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**EUROPEAN SOLAR TELESCOPE**

**Procurement Rules**

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## PREAMBLE

Having regard to Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement;

Having regard to the corresponding Spanish law on public procurement (*Ley 9/2017, de 8 de noviembre, de Contratos del Sector Público, por la que se transponen al ordenamiento jurídico español las Directivas del Parlamento Europeo y del Consejo 2014/23/UE y 2014/24/UE, de 26 de febrero de 2014*);

Whereas:

the European Solar Telescope considers it desirable to regulate procurement so as to promote the objectives of:

- (1) **Value for Money** – Secure the best mix of quality, effectiveness and price over the whole life cycle of the purchased goods, works or services.
- (2) **Publicity** – Contracts above certain thresholds shall be published in appropriate media, except where the circumstances or the nature of the contract justify reliance on specific exemptions.
- (3) **Integrity** – All procurement shall be conducted in a manner above reproach and with complete impartiality and preferential treatment for none.
- (4) **Innovation** – Where possible, procurement needs should be stated as outcomes as early as possible in a non-prescriptive way to maximise the opportunities for innovators and suppliers to present their solutions.
- (5) **Sustainability** – In accordance with relevant EU policy, seek to procure goods, services and works with a reduced environmental impact throughout their life cycle, as well as to promote decent work, social inclusion, accessibility, employment opportunities, ethical trade, gender equality, health and safety and achieve wider compliance with social objectives.

The Project Office of the European Solar Telescope has adopted the following procurement rules:

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## Chapter 1. GENERAL PROVISIONS

### Article 1 *Definitions*

For the purpose of these rules:

“PG” means the Procurement Group of the European Solar Telescope Project Office.

“Call for Tenders” means a call for competition made in a manner required or permitted by Article 11.

“Currency” means the monetary unit of account.

“Contractor” means a party who has been awarded and entered into a contract with the Organisation.

“Days” mean calendar days, unless otherwise indicated.

“Directive 2014/24/EU” means Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement.

“Electronic means” means electronic equipment for the processing and storage of data transmitted, conveyed or received electronically.

“Framework agreement” means an agreement between the Organisation and one or more suppliers, the purpose of which is to establish the terms governing contracts to be awarded during a given period, in particular with regard to price, technical aspects and, where appropriate, quantity envisaged.

“Host State” means Spain.

“Organisation” means Instituto de Astrofísica de Canarias, unless otherwise indicated.

“Partner country” means a country, which is a member or an observer in the European Association for Solar Telescope.

“Procurement documents” or “Tender documents” mean any document or documents produced or referred to by the Organisation to describe or determine elements of the procurement or the procedure, including the call for tenders, the invitation to tender, the technical specifications, and where appropriate, the proposed conditions of contract and any additional documents.

“SAN” means a Specific Advance Notice (SAN) of a possible future procurement.

“Supplier” means any natural or legal person, a public entity or group of such persons and/or bodies, which offer the execution of works, supply of products or services on the market.

“Tenderer” means a supplier that has submitted a tender or a request to participate in a tender procedure.

“Working day” means a day other than Saturday, Sunday or a bank holiday in Spain.

#### Article 2 *Scope of application*

- (1) These procurement rules apply to all contracts for pecuniary interest for the provision of goods, works or services, concluded in writing between the Organisation and a third party or parties.
- (2) These procurement rules only apply to procurement contracts that are financed, for the most part, by the Organisation’s budget and carried out by the Organisation or on behalf of the Organisation.
- (3) The rights conferred by these procurement rules are applicable to suppliers and tenderers from the EU Member States, Partner Countries, and other states that benefit from relevant international or bilateral agreements on procurement with the EU, but only where such agreements apply to the procurement concerned.

#### Article 3 *Principles and objectives*

- (1) The procedures for award of contracts by the Organisation shall respect the EU principles of transparency, proportionality, mutual recognition, equal treatment and non-discrimination.
- (2) While conducting procurement, the Organisation shall seek to promote the objectives of value for money, publicity, integrity, innovation and sustainability, as set out in the preamble to these rules.

#### Article 4 *Estimation of the value of contracts*

- (1) The estimated value of a procurement shall be based on the total amount payable over the duration of the contract or the framework agreement, net of VAT, as estimated by the Organisation, including any forms of options and renewals, taking into account all forms of remuneration.
- (2) Unless objectively justified by the specific circumstances of the contract, the Organisation shall neither divide its procurement nor use a particular valuation method for estimating the value of procurement so as to limit competition among suppliers or tenderers or to otherwise avoid its obligations under these rules.
- (3) Notwithstanding paragraph (2) above and provided that transparency and competition are preserved, the Organisation shall seek to subdivide contracts into separate lots to facilitate market access opportunities for small and medium enterprises and to reduce the risk of over dependency on one supplier.

