



## ANNEX 3

CFT/ESO/09/27821/YWE

# Contractual Conditions Governing the Procurement of the EVALSO Optical Infrastructure

## INTRODUCTION

The terms of the Contract or Contracts which may be placed as a result of this Call for Tenders shall be those contained in the General Conditions of ESO Contracts, which are provided as Annex 5 to this CFT. In particular, section IX of the General Conditions of ESO Contracts dealing with disputes, the status of ESO and applicable law shall be fully applicable.

The purpose of this document is to identify and develop the specific terms which shall apply in complement or in replacement of certain elements of the General Conditions.

### 1: Payments

#### 1.1 IRUs

The payments for IRU prices shall be made as follows:

- At contract award, the Contractor may ask for an advance payment of up to 30% of the relevant contract price. ESO shall make this advance payment upon presentation by the Contractor of a bank guarantee (Boleta de Garantia) in favour of ESO and for the amount of the advance payment. This bank guarantee shall remain valid until Acceptance of the work, i.e. until the Contractor demonstrates via appropriate testing that the capacity contracted is in conformity with the specifications;
- At Acceptance of the work, ESO shall pay the balance of the IRU price not paid through the advance payment, subject to presentation by the Contractor of a bank guarantee for 50% of the relevant contract price;
- At each anniversary date of the Contract, the bank guarantee shall be reduced by 5% of the Contract price, so as to reach a zero value by the end of year 10.

*[This proposal for the payment of the IRUs is consistent with ESO's general practice to request that bank guarantees be put in place in order to secure the payments made by ESO. In this respect, bidders are reminded that the procurement process permits them to submit alternative offers which may deviate from certain ESO requirements, see section II.6 of the Special Conditions governing the Call for Tenders. This is however conditional upon the submission of a baseline tender compliant with the ESO requirements, see section II.6.3 of the Special conditions]*



### 1.2 Yearly maintenance charges

If and where applicable, maintenance charges shall be paid by ESO yearly in advance.

### 1.3 Installation of new dark fibers (item 1.a and item 4 of the technical specifications)

If ESO elects to take ownership of the new dark fibers infrastructure installed in relation to item 1.a (connection between ESO/Paranal and a convenient point along Ruta 5) and/or item 4 (connection between OCA and ESO/Paranal), the payment of the prices corresponding to the installation of the new fibre infrastructure shall be made by ESO as follows:

- 90% of the price shall be paid during the construction of the fiber infrastructure in instalments against the achievement of specific project milestones, such payments being secured by bank guarantees in favour of ESO and for the amount of the advance payments, valid until Provisional Acceptance of the new infrastructure;
- the remaining 10% of the price shall be retained during the guarantee period (2 years from Provisional Acceptance) or may be paid at the time of Provisional Acceptance against a bank guarantee in favour of ESO and for the same amount (10%), valid for the duration of the guarantee period.

## 2. Payments against Outages

If the service parameters specified in section 4.5 of the technical specifications are not met, the Contractor shall pay ESO the following amounts:

- For each single downtime exceeding the duration specified in section 4.5.1 of the specification, the relevant yearly maintenance price shall be reduced by:
  - o 5% for the first occurrence;
  - o 10% for the second occurrence;
  - o 20% for the third and subsequent occurrence(s).
- For each time when the maximum unavailability over a consecutive period of 12 months is exceeded, the relevant yearly maintenance price shall be reduced by:
  - o 5% for the first occurrence;
  - o 10% for the second occurrence;
  - o 20% for the third and subsequent occurrence(s).

In addition, if during any consecutive period of 12 months, the unavailability level as defined in section 4.5.1 of the Technical Specifications exceeds 10%, the Contractor shall pay to ESO 5% of the relevant IRU price.

ESO may elect, at its own discretion, to deduct these payments from other amounts due by ESO to the Contractor.



**3. Cancellation of Contracts** (in complement to Article 30 of the General Conditions of ESO Contracts)

ESO may cancel the contract at its sole discretion if the parameters specified in section 4.5 of the technical specifications are exceeded:

- In more than 3 instances per year for the single downtime events;
- In more than 5 instances over the contract duration for the maximum unavailability over a consecutive period of 12 months.

In such instances, the Contractor shall reimburse ESO the relevant IRU price on a pro rata basis (for example, for a 10 year IRU where ESO would cancel the contract under this clause during year 6, the Contractor shall reimburse ESO 40% of the IRU price).

**4. Penalties for delays** (in complement of Article 29 of the General Conditions of ESO Contracts)

Section 4.6 of the technical specifications sets guidelines for the duration of the project, and leaves some degree of flexibility to the Contractor to propose and justify the detailed delivery schedule.

In compliance with articles 29.1 and 29.2 of the General Conditions of ESO Contracts, a penalty of 1% per month of delay applicable to the contract price shall apply in relation to items 1.a and/or 4. The penalties may not exceed 10% of the relevant contract price.

**5. Termination for ESO's convenience** (in complement of Article 12.5 of the General Conditions of ESO Contracts).

ESO's maximum liability in the event of termination for convenience shall be limited to the yearly maintenance price of that year when such termination may occur (i.e. no liability towards yearly maintenance charges for subsequent years).

**6: Third Party Indemnity**

The Contract shall include an obligation on the Contractor to defend, indemnify and hold harmless ESO against claims for any material damage or personal injuries which third party may suffer and which may be attributed to the services provided by the Contractor.