

Enclosure 2 -

**Attached to the Invitation to tender N° EMSA/OP/05/2015
for the supply of specialised oil pollution response equipment Lot [X]**

DRAFT FRAMEWORK SUPPLY CONTRACT

FRAMEWORK CONTRACT NUMBER – EMSA/OP/05/2014-Lot [X]

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,

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,]]

on the other part

HAVE AGREED

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

| | |
|------------------|---|
| Annex I | Tender specifications (reference No EMSA/OP/05/2015 of [insert date]) |
| Annex II | Contractor's tender (reference No EMSA/OP/05/2015 of [insert date]) |
| Annex III | Model specific contract |
| Annex IV | Pre-financing Guarantee |

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

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

I - SPECIAL CONDITIONS

ARTICLE I.1 – SUBJECT MATTER

- I.1.1** The subject matter of the FWC is the supply of oil pollution response (OPR) equipment, more specifically *[insert name of the type of system]*.
- I.1.2** 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.2 - ENTRY INTO FORCE AND DURATION

- I.2.1** The FWC shall enter into force on the date on which it is signed by the last party.
- I.2.2** Under no circumstances may implementation commence before the date on which the FWC enters into force. Delivery of supplies may under no circumstances begin before the date on which the specific contract enters into force.
- I.2.3** The FWC is concluded for a period of four years 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.2.4** The specific contracts shall be returned 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.2.5** On own initiative or on request by EMSA, the Contractor might, if agreed by EMSA, update the items in the equipment and ancillaries list of supplies once a year to adjust to production changes in the models and their options at a price whose relationship to the prevailing market price for equivalent items remains constant. In updating its price list, prices may be reduced at any time, but never increased.

ARTICLE I.3 - PRICES

- I.3.1** The maximum amount of the FWC shall be EUR *[amount in figures and in words]* excluding VAT. However, this must in no way be construed as a commitment on EMSA to purchase for the maximum amount.

The maximum prices of the supplies shall be as listed in Annex II.

I.3.2 Price revision

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

At the beginning of the second and every following year of the FWC, 80% of each price may be revised upwards or downwards if such revision is requested by one of the parties in writing no later than three months before the anniversary of the date on which it was signed. The other party shall acknowledge receipt within 15

days of reception of the request. The new prices shall be communicated as soon as the final index is available. EMSA shall purchase on the basis of the prices in force on the date on which order forms are signed by both parties. Such prices shall not be subject to revision.

This revision shall be determined by the trend in the harmonised indices of consumer prices (HICP) EICP published for the first time by the Eurostat monthly 'Data in focus' publication at <http://www.ec.europa.eu/eurostat/>.

Revision shall be calculated in accordance with the following formula:

$$Pr = Po (0,2 + 0,8 \times \frac{Ir}{Io})$$

where:

Pr = revised price;

Po = price in the original tender;

Io = index for the month corresponding to the final date for submission of tenders;

Ir = index for the month corresponding to the date of receipt of the letter requesting a revision of prices.

ARTICLE I.4 – PAYMENT ARRANGEMENTS AND PERFORMANCE OF THE FRAMEWORK CONTRACT

I.4.1 Single framework contract

Unless otherwise agreed by the parties, within two weeks from receipt of EMSA request, the contractor shall submit a quotation on transportation cost of the OPR equipment from the warehouse to the delivery place specified by EMSA and on the proposed week number for delivery of the equipment. The quotation will also confirm if pre-financing as per Article I.4.4 is requested for the specific order. Subject to EMSA's approval, the specific contract will be sent to the contractor within four weeks from receipt of the quotation and proposal for the delivery time.

Within two weeks of a specific contract being sent by EMSA to the contractor, EMSA shall receive the completed specific contract back, duly signed and dated.

I.4.2 Delivery

Subject to the positive assessment of the FAT, the contractor shall deliver the OPR equipment to the delivery place indicated in the specific contract. The Delivered Duty Paid (DDP) Incoterm clause will be applied.

The OPR equipment shall be delivered according to the delivery time shown in the specific contract. The time for delivering shall not exceed 6 months from the date of signature of the specific contract. The period allowed for the execution of the delivery of supplies shall start to run on the date the contractor signs the specific contract, unless a different date is indicated on the specific contract.

The contractor shall notify EMSA of the exact date of delivery at least 30 days in advance. Deliveries may be made on any working day during normal working hours, at the agreed place of delivery.

