



OFFICE FOR HARMONIZATION IN THE INTERNAL MARKET  
(TRADE MARKS AND DESIGNS)

**GENERAL TERMS AND CONDITIONS**  
**APPLICABLE FOR TENDERING AND CONTRACTS**  
**WITH THE OFFICE FOR HARMONIZATION**  
**IN THE INTERNAL MARKET**

**May 2013**

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## **Part I: Provisions Relating to Tendering and Award of Contracts**

### **ARTICLE 1 – TENDERS**

The submission of a tender in response to an invitation to tender issued by the Office for Harmonization in the Internal Market (hereinafter referred to as the "Office") entails:

- (i) acceptance by the tenderer of the terms and conditions stipulated in the invitation to tender, in this document (General Terms and Conditions) and in the special terms and conditions, if any;
- (ii) Waiver of the tenderer's own conditions of sale or work.

### **ARTICLE 2 – PRICES**

- 2.1 The Office concludes contracts and effects payments in euro. Tenders must accordingly be expressed in euro.
- 2.2 Save as otherwise expressly provided in the invitation to tender, the contract prices shall be firm and non-revisable.

### **ARTICLE 3 – NO OBLIGATION TO AWARD THE CONTRACT**

Completion of a procurement procedure imposes no obligation on the Office to award the contract.

Should the award or the invitation to tender cover several items or lots, the Office reserves the right to award a contract for only some of them.

The Office shall not be liable for any compensation with respect to tenderers whose tenders have not been accepted nor if it decides not to award the contract.

## **Part II: Common Provisions Applicable to Supply, Service and Works Contracts**

### **ARTICLE 4 – DEFINITIONS**

The following definitions shall apply:

- “the Contract” shall mean a direct or framework contract for supplies or services or works, as specified in the title of the Contract;
- “purchase order form or specific contract” shall mean the simplified contract (purchase order form, specific contract, etc.) used for implementing a framework contract, as specified in the Special Conditions or tender specifications;
- “tasks” shall refer to the delivery of supplies and/or the provision of services and/or works, as specified in the tender specifications.

### **ARTICLE 5 – LEGAL PERSONALITY OF THE CONTRACTOR**

- 5.1 Any change in the legal personality of the Contractor, whether due to a merger, takeover, acquisition or any other cause, must be communicated immediately in writing to the Office.
- 5.2 Where required by the Office, the Contractor must provide without unjustified delay a new third-party file form, duly completed and signed.

### **ARTICLE 6 – APPLICABLE LAW AND SETTLEMENT OF DISPUTES**

- 6.1 The Contract shall be governed by European Union law, complemented, where necessary, by Spanish law.
- 6.2 Any dispute between the parties resulting from the interpretation or application of the Contract which cannot be settled amicably shall be brought before the courts of Alicante.

### **ARTICLE 7 – PERFORMANCE OF THE CONTRACT**

- 7.1 The Contractor shall perform the Contract to the highest professional standards.
- 7.2 The Contractor shall be solely responsible for taking the necessary steps to obtain any permit or licence required for performance of the Contract under the laws and regulations in force at the place where the tasks assigned to it are to be executed.
- 7.3 Without prejudice to Article 10 (Conflict of Interests) any reference made to the Contractor’s personnel in the Contract shall relate exclusively to individuals involved in the performance of the Contract.
- 7.4 The Contractor must ensure that the personnel performing the Contract possess the professional qualifications and experience required for the execution of the tasks assigned to them.
- 7.5 The Contractor shall neither represent the Office 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.
- 7.6 The Contractor shall have sole responsibility for the personnel who execute the tasks assigned to them. The Contractor shall stipulate the following employment or service relationships with its personnel:

- (a) personnel executing the tasks assigned to the Contractor may not be given orders directly by the Office;
  - (b) the Office may not under any circumstances be considered to be the employer of the personnel referred to in point (a) and the said personnel shall undertake not to invoke against the Office any right arising from the contractual relationship between the Office and the Contractor.
- 7.7 In the event of a disruption resulting from the action of one of the Contractor's personnel working on Office premises or in the event that the expertise of a member of the Contractor's personnel fails to correspond to the profile required by the Contract, the Contractor shall replace him/her without delay. The Office shall have the right to make a reasoned request for the replacement of any such personnel. The replacement personnel must have the necessary qualifications and be capable of performing the Contract under the same contractual conditions. The Contractor shall be responsible for any delay in the execution of the tasks assigned to it resulting from the replacement of personnel.
- In the event that the Contractor's personnel work on the Office's premises, the Contractor is required, at the Office's request, to replace immediately and without compensation any person considered by the Office to be *persona non grata*.
- 7.8 Should any unforeseen event, action or omission directly or indirectly hamper execution of the tasks, either partially or totally, the Contractor shall immediately and on its own initiative record it and report it to the Office. The report shall include a description of the problem and an indication of the date on which it started and of the remedial action taken by the Contractor to ensure full compliance with its obligations under the Contract. In such an event the Contractor shall give priority to solving the problem rather than to determining liability.
- 7.9 Should the Contractor fail to perform its obligations under the Contract, the Office may – without prejudice to its right to terminate the Contract – reduce or recover payments in proportion to the scale of the unperformed obligations. In addition, the Office may claim compensation or impose liquidated damages provided for in Article 17 (Liquidated Damages).

