Universität Hamburg
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Guide for Executing Independent Contractor Agreements and Fee Agreements

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Overview

Generally, all work undertaken at the University including externally funded research projects must be carried out by University employees. However, if service and support is needed on short notice that may not be undertaken by Universität Hamburg employees, then as a rule **independent contractor agreements and fee agreements** may be drawn upon.

Should the execution of 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 requirements or used to circumvent employer obligations. Strict criteria must be applied to evaluate the employment relationship as misclassification audits by social security entitlements providers or tax and revenue offices as well as lawsuits filed by the "employees" concerned can result in the relationship being defined as an undisclosed or concealed employment relationship, thus effectively making the independent relationship a sham.

The execution of independent contractor agreements and fee agreements is subject to the provisions of the German Regulations on Awarding and Drafting Public Procurement Contracts for Independent Services (VOL/A, VOF) and the State of Hamburg Procurement Regulations (BO). The determination of the correct bidding procedure is contingent upon the value of the calculated consideration or fee and must be observed. Likewise the award decision must be appropriately documented.

The commencement of any work or the rendition 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 in which the legally bargained for exchange is the independent production and tender of the subject matter of the agreement by the contractor and the payment of the stipulated consideration therefor by the principal.
- The contractor does not simply owe some kind of contractual performance, but rather must tender a particular work product or result.
- The subject matter of an independent contractor agreement can be 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 could 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.
- It is a matter of non-recurring performance, not continuous performance.
- The scope of the work and the date of delivery are specifically defined.

Characteristics of a fee agreement:

- The execution of an employment agreement is precluded,
- the service to be rendered will be rendered autonomously, and
- the subject matter of the agreement is not premised on the production of any particular work product or result.

Contacts and assistance

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Which group of individuals may be given an independent contractor agreement or fee agreement?

1. **Universität Hamburg employees** must report any independent contractor agreement or fee agreement as additional gainful employment. The notice of additional gainful work must be

made in writing, i.e., signed by the employee pursuant to Section 75 of the Hamburg Civil Service Act (HmbBG) or Section 3 subsection 4 of the Public Sector Collective Wage Agreement for the German Federal States (TV-L) respectively. Please use the form prepared by Human Resources to report additional gainful employment, (Notice of Additional Gainful Employment) and send it through official channels to the human resources clerk responsible for handling your personnel matters—for professors this means through your dean's office.

The human resources clerk must then seek approval from the head of Human Resources as Section 60 of the Hamburg State Budget Regulations (LHO) states that the assent of the agency director shall be required for any agreements executed between public employees and their public employers. There is an exception for correction assistance only.

If the work to be rendered within the scope of an independent contractor agreement or fee agreement belongs to the duties carried out by full-time university employees or is of the kind that could be delegated to them within the scope of their normal duties, then no independent contractor agreement may be executed with these individuals pursuant to legal provisions governing additional gainful employment for civil servants (Section 4 of the Hamburg Regulations Governing Additional Gainful Employment in Higher Education Institutions (HmbHNVO)).

2. **Other public employees** upon submission of a request must also submit an authorization for additional gainful employment (from the director of your agency pursuant to Section 60 LHO).

3. Independent contractor agreements and fee agreements may be executed with **foreign nationals** provided that they have the requisite residency permit[1], if applicable.

   Foreign students always require explicit authorization from the Ausländerdienststelle (district office for foreign nationals). Please be aware, however, that lawmakers have not clearly set forth the extent of independent work allowable in conjunction with studying. Thus, the Registration Office for Foreigners is responsible for reviewing on a case-by-case basis whether or not the activity would jeopardize the achievement of study objectives within a reasonable period of time. This requires documents that can be reviewed, i.e., the foreign national under consideration for employment must submit some form of documentation from the higher education institution indicating the type of activity, the scope of time, and compensation, provided that no agreement has been executed. Authorization must be received prior to the commencement of any work.

   Foreign nationals who wish to enter the country for the purpose of gainful employment should seasonably familiarize themselves with entry requirements. Current information is available on the German Federal Foreign Office website (Auswärtiges Amt).

   In Hamburg you can also contact the State Registration Office for Foreigners.

   You can find additional information in our information sheet entitled Foreign Nationals .

