



European Securities and
Markets Authority

Framework service contract with ESMA

Consultancy for services in the field of facility management

Contract number: ESMA/2019/[insert reference number]



Framework service contract

Framework contract N° [insert reference number]

The European Securities and Markets Authority (hereinafter referred to as 'ESMA' or, when applicable, as 'the Union', the lead contracting authority (ESMA) and the following contracting authority:

European Banking Authority (EBA),

(hereinafter collectively referred to as 'the contracting authority')

represented for the purposes of the signature of this framework contract by Verena Ross, ESMA Executive Director and Authorising Officer,

of the one part,

and

[official name in full]

[statutory registration number]

[official address in full]

[VAT registration number]

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

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

(hereinafter referred to as 'the Contractor'), represented for the purposes of the signature of this framework service contract by [*forename, surname and function,*]

of the other part,

HAVE AGREED

the **special conditions**, the **general conditions for the framework service contract**, and the following annexes:

Annex I – Tender specifications (reference N° PROC/2019/01)

Annex II – Contractor's tender

Annex III – Model for order forms and model for specific contracts

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

This FWC sets out:

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

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

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I. SPECIAL CONDITIONS

I.1 Order of priority of provisions

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

- a) The provisions set out in the special conditions take precedence over those in the other parts of the FWC.
- b) The provisions set out in the general conditions take precedence over those in the order form and specific contract (Annex III).
- c) The provisions set out in the *order form* and specific contract (Annex III) take precedence over those in other annexes.
- d) The provisions set out in the tender specifications (Annex I) take precedence over those in the tender (Annex II).
- e) The provisions set out in the FWC take precedence over those in the specific contracts.
- f) The provisions set out in the specific contracts take precedence over those in the requests for services.
- g) The provisions set out in the requests for services take precedence over those in specific tenders.

Any reference to specific contracts applies also to order forms.

I.2 Subject

I.2.1

The subject of the FWC is Consultancy for services in the field of facility management.

I.3 Entry into force and duration

I.3.1

The FWC shall enter into force on the date on which it is signed by the last contracting party.

I.3.2

Under no circumstances may implementation commence before the date on which the FWC enters into force.

I.3.3

The FWC is concluded for a period of 12 months with effect from the date on which it enters into force. Unless otherwise specified, all periods specified in the FWC are calculated in calendar days. The period of *performance of the contract* may be extended only with the express written agreement of the parties before the expiration of such period.

I.3.4

The order forms or specific contracts shall be signed by both parties before the FWC expires. The FWC shall continue to apply to such order forms and specific contracts after its expiry. The services relating to such specific contracts must be performed no later than six months after its expiry.

I.3.5

The FWC shall be renewed automatically up to three times under the same conditions, unless written notification to the contrary is sent by one of the parties and received by the other three months before the end of the ongoing duration. Renewal does not imply any modification or deferment of existing obligations.

I.4 Appointment of the contractor and implementation of the FWC

I.4.1 Appointment of the contractor

ESMA appoints the Contractor for a multiple FWC in cascade in [complete position].

I.4.2 Period of provision of the services

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

I.4.3 Implementation of multiple FWC in cascade

The FWC is implemented as follows: ESMA orders services by sending a specific contract by email to the Contractor who is ranked first in the cascade.

Within ten working days, the Contractor must either:

- a) send the specific contract back to ESMA signed and dated; or
- b) send an explanation of why it cannot accept the offer.

If the contractor does not accept the order or fails to observe the deadline or if it is in a situation of conflicting interests that may negatively affect the performance of the specific contract (see Article II.7), ESMA may place the order with the next contractor on the cascade.

If the contractor repeatedly refused to sign specific contracts or repeatedly fails to send them back on time, the contractor may be considered in breach of its obligations under this FWC as set out in Article II.18.1(c).

I.5 Prices

I.5.1 Maximum amount of the FWC and maximum prices

The maximum amount covering all purchases under this FWC including all renewals is €[amount in figures and in words]. However, it must not be construed as a commitment on ESMA to purchase for the maximum amount.

The maximum prices of the services shall be as listed in Annex II. ESMA may accept any lower prices if offered by the contractor.

I.5.2 Price revision index

Price revision is determined by the formula set out in Article II.20 and using the trend in the harmonised indices of consumer prices (HICP) [complete]¹ available on Eurostat Databases (Theme: Economy and finance; Prices) website: <http://ec.europa.eu/eurostat/data/database>.

I.5.3 Reimbursement of expenses

Reimbursement of expenses is not applicable to this FWC.

I.6 Payment arrangements

I.6.1 Pre-financing

Pre-financing is not applicable to this FWC.

I.6.2 Interim payment

Interim payment is not applicable to this FWC.

¹

Specify the consumer price index or any other index adapted to the purchase, e.g.:

- Euro area (19 countries): for contracts expressed in euro (as a general rule);
- European Union (current composition): for contracts performed in the European Union outside the euro area;
- consumer price index of the state in whose currency the FWC price is expressed;

a) index of the state where the contractor is mainly based; or

b) index of the state where the service will be mainly carried out.

- Any other index corresponding to the main cost of the contract (e.g. index linked to salaries for interim services, oil prices for transport-related contracts, etc.).

I.6.3 Payment of the balance

The contractor (or leader in the case of a joint tender) may claim the payment of the balance in accordance with Article II.21.6.

The contractor (or leader in the case of a joint tender) must send an invoice electronic means for payment of the balance due under a specific contract, for the services already provided, as indicated in Section 3.12 in the tender specifications and accompanied by the following:

- the reference numbers of the FWC,
- the reference number(s) of the order form(s) / specific contract(s),
- an exact description of each service,
- the exact amount to be paid per service and the total amount,
- the exact details of the bank account to which payment is to be made.

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

Invoices for the services shall be issued quarterly, with the exception of Q4, following this timing:

- Q1: 01 January - 31 March
- Q2: 01 April – 31 June
- Q3: 01 July – 30 September
- Q4: 01 October – 31 December: invoice for October and November shall be issued in December, invoice for December in January unless specified otherwise in the relevant specific contract. If ESMA has observations to make, it must send them to the contractor (or leader in the case of a joint tender) and suspend the time limit for payment in accordance with Article II.21.7.

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

Once the suspension is lifted, ESMA must give its approval and pay within the remainder of the time-limit indicated above unless it rejects partially or fully the submitted documents or deliverables.

I.6.4 Performance guarantee

Performance guarantee is not applicable to this FWC.

I.6.5 Retention money guarantee

Retention money guarantee is not applicable to this FWC.

