



European Securities and
Markets Authority

General conditions for ESMA purchase orders

June 2021



Table of Contents

GENERAL CONDITIONS OF THE CONTRACT	3
ARTICLE 1 – PERFORMANCE OF THE CONTRACT	3
ARTICLE 2 – MEANS OF COMMUNICATION	4
ARTICLE 3 – LIABILITY	4
ARTICLE 4 – CONFLICTS OF INTEREST	5
ARTICLE 5 – CONFIDENTIALITY	6
ARTICLE 6 – PROCESSING OF PERSONAL DATA	6
ARTICLE 7 – SUBCONTRACTING	9
ARTICLE 8 – AMENDMENTS.....	9
ARTICLE 9 – ASSIGNMENT	10
ARTICLE 10 – OWNERSHIP OF THE RESULTS – INTELLECTUAL AND INDUSTRIAL PROPERTY RIGHTS	10
ARTICLE 11 – FORCE MAJEURE	13
ARTICLE 12 – LIQUIDATED DAMAGES.....	13
ARTICLE 13 – SUSPENSION OF THE PERFORMANCE OF THE CONTRACT	14
ARTICLE 14 – TERMINATION OF THE CONTRACT	15
ARTICLE 15 – PAYMENTS	16
ARTICLE 16 – RECOVERY	19
ARTICLE 17 – CHECKS AND AUDITS	19

GENERAL CONDITIONS OF THE CONTRACT

The contract consists of a purchase order and these general conditions. In the event of conflicting interpretations, the purchase order shall take precedence over the general conditions. If ESMA's request for offer and the contractor's quote are annexed to the purchase order, ESMA's request for offer shall take precedence over the quote and the contract shall take precedence over both. The several instruments shall be an integral part of the contract and, subject to the above, they shall be taken as mutually explanatory.

ARTICLE 1 – PERFORMANCE OF THE CONTRACT

- 1.1 The contractor shall perform the contract to the highest professional standards.
- 1.2 The contractor shall be solely responsible for taking the necessary steps to obtain any permit or licence required for performance of the contract under the laws and regulations in force at the place where the tasks assigned to it are to be executed.
- 1.3 Without prejudice to Article 4 any reference made to the contractor's personnel in the contract shall relate exclusively to individuals involved in the performance of the contract.
- 1.4 The contractor must ensure that the personnel performing the contract possess the professional qualifications and experience required for the execution of the tasks assigned to it.
- 1.5 The contractor shall neither represent ESMA nor behave in any way that would give such an impression. The contractor shall inform third parties that it does not belong to the European public service.
- 1.6 The contractor shall be solely responsible for the personnel who execute the tasks assigned to the contractor.

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

- a) personnel executing the tasks assigned to the contractor may not be given orders directly by ESMA;
 - b) ESMA may not under any circumstances be considered to be the employer of the personnel referred to in point (a) and the personnel shall undertake not to invoke against ESMA any right arising from the contractual relationship between ESMA and the contractor.
- 1.7 In the event of disruption resulting from the action of one of the contractor's personnel working on ESMA's premises or in the event that the expertise of a member of the contractor's personnel fails to correspond to the profile required by the contract, the contractor shall replace him without delay. ESMA shall have the right to make a reasoned

request for the replacement of any such personnel. The replacement personnel must have the necessary qualifications and be capable of performing the contract under the same contractual conditions. The contractor shall be responsible for any delay in the execution of the tasks assigned to it resulting from the replacement of personnel.

- 1.8 Should the execution of the tasks be directly or indirectly hampered, either partially or totally, by any unforeseen event, action or omission, the contractor shall immediately and on its own initiative record it and report it to ESMA. The report shall include a description of the problem and an indication of the date on which it started and of the remedial action taken by the contractor to ensure full compliance with its obligations under this contract. In such an event the contractor shall give priority to solving the problem rather than determining liability.
- 1.9 Should the contractor fail to perform its obligations under the contract, ESMA may - without prejudice to its right to terminate the contract - reduce or recover payments in proportion to the scale of the unperformed obligations. In addition, ESMA may claim compensation or impose liquidated damages in accordance with Article 12.

ARTICLE 2 – MEANS OF COMMUNICATION

- 2.1 Any communication relating to the contract or to its performance shall be made in writing and shall bear the contract number. Any communication is deemed to have been made when it is received by the receiving party, unless otherwise provided for in this contract.
- 2.2 Electronic communication shall be deemed to have been received by the parties on the day of dispatch of that communication, provided it is sent to the addressees listed in the purchase order. Without prejudice to the preceding, if the sending party receives a message of non-delivery to or of absence of the addressee, it shall make every effort to ensure the actual receipt of such communication by the other party.

