



European Organisation
for Astronomical
Research in the
Southern Hemisphere

Organisation Européenne
pour des Recherches
Astronomiques
dans l'Hémisphère Austral

Europäische Organisation
für astronomische
Forschung in der
südlichen Hemisphäre

**General Conditions of ESO
Contracts**

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GENERAL CONDITIONS OF ESO CONTRACTS
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General Conditions of ESO Contracts

DEFINITIONS

“Confidential Information” shall mean: any and all information of a commercial, technical or financial nature which is not generally available to the public and which is disclosed by one party to the other for the performance of the Contract including, without limitation, data, know-how, secret formulae, processes, designs, photographs, drawings, specifications, patentable information and software programs, regardless of form, format or media and whether communicated or obtained through meetings, documents, correspondence or inspection of a tangible item and which can be reasonably deemed to be confidential, including all the above classified as “ESO Internal”.

“Contract” shall mean: the specific contract or purchase order for the Supplies and any annex thereto and/or applicable document thereof, including these General Conditions of ESO Contracts.

“Contractor” shall mean: the company, organisation, institute or individual that is party to the Contract other than ESO.

“Equipment” shall mean: any product, good, component, sample, model, tool, apparatus or other item or any part thereof, excluding materials.

“ESO” shall mean: The European Organisation for Astronomical Research in the Southern Hemisphere.

“In writing” shall mean: by signed letter or fax or electronically signed e-mail.

“Representative” shall mean: any person duly appointed and authorized by ESO or the Contractor to represent them.

“Sub-contract(s)” shall mean: any contract or purchase order, sub-contract or sub-order that the Contractor may conclude with any third party in connection with the performance of the Contract.

“Sub-contractor” shall mean: any company, organisation, institute or individual with whom the Contractor concludes a Sub-contract.

“Supplies” shall mean: any good, document or service to be delivered by the Contractor under the Contract, or part thereof.

“Work” shall mean: any activity performed or to be performed by the Contractor necessary or appropriate to achieve the purpose of the Contract.

I. GENERAL PROVISIONS

1. Applicability

1.1 The following General Conditions shall apply to Contracts placed by ESO insofar as not stated otherwise in the Contract. Furthermore, specific conditions may be set out or invoked in the Contract.

1.2 Any provisions contrary to or deviating from these General Conditions, whether included in the Contractor's general conditions or explicitly formulated in documentation provided to ESO by the Contractor prior to Contract signature, are rejected unless specifically accepted by ESO in writing.

2. Compliance with Laws

The Contractor shall comply with all relevant laws and regulations. ESO shall not be responsible or liable in the event the Contractor infringes any of said laws and regulations.

3. Entry into force of the Contract

3.1 The Contract shall enter into force upon signature by the authorized signatory(ies) of each party.

3.2 Any amendment to the Contract shall only enter into force upon signature by the authorized signatory(ies) of each party.

4. Authorized Representatives

Each party shall be represented by, and all notices and correspondence concerning the Contract shall be communicated by and to, its Representative(s).

ESO reserves the right to verify the validity and extent of the authority of the Contractor's Representatives and the Contractor shall provide support documentation, if so requested by ESO.

II. PERFORMANCE OF CONTRACTS

5. Execution of Work

5.1 The Contractor shall be solely responsible for the performance of the Contract in every respect. The Work shall be performed with professional skill, care and utmost diligence and at least in accordance with the relevant trade, industrial and technical practice and the state of the art.

5.2 The Contractor shall be granted, on request, free access to the ESO site for all questions relating to the performance of the Contract. He shall be deemed, both for himself and on behalf of any of his Sub-contractors, to be fully conversant with the conditions for the delivery of Supplies and with the nature of any foreseeable special difficulties inherent in the performance of the Contract. He shall therefore be excluded from making any claims in respect of such matters, except in circumstances beyond the Contractor's reasonable control.

5.3 ESO's approval of a technical document shall in no way relieve the Contractor of his responsibility for the proper performance of the Contract.