I.7 Bank Account

Payments shall be made to the Contractor's (or leader in the case of a joint tender) bank account denominated in euro identified as follows:

Name of bank:

Full address of branch:

Exact denomination of account holder:

Full account number including bank codes:

IBAN² code:

I.8 Communication details

I.8.1

Communications other than the ones listed under Article I.8.2 and I.8.3 shall be sent to the following address:

ESMA:

ESMA
Att: Procurement
103 rue Grenelle
Paris 75007
Email: procurement@esma.europa.eu

Contractor:

[Full name and function]

[Department]

[Full official address]

[Email: complete]

By derogation from this Article, different contact details for the contracting authority or the contractor may be provided in specific contracts or order forms.

² BIC or SWIFT code for countries with no IBAN code

I.8.2

Invoices and debit notes shall be communicated between the contractor and ESMA only by electronic means. Any communication by using different email addresses than the ones designated below shall not be considered valid for the performance of this contract.

For ESMA, the unique dispatching and recipient email address shall be invoices@esma.europa.eu

For the Contractor, the unique dispatching and recipient email address shall be [complete email address].

Both parties will ensure that only authorised persons may have access to the designated dispatching and recipient email addresses and to the documents transmitted through them.

PDF format or equivalent must be used for enhancing the integrity of the documents to be transmitted.

I.8.3

As derogation to Article II.11, contract amendments, specific contracts and order forms shall be formalised and communicated between the contractor and ESMA only by electronic means. Any communication by using different email addresses than the ones designated below shall not be considered valid for the performance of this contract.

For ESMA, the unique dispatching and recipient email address shall be procurement@esma.europa.eu.

For the contractor, the unique dispatching and recipient email address shall be [complete email address].

Both parties will ensure that only authorised persons may have access to the designated dispatching and recipient email addresses and to the documents transmitted through them.

PDF format or equivalent must be used for enhancing the integrity of the documents to be transmitted.

I.8.4

E-PRIOR shall not be used for the performance of this contract.

I.9 Data Controller

For the purposes of Article II.9, the data controller is ESMA

I.10 Exploitation of the *results* of the FWC

I.10.1 Detailed list of modes of exploitation of the *results*

In accordance with Article II.13.1 whereby the Union acquires ownership of the *results* as defined in this FWC, including the tender specifications, these *results* may be used for any of the following modes of exploitation:

- a) use for its own purposes:
 - i. making available to the staff of ESMA;
 - ii. making available to the persons and entities working for ESMA or cooperating with it, including contractors, subcontractors whether legal or natural persons, Union institutions, agencies and bodies, Member States' institutions;
 - iii. installing, uploading, processing;
 - iv. arranging, compiling, combining, retrieving;
 - v. copying, reproducing in whole or in part and in unlimited number of copies
- b) distribution to the public in hard copies, in electronic or digital format, on the internet including social networks as a downloadable or non-downloadable file;
- c) communication through press information services;
- d) inclusion in widely accessible databases or indexes, such as via 'open-access' or 'open data' portals, or similar repositories, whether freely accessible or accessible only upon subscription;
- e) modifications by ESMA or by a third-party in the name of ESMA, including:
 - i. shortening;
 - ii. summarising;
 - iii. modifying the content, the dimensions;
 - iv. making technical changes to the content (necessary correction of technical errors), adding new parts or functionalities, changing functionalities, providing third parties with additional information concerning the *result* (e.g. source code) with a view to making modifications;
 - v. addition of new elements, paragraphs, titles, leads, bolds, legend, table of content, summary, graphics, subtitles, sound;
 - vi. addition of metadata, for text and data-mining purposes; addition of right-management information; addition of technological protection measures;
 - vii. preparation in audio form, preparation as a presentation, animation, pictograms story, slide-show, public presentation;
 - viii. extracting a part or dividing into parts;
 - ix. incorporating, including by cropping and cutting, the results or parts thereof in other works, such as on websites and webpages;
 - x. translating, inserting subtitles, dubbing in different language versions:
 - English, French, German;
 - all official languages of the EU;
 - languages used within the EU;
 - languages of candidate countries;

- f) rights to authorise, or license the modes of exploitation set out in any of the points (a) to (e) to third parties, provided however that this does not apply to *pre-existing rights* and *pre-existing materials*, if they are only licensed to the Union, except as foreseen by Article II.13.2.
- g) other adaptations which the parties may later agree; in such case, the following rules apply: ESMA must consult the contractor. If necessary, the contractor must in turn seek the agreement of any *creator* or other right holder and must reply to ESMA within one month by providing its agreement, including any suggestions of modifications, free of charge. The contractor may refuse the intended modification only if a *creator* can demonstrate that the intended modification may harm his/her honour or reputation, thereby violating his/her moral rights.

The modes of exploitation may be defined in more details in the specific contract.

The list above is in addition to whatever rights already accrue to ESMA on the basis of existing exceptions in the applicable legislation, such as the copyright exception to ensure the proper performance or reporting of administrative proceedings, in cases where such exceptions apply.

I.10.2 Licence or transfer of pre-existing rights

All *pre-existing rights* incorporated in the *results*, if any, are licensed to ESMA as set out in Article II.13.2.

By derogation to Article II.13.2, ESMA acquires fully and irrevocably all *pre-existing rights* incorporated in the *results*, unless provided otherwise in a specific contract.

I.10.3 Provision of list of pre-existing rights and documentary evidence

The contractor must provide ESMA with a list of *pre-existing rights* as set out in Article II.13.4 together with the invoice for payment of the balance at the latest.

I.11 Termination by either party

Either party may terminate the FWC and/or the FWC and specific contracts by sending formal notification to the other party with three month written notice.

If the FWC or a specific contract is terminated:

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

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

I.12 Applicable law and settlement of disputes

I.12.1

The FWC is governed by Union law, complemented, where necessary, by the national substantive law of France.

I.12.2

The courts of Paris, France, have exclusive jurisdiction over any dispute regarding the interpretation, application or validity of the FWC.

I.13 [Interinstitutional FWC

I.13.1

This FWC is interinstitutional. ESMA acts on its own behalf and on behalf of the bodies listed in the title of the FWC ("the contracting authorities") for which provided ESMA with a power of attorney before FWC signature. ESMA signs the FWC and any amendments on behalf of itself and of all other contracting authorities.

I.13.2

Each contracting authority is responsible for the particular order forms or specific contracts it awards.

I.13.3

In the Contractor has a complaint in relation to the conclusion, performance or termination of an order form or specific contract, the Contractor remains bound by its obligations under the FWC and other order forms or specific contracts.

SIGNATURES

For the Contractor,

[forename/surname/function]

For ESMA,

Verena Ross, Executive Director

signature: _____

signature: _____

Done at....., on.....

Done at Paris, on.....

In duplicate in English.

DRAFT

II. GENERAL CONDITIONS FOR THE FRAMEWORK CONTRACT FOR SERVICES

II.1 Definitions

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

'Back office': the internal system(s) used by the parties to process electronic invoices;

'Breach of obligations': failure by the contractor to fulfil one or more of its contractual obligations.