## ARTICLE 8 – MEANS OF COMMUNICATION

- 8.1 Any communication relating to the Contract or to its performance shall be made in writing and shall bear the Contract number and, where applicable, the purchase order form or specific contract number. Any communication is deemed to have been made when it is received by the receiving party unless otherwise provided for in the Contract.
- 8.2 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 the Special Conditions. 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.
- 8.3 Mail sent using the postal services is deemed to have been received by the Office on the date on which it is registered by the Department responsible referred to in the Special Conditions.

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

## **ARTICLE 9 – LIABILITY**

- 9.1 The Contractor shall be solely responsible for complying with any legal obligations incumbent on it. In particular, where the Contract is to be executed on Spanish territory, the Contractor shall ensure compliance with the relevant provisions of Spanish legislation concerning health and safety in the workplace and the rights of workers.
- 9.2 The Office shall not be held liable for any damage caused or sustained by the Contractor, including any damage caused by the Contractor to third parties during or as a consequence of performance of the Contract, except in the event of wilful misconduct or gross negligence on the part of the Office.
- 9.3 The Contractor shall be held liable for any loss or damage sustained by the Office in the performance of the Contract, including in the event of subcontracting under Article 13 (Subcontracting), and for any claim by a third party, but only to an amount not exceeding three times the total amount of the Contract or, where applicable, to an amount not exceeding three times the total amount of the relevant purchase order form or specific contract.
- Nevertheless, if the damage or loss is caused by the gross negligence or wilful misconduct of the Contractor or of its personnel or subcontractors, the Contractor shall have unlimited liability for the amount of the damage or loss.
- 9.4 The Contractor shall indemnify and hold the Office 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 the Office by a third party as a result of damage caused by the Contractor during the performance of the Contract.
- 9.5 In the event of any action brought by a third party against the Office in connection with the performance of the Contract, including any alleged breach of intellectual property rights, the Contractor shall assist the Office. Expenditure incurred by the Contractor to this end may be borne by the Office.
- 9.6 The Contractor shall take out an insurance policy against risks and damage relating to the performance of the Contract if required by the relevant applicable legislation. It shall take out supplementary insurance as reasonably required by standard practice in the industry. A copy of all the relevant insurance policies shall be provided to the Office should it so request.

## **ARTICLE 10 – CONFLICT OF INTERESTS**

- 10.1 The Contractor shall take all necessary measures to prevent any situation of conflict of interests. Such a situation arises where the impartial and objective performance of the Contract is compromised for reasons involving economic interest, political or national affinity, family or emotional ties, or any other shared interest.
- Any situation constituting or likely to lead to a conflict of interests during the performance of the Contract shall be notified to the Office in writing without delay. The Contractor shall immediately take all the necessary steps to rectify the situation.
- The Office reserves the right to verify that the steps taken are appropriate and may require that additional steps be taken within a specified deadline.

- 10.2 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, where such advantage constitutes an illegal practice or involves corruption, either directly or indirectly, inasmuch as it is an incentive or reward relating to the performance of the Contract.
- 10.3 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 a conflict of interests. The Contractor shall also pass on all the relevant obligations in writing to third parties involved in the performance of the Contract, including subcontractors. A copy of the instructions given and the undertakings made in this respect shall be provided to the Office, should it so request.
- 10.4 Without prejudice to Article 7 (Performance of the Contract) the Contractor shall replace, immediately and without compensation from the Office, any member of its personnel placed in a situation which could give rise to a conflict of interests.

## **ARTICLE 11– CONFIDENTIALITY**

- 11.1 The Office and the Contractor shall treat with confidentiality any information and documents, in any form, disclosed in writing or orally in relation to the performance of the Contract and identified in writing as confidential.
- 11.2 The Contractor shall:
- (a) not use confidential information and documents for any purpose other than fulfilling its obligations under the Contract without prior written agreement of the Office;
  - (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 the Office.
- 11.3 The confidentiality obligation set out in this Article shall be binding on the Office and on the Contractor during the performance of the Contract and for five years starting from the date of the payment of the balance unless:
- (a) the disclosing party agrees to release the other party from the confidentiality obligation earlier;
  - (b) the confidential information becomes public through other means than in breach of the confidentiality obligation, through disclosure by the party bound by that obligation;
  - (c) the disclosure of the confidential information is required by law.
- 11.4 The Contractor shall obtain from any natural person with the power to represent it or take decisions on its behalf, as well as from third parties involved in the performance of the Contract, including subcontractors, a written undertaking that they will comply with the confidentiality obligation set out in this Article. A copy of these written undertakings shall be provided to the Office, should it so request.