#### Article 5 *Information on possible forthcoming procurement*

- (1) The Organisation will, where possible, publish on its website information regarding procurement activities planned for forthcoming months or years.
- (2) The Organisation may also publish on its website a specific advance notice (SAN) of a possible future procurement. A SAN shall include information relevant to the

procurement and must be sufficiently precise, insofar as that information is available to the Organisation, to enable suppliers to identify the nature and scope of the future procurement.

- (3) Where, in relation to contracts with a value exceeding EUR 200 000, a SAN is published between 30 days and 12 months in advance of the publication of a call for tender, and the conditions in paragraph 4 below are met, the time limit for submitting a request to participate or for the submission of a tender may be shortened in accordance with Article 13, Article 14 and Article 15.
- (4) For the purpose of paragraph (3) above, a SAN shall include information on regarding, insofar as that information was available at the time the SAN was published:
  - a) description of the procurement including the nature and extent of works, nature and quantity or value of supplies, nature and extent of services, as applicable;
  - b) estimated date for the performance of the contract;
  - c) estimated time frame for the publication of a call for tenders in respect of the contract referred to in the SAN;
  - d) any other information that may be relevant in the circumstances.
- (5) Any publication in accordance with this Article does not constitute a call for tenders and does not confer any rights on suppliers or tenderers.

#### Article 6 *Specific exclusions*

These procurement rules do not apply to contracts for:

- (1) the acquisition or rental, by whatever financial means, of land, existing buildings or other immovable property;
- (2) employment, secondment and personnel placement contracts;
- (3) arbitration, conciliation or other legal services;
- (4) the delivery of in-kind contributions entered between the Organisation and a delivering body following an in-kind expression of interest, provided that the financing of such in-kind contribution is through the budget of the Partner Country;
- (5) joint or collaborative procurement conducted in accordance with Articles 22 (2) and 22 (4);
- (6) banking services and loans;
- (7) educational and vocational services;

- (8) recreational, cultural and sporting services;
- (9) hotel and accommodation services; or
- (10) health and work environment related services.

#### *Article 7 Language*

- (1) As a general rule, tender documents and ancillary correspondence shall be in English, unless decided otherwise by the Organisation where the following conditions are fulfilled:
  - a) the decision is justified by the subject matter of the contract; and
  - b) where, due to technical or geographical reasons, only domestic suppliers or contractors are likely to be interested in submitting tenders.
- (2) Responses to calls for tenders shall be in the language of the tender documents or in any other language permitted by the tender documents.

#### *Article 8 Currency*

- (1) As a general rule, the Organisation shall ask suppliers to submit tender quotes in EUR.
- (2) Depending on the subject matter of the contract and in special circumstances, the Organisation may also allow suppliers to submit tenders in other currencies.

#### *Article 9 Conflicts of interest*

- (1) For the purpose of this Article, a conflict of interest shall, at the least, be deemed to arise in any situation where a relevant staff member of the Organisation has a private or other interest which influences, or appear to influence, the impartial and objective performance of the procurement process, the outcome of the procurement process, or his or her official duties.
- (3) All relevant staff members of the Organisation shall take appropriate measures to effectively identify, prevent and remedy conflicts of interest arising from the conduct of the procurement so as to ensure integrity, equal treatment of all suppliers and tenderers and to avoid any distortion of competition.
- (2) For the purpose of this Article, a “relevant staff member of the Organisation” shall include any individual who is involved in the exercise of the Organisation’s procurement procedures or who may be in a position to influence the outcome of the exercise of those procedures.

## **Chapter 2. PROCUREMENT PROCEDURES**

### **Article 10 *General provisions***

- (1) The provisions under this chapter shall only apply to contracts with an estimated value of > 50 000 EUR.
- (2) As a general rule, the procurement documents shall be free of charge and fully accessible to suppliers from the date of publication of a call for tenders via the Internet, in a designated area on the Organisation's website.
- (3) If, due to exceptional reasons justified by the subject matter of the contract, the tender documents are not fully available by means of the Internet, suppliers may request the delivery of the tender documents, in which case the Organisation shall provide the tender documents within 3 working days of receipt of such request, provided such request was made at least 5 working days before the time limit for receipt of tenders or request to participate.
- (4) In the case referred to in paragraph (3) above, the time limits for the receipt of tenders referred to in Article 13, Article 14 and Article 15 below, shall be prolonged by 5 days.
- (5) Where practicable, the Organisation may also allow for tenders to be submitted by electronic means, in which case it may reduce the time limit for receipt of tenders referred to in Article 13, Article 14 and Article 15 by 3 days. Such electronic means must be non-discriminatory, generally available and compatible with the information and communication technology products in general use.