'Confidential information or document': any information or document received by either party from the other or accessed by either party in the context of the implementation of the FWC, that any of the parties has identified in writing as confidential. It may not include information that is publicly available;

'Conflict of interest': a situation where the impartial and objective implementation of the FWC by the contractor is compromised for reasons involving family, emotional life, political or national affinity, economic interest, any other direct or indirect personal interest or any other shared interest with ESMA or any third party related to the subject matter of the FWC;

'Creator': means any natural person who contributes to the production of the *result*;

'EDI message' (electronic data interchange): a message created and exchanged through the electronic transfer, from computer to computer, of commercial and administrative data using an agreed standard;

'e-PRIOR': the service-oriented communication platform that provides a series of web services and allows the exchange of standardised electronic messages and documents between the parties. This is done either through web services, with a machine-to-machine connection between the parties' back office systems (EDI messages), or through a web application (the supplier portal). The Platform may be used to exchange electronic documents (e-documents) such as electronic requests for services, electronic specific contracts, electronic acceptance of services and electronic invoices between the parties.

'Force majeure': any unforeseeable, exceptional situation or event beyond the control of the parties that prevents either of them from fulfilling any of their obligations under the FWC. The situation or event must not be attributable to error or negligence on the part of the parties or on the part of the subcontractors and must prove to be inevitable despite their exercising due diligence. Defaults of service, defects in equipment or material or delays in making them available, labour disputes, strikes and financial difficulties may not be invoked as force majeure, unless they stem directly from a relevant case of force majeure;

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

'Fraud': an act or omission committed in order to make an unlawful gain for the perpetrator or another by causing a loss to the Union's financial interests and relating to: i) the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the misappropriation or wrongful retention of funds or assets from the Union budget, ii) the non-disclosure of information in violation of a specific obligation, with the same effect or iii) the misapplication of such funds or assets for purposes other than those for which they were originally granted, which damages the Union's financial interests;

'Grave professional misconduct': a violation of applicable laws or regulations or ethical standards of the profession to which a contractor or a related person belongs, including any conduct leading to sexual or other exploitation or abuse, or any wrongful conduct of the contractor or a related person which has an impact on its professional credibility where such conduct denotes wrongful intent or gross negligence.

'Implementation of the FWC': the purchase of services envisaged in the FWC through the signature and performance of specific contracts;

'Interface control document': the guideline document which lays down the technical specifications, message standards, security standards, checks of syntax and semantics, etc. to facilitate machine-to-machine connection. This document is updated on a regular basis;

'Irregularity': any infringement of a provision of Union law *resulting* from an act or omission by an economic operator, which has, or would have, the effect of prejudicing the Union's budget.

'Notification' (or 'notify'): form of communication between the parties made in writing including by electronic means;

'Order form': a simplified form of specific contract by which ESMA orders services under this FWC;

'Performance of a specific contract': the execution of tasks and delivery of the purchased services by the contractor to ESMA;

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

'Pre-existing material': any material, document, technology or know-how which exists prior to the contractor using it for the production of a *result* in the implementation of the FWC;

‘Pre-existing right’: any industrial and intellectual property right on pre-existing material; it may consist in a right of ownership, a licence right and/or right of use belonging to the contractor, the creator, ESMA as well as to any other third parties;

‘Professional conflicting interest’: a situation in which the contractor’s previous or ongoing professional activities affect its capacity to implement the FWC or to perform a specific contract to an appropriate quality standard.

‘Related person’: any natural or legal person who is a member of the administrative, management or supervisory body of the contractor, or who has powers of representation, decision or control with regard to the contractor;

‘Request for services’: a document from ESMA requesting that the contractors in a multiple FWC with re-opening of competition provide a specific tender for services whose terms are not entirely defined under the FWC;

‘Result’: any intended outcome of *the implementation of the FWC*, whatever its form or nature.. A *result* may be further defined in this FWC as a deliverable. A *result* may, in addition to newly created materials produced specifically for ESMA by the contractor or at its request, also include pre-existing materials;

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

‘Supplier portal’: the e-PRIOR portal, which allows the contractor to exchange electronic business documents, such as invoices, through a graphical user interface.

II.2 Roles and responsibilities in the event of a joint tender

In the event of a joint tender submitted by a group of economic operators and where the group does not have legal personality or legal capacity, one member of the group is appointed as leader of the group.

II.3 Severability

Each provision of this FWC is severable and distinct from the others. If a provision is or becomes illegal, invalid or unenforceable to any extent, it must be severed from the remainder of the FWC. This does not affect the legality, validity or enforceability of any other provisions of the FWC, which continue in full force and effect. The illegal, invalid or unenforceable provision must be replaced by a legal, valid and enforceable substitute provision which corresponds as closely as possible with the actual intent of the parties under the illegal, invalid or unenforceable provision. The replacement of such a provision must be made in accordance with Article II.11. The FWC must be interpreted as if it had contained the substitute provision as from its entry into force.

II.4 Provision of services

II.4.1

Signature of the FWC does not guarantee any actual purchase. ESMA is bound only by specific contracts implementing the FWC.

II.4.2

The Contractor must provide services of high quality standards, in accordance with the state of the art in the industry and the provisions of this FWC, in particular the tender specifications and the terms of its tender. Where ESMA has the right to make modifications to the results, they must be delivered in a format and with the necessary information which effectively allow such modifications to be made in a convenient manner.

II.4.3

The Contractor must comply with the minimum requirements provided for in the tender specifications. This includes compliance with applicable obligations under environmental, social and labour law established by Union law, national law and collective agreements or by the international environmental, social and labour law provisions listed in Annex X to Directive 2014/24/EU³, compliance with data protection obligations resulting from Regulation (EU) 2016/679⁴ and Regulation (EU) 2018/1725⁵.

II.4.4

The Contractor must obtain any permit or licence required in the State where the services are to be provided.

II.4.5

All periods specified in the FWC are calculated in calendar days, unless otherwise specified.

³ OJ L 94 of 28.03.2014, p. 65.

⁴ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, OJ L 119, 4.5.2016, p. 1, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2016.119.01.0001.01.ENG

⁵ Regulation (EU) 2018/1725 of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC, OJ L 295/39, 21.11.2018, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018R1725&from=EN>

II.4.6

The Contractor must not present itself as a representative of ESMA and must inform third parties that it is not part of the European public service.

II.4.7

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

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

II.4.8

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

II.4.9

At ESMA's reasoned request, the Contractor must replace any member of personnel who:

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

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

II.4.10

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

II.4.11

The contractor must immediately inform the contracting authority of any changes in the exclusion situations as declared, according to Article 137 (1) of Regulation (EU) 2018/1046.

II.5 Communication between the parties

II.5.1 Form and means of communication

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

- a) be made in writing in paper or electronic format in the language of the contract;
- b) bear the FWC number and, if applicable, the specific contract number;
- c) be made using the relevant communication details set out in Article I.8; and
- d) be sent by mail, email or, for the documents specified in the special conditions, via *e-PRIOR*.