In the event of failure to observe the delivery time set in the specific contract EMSA may impose liquidate damages as per Article II.11.

I.4.3 Commissioning of the equipment, Training service and Acceptance Test

If requested by EMSA and reflected in the specific contract, within maximum two months following the delivery of the OPR equipment at the selected stockpile, the contractor shall carry out the commissioning of the equipment and/or shall provide on-site training service on board a vessel or at the place indicated by EMSA in the specific contract.

Unless otherwise agreed by the parties in the specific contract, within one month after completing the commissioning (and the training service if applicable), EMSA representatives shall assess the completeness and the technical condition of the OPR equipment during an Acceptance Test conducted by the contractor on board a vessel or at the place indicated by EMSA in the specific contract.

The contractor shall submit a Final Technical Report within two weeks from the date of the Acceptance Test. EMSA shall have maximum four weeks from receipt to approve, with or without comments or reservations, or reject the report as well as to request the contractor to repeat the Acceptance Test.

In case additional information or a new report is requested, the contractor shall have two weeks to submit it from the date of EMSA request. The Acceptance Test may be rescheduled at the time and place agreed by the parties.

I.4.4 Pre-financing

If pre-financing is requested by the contractor, the invoice for the pre-financing payment of 30% of the total price of the specific contract shall be sent to EMSA within maximum 14 days following signature of the specific contract by the last contracting party.

EMSA shall execute the pre-financing payment within 30 days from the receipt of the invoice.

For specific contracts of more than EUR 60,000 EMSA may, based on risk assessment, request the contractor to provide with a pre-financing guarantee equal to at least 30% of the total price of the specific contract. EMSA may refuse to make payments where the award procedure or the performance of the specific contract proves to have been subject to substantial errors, irregularities or fraud attributable to the contractor.

I.4.5 Payment scheme

Following the delivery of the equipment EMSA shall verify that quantity, quality, price and packaging conditions of the OPR equipment are conformed to those specified in the specific contract.

Option a): In case no training, commissioning and Acceptance Test are agreed in the specific contract, within four weeks from delivery at the stockpile EMSA shall issue the Certificate of Conformity to accept the OPR equipment in accordance with Article II.1.2.

Upon receipt of the Certificate of Conformity, the contractor shall submit an invoice for the payment of the balance of the total price of the specific contract. EMSA shall make the payment of the balance within 30 days of the receipt of the invoice.

Option b): If after delivery of the OPR equipment the parties have agreed on the terms and conditions for the execution of the commissioning of the equipment, and/or on-site training service and Acceptance Test (as per Article I.4.3 above and Article III.3 of the specific contract), EMSA shall make the payment of the balance of the total price of the specific contract conditioned to positive assessment of these services.

Within maximum four weeks from the receipt of the Final Technical Report by the contractor, EMSA may approve or reject the report. If the Final Technical Report is approved, EMSA shall issue the Certificate of Conformity to accept the OPR equipment in accordance with Article II.1.2.

Following the receipt of the Certificate of Conformity, the contractor shall submit an invoice for payment of the balance of the total price of the specific contract.

For both options a) and b) above, EMSA shall make the payment of the balance within 30 days from receipt of the invoice.

In case pre-financing was granted, invoice for balance payment has to indicate separately amount of balance payment and amount of pre-financing.

ARTICLE I.5 – BANK ACCOUNT

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

Name of bank:

Full address of branch:

Exact designation of account holder:

Full account number including [*bank*] codes:

[*IBAN code*:]

ARTICLE I.6 – COMMUNICATION DETAILS AND DATA CONTROLLER

For the purpose of Article II.6, the data controller shall be [insert name of entity]. Communications shall be sent to the following addresses:

EMSA:

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

Contractor:

[Full name]

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

Invoices shall be sent to the following address:

EMSA:

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

ARTICLE I.7 – APPLICABLE LAW AND SETTLEMENT OF DISPUTES

- I.7.1** The FWC shall be governed by Union law, complemented, where necessary, by the law of Portugal¹.
- 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, Portugal².

ARTICLE I.8 – TERMINATION BY EITHER PARTY

Either party may, unilaterally and without being required to pay compensation, terminate the FWC or the FWC and order forms by notifying the other party and by giving [one month's] notice. Should EMSA terminate the FWC or order forms, the contractor shall only be entitled to payment corresponding to the supplies ordered and delivered before the termination date. The first paragraph of Article II.13.3 shall apply.

