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## **In-kind Contribution Agreement**

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European Spallation Source ERIC

and

[Name of Partner]

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### **Construction Phase**

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This Agreement is made by and between:

- (1) **European Spallation Source ERIC**, Swedish Reg. No. 768200-0018, a European Research Infrastructure Consortium established by decision (EU) 2015/1478 of the European Commission in accordance with Regulation (EC) No 723/2009, having its statutory seat in Lund, Sweden (“**ESS ERIC**” or “**Organisation**”); and
- (2) **[Name]**, a **[type of organisation]**, incorporated under the laws of **[Country]** whose registered office is at **[address, City, Country]** (the “**Contractor**” or “**Partner**”).

#### **RECITALS:**

- A. The European Spallation Source (ESS) is a joint European project. The ESS facility (the “**Facility**”) will be a world-leading centre for materials research and life sciences using neutrons and will host the world’s most powerful neutron source. The Facility is being built in Lund, Sweden, with a data management and software centre in Copenhagen, Denmark.
- B. The European Commission has, by decision (EU) 2015/1478 of 19 August 2015, established the ESS as a European Research Infrastructure Consortium, responsible for constructing, operating, developing and decommissioning the Facility. The Swedish and Danish Governments have agreed to host ESS with Sweden as the host member state in accordance with Regulation (EC) No 723/2009.
- C. During the pre-construction phase of ESS, a design review was conducted in order to optimise the construction of the accelerator and target. The design and development of the first sets of instruments has since begun. As part of this design work, the Organisation is collaborating with leading laboratories, institutes and research facilities within the Partner Countries.
- D. The Parties are mainly leading research institutes within the field of neutron science and large-scale facilities operating accelerator driven sources.
- E. ESS ERIC and the Partner Countries have agreed to collaborate on the construction of ESS in order to meet the specific goals and needs of ESS and to ensure the harmonisation of all contributions to the construction, whether from other Partner Countries or ESS ERIC itself.
- F. The Partner Countries have agreed on a “Framework for Handling In-kind Contributions”. These principles shall form the basis for recognizing the work and services performed under this Agreement as in-kind contributions by the Government of **[Country]** and to accredit its value as a part of the Government of **[Country]**’s total contribution to the construction of ESS.
- G. The provision by the Partner of the work and services under this Agreement, and the assumption and performance of all other obligations by the Partner under this Agreement, is an in-kind contribution to the ESS project by the Government of **[Country]** However, the Partner alone has the full technical, financial and commercial responsibility towards ESS ERIC for the performance of the Agreement.

#### **1. DEFINITIONS**

The following terms and expressions shall, when used in this Agreement, have the following meanings, which shall be equally applicable to both singular and plural forms:

“**Access Rights**” mean licences and user rights to Foreground or Background.

“**Agreement**” means the documents referred to in Article 2.1.

**“Background”** means information, techniques, Know-how, software and materials (regardless of the form or medium in which they are disclosed or stored) held by the Parties prior to the conclusion of the Agreement, or acquired in parallel with it, as well as copyrights, other intellectual property rights, or rights pertaining to such information, techniques, know-how, software and materials following applications for, or the issue of, patents, designs, plant varieties, supplementary protection certificates or similar forms of protection.

**“Commencement Date”** refers to [date]

**“Completion Date”** refers to the date when the Partner has delivered all the Project Results and performed all other works and services under the relevant Schedule and the Project Results have successfully passed the evaluations and reviews under the relevant Schedule.

**“Confidential Information”** means any scientific, technical, financial, commercial or other information of a confidential or proprietary nature (regardless of the form or medium in which they are disclosed or stored) that are provided by either Party to the other Party and that is clearly marked ‘confidential’, prior to or after the Commencement Date, in connection with the Agreement.

**“Contractor”** refers to the Contractor defined above.

**“Council”** means the council of ESS ERIC.

**“Foreground”** means the results, including information, whether or not they can be protected, arising from the Project, as well as copyrights and other Intellectual Property and Know-how or rights pertaining to such results following applications for, or the issue of patents, designs, plant varieties, supplementary protection certificates or similar forms of protection.

**“Framework”** refers to the “Framework for Handling In-kind Contributions” attached to this document as Annex 1.

**“IKRC”** – refers to the In-kind Review Committee body set up by the Council in accordance with Annex 3 of the Statutes, with the purpose of evaluating the in-kind contribution proposals.

**“Intellectual Property”** means patents, trade marks, service marks, domain names, company names, registered designs, copyrights, database rights, design rights, confidential information, applications for any of the above, and any similar right recognised from time to time in any jurisdiction, together with all rights of action in relation to the infringement of any of the above.

**“Know-how”** means unpatented technical information (including, without limitation, information relating to inventions, discoveries, concepts, methodologies, models, research, development and testing procedures, the results of experiments, tests and trials, manufacturing processes, techniques and specifications, quality control data, analyses, reports and submissions) that is not in the public domain.

**“Parties”** refer to the Partner and ESS ERIC, and **“Party”** shall refer to either of them.

**“Partner”** shall have the same meaning as “Contractor”.

**“Partner Country”** refers to the founding members and founding observers of ESS ERIC and any subsequent member and observer of ESS ERIC admitted upon approval by the Council.

“**Project**” means all the works, services and other activities relating to the construction phase undertaken by ESS ERIC with or without the involvement of the Partner.

“**Project Results**” mean the reports, documents and other material to be delivered by the Partner to ESS ERIC as set out in the Schedules.

“**Scope of Works**” means the obligations and contributions, including the works and services set out in the Schedules.

“**Statutes**” refer to the statutes of the ESS ERIC as amended from time to time.

“**Time Schedule**” means the time schedule, which forms part of Schedules.

“**Variation**” means a change in nature, scope or timing of the Scope of Works.

## **2. AGREEMENT DOCUMENTS**

2.1 The agreement between ESS ERIC and the Partner consists of the following documents (collectively referred to as the “**Agreement**”):

- I. this document;
- II. the Schedules hereto;
- III. the Framework (Annex 1).