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

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

II.5.2 Date of communications by mail and email

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

Email is deemed to have been received by the receiving party on the day of dispatch of that email, provided that it is sent to the email address indicated in Article I.8. The sending party must be able to prove the date of dispatch. In the event that the sending party receives a non-delivery report, it must make every effort to ensure that the other party actually receives the communication by email or mail. In such a case, the sending party is not held in breach of its obligation to send such communication within a specified deadline.

Mail sent to ESMA is deemed to have been received by ESMA on the date on which the department responsible referred to in Article I.8 registers it.

Formal notifications are considered to have been received by the receiving party on the date of receipt indicated in the proof received by the sending party that the message was delivered to the specified recipient.

II.5.3 Submission of e-documents via e-PRIOR

- 1) If provided for in the special conditions, the exchange of electronic documents (e-documents) such as requests for services, specific contracts and invoices between the parties is automated through the use of the e-PRIOR platform. This platform provides

two possibilities for such exchanges: either through web services (machine-to-machine connection) or through a web application (the supplier portal).

- 2) ESMA takes the necessary measures to implement and maintain electronic systems that enable the supplier portal to be used effectively.
- 3) In the case of machine-to-machine connection, a direct connection is established between the parties' back offices. In this case, the parties take the measures necessary on their side to implement and maintain electronic systems that enable the machine-to-machine connection to be used effectively. The electronic systems are specified in the interface control document. The contractor (or leader in the case of a joint tender) must take the necessary technical measures to set up a machine-to-machine connection and at its own cost.
- 4) If communication via the supplier portal or via the web services (machine-to-machine connection) is hindered by factors beyond the control of one party, it must notify the other immediately and the parties must take the necessary measures to restore this communication.
- 5) If it is impossible to restore the communication within two working days, one party must notify the other that alternative means of communication specified in Article II.5.1 will be used until the supplier portal or the machine-to-machine connection is restored.
- 6) When a change in the interface control document requires adaptations, the contractor (or leader in the case of a joint tender) has up to six months from receipt of the notification to implement this change. This period can be shortened by mutual agreement of the parties. This period does not apply to urgent measures required by the security policy of ESMA to ensure integrity, confidentiality and non-repudiation of information and the availability of e-PRIOR, which must be applied immediately.

II.5.4 Validity and date of e-documents

- 1) The parties agree that any e-document, including related attachments exchanged via *e-PRIOR*:
 - a) is considered as equivalent to a paper document;
 - b) is deemed to be the original of the document;
 - c) is legally binding on the parties once an *e-PRIOR* authorised person has performed the 'sign' action in *e-PRIOR* and has full legal effect; and
 - d) constitutes evidence of the information contained in it and is admissible as evidence in judicial proceedings.
- 2) The parties expressly waive any rights to contest the validity of such a document solely on the grounds that communications between the parties occurred through e-PRIOR or that the document has been signed through *e-PRIOR*. If a direct connection is established between the parties' *back offices* to allow electronic transfer of documents, the parties agree that an e-document, sent as mentioned in the *interface control document*, qualifies as an *EDI message*.
- 3) If the e-document is dispatched through the *supplier portal*, it is deemed to have been legally issued or sent when the contractor (or leader in the case of a joint tender) is able to successfully submit the e-document without any error messages. The generated

PDF and XML document for the e-document are considered as a proof of receipt by ESMA.

- 4) In the event that an e-document is dispatched using a direct connection established between the parties' *back offices*, the e-document is deemed to have been legally issued or sent when its status is 'received' as defined in the *interface control document*.
- 5) When using the *supplier portal*, the contractor (or leader in the case of a joint tender) can download the PDF or XML message for each e-document for one year after submission. After this period, copies of the e-documents are no longer available for automatic download from the *supplier portal*.

II.5.5 Authorised persons in e-PRIOR

The contractor submits a request for each person who needs to be assigned the role of 'user' in *e-PRIOR*. These persons are identified by means of the European Communication Authentication Service (ECAS) and authorised to access and perform actions in *e-PRIOR* within the permissions of the user roles that ESMA has assigned to them.

User roles enabling these *e-PRIOR* authorised persons to sign legally binding documents such as specific tenders or specific contracts are granted only upon submission of supporting documents proving that the authorised person is empowered to act as a legal representative of the contractor.

II.6 Liability

II.6.1

ESMA is not liable for any damage or loss caused by the contractor, including any damage or loss to third parties during or as a consequence of *implementation of the FWC*.

II.6.2

If required by the relevant applicable legislation, the contractor must take out an insurance policy against risks and damage or loss relating to the *implementation of the FWC*. It must also take out supplementary insurance as reasonably required by standard practice in the industry. Upon request, the contractor must provide evidence of insurance coverage to ESMA.

II.6.3

The contractor is liable for any loss or damage caused to ESMA during or as a consequence of *implementation of the FWC*, including in the event of subcontracting, but only up to an amount not exceeding three times the total amount of the relevant specific contract. However, if the damage or loss is caused by the gross negligence or wilful misconduct of the contractor or of its *personnel* or subcontractors, as well as in the case of an action brought against the

contracting authority by a third party for breach of its intellectual property rights, the contractor is liable for the whole amount of the damage or loss.

II.6.4

If a third party brings any action against ESMA in connection with the *implementation of the FWC*, including any action for alleged breach of intellectual property rights, the contractor must assist ESMA in the legal proceedings, including by intervening in support of ESMA upon request.

If ESMA's liability towards the third party is established and that such liability is caused by the contractor during or as a consequence of the *implementation of the FWC*, Article II.6.3 applies.

II.6.5

If the contractor is composed of two or more economic operators (i.e. who submitted a joint tender), they are all jointly and severally liable to ESMA for the *implementation of the FWC*.

II.6.6

ESMA is not liable for any loss or damage caused to the contractor during or as a consequence of *implementation of the FWC*, unless the loss or damage was caused by wilful misconduct or gross negligence of ESMA.

II.7 Conflict of interest and professional conflicting interests

II.7.1

The contractor must take all the necessary measures to prevent any situation of *conflict of interest* or *professional conflicting interest*.

II.7.2

The contractor must notify ESMA in writing as soon as possible of any situation that could constitute a *conflict of interest* or a *professional conflicting interest* during the *implementation of the FWC*. The contractor must immediately take action to rectify the situation.

ESMA may do any of the following:

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

II.7.3

The contractor must pass on all the relevant obligations in writing to:

- h) its personnel;
- i) any natural person with the power to represent it or take decisions on its behalf;
- j) third parties involved in the *implementation of the FWC*, including subcontractors.

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

II.8 Confidentiality

II.8.1

ESMA and the contractor must treat with confidentiality any information or documents, in any format, disclosed in writing or orally, relating to the implementation of the FWC and identified in writing as confidential.

