IT-Services

Procurement & Portfolio Management

Contract law for Employees
«For larger procurement projects it is necessary to have a formal contract signed by both parties and not just a purchase order.»
Motivation

- Verbal statements count and endanger procurement. ETH demands written commitments
- We want freedom to negotiate, you communicate (too much) with suppliers
- Satisfactory alternatives are often available
- We want to provide clarity in procurement, for both sides
- Our image: ETH as an institution «knows» what it‘s doing!
Agenda

• Introduction
• Contract design
• Project management
• IT services or “Staff Leasing”
• Questions & Answers
• Links/ contacts
• Thanks
Introduction
Procedure

- From the idea to a project
- Procurement
  - Planning
  - Tendering
  - Award
  - Contractual framework -> Freedom/limitations
- Contract
- Project management
- Success
IT-Procurement at the ETH

- 1200 orders/ year
- 47 million CHF/ year
- 200 new contracts / year
- 200 active contracts / additionally
Principles for Procurement at the ETH

- Financial regulations
  - https://www1.ethz.ch/fc/docs/allgemein/finanzreglement_eth_zuerich_050928_v150101.pdf
- AGB (Art. 89)
  - AGB ETH domain
  - Federal IT AGB
- Purchasing orders (Art. 92)
  - Rules, exceptions
  - Order confirmation
- Written Form (Art. 108/ Art. 69)
  - Liability
  - Contractual limit
  - Intangible assets
  - Signature competences
  - …
Swiss Law

- ETH procurements shall be conducted according to the guidelines of Swiss law and under Swiss jurisdiction.
- Exceptions are clarified by ITS PPF in cooperation with the legal department.
Contract design
Definition

- A contract is concluded through an **offer** and an **acceptance**.
- **Offer** and **acceptance** should match, so that a consensus exists between the parties.

- **Federal Code of Obligations (OR)**
  To conclude a contract a consistent mutual expression of wishes is required. This can be done explicitly or implicitly.
Graphical Depiction

Contract = Offer (quote) + Order (Acceptance)

Offer
Order
No contract

Offer
Order
Contract

Offer
Order
No contract

«Yes, but…»

«Yes»

«Yes, but…»
The ETH, with its contracts, wants:

- To establish clarity, completeness and transparency
- Fairness for all parties
- The consistent assertion of its position
- Risk mitigation for its institutions
- To comply with procurement law and guidelines.
Principles

- ETH signs contracts on the basis of the T&C of the ETH domain or the IT T&C of Federal Government.

- The ETH legal service maintains the appropriate contract drafts.

- These templates were adapted for IT procurement, by ITS PPF as part of their competences.
The hierarchy of contractual components are defined so that no problems arise with contradicting statements.

By default these are:

- 1. Frame agreement
  2. Individual contract
- 1. Contract
  2. T&C (ETH or Federal Government)
  3. ETH tender
  4. Offer from the supplier

Offers and orders shall refer to the appropriate contracts/T&C.
Additions to the TC

Topics that need to be added to the contract, according to the TC of the ETH and the T&C of the federal government:

- Changes/amendments to the T&C of Federal Government IT
- Details regarding delivery/services/acceptance/warranty/place of execution/appointments
- Costs/types of cost
- Key-person used by the supplier/Contact person at ETH, substitutes of these people.
- Cooperative duties of the ETH (building access, services, ...)
- Categorisation of possible deficiencies and consequences
- Potential import-/export limitations
- Service/maintenance/support/service times and troubleshooting time frames
- Documentation
- Commencement and duration of the contract, consequences of termination
- Potential price adjustment rules, payment plan, potential penalty adaptations
- Etc.
## Difference between various contracts

