

Swarm DISC Subcontract

PERTAINING TO

Swarm DISC ITT 6.3 –
'Swarm climatological model of low- and mid-latitude toroidal magnetic fields'

between

Technical University of Denmark

National Space Institute
DK-2800 Kgs. Lyngby
CVR-no.: 30 06 09 46

(hereinafter referred to as "DTU Space")

and

[Subcontractor]

[Address]

[Address]

VAT Number: [xxx]

ESA-P/ESA-STAR Entity Code: [xxx]

(hereinafter referred to as the "Subcontractor")

each referred to as "Party" and collectively as "Parties"

RECITALS:

WHEREAS with contract change notice 2 (CCN 2) and subsequent extensions to ESRIN Contract No. 4000109587/13/I-NB SWARM ESL (hereinafter called the "ESA Contract") the European Space Agency (hereinafter called "ESA" or the "Agency") has requested the Swarm Data, Innovation and Science Cluster (Swarm DISC) to conduct a series of new procurement actions for new products, tools, and services on behalf of ESA;

WHEREAS DTU Space has published the Swarm DISC Invitation to Tender (ITT) 6.3 – 'Swarm climatological model of low- and mid-latitude toroidal magnetic fields' in accordance with the Swarm DISC Procurement Procedure (Doc. No. SW-RS-DTU-GS-003), and the Tender Evaluation Board (as defined herein) has recommended the proposal <proposal ID, revision, and title> submitted by the Subcontractor (hereinafter called the "Proposal");

WHEREAS ESA has accepted the recommendation presented by Swarm DISC, and has requested DTU Space to issue a subcontract to the ESA Contract for implementation of this proposal;

WHEREAS the Parties have agreed that the Subcontractor shall, as subcontractor to DTU Space, perform the "<project title>" activities as described in the Proposal (hereinafter called the "Project Activities") in accordance with the provisions stated below;

NOW THEREFORE the Parties enter into this Subcontract pertaining to the Project Activities (hereinafter referred to as the "Subcontract").

1. Definitions

- 1.1 Any definitions in the ESA Contract and its appendixes shall equally apply to this Subcontract. Notwithstanding the foregoing, the “Contract Price” referred to in the Esa Contract / GCC shall in this Subcontract mean the price defined in section 4.1.2. of this Subcontract.

2. Applicable Documents

- 2.1 The work shall be performed by the Subcontractor in accordance with the following documents to the extent and insofar as they relate to the subcontracted Project Activities, which are listed in order of precedence in case of conflict:

- a) The Articles of this Subcontract and its exhibit 1 (Payment Plan).
- b) Statement of Work for Swarm DISC ITT 6.3, document no. SW-SW-DTU-GS-133, rev 1.
- c) The ESA Contract (excluding its Appendix 1), cf. details in section 3.6.
- d) General Clauses and Conditions for ESA Contracts, ref. ESA/REG/002, hereafter called “GCC”, not attached hereto but known to both Parties and available on <https://doing-business.sso.esa.int/> under “Tendering” → “Reference Documentation” → “Administrative Documents”.
- e) Subcontractor’s proposal ref. **<proposal ID, revision, and title>**

- 2.2 This Subcontract is based on the principle of *flow-down*, i.e. that the ESA Contract shall apply mutatis mutandis, except if other regulation follows from this Subcontract. It therefore follows, that:

- any mentioning of DTU Space (the Contractor) in the ESA Contract shall, mutatis mutandis, apply to the Subcontractor in matters pertaining to the delivery of work by the Subcontractor under this Subcontract,
- any mentioning of ESA (the Agency) in the ESA Contract shall, mutatis mutandis, apply to DTU Space in matters pertaining to the delivery of work by the Subcontractor under this Subcontract, and
- any mentioning of Contract Price in the ESA Contract shall be understood as the price specified in this Subcontract section 4.