II.8.2

Each party must:

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

II.8.3

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

- a) the disclosing party agrees to release the receiving party from the confidentiality obligation earlier;

- b) the confidential information or documents become public through other means than a breach of the confidentiality obligation;
- c) the applicable law requires the disclosure of the confidential information or documents.

II.8.4

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

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II.9 Processing of personal data

II.9.1 Processing of personal data by the contracting authority

Any personal data included in or relating to the FWC, including its implementation, shall be processed in accordance with Regulation (EU) No 2018/1725. Such data shall be processed solely for the purposes of the implementation, management and monitoring of the FWC by the data controller.

The contractor or any other person whose personal data is processed by the data controller in relation to this FWC has specific rights as a data subject under Chapter III (Articles 14-25) of Regulation (EU) No 2018/1725, in particular the right to access, rectify or erase their personal data and the right to restrict or, where applicable, the right to object to processing or the right to data portability.

Should the contractor or any other person whose personal data is processed in relation to this FWC have any queries concerning the processing of its personal data, it shall address itself to the data controller. They may also address themselves to the Data Protection Officer of the data controller. They have the right to lodge a complaint at any time to the European Data Protection Supervisor.

Details concerning the processing of personal data are available in the data protection notice referred to in Article I.9.

II.9.2 Processing of personal data by the contractor

The processing of personal data by the contractor shall meet the requirements of Regulation (EU) No 2018/1725 and be processed solely for the purposes set out by the controller.

The contractor shall assist the controller for the fulfilment of the controller's obligation to respond to requests for exercising rights of person whose personal data is processed in relation to this FWC as laid down in Chapter III (Articles 14-25) of Regulation (EU) No 2018/1725. The contractor shall inform without delay the controller about such requests.

The contractor may act only on documented written instructions and under the supervision of the controller, in particular with regard to the purposes of the processing, the categories of data that may be processed, the recipients of the data and the means by which the data subject may exercise its rights.

The contractor shall grant personnel access to the data to the extent strictly necessary for the implementation, management and monitoring of the FWC. The contractor must ensure that personnel authorised to process personal data has committed itself to confidentiality or is under appropriate statutory obligation of confidentiality in accordance with the provisions of Article II.8.

The contractor shall adopt appropriate technical and organisational security measures, giving due regard to the risks inherent in the processing and to the nature, scope, context and purposes of processing, in order to ensure, in particular, as appropriate:

- a) the pseudonymisation and encryption of personal data;
- b) the ability to ensure the ongoing confidentiality, integrity, availability and resilience of processing systems and services;
- c) the ability to restore the availability and access to personal data in a timely manner in the event of a physical or technical incident;
- d) a process for regularly testing, assessing and evaluating the effectiveness of technical and organisational measures for ensuring the security of the processing;
- e) measures to protect personal data from accidental or unlawful destruction, loss, alteration, unauthorised disclosure of or access to personal data transmitted, stored or otherwise processed.

The contractor shall notify relevant personal data breaches to the controller without undue delay and at the latest within 48 hours after the contractor becomes aware of the breach. In such cases, the contractor shall provide the controller with at least the following information:

- a) nature of the personal data breach including where possible, the categories and approximate number of data subjects concerned and the categories and approximate number of personal data records concerned;
- b) likely consequences of the breach;
- c) measures taken or proposed to be taken to address the breach, including, where appropriate, measures to mitigate its possible adverse effects.

The contractor shall immediately inform the data controller if, in its opinion, an instruction infringes Regulation (EU) 2018/1725, Regulation (EU) 2016/679, or other Union or Member State data protection provisions as referred to in the tender specifications.

The contractor shall assist the controller for the fulfilment of its obligations pursuant to Article 33 to 41 under Regulation (EU) 2018/1725 to:

- a) ensure compliance with its data protection obligations regarding the security of the processing, and the confidentiality of electronic communications and directories of users;
- b) notify a personal data breach to the European Data Protection Supervisor;
- c) communicate a personal data breach without undue delay to the data subject, where applicable;
- d) carry out data protection impact assessments and prior consultations as necessary.

The contractor shall maintain a record of all data processing operations carried on behalf of the controller, transfers of personal data, security breaches, responses to requests for exercising rights of people whose personal data is processed and requests for access to personal data by third parties.

The contracting authority is subject to Protocol 7 of the Treaty on the Functioning of the European Union on the privileges and immunities of the European Union, particularly as regards the inviolability of archives (including the physical location of data and services as set out in Article I.9.2) and data security, which includes personal data held on behalf of the contracting authority in the premises of the contractor or subcontractor.

The contractor shall notify the contracting authority without delay of any legally binding request for disclosure of the personal data processed on behalf of the contracting authority made by any national public authority, including an authority from a third country. The contractor may not give such access without the prior written authorisation of the contracting authority.

The duration of processing of personal data by the contractor will not exceed the period referred to in Article II.24.2. Upon expiry of this period, the contractor shall, at the choice of the controller, return, without any undue delay in a commonly agreed format, all personal data processed on behalf of the controller and the copies thereof or shall effectively delete all personal data unless Union or national law requires a longer storage of personal data.

For the purpose of Article II.10, if part or all of the processing of personal data is subcontracted to a third party, the contractor shall pass on the obligations referred to in Articles I.9.2 and II.9.2 in writing to those parties, including subcontractors. At the request of the contracting authority, the contractor shall provide a document providing evidence of this commitment.

II.10 Subcontracting

II.10.1

The contractor must not subcontract and have the FWC implemented by third parties beyond the third parties already mentioned in its tender without prior written authorisation from ESMA.

II.10.2

Even if ESMA authorises subcontracting, the contractor remains bound by its contractual obligations and is solely responsible for the *implementation of the FWC*.

II.10.3

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

II.10.4

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

II.11 Amendments

II.11.1

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

II.11.2

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

II.12 Assignment

II.12.1

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

II.12.2

Any right or obligation assigned by the contractor without authorisation is not enforceable against ESMA.

II.13 Intellectual property rights

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

The Union acquires irrevocably worldwide ownership of the *results* and of all intellectual property rights under the FWC on the newly created materials produced specifically for the Union under the FWC and incorporated in the results, without prejudice however to the rules applying to pre-existing rights on pre-existing materials, as per Article II.13.2.

The intellectual property rights so acquired include any rights, such as copyright and other intellectual or industrial property rights, to any of the *results* and in all technological solutions and information created or produced by the contractor or by its subcontractor in *implementation of the FWC*. ESMA may exploit and use the acquired rights as stipulated in this FWC. The Union acquires all the rights as from the moment the contractor has created the *results*.