<table>
<thead>
<tr>
<th>Type</th>
<th>Order /Service Contract (OR Art 394ff)</th>
<th>Employment Contract (OR Art 319ff)</th>
<th>Work Contract (OR Art. 363ff)</th>
<th>Purchase Contract (OR Art. 184ff)</th>
<th>Employee Leasing (AVG)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Performance</strong></td>
<td>Liable for diligent and faithful performance only. Not responsible for successful end result.</td>
<td>Liable for diligent and faithful performance as stipulated in contract. Not responsible for successful end result.</td>
<td>Liable for diligent and faithful performance and the resulting, contractually agreed result.</td>
<td>Liable for the delivery of the contractually agreed upon item without any deficiencies.</td>
<td>Liable for the careful search, selection and instruction of the employee only.</td>
</tr>
<tr>
<td><strong>Comment</strong></td>
<td>Examples: Medical Services Consulting Services</td>
<td>Every ETH employee</td>
<td>Delivery of the agreed result absolutely mandatory</td>
<td>The supplier has the obligation to deliver an item without legal or material flaws</td>
<td>Purchase of working hours from IT specialists</td>
</tr>
<tr>
<td><strong>Termination</strong></td>
<td>Possible at any time for the ETH. However the supplier must be compensated for any loss incurred</td>
<td>Period of notice must be adhered to</td>
<td>Possible at any time for the ETH. However the supplier must be compensated for any loss incurred.</td>
<td>Usually not possible unless deficiencies exist</td>
<td>According to mutual agreement</td>
</tr>
</tbody>
</table>

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**Jürg Häubi | 17**
Diagram INCOTERMS®


<table>
<thead>
<tr>
<th>Incoterms 2010</th>
<th>Seller</th>
<th>Export Customs Clearance</th>
<th>Inland Carrier Loaded</th>
<th>Sea/Air/Rail Terminal</th>
<th>Quay</th>
<th>Port of Loading/Loaded on Board</th>
<th>Main Lift of Transport</th>
<th>Port of Discharge</th>
<th>Quay</th>
<th>Import Customs Clearance</th>
<th>Named Place</th>
<th>Sea Terminal/Inland Terminal</th>
<th>Buyer</th>
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<td>Ex Works</td>
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<td>FCA</td>
<td>Free Carrier (At Sellers Place)</td>
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<td>CPT</td>
<td>Carriage Paid To</td>
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<td>CIP</td>
<td>Carriage and Insurance Paid To</td>
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<td>DAT</td>
<td>Delivered At Terminal</td>
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<td>DAP</td>
<td>Delivered At Place</td>
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<td>DDP</td>
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<td>FAS</td>
<td>Free Alongside Ship</td>
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<td>FOB</td>
<td>Free On Board</td>
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<td>CFR</td>
<td>Cost and Freight</td>
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Examples of Open Source Regulations

Software regulations by license type (examples)

<table>
<thead>
<tr>
<th></th>
<th>EULA</th>
<th>GPL</th>
<th>CDDL</th>
<th>BSD</th>
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<tbody>
<tr>
<td>Right to copy</td>
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<td>Right to modify</td>
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<td>Right to distribute</td>
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<td>Right to display</td>
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<td>Right to manufacture</td>
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<td>Right to use</td>
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<tr>
<td>Right to sell</td>
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</tbody>
</table>

- must use GPL for everything
- use CDDL for things already under CDDL

source: blogs.oracle.com through google search: open source license eula gnu
Protective rights

This refers particularly to violations of rights while using software

- Usage, saving, modifying, resale, but also topics related to property rights, patent rights, creator rights and trademarks.

In such cases one should always involve legal services
Risks

- Liability for contractual violations or failure to deliver on extra-contractual obligations are not limited in the OR in height or width.

- Usually the height and width are defined and limited in the T&Cs, this is in the interest of all contractual parties.

- In principle the risks exist for the supplier as well as for ETH, therefore we want to keep our position in focus. However, we will stay fair!
Examples of Risks

Delay
- We buy a computer that works perfectly but was delivered 3 weeks too late.

Defective performance (Warranty)
- The supplied feed switches off frequently and without cause.

Damage (Product liability / consequential damage)
- A relay catches fire due to excess voltage from the supplied control system, which spreads over to the datacenter. The ETH datacenter burns down.

Legal warranty (property rights)
- A supplier sells us a software with components not properly licensed from the manufacturer or that contain patent violations.

Open Source Software (property rights)
- Temptation of free availability and infection
Liability

- Contract serves as a foundation/limit
- Damage is present
- Contract violations
- Cause for liability
  («There is a guilty party or a causal liability»)
- Causal connection
Penalties
(eg. T&C WV, Art. 20)

In contrast to the liabilities for damage, penalties do not need evidence of damage.