### **Article 11 *Call for tenders***

- (1) The Organisation shall make known its intention to conduct a new procurement by means of a call for tenders, unless the circumstances justify use of the procedure without publication of a call for tenders in accordance with Article 16.
- (2) The information provided with the call for tenders shall be sufficiently precise as to enable suppliers to identify the nature and scope of the procurement.
- (3) A call for tenders shall be published, as a minimum requirement, on the Organisation's website in a designated area accessible to suppliers via the Internet. Depending on the subject matter and the value of the contract, the Organisation may publish the call for tenders in additional media to ensure transparency and competition, including, where appropriate, the Industry Liaison Office's network and the Supplement to the Official Journal of the European Union.

### **Article 12 *Choice of procedures***

The Organisation shall have the freedom to organise the procurement procedure leading to the award of a contract in accordance with any of the procedures described in Article 13, Article 14 and Article 15, provided that a call for tenders has been made in accordance with Article 11.

### Article 13 *Open procedure*

- (1) Upon publication of a call for tenders, any interested supplier may submit a tender in response.
- (2) The minimum time limit for receipt of tenders shall be reasonable and proportionate to the subject matter of the contract, no less than 20 days from the date on which the call for tenders was published. For contracts with a value exceeding EUR 200 000 where no SAN has been published in accordance with Article 5, the minimum time limit for receipt of tenders shall be no less than 30 days.
- (3) The Organisation shall assess the tenders submitted on the basis of the award criteria set out in the tender documents and in line with Article 26.

### Article 14 *Restricted procedure*

- (1) Upon publication of a call for tenders, any interested supplier may submit a request to participate.
- (2) The call for tenders may require the provision of information for qualitative selection within the time limits indicated and may include a questionnaire. The selection criteria used to carry out the qualitative selection shall comply with Article 25 and shall be published with the call for tenders.
- (3) The minimum time limit for the receipt of tenders shall be reasonable and proportionate to the subject matter of the contract, but no less than 15 days. For contracts with a value exceeding EUR 200 000 where no SAN has been published in accordance with Article 5, the minimum time limit for the receipt of tenders shall be 25 days.
- (4) Only those suppliers invited to do so by the Organisation following its qualitative assessment of the information provided in response to the call for tenders, may submit a tender. The minimum number of suppliers invited to submit a tender shall be three (3) and in any event, a number sufficient to ensure genuine competition. However, where the number of suppliers meeting the selection criteria is below the minimum number, the Organisation may continue the procedure with those suppliers only.
- (5) The Organisation shall assess the tenders submitted on the basis of the award criteria set out in the tender documents and in line with Article 26.

### Article 15 *Competitive procedure with negotiation*

- (1) Upon publication of a call for tenders, any interested supplier may submit a request to participate. The information provided with the call for tenders shall be sufficiently precise to enable suppliers to identify the nature and scope of the procurement.
- (2) The call for tenders may require the provision of information for qualitative selection within the time limits indicated and may include a questionnaire. The selection criteria used to carry out the qualitative selection shall comply with Article 25 and shall be

published with the call for tenders.

