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Southern Hemisphere

Organisation Européenne
pour des Recherches
Astronomiques
dans l'Hémisphère Austral

Europäische Organisation
für astronomische
Forschung in der
südlichen Hemisphäre

**CONDITIONS GOVERNING CALLS FOR PROPOSALS AND
CONTRACTS**

FOR THE VLT INSTRUMENTATION

in complement to the

***"General Conditions Governing Invitations to Tender and
Tenders"***

and to the

***"General Conditions of ESO Contracts - Munich December
2009"***

Munich, December 2009

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**ESO - EUROPEAN ORGANISATION FOR ASTRONOMICAL
RESEARCH IN THE SOUTHERN HEMISPHERE**

**CONDITIONS GOVERNING CALLS FOR PROPOSALS AND CONTRACTS
FOR THE VLT INSTRUMENTATION**

1. STRUCTURE OF THE PROPOSALS

The Proposals shall be presented in such a way that they can be related, point by point, to the requirements in the form and in accordance with any specific provisions specified hereafter.

The Proposals shall be subdivided into the following two main elements:

- 1.1. the FINANCIAL PROPOSAL, including the PROPOSAL FORM and the SUPPLEMENTARY OFFER including prices, payment scheme, delivery time, country/ies of origin of the supply, subcontractors and in general the contractual response;
- 1.2. the TECHNICAL PROPOSAL including the TECHNICAL DESCRIPTION, the PLANNING/MANAGEMENT PLAN and the outline of the PROGRAM to be carried out under the guaranteed OBSERVING TIME.

2. PROPOSAL FORM AND SUPPLEMENTARY OFFER

The financial Proposals shall be submitted on the Proposal Form provided by ESO.

Any relevant contractual and financial information, necessary for a clear understanding of the Proposal, must be submitted in a Supplementary Offer together with the Proposal Form.

3. PRICES

(Complement to Article 3 of the 'General Conditions Governing Invitations to Tender and Tenders')

Prices shall be quoted in EURO (€);

prices shall include contingencies to cover foreseeable price increases. Should as a consequence of unforeseeable circumstances the project be feasible for less than the agreed price or be not feasible at the agreed price, the contract parties commit themselves to enter into negotiations on a price adjustment;

prices shall be quoted free of taxes and customs duties

(cf. Article 7 of the ESO Multilateral Protocol - Annex 3);

prices shall include all supplies necessary for the execution of the contract;

prices shall include the cost of insurance as defined in Article 39 - INSURANCES of the present Conditions.

4. PAYMENT SCHEME

The Bidder shall propose a payment plan.

Progress payments shall be linked to the completion of well defined milestones (work packages, tasks, phases, review meetings, etc.).

The Contractor guarantees to ESO that payments made will be used only for the purpose of the Contract, that all goods and materials procured for ESO will be delivered to ESO and that all unused funds paid by ESO, will be refunded to ESO.

Proposed progress and advance payments shall be subject to negotiation.

5. DELIVERIES - TIME LIMITS - PENALTIES FOR DELAYS

(Complement to Article 9 and Replacement of Article 29 of the 'General Conditions of ESO Contracts')

The delivery time has to be indicated on the Proposal Form and in the Planning and Management Proposal.

The supplies specified in the contract shall be delivered in compliance with the provisions of the contract, on the date and place and in the manner stipulated therein (cf. Article 9.1 of the 'General Conditions of ESO Contracts').

In view of the highly negative consequences which any delay in delivery beyond the guaranteed delivery time would cause, a penalty clause for late delivery will have to be foreseen in the Contract, based on a withdrawal or reduction of the amount of guaranteed observing time (cf. also Article 36 of the present Conditions).

Your attention is particularly drawn to the dispositions of Articles 9.3 and 9.4 of the 'General Conditions of ESO Contracts'.

This penalty clause shall replace the provisions of Article 29 - Penalties for Delays - of the 'General Conditions of ESO Contracts'.

6.