- **Delay** (failure to fulfil the contract with regards to time)
  (choose relevant milestones/ must be demanded in writing, except if automatism is agreed in the contract)

- **Procedural principles** (eg. T&C WV Art. 5.3/ 22.6)
  (Work safety regulations, working conditions and wage equality for both genders; confidentiality; integrity clauses; …)

- **Performance penalties**
  (e.g. Service level agreement neglected, …)
Acceptance of Result / Effect of Acceptance

- The result needs to be clearly defined:
  - Performance contents: factual, temporal, personal
  - Performance scope: what is included / not included
  - How are the risks distributed

- Effect of acceptance
  - Reversal of proof -> the ETH must, from this point onwards, prove that something is not alright!
  - Beginning of the period of limitation
  - Beginning of the warranty period
  - Transfer of benefits and risks to ETH
  - Often partial or final payment to the supplier
Warranty

This refers to the delivery being free of deficiencies.
Both in the case of delay and other deficiencies we`re entitled to:

- Improvements (repair/ replacement)
- Replacement (replacement through a third party at the cost of the supplier)
- Reduction (of price of purchase)
- Damage compensation/ contractual penalty
- Cancelation of the contract (reversal procedure)
Legal Engineering

- Through «Legal Engineering» risks can be made to be tangible and limited.
- Contact ITS PPF at an early stage!
Project Management
Planning Phase

- Most of the future risks are determined in the planning phase of a procurement, even undesired ones. Following points must be clarified:
  - **Requirements** of procurement regulations with ITS PPF
  - Comprehensive, but not restrictive **Specifications**, Taking into consideration the entire lifecycle (later maintenance/ upkeep/ expansion/ potential upgrade/ options)
  - Hence **Acceptance** procedure and conditions should be included in later agreements with the supplier
  - Formulate a detailed **Quantity structure** and exact transcription of the performance
  - Define and limit **Cooperation duties** of ETH.
  - Define a time plan with Milestones relevant to delay penalties.
Realisation Phase

A contract is usually signed after the tendering process is legally executed.

The realisation phase is about:

- **Realizing** the contract
- **Defending** against unjustified demands of the supplier
- **Enforcement** of valid ETH demands (deadlines, warranty cases, contractually agreed performance, …)
- If necessary, timely **reminders** and documenting of potential «problems»
- If necessary, to **manage change** contractually and in keeping with the project tender.
- **Conclusion** and signing of the **acceptance protocols**
- **Effecting** payments
- Managing **warranty**
Employee Leasing or IT-Service Contract
Specifics of Employee Leasing

- ETH acquires personnel by employee leasing only in exceptional cases
- Employee leasing is regulated according to Worker Protection and Employment Service Act (AVG)
- When additional staff is needed to handle extra work, the options are:
  - Employment contract by ETH Zurich
  - Buying of IT-services with IT-service contract (federal GTC for IT-services; containing components of agency contract)
  - (“Buying of personnel”, by using Employee Leasing)
- Definition Employee Leasing: leased person is integrated into client company (ETH), client company has authority to issue instructions, i.e. leased person is not independent
Employment through HR

- The specific provisions of labour legislation apply. Cf. ETH Compliance Guide
- Responsible: HR

- Themes:
- Engage ETH employee
- Temporary employee (hourly, monthly)
- Permanent employment
- “Services ordered by the ETH”
Public Procurement Act (BöB)

- “Employee Leasing” to be distinguished from “IT-service contracts”
- Employee Leasing - as opposed to IT-service contracts - is not subject to the BöB,
  - therefore no means of legal redress (appeal) for rejected offers
- The main rules still apply:
  - competition, transparency, equal treatment, profitability
- Attention:
  - No disguised employee leasing allowed (would violate BöB!)
  - (Complaint still possible at the controlling body)
# Limits of Employee Leasing and IT-Services

Verdict of the Federal Administrative Court from June 21, 2011 (BVGer Entscheid B-1687/2010)