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

II.13.2 Licensing rights on pre-existing materials

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

The contractor licenses the *pre-existing rights* on a royalty-free, non-exclusive and irrevocable basis to the Union, which may use the *pre-existing materials* for all the modes of exploitation

set out in this FWC or in specific contracts.. Unless otherwise agreed, the licence is non-transferable and cannot be sub-licensed, except as provided hereafter:

(a) the pre-existing rights can be sub-licensed by the contracting authority to persons and entities working for it or cooperating with it, including contractors and subcontractors, whether legal or natural persons, but only for the purpose of their mission for the Union;

(b) if the result is a "document" such as a report or a study, and it is meant to be published, the existence of pre-existing materials in the result may not prevent the publication of the document, its translation or its "reuse", it being understood however that the "reuse" may only be made of the result as a whole and not of the pre-existing materials taken separately from the result; for the sake of this provision, "reuse" and "document" have the meaning given by the Commission Decision of 12 December 2011 on the reuse of Commission documents (2011/833/EU).

All pre-existing rights are licensed to the Union from the moment the results are delivered and approved by the contracting authority.

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

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

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

II.13.3 Exclusive rights

The Union acquires the following exclusive rights:

- a) reproduction: the right to authorise or prohibit direct or indirect, temporary or permanent reproduction of the *results* by any means (mechanical, digital or other) and in any form, in whole or in part;
- b) communication to the public: the exclusive right to authorise or prohibit any display, performance or communication to the public, by wire or wireless means, including the making available to the public of the *results* in such a way that members of the public may access them from a place and at a time individually chosen by them; this right also includes the communication on Internet and broadcasting by cable or by satellite;
- c) distribution: the exclusive right to authorise or prohibit any form of distribution of *results* or copies of the *results* to the public, by sale or otherwise;

- d) rental: the exclusive right to authorise or prohibit rental or lending of the *results* or of copies of the *results*;
- e) adaptation: the exclusive right to authorise or prohibit any modification of the *results*;
- f) translation: the exclusive right to authorise or prohibit any translation, adaptation, arrangement, creation of derivative works based on the *results*, and any other alteration of the *results*, subject to the respect of moral rights of authors, where applicable;
- g) where the *results* are or include a database: the exclusive right to authorise or prohibit the extraction of all or a substantial part of the contents of the database to another medium by any means or in any form; and the exclusive right to authorise or prohibit the re-utilization of all or a substantial part of the contents of the database by the distribution of copies, by renting, by on-line or other forms of transmission;
- h) where the *results* are or include a patentable subject-matter: the right to register them as a patent and to further exploit such patent to the fullest extent;
- i) where the *results* are or include logos or subject-matter which could be registered as a trademark: the right to register such logo or subject-matter as a trademark and to further exploit and use it;
- j) where the *results* are or include know-how: the right to use such know-how as is necessary to make use of the *results* to the full extent provided for by this FWC, and the right to make it available to contractors or subcontractors acting on behalf of ESMA, subject to their signing of adequate confidentiality undertakings where necessary;
- k) where the *results* are documents:
- the right to authorise the reuse of the documents in conformity with the Commission Decision of 12 December 2011 on the reuse of Commission documents (2011/833/EU), to the extent it is applicable and the documents fall within its scope and are not excluded by any of its provisions; for the sake of this provision, “reuse” and “document” have the meaning given to it by this Decision;
 - the right to store and archive the *results* in line with the document management rules applicable to ESMA, including digitisation or converting the format for preservation or new use purposes;
- l) where the *results* are or incorporate software, including source code, object code and, where relevant, documentation, preparatory materials and manuals, in addition to the other rights mentioned in this Article:
- end-user rights, for all uses by the Union or by subcontractors which *result* from this FWC and from the intention of the parties;

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

The contractor warrants that the exclusive rights and the modes of exploitation may be exercised by the Union on all parts of the *results*, be it via a transfer of ownership of the rights, on those parts which were specifically created by the contractor or via a licence of the pre-existing rights, on those parts consisting of *pre-existing materials*.

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

II.13.4 Identification of *pre-existing rights*

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

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

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

Upon request by ESMA, the contractor must, in addition to the list mentioned under Article II.13.4., provide evidence that it has the ownership or the right to use all the listed *pre-existing rights*, except for the rights owned or licensed by the Union. ESMA may request this evidence even after the end of this FWC.

This provision also applies to image rights and sound recordings.

This evidence may refer, for example, to rights to: parts of other documents, images, graphs, sounds, music, tables, data, software, technical inventions, know-how, IT development tools, routines, subroutines or other programs ('background technology'), concepts, designs,

installations or pieces of art, data, source or background materials or any other parts of external origin.

This evidence must include, as appropriate:

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

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

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

II.13.6 Quotation of works in the *result*

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

II.13.7 Moral rights of *creators*

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

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

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

II.13.8 Image rights and sound recordings

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

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

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

II.13.10 Visibility of Union funding and disclaimer

When making use of the results, the contractor must declare that they have been produced under a contract with the Union and that the opinions expressed are those of the contractor only and do not represent ESMA's official position. ESMA may waive this obligation in writing or provide the text of the disclaimer.

II.14 Force majeure

II.14.1

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

II.14.2

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

II.14.3

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

II.15 Liquidated damages

II.15.1 Delay in delivery

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

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

where:

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

d is the duration specified in the relevant specific contract for delivery of the relevant purchase or deliverable or *result* or, failing that, the period between the date specified in Article I.4.2 and the date of delivery or performance specified in the relevant specific contract, expressed in days.

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

II.15.2 Procedure

ESMA must *formally notify* the contractor of its intention to apply liquidated damages and the corresponding calculated amount.

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

If the contractor submits observations, ESMA, taking into account the relevant observations, must *notify* the contractor:

- a) of the withdrawal of its intention to apply liquidated damages; or
- b) of its final decision to apply liquidated damages and the corresponding amount.

II.15.3 Nature of liquidated damages

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

II.15.4 Claims and liability

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

II.16 Reduction in price

II.16.1 Quality standards

If the contractor fails to provide the service in accordance with the FWC or a specific contract ('unperformed obligations') or if it fails to provide the service in accordance with the expected quality levels specified in the tender specifications ('low quality delivery'), ESMA may reduce or recover payments proportionally to the seriousness of the unperformed obligations or low quality delivery. This includes in particular cases where ESMA cannot approve a *result*, report or deliverable as defined in Article I.6 after the contractor has submitted the required additional information, correction or new version.

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

II.16.2 Procedure

ESMA must *formally notify* the contractor of its intention to reduce payment and the corresponding calculated amount.

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

If the contractor submits observations, ESMA, taking into account the relevant observations, must *notify* the contractor:

- a) of the withdrawal of its intention to reduce payment; or
- b) of its final decision to reduce payment and the corresponding amount,.

II.16.3 Claims and liability

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

II.17 Suspension of the implementation of the FWC

II.17.1 Suspension by the contractor

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

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

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

II.17.2 Suspension by ESMA

ESMA may suspend the *implementation of the FWC or performance of a specific contract* or any part of it:

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

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

ESMA must *notify* the contractor as soon as the verification is completed whether:

- a) it is lifting the suspension; or
- b) it intends to terminate the FWC or a specific contract under Article II.18.1(f) or (j).