- (3) In addition to (2) above, the call for tenders may also require the submission of an initial tender, which shall be the basis for the subsequent negotiations.
- (4) The minimum time limit for receipt of a request to participate in accordance with paragraphs (1) and (2) shall be no less than 15 days, or for contracts with a value exceeding EUR 200 000 where no SAN has been published in accordance with Article 5, 25 days.
- (5) If the call for tenders also requires the submission of an initial tender in accordance with paragraph (3), the time limits shall be no less than 20 days, or for contracts with a value exceeding EUR 200 000, where no SAN has been published in accordance with Article 5, 30 days.
- (6) Following the qualitative assessment of the information provided in response to the call for tenders, only those suppliers invited to do so by the Organisation may take part in the negotiations. Where the call for tender is made in accordance with paragraphs (1) and (2), the invitation to negotiate may be accompanied by a requirement to submit an initial tender, which shall form the basis for such negotiations. The minimum number of tenderers invited to take part in the negotiations shall be 3 and in any event a number sufficient to ensure genuine competition. However, where the number of suppliers meeting the selection criteria is below the minimum number, the Organisation may continue the procedure with those suppliers only.
- (7) During the negotiations, the Organisation shall ensure equal treatment of all tenderers and shall not provide information in a discriminatory manner by giving some tenderers an advantage over others.
- (8) The negotiations may take place in successive stages in order to reduce the number of tenders to be negotiated.
- (9) In the case of research and development activities, the Organisation may decide to use the negotiation phase to conduct separate research and development activities with one or several tenderers. Such activities may aim at the development of an innovative supply, service or work and the subsequent purchase of the resulting supply, service or work. In such cases, the negotiations may be structured in successive stages reflecting the steps of the research and innovation process.
- (10) In accordance with Article 27, the Organisation shall not reveal to the other tenderers any confidential information communicated by a tenderer participating in the negotiations without first obtaining that tenderer's consent.
- (11) The Organisation shall inform tenderers in good time of its intention to conclude negotiations and set a common deadline for submission of final tenders. The final tenders shall comply with the minimum requirements of the tender documents and be based on the outcome of the negotiations.
- (12) The Organisation shall assess the final tenders submitted on the basis of the award criteria set out in the tender documents and in line with Article 26.

## Article 16 *Procedure without publication of a call for tenders*

In the specific cases and circumstances laid down in this Article, the Organisation may award contracts by way of direct negotiations with one or more suppliers, without prior publication of a call for tenders. In such cases, Article 26 shall not be applicable.

- (1) The Organisation may award contracts following the procedure under this Article in the following circumstances:
  - a) in the absence of competition for technical reasons or due to exclusive rights including intellectual property rights, where no reasonable alternatives are available;
  - b) where only one or no applications, requests to participate or suitable tenders have been submitted in response to a previous call for tenders, provided that the initial conditions of the contract or the tender documents are not substantially altered, that the tender to be awarded the contract complies with the original exclusion and selection criteria if such were required, and that no more than one year has elapsed since the publication of the original call for tenders;
  - c) for research and development contracts which are performed by non-commercial entities solely for purpose of research, testing, experimentation, study or development in connection with the construction of the Organisation, provided that the contract does not include quantity production to establish commercial viability or for recovering general research and development costs;
  - d) in external circumstances of an urgent nature, unforeseeable and not attributed to the Organisation, where the time limits under in Article 13, Article 14 and Article 15 cannot be complied with;
  - e) for additional deliveries by the original supplier where a change of supplier would oblige the Organisation to acquire supplies or services having different characteristics which would result in incompatibility or disproportionate technical difficulties in operation, maintenance or application; or
  - f) for strict security reasons.

## **Chapter 3. PROCUREMENT ARRANGEMENTS**

### Article 17 *Framework agreement*

- (1) The Organisation may award a framework agreement in accordance with these rules and in such a case all references to a contract in Chapter 2 should be read as including a framework agreement, except where the context requires otherwise.
- (2) The duration of the framework agreement shall be reasonable and justified by the subject matter of the contract and shall not exceed 5 years, save for exceptional circumstances duly justified by the subject matter of the framework agreement.
- (3) Where a framework agreement is concluded with a single supplier, contracts awarded

pursuant to the framework agreement shall be within the limits laid down in the framework agreement.

- (4) Where a framework agreement is concluded with more than one supplier and all the terms and conditions governing the provision of the works, services or supplies concerned are laid down in the framework agreement, specific contracts shall be awarded without reopening competition on the basis of objective criteria for determining which of the suppliers shall perform the contract. Such objective criteria shall be stipulated in the original tender documents or in the framework agreement.
- (5) Notwithstanding paragraph (4) above, the Organisation may decide to reopen competition amongst suppliers party to the framework agreement provided that the choice of whether to reopen competition is reasonable given the circumstances at hand and that the award criteria used are objective, communicated to tenderers in advance, and relate to the subject matter of the specific contract.
- (6) Where a framework agreement is concluded with more than one supplier and not all the terms and conditions governing the contract to be awarded are laid down in the framework agreement, that contract may be awarded to a supplier who is a party to the framework agreement provided that:
  - a) The tender documents stipulate that competition amongst suppliers party to the framework may be reopened for the award of specific contracts;
  - b) The contract is awarded following competition; and
  - c) The competition is based on the same criteria for the award of the framework agreement, but such criteria may be more precisely formulated and where appropriate, accompanied by other criteria, which have been referred to in the original tender documents for the framework agreement.
- (7) The Organisation shall not misuse a framework agreement in order to prevent, restrict or distort competition.

