

Annex 2 – Draft purchase and supply agreement Scanning Probe Microscope (ARIV 2018)

The undersigned:

1. The Foundation for Dutch Scientific Research Institutes (KvK 41150068), with its institute ARCNL, in this regard represented by the Institute Manager dr. M. Fretz, established at Science Park 106, 1098 XG Amsterdam, hereinafter referred to as “**ARCNL**” or “**Client**”,

and

2. [contractor's full name and legal form], (statutory having its registered office in [location], represented in this regard by the [function], [Mr./Ms.] [name], hereinafter referred to as the “**Contractor**”,

Client and Contractor hereafter also referred to as a “**Party**” and jointly referred to as “**Parties**”;

WHEREAS:

- a) ARCNL requires an Ultra High Vacuum Scanning Probe Microscope;
- b) A Tender has taken place for the aforementioned purpose, via the TenderNed tendering platform with tender number [TenderNed number] under the Public Procurement Act 2012;
- c) The Tender contains all relevant documents for Candidates to be able to issue an offer;
- d) [name of company] has sufficiently informed itself of what ARCNL wants to achieve with the Assignment;
- e) [name of company] on [date] has issued an entry on the Tender;
- f) ARCNL has accepted the Registration of [name of company];
- g) The assessment has shown that the Registration of [name of company] has the best value for money for ARCNL;
- h) The Parties wish to record the resulting legal relationship in writing in an Agreement;
- i) This Agreement sets out the terms and conditions applicable to all deliveries and services provided by [name of company] to ARCNL, resulting from the Tender;

AGREE AS FOLLOWS:

A number of terms in this Agreement, including the recitals of this Agreement, are written with initial capitals. Unless explicitly stated otherwise, these terms are defined in the Descriptive document Ultra High Vacuum Scanning Probe Microscope d.d. [date]. The following additional and deviating terms are defined as follows for the purposes of this Agreement:

Annexes:	The annexes that are mentioned in article 1.2 of this Agreement.
Documentation:	As defined in article 1 of the ARIV-2018.
Product:	The Ultra High Vacuum Scanning Probe Microscope, as referred to in Annex 4 of this Agreement.
Registration:	Contractor's offer that has been submitted digitally by means of TenderNed d.d. [date] attribute [TenderNed reference].
Tender Documents:	All documents drawn up by Contractor and placed in TenderNed with reference [TenderNed reference].
Tender:	The digital request for the Assignment as described in the Tender Documents as placed by Contractor on TenderNed with reference [reference number].

Article 1 Object of the Agreement

- 1.1. Client hereby purchases the Product of the Contractor, and the Contractor hereby sells the Product to the Client, in accordance with the Registration issued by the Contractor on the basis of the Tender Documents, unless this Agreement explicitly provides otherwise.
- 1.2. The following documents form an integral part of the Agreement. In the event of mutual inconsistencies, a higher ranked document takes precedence over a lower ranked document:
 - 1) this document;
 - 2) Summary of Additional Information and Changes (Annex 1);
 - 3) the ARIV-2018 (Annex 2);
 - 4) the (other) Tender Documents (Annex 3);
 - 5) the Registration issued by the Contractor to the Client of [date] with reference [reference number] (Annex 4);
 - 6) **<OPTIONAL>** The other Annexes.

Article 2 Entry into force of the Agreement

This Agreement enters into force on the date on which it is signed by both Parties and shall terminate upon completion of delivery of the Product including a successful Site Acceptance Test (SAT) as referred to in article 5.5 of this Agreement.

Article 3 Delivery

- 3.1. Notwithstanding the provisions of article 3.1 of the ARIV 2018, the Delivery of the Product by the Contractor will take place in accordance with Incoterms 2020.
- 3.2. Delivery of the Product by the Contractor shall be in accordance with the specifications set by the Client and described in the Tender Documents.

- 3.3. The Product will be delivered no later than [date] to the following address:

ARC NL
Science Park 106
1098 XG Amsterdam
The Netherlands.

Article 4 Software

- 4.1. On delivery as referred to in article 3 and 5 of this Agreement Client will receive from the Contractor a nonexclusive, non-transferable right of use for an unlimited time to the software (hereafter: the "Licence"), including the associated Documentation and materials, in return for the payment referred in article 7 of this Agreement. The Licence(s) cannot be cancelled by the Contractor. Further, the right of use is not tied to any location.
- 4.2. Client receives general software updates for a minimum period of 10 years from the date of approval by Client as referred to in article 5.7 of this Agreement.
- 4.3. Client is entitled to copy the software provided and the associated Documentation for back-up purposes. References to property rights and copyrights may not be removed in this process.
- 4.4. If software has been lost or in the opinion of Client is or has become faulty or unreliable, the Contractor will on first request make replacement software available to Client in return for appropriate market terms and rates for up to 15 years from the date of approval by Client as referred to in article 5.7 of this Agreement.
- 4.5. The Contractor is responsible for the implementation of the software.

