

**ENCLOSURE T.2 - DRAFT FRAMEWORK CONTRACT FOR SERVICES**

**Enclosed to Procurement Procedure No EMSA/CPNEG/38/2016 - Service Contract for Equipment Assistance Service (EAS) – Southern Europe**

**Competitive procedure with negotiation**

**Phase II – Invitation to Tender**

FRAMEWORK CONTRACT NUMBER – [complete]

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, Executive Director,

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,]]<sup>1</sup>

on the other part,

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<sup>1</sup> 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** and the following annexes:

<b>Annex I</b>	Tender specifications (reference No [complete] of [insert date]) and Appendices
<b>Annex II</b>	Contractor's tender (reference No [complete] of [insert date])
<b>Annex III</b>	Incident Response Contract-Equipment
<b>Annex IV</b>	Draft Specific Contract
<b>Annex V</b>	Expenses reimbursement for Contractor

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

This FWC sets out:

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

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

## **I - SPECIAL CONDITIONS**

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

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

- (a) The provisions set out in the special conditions take precedence over those in the other parts of the FWC.
- (b) The provisions set out in the general conditions take precedence over those in the specific contract (Annex IV)
- (c) The provisions set out in the specific contract (Annex IV) take precedence over those in the other annexes.
- (d) The provisions set out in the tender specifications (Annex I) take precedence over those in the tender (Annex II).
- (e) The provisions set out in the FWC take precedence over those in the specific contracts.

### **ARTICLE I.2 – SUBJECT MATTER**

- I.2.1** The subject matter of the FWC is the provision, upon demand and at short notice, of oil pollution response services, more particularly the availability on-site of specialised Oil Spill Response (OSR) equipment and/or Dispersant in order to respond to oil spills in the European regional sea basins. For this purpose, the contractor agrees as per annexes I and II to have the necessary transportation and logistics arrangement in place and store, insure, maintain equipment and dispersant owned by EMSA and train its personnel in order to have the capacity to mobilise at short notice and to offer equipment items and/or dispersant owned by EMSA as well as if so requested by a Requesting Party technical support personnel at pre-defined conditions within the framework of an Incident Response Contract-Equipment (annex III).
- I.2.2** Signature of the FWC imposes no obligation on EMSA to purchase. Only performance of the FWC through specific contracts is binding on 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** Under no circumstances may performance commence before the date on which the FWC enters into force. Execution of the tasks may under no circumstances begin before the date on which the specific contract enters into force.
- I.3.3** The FWC is concluded for a period of 48 months with effect from the date on which it enters into force. Unless otherwise specified, all periods specified in the FWC are calculated in calendar days.
- I.3.4** The specific contracts shall be signed by both parties before the FWC expires.  
  
The FWC shall continue to apply to such specific contracts after its expiry. They shall be executed no later than six months after its expiry.
- I.3.5.** An emergency oil pollution response operation commenced during the duration of this FWC or any specific contract shall be completed according to the Incident Response Contract-Equipment with the Requesting Party concerned. The expiry of this FWC or any specific contract shall not result in the termination of an on-going oil pollution response operation.

## ARTICLE I.4 – PRICES

**I.4.1** The maximum amount of the FWC shall be EUR **[amount in figures and in words]**. This maximum amount is excluding the mobilisation lump sums and reimbursement of costs linked to the participation in pollution response exercises as per c below and the payments to the contractor in the framework of the performance of actual pollution response as per Article I.15 below. However, this must in no way be construed as a commitment on EMSA to purchase for the maximum amount.

The maximum prices of the services shall be:

- a. For the initial EAS arrangement as described under point 2.6.1 of the Tender Specifications (Annex I), EMSA will pay the contractor an annual service availability fee at the amount of EUR **[amount in figures and in words]** in four instalments per year.
- b. For additional services as described under point 2.6.2 of the Tender Specifications (Annex I), the maximum prices of the services shall be in accordance with prices in Annex II (contractor's tender).  
The price will be detailed in each specific contract respecting the maximums per category of cost and unit price.
- c. For the participation in international or national oil pollution response exercises and for ad hoc transportation needs, the contractor is entitled to receive a mobilisation lump sum and reimbursement based on the quotation approved by EMSA as per article I.5.4 below including but not limited to the following activities and costs:
  - All Equipment transportation costs to and from the exercise location or ad hoc transportation location including loading and unloading and insurance;
  - Prices for stand-by of one truck at the exercise location ad hoc transportation location (if required in the request for quotation);
  - Availability of technical support personnel (if required in the request for quotation);
  - Customs duties, all permits, import duties and taxes, any administrative authorisations and clearance expenses as may be required and arising out of the participation to exercises or the ad hoc transportation;
  - Consular charges appertaining to the technical support personnel where applicable.