In the event of any discrepancies or inconsistencies between provisions of any of the Agreement documents, they shall be given priority in the order stated above.

## **3. WORK PROGRAMS OF THE PARTIES**

3.1 The work program of the Parties including planned timeline, specifications and milestones within the present collaboration are described in detail in the Schedules.

3.2 ESS ERIC will coordinate the works and services of the Parties with own contributions or contributions from other Partner Countries’ institutions to the Construction Phase, review the rendered works and services regarding its applicability to the ESS Project and propose and discuss changes to the work programs as a result of non-conformity with third parties contributions.

## **4. OBLIGATIONS OF THE PARTNER**

### **4.1 Scope of the works and services**

4.1.1 The Partner shall carry out the Scope of Works set out in the Schedules.

4.1.2 The Partner shall provide and be responsible for all technical and financial reports, labour, materials, equipment and other resources required for the performance of the Scope of Works.

### **4.2 Standard of Performance**

4.2.1 In carrying out the Scope of Works, the Partner shall use the degree of skill, care and diligence reasonably expected of a professional and experienced research institute providing works and services similar to the Scope of Works.

- 4.2.2 The Partner shall institute and maintain a quality control and project management system, which shall comply with internationally recognised standards. The Partner shall ensure performance testing prior to acceptance and commissioning.
- 4.2.3 The Partner shall comply with ESS ERIC's document management systems for PLM and CAD. Any deviation from this format must be approved by ESS ERIC in advance, prior to the commencement of work.
- 4.2.4 Whenever the Partner, the Partner's staff or any other personnel working on the behalf of the Partner work on ESS ERIC's premises, the Partner shall ensure their compliance with ESS ERIC's code of conduct as well as fire, health and safety rules and procedures.
- 4.3 **Compliance with Laws, Authorisations and Intellectual Property Rights**
- 4.3.1 The Partner shall carry out the Scope of Works in accordance with applicable laws and regulations, permits and authorisations, and recognised up-to-date professional practices and standards.
- 4.3.2 The Partner warrants and represents that, to the best of its knowledge, it carries out the Scope of Works without infringement of any patent, design, copyright or other Intellectual Property of any third party. To the best of the Partner's knowledge, any plant, equipment or material designed, specified, recommended or required by the Partner shall, when properly operated after completion, be capable of operation without infringement of any Intellectual Property rights.
- 4.4 **Conflicts of Interest**
- 4.4.1 The Partner shall not accept any contribution or specify any material, product or system that would create a conflict of interest compromising the Partner's professional judgment with respect to the Scope of Works.
- 4.5 **Information and Communication**
- 4.5.1 The Partner shall:
- I. keep ESS ERIC fully informed of the progress of the Scope of Works, including providing ESS ERIC with such reports in writing as are specified in the Schedules or as ESS ERIC may otherwise reasonably require;
  - II. attend meetings and briefings with the staff of ESS ERIC and/or other Partners as reasonably required by ESS ERIC; and
  - III. take all other reasonable actions which are necessary to enable ESS ERIC to monitor the scientific, technical and financial performance of the Scope of Works and to carry out reviews, analyses and approvals required under the Schedules.
- 4.5.2 Where no significant milestones or developments have occurred in the reported period, the Partner may provide a short confirmation of adherence to the planning and time schedule set out in the Scope of Work. Such confirmation may be done by way of email.

## **5. OBLIGATIONS OF ESS ERIC**

### **5.1 Assistance**

- 5.1.1 ESS ERIC shall co-operate with the Partner and give all reasonable assistance to the Partner in its performance of the Scope of Works.

### **5.2 Information and Decisions**

- 5.2.1 ESS ERIC shall upon request, free of charge and within a reasonable time, provide the Partner with all information held by ESS ERIC pertaining to the Scope of Works.
- 5.2.2 ESS ERIC shall give its decisions in writing within a reasonable time on all matters properly referred to it in writing by the Partner.

### **5.3 Monitoring and Approvals**

- 5.3.1 ESS ERIC shall monitor the scientific, technical and financial progress of the Scope of Works and carry out reviews, analyses and approvals as set out in the Agreement, the Framework (in particular Article 5 thereof) and the relevant Schedules.

## **6. ORGANISATION**

- 6.1 The Parties will establish the following organisational structure:

- **General Coordinators**
- **Work-Unit Coordinators**

- 6.2 The following persons shall be contacted for the general coordination of work and the clarification of technical issues for the execution of the Agreement ("**General Coordinators**"):

For the Partner: [name]

For ESS ERIC: [name]

- 6.3 Each Work-Unit defined in the Schedules is to be managed by a Coordinator designated by ESS ERIC and a local Coordinator to be designated by the Partner ("**Work-Unit Coordinators**"). The Work-Unit Coordinators are designated in the relevant Schedule.
- 6.4 Each Party shall immediately notify the other Party in writing of any change in the identity of its General Coordinator or Work-Unit Coordinator.
- 6.5 The General Coordinators will keep each other informed of the progress of the works and services. The General Coordinator of the Partner shall provide ESS ERIC's General Coordinator with the regular progress reports that the Work-Unit Coordinators have prepared.
- 6.6 The respective Work-Unit Coordinators shall agree on the tasks within the work-unit and how to best execute them in order to reach the goals of the ESS construction according to the Statutes. The Work-Unit Coordinators will attend the meetings of ESS advisory committees (as set out in the Statutes) relevant to their work-unit and/or Schedule, as may be requested by ESS ERIC from time to time.

## **7. DELIVERY OF THE PROJECT RESULTS**

### **7.1 Quality and Time**

- 7.1.1 The Project Results shall satisfy all the requirements of the relevant Schedule and shall be delivered to ESS ERIC in accordance with the applicable Time Schedule.
- 7.1.2 The Scope of Works in each Schedule shall be deemed completed when the Partner has delivered all the Project Results and performed all other works and services under the relevant Schedule and the Project Results have successfully passed the tests and evaluations under the Agreement and the relevant Schedule in accordance with the Framework.

