

DRAFT FRAMEWORK CONTRACT FOR SUPPLIES [LOT ...]

FRAMEWORK CONTRACT NUMBER – 2016/EMSA/OP/14/2016

The European Maritime Safety Agency (hereinafter referred to as "EMSA"), with its seat at Praça Europa 4, 1249-206, Lisbon, Portugal, VAT registration no.: 507 685 326, represented by Markku Mylly, EMSA Executive Director,

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]

[appointed as the leader of the group by the members of the group that submitted the joint tender]

([collectively] 'the contractor'), represented for the purposes of the signature of this framework contract by
[forename, surname, function of legal representative and name of company in the case of a joint tender]

[For joint tenders, repeat these data as many times as there are contractors and continue numbering]

on the other part

HAVE AGREED

to the **special conditions**, the **general conditions for framework contracts for supplies**, and the following Annexes:

Annex I Tender specifications (reference No EMSA/OP/14/2016 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 FWC").

This FWC sets out:

1. the procedure by which EMSA may order supplies from the contractor;
2. the provisions that apply to any specific contract which EMSA 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:

The provisions set out in the special conditions take precedence over those in the other parts of the FWC.

The provisions set out in the general conditions take precedence over those in the specific contract (Annex III)

The provisions set out in the specific contract (Annex III) take precedence over those in the other annexes.

The provisions set out in the tender specifications (Annex I) take precedence over those in the tender (Annex II).

The provisions set out in the FWC take precedence over those in the specific contracts.

ARTICLE I.2 SUBJECT MATTER

The subject matter of the FWC is the provision of shore-based Automatic Identification Systems (AIS) equipment to Lebanon and Tunisia in the framework of the European Neighbourhood Policy in the Mediterranean sea implemented by EMSA.

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 7 months with effect from the date of its entry 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 supplies relating to such specific contracts must be delivered no later than the 10 March 2017.

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 supplies

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

I.4.3 Implementation of single FWC

Unless otherwise agreed by the parties, within two weeks from receipt of EMSA request, the contractor shall submit a quotation on transportation cost of the AIS equipment from the warehouse to the delivery place specified by EMSA and on the proposed week number of delivery of the equipment.

Subject to EMSA's approval, the specific contract will be sent to the contractor within one week from receipt of the quotation and proposal for the delivery time.

Within 7 working days, the contractor must either:

- send the specific contract back to EMSA signed and dated; or
- send an explanation of why it cannot accept the order.

If the contractor repeatedly refuses to sign the specific contracts 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.17.1 (c).

I.4.4 DELIVERY

The AIS equipment shall be delivered according to the delivery time specified in the specific contract. The time for delivering shall not exceed 4 months from the date of signature of the specific contract. The period allowed for the execution of the delivery of supplies shall start to run on the date the contractor signs the specific contract, unless a different date is indicated on the specific contract.

The ownership of the equipment together with associated risk shall be transferred from the contractor to EMSA upon delivery of the equipment at the quay of the port in the beneficiary country.

The delivery of the equipment shall be accompanied by a consignment note in duplicate to be signed by the contractor or his carrier and by the beneficiaries' representative(s). The contractor shall send a copy of the signed consignment note to EMSA by fax/e-mail.

Additional modalities of handover of the equipment may be agreed by the parties regarding the delivery of the equipment.

EMSA may send a representative on the delivery date.

The beneficiary country shall be responsible to take all the necessary steps to clear the equipment for import as well as take care of all the necessary formalities for that (if any).

The beneficiary country shall be responsible to take care and pay for the local transport from the port where the equipment was delivered on quay to the place where the equipment shall be stored.

The contractor shall notify EMSA of the exact date of delivery at least 15 days in advance. All deliveries shall be made between 9.00 hours and 19.00 hours at the agreed place of delivery.

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] excluding VAT.

However, this does not bind EMSA to purchase for the maximum amount.

I.5.2 Price revision index

Price revision is not applicable to this FWC.

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 50 % of the total price referred to in the relevant specific contract in accordance with Article II.20.6.

The contractor (or leader in the case of a joint tender) must send an invoice for the interim payment as provided for in the tender specifications, accompanied by the relevant progress report, specifying the following:

- equipment purchased,
- its warranty period,
- its compatibility with the Mediterranean AIS Regional Exchange Server MAREΣ,

It shall include all the relevant technical documentation (these documents could be compiled in a CD).