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

- 2.3 Mail sent using the postal services is deemed to have been received by ESMA on the date on which it is registered by the department responsible referred to in the purchase order.

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

ARTICLE 3 – LIABILITY

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

- 3.2. ESMA shall not be held liable for any damage caused or sustained by the contractor, including any damage caused by the contractor to third parties during or as a consequence of performance of the contract, except in the event of wilful misconduct or gross negligence on the part of ESMA.
- 3.3. The contractor shall be held liable for any loss or damage sustained by ESMA in performance of the contract, including in the event of subcontracting, and for any claim by a third party, but only to an amount not exceeding three times the total amount of the contract. Nevertheless, if the damage or loss is caused by the gross negligence or wilful misconduct of the contractor or of its personnel or subcontractors, the contractor shall have unlimited liability for the amount of the damage or loss.
- 3.4. The contractor shall indemnify and hold the Union harmless for all damages and costs incurred due to any claim. The contractor shall provide compensation in the event of any action, claim or proceeding brought against ESMA by a third party as a result of damage caused by the contractor during the performance of the contract. In the event of any action brought by a third party against ESMA in connection with the performance of the contract, including any alleged breach of intellectual property rights, the contractor shall assist ESMA. Such expenditure incurred by the contractor may be borne by ESMA.

ARTICLE 4 – CONFLICTS OF INTEREST

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

ARTICLE 5 – CONFIDENTIALITY

5.1 ESMA and the contractor shall treat with confidentiality any information and documents, in any form, disclosed in writing or orally in relation to the performance of the contract and identified in writing as confidential.

The contractor shall:

- a) not use confidential information and documents for any purpose other than fulfilling its obligations under the contract without prior written agreement of ESMA;
- b) ensure the protection of such confidential information and documents with the same level of protection it uses to protect its own confidential information, but in no case any less than reasonable care;
- c) not disclose directly or indirectly confidential information and documents to third parties without prior written agreement of ESMA.

5.2 The confidentiality obligation set out in Article 5.1 shall be binding on ESMA and the contractor during the performance of the contract and for five years starting from the date of the payment of the balance unless:

- a) the concerned party agrees to release the other party from the confidentiality obligation earlier;
- b) the confidential information becomes public through other means than in breach of the confidentiality obligation through disclosure by the party bound by that obligation;
- c) the disclosure of the confidential information is required by law.

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

ARTICLE 6 – PROCESSING OF PERSONAL DATA

6.1 Processing of personal data by ESMA

Any personal data included in or relating to the contract, including its implementation, shall be processed in accordance with Regulation (EU) 2018/1725. Such data shall be processed solely for the purposes of the implementation, management and monitoring of the contract by the data controller.

The contractor or any other person whose personal data is processed by the data controller in relation to this contract has specific rights as a data subject under Chapter III (Articles 14-25) of Regulation (EU) 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 contract, 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.

For the purpose of this article, the data controller is the ESMA Head of Finance and Procurement Unit.

6.2 Processing of personal data by the contractor

The processing of personal data by the contractor shall meet the requirements of Regulation (EU) 2018/1725 and be processed solely for the purposes set out by the controller. For the purpose of this article, the subject matter and purpose of the processing of personal data by the contractor are strictly linked to the implementation of the contract.

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 contract as laid down in Chapter III (Articles 14-25) of Regulation (EU) 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 contract. 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 5.

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.

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.

ESMA 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 and data security, which includes personal data held on behalf of ESMA in the premises of the contractor or subcontractor.

For the purpose of this article, the localisation of and access to the personal data processed by the contractor shall comply with the following:

- a) the personal data shall only be processed within the territory of the European Economic Area and will not leave that territory;
- b) the contractor may not change the location of data processing without the prior written authorisation of ESMA.

The contractor shall notify ESMA without delay of any legally binding request for disclosure of the personal data processed on behalf of ESMA 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 ESMA.

The duration of processing of personal data by the contractor will not exceed the period referred to in Article 17.1. 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 7, 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 6.1 and 6.2 in writing to those parties, including subcontractors. At the request of ESMA, the contractor shall provide a document providing evidence of this commitment.