### **7.2 ESS ERIC's Evaluation**

- 7.2.1 ESS ERIC shall evaluate the Project Results delivered by the Partner in accordance with the terms set out in the relevant Schedule and in line with Article 9.1 of the Framework. Unless otherwise provided in the Schedule, the Project Results shall be evaluated within 45 days of receipt thereof. Where no comments, changes or corrections to any part of the Project Results are required, the Project Results shall be deemed approved within 90 days of receipt thereof.
- 7.2.2 The evaluation of, comments on or approval of the Project Results shall not relieve the Partner of its responsibility for the completeness or correctness of the Project Results or of its obligations and responsibilities under the Agreement. However, with the exception of hidden defects, a Partner's responsibility for the completeness or correctness of the Project Results shall be limited to two (2) years following approval of the Project Results.

### **7.3 Delays**

- 7.3.1 If the Partner foresees any delay in the delivery of the Project Results, it shall immediately notify ESS ERIC in writing and take all reasonable actions to remedy such delay. The Parties shall meet to discuss the matter, unless deemed unnecessary by the Parties.
- 7.3.2 If the Partner is delayed, ESS ERIC may demand in writing that the Partner, at its own cost, deliver the Project Results within an additional time as ESS ERIC may specify. Such additional time shall be reasonable in the circumstances. If the Partner fails to do so, ESS ERIC shall, after prior notice to the Partner, be entitled to carry out the necessary work either by itself or by other means, in which case, the Partner shall provide such assistance and take such measures as may be necessary to enable ESS ERIC or any third party to carry out the work. ESS ERIC may, upon the recommendation of the IKRC, require compensation for financial or other losses due to the Partner's delay.
- 7.3.3 Notwithstanding the above and subject to a recommendation by ESS ERIC and the IKRC, if the Partner is delayed, the Council may withhold crediting in-kind value due to the Partner or Partner Country. The amount withheld shall be reasonable in view of the extent and importance of the delay.
- 7.3.4 If the Partner's performance of the Scope of Works is subject to ESS delivering (directly by itself or indirectly through other in-kind partners) certain dependencies to the Partner and in case the Partner is delayed or expected to be delayed due to failure, suspension or other delay by ESS (itself or indirectly by other in-kind partners) to, in whole or in part, deliver such dependencies to the Partner, the Partner may be entitled to a corresponding and reasonable adjustment of its Scope of Works and/or extension of time in performing its obligations hereunder (as applicable). The Parties shall agree on such adjustment and/or extension of time in accordance with Article 8.1. "Dependencies" shall for the purpose of this Article 7.3.4 be



defined as data, material, equipment or other input as set out in the Schedules, necessary for the Partner's performance of the Scope of Works.

#### **7.4 Defects**

- 7.4.1 If any part of the Project Results delivered by the Partner is found to be defective or different from the requirements under the Scope of Works or otherwise not in compliance with the provisions of the Agreement, ESS ERIC shall notify the Partner in writing, specifying in reasonable detail the defect, deviation or non-compliance. Unless deemed unnecessary by the Parties, the Parties shall thereafter meet to discuss the matter.

Following such notification and discussion, the Partner shall at its own cost re-perform the relevant part of the Scope of Works and re-deliver the relevant Project Results within a reasonable time. If it fails to do so, ESS ERIC shall be entitled, after prior notice to the Partner, to carry out the necessary work itself or by others, in which case the Partner shall provide such assistance and take such measures as may be necessary to enable ESS ERIC or any third party to carry out the work. ESS ERIC may further require compensation for financial or other losses due to the Partner's defective delivery.

- 7.4.2 Notwithstanding the above and subject to a recommendation by ESS ERIC and the IKRC, the Council may, in addition, withhold crediting in-kind value due to the Partner or Partner Country. The amount withheld shall be reasonable in view of the extent and importance of the defect.

- 7.4.3 The Parties agree that they shall share the risk associated with developing new technology (i.e., the risk that a solution required under the Scope of Works is not technically feasible). If such a risk materialises, this shall not be considered a defect, difference or non-compliance under Article 7.4.1 if the Partner so notifies ESS ERIC prior to the delivery of the relevant Project Results. Together with any such notification, the Partner shall submit evidence of the non-feasibility to ESS ERIC and the Parties shall jointly find an alternate solution which in its technical, economic and other effects shall be as close as possible to the solution required under the Scope of Works and negotiate the arrangements required to implement such solution.

### **8. VARIATIONS**

- 8.1 ESS ERIC may order in writing a Variation, or may ask the Partner to propose a Variation. If required, then upon recommendation of the IKRC, the Partner may be entitled to an extension of delivery time and compensation for additional costs related to the preparation and submission of such proposals and performance of the Variation. Such compensation may also take the form of recognition of in-kind contribution by the Government of [Country], following submission to the IKRC and in accordance with the Framework.

- 8.2 Subject to Article 8.1 above, ESS ERIC and the Partner shall agree in writing the value of the Variation and its impact, if any, on the Time Schedule.

- 8.3 Where practicable, the value of the Variation and the impact on the Time Schedule shall be agreed between the Parties prior to the Partner's commencement of works relating to the Variation.

- 8.4 Except in cases of negligence or wilful misconduct, the Partner shall not be liable for additional costs resulting from the extension of delivery time that has been agreed in accordance with Article 8.1 above.

**9. TRANSPORTATION**

- 9.1 Unless agreed differently in the Schedule, all tangible deliverables shall be delivered DDP Incoterms (in accordance with the ICC's most recent edition), unloaded at the final destination indicated by ESS ERIC.

**10. TRANSFER OF OWNERSHIP**

- 10.1 In accordance with Article 9 of the Framework, following approval of the in-kind contribution by the Council and written notification to the Partner thereof, ownership of the Project Results shall be transferred to ESS ERIC. The in-kind contribution value shall be credited to the Government of [Country] according to agreed milestones at the next annual crediting.

