Guide for Concluding Independent Contractor Agreements and Fee Agreements

July 2021

Overview

In principle, all work performed / services provided for the University—including externally funded research projects—must be carried out by employees of the University. However, if services or support are needed at short notice that employees of Universität Hamburg are unable to provide, then an independent contractor agreement or fee agreement may, as a rule, be awarded.

Should an independent contractor agreement or fee agreement be necessary, it is imperative to ensure that any agreement is not being used as a substitute for permanently addressing human resource needs or to avoid any employer obligations. Strict criteria must be applied to evaluate the employment relationship, as misclassification audits by social insurance providers or internal revenue offices, or lawsuits filed by the “employee” concerned can result in the employment relationship subsequently being defined as a covert employment relationship and thus as pseudo self-employment.

The awarding of independent contractor agreements and fee agreements is subject to the provisions of the German regulations for tenders below the threshold amounts (Unterschwellenvergabeordnung, UVgO) and Hamburg’s procurement regulations (Beschaffungsordnung, BO). Correct bidding procedure must be followed depending on the wage or fee payable. Likewise, the award decision must be appropriately documented.

The performance of any work or provision of any service may only begin once the agreement has been signed by the principal’s authorized representatives and the contractor.

Characteristics of an independent contractor agreement:

- An independent contractor agreement is a bilateral agreement for which remuneration has been agreed obligating the contractor to autonomously perform/provide individual, self-contained work and the principal to pay the remuneration (wages) agreed.
- The contractor must produce a particular work product or outcome rather than any activity.
- An independent contractor agreement may cover the production or alteration of an object as well as the achievement of a particular result effectuated by the stipulated work or service. Decisive for the achievement of a particular result is that the stipulated work product is created...
through the contractor’s performance of work. This can be a tangible work product, e.g., the manufacture of an item from materials provided by the customer or the creation of an intangible work product, e.g., the production of intellectual content for an opinion or peer review.

- The agreement is a non-recurring performance and not continuous service/performance.
- The scope of the work and the date of delivery are specifically defined.

**Characteristics of a fee agreement:**

- The awarding of an employment agreement is precluded.
- The service must be rendered autonomously,
- with the fee agreement governing the provision of the service as opposed to a specific outcome, but rather the service as such.

**Contact persons and assistance**

<table>
<thead>
<tr>
<th>Name</th>
<th>Staff Code</th>
<th>Telephone Extension</th>
<th>Area(s) of responsibility</th>
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</thead>
<tbody>
<tr>
<td>Martina Schönfelder</td>
<td>732.4</td>
<td>-2527</td>
<td>Advice on fundamental issues</td>
</tr>
<tr>
<td>Pia Zech</td>
<td>732.5</td>
<td>-7199</td>
<td>Administration</td>
</tr>
<tr>
<td>Bettina Arlt</td>
<td>732.6</td>
<td>-6786</td>
<td>Administration</td>
</tr>
<tr>
<td>Christian Quack</td>
<td>732.7</td>
<td>-2477</td>
<td>Administration</td>
</tr>
</tbody>
</table>

Contact us: [werkvertrag@uni-hamburg.de](mailto:werkvertrag@uni-hamburg.de) or by post: Strategischer Einkauf (732), Mittelweg 124, 20148 Hamburg, Germany. Or drop by Room 4009 (Mittelweg 124).

**Who can be awarded an independent contractor agreement or fee agreement?**

1. **Universität Hamburg employees** must report independent contractor agreements and fee agreements as additional gainful employment. Complete the [Notice of Additional Gainful Work](#) and submit it to HR Services (Dept. 6) via the official channels. Professors must send the completed form to the dean, who will then forward it to the responsible HR officer.

   The human resources clerk must then seek approval from the head of Human Resources as required by Section 60 of the Hamburg State Budget Regulations (LHO) for any agreements executed between public employees and their public employers.

   The only exception here is correction assistance.

   Pursuant to Section 4 of the Hamburg regulations governing additional gainful work in higher education institutions (Verordnung über die Nebentätigkeit des beamteten wissenschaftlichen und künstlerischen Personals an Hochschulen, HmbHNVO), if work to be performed within the scope of an independent contractor agreement or fee agreement counts among the duties normally carried out by full-time university employees or could be delegated to them within the scope of their normal duties, then no independent contractor agreement may be awarded to these individuals.

2. **Other public employees in Hamburg** must also submit an authorization for additional gainful work (from the agency director pursuant to Section 60 LHO) upon submission of a request.
3. Independent contractor agreements and fee agreements may be signed with foreign nationals, provided that they have the requisite residence permit\(^1\), as applicable.