The progress report shall also specify the carrier contracted for the transportation of the equipment to the relevant country as well as estimated date of delivery. The report shall also include the proof of insurance taken and indicate any relevant actions taken in relation to the intended transportation of the equipment to the place of destination.

EMSA must approve any submitted documents or supplies and pay within 30 days from receipt of the invoice.

If EMSA 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.20.7.

The contractor (or leader in the case of a joint tender) has 10 days to submit additional information or corrections or new supplies if EMSA requires it.

EMSA must give its approval and pay within the remainder of the time-limit indicated in point (2.) unless it rejects partially or fully the submitted documents or supplies.

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.20.6.

The contractor (or leader in the case of a joint tender) must send an invoice for payment of the balance due under a specific contract, as provided for in the tender specifications and accompanied by the following:

- a) duly signed and dated copy of the consignment note attesting the delivery of the equipment.

EMSA must approve any submitted documents or supplies and pay within 60 days from receipt of the invoice.

If EMSA 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.20.7.

The contractor (or leader in the case of a joint tender) has 30 days to submit additional information or corrections or new supplies if EMSA requires it.

EMSA must give its approval and pay within the remainder of the time-limit indicated in point (2.) unless it rejects partially or fully the submitted documents or supplies.

I.6.4 Performance guarantee

Performance guarantee is not applicable to this FWC.

I.6.5 Retention money guarantee

Retention money guarantee is not applicable to this FWC.

ARTICLE I.7 – BANK ACCOUNT

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

Name of bank:

Full address of branch:

Exact designation of account holder:

Full account number including [bank] codes:

[IBAN¹ code:]

ARTICLE I.8 – COMMUNICATION DETAILS

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

¹ BIC or SWIFT code for countries with no IBAN code.

EMSA:

European Maritime Safety Agency
Markku Mylly
Executive Director
Praça Europa 4
1249-206 Lisbon
Portugal

Contractor:

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

Invoices shall be sent to the following address:

EMSA:

European Maritime Safety Agency
Invoice Registration (IR)
Unit A.2 – Legal and Financial Affairs
Praça Europa 4
1249-206 Lisbon
Portugal

ARTICLE I.9 - DATA CONTROLLER

For the purpose of Article II.9, the data controller is the Head of Unit B.3 – Environment & Capacity Building.

ARTICLE I.10 - 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 one month 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 supplies delivered before termination takes effect.

The second, third and fourth paragraphs of Article II.17.4 apply.

ARTICLE I.11 - APPLICABLE LAW AND SETTLEMENT OF DISPUTES

I.11.1 The FWC shall be governed by Union law, complemented, where necessary, by the law of Portugal.

I.11.2 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.12 – INTER-INSTITUTIONAL CONTRACT

Not applicable.

ARTICLE I.13 – E-PROCUREMENT

The execution of the contract between EMSA 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. At the request of EMSA, the use of the above applications may be mandatory during the lifetime of the contract.

SIGNATURES

For the contractor,

[Company name/forename/surname/function]

For EMSA,

Markku Mylly

Executive Director

signature: _____

signature: _____

Done at:

Done at Lisbon

Date:

Date:

In duplicate in English.

II - GENERAL CONDITIONS FOR FRAMEWORK CONTRACT FOR SUPPLIES

ARTICLE II.1 – DEFINITIONS

For the purpose of this FWC, the following definitions (indicated in *italics* in the text) apply:

‘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, or any other shared interest with EMSA or any third party related to the subject matter of the FWC;

‘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, 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’: any intentional act or omission affecting the Union’s financial interests relating to the use or presentation of false, incorrect or incomplete statements or documents or to non-disclosure of information in violation of a specific obligation;

‘Implementation of the FWC’: the purchase of supplies envisaged in the FWC through the signature and *performance of specific contracts*;

‘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 EMSA orders supplies under this FWC;

‘Performance of a specific contract’: the execution of tasks and delivery of the purchased supplies by the contractor to EMSA;

‘Personnel’: persons employed directly or indirectly or contracted by the contractor to implement the FWC;

‘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 person who has the power to represent the contractor or to take decisions on its behalf;

‘Request for supplies’: a document from EMSA requesting that the contractors in a multiple FWC provide a specific tender for supplies whose terms are not entirely defined under the FWC;

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

‘Substantial error’: any infringement of a contract provision resulting from an act or omission, which causes or might cause a loss to the Union’s budget.