Article 5 Acceptance

- 5.1. Acceptance of the Product will take place in two steps:
1) Factory Acceptance Test (FAT);
2) Site Acceptance Test (SAT).
- 5.2. The Factory Acceptance Test (FAT) is to commence within the delivery period as referred to in article 3.3 of this Agreement, so that the Site Acceptance Test (SAT) can take place within the delivery period as referred to in article 3.3 of this Agreement as well.
- 5.3. Two representatives of Client will visit Contractor's location for the Factory Acceptance Test (FAT). During the visit, Contractor will demonstrate under normal operational conditions that the Product is capable of achieving all requirements and wishes included in the Registration from Contractor.
- 5.4. The Site Acceptance Test (SAT) is to commence within thirty (30) days following the Factory Acceptance Test (FAT) and is to be completed within sixty (60) days following the Factory Acceptance Test (FAT).
- 5.5. The Site Acceptance Test (SAT) will be carried out by both the Parties on site of Client. In this Site Acceptance Test (SAT), the Contractor demonstrates that the Product works properly on site of Client according to the description of the Acceptance Procedure in the Tender Documents (as mentioned in paragraph 3.6 of the Descriptive Document).

- 5.6. During the Site Acceptance Test (SAT), checks will be made that the Product functions properly; Client will test the system(s) under normal operational conditions.
- 5.7. Once the Site Acceptance Test (SAT) has been completed successfully and the Product has been proven fully operational, the Product will be approved by Client.
- 5.8. If a successful completion of the Factory Acceptance Test or Site Acceptance Test cannot be achieved since one or more requirements have not been met, Client will have the right to terminate the Agreement immediately and refuse the Product without any liability or an obligation on any legal ground to compensate for Contractors' costs and/or damages. In this case, Contractor will refund all payments to Client that have already been made, within ten (10) days after the termination by Client.
- 5.9. If a successful completion of the Factory Acceptance Test or Site Acceptance Test cannot be achieved since one or more quality criteria as mentioned in Annex D of the Tender Documents have not been met by Contractor, the Client will have the immediate right to impose a penalty to Contractor of €5.000,- per qualitative point awarded for the criteria in question.

Article 6 Warranty

- 6.1. The Contractor warrants to Client that the Product will be free of defects for a period of **[one (1) year – or more years as provided in offering of Contractor]**, to commence on the date of final acceptance as referred to in article 5.7. The warranty is expressly in lieu of any other express or implied warranties, including the warranty of merchantability and fitness for a particular purpose. The Contractor's obligation under the foregoing warranty is initially limited to repairing or replacing the defective Product, at the Contractor's option. Replacement parts will be new or of equal functional quality and warranted for the remaining portion of the original warranty or 90 days, whichever is longer. If Contractor fails to resolve the defect through repairing or replacing within 30 days after Client's written request, Client may invoke the provisions of article 11.2.
- 6.2. Contractor assumes no liability under the warranties as referred to in article 6.1 for equipment or system failures resulting from:
 - a) abuse, misuse, modification or mishandling;
 - b) damage due to forces external to the machine including, but not limited to, flooding, power surges, power failures, defective electrical work, transportation or Client-supplied replacement parts or utilities or services such as gas;
 - c) improper operation or maintenance, contrary to the user/maintenance instructions by the Contractor and/or documentation;
 - d) failure to perform preventive maintenance in accordance with the Contractor's recommendations (including keeping an accurate log of preventive maintenance).
- 6.3. The Contractor further guarantees that for a period of at least ten (10) years after delivery it will be possible to supply parts or components or equivalent interchangeable, functionally equivalent equipment for the Product at appropriate market terms and rates, to be further agreed at the time.
- 6.4. During the guarantee period referred to in article 6.1 of this Agreement, the services will be provided continuously by the Contractor, on working days. For this purpose, the Contractor will have free access to the Product, subject to the internal regulations of Client.

- 6.5. The Contractor undertakes that upon receipt of a written or telephone report of a defect, it will, as promptly as possible, take measures, to remedy such defect in the shortest possible time.
- 6.6. Client is not allowed to make larger / significant modifications to the Product during the warranty period as referred to in article 6.1, only after written approval by Contractor. If Client makes modifications to the Product without written approval, the warranty as referred to in article 6.1 is void for consequences which are directly related to these modifications.
- 6.7. In exemption to article 6.6, the Contractor has been notified in the Tender Documents of planned modifications. In case of planned modifications Contractor will be informed when these modifications will be performed and has the opportunity to take precautions to keep the warranty as referred to in article 6.1.