Quoted prices should be in accordance with prices in Annex II (contractor's tender).

In addition, travel, subsistence expenses for the technical support personnel shall be reimbursed in accordance with Article II.22. The expenses reimbursement form is attached as Annex V. The daily allowance and accommodation ceilings shall be determined in accordance with Annex V.

### **I.4.2 Price revision**

Price revision is determined by the formula set out in Article II.20 and using the trend in the harmonised indices of consumer prices (HICP): European index of consumer prices (EICP) published for the first time in Eurostat's monthly 'Data in Focus' publication available on the website: <http://www.ec.europa.eu/eurostat/>.

## ARTICLE I.5 – PAYMENT ARRANGEMENTS AND PERFORMANCE OF THE FRAMEWORK CONTRACT

### **I.5.1 Single framework contract**

EMSA orders services by sending the contractor a specific contract in paper format.

Within 10 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.18.1 (c).

The period for the provision of the services starts to run from the date indicated in the specific contract.

### **I.5.2 Payment for the initial EAS arrangement**

#### **a. Compensation for the Preparation Phase**

The contractor (or leader in the case of a joint tender) is entitled to receive the equivalent of 25% of the annual service availability fee as compensation for the preparation phase.

Within 10 days following the issuing of the Acceptance Note, the contractor shall send to EMSA the relevant invoice.

All invoices shall indicate both the contractor's and EMSA's VAT numbers.

Within 30 days following receipt of the relevant invoice, EMSA will make the payment.

#### **b. Payment of the service availability fee**

The contractor is entitled to receive the service availability fee for the stand-by phase as from the day following the day on which the Completion Report is accepted by EMSA in writing as indicated in the Acceptance Note.

Within 30 days following expiration of the relevant calendar quarter, the contractor shall submit an invoice for an interim payment equal to maximum 25 % of the annual service availability fee or for the proportional part of the annual availability fee depending on the services provided during the relevant calendar quarter. If a reduction *pro rata temporis* of payment has to be applied in accordance with article II.16, the reduction will be calculated using as basis a year of 365 days. All invoices shall indicate both the contractor's and EMSA's VAT numbers.

Invoices for interim payment shall be accompanied by the activity report or any other document in accordance with the Tender Specifications (Annex I) and the relevant specific contract. EMSA must approve any submitted documents or deliverables and pay within 60 days from receipt of the invoice. If EMSA has observations to make, it must send them to the contractor and suspend the time limit for payment in accordance with Article II.21.7. The contractor has 30 days to submit additional information or corrections or a new version of the documents if the contracting authority requires it.

With regard to the payment of the last quarter of the year, EMSA may at its discretion request the contractor to submit the invoice and the report before expiration of the relevant quarter and EMSA may at its own discretion decide to pay the quarterly service availability fee before the end of the relevant quarter.

### **I.5.3. Payment for additional EAS arrangement**

Within 30 days following expiration of the relevant calendar quarter, the contractor shall submit an invoice for an interim payment equal to the proportional part of the price referred to in the specific contract and depending on the services provided during the relevant quarter. If a reduction *pro rata temporis* of payment has to be applied in accordance with article II.16, the reduction will be calculated using as basis a year of 365 days. All invoices shall indicate both the contractor's and EMSA's VAT numbers.

Invoices for interim payment shall be accompanied by the activity report or any other document in accordance with the Tender Specifications (Annex I) and the relevant specific contract. EMSA must approve any submitted documents or deliverables and pay within 60 days from receipt of the invoice. If EMSA has observations to make, it must send them to the contractor and suspend the time limit for payment in accordance with Article II.21.7. The contractor has 30 days to submit additional information or corrections or a new version of the documents if the contracting authority requires it.

### **I.5.4. Payment for participation in international or national oil pollution response exercises and ad hoc transportation requests**

Prior to the exercise date, EMSA will communicate to the contractor the exercise details and scenario or ad hoc transportation details.

Within 5 working days of a request for quotation for services related to participation to the exercise or ad hoc transportation request being sent by EMSA to the contractor, EMSA shall receive one quotation. Prices have to be quoted net and gross in euro this being clearly indicated in the quotation submitted.

EMSA will verify the quotation submitted and inform the contractor within 10 working days after receipt whether it is approved for the purpose of this Contract. For this purpose, the contractor shall cooperate with EMSA and provide any information, documentation and explanation requested by EMSA.