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 – DELIVERY OF SUPPLIES

- II.4.1** Signature of the FWC does not guarantee any actual purchase. EMSA is bound only by specific contracts implementing the FWC.
- II.4.2** 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/EU⁴.
- II.4.3** All periods specified in the FWC are calculated in calendar days, unless otherwise specified.
- II.4.4** The contractor must not present itself as a representative of EMSA and must inform third parties that it is not part of the European public service.
- II.4.5** The contractor is responsible for the *personnel* who perform the contract and exercises its authority over its *personnel* without interference by EMSA. The contractor must inform its *personnel* that:
- (a) they may not accept any direct instructions from EMSA; and
 - (b) their participation in providing the supplies does not result in any employment or contractual relationship with EMSA.
- II.4.6** 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 supplies, as the case may be on the basis of the selection criteria set out in the tender specifications.
- II.4.7** At EMSA’s reasoned request, the contractor must replace any member of *personnel* who:
- (a) does not have the expertise required to provide the supplies; or
 - (b) has caused disruption at the premises of EMSA.

⁴ OJ L 94 of 28.03.2014, p. 65

The contractor bears the cost of replacing its *personnel* and is responsible for any delay in providing the supplies resulting from the replacement of *personnel*.

- II.4.8** The contractor must record and report to EMSA any problem that affects its ability to deliver the supplies. The report must describe the problem, state when it started and what action the contractor is taking to resolve it.

II.4.9 Delivery

- (a) Time allowed for delivery

The time allowed for delivery is calculated in accordance with Article I.4.

- (b) Date, time and place of delivery

The Commission must be notified in writing of the exact date of delivery within the period indicated in Article I.4. All deliveries must be made at the agreed place of delivery during the hours indicated in Article I.4.

The contractor must bear all costs and risks involved in delivering the supplies to the place of delivery.

- (c) Consignment note

Each delivery must be accompanied by a consignment note in duplicate, duly signed and dated by the contractor or its carrier, giving the specific contract number and particulars of the supplies delivered. One copy of the consignment note must be countersigned by EMSA and returned to the contractor or to its carrier.

II.4.10 Certificate of conformity

Signature of the consignment note by EMSA, as provided for in point (c) of Article II.4.11 is simply an acknowledgment of the fact that the delivery took place and in no way implies conformity of the supplies with the specific contract.

Conformity of the supplies delivered must be evidenced by the signature of a certificate to this effect by EMSA no later than one month after the date of delivery, unless otherwise specified in the special conditions or in the tender specifications.

Conformity must be declared only where the conditions laid down in the FWC and in the specific contract are satisfied and the supplies conform to the tender specifications.

If, for reasons attributable to the contractor, EMSA is unable to accept the supplies, the contractor must be notified in writing at the latest by the deadline for conformity.

II.4.11 Conformity of the supplies delivered with the FWC

The supplies delivered by the contractor to EMSA must be in conformity in quantity, quality, price and packaging with the FWC and the relevant specific contract.

The supplies delivered must:

- (a) correspond to the description given in the tender specifications and possess the characteristics of the supplies provided by the contractor to EMSA as a sample or model;
- (b) be fit for any specific purpose required of them by EMSA and made known to the contractor at the time of conclusion of this FWC and accepted by the contractor;
- (c) be fit for the purposes for which supplies of the same type are normally used;
- (d) demonstrate the high quality standards and performance which are normal in supplies of the same type and which EMSA can reasonably expect, given the nature of the supplies and taking into account any public statements on the specific characteristics of the supplies made by the contractor, the

- producer or its representative, particularly in advertising or on labelling; 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.
- (e) be packaged according to the usual method for supplies of the same type or, failing this, in a way designed to preserve and protect them.

II.4.12 Remedy

The contractor must be liable to EMSA for any lack of conformity which exists at the time the supplies are verified.

In case of lack of conformity, without prejudice to Article II.14 on liquidated damages applicable to the total price of the supplies concerned, EMSA is entitled:

- (a) either to have the supplies brought into conformity, free of charge, by repair or replacement;
(b) or to have an appropriate reduction made in the price.

Any repair or replacement must be completed within a reasonable time and without any significant inconvenience to EMSA, taking account of the nature of the supplies and the purpose for which they are required by EMSA.

The term 'free of charge' in paragraph (b) refers to the costs incurred to bring the supplies into conformity, particularly the cost of postage, labour and materials.