ARTICLE I.9 – INTELLECTUAL PROPERTY RIGHTS RELATED TO THE GOODS DELIVERED UNDER THE CONTRACT

EMSA may use the goods delivered under the contract for its own purposes, by:

- (a) making it available to the staff of EMSA
- (b) making it 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
- (c) installing, uploading, processing

¹ Except where duly justified.

² Except where duly justified. Such exceptions include for example: a supply contract concluded by a Representation of the EMSA in a Member State.

- (d) arranging, compiling, combining, retrieving

ARTICLE I. 10– OTHER SPECIAL CONDITIONS

In the event of failure to perform one of the ancillary services defined in Article I.4.3, EMSA may impose liquidated damages as per Article II.1 to compensate any damage to EMSA or to any third party that might be involved in the execution of these services.

SIGNATURES

For the contractor,

For EMSA,

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

[Insert name and title of the Authorising Officer]

signature[s]: _____

signature:_____

Done at [place], [date]

Done at [Lisbon], [date]

In duplicate in English.

II - GENERAL CONDITIONS FOR SUPPLY FRAMEWORK CONTRACTS

ARTICLE II.1 - PERFORMANCE OF THE CONTRACT

Whenever EMSA wishes products to be supplied, it shall send an order form to the contractor, in duplicate, specifying the terms of supply of the products, such as quantity, designation, quality, price, place of delivery and time allowed for delivery, in accordance with the conditions laid down in the FWC.

Within the period indicated in Article I.4, the contractor shall return one original of the order form, duly signed and dated, thereby acknowledging receipt of the order form and acceptance of the terms.

II.1.1 Delivery

a) Time allowed for delivery

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

b) Date, time and place of delivery

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

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

c) Consignment note

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

II.1.2 Certificate of conformity

Signature of the consignment note by EMSA, as provided for in point c) of Article II.1.1 is simply an acknowledgment of the fact that the delivery took place and in no way implies conformity of the supplies with the order form.

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

Conformity shall be declared only where the conditions laid down in the FWC and in the order form are satisfied and the supplies conform to the tender specifications (Annex I).

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

II.1.3 Conformity of the supplies delivered with the FWC

a) The supplies delivered by the contractor to EMSA must be in conformity in quantity, quality, price and packaging with the FWC and the relevant order form.

- b) The supplies delivered must:
- (i) correspond to the description given in the tender specifications (Annex I) and possess the characteristics of the supplies provided by the contractor to EMSA as a sample or model;
 - (ii) be fit for any specific purpose required of them by EMSA and made known to the contractor at the time of conclusion of this FWC and accepted by the contractor;
 - (iii) be fit for the purposes for which supplies of the same type are normally used;
 - (iv) demonstrate the quality and performance which are normal in supplies of the same type and which EMSA can reasonably expect, given the nature of the supplies and taking into account any public statements on the specific characteristics of the supplies made by the contractor, the producer or its representative, particularly in advertising or on labelling;
 - (v) be packaged according to the usual method for supplies of the same type or, failing this, in a way designed to preserve and protect them.

II.1.4 Remedy

- a) The contractor shall be liable to EMSA for any lack of conformity which exists at the time the supplies are verified.
- b) In case of lack of conformity, without prejudice to Article II.11 regarding liquidated damages applicable to the total price of the supplies concerned, EMSA shall be entitled:
 - (i) either to have the supplies brought into conformity, free of charge, by repair or replacement;
 - (ii) or to have an appropriate reduction made in the price.
- c) Any repair or replacement shall be completed within a reasonable time and without any significant inconvenience to EMSA, taking account of the nature of the supplies and the purpose for which they are required by EMSA.
- d) The term 'free of charge' in paragraph (b) refers to the costs incurred to bring the supplies into conformity, particularly the cost of postage, labour and materials.

II.1.5 Assembly

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

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

II.1.6 Services provided to supplies

If required by the tender specifications (Annex I), services to supplies shall be provided accordingly.

II.1.7 General provisions concerning supplies

a) Packaging

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

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

- (i) and address for delivery;
- (ii) name of contractor;
- (iii) description of contents;
- (iv) date of delivery;
- (v) number and date of order form;
- (vi) EC code number of article.

b) Guarantee

The supplies shall be guaranteed against all defects in manufacture or materials for two years from the date of delivery, unless provision is made for a longer period in the tender specification (Annex I).