Within 10 days following the exercise performance or ad hoc transportation, the contractor shall submit an invoice. All invoices shall indicate both the contractor's and EMSA's VAT numbers.

The invoice shall be accompanied by the document in accordance with the 'Guidelines on conducting equipment condition tests and exercises' (Appendix 2 to Annex I Tender Specifications) or ad hoc transportation report and any other documents which may be requested by EMSA such as proofs of payments of suppliers or suppliers' invoices. EMSA must approve any submitted documents or deliverables 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.21.7. The contractor (or leader in case of a joint tender) has 30 days to submit additional information or corrections or a new version of the documents if the contracting authority requires it.

## **ARTICLE I.6 – BANK ACCOUNT**

Payments shall be made to the contractor's bank account denominated in [euro]<sup>2</sup> identified as follows:

Name of bank: [complete]

Full address of branch: [complete]

Exact designation of account holder: [complete]

Full account number including [bank] codes: [complete]

[IBAN<sup>3</sup> code: [complete]]

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<sup>2</sup> Or local currency where the receiving country does not allow transactions in EUR.

<sup>3</sup> BIC or SWIFT code for countries with no IBAN code.

## **ARTICLE I.7 – COMMUNICATION DETAILS AND DATA CONTROLLER**

For the purpose of Article II.9, the data controller shall be the Head of Unit C.1 – Pollution Response Services

Communications must be sent to the following addresses:

EMSA:

European Maritime Safety Agency  
Frédéric Hébert  
Head of Unit – Pollution Response Services  
Praça Europa 4  
1249-206 Lisbon  
Portugal

Contractor:

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

## **ARTICLE I.8 – APPLICABLE LAW AND SETTLEMENT OF DISPUTES**

**I.7.1** The FWC 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 FWC which cannot be settled amicably shall be brought before the courts of Lisbon, Portugal.

## **ARTICLE I.9 - USE, DISTRIBUTION & PUBLICATION OF INFORMATION**

*[Not applicable]*

## **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 six months written notice.

If the FWC or a specific contract is terminated:

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

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

## **ARTICLE I.11 – INTER-INSTITUTIONAL FRAMEWORK CONTRACT**

*[Not applicable]*

## **ARTICLE I.12 – THE OIL POLLUTION RESPONSE EQUIPMENT**

### **I.12.1. Title**

Title to and ownership of the equipment is and shall remain with EMSA. The contractor shall as possessor of the equipment exercise proper custody, care and safekeeping of the oil pollution response equipment during the whole Framework Contract and any specific contract.

The contractor shall neither remove nor permit removal of any serial number, model number, label, name or any identification of ownership.

The contractor will warrant and defend the possession of the equipment against claims and demands from any third party. In any event, the contractor shall indemnify EMSA against the consequences of any claims made by third parties in relation to the oil pollution response equipment.

The contractor is not entitled to dispose of the equipment or to use it as collateral for any loan or to pledge the equipment as security for any debt or to mortgage the same or otherwise to transfer or to assign the same to a third party.

### **I.12.2. Equipment reception and storage conditions**

#### **a. Equipment import**

During the course of this FWC and any specific contract, upon EMSA's request, the contractor should support the import of equipment in the country where the contracted storage facilities are located. This support would include acting as EMSA's direct representative for equipment customs clearances including but not limited to liaising with the relevant customs office, submission of customs documents and declarations and any proceeding necessary to facilitate the import of the equipment.

#### **b. Equipment delivery**

On the date of the equipment delivery as notified by EMSA in advance, the contractor will take possession of the equipment. The reception implies that the contractor performs, on behalf of EMSA, the following:

- Visual check of the equipment packages;
- Verification that the quantity of packages delivered is in line with the consignment note;
- Verification of the quantity of the equipment and ancillaries as per the packing list which EMSA will have provided in advance;
- Signature of the consignment note on behalf of EMSA provided that the overall condition and quantity of the packages delivered are appropriate;
- Reporting to EMSA on the delivery. This report shall include as a minimum: the equipment packing list as signed by the contractor representative and pictures of the equipment delivered.

The equipment reception may be witnessed by EMSA.

#### **c. Equipment condition**

The contractor shall ensure that all amenities, facilities and conditions required for the storage of the equipment as detailed in Annex I (Tender Specifications) are in place. Special care must be taken by the contractor regarding security and safety in the storage area to avoid any loss and/or damage to the



equipment. The contractor will be liable for loss and/or any damage caused to or by the equipment during the execution of the relevant specific contract (s) or any extension as the case may be.