## ARTICLE 12 – PROCESSING OF PERSONAL DATA

- 12.1 Any personal data contained in the Contract shall 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 shall be processed by the Office only for the purposes of the performance, management and monitoring of the Contract without prejudice to its possible transmission to the bodies charged with monitoring or inspections task in application of Union law.
- 12.2 The Contractor shall have the right to access its personal data and to rectify any such data. The Contractor should address any queries concerning the processing of its personal data to OHIM's Data Protection Officer.
- The Contractor shall also have right of recourse at any time to the European Data Protection Supervisor.
- 12.3 Where the Contract requires the processing of personal data by the Contractor, the Contractor may act only under the supervision of the Office, 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/her rights.
- 12.4 The Contractor shall grant its personnel access to the data to the extent strictly necessary for the performance, management and monitoring of the Contract.
- 12.5 The Contractor shall adopt appropriate technical and organisational security measures having regard to the risks inherent in the processing and to the nature of the personal data concerned in order to:
- (a) prevent any unauthorised person from gaining access to computer systems processing personal data, and especially:
    - (i) unauthorised reading, copying, alteration or removal of storage media;
    - (ii) unauthorised data input, as well as any unauthorised disclosure, alteration or erasure of stored personal data;
    - (iii) unauthorised 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.

Such measures shall be agreed between the Contractor and the Office.

## ARTICLE 13 – SUBCONTRACTING

- 13.1 The Contractor shall not subcontract without prior written authorisation from the Office nor cause the Contract to be performed *de facto* by third parties.



- 13.2 Even where the Office authorises the Contractor to subcontract to third parties, the Contractor shall nevertheless remain bound by its contractual obligations and shall be solely responsible for the proper performance of the Contract.
- 13.3 The Contractor shall make sure that the subcontract does not affect rights and guarantees to which the Office is entitled by virtue of the Contract, notably Article 22 (Checks and Audits).

## **ARTICLE 14 – AMENDMENTS**

- 14.1 Any amendment to the Contract or, where applicable, to the purchase order form or specific contract, shall be made in writing and signed by the contracting parties before fulfilment of any new contractual obligations.
- 14.2 The amendment may not have the purpose or the effect of making changes to the Contract or, where applicable, to purchase order forms or specific contracts, which might call into question the decision awarding the Contract, purchase order form or specific contract or result in unequal treatment of tenderers or contractors.
- 14.3 A purchase order form or specific contract shall not be deemed to constitute an amendment to a framework contract.

## **ARTICLE 15 – ASSIGNMENT**

- 15.1 The Contractor shall not assign the rights, including claims for payments, and obligations arising from the Contract, in whole or in part, without prior written authorisation from the Office.
- 15.2 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 and shall have no effect on the Office.

## **ARTICLE 16 – FORCE MAJEURE**

- 16.1 “Force majeure” means any unforeseeable and exceptional situation or event beyond the control of the contracting parties which prevents either of them from fulfilling any of their obligations under the Contract, which was not attributable to error or negligence on their part or on the part of subcontractors and which could not have been avoided by the exercise of 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.
- 16.2 If either contracting party is faced with force majeure, it shall formally notify the other party without delay, stating the nature, likely duration and foreseeable effects.
- 16.3 The contracting party faced with force majeure shall not be held in breach of its contractual obligations if it has been prevented from fulfilling them by force majeure. Where the Contractor is unable to fulfil its contractual obligations owing to force majeure, it shall have the right to remuneration only for the tasks actually executed.
- 16.4 The contracting parties shall take all the necessary measures to limit any damage due to force majeure.

## ARTICLE 17 – LIQUIDATED DAMAGES

- 17.1 The Office 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.
- 17.2 Should the Contractor fail to perform its contractual obligations within the time limits set by the Contract or, where applicable, by the relevant purchase order form or specific contract, then, without prejudice to the Contractor's actual or potential liability or to the Office's right to terminate the Contract or relevant purchase order form or specific contract, the Office may impose liquidated damages for each and every calendar day of delay according to the following formula:

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

where:

- V* is the amount specified in the Special Conditions or, where applicable, the price of the relevant purchase;
- d* is the duration specified in the Special Conditions or, where applicable, the duration specified in the relevant purchase order form or specific contract or, failing that, the period between the date specified in the Special Conditions and the date of delivery or performance specified in the relevant purchase order form or specific contract.
- 17.3 The Contractor may submit arguments against this decision within 30 days of receipt of the formal notification. In the absence of a reaction on its part or of written withdrawal by the Office within 30 days of the receipt of such arguments, the decision imposing the liquidated damages shall become enforceable.
- 17.4 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 18 – SUSPENSION OF THE CONTRACT

### 18.1 Suspension by the Contractor

The Contractor may suspend the performance of the Contract or, where applicable, purchase order form or specific contract, or any part thereof if a case of force majeure makes such performance impossible or excessively difficult. The Contractor shall inform the Office about the suspension without delay, giving all the necessary reasons and details and the envisaged date for resuming the performance of the Contract or purchase order form or specific contract.