Foreign students always require explicit authorization from the local foreigners’ department (Ausländerdienststelle). However, be aware that the lawmakers have not clearly defined to what extent independent work is permitted while studying. The Registration Office for Foreigners is therefore responsible for reviewing in each individual case whether or not the activity would jeopardize a student’s attainment of their study goals within a reasonable period of time. Verifiable documents are required for this, which means that if an agreement has not yet been awarded, the foreign national must submit documents from the higher education institution indicating the type of activity, time frame, and remuneration. Authorization must be granted before any work is started.

Foreign nationals wishing to enter the country for the purpose of taking up gainful work should familiarize themselves with the entry requirements well in advance. See the website of the [German Federal Foreign Office](https://www.b.getPassword()) for the latest information.

In Hamburg, you can also contact the [Central Registration Office for Foreigners](https://www.b.getPassword()).

Additional information is available in our “Foreign Nationals” information sheet.

4. **Students**: Pursuant to Section III subsection 8.2 of the guidelines for employing research and student assistants (“Richtlinie für die Beschäftigung von wissenschaftlichen und studentischen Hilfskräften”), paid activities other than studying, including any work as a research or student assistant, may not exceed 19 hours per week or 86 hours per month.

Exceptions to this rule are academic tutors, who may work more than 19 hours per week, provided that they do not enjoy privileged student employee status pursuant to the German social security legislation (e.g., because they are enrolled on a master’s degree program).

Independent contractor agreements and fee agreements can therefore seldom be awarded to students, as they should not already be working at the University as a student employee or tutor. Awarding independent contractor agreements and fee agreements is only permitted if the orderly completion of studies is not jeopardized. Furthermore, students should only conduct work within the scope of an independent contractor agreement or fee agreement that does not require a university degree.

5. **Entrepreneurial start-ups**: Persons who receive a grant pursuant to Sections 93 and 57 of Book III of the German Social Code (SGB III) are considered self-employed and are therefore personally responsible for paying compulsory social security contributions if not exempt from compulsory insurance contribution obligations upon their own application or no compulsory insurance contribution obligation exists because the self-employment is marginal.

In this regard, the awarding of an independent contractor agreement or fee agreement is unproblematic.

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<table>
<thead>
<tr>
<th>Undisclosed or covert employment (pseudo self-employment)</th>
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<td>Contractors must be self-employed when fulfilling contractual obligations and may not be incorporated into the University’s operations at the current or a future time.</td>
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\(^1\) Citizens of the European Union (EU) and European Economic Area (EEA), including the EU Member States, Iceland, Liechtenstein, and Norway, do not need a residence permit.
**Pseudo self-employment** will mean compulsory social security contributions become payable for all areas and wage taxes become payable on the contractually agreed wages or fees. If it emerges after an agreement has been reached that the activities agreed therein are subject to compulsory social security contributions and wage taxes, Universität Hamburg—as the “employer”—is obliged to pay all compulsory social security contributions (for low-wage marginal activities, the flat-rate amount) and wage taxes. Subsequent recourse against the contractor is generally out of the question. Therefore, it is absolutely imperative to check whether the requested activity is truly an independent activity **before** awarding any agreement.

The following conditions must be satisfied in order to award an agreement:

- **The contractor may not be bound by any orders or instructions from the principal during the provision of any work / performance of any services.** However, this does not mean that specific terms cannot be stipulated in the agreement regarding the characteristics of goods or services.

- **To ensure independence in self-employment, as a rule the contractor may not work on University premises.**

- It is also a sign of a lack of independence if a contractor is required to maintain specific **working hours** and must perform work or provide services personally, i.e., is prohibited from subcontracting to third parties.

- **Work repeatedly or regularly carried out by University employees is an indication of dependent employment and thus of an obligation to pay compulsory social security contributions.** German social security legislation assumes that activities based on an independent contractor agreement are actually a dependent employment relationship subject to compulsory social security contributions if the contractor is or was active in the same line of work as an employee.

  For this reason, an independent contractor agreement or fee agreement may not be awarded to a current or former employee for which the subject matter is substantially similar to the contractor’s current or former employment duties.

- **An obligation to pay social security or pension insurance contributions may arise if the contractor:**
  - does not or only rarely employs any staff, and
  - they essentially only have one client in the long term.

  If the activity is otherwise clearly independent, then the independent contractor carrying out employee-like activities is subject to pension insurance contributions and must pay these for himself/herself.

Strategic Purchasing (732) will determine the compulsory social security contribution status based on the information provided on the compulsory social security contributions (included in the requisition request form). If several boxes in the left column are checked, this could be an indication that an independent contractor agreement is not appropriate because the relationship is a dependent employment relationship subject to compulsory social security contributions. In case of doubt, Strategic Purchasing (732) will request a status determination procedure and a decision by the German pension insurance fund (Deutsche Rentenversicherung).
Requisition request

Who to contact if you wish to award an independent contractor agreement:

- In case of questions or uncertainty, contact Strategic Purchasing directly—see page 2 for details of the contact person responsible for independent contractor agreements. The team will gladly answer your questions and provide alternative contract options as required.