**11. FINANCIAL MATTERS**

- 11.1 Unless otherwise provided for hereinafter, either Party shall finance its own costs incurred in executing this Agreement.
- 11.2 The provision by the Partner of the Scope of Works under this Agreement, and the assumption and performance of all other obligations by the Partner under this Agreement, is an in-kind contribution by the Government of [Country] under the Statutes. In accordance with the Framework, the Partner's works and services specified in the Schedules under this Agreement shall be submitted to the IKRC for recognition as in-kind contributions to the Government of [Country]'s total contribution to the construction of the ESS. ESS ERIC shall not pay any consideration to the Partner under this Agreement.
- 11.3 The value of the in-kind contribution attributed by the Partner shall be based on ESS ERIC's Cost Book and be specified in the Schedule. The currency used shall be Euro. The Partner shall, as part of the performance of the Scope of Works, document all the items relevant and necessary to certify the value of the in-kind contribution within the Schedules. If necessary, and upon request, the Partner shall present such documents to ESS ERIC, together with the Project Reports in order to facilitate the review by the IKRC for recognition as in-kind contributions to the Government of [Country]'s total contribution to the construction of ESS. Any cost fluctuations shall be handled in accordance with the scheme set out in Article 7 of the Framework.
- 11.4 All taxes, charges and fees of whatever nature, which may be imposed by any authority on the Partner shall be paid and borne by the Partner.

**12. LIABILITY**

- 12.1 Where a Party breaches the Agreement, it shall be liable to the other Party for all reasonably foreseeable damages, losses and costs caused directly by the breach. A Party's liability in damages shall be limited to the value of this Agreement.
- 12.2 Cost estimates prepared by the Partner as part of the Schedule shall be prepared to the best knowledge and judgement of the Partner, but the Partner shall not be liable to ESS ERIC if the actual costs deviate from the estimated costs.
- 12.3 Neither Party shall be liable for any indirect or consequential damages or losses such as, but not limited to, loss of production, profit or goodwill, whether under contract, in tort or otherwise.
- 12.4 The limitations under Articles 12.2 and 12.3 shall not apply to claims arising from fraud,

wilful misconduct or gross negligence.

### **13. INTELLECTUAL PROPERTY RIGHTS AND CONFIDENTIALITY**

#### **13.1 Background**

13.1.1 Each Party is and remains the sole owner of its Background.

#### **13.2 Ownership and Protection of Foreground**

##### **13.2.1 Ownership of Foreground**

13.2.1.1 Foreground shall be the property of the Party carrying out the work leading to that Foreground.

13.2.1.2 Where the Partner and ESS ERIC have jointly carried out work generating Foreground and where their respective share of the work cannot reasonably be ascertained, they shall have joint ownership (50/50) of such Foreground. The Parties shall agree amongst themselves the allocation and terms of exercising ownership of that Foreground in accordance with the provisions of the Agreement.

13.2.1.3 If according to the laws and regulations applicable in a Party's country, personnel working for that Party are entitled to claim rights to Foreground, the Party concerned shall take steps or reach appropriate agreements to ensure that these rights can be exercised in a manner compatible with its obligations under the Agreement. Where applicable, ESS ERIC shall reimburse the Partner's costs for employee inventor's compensation, provided that such costs are reasonable in the circumstances.

13.2.1.4 Subject to Article 16.5.2 below, where a Party wishes to transfer ownership of Foreground, it shall take steps to conclude agreements to pass on to the assignee its obligations under the Agreement, in particular regarding granting of Access Rights, dissemination and use of the Foreground. The Party shall give at least 60 working days prior notice to the other Party of the envisaged assignment and the name, address and contact details of the assignee. The prior notice shall include detail and evidence of the steps taken by the Party to ensure the transfer of the obligations under this Agreement to the assignee, in particular regarding granting of Access Rights, dissemination and use of the Foreground.

13.2.1.5 A Party may object to a transfer of Foreground by the other Party within 30 working days of notification of such envisaged transfer, if the transfer would adversely affect its Access Rights. If such objection is made, the transfer may not be made until the transferring Party has demonstrated to the reasonable satisfaction of the objecting Party that legally binding arrangements have been made to secure the Access Rights of the objecting Party.

##### **13.2.2 Protection of Foreground**

13.2.2.1 Where Foreground is capable of industrial or commercial application, the Partner may provide for its adequate and effective protection, in conformity with relevant legal provisions, including the Agreement with due regard to the legitimate interest of ESS ERIC.

13.2.2.2 Where the Partner does not intend to protect its Foreground in a specific country it shall inform ESS ERIC. Where the Partner intends to waive the protection of its Foreground, ESS ERIC shall be informed at least 45 days prior to the corresponding deadline. In such a case and where ESS ERIC consider it necessary to protect such Foreground in a particular country, ESS ERIC may, at its own discretion adopt measures to protect the Foreground.

13.2.2.3 The Partner may publish or allow the publication of data, on whatever medium, concerning Foreground it owns provided that this does not affect the protection of that Foreground. ESS ERIC shall be given 30 days prior written notice of any planned publication. If, before the end of this period, ESS ERIC so requests, a copy of this data shall be communicated to it within 30 days after receipt of such request. ESS ERIC may object to the publication within 30 days after receipt of the data to be published, if it considers that the protection of the Foreground would be adversely affected by this publication. The planned publication shall be suspended until the end of this consultation period, which should not exceed six (6) months. In the absence of any objection within the above-mentioned period, it is deemed that ESS ERIC agrees.

13.2.2.4 To the extent possible under this Agreement, Open Source and Open Access principles shall be favoured according to the Statutes and the Framework.

### 13.3 **Access Rights**

#### 13.3.1 Access Rights for execution of the ESS

13.3.1.1 ESS ERIC shall, on a royalty-free basis and without any limitation in time, enjoy Access Rights to all Foreground and Background of the Partner which is related to the Scope of Works and which is needed for carrying out the design, construction, completion, testing, operation, maintenance, alteration, renewal and demolition of the ESS facility and any other related activity throughout the life time of the ESS. The Access Rights of ESS ERIC under this Article may be exercised by ESS ERIC without requiring further agreements or other formalities. The expiration or termination of the Agreement, irrespective of the reason, shall not affect the Access Rights of ESS ERIC under this Article.