### **I.12.3. Equipment maintenance and project management**

The contractor shall preserve and maintain the equipment in line with the Tender Specifications (Annex I) and the contractor's tender (Annex II).

The contractor shall immediately inform EMSA about any damage or loss sustained by the equipment. The contractor shall replace lost or damaged oil pollution response equipment at his own expense cost and risk.

EMSA has at any time during business hours the right to visit and inspect the stored equipment giving a one-week notice to the contractor. Costs incurred by the contractor related to potential visits by EMSA are covered by the terms and conditions of this Contract and any associated specific contract. No additional funds will be available.

### **I.12.4. Return of the equipment**

EMSA may prior to the expiration of a relevant specific contract or on the date of early termination of this Contract require the contractor to make the equipment available, packed on a date specified by EMSA. On that date, EMSA may send a representative and/or inform the contractor in writing of the name and position of the person entitled to receive the equipment.

The equipment list provided together with the relevant specific contract shall be used on the date of return to note the quantity of equipment.

Prior to such delivery, risk of loss of or damage to the oil pollution response equipment shall remain with the contractor.

If at the time of return, the equipment (or any part of it) has not been maintained in the condition as required by the Contract the contractor shall indemnify EMSA for all costs reasonably incurred by it in restoring the equipment or any part of it or in replacing the equipment or any part of it if it cannot be so restored at a cost below the cost of replacement. This provision shall be in addition to any other rights which EMSA may have arising from the Contractor's failure to maintain the oil pollution response equipment during the period of the Contract.

### **I.12.5. Labelling**

- a. Following the delivery of new equipment and/or dispersant IBC containers under a specific Contract, EMSA will provide the contractor with labels, related supporting fittings as well as Guidelines for labelling.
- b. Upon receipt of the labels, the contractor shall physically fit each label to its associated equipment item and/or Dispersant IBC containers.
- c. If labels are lost or damaged during the Contract implementation, the contractor shall inform EMSA which will provide new labels for the relevant equipment item(s) and/or dispersant IBC container(s).
- d. All costs including but not limited to labour costs related to the physical marking of the equipment with labels shall be borne by the contractor and are covered by the service availability fee as agreed under this Contract.
- e. Upon completion of each marking service, the contractor shall inform EMSA in writing and submit to EMSA photographic evidence.

## **ARTICLE I.13. OIL POLLUTION RESPONSE EQUIPMENT CONDITION TESTS**

The aim of the oil pollution response equipment condition tests as described in 'Guidelines on conducting equipment condition tests and exercises' (Appendix 2 to Annex I Tender Specifications) is to verify the performance of the contracted service and check the oil pollution response equipment functionality and operational readiness. The oil pollution response equipment condition tests shall be carried out in line with 'Guidelines on conducting equipment condition tests and exercises'. EMSA shall have the option to update 'Guidelines on conducting equipment condition tests and exercises' based on experience of implementation. The contractor will perform at least one oil pollution response equipment condition test per oil pollution response equipment set every two years with a maximum number of six condition tests per year. At the beginning of each year, an Annual Equipment Condition Test Plan shall be submitted to EMSA. The contractor will inform EMSA, at least 2 weeks in advance, of any change in the date of the oil pollution response equipment condition test. EMSA staff and persons invited by EMSA may attend each oil pollution response equipment condition test as observers.

## **ARTICLE I.14. OIL POLLUTION RESPONSE EXERCISES**

The different types, purposes and procedures of exercises EMSA may request are described in 'Guidelines on conducting equipment condition tests and exercises' (Appendix 2 to Annex I Tender Specifications).

If appropriate, EMSA staff and persons invited by EMSA may attend an exercise as observers.

After termination of each exercise, the contractor shall submit to EMSA a report on the exercise as described in 'Guidelines on conducting equipment condition tests and exercises' (Appendix 2 to Annex I Tender Specifications).

The contractor is remunerated for his participation in International and/or EMSA exercises according to Article I.5.4.

## **ARTICLE I.15. ACTUAL OIL POLLUTION RESPONSE**

**I.15.1.** At receipt of a request for assistance from a Requesting Party, EMSA may decide to send a Notice of Mobilisation to the contractor including all details EMSA considers relevant.

**I.15.2.** The contractor irrevocably undertakes to comply with 'EAS Mobilisation Procedures' in Appendix I to Annex I (Tender Specifications) and to enter into the Incident Response Contract-Equipment (Annex III) with a Requesting Party as indicated in EMSA's Notice of Mobilisation.