**COUNTRY OF ORIGIN OF THE BIDDER, OF THE ASSOCIATED INSTITUTES
AND OF THE SUBCONTRACTORS**

Bidders must have their legal seat in one of the ESO Member States. They shall indicate in the Proposal Form and in its Supplementary Offer the associated Institutes and the proposed subcontractors, the country of origin of both, the place of execution of the subcontracted work as well as the corresponding share in per cent of the total price of the Proposal.

Preference should be given to associates and subcontractors from ESO Member States, unless competent institutes or firms from non-Member States offer a more advanced technology/quality, or if significant financial or time savings can be achieved. The main Contractor has the full responsibility for the performance of the associated institutes and the subcontractors. The final integration and testing of the instrument has in any case to take place in a Member State.

7. COUNTRY/IES OF ORIGIN OF THE SUPPLY

The country/ies of origin of the supply has/have to be indicated in the Proposal Form. The Bidder shall complete the Geographical Distribution Form, showing the countries in which activities are performed or from which significant purchases are made.

8. TECHNICAL PROPOSAL

(This document shall not contain any financial [price] information concerning the Proposal.)

The Proposal Form and its Supplementary Offer (item 1.1) must be completed by a separate TECHNICAL PROPOSAL including any relevant information necessary for a clear understanding of the Proposal.

The submission of a Proposal shall be deemed to be an implicit acknowledgement by the Bidder that he is in a position to fulfill every obligation, without exception, under the contract which may be concluded with him and that he is in possession of all the necessary information to that effect.

9. PLANNING AND MANAGEMENT PLAN

(This document shall not contain any financial [price] information concerning the Proposal.)

This part of the proposal must include any relevant information concerning the Planning and Management aspects of the Proposal, and in particular:

the overall planning and detailed time schedule of the work;

the management and organization chart, including the subcontractors, stating the name, experience and qualification of the senior staff who will be in charge of the project;

this planning shall cover all aspects of the envisaged work, which shall include all items of the subject of the Contract, including all work and services connected therewith (cf. Article 1 of the 'General Conditions of ESO Contracts');

in producing the network, the Bidder shall state any alternatives or assumptions he may have made in arriving at the proposed logic and schedule;

normal planning practice shall ensure the inclusion of margins in activity time estimates to provide contingency for problems which may occur;

on the basis of the developed and analyzed network, the Bidder shall submit bar charts covering his own work and the work of each proposed subcontractor. The durations of the major activities shall be shown against linear calendar time-scale.

The Bidder shall identify in the planning documents those events (milestones) which denote a significant progress checkpoint. The milestones proposed, to be linked with payments, shall be identified as such.

Should the proposed planning depart from the 'Time Schedule of the Project', described in the Technical Specification, the Bidder is requested to point out the deviations and give substantiated comments for such deviations.

10. COMPLIANCE WITH TECHNICAL AND MANAGEMENT REQUIREMENTS

The Bidder shall explicitly state whether the requirements of the specification and/or work statement can be met, it being understood that in some areas of the project new technology fields may have to be entered which might entail imponderables and, therefore, a success in the achievement of all targets of the contract may not be guaranteed in detail.

Nevertheless, any reservation must be clearly identified in a separate chapter of the Proposal, with appropriate reference to the requirement concerned.

The consequences of the reservation, the reasons therefore and the possibility of and conditions for it being withdrawn shall be described, it being understood that a Contract can only be concluded on the assumption that by keeping to the Specification a good functioning of the Instrument is warranted.

11. LANGUAGE

All Proposal documents including the Supplementary Offer/s must be drawn in English.

12. GENERAL INFORMATION ON BIDDERS' STATUS

The Bidder shall be legally identified. Bidders shall inform ESO in the Proposal Form and in the Supplementary Offer, in which form they have associated themselves for the submission of the Proposal and later will associate themselves for the execution of the contract, e.g.: Consortium, Joint Venture, Main Contractor/Subcontractor, etc., and define their responsibility and liability depending on the form of association selected and confirm their registered address and persons empowered to act as representatives.

Upon request, the Bidder shall submit any additional information required.

13. ALTERNATIVE OFFERS AND OPTIONS

In addition to a basic Proposal, strictly complying with the Technical Specification, the Bidder may submit alternatives which present technical and/or financial advantages. ESO reserves the right to disregard such a submission, if the basic Proposal in compliance with the requirements is not available simultaneously.