II.4.13 Assembly

If required by the tender specifications (Annex I), the contractor must assemble the supplies delivered within a period of one month unless otherwise specified in the special conditions.

Any lack of conformity resulting from incorrect installation of the supplies must be deemed to be equivalent to lack of conformity of the supplies if installation forms part of the FWC and the supplies were installed by the contractor or under its responsibility. This applies equally if the product was to be installed by EMSA and was incorrectly installed owing to a shortcoming in the installation instructions.

II.4.14 Services provided to supplies

If required by the tender specifications, services to supplies must be provided accordingly.

II.4.15 General provisions concerning supplies

(a) Packaging

The supplies must be packaged in strong boxes or crates or in any other way that ensures that the contents remain intact and prevents damage or deterioration. Packaging, pallets, etc., including contents, must not weigh more than 500 kg.

Unless otherwise specified in the special conditions or in the tender specifications (Annex I), pallets must be considered as one-way packaging and must not be returned. Each box must be clearly labelled with the following information:

- Name of contracting authority and address for delivery;
- name of contractor;
- description of contents;
- date of delivery;

- number and date of specific contract;
- EC code number of article.

(b) Guarantee

The supplies must be guaranteed against all defects in manufacture or materials for two years from the date of delivery, unless provision is made for a longer period in the tender specifications.

The contractor must guarantee that any permits and licences required for manufacturing and selling the supplies have been obtained.

The contractor must replace at its own expense, within a reasonable time limit to be determined by agreement between the parties, any items which become damaged or defective in the course of normal use during the guarantee period.

The contractor is responsible for any conformity defect which exists at the time of delivery, even if this defect does not appear until a later date.

The contractor is also responsible for any conformity defect which occurs after delivery and is ascribable to non-compliance with its obligations, including failure to provide a guarantee that, for a certain period, supplies used for the purposes for which they are normally used or for a specific purpose will preserve their qualities or characteristics as specified.

If part of an item is replaced, the replacement part must be guaranteed under the same terms and conditions for a further period of the same duration as that specified above.

If a defect is found to originate in a systematic flaw in design, the contractor must replace or modify all identical parts incorporated in the other supplies that are part of the order, even though they may not have been the cause of any incident. In this case, the guarantee period must be extended as stated above.

ARTICLE II.5 COOMUNICATION 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

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.

E-mail is deemed to have been received by the receiving party on the day of dispatch of that e-mail, provided that it is sent to the e-mail 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 EMSA is deemed to have been received by EMSA 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.

ARTICLE II.6 LIABILITY

- II.6.1 EMSA 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, 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 EMSA.
- II.6.3 The contractor is liable for any loss or damage caused to EMSA during or as a consequence of implementation of the FWC, including in the event of subcontracting, but only 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, the contractor is liable for the whole amount of the damage or loss.
- II.6.4 If a third party brings any action against EMSA in connection with the *implementation of the FWC*, the contractor must assist EMSA in the legal proceedings, including by intervening in support of EMSA upon request.

If EMSA'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 EMSA for the *implementation of the FWC*.
- II.6.6 EMSA 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 EMSA.

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* EMSA 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. EMSA 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 EMSA 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 obligation set out in this Article are binding on EMSA 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,

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 EMSA, the contractor must provide a document providing evidence of this commitment.

ARTICLE II.9 PROCESSING OF PERSONAL DATA

II.9.1 Any personal data included in the FWC must be processed in accordance with Regulation (EC) No 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 must be processed by the data controller solely for the purposes of the implementation, management and monitoring of the FWC. This does not affect its possible transmission to the bodies entrusted with monitoring or inspection tasks in application of Union law.

II.9.2 The contractor has the right to access 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.9.3 The contractor has right of recourse at any time to the European Data Protection Supervisor.

- II.9.4** If the FWC requires the contractor to process any personal data, 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 that may be processed, the recipients of the data and the means by which the data subject may exercise its rights.
- II.9.5** The contractor must grant *personnel* access to the data to the extent strictly necessary for the implementation, management and monitoring of the FWC.
- II.9.6** The contractor must adopt appropriate technical and organisational security measures giving due 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 inputting, as well as any unauthorised disclosure, alteration or erasure of stored personal data;
 - (iii) unauthorised use 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.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 EMSA.
- II.10.2** Even if EMSA 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 EMSA under this FWC, particularly those under Articles II.8 and II.23.
- II.10.4** EMSA may request the contractor to replace a subcontractor found to be in a situation provided for in points (d) and (e) of Article II.17.1.