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

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

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

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

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

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

II.1.8 General provisions on performance of the FWC

- (a) The contractor shall perform the FWC to the highest professional standards.
- (b) The contractor shall be solely responsible for taking the necessary steps to obtain any permit or licence required for performance of the FWC under the laws and regulations in force at the place where the order forms are to be executed.
- (c) Any reference made to the contractor's personnel in the contract shall relate exclusively to individuals involved in the performance of the FWC.
- (d) The contractor must ensure that any personnel performing the FWC possesses the professional qualifications and experience required for execution of the order forms assigned to it.
- (e) The contractor shall neither represent EMSA nor behave in any way that would give such an impression. The contractor shall inform third parties that it does not belong to the European public service.
- (f) The contractor shall be solely responsible for the personnel who executes the tasks assigned to the contractor.

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

- (i) personnel executing the tasks assigned to the contractor may not be given orders directly by EMSA;
 - (ii) EMSA may not under any circumstances be considered to be the employer of the personnel referred to in point (i) and the personnel shall undertake not to invoke against EMSA any right arising from the contractual relationship between EMSA and the contractor.
- (g) In the event of disruption resulting from the action of one of the contractor's personnel working on EMSA premises or in the event that the expertise of the contractor's personnel fails to correspond to the profile required by the FWC, the contractor shall replace him without delay. EMSA shall have the right to make a reasoned request for the replacement of such personnel. The replacement personnel must have the necessary qualifications and be capable of performing the FWC under the same contractual conditions. The contractor shall be responsible for any delay in the execution of the order forms resulting from the replacement of personnel.
 - (h) Should the execution of the FWC be directly or indirectly hampered, either partially or totally, by any unforeseen event, action or omission, the contractor shall immediately and at his own initiative record it and report it to EMSA. The report shall include a description of the problem and an indication of the date on which it started and of the remedial action taken by the contractor to ensure full compliance with his obligations under the FWC. In such event the contractor shall give priority to solving the problem rather than determining liability.
 - (i) Should the contractor fail to perform his obligations under the FWC, EMSA may-without prejudice to its right to terminate the FWC-reduce or recover payments in proportion to the scale of the unperformed obligations. In addition, EMSA may claim compensation or impose liquidated damages in accordance with Article II.11.

ARTICLE II.2 – MEANS OF COMMUNICATION

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

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

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

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

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

ARTICLE II.3 - LIABILITY

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

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

II.3.3 The contractor shall be liable for any loss or damage sustained by EMSA in performance of the FWC, including in the event of subcontracting, and for any claim by a third party, but only to an amount not exceeding three times the total amount of the Contract. Nevertheless, if the damage or loss is caused by the gross negligence or wilful misconduct of the contractor or of its personnel, the contractor shall have unlimited liability for the amount of the damage or loss.

II.3.4 The contractor shall indemnify and hold EMSA harmless for all damages and costs incurred due to any claim. The contractor shall provide compensation in the event of any action, claim or proceeding brought against EMSA by a third party as a result of damage caused by the contractor during the performance of the FWC.

In the event of any action brought by a third party against EMSA in connection with performance of the FWC, the contractor shall assist EMSA. Such expenditure incurred by the contractor may be borne by EMSA.

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

ARTICLE II.4 - CONFLICT OF INTERESTS

- II.4.1** The contractor shall take all necessary measures in order to prevent any situation of conflict of interest. Such situation arises where the impartial and objective performance of the FWC is compromised for reasons involving economic interest, political or national affinity, family or emotional ties, or any other shared interest.
- II.4.2** Any situation constituting or likely to lead to a conflict of interest during the performance of the FWC shall be notified to EMSA in writing without delay. The contractor shall immediately take all necessary steps to rectify the situation. EMSA reserves the right to verify that the steps taken are appropriate and may require that additional steps be taken within a specified deadline.
- II.4.3** The contractor declares that it has not granted and will not grant, has not sought and will not seek, has not attempted and will not attempt to obtain, and has not accepted and will not accept, any advantage, financial or in kind, to or from any party whatsoever, when such advantage constitutes an illegal practice or involves corruption, either directly or indirectly, in so far as it serves as an incentive or reward relating to the performance of the FWC.
- II.4.4** The contractor shall pass on all the relevant obligations in writing to its personnel and to any natural person with the power to represent it or take decisions on its behalf and ensure that it is not placed in a situation which could give rise to conflicts of interest. The contractor shall also pass on all the relevant obligations in writing to third parties involved in performance of the FWC including subcontractors.

