



W. M. KECK OBSERVATORY
Maunakea, Island of Hawai'i

**COMMERCIAL ITEMS OR SERVICES CONTRACT
GENERAL PROVISIONS**

CALIFORNIA ASSOCIATION FOR RESEARCH IN ASTRONOMY dba W. M. KECK OBSERVATORY ("WMKO")

1. OFFER AND CONTRACT

The following terms, together with any supplemental terms, statement of work, plans, specifications, or other documents attached or incorporated by reference as set forth in this purchase order ("PO"), constitute WMKO's offer to Supplier and shall, when accepted, constitute the entire agreement ("Contract") between WMKO and Supplier. Supplier shall include Supplier and its subcontractors or sub-suppliers at any level. In the Contract documents, Supplier may be alternatively referred to as contractor, vendor, or consultant, and these terms may be used interchangeably.

WMKO gives notice of its objection to any different or additional terms. This Contract is valid only as written. If price, terms, shipping date, or other expressed conditions of this Contract are not acceptable, WMKO must be notified and any variation must be accepted in writing prior to shipment or delivery. This Contract shall be deemed to have been accepted (a) absent written notification of non-acceptance by Supplier within a reasonable time, (b) upon timely delivery of the products identified to the shipping address specified in the PO.

Supplier will provide the goods and services to be furnished under the Contract ("Services") as an independent contractor and furnish all equipment, personnel, and material sufficient to provide the Services expeditiously and efficiently. Supplier will devote only its best-qualified personnel to work under the Contract. Should WMKO inform Supplier that anyone providing the Services is not working to this standard, Supplier will immediately remove such personnel from providing Services and he or she will not again, without WMKO's written permission, be assigned to provide Services. At no time will Supplier or Supplier's employees, sub-suppliers, agents, or assigns be considered employees of WMKO for any purpose, including but not limited to workers' compensation provisions.

2. TIME OF DELIVERY

Time is of the essence in this Contract. If delivery or other performance dates cannot be met, Supplier must notify WMKO immediately. Such notification shall not, however, constitute a change to the terms of this Contract except as the PO may be modified in writing by WMKO.

3. IMPROPER DELIVERY

In addition to other remedies provided by law, WMKO reserves the right to refuse any goods or services and to cancel all or any part of this Contract if Supplier fails to deliver all or any part of the goods or services in accordance with the terms and conditions of this Contract. Acceptance of any part of this

order shall not bind WMKO to accept any future shipments nor deprive it of the right to return goods already accepted.

4. ASSIGNMENT

Supplier shall have no right to assign or subcontract this Contract or any benefits from this Contract without WMKO's prior written consent. This Contract may only be amended by a writing signed by each of the parties' authorized representatives. Waiver or non-enforcement by either party of a provision of the Contract will not constitute a waiver or non-enforcement of any other provision or of any subsequent breach of the same or similar provision.

5. AUTHORITY OF WMKO REPRESENTATIVES AND REQUIRED NOTICES; FACSIMILE AND ELECTRONIC SIGNATURES ACCEPTABLE

(a) No PO, amendment, notice, or direction received by Supplier shall be binding unless issued or ratified in writing by the WMKO Purchasing Agent, Contracts and Purchasing Officer ("CPO"), or by representatives designated in writing by either of them.

(b) Facsimile (fax) or electronic signature copies of contract documents are just as binding as originally-executed documents.

6. CHANGES

WMKO may, at any time by written order to Supplier, make changes within the general scope of this Contract in: (a) drawings, designs, or specifications; (b) method of shipment or packing; and (c) place of delivery. If any such change causes an increase or decrease in the cost of, or the time required for, the performance of any part of the work under this Contract, an equitable adjustment shall be made in the price or delivery schedule or both, and the Contract shall be modified in writing accordingly. Any claim by Supplier for adjustment under this Section must be asserted within 30 days from the date of receipt by Supplier of the notification of change; provided, however, that WMKO, if it decides that the facts justify such action, may receive and act upon any such claim asserted at any time prior to final payment under this Contract. Nothing in this clause shall excuse Supplier from proceeding with this order as changed.