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

The contracting authority may in addition suspend the time allowed for payments in accordance with Article II.21.7.

II.18 Termination of the FWC

II.18.1 Grounds for termination by ESMA

ESMA may terminate the FWC or any on-going specific contract in the following circumstances:

- a) if provision of the services under a pending specific contract has not actually started within 15 days of the scheduled date and ESMA considers that the new date proposed, if any, unacceptable, taking into account Article II.11.2;
- b) if the contractor is unable, through its own fault, to obtain any permit or licence required for implementation of the FWC;
- c) if the contractor does not implement the FWC or perform the specific contract in accordance with the tender specifications or request for service or is in breach of another substantial contractual obligation or repeatedly refuses to sign specific contracts. Termination of three or more specific contracts in these circumstances also constitutes grounds for termination of the FWC;
- d) if the contractor or any person that assumes unlimited liability for the debts of the contractor is in one of the situations provided for in points (a) and (b) of Article 136(1) of the Financial Regulation⁶;
- e) if the contractor or any related person is in one of the situations provided for in points (c) to (h) of Article 136(1) or Article 136(2) of the Financial Regulation;
- f) if the procedure for awarding the FWC or the implementation of the FWC prove to have been subject to irregularities, fraud or breach of obligations;
- g) if the contractor does not comply with applicable obligations under environmental, social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X to Directive 2014/24/EU;
- h) if the contractor is in a situation that could constitute a *conflict of interest* or a professional conflicting interest as referred to in Article II.7;
- i) if a change to the contractor's legal, financial, technical, organisational or ownership situation is likely to substantially affect the *implementation of the FWC* or substantially modify the conditions under which the FWC was initially awarded or a change regarding

⁶ Regulation (EU, EURATOM) No 966/2012 on the financial rules applicable to the general budget of the Union, as amended <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32012R0966>

the exclusion situations listed in Article 136 of Regulation (EU) 2018/1046 that calls into question the decision to award the contract;;

- j) in the event of *force majeure*, where either resuming implementation is impossible or the necessary ensuing amendments to the FWC or a specific contract would mean that the tender specifications are no longer fulfilled or result in unequal treatment of tenderers or contractors;
- k) if the needs of ESMA change and it no longer requires new services under the FWC; in such cases ongoing specific contracts remain unaffected;
- l) if the termination of the FWC with one or more of the contractors means that the multiple FWC with reopening of competition no longer has the minimum required level of competition;
- m) if the contractor is in breach of the data protection obligations resulting from Article II.9.2;
- n) if the contractor does not comply with the applicable data protection obligations resulting from Regulation (EU) 2016/679.

II.18.2 Grounds for termination by the contractor

The contractor may terminate the FWC or any on-going specific contract if : ESMA fails to comply with its obligations, in particular the obligation to provide the information needed for the contractor to implement the FWC or to perform a specific contract as provided for in the tender specifications.

II.18.3 Procedure for termination

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

The other party has 30 days following the date of receipt to submit observations, including the measures it has taken or will take to continue fulfilling its contractual obligations. Failing that, the decision to terminate becomes enforceable the day after the time limit for submitting observations has elapsed.

If the other party submits observations, the party intending to terminate must formally notify it either of the withdrawal of its intention to terminate or of its final decision to terminate.

In the cases referred to in points (a) to (d), (g) to (i), (k) to (n) of Article II.18.1 and in Article II.18.2, the date on which the termination takes effect must be specified in the formal notification.

In the cases referred to in points (e), (f) and (j) of Article II.18.1, the termination takes effect on the day following the date on which the contractor receives notification of termination.

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

II.18.4 Effects of termination

The contractor is liable for damage incurred by ESMA as a result of the termination of the FWC or a specific contract including the additional cost of appointing and contracting another contractor to provide or complete the services, except if the damage is a result of termination in accordance with Article II.18.1 (j), (k) or (l) or Article II.18.2. ESMA may claim compensation for such damage.

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

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

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

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

II.19 Invoices, value-added tax and E-invoicing

II.19.1 Invoices and value added tax

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

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

ESMA is exempt from all taxes and duties, including VAT, in accordance with Articles 3 and 4 of the Protocol 7 of the Treaty on the Functioning of the European Union on the privileges and immunities of the European Union.

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

II.19.2 E-invoicing

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

II.20 Price revision

If a price revision index is provided in Article I.5.2, this Article applies to it.

Prices are fixed and not subject to revision during the first year of the FWC.

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

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

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

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

The price revision is calculated using the following formula:

$$Pr = Po \times (Ir \div Io)$$

where: Pr = revised price;

Po = price in the tender;

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

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

II.21 Payments and guarantees

II.21.1 Date of payment

The date of payment is deemed to be the date on which ESMA account is debited

II.21.2 Currency

Payments are made in euros, , unless another currency provided is for in Article I.7.

II.21.3 Conversion

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

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

http://ec.europa.eu/budget/contracts_grants/info_contracts/inforeuro/inforeuro_en.cfm

II.21.4 Costs of transfer

The costs of the transfer are borne as follows:

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

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

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

- a) the financial guarantee is provided by a bank or a financial institution approved by ESMA or, at the request of the contractor and with the agreement of ESMA by a third party; and
- b) the guarantee shall have the effect of making the bank or financial institution or the third party provide irrevocable collateral security, or stand as first-call guarantor of the contractor's obligations without requiring that the contracting authority has recourse against the principal debtor (the contractor).

The contractor bears the cost of providing such guarantee.

Pre-financing guarantees must remain in force until the pre-financing is cleared against interim payments or payment of the balance. Where the payment of the balance takes the form of a debit note, the pre-financing guarantee must remain in force for three months after the debit note is sent to the contractor. ESMA must release the guarantee within the following month.

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

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

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

II.21.6 Interim payments and payment of the balance

The contractor (or leader in the case of a joint tender) must send an invoice for interim payment, as provided for in Article I.6 or in the tender specifications or in the specific contract.

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

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

Payment of the balance may take the form of recovery.

II.21.7 Suspension of the time allowed for payment

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

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

ESMA must notify the contractor (or leader in the case of joint tender) as soon as possible of any such suspension, giving the reasons for it. In cases b) and c) referred above, the contracting authority shall notify the contractor (or leader in case of a joint tender) the time limits to submit additional information or corrections or a new version of the documents or deliverables if the contracting authority requires it.

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

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

II.21.8 Interest on late payment

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

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

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

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

II.22 Reimbursements

II.22.1

If provided for in the special conditions or in the tender specifications, ESMA must reimburse expenses directly connected with the provision of the services either when the contractor provides it with supporting documents or on the basis of flat rates.

II.22.2

ESMA reimburses travel and subsistence expenses on the basis of the shortest itinerary and the minimum number of nights necessary for overnight stay at the destination.