13.3.1.2 The Parties may agree, where appropriate and to the extent it is legally possible, to exclude specific Background from the scope of Article 13.3.1.1 above. Such agreement shall be made in writing and form part of the relevant Schedule.

#### 13.3.2 Access Rights for other purposes

13.3.2.1 Each Party shall enjoy non-exclusive Access Rights to the Foreground and to the Background, if that Foreground or Background is related to the Scope of Works and is needed to use their own Foreground. Access Rights to Foreground and Background shall be granted on a royalty-free basis for use in research activities without limitation in time. For use in the development, creation or marketing of a product or process or for creation or provision of a service, Access Rights to Background and Foreground shall be granted on fair conditions to be agreed separately.

13.3.2.2 The Parties may agree, where appropriate and to the extent it is legally possible, to exclude specific Foreground and Background from the scope of Article 13.3.2.1 above. Such agreement shall be made in writing and form part of the relevant Schedule.

#### 13.3.3 General

13.3.3.1 The Access Rights referred to under Article 13.3.2 above shall be granted to the other Party upon written request. The granting of such Access Rights may be made conditional on the conclusion of specific agreements aimed at ensuring that they are used only for the intended purpose and on appropriate undertakings regarding confidentiality. The Parties may also conclude agreements with the purpose of granting additional or more favourable Access Rights, including access rights to third parties, or specifying the requirements applicable to

Access Rights but not restricting the latter. Any agreement providing for Access Rights to Parties and/or third parties must ensure that the potential access rights for the other Party are maintained.

- 13.3.3.2 Except where the Party granting Access Rights so agrees, Access Rights shall confer no entitlement on the other Party to grant sub-licences, provided, however, that ESS ERIC shall be entitled to grant sub-licenses for the purpose of carrying out the design, construction, completion, testing, operation, maintenance, alteration, renewal and demolition of the ESS facility and any other related activity throughout the life time of the ESS.

#### 13.4 **Confidentiality**

- 13.4.1 If a Party (the “**Receiving Party**”) receives Confidential Information from another Party (the “**Disclosing Party**”), for a period of 5 years from the expiration or termination of this Agreement or the relevant Schedule (the earliest of the two), the Receiving Party shall:
- I. keep the Confidential Information strictly confidential;
  - II. make available the Confidential Information only to its officers and employees who need to have access to it for the purpose of the Agreement;
  - III. not pass the Confidential Information to any third party, even under a confidentiality agreement, without the prior written consent of the Disclosing Party (however ESS ERIC shall be entitled to disclose such information to persons temporarily assigned to ESS ERIC); and
  - IV. use the Confidential Information only for purposes of the Agreement.
- 13.4.2 The foregoing obligations shall not apply to any portion of Confidential Information which the Receiving Party can establish,
- I. was known to the Receiving Party prior to its receipt from the Disclosing Party;
  - II. at the time of disclosure was, or thereafter becomes through no fault of the Receiving Party, generally available to the public by publication or otherwise; or
  - III. was received without any obligation of secrecy from a third party which, to the best knowledge of the Receiving Party, has the right to disclose the same;
  - IV. was independently developed by the Receiving Party without access or reference to the Confidential Information of the Disclosing Party; or
  - V. was disclosed in order to comply with applicable laws or regulations or with a court or administrative order.
- 13.4.3 The Receiving Party shall, to the extent permitted by applicable law, impose the same obligations as set out above on all of its officers and employees having access to the Confidential Information, both during and following their retention by the Receiving Party. Notwithstanding the foregoing, the Receiving Party shall be liable for any breach of the Agreement by its officers and employees.

#### 14. **FORCE MAJEURE**

- 14.1 Neither Party shall be held liable or deemed in breach of the Agreement for failure of or delay

in performance of its obligations to the extent that and for so long as such performance is prevented or delayed by causes beyond its reasonable control, such as, without limitation, fire, flood, earthquake, war, embargoes, blockades, strikes, riots. The Party whose performance is so prevented or delayed shall promptly inform the other Party of the occurrence of any such event and such Party shall use all reasonable efforts to avoid the effect of such event and to mitigate damages to the fullest extent possible. Upon termination of such event, the prevented Party shall forthwith resume performance of the Agreement.

- 14.2 If by reason of any of the above circumstances, the failure or delay to perform has lasted for more than six consecutive months, either Party shall be entitled to terminate this Agreement by written notice to the other Party.

## **15. DURATION AND TERMINATION**

- 15.1 This Agreement shall come into effect on the Commencement Date and shall continue in force until all obligations of either Party under this Agreement have been fulfilled, unless terminated earlier in accordance with Article 15.2.
- 15.2 Without prejudice to any other right or remedy it may have, each Party may terminate this Agreement or any specific Schedule at any time by notice in writing to the other Party if the other Party is in material breach of any other part of this Agreement and, if the breach is capable of remedy within 90 days, the breach is not remedied within 90 days of the other Party receiving notice specifying the breach and requiring its remedy. Failures or defects lasting for six (6) consecutive months shall entitle a Party to terminate this Agreement by a written notice.
- 15.3 Upon termination of this Agreement or a specific Schedule, any provision of this Agreement which expressly or implicitly comes into or continues in force on or after termination of this Agreement, including the provisions of Articles 12 and 13, shall continue in force; each Party shall return to the other Party any documents in its possession or control which contain or record any of the Confidential Information on the other Party.

## **16. MISCELLANEOUS**

### **16.1 Independent Contractor**

- 16.1.1 The Partner shall be an independent contractor in the performance of the Scope of Works and shall have complete charge of the persons engaged in the performance of the Scope of Works. Nothing in the Agreement creates or shall be deemed to create any agency, partnership or joint venture relationship between the Parties. Subject to Article 5.3 above, a Party shall have no authority to act on behalf of or to bind the other Party in any way.
- 16.1.2 All persons engaged by the Partner shall for all purposes be considered employees or representatives of the Partner. If the Partner seconded any of its employees to the offices of ESS ERIC during the term of the Agreement, such secondees shall remain an employee of the Partner. The Partner shall be responsible for the obtaining of necessary permits and for the payment of all taxes and charges for all persons engaged by the Partner. The Partner shall also maintain during the term of the Agreement adequate insurance for all personnel working on the behalf of the Partner.

