EMSA intends to terminate the contract it shall notify the contractor of its intention specifying the grounds thereof. EMSA shall invite the contractor to make any observations and, in the case of point (c) of Article II.14.1, to inform EMSA about the measures taken to continue the fulfilment of its contractual obligations, within 30 days from receipt of the notification.

If EMSA does not confirm acceptance of these observations by giving written approval within 30 days of receipt, the termination procedure shall proceed. In any case of termination EMSA shall notify the contractor about its decision to terminate the contract. In the cases referred to in points (a), (b), (c), (e), (g) and (j) of Article II.14.1 the formal notification shall specify the date on which the termination takes effect. In the cases referred to in points (d), (f), (h), and (i) of Article II.14.1 the termination shall take effect on the day following the date on which notification of termination is received by the contractor.

II.14.3 Effects of termination

In the event of termination, the contractor shall waive any claim for consequential damages, including any loss of anticipated profits for uncompleted work. On

receipt of the notification of termination, the contractor shall take all appropriate measures to minimise costs, prevent damage, and cancel or reduce its commitments. The contractor shall have 60 days from the date of termination to draw up the documents required by the special conditions for the tasks already executed on the date of termination and produce an invoice if necessary. EMSA may recover any amounts paid under the contract.

EMSA may claim compensation for any damage suffered in the event of termination.

On termination EMSA may engage any other contractor to execute or complete the services. EMSA shall be entitled to claim from the contractor all extra costs incurred in this regard, without prejudice to any other rights or guarantees it may have under the contract.

ARTICLE II.15 – REPORTING AND PAYMENTS

II.15.1 Date of payment

Payments shall be deemed to be effected on the date when they are debited to EMSA's account.

II.15.2 Currency

The contract shall be in euros. Payments shall be executed in euros.

Conversion between the euro and another currency shall be made according to the daily euro exchange rate published in the *Official Journal of the European Union* or, failing that, at the monthly accounting exchange rate established by the European Commission and published on its website, applicable on the day on which the payment order is issued by EMSA.

II.15.3 Costs of transfer

The costs of the transfer shall be borne in the following way:

- (a) costs of dispatch charged by the bank of EMSA shall be borne by EMSA,
- (b) cost of receipt charged by the bank of the contractor shall be borne by the contractor,
- (c) costs for repeated transfer caused by one of the parties shall be borne by the party causing repetition of the transfer.

II.15.4 Invoices and Value Added Tax

Invoices shall contain the contractor's identification, the amount, the currency and the date, as well as the contract reference.

Invoices shall indicate the place of taxation of the contractor for value added tax (VAT) purposes and shall specify separately the amounts not including VAT and the amounts including VAT.

EMSA is, as a rule, exempt from all taxes and duties, including VAT, pursuant to the provisions of Articles 3 and 4 of the Protocol on the Privileges and Immunities of the European Union.

The contractor shall accordingly complete the necessary formalities with the relevant authorities to ensure that the supplies and services required for performance of the contract are exempt from taxes and duties, including VAT exemption.

II.15.6 Interim payments and payment of the balance

The contractor shall submit an invoice for interim payment upon delivery of the documents, as provided for in Article I.4 and in the tender specifications.

The contractor shall submit an invoice for payment of the balance following the end of the period referred to in Article I.4.2, accompanied by a final progress report or any other documents provided for in for in Article I.4 or in the tender specifications.

Upon receipt, EMSA shall pay the amount due as interim or final payment within the periods specified in Article I.4, provided the invoice and documents have been approved and without prejudice to Article II.15.7. Approval of the invoice and documents shall not imply recognition of the regularity or of the authenticity, completeness and correctness of the declarations and information they contain.

Payment of the balance may take the form of recovery.

II.15.7 Suspension of the time allowed for payment

EMSA may suspend the payment periods specified in Article I.4 at any time by notifying the contractor that its invoice cannot be processed, either because it does not comply with the provisions of the contract, or because the appropriate documents have not been produced.