#### Article 18 *Electronic catalogues*

- (1) The Organisation may require tenders to be presented in the format of an electronic catalogue, in accordance with the technical specifications and format established by the Organisation.
- (2) Where tenders have been submitted in the form of electronic catalogues to a framework agreement concluded with more than one supplier, the Organisation may use one of the following options:
  - a) award a contract on the basis of the electronic catalogues originally submitted to the framework agreement; or
  - b) invite suppliers party to the framework agreement to resubmit electronic catalogues, adapted to the requirements of the contract in question if necessary.

#### Article 19 *Collaborative and joint procurement*

- (1) The Organisation may award a contract or conclude a framework agreement jointly or in collaboration with other contracting authorities in Spain or in other countries.
- (2) When acting in collaborative procurement with other contracting authorities that are subject to other procurement procedures pursuant to Directive 2014/24/EU, or international rules, the Organisation may choose to organise the joint or collaborative procurement in accordance with such other procurement procedures.
- (3) The Organisation may enter into a contract or establish a framework agreement for use by other contracting authorities, provided that it has clearly identified, by name or by category, those contracting authorities entitled to rely on the contract or framework agreement in the call for tenders and tender documents.
- (4) Where one or more of the contracting authorities mentioned in paragraph (3) above is subject to other procurement procedures pursuant to Directive 2014/24/EU or international rules, the Organisation may organise the award of the contract or the framework agreement in accordance with such other procurement procedures.

### **Chapter 4. CONDUCT OF THE PROCUREMENT**

#### Article 20 *Grounds for exclusion*

- (1) The Organisation may treat as ineligible and may not invite a supplier to tender or award a contract to a supplier if the Organisation has actual knowledge that the supplier or its directors or any other person who has powers of representation, decision or control of the supplier:
  - a) has been convicted of any of the following offences in the last three years: participation in criminal organisation; corruption; fraud; money laundering; terrorist offences or offences linked to terrorist activities; child labour or other forms of illegal trafficking in human beings;
  - b) has failed to comply with applicable environmental, social or labour laws in the last three years;
  - c) is guilty of grave professional misconduct, which renders the supplier or tenderer's integrity questionable;
  - d) is involved in or in the last three years has been involved in collusion;or where the Organisation has actual knowledge of the existence of any of the following circumstances:
  - e) an unfair advantage that may distort competition as a result of the prior involvement of the supplier or tenderer in the preparation of the procurement process, in accordance with Article 25(4);

- f) significant previous deficiencies in the performance of prior contracts awarded by the Organisation;
  - g) serious misrepresentation while supplying information required as part of a tender procedure; or
  - h) where the supplier or tenderer is bankrupt, or is the subject of insolvency or winding-up procedures or is in any equivalent situation arising from a similar procedure under the laws and regulations of any state.
- (2) at any time during the procurement procedure, the Organisation may exclude a supplier or a tenderer where, due to new information brought to light, it turns out that the supplier or tenderer is in one of the situations referred to in paragraphs (1)(a)-(h) above.
  - (3) The Organisation may request that official registers, certificates, statements and other means of proof are submitted as evidence against grounds for exclusion in accordance with paragraph (1) above.
  - (4) A supplier that is in one of the situations referred to in paragraph (1) above shall have the possibility to request that compliance measures taken by that supplier are sufficient to demonstrate its reliability despite the existence of a relevant ground for exclusion, with a view that possible admission to the procurement procedure be examined.
  - (5) Such compliance measures may particularly include personnel and organisational measures such as the severance of all links with persons or organisations involved in the misbehaviour, appropriate staff reorganisation measures, the implementation of reporting and control systems, the creation of an internal audit structure to monitor compliance and the adoption of internal liability and compensation rules.
  - (6) The compliance measures taken by the supplier shall be evaluated by the Organisation, taking into account the particular circumstances of the offence or misconduct. The organisation shall give the supplier a statement of the reasons for its decision in case it considers the compliance measures taken to be insufficient.

#### Article 21 *Technical specifications*

- (1) The technical specifications shall define the components required of the works, supplies or services to be performed under the contract and shall be set out in the tender documents.
- (2) Technical specifications shall afford equal access to suppliers in the procurement procedure and shall not have the effect of creating unjustified obstacles to competition or result in unfair discrimination.
- (3) Where relevant to the subject matter of the contract, the technical specifications shall be drawn up so as to promote the objectives of innovation and sustainability as set out in the preamble to these rules.