### **16.2 Subcontracting**

- 16.2.1 The Partner shall have the right to involve subcontractors, availing of specific expertise, in the performance of the Scope of Works. The Partner shall notify ESS ERIC of all subcontractors,

specifying in each case their specific expertise.

- 16.2.2 The subcontracting of any part of the Scope of Works shall not relieve the Partner from any liability or obligation under the Agreement. The Partner is fully responsible for the compliance with the Agreement by all of its subcontractors.

**16.3 Entire Agreement**

- 16.3.1 This Agreement constitutes the entire agreement between the Parties with respect to the subject matter hereof and supersedes all prior agreements, whether written or oral, with respect to the subject matter of the Agreement.

**16.4 Amendments**

- 16.4.1 Amendments to or changes of the Agreement shall, in order to be valid, be made in writing and signed by authorised representatives of the Parties and shall be clearly stated as amendments to or changes of the Agreement.

**16.5 Assignment**

- 16.5.1 Except with the prior written consent of ESS ERIC, the Partner shall not assign, novate or otherwise transfer partially or totally any of its rights or obligations under the Agreement.
- 16.5.2 ESS ERIC shall have the right to assign, novate or otherwise transfer any or all of its rights and obligations under the Agreement to a successor entity or other legal entity established by the Partner Countries in the ESS project.

**16.6 No Waiver**

- 16.6.1 This Agreement may not be waived except in writing. The failure of Party to insist upon strict adherence to any provision of the Agreement shall not be considered a waiver of any right under the Agreement and shall not deprive that Party of the right at any later time to insist upon the strict adherence to the Agreement.

**16.7 Anti-Corruption**

- 16.7.1 The Partner warrants that no offer, payment, consideration, or benefit of any kind which constitutes an illegal or corrupt practice has been or shall be made, either directly or indirectly, as an inducement or reward for the award of the Agreement or in the subsequent execution of the Agreement. Any such practice will be grounds for terminating the Agreement without any compensation to the Partner and for such other additional actions, civil and/or criminal, as may be applicable.

**16.8 Waiver of Immunity**

- 16.8.1 Any Party who is a public body of any nature hereby
- I. irrevocably and unconditionally agrees that it is subject to suit with respect to its obligations hereunder and that the execution, delivery and performance of the Agreement constitute private and commercial acts; and
  - II. waives any right of immunity which it now has or may in the future have in any jurisdiction in connection with any legal proceedings.

**16.9 Use of images or logos of the other Party**

16.9.1 Without the prior written consent of the other Party, which shall not be unreasonably withheld, neither Party shall use or make reference to any images or logos of the other Party.

**16.10 Publicity**

16.10.1 Without the prior written consent of ESS ERIC, the Partner shall not publicise the Agreement or any part thereof unless it is obligated to do so to comply with applicable laws or regulations or with a court or administrative order.

**17. SETTLEMENT OF DISPUTES**

17.1 In the event of dispute of difference of opinion between the Parties arising out of or in connection with this Agreement, both Parties shall use its best efforts to settle each dispute or difference of opinion amicably by negotiations.

17.2 Dispute controversies or difference of opinion, including with respect to any right or obligation that survives termination or cancellation of this Agreement, which cannot be amicably settled by negotiations between the Parties, shall be administered and resolved by the Council following recommendation by the IKRC. The Council shall make a decision on how to settle the dispute. The Council shall decide its own rules of procedure and shall have the right to refer the dispute to another forum, such as Alternative Dispute Resolution (ADR) or a court, in which case, the governing law shall be the substantive laws of Sweden.

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**ENCLOSURE 1 – CONSTRUCTION IN-KIND MONTHLY STATUS REPORT****Monthly Status Report – [Month]****Name of WP/WU**

Previous Reporting Period Achievements:	Next Reporting Period Planned Achievements:

Risk and Action Plans:

The following documents are attached:

Updated Milestone tracking list ☐

Updated IKC risk register ☐

Date:

Name / Work Unit:

Institute / Facility:

Contract ref no:

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**IN WITNESS WHEREOF**, the Agreement has been executed in two (2) originals, of which the Parties have received one (1) each.

**European Spallation Source ERIC**

[Name of Partner]

\_\_\_\_\_  
*Date*

\_\_\_\_\_  
*Date*

\_\_\_\_\_  
*Signature*

\_\_\_\_\_  
*Signature*

\_\_\_\_\_  
*Name (in block letters)*

\_\_\_\_\_  
*Name (in block letters)*

\_\_\_\_\_  
*Position*

\_\_\_\_\_  
*Position*

**ANNEX 1 – FRAMEWORK FOR HANDLING IN-KIND CONTRIBUTIONS DURING THE CONSTRUCTION PHASE**

Framework for Handling  
In-kind Contributions

**Introduction**

In accordance with the Articles of Statutes of the European Spallation Source – ERIC, hereinafter referred to as the Organisation, and in particular Annex 4 thereof, the Council of the Organisation has adopted the following Internal provisions on in-kind contributions.

**Article 1**  
**General principles**

1.1 An In-kind contribution is a non-cash contribution provided by a Member to the Organisation and may cover:

- Technical components for the ESS facility as well as personnel needed to perform the testing, installation and/or integration of any such components;
- R&D work as well as personnel needed to perform the R&D work;
- Personnel made available for specific tasks during the Construction Phase;
- or,
- Other products or services relevant for the completion of the ESS facility.

1.2 Suitable in-kind contributions and their value are identified and specified by the Organisation with reference to the ESS project descriptions included in the Programme Plan, which will be made accessible to all Members. The identification of suitable in-kind contributions should be subject to review and recommendation by the Science Advisory Committee or the Technical Advisory Committee to the Council.