EMSA shall inform the contractor in writing as soon as possible of any such suspension, giving the reasons for it.

Suspension shall take effect on the date the notification is sent by EMSA. The remaining payment period shall start to run again 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 may request EMSA to justify the continued suspension.

Where the payment periods have been suspended following rejection of a document referred to in the first paragraph and the new document produced is also rejected, EMSA reserves the right to terminate the contract in accordance with Article II.14.1(c).

II.15.8 Interest on late payment

On expiry of the payment periods specified in Article I.4, and without prejudice to Article II.15.7, the contractor 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 percentage points. The reference rate shall be the

rate in force on the first day of the month in which the payment period ends, as published in the C series of the *Official Journal of the European Union*.

The suspension of the payment periods in accordance with Article II.15.7 may not be considered as a late payment.

Interest on late payment shall cover the period running from the day following the due date for payment up to and including the date of actual payment as defined in Article II.15.1.

However, when the calculated interest is lower than or equal to EUR 200, it shall be paid to the contractor only upon request submitted within two months of receiving late payment.

[ARTICLE II.16 – NOT APPLICABLE]

ARTICLE II.17 – RECOVERY

II.17.1 If an amount is to be recovered under the terms of the contract, the contractor shall repay EMSA the amount in question according to the terms and by the date specified in the debit note.

II.17.2 If the obligation to pay the amount due is not honoured by the date set by EMSA in the debit note, the amount due shall bear interest at the rate indicated in Article II.15.8. Interest on late payments shall cover the period from the day following the due date for payment, up to and including the date when EMSA receives full payment of the amount owed.

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

II.17.3 If payment has not been made by the due date, EMSA may, after informing the contractor in writing, recover the amounts due by offsetting them against any amounts owed to the contractor by EMSA or by calling in the financial guarantee, where provided for in Article I.4.

ARTICLE II.18 – CHECKS AND AUDITS

II.18.1 EMSA and the European Anti-Fraud Office may check or carry out an audit on the performance of the contract. It may be carried out either directly by its own staff or by any other outside body authorised to do so on its behalf.

Such checks and audits may be initiated during the performance of the contract and during a period of five years which starts running from the date of the payment of the balance.

The audit procedure shall be deemed to be initiated on the date of receipt of the relevant letter sent by EMSA. Audits shall be carried out on a confidential basis.

II.18.2 The contractor shall keep all original documents stored on any appropriate medium, including digitised originals when they are authorised by national law and under the conditions laid down therein,

for a period of five years which starts running from the date of payment of the balance.

II.18.3 The contractor shall allow EMSA's staff and outside personnel authorised by EMSA the appropriate right of access to sites and premises where the contract is performed and to all the information, including information in electronic format, needed in order to conduct such checks and audits. The contractor shall ensure that the information is readily available at the moment of the check or audit and, if so requested, that information be handed over in an appropriate form.

II.18.4 On the basis of the findings made during the audit, a provisional report shall be drawn up. It shall be sent to the contractor, which shall have 30 days following the date of receipt to submit observations. The final report shall be sent to the contractor within 60 days following the expiry of that deadline.

On the basis of the final audit findings, EMSA may recover all or part of the payments made and may take any other measure which it considers necessary.

II.18.5 By virtue of 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 Communities' financial interests against fraud and other irregularities and Regulation (EC) No 1073/1999 of the European Parliament and the Council of 25 May 1999 concerning investigation conducted by the European Anti-Fraud Office (OLAF), the OLAF may also carry out on-the-spot checks and inspections in accordance with the procedures laid down by Union law for the protection of the financial interests of the Union against fraud and other irregularities. Where appropriate, the findings may lead to recovery by EMSA.

II.18.6 The Court of Auditors shall have the same rights as EMSA, notably right of access, for the purpose of checks and audits.