14. ACKNOWLEDGEMENT OF RECEIPT

The Bidder is requested to send by return of mail to ESO the 'Acknowledgement of Receipt', attached to the Calls for Proposals, stating whether or not he intends to submit a Proposal.

Failure by a potential bidder to return the form might result for him in not receiving answers to bidders' queries or other correspondence related to the Calls for Proposals. No extension of the given closing date of the Calls for Proposals will be granted on these grounds.

15. AMENDMENTS TO CALLS FOR PROPOSALS

ESO reserves the right to issue amendments to the Calls for Proposals.

16. QUESTIONS RELATING TO CALLS FOR PROPOSALS

Any questions by the Bidder concerning the Calls for Proposals, including those of technical nature, shall be submitted in writing to the nominated Contracts Officer. Questions shall, where possible, make specific reference to the appropriate section(s) of the Call for Proposals documents.

Replies, together with the questions received, will be distributed to all those potential bidders who have returned the 'Acknowledgement of Receipt' indicating that they are interested in participating.

Any request for documentation referred to in the Calls for Proposals shall be sent to the nominated Contracts Officer. ESO does not undertake to make any document available unless the Call for Proposals documents specifically state that such document is available on request for the purpose of the Calls for Proposals.

17. INTELLECTUAL PROPERTY - RIGHTS OF ESO

(Complement to Chapter VI - Intellectual Property and Patent Rights - of the '*General Conditions of ESO Contracts*')

Any document submitted in reply to the Calls for Proposals shall become the property of ESO. ESO will use commercially confidential or proprietary information solely for the purpose of the evaluation of the Proposals. Documentation and information incorporated in the subsequent contract will be governed by Chapter VI - Intellectual Property and Patent Rights of the '*General Conditions of ESO Contracts*'.

Notwithstanding the transfer of ownership of the Instrument to ESO, the Contractor retains the rights of use and exploitation of the scientific and commercial results of the project, including the right to claim patents for inventions or to protect other exclusive rights and to publish scientific results.

Otherwise the provisions as defined in Chapter VI of the '*General Conditions of ESO Contracts*' shall apply.

ESO reserves the right to eliminate from considerations proposals which purport to restrict the use of documents or information beyond these provisions.

18. ROYALTIES AND LICENCE FEES

ESO will only accept to pay license fees or royalties on condition that:

- they are clearly identified in the Proposal, with the financial basis for their calculation, method of application and total amount; and
- they are demonstrated to be of direct and necessary benefit to the work to be performed;
- they are not merely the consequence of a general agreement or commitment to a third party;
- they are applied only to that part of the effort to be performed by a contractor or subcontractor that is directly related to the subject matter of the license or royalty agreement.

A copy of the documents justifying the request for the payment of a license fee or royalty, or the appropriate part thereof, shall be included in the Proposal.

19. THIRD PARTY COMMITMENTS

The Bidder shall indicate if he has entered into any arrangements or license agreements as to intellectual property rights concerning the subject of the Calls for Proposals, either as part of a general arrangement or with specific reference to the Calls for Proposals. A copy of the document recording the commitment, or an appropriate part thereof, shall be submitted with the Proposal. If such arrangement or agreement would result in costs to be borne by ESO, these must be separately identified.

20. RESERVATION AND RESTRICTIONS

If as a result of

- a commitment with a third party as to intellectual property rights, or
- an existing intellectual property right of the Bidder, or a claim by the Bidder that intellectual property rights will be generated under the contract which are not paid for by ESO, or
- any other reason

the Bidder wishes to make any restriction on the rights of distribution and use, as foreseen and defined in the '*General Conditions of ESO Contracts*', of any data, including documentation, related to the work under the contract, such proposed restriction must be clearly defined and justified in the Proposal. It will be taken into account in the evaluation and, if contrary to the stated objectives of the Calls for Proposals, might render the Proposal unacceptable. ESO will not accept reservations made subsequent to the closing date of the Calls for Proposals.