ARTICLE 7 – SUBCONTRACTING

- 7.1. The contractor shall not subcontract without prior written authorisation from ESMA nor cause the contract to be de facto performed by third parties.
- 7.2. Even where ESMA authorises the contractor to subcontract to third parties, it shall nevertheless remain bound by its contractual obligations and shall be solely responsible for the proper performance of this contract.
- 7.3. The contractor shall make sure that the subcontract does not affect rights and guarantees granted to ESMA by virtue of this contract, notably Articles 5, 10 and 17.

ARTICLE 8 – AMENDMENTS

- 8.1 Any amendment to the contract shall be made in writing before fulfilment of any new contractual obligations and in any case before the date of payment of the balance.

- 8.2 The amendment may not have the purpose or the effect of making changes to the contract which might call into question the decision awarding the contract or result in unequal treatment of tenderers.

ARTICLE 9 – ASSIGNMENT

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

ARTICLE 10 – OWNERSHIP OF THE RESULTS – INTELLECTUAL AND INDUSTRIAL PROPERTY RIGHTS

10.1 Definitions

In this contract the following definitions apply:

- 1) 'results' means any intended outcome of the performance of the contract which is delivered and finally accepted by ESMA;
- 2) 'creator' means any natural person who contributed to the production of the result and includes personnel of ESMA or a third party;
- 3) 'pre-existing rights' means any industrial and intellectual property rights, including background technology, which exist prior to ESMA or the contractor ordering them for the purpose of the contract execution and include rights of ownership and use by the contractor, the creator, ESMA and any third parties.

10.2 Ownership of the results

The ownership of the results shall be fully and irrevocably acquired by the Union under this contract. Those rights in the results may include any rights in any of the results listed in this contract, including copyright and other intellectual or industrial property rights, as well as all technological solutions and information contained within these technological solutions, produced in performance of the contract. ESMA may exploit them as stipulated in this contract. All the rights shall be acquired by the Union from the moment the results are delivered by the contractor and accepted by ESMA. Such delivery and acceptance are deemed to constitute an effective assignment of rights from the contractor to the Union.

The payment of the price as set out in the purchase order is deemed to include any fees payable to the contractor in relation to the acquisition of rights by the Union including all forms of use of the results.

The acquisition of rights by the Union under this contract covers all territories worldwide.

Any intermediary sub-result, raw data, intermediary analysis made available by the contractor cannot be used by ESMA without the written consent of the contractor, unless the contract explicitly provides for it to be treated as a self-contained result.

10.3 Licensing of pre-existing rights

The Union shall not acquire ownership of the pre-existing rights.

The contractor shall license the pre-existing rights on a royalty-free, non-exclusive and irrevocable basis to the Union. ESMA may use them for its own purposes, for distribution to the public or for any modification including by third parties in the name of ESMA. All the pre-existing rights shall be licensed to the Union from the moment the results were delivered and accepted by ESMA.

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

10.4 Modes of exploitation

The Union shall acquire ownership of each of the results produced as an outcome of this contract which may be used for any of the following purposes:

- a) giving access upon individual requests without the right to reproduce or exploit, as provided for by Regulation 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents;
- b) storage of the original and copies made in accordance with this contract;
- c) archiving in line with the document management rules applicable to ESMA.

10.5 Identification and evidence of granting of pre-existing rights and rights of third parties

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

The contractor shall establish to that effect a list of all pre-existing rights and rights of creators and third parties on the results of this contract or parts thereof. This list shall be provided no later than the date of delivery of the final results.

In the result, the contractor shall clearly point out all quotations of existing textual works.

The complete reference should include as appropriate: name of the author, title of the work, date and place of publication, date of creation, address of publication on internet, number, volume and other information which allows the origin to be easily identified.

Upon request by ESMA, the contractor shall provide evidence of ownership of or rights to use all the listed pre-existing rights and rights of third parties except for the rights owned by the Union.

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

The evidence shall include, as appropriate:

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

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

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

10.6 Creators

By delivering the results, the contractor warrants that the creators undertake not to oppose that their names be recalled when the results are presented to the public and confirms that the results can be divulged. Names of authors shall be recalled on request in the manner communicated by the contractor to ESMA.

The contractor shall obtain the consent of creators regarding the granting of the relevant rights and be ready to provide documentary evidence upon request.

10.7 Persons appearing in photographs or films

If natural, recognisable persons appear in a result or their voice is recorded, the contractor shall submit a statement of these persons (or of the persons exercising parental authority in case of minors) where they give their permission for the described use of their image or voice on request by ESMA. This does not apply to persons whose permission is not required in line with the law of the country where photographs were taken, films shot or audio records made.