6. Assignment - Sub-contracts

6.1 The Contractor shall not, without the permission in writing by ESO, sub-contract the performance of all or any part of his obligations under the Contract to any other Sub-contractors than those specified in the Contract. Any such permission may be subject to conditions. In any event the Contractor shall remain solely responsible to ESO for the performance of the Contract.

6.2 The Contractor shall be, without prior written consent of ESO, debarred from modifying the list of Sub-contractors as well as the corresponding shares of the Work sub-contracted in per cent of the total price of the Contract, as it was presented by the Contractor in the tender/proposal, prior to the award of the Contract or as it is laid down in the Contract.

6.3 Unless otherwise authorized by ESO in writing, the conditions of the Sub-contracts shall secure to ESO any rights provided to it under the terms of the Contract.

- 6.4 The Contractor shall not assign his obligations under the Contract or any part thereof without prior permission in writing by ESO, which may be subject to conditions.
- 6.5 ESO may terminate the Contract in whole or in part with immediate effect, without any compensation whatsoever, if the Contractor fails to comply with these obligations or with any of the conditions attached to any permission granted by ESO.

7. Deliveries - Performance - Time Limits

- 7.1 The Contractor shall not without prior permission in writing by ESO deliver Supplies at any date(s) or place(s) or in a manner other than as specified in the Contract.
- 7.2 If the Contract is to be performed by stages and the Contract does not stipulate a time-table, the Contractor shall send to ESO within one month from the date of signature of the Contract, a time-table indicating the projected completion dates of the stages in the performance of the Contract. The validity of this time-table as well as any update thereof shall be subject to ESO's approval. In the event that ESO does not give notice to the contrary within one month of its receipt, the time-table or any update thereof shall be deemed to be approved.
- 7.3 The Contractor shall, as soon as reasonably possible, notify ESO in writing of any circumstance delaying or threatening to delay or affecting or threatening to affect the proper performance of the Contract failing which the Contractor shall be precluded from making any claim in this respect regarding compensation of costs, extension of time or any other remedy in relation thereto.

The time-limits specified in the Contract shall be prolonged by ESO only in respect of a delay which cannot be imputed to the Contractor.

- 7.4 To the extent that a failure to perform an obligation cannot be imputed to the Contractor, he shall not be in default nor be liable for damages nor owe any penalty, provided that he has given ESO written notice of the failure and the reason therefore as soon as reasonably possible and in any case within the period agreed for the performance of the obligation.

Notwithstanding the foregoing, ESO might decide to terminate the Contract as per Paragraph 12.2.

8. Information to be provided

- 8.1 The Contractor shall supply ESO free of charge with all the documents, information, testing results and technical data which ESO may reasonably deem necessary for the performance of the Contract.
- 8.2 In case of a Contract relating to study, experiment, research and development the Contractor shall supply ESO, free of charge, with all the information and technical data in documentary or other appropriate form generated under the Contract giving full details concerning the Work and the results achieved.

9. Items Made Available by ESO

- 9.1 Any Equipment, material, computer software, database, technical document, imagery or information made available to the Contractor by ESO for the performance of the Contract shall remain the property of ESO and shall be returned to ESO, including any copies thereof, upon completion of their use, and at the latest immediately after execution of the Contract or the date of its termination.
- 9.2 The Contractor shall be responsible for the safe keeping, maintenance, storage, transport and, as appropriate, insurance of all such items and shall use them exclusively for the performance of his obligations under the Contract.

These items are made available by ESO in their existing conditions and without any express or implied warranty. The Contractor shall check any items and notify ESO within two weeks after receipt of any such item about any defects or unfitness, failing which the item shall be deemed to have been made available to the Contractor without any defects and fit for the purpose for which it was made available to the Contractor.

- 9.3 The Contractor shall take all necessary measures to make known and protect the ownership of ESO of such items, including clearly marking them as ESO property.

If such items have been purchased by the Contractor for and on behalf of ESO, he shall take all necessary measures and, in particular, retain all documents required to prove ESO's ownership.