Once the circumstances allow resuming performance, the Contractor shall inform the Office immediately, unless the Office has already terminated the Contract, purchase order form or specific contract.

### 18.2 Suspension by the Office

The Office may suspend the performance of the Contract or, where applicable, pending purchase order forms or specific contracts, or any part thereof:

- (a) if the award procedure for the Contract, purchase order form or specific contract, or if the performance of the Contract proves to have been subject to substantial errors, irregularities or fraud;

- (b) in order to verify whether presumed substantial errors, irregularities or fraud have actually occurred.

Suspension shall take effect on the day the Contractor receives formal notification, or at a later date provided in the notification. The Office shall give notice as soon as possible to the Contractor to resume performance of the Contract or, where applicable, pending purchase order forms or specific contracts, or inform the Contractor that it is proceeding with the termination of the Contract.

The Contractor shall not be entitled to claim compensation on account of suspension of the Contract or, where applicable, purchase order forms or specific contracts, or of part thereof.

## **ARTICLE 19 - TERMINATION**

### **19.1 Grounds for termination**

The Office may terminate the Contract and, where applicable, a purchase order form or specific contract, in the following circumstances:

- (a) if a change to the Contractor's legal, financial, technical or organisational or ownership situation is likely to affect substantially the performance of the Contract or, where applicable, purchase order form or specific contract, or calls into question the decision to award the Contract, purchase order form or specific contract;
- (b) if execution of the tasks under the Contract or, where applicable, under a pending purchase order form or specific contract, has not actually commenced within fifteen days of the date foreseen, and the new date proposed, if any, is considered unacceptable by the Office, taking into account Article 14.2;
- (c) if the Contractor does not perform the Contract or, where applicable, purchase order form or specific contract, as established in the tender specifications or fails to fulfil another substantial contractual obligation; where applicable, termination of three or more purchase order forms or specific contracts on this ground shall constitute ground for termination of the framework contract;
- (d) in the event of force majeure notified in accordance with Article 16 (Force Majeure) or if the performance of the Contract or, where applicable, purchase order form or specific contract, has been suspended by the Contractor as a result of force majeure, notified in accordance with Article 18.1, where either resuming performance is impossible or the modifications to the Contract or purchase order form or specific contract might call into question the decision awarding the Contract, purchase order form or specific contract, 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 the Contract or those of the country where the Contract is to be performed;

- (h) if the Office has evidence that the Contractor or any natural person 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 detrimental to the Union's financial interests;
- (i) if the Office has evidence that the Contractor or any natural person with the power to represent it or take decisions on its behalf have committed substantial errors, irregularities or fraud in the award procedure or the performance of the contract, including in the event of submission of false information;
- (j) if the Contractor is unable, through its own fault, to obtain any permit or licence required for performance of the Contract;
- (k) in the case of a framework contract, if the needs of the Office change substantially and it no longer requires new supplies and/or services under the Contract;
- (l) in the case of a multiple framework contract with reopening of competition, when due to the termination of the Contract with one or more of the Contractors, there is no minimum required competition.

## **19.2 Procedure for termination**

When the Office intends to terminate the Contract, purchase order form or specific contract, it shall formally notify the Contractor of its intention specifying the grounds thereof. The Office shall invite the Contractor to make any observations and, in the case of point (c) of Article 19.1, to inform the Office about the measures taken to continue the fulfilment of its contractual obligations, within 30 days from receipt of the notification.

If the Office 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 the Office shall formally notify the Contractor about its decision to terminate the Contract, purchase order form or specific contract. In the cases referred to in points (a), (b), (c), (e), (g), (j), (k) and (l) of Article 19.1 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 19.1 the termination shall take effect on the day following the date on which notification of termination is received by the Contractor.

## **19.3 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 calendar days from the date of termination to draw up the documents required by the Special Conditions or purchase order forms or specific contracts for the supplies and/or services provided on the date of termination and produce the corresponding invoice, if necessary.

The Office may refuse to make payments to the Contractor, may recover amounts already paid under the Contract and may claim compensation for any damage suffered.

On termination the Office may engage any other contractor to deliver the supplies and/or execute or complete the services. The Office shall be entitled to claim from the Contractor all extra costs incurred in this regard, without prejudice to any other rights or guarantees it may have under the Contract.