- 2.3 In the event a conflict between the present Subcontract and the ESA Contract should arise, the order of precedence shall be as follows: 1) this Subcontract, 2) the ESA Contract, it being noted that this order of precedence shall not lead to an unintended disregard of the applicable documents listed in Clause 2 herein.

- 2.4 The Subcontractor is obliged to ensure that the applicable provisions under the ESA Contract and the GCC shall apply to all lower level subcontractors.

3. Subject of the Subcontract

- 3.1 The Subcontractor undertakes to perform the work specified in Statement of Work (SW-SW-DTU-GS-133).

- 3.2 The Subcontractor shall for this purpose make available the necessary qualified personnel, services, facilities, resources and other items necessary to perform the work required for the execution of this Subcontract.

- 3.3 The work shall be performed according to the schedule as identified in the Proposal **<proposal ID, revision, and title>**.
- 3.4 The Subcontractor shall at all times:
- a) Ensure that the Subcontractor's employees refrain from doing anything which may have the effect of putting DTU Space in breach of its obligations under the ESA Contract;
 - b) Ensure that in the performance of this Subcontract, the Subcontractor will not act in any way which will incur any liabilities on behalf of DTU Space in respect of this Subcontract;
 - c) Provide reports to DTU Space and provide other information and attend such meetings as may be required by DTU Space to ensure the efficient performance of the work specified in SW-SW-DTU-GS-133;
 - d) Do all that is reasonably necessary to enable DTU Space to comply with the ESA Contract, including any audits either of a technical or financial nature required by the Agency; and
 - e) Take reasonable measures to ensure the accuracy of any information or materials it supplies to DTU Space (or, as the case may be, to other parties to the ESA Contract).
- 3.5 The Subcontractor shall afford to DTU Space and to the Agency full visibility into the performance of all related tasks pertaining to the Subcontractor as well as any lower level subcontractor; this shall include access to all documentation associated with the execution of the work foreseen under this Subcontract.

4. Price and Payment

4.1 Price

- 4.1.1 The price type of the Subcontract is a Firm Fixed Price (FFP) as defined in Clause 2.1 of the GCC.
- 4.1.2 The total price agreed for this Subcontract amounts to EUR 100.000 (FFP).
- 4.1.3 The above amount does not include any taxes or duties in the member states of the Agency.
- 4.1.4 The price is deemed to include all applicable fees for licenses to be purchased and delivered in the frame of the Subcontract, indicating the Agency as the end user. The price is further deemed to include any and all license fees payable according to Clause 43.7 of the GCC.
- 4.1.5 The price is Delivered Duty Paid for all deliverables, exclusive of import duties and VAT in accordance with the INCOTERMS 2020.

4.2 Payment

- 4.2.1 The detailed payment plan is specified in Exhibit 1.
- 4.2.2 The Subcontractor shall be paid in accordance with the payment plan in Exhibit 1 and the provisions of this Clause 4.
- 4.2.3 Advance Payment request is accepted following the signature by both Parties of this Subcontract and a successful project kick-off (Milestone MIL-01).
- 4.2.4 Subsequent progress payments require:

- Actual fulfilment/achievement of the milestone(s) as defined in Exhibit 1.
- Confirmation submitted by the Subcontractor according to confirmation template, (attached as Exhibit 2) with supporting documentation to the extent such documentation is necessary for the purpose of documenting the fulfilment/achievement of the relevant milestone.
- Correctly issued invoice, cf. Clause 4.2.5. below.