7. FORCE MAJEURE

Neither party shall be liable for damages arising out of failure to deliver nor any delay in delivery caused by strikes, lockouts, fires, war, or acts of God. Supplier shall notify WMKO in writing as soon as it is reasonably possible after the commencement of any event triggering a delayed delivery or inability to deliver.

8. EXISTING COMMERCIAL COMPUTER SOFTWARE – LICENSING

(This Article is applicable to the acquisition of any existing commercial computer software under this Contract, including Commercial-off-the shelf (COTS) software. This Article does not apply to the development of software.)

(a) If Supplier proposes its standard commercial software license, only those portions of the license that comply with the provisions of this Contract are incorporated into and made a part of this Contract.

(b) If Supplier does not propose its standard commercial software license until after this Contract has been issued, or at or after the time the computer software is delivered, such license shall nevertheless be deemed incorporated into and made a part of this Contract under the same terms and conditions as in paragraph (a) above. To receive updates, correction notices, consultation, and similar activities on the computer software, any authorized user may acknowledge receipt of a registration form or card and return it directly to Supplier; however, such signing shall not add to or alter the terms and conditions of this Contract regardless of any notations on the form or card to that effect.

(c) If the specified computer software is shipped or delivered to WMKO, Supplier agrees that it has unconditionally accepted the terms and conditions in this Section and that the terms and conditions of this Contract (including the incorporated license) constitute the entire agreement between the parties concerning rights in the computer software.

(d) The computer software may be:

(1) Used, or copied for use, in or with any computer owned or leased by, or for WMKO. Any restrictions on use of the software or distribution of the software to multiple such computers shall be void unless explicitly agreed to by WMKO.

(2) Reproduced for safekeeping (archives) or backup purposes;

(3) Modified, adapted, or combined with other computer software, provided that the modified, combined, or adapted portions of the derivative software incorporating restricted computer software shall be subject to the same restricted rights; and

(4) Disclosed and reproduced for use by WMKO designees in accordance with this Section.

(e) The software may be used by WMKO in support and furtherance of any of its obligations to the U.S. Government or other funding organization.

(f) Supplier warrants that it has the right to sell, license, or transfer the license for the software furnished to WMKO under and in accordance with the terms of this Contract.

9. COPYRIGHTABLE WORK

Supplier hereby assigns to WMKO the entire copyright, title, and interest in copyrightable work generated in the performance of this Contract.

10. EXPORT COMPLIANCE

(a) LICENSES. Supplier shall comply with all U.S. export control laws and regulations, including the International Traffic

in Arms Regulations (ITAR), 22 CFR Parts 120 through 130, and the Export Administration Regulations (EAR), 15 CFR Parts 730 through 799. Absent license exemptions/exceptions, Supplier shall obtain the appropriate licenses or other approvals, if required, for exports of hardware, technical data, and software, or for the provision of technical assistance.

(b) IDENTIFICATION OF EXPORT CONTROLLED ITEMS. Supplier shall notify WMKO in writing prior to delivery if it will be providing any items under this Contract that are controlled under ITAR (i.e., hardware, software, technology, components, accessories, etc.). Any such item(s) or its packaging shall be properly marked to alert WMKO of the ITAR restrictions upon delivery to WMKO.

11. DISPUTES AND GOVERNING LAW

(a) Any dispute or claim arising out of, in connection with, or relating to this Contract shall be submitted for resolution to ascending levels of management of the parties. If the dispute cannot be resolved after such negotiations, either party may pursue any appropriate legal recourse not inconsistent with the provisions of this Contract.

(b) Pending any decision, judgment, or settlement of any dispute, Supplier will proceed diligently with performing this Contract.

(c) This Contract and any document to which it is appended shall be construed and enforced under the laws of the State of Hawaii. Disputes will be adjudicated on the Island of Hawaii.