## **ARTICLE 20 – INVOICING AND PAYMENTS**

### **20.1 Date of payment**

Payments shall be deemed to have been made on the date when they are debited to the Office's account.

### **20.2 Currency**

The Contract shall be in euro. Payments shall be executed in euro.

### **20.3 Costs of transfer**

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

- (a) costs of dispatch charged by the Office's bank shall be borne by the Office,
- (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.

### **20.4 Address for submission of invoices**

Invoices shall be sent to the following address:

Office for Harmonization in the Internal Market  
(Trade Marks and Designs)  
Resources Department – Finance Area  
Avenida de Europa, 4  
E-03008 Alicante  
SPAIN.

The Office shall not be liable for any delay in the payment of invoices sent to any other address.

Should the Office establish an electronic invoicing system, it reserves the right to require the Contractor to send its invoices electronically.

### **20.5 Third-party file**

No payments may be made by the Office if the Contractor has not completed the third-party file form correctly.

The Contractor shall inform the Office immediately of any changes to its tax and/or bank information and, where necessary, duly fill out and submit a new third-party file form to the Office.

The Office shall not be liable for any delay in the payment of invoices due to irregularities or errors in the third-party file of the Contractor.

### **20.6 Invoices and Value Added Tax**

Invoices shall contain the Contractor's identification information, the amount in euro and the date, as well as the reference number of the Contract and, where applicable, purchase order form or specific contract.

The Contractor recognises that the Office is, as a rule, exempt from all taxes and duties, including value-added tax (VAT).

The Office for Harmonization in the Internal Market (Trade Marks and Designs) is a body of the European Union which has legal personality and which enjoys the fiscal benefits granted to the European Institutions by the Member States of the European Union pursuant to the

provisions of Articles 3, 4 and 18 of the Protocol on the Privileges and Immunities of the European Union (n°7) annexed to the Treaty of Rome and which apply to the Office by virtue of Article 117 of Council Regulation (EC) n° 207/2009 of 26 February 2009 on the Community trade mark.

With regard to Spain, the Office is exempt of VAT according to Article 151.1.a.b. of Directive 2006/112/CE within the limits and conditions established in the Seat Agreement between the Kingdom of Spain and the European Union, signed in Madrid on the 20/09/2011 and published in the “Boletín Oficial del Estado” of the 21/10/2011.

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

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.

## **20.7 Pre-financing and performance guarantees**

Pre-financing guarantees shall remain in force until the pre-financing is cleared against interim payments or 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. The Office shall release the guarantee within the following month.

Performance guarantees shall cover performance of the service in accordance with the terms set out in the tender specifications until its final acceptance by the Office. The amount of a performance guarantee shall not exceed the total price of the Contract. The guarantee shall provide that it remains in force until final acceptance. The Office shall release the guarantee within a month following the date of final acceptance. Where, in accordance with the Special Conditions, a financial guarantee is required for the payment of pre-financing, or as performance guarantee, it shall fulfill 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 the Office, by a third party;
- (b) the guarantor stands as first-call guarantor and does not require the Office to have recourse against the principal debtor (the Contractor).

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

## **20.8 Interim payments and payment of the balance**

The Contractor shall submit an invoice for interim payment upon delivery of intermediary results, accompanied by a progress report or any other documents, as provided for in the Special Conditions or in the tender specifications.

The Contractor shall submit an invoice for payment of the balance within 60 days following the end of the period referred to in the Special Conditions, accompanied by a final progress report or any other documents provided for in the Special Conditions or in the tender specifications.

Upon receipt, the Office shall pay the amount due as interim or final payment within the periods specified in the Special Conditions, provided the invoice and documents have been approved and without prejudice to Article 20.9. 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.

## **20.9 Suspension of the time allowed for payment**

The Office may suspend the payment periods specified in the Special Conditions at any time by notifying the Contractor that its invoice cannot be processed, either because it does not

comply with the provisions of the Contract, or because the appropriate documents have not been produced.

The Office shall inform the Contractor in writing as soon as possible of any such suspension, giving the reasons for it.

Suspension shall take effect from the date the notification is sent by the Office. 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 the Office 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, the Office reserves the right to terminate the Contract in accordance with point c of Article 19.1.

#### **20.10 Interest on late payment**

On expiry of the payment periods specified in the Special Conditions, and without prejudice to Article 20.9, the Contractor is entitled to interest on late payment at the rate applied by the European Central Bank for its main refinancing operations in euro ("the reference rate") plus eight percentage points ("the margin"). 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 payment periods in accordance with Article 20.9 may not be considered as a late payment.

Interest on late payment shall cover the period running from the calendar day following the due date for payment up to and including the day of actual payment as defined in Article 20.1.