4. **Students:** Pursuant to Part III, Subsection 8.2 of the "Richtlinie für die Beschäftigung von wissenschaftlichen und studentischen Hilfskräften" (guidelines for employing research and student assistants), engaging in 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.

[1] Citizens of the European Union and the European Economic Area (these include the EU Member States, Iceland, Liechtenstein, and Norway) do not need a residency permit.

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

Independent contractor agreements and fee agreements can thus seldom be given to students as they should not already be working as student employees or tutors at the university. Moreover, the execution of independent contractor agreements and fee agreements is only then permissible if the orderly course of the degree program 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 higher education degree.

5. **Entrepreneurial start-ups:** Persons who receive a grant pursuant to Sections 93 and 57 of Title III of the German Social Security Code (SGB III) are considered to be persons engaging in independent activities and who are themselves responsible for remitting social security contributions exempt from compulsory insurance contribution obligations, most likely upon their own application therefor; or no compulsory insurance contribution obligation exists because freelance activities are marginal.
   In this regard, the execution of an independent contractor agreement or fee agreement is unproblematic.

Undisclosed or concealed employment relationship (sham independent contractor status)

Contractors must be **independent** when discharging contractual obligations and may not currently or prospectively be incorporated into the University's operations.

A **sham independent contractor status** will result in compulsory social security contributions for all areas and wage taxes being levied and paid on contractual consideration or remuneration. If after an agreement has been concluded it turns out that the activities regulated therein are subject to compulsory social security contribution obligations and wage taxes, Universität Hamburg), as the "employer," will then be held responsible for the payment of 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 **before** executing any agreement to check whether the requested activity is truly an independent activity.

In order to execute an agreement, the following conditions must be satisfied:

- In the production of any work / rendition of any service the contractor must not be bound by any orders or instructions of the customer/client. However, this does not mean that specific warranties with respect to the qualities and features of the good or service cannot be stipulated in the agreement. Since the incorporation of the contractor in the customer's / client's operations tends to indicate the lack of an independent activity, the contractor as a rule may not work on the University's premises. There will be an indication of a lack of independent activity if the contractor must work particular hours and must promise to personally produce a good or render a service, i.e., is prohibited from sub-contracting with third parties.

- The activities stipulated in the independent contractor agreement can also be an indication of a dependent employment relationship, thus resulting in the obligation to remit compulsory social security contributions, if these are the same activities that are regularly carried out by

the University's employees. There is a presumption under German social security law that an activity that is the subject matter of an independent contractor agreement is in actuality a dependent employment relationship subject to compulsory social security contribution obligations if the contractor is or was active in the same line of work as an employee.

For this reason, employees (including former employees) may not be given an independent contractor agreement or fee agreement, the subject matter of which being substantially similar to the contractor's actual or former official employment duties.

- The fact that the contractor does not have any employees or only employs low-wage marginally employed persons and that the contractor more or less only has one material customer/client can also result in compulsory German social security and statutory pension contribution obligations. If the activity, however, is otherwise clearly independent, then the independent contractor carrying out employee-like activities is subject to retirement contribution obligations and must pay these insurance contributions him or herself pursuant to Section 2 sentence 1 no. 9 of Title VI of the German Social Security Code (SGB VI).

The Strategic Purchasing Team (732) will determine the compulsory social security contribution status based on the information provided with respect to compulsory social security contribution obligations (integrated in the requisition request forms). If several boxes are checked in the left column, this could be an indication that an independent contractor agreement is not appropriate because the relationship is a dependent employer-employee relationship subject to compulsory social security contribution obligations. If there is doubt with respect to the status of the relationship, Team 732 will initiate a status proceeding pursuant to Section 7 of Title IV of the German Social Security Code (SGB IV) with the German Statutory Pension Insurance Scheme.

Requisition request

Employees who would like to execute an independent contractor agreement should contact

- the Strategic Purchasing Team (independent contractor agreements) directly (see page 2 for the contact person) if there are any questions or uncertainties. Your questions will gladly be answered and the Team can provide you with alternative contract options, if required.

  If after a review it is determined that the transaction is an employer-employee relationship involving compulsory social security contribution obligations, Team 732 will present the matter to Human Resources (Dept. 6) so that together they can properly resolve the matter.
- Team 732 about your requisition request. The requisition request should be filled out as completely as possible, signed, and forwarded before the commencement of any planned work.