4.2.5 Invoices must be presented to DTU Space as set out in the payment plan (Exhibit 1) and marked clearly with the following information:

- Project no. 60798 Swarm ESL
- DTU contractual and administrative representative: Nils Olsen
- Subcontract ID: SW-CO-DTU-GS-1XX
- Payment Milestone No., title and amount according to Exhibit 1
- If applicable, subcontractor's VAT number
- If applicable, invoices shall separately show all due taxes or duties
- Subcontractor's Bank Account information, including IBAN or Swift code

4.2.6 DTU Space shall pay the Subcontractor's invoices within thirty days of receiving any such invoice provided always that:

- The Subcontractor has fulfilled any specific deliverables within their work package associated with the payment milestone specified in Exhibit 1, including any reports due according to SW-SW-DTU-GS-133.
- The invoice is correctly rendered.
- DTU Space has received the corresponding amounts from the Agency.

4.3 In the event that the Agency requires the reimbursement of any sums paid under this Subcontract, then if and to the extent that such requirement arises from the acts or omissions of the Subcontractor, the Subcontractor hereby agrees to reimburse DTU Space an amount equal to the sum which the Agency requires DTU Space to reimburse.

5. The Parties' Representatives

5.1 Representatives of DTU Space:

All correspondence for technical matters shall be addressed to:

		With copy to:
Name	Klaus Nielsen	Nils Olsen
Phone	+45 4525 9776	
Fax	+45 4525 9701	
e-mail	klausn@space.dtu.dk	nio@space.dtu.dk
Mail Address	Swarm DISC project office DTU Space Centrifugevej, Bldg. 356 DK-2800 Kgs. Lyngby Denmark	

All correspondence for contractual and administrative matters shall be addressed to:

		With copy to:
Name	Nils Olsen	Klaus Nielsen
Phone	+45 4525 9708	
Fax	+45 4525 9701	
e-mail	nio@space.dtu.dk	klausn@space.dtu.dk
Mail Address	Swarm DISC project office DTU Space Centrifugevej, Bldg. 356 DK-2800 Kgs. Lyngby Denmark	

5.2 Representatives of the Subcontractor:

All correspondence for technical matters shall be addressed to:

		With copy to:
Name		
Phone		
Fax		
e-mail		
Mail Address		

All correspondence for contractual and administrative matters shall be addressed to:

		With copy to:
Name		
Phone		
Fax		
e-mail		
Mail Address		

6. Liability

- 6.1 Except as mentioned below, no Party shall be responsible to any other party for any indirect or consequential loss or similar damage such as, but not limited to, loss of profit, loss of revenue or loss of contracts, provided such damage was not caused by wilful misconduct or gross negligence. A party's aggregate liability towards the other, except as mentioned below, shall be limited to the price specified in section 4, provided such damage was not caused by wilful misconduct or gross negligence.

The aforementioned limitations of liability shall not be applied in case a Subcontractor's breach of this Subcontract or omission creates to the DTU Space a liability towards the ESA. In such case the Subcontractor in breach shall indemnify and hold harmless the DTU Space from any cost, charge, damages, expense or loss incurred by the DTU Space as a result of the Subcontractor's breach or omission.

- 6.2 GCC clauses on liability applies (as specified in section 2.2, but references to GCC clauses are here given for convenience: Clause 18 (damage to staff and goods), clause 19 (liability for consequential damage during the execution of the contract), and 20 (liability of acceptance).
- 6.3 GCC clause 18.2 (damages to deliverables) contain a cap on the liability equal to the Contract Price, which for the purpose of this Subcontract shall mean the price specified in section 4.
- 6.4 Regarding infringement of third-party rights and confidentiality reference is made for convenience to GCC clause 24, 26, 38, and 52.
- 6.5 The Subcontractor shall be obliged to flow down its obligations pursuant to this Clause 6 (including this Clause 6.4) to all lower level subcontracts (it being noted that the Subcontractor on all accounts shall remain responsible and liable for its lower level subcontractors as set out in the GCC).
- 6.6 For the clarity, the scope of warranty referred to in GCC clause 21 is in this Subcontract limited solely to the Deliverables described in the Statement of Work of this Subcontract.