II.22.3

ESMA reimburses travel expenses as follows:

- a) travel by air: up to the maximum cost of an economy class ticket at the time of the reservation;
- b) travel by boat or rail: up to the maximum cost of a first class ticket;
- c) travel by car: at the rate of one first class rail ticket for the same journey and on the same day.

In addition, ESMA reimburses travel outside Union territory if it has given its prior written approval for the expenses.

II.22.4

ESMA reimburses subsistence expenses on the basis of a daily subsistence allowance as follows:

- a) for journeys of less than 200 km for a return trip, no subsistence allowance is payable;
- b) the daily subsistence allowance is payable only on receipt of supporting documents proving that the person concerned was present at the destination;
- c) the daily subsistence allowance takes the form of a flat rate payment to cover all subsistence expenses, including meals, local transport including transport to and from the airport or station, insurance and sundries;

- d) the daily subsistence allowance is reimbursed at the flat rates specified in Article I.5.3;
- e) accommodation is reimbursed on receipt of supporting documents proving the necessary overnight stay at the destination, up to the flat rate ceilings specified in Article I.5.3.

II.22.4

ESMA reimburses the cost of shipment of equipment or unaccompanied luggage if it has given its prior written approval for the expense.

II.23 Recovery

II.23.1

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

II.23.2 Recovery procedure

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

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

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

- a) by offsetting them against any amounts owed to the contractor by the Union or by the European Atomic Energy Community or by an executive agency when it implements the Union budget;
- b) by calling in a financial guarantee if the contractor has submitted one to ESMA;
- c) by taking legal action.

II.23.3 Interest on late payment

If the contractor does not honour the obligation to pay the amount due by the date set by ESMA in the debit note, the amount due bears interest at the rate indicated in Article II.21.8. Interest

on late payments will cover the period starting on the day after the due date for payment and ending on the date when ESMA receives the full amount owed.

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

II.23.4 Recovery rules in the case of joint tender

If the contract is signed by a group (joint tender), the group is jointly and severally liable under the conditions set out in Article II.6 (liability). ESMA shall send the debit note first to the leader of the group.

If the leader does not pay by the due date the whole amount, and if the amount due cannot be offset or can only be offset partially in accordance with Article II.23.2 (a), then ESMA may claim the amount still due to any other member or members of the group by notifying them with a debit note in conformity with the provisions laid down in Article II.23.2.

II.24 Checks and audits

II.24.1

ESMA and the European Anti-Fraud Office may check or require an audit on the *implementation of the FWC*. This may be carried out either by OLAF's own staff or by any outside body authorised to do so on its behalf.

Such checks and audits may be initiated at any moment during the provision of the services and up to five years starting from the payment of the balance of the last specific contract issued under this FWC

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

II.24.2

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

II.24.3

The contractor must grant ESMA's staff and outside personnel authorised by ESMA the appropriate right of access to sites and premises where the FWC is implemented and to all the information, including information in electronic format, needed to conduct such checks and audits. The contractor must ensure that the information is readily available at the moment of

the check or audit and, if so requested, that information is handed over in an appropriate format.

II.24.4

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

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

II.24.5

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

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

II.24.6

The Court of Auditors and the European Public Prosecutor's Office established by Council Regulation (EU) 2017/1939⁷ ('the EPPO') have the same rights as the contracting authority, particularly right of access, for the purpose of checks, audits and investigations.

⁷ Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office

ANNEX III

- Model for specific contracts
- Model for order forms

DRAFT

SPECIFIC CONTRACT N° *[complete]*

implementing Framework contract N° *[complete]*

The European Securities and Markets Authority (hereinafter referred to as “ESMA”), represented for the purposes of the signature of this specific contract by *[forename, surname, function]*,

on the one part,

and

[full official name]

[statutory registration number]

[full official address]

[VAT registration number]

(hereinafter referred to as "the contractor"), [represented for the purposes of the signature of this specific contract by *[forename, surname and function,]*

on the other part,

HAVE AGREED

Article 1 Subject matter

1.1

This specific contract implements Framework Contract (FWC) N° *[complete]*.

1.2

The subject matter of this specific contract is *[short description of subject]*.

1.3

The contractor undertakes, in accordance with the terms set out in the FWC and in this specific contract and the annexes thereto, which form an integral part thereof, to perform the tasks specified in Annex [*complete*].

Article 2 Entry into force and duration

2.1

This specific contract shall enter into force on the date on which it is signed by the last party.

2.2

The duration of the execution of the tasks shall not exceed [*complete*] months. Execution of the tasks shall start from [*insert date*].

The period of execution of the tasks may be extended only with the express written agreement of the parties before such period elapses.

Article 3 Price

3.1

The maximum total price to be paid under this specific contract shall be EUR [*amount in figures and in words*] covering all tasks executed.

3.2

In addition to the maximum total price, reimbursable expenses shall be reimbursed according to the provisions of the FWC.

Article 4 Performance guarantee

Not applicable

Article 5 Exploitation of the results

[Not applicable]

[*Insert details on the intended use of results linked to the specific request for service supplementing or replacing clause I.10 of the special conditions*]

Annexes

Request for service

Contractor's specific tender of [*insert date*]

Signatures

For the contractor,

[*forename/surname/function*]

For ESMA,

[*forename/surname/function*]

signature: _____

signature: _____

Done at....., on.....

Done at Paris, on.....

In duplicate in English.

DRAFT

 ORDER FORM UNDER FRAMEWORK CONTRACT			
Contact person at ESMA		Place of delivery/performance	
		Delivery/performance date	
Order form number		Contractor's offer date	
Project Code		Contractor's offer reference	
This order form is governed by the provisions of the Framework Contract N°: _____ in force from (dd/mm/yyyy) _____ to _____.			
SERVICES OR GOODS PURCHASED			
DESCRIPTION OF THE SERVICES OR GOODS	QUANTITY	PRICE IN €	
		UNIT PRICE	TOTAL
	0.00	€0.00	€0.00
			€0.00
			€0.00
			€0.00
			€0.00
			€0.00
			€0.00
			€0.00
Pursuant to the provisions of Articles 3 and 4 of the Protocol on the Privileges and Immunities of the European Union, ESMA is exempt from all taxes and duties, including VAT, on payments due in respect of this contract. For intra-community purchases, the mention "VAT exemption / European Union / Article 151 of Council Directive 2006/112/EC" should be added on the invoice.		Net amount	€0.00
		VAT (20%)	€0.00
		Total amount	€0.00
ACCEPTANCE BY ESMA			
Date		Signature	
Authorising Officer's name			
ACCEPTANCE BY CONTRACTOR			
Date		Signature	
Company's name			
Signatory's name			
The Contractor must sign and date this order form and send it to procurement@esma.europa.eu before any contracted work starts. Invoices, which must include the bank account number, must be sent to invoices@esma.europa.eu .			