10. Publicity

- 10.1 The Contractor may not, for publicity purposes, use the name, emblem or images of ESO or any of the names under which ESO or its observatories are known, or indicate that he is an ESO supplier, unless he has first obtained ESO's permission in writing. Any permission may be withdrawn by ESO at any time without any compensation due and shall expire automatically on the date of Final Acceptance of the Supplies.
- 10.2 Press releases, advertising, broadcasting, programs, exhibitions, news bulletins or any other publications by the Contractor related or referring to the Contract shall be drawn up in consultation with ESO.

11. Confidentiality

- 11.1 Each party agrees and confirms to use any Confidential Information, whether written or verbal, passed on to him by the other party solely for the purpose for which it was released to him and to make no other use thereof; each party moreover agrees and confirms to treat it in the strictest confidence and to take all reasonable security precautions in the safekeeping of the Confidential Information, applying no lesser security measures to it than to its own Confidential Information. The parties, where it is strictly necessary for the performance of the Contract, may disclose Confidential Information to such employees and/or third parties who are committed by law and/or by the provisions of their contract to observe similar confidentiality with regard to business matters.

Each party recognizes that the receipt of these documents and/or information from the other party does not constitute a prior use by him in terms of patent law(s), 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 the disclosing party.

The above disclosure and use limitations shall not extend to Confidential Information when and as far as this is or has become public knowledge, or has already been lawfully in the possession of the receiving party before the Confidential Information was passed on to him by the disclosing party or as far as such Confidential Information is lawfully acquired by him from third parties.

- 11.2 The above obligations shall remain in full force and effect after termination or cancellation of the Contract, unless otherwise notified in writing by the disclosing party.

12. Right to Modify and Power to Terminate the Contract

12.1 ESO may call for any modifications to the Contract that may appear to it desirable.

The Contractor may also suggest modifications and in this case, he shall submit to ESO a modification request for ESO's approval.

In both cases, the Contractor shall indicate any consequence that the modification might have on the completion dates, price of the Contract, guarantee and other aspects, as relevant. Prior to its implementation, any such modification shall be agreed upon in an amendment to the Contract, signed by both Parties, specifying the modifications involved and their effect on the completion dates, price of the Contract, guarantee and other aspects, as relevant.

Until the amendment is signed by both parties, the Contractor shall carry out the Work as originally agreed. The Contractor shall systematically incorporate the modifications into the performance schedule and ensure smooth continuation of the performance of the Contract.

12.2 ESO may at any time, by registered letter, terminate the Contract in whole or in part, with payment of full compensation to the Contractor of reasonable costs, expenditures and liabilities incurred by him in the performance of his obligations under the Contract up to the moment of termination, the amount of which shall not exceed, in the aggregate, the value of the Contract. No compensation shall be paid for loss of profit.

13. Inspection - Supervision

13.1 ESO may at any time carry out any supervision, check or inspection it may consider desirable, both on the Contractor's premises and on those of his Sub-contractors, through any persons appointed by ESO for this purpose. The exercise of this right shall in no way prejudice ESO's decision when taking delivery of or accepting any Supplies and shall in no circumstances affect ESO's right in the matter of guarantees or lessen in any way the Contractor's responsibilities regarding the due fulfillment of his obligations.

13.2 The Contractor shall take all necessary measures to permit ESO to make such checks or inspections. He shall also facilitate ESO's supervision over the performance of the Contract. The above provisions shall equally apply to Sub-contractors, who shall be notified in due time by the Contractor.

13.3 ESO undertakes to treat as confidential any information acquired when exercising its rights of check, inspection, verification or supervision, and to strive to reduce to a minimum any inconvenience which the exercise of these rights might cause to the Contractor's activities.

13.4 ESO may carry out any verification needed to satisfy itself of the proper technical performance of the Contract, and may call for the suspension of any Work it may judge unsatisfactory because it fails to comply either with the terms of the Contract and/or with the normal customs of the trade.

13.5 Whenever so requested, the Contractor shall submit to ESO written reports concerning the progress and/or performance of the Contract. Such reports shall be submitted solely for purposes of information, and acceptance by ESO of any such report shall in no way prejudice ESO's subsequent decisions regarding the performance of the Contract, or affect any of ESO's rights, particularly in the matter of guarantees.