If a review determines that an employment relationship involving compulsory social security contributions exists, Strategic Purchasing (732) will contact HR Services (Dept. 6) to clarify the matter.

- In case of a requisition request, contact the person within Strategic Purchasing (732) responsible for independent contractor agreements. Provided the requisition request is completed in full and signed before the planned start of work, a contract can be awarded.

Ideally, submit documents via email (werkvertrag@uni-hamburg.de) or alternatively in a paper format.

If you want to commission a person to act on behalf of a company, submit a purchase order to the responsible Procurement Team. This involves commissioning an individual, who is employed by a company and deployed by them. The company is commissioned and paid, not the individual. The assignment is not additional gainful work for the individual, who is remunerated separately.

Also contact the responsible Procurement Team when commissioning a legal entity (GmbH, GbR, etc.).

Important note: the responsible resource manager must specifically confirm by signing the requisition request form that the required financing has been secured and (in the case of external funding) the funding provisions allow the awarding of an independent contractor agreement for the matter covered by the requested agreement.

Under no circumstances may work for which the awarding of an agreement is being requested begin until the agreement has been signed by the contractor and an authorized member of the Strategic Purchasing team. The person submitting the request is responsible for ensuring this. Failure to do so may result in legal repercussions for the Free and Hanseatic City of Hamburg (FHH) and disciplinary action and claims for damages may be pursued.

Contract award

The awarding of contracts for goods and services using independent contractor agreements or fee agreements is determined in accordance with the total contract value and documented in the requisition request.

<table>
<thead>
<tr>
<th>Up to EUR 1,000</th>
<th>No comparable offers; direct engagement</th>
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<tbody>
<tr>
<td>From EUR 1,000</td>
<td>At least 3 tenders, or direct engagement if:</td>
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<tr>
<td></td>
<td>a) the total contract value is less than EUR 25,000 and the contractor reliably affords the required market knowledge; → Detail the contractor’s market knowledge in the requisition request.</td>
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<td>b) performance of the service is particularly urgent;²</td>
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<td>c) the service can only be performed by one specific company;</td>
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<td></td>
<td>d) there are less than 3 tenders.</td>
</tr>
<tr>
<td>From EUR 25,000</td>
<td>Contact Strategic Purchasing (732) before you publish the call for tenders.</td>
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</table>

² Circumstances that Universität Hamburg could not have foreseen make performance/provision particularly urgent and the University is not responsible for the reason(s) for the particular urgency.
Be sure to include all anticipated costs for procurement (e.g., travel expenses) when estimating the total contract value. This means that all items that generate costs for Universität Hamburg during the contractual period must be taken into account. The value-added tax is not included in this calculation.

## Agreement

Without exception, all agreements must be awarded in writing by Strategic Purchasing (732).

An obligation (“Obligo”) will be saved in SAP once the agreement has been awarded so that the amount appears in the SharePoint account statement.

## Wage/fee payment

The wage stipulated may only be paid on the basis of an itemized invoice
- from which the scope of work/services rendered is clear;
- on which orderly performance of the work/service must be confirmed.

The invoice must contain an invoice number and the contractor’s tax number. The value-added tax payable must be indicated as required.

Invoices must be sent to Strategic Purchasing (732), which will process the payment.

Payment in installments is only permitted if partial deliveries and the corresponding proportions of the total work value have been agreed with the contractor, performed in full, and are free from defects.

## Disclosure notices

As soon as the payments from independent contractor agreements and fee agreements with Universität Hamburg with a contractor reach EUR 1,500 per year, the University will prepare the disclosure notice stipulated in Section 2 of the German transaction reporting regulations (Verordnung über Mitteilungen an die Finanzbehörden durch andere Behörden und öffentlich-rechtliche Rundfunkanstalten, MV) in conjunction with Section 93a of the German internal revenue code (Abgabenordnung, AO) and submit it to the responsible internal revenue office. All payments associated with the independent performance of work / provision of services / delivery of goods (including teaching contracts and all types of fees) must be reported.

## Breaches of contract and warranty

Pursuant to Section 634a subsection 1 of the German Civil Code (BGB), claims for defects relating to independent contractor agreements shall expire after 2 years (or 5 years for construction projects) in the case of work involving the manufacture, maintenance, or alteration of an object or the provision of planning of supervision services. To avoid any financial disadvantage for Universität Hamburg and any indemnity claims that may arise, the requester must inspect all work upon receipt for conformity with the agreement and assert any warranty claims in a timely manner if the work agreed is not completed or deficient. Strategic Purchasing (732) should be consulted in such cases.

In the case of fee agreements, partial performance (i.e., quantitatively inferior performance) can lead to a reduction of the fee due to partial non-performance (Sections 275, 326 in conjunction with Section 441 subsection 3 BGB) or partial offsetting with a possible claim for damages pursuant to Section 280 BGB.