12. INSPECTION AND ACCEPTANCE

WMKO may inspect the work and activities of Supplier under this Contract in a reasonable and appropriate manner. Final inspection shall be at WMKO's premises unless otherwise agreed in writing. Items rejected as not conforming to this Contract shall be, at WMKO's option, returned at Supplier's expense, including transportation and handling fees, or corrected or replaced by Supplier in a timely manner. Unless Supplier removes, corrects, or replaces the goods or services within the delivery schedule, WMKO may require its delivery and make an equitable price reduction. WMKO may also opt for a refund of the amount paid under this Contract.

13. INSURANCE

(This Article is applicable when Supplier will be entering WMKO-controlled premises.)

(a) Supplier shall, at its own expense, provide and maintain during the entire performance period of this Contract the following insurance with WMKO named as an additional insured in policies for comprehensive liability insurance with a carrier licensed and admitted in the State of Hawaii:

(1) Workers' Compensation and Employer's Liability Insurance at limits required by applicable Federal and State workers' compensation and occupational disease statutes.

(2) Commercial General Liability Insurance, including automobiles (owned, non-owned, or leased), completed operations, products, and contractual liability, for a combined coverage limit of not less than Two Million Dollars (\$2,000,000) for all deaths, injuries, and property damage arising from one accident or occurrence.

(3) For Professional Service Providers, they shall maintain Errors and Omissions Insurance, including coverage for personal injury, death, property damage, and contractual liability for a combined coverage limit of not less than Two Million Dollars (\$2,000,000) for each occurrence (Five Million Dollars (\$5,000,000) in the aggregate.) Said insurance shall be maintained for the statutory period during which the professional may be exposed to liability. Supplier shall require that the aforementioned professional liability insurance coverage language also be incorporated into its contract with any other entity with which it contracts for professional services. This Section 12(a)(3) may be modified upon mutual written of the parties.

(b) For the coverages stated above, WMKO may, at its sole discretion, accept lower policy limits. Any such acceptance will be documented separately and attached to the PO.

(b) Insurance Certificates and Endorsements. Before commencing work under this Contract, Supplier shall furnish (i) certificates of insurance for the coverages specified in paragraph (a) above, and (ii) an additional insured endorsement naming WMKO as an additional insured to the Contract for the coverage specified above. WMKO may also require additional endorsement to the California Institute of Technology for work on the summit of Maunakea or at WMKO headquarters in Kamuela, Hawaii. Such certificates and the endorsement shall provide that any cancellation or material change in the insurance policies shall not be effective (i) for such period as the laws of the State in which this Contract is to be performed, or (ii) until 30 days after the insurer or Supplier gives written notice to WMKO, whichever period is longer. Also, such certificates and the endorsement shall (i) cover contractual liability assumed under this Contract, and (ii) be primary and non-contributing to any insurance procured by WMKO. Supplier agrees to permit WMKO to examine its original policies. Should Supplier neglect or refuse to provide the insurance required, or should such insurance be cancelled, WMKO may procure the same and the costs shall be deducted from monies then due or to become due to Supplier.

14. INDEMNIFICATION

(a) Supplier agrees to indemnify and to hold WMKO, its directors, agents, officers, and employees, harmless against all costs, claims, liability, loss, damage, and expenses including attorney's fees, arising from or due to any actual or claimed trademark, patent, or copyright infringement and any litigation based thereon, regarding any part of the goods and/or services covered by this Contract. Supplier shall defend any such litigation brought against WMKO, provided that WMKO notifies Supplier promptly of any such suit. WMKO retains the right to participate in the defense against any such claim or action and the right to consent to any settlement, the consent of which will not be unreasonably withheld. Supplier's obligations shall survive acceptance of the goods and payment by WMKO.

(b) Supplier agrees it will be responsible to WMKO for, and will indemnify, immediately defend, and hold harmless WMKO, its directors, agents, officers, and employees, from any loss, cost, damage, expense, or liability, including attorney's fees, or

any suit therefore, by reason of actual or alleged claims of any kind, including but not limited to, property damage or personal injury of whatever kind of character relating to the performance of the work by Supplier or its lower-tier subcontractors, however caused, including any resulting from any alleged or actual negligent act or omission, regardless of whether such act or omission is active or passive, but excepting only a duty to indemnify to the extent such loss, cost damage, expense or liability is:

(i) Under any construction contract, attributable to the active negligence or willful misconduct of WMKO, its directors, agents, officers or employees; or

(ii) Under any other contract for either goods or services, attributable to the sole negligence or willful misconduct of WMKO, its directors, agents, officers or employees.

WMKO retains the right to participate in the defense against any such claim or action, and the right to consent to any settlement, which consent will not unreasonably be withheld.

15. NEW MATERIAL

Unless this Contract specifies otherwise, Supplier represents that the goods and supplies are new and are not of such age or so deteriorated as to impair their usefulness or safety. If Supplier believes that furnishing other than new material will be in WMKO's interest, Supplier shall so notify the Purchasing Agent or CPO in writing and request authority to use such material.

16. ORDER OF PRECEDENCE

To the extent there is inconsistency among any documents relating to this PO, the inconsistency will be resolved in the following order of priority:

(a) These General Provisions;

(b) The details specified on the PO, including any Supplemental Terms and Conditions, descriptions of products or services, or any other attachment;

(d) Supplier's contract provisions.

17. PAYMENT

(a) Invoices shall be submitted to the attention of WMKO's Accounts Payable Department at **e-invoice@keck.hawaii.edu**, unless otherwise specified, and shall contain the following information as applicable: (i) Contract or PO number, (ii) item number, (iii) description of supplies or services, (iv) size, (v) quantity, (vi) unit price, (vii) extended totals, and (viii) any other information that may be specified on the face of this Contract. Any applicable state or Federal taxes shall be shown separately on the invoice.

(b) WMKO shall pay Supplier, upon the submission of proper invoices, the prices agreed upon in this Contract for supplies delivered and accepted or services rendered and accepted, less any deductions provided in this Contract.

(c) WMKO shall make its best effort to make payments within the net period, if any, specified in the Contract, measured from the date of receipt of the goods or services at the destination or the date of receipt of the invoice, whichever is later. Discount time periods will be measured from the same

date. Payment shall be deemed to have been made on the date the check is mailed or on the date on which an electronic funds transfer was made. In no event will WMKO be liable for or pay a surcharge, interest, or any kind of penalty as a result of WMKO's payment not being made within the net period, if any, specified in the Contract or the date of payment by electronic funds transfer.

(d) Payment for goods or services will not waive or otherwise affect WMKO's right to inspect such goods or services or to reject, or revoke acceptance of, nonconforming goods or services.

(e) If Supplier becomes aware that WMKO overpaid on an invoice payment, Supplier shall (i) remit the overpayment along with a description of the overpayment to WMKO's Accounts Payable Department including the (A) Circumstances of the overpayment (e.g., duplicate payment, erroneous payment, liquidation errors, date(s) of overpayment); (B) affected contract number and delivery order number, if applicable; (C) affected contract line item or subline item, if applicable; and (D) Supplier point of contact; and (ii) provide a copy of the remittance and supporting documentation to WMKO's Purchasing Agent or CPO.

18. USE OF NAME

Supplier agrees not to use the name or trademarks of WMKO or any member its staff in sales promotional work or advertising, or in any form of publicity, without the prior written permission of WMKO.

19. TITLE AND RISK OF LOSS

(a) Title to deliverables shall pass to WMKO upon formal acceptance by WMKO, regardless of when or where WMKO takes physical possession, unless the Contract specifically provides for earlier passage of title.

(b) Risk of loss shall not pass to WMKO until deliverables have been actually received and accepted by WMKO at the destination specified in the Contract. Supplier assumes all responsibility for packing, crating, marking, transportation, and liability for loss or damage in transit, notwithstanding any agreement by WMKO to pay freight, express, or other transportation charges. Supplier agrees to trace lost or delayed shipments at the request of WMKO.

20. TAXES

(a) Except as may be otherwise provided in this Contract, the contract price includes all applicable Federal, State, and local taxes and duties. Regarding transactions for which WMKO may be exempt from any tax or duty, WMKO will provide, upon request, evidence to support its claim to such exemption.

(b) WMKO will comply with all Federal and State income tax laws with respect to withholding and year-end tax reporting.

(c) The Internal Revenue Service (IRS) requires WMKO to have on file a Taxpayer Identification Number (TIN) for every US person or US business that receives a payment, regardless if the payment is tax reportable or not. This information is provided on IRS Form W-9. US Citizens and Resident Aliens are required to complete a Form W-9 before receiving any payments from WMKO. A TIN can be any of the following: a Social Security

Number (SSN), an Individual Taxpayer Identification Number (ITIN), or an Employer Identification Number (EIN). Failure to provide a TIN will result in delay of payment and/or backup withholding.

(d) Foreign businesses providing services in the US for WMKO are required to provide the appropriate IRS Form W-8 (i.e., Form W-8BEN, W-8ECI, or W-8IMY).

(e) Foreign individuals providing services in the US for WMKO are required to provide an IRS Form W-8BEN or IRS Form 8233 depending on the appropriate tax withholding treatment.

21. TERMINATION

(a) For Cause. WMKO may terminate this Contract, or any part of it, for cause in the event of any default by Supplier, or if Supplier violates any Contract terms and conditions, or fails to cure any failures or deficiencies within a reasonable time period, or fails to provide WMKO, upon request, with adequate assurances of future performance. In the event of termination for cause, WMKO shall not be liable to Supplier for any amount for supplies or services not accepted, and Supplier shall be liable to WMKO for such damages as would give WMKO the benefit of the bargain, put WMKO in the same position that it would have been in if Supplier had not breached the Contract and any and all rights and remedies provided by law. If it is determined that WMKO improperly terminated this Contract for cause, such termination shall be deemed a termination for convenience.

(b) For Convenience. WMKO reserves the right to terminate this Contract, or any part, for its sole convenience. If such termination occurs, Supplier shall immediately stop all work and shall immediately cause all of its subcontractors to cease work. Subject to the terms of this Contract, Supplier shall be paid a percentage of the Contract price reflecting the percentage of the work performed prior to the notice of termination, plus reasonable charges Supplier can demonstrate to the satisfaction of WMKO, using its standard record keeping system, have resulted from the termination and are non-cancellable. Supplier shall not be paid for any work performed or costs incurred which reasonably could have been avoided.

(c) Survival. Upon expiration or termination of this Contract, the following provisions will survive: EXPORT COMPLIANCE; DISPUTE AND GOVERNING LAW; WARRANTIES; COPYRIGHTABLE WORK; INDEMNIFICATION; USE OF NAME; AND CONFIDENTIALITY.

22. WARRANTY

In addition to any other warranties set forth in the Contract, Supplier makes the following warranties. Supplier acknowledges that failure to comply with any of the warranties in the Contract will constitute a material breach of the Contract and WMKO will have the right to terminate the Contract without damage, penalty, cost or further obligation.

(a) General Warranties. Supplier agrees that the goods and services furnished under the Contract will be covered by the most favorable warranties Supplier gives to any customer for the same or substantially similar goods and services, or such other more favorable warranties as specified in the Contract. The rights and remedies so provided are in addition to and do

not limit any rights afforded to WMKO by any other provision of the Contract. Supplier expressly warrants all goods and services delivered under this Contract to be free from defects in material and workmanship and to be of the quality, size, and dimensions ordered. This express warranty shall not be waived by reason of the acceptance of the goods or services or payment by WMKO. Supplier shall provide WMKO with a copy of any standard warranty which is normally offered on a commercial product deliverable under this Contract. The commercial product warranty shall be deemed to be incorporated by reference and WMKO shall be entitled to all rights under such warranty.