10.8 Visibility of Union funding and disclaimer

When making use of the results, the contractor shall declare that they have been produced within 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.

ARTICLE 11 – FORCE MAJEURE

11.1. 'Force majeure' means any unforeseeable and exceptional situation or event beyond the parties' control which prevents either of them from fulfilling any of their obligations under the contract, which was not attributable to error or negligence on their part or on the part of subcontractors, and which proves to be inevitable in spite of exercising due diligence. Any default of a service, defect in equipment or material or delays in making them available, unless they stem directly from a relevant case of force majeure, as well as labour disputes, strikes or financial difficulties, cannot be invoked as force majeure.

11.2. A party faced with force majeure shall formally notify the other party without delay, stating the nature, likely duration and foreseeable effects.

11.3. The party faced with force majeure shall not be held in breach of its contractual obligations if it has been prevented from fulfilling them by force majeure. Where the contractor is unable to fulfil its contractual obligations due to force majeure, it shall have the right to remuneration only for the tasks actually executed.

11.4. The parties shall take all the necessary measures to limit any damage due to force majeure.

ARTICLE 12 – LIQUIDATED DAMAGES

ESMA may impose liquidated damages should the contractor fail to complete its contractual obligations, also with regard to the required quality level, according to ESMA's request for offer.

Should the contractor fail to perform its contractual obligations within the time limits set by the contract, then, without prejudice to the contractor's actual or potential liability or to

ESMA's right to terminate the contract, ESMA may impose liquidated damages for each and every calendar day of delay according to the following formula: $0.3 \times (V/d)$.

'V' is the price specified in the purchase order; 'd' is the duration specified in the purchase order or, failing that, the period between the date of issue and the delivery or performance date specified in the purchase order, expressed in calendar days.

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

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

ARTICLE 13 – SUSPENSION OF THE PERFORMANCE OF THE CONTRACT

13.1 Suspension by the contractor

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

Once the circumstances allow resuming performance, the contractor shall inform ESMA immediately, unless ESMA has already terminated the contract.

13.2 Suspension by ESMA

ESMA may suspend the performance of the contract or any part thereof:

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

Suspension shall take effect on the day the contractor receives formal notification, or at a later date provided in the notification. ESMA shall give notice as soon as possible to the contractor to resume the suspended tasks or inform the contractor that it is proceeding with the termination of the contract. The contractor shall not be entitled to claim compensation on account of suspension of the contract or of part thereof.

ARTICLE 14 – TERMINATION OF THE CONTRACT

14.1. Grounds for termination

ESMA may terminate the contract in the following circumstances:

- a) if a change to the contractor's legal, financial, technical or organisational or ownership situation is likely to affect the performance of the contract substantially or calls into question the decision to award the contract;
- b) if execution of the tasks has not actually commenced within three months of the date foreseen, and the new date proposed, if any, is considered unacceptable by ESMA, taking into account Article 8.2;
- c) if the contractor fails to fulfil substantial contractual obligation;
- d) in the event of force majeure notified in accordance with Article 11 or if the performance of the contract has been suspended by the contractor as a result of force majeure, notified in accordance with Article 11, where either resuming performance is impossible or the modifications to the contract might call into question the decision awarding the contract or result in unequal treatment of tenderers;
- e) if the contractor is declared bankrupt, is being wound up, is having its affairs administered by the courts, has entered into an arrangement with creditors, has suspended business activities, is the subject of proceedings concerning those matters, or is in any analogous situation arising from a similar procedure provided for in national legislation or regulations;
- f) if the contractor or any natural person with the power to represent it or take decisions on its behalf has been found guilty of professional misconduct proven by any means;
- g) if the contractor is not in compliance with its obligations relating to the payment of social security contributions or the payment of taxes in accordance with the legal provisions of the country in which it is established or with those of the country of the applicable law of this contract or those of the country where the contract is to be performed;
- h) if ESMA has evidence that the contractor or natural persons with the power to represent it or take decisions on its behalf have committed fraud, corruption, or are involved in a criminal organisation, money laundering or any other illegal activity detrimental to the Union's financial interests;
- i) if ESMA has evidence that the contractor or natural persons with the power to represent it or take decisions on its behalf have committed substantial errors, irregularities or fraud in the award procedure or the performance of the contract, including in the event of submission of false information;

- j) if the contractor is unable, through its own fault, to obtain any permit or licence required for performance of the contract.