1.3 Each in-kind contribution will be subject to a written contract between the Organisation and the delivering body performing the in-kind contribution. The in-kind contribution contract should cover, at a minimum and when applicable, the following issues:

- A technical description and specification including interface and integration requirements,
- A project plan, including time schedules, deliverables and milestones;
- The total attributed value
- Terms of delivery and transportation,
- Quality control and performance testing prior to acceptance and commissioning,
- Documentation; operating manual, parts list, maintenance manual including spare parts list;
- Training of operating staff
- Technical and financial control systems,
- Appointment of responsible personnel,
- Roles and responsibilities of the Organisation, and the delivering body
- Insurances,
- Ownership of background and foreground
- Use and dissemination of foreground

- Licenses and rights
- Access rights
- Transfer of ownership
- Procedures for reporting
- The scope and content of the formal evaluation carried out at delivery of the in-kind contribution
- Risk assessment and risk management

1.4 An in-kind Review Committee (IKRC) shall be set up by the Council, with the purpose of evaluating the in-kind contribution proposals. The Council shall approve all in-kind contracts based on the recommendation from the IKRC. After such approval, the Member shall be accredited the in-kind contribution value as a part of its total contribution to the ESS.

1.5 The internal provisions on In-kind contributions shall be regulated by the Council.

1.6 The Organisation's Cost Book value defines the total value of an in-kind contribution. The values in the Organisation's Cost Book are expressed, until otherwise agreed, at the price level stated in the statutes and annexes. The delivering body is wholly responsible for the contribution including the cost. The XX (currency TBD) shall be the standard currency unit for all in-kind contributions. Any currency exposure shall be borne by the delivering body.

## **Article 2**

### **Allocation of in-kind contributions**

2.1 All Members may express their interest in contributing with in-kind contributions. The Organisation will inform interested Members about the work package specifications of the in-kind contributions.

2.2 The Organisation may evaluate proposals for in-kind contributions in order to assure that the proposal is in line with the Organisation's Programme Plan and meets the standards and specification requirements.

2.3 The Organisation shall keep a detailed list of the in-kind contributions to be provided by each Member. The list shall include a specification of the contribution, the attributed value, a schedule for the delivery and a short specification of the in-kind contribution.

2.4 In the event that more than one Member would be interested in supplying the same work package or task, a process of negotiation and/or bidding shall take place. The process will be handled by the IKRC in the spirit of collaboration. The IKRC will define the criteria for selection, which will be subject to approval by the Council. It is possible for an in-kind contribution to be allocated to a group of Members, although one of the Members shall be appointed as the lead and take legal responsibility for the contract.

### **Article 3**

#### **Adjustments of allocations**

3.1 In exceptional cases, as defined by the IKRC, after prior consultation with, and after recommendation from the organisation and after approval by the Council, a Member may:

- renounce the obligation to contribute in-kind for which it had accepted responsibility and instead provide a sufficient contribution in cash without unjustified delay. In that connection the term "without unjustified delay" means sufficient time to enable the Organisation to procure the items renounced by the contributor from another source. Sufficient contribution in cash means sufficient amount of cash to cover the total cost of procuring the equivalent goods or services.
- in agreement with another Member, transfer to or receive from such other Member an obligation to provide a specific in-kind contribution. In such cases the obligation to provide sufficient cash contribution shall be adjusted accordingly.

3.2 Any adjustments according to the above shall be accompanied by a corresponding rectification of the budget of the in-kind contribution.

### **Article 4**

#### **The in-kind contribution Contract**

4.1 Each in-kind contribution shall be subject to a written contract between the Organisation and the delivering body performing the in-kind contribution. The contract shall include the specification of the contribution and terms of delivery. There shall be no ambiguity of the roles and responsibilities in the in-kind contribution contract. Contracts will be based on a contract template approved by the AFC.

4.2 The contract will be the basis for performance and delivery of the in-kind contribution and should cover, at a minimum and when applicable, the following issues:

- A technical description and specification including interface and integration requirements,
- A project plan, including time schedules, deliverables and milestones;
- The total attributed value
- Terms of delivery and transportation,
- Quality control and performance testing prior to acceptance and commissioning,
- Documentation; operating manual, parts list, maintenance manual including spare parts list;
- Training of operating staff
- Technical and financial control systems,
- Appointment of responsible personnel,
- Roles and responsibilities of the Organisation, and the delivering body

- Insurances,
- Ownership of background and foreground
- Use and dissemination of foreground
- Licenses and rights
- Access rights
- Transfer of ownership
- Procedures for reporting
- The scope and content of the formal evaluation carried out at delivery of the in-kind contribution
- Risk assessment and risk management

## **Article 5**

### **Responsibility for production and delivery**

5.1 The delivering body has the full technical, financial and commercial responsibility for the production and delivery of the in-kind contribution. The delivering body is also responsible for following applicable legislation during the completion of the in-kind contribution.

5.2 The delivering body shall provide necessary resources in qualified personnel, facilities and equipment in order to satisfactorily fulfil the contribution according to the specifications detailed in the in-kind contribution contract. Secondment of personnel can be considered as part of an in-kind contribution when clearly defined as part of a Work Package. All seconded or delegated personnel should be adequately qualified according to the criteria specified by the Organisation. All delegated/seconded personnel will remain employed by the institute, laboratory or other body delivering the in-kind contribution, hereinafter called the "delivering body". The delivering body remains solely responsible as employer and shall bear all associated costs such as salary, fiscal charges etc., including any costs for insurance coverage. All delegated/seconded personnel is subject to the safety, business and any other regulations in effect at the Organisation's location (while delegated/seconded.)

5.3 The Organisation is responsible for the successful operation of the facility and ensuring that the different systems and components are properly integrated and operated together as a whole. Any modification likely to affect the interface and integration with other components requires prior agreement of the Organisation. Any in-kind contribution must include appropriate documentation and/or training of the Organisation's personnel regarding the delivered technical components and other deliverables, to ensure their operation, maintenance and possible upgrade and modification.