21. CONFIDENTIALITY UNDERTAKING

The Bidder having received the Call for Proposals documents undertakes to use the drawings and/or other engineering particulars passed on to him by ESO - EUROPEAN ORGANISATION FOR ASTRONOMICAL RESEARCH IN THE SOUTHERN HEMISPHERE, Garching, and/or any of the information embodied therein, solely for the purpose for which they were released to him and to make no other use thereof; he moreover undertakes to treat such drawings, particulars and information in strictest confidence and to limit the disclosure of such drawings and/or particulars or copies thereof, and of the information embodied therein, even within his company to such staff members who are committed by law and/or by the provisions of their employment contract to observe secrecy with regard to business matters. He shall, therefore, refrain from passing on the drawings and/or particulars received from ESO or copies thereof or any information embodied therein, to any third party by communication or publication or otherwise.

He recognizes that the receipt of these drawings, particulars and/or information from ESO does not constitute a prior use by him in terms of the patent law, and he, therefore, shall not make their receipt a reason for claiming a prior use right to any patent applications which may be filed later by ESO or by the inventor with ESO's consent.

The above secrecy obligations and limitations of use shall not extend to details, know-how or experience, however, when and as far as these constitute known prior art accessible to the public, or have already been in their possession before information from ESO or as far as such drawings, particulars and/or information are lawfully acquired by them from third parties.

22. CLOSING DATE

(Complement to Article 2.8 of the 'General Conditions Governing Invitations to Tender and Tenders')

The closing date for the Call for Proposals is set in the invitation letter and/or in the Technical Specification of the Call for Proposals (cf. Article 2.8 of the 'General Conditions Governing Invitations to Tender and Tenders').

23. NO EXTENSION OF CLOSING DATES

Requests to postpone closing dates will not be considered unless specified otherwise in the invitation letter of the Call for Proposals.

24. PACKING AND DISPATCH OF PROPOSALS

Two copies of the Proposals shall be dispatched in double envelope. The inner envelope shall be sealed and shall be without indication of origin but marked with the definition of the supplies or services and the reference number of the Call for Proposals.

Both sides of the envelope shall be marked as follows:

CONFIDENTIAL - TO BE OPENED BY THE AWARD COMMITTEE ONLY

The outer envelope, carrying the Bidder's name and address shall be sent to the following address:

E S O
Contracts & Procurement
Karl-Schwarzschild-Strasse 2
D-85748 Garching bei München (Germany)

25. INFORMATION ON DISPATCH OF THE PROPOSALS

At the time of the dispatch of the Proposals, the Bidder shall email or telefax the following information to Contracts & Procurement for the attention of the responsible Contract Officer:

- reference no. of the Call for Proposals
- date of posting
- place of posting as defined by postmark
- number of registered parcels
- name of the person of the Bidder responsible for posting
- name of the Bidder.

If, the above-mentioned formalities having been fulfilled, the Proposal does not reach ESO within one week after the closing date, the Bidder will be informed and an extension may be granted in order to allow him to forward duplicates.

26. CLARIFICATIONS OF PROPOSALS

ESO reserves the right to ask the Bidders for clarifications of the Proposals during the evaluation period. Clarifications shall not be regarded as amendments or modifications of the Proposals.

27.

NO INFORMATION ABOUT EVALUATION DURING EVALUATION PERIOD

Bidders are not entitled to contact ESO staff during the evaluation and selection period to ask for information on the evaluation. ESO reserves the right to eliminate from the evaluation a Bidder contravening this provision.

28. AMENDMENT, WITHDRAWAL OR RESUBMISSION OF PROPOSALS

Amendments, withdrawals or resubmissions of the Proposals will be permitted if they reach ESO before the closing date and time, in accordance with the dispatch conditions.

29. INFORMATION ABOUT THE RESULT OF THE CALLS FOR PROPOSALS

Bidders will be informed in writing of the result of the Calls for Proposals after a decision has been taken. Upon receiving notice that his proposal has been unsuccessful, a Bidder may request the nominated Contracts Officer to advise him of the reasons why the proposal has not been retained. Any information will be limited to the Bidder's own proposal. The decision on the result of the Calls for Proposals will be without appeal, and ESO will not enter into correspondence on the reasons for its decision.