ARTICLE II.5 – CONFIDENTIALITY

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

The contractor shall:

- (a) not use confidential information and documents for any purpose other than fulfilling its obligations under the FWC without prior written agreement of EMSA;
 - (b) ensure the protection of such confidential information and documents with the same level of protection it uses to protect its own confidential information, but in no case any less than reasonable care;
 - (c) not disclose directly or indirectly confidential information and documents to third parties without prior written agreement of EMSA.
- II.5.2** The confidentiality obligation set out in Article II.5.1 shall be binding on EMSA and the contractor during the performance of the FWC and for five years starting from the date of the payment of the balance unless:
- (a) the disclosing party agrees to release the other party from the confidentiality obligation earlier;
 - (b) the confidential information becomes public through other means than in breach of the confidentiality obligation, through disclosure by the party bound by that obligation;
 - (c) the disclosure of the confidential information is required by law.

- II.5.3** The contractor shall obtain from any natural person with the power to represent it or take decisions on its behalf, as well as from third parties involved in the performance of the FWC or order form an undertaking that they will comply with the confidentiality obligation set out in Article II.5.1.

ARTICLE II.6 – PROCESSING OF PERSONAL DATA

- II.6.1** Any personal data included in the contract shall be processed pursuant to Regulation (EC) 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data. Such data shall be processed by the data controller solely for the purposes of the performance, management and monitoring of this FWC without prejudice to its possible transmission to the bodies charged with monitoring or inspection tasks in application of Union law.
- II.6.2** The contractor shall have the right of access to its personal data and the right to rectify any such data. The contractor should address any queries concerning the processing of its personal data to the data controller.
- II.6.3** The contractor shall have right of recourse at any time to the European Data Protection Supervisor.
- II.6.4** Where the FWC requires the processing of personal data by the contractor, the contractor may act only under the supervision of the data controller, in particular with regard to the purposes of the processing, the categories of data which may be processed, the recipients of the data, and the means by which the data subject may exercise his rights.
- II.6.5** The contractor shall grant his personnel access to the data to the extent strictly necessary for the performance, management and monitoring of the FWC.
- II.6.6** The contractor undertakes to adopt appropriate technical and organisational security measures having regard to the risks inherent in the processing and to the nature of the personal data concerned in order to:
- a) prevent any unauthorised person from having access to computer systems processing personal data, and especially:
 - (i) unauthorised reading, copying, alteration or removal of storage media;
 - (ii) unauthorised data input as well as any unauthorised disclosure, alteration or erasure of stored personal data;
 - (iii) unauthorised use of data-processing systems by means of data transmission facilities;
 - b) ensure that authorised users of a data-processing system can access only the personal data to which their access right refers;
 - c) record which personal data have been communicated, when and to whom;
 - d) ensure that personal data being processed on behalf of third parties can be processed only in the manner prescribed by EMSA;
 - e) ensure that, during communication of personal data and transport of storage media, the data cannot be read, copied or erased without authorisation;
 - f) design its organisational structure in such a way that it meets data protection requirements.

ARTICLE II.7 – SUBCONTRACTING

- II.7.1** The contractor shall not subcontract without prior written authorisation from EMSA nor cause the FWC to be de facto performed by third parties.
- II.7.2** Even where EMSA authorises the contractor to subcontract to third parties, it shall nevertheless remain bound by its contractual obligations and shall be solely responsible for the proper performance of this FWC.
- II.7.3** The contractor shall make sure that the subcontract does not affect rights and guarantees granted to EMSA by virtue of this FWC, notably by Article II.16.

ARTICLE II.8 – AMENDMENTS

- II.8.1** Any amendment to the FWC or order form shall be made in writing before fulfilment of all contractual obligations. An order form may not be deemed to constitute an amendment to the FWC.
- II.8.2** The amendment may not have the purpose or the effect of making changes to the FWC or to order forms which might call into question the decision awarding the FWC or order form or result in unequal treatment of tenderers or contractors.

ARTICLE II.9 – ASSIGNMENT

- II.9.1** The contractor shall not assign the rights, including claims for payments, and obligations arising from the FWC, in whole or in part, without prior written authorisation from EMSA.
- II.9.2** In the absence of such authorisation, or in the event of failure to observe the terms thereof, the assignment of rights or obligations by the contractor shall not be enforceable against EMSA and shall have no effect on it.

ARTICLE II.10– FORCE MAJEURE

- II.10.1** ‘Force majeure’ means any unforeseeable and exceptional situation or event beyond the parties’ control which prevents either of them from fulfilling any of their obligations under the FWC, which was not attributable to error or negligence on their part or on the part of a subcontractor and which proves to be inevitable in spite of exercising due diligence. Any default of a service, defect in equipment or material or delays in making them available, unless they stem directly from a relevant case of force majeure, as well as labour disputes, strikes or financial difficulties, cannot be invoked as force majeure.
- II.10.2** A party faced with force majeure shall formally notify the other party without delay stating the nature, likely duration and foreseeable effects.
- II.10.3** The party faced with force majeure shall not be held in breach of its contractual obligations if it has been prevented from performing them by force majeure. Where the contractor is unable to fulfil its contractual obligations owing to force majeure, it shall have the right to remuneration only for the tasks actually executed.
- II.10.4** The parties shall take all the necessary measures to limit any damage due to force majeure.

ARTICLE II.11 - LIQUIDATED DAMAGES

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

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

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

V is the amount of the relevant purchase;

d is the duration specified in the relevant order form or, failing that, the period between the date specified in Article I.4.1 and the date of delivery or performance specified in the relevant order form, expressed in days.

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

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

ARTICLE II.12 – SUSPENSION OF THE PERFORMANCE OF THE CONTRACT

II.12.1 Suspension by the contractor

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

Once the circumstances allow resuming performance, the contractor shall inform EMSA immediately, unless EMSA has already terminated the FWC or order form.

II.12.2 Suspension by EMSA

EMSA may suspend the performance of the FWC or order form or any part thereof:

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

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

ARTICLE II.13 – TERMINATION OF THE FWC

II.13.1 Grounds for termination

EMSA may terminate the FWC or an order form respectively in the following circumstances:

- (a) if a change to the contractor's legal, financial, technical or organisational or ownership situation is likely to affect the performance of the FWC or order form substantially or call into question the decision to award the FWC;
- (b) if execution of the tasks under a pending order form has not actually commenced within 15 days of the date foreseen, and the new date proposed, if any, is considered unacceptable by EMSA, taking into account article II.8.2;
- (c) if the contractor does not perform the FWC or an order form as established in the tender specifications or fails to fulfil another substantial contractual obligation; termination of three or more order forms on this ground shall constitute ground for termination of the FWC;
- (d) in the event of force majeure notified in accordance with article II.10 or if the performance of the FWC or order form has been suspended by the contractor as a result of force majeure, notified in accordance with article II.12, where either resuming performance is impossible or the modifications to the FWC or order form might call into question the decision awarding the FWC or order form, or result in unequal treatment of tenderers or contractors;
- (e) if the contractor is declared bankrupt, is being wound up, is having its affairs administered by the courts, has entered into an arrangement with creditors, has suspended business activities, is the subject of proceedings concerning those matters, or is in any analogous situation arising from a similar procedure provided for in national legislation or regulations;
- (f) if the contractor or any natural person with the power to represent it or take decisions on its behalf has been found guilty of professional misconduct proven by any means;
- (g) if the contractor is not in compliance with its obligations relating to the payment of social security contributions or the payment of taxes in accordance with the legal provisions of the country in which it is established or with those of the country of the applicable law of this FWC or those of the country where the FWC is to be performed;
- (h) if EMSA has evidence that the contractor or any natural persons with the power to represent it or take decisions on its behalf have committed fraud, corruption, or are involved in a criminal organisation, money laundering or any other illegal activity;
- (i) if EMSA has evidence that the contractor or any natural persons with the power to represent it or take decisions on its behalf have committed substantial errors, irregularities or fraud in the award procedure or the performance of the FWC, including in the event of submission of false information;
- (j) if the contractor is unable, through its own fault, to obtain any permit or licence required for performance of the FWC or order form;
- (k) if the needs of EMSA change and it no longer requires new supplies under the FWC.