- (4) Technical specifications shall not refer to a specific make or source, or a particular process that characterises the products or services provided by a specific supplier with the effect of favouring or eliminating certain suppliers or certain products.
- (5) Notwithstanding paragraph (4) above, when a reference to a specific make or source cannot be objectively avoided in order to describe the subject matter of the contract, it shall be accompanied by the words “or equivalent”.

#### Article 22 *Selection criteria*

- (1) The Organisation may establish selection criteria for the qualitative selection of suppliers to be invited to tender or, where applicable, to negotiate the contract.
- (2) The selection criteria used shall be based on objective criteria that the Organisation may determine, provided it makes the criteria available to suppliers in advance.
- (3) The criteria must be related and proportionate to the subject-matter of the contract, and may include (but are not limited to): suitability to pursue a professional activity, economic and financial standing, and technical and professional ability.
- (4) Where appropriate and relevant for a particular contract, a tenderer may rely on the capacities of other entities to demonstrate economics and financial standing or technical and professional ability, subject to the following conditions set out in paragraphs (5), (6) and (7) below.
- (5) With regard to criteria relating to economic and financial standing, the Organisation may require that the tenderer and those other entities be jointly liable for the execution of the contract.
- (6) With regard to criteria relating to technical capacity, the Organisation may require the tenderer to prove that it will have at its disposal the relevant resource by, for example, providing a commitment in writing to that effect.
- (7) With regard to educational and professional qualifications or experience of individuals, a tenderer may only rely on the capacities of other entities if those individuals perform the services or works that require their qualification or experience.

#### Article 23 **Award criteria**

- (1) The Organisation shall award contracts on the basis of best-value-for-money, which shall be assessed on the basis of objective criteria in accordance with the principles set out in Article 3(1) above.
- (2) The objective criteria used to assess the best-value-for-money shall be linked to the subject matter of the contract and shall not confer an unrestricted freedom of choice on the Organisation. Such criteria may include environmental, social or innovation-related criteria and shall reflect the objectives set out in the preamble of these rules and Article 3(2) above.

- (3) The criteria used to assess the best-value-for-money shall be set out in the call for tenders or the tender documents and be sufficiently clear to allow tenderers to understand on what basis their tenders will be assessed and to allow the information provided by the tenderers to be effectively verified.
- (4) In appropriate cases, justified by the subject matter of the contract, the best-value-for-money may be based solely on price or life-cycle costing.
- (5) Except in duly justified cases, the Organisation shall require that proposals be submitted following a double envelope system, whereby the commercial offer is separated from the technical offer.

#### **Article 24 *Confidentiality***

- (1) In its communications with suppliers or tenderers or any other third party, the Organisation shall not disclose any information if the non-disclosure of such information is necessary for the protection of essential interests of the Organisation, the Host State or a Partner Country.
- (2) The Organisation shall not disclose information communicated to it by a supplier or a tenderer that has been reasonably designated by that supplier or tenderer as confidential and that, according to the Organisation's assessment, would likely prejudice the legitimate commercial interests of that supplier or tenderer, or would impede fair competition, unless disclosure of that information is ordered by a court or administrative body as required under EU laws or laws of the Host State.

#### **Article 25 *Market consultations and involvement of suppliers in the procurement***

- (1) Prior to commencing a procurement procedure, the Organisation may conduct a market survey or consultation to plan the conduct of the procurement, prepare the tender documents and inform the market on forthcoming procurement plans.
- (2) For this purpose, the Organisation may engage external independent experts or market participants, provided this does not have the effect of distorting competition.
- (3) The Organisation shall take appropriate measures to ensure that competition is not distorted as a result of the participation in the procurement procedure by a tenderer or an entity related to a tenderer previously involved in the preparation of the procurement.
- (4) The Organisation may exclude a supplier or a tenderer if it has grounds to conclude that the prior involvement of that tenderer, supplier or related entity in the procurement process is capable of distorting competition or compromising the integrity of the procedure.
- (5) Prior to any such exclusion, the supplier or tenderer shall be given the opportunity to prove that its involvement in the preparation of the tender process is not capable of distorting competition.