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

### **ARTICLE 21 - RECOVERY**

21.1 If an amount is to be recovered under the terms of the Contract, the Contractor shall repay the Office the amount in question according to the terms and by the date specified in the debit note issued by the Office.

21.2 If the obligation to pay the amount due is not honoured by the date set by the Office in the debit note, the amount due shall bear interest at the rate indicated in Article 20.10 (Interest on late payment). Interest on late payments shall cover the period from the calendar day following the due date for payment, up to and including the calendar day on which the Office receives full payment of the amount owed.

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

21.3 If payment has not been made by the due date, the Office may, after informing the Contractor in writing, recover the amounts due by offsetting them against any amounts owed to the Contractor by the Union or by the European Atomic Energy Community, or by calling in the guarantee, where provided for in the Special Conditions.

## ARTICLE 22 – CHECKS AND AUDITS

- 22.1 The Office and the European Anti-Fraud Office may check or have an audit on the performance of the Contract. It may be carried out either directly by its own staff or by any other outside body authorised to do so on its behalf.

Such checks and audits may be initiated during the performance of the Contract and during a period of five years which starts running from the date of the payment of the balance or, where applicable, from the date of payment of the last purchase order form or specific contract.

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

- 22.2 The Contractor shall keep all original documents stored on any appropriate medium, including digitised originals when they are authorised by national law and under the conditions laid down therein, for a period of five years which starts running from the date of payment of the balance or, where applicable, from the date of payment of the last purchase order form or specific contract.

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

- 22.4 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, the Office may recover all or part of the payments made and may take any other measure which it considers necessary.

- 22.5 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), 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 the Office.

- 22.6 The Court of Auditors shall have the same rights as the Office, notably right of access, for the purpose of checks and audits.



## **Part III – Additional Provisions concerning the Performance of Supply Contracts**

### **ARTICLE 23 – PACKING, SHIPPING, CARRIAGE AND INSURANCE**

The packing, shipping, carriage and insurance of supplies shall be the responsibility of the Contractor.

The Contractor shall complete or cause to be completed all the formalities involved in shipping, in particular those involved in exportation.

The Contractor shall complete or cause to be completed all the formalities involved in importation or shall provide all the documents required for the purpose, as required by the tender conditions.

### **ARTICLE 24 – PACKAGING**

24.1 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.

The maximum total volume for packed goods (where applicable, pallet included) shall not exceed 1250 mm width and 1600 mm height.

24.2 Unless otherwise specified in the Special Conditions or in the tender specifications, the packing materials shall remain the property of the Office.

Unless otherwise specified in the Special Conditions or in the tender specifications, pallets shall be considered as one-way packaging and shall not be returned.

24.3 Each box shall be clearly labelled with the following information:

- Office for Harmonization in the Internal Market (Trade Marks and Designs) and address for delivery;
- name of Contractor;
- description of contents;
- date of delivery;
- reference number and date of the Contract and, where applicable, reference number of purchase order form or specific contract.

### **ARTICLE 25 – DELIVERY OF SUPPLIES**

#### **25.1 Time allowed for delivery**

The time allowed for delivery shall be a maximum of four weeks unless otherwise specified in the Special Conditions or the tender specifications.

#### **25.2 Place of delivery**

The delivery of the supplies shall be made at the goods delivery entrance of the Office's main seat, situated in Avenida de Europa, 4, Polígono Agua Amarga, 03008 Alicante, Spain. The place of delivery might also be any other building in the area of Alicante where the Office has premises.

The Office reserves the right to change the delivery address, giving sufficient notice. In such a case, the cost of carriage may be adjusted by mutual agreement.

### **25.3 Procedure for delivery**

The supplies shall be unloaded by the Contractor in the goods delivery bay and transferred to the X-ray inspection equipment situated in the warehouse adjacent to the goods delivery bay. Once the inspection has been completed and the supplies have been sealed by the Office's security services, the Contractor must transfer them to the reception storeroom, indicated by Office staff or, where specified in the Special Conditions or, where applicable, purchase order form or specific contract, the Contractor must reload the supplies onto its vehicle, transport them to the Office building specified in the Special Conditions, purchase order form or specific contract, and unload them definitively in the appropriate goods delivery bay. All of the above actions must be carried out by the Contractor using its staff and equipment.

### **25.4 Date and time of delivery**

The Office shall be notified in writing at least four working days in advance of the exact date of delivery. All deliveries shall be made at the agreed place of delivery between 09:00h and 12:00h.

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

### **25.5 Consignment note**

Each delivery shall be accompanied by a consignment note in duplicate, duly signed and dated by the Contractor or its carrier. The consignment note shall give the Contract number and, where applicable, the purchase order form or specific contract number and particulars of the supplies delivered. Where applicable, a copy of the purchase order form, stamped by the Contractor, shall be annexed to the consignment note. One copy of the consignment note shall be countersigned by the Office and returned to the Contractor or to its carrier.