7. Disputes

- 7.1 With reference to Clause 34 of the GCC, this Subcontract shall be governed by the laws of Denmark, excluding however its conflict of laws rules.
- 7.2 Any dispute arising out of or in connection with this Subcontract shall be resolved by arbitration as set out in Clause 35 of the GCC. The arbitration proceedings shall take place in Copenhagen, Denmark.
- 7.3 DTU Space has tendered this Subcontract in accordance with the rules imposed by ESA under the reference frame of Contract No. 4000109587/13/I-NB. In the event that the ESA Industrial Ombudsman or an applicable administrative authority or court of law, decides or rules that the public procurement rules or other legislation has been infringed in relation to the award of the Subcontract with the consequence that the award decision is annulled, and this is not due to DTU Space's gross negligence or wilful misconduct, DTU Space is entitled to terminate this Subcontract with one month's notice. Neither the Subcontractor, nor DTU Space or any other party who also has entered into this Subcontract shall be entitled to any compensation, damages or indemnification in this

event. The right to termination by DTU Space under this Clause shall also apply in the event that the decision, ruling or judgement is appealed.

8. Miscellaneous

- 8.1 This Subcontract enters into force with the date of the last signature and remains in effect until complete fulfilment of all obligations undertaken under this Subcontract, unless the ESA Contract and/or the GCC provide for early termination, cf. also Clause 3.6 above.
- 8.2 Unless otherwise provided for in the ESA Contract, changes to this Subcontract shall only be valid and binding if agreed in writing and signed by the duly authorized representatives of both Parties. This requirement can only be waived in writing.
- 8.3 Should any part or provision of this Subcontract become invalid, illegal or unenforceable, it shall not affect the validity of the remaining provisions of this Subcontract. In such a case, the Parties shall be entitled to request that a valid and practicable provision be negotiated which fulfils the purpose of the original provision.
- 8.4 The Parties acknowledge that this Agreement is being negotiated and entered during the Covid-19 pandemic. The pandemic has caused global disruption with consequence that have not necessarily fully materialised. The Parties are not fully able to predict how the pandemic will influence the Project. Therefore, the Parties agree to mitigate and collaborate on any needed measures as much as possible.
- 8.5 Should any parts of the Project Activities not be possible to complete, the Parties shall at a regular basis discuss if any change to the project is needed, and whether there are any possible work-arounds to unforeseen obstacles.

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Exhibits:

- Exhibit 1 Detailed Payment Plan – provided below
- Exhibit 2 Confirmation template – provided below

[SIGNATURES FOLLOW ON SEPARATE PAGE]

Signatures:

For DTU Space

Place:

[date]

Henning Skriver, Director of DTU Space

For Subcontractor

Place:

[date]

[Name, Position]

The person appointed by subcontractor to oversee the delivery of the work, hereby declare that he or she understand and accept the terms of this Subcontract.

[Date]

[Name, Position]

Exhibit 1 – Detailed Payment Plan

Mile-stone	Description	Schedule date	KO +	Payment to Prime Contractor (EURO)	Payment, % of total contract
MIL-01	Project Kick-Off	<date>	KO	15.000	15%
MIL-03	Acceptance of Delivery 2	<date>	KO + 7	65.000	65%
MIL-05	Acceptance of Final delivery and successful Final presentation	<date>	KO + 12	20.000	20%
Total				100.000	100%

Breakdown of FFP per entity

[To be filled out in case the proposal includes the use of subcontractors]

Subcontractor	Country	Vendor code	Total (EURO)
Total			

Exhibit 2 – Confirmation template

Project	Swarm DISC ITT 6.3 – ‘Swarm climatological model of low- and mid-latitude toroidal magnetic fields’
Contract ref.	SW-CO-DTU-GS-1XX
Milestone no. and description	
Milestone amount	
Milestone achievement ref. proposal	
Subcontractor	
Team manager	

We hereby certify to have performed a positive check that the accomplishment of this milestone conforms to the above definition. No deficiencies were identified.

Date and signature:
