

Aanbesteding: Cryogen free dilution refrigerator
Aanbestedende Dienst: Stichting Nederlandse Wetenschappelijk Onderzoek Instituten (NWO-I)
Referentie: 11022024

Toelichting:

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Vraag:

- Will the individual scores and provisional scores of each member of the Assessment Committee be disclosed?

Antwoord:

No, the individual and provisional scores of each member will not be disclosed

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Vraag:

No, the individual and provisional scores of each member will not be disclosed

Antwoord:

As described in Article 4.2.1 (step 3), the objective of the plenary evaluation meeting is to jointly agree upon the definite score for each Subcriterion, and the arguments explaining those scores

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Vraag:

- Article 4.4 Criterion II. Quality of equipment (55 points): How are 55 points awarded per sub criterion? Are the points equally divided in

accordance with the number of items listed? Or is it up to the discretion of each member of the Assessment Committee to give an overall score per cub criterion?

Antwoord:

The 55 points are divided as follows over the three Subcriteria: Subcriterion IIA (Technical quality): 25 points, Subcriterion IIB (Mitigation of vibrations and sound): 20 points, Subcriterion IIC (Ease of operation and integration in the lab): 10 points. Within these Subcriteria no further division of points has been applied over the items that are of interest for the contracting authority. The answer in whole on each Subcriterion will be assessed accordingly to the assessment guideline table at the end of Chapter 4 of the tender document. This assessment is indeed to the discretion of the individual members, that is to say in the first instance: the arguments of individual members are discussed in the plenary evaluation meeting.

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Vraag:

- Article 3.2 (Manufacture and delivery): We propose that the Principal may supervise the activities if necessary to verify the Contractor's compliance with its technical obligations under the Contract, subject to:
30 days' prior written notice;
Performed by an independent third-party auditor acceptable to the Contractor and who is subject to confidentiality obligations;
Performed during normal business hours without interruption to the Contractor's operations;
Not more than once per year; and
Principal pays the costs of the supervision/inspection.

Antwoord:

We accept these suggestions as a possible replacement of Article 3.2

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Vraag:

- Article 5.1 (Delivery): There are two Incoterms delivery terms mentioned in conflict. We propose that the delivery term is Incoterms 2020 DAP Science Park 102, 1098 XG Amsterdam, the Netherlands [=Delivery Site address in Appendix 7].

Antwoord:

We accept this suggestion as a possible change to Article 5.1, which would in that case read “Contractor shall deliver the System DAP (delivery at place, in accordance with Incoterms 2020) at Science Park 102, 1098 XG Amsterdam, promptly within [number of months stated by Contractor in quotation or other tender documentation] calendar months.”

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Vraag:

- Article 6.4 (Delivery in operational order): We propose that the following clarification is added in article 6.4 with regards to the Acceptance Test:

Antwoord:

o The Contractor shall conduct the product testing in adherence to the Contractor’s established testing practices and protocol to confirm the fulfilment of the key technical specifications as stipulated in the Contract. Upon successful completion of the product test the Principal agrees to immediately sign the acceptance certificate for the System. The Principal shall immediately notify the Contractor in writing of any errors it has detected during the testing. The Contractor shall correct any errors discovered during the testing without undue delay. Acceptance will not be prevented by minor errors that do not prevent the System from being used for the agreed purpose or prevent its operation. However, the Contractor shall correct such errors and defects free of charge and without any undue delay. The System shall be automatically deemed fully accepted by the Principal if the Principal takes the System into use, or at the latest 30 days after the installation date of the System in the absence of a substantiated written notice of errors, whichever occurs first

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Vraag:

• Article 6.4 (Delivery in operational order): We propose that the following clarification is added in article 6.4 with regards to the Acceptance Test:

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Antwoord:

Instead of the proposed modification, we accept to remove Article 6.4 from the contract. We note that the procedure of the Site Acceptance Test is described in Article 7.5 of the draft contract. The Tenderer is asked to propose a protocol for the Site Acceptance Test according to Article 6.6.3 of the descriptive document.

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Vraag:

• Article 7.13.2. (Factory and Site Acceptance Tests, takeover and property transfer): We propose that the following sentence is added:

- o If the Principal requires postponement of the delivery or is unable to take delivery upon the agreed date, the Principal shall reimburse the Contractor for all costs and expenses associated with the postponement of the delivery, including without limitation storage costs.

Antwoord:

We accept this suggestion as a possible addition to Article 7.13.2

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Vraag:

- Article 11 (Confidentiality): We propose that the confidentiality obligations would be made mutual, for example by adding the following clauses:
 - o “Confidential Information” shall mean all information including but not limited to any knowledge, know-how, trade secrets, technological or commercial information, device and software, including source code, whether or not subject to or capable of protection by intellectual property rights, which one Party (hereinafter “Receiving Party”) has received in the context of the Contract directly or indirectly from the other Party (hereinafter “Disclosing Party”) in whatever form including but not limited to in writing, orally, electronically or by observation. The Receiving Party shall keep Confidential Information in strict confidence and not disclose it to any third parties without the consent of the Disclosing Party. The Receiving Party shall have the right to use Confidential Information solely for the purposes of performing its obligations relating to the Contract and exercising its rights and obligations under the Contract.
 - o However, the preceding confidentiality obligations and limitations on use shall not apply to information:
 - (i) which the Receiving Party can demonstrate has been in its possession prior to the first receipt from the other Party;
 - (ii) which at the date hereof or thereafter becomes a matter of public knowledge without a breach of this confidentiality obligation; or
 - (iii) which the Receiving Party demonstrates has been obtained from a third party under circumstances permitting its disclosure to others.
 - o If the Receiving Party is required, pursuant to an administrative or a judicial action or subpoena or other legal requirement, to disclose the Confidential Information, the Receiving Party shall have the right to make such disclosure, provided that the Receiving Party notifies the Disclosing Party prior to any such disclosure, to the extent the Receiving Party is lawfully permitted to do so, and that the Receiving Party reasonably cooperates with the Disclosing Party, at the Disclosing Party’s request, in seeking any legal remedy the Disclosing Party considers necessary to protect its Confidential Information; provided that if such remedy is not obtained, the Receiving Party shall be free to disclose such portion of the Confidential Information as is legally required.
 - o The confidentiality obligations hereunder shall be in force during the term of the term of the Contract and for a period of five (5) years thereafter. Notwithstanding the above, the obligation of nondisclosure and nonuse of Contractor’s trade secrets and manufacturing know-how shall not expire

unless and until trade secret protection no longer applies under applicable law or the manufacturing know-how becomes a matter of public knowledge without a breach of this confidentiality obligation.

o Notwithstanding the confidentiality obligations stated above, the Contractor has a right to disclose Confidential Information to its subcontractors and legal and financial advisors provided that they have a legitimate need to know and that they are bound by similar confidentiality obligations as those contained herein.

Antwoord:

We accept the addition of these clauses to Article 11.

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Vraag:

- Article 13.3 (Force majeure): We propose that the termination right based on prolonged force majeure is mutual

Antwoord:

We agree to replace “Principal” in Article 13.3 to “either Party”.

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Vraag:

- Article 19 (Dissolution / termination): We propose that this Article is deleted due to Trade Compliance and Sanctions regulations and limitations as the System cannot be freely assigned to another party. Additionally, we propose that this Article is replaced with the following Trade Compliance and Sanctions related terms:
 - o Each Party is obligated to adhere to relevant laws and regulations concerning export/import control and sanctions, as enforced or administered by regulatory bodies such as the European Union, the United States of America, or any pertinent jurisdiction, including compliance with national laws. This includes, but is not limited to, compliance with EU financial sanctions, the EU export control regime, the U.S. Treasury Department

Office of Foreign Assets Control list of U.S. Specially Designated Nationals, the U.S. Department of Commerce Denied Person's List, Entity List, or the U.S. Commerce Department's Export Administration Regulations (EAR) collectively referred to as "Trade Compliance Regulations".

o The Principal shall provide the Contractor with a duly completed end user statement ("EUS") on a template provided by the Contractor. The EUS is required for, among others, applying for required authorization ("Authorization"), such as an export license, issued by the authorities in applicable jurisdictions.

o The Principal acknowledges that the Contractor cannot deliver the System, Installation Services, or any other services without obtaining required Authorization. In case any such Authorization is delayed or denied, the Contractor shall have no liability whatsoever towards the Principal.

o Without Authorization under the Trade Compliance Regulations, the Principal is prohibited from importing, re-importing, exporting, re-exporting, selling, reselling, distributing, or otherwise making the System, Installation Service, or any of its components available for use in any country in violation of the prevailing Trade Compliance Regulations. Such actions must only be undertaken with explicit permission from the Contractor or, when applicable, with Authorization issued by the authorities in relevant jurisdictions.

o The Contractor shall not be liable to the Principal for any loss, damage, cost or expense arising out of or relating to (i) changes in Trade Compliance Regulations after the date of this Contract, (ii) any delay or failure to obtain Authorization, or (iii) any other direct or indirect limitation or delay due to Trade Compliance Regulations.

Antwoord:

We agree to remove Article 19. We refer to the General Government Terms and Conditions for Public Service Contracts (ARVODI 2018) for relevant terms and conditions, which applies as stipulated in Appendix 10 of the draft contract. Those terms and conditions comply to Trade Compliance and Sanctions regulations and limitations. We therefore do not accept the suggested replacement texts

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Vraag:

• Article 3 (Product warranty): We propose to add for clarification that warranty for the System is limited to 36 months.

Antwoord:

We accept to add this clarification, as one clause of a new Article
“Amendments to the ARVODI 2018 General Terms and Conditions”.

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Vraag:

• Article 18.1. (Financial terms): We propose to amend payment term from 30 days to 14 days and the payment schedule is 40% upon order, 50% upon delivery and 10% upon acceptance in accordance with Article 16 of the Contract Draft in Appendix C.

Antwoord:

We accept to change the text in Article 16.3 to replace “30 days” by “14 days”. No further amendment to ARVODI 2018 is necessary regarding the payment schedule, since the stipulations in the Agreement prevail over ARVODI 2018 according to Article 2.2.

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Vraag:

• Article 21 (Liability): The liability should be limited to the total amount paid under the purchase order corresponding to Article 14 of the Contract Draft in Appendix C

Antwoord:

Liability is limited according to Article 21.3 of ARVODI 2018. This suggestion is not accepted.

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Vraag:

- Article 22.6. (Termination): We propose to delete Article 22.6. i.e. the termination for convenience right.

Antwoord:

We accept to delete Article 22.6. We will add a clause to that effect as part of a new Article “Amendments to the ARVODI 2018 General Terms and Conditions”.

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Vraag:

- Article 24 (IPR): Please clarify that right to use existing IPR is limited to as long as the Principal is entitled to use the System as suggested in the amendment proposals below. In connection with Article 10.5. of the Contract Draft in Appendix C, we propose to delete Article 24 of the ARVODI 2018 and replace it with the following terms added to the Contract Draft in Appendix C for clarification and the indemnity in Article 24.7 must be subject to limitation of liability with the contract price as cap as outlined in the Contract Draft in Appendix C:
 - o All intellectual property rights, software, and know-how in and to the System and Installation Services as well as all documentation for the System and Installation Services and any and all trademarks or service marks used in connection with the System and Installation Services shall remain or vest in, and be the exclusive property of, the Contractor or its affiliates or third-party licensors.
 - o The Principal shall have a limited, non-exclusive, non-transferable, and non- sublicensable right to use the intellectual property rights and software that may subsist in the System only for the purpose of and to the extent necessary for using the System. This right shall only be in force for as long as the Principal is entitled to use and uses the System in accordance with the Contract. The Principal shall not reverse engineer, disassemble, decompose, analyse for the purposes of finding out the composition or functionality of the System or the software, contained in the System.

Antwoord:

We accept the deletion of Article 24 of ARVODI 2018, and will add a clause to that effect as part of a new Article “Amendments to the ARVODI 2018 General Terms and Conditions”. We will add a new Article “Documentation” with the following clauses:

24.1 The Supplier will provide the Purchaser with clear, adequate Documentation, drawn up in Dutch or English, on the characteristics and functionalities of the Product.

24.2 The Purchaser has the right to reproduce, amend and publish the Documentation for use within its organisation without making further payment provided the copyright marks present on the documentation are retained.

24.3 The Supplier indemnifies the Purchaser against claims that third parties might enforce on the ground of a copyright accruing to them in relation to the Documentation.

In addition, we agree to add the suggested text in the two terms to Article 10.5, in as far as those statements are not already covered by the current Article 10.5.

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