II.13.2 Procedure for termination

When EMSA intends to terminate the FWC or order form it shall notify the contractor of its intention specifying the grounds thereof. EMSA shall invite the contractor to make any observations and, in the case of point (c) of Article II.13.1, to inform EMSA about the measures taken to continue the fulfilment of its contractual obligations, within 30 days from receipt of the notification.

If EMSA does not confirm acceptance of these observations by giving written approval within 30 days of receipt, the termination procedure shall proceed. In any case of termination EMSA shall notify the contractor about its decision to terminate the FWC or order form. In the cases referred to in points (a), (b), (c), (e), (g), (j), (k) and (l) of Article II.13.1 the formal notification shall specify the date on which the termination takes effect. In the cases referred to in points (d), (f), (h), and (i) of Article II.13.1 the termination shall take effect on the day following the date on which notification of termination is received by the contractor.

II.13.3 Effects of termination

In the event of termination, the contractor shall waive any claim for consequential damages, including any loss of anticipated profits for uncompleted work. On receipt of the notification of termination, the contractor shall take all the appropriate measures to minimise costs, prevent damages, and cancel or reduce its commitments. The contractor shall have 60 days from the date of termination to draw up the documents required by the special conditions or order forms for the tasks already executed on the date of termination and produce an invoice if necessary. EMSA may recover any amounts paid under the FWC.

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

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

ARTICLE II.14 – REPORTING AND PAYMENTS

II.14.1 Date of payment

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

II.14.2 Currency

The FWC shall be in euros.

Payments shall be executed in euros or in the local currency as provided for in Article I.5.

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

II.14.3 Costs of transfer

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

- (a) costs of dispatch charged by the bank of EMSA shall be borne by EMSA,

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

II.14.4 Invoices and Value Added Tax

Invoices shall contain the contractor's identification, the amount, the currency and the date, as well as the FWC reference and reference to the order form.

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

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

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

II.14.5 Pre-financing and performance guarantees

Pre-financing guarantees shall remain in force until the pre-financing is cleared against payment of the balance and, in case the latter takes the form of a debit note, three months after the debit note is notified to the contractor. EMSA shall release the guarantee within the following month.

Performance guarantees shall cover delivery of supplies and performance of the related services in accordance with the terms set out in the tender specifications until their final acceptance by EMSA. The amount of the performance guarantee shall not exceed the total price of the order form. The guarantee shall provide that it remains in force until final acceptance. EMSA shall release the guarantee within a month following the date of final acceptance.

Where, in accordance with Article I.4, a financial guarantee is required for the payment of pre-financing, or as performance guarantee, it shall fulfil the following conditions:

- (a) the financial guarantee is provided by a bank or an approved financial institution or, at the request of the contractor and agreement by EMSA, by a third party;
- (b) the guarantor stands as first-call guarantor and does not require EMSA to have recourse against the principal debtor (the contractor).

The cost of providing such guarantee shall be borne by the contractor.

II.14.6 Payment of the balance

The contractor shall submit an invoice within 60 days following receipt of the certificate of conformity of the supplies signed by EMSA, accompanied by a final progress report or any other documents provided for in the FWC or order form.

Upon receipt, EMSA shall pay the amount due as final payment, within the period specified in Article I.4, provided the invoice and documents have been approved and without prejudice to Article II.14.7. Approval of

the invoice and documents shall not imply recognition of the regularity or of the authenticity, completeness and correctness of the declarations and information they contain.

Payment of the balance may take the form of recovery.

II.14.7 Suspension of the time allowed for payment

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

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

Suspension shall take effect on the date the notification is sent by EMSA. The remaining payment period shall start to run again from the date on which the requested information or revised documents are received or the necessary further verification, including on-the-spot checks, is carried out. Where the suspension period exceeds two months, the contractor may request EMSA to justify the continued suspension.

Where the payment periods have been suspended following rejection of a document referred to in the first paragraph and the new document produced is also rejected, EMSA reserves the right to terminate the order form in accordance with Article II.13.1(c).

II.14.8 Interest on late payment

On expiry of the payment periods specified in Article I.4, and without prejudice to Article II.14.7, the contractor is entitled to interest on late payment at the rate applied by the European Central Bank for its main refinancing operations in Euros (the reference rate) plus eight percentage points. The reference rate shall be the rate in force on the first day of the month in which the payment period ends, as published in the C series of the *Official Journal of the European Union*.

The suspension of the payment period in accordance with Article II.14.7 may not be considered as a late payment.