Signature of the consignment note by the Office is simply an acknowledgment of the fact that the supplies have been delivered and in no way implies conformity of the supplies with the Contract or, where applicable, purchase order form or specific contract.

## **ARTICLE 26 – CONFORMITY**

### **26.1 Certificate of conformity**

Conformity of the supplies delivered shall be evidenced by the signature of a certificate to this effect by the Office no later than one month after the date of delivery, unless otherwise specified in the Special Conditions or in the tender specifications.

Conformity shall be declared only where the conditions laid down in the Contract and, where applicable, purchase order form or specific contract, are satisfied and the supplies conform to the tender specifications.

Where, for reasons attributable to the Contractor, the Office is unable to accept the supplies, the Contractor shall be notified in writing.

### **26.2 Conformity of the supplies delivered with the Contract**

- a) The supplies delivered by the Contractor to the Office must be in conformity in quantity, quality, price and packaging with the Contract and, where applicable, the relevant purchase order form or specific contract.
- b) The supplies delivered must:
  - (i) correspond to the description given in the tender specifications and possess the characteristics of the supplies provided by the Contractor to the Office as a sample or model;

- (ii) be fit for any specific purpose required of them by the Office and made known to the Contractor at the time of conclusion of the Contract 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 the Office 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.

### **26.3 Remedy**

- a) The Contractor shall be liable to the Office 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 17 (Liquidated Damages) regarding damages applicable to the total price of the supplies concerned, the Office 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 the Office, taking account of the nature of the supplies and the purpose for which they are required by the Office.
- d) The term 'free of charge' in paragraph b) refers to the costs incurred to bring the goods into conformity, particularly the cost of carriage, labour and materials.

### **26.4 Assembly**

If required, the Contractor shall assemble the supplies delivered within a period of one month unless otherwise specified in the Special Conditions or, where applicable, in the purchase order form or specific contract.

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 Contract and the supplies were installed by the Contractor or under its responsibility. This shall apply equally if the product was to be installed by the Office and was incorrectly installed owing to a shortcoming in the installation instructions.

### **26.5 Services provided to supplies**

If required by the Special Conditions or the tender specifications, services related to supplies shall be provided accordingly.

## **ARTICLE 27 – GUARANTEE**

- 27.1 The supplies shall be guaranteed against all defects in manufacture or materials for two years from the date of delivery, unless provision for a longer period is made in the tender specifications.
- 27.2 The Contractor shall guarantee that any permits and licences required for manufacturing and selling the supplies have been obtained.

- 27.3 The Contractor shall replace at its own expense, within a reasonable time limit to be determined by agreement between the parties, any items which become damaged or defective in the course of normal use during the guarantee period.
- 27.4 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.
- 27.5 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.
- 27.6 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 Contract, or, where applicable, purchase order form or specific contract, even though they may not have been the cause of any incident. In this case, the guarantee period shall be extended as stated above.

## **Part IV – Additional Provisions concerning the Performance of Service Contracts**

### **ARTICLE 28 – OWNERSHIP OF THE RESULTS – INTELLECTUAL AND INDUSTRIAL PROPERTY RIGHTS**

- 28.1 Any results or rights therein, including copyright and other intellectual or industrial property rights, obtained as a result of the performance of the Contract, shall be owned solely by the Office. All the rights shall be acquired by the Office from the moment the results are delivered by the Contractor and accepted by the Office. The payment of the price as set out in the Contract, or purchase order forms or specific contracts is deemed to include any fees payable to the Contractor in relation to the acquisition of ownership of rights by the Office including all forms of use of the results. The acquisition of ownership of rights by the Office under the Contract covers all territories worldwide.
- 28.2 The Office may use, publish, exploit, assign or transfer results and rights referred to in paragraph 1 as it sees fit, without geographical or other limitation, except where limitations are imposed by the existence of any industrial or intellectual property rights prior to the Contract being entered into. The Contractor shall license the pre-existing rights on a royalty-free, non-exclusive and irrevocable basis to the Office. All the pre-existing rights shall be licensed to the Office from the moment the results were delivered and accepted by the Office. The licensing of pre-existing rights to the Office under the Contract covers all territories worldwide and is valid for the whole duration of intellectual property rights protection
- 28.3 When delivering the results, the Contractor shall warrant that they are free of rights or claims from creators and third parties including in relation to pre-existing rights, for any use envisaged by the Office. This does not concern the moral rights of natural persons. The Contractor shall establish to that effect a list of all pre-existing rights and rights of creators and third parties on the results of this Contract or parts thereof. This list shall be provided no later than the date of delivery of the final results. In the result the contractor shall clearly point out all quotations of existing textual works. The complete reference should include as appropriate: name of the author, title of the work, date and place of publication, date of creation, address of publication on internet, number, volume and other information which allows the origin to be easily identified.
- 28.4 Upon request by the Office, the Contractor shall provide evidence of ownership or rights to use all the listed pre-existing rights and rights of third parties except for the rights owned by the Office. This evidence may refer, inter alia, to rights to: parts of other documents, images, graphs, tables, data, software, technical inventions, know-how etc. (delivered in paper, electronic or other form), IT development tools, routines, subroutines and/or other programs ("background technology"), concepts, designs, installations or pieces of art, data, source or background materials or any other parts of external origin. The evidence shall include, as appropriate:
- a) the name and version number of a software product;
  - b) the full identification of the work and its author, developer, creator, translator, data entry person, graphic designer, publisher, editor, photographer, producer;
  - c) a copy of the licence to use the product or of the agreement granting the relevant rights to the Contractor or a reference to this licence;