14. Routing - Transport - Packing

- 14.1 The handling, packing and transport of Supplies to be delivered shall be the Contractor's sole responsibility. The Contractor shall have all Supplies suitably packed for safe transportation and delivery.

Unless otherwise agreed in the Contract, the costs relating to dispatch, transport and routing of Supplies and their unloading at the place specified in the Contract, including insurance costs, shall be borne by the Contractor who shall, throughout the entire duration of transport, including the unloading at their destination, retain responsibility for the Supplies which he is required to deliver under the terms of the Contract.

- 14.2 ESO reserves the right to change at any reasonable time the place of delivery of the Supplies, subject to a reasonable adjustment of the prices specified in the Contract.
- 14.3 Should ESO request the postponement of dispatch of the whole or part of an item to be supplied, the Contractor shall provide free storage and maintenance, including insurance, under his own responsibility and liability for a period of two months dating from the stipulated date of delivery. If this period exceeds two months, the Contractor's obligations shall continue, subject to agreement between the parties concerning reasonable payments to be made.
- 14.4 Material and products required for transport and handling, including crates, cases and receptacles of any type, shall be supplied by the Contractor and, with the exception of ISO freight containers, be regarded as non-returnable. The cost of such items shall be deemed to have been included in the Contract price.

15. Provisional Acceptance

- 15.1 Provisional Acceptance shall be granted after the Supplies have been delivered and have satisfied the conditions of the Contract, and provided that the Contractor has fulfilled all his obligations for this purpose. The Contractor may request from ESO a certificate of Provisional Acceptance.
- 15.2 In the event of rejection affecting only a portion of the Supplies, Provisional Acceptance may be granted for the Supplies not rejected, in so far as they can be utilized independently of the rejected portion.
- 15.3 Within three months from the submission of the request for Provisional Acceptance as per section 1 of this Paragraph, ESO shall either provide the Contractor with a certificate of Provisional Acceptance or, in the event that the requirements of the Contract have not been fulfilled, shall reject the request for Provisional Acceptance motivating such rejection. If ESO does not provide the certificate of Provisional Acceptance nor rejects the request for Provisional Acceptance within the above specified period of time, the Supplies shall be deemed to be accepted on the day following the end of that period.
- 15.4 Property in the Supplies shall pass to ESO upon Provisional Acceptance.

16. Guarantee

- 16.1 The guarantee period shall be two years for all Supplies furnished by the Contractor. For Supplies for which a longer guarantee period is usually applied based on the standard of the relevant industry, such longer guarantee period shall also apply under the Contract. The guarantee period shall begin on the date of Provisional Acceptance.

- 16.2 If Supplies turn out not to comply with the contractual terms during the guarantee period, the Contractor shall carry out, at his own expense, all Work necessary to comply with the terms of the Contract. ESO shall decide, after receiving the Contractor's proposals, whether such Supplies shall be replaced free of charge by the Contractor, whether their cost shall be reimbursed by him at replacement prices, or whether they shall be repaired or modified by him at his expense. If the Contractor fails to comply with the above requirements, ESO may, after serving due notice to the Contractor, take the necessary action in his stead and at his expense.
- 16.3 For Supplies replaced, repaired or modified, the guarantee period shall be suspended and shall recommence on the date of replacement or acceptance by ESO of the repaired or modified Supply, respectively.
- 16.4 If, during the guarantee period, or during the periods of repair or modification, Supplies as a whole become unusable for reasons attributable to the Contractor, in particular as a result of abnormal wear, breakage or defective functioning of one or more parts of the said Supplies, the guarantee period for the whole of the Supplies concerned shall be extended by all the periods during which the said Supplies as a whole were unusable.
- 16.5 All defective Supplies will be held by ESO on the Contractor's behalf free of charge, for a period of one month following ESO's notification thereof to the Contractor in writing. Thereafter, such Supplies shall be at the disposition of ESO without charge, to use as it thinks fit or to dispose of them at the Contractor's expense.
- 16.6 The Contractor shall meet all costs arising in connection with his obligations under the guarantee, including those of transport. He shall not be responsible for costs resulting from deterioration attributable to ESO by reason of negligence, inadequate supervision or maintenance, or mishandling. Except as provided for in Paragraph 16.2, the Contractor shall not be held liable if Supplies have been replaced, modified or repaired by ESO without the Contractor's written consent.
- 16.7 If the defect observed in the course of the guarantee period is found to be due to a technical error of a systematic nature, the Contractor shall replace or modify at his expense all identical components covered by the Contract which are liable to suffer from this error, even if these components are functioning correctly.