Article 7 Price and other financial provisions

- 7.1. The agreed price for the Product is: € [amount] (excl. VAT). The price relates to all the Products to be delivered under this Agreement, together with any accompanying materials and Documentation, such as user manuals and the like.
- 7.2. Payment will be made as follows:
- 40% of the total amount for the Product after signing the Contract, as soon as the Contractor has submitted the bank guarantee referred to in article 12.1 of the ARIV 2018. This bank guarantee will provide security for 40% of the total amount of the Product and shall be returned to the bank after the Factory Acceptance Test (FAT) as referred to in article 5.3 of this Agreement. The amount of the guarantee will in no way limit the Contractor's liability under this Agreement;
 - 40% of the total amount for the Product after a successfully executed Factory Acceptance Test (FAT);
 - 20% of the total amount for the Product after a successfully executed Site Acceptance Test (SAT).
- 7.3. Contractor invoices Client electronically by sending an XML or a PDF file to finances@arcnl.nl.

Article 8 Contacts

- 8.1. Contact person for Client is [name].
Contact person for Contractor is [name].
- 8.2. Notwithstanding the provisions of article 6.2 of the ARIV 2018, the contacts named above may not make legally binding agreements on the Parties' behalf.

Article 9 Instruction

- 9.1. The Contractor will train and instruct Client. The training and instruction will be performed during the supervision of the execution of the installation, implementation and putting into operation of the Product.
- 9.2. The Contractor will provide a user training at Client's location within a month after the approval of the Product as referred to in article 5.7 of this Agreement. This training must include the operation of the full setup and all SPM modes of the Product.

- 9.3. On request of Client, the Contractor will train and assist the qualified technicians for the daily maintenance of the Product during the supervision of the execution and after the installation and implementation. After the first training that is included in the Registration from Contractor, the Contractor shall be compensated for any training and assistance after installation, implementation and acceptance by Contractor, after a written offer based on appropriate market terms and rates, to be further agreed at the time.
- 9.4. The Contractor will be responsible that qualified personnel will be present at all times training and instructions are given according to the agreed schedule.

Article 10 Documentation

- 10.1. The Contractor shall provide Client with sufficient Documentation on the properties and use options of the Product, including those of its component parts. The Documentation must be such that it gives a full, complete and detailed description of the Product, including the associated equipment and software and their functions.
- 10.2. The Contractor shall ensure that the Documentation supplied by it is replaced, changed or amended as quickly as possible at its expense if it should appear at any time during the use of the Product by Client that the Documentation contains incorrect information or is otherwise incomplete, inadequate or outdated.

Article 11 Other Terms and Conditions

- 11.1. This Agreement is subject solely to the General Government Purchasing Conditions 2018 (ARIV 2018), in so far as the Agreement does not deviate from them. Any general and special terms and conditions drawn up by the Contractor do not apply. Through its Registration Contractor explicitly waived the right to claim applicability of its own terms and conditions.
- 11.2. The other rights and claims referred to in article 13.3 of the ARIV 2018 may be exercised instead of or in addition to the rights and claims under article 13.2.
- 11.3. Notwithstanding article 14 of the ARIV 2018 and any other limitations of liability either implicitly or explicitly referred to in this Agreement, the Party that imputably fails to discharge its obligations is liable to the other Party for any loss incurred by the other Party.
- 11.4. If the duty of confidentiality imposed on the Contractor under article 8 of the ARIV 2018 is breached, the Contractor will be liable to an immediately payable fine of €10.000,- per event.

Article 12 Declaration of integrity

The Contractor hereby declares that it has not offered or given the Client's staff, subordinates or auxiliary persons any benefit in order to obtain the order, nor arranged for them to be offered or given any such benefit. It will not do so in the future with a view to inducing such persons to perform or refrain from performing any act.

Article 13 Final provisions

- 13.1. Any derogations from this Agreement are binding only if they have been expressly agreed by the Parties in writing.

- 13.2. Any written or oral agreements previously made by the Parties about the order(s) placed under this Agreement for the delivery of the Product will be nullified by the signature of the Agreement.

Done on the later of the two dates stated below and signed in duplicate.

Place:

Date:

**Advanced Research Center for
Nanolithography (ARC NL),**

Place:

Date:

[name and legal form of contractor],

Dr. M. Fretz
Institute Manager

[name]
[function]

Annexes:

- 1) Summary of Additional Information and Changes;
- 2) the ARIV-2018;
- 3) the Tender Documents;
- 4) the Subscription issued by the Contractor to the Client of [date] with reference [reference number];
- 5) **<OPTIONAL>** The other Annexes.