<table>
<thead>
<tr>
<th></th>
<th>Employee leasing</th>
<th>IT- Services</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Just working hours or concrete services?</strong></td>
<td>It is a matter of purchasing working hours from IT specialists and not concrete services.</td>
<td>It is a matter of purchasing concrete, factually determined services.</td>
</tr>
<tr>
<td><strong>Concrete connection to a project Y/N</strong></td>
<td>The personnel profiles cannot be allocated to specific projects but rather cover a wide range of needs for the operation of an assignment. Specialists will be widely integrated as our own employees within the operation.</td>
<td>The personnel profiles can be allocated to specific projects.</td>
</tr>
<tr>
<td><strong>Right of issuing instructions/directives</strong></td>
<td>Direct and comprehensive right of instruction; the industrial law authority of instruction goes further than it would with an assignment relationship.</td>
<td>OR 397: A right of instruction is intended, however this does not go as far as the right of instruction within industrial law. The contractual authority of instruction only refers to the concrete provision of the agreed transaction.</td>
</tr>
<tr>
<td><strong>Place of work/Integration</strong></td>
<td>The leased employee typically works within the operation of the employer. Specialists should be integrated into the operation just as normal employees would be.</td>
<td>Employee does not HAVE to work at the employers. No integration in the assignment operation necessary.</td>
</tr>
<tr>
<td><strong>Economic Risk/Liability</strong></td>
<td>Economic risk lies with assignment operator. The provider is not liable for the normal work product (as well as for the execution lege artis). He is liable only for the careful search, selection and instruction of the employee. Therefore the operator carries the economic risk from a malfunction or negligent work product. Potentially, one can ask the provider to exchange an unsatisfactory employee.</td>
<td>Economic risk lies with the provider. OR 398: Liable for a diligent and faithful performance for the employer. Therefore the provider is liable for bad quality service and bears the risk in the event of a malfunction.</td>
</tr>
</tbody>
</table>

**Employee leasing contract** (CPC 872) Not present in the positive list (appendix 1a VöB), therefore not a BöB-procurement

**IT service assignment** (CPC 84) Present in the positive list (Appendix 1a article. 7 VöB), therefore BöB applicable.
Leasing of an Employee

Assignment operator

Lease contract

Lease provider

Employee

C works at A, A has right of instruction

B

Employment contract

A

C

A has right of instruction

Jürg Häubi, IT Procurement & Portfolio
Sub-Leasing: Prohibited four or more-sided relationships

- Employer (Provider)
- Employee
- Subcontractor (Employer, Assignment organisation?)
- Third party (Assignment Organisation?)
Prohibited International Employee Leasing

Employee leasing from outside of Switzerland is not permitted (Art. 12 para. 2 AVG).

- Direct leasing through international providers is prohibited.
- Indirect leasing as a part of providing services is also prohibited (exception: employees are part of a Swiss provider).
Please note

- The leased employee must be employed by the provider
- Contract with provider must be in writing
- Contract can bear the name of the employee
- Provider must have his place of business in Switzerland
- Provider must usually have an authorisation to lease from the authorities (exceptions)
- The client organisation must ensure that the employee respects working regulation, like Sunday and night work (to be legally authorised) as well as legal working hours and break regulations.
Advantages and disadvantages of employee leasing

- **Advantage**
  - Flexible in adapting capacity
  - Quickly set up

- **Disadvantage**
  - **Risk/ liability** lies with the ordering organisation
  - Can be *illegal circumvention* of procurement regulation

- Therefore
  - Employee leasing shall be avoided whenever possible
Questions
Links/ Contacts

- All T&C of the ETH and the IT T&C of the federal government
  - http://www.fc.ethz.ch/services/einkaufen
- IT procurement
  - http://www.id.ethz.ch/services/category/ppf
- BBL Homepage
  - www.bbl.admin.ch
- Contacts from IST PPF
  - juerg.haeubi@id.ethz.ch, ilka.titze@id.ethz.ch or katharina.leith@id.ethz.ch
  - dordaneh.arangeh@sl.ethz.ch
- Legal service of the ETH
  - http://www.rechtsabteilung.ethz.ch
Links for Employee Leasing

- Legal bases

- Directives
  - [http://www.treffpunkt-arbeit.ch](http://www.treffpunkt-arbeit.ch)

- Authorised providers of employee leasing

- Compliance at ETH
Thank you for your attention

Thank you for your feedback