14.2. Procedure for termination

When ESMA intends to terminate the contract, it shall formally notify the contractor of its intention specifying the grounds thereof. ESMA shall invite the contractor to make any observations and, in the case of point (c) of Article 14.1, to inform ESMA about the measures taken to continue the fulfilment of its contractual obligations, within 30 days from receipt of the notification.

If ESMA does not confirm acceptance of these observations by giving written approval within 30 days of receipt, the termination procedure shall proceed. In any case of termination, ESMA shall formally notify the contractor about its decision to terminate the contract. In the cases referred to in points (a), (b), (c), (e), (g) and (j) of Article 14.1, the formal notification shall specify the date on which the termination takes effect. In the cases referred to in points (d), (f), (h), and (i) of Article 14.1, the termination shall take effect on the day following the date on which notification of termination is received by the contractor.

14.3. Effects of termination

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

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

On termination, ESMA may engage any other contractor to execute or complete the tasks. ESMA shall be entitled to claim from the contractor all extra costs incurred in this regard, without prejudice to any other rights or guarantees it may have under the contract.

ARTICLE 15 – PAYMENTS

15.1 Invoices and Value Added Tax

Invoices shall be sent to invoices@esma.europa.eu.

Invoices shall contain:

- contractor's identification,

- ESMA's identification including address,
- amount and currency,
- date,
- contract reference (ESMA's number of the purchase order),
- specification of invoiced services / supplies,
- contractor's bank account (identical to the bank account indicated in the purchase order).

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

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

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

15.2 Currency

Payments shall be executed in euros or in the local currency as specified in the purchase order.

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

15.3 Costs of transfer

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

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

15.4 Date of payment

Payments shall be done within 30 days from receipt of the invoice via invoices@esma.europa.eu. If ESMA has observations to make, it must send them to the contractor and the time limit for payment is suspended (Article 15.6).

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

15.5 Payment of the balance

The contractor shall submit an invoice for payment of the balance within 60 days following the delivery of the services or supplies referred to in the purchase order.

Upon receipt, ESMA shall pay the amount due as final payment within the period specified in the purchase order, provided the invoice and services or supplies have been approved, without prejudice to Article 15.6. Approval of the invoice and services or supplies shall not imply recognition of the regularity or of the authenticity, completeness and correctness of the declarations and information they contain.

Payment of the balance may take the form of recovery.

15.6 Suspension of the time allowed for payment

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

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

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

When the payment periods have been suspended following rejection of a document referred to in the first paragraph and the new document produced is also rejected, ESMA reserves the right to terminate the contract in accordance with Article 14.1(c).

15.7. Interest on late payment

On expiry of the payment periods specified in the purchase order, and without prejudice to Article 15.6, the contractor is entitled to interest on late payment at the rate applied by the European Central Bank for its main refinancing operations in Euros (the reference rate), plus eight points. The reference rate shall be the rate in force on the first day of the

month in which the payment period ends, as published in the C series of the Official Journal of the European Union.

The suspension of the payment periods in accordance with Article 15.6 may not be considered as a late payment.

Interest on late payment shall cover the period running from the day following the due date for payment up to and including the date of actual payment, as defined in Article 15.4.

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

ARTICLE 16 – RECOVERY

16.1. If an amount is to be recovered under the terms of the contract, the contractor shall repay ESMA the amount in question according to the terms and by the date specified in the debit note.

16.2. If the obligation to pay the amount due is not honoured by the date set by ESMA in the debit note, the amount due shall bear interest at the rate indicated in Article 15.7. Interest on late payments covers the period from the day following the due date for payment up to and including the date when ESMA receives full payment of the amount owed.

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

16.3. If payment has not been made by the due date, ESMA may, after informing the contractor in writing, recover the amounts due by offsetting them against any amounts owed to the contractor by the Union or by the European Atomic Energy Community.

ARTICLE 17 – CHECKS AND AUDITS

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

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

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

17.2 The contractor shall keep all original documents stored on any appropriate medium, including digitised originals when they are authorised by national law and under the

conditions laid down therein, for a period of five years which starts running from the date of payment of the balance.

- 17.3 The contractor shall allow ESMA's staff and outside personnel authorised by ESMA the appropriate right of access to sites and premises where the contract is performed and to all the information, including information in electronic format, needed in order to conduct such checks and audits. The contractor shall ensure that the information is readily available at the moment of the check or audit and, if so requested, that information be handed over in an appropriate form.
- 17.4 On the basis of the findings made during the audit, a provisional report shall be drawn up. It shall be sent to the contractor, which shall have 30 days following the date of receipt to submit observations. The final report shall be sent to the contractor within 60 days following the expiry of that deadline.