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 EMSA. In such cases, the contractor must provide EMSA with the identity of the intended assignee.

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

ARTICLE II.13 FORCE MAJEURE

II.13.1 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.13.2 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 supplies actually delivered and which obtain a certificate of conformity.

II.13.3 The parties must take all necessary measures to limit any damage due to *force majeure*.

ARTICLE II.14 LIQUIDATED DAMAGES

II.14.1 Delay in delivery

If the contractor fails to perform its contractual obligations within the applicable time limits set out in this FWC, EMSA 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 supply;

d is the duration specified in the relevant specific contract for delivery of the relevant purchase or supply 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.15.

II.14.2 Procedure

EMSA 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, EMSA, 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.14.3 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 supplies within the applicable time limits set out in this FWC.

II.14.4 Claims and liability

Any claim for liquidated damages does not affect the contractor's actual or potential liability or EMSA's rights under Article II.17.

ARTICLE II.15 REDUCTION IN PRICE

II.15.1 Quality standards

If the contractor fails to deliver the supply in accordance with the FWC or a specific contract ('unperformed obligations') or if it fails to deliver the supply in accordance with the expected quality levels specified in the tender specifications ('low quality delivery'), EMSA may reduce or recover payments proportionally to the seriousness of the unperformed obligations or low quality delivery. This includes in particular cases where EMSA cannot approve a document or deliver a certificate of conformity for supply as defined in Article I.6 after the contractor has submitted the required additional information, correction or new supply.

A reduction in price may be imposed together with liquidated damages under the conditions of Article II.14.

II.15.2 Procedure

EMSA 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, EMSA, 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.15.3 Claims and liability

Any reduction in price does not affect the contractor's actual or potential liability or EMSA's rights under Article II.17.

ARTICLE II.16 SUSPENSION OF THE IMPLEMENTATION OF THE FWC

II.16.1 Suspension by the contractor

If the contractor is affected by *force majeure*, it may suspend the performance of a specific contract.

The contractor must immediately *notify* EMSA of the suspension. The notification must include a description of the *force majeure* and state when the contractor expects to resume the performance of the contract.

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

II.16.2 Suspension by EMSA

EMSA 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 *substantial errors, irregularities or fraud*;
- (b) in order to verify whether the presumed *substantial errors, irregularities or fraud* actually occurred.

EMSA must *formally notify* the contractor of the suspension. Suspension takes effect on the date of *formal notification*, or at a later date if the *formal notification* so provides.

EMSA must *notify* the contractor as soon as possible whether:

- (a) it is lifting the suspension; or
- (b) it intends to terminate the FWC or a specific contract under Article II.17.1(f) or (j).

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

ARTICLE II.17 TERMINATION OF THE FWC

II.17.1 Grounds for termination by EMSA

EMSA may terminate the FWC or a specific contract in the following circumstances:

- (a) if provision of the supplies under a pending specific contract has not actually started within 15 days of the scheduled date and EMSA 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 supplies* 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 106(1) of the Financial Regulation⁵;
- (e) if the contractor or any *related person* is subject to any of the situations provided for in points (c) to (f) of Article 106(1) or to Article 106(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 *substantial errors, irregularities or fraud*;
- (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;

⁵ Regulation (EU, EURATOM) No 966/2012 on the financial rules applicable to the general budget of the Union, as amended <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32012R0966>

- (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 EMSA change and it no longer requires new supplies 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.

II.17.2 Grounds for termination by the contractor

The contractor may terminate the FWC or a specific contract if:

- (a) it has evidence that EMSA has committed *substantial errors, irregularities or fraud* in the procedure for awarding the FWC or the *implementation of the FWC*;
- (b) EMSA 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.17.3 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 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) and (l) of Article II.17.1 and in Article II.17.2, the date on which the termination takes effect must be specified in the *formal notification*.

In the cases referred to in points (e), (f) and (j) of Article II.17.1, the termination takes effect on the day following the date on which the contractor receives *notification* of termination.

In addition, at the request of EMSA and regardless of the grounds for termination, the contractor must provide all necessary assistance, including information, documents and files, to allow EMSA to complete, continue or transfer the delivery of the supplies to a new contractor or internally, without interruption or adverse effect on the quality or continuity of delivery of the supplies. 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.17.4 Effects of termination

The contractor is liable for damage incurred by EMSA as a result of the termination of the FWC or a specific contract including the cost of appointing another contractor to provide or complete the supplies, unless the damage was caused by the situation specified in Article II.17.1(j), (k) or (l) or in Article II.17.2. EMSA 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.17.2.