17. Final Acceptance

- 17.1 Final Acceptance shall be granted with effect from the expiry of the guarantee period, provided that the Contractor has met all his obligations.
- 17.2 If the Contractor makes a written request for Final Acceptance, ESO shall give its reply within fifteen days following such request. In every case, ESO may require a general examination to be made of the Supplies and their history since Provisional Acceptance, and the findings to be recorded in a document signed by both parties, whereupon, if all contractual requirements have been fulfilled, Final Acceptance shall be granted and a certificate of Final Acceptance shall be provided to the Contractor. Where appropriate and if so requested, the Final Acceptance may be given with retroactive effect.
- 17.3 In the event of rejection affecting only part of the Supplies, final acceptance maybe granted for the Supplies not rejected, in so far as they can be utilized independently of the rejected portion.
- 17.4 If, during the guarantee period, it is necessary to replace, repair or modify a portion of the Supplies by reason of abnormal wear, breakage or defective functioning, the extension of the guarantee period relating to said portion of the Supplies shall not preclude the granting by ESO of the Final Acceptance for the Supplies not affected by the extension of the guarantee period.

III. PRICES - PAYMENTS - FINANCIAL PROVISIONS

18. Prices

Unless otherwise agreed in the Contract, prices shall at all times be deemed to be firm and fixed, not subject to revision and inclusive of all costs relating to the performance of the Contractor's obligations under the Contract. With regard to customs duties, taxes and levies, there are special arrangements for ESO, and the Contractor is required to become conversant with such arrangements. Accordingly prices shall be quoted net and free of tax. Where VAT is applicable, these taxes shall be shown clearly on the invoice. Save in respect of possible exemption from VAT arising from the special fiscal conditions which apply to ESO, the Contractor shall in no way be released from his obligation to pay any taxes which may normally be due.

19. Price Revisions

Price revisions, if applicable, shall not be effective beyond the contractual time limits if the delay is due to the Contractor. The indices used in the price revision formulae must be those of official government publications. Information from private sources shall be accepted only when such official sources are not available. The consequences of applying price revision formulae shall in any case be limited to the changes in prices which has effectively taken place.

20. Payments

- 20.1 No payment shall be effected without receipt of an invoice drawn up in the form prescribed in the Contract and accompanied by all relevant supporting documents.
- 20.2 Provided that the invoice has been accepted, payments shall be effected within thirty days following receipt of the invoice in the form and under the conditions laid down in the Contract.
- 20.3 ESO reserves the right to retain from any amount payable to the Contractor under the Contract the same amount due or becoming due by the Contractor to ESO for any reason in connection with the Contract or any other contract in place between ESO and the Contractor.

21. Miscellaneous Financial Provisions

- 21.1 No advance payments (i.e. payments made before successful delivery of usable Supplies of equivalent value) shall be made by ESO unless the Contractor has provided, from a bank approved by ESO, a joint and several banker's guarantee in ESO's favor for an amount equal to the sum of the advance payment.
- 21.2 Payment may be effected by installments for each completed part of the Contract.
- 21.3 Until Final Acceptance, ESO may withhold the payment of up to ten per cent of the Contract price as security; this security may also be provided by a joint and several banker's guarantee for the same duration and amount.

IV. SAFETY

22. Contractor's Obligations

In addition to observing all relevant national legislation in safety and health matters, the Contractor shall, when on the ESO site, comply with the safety regulations in force thereon, with which he is required to become conversant. He shall take all necessary measures to this effect.