Interest on late payment shall cover the period running from the day following the due date for payment up to and including the date of actual payment as defined in Article II.14.1.

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

ARTICLE II.15 –RECOVERY

II.15.1 If an amount is to be recovered under the terms of the FWC, the contractor shall repay EMSA the amount in question according to the terms and by the date specified in the debit note.

II.15.2 If the obligation to pay the amount due is not honoured by the date set by EMSA in the debit note, the amount due shall bear interest at the rate indicated in Article II.14.8. Interest on late payments shall cover the period from the day following the due date for payment up to and including the date when EMSA receives the full amount owed.

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

- II.15.3** If payment has not been made by the due date, EMSA may, after informing the contractor in writing, recover the amounts due by offsetting them against any amounts owed to the contractor by EMSA or by calling in the financial guarantee, where provided for in Article I.4 or in the order form.

ARTICLE II.16 – CHECKS AND AUDITS

- II.16.1** EMSA and the European Anti-Fraud Office may check or carry out an audit on the performance of the FWC. It may be carried out either directly by its own staff or by any other outside body authorised to do so on its behalf.

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

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

- II.16.2** The contractor shall keep all original documents stored on any appropriate medium, including digitised originals when they are authorised by national law and under the conditions laid down therein, for a period of five years which starts running from the date of expiry of the FWC.

- II.16.3** The contractor shall allow EMSA's staff and outside personnel authorised by EMSA the appropriate right of access to sites and premises where the FWC is performed and to all the information, including information in electronic format, needed in order to conduct such checks and audits. The contractor shall ensure that the information is readily available at the moment of the check or audit and, if so requested, that information be handed over in an appropriate form.

- II.16.4** On the basis of the findings made during the audit, a provisional report shall be drawn up. It shall be sent to the contractor, which shall have 30 days following the date of receipt to submit observations. The final report shall be sent to the contractor within 60 days following the expiry of that deadline.

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

- II.16.5** By virtue of Council Regulation (Euratom, EC) No 2185/96 of 11 November 1996 concerning on-the-spot checks and inspection carried out by the Commission in order to protect the European Communities' financial interests against fraud and other irregularities and Regulation (EC) No 1073/1999 of the European Parliament and the Council of 25 May 1999 concerning investigation conducted by the European Anti-Fraud Office (OLAF), the OLAF may also carry out on the spot checks and inspections in accordance with the procedures laid down by Union law for the protection of the financial interests of the Union against fraud and other irregularities. Where appropriate, the findings may lead to recovery by EMSA.

- II.16.6** The Court of Auditors shall have the same rights as EMSA, notably right of access, for the purpose of checks and audits.

ARTICLE II.17 –INTELLECTUAL AND INDUSTRIAL PROPERTY RIGHTS

II.17.1 Definitions

In this contract the following definitions apply:

- (1) '**delivered good**' means the goods delivered under the contract and accepted by EMSA.

- (2) **‘creator’** means any natural person who contributed to the production of the goods and includes personnel of EMSA or a third party.
- (3) **‘pre-existing rights’** means any industrial and intellectual property rights, including background technology, which exist prior to EMSA or the contractor ordering them for the purpose of the contract execution and include rights of ownership and use by the contractor, the creator, EMSA and any third parties.

II.17.2 Licensing of pre-existing rights

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

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

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

II.17.3 Identification and evidence of granting of pre-existing rights and rights of third parties

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

The contractor shall establish to that effect a list of all pre-existing rights. This list shall be provided by the Contractor in the tender during the procurement procedure.

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

Upon request by EMSA, the contractor shall provide evidence of the by him declared IPR situation.

This evidence may refer, inter alia, to rights to: parts of other documents, images, graphs, tables, data, software, technical inventions, know-how etc. (delivered in paper, electronic or other form), IT development tools, routines, subroutines and/or other programs ("background technology"), concepts, designs, installations or pieces of art, data, source or background materials or any other parts of external origin.

The evidence shall include, as appropriate:

- (a) the name and version number of a software product;
- (b) the full identification of the work and its author, developer, creator, translator, data entry person, graphic designer, publisher, editor, photographer, producer;
- (c) a copy of the licence to use the good or of the agreement granting the relevant rights to the contractor or a reference to this licence;

- (d) a copy of the agreement or extract from the employment contract granting the relevant rights to the contractor where parts of the results were created by its personnel;
- (e) the text of the disclaimer notice if any.

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