30. CONSTITUTION OF CONTRACTS

(Complement to Article 5 of the '*General Conditions of ESO Contracts*')

In addition to the stipulations of Article 5 of the '*General Conditions of ESO Contracts*', contracts shall be deemed to be constituted only after the obtention by the Contractor of the Export License for any restricted material for the use of ESO in Germany and on ESO's premises in Chile.

Reference is also made to Article 8 of the '*Multilateral Protocol on the Privileges and Immunities of the European Organization for Astronomical Research in the Southern Hemisphere*', stating that goods and materials intended for use in connection with the official activities of ESO, whether imported or exported by the Organization, shall be exempt from all prohibitions and restrictions on import or export (cf. Annex 3).

31. CONTRACT MANAGEMENT - REPRESENTATION

(Complement to Article 7 of the '*General Conditions of ESO Contracts*')

The Bidder shall appoint a duly accredited agent to negotiate on his behalf with ESO.

In addition to the stipulations of Article 7 of the '*General Conditions of ESO Contracts*', the Contractor shall nominate an accredited representative for the duration of the performance of the contract who will have the title 'PRINCIPAL INVESTIGATOR'.

ESO shall appoint a 'PROJECT RESPONSIBLE' in charge of the technical follow-up of the contract.

32. INSPECTION - SUPERVISION

(Complement to Article 13 of the '*General Conditions of ESO Contracts*')

In addition to the stipulations of Article 13 of the '*General Conditions of ESO Contracts*', monitoring of contracts shall also include regular written progress reports from the Contractor, formal reviews at critical phases before approval for the next phase is given by ESO, additional reviews and meetings as deemed necessary by ESO. A formal planning will be included in the contracts.

33. PROPERTY IN THE SUPPLIES

(Replacement of Article 15.3 of the '*General Conditions of ESO Contracts*' - cf. also Article 38 of the present Conditions)

Article 15.3 of the '*General Conditions of ESO Contracts*' is replaced by the following stipulation:

"All parts procured by the Contractor under this Contract or machined from raw materials for this project are the property of ESO. In this sense, parts of as well as the complete instrument will be the property of ESO, even if it has not been handed over officially to ESO and the Provisional Acceptance has not been granted by ESO."

Otherwise, transfer of the instrument to ESO and property in this supply shall ultimately pass over to ESO at the date of Provisional Acceptance.

34. CANCELLATION OF CONTRACTS

(Complement to Article 30 of the '*General Conditions of ESO Contracts*')

The provisions of Article 30 of the "*General Conditions of ESO Contracts*" shall apply except for Article 30.2 which is amended as follows:

"Both Contract parties may unilaterally cancel the Contract for important reasons. Such cancellation, however, shall only be acceptable if at the request of the party that has applied on the grounds of important, justified reasons for cancellation, no Contract Amendment could be reached by negotiation between the Contract parties within a period of three months.

In case the objectives of the Contract cannot be met, a final balance will be worked out jointly by ESO and the Contractor. The Contractor will reimburse ESO for any amount which has been overpaid with respect to this balance."

35. TECHNICAL PUBLICATIONS

The contents and authorship of any written or verbal communication concerning technical aspects of the instrument shall be agreed in advance by the Principal Investigator and ESO. This procedure shall be applied for the period starting with the signature date of the contract until one year after the installation of the instrument at the telescope.

36. COMMISSIONING AND GUARANTEED TIME

An appropriate number of observing nights, normally split over two runs, will be made available for the commissioning of the instrument. The definition of the program in the commissioning time will be coordinated between the Principal Investigator and ESO. The first commissioning period will be under the responsibility of the Principal Investigator, the second under the responsibility of the ESO instrument scientist. At the end of the commissioning period, the capability of the instrument must be fully demonstrated and documented to enable the provisional acceptance by ESO.