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

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

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

- 28.5 By delivering the results the Contractor warrants that the creators undertake not to oppose that their names be recalled when the results are presented to the public and confirms that the results can be divulged. Names of authors shall be recalled on request in the manner communicated by the Contractor to the Office. The Contractor shall obtain the consent of creators regarding the granting of the relevant rights and be ready to provide documentary evidence upon request. If natural, recognisable persons appear in a result or their voice is recorded the Contractor shall submit a statement of these persons (or of the persons exercising parental authority in case of minors) where they give their permission for the described use of their image or voice on request by the Office. This does not apply to persons whose permission is not required in line with the law of the country where photographs were taken, films shot or audio records made.
- 28.6 Should performance of the Contract involve the use of patents, utility models, trade marks for goods or services or industrial designs belonging to third parties, the Contractor shall indemnify the Office against any action for infringement which may be brought against it.

The Contractor shall not indemnify the Office in cases where the action for infringement is the consequence of:

- the Office imposing the use of any industrial property rights indicated in the first sub-paragraph and belonging to a third party;
- use of the industrial property rights by the Office for a purpose other than that indicated in the Contract or contrary to the purposes specified in the Contract;
- an unjustified refusal from the Office of changes to the provisions of the Contract proposed by the Contractor to mitigate the risks of infringements of intellectual or industrial property rights.

The Office and the Contractor shall inform each other of any information that could lead to an intellectual or industrial property right impeding performance of the Contract. At the first indication that an action has been brought by a third party, in particular the lodging of a claim, even after performance of the Contract, the party implicated shall notify the other party without delay, whereupon both parties shall act jointly and shall exchange all information and evidence they may possess or obtain.

## **Part V – Additional Provisions concerning the Performance of Works Contracts**

### **ARTICLE 29 – REPRESENTATION OF THE OFFICE**

The Office shall appoint a representative to oversee the Contractor to ensure that all the stipulations and provisions contained in the contract documents are fully observed.

The Office shall inform the Contractor of the name of its representative, and the name of person who will stand in for the representative in the event of the latter's absence, within 15 days of the signature of the Contract.

The Office's representative shall be responsible in particular for:

- authorising the entry of the Contractor's staff to the Office's premises;
- monitoring the services provided by the Contractor under the Contract and verifying that the provisions of the Contract are adhered to,
- proposing alterations or amendments that may improve progress of the task in hand,
- checking and certifying the number of persons employed by the Contractor, and their qualifications, against the requirements of the Contract;
- indicating defects and failures in the performance of the Contract.

The Contractor shall afford and shall ensure that its staff afford due respect to the representatives of the Office, and shall ensure that they have free access to the Contractor's work locations, all works areas and stores of materials to be used in the works, for their inspection.

The fact that the Office's representative performs supervisory duties, carries out inspections and verifications and issues provisions or stipulations does not release the Contractor from its own obligations or liabilities regarding the correct and full implementation of the Contract and does not release the Contractor from its obligations under the applicable laws, regulations and standards in force.

### **ARTICLE 30 – SUSPENSION OF CONTRACTUAL ACTIVITIES**

In the event that unforeseen circumstances temporarily prevent all or some of the contractual activities being performed, the Office may order suspension of those activities and their subsequent resumption as soon as the grounds for that suspension cease to exist.

If the Office orders the suspension of only part of the contractual activities, the Contractor shall continue to perform the remaining activities and shall not be entitled to request compensation for being unable to perform all the contractual activities simultaneously.

### **ARTICLE 31 – PROHIBITION ON THE CONTRACTOR SUSPENDING, INTERRUPTING OR DELAYING CONTRACTUAL ACTIVITIES**

The Contractor may not, under any circumstances, take a unilateral decision to suspend, interrupt or delay performance of the contractual activities even in the event of disputes with the Office awaiting resolution.

A unilateral decision by the Contractor to suspend, interrupt or delay the contractual activities shall constitute a failure to perform and may give rise to the immediate termination of the Contract on the grounds of breach of contract by the Contractor.