**I.15.3.** The contractor continues to be entitled to receive the Service Availability Fee for the period oil recovery operations are performed under an Incident Response Contract-Equipment with a Requesting Party.

**I.15.4.** Upon EMSA's request, the contractor shall enter into contract with any third party, not being an EU Member State, EU Candidate Country, EU Acceding Country, European Free Trade Association (EFTA) coastal Member States or a third country sharing a regional sea basin with the EU, that requires assistance with one or several oil pollution response equipment items and/or Dispersant.

EMSA will set the conditions for the performance of the service to the third party in particular with regard to the maximum duration of the activity and the terms of the contract to be concluded with the third party. The contractor undertakes not to be paid from the third party amounts higher than the prices agreed in the Incident Response Contract-Equipment (Annex III). In addition to the Incident Response Contract-Equipment prices, the contractor may charge the third party, as specified in EMSA's request, for costs corresponding to the use of the elements financed by EMSA within the framework of this Contract namely the oil pollution response equipment, the Dispersant purchase costs and the Service availability fee. The contractor recognises that

these costs have initially been financed by EMSA. If so requested by EMSA, the contractor undertakes to reimburse to EMSA proportion of payments received from the third party corresponding to these costs.

**I.15.5.** The contractor shall appoint a Duty Officer available to receive the Notice of Mobilisation throughout the year (24 hours a day). The contractor shall inform EMSA in due time and in writing of any changes in the Duty Officer contact details.

## **I.16. 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,

For EMSA,

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

Markku Mylly, Executive Director

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

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

Done at:

Done at Lisbon.

Date:

Date:

In duplicate in English.

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

### ARTICLE II.1 – DEFINITIONS

For the purpose of this FWC, the following definitions 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 the contracting authority 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 of service, defects in equipment or material or delays in making them available, labour disputes, strikes and financial difficulties may not be invoked as force majeure, unless they stem directly from a relevant case of force majeure;

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

**‘Fraud’:** 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 services 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 the contracting authority orders services under this FWC;

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

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

**‘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 services’:** a document from the contracting authority requesting that the contractors in a multiple FWC provide a specific tender for services whose terms are not entirely defined under the FWC;

**‘Specific contract’:** a contract implementing the FWC and specifying details of a service 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 – PROVISION OF SERVICES**

- II.4.1** Signature of the FWC does not guarantee any actual purchase. The contracting authority is bound only by specific contracts implementing the FWC.
- II.4.2** The contractor must provide services of high quality standards, in accordance with the state of the art in the industry and the provisions of this FWC, in particular the tender specifications and the terms of its tender.
- II.4.3** The contractor must comply with the minimum requirements provided for in the tender specifications. This includes compliance with applicable obligations under environmental, social and labour law established by Union law, national law and collective agreements or by the international environmental, social and labour law provisions listed in Annex X to Directive 2014/24/EU<sup>4</sup>.
- II.4.4** The contractor must obtain any permit or licence required in the State where the services are to be provided.
- II.4.5** All periods specified in the FWC are calculated in calendar days, unless otherwise specified.
- II.4.6** The contractor must not present itself as a representative of the contracting authority and must inform third parties that it is not part of the European public service.

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<sup>4</sup> OJ L 94 of 28.03.2014, p. 65

**II.4.7** The contractor is responsible for the personnel who carry out the services and exercises its authority over its personnel without interference by the contracting authority. The contractor must inform its personnel that:

- (a) they may not accept any direct instructions from the contracting authority; and
- (b) their participation in providing the services does not result in any employment or contractual relationship with the contracting authority.

**II.4.8** The contractor must ensure that the personnel implementing the FWC and any future replacement personnel possess the professional qualifications and experience required to provide the services, as the case may be on the basis of the selection criteria set out in the tender specifications.

**II.4.9** At the contracting authority's reasoned request, the contractor must replace any member of personnel who:

- (a) does not have the expertise required to provide the services; or
- (b) has caused disruption at the premises of the contracting authority.

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

**II.4.10** The contractor must record and report to the contracting authority any problem that affects its ability to provide the services. The report must describe the problem, state when it started and what action the contractor is taking to resolve it.

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

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

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

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

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

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

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

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

Email is deemed to have been received by the receiving party on the day of dispatch of that email, provided that it is sent to the email address indicated in Article I.7. The sending party must be able to prove the date of dispatch. In the event that the sending party receives a non-delivery report, it must make every effort to ensure that the other party actually receives the communication by email or mail. In such a case, the sending party is not held in breach of its obligation to send such communication within a specified deadline.