**Article 26 *Notice of decision to reject a tenderer or to award a contract***

- (1) The Organisation shall send a notice to tenderers who failed to meet the exclusion or selection criteria pursuant to Articles 20 and 22. The notice shall be sent as soon as possible after a decision has been made and include the reasons why the tenderer was unsuccessful in meeting those criteria.
- (2) Prior to entering into a contract or concluding a framework agreement, the Organisation shall send all unsuccessful tenderers, who have not been informed of their rejection pursuant to paragraph (1) above, a notice communicating its decision to award the contract or conclude a framework agreement.
- (3) The notice referred to in paragraph (2) shall include:
  - a) the criteria used for the award of the contract;
  - b) the name of the tenderer or tenderers to be awarded the contract or to become a party to the framework agreement;
  - c) the score for each award criterion obtained by the tenderer which is to receive the notice and the tenderer or tenderers to be awarded the contract or to become a party to the framework agreement; and
  - d) where paragraph (4) below is applicable, the earliest date the Organisation intends to enter into the contract or to conclude the framework agreement.
- (4) For contracts awarded under Article 13, Article 14 and Article 15 with a value of over EUR 200 000, the Organisation must not enter into the contract or conclude the framework agreement before the end of a standstill period.
- (5) The standstill period shall end at midnight at the end of the 10th day following the relevant sending date of the notice in accordance with paragraphs (1) and (2). The “relevant sending date” means the day on which the notice is sent, which for the purpose of calculating the standstill period, shall be counted as the first day.
- (6) For contracts falling under Chapter 3, the decision of whether to follow the provisions of this Article shall be at the Organisation’s discretion.

**Article 27 *Cancellation of a procurement procedure***

- (1) The Organisation may decide to cancel a procurement procedure at any time before entering into a contract, provided such decision is motivated by objective reasons and is in conformity with the principles set out in Article 3(1).
- (2) The Organisation shall inform all tenderers of its decision within a reasonable time.
- (3) Participation in a tender procedure that has been cancelled shall not give rise to any compensation claims for foregone profits or costs incurred by suppliers or tenderers.

## **Chapter 5. AUDIT**

### **Article 28 *General audit***

- (1) The Organisation may appoint an internal auditor to conduct an annual review of procurements against the procurement rules of the Organisation. The auditor shall provide a written report of its findings within 60 days of its appointment. The auditor shall be independent of the Organisation's procurement function.
- (2) The Tenders Appeal Board may appoint an ad-hoc internal auditor in relation to a specific procurement, in which case it shall provide its report in writing to the Tenders Appeal Board within 14 days of its appointment. The ad-hoc internal auditor shall be independent of the Organisation's procurement function.
- (3) The internal auditor referred to in paragraph (1) above shall be approved by the Director General and be independent of the Organisation's procurement function.

### **Article 29 *PG oversight***

The PG shall have oversight over the annual procurement plan for contracts with a value of over EUR > 50 000. Additional rules regarding the PG's involvement in the award of contracts of this value may be set out in the Organisation's internal procedures.

## **Chapter 6. CONTRACT PERFORMANCE**

### **Article 30 *Contract conditions***

- (1) The Organisation may require compliance with obligations in the fields of environmental, social, tax and employment law that apply at the place where the works are executed or the services provided in addition to obligations resulting from laws, regulations, decrees, collective agreements and decisions applicable in the relevant State.
- (2) The Organisation may also require additional stipulations relating to the performance of the contract, concerning in particular innovation-related, environmental, social or employment-related considerations.

### **Article 31 *Subcontracting***

- (1) The Organisation may ask tenderers to indicate in their tenders any share of the contract that may be subcontracted to third parties and the identity of such proposed subcontractors.
- (2) The Organisation may verify whether there are grounds for exclusion of subcontractors under Article 20, in which case it may require a tenderer to replace those subcontractors so identified.

### **Article 32 *Amendments to contracts during their term***

- (1) Contracts may not be modified during their term unless one or more of the following

conditions are fulfilled:

- a) the modification is not substantial;
  - b) the modification has been provided for in the initial tender documents and is included in the final contract by way of a clear, precise and unequivocal review or option clause;
  - c) the modification is in relation to the identity of the contracting partner due to corporate restructuring, including takeover, merger, acquisition or insolvency of the original contracting partner, provided the new contracting partner fulfils the criteria for qualitative selection applied in the original tender procedure;
  - d) the modification has become necessary due to unforeseen and urgent reasons related to technical and economic reasons and the replacement of the contractor would result in significant increase of costs or substantial delays to the Organisation. In any event, the increase in the value of the contract due to such modification must not exceed 50 % of the value of the original contract; or
  - e) the value of the modification (either in terms of price or risk allocation) is below 20 % of the original contract for services and supplies contracts, or 25 % for works contracts, provided the modification does not change the overall nature of the contract.
- (2) For the purpose of this Article, a “substantial modification” is any modification which:
- a) would have attracted additional or other suppliers to the initial tender process;
  - b) introduces or excludes conditions that would have allowed the admission of suppliers other than those initially selected to the tender process;
  - c) would have resulted in the appointment of a tenderer other than the one originally appointed; or
  - d) considerably changes the economic balance of the contract in favour of the contractor.
- (3) For the purpose of this Article, the term “contract” shall also include a framework agreement.

### Article 33 *Extension of contract term*

- (1) Contracts may not be extended unless one or both of the following conditions are fulfilled:
- a) where the extension has been provided for in the initial tender documents and is included in the final contract by way of a clear, precise and unequivocal option for extension clause;

b) where the extension is required for additional works, services or supplies by the same contractor, which have become necessary due to unforeseeable circumstances and the replacement of the contractor would result in significant increase of costs or substantial delays to the Organisation. In any event, the increase in the value of the contract due to the extension (or successive extensions) must not exceed 50 % of the value of the original contract.

## **Chapter 7. APPEAL PROCEDURE**

### **Article 34 *Right of appeal***

- (1) Subject to Article 2(3) above and to paragraph (2) below, any supplier or tenderer who suffered or risks suffering loss or damage due to breach of these rules, may appeal a procurement decision taken by the Organisation.
- (2) Appeals must be submitted in writing to the Organisation's Tenders Appeal Board within 14 days from the day on which the person submitting the appeal knew or ought to have known of the grounds for the appeal and in any event no later than 3 months from the date when the grounds for submitting the appeal first arose.
- (3) In exceptional circumstances, the Tenders Appeal Board may extend the time limit of 14 days set out in paragraph (2) above, where the Tenders Appeal Board considers that there are compelling reasons for doing so. However, no such extension of the time limit shall be granted so as to permit an appeal to be reviewed more than 3 months from the date when the grounds for submitting that appeal first arose.

### **Article 35 *Handling of appeals***

- (1) If the Tenders Appeal Board considers that a decision taken by the Organisation infringes these rules, it shall order that the tender procedure or parts of it be rectified or grant any other remedy that would be adequate and reasonable in the circumstances. Where no infringement is considered to have taken place, it shall reject the appeal.
- (2) The Tenders Appeal Board may make an order suspending the procurement procedure or the award of contract until it has issued its final decision.
- (3) For the purpose of investigating an appeal, the Tenders Appeal Board may order that an audit be conducted in accordance with Article 28(2) prior to issuing its decision.
- (4) The Tenders Appeal Board shall notify the appellant in writing of its final decision within 30 working days following the date of receipt of the appeal; such notification shall state the grounds on which its decision is based.
- (5) The Tenders Appeal Board shall be independent of the Organisation's Procurement Division or any relevant staff member of the Organisation within the meaning of Article 9(4).

- (6) The Tenders Appeal Board shall be appointed by the Director General and composed of at least 3 but no more than 5 competent members of the Organisation's staff and/or external parties, chaired by a member of the legal division or any other person appointed by the head of the legal division, provided that person is legally qualified and competent in EU procurement law.

#### *Article 36 Jurisdiction*

- (1) The Arbitration Board shall have exclusive jurisdiction over any dispute between the Organisation and a supplier arising out of or in connection with the final decision of the Tenders Appeal Board.
- (2) The Rules for Expedited Arbitrations shall apply taking into account the complexity of the matter, the amount in dispute and other circumstances, that the Arbitration Rules shall apply.
- (3) The seat of the arbitration shall be in La Laguna, Santa Cruz de Tenerife, Spain, and the language to be used in the arbitral proceedings shall be English.
- (4) Filing a request for arbitration under this Article shall only be possible following the final decision of the Tenders Appeal Board and no later than 30 days following the date on which that decision was communicated to the appellant in writing.

### **Chapter 8. FINAL PROVISIONS**

#### *Article 37 Interpretation*

These rules shall be interpreted in light of principles of European Union legislation and Spanish law.

#### *Article 38 Amendments*

Material amendments to these procurement rules shall require the approval of the Board of the European Solar Telescope by simple majority vote following recommendation of the PG.

#### *Article 39 Entry into force*

These procurement rules shall enter into force on 1 January 2019.