A period of guaranteed observing time with (GTO) his/her instrument will also be granted to the Principal Investigator as scientific reward to the groups having contributed to the construction of the instrument with their manpower and/or with cash funds. The subdivision of this time amongst the institutes that have contributed to the project will be the responsibility of the Principal Investigator. The guaranteed time will be distributed within the first three years of operation of the instrument. The amount of guaranteed time shall be computed according to the following formula: one VLT night corresponds to 50 k€ of cash contribution or 1.5 VLT nights correspond to 1 person year of qualified manpower. In the case of a VLT Interferometry instrument which requires the use of more than one UT, a corresponding reduction factor will be applied to the number of guaranteed nights. When the VLTI instrument is used with the Auxiliary Telescopes only, one night will correspond to 29 k€ of cash contribution. If the performance of the instrument is strongly limited by the brightness of the sky, at least 2/3 of the assigned nights will be one week from the new moon.

The total amount of GTO will be specified when the contract is finalized.

The policy to apply for GTO is defined in the attached document "Policy for Guaranteed Time Observations (GTO)" - Annex 4.

37. TRANSPORTATION AND TRANSPORT INSURANCE

In the course of the performance of the Contract, ESO will pay for transportation and transport insurance of the instrument to ESO Garching and to ESO Chile.

38. PRELIMINARY AND PROVISIONAL ACCEPTANCE

(Complement to Article 15.1 and 15.2 of the '*General Conditions of ESO Contracts*' - cf. also Article 33 of the present Conditions)

Preliminary Acceptance will take place at the Contractor's workshop in Europe.

Provisional Acceptance as defined in Article 15 of the '*General Conditions of ESO Contracts*' will take place after successful commissioning of the instrument at the ESO Observatory in Chile.

39. INSURANCES

Insurances are to be provided in accordance with Article 32 of the "*General Conditions of ESO Contracts*" (Liability in Tort – Social Security – Contractual Liability – Insurance) as and when applicable.

40. GUARANTEE

(Complement to Article 16 of the '*General Conditions of ESO Contracts*')

The Guarantee Period shall be two years from the date of Provisional Acceptance.

Article 16.6 of the '*General Conditions of ESO Contracts*' is amended as follows:

"The Contractor shall execute the necessary repairs and modifications of the delivered instrument during the two years' guarantee period between Provisional Acceptance and Final Acceptance.

The Contractor shall, within available project funds, replace components which failed during normal operation or need to be replaced due to modification.

In any of these cases ESO will organize and pay for the transport, travel, food and accommodation of the Contractor's personnel."

41. GENERAL CONDITIONS GOVERNING CALLS FOR PROPOSALS FOR THE VLT INSTRUMENTATION

The provisions of the "*General Conditions Governing Invitations to Tender and Tenders*" shall apply (Annex 1 to the Calls for Proposals, except for the extent that they have been modified in the above Articles 1 to 40 of the present '*Conditions Governing Calls for Proposals and Contracts for the VLT Instrumentation*'.

42. GENERAL CONDITIONS GOVERNING CONTRACTS FOR THE VLT INSTRUMENTATION

The provisions of the "*General Conditions of ESO Contracts - Munich December 2009*" shall apply (Annex 2), except for the extent that they have been modified in the above Articles 1 to 41 of the present '*Conditions Governing Calls for Proposals and Contracts for the VLT Instrumentation*'.

43. COMPLIANCE WITH CONTRACT CONDITIONS

The Bidder shall explicitly state that the contract conditions are read, understood and accepted and that any sales conditions of his own do not apply. In case, exceptionally, that he wishes to propose modifications or amendments, the full text of such modifications or amendments shall be given and the reasons for such requests shall be clearly explained.

44. RESERVATIONS

Any reservations to the requirements, or proposed modifications or amendments to the contract conditions will be taken into account in the evaluation. Acceptance of the Proposal containing reservations, or proposed modifications or amendments is not to be construed as acceptance of these, until such acceptance is stated in writing by ESO.

45. CONTACT PERSONS AT ESO

For any further information you may consider necessary, please write to the nominated Contract Officer of the ESO Contracts & Procurement Service, indicating the reference number of the Call for Proposals and its full title.

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Annexes:

Annex 1: General Conditions Governing Invitations to Tender and Tenders, Munich December 2009

Annex 2: General Conditions of ESO Contracts - Munich – December 2009

Annex 3: Copy of the ESO Multilateral Protocol

Annex 4: Policy for Guaranteed Time Observations (GTO)