(b) Permits and Licenses. Supplier agrees to procure all necessary permits and licenses and abide by all applicable laws, regulations and ordinances of the United State and of the state, territory, and political subdivision, or any other country in which the services are provided.

(c) Warranty and Quiet Employment. Supplier warrants that Supplier has the right to use all intellectual property that will be needed to provide goods or services.

23. OCCUPATIONAL SAFETY AND HEALTH ACT

By accepting this Contract, Supplier certifies that all products and services provided conform to current OSHA requirements and that Supplier will comply with any site specific safety rules.

24. BANKRUPTCY

(a) If Supplier enters bankruptcy proceedings, whether voluntary or involuntary, Supplier shall furnish written notification of the bankruptcy to WMKO's Purchasing Agent or CPO within five days of the initiation of the proceedings. This notification will include the date on which the bankruptcy petition was filed and the identity of the court in which the bankruptcy petition was filed.

(b) Supplier shall to the maximum extent permitted by law: (1) continue to ensure that WMKO has the right of access to all areas of the facilities and records involved in this order; and (2) provide WMKO access to documents delivered in place or held at Supplier's facility, or provide electronic copies thereof. Supplier shall ensure that the trustee, receiver, liquidator, and court, knows of this access requirement.

(c) These obligations remain in effect until final payment under this order.

25. NO THIRD-PARTY RIGHTS

Nothing in this Contract is intended to make any person or entity that is not a signer to this Contract a third-party beneficiary of any right created by this Contract or by operation of law.

26. CONFIDENTIALITY

Supplier will use its best efforts to keep confidential any information provided WMKO and marked "Confidential Information," or any oral information conveyed to Supplier by WMKO and followed by a written communication within thirty (30) days that the information is Confidential Information. This non-disclosure provision will not apply to any of the following:

(a) Information which Supplier can demonstrate by written records was known to Supplier prior to the effective date of this Contract (unless covered by a separate confidentiality obligation between such parties);

(b) Is currently in, or in the future enters, the public domain other than through a breach of this Contract or through other acts or omissions of Supplier;

(c) Is obtained lawfully from a third party, or;

(d) Is required to be disclosed by legal process.

27. SEVERABILITY

If a provision of this Contract becomes, or is determined to be illegal, invalid, or unenforceable, that will not affect the legality, validity, or enforceability of any other provision of the Contract or of any portion of the invalidated provision that remains legal, valid, or enforceable.

28. LIENS

Supplier agrees that at any time upon request of WMKO, Supplier will submit a sworn statement setting forth the work performed or material furnished by sub-suppliers and material men, and the amount due and to become due to each, and that before the final payment called for under this Contract, will upon WMKO's request submit a complete set of vouchers showing what payments have been made for such work performed or material furnished. Supplier will promptly notify WMKO in writing of any claims, demands, and causes of action, liens, or suits brought to its attention that arise out of this Contract. WMKO will not be obligated to make final payment until Supplier, if required, delivers to WMKO a complete release of all liens arising out of this Contract, or receipts in full in lieu thereof, as WMKO may require, and if required in either case, an affidavit that as far as it has knowledge or information, the receipts include all the labor and materials for which a lien could be filed; but Supplier may, if any sub-supplier refuses to furnish a release or receipt in full, furnish bond satisfactory to WMKO to indemnify it against any claim by lien or otherwise. If any lien or claim remains unsatisfied after all payments are made, Supplier will refund all monies that WMKO may be compelled to pay in discharging such lien or claim, including all costs and reasonable attorneys' fees.

29. COMPLIANCE WITH APPLICABLE STATE AND FEDERAL LAW

By accepting this Contract, Supplier certifies that it is apprised of and shall comply with any other applicable state or federal law.