V. INTELLECTUAL PROPERTY AND THIRD PARTIES RIGHTS

23. Intellectual Property

23.1 Newly developed data, information, knowledge:

ESO will be the owner of all new data, information and knowledge developed under or in consequence of the Contract. Any such new data, information and knowledge, shall be supplied to ESO without any restriction. In case the Contractor wishes to use or exploit the newly developed data, information or knowledge, it shall request a license from ESO with that effect. Licensing conditions shall be defined by ESO.

23.2 Protected intellectual property:

The Contractor shall provide ESO with all necessary data, information and knowledge required for ESO to exercise its rights to take out any intellectual property title regarding the newly developed data, information or knowledge. The Contractor shall provide all reasonable support, as required from an inventor, to ESO for these applications, and will not withhold any consent required.

Should ESO not be interested in filing an application for any intellectual property title regarding the newly developed data, information or knowledge, on the request of the Contractor ESO might consider transferring the necessary rights to the Contractor. The conditions of the transfer of rights shall be defined by ESO and shall include the obligation of the Contractor to grant to ESO for the purpose of scientific research an irrevocable, non-exclusive, free license, which ESO may make available to third parties engaged in work on its behalf. Furthermore, such license shall be freely transferable to universities and to similar scientific institutes working in the same field as ESO in the Member States of the Organisation.

23.3 Pre-existing data, information and knowledge:

If ESO requires data, information or knowledge owned by the Contractor and already existing prior to the signing of the Contract to use or modify any Work or Supplies, the Contractor will grant ESO a non-exclusive and free of charge license to use these data, information and knowledge, including the right to sublicense it under sufficient confidentiality restrictions to third parties, for the above mentioned purposes. The Contractor shall provide the data, information and knowledge in sufficient details to enable ESO to exercise the above rights. Any data, information and knowledge not listed as pre-existing in the documentation provided to ESO by the Contractor prior to Contract signature, shall be considered newly developed.

23.4 Third party rights:

The Contractor shall deliver all Supplies to ESO free from any restrictions arising from third party rights that could limit any of ESO's rights, except if expressly accepted by ESO in writing. The Contract price shall be deemed to include all fees and royalties for the use of third party rights. The Contractor shall indemnify ESO for any loss or damage, including legal costs, and hold ESO harmless from and against any claims of third parties arising from any infringement or alleged infringement of third party rights.

23.5 Publication:

No publication in any format of the newly developed data, information and knowledge shall be done without the prior consent of ESO in writing.

24. Right of Repair

- 24.1 The Contractor's patent and intellectual property rights shall in no way preclude ESO from repairing any Supplies, or having it repaired by whoever it chooses, on expiry of the guarantee period, and from obtaining any parts for this purpose. Preference shall be nevertheless given to the Contractor provided his prices and repair or delivery times are reasonable.
- 24.2 ESO shall make available the data, information and knowledge to third parties under confidentiality restrictions, which will allow the third party to use them only for the purpose of the repair. ESO shall communicate to third parties only such information as is necessary for the repair, and shall ensure that such information is used only for that purpose.

VI. DELAYS – CANCELLATION OR TERMINATION

25. Penalties

- 25.1 If the Contractor fails to comply with the time limits specified in the Contract, prolonged if necessary in accordance with the Contract, he shall be liable to penalties for delay. The amounts of the penalties shall be set out in the Contract and prior warning by ESO shall not be necessary.
- 25.2 If in Contracts providing for the delivery of services the Contractor fails to fulfill his obligations under the Contract regarding these services, ESO reserves the right to request penalties for improper or non-performance, following a prior written warning by ESO. The amount of the penalties shall be determined by ESO taking into account the criticality of the failure, and shall in no case exceed ten percent of the price of the corresponding services.
- 25.3 As a general rule, penalties shall be calculated on the basis of the total amount of the Contract.
- 25.4 Where the Contract provides for delivery by stages, installments or lots, and if the delay in delivery of such a stage, installment or lot does not impede the general performance of the Contract, the penalties shall be calculated on the basis of the value of each stage, installment or lot.
- 25.5 Penalties shall be deducted from the payments due, without prejudice to ESO's right to claim the sum directly.
- 25.6 ESO shall be entitled to payment of the penalties without prejudice to all its other rights or claims, including, but not limited to, its right to claim performance of the obligation to deliver Supplies as agreed in the Contract and its right to claim damages to the extent that the damages exceed the amount of the penalty.