5.4 As the responsible body for the realisation of the project, the Organisation will monitor the technical progress of the production of the in-kind contribution and

should thereby be provided with relevant information and data. This would include progress reports, regular meetings and visits of the Organisation's personnel for monitoring and quality assurance. This would also include the elaboration of testing and acceptance procedures for the in-kind contribution. In exceptional cases, after seeking acceptance from the IKRC and approval by the Council, the Organisation has the right to impose project management support, from either the Organisation or from a third party appointed by the Organisation, if it considers it necessary. The costs for such project management support shall be borne by the Member and/or the delivering body.

### **Article 6**

#### **Change of cost and remedy**

6.1 The Member making the in-kind contribution and its delivering body bear the full responsibility for any cost overruns. Subject to the exceptions in 6.2 below, cost overruns will not increase the value of the in-kind contribution to be credited to the Member.

6.2 If a change of costs occurs due to a change by the Organisation of the design basis or the specification of a system or component to be produced by the delivering body (each called a "Change"), the Organisation or the Member may request the Council to consider a change of the in-kind contribution. Any change in the in-kind contribution and the following contract shall be subject to approval by the Council. It is the responsibility of the delivering body to inform the Council on the cost impact of the Change, including that it cannot be otherwise accommodated. A change in the in-kind contribution may be in, but is not limited to, the form of:

- An increased or decreased in-kind value for the package, after consultation with the IKRC and after negotiation between the Organisation and the concerned Member.
- The transfer of responsibility for the package to another Member willing to perform the task.
- The transfer of responsibility to the Organisation, accompanied by an additional cash contribution by the Member and/or the delivering body sufficient to enable the Organisation to timely procure or perform the specified items or tasks to be performed.

### **Article 7**

#### **Scheme for handling cost fluctuations**

7.1. In exceptional cases, when the Organisation's Cost Book value cannot be matched by the delivering body producing the in-kind contribution, it is the responsibility of the Member to demonstrate the flaw in the initial estimate and the specific circumstances, which have invalidated the initial estimate.

7.2. Cost fluctuations caused by inflation, currency fluctuations and non-extreme variations in raw-material prices and other similar circumstances, are not to be



considered as exceptional cost increases. Furthermore, increased administrative overheads or cost for laboratory facilities are not to be considered as exceptional cost increases. Such costs are to be borne by the Member and/or the delivering body and shall not be credited to the Member's overall in-kind contributions.

7.3 A scheme for handling exceptional cost increases, other than as referred to in Article 7.1, shall be defined in the Financial rules.

## **Article 8**

### **Delivery**

8.1 It is the responsibility of the delivering body to deliver the in-kind contribution in accordance with the specification set out in the in-kind contribution contract.

8.2 Terms of delivery and costs related to transportation, insurance are to be included in each in-kind contribution.

8.3 If a delivering body fails to deliver the in-kind contribution, the value of the contribution may not be credited towards the Member's overall contribution, and, subject to the provisions set out in the following paragraphs, has to be replaced, fully or partially, by contributions in cash by the Member.

8.4 If a delivering body fails to deliver the in-kind contribution in time according to the schedule set out in the In-kind contribution contract, the Council, upon the recommendation of the IKRC and the Organisation, will decide whether or not the delayed contribution can still be accepted and to what extent the Member shall compensate the Organisation for any financial or other losses due to the delayed delivery. If the delay is due to a Change, the Council, upon the recommendation of the IKRC and the Organisation, shall grant an extension of the time for delivery. In such circumstances the extension of the delivery time has to be reasonable. Except in case of negligence or wilful misconduct the Member and/or the delivering body shall not be liable for any eventual expenses emerged from the delay at the delivering body.

8.5 If a delivering body should deliver an in-kind contribution, which is defective or otherwise not in compliance with the requirements of the in-kind contribution contract, the delivering body has the right and obligation to remedy the deficiency at its own cost within an agreed and reasonable time. The detailed conditions for compensation and remedy shall be considered in each contract.

**Article 9**  
**Evaluation, crediting and passage of title**

9.1 A formal evaluation shall take place after the delivery of the in-kind contribution as specified in the in-kind contribution contract. The scope and content of the formal evaluation will also be specified in the in-kind contribution contract. The responsible technical personnel from the Organisation and the delivering body, including the work package leaders, shall perform the evaluation. The evaluation shall determine the degree of compliance of the delivered components with the quality criteria set out in the contract and the overall technical specification.

9.2 After the approval of the in-kind contribution by the Council, the ownership shall be transferred to the Organisation, and the value shall be credited according to milestones to the Member's share of the contribution at the next annual crediting.

9.3. In exceptional cases, and upon recommendation by the Organisation and the IKRC, the Council may decide to what extent the accrued value of the in-kind contribution may be charged to the Member's overall contribution. This would apply in the case that the in-kind contribution, though defective or otherwise not compliant with the requirements of the in-kind contribution contract, is judged to be still of use for the Organisation.

**Article 10**  
**Scheme for handling Conflict of interest and Disputes**

10.1 In case of disputes between the parties it shall be the IKRC's task to suggest to the Council how such disputes should be settled. Based on the recommendation from the IKRC the Council will take the final decision on how to settle the disputes.

10.2 Members of the IKRC shall declare whether any dispute or proposal concerning the allocation of in-kind tasks directly or indirectly affects their personal affairs or the affairs of the institution or the official body, which they are representing or affiliated to. In case of such conflict or a risk of a conflict, the affected member of the IKRC shall refrain from participating in any discussion or decision concerning that dispute or proposal. The conflicted member may however maintain the right to present argumentation prior to the voting procedure, which will be held in his absence.

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**IN WITNESS WHEREOF**, the Agreement has been executed in two (2) originals, of which the Parties have received one (1) each.

**European Spallation Source ERIC**

**Name of Partner**

\_\_\_\_\_  
*Date*

\_\_\_\_\_  
*Date*

\_\_\_\_\_  
*Signature*

\_\_\_\_\_  
*Signature*

\_\_\_\_\_  
*Name (in block letters)*

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*Name (in block letters)*

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*Position*

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*Position*