Mail sent to the contracting authority is deemed to have been received by the contracting authority on the date on which the department responsible referred to in Article I.7 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** The contracting authority is not liable for any damage or loss caused by the contractor, including any damage or loss to third parties during or as a consequence of implementation of the FWC.
- II.6.2** If required by the relevant applicable legislation, 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. The Contractor must take out and maintain during the FWC duration the insurance policies listed under point 2.6.1.10 of the Tender Specifications (Annex I). Upon request, the contractor must provide evidence of insurance coverage to the contracting authority.
- II.6.3** The contractor is liable for any loss or damage caused to the contracting authority during or as a consequence of implementation of the FWC, including in the event of subcontracting, but only up to an amount not exceeding three times the total amount of the relevant specific contract. However, if the damage or loss is caused by the gross negligence or wilful misconduct of the contractor or of its personnel or subcontractors, the contractor is liable for the whole amount of the damage or loss.
- II.6.4** If a third party brings any action against the contracting authority in connection with the implementation of the FWC, including any action for alleged breach of intellectual property rights, the contractor must assist the contracting authority in the legal proceedings, including by intervening in support of the contracting authority upon request. If the contracting authority's liability towards the third party is established and that such liability is caused by the contractor during or as a consequence of the implementation of the FWC, Article II.6.3 applies.
- II.6.5** If the contractor is composed of two or more economic operators (i.e. who submitted a joint tender), they are all jointly and severally liable to the contracting authority for the implementation of the FWC.
- II.6.6** The contracting authority is not liable for any loss or damage caused to the contractor during or as a consequence of implementation of the FWC, unless the loss or damage was caused by wilful misconduct or gross negligence of the contracting authority.

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

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

The contracting authority may do any of the following:

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

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

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

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

## **ARTICLE II.8 – CONFIDENTIALITY**

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

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

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

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

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

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

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

**II.9.1** 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 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 the contracting authority;
  - (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 the contracting authority.
- II.10.2** Even if the contracting authority authorises subcontracting, the contractor remains bound by its contractual obligations and is solely responsible for the implementation of the FWC.

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

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

#### **ARTICLE II.11 – AMENDMENTS**

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

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

#### **ARTICLE II.12 – ASSIGNMENT**

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

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

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

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

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

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

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

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

The contractor licenses the pre-existing rights on a royalty-free, non-exclusive and irrevocable basis to EMSA, which may use the pre-existing materials for all the modes of exploitation set out in this FWC or in specific contracts. All pre-existing rights are licensed to EMSA from the moment the results are delivered and approved by EMSA.

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

- (a)** use for its own purposes:
- I. making available to the staff of EMSA
  - 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 to making modifications
  - V. addition of new elements, paragraphs titles, leads, bolds, legend, table of content, summary, graphics, subtitles, sound, etc.
  - VI. preparation in audio form, preparation as a presentation, animation, pictograms story, slide-show, public presentation etc.
  - VII. extracting a part or dividing into parts
  - VIII. use of a concept or preparation of a derivative work
  - IX. digitisation or converting the format for storage or usage purposes
  - X. modifying dimensions
  - XI. translating, inserting subtitles, dubbing in different language versions (including, but not limited to all official languages of the EU and languages of candidate countries)
- (d)** the modes of exploitation listed in article II.13.3
- (e)** rights to authorise, license, or sub-license in case of licensed pre-existing rights, the modes of exploitation set out in any of the points (a) to (d) to third parties.

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

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

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

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

EMSA acquires the following exclusive rights:

- (a) reproduction: the right to authorise or prohibit direct or indirect, temporary or permanent reproduction of the results by any means (mechanical, digital or other) and in any form, in whole or in part;
- (b) communication to the public: the exclusive right to authorise or prohibit any display, performance or communication to the public, by wire or wireless means, including the making available to the public of the results in such a way that members of the public may access them from a place and at a time individually chosen by them; this right also includes the communication and broadcasting by cable or by satellite;
- (c) distribution: the exclusive right to authorise or prohibit any form of distribution of results or copies of the results to the public, by sale or otherwise;
- (d) rental: the exclusive right to authorise or prohibit rental or lending of the results or of copies of the results;
- (e) adaptation: the exclusive right to authorise or prohibit any modification of the results;
- (f) translation: the exclusive right to authorise or prohibit any translation, adaptation, arrangement, creation of derivative works based on the results, and any other alteration of the results, subject to the respect of moral rights of authors, where applicable;
- (g) where the results are or include a database: the exclusive right to authorise or prohibit the extraction of all or a substantial part of the contents of the database to another medium by any means or in any form; and the exclusive right to authorise or prohibit the re-utilization of all or a substantial part of the contents of the database by the distribution of copies, by renting, by on-line or other forms of transmission;
- (h) where the results are or include a patentable subject-matter: the right to register them as a patent and to further exploit such patent to the fullest extent;
- (i) where the results are or include logos or subject-matter which could be registered as a trademark: the right to register such logo or subject-matter as a trademark and to further exploit and use it;
- (j) where the results are or include know-how: the right to use such know-how as is necessary to make use of the results to the full extent provided for by this contract, and the right to make it available to contractors or subcontractors acting on behalf of EMSA, subject to their signing of adequate confidentiality undertakings where necessary;
- (k) where the results are documents:
  - (i) giving access upon individual requests without the right to reproduce or exploit, as provided for by Regulation 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents;
  - (ii) the right to store and archive the results or copies of the results in line with the document management rules applicable to EMSA, including digitisation or converting the format for preservation or new use purposes;
- (l) where the results are or incorporate software, including source code, object code and, where relevant, documentation, preparatory materials and manuals, in addition to the other rights mentioned in this Article:
  - (i) end-user rights, for all uses by EMSA or by subcontractors which result from this FWC and from the intention of the parties;
  - (ii) the rights to decompile or disassemble the software;

- (m) to the extent that the contractor may invoke moral rights, the right for EMSA, except where otherwise provided in this FWC, to publish the results with or without mentioning the creator(s)' name(s), and the right to decide when and whether the results may be disclosed and published.

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

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

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

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

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

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

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

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

This evidence must include, as appropriate:

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

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

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

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

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

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

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

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

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

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

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

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

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

#### **II.13.10 Visibility of EMSA funding and disclaimer**

When making use of the results, the contractor must declare that they have been produced under 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 or provide the text of the disclaimer.

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

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

## **ARTICLE II.14 – FORCE MAJEURE**

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

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

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

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

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

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

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

where:

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

d is the duration specified in the relevant specific contract for delivery of the relevant purchase or deliverable or, failing that, the period between the date specified in Article I.5.1 and the date of delivery or performance specified in the relevant specific contract, expressed in days.

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

### **II.15.2 Procedure**

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

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

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

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

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

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

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

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

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

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

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

If the contractor fails to provide the service in accordance with the FWC or a specific contract ('unperformed obligations') or if it fails to provide the service in accordance with the expected quality levels specified in the tender specifications ('low quality delivery'), the contracting authority may reduce or recover payments proportionally to the seriousness of the unperformed obligations or low quality delivery. This includes in particular cases where the contracting authority cannot approve a report or deliverable as defined in Article I.5 after the contractor has submitted the required additional information, correction or new version.

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

### **II.16.2 Procedure**

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

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

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

(a) of the withdrawal of its intention to reduce payment; or

(b) of its final decision to reduce payment and the corresponding amount.

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

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



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

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

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

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

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

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

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

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

The contracting authority 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.

The contracting authority 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.18.1(f) or (j).

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

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

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

The contracting authority may terminate the FWC or a specific contract in the following circumstances:

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

- (d) if the contractor or any person that assumes unlimited liability for the debts of the contractor is in one of the situations provided for in points (a) and (b) of Article 106(1) of the Financial Regulation<sup>5</sup>;
- (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;
- (j) in the event of force majeure, where either resuming implementation is impossible or the necessary ensuing amendments to the FWC or a specific contract would mean that the tender specifications are no longer fulfilled or result in unequal treatment of tenderers or contractors;
- (k) if the needs of the contracting authority change and it no longer requires new services under the FWC; in such cases ongoing specific contracts remain unaffected;
- (l) if the termination of the FWC with one or more of the contractors means that the multiple FWC with reopening of competition no longer has the minimum required level of competition.

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

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

- (a) it has evidence that the contracting authority has committed substantial errors, irregularities or fraud in the procedure for awarding the FWC or the implementation of the FWC;
- (b) the contracting authority fails to comply with its obligations, in particular the obligation to provide the information needed for the contractor to implement the FWC or to perform a specific contract as provided for in the tender specifications.

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

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

The other party has 30 days following the date of receipt to submit observations, including the measures it has taken 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.18.1 and in Article II.18.2, 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.18.1, the termination takes effect on the day following the date on which the contractor receives notification of termination.

<sup>5</sup> 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>

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

If a price revision index is provided in Article I.4.2, this Article applies to it.

Prices shall be fixed and not subject to revision during the first and second years of duration of the FWC.

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

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

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

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

The price revision is calculated using the following formula:

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

where: Pr = revised price;

Po = price in the tender;

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

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

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

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

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

#### **II.21.2 Currency**

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

### **II.21.3 Conversion**

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

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

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

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

The costs of the transfer are borne as follows:

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

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

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

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

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

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

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

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

The contractor (or leader in the case of a joint tender) must send an invoice for interim payment, as provided for in Article I.5 or in the tender specifications or in the specific contract.

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

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

Payment of the balance may take the form of recovery.

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

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

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

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

Suspension takes effect on the date the contracting authority sends the notification. The remaining payment period resumes from the date on which the requested information or revised documents are received or the necessary further verification, including on-the-spot checks, is carried out. Where the suspension period exceeds two months, the contractor (or leader in the case of a joint tender) may request the contracting authority to justify the continued suspension.

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

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

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

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

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

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

## **ARTICLE II.22 – REIMBURSEMENTS**

**II.22.1** Where provided by the special conditions or by the tender specifications, EMSA shall reimburse the expenses which are directly connected with execution of the tasks on production of original supporting documents, including receipts and used tickets

**II.22.2** Travel expenses are reimbursed on the following basis:

- a. The shortest and most economical normal route by rail (first class) between the seat of the contractor and the place where the task is to be executed.
- b. If the journey includes at least six hours of night travel between 22:00 and 7:00, the cost of accommodation in a double sleeper.
- c. Seat reservations and transport of necessary luggage, and supplements for high-speed trains.
- d. Expenses arising for journeys by sea are reimbursed on presentation of the supporting documents. The cost of transporting a car by sea is not reimbursed.
- e. Where the person concerned travels by car, travel expenses are reimbursed on the basis of the first class rail fare, excluding any supplements. The person is requested to provide supporting documents as to the actual price of a first class rail ticket for the journey in question at the occasion the experts is participating in.
- f. Where the distance by rail exceeds 400 km, or where the route includes a sea crossing, the cost of travel by air will be reimbursed on the basis of the fare in economy class or, if that is not available, business class.
- g. Taxi fares are not reimbursed

**II.22.3** Subsistence expenses are reimbursed on the following basis:

- a. For journeys of less than 200 km (return trip) no subsistence expenses shall be payable.
- b. Reimbursement of accommodation is based on actual costs of accommodation on production of an original invoice up to the ceiling as indicated in Annex IV per necessary overnight stay related to the tasks executed. Accommodation shall be arranged and paid directly by the contractor.
- c. Flat rate daily allowance as specified in Annex III shall be reimbursed for days during which the tasks are executed. This amount covers all expenses at the place where the tasks related to the contract are executed, including the cost of meals and local transport (incl. taxi).
- d. Daily allowance for up to two days may be paid for extra overnight stays necessary to qualify for a reduced transport fare through e.g. a stay over from Saturday to Sunday, provided the reduction amounts at least to the extra allowance paid.

**II.22.4** The cost of shipment of equipment or unaccompanied luggage shall be reimbursed provided EMSA has given prior written authorisation.

**II.22.5** Conversion between the euro and another currency shall be made as specified in Article II.21.3.

## **ARTICLE II.23 – RECOVERY**

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

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

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

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

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

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

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

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

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

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

If the contract is signed by a group (joint tender), the group is jointly and severally liable under the conditions set out in Article II.6 (liability). The contracting authority 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.23.2 (a), the contracting authority 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.23.2.

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

**II.24.1** The contracting authority and the European Anti-Fraud Office may check or require an audit on the implementation of the FWC. This may be carried out either by OLAF's own staff or by any 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 services and up to five years starting from the payment of the balance of the last specific contract issued under this FWC

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



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

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

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

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

**II.24.5** In accordance with Council Regulation (Euratom, EC) No 2185/96 of 11 November 1996 concerning on-the-spot checks and inspection carried out by the Commission in order to protect the European Communities' financial interests against fraud and other irregularities and Regulation No 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office, the European Anti-Fraud Office may carry out investigations, including on the spot checks and inspections, to establish whether there has been fraud, corruption or any other illegal activity under the contract affecting the financial interests of the Union. Findings arising from an investigation may lead to criminal prosecution under national law.

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

**II.24.6** The Court of Auditors has the same rights as the contracting authority, particularly right of access, for the purpose of checks and audits.