26. Cancellation or Termination of Contracts

26.1 In addition to the provisions made under Paragraphs 6.5, 12.2 and 27 ESO may at any time cancel or terminate the Contract in whole or in part by registered letter, without any compensation whatsoever, if the Contractor fails to complete all or part of the Contract or if it becomes apparent that the Contractor shall not be capable of performing a substantial part of its obligations, after receiving a formal letter of notice, or in the event of gross negligence or misconduct on the part of the Contractor, in particular in cases of:

- (i) repeated or serious disregard of the disciplinary or safety regulations applicable on the ESO site;
- (ii) corruption or attempted corruption of an ESO employee or of any person acting on ESO's behalf;
- (iii) acts of fraud, misrepresentation and falsification concerning the quality, quantity or composition of Supplies.

26.2 Cancellation or termination by ESO in such cases shall automatically give ESO the right to obtain, at the expense of the Contractor, all or part of the undelivered or rejected Supplies from any supplier ESO may consider suitable. The Contractor shall do everything in his power that is required to enable the new supplier to deliver the Supplies, in particular make available the necessary information and Intellectual Property Rights. If the prices quoted by the new supplier are higher than those of the cancelled or terminated Contract, the Contractor shall, on request from ESO, pay to ESO the difference between the new and the old prices, without prejudice to the compensation that ESO may claim from him for non-completion of the Contract.

Penalties already due under the provisions of Paragraph 25 before cancellation or termination of the Contract shall remain payable, but their amount shall be deducted from the compensation due under the provisions of this paragraph.

26.3 Notwithstanding the provisions of Paragraph 26.2, if the Contractor can, in good faith, claim that he has been the victim of external, unpredictable and unavoidable circumstances preventing him from completing the Contract and can provide proof that he has nevertheless taken all reasonable steps to fulfill his obligations under the Contract, the parties shall cooperate in seeking a way of terminating the Contract equitably.

VII. MISCELLANEOUS PROVISIONS

27. Bankruptcy - Prosecution for Debt - Sequestration - Distraint - Liquidation

27.1 Should a Contractor become insolvent or bankrupt or should any actions be taken against him related to such events, such as prosecution for debt, sequestration, distraint or liquidation of assets, or if any of those situations are threatening to occur, ESO reserves the right to cancel or terminate the Contract by registered letter without compensation and without prejudice to ESO's right to seek legal redress.

27.2 ESO has the same right of cancellation or termination if a Contractor makes a composition, administration or other arrangement with his creditors or for their benefit, or effects a transfer of his property to their advantage or signs a fiduciary agreement in their favor affecting or threatening to affect in any way the Contractor's performance of the Contract.

28. Liability

- 28.1 Each party shall hold the other party harmless from, and indemnify it for loss and damage, including, but not limited to, personal injury and death and related legal costs, resulting from acts or omission of the party, its employees, agents and/or Sub-contractors.
- 28.2 Except in cases of gross negligence or willful misconduct, a party shall not be liable to the other for loss of contract, loss of income or profit or any other consequential or indirect loss or damage.
- 28.3 The Contractor shall take out and maintain insurance cover, with companies of reputed solvency, for liability risks connected with the performance of the Contract, including third party liability, and shall provide evidence of such insurance cover upon ESO's request.

VIII. DISPUTES - STATUS - APPLICABLE LAW

29. Arbitration

Failing an amicable settlement, any dispute between the parties arising out of or relating to the Contract shall be finally settled by international arbitration in accordance with the following rules:

- 29.1 Each party shall appoint an arbitrator within thirty days after notice has been given, by registered letter with acknowledgment of receipt, by either party to the other, of its intention to resort to arbitration. The two arbitrators shall, by joint agreement and within thirty days of the appointment of the second arbitrator, select a third arbitrator, who may in no case be drawn from amongst persons who are or have been in any way in the service of ESO or of the Contractor, or of any subsidiary or affiliated company of the latter. The third arbitrator thus selected shall preside over the arbitration tribunal.
- 29.2 Should one of the parties fail to appoint an arbitrator and/or the two arbitrators fail to agree on the selection of a third, the choice shall be made by the President of the *Centro de Arbitraje y Mediación de Santiago* ("CAM"), at the request of the first party to do so.
- Should an appointed arbitrator be prevented for any reason from fulfilling his functions, a replacement shall be selected within a period of thirty days in accordance with the above procedure.
- 29.3 The arbitration proceedings shall take place in **Santiago** unless otherwise agreed by the parties. With regard to matters of procedure not dealt with in the Contract, the procedure of the arbitration shall follow the **international commercial arbitration law of the Republic of Chile (No 19.971)**. The language of the proceedings shall be English. **However, witnesses may be heard and evidence presented in Spanish.**
- 29.4 The arbitrators shall be entitled to be assisted, in such manner as they see fit, by legal advisers, experts and other persons selected by them, to undertake investigations, to hear the parties either separately or in each other's presence, assisted if they so desire by legal advisers and/or experts, and generally to carry out any enquiries, investigations and hearings which may provide them with information for the performance of their task.

The parties shall provide the arbitrators in a timely manner with such assistance as they are capable of providing.

- 29.5 The arbitration tribunal shall faithfully interpret the terms of the Contract. The award shall

be made by majority vote and shall set out the detailed reasons for the decision. The costs and fees of arbitration shall be determined and apportioned by the arbitration tribunal and shall in principle be borne by the unsuccessful party.

The award shall be made at the latest within one year of the final appointment of the third arbitrator. This time limit may be extended provided the parties agree.

- 29.6 The arbitration tribunal shall be the sole authority to take, at the request of either party, any interim measures it deems necessary to preserve the respective rights of either party or in respect of the matter in dispute.

Such interim measures may be established in the form of an interim award. The arbitration tribunal shall be entitled to require security for the costs of such measures from the party requesting the interim measure.

Request for urgent interim measures that cannot await the constitution of the arbitration tribunal may be made to the ICC International Court of Arbitration, to be decided in accordance with the relevant ICC Rules of Arbitration in force at the time of the signature of the Contract.

- 29.7 The award shall be final and binding upon the parties, who shall in advance undertake not to resort to any form of appeal or revision or make recourse to any other judicial authority against the award, whether ordinary or extraordinary.

Nevertheless, either party to the dispute may, within fifteen days of announcement of the arbitrators' award, request them to provide a joint interpretation of their award. This interpretation shall be given within thirty days of the award. During this time execution of the award shall be suspended.

- 29.8 The enforcement of the award or any interim award shall be governed by the rules in force in the state in which it is to be executed.

- 29.9 The arbitration clause set out in the present Paragraph shall be applicable to all amendments, modifications and addenda to the Contract, even if this Paragraph is not specifically mentioned therein and provided that there is no formal provision to the contrary in such amendments, modifications or addenda.

30. Status of ESO

ESO is an Intergovernmental Organisation set up by the Convention Establishing a European Organisation for Astronomical Research in the Southern Hemisphere concluded on 5 October 1962, and has its seat at Garching bei München, Federal Republic of Germany. ESO enjoys international status as defined in the Protocol on the Privileges and Immunities of ESO concluded on 12 July 1974, the Headquarters Agreement between the Government of the Federal Republic of Germany and ESO concluded on 31 January 1979 and the Agreement between the Government of Chile and ESO for the purpose of Establishing an Astronomical Observatory in Chile concluded on 6 November 1963, as amended by the Agreement concluded on 18 April 1995. Special legal, customs and fiscal conditions therefore apply to ESO in its Member States and in the Republic of Chile. The Contractor shall be deemed to be conversant with the effect of these special conditions and shall accordingly, in conjunction with the appropriate ESO services, make such arrangements as may be required.

31. Applicable Law

31.1 ESO contracts are subject to the regulations adopted by ESO by virtue of its international status. For matters of substance not specifically covered by these regulations or the Contract, the Contract shall be governed by **Chilean** law.

31.2 ESO contracts are deemed to have been drawn up and to be performed in **Santiago**.

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