  Documents can be submitted either in hard copy or electronically to the following address: (Werkvertrag@verw.uni-hamburg.de).
  Alternatively, the local office responsible for handling your matters can also receive all documents from you. The documents will then be forwarded to Team 732 and someone from the Team will contact you or the contractor directly.

Please note that the responsible project or cost center managers must specifically confirm by signing the requisition request form that the requisite financing has been secured and that the provisions of the grant (in cases of external funding) permit the execution of an independent contractor agreement for the subject matter covered by the requested agreement.
In no event may work for which the execution of the agreement is being requested commence until the agreement is signed by the contractor and an authorized member of Team 732. The

person submitting the request is responsible for ensuring this. If you do not warrant this, this can lead to legal liability on the part of the Free and Hanseatic City of Hamburg (FHH) and result in reviewing whether or not disciplinary action and an indemnity claim will be pursued.

Award

The award of a contract for goods and services using independent contractor agreements or fee agreements is determined in accordance with the total contract value pursuant to Section 3 of the Hamburg Procurement Regulations (BO).
In estimating the total contract value all expected costs for procurement must be added together. This means that all items in the contract term that entail costs for Universität Hamburg must be taken into consideration. This does not include value-added tax.

Independent contractor services that are clear and precisely describable (Section 4 subsection 1 no. 1 BO):

Up to EUR 500	Direct engagement
Less than EUR 50,000	Discretionary award • at least 3 tenders or • direct engagement, provided that there are particular reasons why only one person is suitable for the work. Please justify this in detail.
Less than EUR 100,000	Restricted call for tenders • at least 6 tenders or • direct engagement, provided that there are particular reasons why only one person is suitable for the work. Please justify this in detail.

Independent contractor services that are <u>not</u> clear and precisely describable (Section 4 subsection 1 no. 2 BO):
e.g., creative services, translations, guest professors, services in research and teaching, fee agreements:

Less than EUR 25,000	Direct engagement
Less than EUR 100,000	Discretionary award • at least 3 tenders or • direct engagement, provided that there are particular reasons why only one person is suitable for the work. Please justify this in detail.

Agreement

Any agreement must without exception be executed in writing by Team 732.
An open item will be set up in SAP once the agreement has been executed so that the commitment of funds (obligation) is identifiable in the SharePoint statement of account.

Payment of consideration / the fee

Stipulated consideration may only be paid if premised on an itemized invoice

- from which the scope of the work and services rendered is apparent and
- on which the rendition of work and services or delivery of goods has been confirmed to have been tendered in conformity with the agreement.

The invoice must contain an invoice number and the contractor's tax number. If required, value-added tax must be itemized.

Invoices must be sent to Team 732, where payment will be prepared.

Installment payments are possible only if this has been stipulated in the agreement and partial performance has been tendered 100% in conformity with the agreement corresponding to that portion of the stipulated installment payment.

Revenue reporting

As soon as any one contractor has received annual payments amounting to EUR 1,500 by means of Universität Hamburg independent contractor agreements and fee agreements, a prescribed **revenue notice** pursuant to Section 2 of the German Federal Regulation Governing Reporting Requirements to Tax and Revenue Authorities by Other Government Agencies and Public Service Broadcasters (Mitteilungsverordnung) in conjunction with Section 93a of the German Internal Revenue Code (AO) will be prepared by the University and sent to the competent internal revenue service office. All payments associated with the independent rendition of services or delivery of goods (including compensation received under a teaching contract as well as all types of professional fees) must be accounted for.

Breach of contract and warranty

The statute of limitations shall run on any warranty claims pursuant to Section 634a subsection 1 of the German Civil Code (BGB) for the conforming tender of work involving the manufacture, maintenance, or alteration of an item or object as well as for planning and monitoring work after **two years** (for construction projects after five years). In order for Universität Hamburg to avoid a financial detriment and any indemnity claims that could result therefrom, the requester must inspect all work upon tender for conformity with the agreement and seasonably assert any warranty claims if work is non-conforming or deficient. Team 732 should be consulted in such cases.

For divisible performance under fee agreements (i.e., respective of quantitative deficient performance) fees may be abated based on partial non-performance (Sections 275 and 326 BGB in conjunction with Section 441 subsection 3 BGB) or partially netted against a possible damages claim pursuant to Section 280 BGB.