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 and any invoice required for supplies that were provided before the date of termination.

In the case of joint tenders, EMSA may terminate the FWC or a specific contract with each member of the group separately on the basis of points (d), (e) or (g) of Article II.17.1, under the conditions set out in Article II.11.2.

ARTICLE II.18 INVOICES, VALUE ADDED TAX AND E-INVOICING

II.18.1 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.

EMSA 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.18.2 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.19 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, EMSA 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 EMSA for verification.

EMSA 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:

I_r

$$Pr = Po \times \left(\frac{I_r}{I_o} \right)$$

I_o

where: Pr = revised price;

Po = price in the tender;

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

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

ARTICLE II.20 PAYMENTS AND GUARANTEES

II.20.1 Date of payment

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

II.20.2 Currency

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

II.20.3 Conversion

EMSA 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/infoeuro/infoeuro_en.cfm

II.20.4 Costs of transfer

The costs of the transfer are borne as follows:

- (a) EMSA 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.20.5 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 guarantee, it must fulfil the following conditions:

- (a) the financial guarantee is provided by a bank or a financial institution approved by EMSA or, at the request of the contractor and with the agreement of EMSA, by a third party;
- (b) the guarantor stands as first-call guarantor and does not require EMSA to have 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. EMSA must release the guarantee within the following month.

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

Retention money guarantees cover full delivery of the supplies in accordance with the specific contract including during the contract liability period and until their final certificate of conformity has been delivered by EMSA. The retention money guarantee must not exceed 10 % of the total price of the specific contract. EMSA must release the guarantee after the expiry of the contract liability period as provided for in the specific contract.

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

II.20.6 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 supplies, 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.20.7 Suspension of the time allowed for payment

EMSA 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 EMSA 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 supplies or documents; or
- (c) because EMSA has observations on the supplies or documents submitted with the invoice.

EMSA must *notify* the contractor (or leader in the case of a joint tender) as soon as possible of any such suspension, giving the reasons for it.

Suspension takes effect on the date EMSA 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 EMSA 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, EMSA reserves the right to terminate the specific contract in accordance with Article II.17.1(c).

II.20.8 Interest on 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.20.7 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.20.1.

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.21 RECOVERY

II.21.1 If an amount is to be recovered under the terms of the FWC, the contractor must repay EMSA the amount in question.

II.21.2 Recovery procedure

Before recovery, EMSA 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, EMSA 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, EMSA may, after informing the contractor in writing, recover the amounts due:

- (a) by offsetting them against any amounts owed to the contractor by the Union or by the European Atomic Energy Community;
- (b) by calling in a financial guarantee if the contractor has submitted one to EMSA;
- (c) by taking legal action.

II.21.3 Interest on late payment

If the contractor does not honour the obligation to pay the amount due by the date set by EMSA in the debit note, the amount due bears interest at the rate indicated in Article II.20.8. Interest on late

payments will cover the period starting on the day after the due date for payment and ending on the date when EMSA 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.21.4 Recovery rules in the case of a 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). EMSA first claims the full amount to the leader of the group.

If the leader does not pay by the due date and if the amount cannot be offset in accordance with Article II.21.2 (a), EMSA may claim the full amount to any other member of the group by *notifying* the debit note already sent to the leader under Article II.21.2.

ARTICLE II.22 CHECKS AND AUDITS

II.22.1 EMSA 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 other outside body authorised to do so on its behalf.

Such checks and audits may be initiated at any moment during the provision of the supplies 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 EMSA. Audits are carried out on a confidential basis.

II.22.2 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.22.3 The contractor must grant EMSA's staff and outside personnel authorised by EMSA 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 form.

II.22.4 On the basis of the findings made during the audit, a provisional report is drawn up. EMSA 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, EMSA may recover all or part of the payments made in accordance with Article II.21 and may take any other measures which it considers necessary.

II.22.5 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 Communities' financial interests against *fraud* and other *irregularities* and Regulation (EC) 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 also 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 performance of the contract and up to five years starting from the payment of the balance of the last specific contract issued under this FWC.

II.22.6 The Court of Auditors has the same rights as EMSA, particularly right of access, for the purpose of checks and audits.